

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041291-EI

In the Matter of:

PETITION FOR AUTHORITY TO RECOVER
PRUDENTLY INCURRED STORM RESTORATION
COSTS RELATED TO 2004 STORM SEASON
THAT EXCEED STORM RESERVE BALANCE,
BY FLORIDA POWER & LIGHT COMPANY.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 8

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, January 4, 2005

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

REPORTED BY: TRICIA DeMARTE, RPR
Official FPSC Reporter
(850) 413-6736

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1 PARTICIPATING:

2 R. WADE LITCHFIELD, ESQUIRE, representing Florida
3 Power & Light Company.

4 VICKI KAUFMAN, ESQUIRE, representing the Florida
5 Industrial Power Users Group.

6 JOSEPH MCGLOTHLIN, ESQUIRE, representing the Office
7 of Public Counsel.

8 MICHAEL B. TWOMEY, ESQUIRE, representing Thomas P.
9 and Genevieve E. Twomey.

10 COCHRAN KEATING, ESQUIRE; RICK MELSON, ESQUIRE;
11 MONNIE KUMMER; and JOHN SLEMKEWICZ, representing the Florida
12 Public Service Commission.

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P R O C E E D I N G S

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2 CHAIRMAN BAEZ: Commissioners, we're on Item 8. And,
3 Commissioners, I guess I would put the same question to you as
4 I did the last time. Although oral argument hadn't been
5 requested, it's your pleasure whether to hear it or not.

6 COMMISSIONER DAVIDSON: Chairman, if it would be
7 appropriate, I wonder if we might hear from General Counsel on
8 the sort of threshold -- the motion to dismiss component of
9 this sort of as a preliminary matter. I don't know. The
10 argument may differ, but if sort of the legal conclusion is the
11 same, perhaps there might be other issues to turn to.

12 CHAIRMAN BAEZ: As well, but I guess does that -- I
13 don't know why I'm feeling a little dense this afternoon. But
14 are you interested, I guess, in hearing from the parties as
15 well?

16 COMMISSIONER DAVIDSON: Well, I don't know.

17 CHAIRMAN BAEZ: Is that the way you're telling me no?

18 COMMISSIONER DAVIDSON: Well, no. No, it's not. I
19 am interested. And maybe the parties can say, you know, the
20 extent to which their arguments on the motion to dismiss are
21 the same or different.

22 MR. LITCHFIELD: Mr. Chairman, Wade Litchfield for
23 FPL. I wonder if in light of the Commission's decision in the
24 Progress docket whether FIPUG and Public Counsel would be
25 willing to withdraw their motions to dismiss as they relate to

1 Issues 1 and 2.

2 MR. McGLOTHLIN: OPC is not prepared to do that.

3 COMMISSIONER DEASON: Well, can you tell me what's
4 different about this as opposed to Progress Energy? The only
5 difference being the stipulation, which was even more reason to
6 possibly grant a motion to dismiss. They even -- that is
7 absent when it was applied to FPL.

8 MR. McGLOTHLIN: I don't think I understood your
9 statement.

10 COMMISSIONER DEASON: The question is quite simple.
11 We just voted on Progress Energy, and we just denied the motion
12 to dismiss. And in that case, there was the added argument
13 that a reason to dismiss it was because of the language in the
14 stipulation. That language is absent for FPL. So what is the
15 basis to go forward with the motion to dismiss for FPL at this
16 point, given the vote that we just made on Progress Energy?

17 MR. McGLOTHLIN: Well, certainly there are some
18 similarities. There's also some differences in language. And
19 there's no avoiding the fact that you'll be hearing some of the
20 same arguments perhaps approached in a somewhat different way.

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1 being requested, it appears to me that that is grounds for
2 dismissal. So perhaps that is simply one lawyer wanting his
3 turn at bat.

4 COMMISSIONER DEASON: But that was for the previous
5 case. Are you talking about -- I'm working under the
6 understanding -- I may be incorrect -- there is not similar
7 language in the stipulation that applies to FPL as existed in
8 the language for Progress Energy.

9 MR. MCGLOTHLIN: There are some differences in
10 language.

11 COMMISSIONER DAVIDSON: Well, I think that answers
12 the question. They're going to give oral argument --

13 COMMISSIONER DEASON: Okay.

14 COMMISSIONER DAVIDSON: -- which is fine.

15 COMMISSIONER DEASON: Let's go for it.

16 CHAIRMAN BAEZ: You said it not me.

17 COMMISSIONER DAVIDSON: I didn't mean to raise an
18 issue.

19 CHAIRMAN BAEZ: Very well. Mr. McGlothlin.

20 MR. MCGLOTHLIN: My name is Joe McGlothlin. I appear
21 for the Office of Public Counsel where I am a new hire.

22 CHAIRMAN BAEZ: Welcome to the Commission,
23 Mr. McGlothlin.

24 MR. MCGLOTHLIN: Thank you. Harold is breaking me in
25 today.

1 As I've said a moment ago, there are some strong
2 similarities in the two cases, and so I ask your indulgence if
3 unavoidably I pose some of the same points and offer some of
4 the same arguments that you've heard already, but there are
5 some differences.

6 COMMISSIONER DAVIDSON: As a threshold matter, when
7 you say Harold is breaking you in, what does that mean?

8 MR. MCGLOTHLIN: It means that this is the first time
9 I've appeared on behalf of the Office.

10 There are some nuances that I will touch on and some
11 differences in approach, as well the similarities in the two
12 cases. And my first statement is quite similar to arguments
13 you've already heard. And our position is that because FPL did
14 not assert in its petition that damages associated with storm
15 losses would cause its return on equity to fall below
16 10 percent, the Commission should dismiss the petition.

17 FPL argues that our motion to dismiss is inconsistent
18 with the stipulation the parties at the Commission approved in
19 2002, but we contend that once you read the stipulation in its
20 entirety as opposed to focusing on a single paragraph that is
21 the central point of FPL's argument, you will see that it is
22 FPL and not OPC and not FIPUG that asks you to ignore the
23 stipulation.

24 Now, my colleague, Earl, has passed around a handout,
25 and as I refer to some of the points of law, I'll ask you to

1 look at the items as I identify them. And by way of context,
2 as I talk about the totality of the stipulation rather than the
3 single paragraph that FPL focuses upon, bear in mind what FPL
4 asks you to approve, a new cost recovery clause that would
5 insulate FPL's earnings entirely from the impact of the storm
6 damages, thereby placing 100 percent of the risk of storm
7 damage on FPL's ratepayers.

8 In its petition, FPL contends that this request is
9 consistent with precedent. It is not. The applicable
10 precedent is the 1993 order in which the Commission rejected
11 FPL's request for a new cost recovery clause specific to storm
12 losses because the proposed measure did not take into account
13 the utility's earnings or achieved rate of return. And you'll
14 see the language in Item 1 of the handout there. And it reads
15 in part, "The utility wants a guarantee that storm losses will
16 have no effect on its earnings. We believe it would be
17 inappropriate to transfer all risk of storm loss directly to
18 ratepayers. The Commission has never required ratepayers to
19 indemnify utilities from storm damage. Even with traditional
20 insurance, utilities are not free from this risk. This type of
21 damage is a normal business risk in Florida."

22 And in the same order the Commission said, "Storm
23 repair expense is not the type of expenditure that the
24 Commission has traditionally earmarked for recovery through an
25 ongoing cost recovery clause. Conservation, oil backout, fuel

1 and environmental costs are currently recoverable under
2 Commission created cost recovery clauses. These expenses are
3 different from storm repair expense in that they are ongoing
4 rather than sporadic expenditures." This order, I would point
5 out, was issued post-Hurricane Andrew.

6 Now, while FPL argues in its petition that its
7 request is consistent with precedent, you won't find the
8 language that I've just pointed you to anywhere in its
9 petition. Instead, in a footnote, FPL tries to distinguish its
10 proposal from this precedent on the basis that its first try in
11 1993 was for a clause that would be applicable to all future
12 storms while this request is specific to the four 2004 storms.
13 This is a good example of a distinction without a difference
14 because everything the Commission said in 1993 about the
15 inappropriateness of requiring ratepayers to indemnify FPL
16 dollar for dollar for the normal business risk of storm damage
17 is applicable to this request as is the statement regarding the
18 sporadic nature of storm expenses.

19 FPL also contends its request is consistent with
20 Commission policy. It is not. The Commission's policy is
21 articulated in Rule 25-6.0143, which an excerpt is in Item 2 of
22 the handout. In the rule the Commission says, The provision
23 level and annual accrual rate for each account shall be
24 evaluated at the time of a rate proceeding and adjusted as
25 necessary. However, a utility may petition the Commission for

1 a change in the provision level and accrual outside a rate
2 proceeding. In other words, by rule, a utility has to deal
3 with deficiencies in the storm damage reserve by petitioning
4 for approval of changes in the level of reserves or in the
5 amount of accruals either during or outside of a rate case.
6 And notice that when it happens outside of a rate case, the
7 accrual would affect the utility's earnings.

8 On Page 1 of its petition, FPL says its petition is
9 filed pursuant to this rule, but its proposal is not consistent
10 with the rule and, in fact, differs dramatically from the
11 method prescribed by the Commission's rule.

12 FPL will argue that in its 1993 order the Commission
13 said that FPL was free to ask again for the indemnification
14 measure, but whether FPL is free to do so or not depends on the
15 proper interpretation of the 2002 stipulation because in that
16 negotiated package, which the Commission approved by order,
17 each party gave up some rights to secure other benefits. FPL
18 wants to interpret the stipulation by reading a single
19 paragraph in isolation, but that paragraph, which is Paragraph
20 13 of the stipulation in this case, says nothing about a new
21 storm damage cost recovery clause. It says, FPL may petition
22 for recovery of storm losses. And an excerpt there is Item
23 3 of your handout.

24 FPL could have petitioned for approval of a larger
25 accrual as the Commission directed in the rule. FPL could have

1 petitioned for authority to apply earnings above a certain
2 threshold to reduce a negative balance of the storm fund, or it
3 could have pursued a combination of both measures. As a matter
4 of fact, this approach of a combination is the approach that
5 Gulf Power requested and that the Commission approved in 1996,
6 Order Number PSC-96-0023 in Docket 951433. In fact, FPL cites
7 the Gulf Power order in its petition but chose not to emulate
8 Gulf Power's example.

9 Using either or both of these approaches, FPL could
10 have implemented Paragraph 13 and addressed the storm fund
11 without increasing rates that customers pay and would not have
12 elicited a motion to dismiss from OPC, in any event, but
13 instead, FPL seeks in its petition to raise the rates that
14 customers pay. Reading the stipulation in its entirety, we
15 believe the most supportable view in terms of logic, in terms
16 of internal consistency, in terms of the rules of construction
17 that one must apply to the stipulation, the most supportable
18 view is that the stipulation does not allow FPL to petition for
19 an increase in rates without first showing that expenses have
20 caused its earned rate of return on equity to fall below
21 10 percent.

22 I'll refer you to Item 4 of the handout, which is
23 Paragraph 5.

24 COMMISSIONER DEASON: Excuse me, Mr. McGlothlin.
25 Before you leave Item 3, I'm just trying to understand. The

1 language says, "Recovery of prudently incurred costs not
2 recovered from those sources," indicating FPL may petition for
3 recovery of prudently incurred costs. Are you saying that that
4 means that that does not allow them to file for an increase in
5 terms of a surcharge or recovery of any sort?

6 MR. MCGLOTHLIN: Reading the two components of the
7 stipulation together, it means they can do so once they are
8 able to demonstrate that absorbing the losses associated with
9 the storm has caused their return on equity to fall below
10 10 percent.

11 COMMISSIONER DEASON: So you have to read that in
12 conjunction in that before they file the petition, they must
13 make a showing of an insufficient earning below.

14 MR. MCGLOTHLIN: That's correct.

15 COMMISSIONER DEASON: But that precise language is
16 not in the stipulation. That's your interpretation of it,
17 whereas FPL will have a different interpretation from you.

18 MR. MCGLOTHLIN: I expect FPL will interpret it
19 differently. But my point is that FPL reaches that conclusion
20 by reading Paragraph 13 in isolation while we contend that that
21 has to be harmonized with the other features of the stipulation
22 taken together.

23 Paragraph 5 says, "FPL will not petition for an
24 increase in its base rates and charges, including interim rate
25 increases, to take effect before the end of this stipulation

1 and settlement, except as provided for in Section 8."
2 Section 8 is Item 5 of your handout. It says, "If FPL's retail
3 base rate earnings fall below a 10 percent return on equity as
4 reported on an FPSC adjusted or pro forma basis on an FPL
5 monthly earnings surveillance report during the term of this
6 stipulation and settlement, FPL may petition the FPSC to amend
7 its base rates notwithstanding the provisions of Section 5."
8 Clearly then, this stipulation precludes FPL from raising base
9 rates without first showing its rate of return has fallen below
10 10 percent.

11 The remaining question is, what do the parties and
12 the Commission intend with respect to increases in the form of
13 cost recovery clauses outside base rates? We contend the
14 answer to this question is found in Paragraph 14, which is Item
15 6 of your handout. Paragraph 14 of the stipulation says, The
16 fuel adjustment clause shall continue as normal. FPL will not
17 use the various cost recovery clauses to recover new capital
18 items which traditionally and historically would be recoverable
19 through base rates. In other words, the parties were saying,
20 FPL don't try to circumvent the limitation on your ability to
21 raise customers' rates by seeking to employ the fuel clause or
22 the other cost recovery causes in an atypical or abnormal
23 fashion. In context, I think it's clear that this paragraph
24 was addressing existing cost recovery clauses.

25 My point is this. Having devised language to enforce

1 the limitation on FPL's ability to raise rates by confining the
2 utility's use of existing cost recovery clauses to normal and
3 routine applications, how likely was it that the parties agreed
4 in the same document to negate this measure by authorizing a
5 totally new cost recovery clause that is not even mentioned in
6 the document?

7 One last point. A fundamental rule of construction
8 is that provisions of a document shall be interpreted and
9 implied to give meaning to each of them and also to harmonize
10 them. The only way to harmonize Paragraph 13, allowing FPL to
11 petition for recovery of storm damage expenses, with Paragraph
12 8, which limits FPL's ability to increase rates to those
13 situations in which its earned rate of return has fallen below
14 10 percent, is to require FPL to show that the storm expenses
15 that have had that effect on earnings; otherwise, the
16 provisions would be in conflict which is under the rules of
17 construction an impermissible result.

18 Finally, I'd like to point out that the
19 interpretation we support here is not a harsh or even
20 unreasonable result. Throughout the life of the stipulation,
21 FPL has had the benefit of a provision that established a floor
22 on its earned rate of return. At the same time, it has had no
23 ceiling on its earnings aside from the obligation to share
24 revenues beyond certain breakpoints.

25 While FPL experienced storm damages, it has the

1 opportunity to demonstrate that the impact on its earnings was
2 sufficiently severe to trigger the protective floor of the
3 stipulation. To require FPL to show its earnings have fallen
4 below 10 percent is consistent both with the stipulation and
5 the principle which the Commission recognized in 1993 that the
6 role of regulation is not to insulate a utility from all
7 exposure or the risk of storm damage. Thank you.

8 CHAIRMAN BAEZ: Thank you, Mr. McGlothlin.

9 COMMISSIONER DAVIDSON: Just a question for General
10 Counsel on that, a short question.

11 CHAIRMAN BAEZ: Go ahead.

12 COMMISSIONER DAVIDSON: Mr. McGlothlin talked about
13 the need, which I think is a -- it's a recognition of basic
14 contract law that provisions of contracts shall be read
15 together to the extent possible to give a coherent
16 interpretation, et cetera. And I think this Commission adheres
17 to that as much as possible. I know that legal does. Was
18 there anything sort of in the argument that persuaded you that
19 on the motion to dismiss issue, just that procedural issue,
20 there should be a different outcome here as opposed to our vote

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1 he motion to dismiss.

2 COMMISSIONER DAVIDSON: Thank you.

3 CHAIRMAN BAEZ: Ms. Kaufman.

4 MS. KAUFMAN: Vicki Gordon Kaufman on behalf of the
5 Florida Industrial Power Users Group. I think on Issue 1 I can
6 be pretty brief and adopt Mr. McGlothlin's arguments even in
7 light of Mr. Melson's comments to you. And I'm assuming,
8 Mr. Chairman, we're going to come back and address the
9 surcharge issue separately?

10 CHAIRMAN BAEZ: Yes.

11 MS. KAUFMAN: Then I'll reserve my time for that.

12 Thank you.

13 CHAIRMAN BAEZ: Mr. Twomey, you had comments to make?

14 MR. TWOMEY: Adopt Public Counsel's.

15 CHAIRMAN BAEZ: Thank you. Mr. Litchfield.

16 MR. LITCHFIELD: Thank you, Mr. Chairman. Of
17 everything that I heard Mr. McGlothlin say only one thing
18 jumped out at me in terms of being different from the Progress
19 situation as far as the stipulation and settlement goes, and
20 that is the inclusion of a section in the stipulation that he
21 referred to you in his handout. I think it's on Item 2 where
22 in the second sentence it says, "In the event that there are
23 insufficient funds in the storm damage reserve and through
24 insurance, FPL may petition the FPSC for recovery of prudently
25 incurred costs not recovered from those sources." So we think

1 is clear as Progress has made its case with respect to the
2 motions to dismiss pending in its docket, this is the only
3 material difference between the two stipulation and settlement
4 agreements for purposes of your review today. **And we think it**
5 would be even clearer in our case that we would have the right
6 to come in and petition this Commission for recovery of costs
7 not recovered from those sources, not from base rates, from
8 those sources, meaning the storm damage reserve and through
9 insurance.

10 I would also like to have handed out to you a set of
11 documents. And I promise I will not take you through all of
12 them, but in the interest of completing what here are just
13 excerpts from these selected documents that Mr. McGlothlin has
14 provided to you, there are some key provisions that he has
15 neglected to point out to you which I'd like to bring to your
16 attention. And I think it will be instructive in terms of sort
17 of laying the groundwork in terms of the regulatory framework
18 that we've been operating under for some time.

19 The '93 order, contrary to the joint movants'
20 contention, is not the only precedent relative to storm costs
21 and the recovery of storm costs. And there are a series of
22 orders that I'll take you through briefly following the
23 '93 decision, but specifically and in the first instance, we
24 would suggest to you that they are misapplying the
25 '93 decision. And if you look on Page 5 of the complete order,

1 you'll see that Mr. McGlothlin referred you to in his excerpts
2 language that appears at the top of that page, but he neglects
3 to draw your attention to that which follows and specifically
4 in the fourth paragraph beginning, "If FPL experiences
5 significant storm-related damage, it can petition the
6 Commission for appropriate regulatory action. In the past, the
7 Commission has acted appropriately to allow recovery of prudent
8 expenses and has allowed amortization of storm damage expense."

9 This Commission did decline to authorize the
10 implication of the proposed storm loss recovery mechanism. As
11 we indicated in our response to the motion to dismiss, that was
12 proposed to be an ongoing recovery clause that would recover
13 all costs in excess of the storm reserve. **That is not what**
14 we're proposing here, not at all what we're proposing here.

15 Again, the Commission concludes, "If a hurricane
16 strikes, FPL can petition at that time for appropriate
17 regulatory action. In the past, we have acted appropriately to
18 allow recovery of prudent expenses and allowed storm damage
19 amortization." Similar language appears in the last paragraph
20 as well. Turning the page. "Our vote today does not foreclose
21 or prevent further consideration at a future date of some type
22 of a cost recovery mechanism, either identical or similar to
23 what has been proposed in this petition." So I think it's
24 grossly unfair for joint movants to take the position that the
25 '93 decision is the only precedent that applies and that it

1 even does apply and preclude us from proposing some type of
2 recovery mechanism.

3 You have before you a '98 decision. And on Page 5 of
4 that decision, again language appears in the first full
5 paragraph beginning, "In the event FPL experiences catastrophic
6 losses, it is not unreasonable or anticipated (sic) that the
7 reserve could reach a negative balance, and the order quotes
8 the Rule 25-6.0143, also referred to you by Mr. McGlothlin,
9 "recognizes that charges to a reserve may exceed the reserve
10 balance resulting in a negative balance." And I'll just read
11 the last sentence. "In cases of catastrophic loss, FPL
12 continues to be able to petition the Commission for emergency
13 relief."

14 Similar language appears in a '95 order, which you do
15 not have and which I won't bother to refer you to now, but it's
16 in Docket 951167-EI, Order Number PSC-95-1588-FOF-EI issued
17 December 27th of '95. The rule itself, Mr. McGlothlin offered
18 that for the proposition that that is -- that rule means that
19 the only mechanism that we can use to recover any storm costs
20 whatsoever is through an accrual in base rates and that's
21 simply not the case. The rule in fact does provide for the
22 establishment of an accrual and the establishment of a reserve,
23 but it expressly acknowledges that the reserve may become
24 negative from time to time given catastrophic losses.

25 Now, the Commission in addressing this issue in the

1 93 decision post-Hurricane Andrew indicated that it was
2 amenable, in fact agreed that a self-insurance proposal was the
3 appropriate way to go. But there are two components to that.
4 One is to establish an appropriate reserve level and then an
5 accrual that would help you reach that target reserve level,
6 but the other component that joint movants continued to ignore
7 is this notion of emergency relief. Now, nobody in this room
8 would propose to predict the precise level that that accrual --
9 that target reserve ought to be established at. We don't know.
10 It's a reasonable estimate that the Commission agreed would be
11 intended to cover most costs in many instances but not all
12 instances. And in the event that there were catastrophic
13 losses that resulted in a negative balance in that reserve, the
14 Commission said the company should come back and petition for
15 emergency relief. And that's exactly what we're doing. So we
16 are being completely consistent with Commission precedent.

17 With respect to the stipulation, I would note that
18 the argument that we heard today from Mr. McGlothlin goes well
19 beyond the four corners of his motion, but I'm prepared to
20 respond to the arguments that we heard. He contends that the
21 only way under the stipulation that the utility could get
22 recovery of excess storm costs is in the event that we fell
23 below the 10 percent threshold. Well, when we negotiated that
24 stipulation and settlement agreement, the company agreed to
25 take on certain risks associated with expenses by agreeing to a

1 revenue cap and sharing above certain thresholds. We took on
2 certain risks associated with our expenses, maybe becoming
3 higher than we had anticipated.

4 Now, we did have a fail-safe in that were expenses so
5 high or revenues so low that we fell below the 10 percent ROE,
6 we could at our option come back and petition the Commission
7 for relief. But there were certain expenses that we expressly
8 did not take on as a risk, and those were the storm costs in
9 excess of the amount in the reserve. We have specific language
10 in Section 13 in the stipulation to that effect. And as you
11 recall, I think it was a question from Commissioner Bradley to
12 Mr. Evanson (phonetic), who appeared before this body at the
13 time that that stipulation was addressed, in which he said, and
14 I'm quoting from our response to the motion to dismiss,
15 Commissioner Bradley to Mr. Evanson: So then the Commission
16 should assume then that you have sufficient funds to cover a
17 catastrophic event at this time in this particular reserve
18 fund.

19 Mr. Evanson: No. And I remember he was pretty
20 emphatic about this. We have what we think is adequate for
21 most occurrences, but I could tell you, surely if a storm like
22 Hurricane Andrew hit Miami and came right up the East Coast
23 through Palm Beach, there would not be nearly enough assets in
24 that fund in insurance, and it would be a significant impact to
25 the company. And there's no doubt I would be here before you

1 asking for some kind of special relief on it because you could
2 be talking about billions of dollars in that case.

3 Now, we're not talking about billions, but we are
4 talking about a sizable amount, well in excess of what we had
5 expected might occur in the ordinary course, but this year was
6 not the ordinary course. These are exactly the type of
7 extraordinary circumstances that the Commission envisioned
8 companies would come back and petition for special relief in
9 the event that the storm reserve was insufficient. We think
10 that the motions to dismiss have to fail for the reasons
11 already discussed in the Progress docket which are equally
12 applicable in our docket. Thank you.

13 COMMISSIONER DEASON: Mr. Chairman, move approval of
14 staff's recommendation on Issue 1.

15 COMMISSIONER DAVIDSON: Second.

16 CHAIRMAN BAEZ: Moved and seconded. All those in
17 favor say, "aye."

18 (Unanimous affirmative vote.)

19 CHAIRMAN BAEZ: We are on Issue 2.

20 COMMISSIONER DEASON: Are we still on the oral
21 argument phase to receive comments on these issues as well or
22 just the initial issue?

23 CHAIRMAN BAEZ: Commissioner Deason, we have not
24 discussed the surcharge, and I remember assuring Ms. Kaufman
25 that she would get a chance to --

1 COMMISSIONER DAVIDSON: Could we hear from staff on
2 this issue first maybe?

3 CHAIRMAN BAEZ: Mr. Keating, if you could tee it up
4 for us, and then we'll go through the parties as well.

5 MR. KEATING: Sure. I'll tee this up briefly so we
6 can move along. This issue addresses Public Counsel's and
7 FIPUG's joint motion or joint request to strike or dismiss
8 FPL's petition to implement its proposed surcharge subject to
9 refund effective January 1st, 2005, or as soon as practicable.
10 It's not styled as a request to strike or dismiss the petition.
11 In essence, that is the relief that Public Counsel and FIPUG
12 have requested through their pleading, so staff has treated it
13 that way in Issue 2.

14 Staff has recommended that you deny the joint request
15 to strike or dismiss the petition. The grounds stated in
16 support of dismissal of the petition essentially refer back to
17 their motion to dismiss the petition that you just addressed.
18 There's nothing in addition to those grounds that are stated in
19 the pleading. So for the same reasons that you voted on Issue
20 1, staff would recommend that you dismiss the motion to the
21 extent that it requests dismissal of FPL's preliminary
22 surcharge petition.

23 To the extent it requests striking the petition, it
24 really appears to request striking the petition on the grounds
25 that it is an unauthorized pleading, that it's a second

1 petition, that it should be in the form of a motion. Staff
2 does not believe that that's a fatal flaw, and even if it is
3 looked at as an amendment to the original petition, that the
4 Commission has freely granted leave to amend petitions
5 particularly at an early stage in the proceeding where parties
6 aren't prejudiced.

7 CHAIRMAN BAEZ: Thank you, Mr. Keating. Ms. Kaufman,
8 now --

9 COMMISSIONER DAVIDSON: I'm sorry to interrupt again.
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13 COMMISSIONER DAVIDSON: I just wanted to get a couple
14 of notions in my head clear before we start on oral argument.

15 What is the difference between -- sort of at the
16 agency level between a petition for interim rate relief and a
17 petition for permanent rate relief? Staff draws that
18 distinction in one of its analyses.

19 MR. KEATING: Well, typically in a petition for a
20 full rate proceeding, which is not the situation we're in here,
21 you'll get a petition for full or for permanent rate relief.
22 Often there's a petition that may come before the petition for
23 permanent rate relief, but there's often a petition for interim
24 rate relief that is dealt with separately. In my experience, I
25 have seen them both styled as petitions rather than having an

1 initial petition for permanent rate relief followed by a motion
2 for interim rate relief. Again, as I suggest in the
3 recommendation, I think it may put form over substance to
4 suggest that one way is better or one way is unauthorized.

5 COMMISSIONER DAVIDSON: Has staff made a preliminary
6 determination as to whether this petition is one for interim
7 rate relief versus permanent rate relief?

8 MR. KEATING: The petition that's at issue here is in
9 the nature of request for an interim rate relief. It's for a
10 rate increase that would be subject to refund pending the
11 Commission's decision at the April hearing on the original
12 petition for, to analogize, more permanent rate relief or the
13 24-month recovery surcharge that FPL has requested.

14 COMMISSIONER DAVIDSON: Two more questions.
15 Ultimately, if Issue 2 -- if the staff recommendation on Issue
16 2 was adopted and the Commission ultimately determined that FPL
17 had not been entitled to the amounts collected, would those
18 amounts be refunded and have to be refunded to the customers?

19 MR. KEATING: Yes, those amounts would be held
20 subject to refund. And I believe that's the nature of what FPL
21 has requested.

22 COMMISSIONER DAVIDSON: Last question. If FPL -- if
23 the Commission determines that FPL is ultimately entitled to
24 all or part of what it collected and none of that is collected
25 now and it's all collected after an order, is there any type of

1 impact on sort of customers or those paying that amount that we
2 should be concerned with?

3 MR. SLEMKEWICZ: Well, if you allow interest on that
4 uncollected amount, it would be running presumably from
5 January 1st forward. So it would increase the amount that
6 would need to be recovered versus an implementation right now.

7 COMMISSIONER DAVIDSON: And I'm sorry, one final,
8 final question. What's the, if we know, official start of
9 hurricane season in Florida?

10 COMMISSIONER DEASON: June 1st.

11 CHAIRMAN BAEZ: You mean you don't know that?

12 COMMISSIONER DAVIDSON: Correct. In many senses I am
13 still the junior Commissioner. You know what? Who up here
14 knows that? I know one person on the end who probably knows
15 that.

16 CHAIRMAN BAEZ: Deason beat me to it.

17 COMMISSIONER DAVIDSON: So when would an order in
18 this case be issued, assuming everything goes smoothly and the
19 Prehearing Officer doesn't cause confusion in the schedule?

20 MR. KEATING: You're talking, a post-hearing order
21 following our April hearing?

22 COMMISSIONER DAVIDSON: Yes.

23 MR. KEATING: Typically that's within about 90 days
24 of the conclusion of the hearing. And I don't recall what the
25 schedule is, if we've set a schedule --

1 COMMISSIONER DAVIDSON: So if there was some amount
2 that the Commission determined that FPL was entitled to, is it
3 possible that if we didn't -- if we voted this out and there
4 was no collection now, that the order -- sort of the order on
5 the amounts to be collected might not even come out until the
6 beginning of the -- until after the beginning of 2005 hurricane
7 season?

8 MR. KEATING: I think that's pretty likely.

9 COMMISSIONER DAVIDSON: Thank you, Chairman.

10 CHAIRMAN BAEZ: We never got to the parties,
11 Commissioners. I apologize. But you've heard some of the
12 questions that have been asked. I guess if there's any -- and
13 in light of the fact that the arguments seem to be the same, I
14 leave it you to be judicious with the points that you feel you
15 need to make.

16 Ms. Kaufman.

17 MS. KAUFMAN: Commissioner, I would like to address
18 the surcharge question, and I know some of the other parties
19 would like to address it as well.

20 CHAIRMAN BAEZ: Go ahead.

21 MS. KAUFMAN: As to Issue 2, I'm not going to belabor
22 the point about whether or not FPL should have sought the
23 Prehearing Officer's permission to amend its petition. We
24 think they should have. We think they didn't follow the rules;
25 recognize that certainly it's within your discretion to permit

1 them to do that or treat the pleading in the way that you see
2 appropriate. However, as to the substance of the request and
3 some of Commissioner Davidson's questions about the
4 implementation of the surcharge now, as a threshold matter, I
5 don't think this is a rate case, and I'm not clear what the
6 authority is. I think Mr. Keating referred to the interim
7 versus permanent rate dichotomy by way of analogy. I am just
8 not aware of what authority there would be to implement what
9 we've all as a shorthand way, I guess, called an interim
10 increase.

11 Secondly, we think there are still a lot of issues,
12 and I think you recognize that. Even though you denied our
13 motion to dismiss, there's a lot of issues still to be
14 resolved. There's a lot of questions about the stipulation.
15 There are a lot of categories of costs and sequences that I
16 imagine we will all be delving into in some detail.

17 When the order on procedure was issued in this case,
18 the Prehearing Officer, in setting what's a pretty expedited
19 schedule for what I think is going to be a very significant
20 proceeding, noted that it appropriately balanced FPL's request
21 for timely consideration with due process rights of the
22 substantially affected parties and permits staff adequate time
23 to investigate the merits of the request. We would suggest to
24 you that until FPL has proven its case and until -- unless and
25 until, I should say, you know, there's an interpretation of the

1 stipulation that will permit them to go forward, that no
2 surcharge should be imposed on the customers, and that we
3 should allow this proceeding to run its course, and at the end
4 of the day, we'll see where we all come out. And at this point
5 in time, we don't think that you have the authority, nor has
6 there been proof yet before you that any surcharge is
7 appropriate. Thank you.

8 CHAIRMAN BAEZ: Thank you, Ms. Kaufman.

9 Mr. McGlothlin.

10 MR. MCGLOTHLIN: Yes. I'll be brief, Chairman Baez.

11 With respect to the analogy with an interim increase, and I
12 agree it is an analogy because we don't have a request for a
13 base rate increase here, there's the issue of statutory
14 authority which is there with respect to the base rate increase
15 but of which I think is very questionable in this situation.
16 And where the mechanisms itself is being challenged, as we have
17 challenged it in our motion to dismiss, it appears to me that
18 there is at least a danger of judging the issue -- prejudging
19 the issue by the implementation of a surcharge before that
20 issue has been reached.

21 Also, one difference between this situation and the
22 typical base rate interim increase is that the interim increase
23 is designed to provide some minimum improvement to the
24 utility's earnings pending the outcome of the final case.
25 Here, FPL proposes to collect the full \$354 million it has

1 requested with the possibility of adjustments later down the
2 road. So that is an inversion of the concept that one normally
3 associates with an interim increase.

4 And finally, I would note that in one of the FPL
5 pleadings, FPL says, "Allowing the establishment of a
6 reasonable mechanism enabling the company to begin to recover
7 the storm reserve deficit subject to refund would benefit FPL's
8 customers and will provide appropriate signals to the
9 investment community while fully accommodating the Commission's
10 right to review the prudence and reasonableness of such costs."
11 So that there's no misunderstanding from -- with respect to our
12 position on this, the issues in this case are not limited to
13 prudence and reasonableness. We had very deep concerns about
14 the possibility that this utility and Progress perhaps are not
15 offsetting the storm costs with the revenues generated by base
16 rates that are applied in normal operations. We see no
17 evidence at this point, although we're still in discovery, that
18 the costs of removal that customers have been paying through
19 the depreciation rates over time are being used to -- are being
20 applied to the costs incurred in removing property as a result
21 of storm damage, and there may be other issues as well. So if
22 you entertain the idea of an immediate surcharge, it should not
23 be -- there should be no assumption attached to it, that the
24 only issues are those identified by FPL in its request for a
25 surcharge, prudence, reasonableness.

1 CHAIRMAN BAEZ: Mr. Twomey.

2 MR. TWOMEY: Thank you, Mr. Chairman. I neglected to
3 say that I'm appearing on behalf of my parents, Thomas and
4 Genevieve Twomey, who are FPL customers and who were parties to
5 FPL's last rate case before this Commission. I filed a
6 petition seeking intervention in this docket on their behalf
7 the 30th of last month. I don't expect or hope that FPL has no
8 objection to me appearing on behalf of them.

9 I want to address the surcharge issue, Mr. Chairman.
10 It's our view that the staff recommendation threatens the very
11 core of procedural due process before this Commission; that is,
12 the right to effective notice and the right to hearing. That
13 is, your staff is saying, and I think it's pretty clear, that
14 you can go ahead today and approve the surcharge being
15 requested by Florida Power & Light starting today effective for
16 bills 30 days out without this utility or this Commission
17 giving the customers of the utility effective notice of what's
18 being requested; more importantly or just as importantly,
19 giving the customers an opportunity for an evidentiary hearing.

20 There is before you now no proof that the expenses
21 claimed to be paid by these companies or this company have in
22 fact actually been paid. Even if they were, there's no proof
23 before you that those expenses were necessary just for
24 hurricane recovery as opposed to annual maintenance that would
25 be paid for by base rates or perhaps expenses that were the

1 result of a failure to maintain the systems properly.

2 There's no proof before you that the expenses they
3 claim, which are in excess of \$354 million to be recovered by
4 this surcharge, are reasonable in their amount. Our view is
5 that you cannot legally get the rate increase cart before the
6 notice and hearing horse. **I want to be clear. I'm not**
7 suggesting, Mr. Chairman and Commissioners, that this is an
8 issue that we believe is at your discretion and you should
9 choose not to exercise it in favor of approving the surcharge
10 today. What we are saying is that we believe the state of the
11 law is that you cannot legally approve such a surcharge today
12 and that you cannot do so without first giving proper notice
13 and without giving the customers of this utility an opportunity
14 to have an evidentiary hearing at which the end of you would
15 presumably, if you wanted to approve the surcharge, find that
16 there was competent and substantial evidence to support the
17 charge.

18 Now, here's why I would say to you that you can't
19 approve the surcharge today. As you-all are aware, the Florida
20 Public Service Commission is a statutory agency. It's a
21 creature of statute. It has long been the law in this state --
22 and I want to read briefly from a 1909 decision in the City of
23 Jacksonville, a Florida Supreme Court case, and it says in a
24 footnote, "The powers of railroad commissioners are restricted
25 to those conferred by the expressed terms of the statute or

1 those which may be reasonably implied from such expressed
2 terms." So far as we had been able to find the decided
3 tendency of modern decisions in constructing statutes defining
4 the powers and duties of administrative boards or commissions
5 is to hold that the power sought to be exercised must be made

6
7 Additionally, there is a corollary statement that
8 says that any fair reasonable doubt concerning the existence of
9 the power of an agency is to be resolved by the courts against
10 the exercise of that authority. If it's in doubt, you can't do
11 it.

12 Now, another corollary, and a necessary one, of
13 course, is, is that while you can't undertake powers that
14 aren't specifically expressed in the statutes, you are obliged
15 to obey those that are. It's fairly straightforward. You're a
16 statutory agency. You have to obey the clear dictates of the
17 written statutes and the case law supporting them.

18 Now, what statutes do we look to to maintain that my
19 parents, FIPUG, the customers and consumers represented by
20 Office of Public Counsel have a right to notice and a right to
21 an evidentiary hearing before you can approve these rates even
22 if the rates are under -- or subject to refund? I would submit
23 that, first, we need to look at Chapter 120. I think everyone
24 would concede that this is a decision -- this case will be a
25 decision that will affect the substantial interest of parties.

1 All the customers, if you approve, will pay more. The utility
2 will get less if you decide against them. It's a 120.57 type
3 hearing. And Chapter 120 says that you have to have, in those
4 hearings, notice; you have to have a hearing; you have to have
5 the right to counsel, the right to present your own evidence,
6 the right to cross-examine the other parties; and you're
7 entitled at the end to a written order with written statements
8 or statements of fact and conclusions of law.

9 You are obliged, Commissioners, this agency is
10 obliged to observe those provisions of Chapter 120 regarding
11 notice and hearing unless you can find a specific exemption
12 saying that you don't have to. And I maintain to you there is
13 no such exemption. Now, are there any other statutes that are
14 applicable in terms of suggesting that the customers of this
15 utility are entitled to notice, due process of notice and an
16 evidentiary hearing? And the answer is, there are.

17 Chapter 366, of course, is the Commission's chapter
18 that deals with electric utilities. 366.041 says, In fixing
19 rates, it shall be the Commission's duty to hear service
20 complaints. No matter how you cut it, they are asking for
21 \$354 million. Commissioner Deason a few moments ago asked the
22 question, well, if you give it a different name, is it still
23 not a rate increase? I think he said words to that effect.
24 The bottom line here is, is that what they're asking you to
25 approve today is a \$354-plus million rate increase they want

1 you to start giving them today.

2 When are you going to hear service complaints?

3 Chapter 366.06(1), In fixing rates, the PSC shall investigate
4 and determine the actual legitimate property, used and useful.
5 When's that going to be done?

6 366.06(2), The Commission shall order and hold a
7 public hearing giving notice to the public.

8 366.06(3) is the file and suspend, so-called file and
9 suspend language. Okay. That's not applicable. That
10 language, by the way, Commissioners, requires that there must
11 be a commencement date. There's no commencement date been
12 found by your staff in this proceeding, and in large part it's
13 because there are no MFRs. And the finding of a commencement
14 date is statutorily tied to the fact that the utility has met
15 the minimum filing requirements provided by the rules and the
16 statutes and that your electric staff has found that they
17 comply. We don't have a commencement date; we don't have MFRs
18 in this case. And you can't say that it is permanent; you
19 can't say it's interim. We'll get to that in a minute.

20 366.07 says, "Rates; adjustment." Whenever the
21 Commission asked for public hearing, asked for public hearing.
22 This is not a public hearing today, Commissioner. **This is an**
23 agenda conference. It's not an evidentiary hearing. Public
24 hearing means evidence, right to be represented, right to
25 cross-examine, put your own case on.

1 Now, staff counsel said or suggested -- I don't know
2 if he said or suggested -- that this is a case for interim
3 rates. The simple fact is that it's not. It's not even
4 remotely close if this is a case for interim rates. Interim
5 rates is a type of rate relief that is provided for
6 specifically by the statutes in 366. It's 366.071. It's in
7 the statute book.

8 I don't recall that Florida Power & Light in
9 requesting this surcharge gave this Commission any but the most
10 general of the Florida Statutes, saying that you should do it
11 because it would avoid intergenerational inequities, I guess
12 which could occur over six months, avoid the inconvenience of
13 paying interest for six months. My parents are ready to worry
14 about that because the short answer to that is, Commissioners,
15 is that if they don't get a rate order until April or May or
16 June of this year, my view is they're not entitled to any
17 interest. But even if they are entitled to interest from
18 January 1st or from the time they expended it, that's something
19 my parents are willing to risk paying.

20 Now, under the interim rate statute, if you look at
21 it, it requires that you have a test period. Okay? The test
22 period can be different for interim rates than for permanent
23 rates, but you've got to have test periods. Okay? What's the
24 test period here?

25 Now, again, they haven't asked for interim rates

1 here. That's something your staff has constructed as an
2 analogous situation that you go ahead and do it. Well, you
3 can't. We don't have a test period here. And the statute
4 specifically says that the company has to make a prima facie
5 case of entitlement to interim rates. They just can't come in
6 and say, we spent \$300 or \$700 million and we want some money
7 now. They have to show a prima facie entitlement, and it is
8 spelled out specifically in the statutes, Commissioners, of what
9 they have to do. And if they don't meet it, you can't give
10 them interim rates. And in the past where a company hasn't
11 made the prima facie case -- and the prima facie case for those
12 of you that might not know is related to what their earnings
13 are.

14 Now, we don't have -- this company says its earnings
15 are immaterial. They're not coming in saying, we meet the
16 criteria of 366.071, the interim rate statute, and are entitled
17 to it. They don't pretend to do that. That's something your
18 staff came up with to justify saying you could raise my
19 parents' rates starting today.

20 Now, I want to show you something else. This is just
21 an example of an interim rate order. Okay. The Commission
22 goes through some effort to have the staff examine the
23 company's claims of what their expenses are; whether those
24 expenses are consistent with the prior rate case; whether those
25 expenses, if accepted, in fact pull their earnings down

1 sufficiently to make the prima facie case.

2 But again, even though there's not exactly what we
3 would call a hearing, Commissioner Edgar, we don't need one in
4 the case of the interim rate statute because the interim rate
5 statute says you don't have to have one. They have to make a
6 prima facie case, but you don't have to have a hearing. The
7 only reason you don't have to have a hearing up front is
8 because the statute specifically says that you don't have to if
9 you comply.

10 This is not a case about interim rates, and you
11 cannot, Commissioners, in my estimation begin to think that you
12 can use the fact that there's an interim rate statute that you
13 can grant this company rates starting today without
14 first holding an evidentiary hearing.

15 Now, the staff I think more than the company, but
16 both are guilty of this, in my view, says, well, if you don't
17 buy the interim rate logic for giving these people, this
18 company all this money without notice and without a hearing,
19 it's let's try the fuel adjustment clause analogy. Okay? The
20 Commission does it all the time. The Commission does fuel
21 adjustment, conservation cost recovery, environmental costs and
22 the like all the time; ergo, it must be okay to give this
23 company \$354 million over the course of 24 months starting
24 today again without notice and without hearing.

25 Now, the problem with that, Commissioners, is that in

1 one case I think at least the recovery clause is statutory
2 while the others are not. The key thing they all have in
3 common though, and this is critical, is that none are approved
4 without prior hearing and notice, prior hearing and notice.
5 And I want to show you something very briefly.

6 Commissioner Edgar, you will probably find out that,
7 if you're not already, you'll be put on the fuel adjustment
8 panel. It seems to be the thing for young Commissioners to be
9 stuck with. It's an exceedingly important docket though,
10 nonetheless.

11 CHAIRMAN BAEZ: Mr. Twomey, I'm going to have to ask
12 you to stop giving out the Commission's secrets, okay?

13 MR. TWOMEY: I apologize, Mr. Chairman.

14 CHAIRMAN BAEZ: Be very careful, sir.

15 COMMISSIONER DEASON: What I want to know is why am I
16 still on it?

17 MR. TWOMEY: In your case it's your 14-something
18 years of accumulated wisdom.

19 COMMISSIONER DEASON: It's my good looks.

20 CHAIRMAN BAEZ: You just came around again, that's
21 all.

22 MR. TWOMEY: Now, with respect to the fuel adjustment
23 clauses, it is not something that happens overnight following a
24 staff recommendation ten days ago and you approve rates. Now,
25 I want to give you an example. Last year in the fuel

1 adjustment dockets, as early as February, February 17th of last
2 year, there was a Commission order issued establishing the
3 procedure for the fuel adjustment and the other cost recovery
4 clauses. It laid out by the Prehearing Officer dates for
5 filing of the companies' testimony, intervenors' testimony,
6 limitations on discovery and the like.

7 Following that, in November, November 4th, 2004,
8 there was issued by Commissioner Bradley a comprehensive and
9 lengthy -- it was some 50 pages -- prehearing order that laid
10 out all the issues to be considered by the Commission at its
11 subsequent hearing, laid out all the witnesses for each of the
12 parties, the positions they took, stipulations and the like.

13 And subsequently, Commissioners, after the hearing
14 that was held in mid November I think it was, the Commission
15 per both Chapter 120 and Chapter 366, as is required by the
16 law, issued an order finding on the companies' claims. Okay?

17 So to repeat, Commissioner Edgar, or to amplify on
18 this, at these fuel adjustment hearings the companies came in
19 with prefiled written testimony, which is the standard here
20 typically, saying -- and they gave that testimony under oath
21 later live, subject to cross-examination saying, these are what
22 my company spent, these are the amounts spent in the past,
23 actual amounts to be trued-up, and these are the projections of
24 the amounts of the next 12 months that we want to have based
25 upon our best availability or capability of making projections.

1 Sworn testimony subject to discovery earlier, cross-examination
2 at hearing. And then and only then does the Commission come
3 out and enter its order. And this order is replete, as you'd
4 expect with an order that's written properly with Chapter 120,
5 based upon the evidence in the record, we find; based upon the
6 evidence in the record, we find. So the clauses don't and
7 never have escaped the notion that you have to give notice to
8 the customers and that there has to be an evidentiary hearing
9 that the customers of the utilities have a right to present
10 their case, they have a right to counsel, they have a right to
11 cross-examination, they have a right and should expect to have
12 an order from this Commission in each and every case saying
13 that based upon competent substantial evidence of record that
14 what you find that what the company is requesting was necessary
15 for hurricane recovery, was reasonable in the amount, and that
16 it was all spent properly.

17 Now, can you get around doing that and not having a
18 hearing? Well, fortunately, the company passed out in their
19 handout a July 14th, 1998 notice of proposed agency action.
20 Now, I don't know how much you-all did this at your prior
21 agency, Commissioner Edgar, but quite often here at the
22 Commission if the Commission wants to avoid actually having a
23 hearing and so forth with the expectation at times that
24 everybody will buy a decision made up front, they go ahead and
25 use the proposed agency action process, which I'm sure you're

1 familiar with. But the key there is that if you were to do a
2 proposed agency action order today saying, we're going to give
3 them this money without looking at whether it was properly
4 spent or hearing their witnesses and so forth and without
5 notice to the customers, at least if you did it as proposed
6 agency action, then my parents, Office of Public Counsel, and
7 FIPUG could come in 30 days hence and say, we don't buy that;
8 we want to have a hearing on the merits.

9 Now, I'll close by saying that this company hasn't
10 suggested that they are going to lose any of the \$354 million
11 by waiting to prove their case in the hearing room. All
12 they're saying essentially is, is that there's a better
13 matching by avoiding the passage of four to six months. We're
14 doing it in the interest of our customers because we'll save
15 our customers interest. Well, I say, "Ha." Listen to what the
16 representatives of the customers are telling you,
17 Commissioners. They don't care about this interest issue. And
18 if there's going to be interest, we'll address that later. But
19 we're not willing to be deprived unconstitutionally,
20 instatutorily of our right to a hearing and notice in order for
21 them to tell us that it's the best thing for us.

22 So I would urge you, Mr. Chairman, to find that you
23 do not have the statutory authority to do this. It's not
24 supported by anything your staff has said, and it's not
25 supported by the generalities that the company has given you in

1 their petition, which is not described and styled as a petition
2 for interim rates. Thank you very much.

3 CHAIRMAN BAEZ: Mr. Litchfield.

4 MR. LITCHFIELD: I think I can be fairly brief. I
5 think the comments that we have just heard really boil down to
6 two or three basic issues: (A) Does this Commission have the
7 authority to accept an interim rate proposal such as FPL has
8 proposed subject to refund? And I think the answer to that is
9 a clear yes. This Commission has broad latitude and plenary
10 authority over the rates and charges of public utilities, and
11 certainly it is within your authority to implement interim rate
12 relief subject to refund such as we have proposed.

13 The other issue that was repeated over and over I
14 think in Mr. Twomey's comments was you need to hold a hearing.
15 Well, in fact, we have a hearing scheduled, and interventions
16 are being accepted. There are testimony dates already on the
17 books. Mr. Twomey, as he indicated, has filed an intervention
18 in this docket as recently as last Thursday, I believe it is,
19 on behalf of his parents, whom I have met, by the way, and are
20 delightful people. And he will have an opportunity, as he
21 indicated, to present testimony and to cross-examine and to
22 conduct discovery and to make his case. And if at the end of
23 the day he demonstrates to this Commission that not a single
24 dollar that the company has proposed to recover through this
25 surcharge mechanism in fact is recoverable, then again the

1 mechanism was subject to refund. And the company per the
2 staff's recommendation is certainly willing to provide a
3 corporate undertaking to the extent that it can cover whatever
4 refunds might be due. So there's really no prejudice, no harm,
5 no foul to Mr. Twomey or his clients or to FIPUG or OPC or
6 their constituents in connection with the procedure that this
7 Commission has plotted out for us to follow.

8 With respect to the comments of Mr. McGlothlin, I
9 think largely they were driven to the merits of some of the
10 costs and the issues and positions that they intend to take,
11 but again that will be their prerogative in the context of the
12 proceeding that this Commission has initiated. Thank you.

13 CHAIRMAN BAEZ: Commissioners, any questions?
14 Commissioner Edgar.

15 COMMISSIONER EDGAR: Thank you. I would like to ask
16 if staff, General Counsel's Office could speak more
17 specifically for my benefit as to the issue raised by
18 Mr. Twomey as to whether an evidentiary hearing is required
19 prior to -- required as a matter of law prior to authorization
20 of a preliminary surcharge in these circumstances.

21 MR. KEATING: First, I would like to note the staff
22 recommendation does not address these questions, and the reason
23 why is because they were not presented in the motion to
24 dismiss. There was no suggestion that the Commission lacked
25 authority to implement a preliminary surcharge in the motions

1 to dismiss. Legal precedent says that in determining the
2 sufficiency of a petition, the Commission should confine its
3 consideration to the petition and documents incorporated
4 therein and the grounds asserted in the motion to dismiss. You
5 heard a wonderful motion to dismiss that was never filed.

6 We have not had a situation like this. And in my
7 experience, which is about eight years here, this is a unique
8 situation where we've been asked to implement a surcharge
9 subject to refund in the electric industry. I have done some
10 research in the water and wastewater industry. We have
11 authorized emergency rates under similar statutory authority;
12 that is, our authority or broad authority to set rates that are
13 just, reasonable, and fair even though there was not explicit
14 statutory authority that said you can set emergency rates.

15 Those were set subject to refund without the benefit
16 of a hearing, and we followed that up with a hearing at which
17 we determined whether the rates that were approved, those
18 preliminary rates or emergency rates were appropriate, and to
19 the extent they were not, they were refunded to customers.

20 It is analogous, and unfortunately, I used the
21 analogy to the interim rate provisions in the statute. It's
22 analogous to how we've handled interim rates where rates are
23 set subject to refund. And in those situations, we typically
24 don't allow any input from the parties. But again, as
25 Mr. Twomey has pointed out, this is not a proceeding on interim

1 :ates pursuant to that provision of the statutes.

2 I think what's unfortunate is I think the staff
3 recommendation was misconstrued a bit by Mr. Twomey to suggest
4 that that was a basis for allowing this relief. It was given
5 as an example of one of the methods the Commission has used
6 under its ratemaking authority. And prior to the interim rate
7 statute being put into effect in 1980, the Commission set
8 interim rates under its broad authority to set rates that were
9 fair, just, and reasonable.

10 COMMISSIONER DEASON: Mr. Chairman.

11 CHAIRMAN BAEZ: Commissioner Deason.

12 COMMISSIONER DEASON: I want to just lay something
13 out and maybe get some feedback. Would it be possible just to
14 defer action on this matter and allow staff additional time to
15 put together a legal analysis of the arguments that's been made
16 as to the exact authority we would be operating under and
17 reschedule this for the next appropriate agenda conference? Is
18 that something we could do? Or maybe everyone else is
19 comfortable in voting for it. I'm a little uncomfortable at
20 this point.

21 I would prefer more in-depth legal analysis in terms
22 of our exact legal authority to proceed with an interim, if you
23 want to call it interim, emergency surcharge, whatever you want
24 to call it. I think there have been some significant questions
25 asked. I'm not willing to concede that we don't have the

1 authority, but still I'm uncomfortable exactly what legal
2 authority we would be operating under. Maybe legal wants the
3 answer to that now, and if they're willing, I'll be -- that's
4 fine, but perhaps some additional time would be helpful.

5 CHAIRMAN BAEZ: Well, I think the question --

6 COMMISSIONER DEASON: And I know part of this is --
7 you know, the part of the motivation by FPL is to try to get
8 something implemented earlier rather than later for a number of
9 reasons, interest and intergenerational inequities and things
10 of that nature. I understand that.

11 CHAIRMAN BAEZ: I come at it -- and I'll tell you one
12 that hasn't been mentioned, but for some of Commissioner
13 Davidson's initial questions, you know, we've got to -- we're
14 in a race against the clock in some respect the way I look at
15 it. And we either have to be as prepared as we could be to go
16 through the things that we went through, that this state went
17 through less than a year ago, or we can't, and otherwise, it
18 just becomes a sore that won't heal or certainly a situation
19 that we are ill prepared for on a going-forward basis. That
20 was my consideration on an interim -- of an interim treatment
21 of this.

22 I will agree with you, Commissioner Deason, that the
23 legal questions are there. I think in a functional sense, the
24 surcharge, how interim as it may be is only a sliding thing.
25 If we're putting it off two weeks at your request, I would

1 certainly respect that. But I do want to go out -- you know,
2 what you and I already know is that part of the considerations
3 out here are timing issues.

4 COMMISSIONER DEASON: Timing is critical, but at the
5 same time, if we proceed and it is determined that we acted
6 without sufficient specific legal statutory authority, then
7 where are we? We may have a court tell us that we were
8 improper in our actions.

9 CHAIRMAN BAEZ: Well, I think -- and maybe the
10 General Counsel can help me out on this after I frame the
11 question. I hear what you're saying, but the one thing that I
12 don't hear being said is that the actual petitions -- or how
13 shall I say this? That the hearings, that the result of the
14 hearings that are planned for later on in this year will yield
15 results that are subject -- that are illegal in some way.

16 COMMISSIONER DEASON: No, no. The hearings are
17 there. I mean, what I hear the arguments is, is that what I
18 understand Mr. Twomey to say is that we need some type of a
19 basis even if it's prima facie, which he's saying we lack at
20 this point to make any type of a change in rates.

21 CHAIRMAN BAEZ: And I agree that that's what
22 Mr. Twomey is saying. And I guess the point that I'm raising
23 is that if we have, as was answered earlier, a, quote, final
24 result emanating from this Commission at midyear, that one way
25 or another will address whatever discrepancies may have existed

1 before, never mind what our authority might be.

2 Do you see what I'm saying? The question would have
3 been resolved one way or another. You either had the authority
4 to do -- either the surcharge was appropriate or is appropriate
5 in order to recover the funds that are being sought --

6 COMMISSIONER DEASON: And I believe even Mr. Twomey
7 concedes that if after we go to hearing and we hear the
8 evidence and we make a determination and if we determine the
9 surcharge is appropriate, I mean, he still may disagree, but I
10 think he would probably concede that at least we went through
11 all of the legal hoops that we would have to go through to do
12 that. His problem is from now until that time.

13 CHAIRMAN BAEZ: And I guess my -- and this is -- you
14 know, it may sound completely improper. I guess what I'm
15 trying to say is that I'm okay outrunning that for reasons of
16 not prejudicing the utility's ability to respond as well, if
17 not better, than they did facing the same situations that they
18 faced this year.

19 Now, they may have been appropriate, they may not
20 have been appropriate, they may have been overspending or not.
21 Those questions are still out there, but in order that no
22 further questions or at least to do our part so that no further
23 questions are out there if they should ever happen again so
24 soon, we need to not be standing in the way of being as
25 prepared as we can. And that's really the logic. It may be

1 completely illogical to some, but that's really the logic that
2 I'm trying to operate under.

3 But having said that, I don't know, Commissioners. I
4 mean, I certainly don't have -- if it's a question of you,
5 Commissioner Deason, needing some more reassurance --

6 COMMISSIONER DEASON: Well, I just heard legal say
7 that these were arguments that they were -- I don't mean to be
8 putting words in their mouth, but they didn't anticipate were
9 coming, and we're really not prepared to address or did not
10 address in their original recommendation. **And if** I'm reading
11 more into your response than that, please clarify.

12 MR. KEATING: I probably wasn't as clear as I should
13 have been. I started my response to Commissioner Edgar's
14 question suggesting that this is a motion to dismiss that we
15 never saw, so it's not addressed in the recommendation. But I
16 do believe under Chapter 366, which is our governing statute
17 here for ratemaking, the Commission has the jurisdiction and
18 the duty to set fair, just, and reasonable rates and charges to
19 be applied by FPL. Now, those terms -- fair, just, and
20 reasonable -- are the terms that appear repeatedly throughout
21 Chapter 366 in the ratemaking provisions of that chapter. They
22 are broad terms and they reflect a broad grant of authority,
23 and the courts have recognized that before.

24 Chapter 366 does specify some particular mechanisms
25 that can be used in the ratemaking process such as the interim

1 rate setting provision in the full ratemaking proceeding, a
2 cost recovery clause for environmental costs and some
3 conservation costs. But given the broad grant of authority to
4 fix fair, just, and reasonable rates, it does not attempt to
5 establish every mechanism that the Commission uses to set
6 rates. It does not establish the fuel and purchased power cost
7 recovery clause through which a substantial portion of rates
8 are set.

9 COMMISSIONER DAVIDSON: Does rulemaking address that
10 somehow? I mean, is every procedure we use somehow encompassed
11 either via statute or rulemaking? I mean, do we have ad hoc --

12 MR. MELSON: We are exempt from rulemaking for
13 clauses. Chapter 120 has got a specific exemption. It says
14 all of our clauses are exempt from the rulemaking requirements.

15 MR. KEATING: Chapter 366 doesn't establish several
16 ratemaking conventions that have been used by the Commission.
17 These are mechanisms that have been used over time to satisfy
18 the broad concepts of setting fair, just, and reasonable rates
19 under Chapter 366. And as I pointed out in my response to
20 Commissioner Edgar, prior to the interim rate statute being
21 enacted in 1980, the Commission did set interim rates under
22 this broad authority to set -- to fix fair, just, and
23 reasonable rates.

24 Also, the Commission as recently as 1999, and this is
25 in a water and wastewater case, but it's based on the same

1 statutory authority to set fair, just, and reasonable rates,
2 the Commission established emergency rates subject to refund.

3 Chapter 367, and the Commission recognized this in
4 that order, does not expressly authorize emergency rates, but
5 it provides the Commission must set rates that are fair, just,
6 and reasonable, and thus provides the Commission the authority
7 to use emergency rates to that end.

8 So that's the extent that I can address the question
9 of the Commission's authority today. I mean, if there are
10 additional matters that Mr. Twomey brought up that still
11 linger, I don't know that I'm prepared to address them today.

12 COMMISSIONER DAVIDSON: I don't want to even attempt
13 to speak for Mr. Twomey, but I think his argument was -- would
14 not be with that we have the authority to establish fair, just,
15 and reasonable. I think he would insist on that. It's that
16 there needs to be some procedure followed. And what we heard
17 from you is that there are examples where we don't have set
18 procedures.

19 And I guess -- I mean, my question -- I'll punt this
20 up to General Counsel, no slight at all to you, Mr. Keating.
21 It's just an additional source of information. Mr. Melson, you
22 obviously are very familiar with Issue 2. It doesn't cite to
23 any specific statutory provisions which would give the
24 Commission authority. We've heard from Mr. Keating. What's,
25 in your opinion, the preferred sort of course of action for

1 dealing with the surcharge petition? It will be dealt with at
2 some point, and it looks as if the time frame that we're
3 discussing now is the period between today and the hearing.
4 And the issue is whether we have authority to approve the
5 petition and have those amounts passed on to customers.

6 MR. MELSON: There's nothing 100 percent on point
7 because this is the first time you've had a request for this
8 type of a surcharge. I think the best analogies, and we have
9 looked at this, are the two that Mr. Keating talked about.
10 Prior to the time you had statutory authority to do interim
11 rates, the Commission did interim rates under its general power
12 to set fair, just, and reasonable, and the courts upheld that.
13 Also, as he said, in the water and wastewater cases, you have
14 done emergency temporary rates or temporary rates again without
15 a specific statute or rule but exercising that general
16 authority. It's my belief that if you were to exercise that
17 authority and we were to be called on to defend that on appeal,
18 we ought to prevail on appeal. If we didn't, and maybe in
19 partial answer to Commissioner Deason's question, if a court
20 ultimately decided the Commission had exceeded its authority to
21 set temporary rates, it seems to me the relief would be refund
22 with interest, which is sort of the paradigm, which is what the
23 company has asked for and what staff has recommended.

24 So I guess it's my brief that while it is -- it
25 depends on that fair, just, and reasonable language. I believe

1 you've got the authority. The question it seems to me that
2 Issue 3 raised and staff recommended you should grant it is
3 given the authority as a matter of discretion now, should you
4 do it? And that was the subject really I think of the argument
5 by Public Counsel and FIPUG that you should not.

6 CHAIRMAN BAEZ: Mr. Twomey, you have comments, but I
7 think we're on Commissioner questions. So if you can -- maybe
8 a Commissioner will ask you a question.

9 MR. TWOMEY: Okay. Yes, sir. Thank you.

10 COMMISSIONER DEASON: I'm sorry, I missed part of
11 your answer. To capsulize it, what I hear you saying is, is
12 that you think we have the authority, but even if we don't,
13 what's going to happen is they'd have to refund, which is what
14 they're willing to do anyway.

15 MR. MELSON: Exactly. And in the process if somebody
16 chose to raise that as an issue on appeal, then maybe we'd get
17 the question settled for the future of whether we have the
18 authority or not. I believe you do, but I recognize it as a
19 debateable question.

20 COMMISSIONER DEASON: Well, let me ask Mr. Twomey.
21 You heard the response that even if we don't, the remedy would
22 probably be what the company was willing to do anyway and
23 that's refund the money.

24 MR. TWOMEY: Well, Commissioner Deason, you're the
25 Commissioner with by far the most experience here. Three of

1 the other Commissioners are lawyers. This is not supposed to
2 be something that you just take a shot at getting right. I
3 would ask you to ask the staff attorney whether this water and
4 sewer case where they left out there the Commission took
5 undescribed procedures for rate relief wasn't appealed. And I
6 would suggest to you this decision could get appealed. And I
7 would say to you, Mr. Melson just said, well, there's no
8 precedent for this, but we think we can get away with it or
9 words to that effect, and one of the first things I read to
10 you-all was that any fair reasonable doubt concerning the
11 existence of a power of a statutory agency is to be resolved
12 against it. Your staff said you have no precedent.

13 COMMISSIONER DEASON: Let me ask this question of
14 Mr. Twomey. You've been around along time too, Mr. Twomey.
15 Your hair is probably more gray than mine.

16 MR. TWOMEY: I wouldn't go that far.

17 COMMISSIONER DEASON: But I'm going to ask you a very
18 direct question.

19 MR. TWOMEY: Yes, sir.

20 COMMISSIONER DEASON: Would you be willing to
21 concede -- and I'm not prejudging anything. When we go to that
22 hearing, from the very first penny to whatever millions of
23 dollars it is at stake, everything will be reviewed, but you
24 must realize that there were substantial funds expended to
25 repair and to restore service. Now, it may -- maybe FPL spent

1 more than they should have. I don't know. The hearing
2 probably will reveal that one way or the other, but there were
3 substantial funds expended. There needs to be recovery of
4 those funds in some form or another. Would you agree with that
5 or do you even --

6 MR. TWOMEY: I have no argument at all with the
7 notion -- I mean, I live in this state. I was subject to some
8 of the winds. I saw on television -- I read the newspapers. I
9 saw the damage done by these hurricanes to the service
10 territories of all of your investor-owned utilities, and I
11 would commend the people and the companies for the work they
12 did in repairing the system as rapidly as they could. And it's
13 clear that some -- I think it's clear that some huge portion of
14 the amounts they claim they have spent were in fact spent and
15 were in fact reasonable and prudent and necessary to the
16 repairs for the hurricane. I'm not disputing that.

17 What I'm trying to suggest here, Commissioners, is
18 this is -- we are a nation of laws. We take pride as opposed
19 to other countries of providing our citizens with due process.
20 And due process I'm saying to you or suggesting to you here
21 always at this Commission -- I've been practicing utility law
22 25 years; I started here at the Commission -- always consumers,
23 any party, the utilities as well if they're on the defendant
24 end of this thing, all parties are entitled to notice and
25 hearing. And my concern here, Commissioner Deason, is, is that

1 out of a desire to speed things up and meet the extraordinary
2 circumstances of hurricanes is that you're being encouraged to
3 skip over fundamental due process rights.

4 COMMISSIONER EDGAR: Mr. Chairman, if I may. I
5 believe in the discussion earlier counsel for the industry
6 suggested that the Commission's authority was clear on this
7 point, and so I would just like you to elaborate please on that
8 as to how you view the status of the law of the authority of
9 the Commission to issue a preliminary -- or authorization for a
10 cost recovery clause without an evidentiary hearing on those
11 points. Thank you.

12 MR. LITCHFIELD: Certainly, Commissioner Edgar. I
13 think the key here in this case is that the company is
14 proposing that this be implemented subject to refund. Now, in
15 fact, there is going to be a hearing to determine exactly
16 whether and to what extent the company should be recovering
17 these costs. And any decision that this Commission makes in
18 that respect based on arguments that Mr. Twomey or others may
19 make will be reflected in whatever refund or reallocation going
20 forward is required as a result of that decision.

21 The Commission -- I think the Commission's authority,
22 as Mr. Keating and Mr. Melson have indicated, is very broad
23 with respect to setting rates. Now, I'm not going to suggest
24 to you that if these rates were being set on a permanent basis
25 that no hearing would be required. Absolutely a hearing would

1 be required. But in fact, as I indicated, a hearing is going
2 to take place. These rates are only temporary, and any
3 customer will be refunded any portion of moneys paid to the
4 extent that this Commission as a result of those hearings and
5 those arguments determine that the costs recoverable are less
6 than what the company is proposing. So really, I think it
7 boils down to the proposal as being subject to refund.

8 This Commission in the past, you've heard other
9 examples of instances in which interim rate relief has been
10 granted. One other example that I would bring to your
11 attention is the concept of mid-course corrections in the
12 clauses. We do make mid-course corrections without hearings
13 during the course of a year knowing that a hearing is going to
14 be held and that the ultimate amounts will be determined and
15 assessed in that hearing, and then factors in those clauses
16 will be adjusted as necessary, not unlike what we're proposing
17 here.

18 CHAIRMAN BAEZ: Commissioners, any other questions or
19 a motion at this point?

20 COMMISSIONER DEASON: Just let me ask a question.
21 I'm not making a motion, but just an inquiry. When could this
22 be brought back with a more thorough legal analysis concerning
23 this Commission's authority to act? When could it be brought
24 back?

25 MR. MELSON: The next agenda is the 19th. I believe

1 recommendations would be due day after tomorrow. I think we
2 could get it back to the next agenda. I'd like to have perhaps
3 permission to file a recommendation late if you wanted more
4 information. I would also, if you're going to go that route,
5 suggest that you consider asking each of the parties to file a
6 brief, a very brief legal memorandum so that we make sure we're
7 covering all of the bases.

8 CHAIRMAN BAEZ: The key being very brief; is that --

9 MR. MELSON: Yes, sir.

10 CHAIRMAN BAEZ: Do we need to go through the motions
11 of suggesting limitations?

12 MR. MELSON: No. And, Commissioner Deason, to be
13 frank with you, I'm not confident there's really much more to
14 find that we haven't discussed one way or another today. I
15 think we could lay it out in a little more comprehensible,
16 understandable format, but I don't think at the end of the day
17 the conclusion is likely to be any different.

18 COMMISSIONER DAVIDSON: And that might help. I mean,
19 I share the Chairman's concerns about the need to sort of move
20 along. I mean, the one thing I think that would not -- one
21 outcome that wouldn't be good is if there is a certain amount
22 that is going to be sort of passed on that all sort of get
23 ordered right upon the next hurricane season, but I'm also very
24 concerned with sort of these concerns about the integrity of
25 the process. I don't have a problem -- if we've got the

1 statutory authority to sort of engage in this procedure, I
2 wouldn't have a problem with it if the authority is clear, but
3 if the authority is not there, I think the double concerns are
4 making sure we protect the integrity of the process but also
5 sort of get the company and the customers in whatever position
6 sooner rather than later that they're going to be in. So I
7 think having it laid out more will help if even that's all, but
8 perhaps we'll get some additional insights from the intervenors
9 and from the company.

10 COMMISSIONER DEASON: Mr. Chairman, I don't want
11 to -- you know, if there are a majority of the Commissioners
12 who are comfortable moving forward, I don't want to stand in
13 the way of that at all because I understand the sensitivity of
14 the timing of this and, you know, the need to go ahead and
15 allow some form of cost recovery obviously with a true-up, but
16 at the same time, you know, I have concerns about the legal
17 framework of which we would be doing that.

18 CHAIRMAN BAEZ: And I appreciate that. And I'll say
19 out loud what I would have pulled you aside and said. It is
20 not my interest to bully you into doing something that you're
21 not comfortable with. I appreciate, you know, taking the rest
22 of the Commissioners' temperatures and I will do that shortly.

23 I do have one question, Mr. Litchfield. I don't know
24 if you had someone with you that might be able to answer the
25 question. Now, you've heard the dates thrown out. The next

1 agenda being the 19th and --

2 COMMISSIONER DEASON: Actually, Mr. Chairman, I
3 believe it's the 18th.

4 CHAIRMAN BAEZ: I stand corrected, the 18th. You
5 can't count on Mr. Melson for anything, it seems.

6 COMMISSIONER DEASON: And the day before that is a
7 holiday.

8 CHAIRMAN BAEZ: Is it a holiday?

9 COMMISSIONER DEASON: Yes, the day before that is a
10 holiday.

11 CHAIRMAN BAEZ: But my question -- the point of my
12 question was this. How much does it impinge -- I mean, we are
13 already -- my understanding is that assuming a decision today,
14 the company was already planning on a February implementation.
15 Does this kind of thing -- not that that's a determinative
16 factor.

17 MR. LITCHFIELD: I understand. I'm advised that
18 initially our proposed implementation date was going to be
19 tomorrow, assuming that this Commission were to agree with the
20 proposal.

21 CHAIRMAN BAEZ: What does that mean exactly?

22 MR. LITCHFIELD: We have changed the implementation
23 date of the surcharge. We have revised that though to be
24 consistent with staff recommendation, which I think proposes
25 that it be implemented on or about the end of the month.

1 February 5th, I'm told.

2 CHAIRMAN BAEZ: So is it safe to say that I think in
3 the interest of being cautious and comfortable, all of us,
4 perhaps having you all address the statutory authority issue,
5 have Public Counsel and Mr. Twomey and FIPUG as well kind of
6 offer us their view of the world? We're not setting anybody
7 back assuming certain results.

8 MR. LITCHFIELD: No, I think given the fact that
9 we've already indicated that we're prepared to implement
10 effective -- I misquoted. Not February 5th but February 3rd.
11 That to the extent that we're able to provide the Commission
12 with additional comfort and get on the next agenda and get a
13 decision, I think we're still within the realm of --

14 CHAIRMAN BAEZ: Mr. Melson.

15 MR. MELSON: Mr. Chairman, let me give you a caution
16 there. The reason for the February 5th date is it is for meter
17 readings on or after 30 days from the date of the Commission
18 vote. If you were to slip the Commission vote for two weeks
19 until the next agenda, then I think the staff's recommendation
20 would be on bills for meter readings more than 30 days after
21 that date. So I think there probably really is a two-week slip
22 unless you were to vary from your past practice of making those
23 things effective 30 days out.

24 MR. MCGLOTHLIN: Chairman Baez --

25 CHAIRMAN BAEZ: Mr. McGlothlin.

1 MR. MCGLOTHLIN: -- if you're looking for input from
2 parties, OPC supports the idea of deferral and would prefer to
3 see the Commission make a more informed decision.

4 CHAIRMAN BAEZ: But would you take us to task for
5 sliding back on the dates, on the implementation dates,
6 assuming there's implementation to be had? I'm looking for
7 some give here.

8 MR. MCGLOTHLIN: I'm not quite sure I understood the
9 question.

10 CHAIRMAN BAEZ: We have -- General Counsel has
11 pointed up a practice that I must confess, although it sounds
12 familiar when I hear it, I've never quite understood the
13 billing, but that's a whole other story.

14 MR. MELSON: The theory is the Commission votes today
15 to increase rates. Customers are on notice today that if they
16 don't want to pay as much, they need to start watching their
17 usage tomorrow. Thirty days out, the company takes a meter
18 reading that captures that time and bills. So essentially
19 they're billing for usage on or after the date of the
20 Commission vote, but the bills are rendered --

21 CHAIRMAN BAEZ: What kind of variance is available to
22 us? I mean, is that written somewhere?

23 MR. MELSON: It is written in the rules for general
24 rate increases. Again, we're in a slightly different posture
25 here. My impression is, and technical staff maybe can correct

1 me, is that is really the customary practice in any type of
2 ate increase. And technical staff may correct me.

3 MR. MCGLOTHLIN: To answer your question, Chairman
4 Baez, we have no objection to that modification.

5 CHAIRMAN BAEZ: To the modification or deviating from
6 he 30-day traditional notice?

7 MR. MCGLOTHLIN: Yes.

8 CHAIRMAN BAEZ: And we can do that --

9 COMMISSIONER DEASON: Let me see if I understand.
10 Public Counsel is saying they would have no objection to
11 shortening the normal 30-day notice?

12 MR. MCGLOTHLIN: In order to have the opportunity to
13 brief you of the statutory authority.

14 COMMISSIONER DEASON: What about Mr. Twomey and
15 Ms. Kaufman?

16 MR. TWOMEY: I'll have my parents cut back on their
17 heat.

18 CHAIRMAN BAEZ: Just in case.

19 MR. TWOMEY: Just in case.

20 CHAIRMAN BAEZ: Ms. Kaufman.

21 MS. KAUFMAN: Chairman Baez, this is not something
22 that I contemplated nor I have discussed --

23 CHAIRMAN BAEZ: You're telling me.

24 MS. KAUFMAN: -- with my clients. So I'm not really
25 in a position to tell you they would acquiesce, but obviously

1 they will comply with whatever the Commission decides.

2 CHAIRMAN BAEZ: Well, having said that and having
3 made a good-faith attempt at getting everybody to sign on,
4 Commissioner Deason, I guess, you know, I'm not -- after
5 hearing all of this, I'm not uncomfortable with holding off the
6 decision so that you can get the kind of comfort, as well as
7 the other Commissioners. I mean, I'm sure you all -- there's
8 been a lot of good questions thrown out here that I think we
9 might need some answer to, but if you can help me as to what
10 you think you might like to see in terms of input in writing --

11 COMMISSIONER DEASON: Well, there was some discussion
12 about the Commission many years ago, even before my time,
13 allowing interim increases without specific statutory authority
14 to do so and how that relates to the -- now where we do have
15 specific statutory authority. Does that mean then when it
16 comes to interim our only avenue is to adhere strictly to the
17 statutory provisions, or do we still have some general grant of
18 authority to even deviate from that? That's what I have a
19 problem with.

20 MR. MELSON: I understand the question.

21 COMMISSIONER DEASON: And then Mr. Twomey's point
22 that even on interim there is a specific exemption within the
23 interim to allow that type of provision without a hearing, but

24
25

1 outside a zone of reasonableness, and of course, that's not
2 being done here. So those kind of differences and
3 distinctions, nuances is what I'd like to have more explored.

4 And then Mr. Twomey's argument that there has to
5 be -- according to 120, there has to be some type of a hearing
6 before there's a change in rates, absent what is allowed by the
7 strict provisions within the interim. That's just what I need
8 some guidance on.

9 MR. MELSON: All right.

10 CHAIRMAN BAEZ: Is everybody clear on what we all
11 need to --

12 MR. LITCHFIELD: We are. May I request a
13 clarification then though?

14 CHAIRMAN BAEZ: By all means.

15 MR. LITCHFIELD: We would then supply the additional
16 briefing, and we would then put this on the next Commission
17 agenda. But everybody is in agreement that we can forego the
18 customary 30 days and adhere to the original date as proposed
19 by staff in the event that the Commission agrees that it has
20 the authority to move forward?

21 CHAIRMAN BAEZ: I think that's what I heard everyone,
22 except Ms. Kaufman, in all fairness, be able to agree to.

23 MS. KUMMER: Chairman, I hate to -- you're reaching a
24 decision. I hate to prolong it. Mr. Melson did an excellent
25 job of explaining the 30 days, but one point I'd like to

1 clarify. If you shorten the 30 days, that means usage that
2 took place before the Commission's decision will be charged the
3 higher rate. And that's -- we consider that retroactive
4 ratemaking, and that's why we wait the 30 days. Sorry.

5 COMMISSIONER DEASON: I'm not sure that it's a
6 question of notice and --

7 MS. KUMMER: Well, it's also the effective date
8 because again the usage, if you put into effect -- if you let
9 them start billing two weeks after, the usage occurred the
10 first two months of that billing cycle will be billed at a
11 higher rate --

12 COMMISSIONER DEASON: Maybe, Mr. Chairman, we need
13 some further legal explanation as to whether that is something
14 that we have discretion to do or not. I don't want to
15 certainly violate the law, and I don't want to engage in
16 retroactive ratemaking.

17 CHAIRMAN BAEZ: You mean add that to the --

18 COMMISSIONER DEASON: Add that to the list.

19 CHAIRMAN BAEZ: Add that to the list.

20 MR. LITCHFIELD: I would note though, Mr. Chairman,
21 that I don't know that anybody in the state can claim to not
22 have been put on notice as to this possibility. I think
23 anybody who's reading the papers or watching television is
24 fully aware of the issues. So in terms of the element of
25 surprise, I just don't think that that's there, and certainly

1 not with respect to FIPUG's customers, which I think are two or
2 three.

3 CHAIRMAN BAEZ: You know, if we were living in a
4 practical world, I would agree with you, but since we're
5 getting beat over the head with interim statutes and whatnot, I
6 think we actually have to pay attention to that. I myself
7 don't read the papers and I knew about it. But I think, you
8 know, Ms. Kummer raises an interesting issue, and I think the
9 best way to deal with that is to have it -- let's get
10 everybody's best on that issue.

11 COMMISSIONER DEASON: For what it's worth,
12 Mr. Chairman, as I recall, we had this argument a year ago, and
13 in an abundance of caution, the Commission adopted the 30-day
14 policy, but I don't think it was ever determined that it was a
15 matter of strict legal interpretation and something that we had
16 to do.

17 CHAIRMAN BAEZ: And would you expect that to change?

18 COMMISSIONER DEASON: I wouldn't expect it to change,
19 but it could. That's the way I recall it.

20 CHAIRMAN BAEZ: With that, we'll defer to the next
21 agenda decision on this issue and I guess on the subsequent
22 issues as well; right? The tariff sheet and the actual
23 permission to implement. Okay.

24 MR. MELSON: Mr. Chairman.

25 CHAIRMAN BAEZ: Yes, sir.

1 MR. MELSON: Could the Commission give the parties a
2 deadline to submit anything that they intend to submit?

3 CHAIRMAN BAEZ: You know, that's what I was going to
4 ask before Ms. Kummer came and threw a monkey wrench into all
5 this stuff. So why don't we discuss -- what's your absolute
6 drop-dead date? I'm going to let you have this one.

7 MR. MELSON: It depends how long you give us to file
8 the recommendation. I'd like to get the parties' input, say,
9 by two o'clock Friday afternoon, and then we would plan to file
10 the first part of next week a recommendation.

11 CHAIRMAN BAEZ: And I think, unless there's any
12 objection, we're going to go with that. I trust you to do your
13 best. Parties, Friday, two o'clock. Very well. Thank you all
14 for your arguments and questions. And thank you,
15 Commissioners, for your indulgence on this one.

16 Why don't we take a five-minute break? Thank you.

17 (Brief recess.)

18 (Agenda Item Number 8 concluded.)

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1 STATE OF FLORIDA)

CERTIFICATE OF REPORTER

2 COUNTY OF LEON)

3

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

5

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

8

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

11

DATED THIS 11th DAY OF JANUARY, 2005.

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13

Tricia DeMarte

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TRICIA DeMARTE, RPR

FPSC Official Commission Reporter

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(850) 413-6736

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