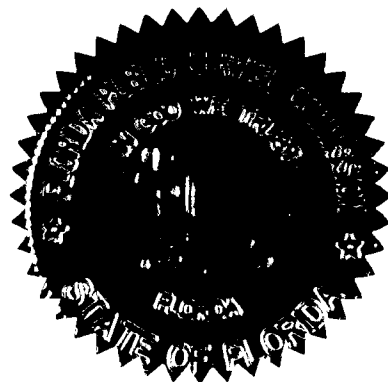


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030884-EU

In the Matter of:

OBJECTIONS TO FLORIDA POWER &
LIGHT COMPANY'S 2003 REQUEST
FOR PROPOSALS FILED AUGUST 25,
2003, BY FLORIDA PARTNERSHIP
FOR AFFORDABLE COMPETITIVE
ENERGY (PACE) AND SOME
INDIVIDUAL MEMBER COMPANIES.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 15**

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

DATE: September 30, 2003

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

REPORTED BY: JANE FAUROT, RPR
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(850) 413-6732

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FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 JON MOYLE, JR., ESQUIRE, and CATHY SELLERS,
3 representing PACE.

4 CHARLES A. GUYTON, ESQUIRE, representing Florida
5 Power & Light Company.

6 COCHRAN KEATING, ESQUIRE, MARTHA BROWN, ESQUIRE,
7 ANDREW MAUREY, MIKE HAFF and JOE JENKINS, representing the
8 Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN JABER: Okay. Let's get back on the record,
3 and we are on Item 15.

4 MR. KEATING: Commissioners, Item 15 is staff's
5 recommendation concerning Florida PACE's objections to
6 specified provisions of Florida Power and Light Company's
7 recent request for proposals for firm capacity and energy
8 beginning in 2007. This case represents the first time that a
9 request for proposal has been issued under the Commission's
10 recently revised bid rule, and represents the first time that
11 the objection process has been used as set forth in Subsection
12 12 of that rule.

13 The objection process provides that your decision be
14 based only on the written submissions of the parties and their
15 oral argument here today. The rule expressly precludes use of
16 discovery or an evidentiary proceeding in reaching a decision
17 on these objections. Accordingly, your findings today are
18 necessarily informal preliminary findings of an advisory
19 nature.

20 Staff's recommendation addresses two issues. First,
21 is PACE permitted under our rule to participate in the
22 objection process. And, second, if so, do PACE's objections
23 violate any provision of our bid rule. The parties are here
24 prepared to present oral argument on these issues and staff is
25 available to answer any questions concerning its

1 recommendation.

2 CHAIRMAN JABER: Let's see. Parties have requested
3 oral argument. Staff, we need to -- do we need to officially
4 vote on that or --

5 MR. KEATING: On whether oral argument should be
6 granted? I believe the rule itself contemplates that there
7 will be oral argument where it indicates that your decision
8 will be based solely on the written submissions and oral
9 argument. Both parties -- I have talked to both attorneys and
10 we have discussed a time frame of 15 to 20 minutes per side.

11 CHAIRMAN JABER: Commissioners, I think that is
12 sufficient if we will just allow 15 to 20 minutes per side.
13 Are you all right with that? Okay. Go ahead. We will start
14 with -- let's see, this is objection filed by PACE and a motion
15 to exclude PACE, so who would you suggest I start with, staff?

16 MR. KEATING: We could take up the issues separately,
17 allow however many of the 15 to 20 minutes the parties would
18 like to devote to the -- for lack of a better term, the
19 standing issue before we get onto the issue of the merits of
20 the objections. It may be reasonable to decide the standing
21 issue first. If you do decide that PACE should not be allowed
22 to participate, then you don't need to address their objections
23 in Issue 2.

24 CHAIRMAN JABER: Okay. Then Issue 1 should be taken
25 up separately. And, FPL?

1 MR. GUYTON: Thank you, Chairman. Commissioners, my
2 name is Charlie Guyton and I represent Florida Power and Light
3 Company. FPL has filed a motion to exclude PACE from the bid
4 rule exception process, and your staff correctly points out in
5 its recommendation that this is an issue of first impression.

6 In an effort to keep my remarks short, I will focus
7 on your staff's recommendation on this issue. FPL agrees with
8 much of staff's legal analysis, we simply depart from them as
9 to conclusion. FPL agrees that this is not an issue of whether
10 PACE has standing in a need case. FPL agrees that prior
11 rulings that PACE had standing in a need case were not based on
12 a determination that they were a, quote, participant, end
13 quote, under the bid rule. And we also agree with your staff's
14 observation that PACE is not a potential generation supplier
15 who would submit a proposal to FPL's RFP.

16 The portion of staff's recommendation that we
17 respectfully take issue with is where your staff goes beyond
18 the explicit and unambiguous language of the bid rule. Your
19 bid rule could not be clearer. The objection process is
20 limited to potential participants in FPL's RFP. The rule
21 states, and I quote, "A potential participant may file with the
22 Commission objections to the RFP," end quote. A participant is
23 further defined as a potential generation supplier.

24 PACE is not a potential generation supplier.
25 Therefore, it is not a potential participant within the meaning

1 of the bid rule. We submit to you that that should be the end
2 of the analysis.

3 However, it has been suggested that -- and I quote,
4 "PACE is in a unique position to state the concerns of the
5 independent power producers." I urge you not to extend the
6 language of the bid rule in this manner for two reasons.
7 First, it essentially amends the express unambiguous language
8 of the bid rule which limits the objection process to potential
9 generation suppliers. You had the opportunity to draft broader
10 language, you chose not to do so. And absent some ambiguity,
11 there should not be an attempt to look to intent or purpose.

12 Second, PACE acknowledges in its pleading that it
13 does not even represent the interest of all of its members.
14 Therefore, it is unreasonable to treat PACE as if it speaks for
15 the entire IPP industry. Consider what you don't know from
16 PACE's pleading. You don't know the number of PACE members;
17 you don't know how many of its members it purports to
18 represent, only some; you don't know whether PACE represents
19 the same subset of members on each of the issues; and you don't
20 know whether PACE's members all have the same interest. All
21 you know from PACE's pleading is that it is not representing
22 all of its members in this proceeding.

23 Now, according to its web page it has five members,
24 which, of course, is a very small subset of the IPP industry.
25 So there is no basis to conclude that it can speak for the

1 entire industry. Moreover, there would appear to be a conflict
2 among its members. One of the objections that they pose is to
3 a minimum requirement that an eligible bidder must have an
4 investment grade bond rating. Not all five, but some of the
5 five of PACE's members have such a rating. How PACE can
6 represent the interest of all IPPs when some of its members
7 don't have the same interest would suggest to us to seem to be
8 a conflict.

9 Commissioners, FPL urges you to apply the express
10 unambiguous language of the rule that created this unique
11 proceeding and exclude PACE from participating because it is
12 not a potential participant, it is not a potential generation
13 supplier. Thank you.

14 CHAIRMAN JABER: Before we move forward, do you agree
15 that if we agreed with your interpretation of participant and
16 find that PACE is not a potential participant, we still have
17 the discretion to rule on Issue 2 and issue what staff calls an
18 advisory opinion? I mean, do you recognize the administrative
19 efficiency in providing guidance with regard to the objections
20 that have been filed?

21 MR. GUYTON: I have not looked at that from that
22 perspective, but I would suggest that your objection process
23 seems to be limited to objections by potential participants.

24 CHAIRMAN JABER: Well, let me let you think about it
25 some more as we move forward, but my question is specifically

1 understanding your legal position about not expanding the rule,
2 do you agree that there is some administrative efficiency in
3 ensuring the best process for providing guidance to the RFP
4 process would be to go ahead and entertain a ruling on Issue 2,
5 as well?

6 MR. GUYTON: I can certainly acknowledge that the
7 Commission when it was struggling back with the bid rule seemed
8 to be looking for a way to address some of those issues up
9 front with some administrative efficiency, and that seemed to
10 be an underlying import of what the Commission was ultimately
11 trying to get to, in terms of this process. So to the extent
12 there is an advantage to that, I can say that that appears to
13 me to be consistent with what the Commission was trying to do.

14 It is a slightly different issue as to how precisely
15 it complies with the language of your argument. I am reluctant
16 to the embrace that because I have just given you a very strict
17 constructionist interpretation of your rule.

18 CHAIRMAN JABER: Commissioners, do you have questions
19 at this point? Commissioner Bradley.

20 COMMISSIONER BRADLEY: I'll wait.

21 CHAIRMAN JABER: Okay. Next.

22 MR. MOYLE: Madam Chairman, Jon Moyle with the Moyle
23 Flanigan law firm appearing on behalf of PACE. For the record
24 with me is Mike Green, the executive director of PACE, and
25 Cathy Sellers is a partner in our firm. I'm prepared to argue

1 today on the objections that PACE filed. Ms. Sellers is going
2 to address the issue of standing. And in addition to what we
3 have filed with you, she is going to have some oral arguments
4 responding to Mr. Guyton's points.

5 CHAIRMAN JABER: Go ahead.

6 MS. SELLERS: Thank you. We are here today on behalf
7 of Florida PACE, which is Florida Partnership for Affordable
8 Competitive Energy, the statewide trade association
9 representing the members, or the interest of its members who
10 are independent power producers in Florida, all of whom may bid
11 in the FPL RFP process.

12 We believe that PACE should be allowed to submit
13 objections to the bid rule in keeping with the preliminary and
14 advisory and informal nature that staff counsel described the
15 bid rule objection process as encompassing. First, PACE being
16 allowed to submit objections is entirely consistent with the
17 purpose of the bid rule's new objection process. This process
18 is designed to allow potential participants to identify and
19 enable the Commission to address provisions in an IOU's RFP
20 that are unfair, onerous, unduly discriminatory, or
21 commercially infeasible.

22 As staff counsel and Commissioners have recognized,
23 this helps avoid problems that may arise later in the need
24 determination process, problems such as this Commission has had
25 to address on previous occasions in the need determination

1 process.

2 As a trade association representing the interests of
3 several IPPs in Florida who may submit bids in response to
4 FPL's RFP, PACE is in a unique position to represent the
5 concerns with respect to this RFP without requiring each IPP to
6 address its own objections. In this respect PACE is stepping
7 into the shoes of its members and submitting objections on
8 their behalf advances an efficient and less costly objection
9 process to the benefit of IPPs and the Commission.

10 Rather than having to entertain objections from
11 several different entities, you can efficiently consider the
12 objections of several contained in the document that we
13 submitted on behalf of their association representing their
14 various interests.

15 Second, PACE previously has been allowed to
16 participate in need determination proceedings on behalf of its
17 members. And this is arguably in derogation, if you will, of
18 the plain language of Subsection 12 of your bid rule which
19 provides that a potential participant -- I'm sorry, Subsection
20 16, the Commission shall not allow potential suppliers of
21 capacity who are not participants to contest the outcome of the
22 selection process in a power plant need determination
23 proceeding.

24 I would submit to you the fact that this Commission
25 has interpreted this provision previously to allow PACE to

1 intervene and participate as a party in various need
2 determination proceedings, including one by FPL last year, and
3 also one by Florida Power Corp recently indicates that the
4 Commission has, indeed, on appropriate occasions gone beyond
5 the plain language of the bid rule. And in this particular
6 case, considering the purpose of the bid rule, we believe that
7 it is very appropriate for them to do so.

8 I would point out that FPL argues even though it
9 claims not to be arguing the 120 standing, in fact in effect it
10 is by arguing that PACE needs to somehow rather discriminate
11 and describe for the Commission the individual specific
12 injuries and interests of each of its members. In effect, FPL
13 appears to be arguing the 120 standing that it claims doesn't
14 apply.

15 We would submit to you that in keeping with the
16 advisory informal nature of this proceeding that a stringent
17 120 injury standard and specific injury standard shouldn't
18 apply. And that given that this objection process was intended
19 to be a more open process without having to meet a stringent
20 standing standard, there is no legal or logical reason to
21 exclude PACE from representing the interests of its members in
22 this particular process.

23 Finally, to the extent that 120 standing is germane,
24 PACE clearly has standing under 120. We have alleged facts
25 sufficient to demonstrate that we meet the Florida homebuilders

1 standing test. And, you know, again in keeping with the
2 spirit, and frankly the language of the bid rule, we submit to
3 you that the Commission should allow PACE to participate, to
4 submit its objections, and we would respectfully request that
5 you allow us to. Thank you.

6 CHAIRMAN JABER: Who are the PACE members?

7 MR. GREEN: This is Mike Green. Constellation,
8 Calpine, Competitive Power Ventures, Reliant, and -- this is a
9 test -- Mirant.

10 CHAIRMAN JABER: Mirant?

11 MR. GREEN: Mirant.

12 CHAIRMAN JABER: Constellation, Calpine, CPV,
13 Reliant, and Mirant.

14 MR. GREEN: Yes, ma'am.

15 CHAIRMAN JABER: Which one of you can respond to the
16 allegation that your participation actually results in a
17 conflict among the members?

18 MR. MOYLE: I can respond to that, I guess, in this
19 way, in that staff in pointing out this rule -- and we are
20 treading on new ground here, you know, correctly pointed out we
21 are not in an evidentiary proceeding. And I think to the
22 extent that we were trying to establish standing under 120
23 there could be some discovery on that and whatnot.

24 You know, the point that Mr. Guyton made with respect
25 to conflict, as I understood it, was that out of the folks

1 named only one of them has an investment grade rating
2 sufficient so that it would not be disqualified sort of out of
3 the starting gate. I can tell you that in -- can I just have
4 one minute?

5 CHAIRMAN JABER: Well, here is my question.

6 MR. MOYLE: I want to make sure I'm not disclosing
7 any attorney/client --

8 CHAIRMAN JABER: Okay. Well, let me ask the question
9 so that you can consult and get the answer I'm looking for.
10 Mr. Moyle, my question is does your participation result in a
11 conflict among your members, is the first question. The second
12 question is who are you filing on behalf of, if that is the
13 case, which five of these companies are you filing on behalf
14 of?

15 MR. MOYLE: Well, I think I can answer it this way,
16 which is that -- and the reason I wanted to check is because we
17 have had conversations. Constellation has been in those
18 conversations.

19 CHAIRMAN JABER: I'm sorry, what did you say?

20 MR. MOYLE: Constellation has been in conversations
21 we have had. They have not pointed out any problem with
22 respect to us arguing against the minimum requirements as we
23 have in our papers. That was the conflict Mr. Guyton said.
24 There have been no other conflicts raised amongst its members.
25 So we are here today representing PACE on a unified front. The

1 members are eager to have objections addressed. The pleadings
2 have been reviewed by the members and we think it is
3 appropriate that we be allowed to present substantive arguments
4 on the objections.

5 CHAIRMAN JABER: I guess when I looked at it the
6 concern staff raised and what Ms. Sellers said in terms of
7 administrative efficiency, I thought you were going to tell me
8 there were 20 or 25 members of PACE, but there are five.

9 MR. MOYLE: Yes. And I wish I could tell you there
10 were 25. Unfortunately, the industry has had some difficult
11 times in the last few years, but we have five.

12 CHAIRMAN JABER: It is what it is, and you have five.

13 MR. MOYLE: Right.

14 CHAIRMAN JABER: Why didn't those five companies file
15 objections?

16 MR. MOYLE: I think it is in part related to
17 administrative efficiency. Rather than have five sets of
18 objections, five sets of lawyers and whatnot, PACE is an
19 organization that can achieve some efficiencies by bringing the
20 objections to you as PACE.

21 CHAIRMAN JABER: And my final question. And,
22 Commissioners, I'm sure you have questions, as well. My final
23 question is what as an organization do you do for these five
24 companies? Help me understand your role.

25 MR. MOYLE: I will defer to Mr. Green on that,

1 because he is the executive director. My role is with respect
2 to this case, I have been retained to represent their interests
3 pursuant to the amendments to the bid rule to put forward
4 objections.

5 CHAIRMAN JABER: I don't mean your specific role.
6 But PACE as an organization, do you do the technical review of
7 the bids and submit the bids in response to the RFP? Mr.
8 Green, walk me through that.

9 MR. GREEN: Mike Green, again. Florida PACE doesn't
10 submit bids, we do not do technical evaluations of bids. This
11 is an aggregation of potential competitors, so there is not
12 going to be any comparison of any bidding thoughts or
13 practices. However, there is a common concern when terms or
14 conditions are such that they are deemed to be onerous or
15 unduly discriminatory, and those are common concerns of all
16 five members of PACE today.

17 The reason why PACE brought forward this concern is
18 purely due to the fact that there are only five members of
19 PACE. We are not flush with money, and these good lawyers cost
20 a lot of money. If we had five people up here representing the
21 same five issues, that is not an efficient use of my members'
22 resources.

23 CHAIRMAN JABER: You just gave Mr. Moyle a
24 compliment. Your real goal is to have us address Issue 2. You
25 need us to address the objections.

1 MR. MOYLE: I would think so. And I know you posed
2 the question to FPL, but in having participated in the
3 workshops and the discussions related to the bid rule, it was
4 my thought that this process was designed to get some issues
5 out at an early stage as compared to letting them potentially
6 fester around out there for quite some period of time. I mean,
7 it seems that while you may not be giving a definitive answer,
8 you surely are probably sending signals with respect to some of
9 the initial issues that we flag that could be problematic. And
10 candidly it might give the company the opportunity to make some
11 midcourse corrections as compared to having this type of debate
12 and discussion at a need case months from now.

13 CHAIRMAN JABER: And the last thing you probably need
14 us to do is to not jeopardize your argument to intervene in the
15 case later on.

16 MR. MOYLE: That's right. That's right. And I think
17 the other point, and staff has made this just from my way of
18 thinking, and I was planning on raising this at the end, but
19 making clear that what we are doing today is, as I understand
20 it, preliminary agency action, not final agency action.
21 Because, as you know, that triggers a whole another set of
22 rights and processes.

23 CHAIRMAN JABER: Commissioners, do you have any
24 questions?

25 COMMISSIONER BRADLEY: I have one.

1 CHAIRMAN JABER: Commissioner Bradley and then
2 Commissioner Deason.

3 COMMISSIONER BRADLEY: And maybe I missed the
4 answer. Which companies have submitted bids or which companies
5 are planning on submitting bids?

6 MR. MOYLE: I can respond to that question this way.
7 I believe that -- well, no one has submitted bids yet because
8 the time frame for which bids are due has not yet come. I
9 think some companies are candidly waiting on some discussions
10 that we have here today, because they are going to have to make
11 judgments depending on decisions or signals that you make as to
12 whether some of the terms and conditions in the RFP need to be
13 adjusted or revised. So, I'm sorry, I can't give you a
14 definitive answer, because I'm not sure that all the companies
15 know as to what they are going to do.

16 COMMISSIONER BRADLEY: Well, that kind of goes back
17 to what the Chairman asked earlier. How do we really know if
18 there is a conflict? I mean, PACE is intervening, but on whose
19 behalf? I mean, it would seem to me that we would need a
20 company to have already stepped up to -- a company that has
21 already stepped up to the plate and expressed a concern about
22 the terms and the conditions of the bid process.

23 I would hate for us to just have an intellectual
24 discussion about the bid process and later on we discover that
25 no one intends to bid anyhow. It would seem to me that we

1 would need to have -- in order for PACE to represent, we
2 need -- to represent the concerns of a company or the companies
3 there needs to be an intent. Some intent to bid or there needs
4 to be a clear reason that someone is bidding, or has bidden, or
5 is going to.

6 MR. MOYLE: I guess I can respond this way. There
7 was a meeting that was held before the bid documents were
8 released where a number of PACE members participated in that
9 meeting. After the bid document was released, there was a
10 meeting in Miami where a number of PACE members attended and
11 participated in that meeting.

12 With respect to what companies ultimately may decide
13 to do, I am not sure I can tell you. I can tell you there has
14 been a lot of interest to date. This is an area that these
15 companies want to do business in Florida. This RFP process
16 provides that opportunity, so there is willingness to
17 participate.

18 Now, I can tell you that I have been retained by
19 PACE, which is a trade organization, and that I have authorized
20 by them to file these objections. I'm not sure that I can go a
21 whole lot beyond that. Now, Mr. Green may be able to shed a
22 little further light on it if you would permit him.

23 COMMISSIONER BRADLEY: Well, let me just ask one
24 other question, Mr. Moyle. The plain language of the bid rule
25 itself, as a Commissioner, I really -- I, as a Commissioner, I

1 try really to be principled and to, as much as I possibly can,
2 stick to the plain language of the statute as well as the plain
3 language of a rule that has been promulgated within this
4 Commission process.

5 And my question is this: Are we setting a terrible
6 precedent by interpreting the plain language of the bid rule to
7 mean something else? Because, I mean, what are we really
8 doing? If we do that, then what type of precedent are we
9 setting in the future when we maybe interpret something just
10 the opposite, that it has the opposite effect on PACE? I mean,
11 it just seems -- it just seems to be inconsistent, in my
12 opinion, for us to get away from the plain language of the bid
13 rule.

14 MR. MOYLE: Let me try to address that point in this
15 way. In that Ms. Sellers cited Paragraph 16 of the bid rule
16 that I don't believe changed any when any of the amendments
17 last summer were done. And that Paragraph 16 says as follows:
18 "The Commission shall not allow potential suppliers of capacity
19 who were not participants to contest the outcome of the
20 selection process in a power plant need determination
21 proceeding." Okay. And I think that is the language that is
22 of concern to you, correct?

23 COMMISSIONER BRADLEY: Yes.

24 MR. MOYLE: This language was in place when PACE
25 intervened in the Florida Power and Light/Manatee/Martin need

1 case and the Florida Power Corporation Hines 3 case. We viewed
2 that as -- talking about precedent, we viewed that as precedent
3 that that provision has been construed liberally to allow
4 intervention of organizations like PACE to protect their
5 members' interests.

6 So, you know, kind of picking up on the same point,
7 we believe that that language allows PACE to come in because,
8 candidly, it has been granted intervention in two other need
9 determination cases. You know, that coupled with sort of the
10 informal nature of it.

11 COMMISSIONER BRADLEY: And one other question, and
12 maybe I didn't hear the answer to this one, either. How are
13 you all going to -- how is PACE going to deal with any intra --
14 well, I wouldn't say intraagency, but any conflicts that might
15 arise among the members as it relates to who is going to bid
16 and to how you are going to separate out the individual
17 companies if one decides to bid.

18 It would seem to me that by having PACE at the table
19 representing everyone it automatically creates a conflict of
20 interest for PACE as it relates to PACE's relationship with the
21 members of the organization. And who is going to -- if there
22 is a grievance, I mean, who is going to give redress to any
23 grievance that might arise?

24 MR. GREEN: This is Mike Green again. As executive
25 director of PACE, you know, it is my responsibility and my role

1 to collect the concerns of the collective membership and
2 represent them as efficiently as possible. This discussion,
3 debate, this informal guidance that we seek here is not to
4 determine which individual company is going to bid or not bid.
5 It will be determined by those individual companies, but PACE
6 is not going to direct or participate in any decision-making by
7 an individual company.

8 But the revised bid rule asked for this Commission to
9 do two things. Number one, to make sure that the information
10 in an RFP is clear. And, number two, that that clearly stated
11 information is, you know, not unduly discriminatory, is fair,
12 is not onerous, and is, I guess, commercially feasible. Those
13 are the four tests. All members of PACE are looking for this
14 informal judgment from this Commission, because this is the
15 only checkpoint right now in this process on the fairness
16 issue. If you remember we did not -- there was some talk about
17 an independent evaluator that would kind of take that role,
18 that was not chosen to go forward with, and this Commission at
19 this step at this time is the one check for fairness, and all
20 members have that same concern that the RFPs that are issued
21 are truly fair, not onerous, are not unduly discriminatory, and
22 are indeed commercially feasible. And there is no conflict in
23 what we are seeking for this discussion today.

24 CHAIRMAN JABER: Commissioner Deason.

25 COMMISSIONER DEASON: Yes. It's a question for Mr.

1 Guyton.

2 Mr. Guyton, I understand the thrust of your argument
3 to be that PACE does not meet the strict definitional
4 requirements of the bid rule, that being that PACE is not a
5 potential participant, correct?

6 MR. GUYTON: That's correct.

7 COMMISSIONER DEASON: But you also added further
8 argument concerning the fact that it's your understanding that
9 PACE is not representing all of its members and PACE has an
10 internal conflict of interest. My question to you is why is
11 that relevant? Not the definitional standing or the
12 definitional requirement in the bid, but the fact that you make
13 the representation that PACE has a conflict of interest?

14 MR. GUYTON: The reason I addressed that was your
15 staff in ultimately making the recommendation that it does,
16 says that it is -- that PACE essentially represents the
17 interest of the IPP industry. That is their logic chain to
18 say, therefore, it makes sense for you to extend this rule
19 beyond its plain language.

20 COMMISSIONER DEASON: Well, I understand that, but I
21 didn't read Staff's recommendation to say that, and maybe I
22 should direct it to them that the reason they were recommending
23 that PACE be allowed to file objections was that they were
24 representing the industry.

25 MR. GUYTON: The sentence that I was keying on,

1 Commissioner Deason, on my copy it's on Page 5 of the staff
2 recommendation, but it's about the third sentence in a
3 paragraph that begins, "PACE, while not a potential generation
4 supplier," and the sentence reads, "PACE is in a unique
5 position to state the concerns of independent power producers
6 under the bid rule's objection process in an efficient manner
7 without the necessity of each independent power producer to
8 file its own set of objections."

9 I concluded from that that staff thought it was
10 appropriate to have a representative of the industry speak on
11 behalf of the industry. I was concerned about how
12 representative PACE was of its industry because their pleading
13 on its face says that they are acting only on behalf of some of
14 their members, an unidentified subset. And it wasn't clear to
15 me that they necessarily represented the interest of all of
16 their members, given that they explicitly said that it was only
17 some of their members. And I was very concerned about
18 extrapolating that to say that they represented the entire
19 industry as staff seems --

20 COMMISSIONER DEASON: Well, I guess I'm trying to --
21 is there a requirement that an industry association or trade
22 organization has to representative 100 percent of its members
23 before it can participate in any representative capacity?

24 MR. GUYTON: No, there is not, particularly not under
25 standing law. But here staff is taking the explicit language

1 that seems to limit and preclude trade associations from acting
2 at all and attempting to expand it by saying you ought to
3 expand it to a representative. And it just seemed to me that I
4 was concerned about kind of reading too much into what PACE
5 actually represents. That was my purpose in raising that
6 aspect of the argument, Commissioner Deason.

7 COMMISSIONER DEASON: Well, I guess I'm at a little
8 bit of a loss. You know, it seems to me that that is an
9 internal situation for PACE to work out between it, its
10 executive director, and its member as to whether and to what
11 extent they are going to participate. And it doesn't really
12 matter as to whether it is 100 percent, or half, or even a
13 minority. But I understand this is a case of first impression.
14 You are concerned about how it is going to be applied, I
15 assume, in future objections in these type of cases.

16 MR. GUYTON: Certainly.

17 CHAIRMAN JABER: I have a question, but let me start
18 with a foundation comment. I want to get to Issue 2. I
19 absolutely want to address the concerns raised in Issue 2.
20 But, in reading Issue 1, the staff recommendation, the parties
21 have done it in their presentation, you use intervention and
22 participant as defined in the bid rule interchangeably, and I
23 don't. I am looking perhaps narrowly, and perhaps incorrectly
24 limiting the definition of participant to what is found in
25 Section 1(d) of the rule.

1 And I see a distinction between finding what a
2 participant is for purposes of filing an objection with
3 intervention in the proceeding when we get to hearing. I
4 really see a difference. I see one standard being whether you
5 are substantially affected -- whether your interests are
6 substantially affected, an Agrico standard for purposes of
7 determining standing different from looking at deciding whether
8 you are a participant pursuant to 25-22.082. So I don't want
9 any misunderstanding with regard to my question or concern. I
10 want to find the best way to get to Issue 2 without opening up
11 a door for abuse of this rule, frankly. We worked hard to get
12 where we are.

13 Saying that, don't you agree there is a distinction
14 between participant -- parties, I am giving you an opportunity
15 to clarify -- and intervention status for purposes of a
16 proceeding, Mr. Guyton?

17 MR. GUYTON: Commissioner, I agree entirely that
18 there is a distinction between participant and a party whose
19 interests are substantially affected under the APA, which is
20 the standard for intervention. And it is clear that this
21 proceeding is not a proceeding in which parties' substantial
22 interests are to be determined, because there is no evidentiary
23 hearing, and there clearly are disputed issues of material
24 fact. So that standard we don't think is appropriate. So that
25 leaves you with the standard of looking to the bid rule, and

1 the bid rule is very specific in how it defines participants,
2 and who is limited, and who could and who couldn't raise the
3 objection through this process. So I agree with you, there is
4 a distinction between the intervention standard in a need case
5 and the objection standard here.

6 CHAIRMAN JABER: Okay. And I don't know if the
7 Commissioners will agree or not. But, again, for the sake of
8 administrative efficiency, this is the first time we have
9 addressed this. So to PACE's credit and its five members, if
10 we say PACE is not a participant, I still think in the
11 abundance of fairness and caution we should get to Issue 2, and
12 at the very least whatever we find for Issue 1 serves as
13 guidance. One way or the other they should be afforded
14 guidance. Do you have any problem with that?

15 MR. GUYTON: Madam Chairman, my client does not.

16 CHAIRMAN JABER: Mr. Moyle or Ms. Sellers. And then,
17 Commissioner Davidson, you have a question? Can you respond to
18 my -- do you see a distinction between participant under the
19 bid rule and standing pursuant to Agrico and 120 for purposes
20 of intervention in a hearing?

21 MS. SELLERS: Commissioner Jaber, yes, I do agree
22 that there is a distinction there. And the point that I was
23 trying to make was in response to Mr. Guyton's plain language
24 argument. And my point was that you, the Commission,
25 previously has interpreted a provision that appears limited on

1 its face to participation only by participants in the need
2 determination process.

3 And if you look at the language strictly of
4 participants, it contemplates potential generation suppliers,
5 and PACE is not that, however its members are. And --

6 CHAIRMAN JABER: I think you have made my point for
7 me.

8 MS. SELLERS: Well, the point that I'm trying to make
9 is I think that you previously in need determination processes
10 have -- notwithstanding the fact that your rule by its plain
11 language arguably would limit participation to exclude
12 organizations like PACE, you nonetheless have, you know,
13 allowed people to -- or PACE to come in and participate on
14 behalf of its members as a party who is representing the
15 interest of its members who are substantially affected, or
16 substantial interests are affected.

17 CHAIRMAN JABER: My concern, Ms. Sellers, and I want
18 you to respond to it, is you are arguing the future. Our
19 allowing intervention was under a previous rule. And
20 notwithstanding the fact that that same provision shows up in
21 this rule, it is nevertheless a new comprehensive rule. And
22 what I am suggesting to you is we are not at the point of
23 deciding your intervention, so you are arguing the future when
24 there may not be a concern.

25 MS. SELLERS: Okay. I think, Commissioner Jaber, the

1 fact that this is an early preliminary process in the whole
2 continuing need determination process even militates more in
3 favor of allowing PACE to participate on behalf of its members.
4 This is a preliminary process. It was intended to be open to
5 allow the Commission to receive the objections and concerns of
6 parties or persons who may be bidding at some point in the
7 future.

8 And as Mr. Green told you, for efficiency purposes
9 and frankly for cost-efficiency purposes, you know, that is why
10 PACE is here instead of its individual members. From the
11 Commission's perspective, frankly, it is more efficient, as
12 well. And I would return to the idea that the spirit of the
13 objection process should be such that it is more open than a
14 need determination process, you know, regardless of how you get
15 there I guess is I what I'm saying.

16 You know, I think that from a public policy
17 perspective it probably makes more sense to, you know, allow
18 objections to be registered now by persons who may be bidding
19 in the future, notwithstanding that they may not meet some, you
20 know, formalistic wooden interpretation of a rule. And I'm not
21 implying that that is what you are saying, but my point is
22 that, you know, the spirit of the bid rule objection process,
23 in our opinion, would be violated if you wouldn't allow PACE to
24 participate.

25 CHAIRMAN JABER: Commissioner Davidson.

1 COMMISSIONER DAVIDSON: Thank you, Madam Chair. I
2 have to say I agree with the chair on the analysis, and I
3 appreciate counsel's pointing out how a similar rule has been
4 applied in prior cases. And I have to tell you that had I been
5 on the Commission, I probably wouldn't have applied it as such.
6 I'm a fairly strict constructionist. And here participant is
7 defined specifically as a potential generation supplier. That
8 is not PACE. I understand, however, that PACE represents
9 potential generation suppliers.

10 And here is where I am at on this issue. I agree
11 wholeheartedly I want to get to Issue 2. I note, as other
12 Commissioners have, that this is the first case under this
13 rule, and going forward I think the parties will know that
14 actual potential generation suppliers will be appearing. Going
15 forward I don't want to unduly extend the definition of a
16 potential generation -- of a participant as specifically
17 defined to an association. And that concept doesn't apply for
18 me just in this case, it is in every case. There are
19 differences between individual standing and associational
20 standing.

21 But that said, I think this discussion will send a
22 signal to the market. I think that will let participants, as
23 defined, know that they should appear. I, too, would like to
24 get to Issue 2, that is the meat of this. I would also suggest
25 that no member of PACE be precluded from raising issues that

1 they could have done had they been here. And I have a question
2 for staff. Do we have the equitable discretion to allow PACE,
3 on behalf of its members, to participate just in this hearing,
4 noting that we do not consider them a participant within the
5 meaning of the rule?

6 MR. McLEAN: Yes, Commissioner.

7 CHAIRMAN JABER: Commissioner Bradley, you had a
8 question?

9 COMMISSIONER BRADLEY: Well, a question and a
10 statement. I'm still struggling with the questions that I
11 asked at the beginning. And I'm even a little bit more
12 perplexed as it relates to PACE's participation as we have
13 gotten further off into the discussion, and I will tell you
14 why. You know, PACE through its own admission says that it is
15 not representing all of its members, only a few. Is that true?

16 MR. MOYLE: There is a statement in the pleading that
17 Mr. Guyton references. Mr. Green is the executive director of
18 that, and I think he can represent that we are here on behalf
19 of PACE and all of its members, if you need him to.

20 COMMISSIONER BRADLEY: Okay. Well, where did I hear
21 that PACE is not representing all of its members, but some of
22 its members?

23 CHAIRMAN JABER: Mr. Guyton. FPL initially made the
24 assertion that that was the case.

25 MR. MOYLE: And I think it is in a pleading to say

1 that some of its members and whatnot. And I think in terms of
2 that, some members of PACE have more concerns about particular
3 issues than others. For example, competitive power ventures
4 has more of a concern about the requirement that says you
5 cannot bid unless you have been in the market for five years,
6 you have been an active participant in the market for five
7 years. That is not to say that other members of PACE haven't
8 supported that position from CPV and others to say, well, wait
9 a minute. Okay, we are okay on all of these objections. You
10 know, I think that may have been part of what Mr. Guyton was
11 seizing on.

12 COMMISSIONER BRADLEY: So, then is it my
13 understanding that all of the members of PACE don't have equal
14 objections to everything on the list that PACE has given to us,
15 is that true or untrue? I mean, some members object to some
16 things and not others and vice versa.

17 MR. GREEN: This is Mike Green. Yes, that is true.
18 Each member of PACE supports PACE being up here. All members
19 of PACE support PACE being up here representing their
20 collective concerns. As John Moyle just said, some of the
21 members have more concerns about certain issues than other
22 issues, but they all support the representation of all the
23 issues that we have brought forth in these pleadings or this
24 the discussion. I don't know how more plainly to say it.

25 CHAIRMAN JABER: Commissioner Deason, you have a

1 question?

2 COMMISSIONER DEASON: I have two questions, one for
3 Mr. McLean and one for -- I will address it to Mr. Guyton
4 first. I'm just trying to understand where we are, and let me
5 pose this hypothetical to you. If Mr. Moyle had simply come up
6 here today and said I am representing Reliant, Constellation,
7 CPV, Calpine, and Mirant, and here are our objections, would
8 you have indicated that he doesn't meet the test to file those
9 objections?

10 MR. GUYTON: No, Commissioner, I would not.

11 COMMISSIONER DEASON: What I'm hearing him saying is
12 that that is who he is representing. It just so happens PACE
13 is the entity that got Mr. Moyle to represent their members in
14 that capacity. So why are we so concerned about this?

15 MR. GUYTON: Well, it is a case of first impression.
16 My client feels that this should be construed narrowly. We are
17 concerned about a broad expansive interpretation of it, and we
18 thought it was appropriate to go ahead and raise the issue, get
19 it addressed and get it decided. But I don't want to
20 unnecessarily prolong this. I mean, I responded to the
21 Chairman earlier, FPL is prepared to move to Issue 2 regardless
22 of how you rule on the participants. I mean, we think the
23 right ruling is the strict interpretation of the language, but
24 we see the advantage and we are willing to get to Issue 2.

25 COMMISSIONER DEASON: And then my question for Mr.

1 McLean. Did I understand you correctly to respond to
2 Commission Davidson that we could determine that PACE does not
3 meet the potential participant definition and still allow them
4 to file objections?

5 MR. McLEAN: Yes, sir, you could, but there is
6 probably no need to. We can permit them into this process that
7 is going on right now today and draw the order such that it
8 does not confer the broad sort of standing that they are
9 concerned about, that FPL is concerned about. I don't think we
10 have any problem with that at all.

11 I don't think you should really address whether they
12 have standing with respect to the case in chief. I think that
13 you can -- we can fashion the order such that they appear here
14 today rightfully to make these suggestions to you, voice their
15 objections, and not reach the issue of whether they have
16 standing in the case in chief. That is to offer no promise --

17 COMMISSIONER DEASON: When you say case in chief, are
18 you talking about the ultimate RFP process and the need
19 determination?

20 MR. McLEAN: Yes, sir, that is what I mean by the
21 case in chief.

22 COMMISSIONER BAEZ: Is that particular issue at stake
23 here today?

24 MR. McLEAN: No, sir, I don't think it is.

25 COMMISSIONER BAEZ: Okay.

1 MR. McLEAN: But there is a legitimate fear that if
2 you confer standing, if you will, just for this process that
3 you have conferred it in a general sense later in the case.
4 And I think that is a legitimate concern and we can craft the
5 order such that it does not do that.

6 COMMISSIONER DAVIDSON: Well, my concern, and also
7 the Chairman's concern, going forward I don't think that we
8 need to without a lot of thought and perhaps changing it, which
9 now is not the time for it, inadvertently expand the
10 definition. I mean, the definition here is clear. So my goal
11 is to, you know, move forward and get to Issue 2, but put the
12 parties on notice in future cases such as this if particular
13 companies do have an interest and want to participate, to just
14 make sure they go through the formalities. It may be all five,
15 and, Mr. Moyle, they can hire you and you can bill each one
16 separately and make a lot of money.

17 CHAIRMAN JABER: There you go.

18 COMMISSIONER DAVIDSON: But that is, you know, my
19 thoughts.

20 MR. McLEAN: Commissioner, I believe that we can
21 craft the order to accomplish your purpose and to address your
22 concern.

23 CHAIRMAN JABER: Mr. McLean, that would help me out,
24 too. Because, you know, truthfully it has nothing to do with
25 PACE. My concern has nothing to do with PACE as an

1 organization. You should be concerned about a broader
2 application of the definition of participant. You should be.
3 You need to go back and think of all the clever ways that
4 associations can be formed. Associations that might not be
5 potential generation suppliers, but would want to come in in
6 favor of an RFP that was submitted. However you get me there,
7 Harold, I would be appreciative. But I would like to get to
8 Issue 2. I want to resolve your concerns. I'm not interested
9 in opening up that rule for abuse.

10 MR. MOYLE: And we are prepared to make the argument.
11 If I could just make two quick points.

12 CHAIRMAN JABER: Go ahead, Mr. Moyle.

13 MR. MOYLE: One, I understand about creativity and
14 associations, but I think you can tie it to the fact that this
15 association represents suppliers. It's not like I could --

16 CHAIRMAN JABER: And I want to hear from your
17 suppliers.

18 MR. MOYLE: -- represent an association of home
19 builders and whatnot, you know, that would come in because they
20 are not referenced in that rule.

21 COMMISSIONER DAVIDSON: And that was the example I
22 was thinking of also. Bad experience with home builders in the
23 past.

24 MR. MOYLE: Right. They get in a lot of things. But
25 the other point that we just need to clarify for the record,

1 Mr. Green pointed out that another member of PACE is National
2 Energy Group that he failed to indicate to you and wanted the
3 record to be clear.

4 MR. GREEN: I failed in my test. I went with Mr.
5 Guyton's list of five and only listed five. There are six
6 members of PACE.

7 CHAIRMAN JABER: We won't tell National Energy Group.

8 MR. GREEN: Thank you very much.

9 COMMISSIONER BRADLEY: Just one other question.

10 CHAIRMAN JABER: Commissioner Bradley.

11 COMMISSIONER BRADLEY: Just for the record, Mr.
12 Green, what type of authority have you been given by the
13 members of PACE, the individual members of PACE to come before
14 this body and to represent their concerns as it relates to this
15 particular bid process? Do you have a written statement or do
16 you have a word of mouth statement or --

17 MR. GREEN: We have meetings of the board members of
18 PACE. I present to them the proposed issues that we would
19 raise based on the conversations that I have had with each of
20 the members. They vote on that and approve it, which they did.
21 We then route outlines of what this oral argument will cover.
22 They vote endorsement of that, which they did. It is all done
23 by vote.

24 CHAIRMAN JABER: Mr. McLean, or Martha, anybody, we
25 have focused on Harold here, but on Issue 1 is there something

1 that requires us to make a specific finding that they are a
2 participant or can we just recognize -- can we just recognize
3 they have filed the objections, this is a case of first
4 impression, put in the qualifications you suggested earlier.

5 MR. McLEAN: Yes, ma'am. Yes, I believe you can do
6 that. I don't think you have to resolve that broad question as
7 to whether they have standing in the case in chief. You don't
8 have to resolve that today. You can simply address their
9 objections and decide their objections on the merits without
10 reaching the issue of whether they have standing. And that is
11 the way we would craft the order if you decided to move forward
12 to Issue 2.

13 CHAIRMAN JABER: I understand what you're saying
14 about whether they have standing in the case in chief. That is
15 not what I am talking about. Do we have to make a specific
16 finding today that they are a participant pursuant to the rule?

17 MR. McLEAN: No, ma'am, you don't.

18 CHAIRMAN JABER: Commissioners, do you have any
19 questions or a motion? Commissioner Baez?

20 COMMISSIONER BAEZ: I had a couple of questions, and
21 first I want to apologize to Commissioner Deason because I
22 interrupted him. I don't know if he had anything else. He has
23 been sitting there quietly.

24 COMMISSIONER DEASON: I didn't even notice. But now
25 you owe me one.

1 COMMISSIONER BAEZ: I want to get something straight,
2 because Mr. McLean keeps using case in chief, and I want to
3 make sure if I am understanding the way the rule works. And,
4 you know, the parties can chime in if they want. Standing, for
5 lack of a better term, to challenge the RFP at this preliminary
6 stage isn't connected to the issue of standing to intervene in
7 the need case, correct, once it is filed, because at this point
8 we don't have anything?

9 MR. McLEAN: No, sir. And what I'm staying is I
10 think it is staff's responsibility, given your discussion on
11 the issue, to make sure that it doesn't address it, to make
12 sure that they are not connected and not linked together. This
13 is for a different purpose. This is a rather informal gig we
14 have got going here, when you want to consider the --

15 COMMISSIONER BAEZ: Exactly.

16 MR. McLEAN: Now, it doesn't make sense to resolve
17 that larger question at this point, in my opinion.

18 COMMISSIONER BAEZ: And I want to make sure that
19 Power and Light has the same understanding. And they are
20 conferring, but if the other parties want to comment on that,
21 you know, the two concepts of participation or involvement at
22 the different stages of this, the nascent need case, they are
23 separate, correct?

24 MR. GUYTON: Absolutely. That was the question that
25 the Chairman asked earlier.

1 COMMISSIONER BAEZ: And here is the trouble that I am
2 having, Commissioners, and I think I'm having problems in
3 opposite order to what I have been hearing from you all. I
4 think I am one of the former prehearing officers that actually
5 signed an order granting intervention to PACE on previous need
6 cases, I think a couple of them. And I firmly believed that as
7 the law applied, the associational standing cases applied, they
8 were fully entitled to intervene on that basis. And I think
9 that they brought and they have always brought a lot of value
10 to the proceedings.

11 Now comes the bid process. In my mind the bid
12 process is where people have skin at stake here. And it seemed
13 to me, you know, at least the way that I was looking at it, it
14 seems to me that when you are going to go and challenge an RFP,
15 I think that becomes a much more personal situation, a much
16 more personal relationship with the RFP. Obviously we have
17 heard some conversation, albeit hypothetical, that maybe some
18 members have different objections to some terms and not others,
19 and this is where their resources should get focused, and it
20 always seemed to me that this informal protest period was going
21 to be where potential participants would prove their -- it is
22 sort of a rite of passage, you know, to prove your interest.
23 Are you committed to the project, are you committed to the
24 participation in the process enough to commit resources to
25 challenge something, because that is going to test your

1 commitment to participate, to actually participating if you are
2 willing to flight over it.

3 Now, I don't discount, and certainly not in this
4 instance, the value that PACE as an aggregate of its members
5 brings to the process. And I think that they were probably not
6 wrong in doing it that way. I think going on into the future,
7 it is better in order to keep the two things clear and to keep
8 the two concepts, the two conceptual parts of this process
9 clear and separate, I think it would be important for us to
10 somehow acknowledge the fact that I don't -- at least in my
11 mind, I don't think PACE is properly as an association, the
12 concept of an association. I think it is kind of hard to get
13 over that hurdle with only five members involved.

14 CHAIRMAN JABER: Six.

15 COMMISSIONER BAEZ: Six members, I'm sorry. I too
16 failed the test. And it's kind of hard to get over that
17 hurdle. But I don't think we need to be discussing, and I
18 don't think we certainly need to be arranging for associational
19 standing at this stage of the process. I think this stage of
20 the process should stand as one of those tests of a
21 participant's commitment. If you are a company, if you are a
22 generator that wants to participate in the RFP that wants to
23 file a bid and has problems with the bid, that should be a test
24 of your willingness to come forward individually and say I'm
25 Mr. Generator and I've got a problem with this RFP, because

1 otherwise I would be in here so fast bidding on this project it
2 would make your head spin. I think that is one of those
3 hurdles that you have to jump through. We need to test
4 commitment on these people's participation.

5 I am fully in favor of and have been in the past of
6 PACE being an intervenor on need cases, because there are
7 certain policy issues that have to be discussed. This is a
8 much more minute set of details. So I'm struggling with that.
9 If Mr. McLean's advice to us is true, and I'm sure it is, that
10 we can somehow get past this issue, that's fine. If we do need
11 to address it, I would address it in the negative.

12 CHAIRMAN JABER: Commissioner Baez, that is exactly
13 where I am. Any other questions or is there a motion?

14 Mr. McLean, let me talk to you about strategy. Can
15 we find that PACE is not a participant, recognize this doesn't
16 preclude intervention when the time is appropriate, but for the
17 sake of administrative efficiency and because this is a case of
18 first impression still get to Issue 2?

19 MR. McLEAN: I believe so. I think a better course
20 perhaps would be is not to make any finding about PACE and
21 whether they are a participant. I don't think you have to
22 reach that point. You are at a very informal stage of your
23 proceedings. I don't see anything wrong with an order that
24 says we are going to deny the motion because in the exercise of
25 our discretion we want to hear from organizations, interested

1 parties who have something at interest here. I mean, you are
2 not talking about an adjudication of substantial interest. We
3 are not in the APA yet.

4 CHAIRMAN JABER: And that was my recollection of
5 designing this objection process. I remember being very vocal
6 about not wanting this to turn into litigation at this stage.
7 Commissioner Deason, you had a question?

8 COMMISSIONER DEASON: Well, I have a question for Mr.
9 Guyton. Mr. Guyton, if you agree that we just need to get to
10 Issue 2, are you willing to simply withdraw your motion to
11 exclude PACE?

12 MR. GUYTON: Commissioner Deason, my only
13 reservation -- I think ultimately the answer will probably be
14 yes. My only reservation is this, that you have come a long
15 way towards defining who should and shouldn't be allowed to go
16 through this objection process. I think you would be well
17 served in the future to have some precedent that would point to
18 to say participant is -- we meant what we said, it is a
19 potential generation supplier. In this instance FPL was
20 willing to acquiesce to going to Issue 2. I would like to see
21 you do that so that we don't find ourselves arguing this again
22 in a subsequent objection procedure, heaven forbid. But with
23 that, yes, we would be willing to do what we can to get all of
24 us to Issue 2.

25 COMMISSIONER DAVIDSON: I think in my view we have

1 got that, that clear statement. The law is clear. I mean, I
2 think we are all in agreement here that PACE is not --

3 COMMISSIONER DEASON: No, we're not.

4 COMMISSIONER DAVIDSON: Oh, I apologize.

5 COMMISSIONER DEASON: Let me set the record straight
6 that right now I endorse staff's recommendation and I will be
7 voting for that, or at least be voting against the motion that
8 I anticipate will be coming absent Florida Power and Light
9 simply withdrawing their objection, or their motion to exclude.

10 COMMISSIONER DAVIDSON: I missed the last point.

11 CHAIRMAN JABER: Commissioner Deason does supports
12 staff's recommendation is what he was saying, and he throws as
13 an alternative the possibility of FPL withdrawing their motion.

14 COMMISSIONER DAVIDSON: Well, my preference as we sit
15 here, because this is a case of first impression, I would like
16 to really just sort of punt this go around and get to Issue 2.
17 I think that hopefully next time in a case like this we would
18 have the individual sort of stakeholders here. I do agree with
19 Commission Baez. That is how I saw this. People that were
20 really interested in participating in this process would come
21 up here and file their objections. It is not really sort of a
22 test the water, see what happens, and then go back to parties
23 and have them decide whether to file or not, or whether to
24 participate. Have those folks up here now.

25 But, again, this is the first time this rule has ever

1 been implemented, so my view is I definitely want to hear from
2 PACE. But my preference would be not have -- my preference
3 would be for FPL to pull the motion, frankly, but if they are
4 not prepared to do that, the second preference would be to have
5 the ruling that we discussed with general counsel, getting to
6 Issue 2 without, you know, addressing that. But that is just
7 one Commissioner's thoughts.

8 MR. GUYTON: Madam Chairman, I can simplify this. I
9 withdraw the motion.

10 CHAIRMAN JABER: Okay. FPL has agreed to withdraw
11 the motion to exclude PACE, Commissioners, so I don't think
12 there is any action to be -- we should acknowledge the
13 withdrawal of FPL's motion for the record?

14 MR. McLEAN: Yes, ma'am.

15 CHAIRMAN JABER: Ms. Brown.

16 MS. BROWN: Madam Chairman, we can also put some
17 background discussion in our advisory preliminary order about
18 the talks that you all had today and what you expect and how
19 you interpret that provision for participants.

20 COMMISSIONER DEASON: No, you can't do because I
21 can't write a dissent to just additional language without a
22 vote.

23 MS. BROWN: That's true.

24 COMMISSIONER DEASON: I would oppose that.

25 MS. BROWN: All right.

1 CHAIRMAN JABER: I think just at this point -- hang
2 on, Commissioner Bradley, I will come back to you. I think at
3 this point all we have done is acknowledge the withdrawal of
4 FPL's motion in light of Mr. Guyton's statement.

5 Commissioner Bradley.

6 COMMISSIONER BRADLEY: I am just trying to understand
7 Commissioner Deason's concern.

8 COMMISSIONER DEASON: I understood Ms. Brown to say
9 she was basically going to include language in her order
10 consistent with the discussion, and we have not had a vote, the
11 motion has been withdrawn, we are not taking action, and I
12 can't very well write a dissent --

13 MS. BROWN: You are right, Commissioner. You are
14 absolutely right.

15 COMMISSIONER DEASON: -- to language that you are
16 just willing to include in an order with no vote.

17 COMMISSIONER BRADLEY: You are going to dissent?

18 COMMISSIONER DEASON: No, I'm not going to dissent
19 because she is not going to have the language in there.

20 COMMISSIONER BRADLEY: Okay. I understand.

21 CHAIRMAN JABER: If there is an order, which I want
22 to get to at the end of Issue 2, I don't even know what it is
23 we exactly will issue. But if there is an order it is only
24 going to acknowledge that Mr. Guyton on behalf of FPL withdrew
25 his motion. Yes. So that takes us to --

1 COMMISSIONER DAVIDSON: One more comment. I don't
2 want to -- with what I just said, I wouldn't open up this
3 process again, but I do note that this association, while it is
4 not within the definition, it is an association for the most
5 part of generators. So if you ever feel that policies and
6 procedures need to be addressed to address this issue, I mean,
7 feel free to bring that to our attention.

8 MR. MOYLE: In the form of a rule amendment I take
9 it.

10 CHAIRMAN JABER: Or something. Not in the immediate
11 future because there might be more things that we discover. I
12 mean, the good news about this --

13 COMMISSIONER DAVIDSON: Perhaps in February.

14 CHAIRMAN JABER: Perhaps the last week of February.
15 Since there are statutory time lines to deal with petitions for
16 rules, yes. I'm sure they expire like the end of March or
17 something. The good news about having this discussion is we
18 are all applying this rule as we go along here, so it is very
19 helpful. But the other thing I want you to take away from me
20 is I want to see Calpine in that chair, I want to see Reliant
21 in that chair, and CPV and Mirant. And you should be comforted
22 knowing that -- look, the more the merrier.

23 Sometimes it is completely impossible to be
24 administratively efficient. Hearing feedback from your members
25 may not be an area where we can be all that administratively

1 efficient, especially on a first case like this. I would have
2 loved to see all six members there.

3 Issue 2.

4 MR. MOYLE: Now that we have disposed of that minor
5 procedural issue, let me jump into the substance of the matter.
6 Again, for the record, Jon Moyle on behalf of PACE. And as we
7 have heard, this is a case of first impression, and I thought I
8 would take just a quick minute to set the stage as to how we
9 got here today.

10 And most of you may know this, but the bid rule was
11 originally enacted in 1994. It has been on the books for
12 nearly nine or ten years or so. It has been used. PACE argued
13 in supporting amendments to the bid rule that it needed some
14 revisions, that it could work better. They pointed out that it
15 had not ever resulted in the award of any capacity to an entity
16 other than the IOU who was proposing a self-build, so this
17 Commission went through the rulemaking process which concluded
18 last summer.

19 We are traveling under the revised rule today, and I
20 wanted just to take a quick moment to point out two particular
21 provisions that you are going to be hearing quite a bit about
22 today, and it is what we are traveling under, what PACE is
23 traveling under with its objections. The first is Paragraph
24 12, and I will just read what Paragraph 12 says. A potential
25 participant may file objections with the Commission limited to

1 specific allegations of violations of this rule within ten days
2 of the issuance of the RFP. Within 30 days from the date of
3 the objection, the Commission panel assigned shall determine
4 whether the objection as stated would demonstrate that a rule
5 violation has occurred, based on the written submission and
6 oral argument by the objector and the public utility without
7 discovery or an evidentiary hearing. So that is kind of the
8 charge that you have before you today which is to consider the
9 objections that PACE has filed. And as mentioned, PACE is a
10 trade organization which represents a number of independent
11 power producers.

12 Before I get into a lot of the provisions that PACE
13 has objected to, just about all of the objections that PACE has
14 raised focus on Paragraph 5 of the bid rule. And Paragraph 5
15 states in pertinent part, I'm quoting, "No term of the RFP
16 shall be unfair, unduly discriminatory, onerous, or
17 commercially infeasible." Again, this is the first time that
18 you all are being asked to make judgments under this new rule.

19 And candidly you are being asked to make some tough
20 calls, what I would call value judgments. Fairness, onerous,
21 those are not terms that are something that you can just plug
22 in a formula and find out whether a term is unfair or onerous.
23 You have to weigh things, consider things, listen to argument.

24 And I thought I might be helpful before we get into
25 this just to refer to what Webster's, how they define these

1 terms. Unfair is defined as not just or even-handed. Onerous
2 is defined as troublesome or oppressive, burdensome.
3 Discriminatory means marked by or showing prejudice, biased.
4 Unduly means excessive. Commercially means of, pertaining to,
5 or engaged in commerce. Infeasible means impracticable. I
6 think keeping in mind those terms and those definitions as we
7 go through the objections that PACE has raised, PACE hopes will
8 be helpful.

9 FPL and PACE have not been able to agree on a lot of
10 things throughout this objection process, but I'm happy to
11 report that I believe there is one thing that we have been able
12 to agree on, and that is that a comparison of the self-build
13 that FPL proposes at Turkey Point, which is south Dade County,
14 should be compared to bids on an apples-to-apples basis. And
15 you have heard that term tossed around at the FERC conference
16 that you all had here a couple of weeks. One of the
17 Commissioners asked about the bid rule in the process and I
18 think made reference to an apples-to-apples comparison. And I
19 don't think that there is disagreement that the goal is to have
20 an apples-to-apples comparison. FPL was asked that question in
21 a process where they are able to provide answers on a website,
22 and I believe they indicated yes, the comparison should be
23 apples-to-apples.

24 So, with that in mind, I would like to get into the
25 substance of the argument. We have raised a number of issues

1 in the filing. I'm going to walk through some of them. Some
2 of them will require a little detail, and so with that let me
3 talk about the first one, which is the geographic preference
4 that FPL states. FPL wants to build its self-build facility in
5 south Dade County. And as indicated, they are proposing it be
6 at Turkey Point, which is located in south Dade County.

7 Their RFP says, and I'm quoting, that they express a
8 strong preference for plants located in southeast Florida based
9 on, one, recognizing the current load generation and balance
10 and the associated system losses; two, understanding that
11 system requirements need to achieve reliability standards and
12 minimize operating costs; and, three, desiring to maintain
13 future fuel diversity options as viable.

14 You may say, well, how is that unfair? And I think
15 sometimes a picture can demonstrate, and I wanted to direct
16 your attention to the picture that we have blown up out of the
17 RFP. We have some handouts that we will provide to you that
18 shows one way that this is unfair to companies such as members
19 of PACE who are trying to get in here and win this RFP.

20 FPL, for the first time -- they didn't use this in
21 the Manatee and Martin case, and are now in the process of
22 imposing what they call a transmission load loss factor. And
23 what is depicted on this chart shows the impact of the
24 transmission load loss factor. You will see down in Miami
25 there is a number 1.0. And really what that means is if you

1 are located right there and you produce 100 megawatts, you are
2 going to get credit for 100 megawatts the way we understand it.
3 If you go up on this chart and look up at Lake Okeechobee, the
4 number is 93.5. That means if you locate a facility up there
5 and you are generating 100 megawatts, you are only going to get
6 credit for 93 megawatts. The same goes if you are over in
7 Manatee County over there near the Tampa Bay area, you would
8 only get credit for 85 megawatts.

9 This transmission loss factor really works a
10 competitive disadvantage on companies that have sites outside
11 of Dade County. As you can see there is one magic spot and
12 that is Turkey Point. And FPL will not consider allowing other
13 entities to locate at that Turkey Point spot.

14 During some of the discussions a suggestion was made,
15 well, rather than putting such what we view as a penalty for
16 not being able to locate there, why don't you site 600
17 megawatts at Turkey Point and 600 megawatts outside southeast
18 Florida. At least evaluate that as an option. FPL indicated
19 that they did not want or would not consider that as an option.
20 We think that still is a viable option and ought to be
21 something that is pursued.

22 Compounding the difficulties with this transmission
23 loss factor is site certification problems. And in the site
24 certification process, many of you may know it is a lengthy
25 process you go through to get the environmental application

1 ready, you file it with DEP, it is a six to nine-month process.
2 It can take up to a million bucks to put it all together. It
3 is very intensive.

4 The schedule that FPL has proposed has bidders filing
5 a site certification one and a half months before negotiations
6 are concluded and presumably a winner is announced. PACE
7 maintains it is commercially unreasonable to require bidders to
8 go through all of that expenditure not knowing whether they are
9 going to be selected or not. And by way of illustration,
10 Florida Power Corporation just recently issued a draft RFP,
11 they are going to be coming in shortly as well, and their
12 schedule had a process where they would make a final decision,
13 announce a winner, and then you would have the site
14 certification be filed two months after they announced who was
15 going to win. Which we believe is more reasonable than a
16 process where people have to go through expenditures and time,
17 energy, and effort to file a site certification a month and a
18 half before negotiations are concluded and presumably a winner
19 announced.

20 Part of what PACE tried to do in its filing was not
21 just to criticize, but to offer suggestions. And given that, I
22 would like to just point out what we believe would be
23 improvements in the current RFP. One would be to push back the
24 date of FPL's April 1st filing for site certification to July
25 1, 2004. This would give bidders more time to be able to go

1 out and work on the site certification application.

2 Another would be to suggest that FPL consider
3 locating 600 megawatts of combined cycle power outside of
4 southeast Florida to go along with 600 megawatts of power
5 located in southeast Florida presumably at the Turkey Point
6 facility. This would level the playing field and help balance
7 the transmission impacts that are shown on the chart.

8 We would also request that the Commission suggest or
9 indicate to FPL that it review its decision and consider
10 accepting bids that propose to be collocated at the Turkey
11 Point facility. And, again, if we are truly having an
12 apples-to-apples comparison, that will level the playing field
13 significantly. It would reduce a lot of variables. You could
14 see whose pencils were sharpest and would be giving ratepayers
15 the best deal with the most cost-effective alternative, if you
16 encourage them to pursue collocation. You will hear that,
17 well, we can't do that legally and whatnot, but I think you
18 could potentially send a strong signal in that regard.

19 Let me talk for minute about financial issues. There
20 are a number of financial issues that are --

21 COMMISSIONER BRADLEY: (Microphone off.)

22 CHAIRMAN JABER: Commissioner Bradley.

23 COMMISSIONER BRADLEY: Yes, just a couple of
24 questions while we are on siting. Mr. Moyle, isn't siting
25 always a difficult problem to solve? Is it ever simple?

1 MR. MOYLE: Having worked on siting power plants, I
2 would tell you it is not an easy thing. And I would tell you
3 it is particularly difficult in southeast Florida, and
4 southeast Florida being Dade, Broward, Palm Beach Counties. It
5 is not an easy thing.

6 COMMISSIONER BRADLEY: And your statement says that
7 the RFP is unfair because of difficult finding sites in
8 southeast Florida. Isn't it difficult to find a site anywhere
9 in the State of Florida at this point?

10 MR. MOYLE: I would say it is not as difficult as it
11 is in Dade, Broward, and Palm Beach with the population growth
12 down there. I will tell you like Okeechobee County, they have
13 a portion, as I understand it, of their local land use map that
14 is zoned for power plants. So it is much easier to put a plant
15 in Okeechobee County where there is more cows than people than
16 it would be to put a plant in Dade County, or Broward County,
17 or Palm Beach County.

18 COMMISSIONER BRADLEY: I guess what I'm struggling
19 with is the adjective difficult and unfair as a result of
20 difficult. I think that this process is a difficult process
21 anyhow, no matter how you try to apply it. Even in
22 Okeechobee County it is going to be a difficult process. And I
23 don't think that that is a valid argument for your purposes at
24 this point, at least not with me. At least the word difficult
25 is not valid. I think the siting is always going to be

1 difficult. I think that -- well, siting in my opinion involves
2 getting the permits, locating the site, dealing with zoning.
3 And location itself is always going to be difficult, you know.
4 I'm just struggling with your argument that it is difficult and
5 that the RFP is unfair.

6 MR. MOYLE: Maybe I didn't do a good job of
7 explaining it. But the point I'm trying to make is the way FPL
8 has set this up is there is one location down there that gets
9 100, and it is Turkey Point. Now, if you wanted to go in there
10 and say I want to get 100, too. You can't locate down there,
11 so if you were a bidder, you would have to go in there and all
12 of a sudden starting whenever they release the RFP back at the
13 end of August, you would have to go in there and try to
14 negotiate and secure land to get right next to there just to
15 control the land, okay?

16 Now, that process would take quite a bit of time.
17 But then, the way they have their schedule, you would have to
18 not only go and control the land, find somebody willing to sell
19 it, then you have to file a site certification on April 1,
20 which candidly is not enough time. It doesn't give bidders
21 enough time to do what I believe is necessary to do to be able
22 to compete, particularly given things like this transmission
23 loss factor.

24 COMMISSIONER BRADLEY: Where is the load?

25 MR. GUYTON: The load -- I'm sorry? It is a

1 system-wide load and need that, as I understand it, they are
2 trying to meet. You know, they answered a question in response
3 to some of the questions that were presented on the website
4 that said their centroid is, I think, north Broward or whatnot,
5 but they could probably better address where their centroid is.

6 COMMISSIONER BRADLEY: Okay. Thank you.

7 CHAIRMAN JABER: You were moving on to finance.

8 MR. MOYLE: Financial issues. There is a requirement
9 in the RFP that an entity that is proposing to build a new
10 plant to compete with FPL's self-build option must have a
11 minimum unsecured debt rating of BBB from Standard & Poor's or
12 BAA2 from Moody's with a stable outlook. This requirement was
13 not in the previous Manatee/Martin RFP in a way that it would
14 serve as an automatic disqualification if you did not have
15 those rating requirements. It has not been seen in an RFP
16 before in Florida that I am aware of, and it has not been seen
17 anywhere in the country with respect to that level of rating
18 being required.

19 PACE believes that this requirement is too
20 restrictive. It will effectively eliminate a lot of potential
21 bidders. And I think there was discussion earlier. Out of
22 PACE's six members, only one currently would meet that
23 requirement. And it is so restrictive that one of the
24 investor-owned utilities that you all regulate that is active
25 in the state would not even currently meet that requirement.

1 It would not be eligible to bid.

2 We don't believe that this is consistent with the
3 purpose of the bid rule to try to see whether the best deal is
4 out there for the ratepayers by effectively knocking out a lot
5 of potential competitors before the game even starts, and would
6 suggest that this requirement be eliminated completely. And
7 you may say, well, wait a minute. Eliminate it completely,
8 that is something that you want to know who you are doing
9 business with and what protections you have.

10 But we would suggest that there are a lot of other
11 ways that you can ensure that protection, such as a completion
12 security requirement which is in the draft RFP, step-in rights
13 which allow the utility to come in and take over a project if
14 it runs into difficulty, performance security, which is in the
15 draft RFP which requires people to post money in the event that
16 they are not able to perform. So we would ask that you all
17 send a clear message that the minimum requirements that are
18 being proposed by FPL that would serve as a threshold
19 requirement are too restrictive. FPL in their response
20 attached excerpts from RFPs issued by other utilities around
21 the country, but it is interesting, if you would look at those
22 none of them have the same high rating that FPL proposes, the
23 BBB level.

24 I mentioned completion security. And while PACE
25 doesn't disagree that some level of completion security is

1 appropriate, it believes the amount sought by FPL are too high
2 and out of line with recent RFPs. FPL is currently seeking to
3 impose 188,000 per megawatt as completion security. This, we
4 believe, is commercially unreasonable and infeasible,
5 especially in light of the recent RFPs. FPL's Manatee/Martin
6 RFP, \$50,000 per megawatt. TECO's recent RFP, none. FPC Hines
7 3, 50,000 per megawatt. The draft of the Hines 4 RFP, 50,000
8 per megawatt. FPL is seeking three times that amount for its
9 completion security and we think that is too high.

10 COMMISSIONER BRADLEY: Excuse me, Madam Chair.

11 CHAIRMAN JABER: Go right ahead.

12 COMMISSIONER BRADLEY: I missed my opportunity, and I
13 need to apologize to Mr. Moyle.

14 MR. MOYLE: That's quite alright.

15 COMMISSIONER BRADLEY: Because you have gotten off
16 into financial security. I have a question as it relates to
17 financial viability. And the BBB rating, the requirement of a
18 BBB rating, does that violate any section of the bid rule that
19 this august body passed several months ago?

20 MR. MOYLE: I would make the argument that it is
21 unfair, that it is commercially infeasible, and that it is
22 unduly discriminatory if you do a survey amongst all the RFPs
23 issued in the country, and that this level is the highest level
24 that has ever been required. So, yes. Mr. Green would like to
25 add something, if you would permit him.

1 MR. GREEN: If you will permit me to add, I mean, if
2 the concern is financial viability, are they going to be able
3 to finance the project with the PPA with FPL with its strong
4 credit, Commissioner Deason and I can get financial backing to
5 build a plant. I mean, that is a financeable project. You can
6 get project financing with the PPA. So if the concern is
7 financial viability and being able to finance a project,
8 project financing is available with the PPA.

9 If the goal of the RFP is to solicit those
10 competitive bids and see what works, I would look at Progress
11 Energy Florida's draft RFP, which is what they do. They don't
12 have a minimum requirement. If Commissioner Deason and I
13 decide to put together a joint venture and propose a power
14 plant, they will ask to see our pro forma, and they will look
15 at that pro forma and make a determination if that is
16 financeable or not. And if they feel it is, then they will go
17 forward. If they feel, no, this is not -- you are not making
18 any money, you are just covering your debt, they will probably
19 say, no, it is not. But do not exclude potential bids on the
20 front end by putting an exceptionally high level that will
21 really preclude five of the six PACE members, for example, from
22 being able to bid.

23 CHAIRMAN JABER: Do you own the bank the Bristol? Is
24 there something you need to be telling me?

25 COMMISSIONER DEASON: I just think that Mr. Green is

1 making an argument why there should be an equity penalty, but
2 we will discuss that when we get there.

3 MR. MOYLE: All right. I talked briefly about the
4 completion security requirement, 188,000. All the other RFPs
5 in Florida we have seen are 50,000. Three times, more than
6 three times the amount. We think it is excessive. A similar
7 argument with respect --

8 CHAIRMAN JABER: Mr. Moyle, you said some numbers
9 with regard to what other companies have required completion
10 security, but you did that quickly. Can you tell me what the
11 other companies have required?

12 MR. MOYLE: Sure. You have got that FPL is currently
13 seeking 188,000 per megawatt. FPL in the Manatee/Martin case
14 sought 50,000 per megawatt. TECO recently issued an RFP where
15 there was not a completion security requirement. Florida Power
16 Corporation's Hines 3 need determination was 50,000 per
17 megawatt; and the Hines 4 draft that has just recently been put
18 on the street is 50,000 per megawatt.

19 CHAIRMAN JABER: And then with regard to the BBB
20 rating, do you know which traditional investor-owned utilities
21 have a rating of BBB or higher?

22 MR. MOYLE: In Florida?

23 CHAIRMAN JABER: Yes.

24 MR. MOYLE: I believe Progress Energy does and
25 Florida Power and Light. Am getting conflicting information on

1 Progress. I thought Progress did. I'm not sure on that one.

2 CHAIRMAN JABER: Okay. Definitely Power and Light,
3 perhaps Progress. No one else that you are aware of?

4 MR. MOYLE: No. And I did research, and one I know
5 does not. I can affirmatively state one does not.

6 CHAIRMAN JABER: Okay.

7 COMMISSIONER DEASON: Is that the holding company or
8 the operating electric utility bond rating you are referring
9 to?

10 MR. MOYLE: The one I checked it was throughout all
11 entities. I think it was the holding company.

12 CHAIRMAN JABER: Mr. Maurey, while we are on this
13 point, before we get too far, Andrew, I'm talking Florida
14 electric IOUs. You gave me this information in the past, and I
15 have forgotten it. What Florida electric companies have BBB or
16 higher?

17 MR. MAUREY: Florida Power and Light, Progress Energy
18 Florida, and Gulf Power Company. Tampa Electric Company is
19 BBB-.

20 CHAIRMAN JABER: Thank you.

21 MR. MOYLE: There is a requirement in the RFP for a
22 performance security, and that is different from completion.
23 Completion provides the security to make sure the plant is
24 constructed and provides power when it commits to providing
25 power. Performance security is to make sure it continues to

1 provide power over the course of years. FPL's RFP that we are
2 talking about today has a 95,000 per megawatt figure, which is
3 the most we have ever seen in Florida. And by reference,
4 Florida Power Corporation uses a sum that is a third of that,
5 less than a third of that, 30,000 per megawatt. So we would
6 argue that that is commercially infeasible and out of line with
7 what we have seen in other RFPs.

8 Commissioner Deason mentioned the equity penalty. We
9 have raised that in our pleading, and I think that the equity
10 penalty will probably be something that will be discussed. We
11 recognize the Commission's decision in the previous FPL
12 Manatee/Martin case, but would point out this, which is FPL
13 when they will file information at the Securities and Exchange
14 Commission and are building their own power plants, they
15 identify to their investors a whole series of risks, such as
16 construction risk, permitting risk, equipment failure risk,
17 equipment under-performance risk, and these are all risks that
18 they will have to incur if they select the self-build.

19 PACE argues that those risks are mitigated if they
20 contract with an IPP or third party to provide that, and that
21 those risks -- there should be an effort made to monetize those
22 risks and to counterbalance those with any equity penalty
23 considerations that we subsequently discuss.

24 I have a few more items and I will wrap up. There is
25 a regulatory-out provision that is in the document that we

1 think is unfair and unreasonable. Briefly, a regulatory-out
2 provision provides that if the PSC, or the legislature, or a
3 judicial body finds that FPL cannot recover from its ratepayers
4 all of the monies that it contracted for with a builder of the
5 power plant, that FPL can reduce those payments. This places a
6 tremendous amount of burden on an IPP, that it is wholly at
7 risk should the Commission disallow recovery or should the
8 legislature change the law.

9 And we would argue that it can be more even-handed
10 and more fair if the reg-out provision simply allows either
11 party to opt out of the contract should there be a change in
12 law up until the date the Commission approves the need
13 determination and the associated purchase power agreement.
14 After the Commission approves the purchased power agreement, it
15 has, in effect, made a judgment about whether these are
16 reasonable costs, and the reg-out provision ought to go away at
17 that point in time. FPL proposes to have a reg-out provision
18 that is there throughout the life the contract.

19 COMMISSIONER BAEZ: Mr. Moyle, is the suggestion that
20 you -- first of all, my first question was how are reg-out
21 clauses, how have they been treated in the past? Reg-out
22 clauses aren't new. I mean, they have been parts of PPAs for
23 years here. What is the difference between their treatment or
24 their being a burden back then and being a burden now? What is
25 it that makes these reg-out clauses different?

1 MR. MOYLE: Well, these, we believe, are pretty
2 pervasive in terms of not sharing the risk any. But you are
3 right, there are reg-out provisions in contracts. What that
4 does, though, when you are talking to lenders, and if you say,
5 hey, I'm forced to take this language, I don't have been any
6 option on that, it is a risk factor that they then have it take
7 into account. And it is my belief that that then causes
8 additional cost to the project if you have onerous reg-out
9 provisions that impose all of the risk of a legislative change,
10 or a PSC change, or a judicial change on the IPP that is
11 bidding.

12 COMMISSIONER BAEZ: Would there be any -- is there
13 any problem to -- and I don't know what the answer is to what
14 I'm going to say now, but if we maintained a consistent
15 treatment of reg-out clauses, the suggestion that you are
16 making saying the reg-out clause evaporates upon the need
17 determination being granted, I would probably go a little
18 further and say until recovery is awarded, whatever it is. But
19 is that the normal way of treating -- what has been our
20 treatment? And maybe staff can help me with this. How have we
21 treated reg-out clauses in the past?

22 MS. BROWN: Well, in the distant past when we --

23 COMMISSIONER BAEZ: Way back when we needed them.

24 MS. BROWN: Yes. When we adopted our rules on
25 negotiated contracts for cogeneration and purchased power, we

1 spent a lot of time discussing reg-out clauses, and determined
2 that they were appropriate in our negotiated contracts because
3 the Commission had a history and intended to support those
4 contracts and the recovery of capacity costs under them. And
5 that has been the way it has been. The Commission said then
6 that it would honor the terms of the contract and the costs
7 that are recovered under them unless there was some
8 demonstrated misrepresentation or fraud under the theory of
9 administrative finality. And that has been the way the
10 Commission has acted basically ever since. I think Andrew
11 would tell you that that is one of the things that gives rating
12 agencies some confidence when they are evaluating purchased
13 power agreements that the State of Florida is involved in.
14 Does that answer your question?

15 COMMISSIONER BAEZ: Well, I guess I'm trying to
16 understand how our efforts to lend certainty to the use of
17 reg-out clauses in the past doesn't translate, or is not
18 helping, or is not helping mitigate what PACE or what the IPP,
19 potential bidders are seeing as an unreasonable term or
20 requirement. I'm trying to understand that.

21 MS. BROWN: Let me ask Andrew to come and answer that
22 question for you, because you are more interested in that angle
23 of it, aren't you, on the risk angle?

24 COMMISSIONER BAEZ: Well, I guess I'm just not -- I
25 mean, I will agree that it is a risk, but I am failing to see

1 how it is any more of a risk today than it has ever been
2 before --

3 MS. BROWN: I don't think it is.

4 COMMISSIONER BAEZ: -- when all of these projects
5 have been financed.

6 MS. BROWN: I don't think it is. In fact, it might
7 even be a little less because of the past history of the
8 Commission supporting cost-recovery under PPAs.

9 MR. MOYLE: I would just have to --

10 CHAIRMAN JABER: Commissioner Bradley. I'm sorry,
11 Mr. Moyle, hang on a second. Commissioner Bradley, you had a
12 question?

13 COMMISSIONER BRADLEY: I will go ahead and hear his
14 answer to his question and then I will ask my question, because
15 she may answer mine while she is answering his.

16 CHAIRMAN JABER: Okay. Andrew.

17 MR. MAUREY: Yes. The rating agencies still look to
18 companies recovery of these expenses and they look favorably
19 upon states that have higher certainty than less certainty on
20 the recovery of these costs. That hasn't changed.

21 COMMISSIONER BAEZ: And I think Mr. Moyle was --

22 MR. MOYLE: And you have had those regulatory-out
23 provisions in previous contracts. I don't know this for sure,
24 staff may know it, but I would suspect they are limited to
25 action by the Public Service Commission. The regulatory-out

1 clause that FPL proposes as a minimum requirement doesn't just
2 limit it to the Public Service Commission, but has it related
3 to any legislative action, any administrative action, any
4 judicial action, or any regulatory body which now has or in the
5 future may have jurisdiction over FPL's rates and charges.
6 That is very broad, very expansive. We think it adds a cost.
7 PACE surely would not be opposed to limiting, you know, in
8 cases of fraud or misrepresentation. I think your bid rule
9 provides for that. You know, that rates wouldn't be recovered
10 in those situations. But we don't think it is fair to impose
11 this broad of a reg-out provision on the IPP industry.

12 CHAIRMAN JABER: Commissioner Bradley, are you ready?

13 COMMISSIONER BRADLEY: I would like to ask Mr. Moyle
14 if he has completed his presentation.

15 MR. MOYLE: No, I have about four more points to
16 make.

17 COMMISSIONER BRADLEY: Okay. I will wait.

18 CHAIRMAN JABER: Commissioner Davidson.

19 COMMISSIONER DEASON: It was a question on the
20 reg-out and I think Mr. Moyle just answered it. And my
21 question was would it at all be beneficial if FPL placed
22 language in the PAA that tracked the bid rule provision in
23 Section 15 with respect to clear authorization to recover
24 prudently incurred costs absent evidence of fraud, mistake, et
25 cetera?

1 MR. MOYLE: I think to the extent that that language
2 would go in the RFP as the regulatory-out language, that would
3 be fine.

4 COMMISSIONER DAVIDSON: And my question to FPL when
5 they get up, would FPL be willing to include such language in
6 the PPA so that banks hopefully could clearly see at least the
7 Commission's intent to allow all prudently incurred PPA costs
8 to be recovered.

9 MR. MOYLE: Madam Chair.

10 CHAIRMAN JABER: I'm trying to digest Commissioner
11 Davidson's question. Would FPL be allowed -- would be to
12 include language that would make clear that the PSC would
13 allow --

14 COMMISSIONER DAVIDSON: Prudently incurred PPA costs
15 to be recovered. I mean, it was a question to FPL recognizing
16 that we don't necessarily -- we wouldn't necessarily have
17 jurisdiction over all reg-out scenarios, but to the extent we
18 are involved, if language was included tracking the bid rule
19 Section 15.

20 CHAIRMAN JABER: I think the lack of understanding I
21 have is what they put in their PPA doesn't bind us, so does it
22 go without saying that we would only allow the prudently
23 incurred costs? Maybe I'm missing something.

24 COMMISSIONER DAVIDSON: Well, I think it goes without
25 saying. I'm trying to think if there was some language that

1 would be acceptable to the different stakeholders that would
2 send a right signal to the banks to help, to at least help
3 bidders overcome any financing difficulties they may encounter
4 as a result of the reg-out provision. And ultimately I
5 understand this is subject to the parties' negotiation, but I
6 wanted to put that issue out on the table for discussion.

7 MR. MOYLE: Thank you. And just to conclude that
8 point, I mean, there obviously are concerns about the
9 financeability of such broad reg-out provisions, and we would
10 welcome a pulling back or a restriction that tracks the bid
11 rule and is not so expansive.

12 The next point I wanted to briefly touch on is the
13 requirement for dual fuel. FPL in its original RFP required as
14 a threshold item that all new power plants that are proposed
15 have dual fuel requirements. PACE objected on the grounds that
16 FPL did not have dual fuel at its Manatee plant and whatnot.
17 We thought that term was onerous, and unreasonable, and unfair.

18 COMMISSIONER DAVIDSON: Isn't this moot now? Hasn't
19 FPL revised that?

20 MR. MOYLE: They have. And the way they have revised
21 it is to say that you don't have to have dual fuel, but what
22 you do have to have is a firm transportation contract on two
23 separate pipelines. And we would submit that FPL doesn't have
24 a complete double redundancy. Say if you have a 500-megawatt
25 plant, the way we read what FPL proposed is you would have to

1 have firm transportation for 500-megawatts on Gulfstream, firm
2 transportation for 500 megawatts on FGT, double redundancy. We
3 think that that is commercially unreasonable. We don't think
4 FPL has complete system double redundancy in terms of firm
5 transportation contracts.

6 While we appreciate the dropping of the dual fuel
7 requirement, we think that a better suggestion is to require
8 that you have firm transportation on one pipeline system with
9 an enabling agreement allowing for interruptible transportation
10 on the second pipeline.

11 COMMISSIONER DAVIDSON: Chairman, I have a question
12 on this issue. Is there any industry standard on this
13 particular issue? I mean, you have offered up a proposed
14 alternative, but can you point us to what maybe occurs in other
15 parts of the country?

16 MR. GREEN: Yes. This is Mike Green. I have been in
17 this business about 31 years, and I don't know of anybody that
18 would go off and pay firm transportation on two separate
19 pipelines. In other words, have 500 megawatts firm
20 transportation on one pipeline and pay for firm transportation
21 on the other. The redundancy you seek is for those rare
22 occasions when, like Florida had one lightning strike at a
23 compressor station, I don't know it was five years ago or
24 something like that. Some very rare occasion when that
25 transportation is going to be interrupted. An enabling

1 agreement with a second pipeline to provide you the coverage
2 for that very, very rare occurrence that you would see. I
3 don't know of anybody that has full transportation, firm
4 transportation on two pipelines for a given capacity.

5 COMMISSIONER DAVIDSON: Well, that sort of addresses
6 what you feel is in the clearly unreasonable, and you have
7 given me one example of what would be in the reasonable. Are
8 there other sort of -- is there some type of general scenario
9 that you could point to that reflects in similar types of
10 transactions what may be the industry standard for the degree
11 of redundancy?

12 MR. GREEN: Well, I don't know if there is an
13 industry standard for it. I mean, everybody -- you want to
14 have a reliable transportation system for national gas. I
15 think both -- I believe and PACE believes that FGT is a
16 reliable transportation system. We also think that the
17 Gulfstream is a reliable transportation system. I'm not sure
18 you need something else. Florida Power and Light has said for
19 this RFP, though they did not say it for Manatee nor did they
20 say it for Martin, that now you need dual fuel, and they have
21 backed off from that saying, well, you need to have two firm
22 contracts.

23 COMMISSIONER DAVIDSON: What did they say for Manatee
24 and Martin?

25 MR. GREEN: It is single fuel. And I do not believe,

1 and Mr. Guyton can represent it, but I don't believe that
2 Martin or Manatee has firm transportation contracts with two
3 pipelines.

4 COMMISSIONER DAVIDSON: Thank you.

5 CHAIRMAN JABER: Complete your presentation, Mr.
6 Moyle.

7 MR. MOYLE: Thank you. I have three more points to
8 make. There has been some back and forth between the parties
9 with respect to the proposed PPA agreement that FPL attached to
10 the RFP. It is a very voluminous document and whatnot. And
11 the way PACE is reading that is that it asks proposers to
12 basically accept this agreement, to be bound by its terms
13 unless it notes an exception to any provision in here that it
14 does not wish to be bound by. And that they have to do that
15 when they submit their bid.

16 We believe it presents a Catch-22 situation. Because
17 if you were to spend the time and effort to go through and
18 really redline this document and, in effect, negotiate it as a
19 way, if you are sitting across the table, not only would it
20 cost you a lot of money, the impact of your taking exception is
21 not clearly known. FPL indicates that what they will do is if
22 you take exceptions, that will be evaluated in the noneconomic
23 portion of the evaluation. But there is not an indication as
24 to how it will be evaluated, whether if you took, you know, a
25 whole bunch of exceptions that would serve to knock you out,

1 because they would say, golly, these guys have taken 50
2 exceptions. This is too much. Let's not continue to negotiate
3 with them.

4 We think that is unreasonable and unfair to present
5 it that way, and would suggest that this be a starting point
6 for negotiations, or would simply seek clarity that if you fail
7 to object to something that it is then not completely off the
8 table for subsequent negotiations. That is the point I want to
9 make with respect to the draft contract.

10 Briefly, there is a \$10,000 fee, an evaluation fee.
11 Previous RFPs, FPL allowed you to submit a proposal with a
12 variation or two, I believe, and they would allow you three
13 options to be evaluated, all for the \$10,000 fee. Florida
14 Power Corp in their RFPs allow you a couple of options, and if
15 you have a variation that goes beyond, I think, three you pay
16 an extra thousand bucks. We think that is reasonable and that
17 FPL's position that they take now, which is any variation in
18 price, or term, or whatnot constitutes a new proposal and you
19 are subjected to another \$10,000 is onerous, and it ought to be
20 revised so that you can submit slight variations, say one or
21 two within the same \$10,000 fee.

22 The final point, and I mentioned it briefly in the
23 arguments was there is a requirement, a threshold requirement
24 now that a proposer have at least five years experience in the
25 operation, construction, development of a power plant. And if

1 they don't have that five years, they are ineligible to bid.
2 We think that is going to be a limiting factor, it is going to
3 potentially take other bids off the table, and don't believe
4 that a lot of people would be able to satisfy that as it
5 relates to construction.

6 If FPL's position is you have to have at least five
7 years of experience developing and constructing power plants,
8 we believe a lot of people don't construct their own power
9 plants, but contract that out, just like they contract out
10 operations, and would like to see the experience requirement
11 either removed or revised so that it didn't limit you to having
12 to have five years of experience in constructing a power plant.

13 That is the final point. I just want to conclude by
14 thanking the Commission for the time they have given us. This
15 is a new process. We have laid a lot on the table. You are
16 confined to listening to arguments, and so that puts a premium
17 on the time that we spend before you today. And I wanted to
18 make a point, and it is a little frustrating. PACE has been
19 involved in lot of these RFPs. None of the members have ever
20 won the first megawatt on them. We keep coming back to you.
21 And somebody was saying, well, the apples-to-apples comparison.
22 Yes, but the refined point is that, you know, it seems now FPL
23 wants a yellow apple located at Turkey Point and all we have
24 are the red apples that are not located there. And we truly
25 are asking for your help and your guidance and for you to

1 exercise the powers that you have to try to give us a fair
2 shake in this process. So with that I would conclude, and
3 thank you for your patience and your attention.

4 CHAIRMAN JABER: Thank you, Mr. Moyle. Commissioner
5 Bradley, you had a question and then, Commissioner Davidson,
6 you had a question.

7 COMMISSIONER BRADLEY: I want to ask this question of
8 staff, Mr. Moyle, Mr. Green, and of Florida Power and Light.
9 Of the 14 objections, and we spent a lot of time on this bid
10 rule several months ago, and at the conclusion of that I
11 thought that Mr. Green was of the opinion that it was an
12 excellent piece of work, even though I voted against it. Of
13 the 14 objections -- and I would like to start with staff,
14 PACE, and Florida Power and Light -- how many of these 14
15 objections violate Subsection 5 of the bid rule that this
16 Commission put forth?

17 MR. HAFF: Again, we have talked about this being a
18 case of first impression, and based on our first impression we
19 don't believe any of PACE's objections violate Subsection 5 of
20 the bid rule.

21 COMMISSIONER BRADLEY: You don't believe that any of
22 them violate Subsection 5 of the bid rule?

23 MR. HAFF: No, sir.

24 COMMISSIONER BRADLEY: Okay. Thank you. And I'm
25 just asking this question for the record. Mr. Green.

1 MR. GREEN: And I will let Jon Moyle speak, as well,
2 but it is my opinion that all 14 violate the rule. Again, the
3 rule talks about is the term and condition fair, unduly
4 discriminatory, is it commercially feasible, whatever the other
5 one was. But those are qualitative decisions that need to be
6 made. And with no other independent party, no other
7 independent evaluator that is capable of stepping in and making
8 that judgment, that judgment is made here. It is PACE's
9 position that all 14 qualify and violate Paragraph 5 because
10 they are either not fair, or are unduly discriminatory, or are,
11 you know, commercially infeasible.

12 COMMISSIONER BRADLEY: Florida Power and Light. Mr.
13 Moyle, I'm sorry.

14 MR. MOYLE: That's alright. I would echo what Mr.
15 Green said. And you have heard us a lot, I mean, we have tried
16 to be constructive and propose suggested alternatives, not just
17 be up here saying it is unfair, it is unfair, but say here is
18 what would be an improvement on it, would make it more fair.
19 But we believe that the ones that we have identified in the
20 pleading run afoul of the bid rule.

21 COMMISSIONER BRADLEY: What was that last statement?

22 MR. MOYLE: The ones that we have identified in our
23 objections, that they run afoul of the bid rule.

24 MR. GUYTON: Commissioner Bradley, none of the
25 objections, none of the provisions that are objected to run

1 afoul of the bid rule.

2 CHAIRMAN JABER: Commissioner Davidson.

3 COMMISSIONER DAVIDSON: Shocking that the parties
4 aren't in agreement on this, but thank you, Chairman. I'm
5 going to hold off on my questions until the end of the
6 presentations so that both sides can jump in. I have quite a
7 few, though, on the issues.

8 CHAIRMAN JABER: Okay. FPL, let me pose a question
9 to you and maybe that can serve as an introduction to your
10 presentation. Based on what you have heard Mr. Moyle as it
11 relates to this suggested language, is there anything that you
12 could agree to? Based on where we are now, is there anything
13 that you would voluntarily agree to before we move forward with
14 your presentation? I can refresh your memory, if you would
15 like.

16 MR. GUYTON: Madam Chairman, the answer to that is
17 no.

18 CHAIRMAN JABER: Okay. Finish your presentation and
19 I will have more specific questions for you later.

20 MR. GUYTON: All right. Commissioners, the sole
21 issue before you today is whether FPL's RFP complies with the
22 bid rule or the amended bid rule. That is all that is
23 appropriately addressed within the narrow scope of this
24 proceeding. And as your staff correctly points out, not only
25 does this RFP appear to comply with the bid rule, it does. It

1 indeed exceeds the requirements of the bid rule in several
2 significant respects.

3 Not all 14 objections have been addressed orally
4 today. I'm going to address ten. Actually maybe a couple
5 more, since I thought a couple were moot, but apparently they
6 are still in play. But let me focus initially on three that I
7 think are related. Those have to do with FPL's statement of a
8 geographic preference. It's the allegation by PACE that FPL is
9 somehow attempting to reserve transmission capacity for future
10 options in FPL's decision to recognize transmission losses and
11 operating efficiency costs in its economic analysis. And I
12 take those three because they are related to each other.

13 At Pages 3 through 6 of the RFP, FPL explains in
14 detail why it has a geographic preference for generating
15 options located in southeast Florida. Even though -- and it is
16 very important to understand this -- we are entertaining bids
17 from any location. We have not restricted the bids to
18 southeast Florida. Now, PACE argues that this violates the bid
19 rule.

20 I am going to take you to the bid rule because the
21 bid rule actually contemplates that a utility might have a
22 geographic preference. Section 5G of the rule requires FPL to
23 disclose, and I quote, the best available information regarding
24 system-specific conditions which may include, but not be
25 limited to preferred locations proximate to load centers,

1 transmission constraints, the need for voltage support in
2 particulars areas, and/or the public utility's need or desire
3 for greater diversity of fuel source. Commissioners, that is
4 exactly what we did when we stated a geographic preference.

5 After disclosing our southeast Florida generation and
6 load imbalance and the related transmission constraints that
7 arise from that, we also disclosed on Page 6 the fact that if
8 that growing imbalance of load and generation in southeast
9 Florida happened to be addressed by a southeast Florida
10 capacity addition in 2007 that would probably have the effect
11 of freeing up transmission capability into southeast Florida in
12 future years. And that, in turn, might facilitate more diverse
13 fuel sources into or the transfer of those into southeast
14 Florida.

15 COMMISSIONER DAVIDSON: Chairman, I'm sorry, I want
16 to sort of jump in here, because you hit on an issue that I had
17 a question on. The Turkey Point site has been -- or the load
18 has been in southeast Florida for years, and I'm wondering how
19 did the Turkey Point suddenly become available for
20 construction, if you can sort of walk me through that process.

21 MR. GUYTON: The Turkey Point site has been available
22 for construction for a number of years. The company has
23 additional land and resources available there at which it could
24 site a generating plant. It was once FPL became aware of the
25 need to address this increasing generation load and generation

1 imbalance in southeast Florida.

2 COMMISSIONER DAVIDSON: When did that need come
3 about, when was it identified, all right, this is what we need
4 to do?

5 MR. GUYTON: The first time that that was addressed
6 in a transmission analysis was -- correct me if I'm wrong, but
7 as I recall was fall of last year. And as that became -- as
8 FPL became aware of that, we started publishing that
9 information on our OASIS website. Through that, and then
10 ultimately through our Ten-Year Site Plan where we also
11 discussed this imbalance, we were apprising potential bidders
12 as well as entities that might want to locate that we had
13 recognized that by 2007 and certainly in later years, that
14 unless transmission facilities were built or there was an
15 addition of southeast Florida generation that there were going
16 to be increasingly greater transmission constraints into
17 southeast Florida.

18 So that information was based on a series of
19 transmission planning studies that were accomplished last year
20 and were initiated in the early part of the year and became
21 available, as I recall, in the fall of 2002. And once we knew
22 it, we published it. We made the IPPs and everybody else aware
23 of it.

24 COMMISSIONER DAVIDSON: Just on those now since we
25 are on the geographic preference. Can you sort of walk me

1 through how the bids are or may be discounted based on distance
2 from the load in southeast Florida?

3 MR. GUYTON: Yes, Commissioner, I think I can. It
4 will be addressed in the economic evaluation through two
5 aspects. Well, actually three. In our last RFP we recognized
6 that there are location-related costs associated with
7 generating units, and one of those are transmission integration
8 costs. Not the costs to interconnect, but once you have
9 interconnected how does that cascade down your system in terms
10 of upgrades that are required throughout your transmission
11 system. That we recognized in our last RFP. It was
12 uncontested essentially in our determination of need case.

13 This time we are going to do that as well. And in
14 addition to that we are going to recognize transmission losses
15 that are associated with location as well as operating costs of
16 southeast Florida combustion turbine units that are required
17 because of the transmission constraints into southeast Florida
18 at certain times of the year.

19 Because of those transmission constraints that arise
20 from this generation load imbalance, the company finds itself
21 that it is having to dispatch units, combustion turbines at a
22 very high cost out of economic dispatch to be able to maintain
23 system reliability within southeast Florida. So we are going
24 to capture the costs associated with having to do that, too.

25 Now, each alternative that is bid into the RFP will

1 have a different impact on that. Turkey Point will have one
2 point, another unit that is built in southeast Florida that may
3 be bid in may have a similar impact. It may be combined with
4 another unit in North Florida or another unit in Martin, we
5 don't know, and we can't begin to anticipate all the
6 permutations. But we do know from trying to decide what our
7 next planned generating unit should be that those costs are
8 likely to be significant. And because we know that, we
9 published it in our RFP so that the IPPs would be fully
10 apprised of it. That is how we intend to address that issue in
11 the economic analysis. It is not going to be a nonprice
12 factor, it is going to be decided head up.

13 And what is important, I think, for you to understand
14 is that it will be decided the same way. This same evaluation
15 will be done to all the alternatives, whether they be FPL or
16 proposals that are bid in by prospective bidders. The
17 calculations will be performed the same.

18 COMMISSIONER DAVIDSON: That is very helpful. Two
19 follow-ups on that. One, has that methodology -- and I
20 apologize if I don't know the RFP as well as you do -- but has
21 that methodology been laid out so that competitors, potential
22 bidders know what is going to be expected and they can map out
23 their bid around it so that they can sort of figure out their
24 own number crunching and hopefully put in the most competitive
25 bid possible. That is part one.

1 And then part two, is this economic analysis in which
2 FPL is going to engage based on some generally accepted
3 industry practice on how these types of -- on how geographic
4 location is handled. I suspect that this comes up across the
5 industry as you build is created, and I would also suspect
6 there is some type of general standard that would discuss how
7 location is dealt with and discounted, if at all.

8 MR. GUYTON: The answer to your first question is
9 yes, that is explained, I would suggest in excruciating detail
10 in Appendix E to the RFP. Which we went to great lengths
11 because it was a new element of the economic analysis to
12 provide a far more detailed description of that methodology
13 than your bid rule even requires. That is one instance where
14 we have exceeded the requirements of the bid rule.

15 And, yes, my understanding of that is that this
16 economic analysis that we undertake to perform is based upon
17 recognized standards within the industry, and we have retained
18 a third-party transmission consultant to help us assess these
19 costs. We have run the methodology by him, we have refined it
20 before we issued the RFP, and we are convinced that it reflects
21 industry standards. And I don't want to suggest it's simple,
22 it's not in terms of the actual methodology. But the concept,
23 I think, is simple to embrace. Does the company experience
24 losses on its transmission system? Yes. Are they affected by
25 location? Yes. Generally, the longer distance that you have

1 to move power the greater your losses are going to be.

2 And, similarly, this imbalance has resulted in this
3 dispatch problem of combustion turbines in southeast Florida.
4 And that, in turn, is a cost that is different for different
5 types of alternatives that may be bid in. Can we say up front
6 what the exact cost is going to be? No. That is going to have
7 to be the result of running load flow studies, and then costing
8 out the transmission integration costs that have to be added.
9 But then once they have done that, they can run these analyses
10 to capture those costs, as well.

11 COMMISSIONER DAVIDSON: One follow-up on this,
12 Chairman. Has FPL performed any internal cost analyses of if
13 you bid on self-build at different locations what the cost
14 differentials would be?

15 MR. GUYTON: Yes, we did. And it's an important
16 point to understand. Because had FPL not done that analysis,
17 it would have chosen the wrong generating unit as its next
18 planned generating unit. If it had ignored those costs, it
19 would not have chosen Turkey Point, it would have chosen
20 another generating site which enjoyed some other cost
21 advantages relative to Turkey Point. But because the losses
22 are real and have to be captured, and the dispatch costs are
23 real and had to be captured, we have done that analysis and
24 that analysis, which is the same analysis that we are going to
25 use to analyze the RFP proposals, suggested that Turkey Point

1 was the best option for our customers.

2 And that is the same analysis that we are going to
3 undertake in the RFP when we analyze Turkey Point against all
4 the other competing options. The other thing you need to
5 understand in that regard is that this is another instance
6 where we have exceeded the requirements of the bid rule. We
7 have put in play, if you will, not only our next planned
8 generating unit, but we said we are going to analyze another
9 600-megawatt option at Turkey Point. It doesn't meet all of
10 our need, but we know that it has some transmission advantages,
11 and we are going to analyze that in conjunction with RFP bids
12 that could make up the remainder of the bid so that perhaps
13 someone that is not in southeast Florida combined with that
14 nonetheless may be able to provide an attractive proposal. So
15 we have gone beyond the requirements of the bid rule by
16 injecting that option, not something we are required to do, but
17 we thought it would be beneficial and we ought to take a look
18 at it.

19 I was discussing the language that we had where we
20 observed what we think is rather obvious that if you add
21 southeast Florida capability or capacity in 2007 it may free up
22 transmission capability and an amount may allow for the
23 movement of more fuel diverse resources into southeast Florida.
24 That language is not an attempt to reserve transmission
25 capacity for a future option as PACE would have you believe.

1 The only transmission costs that we will analyze in this RFP
2 are costs that are associated with the RFP generating
3 alternatives that we consider, whether they be FPL or
4 self-build. We are not injecting in this analysis any future
5 costs for any future capacity additions.

6 Commissioners, I will depart from some of my prepared
7 remarks because we have addressed them, but I do want to --
8 through questions, but I do want to make the point that these
9 are these transmission losses as well as the inefficient
10 dispatch, these are real costs. They are not properly
11 characterized as a penalty. They are costs associated with
12 location. Like any other costs, some alternatives are going to
13 have advantages and some are going to have disadvantages, but
14 that hardly makes them a penalty. But what is most important
15 is that real costs must be reflected if the most cost-effective
16 option is to be selected in the process.

17 The other thing that I wanted to mention briefly in
18 response to something Mr. Moyle suggested is --

19 CHAIRMAN JABER: Mr. Guyton, give me an idea of how
20 much more time you need for your presentation.

21 MR. GUYTON: I need about ten minutes, assuming no
22 questions.

23 CHAIRMAN JABER: We are going to take a ten-minute
24 break and see if during that time you could expedite your
25 presentation.

1 MR. GUYTON: All right. I'll do my best.

2 CHAIRMAN JABER: Commissioners, let's take a
3 ten-minute break.

4 (Off the record.)

5 CHAIRMAN JABER: Mr. Guyton, you were finishing up
6 your presentation.

7 MR. GUYTON: Thank you, Madam Chairman. Before I
8 move on to the next series, I want to mention one thing that
9 was addressed by PACE's counsel, and that was a plea to impose
10 collocation. We have addressed at great length in our response
11 all the various problems that are associated with collocation.
12 I will not take you through those, but I do think you need to
13 be aware. PACE originally advocated collocation as a rule
14 provision and they chose to withdraw it in the most recent
15 amended bid rule proceeding. I just find it remarkable that
16 they would press for it now, given that they chose to take it
17 out of the bid rule. Be that as it may, clearly the fact that
18 we don't have collocation clearly does not violate the bid
19 rule.

20 There are four provisions to the RFP that are
21 designed to protect customers to which PACE objects. The first
22 is having a minimum requirement of an investment grade bond
23 rating if a proposal relies upon construction of a new
24 generating asset. The second is completion security for
25 proposals with new assets and performance security from all

1 proposals. The third is an April 1, 2004, Power Plant Siting
2 Act application milestone. And the fourth is minimum proposer
3 experience requirements.

4 Perhaps the best way to view PACE's objections is to
5 consider what PACE would have the RFP provide as an
6 alternative. Under PACE's approach, FPL should entertain
7 proposers who enjoy junk bond ratings, who have never
8 successfully developed, permitted, constructed, and operated a
9 single power plant, who provide no or only nominal completion
10 or performance security, and who are willing -- who are not
11 willing to meet a PPSA filing deadline that is essential if the
12 in-service date of the unit is going to be achieved.

13 Commissioners, these objections are merely
14 self-serving. And, quite frankly, if FPL signed a contract
15 without these basic customer protection provisions, I would be
16 concerned that you would hold my client accountable for being
17 imprudent.

18 Let me address each one briefly. Why should FPL
19 insist upon a minimum level of financial viability for entities
20 financing and building \$100 million power plants, because the
21 default risk of entities that are below investment grade is
22 frighteningly high. Companies with an initial rating of B have
23 historical 5, 10, and 20-year default rates of 32, 50, and 61
24 percent respectively. This default risk can and should be
25 minimized by limiting potential contract entities to those that

1 have investment grade ratings.

2 There was a suggestion that we didn't require that in
3 the Martin and Manatee RFP. It wasn't a minimum requirement,
4 but it was indeed invoked when we selected the short list. We
5 decided that we were not going to advance anyone to the short
6 list that didn't have an investment grade rating of BBB. That
7 was not contested at all in that case, as you may recall. Also
8 I would point out to you that this is simply limited to
9 entities that are building new assets. It is not limited to
10 entities that have assets in the ground, and indeed it is not
11 applicable to existing utilities in the state that might not
12 have that bond rating as long as they are bidding a system
13 sale.

14 So we are not precluding the Calpines, the Reliants,
15 the TECOs, all of these entities that might not have that. We
16 are not precluding them from participating, we are only
17 precluding them from bidding a new generating asset that
18 challenges significantly their financial position.

19 Why should FPL insist upon performance and completion
20 security, because step-in rights don't provide any funds for
21 customers if a developer fails to perform or complete on time
22 and there will be increased costs associated with that failure.
23 Security arrangements are necessary if there are going to be
24 monies available to protect or at least mitigate against costs
25 from customers.

1 CHAIRMAN JABER: Mr. Guyton, in response to my
2 question on this subject, staff said that all of the IOUs in
3 Florida have at least a BBB or higher. There is one that I
4 think Andrew said had a BBB-. Do you still believe that is the
5 case?

6 MR. MAUREY: I verified that, yes. There is one
7 utility, TECO has a BBB-, all the other three are BBB and
8 above. One thing I did not add was that the designation of a
9 stable, negative, or negative credit watch. Tampa Electric is
10 BBB- credit watch negative. Progress Energy Florida is BBB
11 stable. FPL is A-. Gulf is A stable.

12 CHAIRMAN JABER: All credible companies have done
13 real well in Florida, and I can't imagine you have a concern
14 about any of those companies. And you added Calpine and
15 Reliant in that mix. With regard to -- and I appreciated your
16 clarification that to the degree they are already in the state
17 they are not precluded from submitting proposals. If they are
18 good enough ratings to consider for proposals, recognizing that
19 that is not for a new generating unit, then can't you accept
20 that perhaps that BBB- is good enough for a new facility? It
21 seems like we should, at the very minimum, capture TECO.

22 MR. GUYTON: Commissioner, I would have to defer to
23 essentially the chief financial officer of a company that set
24 these, but there is a reason to differentiate between entities
25 that are building new facilities as opposed to entities that

1 have the assets in the ground.

2 CHAIRMAN JABER: Well, I need to understand it,
3 because as I said earlier, this is one of the specific
4 questions I had related to my earlier question. Isn't there
5 something you would voluntarily agree to change? Because I
6 personally don't see the difference between BBB versus BBB-.
7 And if there is a difference, I don't think there is a huge
8 difference in terms of credibility.

9 MR. GUYTON: And as I say, this really goes to
10 entities that would actually be building new generating assets,
11 but that is all that this particular minimum requirement is
12 applicable to. And that is an important distinction that I
13 think you need to pick up on. And the reason we draw that
14 distinction is because you are talking about going out into the
15 market on a company that is already stretched financially, does
16 already have a below investment grade bond rating, and asking
17 them to raise capital in the order of magnitude of a couple
18 hundred maybe \$300 million for a proposal. That puts further
19 stress on the entity. Unlike a situation where they would just
20 simply be building, or they would just simply be bidding in a
21 system sale that doesn't put additional stress on their
22 financial situation. And that was the rationale for drawing
23 the distinction.

24 CHAIRMAN JABER: Well, then what is the purpose of
25 the security package requirement? We had this same discussion

1 during the bid rule process, and I keep coming back to the
2 point. That is their problem. If you are covered from a
3 security package standpoint, I just don't see what the real
4 concern is. And I am giving you an opportunity to help me
5 understand. If it is good enough for the system sales, the
6 BBB-, why isn't good enough for a new generation unit?

7 MR. GUYTON: One has to be concerned about default
8 risk, particularly when you look at the default risk that I
9 outlined to you awhile back. Security provisions do not
10 provide a provision for default risk. Dealing with investment
11 grade entities does protect not only FPL, but more importantly
12 its customers from the potential for a default risk. If
13 somebody goes out and builds a power plant and then decides it
14 is going to default and seek bankruptcy protection as is
15 becoming remarkably commonplace these days, our customers need
16 a protection from that risk. The way we protect them from that
17 risk is dealing with entities that don't have such a great deal
18 of default risk, that being investment grade entities.

19 CHAIRMAN JABER: Well, what is the purpose of
20 performance security and step-in rights and a competition of a
21 security requirement if that doesn't capture default risk? You
22 know, candidly it sounds like you are being unreasonable on the
23 point. We may agree to disagree, but I would encourage you to
24 think about it some more.

25 COMMISSIONER DAVIDSON: And, Chairman, I had a

1 follow-up on this --

2 CHAIRMAN JABER: Commissioner Davidson.

3 COMMISSIONER DAVIDSON: -- point of the security
4 package requirements, and it is a question to staff. I would
5 like to know what determination, if any, staff has made as to
6 the reasonableness of the requirements set forth in the bid?

7 MR. MAUREY: Are you dealing with the objection of
8 financial viability and security requirement specifically?

9 COMMISSIONER DAVIDSON: Yes. Well, I am actually
10 talking about the whole security package of requirements;
11 performance security, completion security, and I'm trying to
12 figure out there are certain amounts that have been set forth
13 by FPL, and I just want to know if staff has looked at those
14 and said, you know what, those are reasonable based on this,
15 they make sense, or we don't know, we are just really deferring
16 to the company.

17 MR. MAUREY: I will have to defer to Mike on that.

18 MR. HAFF: You're right, Commissioner, that as PACE
19 has said that these completion security and performance
20 security numbers are higher than in the prior FPL Martin and
21 Manatee RFP, and are also higher than the other RFPs that were
22 mentioned earlier from Power Corp and TECO. FPL has
23 represented that these numbers are calculations based on its
24 best estimate of completing a power plant that is not
25 completed, the completion security, or if the plant does not

1 perform as it is projected to perform for FPL to buy
2 replacement capacity and energy to meet its needs. So while
3 they are higher than we have seen in the past --

4 COMMISSIONER DAVIDSON: Well, has staff done an
5 independent analysis of the reasonableness of their
6 requirements or assessed their requirements? Do you have any
7 applicable industry standards?

8 MR. HAFF: Not based on this first impression, no, we
9 do not.

10 MS. BROWN: If I may interject here, Commissioner
11 Davidson, that is because in part of the bid rule, which
12 provides that the Commission will make these determinations
13 based upon the oral arguments of the parties and the written
14 submissions. So we haven't gone out to collect a lot of our
15 own facts. If you don't believe that you can make some sort of
16 a preliminary -- give some sort of a preliminary view on it,
17 part of that may be that you need more facts, and that would
18 then take place in the need determination hearing. But we are
19 not supposed to have an evidentiary proceeding here, so it is
20 kind of an odd duck.

21 COMMISSIONER DAVIDSON: What are we doing? I wasn't
22 here during the bid rule. Is this just sort of a nothing
23 strikes us as bad, so move forward type of exercise?

24 CHAIRMAN JABER: Or this gives me heartburn and you
25 need to consider changing it. And if you don't, you go forward

1 at your own risk in the need determination. Again, each
2 Commissioner needs to speak for himself/herself, but from my
3 perspective, Commissioner Davidson, in response to your
4 excellent question, it was on its face does the RFP violate the
5 rule. And then I'm looking at it from -- and in violating the
6 rule is it onerous, commercially infeasible, unduly burdensome,
7 and whatever that fourth one is. And then there are some
8 things that may defy logic or may give you concern above that.
9 And the whole idea was to provide guidance so that we can
10 eliminate a lot of the controversy when we get to the need
11 case. Commissioners, have I left anything out? That was the
12 intent, right? In a very expedited fashion. You had a
13 question, Commissioner Baez?

14 COMMISSIONER BAEZ: Yeah. And, Mr. Guyton, I don't
15 know, if in addressing the issue of the security package
16 requirements you answered my question, the question I'm going
17 to ask. I may not have heard it, but you did hear counsel for
18 PACE throw out some numbers. Obviously the previous
19 Martin/Manatee RFP and what the requirements were there, and
20 also I think Progress Energy had a Hines project where he
21 offered some numbers there. And I'm not sure I heard you
22 address what the reason for the differences might be. Did you
23 do that?

24 MR. GUYTON: No, I haven't quite got there.

25 COMMISSIONER BAEZ: You hadn't gotten there. Okay,

1 great. Then I will let you go on, then.

2 MR. GUYTON: Well, let me address that right now.
3 Yes, Florida Power and Light Company has requested a higher
4 completion security amount in this RFP than it did in the last
5 RFP. Two reasons. We went back and looked at the completion
6 security requirement in the last RFP, recognized that it would
7 be exhausted in five months, and we didn't think that was
8 enough protection for our customers.

9 So we went out and we did an analysis which I have
10 laid out in detail in the text of our response that said if we
11 had to go out at the end of -- or about the time this unit was
12 going to come on and secure an alternative, what would it cost
13 us. And it would cost us the cost of going out and building
14 some CTs to supplant it, and then ultimately building a
15 combined cycle unit on an expedited basis. There would be a
16 phased construction. What money would we save? Well, we would
17 obviously save what we would have paid under the contract, so
18 you have to offset that from that expedited construction cost.

19 And then you have to go out and calculate using
20 production costing models essentially how much you would be
21 paying for placement energy and replacement capacity while you
22 were out building this and you weren't having capacity
23 delivered to you. That is the calculation that we performed.
24 Then we divided that by our total need to get a dollars per
25 megawatt basis. And that is the basis for our completion

1 security. We thought that was the risk that our customers
2 faced for a failure to complete on time, and that is what we
3 should attempt to mitigate in terms of cost. It is not exactly
4 a worst-case scenario, but it is enough to protect our
5 customers in most instances if that happens.

6 COMMISSIONER BAEZ: And when you came -- and forgive
7 me, but what changed between this RFP and the last to make you
8 say, you know, five months is not enough? Or did you have any
9 idea that it was five months the last time when you set \$50,000
10 per megawatt?

11 MR. GUYTON: Two things changed. One, this is an
12 acknowledge in hindsight that we didn't ask for enough last
13 time. We didn't get out there and ask enough to necessarily
14 protect our customers in the event of a failure to complete.
15 And, I mean, it is not easy to admit that, but that is where we
16 found ourselves. And we did not want to make that mistake
17 again. Secondly, the nature of the industry that is bidding
18 into this has changed remarkably. The risk profile of the
19 entities that are bidding into this has gone up dramatically as
20 is evidenced by the fairly significant downgrades that you have
21 seen in the IPP industry. And there is a much higher risk of
22 somebody not completing a unit now than there was 18 months ago
23 when we established the completion security for the last RFP.
24 So those two factors are the ones that have changed.

25 CHAIRMAN JABER: Commissioner Deason.

1 COMMISSIONER DEASON: Yes. In relation to the
2 completion security and the performance security, have you in
3 any way offset your equity penalty adjustment or your proposed
4 equity penalty adjustment for the fact that these risks would
5 no longer be borne by you and your customers, but would be
6 transferred over to the winning bidder? So is there any
7 adjustment to the equity penalty?

8 MR. GUYTON: The short answer is that we have made a
9 specific adjustment to the methodology that we used to
10 calculate the equity adjustment to offset for reduced risks
11 that are associated with there being a performance and a
12 completion security for proposals that we might contract with
13 as opposed to one that if we were to build ourselves. So the
14 answer to that is yes. And, indeed, in Appendix C where we
15 have outlined the equity adjustment, we have explicitly
16 captured those mitigating risk factors, as the Commission
17 instructed us to the last time in our last need case.

18 I have touched briefly on the Power Plant Siting Act
19 deadline, the application filing deadline. It is very simple.
20 For somebody to meet a June 2007 in-service date, they need to
21 file that application by April of 2004, or they are going to be
22 at risk of missing the in-service date. It is a way to ensure
23 that. And we are not imposing anything on proposers that we
24 are not proposing on ourselves. We are doing the pre-PPSA site
25 work, as well. We'll have to expend those costs just like a

1 proposer will. That is a cost of doing business. There are
2 development costs associated with getting units in a position
3 where you can bid them into an RFP or use them in an RFP.

4 Should we insist upon a minimum level of experience?
5 I think the answer to that is obvious. We want to protect our
6 customers from the risk of somebody that is totally
7 inexperienced coming in and building and operating a plant.
8 But PACE's counsel is a bit confused about what we have
9 required. We have not required five years of experience with
10 prior building construction, development, and permitting of a
11 power plant. They only have to do that activity once before.
12 They have just had to go through the development and building
13 construction process once. What they need five years
14 experience on, either they or a party they are willing to
15 contract with, is the operation of a similar power plant. That
16 is because you just need to have a track record. That is a
17 relatively brief track record, but we think it is necessary to
18 protect our customers.

19 PACE argues that an equity adjustment violates the
20 bid rule. Here is what you had to say in our most recent need
21 determination case. "Consideration of an equity adjustment is
22 appropriate." Now, I know you didn't embrace an equity
23 adjustment in that case, but you did say that in future
24 dockets -- and I am quoting here, "A case-by-case examination
25 of the entire circumstances surrounding the evaluations of PPAs

1 and the presence or absence of any mitigating factors shall be
2 considered." And as I pointed out, Commissioner Deason, we
3 have captured mitigating factors in this analysis.

4 Also, I would remind you, you chose not to amend your
5 bid rule to prohibit equity adjustments when you revisited it
6 just the first part of this year. An equity adjustment does
7 not violate the bid rule. PACE takes issue with our proposed
8 evaluation fee. We have showed you that it is cost-based as
9 required by your bid rule, and we have also explained in
10 supporting affidavits that there not appreciable variations in
11 cost as opposed to a variation in our proposal as versus an
12 entirely different proposal. They still require essentially
13 the same analytical effort.

14 That leaves me with the regulatory modification
15 clause and then a couple of things that Mr. Moyle addressed
16 that I want to brief you on. I'm very cognizant of the time,
17 Madam Chairman. I am trying my best.

18 PACE objects to us including a regulatory
19 modification clause. Understand what that clause does. One,
20 it requires FPL to defend the validity of a contract and its
21 right to recover capacity or contract payments. Two, in the
22 event of a disallowance, it passes the disallowance to the
23 seller. And, three, it allows the seller, not FPL, to
24 terminate the contract in the event of a disallowance being
25 passed to them.

1 Now, we pointed out in a supporting affidavit in our
2 pleading that this provision does not stop an entity from being
3 able to finance a project unless they are remarkably weak
4 anyway. We have a number of contracts, purchased power
5 agreements that have regulatory modification or regulatory-out
6 provisions in them. They were all able to be successfully
7 financed. But just a year ago we had a regulatory modification
8 provision in our RFP to which developers could take exceptions.
9 Only four out of 13 took exceptions during that period of time.

10 You will recall what was happening in the IPP
11 industry. There were almost constant downgrades at that time.
12 Only four of them apparently thought that they might not be
13 able to finance if that was in there. We think that is
14 compelling evidence that these provisions do not make a
15 contract or a project unfinanceable.

16 Commissioner Davidson, you asked the question would
17 we be willing to take a look at language in the PPA that is
18 consistent with the bid rule. Actually what we are trying to
19 address with the modification, the regulatory modification is
20 that risk of disallowance over and above the bid rule. The bid
21 rule has addressed what should be recoverable, but it leaves a
22 small amount, a modest exposure, if you will, potentially
23 unrecoverable, a disallowance.

24 COMMISSIONER DAVIDSON: Does the RFP itself, though,
25 sort of track the language of the bid rule so that if bidders

1 are taking out, seeking financing they can at least point to
2 this and say, look, there is only what you have described as a
3 modicum over and above what might be at issue here at the
4 Commission, but we can at least get the biggest chunk of it
5 through this language.

6 MR. GUYTON: It does not, but it doesn't need to
7 because they can take the bid rule itself to their financier
8 and say this is a very modest risk.

9 COMMISSIONER DAVIDSON: Well, is there a problem,
10 though, including that in the contract documentation itself? I
11 know bankers don't want to look at statutes, they want to look
12 at the deal documents.

13 MR. GUYTON: As long as it has the other provisions
14 that allocate that risk in a fashion that we have, I think that
15 could be perhaps recrafted. That certainly is something that I
16 can take look at. It has also been suggested that this is
17 discriminatory, that this is not imposed upon utilities. But
18 the fact of the matter is the entity that performs and earns
19 the return is the entity that ought to assume the risk of
20 disallowance. We do it with our own units and IPPs that bid in
21 should do it with their units.

22 Briefly, the dual fuel requirement that was raised
23 that we thought had been put to rest. We have modified the
24 dual fuel requirement to essentially allow an entity to bid in
25 a Manatee type alternative, just like we had in our last RFP.

1 Our Martin unit was dual fuel, and it had the dual fuel
2 capability. You may recall that Manatee could draw potentially
3 on two different pipelines, and we thought was an adequate
4 substitute for dual fuel capability. The question was raised
5 do we have -- does FPL have firm transportation that it could
6 use under both pipelines to serve Manatee, and the answer to
7 that is yes. And we have imposed that same requirement to be
8 consistent with the Manatee proposal. We have the capability
9 and we have firm transport available on both pipelines to be
10 able to serve that plant.

11 CHAIRMAN JABER: Mr. Guyton, on that point it was
12 suggested that instead of firm contracts which come with that
13 an expense on two separate pipelines, that perhaps a more
14 prudent approach would to have a firm transportation contract
15 on one pipeline with a commitment that there is a right to
16 interrupt on a second. What's wrong with that?

17 MR. GUYTON: Well, interruptible gas is not a firm
18 supply of gas. And if you are relying upon this unit for
19 reliability purposes for most of the hours of the year, you
20 need to have firm transportation to the unit. That is what we
21 have under Manatee. We can draw on both pipelines because we
22 have an allocation of firm transportation. If you have firm --

23 CHAIRMAN JABER: You are not drawing on both
24 pipelines at the same time, though.

25 MR. GUYTON: No, you are not.

1 CHAIRMAN JABER: So if any bidder could present you
2 with a contract between it and the pipeline that there is a --
3 I will get away from using firm -- that there is a written
4 commitment, agreement, contract to interrupt on that second
5 pipeline, what's wrong with that?

6 MR. GUYTON: I want to make sure that we are talking
7 about the same thing here. There are two types of
8 transportation, one is firm and one is interruptible.
9 Interruptible is a lot like as-available energy. You buy it
10 when it is available. And the proposal that has been made here
11 is that one should be firm and one should be interruptible.
12 But they also say they want to be consistent with Manatee.
13 Well, Manatee has firm right to draw on both pipelines, and
14 that is what we have tried to do. We have revised this RFP to
15 make it consistent with the position that we took in the
16 Manatee need determination case.

17 CHAIRMAN JABER: Mr. Guyton, I understand the
18 difference between firm and interruptible.

19 MR. GUYTON: I'm sorry. I didn't mean to insult you.

20 CHAIRMAN JABER: Saying that, aren't gas pipelines
21 always available? I mean, isn't that why you use Gulfstream
22 and FGT?

23 MR. GUYTON: No, gas pipelines are not necessarily
24 available. Interruptible is there when it is there and
25 sometimes the pipeline is maxed out. That is why one contracts

1 for firm transportation.

2 CHAIRMAN JABER: Well, then if that is the case, then
3 how firm was your contract for Manatee/Martin?

4 MR. GUYTON: We had firm capability on both
5 pipelines, to my understanding, and I will certainly correct it
6 if I am misrepresenting this in any fashion. We had firm
7 transport capability under both pipelines into Manatee.

8 CHAIRMAN JABER: Via contract?

9 MR. GUYTON: Or tariff. But whatever the contractual
10 arrangement is, whether it be special agreement or tariff. I
11 would have to check. But, yes, there is a contract, right.

12 CHAIRMAN JABER: Mr. Moyle, I want you to respond to
13 this. I want to make sure I understand this point. Why can't
14 you enter into a contract with both pipelines for firm capacity
15 understanding that you would only go to the second one when
16 capacity wasn't available for the first one?

17 MR. GREEN: Rather than Mr. Moyle, I will try to
18 answer it. Firm capacity -- and don't quote me on figures,
19 maybe it is 70 cents a thousand Btu or something. You have to
20 pay for it. And you would pay for it whether you use it or
21 don't use it. It is a reservation that you have got some
22 capacity out there. The Manatee plant relies on -- and it is
23 true, Florida Power and Light has firm capacity, and they pay
24 these capacity payments for their system capacity needs. And I
25 don't know what their total gas system capacity needs are, but

1 let me guess it is 4,000-megawatts. I don't know if that is
2 right. So they probably have 4,000 megawatts combined between
3 FGT and Gulfstream on firm capacity payments they are paying.
4 They don't have 8,000 megawatts of firm capacity payments for
5 gas, they have 4,000. And they can mix and match that. That
6 is true.

7 But to require an IPP to basically reserve twice as
8 much as it will ever need is not an apples-to-apples comparison
9 to FPL. They are not reserving twice of what they will ever
10 need. They are not reserving 8,000 megawatts if 4,000 is the
11 amount of gas generation they have. You know, the more
12 commercially feasible way for an individual project, not a
13 total system, is to have firm transportation on one pipeline.
14 And, again, keeping in mind this is just -- and then to have an
15 enabling agreement to get on the other.

16 A signed agreement that says we are enabled either
17 through a direct interconnect to that second pipeline or
18 because the two pipelines physically crossover, Gulfstream and
19 FGT tie together somewhere, that there is some interconnection
20 possibilities. That is more feasible to show in that rare
21 occasion that one of the pipes has a transportation problem.
22 And these are two very, very reliable gas pipelines. This is a
23 very rare occurrence that you are considering. And to require
24 an IPP to basically pay two 75 cent/1,000 transportation
25 charges on 100,000 Btus a day is unrealistic. It is

1 commercially infeasible.

2 CHAIRMAN JABER: Mr. Guyton, you have reserved your
3 total capacity through both of those pipelines, there is no
4 duplication there. You use both -- you have the ability to use
5 both pipelines to achieve your total capacity needs, is that
6 correct?

7 MR. GUYTON: Yes, Commissioner. That is my
8 understanding is that we can use both pipelines to serve plants
9 and that we have some uncommitted transport on each in the
10 event of a failure of one.

11 CHAIRMAN JABER: But that is to achieve your total
12 capacity needs.

13 MR. GUYTON: I'm reluctant to answer that only
14 because I'm afraid I may mislead you. I don't know the answer
15 to that.

16 CHAIRMAN JABER: No problem.

17 MR. GUYTON: My impression is it is slightly greater,
18 but I don't want to -- I just don't want to answer because I
19 may mislead you.

20 CHAIRMAN JABER: No problem. But you would also
21 agree that -- are you paying for that capacity whether or not
22 you use it?

23 MR. GUYTON: If it is firm, yes.

24 CHAIRMAN JABER: Commissioner Deason, you had a
25 question?

1 COMMISSIONER DEASON: Well, I guess the question that
2 I have is are you open to look at alternatives to a strict
3 requirement that there be -- using Mr. Moyle's terminology --
4 double redundancy in the sense that if for some reason a
5 pipeline would go down, and that is the particular pipeline
6 that the winning bidder would be using, that if there were a
7 provision in the contract that would require them to repay you
8 for replacement energy in that rare event that that pipeline
9 would go down, would that meet your needs?

10 MR. GUYTON: Quite frankly, I'm not authorized to
11 respond to it, but I can get an answer to that, Commissioner
12 Deason.

13 COMMISSIONER DEASON: Let me ask Mr. Green. Is that
14 something that would be a cheaper alternative? You say it is a
15 very unlikely event, and I agree, it is an unlikely event for a
16 pipeline to go down. It happened once about five years ago,
17 and it was a lightning strike, and I think there have been
18 provisions put in to hopefully prevent that type event from
19 occurring again, but obviously other things could happen in the
20 future. But would you be willing, would you be willing to put
21 together a bid that would -- if you were a bidder -- that would
22 protect FPL and its customers in the unlikely event that the
23 pipeline you relied upon went down and FPL had to go and get
24 replacement energy?

25 MR. GREEN: Absolutely. And I think the enabling

1 agreement does that. I mean, you show the investor-owned
2 utility that you have a firm transportation contract. In that
3 very rare occasion, if it goes down, look, I am
4 interconnected -- I paid for the interconnection to the second
5 pipeline, perhaps you do that. Or, look, I'm within a certain
6 distance of the physical connection of the two pipelines
7 already, so if one goes slow, the valves can still get gas to
8 me. And I have the ability to go out there and shop for
9 interruptible. You know, I think FPL has the same problem if a
10 gas pipeline goes down.

11 Again, Florida Power and Light does not have firm
12 capacity, double redundancy, to use my attorney's term. I
13 mean, they don't reserve 8,000 megawatts for a 4,000 megawatt
14 unit, so if one goes down they have the same problem. It is a
15 rare occurrence. And to require an IPP to basically reserve
16 twice as much as the plant needs when the FPL system is not
17 reserving twice as much as what their system needs seems
18 unfair.

19 CHAIRMAN JABER: Mr. Guyton, I can count half a dozen
20 people sitting in the audience, including Mr. Litchfield
21 sitting next to you, is there someone that can answer that
22 question for me about whether you have got double redundancy as
23 it relates to Martin/Manatee?

24 MR. GUYTON: There is no one here. We will have to
25 try to contact someone in Juno. I mean, it is a fairly

1 technical question about fuel capability on the pipeline.

2 COMMISSIONER BAEZ: Isn't that something that shows
3 up in fuel filings?

4 MR. HAFF: Repeat that question, I'm sorry?

5 COMMISSIONER BAEZ: Wouldn't that information be
6 something that showed up on fuel filings?

7 MR. HAFF: You mean the amount of gas that Florida
8 Power and Light --

9 COMMISSIONER BAEZ: If you were paying for firm gas
10 twice, twice over?

11 MR. HAFF: Well, the amount would show up and --

12 COMMISSIONER BAEZ: The amount would show up but not
13 confirmation of whether there was firm reservation on two
14 separate lines?

15 MR. HAFF: I don't understand that the fuel filings
16 show that.

17 COMMISSIONER BAEZ: Okay.

18 CHAIRMAN JABER: I missed Commissioner Baez'
19 question.

20 COMMISSIONER BAEZ: No, I was just curious if that is
21 not the type of information -- I mean, I guess that strategy
22 and that policy, while it might be good, might be subject to
23 all sorts of scrutiny at some point as to whether it was
24 absolutely necessary.

25 MR. JENKINS: I really can't -- unfortunately, I

1 can't answer the question. What we focus on in the fuel clause
2 is if the amounts going through, and I really can't tell you
3 now if there is a separate reservation charge.

4 COMMISSIONER BAEZ: Have you ever heard of that?

5 MR. JENKINS: Yes. Yes, I have heard of it. And
6 also I would like to point out --

7 COMMISSIONER BAEZ: Have you heard of it like I have
8 heard of UFOs? I mean, is it common?

9 MR. JENKINS: Our real concern is not with no much
10 with two pipelines, but having two separate fuels. Every time
11 there is a darn hurricane in the Gulf, we spend afternoon after
12 afternoon because they are shutting down all the wells for gas
13 operator safety on the platforms. And what comes into play is
14 not so much pipeline capacity, but just the sheer availability
15 of natural gas from the Gulf. Now, in the future, it may be a
16 little bit different with -- I don't think we will have a
17 hurricane in the Gulf and a hurricane in the Bahamas if we ever
18 get the pipeline under the Gulfstream built. That is probably
19 not what you wanted to hear.

20 CHAIRMAN JABER: Commissioner Davidson, you have got
21 a question?

22 COMMISSIONER DAVIDSON: I have got couple of
23 questions. Have you finished the main part of your
24 presentation?

25 MR. GUYTON: I have one more point, but I would be

1 happy to entertain questions.

2 COMMISSIONER DAVIDSON: Okay. Well, let me go ahead
3 and get a couple of these out. Developer experience
4 requirements.

5 MR. GUYTON: Uh-huh.

6 COMMISSIONER DAVIDSON: Is there a way to provide for
7 language that would not exclude creative and innovative
8 management teams or arrangements of people and companies that
9 could bring to you the experience you feel you need even though
10 the company itself may be newly created, there may be a
11 wholly-owned subsidiary that is brand new that perhaps wouldn't
12 qualify under the rule. I think in an emerging market there
13 are lots of executives out there that bring a lot of experience
14 to the table, but it might not come in a form that would have
15 as a form five years of experience. And I want to make sure
16 that the language is drafted such that it does allow for
17 something that brings to the table the experience even though
18 it may not be in the form of an entity that has got the exact,
19 as an entity, experience that you seek. If you could comment
20 on that.

21 MR. GUYTON: We have in the website questions as
22 follow-up to our pre-bid proposal we have been asked about this
23 minimum experience requirement. And we have pointed out the
24 response there are two different elements. One is that you
25 have to have been able to develop, permit, and construct, and

1 you have only got to show that you have done it once. And then
2 separately you have to have five years of operational
3 experience, either you or somebody you contract with. Or as we
4 pointed out in this, another entity that is willing to
5 guarantee your performance. So we have tried to capture that.

6 We have stopped short of taking and trying to look at
7 individual resumes of individual people because that is
8 problematic and difficult and subject to all sorts of
9 criticisms about how subjective that process is. We tried to
10 come up with a brighter line to be able to address what passes
11 and what does not rather than putting ourselves in the position
12 of having to defend a decision about subjective judgment.

13 But there is another aspect here. There needs to be
14 some entity, not just individuals, but some entity that has a
15 track record, as well. That can be the proposer, or it could
16 be another entity that they may want to joint venture with, but
17 they are willing to guarantee it. But we think the customers
18 ought to have some experience to be able to look to that could
19 be guaranteed on an organizational basis. I hope that is
20 responsive. And we have tried to take a look at that and craft
21 language that addresses that.

22 COMMISSIONER DAVIDSON: Just one additional question,
23 Madam Chair. Thank you. Turning to the issue of the
24 evaluation fees. There is a fee of \$10,000 for each bid, any
25 variation in key terms are treated as a separate project and

1 there is another \$10,000 assessed. How did FPL arrive at that
2 \$10,000 fee?

3 MR. GUYTON: We took a look at the external costs
4 that were incurred in the last RFP, outside consultants, notice
5 requirements, software requirements, and priced that out and
6 then divided it by the number of proposals that were received
7 to come up with a figure. And there is more detail of just how
8 we did this in our response, but that calculation came out to
9 \$9,600 per proposal. That did not capture the internal FPL
10 costs in terms of Mr. Litchfield's time, or the analysts time,
11 or the resource planning, or -- it was an external cost. And
12 we did that because we thought that was favorable to the
13 developers. Had we included those internal costs, the fees
14 would have been significantly greater than the \$10,000 that we
15 required. But we did that because the bid rule says that the
16 fee needs to be cost-based.

17 COMMISSIONER DAVIDSON: I appreciate that. A
18 follow-up question to PACE on this point. Do you have any
19 evidence as to why -- that supports your contention that this
20 amount is excessive or is it just your opinion at this point?

21 MR. MOYLE: Well, we have the evidence from what
22 Power Corp has done in their past ones, there past two, I
23 believe, where they said 10,000 plus you get a couple of
24 variations on that and anything addition to that is 1,000. So,
25 you know, we haven't been able to conduct any discovery, but it

1 tells me that there is a pretty big divergence in cost with
2 respect to how one utility evaluates bids and what it does and
3 then how Light does it. I don't know what their costs are, how
4 much they are paying consultants. You would have to really dig
5 into that number. It just seems to us in terms of looking at
6 what Light did last time, what Power Corp did the previous time
7 and is doing now that it is out of whack.

8 COMMISSIONER DAVIDSON: Another hopefully minor
9 point. Cash deposits and interest accrued. I am a little bit
10 unclear on the language there. Is it FPL's intent to keep or
11 not keep -- to keep or return the interest earned on cash
12 deposits that are paid by a bidder who ultimately follows
13 through with its end of the contract?

14 MR. GUYTON: That is not addressed in the RFP. I
15 mean, we are silent on that. That is a PPA provision, that is
16 a purchased power agreement provision that is negotiable
17 between the parties. That is not a minimum requirement. We
18 have not taken a position one way or the other on that.

19 COMMISSIONER DAVIDSON: I'm assuming FPL, though,
20 would have no problem returning interest on a deposit from a
21 performing party?

22 MR. GUYTON: I would be surprised if they did, but
23 the fact of the matter is we have not taken a position one way
24 or another on that. That is a negotiable term.

25 COMMISSIONER DAVIDSON: Go ahead, Mr. Moyle. Did you

1 have a --

2 MR. MOYLE: I guess, you know, we raised the point
3 about the contract terms and whatnot, that you are basically
4 deemed to have accepted them unless you specifically note them.
5 And this just kind of points that out, that if somebody didn't
6 go through the contract and pointed that out as an exception,
7 when you are sitting at the table they are going to say, hey,
8 you didn't come in here on the interest deal. You know, you
9 have got to put 100 grand in, or whatever the number is, and
10 the language in the proposed PPA says for the benefit of FPL.
11 And they would argue for the benefit means us. You have deemed
12 to have accepted it. And I think that sort of highlights the
13 unfairness of the process that was set up.

14 COMMISSIONER DAVIDSON: And perhaps language can be
15 drafted that differentiates between parties that perform and
16 parties that don't perform. I hope so. A question for Florida
17 Power and Light on the equity penalty. As I understand it, in
18 the last FPL case the Commissioners expressed a desire to see
19 evidence on other mitigating factors related to the cost of
20 capital. Did FPL address any such mitigating factors in the
21 RFP?

22 MR. GUYTON: Yes, Commissioner, we did. In
23 Appendix C we set forth in detail the methodology that we will
24 employ. There is an entire subsection there that addresses
25 mitigating factors and the way we are going to attempt to

1 monetize those as PACE's counsel has suggested would be
2 appropriate. That is a term of the RFP.

3 COMMISSIONER DAVIDSON: One last question, I believe.
4 A policy question to PACE. You have raised some issues with
5 regard to the PPA, but would you all rather see a PPA in an RFP
6 or not? I mean, it seems to me that that sort of brings to the
7 table and at least raises issues for negotiation, additional
8 topics that it gets the parties a little bit further along in
9 the discussion. So I'm curious as to your thoughts on the PPA.

10 MR. GREEN: Commissioner, I think PACE members and
11 any IPP appreciates the fact that Florida Power and Light or
12 any investor-owned utility would give out the PPA or a draft
13 PPA as an indication of what might be expected of them. I
14 think that is very good. But the language is such that it is
15 almost like if you don't take exception of this -- and this is
16 not a minimum document, this is a fairly lengthy draft PPA --
17 if you don't review it and take exception to things now, you
18 basically might be held to all of those things right now.

19 In most PPA negotiations the final contract is
20 negotiated just as you would expect in the contract negotiation
21 phase, and that is what we would seek. I mean, we appreciate
22 the idea that there are -- and we have been able to identify
23 several issues that concern us, and I would envision that
24 bidders if and when they do bid would raise several of those
25 issues. But to say that if you don't raise them all now

1 forever hold your peace is sort of an unrealistic expectation.
2 And we would -- you know, we appreciate the fact that the PPA
3 is there, but don't lock it in. You know, let the two parties
4 when it gets to the contract negotiation stage negotiate the
5 final PPA. That is what contract negotiations are. The PPA is
6 a contract.

7 CHAIRMAN JABER: Mr. Guyton, I think it is good you
8 have included the PPA in the RFP, too. That wasn't required.
9 I think as Commissioner Davidson says, it lends itself to
10 additional discussion. But PACE has identified at least one
11 example, and you acknowledge that that example lends itself to
12 additional negotiation. For the record, did you intend to
13 restrict the negotiations on the PPA in any way by including
14 the PPA in the request for proposal?

15 MR. GUYTON: We intended to facilitate the
16 negotiations by including that. And we did it in two ways.
17 One, we said here are the terms that we would like to see. And
18 obviously it is limited to a particular type of power plant, so
19 obviously other things could be bid in and it doesn't address
20 every conceivable type of proposal. But here is the conceptual
21 framework that we would like to have.

22 And we said to the extent that you can't agree to
23 this, state an exception and give us alternative language, all
24 of which is helpful in terms of facilitating negotiations if we
25 get to that point. We said also that we need to know those

1 exceptions to be able to assess the risk associated with this
2 alternative relative to other alternatives. PACE argues, well,
3 we don't know how that is going to be evaluated. Well, it is
4 going to be part of our risk assessment, we told them that.
5 But we can't tell them how we are going to assess the risk
6 completely, because we don't know to what terms they are going
7 to accept and how many versus what somebody else takes an
8 exception to.

9 CHAIRMAN JABER: How is it a bidder -- frankly, how
10 is it that the Commission staff in a need proceeding would be
11 able to understand what is part of the conceptual framework
12 versus a specific term of a PPA that would allow that interest
13 be returned? And I see the point. I think it is a valid
14 point. There was a specific term not included in the PPA. Did
15 they need to take exception to that, i.e., the interest being
16 returned? I mean, how did you make the distinction between
17 this is the conceptual framework versus we expect that you
18 would have raised this as a concern or you are forever
19 precluded from it?

20 MR. GUYTON: Well, the primary way we did that is
21 that if we felt like that this was an absolute no go
22 alternative, or a must have alternative. We took it out of the
23 PPA and made it a minimum requirement in the RFP, okay? So
24 they know up front that those -- and there is at least the
25 regulatory modification provision as an example of that.

1 Everything else is on the table to negotiate, but they need to
2 let us know that they take exception to it, because we are
3 assessing the risk associated with contracting with this
4 entity. And unless they state that exception, we are under the
5 distinct impression that it is fine with them.

6 CHAIRMAN JABER: Mr. Guyton, either it is, like, late
7 in the day, and I am finding you to be particularly difficult
8 or you are talking in circles because you don't realize who you
9 are talking to. I don't know. Either way, it is not good for
10 you.

11 MR. GUYTON: I apologize. It is not my intent.

12 CHAIRMAN JABER: So let's start over. My question
13 is -- and I thought you answered that if it is not -- if it was
14 important enough to you and part of the conceptual framework
15 you put it into a minimum requirement and disclosed it vividly
16 in the RFP and that everything else was negotiable.

17 MR. GUYTON: That's correct.

18 CHAIRMAN JABER: But then you followed up with but
19 the onus is on them to raise an exception otherwise we can't
20 measure the risk. What does that mean, that the ability to
21 have your interest returned is a measure of risk that you want
22 to evaluate later?

23 MR. GUYTON: To use the interest is not something
24 that had even occurred to us, it was just simply a matter that
25 was going to be subject to negotiation. And, in fact, quite

1 frankly it wasn't important enough to even find its way into
2 the PPA.

3 CHAIRMAN JABER: Okay. Would you agree that there
4 might be other things like that that are just negotiable and --

5 MR. GUYTON: Absolutely, Commissioner. We are trying
6 to find out whether we have a meeting of the minds, or whether
7 we are going to have to negotiate a thousand things, or ten.
8 That is what we are trying to find out.

9 COMMISSIONER DAVIDSON: Can I ask probably a repeat
10 of your question, Chairman?

11 CHAIRMAN JABER: Please.

12 COMMISSIONER DAVIDSON: Thank you. Is it accurate or
13 inaccurate to state that a bidder who does not object to a
14 specific term in the PPA will, as a matter of contract law and
15 interpretation by FPL, be bound by the PPA? If they don't
16 object they are bound, there ain't no negotiations? Accurate
17 or inaccurate and then explain.

18 MR. GUYTON: I think inaccurate. I don't think it
19 goes quite that far.

20 COMMISSIONER DAVIDSON: How far does it go?

21 MR. GUYTON: I think it goes to the point of we need
22 to understand, not as a matter of contract law, but what you
23 are offering us. And the way to do that is we have told you
24 what we would like to see in a contract, that is not an offer,
25 this is what we would like to see. You are going to bid in and

1 we would like to know the elements of contract that you are
2 offering us based upon this price and then we can take that and
3 can assess that heads up against all the other proposals.
4 Without that, without requiring them to state exceptions,
5 without requiring them to tell us alternatives, we can't assess
6 the relative risk of one proposal to the other.

7 COMMISSIONER DAVIDSON: A follow-up on that and then
8 I will hush. The PPA is just a negotiating document. Bidders
9 put in, then you engage in contract negotiations with those
10 bidders, but they are not bound by the PPA, and you are not
11 going to say they are bound by the PPA. Rather, you are saying
12 these topics are topics we need to address and here is our
13 position on it, now give us yours.

14 MR. GUYTON: Well, it's not quite that simple,
15 because if they were to, for instance, sandbag and raise no
16 objection, get to the PPA, and it turns out that there is a
17 host of exceptions that they -- that this bid is not what it
18 appears to be, then I suspect the risk assessment that we have
19 done of coming -- of the ability to come to contract with this
20 entity is going to change dramatically. Is that binding in the
21 negotiations, does it create a contract? I don't think it
22 does. It changes the risk assessment, and that is what we are
23 trying to do. We are trying to find out how close to terms we
24 are with this Bidder A versus Bidder C.

25 COMMISSIONER DAVIDSON: Finally, and this really will

1 be a final comment. I'm not saying one approach is better than
2 the others, I'm just trying to understand what it is so that it
3 is either binding or not, and the parties have similar and
4 consistent expectations about the role of the PPA. That is
5 really my focus of these questions.

6 CHAIRMAN JABER: As were mine, Commissioner. And
7 really it is also for the purposes of the need case. I want to
8 make sure that our staff understands, too, and that we do. I
9 thought it was a simple question.

10 MR. GUYTON: I'm sorry, I thought I had given a
11 simple answer. And I am obviously not striking a responsive
12 cord here. But there are two elements; one is that we need to
13 be able to perform a risk assessment one against the other and
14 the extent to which they have stated exceptions gives us an
15 idea of the risk that we might anticipate in terms of
16 contract --

17 CHAIRMAN JABER: I think the difficulty might be none
18 of us know what is not in the PPA that is subject to
19 negotiation. But if you can just give me reassurance or a
20 commitment that what was important and what was worthy of
21 evaluation, what you will consider for evaluating the bids has
22 been clearly identified in the RFP, I can be fine. Isn't that
23 simple? Is that not simple?

24 MR. GUYTON: Yes, it is simple. What was in the RFP
25 was the minimum requirements that we absolutely had to have.

1 What was in the PPA is what we would like to have. We are
2 going to evaluate relative to each other whether somebody has
3 taken an exception to two things or 100 things in the PPA.
4 That is part of the evaluation of the risk assessment and that
5 was the only reservation that I had with trying to respond to
6 your question.

7 CHAIRMAN JABER: But for purposes of our evaluation
8 of what you did, we are going to look at the RFP and what you
9 used as criteria delineated in the RFP, and that is what is
10 consistent with the bid rule. Are we clear on that?

11 MR. GUYTON: Absolutely.

12 CHAIRMAN JABER: Mr. Moyle and then Mr. Guyton --
13 Commission Baez.

14 COMMISSIONER BAEZ: I'm sorry, I had a question. Mr.
15 Guyton, it sounds to me like you are trying to present this PPA
16 as just a little something extra. But the way you describe it,
17 its purpose, starts sounding like in the aggregate, although
18 any one of the terms of the PPA, any one of the remaining terms
19 that didn't make it as a full-fledged minimum requirement on
20 the RFP, but in the aggregate they all become a minimum
21 requirement. And I see a nodding, or a shaking your head, but
22 here is what I'm hearing. You are assessing, you know, how
23 many objections, whether you are dealing with ten objections or
24 a thousand objections to these little things, all right, and
25 you are assessing a value to that. And that has to become -- I

1 mean, there has to be a purpose to it. And in my mind that all
2 of a sudden starts becoming a minimum requirement in the
3 aggregate, something that gets broken down and says, you know
4 what, Bidder A has seven out of ten on the RFP requirements and
5 also, you know, he is either going to be a pain in the A on
6 this PPA thing or he is not and that makes him --

7 COMMISSIONER DAVIDSON: A what?

8 COMMISSIONER BAEZ: You heard me. He wants his
9 interest back. He is going to be a -- he is going to want his
10 interest back, whereas the other guy doesn't. And that is
11 going to make that bidder more attractive or less attractive
12 accordingly. So, it doesn't matter that you are holding out
13 all of these other terms that didn't make it on their own merit
14 into the RFP as minimum requirements, that PPA itself is a
15 minimum requirement to varying degrees, but it is. You are
16 using it to evaluate, aren't you?

17 MR. GUYTON: There is a distinction that I want to
18 draw, because the last part of your question is the important
19 distinction. The answer to the last part of your question is
20 are we using it to evaluate it? Yes, absolutely. Is it a
21 minimum requirement? No. I mean, minimum requirement, pass or
22 fail. Either you agree to it and you fail, or you pass. The
23 other are shades of gray and they go into the nonprice
24 evaluation that we are asked and expected to undertake as we
25 take a look at this. And that is what we have tried to capture

1 here. Is it part of the evaluation? Absolutely. I don't want
2 to mislead you there. We are going to evaluate and assess the
3 risk. Is it a minimum requirement in the sense that if you
4 raise an objection and propose alternative language, we are not
5 going to consider it? Absolutely not. We are going to
6 consider it and we are going to consider the entire risk and
7 assess the risk of the entire contract as it comes out, both as
8 to itself and in relation to others.

9 COMMISSIONER BAEZ: Can the relative number of
10 objections taken to the PPA compared to -- can it add or
11 subtract from other minimum requirements? I mean, can it help
12 you or harm your relationship --

13 MR. GUYTON: It won't add or subtract to the other
14 minimum requirements. It will go into an assessment of risk of
15 dealing with this particular bidder. And taking an exception
16 is not something that will necessarily be held against someone.
17 They may take an exception and propose alternative language
18 that we like better than we put in the PPA. That improves
19 their risk profile. It suggests to us that we have a greater
20 likelihood of getting to contract for that entity than another
21 entity. One entity may only except to ten, and another may
22 except to 100, but 99 out of 100 are de minimis. But two or
23 three of the ten are very important. In that instance, the
24 risk may be greater with the entity that has fewer objections.

25 But there is no way that we can anticipate at this

1 point in time, you know, what that risk assessment would
2 appropriately be. So what we have done is we have set it out
3 here and said we are going to evaluate this and we are going to
4 do our best to assess the risk, but we can't tell you more than
5 that until we know what we are in agreement with and what we
6 are not.

7 CHAIRMAN JABER: Do you say in the RFP, which the
8 rule does require, that the inclusion of the PPA may be an
9 attribute, criterion, or a methodology we are going to employ
10 in evaluating the bid? Is that clearly articulated?

11 MR. GUYTON: Yes, Commissioner, we indicate in the
12 discussion of the evaluation criteria of the nonprice
13 evaluation that that is one of the three elements that we are
14 going to assess.

15 CHAIRMAN JABER: You said you had one more point you
16 needed to address or were you done?

17 MR. GUYTON: Actually, Commissioner, this last
18 discussion addressed that.

19 CHAIRMAN JABER: Commissioners, do you have --

20 MR. MOYLE: Madam Chair, I just feel compelled. I've
21 got to make a point.

22 CHAIRMAN JABER: Go ahead, Mr. Moyle. I was going to
23 come back to you. I forgot.

24 MR. MOYLE: This clearly presents I think the
25 quandary that the IPP community is in, because you have heard

1 what Mr. Guyton explained, but if go to the core document,
2 which is the RFP that they issue, on Page 26 under proposer
3 exceptions, it says, and I quote, "Failure to state exceptions,
4 impose alternative language shall constitute acceptance of the
5 terms and conditions set forth in the RFP and/or the PPA." I
6 read that to say if you don't object, then this is what you
7 will be bound by.

8 But then as we go through the document and we use the
9 interest provision because it was one that I thought was
10 particularly unfair, but it was really designed to be
11 illustrative. There is a taxes provision that says that the
12 bidder has to agree to pay all future federal, state, county
13 taxes. I mean, you don't know what these taxes would be. If
14 you come in and say, you know what, I will pay the property
15 taxes, but I shouldn't have to pay all future federal taxes.
16 Let's not do that. You really don't know how that is going to
17 be evaluated. It goes into this noneconomic evaluation and it
18 could be the death knell for a proposal or not. And that is
19 sort of the uncertainty.

20 I mean, one bidder may say, you know what, I think I
21 can just get in there. If I can get in there I can negotiate,
22 so I won't take many exceptions. Another bidder may say you
23 know that clearly says I am deemed to accept it, so I am go
24 through and put in all of these exceptions, and they may get
25 knocked out in the noneconomic evaluation portion.

1 CHAIRMAN JABER: And, Mr. Guyton, the only thing I
2 would add to that as it relates to my concern is the weight you
3 would place on that objection versus the guy who wants his
4 interest back. I mean, how do they know that? We wouldn't
5 innovate that. Not that we are smarter, but if they don't know
6 it, we are not going to know it. Commissioner Baez would know.

7 COMMISSIONER DAVIDSON: I agree, Chairman, we don't
8 know it. And that is really what I'm trying to focus on is
9 just getting a process in place so everybody's expectations are
10 on the same page as to how this is evaluated. I want to
11 emphasize that I think it is great putting the PPA in there.
12 Don't be deterred from doing it again by this discussion and
13 all the issues. My thought is now, and, again, I am sort of
14 back to what it is we are supposed to do.

15 I think going forward we are going to here a lot of
16 detail. I mean, there is so much detail on each of these.
17 Ultimately we just have to trust that the process will work,
18 and if it doesn't, act as a check on that and hope that as this
19 process moves forward the company walks away with some guidance
20 from our comments as to what needs to be addressed. I am
21 sitting here thinking and, you know, I could take two weeks on
22 my own and study each of these criteria and probably come up
23 with a solution. Each of you may do the same thing and they
24 may slightly differ and it wouldn't make any of them
25 necessarily unreasonable, or it wouldn't make of any of them

1 reasonable.

2 COMMISSIONER DEASON: Is Commissioner Davidson
3 suggesting or volunteering to take two weeks of his time to
4 solve all this, because if he is I will move that right now.

5 CHAIRMAN JABER: We heard it.

6 COMMISSIONER DAVIDSON: And, staff, you will be
7 there, right, to help? So I guess I'm looking still, since I
8 wasn't involved in the bid rule, on some guidance in terms of
9 what it is that we are sort of passing on today and stamping.
10 If it is more of a, you know, general this passes the most sort
11 of general smell test, but then we are really going to look at
12 this as the process moves forward, or if now is the time to
13 sort of go through and say security package, we don't have an
14 analysis regarding reasonableness, thus we can't support it.
15 If they are sort of prima facie, if we are either focused on a
16 clear negative, a clear positive, or if we are right on the
17 fence and it is neutral.

18 COMMISSIONER BAEZ: Well, Madam Chairman, I was just
19 going to mention, I'm sorry, that there is some waiver of
20 claims to the rule. I mean, if you raise them and they were
21 settled a certain way, then that claim doesn't survive to the
22 need determination. I don't know if that helps you.

23 MS. BROWN: Commissioner, I don't think --

24 COMMISSIONER BAEZ: Of if maybe you can clarify for
25 me then.

1 MS. BROWN: I think we talked about that and
2 suggested that in one of the early iterations.

3 COMMISSIONER BAEZ: That didn't make it into the
4 rule?

5 MS. BROWN: It didn't make it into the rule. You are
6 not waiving claims.

7 COMMISSIONER BAEZ: So everything survives?

8 CHAIRMAN JABER: Well, it is not a waiver of the
9 claim. But if we find that a term is unfair, onerous, unduly
10 burdensome, the rule does contemplate that we would say, look,
11 this does not pass the smell test.

12 COMMISSIONER DAVIDSON: What if we don't know at this
13 point -- I'm sorry.

14 CHAIRMAN JABER: Let's take up Commissioner -- well,
15 let's get clear on that, Martha, in response to Commissioner
16 Baez's question.

17 COMMISSIONER BAEZ: If this -- now we have been
18 discussing the PPA issue, for instance, and by the Commission's
19 decision that says, you know, it is all right for them to
20 attach the PPA, and it is all right for them to use the PPA as
21 they intend. That discussion doesn't take place at the need
22 determination.

23 MS. BROWN: Yes, it does.

24 COMMISSIONER BAEZ: It does?

25 MS. BROWN: No rights are adjudicated here. This

1 process we are doing, as I said, is an odd duck. It is a
2 preliminary advisory procedural process where you take a
3 flash-cut, first cut, general, yes or no, passing the smell
4 test, Commissioner Davidson said look at it. And then you say
5 this stinks or, no, this is all right. But you can bring it
6 back. You can bring it back.

7 CHAIRMAN JABER: Let's get away from smell test,
8 using those words, and let's use what the word says that
9 through the objection process we are going to review whether
10 there has been a rule violation. And I always thought that if
11 we found that there was a rule violation and, therefore, the
12 objection should be entertained, then the company may go
13 forward legally via our process, but they operate under their
14 own risk. I mean, there is -- I don't want your comment to be
15 misconstrued by these companies.

16 MS. BROWN: No, I understand, and I agree with you on
17 that.

18 CHAIRMAN JABER: It is serious for us to find that
19 there has been a rule violation.

20 MS. BROWN: Yes, I think that is true. But remember
21 that you are doing that without any evidentiary backup. And to
22 determine whether something is commercially feasible, you
23 really need some evidence. No one is foreclosed from raising
24 these issues again in the need determination. What you are
25 doing here is giving them a very good idea about how you feel

1 about it, and it is going to be incumbent upon them to present
2 competent substantial evidence to change your mind when we get
3 to the need determination.

4 CHAIRMAN JABER: Commission Davidson, your initial
5 question, I thought you raised good questions, and what I
6 always envisioned was exactly what I articulated. That if we
7 clearly found a rule violation that we would use this expedited
8 process to send those signals, and that may result in a
9 modification to the RFP. It may be that we find things that
10 don't rise to a level of rule violation. You said middle
11 ground, but doesn't rise to the level of a rule violation, but
12 it just doesn't look right from a prudency -- from a -- I don't
13 know, logical logistical standpoint. So it really was designed
14 to provide guidance without holding up the need process.

15 Commissioners, do you agree with that assessment?

16 COMMISSIONER DEASON: Yes, I do. The way I look at
17 it is at this phase we have to -- to declare something a rule
18 violation it has to be fairly egregious, something that rises
19 to a level that we are confident that this provision, whatever
20 it may be is unfair, onerous, or whatever the standards may be.
21 And it is an attempt to go ahead and identify that so that the
22 parties can adjust accordingly, and hopefully we don't have to
23 find ourselves spending unnecessary time at the need
24 determination on matters that could have been clarified up
25 front. That is the way I look at it. I think that was my

1 intent when we adopted the rule. Of course, when I adopted the
2 rule I didn't know that this process was going to take four
3 hours of an agenda conference, but I think it has been time
4 well spent.

5 CHAIRMAN JABER: Exactly. I was going to say the
6 good news about that is it is hopefully preventing us from four
7 days of hearing. Starting backwards, I have to tell you there
8 is nothing in here that to me smacks of a rule violation.
9 There are some areas that give me grave concern.

10 The one that came closest to me, Mr. Guyton, and I
11 would encourage the Commissioners to have the same dialogue
12 with you all, the one that came closest to me is your reliance
13 on the purchased power agreement. And I look at the part of
14 the rule that says you need to provide the criteria and the
15 ranking factors, and maybe you have articulated in the RFP that
16 the PPA will be used in terms of assessing risk, but it doesn't
17 sound like how those factors in the PPA will be ranked has been
18 clearly articulated.

19 What stops me short of saying it is a rule violation
20 is a recognition that you weren't required to include the PPA.
21 I appreciate that you have done that, but when you made the
22 decision to do that, I don't know if it has created more
23 confusion or not. The other area that gives me concern is the
24 comprehensive analysis on security. The security passage
25 requirements combined with financial viability. I would ask

1 that you consider at the very minimum recognizing that all of
2 the IOUs don't meet your standard, much less IPPs. And then --

3 COMMISSIONER DEASON: Let me say I don't share that,
4 so we are getting things out here, and we are probably going to
5 be sending mixed signals to everybody. I don't share that
6 view, so that is just one Commissioner speaking.

7 CHAIRMAN JABER: And, see, this is a good dialogue,
8 too, because you need to know I am going to have that concern
9 at the hearing. Commissioner Deason may not, I don't know.
10 Maybe the two of us change our mind, but --

11 COMMISSIONER DEASON: But I do agree with your
12 statement that I don't think anything rises to a rule violation
13 at this point.

14 CHAIRMAN JABER: Yes. The dual fuel requirements
15 give me concern. Maybe I'm being naive, but I think an
16 enabling agreement that would clearly show a commitment to
17 interrupt that second pipeline is sufficient. Again, what
18 makes it hard for me to make this rise to the level of a rule
19 violation is I didn't get a concise answer from you on what you
20 did for Martin and Manatee. Maybe you have by now, but I
21 couldn't get an answer.

22 COMMISSIONER DEASON: Let me say I share that one.
23 That is a good signal. I don't know how we want to handle
24 this. I just feel compelled to at least speak up.

25 CHAIRMAN JABER: I welcome that, yes.

1 COMMISSIONER DAVIDSON: I completely disagree with
2 everything that has been said. I'm kidding, kidding.

3 COMMISSIONER DEASON: That gives me great comfort
4 that I'm right.

5 COMMISSIONER DAVIDSON: Strike that from the record,
6 please.

7 CHAIRMAN JABER: I think this is the way we should
8 handle it. I mean, this is informal. This is informal. But I
9 think my direction to you would be to be reasonable in looking
10 at our alternatives. I understand the goal. I understand that
11 you are looking for a commitment on capacity required. What I
12 wasn't real clear on, FPL, was why that took two firm contracts
13 with two separate pipelines. So my direction would be that you
14 take a look at that from a how-can-we-be-more-reasonable
15 standpoint.

16 And then finally on the completion security, the
17 188,000 per megawatt, I didn't ask you what that would come out
18 to be, but I would suggest to you that there is a huge jump
19 between 50,000 per megawatt to 188,000. And I would leave it
20 at that. I don't know what the right number is. That's all I
21 had.

22 Commissioner Davidson.

23 COMMISSIONER DAVIDSON: I have a couple of comments.
24 I will try and get through these quickly. And please jump in,
25 everyone except Commissioner Deason.

1 COMMISSIONER DEASON: I'm just trying to expedite
2 things.

3 COMMISSIONER DAVIDSON: Geographic preference. I
4 head the analysis, fine there. Regulatory-out clause. And,
5 again, I agree with the other Commissioners, nothing here
6 strikes me as, per se, egregious. And my test for all of these
7 throughout, from both sides, is going to be what is the
8 commercial reasonableness of this. So to the extent FPL can
9 demonstrate, or bidders can demonstrate, one side or the other,
10 that will be important.

11 But regulatory-out clause, if you all could consider
12 adding in language similar to Section 15 of the bid rule, if
13 that makes economic sense, I think that could help send a
14 signal to the investment community.

15 Financial viability and security package, I share a
16 little bit of the Chairman's concerns. I think I'm closer to
17 Commissioner Deason. I would like to see how the equity
18 penalty, though, is addressed as part of the security package
19 requirements, and, again, demonstrate that the whole package is
20 commercially reasonable.

21 PPA, we have talked about that at great length.

22 Equity penalty I just commented on.

23 Cash deposits and interest accrued, again that is
24 part of the PPA. If that could be addressed sort of up front.

25 The evaluation fees, again, whatever makes sense in

1 the industry. The \$10,000 for a variation in any key term and
2 being assessed another 10,000 strikes me as high, but that is
3 just one opinion. And, again, point to evidence in the
4 industry in the market as to what is typically charged for such
5 variations.

6 Developer experience requirements. Again, to the
7 extent that you are not going to leave out creative management
8 teams, even though some entity itself may be new, if that can
9 be done in a commercially feasible way, it makes sense. The
10 market has changed and we have got a lot of great executives
11 and managers out there, and if they can marry up a great team
12 with capital, don't exclude a creative or innovative approach
13 just because it is not the way it has always been done.

14 And those are my comments.

15 COMMISSIONER BAEZ: Again, I will join the rest of
16 the Commissioners in saying that I didn't see any outright
17 violations of the rule, but I will give my two cents worth in
18 no particular order. I think the use of the PPA, while it was
19 well intentioned -- let me preface by saying this. I think the
20 bid rule -- one of the effects now we are seeing of the bid
21 rule is that it has forced the RFP issuer to -- since the bid
22 rule sought to make it more transparent, make it more
23 objective, make it more -- have more information available as
24 to the evaluations and so forth, took a lot of discretion out
25 of the utility's hands, and you see the result. There is an

1 incredible amount of minutia. It has forced a lot of these
2 objections you see as being unreasonable were once thought too
3 much -- were once placed in the discretion, or once had
4 remained in the discretion of the company. So I think you are
5 seeing some progress along that line. It is things that have
6 to be refined. So that is why all the problems this first time
7 out, I think.

8 The PPA, I think it was a good idea, but I think what
9 was also necessary is an explanation as to what it was going to
10 be used and how it was going to be used. Because I think there
11 is too much speculation on a potential bidder's part to figure
12 that out. The security package, specifically the performance
13 and the completion securities, I know, Mr. Guyton, you
14 mentioned that it was -- you know, the numbers were boosted
15 after you all took a realistic look. I don't know what you
16 could do about it now, but I would note that the boost is
17 troublesome. It was troublesome to me to see the considerable
18 difference from one year to another. I know that you have
19 already admitted that you probably made mistakes in the past,
20 and are trying to get it right. Let's hope that this is the
21 last time that that kind of adjustment takes place, because I
22 think it does have a severe effect on bidders' decisions to
23 participate.

24 The regulatory-out clause, I would join Commissioner
25 Davidson's comments if there is something that can be done. I

1 sense that there was a broadness that might not be entirely
2 necessary. I mean, something -- I'm trying to harken back to
3 the reg-out clauses that existed in the old power purchase
4 agreements. I mean, to the extent that there is any changed
5 circumstances that need to be addressed, I understand, but I
6 think it should be a progression of that and it is very
7 difficult to try and speculate about all of the changes that
8 can come down the pike.

9 And the evaluations fee, I think it needs to be a
10 little bit more reasonable in increments. I was persuaded by
11 Mr. Moyle's points on that. Any new variation, I don't know
12 that it would cost \$10,000. And remember that this is a
13 cost-based -- this is a cost-based fee. It's supposed to be.
14 So, I think more attention needs to be paid there. Other than
15 that, I am okay with everything else.

16 CHAIRMAN JABER: Do you have anything to add,
17 Commissioner Deason?

18 COMMISSIONER DEASON: I have just a few things to
19 add. First of all, let me just reiterate that I don't anything
20 rises to the level of a rule violation. The question of the
21 unsecured debt rating requirement and the completion security,
22 and performance security, I tend to agree that what is being
23 proposed with this caveat, and that is I think that we need --
24 perhaps in this case Florida Power and Light needs to look at
25 the combination of all of these requirements if it is going to

1 have the effect of severely diminishing the pool of applicants
2 to provide a bid such that we do not have an adequate number of
3 bids that we then are unable to make an adequate determination
4 of most cost-effective unit in a need determination. It seems
5 to me that there may be some flexibility, could be some
6 flexibility given. Perhaps a company with a higher bond rating
7 perhaps would not have to have as much completion security or
8 performance security. I don't know, these are things I'm
9 just --

10 CHAIRMAN JABER: That would satisfy my concern. That
11 kind of review of alternatives would satisfy my concern
12 recognizing that we are just looking for proposals that would
13 give the least-cost alternative.

14 COMMISSIONER DEASON: So we do agree.

15 CHAIRMAN JABER: We do agree.

16 COMMISSIONER DEASON: I am comforted by the fact with
17 the equity penalty that there have been mitigating factors
18 identified and that has been included in the analysis. I agree
19 with Commissioner Davidson's thoughts on the regulatory-out
20 provisions. The one area that almost rises to the -- I guess
21 it rises to the highest level of concern, and that is the
22 requirement to have dual firm capacity on pipelines. I'm not
23 convinced that is a requirement that FPL puts on their own
24 units. I would like more information on that. I would not
25 want this to have the effect of a bidder not putting a bid in

1 because of the fact that they feel like that if they were
2 required to do this that they would not be cost competitive.
3 And I think that the likelihood of a major pipeline
4 interruption is small, and that this could have the effect of
5 increasing costs unnecessarily. So that is a concern, but I
6 don't think it rises to the level of a rule violation. And I
7 will end it at that.

8 CHAIRMAN JABER: Commissioner Bradley.

9 COMMISSIONER BRADLEY: I'll be brief. I think that I
10 made most of my comments at the beginning of our discussion
11 relative to this particular issue. However, I will, again,
12 make the statement that after listening to the discussion that
13 we have had here today and after listening to PACE's concerns
14 as it relates to the 14 objections that they put forth, again,
15 I don't think that any of them rise to the level of a violation
16 as it relates to Subsection 5 of the bid rule.

17 How do we mitigate this situation? That is the
18 question I can't answer. It always seems to me that
19 relationship building is maybe one consideration that might be
20 given. The other question that came to mind as I listened to
21 the discussion is what is the most appropriate venue for
22 addressing the issues that are included in the bid rule. I
23 said during our discussion of the bid rule this spring that I
24 thought that the appropriate venue is the legislature, and I
25 still firmly believe that that is the appropriate venue. And I

1 just don't ever, in my opinion, feel that some of the issues
2 that have been put forth today will be adequately addressed by
3 this body, because after all, this body's sole purpose is to
4 implent the will of the legislative -- the representatives of
5 the legislature, vis-a-vis the Florida Statutes. And I just
6 would, again, strongly suggest that you all give consideration
7 to that venue as it relates to your issues.

8 CHAIRMAN JABER: Staff, what do we need to do from
9 here? You need a motion. Is there an order that needs to be
10 issued?

11 MS. BROWN: We were talking about that just a little
12 while ago, because you mentioned it very early on, and having
13 considered it, we don't think that you do need to issue
14 anything in writing. This process is really separate from the
15 Administrative Procedures Act which would require any final
16 decision that you make to be put in writing. But this is an
17 advisory preliminary procedural decision. It reminds me of a
18 preliminary hearing in a court where the judge will give his
19 opinion or make his ruling but never write it down.

20 I mean, you have all said, each one of you, that you
21 don't believe that any of these objections rise to the level of
22 a rule violation, bid rule violation, and that is what this
23 process asks of you. I don't think anything more needs to be
24 done.

25 COMMISSIONER DAVIDSON: Just from one Commissioner,

1 I would benefit from a written order from Commissioner Deason's
2 office. I think he could really capture --

3 COMMISSIONER DEASON: You just go back to your office
4 and wait for it.

5 CHAIRMAN JABER: Yes, exactly.

6 MS. BROWN: We think you can close the docket at this
7 point. You have given lots of guidance.

8 MR. MOYLE: And, Commissioners, I would add that --

9 CHAIRMAN JABER: Wait, wait. I was just going to
10 tell my colleagues that I tend to agree with Ms. Brown,
11 commissioners, I don't think -- unless you all disagree
12 strongly, I don't think we need an order. The parties have the
13 transcripts, and we have the transcript. And in the spirit of
14 keeping this informal, I don't think this rises to a level of
15 an order. The docket, you need us to close the docket --

16 MS. BROWN: Yes.

17 CHAIRMAN JABER: -- as an administrative function?

18 MS. BROWN: Yes.

19 CHAIRMAN JABER: Can I just direct you to close the
20 docket?

21 MS. BROWN: Yes, I think so. I'll be happy to.

22 CHAIRMAN JABER: And we will leave the writing of
23 order to Commissioner Deason for another docket. Okay. That
24 resolves Item 15.

25 Parties, thank you.

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MR. MOYLE: Thank you, Commissioners.

CHAIRMAN JABER: Staff, good job. Thanks.

1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

4

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

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

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

19 DATED THIS 9th day of October, 2003.

20

21



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23 _____
24 JANE FAUROT, RPR
25 Chief, Office of Hearing Reporter Services
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Administrative Services
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