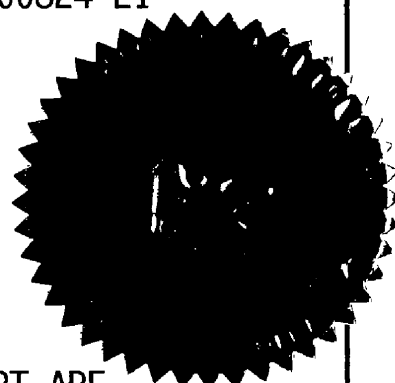


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 000824-EI

In the Matter of:

REVIEW OF FLORIDA POWER  
CORPORATION'S EARNINGS, INCLUDING  
EFFECTS OF PROPOSED ACQUISITION OF  
FLORIDA POWER CORPORATION BY  
CAROLINA POWER & LIGHT.



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PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE: CHAIRMAN LILA A. JABER  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER BRAULIO L. BAEZ  
COMMISSIONER RUDOLPH "RUDY" BRADLEY  
COMMISSIONER CHARLES M. DAVIDSON

DATE: Monday, June 30, 2003

TIME: Commenced at 9:30 a.m.  
Concluded at 2:00 p.m.

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

REPORTED BY: JANE FAUROT, RPR, Chief Reporter  
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23 behalf of the Commission Staff.

24

25

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

1  
2 CHAIRMAN JABER: Good morning. Let's go ahead and  
3 get started this morning. Ms. Brubaker, this is a special  
4 agenda conference. I don't think there was a special notice  
5 that you need to read this morning; right?

6 MS. BRUBAKER: No.

7 CHAIRMAN JABER: Okay. Why don't you make the  
8 introduction.

9 MS. BRUBAKER: Hello. Thank you. Commissioners, at  
10 the May 20th, 2003, agenda conference the Commission deferred  
11 to vote on the motion to enforce settlement agreement and  
12 scheduled the special agenda to hear oral argument on the  
13 motion in limine and to hear and decide any other pending  
14 procedural matters before the Commission at this time.

15 There are several items that need to be taken up, and  
16 I can either go through a suggested order or, if you have an  
17 order presentation in mind, we could hear it at this time.

18 CHAIRMAN JABER: Actually I do. Let me, let me run  
19 it by you and the Commissioners.

20 The first thing I'd like to take up, I understand  
21 that there was a motion for recusal filed with orders that were  
22 subsequently signed. So I'd like for you to address that  
23 first. And then I'd like to go to the -- I'd like to ask the  
24 Commission for a motion on oral argument. Next, I'd like to go  
25 to the motion in limine and motion to strike and the responses

1 thereto. After that, I'd like to take up the motion for  
2 reconsideration of Order 030687, then the motion for discovery  
3 that was filed by the Attorney General, and finally the motion  
4 to file real staff recommendation filed by Sugarmill Woods.

5 Commissioners, that just seemed to naturally flow for  
6 this morning. Do you have any -- is there any concern with  
7 that?

8 MR. McLEAN: Yes, ma'am. Right at the beginning, let  
9 me tell you that I have orders from two Commissioners that have  
10 been duly recorded declining to recuse themselves.

11 There was also a motion to suggest that the three  
12 Commissioners should recuse the other two involuntarily.  
13 There's no legal authority for that that I know of. I suggest  
14 that you deny that motion for being legally insufficient.

15 CHAIRMAN JABER: So you need a motion?

16 MR. McLEAN: Yes, ma'am.

17 CHAIRMAN JABER: Commissioners, do you understand?  
18 Harold's recommendation is that the two Commissioners have  
19 signed an order declining to recuse themselves. Part of the  
20 request in the motion was that the three remaining  
21 Commissioners act on that. And, Mr. McLean, your  
22 recommendation is -- repeat that.

23 MR. McLEAN: That that motion be dismissed as legally  
24 insufficient. There's no authority for that particular action.  
25 If there's any review of those two Commissioners' decisions, it



1 does not lie with this agency.

2 COMMISSIONER BAEZ: Madam Chairman, I can, I can move  
3 denial. I just have one clarifying question. Is this, is this  
4 a full, is this a full Commission vote?

5 MR. McLEAN: Yes, it is.

6 COMMISSIONER BAEZ: Okay. So move, Madam Chair.

7 COMMISSIONER DEASON: May I ask Mr. McLean a  
8 question?

9 CHAIRMAN JABER: Commissioner Deason.

10 COMMISSIONER DEASON: Refresh my memory. It's  
11 been -- luckily it's not too often we get requests for recusal  
12 around here. That is to be taken up by the individual  
13 Commissioner who's, who is being requested to recuse themself.

14 MR. McLEAN: The motion to recuse, yes, sir.

15 COMMISSIONER DEASON: And then that has been done and  
16 their orders have been issued.

17 MR. McLEAN: That's correct, sir.

18 COMMISSIONER DEASON: Now if -- the parties seeking  
19 that recusal, what is their next course of action if they wish  
20 to pursue that further?

21 MR. McLEAN: To take it to the appropriate appellate  
22 court, to take the denial to the appropriate appellate court by  
23 whatever writ they think they might have success with.

24 COMMISSIONER DEASON: Okay. So there's no role for  
25 any of the other Commissioners to be involved in that?

1 MR. McLEAN: There is none, sir.

2 CHAIRMAN JABER: But if that's the case, my question  
3 to you, Mr. McLean, I've gone back and forth on this, if that's  
4 the case, why do we need to entertain a motion at all?

5 MR. McLEAN: Because you have a pending motion before  
6 you that needs disposing, that you need to dispose of. There  
7 is a motion pending before the Commission suggesting that three  
8 Commissioners should involuntarily recuse the other two.  
9 There's no legal authority for that motion, and I suggest that  
10 you deny it on the basis that there's no legal authority for  
11 it.

12 COMMISSIONER BAEZ: Is, is the, is the denial of the  
13 motion reviewable?

14 MR. McLEAN: Yes, sir.

15 COMMISSIONER BAEZ: Okay.

16 CHAIRMAN JABER: Mr. McLean, Mr. Twomey has his hand  
17 raised, and I'm assuming that's because he'd like to address  
18 us. Is there an opportunity on, on recusal for the party that  
19 seeks recusal to address the Commission?

20 MR. McLEAN: Madam Chairman, oral argument is always  
21 at your discretion. I'd suggest to you that oral argument is  
22 unnecessary in this particular case. Not in this particular  
23 case, in this particular issue.

24 There was once, I might mention, there was once a  
25 rule which provided a procedure by which the other

1 Commissioners would review the nonrecusing Commissioner's  
2 order. That rule is long gone.

3 COMMISSIONER DEASON: And that was, I guess, many,  
4 many years ago it seemed that I recalled a similar situation in  
5 the early '90s. And that rule that would have allowed for that  
6 to be reviewed by other Commissioners, that no longer exists;  
7 is that correct?

8 MR. McLEAN: That's correct, sir.

9 CHAIRMAN JABER: And just for purposes of the record,  
10 that rule doesn't exist because of the implementation of the  
11 uniform rules.

12 MR. McLEAN: That's correct.

13 CHAIRMAN JABER: I mean, it wasn't, it wasn't that we  
14 had the rule repealed. It was that -- maybe Ms. Helton can  
15 refresh our memory. It was that the Administration Commission  
16 found the rule unnecessary in light of the changes to the APA.

17 MR. McLEAN: That's correct. And because the APA has  
18 the specific provision on recusal of agency heads, whether  
19 they're collegial or otherwise. It has no mention of any  
20 review by the agency itself.

21 CHAIRMAN JABER: Okay. Mr. Twomey, I have to tell  
22 you, I understand your motion for recusal. I personally don't  
23 need oral argument on that motion, but I'll be flexible.

24 Commissioners Deason and Baez, if you want to hear oral --

25 MR. TWOMEY: I didn't -- Madam Chair, I wasn't going

1 to argue about the substance of what the Commissioners did. I  
2 was going to suggest to you that, notwithstanding the absence  
3 of a rule now because of lack of, of statutory authority for  
4 that rule, it'd be my belief that you still have, that the  
5 Commission, the full Commission has the authority to review on  
6 reconsideration any orders signed by an individual  
7 Commissioner. And, and my suggestion then would be -- my  
8 position would be that if Commissioners Davidson and Bradley  
9 have declined to recuse themselves for the reasons given, that,  
10 not today necessarily, but that I should file, I have a right  
11 to file a motion for reconsideration to the full body.

12 CHAIRMAN JABER: Okay.

13 MR. TWOMEY: Notwithstanding the absence of a rule  
14 saying that you can.

15 CHAIRMAN JABER: Right.

16 COMMISSIONER DEASON: Well, Mr. Twomey, have you  
17 filed for reconsideration of those orders?

18 MR. TWOMEY: No, sir. In fact, I haven't. And I  
19 apologize for the late filing of that, those motions or that  
20 motion vis-a-vis today. I was originally thinking in terms of  
21 the July 9th date as being the critical date and didn't file  
22 that motion rightly, I'll tell you.

23 But having talked to my client, we decided that,  
24 given the importance of the discovery issue today, which we  
25 think is critically important, that we'd go ahead and try and

1 accomplish that in prior to the vote on the discovery.

2           So, no, sir. But I've only seen by facsimile  
3 Commissioner Davidson's order and I haven't seen Commissioner  
4 Bradley's yet. So I have not filed a motion for  
5 reconsideration. I intend to.

6           CHAIRMAN JABER: Well, Mr. McLean, in light of that  
7 statement, I guess I come back to the original question: Is  
8 there something we need to do today or you just --

9           MR. McLEAN: Well, there is a pending motion before  
10 you to suggest that three Commissioners should involuntarily  
11 recuse the other two. I think that you should either decline  
12 to rule on that motion or deny the motion.

13           I remain of the opinion that review of those  
14 individual Commissioners' orders lies not with the rest of you  
15 but with the 1st DCA.

16           CHAIRMAN JABER: Okay. Commissioners, what's your  
17 pleasure? It sounds like we have choices here.

18           COMMISSIONER DEASON: Madam Chairman, it seems to me  
19 that Mr. Twomey -- I certainly understand the nature of the  
20 motion, but he says he's only read one order, Commissioner  
21 Davidson's order, and the other he's not.

22           Perhaps -- and I understand our counsel's position  
23 that it's not something that would come before us anyway. It  
24 just seems to me that all this is premature.

25           CHAIRMAN JABER: I agree. I agree.

1           COMMISSIONER DEASON: I think that Mr. Twomey should  
2 read those orders. He may be satisfied with those orders. I  
3 don't know.

4           CHAIRMAN JABER: Mr. Twomey, let me ask you a  
5 question.

6           MR. TWOMEY: Yes, ma'am.

7           CHAIRMAN JABER: Would you just consider withdrawing  
8 that latter portion of your motion and let's just move on?  
9 We're ready to move on.

10           And if you seek reconsideration, I understand your  
11 position, but we'll cross that bridge when we come to it.

12           MR. TWOMEY: Well, it's fine. I'm not opposed to you  
13 ruling on the motion at all. I can still seek the  
14 reconsideration and take my chances there.

15           I just wanted to point out that I was of the belief  
16 that it's still within the jurisdiction of the Commission to  
17 hear it, the remainder of the Commission.

18           And I would point out to you as well that the -- I  
19 want to remind you --

20           CHAIRMAN JABER: I guess what I'm saying is you've  
21 created a procedural quandary for us. If, if we entertain a  
22 motion now, Commissioner Baez's good question is appropriate,  
23 does that create an order that is reviewable? But then you're  
24 telling us you might seek reconsideration, so that'll create a  
25 second order. It seems like the cleaner approach procedurally

1 is that you today officially withdraw the latter portion of  
2 your motion. And if you choose to seek reconsideration, you  
3 choose to seek reconsideration.

4 MR. TWOMEY: By -- withdraw which portion? The  
5 portion --

6 CHAIRMAN JABER: There's a portion of your motion on  
7 recusal that suggests that the three remaining Commissioners --

8 MR. TWOMEY: Okay. Yes. I understand you now. I'll  
9 withdraw that.

10 CHAIRMAN JABER: Thank you.

11 MR. TWOMEY: And I want to just point out as well  
12 that the, the motion filed Friday doesn't go just to the  
13 disqualification or recusal.

14 CHAIRMAN JABER: Yes. Right.

15 MR. TWOMEY: But the other portion about the staff  
16 recommendation, which was the genesis for seeking the recusals.

17 CHAIRMAN JABER: I understand. That's going to be  
18 the last thing we take up.

19 MR. TWOMEY: Okay.

20 CHAIRMAN JABER: But for purposes of the record you  
21 have withdrawn.

22 MR. TWOMEY: I'll withdraw it.

23 CHAIRMAN JABER: Thank you, sir.

24 Commissioners, it sounds like we can move on. There  
25 are various requests for oral argument. There was the most

1 recent request for oral argument that was filed by the Attorney  
2 General. I'd like to entertain a motion for oral argument that  
3 addresses all of them.

4 COMMISSIONER BAEZ: That is an all or nothing?

5 CHAIRMAN JABER: That's sort of my preference.

6 COMMISSIONER BAEZ: I mean, not that I have a problem  
7 with it. I just want to make sure --

8 CHAIRMAN JABER: I think for the sake of efficiency  
9 we should entertain oral argument all at once on all motions.

10 COMMISSIONER BAEZ: Okay.

11 COMMISSIONER DAVIDSON: That was going to be my  
12 motion, Chairman. I first wanted to address the suggested  
13 order you had of the motion in limine, motion to strike, then  
14 the motion for reconsideration, then the AG's motion for  
15 discovery, and then the, Mr. Twomey's motion to file the,  
16 quote, real staff recommendation. That order seems to make  
17 sense. And I would move that the parties be allowed 15 minutes  
18 each for oral argument to cover all of those issues, and then  
19 following which the Commission would take up discussion and  
20 debate.

21 CHAIRMAN JABER: Thank you. Thank you. Is there a  
22 second?

23 COMMISSIONER BAEZ: Second.

24 CHAIRMAN JABER: And a second. All those in favor,  
25 say aye.



1 (Simultaneous affirmative vote.)

2 CHAIRMAN JABER: The motion carries unanimously.

3 We'll start oral argument, I think, with either  
4 Public Counsel or the Attorney General. Do you all have a  
5 preference? The Attorney General? Go ahead and state your  
6 name, please.

7 MR. KISE: Thank you, Commissioner or Chairman.

8 CHAIRMAN JABER: Let me just say, we'll do Attorney  
9 General, Public Counsel. Ms. Kaufman, who are you here  
10 representing?

11 MS. KAUFMAN: Chairman Jaber, I'm here on behalf of  
12 FIPUG.

13 CHAIRMAN JABER: FIPUG, Sugarmill Woods, and then  
14 we'll come back to Progress Energy. Are you with Progress?

15 MS. BOWMAN: Yes. Jill Bowman, Progress Energy  
16 Florida.

17 CHAIRMAN JABER: Thank you. Go ahead.

18 MR. McLEAN: Madam Chairman, may I interrupt just one  
19 moment to ask whether you allotted 15 minutes per side or 15  
20 minutes per lawyer? I didn't understand.

21 COMMISSIONER DAVIDSON: My, my motion intended, and  
22 probably wasn't clear there, 15 minutes per side, to be divided  
23 by the litigants as they deem appropriate.

24 CHAIRMAN JABER: You know, Commissioner Davidson, I  
25 would normally agree with you, but there's some multiple

1 motions that some parties joined in and some did not. Maybe in  
2 this case it's not appropriate to have a time limit at all.  
3 What do you think? I'm flexible. I don't really -- it doesn't  
4 matter to me.

5           COMMISSIONER DAVIDSON: Well, I think, I think to  
6 have, for example, 20 minutes from advocates who have joined on  
7 the same motion is not necessarily productive. I mean, maybe  
8 we extend the time to 20 minutes per side and hopefully the  
9 parties can pick a lead on a particular motion; if there are  
10 two parties on one side of a motion, pick a lead to argue the  
11 motion, if that makes sense.

12           CHAIRMAN JABER: Hang on, Commissioner Bradley. That  
13 seems reasonable to me. Attorney General, Public Counsel,  
14 Mr. Twomey in particular, if we just give you a 20-minute  
15 opportunity for oral argument, it seems to me that you can  
16 govern yourselves accordingly. You know which issues are  
17 appropriate for discussion related to your motions and which  
18 are not.

19           Commissioner Bradley, you had a question?

20           COMMISSIONER BRADLEY: Yes. That was my question.  
21 Are we going to allow oral argument on, on any points of  
22 discussion or is it just limited to evidence that's already,  
23 that is already on the record?

24           CHAIRMAN JABER: This is oral argument related to all  
25 the motions that have been filed to take up today.

1 COMMISSIONER BRADLEY: Okay.

2 MR. McLEAN: And, Commissioner Bradley, I might add  
3 that oral argument will not be permitted on the issue of  
4 recusal in any way, shape, manner or form.

5 COMMISSIONER BRADLEY: Okay.

6 CHAIRMAN JABER: No. This is on the motions in  
7 limine, motions to strike, motion for discovery and the motion  
8 to file staff recommendation. And you amended your motion 20  
9 minutes per side.

10 COMMISSIONER DAVIDSON: 20 minutes per side. And if  
11 there is any way for counsel to follow the order of the  
12 motions, that would help. But I understand, given the number  
13 of counsel here, that may not be possible. But if they could  
14 be addressed in that order, that would be great.

15 CHAIRMAN JABER: Okay. Is there a second,  
16 Commissioners, to that -- Mr. Shreve?

17 MR. SHREVE: One point, I don't think there's -- if  
18 you're going to argue them all at the same time and have,  
19 unless you're going to go back and forth and back and forth, I  
20 think just go ahead and take the entire argument unless you're  
21 going to -- if you intend to argue all the motions separately  
22 and also have the parties argue separately, I think we'll have  
23 a --

24 COMMISSIONER DAVIDSON: No. I think the intent is to  
25 take all the arguments at one time, but I assume that different

1 portions of it will be argued by different advocates. I may be  
2 wrong, but that's -- I was assuming that you all would play  
3 different roles.

4 CHAIRMAN JABER: Let's get it started. We're all  
5 going to govern ourselves accordingly. We've got 20 minutes  
6 per side. I'm ready to get started. I'm ready to get started.  
7 We've got a motion. We're doing 20 minutes per side. Let's  
8 all be professional about how we conduct the argument, and I'll  
9 be flexible with respect to the time.

10 MR. TWOMEY: That's what I was going to ask you to  
11 do, Madam Chair.

12 CHAIRMAN JABER: I'm always flexible, Mr. Twomey.  
13 Is there a second?

14 COMMISSIONER BAEZ: Second.

15 CHAIRMAN JABER: All those in favor, say aye.

16 (Simultaneous affirmative vote.)

17 CHAIRMAN JABER: Okay. Attorney General, go ahead.

18 MR. KISE: Thank you, Chairman Jaber.

19 Christopher Kise, Solicitor General on behalf of the  
20 people of the State of Florida and Attorney General Charlie  
21 Crist. And I appreciate not only you granting our motion to  
22 intervene, but entertaining oral argument today.

23 COMMISSIONER DEASON: Excuse me, sir. Could you  
24 repeat your last name, please?

25 MR. KISE: Kise, K-I-S-E. I'm sorry.

1 COMMISSIONER DEASON: Thank you.

2 MR. KISE: I appreciate the Commission and Chairman  
3 Jaber granting the motion to intervene allowing the Attorney  
4 General to participate in these proceedings because, as the  
5 Commission can probably discern from our intervention, this is  
6 a matter that the Attorney General believes is very significant  
7 to the people of Florida, and the Attorney General has both  
8 concerns about these proceedings as well as attaching a great  
9 deal of significance to them. It is not every day, as the  
10 Commission knows, that the Attorney General intervenes in  
11 proceedings of this nature. And I would want to emphasize for  
12 the record the significance to which Attorney General Crist  
13 attaches to ensuring that the citizens of Florida and the  
14 ratepayers of Progress Energy obtain the refund to which they  
15 are entitled.

16 That being said, I think all these motions are and  
17 really -- and, frankly, I think it is a good idea we're  
18 considering them together because I think they sort of run  
19 together effectively. And I believe the Commission is  
20 presented really with two choices today. There's really only  
21 two directions you can go, and they affect everything. They  
22 affect all of these motions.

23 The Commission can either grant the motion in limine  
24 and exclude consideration of anything other than the four  
25 corners of the agreement, and that is the position the Attorney

1 General has taken and various other parties and a position that  
2 we believe is the correct position.

3 That being said, the other choice would be to deny  
4 the motion in limine. And, therefore, our position would be  
5 that if that's done and if the Commission considers anything  
6 other than the four corners of the agreement, then merits  
7 discovery must be allowed because anything other than a denial  
8 of the motion in limine with an appropriate time for the  
9 parties to engage in what I'll term as merits discovery would  
10 be a denial of due process. There's, frankly, in the Attorney  
11 General's mind, no other way to go here. The Commission either  
12 considers only the contract or it opens the door to other  
13 matters. I mean, the door is, frankly, in our view, either  
14 open or it's closed.

15 The only analogy I can think of, and forgive my -- I  
16 don't mean to be flippant, but, frankly, you can't be a little  
17 bit pregnant. I mean, you can't, you can't just open the door  
18 a little bit and let in some things, as Progress Energy would  
19 like, but not let in other things.

20 Progress Energy argues that, well, we can consider  
21 matters of record and we can consider things that were before  
22 the Commission and what the parties were thinking at the time.  
23 Well, from the Attorney General's perspective, that's sort of  
24 like a trial judge, when considering a motion to enforce a  
25 settlement agreement, going back and opening up the entire

1 trial transcript and thinking about what testimony came in and  
2 what the parties were thinking at the time. And, frankly,  
3 under those circumstances that would clearly be impermissible.  
4 And the Commission, I hope, follows that analogy in the sense  
5 that on a motion to enforce settlement agreement in a trial  
6 court you're concerned only with the terms of that agreement.  
7 Everything else is merged into that agreement. And that  
8 effectively is what has happened here. Every other  
9 consideration that was before the Commission in our view was  
10 merged into the terms of that agreement. And so to consider  
11 anything but that agreement, which again is within the  
12 discretion of this Commission if you so decide to do so, but to  
13 consider anything other than that agreement, we believe, would  
14 be inappropriate unless you allow the parties an opportunity to  
15 engage in merits discovery.

16           Now I understand that that, frankly, will extend  
17 maybe even a little bit further, hopefully not too much  
18 further, the docket and the time for ultimate determination.  
19 And we apologize to the Commission, the Attorney General does,  
20 for our late arrival, if you will, in these proceedings. But,  
21 nevertheless, given the significance to the people of Florida,  
22 we think that this issue deserves at least some time to be  
23 flushed out.

24           CHAIRMAN JABER: Mr. Kise, let me understand what you  
25 think we can consider if we accept your argument under the

1 corners of the agreement.

2           Would it be your position that the corners of the  
3 agreement includes the order that approved the settlement?

4           MR. KISE: Yes, Chairman Jaber.

5           CHAIRMAN JABER: Okay. So it would be the agreement  
6 itself, the order that approved the settlement. What about the  
7 agenda conference where we deliberated on accepting the  
8 settlement?

9           MR. KISE: I would say no to that, Chairman Jaber.  
10 Simply, simply the agreement itself, the terms of the  
11 written -- simply the terms of the written agreement -- I'm  
12 looking down the table to make sure that I'm not saying  
13 anything that my co-counsel here disagree with because I don't  
14 want to start that argument. But I --

15           CHAIRMAN JABER: And I appreciate that you're doing  
16 that because let me give everyone a heads-up; that is a  
17 question I'm going to ask each and every one of you. Because  
18 as I read the pleadings, and I have read all of these  
19 pleadings, it wasn't clear to me where the levels of  
20 disagreement were with respect to what constituted the four  
21 corners of the agreement. I don't think you all are saying a  
22 whole lot of different things. So maybe you could consult with  
23 Mr. Shreve. Because as I read Public Counsel's documents, it  
24 does appear to me that they do include the agenda conference.  
25 I could be wrong, so.



1 COMMISSIONER BRADLEY: I have a question.

2 CHAIRMAN JABER: While you talk about that,  
3 Commissioner Bradley.

4 COMMISSIONER BRADLEY: Is it the Attorney General's  
5 opinion that, that we have a settlement and that there's a  
6 disagreement about a portion of the settlement? Is that --

7 MR. KISE: May I respond?

8 CHAIRMAN JABER: Yes.

9 MR. KISE: Not being familiar with how loose we are,  
10 I didn't want to speak out of turn.

11 CHAIRMAN JABER: Go ahead, Mr. Kise.

12 MR. KISE: Thank you. Commissioner Bradley, yes, the  
13 position of the Attorney General is, in fact, that we do have a  
14 settlement, and the settlement is as evidenced by the agreement  
15 itself and the order entered entering that agreement, the order  
16 of the Commission. And so we're, we're essentially engaged in  
17 an interpretation of what the Attorney General believes of the  
18 unambiguous terms of that agreement itself.

19 And, frankly, up until about a week or two before the  
20 staff recommendation came out, it appeared as though almost  
21 everyone except Progress Energy believed that the terms were  
22 unambiguous, including, quite frankly, lay people who seem to  
23 be a better arbiter, in our humble view, of what is and what is  
24 not ambiguous than lawyers. It was only apparently after  
25 lawyers got involved that it appears now that the agreement is

1 somewhat ambiguous.

2 But our position would be that we do, in fact, have a  
3 settlement agreement that should be enforced according to its  
4 terms.

5 COMMISSIONER BRADLEY: Okay. Follow-up. You  
6 mentioned merit discovery, and I'm really struggling with it  
7 being ambiguous or unambiguous in the four corners of the  
8 agreement.

9 Would it also be the Attorney General's opinion then  
10 that if we can't come to an agreement then, that the contract  
11 itself is null and void?

12 MR. KISE: No, Commissioner, it would not. The  
13 agreement is subject to interpretation. If this Commission  
14 decides that a term or terms of the agreement are ambiguous,  
15 then that creates a host of issues, most pointedly which are  
16 merits discovery in our opinion.

17 And by merits discovery, I hope I'm being clear to  
18 the Commission, I mean discovery directed to the parties'  
19 various positions as to the ambiguity. If this Commission were  
20 to determine that there was an ambiguity in this agreement,  
21 something that we respectfully believe there is not, but if the  
22 Commission in its, within its discretion makes that  
23 determination, then we would be dealing still with a question  
24 of interpretation by the Commission. It's just how we go about  
25 the process of the interpretation that we then would be dealing

1 with. But under no circumstances would we, the Attorney  
2 General, nor I think any of the parties on our side, if you  
3 will, argue that the agreement is null and void. It is, it is  
4 an enforceable and effective agreement subject to  
5 interpretation either by this Commission or by an appropriate  
6 appellate court, should the parties take it to that level. But  
7 certainly the agreement is enforced and it is enforceable  
8 according to its term.

9           COMMISSIONER BRADLEY: Would you explain what you  
10 mean when you say "subject to interpretation by this  
11 Commission"?

12           MR. KISE: Well, obviously the parties have presented  
13 an issue, Commissioner, with respect to what a particular term  
14 or terms mean; what refund is, frankly, due, if you will. And  
15 that being said, the Commission is now charged, fortunately or  
16 unfortunately, at this point with the obligation, if you will,  
17 to determine which of the parties is correct. And so that is a  
18 matter loosely, using the word, of interpretation.

19           We, again, believe the contract is, is unambiguous.  
20 We think that it's simply a matter of applying a mathematical  
21 formula to numbers and figures that were determined a long time  
22 ago to be relevant under the terms of this agreement. And so  
23 on the one hand if the agreement is unambiguous, and perhaps  
24 I'm getting at the heart of your question, Commissioner, I hope  
25 so, we're not necessarily dealing with a matter of

1 interpretation. We're simply dealing with a matter of  
2 computation, if you will, if the agreement is not ambiguous.

3 I think even Florida Power, pardon me, Progress  
4 Energy concedes that if the agreement is not ambiguous, we,  
5 the people effectively win. Because their whole argument  
6 against our motion in limine is to the effect of, well, you're  
7 trying to determine the merits of the case before we get to the  
8 hearing on the merits of the case, and you can't determine  
9 whether or not the contract is unambiguous before you actually  
10 get to July 9th. That, to me, effectively concedes that if you  
11 determine that the motion in limine should be granted and that  
12 the contract is unambiguous, then the people win.

13 COMMISSIONER BRADLEY: So you would agree that, with  
14 this Commission's quandary in that basically what we did was to  
15 entrust in two parties the action of coming up with a  
16 settlement agreement to determine what would be fair and  
17 equitable to all parties concerned, the consumers, the, the  
18 Office of Public Counsel, as well as Progress Energy, and we  
19 didn't have the advantage of having a full-blown rate case. So  
20 that kind of puts us at a disadvantage in terms of us deciding  
21 if this is, this agreement is ambiguous or unambiguous. And so  
22 you would agree that it is within the discretion of this august  
23 body to make a determination as to what is fair and equitable  
24 for all parties concerned, regardless of what evidence is  
25 presented?

1 MR. KISE: Respectfully, Commissioner Bradley --

2 COMMISSIONER BRADLEY: You know, I'm trying, I'm  
3 trying -- you say four corners. I'm trying to figure out how  
4 we really decide this issue without having a full-blown rate  
5 case.

6 MR. KISE: Respectfully, Commissioner Bradley, and I  
7 don't mean this -- again, I don't mean to be flippant. Our  
8 position would be to determine what the parties agreed to. You  
9 read the agreement, you read the contract that's in front of  
10 you and don't consider anything else but that document and the  
11 order entering that document. You did entrust the parties to  
12 reach a settlement that they believed was fair to them, fair to  
13 the people, fair to Progress Energy. They reached that  
14 settlement. And now one of the parties apparently doesn't want  
15 to live by the terms of what we believed to be an unambiguous  
16 contract simply because their revenues may be different than  
17 they projected originally.

18 Whatever the reason may be, the Commission's role in  
19 this, as we see it, respectfully, is to read the contract and  
20 make that decision. It is within your discretion to make the  
21 decision as to what you believe the contract says, but we would  
22 disagree respectfully with any, any notion that, that the  
23 Commission has the equitable power, if you will, to do anything  
24 they think is in the interest of any party to the agreement.  
25 The parties have accomplished that on their own, quite frankly,

1 and they have, they have done that job. And we are here today  
2 in part and then again on July 9th or whatever date Chairman  
3 Jaber decides to set to determine what the agreement actually  
4 says. And, again, our position -- I won't restate it in the  
5 interest of time.

6 CHAIRMAN JABER: Okay. Mr. Kise, were you -- did you  
7 complete your presentation or was there more?

8 MR. KISE: No, frankly, I was troubled that I was  
9 taking too much time, so I'll defer to my other counsel.

10 COMMISSIONER DAVIDSON: Actually, Chairman, could I  
11 ask --

12 MR. KISE: If there are any questions, I'm certainly  
13 --

14 CHAIRMAN JABER: Yeah. With respect to the time, I  
15 opened the door when we started asking questions, and this is  
16 why I think maybe in this case the time, we need to be more  
17 flexible. So do you have more on your presentation?

18 MR. KISE: No, not formally. If there are any  
19 questions, of course, the Attorney General is happy to  
20 entertain them.

21 CHAIRMAN JABER: Okay. Commissioner Davidson?

22 COMMISSIONER DAVIDSON: Thank you, Madam Chairman,  
23 and thank you, Mr. Kise.

24 The parol -- I want to focus in on the parol evidence  
25 rule for a moment. And for other counsel up here as well,

1 please feel free to address this at your, during your  
2 presentation.

3 Under -- according to the parol evidence rule  
4 generally and under Florida law specifically I agree, prior or  
5 contemporaneous conversations, negotiations are immaterial and  
6 irrelevant to the question of what the agreement is. You  
7 can -- the parol evidence rule says that, doctrine of merger  
8 says that, et cetera.

9 But my question is this: Do you agree that under the  
10 parol evidence rule extrinsic evidence can be used to explain  
11 the meaning of a term within that integrated contract?

12 And I'll give you a hypothetical. For example,  
13 assume a provision in a contract provides that all fabric sold  
14 shall be blue. Party X means, understands that to be navy  
15 blue. Party Y understand, intends that to be powder blue or  
16 indigo.

17 As just a matter of contract law, would you agree  
18 with the proposition that parol evidence can be used to explain  
19 the meaning of a term but not contradict that term? For  
20 example, a party could come in and say, well, that actually  
21 means red.

22 MR. KISE: Respectfully, Commissioner, I would say  
23 that we're not dealing then, in response to your question and  
24 your hypothetical, we're not really dealing then with evidence.  
25 We're dealing with matters such as the one you're talking about

1 where blue might be governed by, say, industry standard.  
2 That's really not evidence, if you will, in the form of  
3 testimony or a party, an advocate's position. It is an  
4 extrinsic matter.

5           As the Supreme Court did many times this term, the  
6 United States Supreme Court in looking at the dictionary, for  
7 example, for the interpretation of particular words, and they  
8 went back, I think, in one case to the 1792 dictionary to make  
9 a determination on a word in the Constitution. That sort of  
10 extrinsic matter, we would think, would be acceptable for the  
11 Commission's review in looking at a term. Looking at industry  
12 standard, looking at what the Commission has done before, for  
13 example, of what the Florida Power & Light agreement or the  
14 Gulf Power agreement that contained identical provisions with  
15 respect to lighting and service fees, that would be certainly  
16 appropriate for the Commission to look. I mean, we're not  
17 asking you to interpret the agreement in a vacuum, just simply  
18 not consider matters that are outside the record in terms of  
19 evidence.

20           And clearly now that Florida Power -- and I apologize  
21 for continuing to use that. Having lived in Florida my whole  
22 life, I'm still used to calling them Florida Power. But  
23 Progress Energy has now withdrawn the affidavit of  
24 Mr. Portuondo simply because I think they recognized they were  
25 revealing their intention, although it was quite evident from



1 their motion papers, to include all sorts of things that  
2 weren't necessarily a part of that contract or, in keeping with  
3 your analogy, things that would be, say, industry standard or  
4 common knowledge, if you will. I mean, the Commission is  
5 certainly entitled to consider common knowledge and industry  
6 standard. And, again, by way of example, the FPL agreement or  
7 the Gulf Power agreement that have been interpreted, as I  
8 understand it from Public Counsel and others, in the same  
9 manner that we are asking this Commission to do so.

10 CHAIRMAN JABER: Commissioner Davidson, can I follow  
11 up on your question? It goes back to the agenda conference.  
12 There were questions that we asked for purposes of  
13 clarification at the agenda conference where we ultimately  
14 voted on the settlement.

15 If -- and I'll ask Public Counsel this, too, when  
16 it's their time. If I want to preserve the opportunity to  
17 consider the agreement, the order approving the agreement and  
18 that agenda conference transcript, do I grant the motion in  
19 limine or do I deny the motion in limine? For me it's as  
20 simple as that. Those are the three things I want to make sure  
21 are preserved for consideration. And perhaps there are others  
22 that the Commissioners -- but just for purposes of answering my  
23 question.

24 MR. KISE: And I don't mean to be evasive, Chairman  
25 Jaber. Not being -- because we weren't parties to this

1 proceeding at that time, the agenda conference, I'm going to  
2 have to defer to Public Counsel with respect to that because  
3 they're much more familiar with the record and I don't want to  
4 misspeak in that regard. I mean, we have our opinion, but I  
5 don't know that it would be in keeping with what is in that  
6 record. I mean, the Attorney General certainly would say that  
7 we stick with the agreement and the order. But, again, having  
8 Public Counsel being more familiar with that, they could  
9 respond.

10 CHAIRMAN JABER: Okay. Commissioner Davidson, do you  
11 have other questions?

12 COMMISSIONER DAVIDSON: Just one follow-up. Outside  
13 of the context of this case, I'm trying to just determine the  
14 State of Florida law in this issue, and this may be something  
15 for General Counsel to address later on. Just outside of the  
16 context, as a general matter of contract law, in Florida is  
17 parol evidence admissible to explain the meaning of a fully  
18 integrated agreement?

19 MR. KISE: Without qualifying myself as an expert,  
20 I'm going to answer that no. The agreement itself is, is as  
21 it's stated. If this Commission were to determine there's some  
22 ambiguity, it could then take in parol evidence or extrinsic  
23 evidence, if you will, in the form of testimony and in the form  
24 of matters of record, in the form of anything. But I would --  
25 and maybe the confusion is the way that the Attorney General's

1 Office is using the term "parol evidence."

2 But to, to steer clear of the terminology and sort of  
3 more bottom line it, extrinsic matters that are not evidentiary  
4 in nature, meaning advocational in nature, dictionaries,  
5 industry standard, things of that nature that are there so that  
6 the agreement is not interpreted in a vacuum would constitute  
7 matters that are within the ordinary ambit of the Commission's  
8 knowledge and within their permissible scope of looking at, to  
9 make a determination as to whether a term, in fact, is  
10 ambiguous and requires interpretation.

11 But to allow parol evidence, if you will, of matters  
12 extrinsic other than as we've defined them in this discourse  
13 into the interpretation of an unambiguous, fully integrated  
14 enforceable agreement we would submit would be improper.

15 COMMISSIONER DAVIDSON: One follow-up, and I promise  
16 this is the last follow-up.

17 Using the hypothetical, if a contract did have the  
18 term, "all fabric," the duty "all fabric sold shall be blue,"  
19 would it be proper to ask a party, and we were sitting here,  
20 what do we mean by blue, would it be proper to ask the parties,  
21 Party A, what did you understand by blue, Party B, what did you  
22 understand by blue? Assuming there was no industry standard,  
23 assuming this was just a novel term in a contract, is that  
24 something that we could properly do? Is that within our  
25 discretion to do that or would we be precluded under Florida

1 law from asking the parties what they meant by that term?

2 MR. KISE: Now, respectfully, you've crossed the line  
3 there to ambiguity. You've basically said we don't know what  
4 blue means. We don't know whether blue means navy blue or it  
5 means royal blue. We know it says blue. We don't know what it  
6 means and so, therefore, we're going to ask the parties. And  
7 by doing so you now have gone to the second part of our  
8 position, which is, okay, if you're going to ask the parties  
9 what they meant by blue, then the parties get to ask each other  
10 what they meant by blue in discovery and they get to bring in  
11 their expert as to what blue is. And Progress Energy will hire  
12 its blue expert and we'll hire our blue expert, if you will.

13 But then you've now crossed that ambiguity line.  
14 You've made a determination that on your own you can't say what  
15 blue in this contract means and, therefore, we need help from  
16 the parties, we need help from the outside. And once you open  
17 that, that blue door, to be, you know, to follow your  
18 hypothetical, once you get past that point, now you, you've got  
19 to allow us discovery, you've got to allow us to engage in a  
20 discourse that helps us understand what they really mean.  
21 Because I know that counsel can come in here, and I can, not  
22 myself, but Public Counsel and counsel for Progress Energy can  
23 talk all they want about what blue means and what the parties  
24 meant, but counsels' words are really, as in most cases where  
25 there's a factual dispute, they're worthless. They're just

1 arguments. We need to know what the parties thought, and that  
2 means we need to know what people at Progress Energy thought  
3 and we need to know what people on the Public Counsel's side  
4 and Mr. Twomey's clients, et cetera. That requires a little  
5 bit of discovery. I don't think it requires a year-long  
6 discovery process, but it might require a month or so.

7 COMMISSIONER DAVIDSON: Thank you. Thank you,  
8 Chairman.

9 CHAIRMAN JABER: Commissioners, questions of the  
10 Attorney General?

11 COMMISSIONER DEASON: Yes, I have a question.

12 Mr. Kise, in Progress Energy's response to your  
13 motion to conduct discovery, it's their position that it simply  
14 circumvents the prehearing officer's prior ruling. What is  
15 your response to that?

16 MR. KISE: Our response, respectfully, is that's a  
17 very creative argument, but that's not our position.

18 Frankly, it doesn't circumvent. The whole reason we  
19 filed the motion is we don't think that those issues had been  
20 presented yet, the whole notion of, wait a minute, we need  
21 merits discovery if, in fact, the Commission is going to deny  
22 the motion in limine. It was only after the staff  
23 recommendation came out that it realized -- and, again, being  
24 latecomers to this process, the Attorney General apologizes for  
25 sort of coming in here and seeking this relief. But it became

1 apparent to the Attorney General rather quickly that if this  
2 Commission were to entertain matters outside the contract,  
3 which it appears maybe you will, then the citizens of Florida  
4 are going to be denied due process, with all respect to other  
5 counsel that are here, the citizens of Florida are going to be  
6 denied due process if we don't get to discover what it is these  
7 various positions are.

8           And so we're not trying to get around anything.  
9 We're not trying to -- the fact that we're raising this matter  
10 now before the full Commission does not indicate we're trying  
11 to get around the prehearing officer. It indicates the concern  
12 that the Attorney General has and the significance that the  
13 Attorney General attaches to these proceedings, and to ensuring  
14 that the ratepayers of Progress Energy and the citizens of  
15 Florida get a fair opportunity to present to this Commission  
16 what, in fact, needs to be considered.

17           And if we're going to open this door to, to  
18 considering matters outside the contract, then, respectfully,  
19 the Attorney General submits that due process requires that we  
20 have at least some opportunity, albeit limited so that we don't  
21 interfere with the Commission's schedule and business, some  
22 opportunity to discover what these positions are and what their  
23 interpretation, going back to Commissioner Davidson's example,  
24 what they mean by blue and what we mean by blue.

25           So we're not here to circumvent anything. We're not

1 here to try and end around anyone. We're simply here to obtain  
2 discovery if, in fact, this Commission decides to deny the  
3 motion in limine and consider other matters. If, in fact, you  
4 grant the motion in limine, then our motion for discovery is  
5 moot, such as the motion to strike is moot, given that the  
6 affidavit has been withdrawn. Okay.

7 CHAIRMAN JABER: Okay. Commissioners, if there are  
8 no other questions of the Attorney General, we'll move on to  
9 Public Counsel.

10 Mr. Shreve -- Commissioner Bradley.

11 COMMISSIONER BRADLEY: Comment on the lighter side.  
12 Jack, you know, you're a different person. It's -- I want to  
13 commend you and congratulate you on your years of service and  
14 wish you well in your future endeavors.

15 And just a little comment. I mean, you are different  
16 because I've never seen a man work so hard on his last day.

17 MR. SHREVE: And I appreciate y'all throwing this  
18 party for me on my last day.

19 CHAIRMAN JABER: It was the least we could do.

20 COMMISSIONER BRADLEY: But, again, congratulations.

21 MR. SHREVE: Thank you, sir.

22 COMMISSIONER BRADLEY: And the State of Florida  
23 appreciates your service.

24 MR. SHREVE: Thanks. Appreciate it.

25 CHAIRMAN JABER: Now you're on.

1 COMMISSIONER BRADLEY: You're on.

2 MR. SHREVE: I'll be very brief. Mr. Beck will  
3 carry, will give the primary arguments we have. And I don't  
4 disagree with anything that the Attorney General has  
5 represented here.

6 I don't understand -- I don't know of anything in the  
7 contract that Florida Power has even said is ambiguous. If  
8 somebody can point that out to me in their questions, I'd like  
9 to know where that might be. Then I'd be glad to reply to it.

10 This Commission has urged settlement in many, many  
11 cases, encouraged it and bragged about the incentive agreements  
12 that have come out of what we've done, because the Commission  
13 clearly doesn't have the authority to order some of the things  
14 that we're able to do in settlements. And in many different  
15 forums this Commission has bragged about this type of  
16 settlement. And we're talking incentive, we're talking about  
17 exactly what we came up with here. We did the first thing with  
18 Florida Power -- well, we did the first one with Bell. We had  
19 an incentive there so that there would be a sharing of any  
20 extra earnings. Bell was great in the determination; we'd have  
21 some arguments about what expenses were, but it always worked  
22 out.

23 Went to Florida Power and Gulf and they both wanted  
24 to move to a revenue stand. And the reason we moved to the  
25 revenue situation was so that we could provide more of an



1 incentive to the company. In other words, the company could go  
2 ahead and properly manage, cut expenses. And when they  
3 overearned because of that, we wouldn't come get the money.  
4 That was the whole thing. So we based it on revenue at Power &  
5 Light, Gulf and Florida Power's request. Now when they were  
6 able to come in and hopefully better manage, cut expenses, they  
7 took advantage of this agreement. Now they're trying, with  
8 something I don't even understand, to get out of the agreement  
9 and take away the benefits that were agreed to for the  
10 customers. They've gotten their benefits on that side where  
11 they got the incentive part of it and we shifted to their way.

12           Now the -- for one thing here, if we talk about  
13 revenue in the agreement as opposed to ROE in the agreement, if  
14 we based our sharing on ROE rather than revenue, we all know  
15 what type arguments we'd have on the ROE. There is no way you  
16 would exclude the \$14 million or any revenue out of there.  
17 It's very clear. So the only way you'd leave the \$14 million  
18 out is if we would have put it in and said the revenue does not  
19 include the \$14 million. We didn't do that here. The revenue,  
20 if you had it with ROE, you wouldn't possibly exclude that  
21 revenue unless you said we're going to exclude it. We didn't  
22 do that.

23           I really don't -- you know, when you get right down  
24 to it, you may be ringing the death knell for agreements. If  
25 you don't have an agreement, then you're not going to be able

1 to go into them.

2           Commissioner Davidson wasn't here, but the other four  
3 of you were here, and I don't think there's anything ambiguous  
4 about your vote on that day and I think you understood where we  
5 were going. This is a pretty big decision, and I'd welcome any  
6 questions you might have. I really would like to respond to  
7 what part of this agreement, rather than an example, might be  
8 ambiguous.

9           CHAIRMAN JABER: Mr. Shreve, let me, let me see if I  
10 can engage that discussion with the concern I had. With your  
11 motion in limine, if we grant that, did you envision it would  
12 include the agreement itself, the order and the, the questions  
13 and answers that we had at the agenda conference or --

14           MR. SHREVE: I really hadn't thought that much about  
15 it. I would suppose that your order would encompass any of the  
16 questions or answers that you had in that, in that because the  
17 order is a part of the record. I don't know -- I mean, there  
18 can be representations made by different parties, although it  
19 wasn't the case there. I think everybody was in perfect  
20 agreement in talking about what a great settlement it was. And  
21 I don't think it was ever mentioned to you that there were any  
22 adjustments that had to be made. The only thing that was  
23 changed was at the Public Service Commission staff and your  
24 insistence which we clarified something, and that was put in  
25 the order.

1           CHAIRMAN JABER: It was? Okay. I didn't go back and  
2 look, but that's exactly what I had in mind.

3           MR. SHREVE: That was in the order, yeah.

4           CHAIRMAN JABER: Okay.

5           MR. SHREVE: And that was correct to put that in  
6 there. We think we had it covered earlier, but it was  
7 clarified.

8           CHAIRMAN JABER: That's exactly what I've got in the  
9 back of my mind. There were clarification questions that we  
10 asked at agenda. And I candidly, staff, I didn't go back to  
11 the order yesterday to look to see if those clarifications were  
12 picked up in the order. But that's critical for me.

13          MR. SHREVE: Just in closing, I -- you know, if we're  
14 going into something other than the wording of the agreement,  
15 then we should have extensive discovery. We shouldn't be  
16 denied any discovery rights we want to take. And there are a  
17 lot of things that can be shown about who had what opinion  
18 when, what was represented in other situations, when this  
19 disagreement came up. Was it just when it came out that we  
20 were going to all of the sudden have a refund coming or was  
21 everything fine up until that point? Any questions, please.

22          CHAIRMAN JABER: Commissioners, do you have questions  
23 of Mr. Shreve? And does Mr. -- Mr. Beck, do you intend to make  
24 a presentation?

25          MR. SHREVE: Mr. Beck is going to.

1 COMMISSIONER BRADLEY: Mr. Shreve, would you agree  
2 that overall this is an excellent agreement?

3 MR. SHREVE: If the agreement is as we reached, which  
4 all of us had an understanding, yes, sir, I think so. And I  
5 appreciated very much -- I remember you made some really nice  
6 remarks that day, and I appreciate those very much because I  
7 think you had looked into it. And, yes, sir, it's a good  
8 agreement.

9 COMMISSIONER BRADLEY: Also, what would your opinion  
10 be as it relates to the agreement and the fact that there's a  
11 dispute, in my opinion, about a portion of it? Is -- someone  
12 made the comment that, you know, you can't be half pregnant;  
13 either you are or you're not.

14 CHAIRMAN JABER: They never ask a woman that though.

15 COMMISSIONER BRADLEY: Someone used that example and  
16 I'm just referring back to it so I can be linguistically  
17 correct.

18 MR. SHREVE: I'm sorry. I --

19 COMMISSIONER BRADLEY: My question is this: We  
20 thought that we had an agreement that had been negotiated  
21 between your office and Progress.

22 MR. SHREVE: Yes, sir.

23 COMMISSIONER BRADLEY: Now there's a dispute as to  
24 either, either you all agree, disagree about the overall  
25 agreement or you disagree about a portion of it. Which one is

1 it?

2 MR. SHREVE: I don't think -- I really haven't heard  
3 any disagreement about the agreement. I mean, I haven't heard  
4 where there's anything that is ambiguous about it. From what I  
5 understand, Power Corp wants to talk about some additional  
6 things that should be considered, and evidently that is the  
7 \$14 million that was actual revenue that came in because of a  
8 change in the rate structure, which I know of no situation and  
9 it certainly wasn't talked about and it certainly was not in  
10 the agreement where that would be considered.

11 The other thing was I know Power Corp has said  
12 several times that the agreement was entered into in May and we  
13 wanted the whole year. That's absolutely ridiculous and not  
14 true.

15 In the specific agreement there is a percentage in  
16 there that takes care of the timing on it. If we had wanted to  
17 reach an agreement that said we will take the last eight months  
18 of the agreement and use that as revenue and lower the  
19 threshold, we could have done that. We didn't do that. We  
20 said we'll take the entire year. We said we'll take the  
21 threshold that everybody agrees to and pursue it from there.  
22 We could have done it a different way, but we didn't.

23 I, I really -- I don't think there is anything in  
24 this agreement that wasn't agreed to and intended at the time.  
25 I'm not sure I answered your question.

1           COMMISSIONER BRADLEY: Well, no. And I'm following  
2 your statements and then I'm trying to figure out, well, why  
3 did you file a petition for us to enter into a discussion about  
4 the agreement if there is an agreement?

5           MR. SHREVE: Because they didn't pay all the money  
6 out that was due under the agreement. Their calculation showed  
7 \$5 million, when under the agreement it should have been, as  
8 your staff earlier said, \$23 million.

9           COMMISSIONER BRADLEY: So is this about the overall  
10 agreement or is it about a portion of the agreement?

11          MR. SHREVE: It's about the calculation of the  
12 refund, so I guess you'd say it's about a portion of the  
13 agreement. We're not saying -- well, it's about a portion of  
14 the calculation of the refund for the first segment of it.

15          COMMISSIONER BRADLEY: Also -- I'm just asking you  
16 the same questions I asked Mr. Kise. Is it within the  
17 Commission's discretion to decide this dispute that exists  
18 between your office and Progress?

19          MR. SHREVE: I assume it's in the Commission's  
20 discretion to decide the dispute. I don't think it's in the  
21 discretion, the Commission's discretion to change the  
22 agreement. Because if it is, then you never know what you have  
23 when you reach an agreement. There might be agreements that  
24 we've had in the past that I wished at some point I'd missed  
25 something. Companies, I'm sure, in the past have missed

1 something. Bell gave back over \$300 million in refunds. Power  
2 & Light gave back over \$200 million in refunds, and never a  
3 peep.

4 COMMISSIONER BRADLEY: And one other question and  
5 I'll be finished.

6 What is there that -- you know, you all worked so  
7 nicely together at the beginning. You all worked and came up  
8 with what I thought was an agreement.

9 MR. SHREVE: So did I.

10 COMMISSIONER BRADLEY: But during this time frame  
11 that does not seem to be the case. Would you all be willing to  
12 revisit and sit down and renegotiate? Is there a commitment  
13 that we can --

14 MR. SHREVE: Well, I don't know. Just open it all up  
15 and say that we'll renegotiate and take a look now and see how  
16 much more rate should be reduced, something along those lines?

17 COMMISSIONER BRADLEY: I mean, what you all discuss  
18 is --

19 MR. SHREVE: I believe we could go ahead and  
20 negotiate a further rate reduction at this point based on the  
21 history.

22 COMMISSIONER BRADLEY: But, I mean, would you all be  
23 willing to sit down and discuss this dispute that you have and  
24 come up with, as you all did previously, and come up with  
25 something that you all can present to the Commission?

1 MR. SHREVE: Commissioner, I'll be glad to sit down  
2 and talk to anyone at any time. I don't like to get into a  
3 position of settling something and then having a company come  
4 in and try and settle it again because we may be back after  
5 that settlement and have to settle down something further.  
6 Maybe we open some other things up. Maybe we can work it by  
7 lowering rates more.

8 COMMISSIONER BRADLEY: Well, I mean, is that  
9 something that you all can do in between now and the next two  
10 hours, you know?

11 CHAIRMAN JABER: Commissioner Bradley, I see where  
12 you're going with it, and certainly whatever the Commissioners'  
13 pleasure is, it is. But I wonder if we can -- let's go forward  
14 with all the oral argument because it may be that even  
15 additional decisions are flushed out through the oral argument  
16 process. And then how about we revisit that idea after we're  
17 done?

18 COMMISSIONER BRADLEY: And -- right. And I, you  
19 know, I just, I just think that these things work best when the  
20 two parties who have a dispute agree to disagree but agree to  
21 come up with something that they both can agree to. And that's  
22 just my position.

23 MR. SHREVE: Commissioner, we've always been willing  
24 to talk at any time and see what comes out of it, which we did  
25 in meeting this settlement, and I'd be glad to talk now. But I



1 don't think anybody should start thinking -- ever have a  
2 settlement with the understanding you're going to try and  
3 disagree with it and then come back in and get some other  
4 advantage later. That's just not the way it's done. But I'd  
5 be more than happy to talk to them.

6 Just in closing, the discovery or limiting our  
7 discovery is very, very important. We cannot go beyond the  
8 words on this agreement without complete discovery.

9 CHAIRMAN JABER: So you would agree with, just to  
10 close, you would agree with the Attorney General's position  
11 that if we grant your motion for limine, nothing more needs to  
12 be done with respect to discovery.

13 MR. SHREVE: I think that's correct.

14 CHAIRMAN JABER: Okay. And if we grant the motion in  
15 limine, at least with respect to the consumer advocates we've  
16 talked to thus far, that means that the Commission would only  
17 be able to consider the agreement and the order approving the  
18 agreement.

19 MR. SHREVE: Correct.

20 CHAIRMAN JABER: Okay. Mr. Beck?

21 MR. BECK: Thank you, Chairman Jaber. Charlie Beck  
22 with the Office of Public Counsel.

23 I'd like to address the motion in limine and the  
24 motion to reconsider the order limiting discovery. Let me  
25 start by trying to answer, I think, the questions that have

1 been presented so far.

2 First on the record, Chairman Jaber, yes, you have  
3 stated correctly our position. The record consists of the  
4 settlement agreement and the order. I think what Progress  
5 Energy is going to try to tell you what the record is is  
6 everything that was ever filed in the clerk's office, including  
7 all their MFRs and all their testimony and whatever existed,  
8 and that's simply not true.

9 You know, if you go beyond the agreement, then the  
10 company is going to be asking you to conduct or make findings  
11 of fact and conclusions of law. You have the agreement, you  
12 have the words of the agreement. But if you go beyond the  
13 agreement and start coming up with the numbers that Progress  
14 Energy is going to propose, and they've got, they've got some  
15 numbers you're not going to find in the agreement anywhere,  
16 once you go beyond the agreement and the order that adopts the  
17 agreement, you're engaging in fact-finding and you're making  
18 conclusions of law based upon that fact-finding. And there has  
19 not been any evidentiary proceeding whatsoever in this case.  
20 So if you go beyond -- you know, anything could be filed in the  
21 clerk's office. You know, you could have Martha Stewart's  
22 Guide to Better Living filed in the clerk's office, but that  
23 doesn't make it evidence. It's not been presented to the  
24 Commission under oath, sworn testimony, sponsored, subject to  
25 cross-examination and entered into a record. It's simply not

1 the same to say something is in the record as in filed in the  
2 clerk's office and say there's evidence. Because the only  
3 thing you have right now is the order approving a settlement  
4 and the settlement itself.

5 CHAIRMAN JABER: Help me remember. It's been so long  
6 now. The -- we did not move testimony into the record. We  
7 never initiated the hearing at all, right, so I did not move  
8 any of the prefiled testimony into the record?

9 MR. BECK: That's my understanding.

10 CHAIRMAN JABER: And none of the exhibits were moved  
11 into the record?

12 MR. BECK: I believe that's correct.

13 CHAIRMAN JABER: And we didn't stipulate anything  
14 related to testimony or exhibits?

15 MR. BECK: I think that's correct.

16 MR. SHREVE: And, Commissioner, on that same point,  
17 if I could point out, all of the testimony and the MFRs were  
18 proven to be wrong by the settlement because there would have  
19 only, according to their calculations, been a \$5 million  
20 reduction.

21 CHAIRMAN JABER: Mr. Beck?

22 MR. BECK: Okay. Now with regard --

23 CHAIRMAN JABER: Commissioner Bradley, you had a  
24 question? Commissioner Bradley?

25 COMMISSIONER BRADLEY: Right. Mr. Beck, you

1 mentioned a very valid concern that I have, and that's the fact  
2 that no testimony was taken, so this Commission was not privy  
3 to discovery and any evidence. And it goes back to what I said  
4 earlier. You know, we in good faith entrusted OPC and Progress  
5 Energy to, we entrusted you all to take the opportunity to  
6 really sit down and, and negotiate an acceptable agreement that  
7 I at that time considered to be in the interest, the best  
8 interest of everyone. And because we did not take evidence, I  
9 mean, the Commission itself is in a quandary in my opinion  
10 because it's kind of difficult to know really what the facts  
11 are as it relates to what we're trying to do here, and that is  
12 to negotiate a settlement between two parties, and we really  
13 didn't have the opportunity to do discovery.

14           So how, how would you suggest then that, that, that  
15 we do this without having a full-blown rate case? I mean, it  
16 would seem to me that either you all have an agreement and you  
17 all can agree. But if you disagree on a portion then, then you  
18 all need to sit, go back and renegotiate that portion that you  
19 all disagree about or we have to throw, throw the whole baby  
20 out and just go through the process of having a full-blown rate  
21 case. I mean, you can't have a, you can't have -- I won't use  
22 pregnancy, but you can't have a little bit of cancer. Either  
23 you do or you don't. And the doctor can't go in and just nip  
24 your skin. He either has, he or she either has to go in and  
25 attack it aggressively and rid the body of it or you still have

1 cancer. So, I mean, how can you have an agreement and disagree  
2 on a portion of it?

3           And that being said, it would seem to me still to be  
4 prudent if you all would take the time to not send us through  
5 all these legal shenanigans, take the time and sit down and  
6 renegotiate your differences and come back with recommendations  
7 to this august body. That seems to be the most prudent thing  
8 in my opinion.

9           You know, where are we going with all of this?  
10 Because, I mean, you know, we're going to have all these legal  
11 motions and, and have, you know, these arguments about what can  
12 be discussed, what can't be discussed. But, I mean, how do you  
13 fairly expect this body to make a prudent decision without  
14 having all of the facts? So are you suggesting then that if  
15 you all disagree then, that we all need to dissolve the  
16 agreement and have a full-blown rate case?

17           MR. BECK: That's not our suggestion, Commissioner  
18 Bradley. We do have an agreement with Progress Energy and we  
19 believe it's a good agreement. What we've asked you to do is  
20 to enforce the agreement. And I think our agreement last --  
21 you know, if the Commission wanted to go ahead and have a  
22 full-blown rate case, then so be it. But our agreement stays  
23 in place until that process is completed. You know, we've got  
24 a good agreement and what we've done is to come in and ask you  
25 to enforce the agreement. You know, it's unfortunate, but

1 sometimes I guess people do disagree on what an agreement  
2 means. In fact, that's the purpose of the parol evidence rule.  
3 The parol evidence rule was designed to make people abide by  
4 their written agreement. Because if you didn't have that sort  
5 of agreement or that kind of rule, then anybody could come in  
6 when they're dissatisfied with their agreement and say, oh, I  
7 didn't mean blue, I meant, you know, indigo or something in  
8 that agreement.

9           The parol evidence rule -- and it's not an  
10 evidentiary rule. It's a rule law. And it says when people  
11 sign an agreement, you put it in writing, that's your  
12 agreement, and it's enforced unless the agreement is ambiguous  
13 on its face. And I think this goes back also to some of the  
14 things Commissioner Davidson was saying. So it is unfortunate  
15 that we've got this disagreement, but we had, we felt that we  
16 had to come to you and ask you to enforce the agreement because  
17 Progress Energy isn't living up to it.

18           COMMISSIONER BRADLEY: Okay. And I'll be finished.  
19 So do you all have a disagreement or do you have an agreement?

20           MR. BECK: We have an agreement. It's in writing.  
21 We've got a written agreement with Progress.

22           COMMISSIONER BRADLEY: But you said you have a  
23 disagreement.

24           MR. BECK: They don't want to abide by it, and  
25 obviously we disagree on what the agreement means. But the

1 written agreement is what it is. I mean, you have it, you've  
2 approved it, and we're entitled to have it in enforced.

3           You know, it's unfortunate that people disagree  
4 sometimes on that, but this happens. You know, it's not  
5 unusual. Courts all the time are brought in to enforce written  
6 agreements where people disagree about them.

7           CHAIRMAN JABER: Mr. Beck, you had more on your --  
8 Commissioner Davidson, you have questions?

9           COMMISSIONER DAVIDSON: A comment and a question for  
10 Mr. Beck. The comment is we do have an agreement. There is an  
11 agreement that's been approved by the Commission, and that  
12 agreement is, in my view, as a matter of public policy entitled  
13 to be enforced.

14           The only issue is -- well, the issue is the amount of  
15 the refund, and the parties have different positions on that.  
16 And that's up for, it's really up for the utility to make its  
17 case as to what it thinks is due. Public Counsel has made its  
18 case.

19           My question for you, Mr. Beck, is -- and I'm glad you  
20 pointed out the parol evidence rule is a rule of substantive  
21 contract law. It's not procedural. It's not evidentiary. And  
22 my question is even -- and it's the same question I've asked a  
23 couple of times now, but I'd like your opinion on it. Assume  
24 you've got a fully integrated agreement, as you do here. Is  
25 parol evidence, in your opinion, under Florida law admissible

1 to give meaning to terms within that contract such as the term  
2 "blue"? I know that's not in there, but assume it was. Just  
3 as a matter of basic contract law.

4 MR. BECK: Okay. My understanding of the law on that  
5 is that you have to look at the agreement itself and decide  
6 whether it's ambiguous or not. If you decide it's an ambiguous  
7 agreement, then you can take evidence to explain what it means.  
8 But if you can't find that ambiguity on the face of the  
9 agreement, then you don't.

10 Let me cite one of the cases. It's mentioned on Page  
11 7 of the staff recommendation. I think it explains this  
12 question and answer.

13 This is Miller versus Kase, K-A-S-E. The staff  
14 recommendation just has a brief excerpt from it toward the top  
15 of Page 7, but let me read you a little more than what's in the  
16 staff recommendation.

17 This case says that, "Construction of a contract is a  
18 question of law which an appellate court may consider de novo,  
19 provided that the language is clear and unambiguous and free of  
20 conflicting inferences. However, where a contract is  
21 susceptible to two different interpretations, each one of which  
22 is reasonably inferred from the terms of the contract, then the  
23 agreement is ambiguous."

24 So you've got to look at the contract itself and  
25 you've got to find by looking at the contract that there's



1 ambiguity. And if you find it's an ambiguous contract, then  
2 you go in and take the parol evidence.

3           It says later in that case, it says, "To that end,  
4 the court must attempt to ascertain the intention of the  
5 parties and may accept parol evidence, not to vary the terms of  
6 the contract, but to explain ambiguous terms."

7           So I think that's it in a nutshell. You've got to  
8 look at our agreement and say that's ambiguous. And if you  
9 decide it's ambiguous, then we can go beyond the terms of the  
10 contract itself. But then you've opened up a full evidentiary  
11 hearing because then you're going to make findings of fact and  
12 conclusions of law.

13           COMMISSIONER DAVIDSON: Follow-up, Madam Chairman.  
14 And on that point I agree with your statement of the law. I  
15 also view the utility here as having the initial burden of  
16 demonstrating the ambiguity within the contract. It's -- while  
17 the PSC, the Commission in reviewing the contract could take  
18 note of that if it discovers it, I do feel it's incumbent upon  
19 the utility to identify that. And in terms of process, it  
20 would seem to be that that identification could occur to the  
21 parties sooner rather than later. What within the contract  
22 supports your position, what doesn't? And once that -- if no  
23 identification is made, that answers the question. If no  
24 ambiguity is identified or alleged, that answers the question.  
25 If an ambiguity is identified or alleged, then that needs to be

1 somehow visited.

2           And I think the scope of what's sort of being offered  
3 up has now been narrowed with, as I understand it, the  
4 affidavit that was submitted in support of Progress's  
5 opposition to the motion to enforce has been withdrawn; is that  
6 correct? So you're really talking about -- when you're talking  
7 about the parol evidence, it may be there is no ambiguity at  
8 all. I just don't want to be in the position on the day of  
9 hearing about an ambiguity and then trying to figure out what  
10 to do with it. It seems to me that that's a fairly narrow  
11 issue in scope and can be, I would think, readily resolved by  
12 the parties. Does that make sense?

13           MR. BECK: I don't believe that the withdrawal of the  
14 affidavit really does much of anything to narrow the scope of  
15 the differences. You know, Progress Energy says they're going  
16 to rely on matters of record, but they've never said what that  
17 means. But I think from all their pleadings it's pretty clear  
18 what it means. And they think matters of record means except  
19 for the truth of the matters contained therein, everything that  
20 was filed in the case, if it went to the clerk's office. You  
21 know, perhaps I'm wrong, but I think that's what they're  
22 saying. They want you to go beyond the agreement. And the law  
23 is clear. If you don't see an ambiguity in an agreement, then  
24 you don't go that route. Whether it's MFR filings or something  
25 else that Progress Energy wants you to consider, it's either

1 you go with the agreement, the order approving the agreement or  
2 you find it's ambiguous and we go to other things. And there's  
3 not a limit. It's not just what's filed in the clerk's office.  
4 It's what is the evidence that goes to clear up that item that  
5 you found ambiguous on the face of the agreement.

6 COMMISSIONER DAVIDSON: Perhaps I opened that issue  
7 too early. That's, I suppose, something we can address when we  
8 get to the motion phase after oral argument.

9 CHAIRMAN JABER: Sounds good. Commissioner Deason,  
10 you had a question? I'm sorry, Mr. Shreve.

11 MR. SHREVE: May I be heard on just from what he  
12 said?

13 CHAIRMAN JABER: Hang on one second.

14 Commissioner Deason, you had a question. Do you mind  
15 if we let Mr. Shreve respond?

16 COMMISSIONER DEASON: Sure. Let Mr. Shreve respond.

17 MR. SHREVE: I think Commissioner Davidson has hit  
18 the nail on the head here. But your decision that's going to  
19 be made today is whether or not there is something ambiguous.  
20 Otherwise, you stay with the agreement. And at this point I  
21 don't even know what they're talking about as far as something  
22 being ambiguous, and I don't think you do either. So I --

23 MR. BECK: Go ahead.

24 MR. SHREVE: I don't know where Mr. Poucher came  
25 from.

1           CHAIRMAN JABER: I'm sorry. What did you say?

2           MR. SHREVE: But, anyway, I think that's exactly  
3 right, what you said. And I don't know that they can come up  
4 with anything in this hearing and say this is ambiguous. I  
5 don't know what's ambiguous in that. That's the reason I was  
6 asking you in your example, we go to something here in this  
7 agreement, and I don't think there's anything ambiguous there.  
8 And if you don't know of anything ambiguous, then we stay with  
9 the document as it's written and just go ahead and make the  
10 calculation, as your staff has in the past.

11           CHAIRMAN JABER: Commissioner Deason, you had a  
12 question?

13           COMMISSIONER DEASON: Yes. The question that I have  
14 relates directly to what Mr. Shreve has been saying and what,  
15 and the questions that Commissioner Davidson has been asking.  
16 And I guess there's a little bit of frustration I have here in  
17 that it seems like we're hearing argument, and I know we  
18 haven't heard from all the parties yet, but it seems a very  
19 crucial part of the argument as to whether there is or is not  
20 ambiguity in the agreement. And I guess my frustration is or  
21 the question is when are we going to decide that? It seems to  
22 me the earlier we can decide that as a Commission, whether  
23 there is or is not ambiguity, the better we will know under  
24 what rules we would need to proceed to determine the issues at  
25 hand. And I guess -- I guess it's not a question. I guess

1 it's a statement. I -- if there's any way possible, Madam  
2 Chairman, I'd like for this Commission to decide that as  
3 quickly as possible and then we will know what we need to do  
4 next.

5 CHAIRMAN JABER: Yeah. Commissioner Deason, that's  
6 really the reason I've been asking the parties the question of  
7 what is it they think we can consider. I'm trying to have some  
8 sort of consensus with respect to what we can consider.

9 So far we've heard the AG and Public Counsel agree  
10 that it's the agreement and the order approving the settlement.  
11 And Mr. Beck made reference to this, too. We need to  
12 understand what Progress's position is in that regard. It may  
13 be that July 9th is the earliest. I don't know. I just don't  
14 know the answer to your question. But I think we're all saying  
15 the same thing.

16 COMMISSIONER DEASON: But I think we run the risk,  
17 and so be it if it happens that way, but come July 9th if  
18 there's a determination by the Commission that the agreement is  
19 ambiguous, well, then it may be that there's going to be the  
20 necessity of reopening a record, taking evidence, allowing  
21 discovery and further postponing this matter. I guess that's  
22 something we'll have to consider at that time.

23 CHAIRMAN JABER: Right. And, you know, the opposite  
24 is true, which is what I'm also struggling with. If we  
25 consider expanding the record now to something more, and I use

1 the word "record" loosely, I'm not talking about evidence, but  
2 just the body of material we'd be looking at, if we expand it  
3 to something more than the agreement and the order approving  
4 the agreement and come July 9th we don't find an ambiguity,  
5 then we've created a whole lot of work for a whole lot of  
6 people. So I'm struggling on both sides of it.

7 Commissioner Davidson, and then let's move on. Let's  
8 finish. Commissioner Deason.

9 COMMISSIONER DEASON: I have one further thing,  
10 please.

11 I would just make an observation, and it seems to me  
12 that we may be dealing in a slightly different process here  
13 than what normally occurs when the parol evidence rule is  
14 utilized. We're not a court of law seeing this agreement for  
15 the first time. This is not a contract that the parties signed  
16 and didn't share with anyone until there's a dispute. This  
17 contract or agreement was presented to the Commission and we  
18 approved it. And it seems to me that at the time, if there  
19 were ambiguities in that, we should, it should have been  
20 incumbent upon us to try to have clarified those. Apparently  
21 we were comfortable that the agreement was not ambiguous. So  
22 as we carry on this, this oral argument, if any of the parties  
23 have any thoughts about how this process perhaps is different  
24 from a classical case where there's a contract and then a court  
25 sees it for the first time when there's a disagreement -- how

1 about, in the parol evidence rule how -- if there's any  
2 difference between these two, I'd like to know that.

3 CHAIRMAN JABER: That's an excellent question. And  
4 it seems to me, just to add onto that, that our order  
5 incorporated the settlement. We approved the settlement. So  
6 you can say you're asking that the settlement be enforced, but  
7 really you're asking that our order be enforced. And I think  
8 that goes additionally to Commissioner Deason's point.

9 Commissioner Davidson, and then we're moving on if  
10 there are no other questions.

11 COMMISSIONER DAVIDSON: A couple of points. I agree  
12 with everything Commissioner Deason said. And in this case,  
13 again, I emphasize it's the utility that has the burden of, of  
14 identifying what they view as the provision or provisions in  
15 the contracts that supports their argument. And I would urge  
16 counsel to represent to, to the Commission and to counsel that  
17 they will get that identified, you know, forthwith and perhaps  
18 we can ask that during argument.

19 Second point, my view, and it's not necessarily an  
20 embedded view now, is that in addition to the agreement and the  
21 order enforcing agreement, I think the agenda conference  
22 transcript would be of benefit to consider. I think there may  
23 be points in there that reflect the thoughts of this tribunal,  
24 issues that the Commission, which I didn't sit on at the time,  
25 considered important. And we certainly have the ability to not

1 improperly use that transcript, but I think it could provide  
2 some useful policy guidance. So on the actual motion in limine  
3 my preference would be to sort of add that transcript in as  
4 well. And I put that out there now so that the parties can,  
5 can address that. And I hope, if there were no strong  
6 objections to that, all the parties would agree. I don't know  
7 what's in there. I just think it would be useful guidance, I  
8 know for me since I didn't sit on the Commission at the time.

9           CHAIRMAN JABER: Thank you, Commissioner. All right.  
10 Mr. Beck, let's complete your presentation and we'll go to Ms.  
11 Kaufman. And what is this that you handed out to us?

12           MR. BECK: Well, what I've handed out is excerpts  
13 from the agreement with Progress Energy on your right-hand  
14 side, and on the left-hand side is a similar portion of the  
15 agreement with Florida Power & Light that preceded the  
16 agreement to Progress Energy.

17           I'm in the position of arguing to you that it's not  
18 ambiguous. And I know the burden is on Progress Energy to show  
19 you where it is. I do want to point out to you that with the  
20 Florida Power & Light agreement, if you compare it side by side  
21 with the Progress Energy agreement, you'll find that the syntax  
22 is virtually identical in the two, two agreements. They  
23 both -- you know, the Florida Power & Light agreement was  
24 effective April 15th; whereas, Progress Energy was May 1st.  
25 You'll see different percentages that reflect that. There's



1 71.5 percent for Florida Power & Light; 67.1 percent for  
2 Progress Energy for the Year 2002. But other than that, the  
3 agreements are identical, I think, other than changing the  
4 numbers. The syntax is identical.

5           There was no ambiguity between us and Florida Power &  
6 Light concerning their agreement. When computing their revenue  
7 or their refund obligation for 2002, it went straight through  
8 the agreement, applied the percentages for 2002 and came up  
9 with a refund.

10           If you do the same thing that we did with Florida  
11 Power & Light to the Progress Energy agreement, you come up  
12 with our number. Progress Energy is telling you that we really  
13 ought to do it different in their case as opposed to the way we  
14 did it with Florida Power & Light. Among the things they argue  
15 to you is that for the Year 2002 they don't want you just to  
16 make the adjustment that's in the agreement of 67.1 percent of  
17 the, of the refund to apply for the years. They say there  
18 should be an additional adjustment of \$42 million on top of  
19 that adjustment in there.

20           A couple of things. First of all, their, their --  
21 what they would have you do is not anywhere in the agreement.  
22 If we had intended to do what they're saying we should have  
23 done, we could have done it in the agreement. I mean, we could  
24 have changed the threshold. We list a \$1.296 billion figure  
25 for 2002. If that was supposed to be \$42 million less, we

1 could have done that. We could have reduced that number by  
2 \$42 million and say, well, that's the threshold, but we didn't.  
3 This is what we agreed to, just like the similar provisions we  
4 agreed to in Florida Power & Light.

5           If we had wanted to do it that way, there's other  
6 ways we could have done what Progress Energy is advocating. We  
7 could have taken an eight-month revenue figure and had a  
8 threshold based on eight months of revenue and cut out the  
9 67.1 percent and simply said to the extent they exceed that  
10 threshold, we could have done it. Again, that's not what we  
11 did. What we did is in the agreement, and we're simply asking  
12 you to enforce it just the same that we did with Florida Power  
13 & Light.

14           We would also point out to you -- and this is kind of  
15 blending over to the motion to reconsider the order limiting  
16 discovery, which we haven't even addressed yet. There is a  
17 recommendation of the staff or draft recommendation dated May  
18 6th, which is two days before the date that the, what's been  
19 called the "options recommendation" was filed. That was the  
20 recommendation of the staff on May 6th until certain events  
21 occurred that changed what the staff was recommending.

22           And I'd like to read to you what the staff said in  
23 that. In fact, let's hand it out.

24           CHAIRMAN JABER: This is a draft document?

25           MR. BECK: Yes. This is a draft of the staff's

1 recommendation in this case as of May 6th.

2 COMMISSIONER DEASON: Madam Chairman, I need to ask a  
3 question here, and I'm not trying to be difficult.

4 CHAIRMAN JABER: Commissioner Deason.

5 COMMISSIONER DEASON: But are you asking us now to  
6 consider things beyond the four corners of the agreement?

7 MR. BECK: I don't know how we argue or show you that  
8 there's no ambiguity other than showing you those sort of  
9 things for argument's sake. I mean, what you've ultimately  
10 got -- I mean, there's obvious irony in that. I don't know how  
11 else to argue to you that there's no --

12 COMMISSIONER BRADLEY: Are we going to the merits of  
13 the --

14 CHAIRMAN JABER: No. He's on the, he's on the motion  
15 for reconsideration issue, which is Issue 1, Commissioners,  
16 Page 4 of -- if you look at Tab 1 in staff's recommendation,  
17 Tab 1, Issue 1 addresses Commissioner Baez's order limiting  
18 discovery. And Public Counsel filed a motion for  
19 reconsideration, and one of the things they argue in the motion  
20 for reconsideration relates to this draft. Does that clarify?  
21 Commissioner Bradley?

22 COMMISSIONER BRADLEY: Just a question of General  
23 Counsel. Is this parol evidence?

24 MR. McLEAN: It might as well say so right on the  
25 cover. It certainly isn't in the agreement, and I don't know

1 why it's being offered to you Commissioners to consider. I  
2 mean, if their thesis is that you ought to look at the  
3 agreement and no further, what's the chart and what's the  
4 exhibit?

5 MR. BECK: I'm trying to argue to the Commission that  
6 there is no ambiguity in the agreement. There's been none  
7 found.

8 COMMISSIONER BRADLEY: But I thought we were here  
9 just to deal with the motions before us.

10 CHAIRMAN JABER: Commissioners, I don't want to get  
11 bogged down. Let's keep this focused. We are now moving to  
12 the motion for reconsideration that was filed by Public  
13 Counsel. Unless I'm missing something, one of the things that  
14 Public Counsel articulates in the motion for reconsideration is  
15 that they want to do discovery related to a draft document that  
16 was circulated by staff. Maybe I'm being very, very -- maybe  
17 I'm purposefully trying to stay focused, but that's the way I  
18 see it. We're shifting now. We're not -- we're no longer  
19 talking about the ambiguity related to the contract. But I  
20 stand to be corrected, Mr. McLean. We need, we need to move  
21 this along.

22 MR. SHREVE: Okay. Commissioner, I think all we're  
23 trying to show there is an argument that there is no ambiguity.  
24 We're not trying to add or detract from the agreement, but we  
25 are trying to show that there is no ambiguity. And that's not

1 just our opinion, but would be in the recommendation.

2 COMMISSIONER BRADLEY: Madam Chair, I know you may  
3 not be getting bogged down, but I am.

4 CHAIRMAN JABER: Go ahead, Commissioner Bradley.

5 COMMISSIONER BRADLEY: Let me ask Public Counsel, is  
6 this parol evidence? I mean --

7 MR. BECK: What I was going to do is show you  
8 that --

9 COMMISSIONER BRADLEY: It's the interpretation of  
10 this Commission's counsel that this is. So should we give  
11 Florida Progress the opportunity to present like kind  
12 information --

13 MR. BECK: If you're going to prohibit --

14 COMMISSIONER BRADLEY: -- at this hearing?

15 MR. BECK: If you're going to prohibit Progress  
16 Energy from mentioning anything other than the agreement  
17 itself, then so it be. But they're going to argue to you  
18 matters outside of the agreement. I don't know how they can  
19 argue their case, unless you let them do that. Now if you're  
20 going to prohibit Progress Energy from mentioning anything  
21 other than the agreement, then, fine, we'll go by that, too.

22 COMMISSIONER JABER: Mr. Beck, can you, can you make  
23 your presentation without referring us, without giving us a  
24 copy of this document? And I would note, Commissioners, that  
25 Progress has filed a response to the motion for

1 reconsideration, and they also address this document at least  
2 in terms of responding to it. Is that right, Mr. McGee? Did  
3 you -- you responded to the motion for reconsideration and  
4 addressed this concern?

5 MS. BOWMAN: Yes, Commissioner, we responded to the  
6 motion for reconsideration. But I don't believe there was any  
7 comment with regard to any draft staff recommendation that I  
8 don't think is appropriately before this Commission.

9 CHAIRMAN JABER: Okay. Mr. Beck, why don't you make  
10 your presentation with respect to the motion for  
11 reconsideration and stay within the, stay within your document.

12 MR. BECK: Okay. What I was doing was finishing up  
13 the motion in limine, and what I had argued to you based on the  
14 agreement and matters is that there is no ambiguity in the  
15 agreement.

16 CHAIRMAN JABER: Well, see, that's not what you said.  
17 That's not what you said. You said, we're getting to the  
18 motion for reconsideration, which we haven't even discussed.  
19 So you three --

20 MR. BECK: I transitioned.

21 CHAIRMAN JABER: Okay.

22 MR. BECK: I'm sorry.

23 CHAIRMAN JABER: Okay. Well, transition quickly.

24 MR. BECK: Okay. As of May 6th the staff agreed with  
25 us that there was no ambiguity. That's the point I'm trying to

1 make in here. The document, whether you look at it or not,  
2 staff believed the settlement was unambiguous, said so on May  
3 6th, and does not require further amplification. They said  
4 that neither the settlement nor the order contains any language  
5 that supports the position urged by Progress Energy. And I'll  
6 leave it at that. But on May 6th the staff was in complete  
7 agreement with us that there is no ambiguity. And,  
8 Commissioner Deason, that's the heart of the motion in limine.  
9 And if you find no ambiguity, then, then we don't go beyond the  
10 matters of the agreement itself. We stick to what the  
11 agreement says.

12           And, again, that moving, transitioning into the order  
13 on discovery, how you decide the motion in limine affects the  
14 discovery. Because if you agree with us on the motion in  
15 limine, then we don't have this merits discovery because you're  
16 not going to take into consideration any matters other than the  
17 agreement and the order. And I know you want to also take in  
18 the transcript. I read that some time ago. I don't think  
19 there's much in there, as I recall. I think that that goes  
20 beyond the line because then you will always open up your  
21 orders to what does the order mean? And then you're always  
22 going back to transcripts and what people said. But be that as  
23 it may.

24           CHAIRMAN JABER: Mr. Beck, how is that different when  
25 we get a motion for reconsideration? And in considering

1 motions for reconsideration and looking at the order, candidly,  
2 I do go back to the agenda transcript and I look at what I said  
3 to refresh my memory with respect to what I was thinking when I  
4 voted, to look at what other Commissioners asked and what the  
5 responses are. How is it different?

6 MR. BECK: Right. Because this is a matter of  
7 contract interpretation where we've got the parol evidence  
8 rule. And that's where it's different is the parol evidence  
9 rule here. It's whether you're going to find that ambiguity or  
10 not. And the law, as I read the law in Florida, it says you  
11 have to find it on the face of the agreement. And I agree with  
12 you, the order approving the agreement merges with the order  
13 because the agreement wasn't effective until you approved it.  
14 And we had no agreement until the PSC approved it. But that's  
15 the difference, I think, is the parol evidence rule.

16 COMMISSIONER DEASON: Let me ask -- I have to ask a  
17 question here.

18 CHAIRMAN JABER: Commissioner Deason.

19 COMMISSIONER DEASON: And this is maybe for future  
20 reference.

21 Mr. Beck, it's not uncommon that we're in an  
22 evidentiary proceeding, many that you've been involved in over  
23 the years, when one side or the other is trying to argue  
24 precedence or what the meaning of an order was that we're  
25 handed copies of a transcript where Commissioners at an agenda



1 conference said this or that instead of just looking at the  
2 order. Does that mean all of that is irrelevant and we don't  
3 have to consider that in hearings in the future?

4 MR. BECK: No. Only in -- no. I think that's fine.  
5 I think in our case we're arguing about a parol evidence rule.  
6 That rule of law says you don't go beyond the agreement unless  
7 you find an ambiguity. That's why we would argue it wouldn't  
8 go beyond. Normally it would be the contract all by itself,  
9 but the contract was contingent upon an order from the  
10 Commission approving the contract. So we would say that the  
11 order itself includes that. Whether you go to the agenda  
12 conference or not, it's not that big a deal. I think you ought  
13 not, but it's not that big a deal. And I don't think you're  
14 going to find anything there that's going to help you, to be  
15 perfectly honest.

16 CHAIRMAN JABER: Okay. Commissioners, any other  
17 questions of Mr. Beck before we move on?

18 MR. BECK: I've only begun to do the motion to  
19 reconsider discovery, but let me move through quickly.

20 CHAIRMAN JABER: Go ahead.

21 MR. BECK: Again, part of the merits discovery, I  
22 think, is determined by the motion in limine. If you agree  
23 with us, then there should be no merits discovery. But there's  
24 also other discovery at issue other than the merits discovery,  
25 and that goes to the fundamental fairness, the processes that

1 led to the filing of a staff recommendation in this case.

2 The staff recommendation doesn't mention these  
3 things, but it's the basis for our request for broader  
4 discovery than was allowed by the prehearing officer. So I  
5 need to go through the facts as we, as we know them and why we  
6 think those facts form the basis for broader discovery by the  
7 Commission.

8 Through a public records request filed by Sugarmill  
9 Woods and the depositions of Commission staff members we found  
10 that the initial staff recommendation that was filed or that  
11 was drafted in this case favored our position on the settlement  
12 agreement 100 percent. There was no alternative  
13 recommendation, there was no three options. It was simply a  
14 recommendation drafted favoring our position.

15 Then there were actions by Commissioner Bradley that  
16 caused the addition of an alternative to the main  
17 recommendation. Again, at that point the recommendation was a  
18 main recommendation favoring our position, agreeing that  
19 Progress Energy should refund \$23 million. Then there was an  
20 alternative that was somewhere between the position of Progress  
21 Energy and our position.

22 On or about May 6th, which was two days before the  
23 options recommendation was filed, Commissioners Bradley and  
24 Davidson were told that staff agreed with the Public Counsel  
25 position, and then they caused staff to change their

1 recommendation from one that favored the Public Counsel's  
2 position to an options. And then we had the agreement that was  
3 finally filed.

4           We believe that action caused harm to our case  
5 because the staff recommendation was actually to favor our  
6 position, but instead what was filed was one that changed the  
7 staff's professional judgment and offered no recommendation.  
8 So one that favors our position with no staff member favoring  
9 Progress Energy was shifted into one where they were all the  
10 same and there was none.

11           We also know that certain Commissioners' aides  
12 received documents that others weren't. We also have a member  
13 of Progress Energy telling staff that two Commissioners were  
14 siding with them.

15           I think these facts as we know them form the basis  
16 for our inquiring whether the process is fair and whether it  
17 was stacked against us because of actions by Progress Energy.

18           What the prehearing officer did is he limited the  
19 discovery solely to whether there was a violation of law by  
20 contacting Commissioners. You know, all of our discovery, we  
21 had requests for production of documents and had depositions,  
22 and the prehearing officer decided that we could -- all of that  
23 discovery would be limited to whether there was a violation of  
24 law.

25           And what I'm arguing to the Commission is there's

1 more at issue than whether there was a violation of law. It's  
2 the entire process that led to the staff's recommendation being  
3 changed from one that favored us into one that had no  
4 recommendation at all.

5 CHAIRMAN JABER: Mr. Beck, reconcile this with the  
6 motion in limine for me. If the Commission found it  
7 appropriate to grant your motion in limine, would you agree  
8 that the prehearing officer's order should be, you know, your  
9 request for a motion for reconsideration should be denied?

10 MR. BECK: No, I don't think it's the same. The  
11 motion in limine would prevent any merits discovery, as the  
12 Solicitor General mentioned, and that's discovery going to the  
13 merits of the refund issue.

14 This is different than the merits discovery. This is  
15 the process discovery is the way I would disclose it. And it's  
16 basically whether it's been a fair process that led to the  
17 filing of the staff recommendation, and it includes the actions  
18 of Progress Energy, the influence they may have had behind the  
19 scenes, and what led to the changing of the staff's  
20 recommendation. Because two days before that recommendation  
21 was filed, the professional opinion of your staff was to go  
22 with us, and that was changed to one where that was not given.  
23 In other words, the professional opinion of staff was not  
24 allowed to be expressed in the final recommendation, and that  
25 harmed us. I see a harm to our case by the Commissioners not

1 being told what the opinion was. It's not fair to the parties,  
2 it's not fair to the public to have that. So that's different  
3 from the merits discovery in the motion in limine.

4 CHAIRMAN JABER: Commissioner Bradley?

5 COMMISSIONER BRADLEY: Yes. Mr. Beck, in your  
6 opinion is the recommendation a recommendation upon filing or  
7 is it a recommendation prior to filing?

8 MR. BECK: I guess it's a formal filed recommendation  
9 when it's filed. I -- sure. It's a recommendation when filed.  
10 Before that it's the proposed or draft recommendation.

11 COMMISSIONER BRADLEY: But you made the statement  
12 that it was a recommendation prior to filing. Is that, is that  
13 a slip of your tongue?

14 MR. BECK: I misspoke. I said it was the draft of  
15 the staff's recommendation at that point on May 6th.

16 COMMISSIONER BRADLEY: Okay.

17 CHAIRMAN JABER: Any other questions before we move  
18 on?

19 MR. BECK: Can I --

20 CHAIRMAN JABER: Mr. Beck.

21 MR. BECK: I'm almost finished. We believe that the  
22 scope of your review should be de novo. I know the staff's  
23 recommended against that because I think the issue of the  
24 process transcends this particular case. You know, it goes to  
25 the fairness of the process.

1           The prehearing officer prohibited any discovery prior  
2 to November 26th, 2002. I think that's a very narrow reading  
3 of the ex parte statute in any event. We do know that Progress  
4 Energy was, was promoting their position with the staff at  
5 least as early as July of 2002. So we believe that it should  
6 go back to that point. Actually it should go back to the  
7 agreement itself as far as the process goes.

8           We proposed to depose a person named Gary Roberts,  
9 who we know works with Mr. Paul Lewis. The prehearing officer  
10 prevented us from taking that deposition, stating that if we  
11 wanted to know what Mr. Lewis said, we should ask him. Well,  
12 we certainly do intend to ask him, but we think that just  
13 because we ask him shouldn't preclude us from asking other  
14 people what Mr. Lewis has said and checking his credibility for  
15 inconsistent statements. So what we have asked -- what we are  
16 asking from you on the discovery reconsideration is to first of  
17 all require Progress Energy to produce all documents responsive  
18 to our discovery request without limitation, and then allow the  
19 depositions to go forward without prior restrictions, and then  
20 allow additional time for additional discovery. With that, I  
21 conclude. Thank you.

22           CHAIRMAN JABER: Thank you, Mr. Beck. Commissioner  
23 Bradley.

24           COMMISSIONER BRADLEY: Yes. Mr. Beck, are you  
25 adverse to reopening the process of negotiating your

1 disagreement with Progress?

2 MR. BECK: Not at all. I'll be glad to talk --

3 COMMISSIONER BRADLEY: Would you be willing to make a  
4 commitment and give us maybe a time frame that you might be  
5 willing to sit down and negotiate? It seems to me that --

6 MR. KISE: Respectfully, Commissioner Bradley, and I  
7 didn't speak up before because it wasn't my place to speak up  
8 because it was Public Counsel's time, but at this point, since  
9 this issue has come up again about discussing and negotiating,  
10 I want to, I want to put out on the record, I have had some  
11 discussion, the Attorney General's Office has had some  
12 discussion in that regard with representatives of Progress  
13 Energy. So I don't want the Commission to believe that, that  
14 we are, you know, to leave this proceeding with the impression  
15 that everyone here is bullheaded and no one is at all trying to  
16 work this out. I mean, we, we are attempting to work it out.  
17 But I don't know, frankly, if there is going to be a way to  
18 work it out.

19 I don't know that two hours or ten hours or any  
20 number -- I wouldn't want to mislead the Commission or you,  
21 Commissioner Bradley, by agreeing to sit down on something.  
22 I'd like to disclose first that we have done some of that and  
23 it has not to date been successful. That doesn't mean that it  
24 won't be, nor does it mean that the parties aren't willing to  
25 discuss a resolution. But at the same time, it would be unfair

1 to give this Commission the impression that either side, and  
2 obviously I'll let Progress Energy speak for themselves in that  
3 regard, are optimistic or pessimistic. It's just too early to  
4 tell. I mean, we have not to date been able to resolve these  
5 issues because effectively we're talking about settling a  
6 settlement, and that makes it very difficult, at least from the  
7 Attorney General's Office it makes it difficult because we  
8 really have to make sure the people get what it is they  
9 bargained for the first time.

10 COMMISSIONER BRADLEY: Mr. Kise, one of the roles  
11 that your office maybe can play is to serve as a mediator, an  
12 outside mediator between OPC and Progress, and I would  
13 encourage you all to stay involved in it.

14 But, Mr. Beck, how, how much discussion have you had  
15 with respect to negotiations?

16 MR. KISE: Well, I've sort of acted in that role on  
17 behalf of the Attorney General, Commissioner Bradley. I mean,  
18 I sort of, following your wise suggestion -- and that is  
19 effectively in some respects how the Intervenor fits into these  
20 proceedings in terms of protecting the public interest is  
21 trying to find a way that does manage the public interest and  
22 make sure that, you know, if there's a resolution that appears  
23 as though it would be in the interest of the public to reach,  
24 then, then that's -- as mediators we sort of are, are there in  
25 that regard. I mean, we're not effectively tasked with that



1 role, but we have, in keeping with our obligation to the  
2 people, tried to work with both sides in that regard to see if  
3 there's a way to resolve this. And, again, I don't know that  
4 there's going to be one. But, nevertheless, we're not  
5 expressing resistance to trying.

6 COMMISSIONER BRADLEY: Mr. Beck -- I mean, I'd like  
7 to have Mr. Beck respond to that, if you don't mind,  
8 Mr. Shreve, since Mr. Beck is going to be running with the ball  
9 after today.

10 MR. SHREVE: I beg your pardon?

11 COMMISSIONER BRADLEY: Since Mr. Beck is going to be  
12 running with the ball after today. I mean, he's --

13 MR. SHREVE: He will, but right now I'm here.

14 COMMISSIONER BRADLEY: Well, what about you,  
15 Mr. Shreve? How many minutes or how many hours have you --

16 MR. SHREVE: I'll be glad to sit down today and talk  
17 to them, but I think we need a decision out of this Commission  
18 as to the issues that are asked for.

19 COMMISSIONER BRADLEY: Okay. And I don't disagree  
20 with you. But it would be my preference that you all sit down  
21 first and then we maybe render a decision. I don't --

22 MR. SHREVE: I'll be glad to sit down with them. No  
23 problem. Now I know the word has been put out out here that I  
24 wouldn't talk to them. And I had a very pointed conversation  
25 with somebody on your staff the other day, and that's just not

1 true. I had a conversation with Mr. McGee when I was out of  
2 town and was waiting for something to come back from them.  
3 This is some time ago. That didn't work out, so he was in a  
4 position to come back with that offer and I haven't heard  
5 anything since. I'll be happy to sit down with them. I don't  
6 like negotiating a settlement that I've already settled one  
7 time. Maybe we'll open up some other issues that they don't  
8 want to open up. But I'll be more than happy to sit down with  
9 them.

10 CHAIRMAN JABER: Okay. Mr. Shreve, let me interject  
11 something here. I feel like it's appropriate for many reasons.  
12 First of all, I do -- there aren't many things at this  
13 Commission I take credit for. But with respect to mediations  
14 and encouraging settlement, I can with all, and I know with the  
15 support of my colleagues, you know, that I'm perhaps the  
16 biggest advocate for that. So I can candidly say that there is  
17 an opportunity every once in while to say let's just make a  
18 decision because they're not making it for themselves. And I  
19 think we may have gotten to that point.

20 That is not to say that I won't be flexible if this  
21 Commission wants to take a break and allow for discussion, but  
22 I'm ready to make a decision.

23 Commissioner Baez, you had a question and then we'll  
24 go --

25 COMMISSIONER BAEZ: Just a clarifying question to

1 something that Mr. Beck said.

2 With respect to the, the prehearing order, the  
3 prehearing officer's order limiting the time in which, for  
4 relevant discovery, not talking about the substance now but the  
5 time, and you made a statement that, that Progress Energy has  
6 been advocating its position since at least a much earlier  
7 date. And I guess I'm -- I want to understand what you implied  
8 by that. Is the advocacy of the -- as the company is  
9 advocating its position -- first of all, I want to know whether  
10 Public Counsel was advocating its position from at least that,  
11 that early date or had an opportunity to and what the  
12 implication of that is. Does that create an unfairness in the  
13 process, is that the implication, or --

14 MR. BECK: Not that by itself. Again, we don't -- of  
15 course, the problem is we don't know what else they're doing.  
16 What we know from July is that they proposed these adjustments.  
17 I know they spoke with a member of the staff about that. They  
18 spoke with us. We told them that we disagreed with them. That  
19 was all in July. I don't know what else they did.

20 I guess the point is we've seen a lot of activity  
21 more recently from them. We've raised the questions of the  
22 process on whether it's been overall a fair process leading up  
23 to the filing of the March or the May 8th recommendation. We  
24 just know of some activity that well precedes the  
25 November 26th, 2002, date in your order. And if you're going

1 to clear the air on this and let, let it be, let all the facts  
2 come out about the process, you shouldn't limit it to that  
3 November date because at least there was some activity  
4 preceding that. The only activity I know of was contacting the  
5 staff. And we also told staff that we disagreed with that  
6 position.

7 COMMISSIONER BAEZ: Thank you.

8 CHAIRMAN JABER: Commissioner Bradley.

9 COMMISSIONER BRADLEY: I'm unclear though. I  
10 think -- did I hear you ask the question -- did you advocate  
11 for your position with staff?

12 MR. SHREVE: Let me --

13 MR. BECK: We told --

14 MR. SHREVE: Commissioner, I'd like to answer. Yes,  
15 we did. And when we're talking about getting discovery back  
16 longer period of time, that's not implying that there was any  
17 illegal or improper communications or anything. But we are  
18 entitled to have that information on the discovery. If -- on  
19 anything that was going on at that time we're entitled to know  
20 about it. That's so -- beyond that time there may not have  
21 been anything improper, but there still may have been  
22 communications. Maybe it was improper, but we don't think  
23 Florida Power should be in the position to determine whether  
24 it's illegal or not and be limited to that. All I'm saying is  
25 that we were entitled to the discovery and not limited. And I

1 think that's what Mr. Beck meant. That goes way back. And  
2 that could be back from the day we had the agreement. We don't  
3 know what happened past that. Not that there was anything  
4 wrong with what was happening, but we're still entitled to have  
5 it. Just put the truth on the table.

6 COMMISSIONER BAEZ: Well, and how much -- and I guess  
7 the way I've gone about it is that there was, there was a  
8 discrete issue on some --

9 MR. SHREVE: I understand where you were coming from.

10 COMMISSIONER BAEZ: And I guess, I think, to some  
11 extent there's been a lot of discussion -- you know, the motion  
12 in limine up or down is going to impact, may have an impact on  
13 discovery. I don't know how the rest of the Commissioners feel  
14 about it. And I suspect that that may be the case.

15 But I'm trying to get -- I guess I'm trying to  
16 understand the, the expanded, I don't know what the word it is  
17 for, but certainly the expanded time for which discovery would  
18 have been appropriate was probably not properly before us or at  
19 least not properly before the prehearing officer in the sense  
20 that what we were dealing with was a discrete time in which,  
21 you know, as has been discussed so far by one side of the  
22 aisle, recommendations change, et cetera, et cetera, may have  
23 changed or looked at.

24 MR. SHREVE: I can understand that. And, frankly,  
25 most of my remarks would go to the merits of it as to what

1 we're entitled to.

2 COMMISSIONER BAEZ: Right.

3 MR. SHREVE: And I thought at the time when I saw  
4 your order that, you know, there's a difference in the time  
5 frame in there as to what people may be thinking about. And I  
6 think that's probably the reason we're here.

7 COMMISSIONER BRADLEY: And one other question.  
8 Mr. Shreve, did you also document and distribute to all the  
9 interested parties all of your communications with staff?

10 MR. SHREVE: I'm sorry. Did --

11 MR. BECK: All of the recommendations?

12 COMMISSIONER BRADLEY: Well, you said that you  
13 advocated for your position with staff. Did you write up and  
14 document the fact that you were interacting with staff and  
15 distribute that to all the interested parties?

16 MR. BECK: When Progress Energy gave their, went over  
17 to staff and said we think this adjustment and this adjustment  
18 should be made, I sent Progress Energy an e-mail saying we  
19 disagreed with it, and I copied staff on that.

20 MR. SHREVE: We also had a meeting that staff called  
21 for where Progress Energy and our office met, and I guess you'd  
22 call it a discussion about the different things. I may not be  
23 answering your question on that. I don't know.

24 COMMISSIONER BRADLEY: Well, would it, would it have  
25 been proper for you to, or improper for you to inform the

1 Commissioners?

2 MR. SHREVE: It would have been improper for me to  
3 come to you as individual Commissioners and try and discuss my  
4 side of it, yes, sir.

5 COMMISSIONER BRADLEY: But, you know, you said you  
6 advocated with staff. Would it have been improper for you to  
7 inform the Commissioners as to what you were discussing with  
8 staff, discussing with staff?

9 MR. SHREVE: I think it would have been improper for  
10 me to come to the Commissioners and try and advocate my  
11 positions. Absolutely. To the staff, no, I don't think so.  
12 And I don't think it was improper for Florida Power to talk to  
13 the staff. But I don't think there is anything that should  
14 keep us from having all of the facts in discovery. And them,  
15 too, if they -- you know, whatever we did.

16 COMMISSIONER BRADLEY: But it wouldn't have been  
17 proper for you to talk with Commission staff, I mean, various  
18 Commissioners' offices and to talk with their staff about what  
19 you were discussing?

20 MR. SHREVE: No. Would have been nothing wrong with  
21 Power Corp or us talking to the staff. It certainly would have  
22 been wrong if I had tried to convey information to you on our  
23 position. Absolutely.

24 COMMISSIONER BRADLEY: Okay.

25 CHAIRMAN JABER: Any other questions? Mr. Beck, you

1 were done. Ms. Kaufman.

2 MS. KAUFMAN: Thank you, Chairman Jaber.

3 My name is Vicki Gordon Kaufman. I'm with the  
4 McWhirter, Reeves Law Firm and I am here this morning on behalf  
5 of the Florida Industrial Power Users Group or FIPUG.

6 CHAIRMAN JABER: I'm sorry, Commissioner Bradley.  
7 Yes. Absolutely. How about we take a 15-minute break. Ms.  
8 Kaufman, I'm sorry. We'll come back at 11:30.

9 (Recess taken.)

10 CHAIRMAN JABER: Let's get back on the record.  
11 Ms. Kaufman, you were making your presentation.

12 MS. KAUFMAN: Thank you, Chairman Jaber. As I said  
13 before we broke, I'm Vicki Gordon Kaufman. I'm with the  
14 McWhirter, Reeves Law Firm. I'm here today on behalf of the  
15 Florida Industrial Power Users Group.

16 FIPUG was an active participant in this docket which  
17 led up to the settlement. We are a signatory to the settlement  
18 agreement and we are much concerned with the proceedings today.  
19 I'm not going to reiterate the arguments that have been so ably  
20 made by the Attorney General and Public Counsel. We fully  
21 support their position. We think that the settlement's clear,  
22 the law is clear. And importantly and what I'm really going to  
23 talk about more today is something that both Mr. Shreve and  
24 Chairman Jaber mentioned, and that is your policy which you've  
25 articulated many times to encourage parties to settle disputes.



1 I'm just going to take one moment on the law,  
2 however, because, as I said, I agree with what's already been  
3 said to you, which is that if the agreement is unambiguous, if  
4 the contract is clear on its face, you may not go outside the  
5 four corners of the agreement.

6 And I just want to point out to you, one of the cases  
7 that your case cites for the opposite view, which is that  
8 somehow you should try to divine the intent of the parties, and  
9 that's the Florida East Coast Railway case. They talk about  
10 that on Page 9 of the recommendation. And I just want to quote  
11 briefly from that case because I think this statement of the  
12 law is what really controls your decision on the motion in  
13 limine.

14 That case says, quote, "Unambiguous language  
15 precludes resort to extrinsic evidence because unambiguous  
16 language provides the best evidence of the parties' intent at  
17 the time they executed the contract. When determining intent,  
18 the best evidence is the plain language of the contract," close  
19 quote.

20 We think this is the rule that you should apply. As  
21 others have said this morning, if adjustments, additional  
22 adjustments that are now being suggested by the company had  
23 been agreed to or contemplated by the parties, they would have  
24 been included in the settlement, and they can't be interpreted  
25 in there, if you will, at this late point.

1           Now I just want to talk to you for a minute about  
2 your policy regarding settlements. And I think Chairman Jaber  
3 already mentioned this, but as long as I've practiced here the  
4 Commission has always encouraged the parties to engage in  
5 settlement as an efficient and effective way and a  
6 cost-effective way to settle their disputes short of  
7 time-consuming and expensive litigation. And FIPUG, for one,  
8 very much appreciates that. They would prefer to do that  
9 rather than spend time and money litigating things before the  
10 Commission.

11           We've taken this to heart, and Mr. Shreve discussed  
12 with you the fact we've had many successful settlements. FIPUG  
13 was a party to the Florida Power & Light settlement, to the  
14 Gulf settlement, and a different client of mine was a party to  
15 the BellSouth settlement. So we're very much in favor of that,  
16 of engaging a settlement and reaching accommodations. However,  
17 when parties engage in settlement discussions, and the  
18 negotiations leading up to this particular agreement were no  
19 different, there's long and hard work that's done by the  
20 parties, there's a give and take and the risks and benefits are  
21 weighed, the risk of perhaps retreating from your litigation  
22 position and accepting a position that is not all that you  
23 might have achieved if you had gone to litigation. The parties  
24 have to weigh those and decide if they want to enter into an  
25 agreement or not.

1           Once they do that, once they enter into the  
2 agreement, once they step back from their litigation position  
3 and once you all look at the settlement and approve it, we  
4 think it's a very dangerous road to go down to then suggest  
5 that in some way you would then go behind the agreement to try  
6 to figure out whether the agreement should be interpreted or  
7 enforced in a way that's not contained within the agreement  
8 itself. I think that parties rely on, as I think Commissioner  
9 Deason said, your authority and your ability to enforce the  
10 agreements that you have approved. And I think they may well  
11 be reluctant, especially in cases of the magnitude that we're  
12 talking about here and in the other rate case settlements that  
13 we've been involved in, to devote the resources to the  
14 settlement process if in the back of their mind there's a  
15 thought that, well, one party or another a ways down the road  
16 may not be all that excited about how the settlement agreement  
17 turns out, and I think Mr. Shreve alluded to this. We value  
18 the risks and the rewards, we advise our client and then we  
19 live by what we have agreed to. And I think that that's a very  
20 important principle that I want to suggest to you that you  
21 should think about as you decide whether or not you want to go  
22 beyond the four corners of the agreement.

23           Now your staff in their recommendation talks to you  
24 about trying to divine the parties' intent. You know, you need  
25 to try to figure out what did they intend when they entered

1 into this settlement agreement? This kind of blends, bleeds  
2 over into the discovery question, the merits discovery. If you  
3 decide that you want or it's appropriate for you to try to  
4 divine the intent other than from the language on the page that  
5 the parties all signed and agreed to, I would suggest to you  
6 that you're going to have to permit discovery, and the  
7 discovery you're going to have to permit is -- you're going to  
8 have to, for example, depose the people that negotiated this  
9 agreement and ask them, what did you intend when you inserted  
10 this phrase? What did you mean when you omitted some other  
11 language from the agreement? That's the only way, I think,  
12 that you can divine, quote, unquote, intent.

13 I'm not suggesting to you that that's what you want  
14 to do. In fact, I think that that is a very poor idea and I  
15 think that it will chill abilities, parties' willingness to  
16 enter into settlement negotiations and agreements. But I think  
17 it's something that you need to consider.

18 I also want to just touch for a moment on a point  
19 Mr. Beck made, which is that, again, I share some frustration  
20 that's been expressed here about not really understanding  
21 what's supposed to be ambiguous about this agreement. But to  
22 the extent Progress Energy suggests to you that you should look  
23 at information that has been filed in this docket, we would say  
24 to you that there is no evidence in this docket. And if you  
25 decide to deny the motion in limine and go beyond the

1 agreement, you are going to have to take sworn evidence, you're  
2 going to have to permit discovery and essentially you're going  
3 to open up the process to -- I think it could be quite  
4 extensive discovery as you try to figure out what the parties  
5 meant by the agreement.

6           So we think the agreement is clear, we think you  
7 should read it and you should enforce it, that you should grant  
8 the motion in limine. And by granting the motion in limine, we  
9 think you need to make that decision today because it will have  
10 implications for your argument next week. But if you deny it,  
11 we think that you also have to grant the motion of the Attorney  
12 General for merits discovery. Thank you.

13           CHAIRMAN JABER: Thank you, Ms. Kaufman. Mr. Twomey.

14           MR. TWOMEY: Madam Chairman, Commissioners, Mike  
15 Twomey on behalf of Buddy Hansen and Sugarmill Woods Civic  
16 Association.

17           Let me say first off in answer to Commissioner  
18 Bradley's question to the Public Counsel earlier: Is it a good  
19 settlement? Damn right it is. It's an excellent settlement on  
20 behalf of the consumers. And, in my estimation, Jack Shreve  
21 and Charlie Beck are responsible for that primarily because  
22 they primarily negotiated the agreement on behalf of the  
23 consumers. It's excellent for the consumers. The company is  
24 finding fault now because they think they're giving back too  
25 much money. That's too bad.

1           Can you disavow the settlement agreement? No, you  
2 can't. You can't declare it moot. You can't disavow it. You  
3 approved it. This is me talking, my opinion legally. You have  
4 an obligation to interpret it. If you find that there's  
5 ambiguity, and as it was stated just a second ago, you need to  
6 decide that up front.

7           The parties maintain that it's not ambiguous. As  
8 Mr. Beck started to point out a minute ago, your staff, as late  
9 as the May 6th draft recommendation, found it, quote,  
10 unambiguous, clear, capable of being decided within its four  
11 corners. My client believes that's the case. We believe that  
12 you should find it's the case and that there is no ambiguity  
13 and there's no necessity for any other information.

14           Notwithstanding that -- and this goes to a question  
15 you raised at the outset, Madam Chairman, in terms of what,  
16 quote, unquote, is the record here that you can consider. Your  
17 staff in the very first draft of its recommendation and running  
18 to the May 6th recommendation spoke at some length to the fact  
19 that after the agreement was presented to you and through their  
20 examination of it they found that there were certain things  
21 that were ambiguous and that they thought required additional  
22 clarification prior to your approval, and they mentioned that  
23 in those draft recommendations. And what the staff said was  
24 they found one, two, if I can recall, maybe three items that  
25 were ambiguous and wanted to have clarified, and they brought

1 those up to you in the course of the agenda conference at which  
2 the agreement was ultimately approved, raised the questions to  
3 you and, according to the staff at least in those draft  
4 recommendations, said that the, all the parties acceded, either  
5 acceded to their interpretation of how things should be counted  
6 or at worst had an opportunity to object or state a position  
7 different than what the staff was saying they saw it as being  
8 and didn't take it.

9           So that's all by way of saying my clients don't have  
10 any problem, Madam Chair and Commissioners, in y'all  
11 considering the transcript of that agenda conference at which  
12 you approved the settlement agreement and which resulted in  
13 your order adopting the same.

14           Now very briefly, we believe that you should grant  
15 the motion in limine because we think there's no ambiguity at  
16 all. And we think you have to be clear right now that if you  
17 do that, that you're going to accept the fact for your own  
18 purposes as well as ours that there's no ambiguity, and that  
19 you can't come up later in the course of a hearing, if there is  
20 one, or in the course of an agenda conference, and say, you  
21 know, I find now at this point, Commissioner Davidson, that the  
22 color blue is not properly defined and I think there's  
23 ambiguity. I think we need to find that up front, decide  
24 whether there's ambiguity in your minds after you hear from the  
25 company. And if there's not, say there's not, and we're going

1 to be bound by that throughout the rest of this process.

2           Clearly if you suggest that there's going to be  
3 ambiguity or if you leave open the door to raise issues of  
4 ambiguity, then we have to have the discovery. It's absolutely  
5 essential on all sides. So my client would urge you to grant  
6 the motion in limine.

7           Furthermore, I believe you should go ahead and  
8 reverse Commissioner Baez's discovery order because  
9 irrespective of whether you grant the motion in limine or not  
10 or find things may be ambiguous, we believe, along with the  
11 Attorney General and the Public Counsel and other customer  
12 representatives, that Commissioner Baez's order is legally too  
13 restrictive. There is no necessity for limiting the scope  
14 either in terms of the substance that could be had or in terms  
15 of the time, particularly given the fact that this document in  
16 terms of the time is out there. We've known whether there's a  
17 formal docket open or not, whether there's a number or not that  
18 the settlement agreement was going to run for three or four  
19 years beyond that date and that there had to be potential for  
20 disagreement as to the amounts. That's -- let's see. That's  
21 it on the previous stuff.

22           As to the real recommendation, here's my point to  
23 y'all. And I apologize for the late filing relative to this  
24 agenda conference in terms of what I filed Friday because I  
25 don't know if you've had a chance to read it or not. I went to



1 great lengths, my party went to great lengths to put in  
2 transcript testimony, the sworn testimony of your staff, four  
3 of your most senior staff with in excess of I think 100 years  
4 of experience here. We put that in because we believe,  
5 Commissioners, that not only is the public generally and the  
6 customers of this utility entitled to your staff's best  
7 professional recommendation, but clearly you are as well.

8           And the testimony that we took of your senior staff  
9 showed that in the end the recommendation that was filed on  
10 May 8th, my view of the testimony, did not in any way represent  
11 your staff's best professional recommendation based upon the  
12 facts, to the extent that there are any in this case, and the  
13 applicable law.

14           And, further, their testimony showed, I believe it's  
15 fair to say, that they conceded that they did not come to you,  
16 Madam Chair, they didn't go to Commissioner Baez, they said  
17 they didn't go to Commissioner Deason, and make you aware of  
18 the pressures, if I can use that word, that they were receiving  
19 from Commissioner Bradley and Commissioner Davidson to modify  
20 their recommendation not only in terms of its form, but I  
21 consider in terms of its substance as well. And that is wrong.

22           My suggestion to you is that not only should my  
23 clients and other customers be indignant, which they are, about  
24 the changes that were wrought in that recommendation as a  
25 result of the pressures coming from Commissioner Bradley and

1 Commissioner Davidson, but you all should as well. Because as  
2 a collegial body it's my advice to you, and I believe you would  
3 accept this, that you should rely, you should be capable of  
4 relying each and every time you receive a recommendation on  
5 believing that it's the best efforts of your professional staff  
6 and that what's in a recommendation hasn't been unduly  
7 influenced by one of your fellow Commissioners.

8           And what we've seen by the sworn testimony of your  
9 senior staff is that -- as Mr. Beck said, we started out with a  
10 recommendation that was squarely 100 percent supportive of the  
11 Public Counsel's position and the customers, 100 percent, no  
12 reservations whatsoever. And then the testimony in the draft  
13 document shows that Commissioner Bradley expressed a desire for  
14 an alternative if he didn't like the main staff recommendation.  
15 And the testimony showed later that Mr. McLean at a minimum  
16 made Commissioner Davidson and Bradley aware of what the staff  
17 leaning was. That's how I read the testimony. And thereafter  
18 the staff endeavored, the best I can tell, to accommodate  
19 Commissioner Bradley with an alternative. And I don't think  
20 it's going too far, if you read all the depositions, to believe  
21 that Mr. Devlin and the rest stretched a little bit to come up  
22 with an alternative, and not only an alternative, but one that  
23 could be justified. That wasn't just bad enough. After the  
24 May 6th draft, which had the alternative and still solidly had  
25 a primary recommendation supporting the customers, the

1 testimony and the drafts show that at the behest, according to  
2 Mr. McLean and others, that Commissioner Davidson wanted a  
3 document that had options and with no specific recommendation  
4 about what the appropriate course of action was to take, and  
5 apparently Commissioner Bradley did as well.

6 Now as a consequence of that, you ended up and we  
7 ended up with a staff recommendation filed May 8th that didn't  
8 in any respect resemble the initial draft, that had no  
9 recommendation whatsoever that said here are three options,  
10 take your choice. And notwithstanding the, the efforts to try  
11 and change it so it was unbiased, anybody that can read can  
12 still see that the recommendation to support the Public  
13 Counsel's position shines through because there wasn't enough  
14 time for editing to change it properly.

15 Now we've discovered this --

16 CHAIRMAN JABER: I'm sorry. If that is the case,  
17 then doesn't -- haven't you just counter, counter -- what is  
18 the word -- your own argument?

19 MR. TWOMEY: No, I have not.

20 CHAIRMAN JABER: Explain that. Because I guess my  
21 fundamental question is that draft document, would you agree  
22 with me, doesn't rise to the level of a recommendation?

23 MR. TWOMEY: I'm not suggesting that it is, Madam  
24 Chair.

25 CHAIRMAN JABER: Okay. It's a draft document. So

1 for purposes of my question let me, let me call it the draft  
2 document. Is the draft document in some form or fashion  
3 included into the ultimate recommendation?

4 MR. TWOMEY: If you want to say -- if your question  
5 is is it included in some form or fashion, in some limited form  
6 or fashion, yes, ma'am, it is.

7 CHAIRMAN JABER: And would you agree with me staff is  
8 not the decision maker?

9 MR. TWOMEY: 100 percent. That's not the point.

10 CHAIRMAN JABER: Go ahead. I just, I needed to get  
11 those questions out of the way.

12 MR. TWOMEY: Yes, ma'am. Staff is to recommend and  
13 advise. You're the decision makers. You don't have to, that  
14 I'm aware of, except for trying to educate your attorney in  
15 terms of what should be placed in an order justifying your  
16 decisions, none of you really have to stand up and say I  
17 justify my vote thusly. Vote it up or down as far as I'm  
18 concerned.

19 But we're not talking about whether the staff is  
20 making decisions here. They don't have a vote. What we are  
21 talking about or what I'm trying to talk about is the  
22 expectation, and, again, I'm going to say it right out loud,  
23 it's an expectation that the five of you all should have is  
24 that when you get a recommendation from your staff, that you  
25 can believe it's their work. Whether you agree with it or not,

1 it ought to be their work. The technical staff, the accounting  
2 staff, the legal staff ought to be able to address whatever  
3 they think is appropriate given their record in the case,  
4 record evidence, and the applicable law, and then if you want  
5 to go with it, fine.

6 COMMISSIONER BRADLEY: Question.

7 CHAIRMAN JABER: Commissioner Bradley.

8 MR. TWOMEY: If you don't want to go with it, then  
9 don't. But --

10 CHAIRMAN JABER: Let's have Commissioner Bradley ask  
11 his question. Hang on to that.

12 MR. TWOMEY: Yes, sir.

13 COMMISSIONER BRADLEY: Those -- you referred to a  
14 draft recommendation and some other draft recommendations that  
15 turned into a recommendation. Wasn't everything done in the  
16 sunshine? I mean, didn't you have access to the fact that that  
17 process was occurring and the other Commissioners also had  
18 access to it?

19 MR. TWOMEY: No, sir, I don't think so. I think, I  
20 think the testimony was, if I understand your question right --

21 COMMISSIONER BRADLEY: Well, Mr. Shreve testified  
22 earlier that he was in the face of his staff, which means that  
23 for sure staff could have informed him or should have informed  
24 him as to what was going on, and the same with you.

25 MR. TWOMEY: No. No. I don't accept that. What

1 we're talking about --

2 COMMISSIONER BRADLEY: Did you -- one other question.  
3 Did you take the time to interact with staff during that period  
4 of time?

5 MR. TWOMEY: I didn't -- no, I didn't care to. I  
6 didn't have any, I didn't have any necessity or thought I had  
7 any necessity for dealing with your staff up until, up until I  
8 received what I will call derisively that goofy recommendation.

9 COMMISSIONER BRADLEY: Well, question, Mr. McLean.  
10 Mr. McLean, during that time frame didn't you discuss with  
11 various Commissioners information that was being discussed  
12 relative to the possible recommendation?

13 MR. McLEAN: Yes, sir. But let me answer it this  
14 way. I responded to any request from any Commissioner to  
15 discuss any aspect of the case that they wanted to discuss with  
16 me. I took absolutely no effort to isolate them from any  
17 information at all.

18 COMMISSIONER BRADLEY: Thank you.

19 MR. TWOMEY: The, the answer -- if I may answer your  
20 question as I heard it, the testimony -- and I'm not, I'm not  
21 here criticizing any member of your staff whatsoever and I want  
22 to make that clear. The testimony, as I read it, Commissioner  
23 Bradley and Commissioners, is that the, the discussions that  
24 staff had, senior staff had with Commissioners Bradley and  
25 Davidson to first obtain an alternative to the primary

1 recommendation and then subsequently to change the  
2 recommendation to one that was a nonrecommendation, I'm fond of  
3 calling it the unrecommendation because it doesn't list a  
4 suggested course of action as you'd expect but rather just  
5 three options, my reading of the testimony I think is fairly  
6 clear is that the staff said they didn't feel it was their  
7 position to go to the three remaining Commissioners and tattle  
8 or advise on the activities of the other Commissioners.

9           Now I'd suggest to you that but for our public  
10 records examinations and the responses thereto and the  
11 depositions that we took, that you, Commissioner Deason and  
12 Chairman Jaber and Commissioner Baez, would not have been made  
13 aware that your staff, even though it was a draft, in several  
14 drafts proposed to say that the public should win in this case  
15 and clearly so, hands down, unambiguous, clear document, look  
16 at the four corners, but rather you would be led perhaps  
17 confusedly, as the rest of us were, to be given a document that  
18 said here's three choices, take your pick.

19           And as a consequence of that -- and everybody out  
20 there knows about this now. They know that there was a  
21 document that went with the customers first and foremost and  
22 they know that there were pressures by two Commissioners to, to  
23 change the document on senior staff, and that the document that  
24 you now have before you, and it's beyond me to understand why,  
25 was refiled Friday, as I understand it. Everybody knows that

1 that's kind of a naked excuse for what the staff really wanted  
2 to give you. And my suggestion is to you that since everybody  
3 knows that, and notwithstanding the document that you have  
4 May 8th wasn't changed completely because of an absence of time  
5 for editing, that you ought to just give free reign in the  
6 public and say to the staff, given all this that's gone on,  
7 we've got some time here, give us your unadulterated  
8 professional advice about how you think we should go on this  
9 case. And if turns out that they say they still want to go  
10 with this three options deal, notwithstanding their sworn  
11 testimony of what went before, then fine. But that's the  
12 thrust of that part of our motion asking you to go ahead and  
13 have them republish the real recommendation is that we were  
14 denied as customers and representatives of customers of your  
15 staff's best expertise and true feelings on this and so were  
16 the three of you.

17 COMMISSIONER BRADLEY: Question.

18 CHAIRMAN JABER: Mr. Twomey -- excuse me,  
19 Commissioner Bradley.

20 Mr. Twomey, let me tell you, as Chairman I think it's  
21 appropriate for me to remark on your motion and start the  
22 discussion. I agree with you wholeheartedly with respect to we  
23 have a very professional staff. As I look around the country,  
24 I think the Florida staff is the most professional staff, and I  
25 am very proud of them and their abilities. And I know when



1 they show up at agenda they are prepared to answer very  
2 difficult questions, and I know when they file the  
3 recommendation they put their heart and soul into their  
4 recommendation and they work nights and weekends. I know that.  
5 I've seen them. I've received calls from them. I know their  
6 professionalism.

7           Here's where I don't, where I don't agree with you.  
8 It's not a recommendation until it gets filed. For many, many  
9 different reasons the draft will change. I understand the  
10 point you make, but here's where I'm somewhat offended by your  
11 recommendation.

12           With all due respect to that professional staff, they  
13 don't have to give me a document that will 100 percent  
14 correlate or agree with what I'm going to find. I have, at the  
15 sake of sounding arrogant, enough expertise and knowledge on my  
16 own to ask them tough questions and modify the recommendation.  
17 So I'm not offended when they give me a recommendation that has  
18 three or four options or 20 or even one. I'm not shy about  
19 modifying it, denying it or agreeing with it, and I'm not shy  
20 about rationalizing or explaining the rationale because my  
21 philosophy is I'm ultimately accountable to the people of the  
22 State of Florida, I agree. But I go to sleep at night knowing  
23 I've asked the questions, I've made a decision and it's my  
24 decision.

25           Saying all of that, I have a different style. That

1 doesn't make it illegal activity. That doesn't make it  
2 inappropriate activity. My philosophy is this: We came in a  
3 year and a half ago with a new mission statement, a new  
4 structure. I invited consumer advocates and utilities and  
5 practitioners and former Commissioners and everyone else to the  
6 table and I said, here's our new structure, here's our mission  
7 statement. You got any problems, do you have any complaints?  
8 Based on that we all moved forward. I don't have to  
9 micromanage staff because they understand their direction. I  
10 don't have to ask for alternatives, but it doesn't make it  
11 wrong to ask for an alternative. I'm also not a new  
12 Commissioner. I have the benefit of staff experience and I  
13 have the benefit of three years on the Commission.

14 My concern about your recommendation and how it gets  
15 presented, your motion and how it gets presented, there's a  
16 real difference between a staff recommendation and a Commission  
17 decision. It's not a recommendation until it gets filed and  
18 it's not a decision until we make it.

19 Commissioners, do you have any questions or concerns  
20 or can we move on?

21 MR. TWOMEY: May I respond to that?

22 COMMISSIONER BRADLEY: I need to ask a question.

23 CHAIRMAN JABER: Mr. Twomey, it wasn't question.

24 COMMISSIONER BRADLEY: I need to ask a question.

25 CHAIRMAN JABER: I just needed you to know what my

1 feeling on that was.

2 Commissioner Bradley.

3 COMMISSIONER BRADLEY: You know, Commissioner, I  
4 mean, Mr. Twomey, when I was sworn in I up front said that I'm  
5 an advocate of a Commission, Commissioner-driven process. And  
6 let me ask you a question. Is this a Commissioner-driven  
7 process or a staff-driven process?

8 MR. TWOMEY: Is -- I'm sorry. Is what?

9 COMMISSIONER BRADLEY: This process that we have,  
10 this administrative process that we have here at the  
11 Commission, who ultimately makes the decisions here?

12 MR. TWOMEY: The Commissioners do obviously.

13 COMMISSIONER BRADLEY: So is it a Commission-driven  
14 process or a staff-driven process? Who works for who? Who --  
15 which dog is wagging their tail?

16 MR. TWOMEY: Sure.

17 COMMISSIONER BRADLEY: Is the tail wagging the dog or  
18 is the dog wagging the tail?

19 MR. TWOMEY: You're in charge, Commissioner. But  
20 what I'm saying to you --

21 COMMISSIONER BRADLEY: Okay. Okay. Now my other  
22 question is this. Getting back to what you said was a, was an  
23 excellent agreement, do you agree that that was an excellent  
24 agreement?

25 MR. TWOMEY: Yes.

1 COMMISSIONER BRADLEY: Was it good for the consumer?

2 MR. TWOMEY: If interpreted properly, yes.

3 COMMISSIONER BRADLEY: Is there an agreement right  
4 now or is there a disagreement?

5 MR. TWOMEY: There is a document styled "Settlement  
6 Agreement," so there's a document. There's a disagreement, a  
7 large one, as to how much money that entitles the customers  
8 from this utility.

9 COMMISSIONER BRADLEY: Okay. I want a yes or no  
10 answer. Is there an agreement or a disagreement?

11 MR. TWOMEY: I'm going to give you the same answer,  
12 Commissioner. There's a settlement agreement that y'all  
13 approved. There is a disagreement as to how to interpret it.

14 COMMISSIONER BRADLEY: Okay. I'll try it one other  
15 way then.

16 MR. TWOMEY: The question doesn't lend itself to a  
17 yes or no.

18 COMMISSIONER BRADLEY: If, if there's a settlement  
19 agreement but a disagreement, does that render the agreement  
20 moot or is it still enforce?

21 MR. TWOMEY: No, sir. As I said before in opening my  
22 remarks, there is a document that's been approved by this  
23 Commission in a Commission order, and to the extent that there  
24 is any disagreement about how it should be interpreted, first,  
25 second, fourth year, my belief is that it's your obligation as

1 the regulatory agency to interpret it.

2 COMMISSIONER BRADLEY: Okay. Now I want you to  
3 switch hats now, if that's possible.

4 In the instance where you, I mean, where you're at  
5 home with your children and they disagree about something that  
6 you all have agreed to, how do you normally mediate that  
7 dispute? Do you take -- I mean, do you come up with options or  
8 do you just give one child an opinion and not consider the  
9 other one? I mean, especially if you don't know all the facts  
10 of the dispute that's occurring in, in your situation, I mean,  
11 in that case. I mean, how -- I mean, do you come up with  
12 option A, B and C, or do you just say, well, hey, Johnny, you  
13 know, I go with option A and, Fred, you know, forget it?

14 MR. TWOMEY: Well, I think it, you know, not trying  
15 to ignore your, your, your question --

16 COMMISSIONER BRADLEY: I just need the benefit of  
17 your wisdom.

18 MR. TWOMEY: Well, what I'm trying to think is, I'm  
19 trying to think honestly is how do I do that and is it, is it  
20 right? So I'm not sure.

21 COMMISSIONER BRADLEY: I mean, in cases where you  
22 don't have the facts.

23 MR. TWOMEY: Oh, I think, I think the -- I think you  
24 would ask -- if there weren't any facts and no written  
25 agreement to interpret, I think you'd ask both sides to give

1 their, their view of the, of the events.

2 CHAIRMAN JABER: Mr. Twomey, were you, were you done  
3 with your presentation?

4 MR. TWOMEY: Yes.

5 CHAIRMAN JABER: Okay. All right. Let's see. I  
6 haven't forgotten anyone else on this side. We're going to  
7 come back -- Commissioner Deason -- Commissioner Davidson, did  
8 you have a question?

9 MR. McLEAN: Commissioner Jaber, may I say one thing?

10 CHAIRMAN JABER: No. Commissioner Deason has a  
11 question.

12 MR. McLEAN: Sorry.

13 COMMISSIONER DEASON: I'm sorry. I have a question.  
14 My microphone was off. You probably didn't hear me.

15 Mr. Twomey, what is it that you -- when you refer to  
16 the real recommendation, what is that in your view?

17 MR. TWOMEY: What is the real recommendation?

18 COMMISSIONER DEASON: Yes.

19 MR. TWOMEY: I think it -- at the very least it is  
20 the, the May 6th draft. There's a legal recommendation there  
21 that addresses the fact that the document is unambiguous, it's  
22 clear. There is a primary staff recommendation that was  
23 consistent with the recommendation drafts from the outset, and  
24 there is a, an alternative that's recommended. That's, that's  
25 my best answer.

1           My preferable answer is just the one that they first  
2 came out with where there wasn't any, any -- let me put it this  
3 way. The draft that existed prior to any demonstrable  
4 Commissioner influence on the document was just a straight  
5 recommendation for the, for the customers. I don't have any  
6 problem with the alternative particularly.

7           COMMISSIONER DEASON: Well, I guess my question is  
8 this. I agree with your statement that a Commissioner, and it  
9 is the way I've always tried to conduct myself, a Commissioner  
10 is, is, should expect the unbiased absolute best professional  
11 recommendation from the staff. I, as a Commissioner, I'm free  
12 to agree with that, disagree, find fault, criticize or  
13 whatever, and that's my responsibility. But it is -- it should  
14 be my expectation that that recommendation is staff's  
15 recommendation. And if I'm not getting that, that troubles me.  
16 That's what I expect.

17           I guess my question to you is given where we are in  
18 this process now, the Commission is going to have to make a  
19 decision. In your view, how do we get the unbiased, objective  
20 professional recommendation in front of the Commissioners? Is  
21 that just to give staff another opportunity to file a  
22 recommendation or is it we go with a previous version and just  
23 somehow put a stamp of approval saying this is the  
24 recommendation that we are going to utilize in this case? How  
25 do we proceed from this point, I guess, is my question?

1 MR. TWOMEY: In this particular case my advice to you  
2 would be to just offer to your staff an opportunity, a  
3 requirement that by a date certain they file the recommendation  
4 that they would have filed but for the communications from the  
5 two Commissioners and go with that.

6 If it turns out, if it turns out that they don't  
7 change it, then that'll say something. If it turns out that  
8 they change it, then we'll see what they say.

9 The -- all I'm saying, Commissioner Deason, is, is  
10 that -- and the Chairman, don't get me wrong, the strong  
11 Commissioners that are knowledgeable in the law and the facts  
12 of the case and that kind of stuff, and I've seen both of you  
13 do this over the course of many years, don't have problems  
14 challenging staff. Even if it's staff's best professional  
15 advice, if you disagree with them, staff doesn't always get it  
16 right, nor can they be expected to always get it right, then  
17 you say I disagree here, there, whatever, deny staff. It  
18 happens all the time.

19 The, the concern I have here and why I'm making such  
20 a big deal of it is that, is that if I could file, if I could  
21 find, if I could find a statutory basis for it, I'm not saying  
22 there isn't one, I'd file a rule, proposed rule asking y'all to  
23 adopt a rule that says Commissioners -- and I'm not just  
24 talking about this case, I'm talking about any case --  
25 Commissioners should not direct staff to, to have the form and



1 substance of a recommendation if it's done to the exclusion of  
2 the knowledge of the other Commissioners.

3 COMMISSIONER BRADLEY: Mr. Twomey, did I just hear  
4 you say though that you would direct us, if you had your  
5 druthers, to have asked staff or to direct staff to go back to  
6 the original recommendation? Isn't that --

7 MR. TWOMEY: No, sir. I said, I said the --  
8 Commissioner Deason asked me more specifically, what do you,  
9 what do you mean by this? And what I'm saying is I would do it  
10 right now. Say, hey, staff, carte blanche, you know, we give  
11 you a week or ten days. File, file a recommendation in this  
12 case and, and pretend that no Commissioners spoke to you on  
13 this issue, or to the extent that they have, ignore them. Give  
14 us your professional recommendation on the law and on the facts  
15 of the case to the extent that they exist and let's start over  
16 on this.

17 CHAIRMAN JABER: Commissioner Deason, did you have  
18 other questions?

19 COMMISSIONER DEASON: No.

20 CHAIRMAN JABER: Commissioner Bradley, you had  
21 another question?

22 COMMISSIONER BRADLEY: No. But Mr. Twomey, with all  
23 respect, and I, I really appreciate and understand that you  
24 have a lot of expertise in these matters, but our quandary is  
25 that we have no basis for rendering at this point, in my

1 opinion, a decision either, in either direction, not direction,  
2 but in, with respect to either point of view. I'll put it that  
3 way. And you have to recognize and realize, in my opinion, the  
4 quandary that this august body is in. It's kind of difficult  
5 to make a decision when you really don't have the facts before  
6 you. And it's even more difficult and it, it kind of, it  
7 rattles your confidence in your compadres when you give them  
8 the opportunity or the task of, of going out and coming up with  
9 a decision, and then all of the sudden they get back and say,  
10 well, hey, there's no deal, and, you know, you know, if you  
11 don't go with me, you know, you are a bad person. Well, if you  
12 don't go with me, you're a bad person. I mean, that puts us in  
13 a terrible fix. And it's kind of hurtful to, you know, to sit  
14 and to read and to see some of the things that, I mean, to  
15 listen to some of the things that are being said and to read  
16 some of the things that are being said when this body, in all  
17 earnestness, is working to resolve a dispute that it has no  
18 information about and that it gave the responsibility of to,  
19 to, to some very good people, good parties, well-informed  
20 parties to come back with a decision that would be beneficial  
21 to everyone who has a vested interest in this particular issue.

22           So, you know, you have to, you know, understand what,  
23 what our predicament is, you know, and to sit and to listen and  
24 to say, well, you know, we want you all to resolve this  
25 dispute, but don't let this information enter the picture or we

1 want to go back ten years on this particular issue. Well, to  
2 me that, to me that doesn't show earnestness with respect to  
3 working to resolve the particular issue of the dispute. And  
4 since you -- if you have a -- if you have ten points in a  
5 settlement and you disagree about nine, that means, in my  
6 opinion, that the whole settlement is, is moot. Either you  
7 agreed or you didn't agree. You can't say I agree on nine but  
8 disagree on ten and say we have a settlement.

9           And, you know, because we all, because we as a body  
10 gave you all a responsibility of, of coming up with a  
11 settlement, and now it has, in your opinion, been rendered moot  
12 or dissolved because of some disagreement about point number  
13 10, that puts us in an awful position.

14           MR. TWOMEY: Yes, sir. But I didn't say that. But  
15 let me -- if I may respond, Madam Chair.

16           The -- and I want to say this with all due respect to  
17 you and Commissioner Davidson. I pointed out in my motion  
18 filed Friday that y'all are the two most junior Commissioners  
19 on this body, and I did that for a reason.

20           The -- in particular with this settlement agreement  
21 it wasn't really done, if you'll go back and think about it,  
22 Commissioner Bradley, and you weren't here, of course,  
23 Commissioner Davidson at the time, there was a wealth of  
24 information filed in the case. There was testimony, prepared  
25 testimony that you never heard and was sworn to. There were

1 MFRs that the customers had essentially insisted upon having so  
2 that they could make a better decision if settlement were to  
3 come. And as you'll recall, the settlement, I believe, came  
4 the day before the hearing was supposed to start. So we were  
5 right there at the starting gate and the company thought that  
6 it would be in its best interest to agree to the settlement  
7 negotiated by Public Counsel and the rest and they accepted it.

8           But my point is, is that it wasn't that you didn't  
9 have anything to look at or your staff have anything to look at  
10 when you accepted this agreement. You had MFRs that showed the  
11 company was asking for this much money in revenues and expenses  
12 and so forth and, notwithstanding that, they agreed to the  
13 documents. So it wasn't done in the cold. And as I pointed  
14 out before, to the extent, and I give your staff credit for  
15 this, to the extent, to the extent they looked at it and saw  
16 that there was a possibility for ambiguity at a later date,  
17 they brought that to your attention, and they believe, at least  
18 as I could read it, that they resolved those ambiguities  
19 against you.

20           Now as to the rest of it, Commissioner Bradley, this  
21 is your job. I mean, this is, this is what I think your job  
22 is. The, the five of you asked for these positions, you asked  
23 to be nominated, you asked to be appointed. When it comes  
24 right down to it, y'all perform the functions of the most  
25 expensive in terms of the cases and controversies you hear --

1 you're Administrative Law Judges. That's it.

2 I mean, if I want to build a dock on the Wakulla  
3 River and I get crossways with DEP and I get a hearing, I go  
4 get myself an experienced Administrative Law Judge at DOAH and  
5 they hear the case, they don't do this, they don't do that,  
6 they take evidence, they rule on the law. And that's what you  
7 do day in and day out, sit as Administrative Law Judges.  
8 Almost all your cases are quasi-judicial, so you're sitting as  
9 judges, not as legislators like in your rule proceedings and so  
10 forth. And the difference between you and the guy or the lady  
11 that does, the Administrative Law Judge that does the dock  
12 cases is that you're routinely dealing in the hundreds and  
13 millions of dollars. And I think fairly here the issue here is  
14 40 or \$50 million when you're looking at the four-year term of  
15 the agreement.

16 But what I'm saying, again, I mean this respectfully,  
17 this, this is your job. You have to sit there, and you've  
18 approved this agreement and there is a disagreement, as you  
19 pointed out, between the customers and the utility. And, and I  
20 think we all accept, the utility does, I know the customers do,  
21 I believe, that we bring it to y'all and you've got to resolve  
22 it. And, and, you know, you use your staff to the extent you  
23 want to listen to what they have to say, listen to your lawyers  
24 about the interpretation of the law, and, and make a decision.  
25 And if, and if we don't like it, we might appeal. If the

1 company doesn't like it, they might appeal. But it's your job  
2 to try and do that. And it's not that -- I don't think it's  
3 really that burdensome. I mean, I don't like to disagree with  
4 you, but y'all can do it.

5 CHAIRMAN JABER: Mr. Twomey, the last three minutes  
6 of discussion, in all candor, is the exact reason I'm not going  
7 to support your motion to have staff file the real  
8 recommendation. You're right. It is our job. To support your  
9 motion gives more importance to a draft document and, frankly,  
10 a staff recommendation that I just don't agree with.

11 So I want, I want to explain. It is not that I  
12 disagree with you with respect to your frustration level. And  
13 maybe I'm -- maybe I err on the side of I understand my own  
14 abilities and I understand the questions I'm going to ask and I  
15 understand that none of us are shy about posing to staff when  
16 the decision does come back which recommendation is  
17 appropriate, which wouldn't work, what are the pros and cons,  
18 what's legally appropriate. So for the very same reasons you  
19 just articulated the last few minutes I'm not going to support  
20 your motion.

21 Commissioner Davidson, and then we're going to go to  
22 Mr. McGee.

23 COMMISSIONER DAVIDSON: Thanks. I just have a couple  
24 of questions for counsel.

25 Mr. McLean, what is the nature of this case, it

1 sounds and in what discipline?

2 MR. McLEAN: It sounds a little bit like contract,  
3 but I'd caution you very carefully that it is, may or may not  
4 be a contract. I don't know whether it is or not. And I don't  
5 think anybody here can point you to a law that says this is a  
6 contract between negotiating parties. You decided that this  
7 agreement meets the public interest.

8 COMMISSIONER DAVIDSON: Who is the primary  
9 draftsman of the initial sort of draft that came out?

10 MR. McLEAN: I'm afraid I don't know that. I had the  
11 impression that it was jointly drafted.

12 COMMISSIONER DAVIDSON: Does anyone know? Dr. Bane?

13 DR. BANE: I believe Mr. Slemkewicz and Ms. Brubaker.

14 MR. McLEAN: Oh, I misunderstood your question,  
15 Commissioner. I thought you were referring to the agreement.

16 COMMISSIONER DAVIDSON: The primary draftsman of  
17 the initial drafts recommendation.

18 MR. McLEAN: I'm sorry.

19 CHAIRMAN JABER: Oh, I thought you meant the  
20 agreement.

21 COMMISSIONER DAVIDSON: No. So it's --

22 MR. McLEAN: I think Mr. Slemkewicz -- in Mary's shop  
23 anyway, and we had some involvement with in legal.

24 COMMISSIONER DAVIDSON: Is Mr. Slemkewicz a contracts  
25 lawyer?

1 MR. McLEAN: No, sir, he's not.

2 COMMISSIONER DAVIDSON: Is he a lawyer of any  
3 discipline?

4 MR. McLEAN: He is not.

5 COMMISSIONER DAVIDSON: If you had it to do over,  
6 would you staff this case, would you staff this, this docket  
7 the same way?

8 MR. McLEAN: No, sir, I wouldn't.

9 COMMISSIONER DAVIDSON: And why not?

10 MR. McLEAN: Because I believe it's essentially a  
11 legal judgment. And I believe that technical staff ought to  
12 tell you the import, the likely consequences of any judgment  
13 that you make. But the judgment that you make and whether you  
14 should make it should have been a matter restricted to the  
15 legal department.

16 COMMISSIONER DAVIDSON: In your experience as General  
17 Counsel or formerly as a staff attorney here or as an aide to  
18 Commissioner John Marks, have Commissioners ever before asked  
19 that options be explored in staff recommendations?

20 MR. McLEAN: Yes, sir.

21 COMMISSIONER DAVIDSON: More than once?

22 MR. McLEAN: Yes, sir.

23 COMMISSIONER DAVIDSON: Can you recall any instance  
24 when that occurred during your tenure as General Counsel?

25 MR. McLEAN: Not specifically. But I, I confer with



1 Commissioners routinely. I believe it's my responsibility as a  
2 lawyer to bring them recommendations which they will find --  
3 which have some chance of success with the Commissioners  
4 themselves.

5           And I also believe, to be absolutely frank about it,  
6 that I have an obligation to the Commissioners to ensure that  
7 they're not surprised by an adverse recommendation that I know  
8 they might not like and so forth. So I confer with them  
9 routinely. Not speaking for Dr. Bane, but I believe she does,  
10 too. I think it's my obligation to do so as their lawyer and  
11 as their employee.

12           COMMISSIONER DAVIDSON: And one final question. Did  
13 I ever request of you a recommendation that ruled in favor of  
14 any party in this case?

15           MR. McLEAN: No, sir. And I want to -- I tried to  
16 speak a little while ago. Mr. Twomey used the word "pressure."  
17 I rejected it in my deposition, I reject it now. You never put  
18 any pressure on me to recommend anything any particular way,  
19 and neither did Commissioner Bradley.

20           COMMISSIONER DAVIDSON: Thank you.

21           MR. McLEAN: Yes, sir.

22           CHAIRMAN JABER: Mr. Shreve, you had your microphone  
23 on a minute ago. I didn't mean to ignore you.

24           MR. SHREVE: I think you've already taken care of the  
25 point that I was going to make. It was as to whether to go

1 back to staff at this time. I think it's time to make a  
2 decision on this.

3 CHAIRMAN JABER: Yeah. Same thing, Mr. Kise?

4 MR. KISE: Yes. I mean, Chairman Jaber, I think just  
5 in brief response, to be clear on the record from the Attorney  
6 General's position regarding the exchange, and Commissioner  
7 Deason's question about what we would do. I mean, the Attorney  
8 General believes you can't really unring the bell at this  
9 point. It's time to move on.

10 If you want to know what the Staff would or wouldn't  
11 have recommended, then I would respectfully suggest to the  
12 Commission just look at the record. There is deposition  
13 testimony, there is drafts, there is current -- but at this  
14 point the Attorney General certainly -- and this is without  
15 commenting, to be clear, on the propriety or lack thereof, we  
16 are not making any -- you know, the existence or lack thereof  
17 of any separate investigation that deals with this issue. Just  
18 simply, substantively, the record is what it is. And going  
19 back now we think would unduly delay these proceedings.

20 Sending it back to Staff, and I don't mean to  
21 disagree with co-counsel, but in our position sending it back  
22 to Staff now and starting this all over again we don't believe  
23 would be productive. We do respect the Commission's role to  
24 make final decisions, and we believe that you have the  
25 information in front of you.

1 CHAIRMAN JABER: Thank you, Mr. Kise. Mr. McGee.

2 MR. SHREVE: May I just add to that?

3 CHAIRMAN JABER: Yes.

4 MR. SHREVE: I didn't say that much, because I  
5 thought you had taken care of it. It's not that I want to  
6 undermine what Mr. Twomey is saying on here, but I think at  
7 this point we have a very narrow decision to make, and I think  
8 you'll make it on the basis of what you know now and what is to  
9 come. And I don't think we need to prolong this. We need a  
10 decision on whether or not we are going with the agreement or  
11 not.

12 CHAIRMAN JABER: Thank you, Mr. Shreve.

13 Mr. McGee, go ahead.

14 MR. MCGEE: Thank you, Madam Chairman. Ms. Bowman  
15 will make the argument on behalf of Progress Energy. Thank  
16 you.

17 CHAIRMAN JABER: Tell me your name one more time.

18 MS. BOWMAN: Jill Bowman on behalf of Progress Energy  
19 Florida. I would like to refocus. There has been a variety of  
20 comments on a number of topics during the events of this  
21 morning, and I think that we need to refocus on the fact that  
22 there are certain motions before the Commission today for their  
23 consideration and determination. And taking them in the order  
24 as Commissioner Jaber suggested, I would begin by discussing  
25 the motion in limine. The dispute appears to be fairly narrow

1 as to what remains in contention with regard to the motion in  
2 limine. And I would like to start by talking about the fact  
3 that this is not an instance which this Commission is being  
4 asked to interpret a contract agreed to by private parties. It  
5 is an instance in which the Commission is being asked to  
6 interpret an order of the Commission that approved an agreement  
7 between the parties concerning the settlement in this case.  
8 And there are -- in that context we believe that the Commission  
9 can adequately consider without resort to anything outside of  
10 the record that was before it when it made that decision to  
11 approve that settlement agreement.

12 CHAIRMAN JABER: Hold on right there, Ms. Bowman.  
13 Mr. Beck, don't you agree with that so far?

14 MR. SHREVE: I was probably talking to Mr. Beck.

15 CHAIRMAN JABER: What Ms. Bowman just said was she  
16 views this as a request to interpret the order of the  
17 Commission and to not look outside the limited record of the  
18 decision the Commission made. Is that right? Don't let me put  
19 words in your mouth. But this goes back to the beginning of  
20 what I said at the start of the agenda, I need to understand  
21 where you disagree.

22 MS. BOWMAN: And I think that --

23 CHAIRMAN JABER: Say what you said again. And, Mr.  
24 Beck, I want you to respond.

25 MS. BOWMAN: The company's position in this case,

1 having withdrawn the affidavit of Mr. Portuondo, is that the  
2 Commission can consider this matter as a legal issue without  
3 resort to anything that was not before it at the time it made  
4 its decision to approve the agreement and issued its order  
5 which is what is being reviewed here. It is not an agreement  
6 between private parties that this Commission had no involvement  
7 with or prior consideration of, it is a review of the  
8 Commission's order.

9           And we believe that that is what the Commission is  
10 entitled to consider. And it is entitled to consider it in the  
11 context of the information that it had when it made its  
12 determination to approve that order, including as follows --

13           CHAIRMAN JABER: Okay. So you just went beyond. In  
14 information it had you would include MFRs and things that were  
15 not put into the record as sworn testimony.

16           MS. BOWMAN: Let me clarify exactly what we intend --

17           CHAIRMAN JABER: Let me ask a very blatant question.  
18 Do you agree or can you agree today that the only thing we  
19 should consider on July 9th is the contract, our order, and  
20 what occurred at agenda. Can you all agree to that?

21           MS. BOWMAN: I think we can, perhaps with one limited  
22 exception, depending on whether or not in the Commission's view  
23 the limited factual information that we believe you did, in  
24 fact, consider in making your determination is -- then you  
25 would otherwise consider it to be extrinsic to the order or to

1 the agenda discussion --

2 CHAIRMAN JABER: I don't know what that means.

3 COMMISSIONER DAVIDSON: I don't, either. What is the  
4 information? What is the piece of information you are talking  
5 about? How would our prior consideration affect that?  
6 Wouldn't that -- if we have already heard and considered, are  
7 we reconsidering? Sorry, I didn't mean to sort of jump in, but  
8 I didn't know -- I am confused about what piece of information  
9 beyond the agreement, the order enforcing the agreement, and  
10 possibly the agenda transcript or pieces of information  
11 specifically would Progress urge us to look to?

12 CHAIRMAN JABER: Thank you, Commissioner Davidson.  
13 And having voted on it, let me be specific and tell you what I  
14 did consider. I considered the settlement that you all  
15 co-filed in front of us. I considered the questions that were  
16 posed in that agenda deliberation. I am here to tell you as  
17 one Commissioner, I didn't look at your MFRs, because  
18 settlements by their nature are compromise. You give some, you  
19 take some. I didn't second-guess you, I didn't second-guess  
20 them. That is what I considered. So I am telling you I  
21 considered your settlement and the questions and answers that  
22 were presented as we deliberated. Why should I consider  
23 anything more in interpreting my order?

24 MS. BOWMAN: I think that there is a starting point  
25 from which, and perhaps it can be inferred from the agreement

1 itself and there isn't really a need in --

2           COMMISSIONER DAVIDSON: You're jumping around. One,  
3 what is the starting point? Two, where, how would we make this  
4 inference from the agreement? And, three, in general, and  
5 maybe take these issues one-by-one -- sorry, again, I didn't  
6 mean to jump off, Chairman -- why wouldn't the MFRs or other  
7 documents out there have through the doctrine of merger, have  
8 basically been dealt with in the settlement agreement itself.  
9 So if you can adopt a starting point, what inference is it that  
10 we need to make, and then talk to that issue of merger.

11           MS. BOWMAN: The starting point would be the revenue  
12 sharing threshold that was established by the settlement  
13 agreement which was approved by this Commission, that would be  
14 the starting point. The settlement agreement itself indicates  
15 that there -- that threshold represents a 125 million reduction  
16 to base rates. That \$125 million reduction had to have been  
17 derived from some other number. That other number was 1.421  
18 billion dollars, which was the revenue forecast that was  
19 presented in the record by the company from which all of the  
20 parties were functioning when they entered into the settlement  
21 agreement itself.

22           COMMISSIONER DAVIDSON: On that point, given that  
23 the -- and we're getting into the merits a little bit here, but  
24 I think we have to deal with this issue of ambiguity, is the  
25 125 million specifically referenced in the contract? I can't

1 recall, I don't have it here in front of me. Given that it is  
2 referenced in the contract, can we properly under Florida law  
3 revisit sort of anything surrounding that or haven't the  
4 parties reached agreement on the 125?

5 MS. BOWMAN: I think that the parties did, in fact,  
6 reach agreement on the 125. We are not asking you to revisit  
7 that. But simply to consider as a part of our argument on the  
8 meaning of the terms in the contract as naturally read in  
9 combination with one another in compliance with the law that  
10 they have to be read in a manner that logically makes them be  
11 capable of being read together as opposed to reading isolated  
12 provisions and interrupting the contract on that basis.

13 MR. SHREVE: Madam Chairman, I object to any  
14 discussion beyond the four corners of the agreement or the  
15 legal arguments as to whether or not there is an ambiguity in  
16 that and no facts whatsoever. Nobody -- Power Corp has no idea  
17 why I agreed to what I agreed to.

18 CHAIRMAN JABER: Let me interrupt both of you.  
19 Commissioner Davidson, I wanted to let you know that when you  
20 asked the question about whether the 125 million was in the  
21 contract, there was some disagreement here with respect to the  
22 response. So if you want to allow an opportunity for that. I  
23 think the question you posed to Progress, they said yes, it  
24 was. The consumer advocates were saying, no, it wasn't.

25 COMMISSIONER DAVIDSON: Oh, I thought you nodded your



1 head yes, Mr. Shreve, that --

2 MR. SHREVE: (Microphone not on) -- 125 million rate  
3 reduction, that is in the agreement.

4 COMMISSIONER DAVIDSON: Exactly. That's what I --

5 MR. SHREVE: The rate reduction.

6 COMMISSIONER DAVIDSON: Yes, that is what I thought.

7 And my aide brought this up, it is referenced in Paragraph 2.  
8 And I've got a more general question that goes to -- it sounds  
9 to me that your argument is based upon contract interpretation.  
10 I mean, I'm really not inclined to sort of go outside the scope  
11 of everything that has been considered heretofore. The  
12 agreement, the order enforcing agreement, the agenda conference  
13 transcript. And I guess my question for you is, is your  
14 argument one of contract interpretation. You are sort of  
15 interpreting the contract differently than OPC, you are  
16 weighing and applying the provisions in a different way, or do  
17 you need to go outside of the contract to support your  
18 argument?

19 MS. BOWMAN: I think that there is a question as to  
20 whether the Commission would consider that Progress Energy was  
21 going outside the contract. If Progress Energy, as it believes  
22 it must and should, asks the Commission to consider the basis  
23 from which the revenue sharing threshold was derived, and that  
24 basis is really -- can reasonably be inferred from the contract  
25 itself, if you simply add the threshold of the \$125 million

1 rate reduction. We just don't want to be precluded by the  
2 granting of the motion in limine here today, if that were to  
3 occur, from discussing that in argument on the 9th. If we can  
4 all agree that we can continue to discuss the fact that that is  
5 the origin of the revenue sharing threshold, then I think we  
6 probably can agree that we don't need to discuss anything  
7 beyond that.

8 COMMISSIONER DAVIDSON: There are two points here and  
9 two avenues. One, you are entitled to make whatever arguments  
10 you can within the parameters of the contract, what it means,  
11 how it is interpreted. So you suggested that a reading of the  
12 contract taking into account contract provisions could support  
13 your argument. You also indicated that you may need to go  
14 outside of what is in the contract to support that argument,  
15 those are two different issues. If you stick to the first, I  
16 don't think the motion in limine has any impact. You are  
17 entitled to argue this contract, the parameters of it, however  
18 you see fit, as is OPC. But you are taking sort of a leap or a  
19 jump to say we have got to go outside of what is in the  
20 contract to make the argument.

21 MS. BOWMAN: Well, I don't think that there is a leap  
22 to matters that were are not informed by the contract, and are  
23 not a part of the contract or can't be reasonably inferred from  
24 the contract. The question is, and the dispute that remains  
25 appears to be what does and what does not constitute something

1 that is extrinsic here. And I do think that we can argue from  
2 the contract itself and the order approving the contract that  
3 it is reasonable to infer that the \$125 million rate reduction  
4 had to have come from the source that we identify. And so long  
5 as we are permitted to make an argument that includes reference  
6 to that information, I think that we can agree that we don't  
7 need to make any additional references to the record.

8           COMMISSIONER DAVIDSON: Well, I mean, that really, I  
9 think -- I don't want to speak for OPC -- but I think that begs  
10 the question. Because you have agreed to it. So my question  
11 is what is the relevance of the source, given that this  
12 document would basically integrate everything up to the point  
13 of the document.

14           MS. BOWMAN: Well, I think that the order of the  
15 Commission and the agreement itself has to be viewed in the  
16 context in which it was entered into and which it was approved.  
17 And that would include consideration of ratemaking principles,  
18 and what was in -- consideration before the Commission when it  
19 actually approved the agreement.

20           CHAIRMAN JABER: But that is what I'm trying to tell  
21 you. No, it wasn't. It wasn't being considered by me. The  
22 difficulty I am having with your argument -- and, Commissioner  
23 Davidson, thank you for your excellent questions, because you  
24 more articulately touched on my concern. You want us to look  
25 at your source document. If it was important enough for you to

1 have me look at it, number one, why didn't you include it in  
2 the settlement? And, number two, why didn't you show up at  
3 agenda with it? And I guess I want to be consistent. If I  
4 didn't have it when I made my vote, I don't think I want it  
5 now.

6 MS. BOWMAN: Well, I think that you did have it when  
7 you made your vote, with all due respect, Commissioner, or  
8 Chairman Jaber. I think that it was available to all of the  
9 parties and to all of the Commissioners as a matter of record.  
10 And in the proper exercise of your jurisdiction and determining  
11 that it was appropriate to approve the settlement, in order to  
12 come to the conclusion that that was the proper approach to  
13 ratemaking, in the context of Progress Utility's rates going  
14 forward, that it is available for your consideration and  
15 therefore ought to be available for your consideration in  
16 determining what, in fact, was approved and what the meaning of  
17 this contract is, given that there is obviously a dispute that  
18 has arisen.

19 COMMISSIONER DAVIDSON: Let me sort of jump in more  
20 directly. Take the settlement agreement, and, again, both  
21 sides, all parties are entitled to argue within the four  
22 corners of this whatever arguments are supported by the  
23 agreement. I don't think anyone disagrees with that. My  
24 question for Progress is, is there a specific provision in this  
25 stipulation and settlement that is ambiguous? That, I think,

1 gets to the heart of the motion in limine, and what everyone  
2 here, I think, wants to try and get resolved sooner rather than  
3 later.

4 MS. BOWMAN: Our argument in opposition to the motion  
5 to enforce is not the suggestion that the Commission has to, in  
6 order to agree with the company's position, find an ambiguity  
7 in the contract. To the contrary, we believe that the  
8 Commission can squarely find in favor of the company's  
9 interpretation simply by reading the terms of the provision of  
10 the agreement, the Commission's order, and considering the  
11 information that was available to the Commission when it issued  
12 that order.

13 COMMISSIONER DAVIDSON: Let me ask -- counsel, if I  
14 can ask a question. Public Counsel, and Mr. Twomey, would you  
15 agree that the utility is entitled to make the latter, that  
16 type of legal argument. They are entitled within the corners  
17 to --

18 MR. SHREVE: When she made the statement that there  
19 is no ambiguity in the document, that is the end of the ball  
20 game.

21 COMMISSIONER DAVIDSON: Well, would you entitle,  
22 though, if they feel they have an argument within the four  
23 corners, without looking to outside evidence, as ridiculous as  
24 you may find it, they are entitled to make that argument?

25 MR. BECK: Yes, Commissioner, if they stay within the

1 four corners of the document. But that is not what counsel for  
2 Progress Energy is telling you. They are telling you you can  
3 look at information that was available to you. You have just  
4 left the agreement if you do that and you are engaging in fact  
5 finding.

6 COMMISSIONER DAVIDSON: I don't want to debate with  
7 counsel, but what I heard from counsel for Progress was that  
8 there is an argument that -- your argument can be made within  
9 the four corners of this agreement.

10 MS. BOWMAN: No, I don't believe that is our  
11 position. I believe it is our position --

12 COMMISSIONER DAVIDSON: I tried.

13 MS. BOWMAN: -- that our argument can be made within  
14 the realm of the matters that were before the Commission when  
15 it considered and approved the agreement. The four corners of  
16 the agreement in and of themselves are not what was approved by  
17 this Commission. That is resolute and obvious from the fact  
18 that there already had to be clarifications made as part of the  
19 agenda conference and the fact that this particular  
20 clarification didn't get made perhaps as a result of this  
21 dispute, but doesn't require this Commission to not avail  
22 itself of the things that were before it when it considered the  
23 agreement initially in order to determine what the order means.

24 COMMISSIONER DAVIDSON: Let me ask two --

25 CHAIRMAN JABER: Excuse me, Commissioner Davidson,

1 we'll come back to you. Ms. Bowman, under your theory, things  
2 available to us would be the prefiled testimony of all parties,  
3 it would be the MFRs of all parties, I suppose it would be the  
4 discovery responses. Do you realize then under that theory  
5 that things available to us would be testimony supporting  
6 further rate reduction, testimony supporting reductions to  
7 expenses that were not specifically articulated or included in  
8 the settlement agreement. And the opposite is true, that there  
9 is testimony suggesting that no adjustments were appropriate.  
10 But those are all the things that are available to us under  
11 your theory. Is that true?

12 MS. BOWMAN: I think that we are looking at a record  
13 in which there had been a number of stipulations reached  
14 prehearing. And the basis of the Commission's approval of the  
15 agreement, and the issuance of its order approving the  
16 agreement cannot be viewed in terms of the four corners of the  
17 agreement. We don't agree with that. And we think that that  
18 is what we are going to argue about when we argue about it in  
19 context, in the context of the merits discussion, which is that  
20 there potentially is a matter that we don't believe is  
21 disputed, we don't believe requires evidence to be taken, but  
22 is a matter of record that leads to the reasonable  
23 interpretation of the contract in accord with the company's  
24 position on the merits.

25 There has been a lot of discussion about the fact

1 that the company is not standing behind its agreement. We  
2 don't agree. Obviously we don't agree with that. We think we  
3 have paid the refund that is required under the agreement and  
4 we think that we can articulate that and limit our articulation  
5 of that to the matters that were before this Commission when it  
6 considered and approved the agreement including, yes, a single  
7 matter of record that I have discussed, which in response to a  
8 question of one of the Commissioners earlier today was, in  
9 fact, a matter stipulated to prior to the hearing in the  
10 prehearing conference.

11 CHAIRMAN JABER: Was that admitted into the record?  
12 Did we establish a record? Did I start the hearing? Did I  
13 move testimony into the record? Did we accept the stipulation?

14 MS. BOWMAN: I don't believe it was necessary for the  
15 Commission to actively open the hearing and to accept evidence  
16 in order for it to be informed by the record that was before  
17 it. In fact, at the agenda conference there were several  
18 comments made by the Commissioners that they had, in fact,  
19 reviewed the record and had had a full rate case before them.  
20 And that that was -- in light of that, that they could approve  
21 the order or they could issue an order subject to the  
22 clarifications that were made approving the agreement of the  
23 parties.

24 CHAIRMAN JABER: Ms. Bowman, let me interrupt you.  
25 Commissioner Davidson had some questions, and then we are going



1 to take a brief break. And I will let you finish your  
2 presentation.

3 COMMISSIONER DAVIDSON: Thank you. And I apologize,  
4 Madam Chair, if I missed this point. What is it specifically  
5 in the record that Progress feels explains or supports its  
6 position? Are we talking about a specific stipulation? I'm  
7 trying to pinpoint the universe, the document or the universe  
8 of documents that you all are talking about. And I just don't  
9 know what those are.

10 MS. BOWMAN: It is really a single fact that we do  
11 believe was stipulated to prehearing, and that is the revenue  
12 forecast from which the revenue sharing threshold was derived.  
13 And I don't think that is disputed. I don't think we need  
14 evidence to talk about that. It is that fact, and that fact  
15 alone from the record that we would intend to rely on in making  
16 our argument on the merits that the refund that was issued was  
17 the appropriate refund.

18 MR. SHREVE: Commissioner, before you take your  
19 break, could I respond to that?

20 CHAIRMAN JABER: Sure, Mr. Shreve.

21 MR. SHREVE: First of all, you mentioned what you  
22 covered when you approved this settlement. Settlement  
23 negotiations have always been held confidential. The  
24 Commission should not know what one company is offering, what  
25 the company is offering, what the public is offering in case

1 you end up going to a hearing. It has always been held that  
2 way. You talk about how you got to these different parts of  
3 the Commission. I will guarantee you, Florida Power -- Florida  
4 Progress has no idea how I came up with any numbers.

5 She is talking about the projected revenue. To give  
6 you an example, the \$125 million reduction in rates had to come  
7 from somewhere. Mr. Dolan is an honest man, he will tell you  
8 the truth. He has told me a couple of times we doesn't know  
9 how we got to \$125 million. I do, because we said that is what  
10 we are going to take and that is all there was to it. And that  
11 was it. And we got the \$125 million rate reduction.

12 And if you are talking about anything beyond this,  
13 you didn't have the MFRs -- I mean, you had the MFRs, that was  
14 ignored. If you take their MFRs and look at them, the  
15 settlement itself proves they are wrong, because we got that  
16 much of a rate reduction out of it. And the protection for the  
17 customers were things that Mr. Beck and I talked about as to  
18 where we came down. Now, I know they came in and showed us  
19 country boys how to do this, but we had a pretty good idea of  
20 where we are. We didn't necessarily explain to them how we got  
21 to wherever we were going.

22 CHAIRMAN JABER: Well, this adopted country girl  
23 wants to take a break. So we are going to come back at ten  
24 after 1:00; 1:15.

25 (Lunch recess.)

1           CHAIRMAN JABER: Let's get back on the record. Ms.  
2 Bowman, did you want to go ahead and complete your  
3 presentation?

4           MS. BOWMAN: Yes. I just had one final comment on  
5 the motion in limine before I move on to the remainder of the  
6 motions before the Commission today. And that is that the  
7 motion in limine really begs the fundamental question that will  
8 be presented to the Commission in the context of the argument  
9 of the merits on the 9th. And I think that perhaps, as the  
10 Staff has recommended, that the Commission ought not to view  
11 this in a vacuum and ought to consider this matter in context,  
12 and consider -- and make a determination at that time having  
13 full arguments of the parties before it what it should and  
14 should not use in making its determination, what it can and  
15 cannot consider.

16           And as our original response to the motion in limine  
17 suggested, that that is better done and accomplished in the  
18 context of a full discussion on the merits. And this body is  
19 certainly capable of distinguishing or delineating at that time  
20 with the benefit of a full merits discussion what it is that it  
21 ultimately believes that it can and should consider in the  
22 context of issuing a determination regarding this dispute.

23           With that I would -- if there are no other questions,  
24 I would move on to the motion for reconsideration. This  
25 Commission has repeatedly held that it will not reconsider

1 matters resolved by the prehearing officer absent proof that  
2 the prehearing officer just completely missed the point. By  
3 the same token, the Commission has repeatedly held that it will  
4 not entertain reargument of matters already argued and  
5 determined by the prehearing officer. We, ourselves, have  
6 sought rehearing, as cataloged by our response, on purely legal  
7 and even jurisdictional matters that did not involve the  
8 exercise of the prehearing officer's discretion like a  
9 discovery matter, yet even in those instances this Commission  
10 has determined that the reargument of matters under  
11 reconsideration was not appropriate and denied reconsideration  
12 on that basis.

13           Here the prehearing officer made a, quite frankly,  
14 purely discovery ruling. The quintessential kind of thing  
15 that's committed to the prehearing officer's discretion. The  
16 moving parties have simply repeated the arguments already made  
17 to the prehearing officer and rejected. The Staff has pointed  
18 out that the prehearing officer had the facts and law before  
19 him, considered and resolved those issues. Therefore, under  
20 the well-settled standard for reviewing motions for  
21 reconsideration, this Commission ought to deny that motion.

22           In any event, the prehearing officer's ruling was  
23 eminently correct. He limited discovery into the alleged  
24 improper ex parte communications to the maximum conceivable  
25 time period under which the rules and the laws governing

1 ex parte communications could have applied to this proceeding.  
2 That was reasonable and correct.

3 He also prohibited discovery beyond that issue  
4 because of the sole question -- the sole reason for deferral of  
5 this matter, the merits of this matter from the agenda  
6 conference on the 20th was based on this desire to investigate  
7 whether or not there had been any improper ex parte  
8 communications.

9 Our response to this, to the motion to enforce has  
10 been pending since March 7th, and no party has undertaken any  
11 merits discovery or suggested any merits discovery was  
12 necessary. And they have not argued to this Commission -- they  
13 have argued to this Commission that they should not receive any  
14 discovery in determining the merits of this case.

15 We are not seeking to introduce any new information,  
16 any information that would have postdated or entered into the  
17 period that Mr. Beck now suggests that he needs discovery  
18 about. So discovery can't be reasonably calculated to lead to  
19 the discovery of admissible evidence for the Commission's  
20 consideration in determining the merits. For this reason,  
21 again, that motion for reconsideration should be denied.

22 As for the Attorney General's motion for new full  
23 merits discovery, it is simply an attempt at a third bite at  
24 the apple. The motion for reconsideration -- I should say, the  
25 request for full merits discovery was presented to the

1 prehearing officer and he has entered an order indicating that  
2 the proper scope of discovery should be limited to whether or  
3 not there were improper ex parte communications. That was his  
4 considered judgment. The parties never moved for  
5 reconsideration of that judgment. And this is simply an  
6 attempt to circumvent the standard that applies to  
7 reconsideration.

8           There is no reason for discovery in this proceeding.  
9 We are not asking the Commission to entertain new information.  
10 We have withdrawn the only new information that could have  
11 possibly led to a basis for the need for discovery in this  
12 proceeding. And, therefore, there is no merit to the Attorney  
13 General's Office desire for full merits discovery and they  
14 cannot really say that there has been a lack of due process to  
15 the customers in this case.

16           The customers have been represented by Public Counsel  
17 since the beginning of this proceeding. And, in fact,  
18 instituted this proceeding that we are now all here to talk  
19 about. It makes no sense for them to say that Public Counsel  
20 hasn't adequately represented the customers of the State of  
21 Florida and that they now need to intervene and to have  
22 discovery on matters that have been before this Commission  
23 fully since March 7th. And for that reason, the motion for  
24 full discovery on the merits should also be denied.

25           As to the remaining motion, which I will only comment

1 on briefly, the motion to have the, quote, real Staff  
2 recommendation filed, I would just suggest that, first of all,  
3 it would be improper to consider any recommendation that the  
4 Staff had not filed as a recommendation at all. And,  
5 therefore, we have the real Staff recommendation. It was filed  
6 with the Commission and should be considered in the same manner  
7 as any other recommendation that the Staff might make on any  
8 issue.

9           CHAIRMAN JABER: Commissioners, do you have questions  
10 of Ms. Bowman before we move on? Commissioners, just to  
11 refresh everyone's recollection, I suggested we -- and you all  
12 agreed that we take up the motion in limine and motion to  
13 strike first. The motion for discovery -- I'm sorry, the joint  
14 motion for reconsideration second, the motion for discovery  
15 third, and then finally the motion to file a real Staff  
16 recommendation.

17           Just to generate a discussion or a motion, I wanted  
18 to just let you all know where I am after hearing all the  
19 argument. I'm not interested in delaying the vote on July 9th.  
20 Commissioners, I would very much like to see, regardless of  
21 what happens today in our motion and decision, that we stay on  
22 track for July 9th. I would hope that we leave ourselves in a  
23 position that allows us to consider the agreement, the order,  
24 and the agenda transcript.

25           I know the difficulty in getting to July 9th, and

1 perhaps finding that there is an ambiguity. Just as one  
2 Commissioner, I am willing to take that risk for several  
3 reasons. First of all, I had in front of me the settlement  
4 agreement, the ability to ask questions and seek clarification  
5 of certain terms at that agenda conference which generated an  
6 order and an agenda transcript. I would like to consider at  
7 least for July 9th the same thing we considered back in  
8 whenever that was we voted on the settlement.

9 I think that while the information, to assume Ms.  
10 Bowman is correct, was available to us, I do recall at that  
11 agenda conference that all the parties didn't want us to  
12 consider the MFRs or anything that was in the docket, although  
13 not in the record, because they wanted the settlement agreement  
14 to substitute for all of that. And I personally want to be  
15 consistent with that.

16 Saying all of that, whether that means we grant  
17 limine, or grant it in part and deny it in part, I don't know.  
18 But the quandary of not knowing what the facts are, I don't  
19 share. I think that I had enough in front of me with respect  
20 to the settlement agreement, I had an opportunity to seek  
21 clarification, and I did. And people had an opportunity to  
22 point out things that gave them concern, and I think some  
23 people did. So that is probably enough to open discussion  
24 and/or a motion, Commissioners.

25 COMMISSIONER DEASON: Well, let me follow up that I



1 agree with what you are saying. I think it is important that  
2 we keep the schedule, if at all possible to decide this matter  
3 on the 9th of July. If we reach that point and we determine  
4 that the Commission is not comfortable making a decision  
5 without additional information, I think we will have to make  
6 that decision at that time.

7           And that if we make that decision, just to put  
8 everyone on notice, I believe that we are going to have an  
9 obligation to open up the matter for discovery so that whatever  
10 additional information that we may be provided, that there is  
11 an opportunity for full discovery. I am optimistic that we can  
12 make a decision based upon the settlement agreement, based upon  
13 the agenda conference discussion, and based upon our order. I  
14 am hopeful of that. I feel confident that we can.

15           So for those reasons, while I think that it is  
16 probably -- I think it is within the Commission's discretion to  
17 open up the matter for further consideration, I don't think it  
18 is advisable to do so based upon what I know at this point. So  
19 if that means that we need to grant the motion in limine so  
20 that everyone is advised that we are going to limit our  
21 consideration to the matters I just listed, that being the  
22 agreement itself, the agenda conference discussion, and the  
23 order, then I would move that we would grant that to that  
24 extent.

25           CHAIRMAN JABER: Okay. And, Commissioner Davidson, I

1 know you have a comment, as well. Just remember also,  
2 Commissioner Deason, we have got to come back to the  
3 reconsideration of Commissioner Baez's order. And to be  
4 consistent with what I said, I envisioned that we would deny  
5 the motion for reconsideration, because it is my view that the  
6 prehearing officer did consider everything that was in front of  
7 him at the time. I think the motion in limine was not  
8 presented to the prehearing officer and to some degree stands  
9 alone. But for the assertions made in the motion for  
10 reconsideration, I don't find that there has been a mistake of  
11 fact or law.

12 COMMISSIONER DEASON: Yes. And my motion really  
13 doesn't address that. I guess we will get to that next, but I  
14 don't have a problem with what you are saying.

15 CHAIRMAN JABER: Commissioner Davidson, you had a  
16 question or comment?

17 COMMISSIONER DAVIDSON: A comment and then perhaps  
18 just a technical modification to Commissioner Deason's motion.  
19 My reading of Florida law is that even where you have a fully  
20 integrated agreement parol evidence can explain the meaning of  
21 a term within there. I have not heard anything yet, though,  
22 that tells me what that ambiguity is or what term needs to be  
23 explained.

24 And as we progress toward July 9th, I don't know what  
25 else is going to come into play which would enable the utility

1 to identify that ambiguous term. So with that said, I want to  
2 make clear that I would not want to deny a party a right to use  
3 the parol evidence rule to explain a term, but we have not been  
4 presented with a basis for doing that yet. Maybe some basis  
5 will be presented and we will then have to address the equities  
6 of that at a future point. But at this point, based on the  
7 record before us, I would support and second Commissioner  
8 Deason's motion. And I think perhaps it would be a motion to  
9 grant the motion in limine in part and deny in part.

10 And specifically we would deny the motion in limine  
11 with regard to the order enforcing the settlement agreement,  
12 and to the agenda conference transcript to the extent the  
13 motion was intended to encompass those. And the remainder of  
14 the motion in limine would be granted, except for those three  
15 items.

16 CHAIRMAN JABER: Thank you, Commissioner Davidson. I  
17 think that the motion in limine did envision the agreement and  
18 the order approving agreement. I think Mr. Beck clarified that  
19 for us. Mr. Beck, do you agree?

20 MR. BECK: Yes.

21 CHAIRMAN JABER: So it would be granting the motion  
22 in limine with respect to the agreement and the order, and then  
23 denying it with respect to the agenda conference transcript?

24 COMMISSIONER DAVIDSON: And any other extrinsic  
25 evidence at this time. Sorry, no -- now I'm completely

1 confused.

2 We want the transcript in, so we are going to move to  
3 deny the motion in limine with regard to the agenda conference  
4 transcript. We will also be considering the agreement and the  
5 order enforcing agreement. All other extrinsic evidence will  
6 be excluded pursuant to the motion in limine at this point.

7 COMMISSIONER DEASON: That is within the spirit of my  
8 motion. I think it is more a clarification. I do have a  
9 problem, though, styling it granting in part and denying in  
10 part. But if that is what is necessary legally, so be it. I  
11 think we have clarified exactly what we want to be able -- put  
12 the parties on notice that we want to be able to consider the  
13 order, the agenda conference, and, of course, the agreement  
14 itself.

15 MR. McLEAN: I was thinking that what you could do is  
16 grant the motion in limine with a proviso that you also wish to  
17 permit the agenda conference discussion. Just granting with a  
18 proviso.

19 COMMISSIONER DEASON: Is that sufficient?

20 MR. McLEAN: I don't know that it makes a lot of  
21 difference, but if you don't like the language that says deny,  
22 then I think that is the way you should go.

23 COMMISSIONER DAVIDSON: I mean, if counsel thinks  
24 that is sufficient, that would seem to be sufficient. And I  
25 would urge before we move on to the next matter, that if

1 Progress seeks to revisit that on a motion for reconsideration  
2 that they spell out, which wasn't done today, what exactly  
3 would be addressed by the extrinsic evidence. Because the last  
4 thing we would want, I think, is to have sort of a surprise  
5 argument the day of the hearing.

6 CHAIRMAN JABER: So the motion is to --

7 MR. SHREVE: If I may be heard on that?

8 CHAIRMAN JABER: Sure.

9 MR. SHREVE: Maybe we are thinking the same thing,  
10 but I don't think they can bring out something new and present  
11 it in a motion for reconsideration that they haven't already  
12 come out with. And if there is going to be any thought in  
13 terms of them bringing anything additional out, they have  
14 already said that there is nothing ambiguous in the contract or  
15 in the agreement, then we should be allowed complete discovery  
16 so we know what is coming and not be surprised. They should be  
17 limited to exactly what has been laid out by you and  
18 Commissioner Deason.

19 COMMISSIONER DAVIDSON: Well, I think we have done  
20 that. But it's the parties job to decide what motions they  
21 make, and we would then assess on the merits. I am not  
22 suggesting they have a basis for that, but we have laid out  
23 what we'll consider at this point. Three items: The  
24 agreement, the order, and the agenda conference transcript.

25 MR. SHREVE: Right. The only point I was making was

1 you mentioned that if they put something in their motion for  
2 reconsideration that they had left out at this point. I would  
3 consider that a surprise and not have been presented to the  
4 Commission. They could have come forward with whatever it was  
5 they were going to do and --

6 COMMISSIONER DAVIDSON: And that would be an  
7 argument you could make at the time. I mean, we are dealing in  
8 hypotheticals right now.

9 MR. SHREVE: I'm not inviting them to do that, then.

10 MR. McLEAN: Madam Chairman, it might help --

11 CHAIRMAN JABER: I think Mr. Shreve's point is this.  
12 Once we make this decision, the standard for reconsideration  
13 will be a mistake of fact or law. And I don't think,  
14 Commissioner Davidson, you are suggesting otherwise.

15 COMMISSIONER DAVIDSON: No.

16 MR. McLEAN: It might help to read the actual  
17 language of the motion which you are about to grant, if you  
18 don't mind. Reading from Page 3 of OPC's motion dated May 16,  
19 "The Commission should prohibit Progress Energy from commenting  
20 on or arguing at the Commission Agenda Conference any facts or  
21 matters not explicitly set forth in the agreement or the  
22 order."

23 Now you would be adding to that language the agenda  
24 conference piece. But, if granted, this would prevent  
25 argument. Not just evidence, but argument as to any other

1 matter.

2 CHAIRMAN JABER: Yes. Can we call it a decision on  
3 the motion in limine specifically allowing for the Commission's  
4 consideration of the settlement agreement, the order, and the  
5 agenda transcript that memorialized the discussion?

6 MR. McLEAN: Yes, ma'am.

7 CHAIRMAN JABER: Can we do that? Commissioners, that  
8 is your motion, that is the spirit of your motion. There  
9 shouldn't be any confusion.

10 COMMISSIONER DEASON: That's fine with me.

11 CHAIRMAN JABER: And there was a second.

12 MR. McLEAN: Yes, ma'am.

13 CHAIRMAN JABER: All those in favor say aye.

14 (Unanimous affirmative vote.)

15 CHAIRMAN JABER: That addresses the motion in limine  
16 and the motion to strike filed by Public Counsel.

17 COMMISSIONER DAVIDSON: Chairman?

18 CHAIRMAN JABER: Okay. Do we need to -- hang on one  
19 second, Commissioner Davidson.

20 Staff, do I need to acknowledge the notice of  
21 withdrawal of the affidavit or that was sort of subsumed?

22 MS. BRUBAKER: Subsumed.

23 CHAIRMAN JABER: Subsumed. Okay.

24 Commissioner Davidson.

25 COMMISSIONER DAVIDSON: If we were through with that

1 issue, I was going to address the second issue, but I didn't  
2 know if --

3 CHAIRMAN JABER: Go ahead.

4 COMMISSIONER DAVIDSON: Just a couple of comments.  
5 One, I do move staff's recommendation on Item 1, which is OPC  
6 and the AG's joint motion for reconsideration of Prehearing  
7 Officer Baez's discovery order. And I would like to just offer  
8 a couple of comments. One, I agree with the reasoning of the  
9 Baez decision. Two, I think even if another Commissioner would  
10 have ruled differently, the question to resolve here is whether  
11 the prehearing officer made a mistake of fact or law. Did he  
12 somehow misapply the relevant law. Did he fail to consider  
13 relevant facts. I personally don't believe he did. And after  
14 reading his order it seems clear to me that he considered all  
15 of the arguments, and, in fact, made an inherently reasonable  
16 decision. So for those reasons I move Staff on Issue 1.

17 CHAIRMAN JABER: There has been a motion to accept  
18 Staff's recommendation which denies the joint motion for  
19 reconsideration.

20 COMMISSIONER DEASON: Second.

21 CHAIRMAN JABER: And a second. All those in favor  
22 say aye.

23 (Simultaneous affirmative vote.)

24 CHAIRMAN JABER: That resolves Issue 1, Page 4 of  
25 Staff's recommendation.



1           The next one is the Attorney General's motion for  
2 discovery. And as I understand it, Ms. Brubaker, the Attorney  
3 General, and Staff take the view that that would be moot if we  
4 did anything close to granting the motion in limine.

5           MS. BRUBAKER: That is my understanding. Certainly I  
6 will stand corrected if the Attorney General has anything to  
7 comment on.

8           MR. KISE: The only comment I would make, Chairman  
9 Jaber, is perhaps to ask the Commission to the extent there is  
10 any more open door here, which I don't know that there is one,  
11 but it appears as though there is still some very limited  
12 question that we could get to July 9th and then this ambiguity  
13 that hasn't been expressed to date all of a sudden appears. To  
14 that extent, I don't know if procedurally it would be correct  
15 if we would need to renew our motion for discovery at that  
16 point.

17           I think the Commission, based on Commissioner  
18 Deason's comments, I think the Commission gets our point in the  
19 sense that if we go that road we are going to need discovery.  
20 But I don't know whether it would be appropriate to just hold  
21 the motion in abeyance pending what happens on July 9th. To  
22 deny it as moot now, I would defer to your counsel on that.  
23 But I just don't know whether we would then need to refile the  
24 same motion. We just don't want to be caught on July 9th with  
25 this ambiguity coming up, again having not appeared to date.

1 But if it appears then, then we would want the discovery, and I  
2 wouldn't procedurally want to be precluded from making that  
3 argument.

4 CHAIRMAN JABER: I understand. Mr. Kise, I am  
5 personally not interested in holding your motion in abeyance,  
6 but I also don't want to give you legal advice. I think just  
7 as one Commissioner, to the degree I believe on July 9th there  
8 is an ambiguity, then we will cross that bridge when we come to  
9 it. But I think you have heard enough discussion about what we  
10 may need and what we may not need. It seems premature to  
11 address discovery until July 9th. But, you know, in the spirit  
12 of giving all the parties enough signals, it is not in my  
13 spirit as a Commission to blindside or surprise anyone.

14 COMMISSIONER DAVIDSON: I am of the same opinion on  
15 this motion. Procedurally and legally I wouldn't see a problem  
16 with the motion being withdrawn or procedurally handled some  
17 other way, and, of course, you have the right to refile. I  
18 also am of the same view. We have yet to here an ambiguity.  
19 There is going to be a high threshold if one is ever alleged.  
20 But it is my position also that there should be no trial by  
21 ambush or surprise. And if at some point in time some problem,  
22 ambiguity, some issue arises that the parties will have an  
23 opportunity to flesh that out and would not have to deal with  
24 it in the context of a day-long hearing. That is my view.

25 CHAIRMAN JABER: Mr. Shreve.

1 MR. SHREVE: Maybe I'm missing something, but I  
2 thought that the decision you have made, I don't even see how  
3 any question of ambiguity could come up at the July 9th  
4 hearing. We are limited to the three items that you have put  
5 in there, and that nobody is supposed to be bringing anything  
6 up beyond that, to me that is arguing an ambiguity. They had  
7 the opportunity to argue it today, and actually said there was  
8 none. I guess I'm just at a loss. I'm probably going  
9 beyond --

10 COMMISSIONER DAVIDSON: Well, we haven't reached the  
11 merit stage of this yet.

12 MR. SHREVE: But you have said what you will reach it  
13 on.

14 CHAIRMAN JABER: Let me --

15 COMMISSIONER DAVIDSON: You are correct. But we have  
16 not sat here and adjudicated every paragraph of that contract.  
17 I think there remains a possibility that we sit here and  
18 scratch our heads, well, wait, what does that mean? Your  
19 position is we will not do that. And you may be absolutely  
20 right there, but I think to prejudge and say there is no chance  
21 at all that we are going to have any issue with this is to  
22 prejudge the merits, and we are just not there yet.

23 MR. SHREVE: If that is still an open question, then  
24 maybe we need the discovery now so that we can show you even  
25 what their opinions were as we came into this contract and over

1 that time period.

2 CHAIRMAN JABER: Mr. Shreve and Commissioner  
3 Davidson, let me tell you what I had in mind. Speaking for  
4 myself, I personally think all I need and all I am comfortable  
5 doing right now is considering the settlement agreement, the  
6 order on settlement agreement, and the agenda transcript, which  
7 is exactly the same posture I was in on the day we voted to  
8 approve the settlement.

9 I think where we are all talking past each other is  
10 I'm not talking about ambiguities that the company may find,  
11 because I happen to agree with Mr. Shreve, this was their  
12 opportunity. So I think what got lost in the shuffle was when  
13 we mixed that up with reconsideration. If someone files a  
14 motion for reconsideration, it needs to be that there has been  
15 a mistake of fact or law that has been identified. That's it.  
16 It is not an invitation or an opening, you know.

17 But, Mr. Shreve, what I was talking about is not  
18 blindsiding anyone. If in my deliberations looking at the  
19 contract, the order, or the agenda transcript, I am just  
20 needing more information, I don't think we should be shy about  
21 coming back on July 9th and suggesting that more information is  
22 necessary. That is not what I hope happens.

23 MR. SHREVE: That may be. I can't for the life of me  
24 contemplate what more information could be needed beyond the  
25 ruling that you have made today, whether it came from the

1 Commission, the Staff, or anyone else.

2 CHAIRMAN JABER: I understand. I think Commissioner  
3 Deason said this better than I could. It is not the optimal  
4 scenario, but -- okay. There was a motion to -- where were we?  
5 There was a motion to deny the joint motion for reconsideration  
6 and a second, and we voted that out. We are on the Attorney  
7 General's motion for discovery.

8 COMMISSIONER DAVIDSON: Right. And on that, it is  
9 your pleasure. If the AG would like to withdraw, I think  
10 procedurally that would be proper, or if a ruling is necessary  
11 we could handle it that way, either, it seems.

12 MR. KISE: I don't know. Given, again, this still  
13 seeming remaining question about whether an ambiguity can  
14 somewhat appear out of the air, I don't know that we would  
15 want -- the Attorney General would want to withdraw the motion.  
16 At the Commission's pleasure, you obviously have the discretion  
17 to deny it as moot, or deny it without prejudice or opportunity  
18 to renew it, depending on what happens on July 9th. I just  
19 would not want to place the Attorney General's Office in a  
20 position of withdrawing a motion based on what we understand to  
21 be Progress Energy's position today, only to have them come  
22 back on the 9th and create a different position, and then argue  
23 somehow, as they seem fond of doing, some technical point about  
24 this rule or that rule precludes the Attorney General from  
25 arguing the merits of his position. So with that being said, I

1 would leave it to the Commission's discretion as to how to  
2 dispense with the motion.

3 CHAIRMAN JABER: Ms. Brubaker, in their motion and in  
4 discussions with you, there wasn't anything said about the  
5 Attorney General not being allowed to renew their motion.

6 MS. BRUBAKER: Absolutely not. I believe that if it  
7 were to be denied today for being premature, there is nothing  
8 that would prejudice them from bringing it, either filing it or  
9 making an ore tenus motion at the July 9th agenda conference,  
10 should that need arise.

11 CHAIRMAN JABER: It seems to me with our vote on the  
12 limine that it is just moot, that the Attorney General's motion  
13 for discovery is moot at this stage.

14 MS. BRUBAKER: I agree.

15 CHAIRMAN JABER: Commissioners, do you have a  
16 preference? Questions?

17 COMMISSIONER DAVIDSON: I apologize. For counsel,  
18 would we move to deny on the grounds that it is moot or would  
19 we just not take it up for consideration?

20 MR. McLEAN: Commissioner, I think you should deny it  
21 without prejudice, because that clears the way for the affected  
22 party to refile if they care to.

23 COMMISSIONER DAVIDSON: Perfect. Move to deny  
24 without prejudice.

25 COMMISSIONER BAEZ: Second.

1 CHAIRMAN JABER: All those in favor say aye.

2 (Unanimous affirmative vote.)

3 CHAIRMAN JABER: That addresses the motion for  
4 discovery. The motion to file real staff recommendation.

5 COMMISSIONER DEASON: Madam Chairman, let me ask,  
6 what is the anticipated order of events for July the 9th? Is  
7 Staff to file anything in addition to what they have already  
8 filed? Are we going to have oral argument on the merits on  
9 July 9th and make a decision? Is Staff going to make any type  
10 of oral recommendation after oral argument? I'm just trying to  
11 understand what the process is going to be.

12 CHAIRMAN JABER: That's great questions. We should  
13 let them speak for themselves.

14 MS. BRUBAKER: Commissioners, following the standard  
15 practice of filing a recommendation 12 days prior to an agenda  
16 conference, noting, of course, this is a special agenda  
17 conference, Staff went ahead and on Friday the 27th filed --  
18 refiled its recommendation. It is the same recommendation as  
19 that which was heard at the May 20th agenda and deferred with  
20 the addition of an Issue A, which discusses oral argument by  
21 the parties recommending that each side had 20 minutes to  
22 present oral argument. Staff anticipates, of course, subject  
23 to your direction to the contrary, that it would be a  
24 discussion of the merits. And certainly we will entertain any  
25 questions or concerns you may have about that.

1 CHAIRMAN JABER: Commissioner Deason, when I agreed  
2 to the deferral, I envisioned that the original motion to  
3 enforce the settlement would be taken up as a matter of  
4 substance and that we would allow parties an opportunity to  
5 participate. Does that answer your question?

6 COMMISSIONER DEASON: Just so I'm clear, on the 9th  
7 we are going to have oral argument 20 minutes per side like  
8 today, given that it is 2:00 o'clock, that would be the first  
9 order of business to have oral argument on the merits?

10 MS. BRUBAKER: That is correct. Unless there are any  
11 pending matters between now and then that arise that need  
12 preliminary attention by the Commission, Staff would anticipate  
13 that would be the first order of business.

14 COMMISSIONER DEASON: And then after the conclusion  
15 of that, the Commission can take up the matter of enforcement  
16 of our order?

17 MS. BRUBAKER: Absolutely.

18 COMMISSIONER DEASON: And the amount of the refund?

19 MS. BRUBAKER: Absolutely.

20 COMMISSIONER DEASON: So this is a little unusual in  
21 the sense that Staff has filed a recommendation before hearing  
22 the oral argument. Does Staff envision making any type of oral  
23 recommendation, or are you going to stand by your filed  
24 recommendation?

25 MS. BRUBAKER: Well, I would anticipate that the oral



1 argument would pertain to the matters that have already been  
2 filed. Certainly nothing has happened here today to make me  
3 think that additional matters will be raised that will need  
4 additional discussion at the July 9th special agenda. Have I  
5 answered your question?

6 COMMISSIONER DEASON: Yes, you answered it.

7 CHAIRMAN JABER: Okay. Commissioners?

8 MR. SHREVE: Commissioner, can I get some  
9 clarification?

10 CHAIRMAN JABER: Mr. Shreve.

11 MR. SHREVE: Do I understand that you are going to  
12 hearing on the 9th with the recommendation that exists today  
13 that was filed?

14 MS. BRUBAKER: It was filed Friday.

15 CHAIRMAN JABER: You said we're going to hearing. We  
16 will have a special agenda conference on July 9th.

17 COMMISSIONER BAEZ: Don't say hearing.

18 MR. SHREVE: Right, but using the recommendation that  
19 is out there. But the recommendation, if you consider the  
20 decision that you have made here, it can't be. It doesn't  
21 work, the calculations won't even come out.

22 MS. BRUBAKER: Respectfully, Commissioners, if I may.  
23 I believe that the Commission has the expertise and discretion  
24 to look at what Staff has filed and make a decision that is  
25 consistent with its vote here today.

1           CHAIRMAN JABER: Mr. Shreve, here is what we are  
2 going to do. Staff has already filed that recommendation. And  
3 in the spirit of all the discussion we had earlier, it is going  
4 to be a long day and we have got a lot to do on July 9th. We  
5 are going to make a decision on July 9th. And I guess I'm not  
6 understanding your point. They have already filed their  
7 recommendation. We are going to consider the recommendation as  
8 we always do, and we are not going to be shy about modifying,  
9 granting, or denying.

10           MR. SHREVE: I understand that is the recommendation  
11 with the three different options, and part of those options  
12 with the decision you made today are impossible. But,  
13 I mean --

14           CHAIRMAN JABER: Well, if that is the case, then  
15 haven't you answered your own question?

16           COMMISSIONER DEASON: The Commission will be  
17 consistent with prior decisions, or at least we will attempt to  
18 be.

19           CHAIRMAN JABER: Now you have just generated a whole  
20 bunch of other questions.

21           MR. SHREVE: This won't be one of those cases --  
22 never mind, I better not say that.

23           CHAIRMAN JABER: Commissioners, let's have a motion  
24 on this.

25           COMMISSIONER BAEZ: Madam Chairman, I guess I am a

1 little fuzzy on how to proceed. In light of what were answers  
2 to -- Mr. Twomey's answers to some of you all's questions, when  
3 is a recommendation a recommendation, I am a little fuzzy as to  
4 how to proceed on a motion to do something that doesn't exist.

5 CHAIRMAN JABER: Well, we got Mr. Twomey to agree to  
6 withdraw one thing already.

7 COMMISSIONER BAEZ: And hope springs eternal, is  
8 that --

9 CHAIRMAN JABER: That's right. Mr. Twomey, it just  
10 seems to me that you know the spirit of what we are trying to  
11 accomplish. Do you want to withdraw the reminder of that  
12 motion?

13 MR. TWOMEY: You mean as opposed to being denied?

14 CHAIRMAN JABER: I think what Commissioner Baez is  
15 suggesting is that we may not have a real motion in front of us  
16 to grant or deny.

17 MR. TWOMEY: I meant to put that --

18 COMMISSIONER BAEZ: No, they are the right words.  
19 I'm not sure --

20 MR. TWOMEY: I meant to put that in quotes, which I  
21 did.

22 CHAIRMAN JABER: Okay. I will put this in quotes.

23 MR. TWOMEY: I will withdraw it.

24 CHAIRMAN JABER: Thank you.

25 COMMISSIONER BAEZ: Thank you, Mr. Twomey.

1 CHAIRMAN JABER: Okay. Commissioners, the last  
2 motion that I need is a motion to keep the docket open.

3 COMMISSIONER BAEZ: So moved.

4 COMMISSIONER DAVIDSON: Second.

5 CHAIRMAN JABER: There is a motion and a second. All  
6 those in favor say aye.

7 (Simultaneous affirmative vote.)

8 CHAIRMAN JABER: July 9th. We need to go faster,  
9 more efficiently, though; and I want to thank all the parties  
10 for being here today.

11 (The special agenda conference concluded at 2:00  
12 p.m.)

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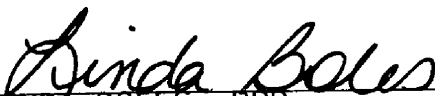
CERTIFICATE OF REPORTER


We, JANE FAUROT, RPR, and LINDA BOLES, RPR, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED THIS 3rd day of July, 2003.

  
LINDA BOLES, RPR  
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Office of Hearing Reporter Services  
FPSC Division of Commission Clerk and  
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