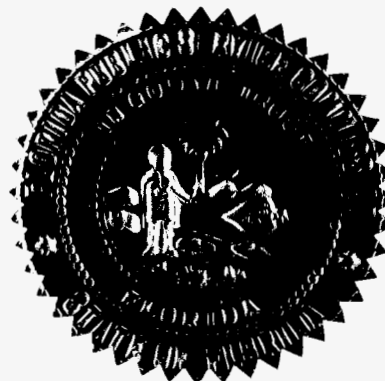


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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. 14

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

DATE:                               January 18, 2005

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

REPORTED BY                    JANE FAUROT, RPR  
  Official FPSC Reporter  
  (850) 413-6732

1 PARTICIPATING:

2 R. WADE LITCHFIELD, ESQUIRE, and NATALIE F. SMITH,  
3 ESQUIRE, representing Florida Power & Light Company.

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

6 JOSEPH McGLOTHLIN, representing the Office of Public  
7 Counsel.

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

10 COCHRAN KEATING, ESQUIRE, KATHERINE FLEMING, ESQUIRE,  
11 ANDREW MAUREY and JOHN SLEMKEWICZ, representing the Florida  
12 Public Service Commission Staff.

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

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2 CHAIRMAN BAEZ: We will go back on the record.

3 Commissioners, we are on Item 14.

4 Mr. Melson.

5 MR. MELSON: Mr. Chairman, Thomas and Genevieve  
6 Twomey have filed a motion for disqualification of  
7 Commissioners Baez, Deason and Bradley. It is my understanding  
8 that was filed with the Clerk's Office about 9:45 this morning.

9 As a result, I would recommend that you consider  
10 temporarily passing this item. I think we ought to allow each  
11 of the Commissioners involved an opportunity to read the motion  
12 and to be advised by the legal staff as to whether or not the  
13 motion is meritorious. And perhaps we could come back at a  
14 time certain after Internal Affairs to see where we go next.

15 CHAIRMAN BAEZ: Thank you, Mr. Melson.

16 And, Commissioners, I would agree that having been  
17 presented with this motion only recently, I think we need to  
18 have some time to review it and have counsel review it, as  
19 well. So on his advice, I think we are going to temporarily  
20 pass Item 14 until a time certain. I am tempted to say one  
21 o'clock, with the anticipation that if we can dispense with the  
22 other item that we have pending, we may be able to move  
23 directly into Internal Affairs, and then we can come after a  
24 lunch break of sorts. So we will call it one o'clock to take  
25 up Item 14.

1 MR. MELSON: Chairman Baez, I would suggest two  
2 o'clock might work a little better, because I do want everybody  
3 to have -- the Commissioners affected to have an opportunity to  
4 read it and to be advised. We might cut it close, depending on  
5 how long IA goes.

6 CHAIRMAN BAEZ: That's fine. You are among those  
7 that can probably speak up on an issue like this. So,  
8 Commissioners, if there is no objection, is two o'clock all  
9 right with everyone? Yes? No objections? Very well, thank  
10 you for your indulgence. We will TP until two o'clock. Thank  
11 you.

12 \* \* \* \* \*

13 CHAIRMAN BAEZ: We'll convene the agenda conference.  
14 Mr. Melson, can you help where we left off.

15 MR. MELSON: Yes, sir. Let me give the Commissioners  
16 and the parties an update.

17 Item 14 had been temporarily passed because of the  
18 Twomeys' motion for disqualification of Commissioners Baez,  
19 Deason and Bradley. Since we have broke, each of the  
20 Commissioners has reviewed that motion. Each of them has  
21 entered an order denying the motion. Those have either been  
22 issued -- they have been signed and are in the process of being  
23 issued, as we speak, by the Clerk's office. So at this point,  
24 with those motions having been denied, I think it is time to  
25 move to the merits of Issue 14.

1 CHAIRMAN BAEZ: Thank you, Mr. Melson.

2 And, Commissioners, as I recall -- Mr. Keating,  
3 refresh my memory, we are on Issue 2?

4 MR. KEATING: That's correct. Issue 1 was disposed  
5 of at the last agenda. It was included in the revised  
6 recommendation, just for purposes of completeness.

7 This item concerns FPL's petition to implement its  
8 proposed storm cost-recovery surcharge, subject to refund,  
9 pending the hearing set for April in this docket. As you will  
10 recall, this matter was addressed at your last agenda  
11 conference where the intervenors made arguments concerning the  
12 Commission's authority to implement the proposed surcharge  
13 prior to hearing. Parties were asked to file legal memoranda  
14 concerning this question, and Staff was instructed to bring a  
15 recommendation on this matter to this agenda.

16 Staff has reviewed the legal memoranda filed by the  
17 parties and has conducted its own research into this question.  
18 Based on that review, staff believes that the Commission has  
19 the clear authority to approve implementation of the proposed  
20 surcharge subject to refund, pending resolution of this case at  
21 hearing.

22 Staff further recommends, as we did in the prior  
23 recommendation, that you approve the proposed surcharge subject  
24 to refund effective 30 days from the date of your vote with  
25 appropriate security for the amount held subject to refund.

1 You have heard argument on this question concerning your  
2 authority to approve this proposed surcharge prior to a  
3 hearing. Of course, it is within your discretion to hear  
4 additional argument if you wish. Staff can answer any  
5 questions.

6 CHAIRMAN BAEZ: Thank you, Mr. Keating.

7 Commissioners, I remember, as Mr. Keating remembers,  
8 that we did have some oral argument from the parties on this  
9 issue. However, in all fairness, I think there have been some  
10 subsequent filings by the parties, that make up part of the  
11 revised recommendation that has been offered to us by Staff.  
12 And if it is all the same to you, I think perhaps we should  
13 allow some further discussion from the parties limited, if at  
14 all possible, to the supplemental information that was  
15 provided.

16 I think if there is no objection to that, we will  
17 proceed on that basis. And we will keep the order in which --  
18 just treat it as we were treating the motion prior.

19 So, Mr. McGlothlin, you can go ahead first and fill  
20 us in on your filing.

21 MR. MCGLOTHLIN: Thank you, Mr. Chairman.

22 Joe McGlothlin for the Office of Public Counsel.

23 I will first refer to FPL's submission. And then if  
24 I may, I would like to comment briefly on staff's  
25 recommendation. In its supplemental memo, FPL identifies, in

1 addition to the references to the broad authority that were  
2 discussed last time, primarily two matters; the orders  
3 authorizing midcourse corrections in the fuel cost-recovery  
4 docket, and the orders approving the collection of the security  
5 costs presented by the companies. Neither provides authority  
6 for the Commission's ability to implement the proposed  
7 surcharge that is before you now.

8           With respect to the midcourse corrections, those were  
9 entered in the fuel cost-recovery clause, and that proceeding  
10 has a long and even a storied history of a regime of hearings  
11 that goes back to 1974. And if you look at the orders cited by  
12 FPL, the one that created the procedures for midcourse  
13 corrections, 13694, it's clear that the only departure that  
14 came about for midcourse corrections came about as a result of  
15 a stipulation of parties that you don't have in this case.

16           And even that stipulation provided that when the  
17 utility comes in for a midcourse correction, that any party can  
18 ask for a hearing on it, or the Commission may decide to have a  
19 hearing on its own motion. So there is nothing about this  
20 narrow departure approved by stipulation that alters the regime  
21 of hearings in the fuel cost-recovery proceedings.

22           What about the orders authorizing collection of  
23 security costs? Again, if you look at one of the orders cited  
24 by FPL, FPL included this projected security cost in the  
25 September projections. Those projections were a part of the

1 hearing process that followed. And in its order the Commission  
2 was able to point to evidence of record as support for the  
3 security costs that it approved in that order. So, again, this  
4 is another example of a matter that was within the context of  
5 required hearings.

6 With respect to the staff's memorandum, I want to  
7 address very briefly two points that the staff raised there.  
8 First, I had argued earlier that the case law supporting the  
9 Commission's inherent ability to provide interim increases in a  
10 rate case had been supplanted by the statute. And staff  
11 correctly points out that in the joint memo that OPC and FIPUG  
12 submitted after the last agenda conference, we characterized  
13 that as judicially created jurisdiction, and that was a poor  
14 choice of terminology, and the staff rightfully pointed that  
15 out, that the courts don't create jurisdiction.

16 But I have a point to give back, which is that in the  
17 Maule Industry case also cited by the staff, in that case the  
18 Supreme Court said that the prior inherent authority had been  
19 preempted and rendered inapplicable by the statute. So while  
20 we may have used a poor choice of terms, the fact remains that  
21 according to the case law the so-called inherent authority on  
22 which the Commission relied do not survive the legislation that  
23 created its ability to implement interim increases.

24 And then, lastly, there is the Citizens v. Wilson  
25 case, a 1990 case, and that does merit attention. In that case



1 TECO filed a petition asking for approval of a tariff that  
2 would have modified the way the conservation cost-recovery  
3 factor would be allocated among rate classes. The Commission  
4 originally noticed it for a PAA type of proceeding, but during  
5 the agenda conference decided to issue a final order on the  
6 theory that the tariff filing was made within the context of  
7 the file and suspend law.

8 The Public Counsel's Office at the time appealed that  
9 decision, and the Supreme Court entered an order that has dual  
10 themes, and what I would describe as dueling themes. It is  
11 true that the court regarded that TECO tariff filing as falling  
12 within the file and suspend language and said that the final  
13 order was, therefore, surplusage, because unless the Commission  
14 actively withholds consent by suspending the rate, it takes  
15 effect automatically.

16 But it also said that OPC, at the time, had no right  
17 to contest the order because in the prehearing conference that  
18 followed, and the cost-recovery clause, by not objecting to the  
19 revised factor, it waived its right to complain about the fact  
20 that the Commission noticed a PAA proceeding, and later  
21 deprived OPC of the opportunity for hearing that that would  
22 have connotated.

23 So, on the one hand, you have in the same case  
24 decision language that says that under the file and suspend law  
25 the tariff takes effect automatically unless the Commission

1 actually withholds consent. In the same decision the court  
2 says that but for a waiver, Public Counsel was entitled to have  
3 a hearing. And one would presume that the hearing would not be  
4 a futile gesture, and OPC would have had the opportunity to  
5 contest the tariff to which the Commission had not actively  
6 withheld consent. So there are some unresolved conflicts  
7 within that case law.

8 COMMISSIONER DEASON: Mr. McGlothlin, did the court  
9 say that OPC had a right to a hearing before the tariff went  
10 into effect, or at some time subsequent thereto?

11 MR. MCGLOTHLIN: I think implicitly, because the  
12 Commission had noticed it for a PAA type of proceeding, one  
13 would presume that the hearing would have been prior to taking  
14 effect, because a protest to the PAA order would have gone back  
15 to square one.

16 COMMISSIONER DEASON: How does that square with the  
17 finding that the tariff, itself, was subject to the file and  
18 suspend law?

19 MR. MCGLOTHLIN: Well, what I'm suggesting is that  
20 there is some tension in the two points made by the court. But  
21 I do not dispute that there is an example of a case in which  
22 the Supreme Court said a tariff filing that is not a general  
23 base rate increase does fall within the file and suspend. I'm  
24 saying that the case is otherwise problematic, but I don't  
25 dispute that it is authority that the Commission can take into

1 account.

2           And if the Commission does regard this particular  
3 tariff filing as falling within the file and suspend language,  
4 even though FPL did not invoke file and suspend in either its  
5 petition or its supplemental memo, then the question arises how  
6 should the Commission apply the file and suspend language. And  
7 I want to take just a couple of minutes to make a couple of  
8 points on that because the court's language is clear, you have  
9 a menu of choices. You can suspend it and set of it for  
10 hearing, in which case no part of it goes into operation, or  
11 you can agree to allow some or all of it into effect, and make  
12 it subject to refund.

13           There are a couple of reasons why I think you should  
14 suspend it and set it for hearing. For one thing, we believe  
15 that this request by FPL is less about any urgency associated  
16 with the request, and more about FPL's opportunity to rehearse  
17 its theory of the case, which is that necessarily the ability  
18 to recover the storm costs is geared to whatever was in the  
19 reserve account plus recovery from customers.

20           If you look at Page 3 of their supplemental memo,  
21 this statement appears: "For example, the Commission has  
22 instituted a regulatory framework of cost-recovery clauses that  
23 operate independent of base rates. Extraordinary costs not  
24 reflected in base rates have been allowed to be recovered  
25 without reference to a utility's authorized or actual

1 earnings." And then in the same document on Page 6 FPL says,  
2 "The Commission in initiating the current regulatory framework  
3 chose, instead, to institute the two-part plan consisting of a  
4 target reserve amount coupled with the right for the utility to  
5 petition for recovery of prudently incurred costs in excess of  
6 its storm reserve."

7 We believe that FPL would seek Commission approval of  
8 a surcharge at this point as progress toward its goal of  
9 convincing the Commission that the only thing at issue, once  
10 you have put this into effect, would be whether the costs were  
11 reasonably and prudently incurred. Well, I want to remind the  
12 Commission that it has never retreated from its language in the  
13 1993 order in which it said what FPL wants is a guarantee that  
14 it would be insulated from all risks of storm damage, and  
15 regulation does not have that as its purpose.

16 And the other point is this: Aside from the 10  
17 percent threshold that is a legal issue that the Commission is  
18 aware of, there are some very basic questions about whether FPL  
19 has made the kind of prima facie showing that even the file and  
20 suspend language would require. Basically, the affidavit  
21 offered in support of the petition says we spent this much  
22 money, and we contend it was prudent and reasonable.

23 But there are some questions about whether FPL has  
24 taken steps that would be necessary to ensure that the revenues  
25 designed to cover basic levels of expenditures in such items as

1 maintenance of distribution lines, maintenance of transmission  
2 lines, operation of vehicles, and whether it has also offset  
3 the costs of replacing retired plant items with the cost  
4 removal that it has been collecting since the plant was placed  
5 in service through the depreciation rates that are called up in  
6 the base rates revenues. The basic questions about whether  
7 those items have been deducted from the overall costs or  
8 whether, instead, FPL has simply poured all costs associated  
9 with repairing and replacing items into the storm reserve.

10 So unless and until FPL has made that type of  
11 showing, our position is that you should suspend the tariff,  
12 subject to hearing. Thank you.

13 CHAIRMAN BAEZ: Questions of Mr. McGlothlin?

14 Ms. Kaufman.

15 MS. KAUFMAN: Thank you, Mr. Chairman. I'm Vicki  
16 Gordon Kaufman with the McWhirter Reeves Law Firm. I'm here on  
17 behalf of the Florida Industrial Power Users Group. And since  
18 we filed a joint memorandum with the Office of Public Counsel,  
19 we will simply adopt and incorporate Mr. McGlothlin's argument  
20 this afternoon.

21 CHAIRMAN BAEZ: Thank you, Ms. Kaufman.

22 Mr. Twomey.

23 MR. TWOMEY: Yes, sir, Mr. Chairman, Commissioners,  
24 good afternoon.

25 I want to say preliminarily, I'm disappointed that

1 you didn't decide to let me argue the motions for recusal, but  
2 I'll accept that. I will say, though, if the orders are  
3 similar or identical to the ones issued in the Ocean Properties  
4 case, I believe they are inadequate.

5 I'll be brief. I want to, on behalf of my parents,  
6 Thomas and Genevieve Twomey, adopt the comments just made by  
7 Joseph McGlothlin on behalf of Public Counsel. I also want to  
8 commend your Staff for their greatly improved legal memorandum  
9 this go around as opposed to the initial one, to include what  
10 appears to be finding the most pivotal case before us now, that  
11 is the Citizens v. Wilson case, which the best I can tell, all  
12 of us, including Florida Power and Light, overlooked.

13 That case, Citizens v. Wilson, in our view, and as  
14 suggested, I think, by Mr. McGlothlin has an apparent holding  
15 that exceeds what the court needed to say, or perhaps what it  
16 should have said, given the facts of the case as described by  
17 Mr. McGlothlin. We would argue that the facts of that case,  
18 again, as suggested by Public Counsel, are substantially  
19 different from the instant case.

20 Specifically, in Wilson the Commission only shifted  
21 responsibility for energy conservation cost-recovery dollars  
22 from interruptible customers to firm customers without first  
23 holding an evidentiary hearing on the matter. That is, as I  
24 think you know, the dollars had previously been through the  
25 process Mr. McGlothlin described in terms of holding lengthy

1 hearings involving prefiled testimony of the company's options  
2 or availability for cross-examination by the other customer  
3 parties, and factual findings and conclusions of law entered by  
4 the Commission that those dollars were, in fact, reasonable and  
5 necessary and prudent in providing the offered service. So  
6 there is a difference there.

7 I would not recommend a repeat by this Commission of  
8 the procedure that was followed in the Citizens v. Wilson case  
9 merely because of the exigent factors that Mr. McGlothlin talks  
10 about, and because you don't have any need, and you didn't have  
11 any need there, apparently, to rush ahead and make a decision  
12 that shifted dollars from the interruptible to the firm  
13 customer classes without going ahead and first taking the  
14 necessary evidence to show that it was the proper thing to do.

15 I want to point out that at Page 17 of your staff's  
16 recommendation at the last paragraph, your staff says, and I  
17 quote, "The relevant case law suggests that FPL must make a  
18 preliminary evidentiary showing that application of its  
19 proposed surcharge on an immediate basis is fair, just, and  
20 reasonable. The evidentiary basis for a rate increase, subject  
21 to refund, is not subject to the same scrutiny as required in a  
22 final hearing, but must be stated with particularity."

23 Staff goes on and talks about what FPL has filed in  
24 the way of evidence in this case, Commissioners, and then goes  
25 on to say, "If the Commission believes that the information

1 filed by FPL provides on a preliminary basis adequate factual  
2 justification for its request to implement its proposed  
3 surcharge, it may grant FPL's preliminary surcharge petition."

4 Now, Mr. McGlothlin has suggested to you in, I think,  
5 a very effective and efficient manner that *Citizens v. Wilson*  
6 doesn't support the notion in this case that you should go  
7 ahead and give this company a rate increase without having a  
8 prior factual evidentiary hearing, not just merely looking at  
9 what the company has filed that is unopposed, not yet tested by  
10 any of its customers opposing the company in this case. You  
11 need to have the evidence before you and it needs to be tested.

12 Now, what evidence do you have? And I use evidence,  
13 and I am moving my fingers to put the quotations around it,  
14 because it is not evidence. It is not preliminary evidence in  
15 our view. It is a one-sided unilateral filing by this company,  
16 as suggested by Mr. McGlothlin, that says we say we spent the  
17 following amounts of money on the following laundry list of  
18 items, ergo we should begin to start charging our customers the  
19 recovery for those items right now.

20 It is you unopposed, it is not tested. And you all  
21 are administrators, you are the functional equivalent of  
22 administrative law judges in a case that is not determining  
23 whether a property owner gets to extend or rebuild a dock on a  
24 creek or a small river. This is a \$354 million matter. You  
25 all should decide this case only after listening to the



1 evidence, hearing it challenged by the customers, and rendering  
2 a final order.

3 As we said before, this company is not going to lose  
4 a penny of the amount of the money that you eventually find  
5 that it is entitled to recover. It is not going to lose a  
6 penny. It is going to be deferred. It is going to slip a few  
7 months as opposed to if you approve the surcharge as starting  
8 tomorrow or next week.

9 One could argue had the company been more diligent in  
10 preparing its case that it could be going to hearing now. But  
11 be that as it may, you're judges. If you sent this case to  
12 DOAH, it is inconceivable to me that an administrative law  
13 judge would grant this company, based upon the one case cited  
14 to you by your staff and the exigent circumstances of that  
15 particular case and what happened then, it is inconceivable to  
16 me that an administrative law judge of the Division of  
17 Administrative Hearings would grant this company \$354 million  
18 of surcharge recovery without first holding a factual  
19 evidentiary hearing, at which we, the customers, have a right  
20 to participate. An administrative law judge wouldn't do it,  
21 and neither should you. Thank you.

22 CHAIRMAN BAEZ: Commissioners, questions of Mr.  
23 Twomey? Mr. Litchfield.

24 MR. LITCHFIELD: Thank you, Mr. Chairman,  
25 Commissioners. My name is Wade Litchfield. Also with me is

1 Natalie Smith, and we are appearing on behalf of Florida Power  
2 and Light Company this afternoon. We are here today to support  
3 your staff's recommendation issued on the 11th of January in  
4 this docket. We think that the questions before you today are  
5 straightforward, and I'm prepared to address all of the issues  
6 at this point.

7           Certainly the arguments of my colleagues have strayed  
8 into Issue 3, as well, in terms of whether this Commission  
9 should approve the surcharge, assuming that it has the  
10 authority. Issue 2 is really quite basic. Is it within this  
11 Commission's authority to implement the surcharge on a  
12 preliminary basis, subject to refund, in advance of the  
13 evidentiary hearing scheduled in this matter where all  
14 questions of reasonableness and prudence of the costs will be  
15 considered and addressed, and where the Commission preserves  
16 all of its rights to address the company's petition for  
17 recovery and any theory of the case that any of my colleagues  
18 may propose at that point.

19           And then Issue 3 is if it is within the Commission's  
20 authority to do so, to take an initial step today to begin to  
21 address the substantial deficit in the storm reserve should  
22 they do so.

23           I have a few general comments really that I think are  
24 going to provide some context for the points that I'm going to  
25 make. First of all, I guess it goes without saying that we

1 recognize, all of us, that we came through an unprecedented  
2 storm season this past year. Following each of those three  
3 hurricanes that struck FPL's service territory within a span of  
4 six weeks, everybody wanted the lights back on as soon as  
5 possible. Homes needed to return to normal, businesses needed  
6 to get back to business, government needed to have its  
7 infrastructure back to full capability. And despite the scope  
8 of the damage inflicted by those hurricanes, expectations were  
9 very high and we shared those expectations.

10 Those expectations were communicated to FPL by the  
11 Governor's Office, by legislators, by this Commission, by  
12 customers, by businesses throughout the state. And as I said,  
13 we share those expectations. And we mobilized, as a result,  
14 the largest restoration effort in the history of this country.  
15 We restored power to over 5.3 million customers within that  
16 short span of time. It required tens of thousands of man  
17 hours. It required importation of thousands of additional  
18 workers from around the country and even as far away as Canada.  
19 This cost an enormous amount of money, in the hundreds of  
20 millions of dollars, well beyond what we had accumulated in the  
21 storm reserve.

22 Now, as I indicated last time, while no one predicted  
23 the severity of this past storm season, this Commission has in  
24 the past put in place a regulatory plan that does address  
25 Florida's vulnerability to hurricane damage, and it does

1 encourage prompt and safe restoration of electric service in  
2 those circumstances, and it does provide means for the recovery  
of prudent and reasonable costs. We think what we have  
4 requested this Commission to do is consistent with that plan  
5 and that framework, and that it is also consistent with the  
6 terms of the settlement agreement that we addressed at the last  
7 agenda.

8           There are policy objectives at issue here, and I just  
9 want to touch on a couple of those. We think that it is very  
10 important for the Commission to respond promptly to what we  
11 view as a matter of significant consequence both to FPL and its  
12 customers, to begin to allow the company to address the  
13 significant deficit that exists today in the storm reserve  
14 docket before another hurricane season is upon us.

15           We think that this action will send an appropriate  
16 signal to the investment community and to FPL's partners and  
17 contractors that the self-insurance framework that this  
18 Commission established back in '93 is in place, and it works,  
19 and provides an effective vehicle for the company to address  
20 extraordinary circumstances relating to the catastrophic 2004  
21 hurricane season, and that we are taking meaningful steps to  
22 prepare ourselves to address the prospect of potentially more  
23 active storm seasons.

24           Now, with respect to the scope of the Commission's  
25 authority, we would concur that we think your staff did an

1 excellent job in describing the extent of the Commission's  
2 authority in that respect. The position that Public Counsel  
3 and FIPUG have taken, and I will refer to them, although Mr.  
4 Twomey did not file paper, he joined in their motions, so when  
5 I refer to FIPUG and Public Counsel, I'm referring to Mr.  
6 Twomey, as well.

7 But their collective position really is predicated on  
8 one basic point. And they cite for you a couple of provisions  
9 in Chapter 366 that contains language stating that just and  
10 reasonable rates shall be established after public hearing. We  
11 agree that that is exactly what those sections state, and that  
12 is precisely what will occur in this docket.

13 Following the evidentiary hearings that will take  
14 place in April, this Commission will determine exactly what  
15 just and reasonable rates ought to be charged in order to  
16 address the storm deficit, and then any revisions that may be  
17 necessary with respect to the temporary or interim surcharge  
18 that need to be made will be made, and refunds with interest,  
19 if necessary.

20 The Commission will have determined, therefore, after  
21 those public hearings the just and reasonable rates fully  
22 consistent with the provisions of Chapter 366 cited by the  
23 Joint Movants. And the plain language of those statutes and no  
24 case law cited by the Joint Movants prevents this Commission  
25 from granting that type of relief.

1           To shore up their argument, therefore, that the  
2 Commission has no authority, the Joint Movants are forced to  
3 take the position that when the legislature adopted  
4 Section 366.071 implementing specific procedures for interim  
5 rate relief for base rate proceedings that they indirectly,  
6 impliedly, or by negative inference divested this Commission of  
7 other jurisdiction that it already had, jurisdiction that had  
8 been recognized previously in, among other cases, the Citizens  
9 v. Wilson case cited to you by your staff.

10           And we think that your staff does a great job in  
11 explaining why those contentions are not well-founded and  
12 incorrect as a matter of law. And that really all the  
13 legislature did was codify some rules that had previously been  
14 recognized as extant within the scope of the Commission's  
15 general authority under Chapter 366.

16           Now, the Joint Movants cite you to a case, Cone v.  
17 Department of Health for the proposition, and they cite  
18 language in there that is somewhat eye-catching and yet for  
19 reasons that I will explain is also misleading. That a special  
20 statute covering a particular subject matter is controlling  
21 over a general statutory provision covering the same and other  
22 subjects in general terms. And by this statement they are  
23 really attempting to suggest, again, that the legislature in  
24 adopting the specific interim procedures for base rate  
25 proceedings intended to divest the Commission of other

1 jurisdiction. It is not a correct representation of that case  
2 and it is not a correct statement of the law.

3 Now, when you look at the Cone case, interestingly  
4 enough, they start their analysis by saying, and this is the  
5 First DCA, "We begin our analysis with the usual recognition of  
6 deference and to an agency's interpretation of a statute it is  
7 charged to administer." And they cite other First DCA  
8 decisions. This Commission, like any other agency, is afforded  
9 that deference in interpreting the statutes that it is charged  
10 to administer unless that decision or determination is quote,  
11 unquote, clearly erroneous.

12 Now, in the Cone case the First DCA overturned the  
13 Department of Health's revocation of a physician's license to  
14 practice osteopathy based on provision under Chapter 456 of the  
15 Florida Statutes that relate to the general regulation of  
16 health care professionals, when there existed, according to the  
17 First DCA, a specific statutory basis for the revocation of an  
18 osteopathic license in Chapter 359, which concerns only the  
19 regulation of osteopathy. And those specific standards in  
20 Chapter 359, said the court, had not been applied by the  
21 Department of Health in its decision. That is not even  
22 remotely similar to the situation here.

23 If there were an analog, the analog might be that the  
24 Commission had perhaps denied -- this Commission perhaps had  
25 denied a request by a utility for interim base rate relief

1 based on its general authority without having any reference  
2 whatsoever to the specific provisions for interim rate relief.  
3 That would be the analog, and that is not what we are talking  
4 about here.

5           The primary rule of statutory construction also cited  
6 in the Cone case that is reflected or cited -- that are relied  
7 upon in Public Counsel and FIPUG's memo is to harmonize related  
8 statutes so that each is given effect. And we would submit  
9 that Chapter 366 and the provisions referenced in Public  
10 Counsel and FIPUG's memorandum can and must be read to  
11 harmonize with the various sections and give effect to each.  
12 Public Counsel and FIPUG, on the other hand, would ask that you  
13 read those provisions in a way that divests this Commission of  
14 jurisdiction.

15           Now, with respect to the midcourse correction, the  
16 Joint Movants have to attempt to show you that there are never  
17 hearings held -- excuse me, that hearings are always held in  
18 the context of prudent midcourse corrections. And they rely on  
19 some AG opinions from 1974, which to start off, we are talking  
20 about 30-year-old Attorney General opinions that are advisory  
21 in nature.

22           But even more important is the context in which those  
23 opinions were addressed. They were addressing a situation that  
24 existed prior to that time where utilities were given the  
25 latitude to make automatic adjustments in their fuel clauses



1 without any hearing whatsoever. And that is the issue that  
2 they were asked to address, and they said, in fact, no,  
3 hearings need to be required. And as a result parties entered  
4 into a stipulation that was approved by the Commission  
5 providing for periodic evidentiary hearings and indicating that  
6 the companies would no longer be able to make these unilateral  
7 automatic adjustments.

8 But like the statutory provisions in 366 that I have  
9 discussed earlier, these opinions didn't address and they do  
10 not preclude the type of interim relief contemplated here by  
11 the proposed storm charge. And they don't preclude, didn't  
12 preclude the type of action the Commission routinely takes in  
13 approving midcourse corrections in anticipation of the full  
14 hearings that are subsequently held.

15 Now, the process within the fuel clause has been  
16 modified from time to time, as you well know, and in 1984 the  
17 midcourse correction methodology was adopted, and that is an  
18 order on which Joint Movants rely quite heavily. But they do  
19 not present the full picture.

20 Subsequent to that order in which the midcourse  
21 correction procedure was adopted, the Commission revisited its  
22 procedures in the 2001 fuel and purchased power recovery clause  
23 docket, and in that docket they recognized at that point that  
24 parties were entitled to request a hearing relative to the  
25 midcourse correction, but here is what they said, and this is

1 in Order Number 01-1665. They said that they have not  
2 conducted evidentiary hearings on request for midcourse  
3 corrections, and I quote, "The history of midcourse corrections  
4 made subsequent to Order Number 13694 shows that this  
5 Commission has not chosen to conduct evidentiary hearings on  
6 petitions for midcourse corrections. Instead, we have granted  
7 or denied such petitions through informal proceedings after  
8 testing the reasonableness of actual and revised projected data  
9 supporting the utility's petition for a midcourse correction.

10 "In each instance we have recognized that a more  
11 thorough prudence review can occur at the next regularly  
12 scheduled hearing in the fuel clause docket. Thus, we retain  
13 jurisdiction over the incremental (decremental) amounts  
14 collected (refunded) as a result of the midcourse correction.  
15 If any collected amounts are found after an evidentiary hearing  
16 to have been incurred imprudently, we may require a utility to  
17 refund such amounts with interest to the utility's ratepayers."  
18 It goes on.

19 With respect to the assertions by Mr. Twomey and Mr.  
20 McGlothlin today that the company hasn't demonstrated the  
21 reasonableness of the amounts, I would submit to you that while  
22 they on the one hand have argued quite aggressively that what  
23 the company is attempting to do is to have you prejudge the  
24 issues in this case, that is exactly what we are not attempting  
25 to do. We have asked for interim recovery, subject to refund,

1 with interest, reserving your rights to review the issues and  
2 the data in the full evidentiary review.

3 In fact, what I heard this afternoon from my  
4 colleagues is that we ought to have a mini-hearing or some type  
5 of evidentiary hearing on the front end to test the  
6 reasonableness of these costs before you are entitled to make a  
7 decision to implement those. We think, in fact, they are  
8 asking you to prejudge the issues.

9 We are going through an audit, as we speak, from your  
10 staff. We are responding to discovery, as we speak, from the  
11 parties at the table. Depositions have been scheduled. We  
12 have filed testimony in this case already. And, of course, we  
13 have the controller for the company that has submitted an  
14 affidavit supporting the costs that we have proposed to have  
15 reflected in the surcharge rider that has been submitted to you  
16 for approval.

17 But I suppose maybe the most obvious point that I  
18 think was acknowledged at the last agenda conference is that  
19 these hurricanes hit. We saw the news. Some of us actually  
20 lived through them, and we saw the kind of damage they  
21 inflicted. And Commissioner Deason at the last agenda asked  
22 Mr. Twomey, he said: "I am going ask you a very direct  
23 question.

24 "Mr. Twomey: Yes, sir.

25 "Commissioner Deason: Would you be willing to

1 concede, and I'm not prejudging anything, when we go to that  
2 hearing from the very first penny to whatever millions of  
3 dollars it is at stake, everything will be reviewed. But you  
4 must realize that there were substantial funds expended to  
5 repair and restore service. Now, it may be -- maybe FPL spent  
6 more than they should have, I don't know. The hearing probably  
7 will reveal that one way or the other. But there were  
8 substantial funds expended, there needs to be recovery of those  
9 funds in some form or another. Would you agree with that or do  
10 you even --"

11 Mr. Twomey response was: "I have no argument at all  
12 with the notion. I mean, I live in this state. I was subject  
13 to some of the winds. I saw on television. I read the  
14 newspapers. I saw the damage done by these hurricanes to the  
15 service territories of all of your investor-owned utilities,  
16 and I would commend the people and the companies for the work  
17 they did in repairing the system as rapidly as they could. And  
18 it is clear that some -- I think it is clear that some huge  
19 portion of the amounts they claim they have spent were, in  
20 fact, spent, and were, in fact, and reasonable and prudent and  
21 necessary to the repairs for the hurricane. I am not disputing  
22 that."

23 I think, Commissioners, you have sufficient basis and  
24 sufficient evidence, if that is the term that we have to use,  
25 before you to make a decision to approve on an interim basis a

1 surcharge that, as your staff has indicated, prior to, I think,  
2 the agenda conference that would be scheduled following the  
3 hearings in this matter to recover something in the order of  
4 \$90 million.

5 Now, I think if the date that your staff has  
6 recommended as the effective date for the surcharge is adopted,  
7 that would shorten that recovery to four and a half months.  
8 And I think if my math is accurate, we would recover something  
9 in the order of \$70 million at that point. Out, again, keep in  
10 mind, I think it is a \$356 million figure that forms the basis  
11 of that surcharge, so less than an a quarter, less than 15 or  
12 20 percent by the time you get through to hearings. We think  
13 there is more than enough reason for you to approve the  
14 surcharge.

15 I would be happy to answer any questions you might  
16 have.

17 CHAIRMAN BAEZ: Commissioners, questions?  
18 Commissioner Bradley.

19 COMMISSIONER BRADLEY: Could you elaborate. I heard  
20 you mention the issue of self-insurance. Could you explain  
21 that concept.

22 MR. LITCHFIELD: Well, the term self-insurance, as I  
23 used it, was in reference to the Commission's plan that they  
24 adopted in 1993 following Hurricane Andrew in which, as a  
25 result of the disappearance of the availability of insurance,

1 the Commission decided that there was another approach.  
2 Specifically, if I can recall the numbers off the top of my  
3 head, we had in place about 300 million in T&D insurance at a  
4 cost of about 3.5 million annually.

5 And after Andrew ripped through Dade County, the  
6 insurance for T&D that we determined was available was reduced  
7 to 100 million. So a third of what we had coverage on before,  
8 and the cost of that insurance, I think, increased six fold,  
9 seven fold. I think it was about \$23 million for 100 million  
10 of coverage, relative to 3-1/2 million for 300 million  
11 coverage. And so we came back to this Commission, and the  
12 Commission with a specific proposal to put in place a permanent  
13 clause mechanism. And this Commission said, no, we are not  
14 going to put in a permanent clause mechanism, we are going to  
15 implement a self-insurance plan that requires some contribution  
16 through base rates to meet a target reserve amount. And then  
17 we are going to give you the right to come back to request  
18 relief for losses above that amount, recognizing that this  
19 amount, this target amount should cover many instances, but  
20 won't cover all circumstances and losses. So that is what I'm  
21 referring to when I speak of a self-insurance plan.

22 CHAIRMAN BAEZ: Commissioner Deason.

23 COMMISSIONER DEASON: Yes. First of all, I want to  
24 express my appreciation to the parties for filing their brief  
25 of supplemental authority. It was very helpful to me. I know

1 that at our last agenda we had an in-depth discussion on our  
2 legal authority, and I was uncomfortable at that time, and I  
3 appreciate the indulgence of fellow Commissioners in delaying  
4 this to get that additional information. It has been very  
5 helpful.

6 I have just a few questions for staff, and I  
7 appreciate staff's very thorough analysis of this, as well.  
8 Staff, if I'm correct, you believe that we have some inherent  
9 basic authority under our general grant of authority from the  
10 legislature, is that correct?

11 MR. KEATING: That is correct, and that was staff's  
12 indication at the prior agenda. I think having gone back and  
13 research the question more thoroughly, having had the time to  
14 do that, I believe it is probably clearer in this situation to  
15 use the authority granted under the file and suspend law.

16 COMMISSIONER DEASON: Since the tariff was filed and  
17 under the authority of the Citizens v. Wilson case, it's clear  
18 that file and suspend applies to a tariff even though the  
19 tariff may be for a rate adjustment less than a full-blown rate  
20 case, is that correct?

21 MR. KEATING: Yes. And, again, that is based on the  
22 Citizens v. Wilson case. I would also point out in Chapter  
23 120, this is something I apologize that didn't make it to the  
24 recommendation, because frankly I found this after the  
25 recommendation was filed. In Chapter 120 there is a section at

1 the end concerning exceptions to the requirements of Chapter  
2 120 that apply to various agencies, including the Public  
3 Service Commission. This is 120.80, Section 12, Paragraph F.  
4 It states that notwithstanding any provision of this chapter,  
5 all public utilities and companies regulated by the Public  
6 Service Commission shall be entitled to proceed under the  
7 interim rate provisions contained in Chapter 74-195, Laws of  
8 Florida, or as otherwise provided by law.

9 Chapter 74-195 is the file and suspend law that was  
10 enacted in 1974. Staff believes this is very relevant because  
11 this language was not added to the statute until at least 1996.  
12 So the legislature appears to recognize that the Commission has  
13 the authority, continuing authority under the file and suspend  
14 law to implement interim rates, even though since that law was  
15 enacted in '74 a separate statutory provision for full rate  
16 proceedings was enacted.

17 COMMISSIONER DEASON: Now, under the file and suspend  
18 law the Commission has the authority -- when a tariff is filed  
19 the Commission has the authority to -- we can deny the tariff  
20 or we can suspend the tariff, is that correct?

21 MR. KEATING: That's correct.

22 COMMISSIONER DEASON: Are there any other options, or  
23 is that it?

24 MR. KEATING: The Commission can approve the tariff,  
25 the Commission may also --



1           COMMISSIONER DEASON: We have the authority to  
2 approve the tariff. Is that decision subject to hearing if we  
3 approve the tariff?

4           MR. KEATING: I'm sorry. In cases where we receive a  
5 tariff filing and the matter is not set for hearing, we have  
6 always, when we approved the tariff on a preliminary basis, we  
7 have indicated that if there is a protest and it subsequently  
8 goes to hearing, that tariff will still remain in effect with  
9 the revenues held subject to refund.

10           Now, the file and suspend law does offer another  
11 option, and that is to take no action whatsoever. But if you  
12 take no action on the proposed tariff within the 60 days  
13 provided in the file and suspend law, it will go into effect by  
14 operation of law without any protection for ratepayers with  
15 none of the money held subject to refund.

16           COMMISSIONER DEASON: To your knowledge has that ever  
17 happened at the Commission?

18           MR. KEATING: In at least one case that I was  
19 involved with the Commission, I think, made a conscious  
20 decision not to take any action on a proposed tariff and we had  
21 a hearing and established --

22           COMMISSIONER DEASON: But we still had a hearing, is  
23 that correct?

24           MR. KEATING: Yes. And that is not to say that there  
25 aren't other instances.

1           COMMISSIONER DEASON: Now, there is also a question  
2 beyond the legal threshold as to whether we have the authority,  
3 but there is the question of if we have the authority, should  
4 we. And that goes to the question of the preliminary showing  
5 that has been made, and I think that is the subject of -- is it  
6 Issue 4, I believe?

7           MR. KEATING: I believe it is Issue 3.

8           COMMISSIONER DEASON: Issue 3? Okay. In Mr.  
9 Twomey's presentation he made a statement concerning  
10 administrative law judges and if this matter were referred to  
11 DOAH, it was his opinion that it would not be approved. And I  
12 don't know if he is referring to the fact that DOAH would find  
13 that there is no legal authority, or if he was alluding to the  
14 second test, and that is, if we have the authority, should we.  
15 And I don't know what an ALJ would do, but I'm asking for  
16 your -- your legal opinion is you are not asking this  
17 Commission to do -- legally whatever you are saying that we can  
18 do, it is your opinion that an ALJ, that would be the same  
19 argument in front of an ALJ, and that the law would be equally  
20 applied here as in front of an ALJ, correct?

21           MR. KEATING: I don't see why it would be applied any  
22 differently here than in front of an ALJ, particularly given  
23 the provision of Chapter 120 that I did just cite to you that  
24 was not in the recommendation that indicates that the  
25 utility -- because the ALJ is going to follow Chapter 120, as

1 well, and it indicates the utilities can use the interim rate  
2 provisions of the file and suspend law.

3 CHAIRMAN BAEZ: Commissioner Davidson, you had a  
4 question?

5 COMMISSIONER DAVIDSON: Just a couple of questions  
6 for staff. In the Citizens v. Wilson case, which you reference  
7 at Page 14 of the staff recommendation, had TECO's right to  
8 cost-recovery already been addressed, meaning was the case  
9 focused on, sort of, cost-recovery, or was it focused on  
10 shifting recovery of those costs from one group to another?  
11 You write in the underlying Commission proceeding, TECO  
12 petitioned to modify its tariffs to remove an energy  
13 conservation cost recovery factor from its interruptible  
14 service schedules and shift the related costs to its firm  
15 service schedules. And that implied to me that the right to  
16 recover the cost had already been somehow determined.

17 MR. KEATING: I don't know for sure. As I read the  
18 case it involved reallocation of costs from one class of  
19 customers to another. I don't know if there were any  
20 additional costs that were rolled into that total amount or  
21 not.

22 COMMISSIONER DAVIDSON: Thank you.

23 CHAIRMAN BAEZ: But in the Wilson case even that  
24 reallocation falls within that basket of substantial interests  
25 that make 120 applicable. I mean, you know, there are

1 substantial interests at stake. Someone's anyway.

2 MR. KEATING: Yes. I mean, there was going to  
3 subsequently, if requested, be a hearing.

4 CHAIRMAN BAEZ: Right. I mean, I understood the  
5 facts, and certainly as Mr. Twomey had proposed them that there  
6 was -- I mean, the suggestion was that there was some interim  
7 measure taken, but there was still anticipated some protection  
8 of the rights of the parties down the road. While it can be  
9 argued that the facts aren't the same as here, the functions or  
10 the processes are, would you agree?

11 MR. KEATING: Yes, I would agree. And the main  
12 reason that case is cited is to provide an example of a  
13 situation where the courts have recognized that the file and  
14 suspend law is not limited in its application to full rate  
15 proceedings, but it also applies to a tariff filing outside of  
16 a full rate proceeding.

17 COMMISSIONER BRADLEY: I have a question.

18 CHAIRMAN BAEZ: Commissioner Bradley.

19 COMMISSIONER BRADLEY: I think in my mind we have had  
20 an adequate enough discussion, at least as I have listened to  
21 separate out the issues of can and should. Can, in my opinion,  
22 is more of a legal issue. Should is more of a public policy  
23 issue. I would like to ask this question of staff, and it may  
24 not be a question for legal staff, it may be more of a question  
25 for technical staff.

1           Let's discuss somewhat the issue of a bond rating  
2 upon the general body of ratepayers. Is there anyone who can  
3 give me some information as it relates to that particular  
4 issue.

5           MR. MAUREY: I'm sorry, now your question relates to  
6 a bond rating for the utility?

7           COMMISSIONER BRADLEY: Yes. How does that impact the  
8 general body of ratepayers, either negatively or positively?

9           MR. MAUREY: In general terms, the better the bond  
10 rating the lower the cost of capital will be to the utility and  
11 it would be to the benefit of the ratepayers. If the bond  
12 rating were to be downgraded, then it would have a higher cost  
13 of capital, a higher cost on the ratepayers. Are you speaking  
14 to this specific instance on how it would affect the company  
15 right now as a result of the storms?

16           COMMISSIONER BRADLEY: Yes.

17           MR. MAUREY: It is too early to tell what impact it  
18 would have. We haven't read of any pending action being taken  
19 by any ratepayers on FPL as a result of these storms.

20           COMMISSIONER BRADLEY: Any action taken by who?

21           MR. MAUREY: There hasn't been any alert, any  
22 writings that the rating agencies are taking any action towards  
23 these companies' bond ratings, as a result of the storms.

24           CHAIRMAN BAEZ: I heard you say ratepayers.

25           COMMISSIONER BRADLEY: Ratepayers, right.

1 CHAIRMAN BAEZ: That's what I heard, too. I've got  
2 you know. Go ahead, Commissioner.

3 COMMISSIONER BRADLEY: Can you give me some  
4 information as to what some of the factors might be that would  
5 affect a company's bond rating?

6 MR. MAUREY: Certainly. The rating agencies will  
7 look at the cash flows of the utility, they will look at their  
8 equity capitalization, their interest coverage, their financial  
9 measures. And in the case of Florida Power and Light, it is a  
10 very strong, financially strong company. It is in a strong  
11 position. And the company can also add in on its own what they  
12 feel that they have heard directly from the rating agencies on  
13 this point. We have not heard anything negative regarding  
14 their rating as a result of the storms.

15 COMMISSIONER BRADLEY: What is the impact of a strong  
16 bond rating upon the general body of ratepayers, and what is  
17 the impact of a bond rating just the opposite of strong? I  
18 mean, how do those two scenarios play out in terms of --

19 MR. MAUREY: A strong bond rating, an investor grade  
20 rating of, say, a single A, the company would be afforded a  
21 certain cost rate for the debt is issues, and the investment  
22 community would be more welcome to equity issuances the company  
23 might make. The result being it would lower its overall cost  
24 of capital. The cost of capital being a cost of doing  
25 business. If the company has a low bond rating, say it is a

1 non-investment grade company, its access to the market under  
2 reasonable terms would be diminished. It would have to pay a  
3 higher interest on its bonds, it would have less interest in  
4 the equity when it floated it, it would have a higher cost of  
5 capital. That would be felt by the ratepayer through a higher  
6 cost of service.

7 MR. LITCHFIELD: Mr. Chairman, may I respond to  
8 Commissioner Bradley's question, as well, with respect to the  
9 company?

10 CHAIRMAN BAEZ: Go ahead, Mr. Litchfield, if you have  
11 got something to add.

12 MR. LITCHFIELD: I think, although I'm not certain, I  
13 believe Mr. Maurey is correct that there has been no official  
14 statement issued by a bond rating agency yet with respect to  
15 Florida Power and Light Company's debt ratings as a result of  
16 the storm deficit. However, please be assured that they are  
17 watching this proceeding very carefully. They are concerned  
18 about the impact and about the regulatory regime and plan that  
19 was put in place. They are watching it very carefully.

20 I believe the rating agencies have made an official  
21 statement with respect to their concern on behalf of at least,  
22 or with respect to at least one of the investor-owned utilities  
23 in this state.

24 CHAIRMAN BAEZ: Commissioner Bradley, anymore  
25 questions?

1 COMMISSIONER BRADLEY: Well, I would ask for a  
2 response from OPC.

3 CHAIRMAN BAEZ: Mr. McGlothlin.

4 MR. MCGLOTHLIN: I recall that attached to FPL's  
5 original petition there was an exhibit, Exhibit C, I believe,  
6 that consisted of excerpts from several bond rating comments.  
7 And with respect to the Florida utilities in general and  
8 others, the consensus or the common thread was that the  
9 agencies were not concerned at that point, referring to the  
10 mechanism available to the utilities, one of which in reference  
11 to Gulf Power was the opportunity to make additional accruals.

12 And I bring that up because it makes the point that  
13 there are ways other than simply dollar-for-dollar  
14 indemnification to the companies from ratepayers to assure  
15 credit rating agencies that there is no concern. Where  
16 circumstances warrant, the utility can look to its own  
17 resources to satisfy the credit rating agencies of its  
18 creditworthiness.

19 CHAIRMAN BAEZ: Any other questions, Commissioners,  
20 or a motion?

21 COMMISSIONER DEASON: We have addressed Issue 1 at  
22 the previous agenda, is that correct?

23 MR. KEATING: Yes, sir.

24 COMMISSIONER DEASON: Now, I suppose, if we go in  
25 order, we are on Issue 2?



1 CHAIRMAN BAEZ: That's correct, Commissioner.

2 COMMISSIONER DEASON: I can move staff's  
3 recommendation on Issue 2.

4 COMMISSIONER DAVIDSON: And can I ask staff a  
5 question before --

6 CHAIRMAN BAEZ: By all means.

7 COMMISSIONER DAVIDSON: Just so I know how I should  
8 vote on the issues which are somewhat related. Staff, can you  
9 advise me how I would vote on the issues if I want to ensure  
10 that the proceeding move forward, but I object to the  
11 imposition of a surcharge at this point. Noting that that vote  
12 would in no way reflect on the merits of the case, I just think  
13 we need to go to hearing. But how would I vote on Issues 2 and  
14 3 and 4?

15 MR. KEATING: Well, I believe based on the vote on  
16 Issue 1 at the last agenda, the proceeding is going to move  
17 forward to hearing. That was a motion to dismiss the petition  
18 sending us to hearing. If you believe that the Commission does  
19 have the authority to implement this proposed surcharge,  
20 subject to refund, prior to the hearing --

21 COMMISSIONER DAVIDSON: No.

22 MR. KEATING: You do not.

23 COMMISSIONER DAVIDSON: No, the vote would be -- I  
24 want to make sure that we get these issues related to storm  
25 cost covered in this proceeding, moved forward, take evidence,

1 go to hearing, all of that, but I'm not supporting the  
2 imposition of a prehearing surcharge.

3 MR. KEATING: If you believe we have the authority to  
4 approve the prehearing surcharge, but choose not to believe  
5 that we should not implement it, you would vote with the staff  
6 recommendation on Issue 2, but then against the staff  
7 recommendation on Issue 3. And the subsequent Issues 4 and 5  
8 are fallouts basically of Issue 3 as to whether we approve a  
9 proposed surcharge or not.

10 COMMISSIONER DAVIDSON: And I may be confused as to  
11 the proceeding. If my vote is my view that we don't have the  
12 authority, I would vote no on Issue 2. But my question is are  
13 we going to proceed? Somehow I don't want that vote to disrupt  
14 the whole, sort of, proceeding and then have to refile and  
15 start again. So will the proceeding on storm cost-recovery  
16 move forward?

17 MR. KEATING: Yes, it would. Issue 2 addresses a  
18 separate petition filed by FPL to implement the surcharge  
19 subject to refund prior to the hearing.

20 COMMISSIONER DAVIDSON: So Issue 2 is does the  
21 Commission have the authority; Issue 3 is should the Commission  
22 exercise that authority?

23 MR. KEATING: Yes.

24 COMMISSIONER DAVIDSON: Okay. Got you. Thanks.

25 MR. KEATING: Just to be clear, Issue 2 covers more

1 than just the authority issue. It covers the arguments that  
2 were raised in the initial motion to strike/dismiss the  
3 preliminary surcharge petition.

4 CHAIRMAN BAEZ: Commissioners, there is a motion to  
5 approve staff on Issue 2. Is there a second?

6 COMMISSIONER BRADLEY: Second.

7 CHAIRMAN BAEZ: Motion and a second. All those in  
8 favor say aye.

9 COMMISSIONER DEASON: Aye.

10 COMMISSIONER BRADLEY: Aye.

11 COMMISSIONER EDGAR: Aye.

12 CHAIRMAN BAEZ: Aye.

13 All those nay?

14 COMMISSIONER DAVIDSON: Nay.

15 CHAIRMAN BAEZ: Issue 3.

16 COMMISSIONER EDGAR: Mr. Chairman, I have a question  
17 on Issue 3.

18 CHAIRMAN BAEZ: Go ahead, Commissioner.

19 COMMISSIONER EDGAR: I believe in the discussion at  
20 agenda two weeks ago there was some mention of the possibility  
21 of interest earnings, and I would like to ask the parties to  
22 speak to that. If indeed the imposition of a preliminary  
23 surcharge were to move forward from this point, would that  
24 impact interest earnings assessed differently than if a  
25 surcharge were to not be approved now, but to be approved

1 after -- of some amount after a full evidentiary hearing?

2 MR. LITCHFIELD: Commissioner Edgar, yes, it would.  
3 It would effectively reduce, in the aggregate, the amount of  
4 interest that would be recovered through the surcharge, because  
5 you are allowing effectively an amortization of the principal  
6 to start sooner rather than later. Otherwise, the principal  
7 would remain unabated, and interest would be accruing on the  
8 total amount as opposed to beginning to amortize that amount on  
9 an interim basis.

10 CHAIRMAN BAEZ: Mr. Twomey.

11 MR. TWOMEY: Yes, Mr. Chairman. Thank you.

12 And, Commissioner Edgar, I think I disagree with  
13 counsel. They don't have a principal amount yet that I'm aware  
14 of on any order that authorizes them to collect interest. It  
15 would be my position that they would -- interest wouldn't start  
16 until this Commission found that there was an entitlement.  
17 And, again, my preference, in my view, after an evidentiary  
18 hearing that they are entitled to something. And then you  
19 could decide then that they would be entitled to the time value  
20 of the money that they are not recovering as they go forward.

21 So I'm just trying to be clear, I don't think they  
22 are entitled to interest now. If you wait -- if you go ahead  
23 and give them a surcharge now, then presumably they will take  
24 from that not only that they are entitled to the surcharge of  
25 about \$2.09 per average family per month, but that they will be

1 entitled to interest on the uncollected balance. Maybe counsel  
2 can state otherwise.

3 On the other hand, if you wait and had the hearing  
4 and then decide on the surcharge, then my view would be that  
5 the surcharge would start then and interest would start then on  
6 the uncollected balance. So that by going now, you increase  
7 the amount of interest consumers have to pay, not diminish it.

8 MR. KEATING: Commissioner, if staff could briefly  
9 address that, as well. I think it is staff's position that the  
10 issue of recoverability of interest would be one that would be  
11 decided at the hearing in this case.

12 COMMISSIONER EDGAR: And does that include the time  
13 that interest would begin to accrue? Because I think what I'm  
14 hearing is counsel here is saying that interest would begin to  
15 accrue at the time the expenditures were made. And, Mr.  
16 Twomey, you are saying that if, indeed, a surcharge is approved  
17 for cost-recovery, that interest would begin to be assessed at  
18 the time that that decision was made.

19 MR. TWOMEY: Yes, ma'am. I'm saying to you that my  
20 understanding of the law is that you can't have, for example,  
21 post-judgment interest until the debt is established. And  
22 there has been no finding by this organization that I am aware  
23 of that Florida Power and Light or any other utility who will  
24 be watching this decision as a precedent in any of its respects  
25 is entitled to interest on the money they spent after the first

1 storm or thereafter.

2 So I'm saying to you my position would be that if you  
3 give them a surcharge now, they will begin collecting the \$2.09  
4 on average from households, and they will expect, I assume,  
5 interest to accrue on the unpaid balance of \$354 million, as  
6 well.

7 My position would be that if you deny them the  
8 surcharge now, they would not be entitled to interest on it  
9 until later in April when you make a finding for whatever  
10 amount that they are entitled to, whether it is the 354, the  
11 full amount, or something lower. Am I clear on that?

12 CHAIRMAN BAEZ: I think I understand what you are  
13 saying, but I'm having trouble with what we are calling  
14 interest and how the interest functions. Isn't interest  
15 accruing as a cost to the total as we speak, whatever total it  
16 is? It doesn't have to be 350, but even if it was one dollar,  
17 isn't there interest accruing on that dollar if it is  
18 outstanding today?

19 MR. TWOMEY: No, sir, I don't think so.

20 CHAIRMAN BAEZ: Why don't you think so?

21 MR. TWOMEY: Because there is no -- because you have  
22 made no -- just because they have spent some money doesn't mean  
23 that they are entitled to interest on it.

24 CHAIRMAN BAEZ: Mr. Slemkewicz, can you jump in here  
25 and explain it to me?

1 MR. SLEMKEWICZ: Whether or not we are going to allow  
2 interest at all and what period will be covered by that  
3 interest, if it is allowed, is going to be --

4 CHAIRMAN BAEZ: Is an issue.

5 MR. SLEMKEWICZ: -- it is an issue. Because right  
6 now the amount is basically deferred in a noninterest bearing  
7 account, so there is no interest associated with it at this  
8 time.

9 CHAIRMAN BAEZ: And what are the kinds of  
10 considerations that you take -- that we would entertain in  
11 deciding whether interest is appropriate or not? What kind of  
12 things --

13 MR. SLEMKEWICZ: Well, one thing we would be looking  
14 at is just the carrying cost of that to the utility and  
15 whether -- if there are legitimate costs that were deferred,  
16 then the costs are legitimate and prudent.

17 CHAIRMAN BAEZ: So if some -- okay. So in an  
18 absolute sense, to the extent that a cost is prudent, is the  
19 carrying cost of that a fallout?

20 MR. SLEMKEWICZ: It does not have to be. We do not  
21 have to allow interest, but it's a judgment call.

22 CHAIRMAN BAEZ: Has this Commission ever disallowed  
23 interest on that basis?

24 MR. SLEMKEWICZ: Not to my knowledge.

25 CHAIRMAN BAEZ: Would you characterize that as a --

1 and, again, I'm trying to understand. I understand that  
2 interest is not an absolute lock, and it shouldn't be, all  
3 right? But things kind of get stuck together. If you start  
4 having expenditures that are deemed prudent, then there are  
5 costs that are -- I mean, it is not a foreign concept.

6 MR. SLEMKEWICZ: No. And there is a carrying cost  
7 associated with having unrecovered amounts sitting there. But  
8 it would be up to the Commission to determine whether or not  
9 that interest should be allowed and to what period.

10 CHAIRMAN BAEZ: The period is -- okay, I understand.  
11 Thank you.

12 COMMISSIONER BRADLEY: And is there a percentage  
13 determination that the Commission would also have to make as it  
14 relates to the interest, or is that standard?

15 MR. SLEMKEWICZ: Right. You could decide to just use  
16 the commercial paper rate like is usually used in a fuel  
17 adjustment or some other rate.

18 COMMISSIONER BRADLEY: May I?

19 CHAIRMAN BAEZ: Yes, please.

20 COMMISSIONER BRADLEY: As it relates to Issue 3, if  
21 the surcharge is allowed, does this issue cover the concept of  
22 a true-up?

23 MR. SLEMKEWICZ: Yes, it does.

24 COMMISSIONER BRADLEY: Just for the record, would you  
25 explain how the concept works?



1 MR. SLEMKEWICZ: Well, if we determine that the  
2 amount that they are requesting is not the appropriate amount  
3 and that it should be something less, then we would take that  
4 into account when we determined what the final amount would be  
5 applied to the customer on a monthly billing basis. So the  
6 customer would get credit for whatever has been collected, and  
7 then we would subtract that, or basically we would subtract  
8 that from the total amount that we determine should be  
9 recovered from the ratepayer.

10 COMMISSIONER BRADLEY: The true-up concept, is that  
11 inclusive also of the interest, if we decide that interest is  
12 allowable?

13 MR. SLEMKEWICZ: That's correct.

14 COMMISSIONER EDGAR: Mr. Chairman?

15 CHAIRMAN BAEZ: Commissioner.

16 COMMISSIONER EDGAR: I'm concerned here that over  
17 time, if indeed we do not move forward on FPL's request today  
18 to implement now, that as you said, Mr. Chairman, when a  
19 reasonable and prudent expenditure was made and then the  
20 interest to that could be, the determination of this Commission  
21 associated with it, I have a concern that if we don't move  
22 forward today that the ratepayers could ultimately be required  
23 to pay more over time. And I would like to ask the Office of  
24 Public Counsel to respond to that, please.

25 MR. MCGLOTHLIN: I will try, Commissioner, although I

1 think the subject of interest is going to be, in the scheme of  
2 things, one of the more complicated issues. I think what you  
3 have now is a proposal by FPL, and it would be the Commission  
4 that determines the parameters of interest, if any. But there  
5 are many occasions when, in the course of doing business, the  
6 utility makes an expenditure and there is no interest attached  
7 to it.

8           One of the reasons we propose that the initial  
9 showing demonstrate that the total number of dollars is  
10 exclusive of all sets that we think need to be made, would be  
11 to have the Commission, if it is going to do anything on an  
12 interim basis, ensure that, first of all, that \$354 million has  
13 been reduced to recognize those items for which the ratepayers  
14 have already paid through base rates. That would have the  
15 effect of whittling on that sum of money, and so that there is  
16 no double recovery.

17           In terms of whether there is going to be interest,  
18 certainly if the utility, in effect, quote, borrows, end quote,  
19 money from the ratepayers and a determination is made later  
20 that it wasn't entitled to that, then the ratepayers should  
21 receive interest on any refunds made. There is the point that  
22 the utility, because it has a negative balance as I understand  
23 it, was required to borrow some monies, and perhaps in the  
24 scheme of things consideration will be given to whether the  
25 interest payments it makes on that debt that it entered into

1 for the purpose of making the payments and making replacements  
2 when they had to be made would enter into the scheme of things.

3 But sitting here today, other than my encouragement  
4 to make sure that only those amounts that have not already been  
5 paid for are reflected in any surcharge amount, assuming that  
6 you are entertaining that idea and not simply suspending the  
7 rates, that is the one thought I have that would address any  
8 desire to discipline the amount of potential interest at play.

9 CHAIRMAN BAEZ: Commissioner.

10 COMMISSIONER EDGAR: I don't have anything.

11 CHAIRMAN BAEZ: I've got a question, and maybe  
12 someone -- Mr. Litchfield referred to what the net, or what the  
13 number is assuming approval, assuming implementation on a  
14 timely basis, and taken all the way out to decision time was a  
15 number like \$70 million. Is that --

16 MR. LITCHFIELD: That is my back-of-the-envelope  
17 estimate based on a four and a half month period.

18 CHAIRMAN BAEZ: Let's use that number. Let's say  
19 that \$70 million gets collected. Are those funds -- where do  
20 those funds go? My basic question is are those actually funds  
21 that are available in the event of another storm on down the  
22 line?

23 MR. SLEMKEWICZ: I don't think at this point that  
24 they are earmarked for anything other than just general revenue  
25 to recover the costs. They could be partially paying down the

1 debt that they may have incurred.

2 CHAIRMAN BAEZ: Okay. Mr. Litchfield, you were  
3 leaning forward to answer, I think.

4 MR. LITCHFIELD: Yes. In fact, those funds would  
5 enable the company to offset that deficit and pay bills as they  
6 come due, or to pay off debt that the company has incurred in  
7 connection with them. And we would, therefore, be better  
8 positioned to respond.

9 CHAIRMAN BAEZ: And my question was going to be even  
10 assuming that it went to pay off debt that has already been  
11 incurred, are you creating space in a credit line? I mean,  
12 maybe I'm not using the right term, but --

13 MR. LITCHFIELD: No, that is the right term.

14 CHAIRMAN BAEZ: So you are creating -- you are  
15 replenishing a credit line, even if the monies were to be  
16 directed in that manner?

17 MR. LITCHFIELD: That's correct.

18 CHAIRMAN BAEZ: Okay.

19 COMMISSIONER BRADLEY: Just a related question. Is  
20 there still debt to be serviced as a result of the three storms  
21 that impacted Florida?

22 MR. LITCHFIELD: Yes.

23 COMMISSIONER BRADLEY: How is that debt being  
24 serviced?

25 MR. LITCHFIELD: Well, the deficit that exists right

1 now in the storm fund is being financed through a number of  
2 sources, and it is difficult to trace it to a particular  
3 issuance, as you know, the way a company finances. In fact, in  
4 some respects there is an argument that the carrying costs  
5 associated with financing that deficit ought to be something  
6 more akin to the company's cost of capital.

7 We chose what we thought was a fairly conservative  
8 interest rate, and that is to use the commercial paper rate  
9 which is very conservative as a proxy for the financing costs  
10 for the whole amount. Which, by the way, is consistent with  
11 what this Commission has approved for over and under fuel  
12 recoveries in the fuel clause. So we felt, as a matter of  
13 prior policy and as a matter of conservatism, that that is the  
14 interest rate we ought to use.

15 COMMISSIONER DEASON: I need to follow up on that,  
16 that last piece. The commercial paper rate you are saying is a  
17 conservative rate that is being utilized by the company. For  
18 what purpose at this point is that rate being used?

19 MR. LITCHFIELD: That is the carrying charge that is  
20 reflected in the storm charge computations.

21 COMMISSIONER DEASON: That is the \$2.09, is that  
22 correct?

23 MR. LITCHFIELD: The \$2.09 includes, as a component,  
24 the carrying costs at the current commercial paper rate.

25 COMMISSIONER DEASON: And what portion of the \$2.09

1 is the carrying cost?

2 MR. LITCHFIELD: We'll see if we can get that answer  
3 for you quickly. Are you asking for the rate itself, or the  
4 actual dollar or penny amount, if you will?

5 COMMISSIONER DEASON: I'm asking what portion of  
6 \$2.09 monthly recurring surcharge is related to the carrying  
7 costs.

8 MR. LITCHFIELD: Our estimate is about four cents of  
9 the \$2.09.

10 COMMISSIONER BRADLEY: That would be -- we have  
11 different classes of customers. Is there any method -- well,  
12 I'll wait until the hearing before I ask that question. That  
13 gets into the merits.

14 CHAIRMAN BAEZ: Commissioners, any other questions?  
15 Just back of the envelope, that is about 2-1/2 percent or about  
16 2 percent roughly? Okay.

17 Commissioners, questions or a motion on Issue 3?

18 COMMISSIONER DEASON: I move approval of staff's  
19 recommendation on Issue 3.

20 COMMISSIONER BRADLEY: Second.

21 CHAIRMAN BAEZ: Moved and seconded. All those in  
22 favor say aye. Aye.

23 COMMISSIONER DEASON: Aye.

24 COMMISSIONER BRADLEY: Aye

25 COMMISSIONER EDGAR: Aye.

1 CHAIRMAN BAEZ: Aye.

2 All those nay?

3 COMMISSIONER DAVIDSON: Nay.

4 CHAIRMAN BAEZ: Thank you, Commissioners.

5 Issue 4.

6 COMMISSIONER DEASON: Move staff on Issue 4.

7 COMMISSIONER BRADLEY: Second.

8 COMMISSIONER DAVIDSON: Moved and seconded. All  
9 those in favor say aye. Aye.

10 COMMISSIONER DEASON: Aye.

11 COMMISSIONER BRADLEY: Aye.

12 COMMISSIONER EDGAR: Aye.

13 CHAIRMAN BAEZ: Aye.

14 All those nay?

15 COMMISSIONER DAVIDSON: Nay.

16 CHAIRMAN BAEZ: Commissioner Davidson?

17 COMMISSIONER DAVIDSON: Nay.

18 CHAIRMAN BAEZ: Okay. Thank you.

19 COMMISSIONER DEASON: Mr. Chairman, I can move staff  
20 on Issues 5 and 6.

21 CHAIRMAN BAEZ: Motion on 5 and 6.

22 COMMISSIONER BRADLEY: Second.

23 CHAIRMAN BAEZ: And a second. All those in favor say  
24 aye?

25 (Unanimous affirmative vote.)

1 CHAIRMAN BAEZ: All those nay?

2 COMMISSIONER DEASON: I think it is unanimous on 5  
3 and 6.

4 CHAIRMAN BAEZ: That's right. Very well. Show 5 and  
5 6 unanimous. Thank you to all the parties for their input and  
6 supplemental input and all the discussion today.

7 Thank you, staff, for your diligence, as well.

8 Thank you, Commissioners.

9 We are adjourned.

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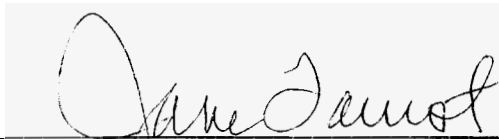
COUNTY OF LEON )

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

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

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' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 25th day of January, 2005.



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