

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 031033-EI

In the Matter of:

REVIEW OF TAMPA ELECTRIC
COMPANY'S 2004-2008 WATERBORNE
TRANSPORTATION CONTRACT WITH
TECO TRANSPORT AND ASSOCIATED
BENCHMARK.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 23

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

DATE: Tuesday, March 1, 2005

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

REPORTED BY: JANE FAUROT, RPR
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1 PARTICIPATING:

2 LEE WILLIS, ESQUIRE, representing Tampa Electric
3 Company.

4 SCHEFFEL WRIGHT, ESQUIRE, representing CSX
5 Transportation.

6 JOHN W. MCWHIRTER, JR., ESQUIRE, representing Florida
7 Industrial Power Users Group.

8 PATRICIA CHRISTENSEN, ESQUIRE, representing the
9 Office of Public Counsel.

10 MICHAEL B. TWOMEY, ESQUIRE, representing Catherine L.
11 Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E.
12 Strohm, Carlos Lissabet, Betty J. Wise, Lesly Diaz and Jane
13 Williamson.

14 COCHRAN KEATING, ESQUIRE, and JENNIFER RODAN,
15 ESQUIRE, representing Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN BAEZ: Commissioners, we are on Item 23, and
3 I believe that is the last item of the day.

4 MR. KEATING: Again, for the record, I'm Cochran
5 Keating with the Commission legal staff. I'm not going to try
6 to follow up Mr. Mann's act.

7 Commissioners, Item 22 (sic) concerns several motions
8 filed after the Commission's final order was issued in this
9 docket. Issue 2 of the recommendation addresses a motion by
10 Tampa Electric for reconsideration of the portion of your final
11 order concerning the appropriate rate for cross-Gulf ocean
12 barge coal transportation service. Issue 2 also addresses a
13
14 final order.

15 Issue 3 addresses a motion by Tampa Electric to
16 reopen the record to take official recognition of a final order
17 in another docket approving a confidential settlement involving
18 recoverable coal transportation rates for Progress Energy.

19 Issue 4 addresses a motion by CSX Transportation for
20 clarification or, alternatively, reconsideration of your final.

21 Staff recommends that you deny Tampa Electric's
22 motions for reconsideration and clarification, and its motion
23 to reopen the record, and staff recommends that you grant CSX's
24 motion for clarification. Tampa Electric has asked for oral
25 argument on its motions. And as noted in Issue 1, staff

1 recommends that you grant oral argument. I believe the other
2 parties to this docket are represented here and may also wish
3 to add their comments if oral argument is granted.

4 CHAIRMAN BAEZ: First, let's take up Issue 1, and
5 then we will just -- if we approve it then we will take up
6 the --

7 COMMISSIONER DAVIDSON: Chairman, I think staff has
8 done a fine job with the motion. I personally don't need oral
9 argument, but I'm going to move staff on 1 just so the parties
10 all have an opportunity to sort of present their views on --

11 CHAIRMAN BAEZ: Very well. There is a motion on
12 Issue 1; is there a second?

13 COMMISSIONER DEASON: Second.

14 CHAIRMAN BAEZ: A motion and a second. All those in
15 favor say aye.

16 (Unanimous affirmative vote.)

17 CHAIRMAN BAEZ: There was no discussion of time. So
18 with your approval, we can set it at five minutes of argument
19 per side. Ten minutes. Okay, go ahead.

20 MR. McWHIRTER: Per side or per person.

21 CHAIRMAN BAEZ: Per person, I'm sorry.

22 COMMISSIONER DAVIDSON: Five minutes for you, ten for
23 everybody else.

24 CHAIRMAN BAEZ: McWhirter only gets five. No, ten
25 minutes.

1 MR. McWHIRTER: Call me Mr. Mann for this proceeding.

2 CHAIRMAN BAEZ: Ten minutes per, and I would urge you
3 to be very judicious with how close to that number you get.

4 Mr. Willis, it's your motion.

5 MR. WILLIS: We appreciate the opportunity to address
6 you today, Commissioners. We are not here before you to
7 challenge the rejection, your rejection of the benchmark
8 methodology that you have used for the last 15 years to
9 determine waterborne coal transportation costs.

10 Likewise, we are not here to reargue the method that
11 you chose under the circumstances of this case to determine a
12 market price. What we are here before you is to ask your
13 reconsideration to appropriately apply the methodology that you
14 selected and to clarify your rebid option that you described in
15 your order.

16 With respect to reconsideration, you concluded that
17 the best alternative to establish market rates is to rely on
18 the actual rates paid by three other utilities. You then
19 decided to use the highest of the three comparable rates. And
20 what we seek here is a fair application of that methodology
21 using this Commission's own best practices standard; that is,
22 once you determined that prices paid by utilities would be the
23 basis of your decision, that fundamental fairness requires that
24 you rely on the most appropriate, relevant, and competent data
25 available to you.

1 We believe that with respect to two of the data
2 points that you overlooked very significant data. First with
3 respect to JEA, staff's initial recommendation, to you did not
4 mention to you that the 2004 JEA rate is considerably higher
5 than the rate that you used to calculate the adjustment. We
6 believe that you overlooked that.

7 Secondly, with respect to Progress Energy, staff's
8 calculation of the Progress Energy rate for ocean shipping is
9 set out in Appendix 7 and was necessarily based, in part, on
10 onrecord confidential information. And staff's calculation
11 also left out a portion of the cost that Progress Energy
12 incurs.

13 Now, staff dismissed this omission by saying, well,
14 Tampa Electric's TECO Transport provider is more efficient than
15 the carriers that Progress Energy uses, so therefore we will
16 just make this -- it is about to wash, so we won't consider
17 these additional costs. Well, Commissioners, we believe that
18 this is a circular Catch-22 and an injection, a random injection of
19 a cost concept within a market pricing analysis. And under
20 that analysis, Tampa Electric never could show that it was
21 paying the appropriate price. Now, we urge that you consider
22 these additional costs.

23 Now, the other parties and staff have said, well, it
24 doesn't matter. You didn't use that. It wasn't the highest
25 rate, so it doesn't really matter. Well, it matters a lot if

1 he proper calculation of the Progress Energy rate is higher
2 than the JEA rate, because then you would not have used the
3 highest rate under the methodology that you chose.

4 With respect to the Progress Energy settlement that
5 you approved on July the 20th after the hearings in this
6 docket, we have urged you, as a sanity check, to look at that
7 settlement amount and look at the end result of what you found
8 was reasonable in that proceeding and what you found reasonable
9 in this proceeding. It was a contemporaneous determination,
10 and we believe that your contemporaneous interpretation of what
11 is fair for Progress Energy's ratepayers is well above the
12 price that you reached here. We believe that it could be three
13 or four dollars higher. **Consequently, the end result that you**
14 **reached in your Order 0999 was dramatically different than your**
15 **contemporaneous findings.**

16 Now, Commissioners, we are asking that in the name of
17 fundamental fairness that you simply look at the Progress
18 Energy decision as a sanity check on the fairness of what you
19 have done. Now, they will also say that this was a settlement.
20 That a settlement even had a term limit, that it was not to be
21 considered as precedent.

22 Well, Commissioners, parties can make agreements and
23 bring them to you, but only you can determine what is fair for
24 a utility to charge its ratepayers. And I suggest you to that
25 it is very relevant that if you came up with such a disparate

1 result in the two proceedings not to take another look at what
2 you did. If you just used the more recent JEA rate, for
3 example, it would make as much as \$6 million difference in the
4 adjustment.

5 So, in summary, with respect to reconsideration,
6 there is a convergence of information that would suggest to you
7 that the adjustment that you made in your order was excessive.
8 First of all, the rate you approved is below the 2004 JEA rate.
9 It is below, well below the 2004 Progress Energy rate. We
10 believe that it is below the properly calculated 2003 Progress
11 Energy rate, and it is more than two dollars below the lowest
12 rate that you have approved for the last 15 years. So all of
13 those things suggest that a reconsideration is warranted, and
14 we urge that you do that.

15 We also requested that you clarify your order. Your
16 order states with respect to the rebid option, your order
17 states that Tampa Electric at its own discretion may choose to
18 rebid all or any portion of the existing coal transportation
19 requirements in an attempt to mitigate the impact of the
20 cost-recovery disallowance discussed above. By that statement,
21 we hope and believe that you intended to give Tampa Electric a
22 real opportunity to avoid the harsh results of your decision by
23 conducting a rebid using the guidelines set out in your order.

24 We have asked you to clarify that if Tampa Electric
25 presents to the Commission an RFP process which the Commission

1 finds to be a fair, competitive RFP, that you would then accept
2 the results of that process as a determination of the fair
3 market price for the period covered by the new RFP, regardless
4 of how that process turns out.

5 Now, the statements that were made during the
6 September 2nd agenda conference, and by the staff at that time,
7 raise doubts in the company's mind of whether if we engaged in
8 that rebid process that we would incur only downside risks.
9 And no rational person would go through that process only for
10 that kind of result.

11 What we are asking you here is to simply tell us what
12 you meant in your order. And tell us, hopefully, that after
13 holding that an RFP is the best method to determine market
14 price, that you clearly and unequivocally state that once you
15 approve the RFP process on the front end that follow the
16 guidelines of your order, then you will accept without
17 reservations the results of that process. We urge you to make
18 that determination and discuss that here.

19 I have some other points I know that I can make in
20 response to the others with respect to official recognition.
21 We believe that you clearly had the opportunity and indeed the
22 obligation to take official notice of your orders. **You do that**
23 all the time. We believe that the case that staff cited as a
24 bar to doing that is completely inapplicable to this
25 situation. That particular case involved a situation where the

1 agency referred to DOAH a matter where DOAH made findings of
2 fact. And under those circumstances DOAH's findings of fact
3 must be accepted by the agency. In that case the agency took
4 official recognition of a matter, and the court said that was a
5 circumvention of the appropriate procedure and they should have
6 remanded the case back to DOAH. Here you are both the trier of
7 fact and the agency, and that case is completely inapplicable.

8 The other cases cited as a bar dealt with a change in
9 policy years later. The People's case, for example, involved a
10 change in policy four years after. Here, by definition, your
11 order is not final yet, and you certainly can take that
12 official recognition. Again, we appreciate the opportunity to
13 present to you.

14 CHAIRMAN BAEZ: Thank you, Mr. Willis.

15 Ms. Christensen, I call on you first.

16 MS. CHRISTENSEN: Good morning, Commissioners.

17 Patricia Christensen on behalf of the Citizens of Florida,
18 Office of Public Counsel, and hopefully I will make this brief.

19 The Citizens support staff's recommendation. We
20 agree that Tampa Electric Company has failed to identify a
21 point of fact or law which the Commission overlooked or failed
22 to consider in rendering its final order. As noted in our
23 response, Tampa Electric is wrong in its assertion that the
24 Commission relied on confidential information outside the
25 record. The record clearly shows that the Commission relied on

1 public information that was made part of the record as Exhibit
2 66. Merely because Tampa Electric would like the Commission to
3 reweigh the evidence is not sufficient legal grounds to support
4 reconsideration.

5 We also agree with staff that the Progress
6 stipulation and settlement has not been made a part of this
7 record, and that was not a mistake of fact or law regarding the
8 stipulation. We also concur with staff that the record should
9 not be reopened for the purposes of considering the Progress
10 stipulation. It would be contrary to the stipulation and the
11 order approving the stipulation.

12 Finally, we agree with staff that Tampa Electric's
13 request for clarification of the Commission's order regarding
14 the RFP process is inappropriate and goes well beyond seeking
15 clarification of what we believe is the clear meaning of the
16 Commission's decision. The Citizens have no objection to the
17 clarifying language proposed by CXR.

18 CHAIRMAN BAEZ: Mr. McWhirter.

19 MR. McWHIRTER: Commissioners, there is a certain
20 harmony in history. Three hundred and fifty years ago
21 Shakespeare said it is a tangled web we weave when first we
22 start to deceive. Now, I would never suggest to you that in
23 any instance would Tampa Electric attempt to deceive you in its
24 activities, but we have in this case which I would construe to
25 indeed be a tangled web. And it is a tangled web of

1 inconsistent positions. And I would like to point out a few of
2 them that are highlighted in the petition for reconsideration
3 and the petition for clarification.

4 In 2003, each intervenor in this case suggested that
5 it would be appropriate to combine the Florida Progress
6 waterborne case with the Tampa Electric case because it would
7 create an efficient process that we could handle more
8 economically and expeditiously. At that time TECO fought
9 against this procedure citing that combining the Progress
10 waterborne case with its waterborne case would be difficult
11 because the cases are so different. In 2005, Mr. Willis, just
12 a moment ago, accuses you of basing your decision on that case
13 and asked you to open this record to bring in confidential
14 information from that case to change your decision. So he now
15 wants to rely on the Progress case.

16 It asked you to use for a precedent a stipulation
17 which you said in your order approving would not serve as
18 precedent. Secondly, it does not dispute the fact that its
19 17-year-old -- or that its five-year contract was based upon an
20 unfair bidding procedure. But it asks you in this case to
21 clarify your order by accepting a future bid process without
22 examination in an adversarial proceeding.

23 It says it was denied due process using the
24 accusation that you relied on information outside of the
25 record, but then it asks you to deny due process to the

1 ntervenors in this case by accepting the undisclosed fruits of
2 n as yet unsubmitted bid process at the time it's formulated,
3 nd to have us all be bound by that without any opportunity to
4 participate in the proceeding. It asks you to reverse your
5 decision in this case because the price per ton is less than
6 you approved using a process that has now been determined to be
7 obsolete, but it ignores the fact that that procedure was
8 debunked because it is now undoubtedly out of date.

9 Necessarily, the prices under an outdated procedure
10 that has been debunked would be higher than the result that you
11 derived in this case. It says the cross-Gulf shipments by
12 other utilities and by its own affiliate are not comparable,
13 and it then criticizes the fact that you tried to make them
14 comparable by comparing a shallow draft, the cost of operating
15 a shallow draft vessel into a shallow harbor with maneuverable
16 difficulty to Tampa Electric's situation where it has a deep
17 draft vessel going into a deep draft harbor with great
18 maneuverability. You tried to come with up with comparables.
19 And when did, you Tampa Electric says that's wrong.

20 Your findings were not based upon a mistake of fact,
21 and Tampa Electric has failed to show where any mistake of fact
22 has come into play. It says the JEA short-term prices in 2003
23 that were given to JEA by Tampa Electric should not be used
24 because short-term prices are lower than long-term prices. But
25 says you should rely on the Progress short-term prices because

1 it suspects from confidential information it hasn't seen that
2 those prices might be higher.

3 It formerly said that its estimates of prices
4 railroads would charge would be a good proxy for a competitive
5 market. But when it developed the competitive bid process in
6 2003, it refused to accept bids from the railroad. It says
7 that there is no competition in the cross-Gulf component of the
8 transportation, so it must develop a hypothetical model to
9 emulate competition. But in the model, it leaves out a major
10 portion of the revenue that would motivate a competitive
11 carrier.

12 Now, I have listed A through H, I guess that is about
13 seven ways that Tampa Electric has created a tangled web of
14 inconsistent positions. And this tangled web results not by
15 deceit or device to mislead by Tampa Electric, it arises
16 because of the nature of a public utility holding company that
17 owns unregulated companies and regulated companies. And the
18 regulated company is used as a conduit to pass through costs
19 from the unregulated company to Tampa Electric's captive
20 customers.

21 I would suggest to you that the potential abuses in
22 this type of setup, a public utility holding company setup was
23 disclosed some 70 years ago. And public utility holding
24 companies were broken up, by in large, and Tampa Electric and
25 Progress Energy were two of the ones that were broken up. By

1 our Order 999, you have brought a ray of sunshine into the
2 act that the public utility holding company has been reborn
3 n Florida, and we still have a situation in which one company
4 wns a regulated company and an unregulated company, and there
5 re potential problems.

6 You have cut through the labyrinth of the dark in
7 this proceeding, and have brought an unusual ray of sunshine by
8 your order. Your order is based upon 1,442 pages of testimony.
9 It is based upon 110 exhibits. There is nothing in the order
10 that indicates your decision was made by something -- by facts
11 that lay outside of the record, and I would suggest to you that
12 it would be totally inappropriate to now bring in confidential
13 information from outside of the record that you didn't rely on
14 to reverse a decision that is well founded on competent,
15 substantial evidence. And I would urge you to deny the
16 petition for reconsideration, deny the motion for
17 clarification.

18 And with respect to the CXT motion, which I think is
19 a valid one, it says one of the things that you didn't mention
20 was that after this contract expires in 2009, let's go to a
21 true fair open bid process where the utility is bound by the
22 bid that it submits contemporaneously with other bidders. And
23 I think that is a good idea, and I hope you will do it even if
24 I may not be here to argue this case in 2010 when it comes up.

25 COMMISSIONER DAVIDSON: Such a pleasant note to end

1 your argument on.

2 MR. McWHIRTER: But if you will remember this
3 argument, you will find it helpful even then.

4 CHAIRMAN BAEZ: Mr. Wright.

5 MR. WRIGHT: Thank you, Mr. Chairman. Robert
6 Scheffel Wright appearing upon behalf of CSX Transportation.
7 First, I want to say that CSX Transportation supports the
8 staff's recommendation in its entirety and that we agree with
9 the comments that Ms. Christensen, on behalf of the Citizens,
10 and with the comments of Mr. McWhirter on behalf of his
11 clients. I will add that I don't think I'm as literary or
12 literate as Mr. McWhirter, and I sure hope he is still here in
13 2010 when this comes back up.

14 I will be as brief and straightforward as I can. In
15 its motion for reconsideration, Tampa Electric asserted, as
16 grounds for reconsideration, several things: That the
17 Commission should reconsider because the costs approved for
18 recovery are less than those historically allowed. The
19 Commission knew this, they decided -- you all decided that it
20 was irrelevant. You made your decision based on competent
21 substantial evidence of record. There is no mistake of fact or
22 mistake of law in your decision on that point.

23 The Commission -- Tampa Electric asserts that you
24 erred and you should reconsider because you approved rates in a
25 stipulation for Progress that TECO suspects is less than that

1 authorized for Progress. I presume that you knew this. I'm
2 sure you knew it. You had the settlement in front of you. You
3 just decide differently based on the evidence in the 1,442
4 pages of testimony and 110 exhibits and the competent
5 substantial evidence of record in this case, explained the
6 difference between Progress's situation and Tampa Electric,
7 although they had already previously done a pretty good job of
8 doing that for you, and made your decision accordingly. You
9 made no mistake of fact or law in that decision.

10 Tampa Electric asserts that you erred and denied them
11 of due process by relying on information relative to Progress's
12 waterborne transportation costs. This is just untrue. The
13 value on its face, and the staff even highlighted this, I want
14 to say at Page 8 of their recommendation, highlighted it with
15 italics. Progress Energy's rate was not used as the basis for
16 the specific adjustment to Tampa Electric's cost-recovery for
17 ocean barge service. There is no mistake here.

18 Tampa Electric asserts that the Commission erred by
19 failing to distinguish the character of the JEA spot coal
20 transportation movements, and by failing to consider JEA 2004
21 transportation costs from the longer term coal transportation
22 movements. We explained there is some differences. In fact,
23 more likely than not the spot coal rates would be higher than
24 lower, and so on. But the real point here for reconsideration
25 purposes is that you understood this, you considered it, you

1 explained it, and you made no mistake. All Tampa Electric is
2 really doing on this one is trying to get you to
3 inappropriately reweigh evidence.

4 With regard to the 2004 JEA rate, that is just flat
5 irrelevant. What is relevant here, and the staff pointed this
6 out very well in their recommendation at Page 12, what is
7 relevant is what TECO knew and reasonably should have known in
8 2002 and 2003 when it made the decisions that were at issue in
9 this docket. As the staff stated at Page 12, the Commission's
10 duty in this case, however, was to determine whether Tampa
11 Electric's contract rates were prudent based on what Tampa
12 Electric knew or reasonably should have known at the time it
13 tested the market. Tampa Electric's RFP process took place in
14 the summer of 2003, well before the PEF stipulation was signed.
15 That was in 2004, just as the JEA spot rate that TECO was
16 asking you to consider today. There is no mistake here.

17 Finally, Tampa Electric in its reconsideration motion
18 asserts that you overlooked evidence that market prices for
19 coal transportation services have increased. This is also
20 irrelevant. And, in fact, not only did you apply the law
21 correctly, it is Tampa Electric here that is attempting to
22 invite you to make a mistake of law. The standard for review
23 of utility prudence decisions -- and I know I'm preaching to
24 the choir here -- is you make the decision, your evaluation of
25 the prudence of their decisions on the basis of what they knew

1 and the circumstances that they faced at the time. There are
2 numerous cases. There is an 1988 fuel case cited in our
3 recommendation, Gulf Power versus PSC, 487 So.2d 1036; Florida
4 Power Corporation versus Cresse, 413 So.2d 1187; and there is
5 another Power Corp case versus the Commission, I think it is in
6 456. I'm not sure, I don't have that cite with me, but that is
7 standard established regulatory law.

8 It would be a mistake of law to go back and evaluate
9 the prices they are paying in light of current market
10 conditions. You have to evaluate them as you have always done
11 on the basis of what they knew and what they had in front of
12 them at the time.

13 With regard to clarification, as the Commission staff
14 pointed out, TECO would like you to tie your own hands, ask you
15 to approve a pig in a poke. An unknown process, undefined,
16 unimplemented with unknown outcomes. This is frankly -- I
17 think we use this word in our response -- this is absurd. This
18 is wrong. It is absurd. It would violate the APA by denying
19 all affected persons, including the parties to this, the
20 intervenor parties to this docket their point of entry.

21 Finally, I would like to make two more points. In
22 his comments, Mr. Willis tried to assert that the Commission
23 staff did this and the Commission staff did that. In fact, you
24 all did, you all made the decisions. The Commissioners made
25 the decisions that TECO complains of. You made them, you

1 articulated them in your order, and you explained them in your
2 order.

3 With regard to the big picture, and I think that is
4 really important, what really happened here is we had three
5 days of very intense sometimes frustrating and hair-pulling
6 hearings with a lot of evidence and a lot of testimony. As we
7 pointed out in our response, and as the Commission staff
8 pointed out in their recommendation, you had tons of competent,
9 substantial evidence to support a wide range of outcomes in
10 this case.

11 You awarded Tampa Electric's cost-recovery that was
12 significantly less than what Tampa Electric wanted. You
13 awarded Tampa Electric cost-recovery that was significantly
14 more than all the intervenors argued was appropriate.
15 Sometimes I think you all say when you make all the parties
16 unhappy you have done a good job. We support the
17 recommendation and urge you to grant the recommendation in its
18 entirety, denying TECO's motion. Thank you.

19 CHAIRMAN BAEZ: Thank you, Mr. Wright.

20 Mr. Twomey.

21 MR. TWOMEY: Is this on?

22 CHAIRMAN BAEZ: It is.

23 MR. TWOMEY: Mr. Chairman, Commissioners, good
24 afternoon. Mike Twomey on behalf of the nine named residential
25 customers of TECO I represented in this case. I will attempt

1 to be briefest of all. First by adopting all the comments made
2 by the preceding consumer representatives, then I would like to
3 point your attention to, I believe it is Page 8 of the staff
4 recommendation, but I may have printed this out differently.

5 In your staff's big picture analysis they point out
6 that the Commission heard extensive evidence on the issues,
7 three days of testimony and over 100 exhibits. From that
8 evidence staff gave you at your original agenda consideration
9 to this case a number of alternatives. They ranged from no
10 reduction in the cost that Tampa Electric would incur from
11 numeric options ranging from \$13.8 million per year to 20.3.
12 As staff goes on and points out, you, based upon your
13 consideration of the evidence in this case, chose the \$15.3
14 million reduction.

15 I wanted to point out that mathematically, whereas
16 there was a \$6.5 million spread between the high and low
17 recommendations from your staff which they claim to you and
18 which we support were all supported by substantial competent
19 evidence, that you went up 1.5 million from the bottom or 23
20 percent. And that was fair we believe, and we believe it is
21 supported by the evidence.

22 The staff in the recommendation on Issue 2 says that
23 you should not grant the reconsideration or the company's
24 clarification because it has not identified a point of fact or
25 law that the Commission overlooked or failed to consider in

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First of all, it was pointed out by Mr. McWhirter

paying are comparable. So what we are asking you to do is to follow your own, your own decision regardless of what the positions were taken prior to that time.

With respect to his comments about deep draft vessels and shallow vessels, all of that has to do with cost. It doesn't have anything to do with prices. And what you did here was you left out part of the price that Progress Energy paid in 2003. Again, there was a discussion that we want you to consider confidential information. The exhibit that staff used to make its computation of Progress Energy is replete with redactions, and we believe that the computations that they made cannot be made without the use of the figure that is blacked out right here. So, there is no inconsistency with what we

1 asked you to do; that is, to have an even hand with this.

2 With respect to the rebid opportunity and the
3 statement that there is no point of entry or opportunity to
4 participate, I suggest to you that that is just plain wrong.
5 What we have said is that we would come to you, present our
6 proposed process following the guidelines that you have stated
7 here, and then after you determine that the process is correct,
8 and then later if you determine we followed that process, that
9 you have the courage of your own convictions in accepting the
10 outcome of the process.

11 There was a reference to 15 years of findings. Those
12 findings were made by you after a hearing and after a thorough
13 review, and there was nothing in this order which goes back and
14 says that anything that you had done previously was wrong.
15 What your finding was for the future, that you would move to a
16 different methodology. And, again, if you look at the prices
17 that you found were reasonable over those 15 years, the result
18 that you have here is more than two dollars different.

19 There was a discussion that the JEA price in 2004 is
20 a short-term price. Well, so is the rate that you actually
21 used. So there is kind of a mixing and matching of principles
22 when it comes to which rate to apply. CSX says that Progress
23 Energy was not used in the calculation. Well, that's right,
24 because the Progress Energy rate wasn't calculated correctly.
25 We believe that if it is calculated correctly and you follow

1 your principle of using the highest rate, then that rate would
2 be used in the calculation.

3 There was a statement that 2004 is irrelevant. I
4 suggest to you that what you are trying to determine is what is
5 the appropriate market rate in 2004. That is what you did
6 previously by the use of the benchmark, and I think that once
7 you reject the bid process, that you are back to determining
8 what is the appropriate market rate in each of those succeeding
9 years.

10 And also, again, the idea that you would be embarking
11 on a determination of an unknown process, a pig in the poke, is
12 just wrong. You would be using your own -- we would be using
13 the procedures that you set out for us, and, again, would just
14 be accepting the result of those procedures. So, again, we
15 urge you to both reconsider and to clarify the order.

16 CHAIRMAN BAEZ: Commissioners, questions? I have a
17 question just so I can clarify in my mind exactly, Mr. Willis,
18 what is your understanding. Can you restate for me what kind
19 of clarification you need in terms of the rebidding? You have
20 heard some statements that what you are asking is to approve a
21 bid process beforehand, before you ever see results from it.
22 And I would like for you to address that.

23 MR. WILLIS: Well, Commissioner, I think the process
24 would be very similar, if not identical, to what you are
25 stating that we should do in the future; that is, that we

1 should have an open, fair, and competitive bid process. And
2 you set out in your order the elements of that.

3 What we would do is that we would come back to you
4 and show you how we would implement those guidelines, and that
5 then there would be simply a statement that if we follow those
6 guidelines and reach a result, you are not going to then come
7 back and say, well, you should have done this in 2003, so that
8 was a nice exercise, but since the price came back -- is higher
9 or something that you might not want to accept, then we are
10 going to say that you should have done this previously. So,
11 you said we had an opportunity to mitigate and we believe that
12 you meant that to be a real and not an illusory opportunity.

13 CHAIRMAN BAEZ: A follow-up question on something you
14 said. I understand that the order that this Commission issued
15 included what I will now, for purposes of discussion, call
16 examples of what a fair and open and certainly by way of
17 critiquing the process that you employed originally.

18 Do you see the requirements in the order as an
19 exhaustive list?

20 MR. WILLIS: Commissioner, we see that we would come
21 back to you with a process, and that you would determine that
22 process would be fair. And I think that we certainly
23 necessarily would have to include those matters, but I think
24 there would be a discussion.

25 CHAIRMAN BAEZ: You recognize that the burden is on

1 you to -- if necessary, and if it were ever possible for it to
2 become an issue, that the burden is on you to go above and
3 beyond that order, what is in that order. Do you recognize
4 that?

5 MR. WILLIS: Yes. If you determine at the outset
6 before we did this that we had certain things that we needed to
7 do with respect to the bid process, the fact is that it would
8 be decided, you know, in advance, and then we would then
9 implement what that process is.

10 CHAIRMAN BAEZ: Can someone refresh my memory, and I
11 read the transcripts of the discussion at agenda conference
12 that day, but I don't recall a mechanism for rebidding, or the
13 notion that a bid process would be, quote, unquote, blessed
14 ahead of time, and that that would seal the -- that would
15 somehow lead to a result. I mean, did we discuss that? Was
16 there any, or is there anything in the order, because I can't
17 recall?

18 MR. KEATING: I don't believe that the order
19 specifies that if there -- I can't remember exactly.

20 CHAIRMAN BAEZ: If I'm not mistaken, what I hear Mr.
21 Willis referring to is what I would term some kind of
22 procedure. It is a procedural or a concept of process probably
23 a lot like the bid rule procedures where you have some level of
24 approval of an RFP process ahead of time. Now, I don't think
25 right now is a great time to argue what that approval means on

1 the back end, but it sounds like you are suggesting something
2 like that.

3 MR. WILLIS: Well, Commissioner, in this particular
4 instance, right after we submitted the bid staff asked for
5 meetings with us, and meetings were attended by other
6 interested parties and suggested that we make certain changes
7 in the way that was done. The company didn't do it in that
8 instance, and this case ensued after that.

9 What we thought that your order meant, and what you
10 meant for this process to be in the future is that we would set
11 out a procedure, and then we would go through perhaps some
12 meetings of the interested parties and then proceed on. I
13 think that is even one the requirements that you have in your
14 order. And then we would get a determination by the Commission
15 that that was an appropriate process and we would go on. I
16 don't think you need a rule to do that.

17 CHAIRMAN BAEZ: No, that is not what I was implying.
18 But I think the process that you are referring to, and correct
19 me if I'm wrong, but the notion, the notion of the company
20 laying out how they intend to issue and administer the RFP
21 process so that we can look at it on paper and say, yes, it is
22 a good one; no, it is a bad one; change it here or change it
23 there, and then be forever foreclosed from discussing that the
24 implementation of the RFP process was somehow flawed as well to
25 me seems a little disingenuous in this.

1 I mean, you can write it up anyway you want. What we
2 are interested in is was it administered properly. Although, I
3 will say this -- and, Commissioners, I'm probably getting ahead
4 of the rest of you and probably of myself. I remember as part
5 of our conversation, you know, agreeing, at least with the
6 notion, of there is a risk obviously to the company rebidding
7 this, because the question of recovery is going to have to be
8 answered at the end of the day. There is a risk that you are
9 undertaking by going through the process at all.

10 But for me personally, our decision was more than
11 anything else, in my mind, to try and clarify that what we
12 needed was an open, competitive, and honest process. I'm not
13 trying to cast aspersions, that is really not what I mean by
14 honest, but that it is open and transparent in short.
15 Something that everyone can see and participate in and not have
16 any doubts about. And if that is the goal, then I'm willing to
17 discuss living with the necessary results of that process.

18 COMMISSIONER DAVIDSON: Can I ask a question about
19 the scope of your question?

20 CHAIRMAN BAEZ: Yes, sure. Please.

21 COMMISSIONER DAVIDSON: Are we talking about sort of
22 after this issue going forward? Because my understanding was
23 that if they ever sort of went through an RFP on this that what
24 we said as sort of the rates, that was it. They could come in
25 better, but we wouldn't come in in a worse situation via our

1 RFP process.

2 CHAIRMAN BAEZ: No, I remember you saying it. I
3 don't remember me saying it. And that is a question, I guess,
4 that we are going to discuss, the four of us, as to what
5 exactly we were voting on, because I know what I was voting on,
6 and I'm certain that everybody else here knows what they were
7 voting on. I'm just curious to see if we were all voting on
8 the same thing, if it coincides.

9 COMMISSIONER DAVIDSON: I didn't know if you were
10 talking about going forward or about this case.

11 CHAIRMAN BAEZ: No, there is a question, there is a
12 request for clarification, and I think, without getting into
13 the specifics of a clarification, I think it is incumbent upon
14 us, it is our responsibility to be as clear as possible.

15 COMMISSIONER DAVIDSON: I agree.

16 CHAIRMAN BAEZ: That is part of the job. So whenever
17 someone asks for clarification on something, I, for one, feel
18 compelled to try. I mean, I'm not one to say, you know what, I
19 have said enough, you go figure it out. It wouldn't be right.
20 It doesn't mean that the clarification is something that
21 anybody is going to be happy with.

22 So my question is as part of the clarification is
23 there some process involved where -- because I have heard it
24 characterized by Mr. Wright, in particular, as a pig in a poke.
25 I mean, you are basically approving something when you don't

1 know what the result of that something is going to be at the
2 end of the day. And that is what causes me concern. If as
3 part of our clarification we are going to start considering how
4 this process is going to work and whether we are going to be
5 blessing an RFP process or the concept in advance, and then
6 tying our hands in order to consider what all the mitigating or
7 aggravating factors are when we discuss cost-recovery, I, for
8 one, am very uncomfortable leaving ourselves open to the
9 argument of, well, you know, you approved the process,
10 therefore you have to approve the result.

11 COMMISSIONER DAVIDSON: Well, I don't want to leave
12 myself open to that, either.

13 CHAIRMAN BAEZ: I think in a perfect world both of
14 those cases get made together.

15 So that there is, I think, Mr. Willis, an opportunity
16 for you all to mitigate, but also the risk that you are doing
17 everything that you have to do to mitigate. And that should be
18 your risk, that is not anyone else's.

19 COMMISSIONER DEASON: Well, let me a question on your
20 comment.

21 CHAIRMAN BAEZ: Please.

22 COMMISSIONER DEASON: You know, I think obviously
23 nobody want to buy a pig in a poke.

24 CHAIRMAN BAEZ: I don't even know what a pig in a
25 poke is.

1 COMMISSIONER DAVIDSON: I don't either.

2 COMMISSIONER DEASON: I don't either, but I know it
3 is a bad thing and I don't want to do it.

4 But, Mr. Chairman, you indicated that you don't want
5 to be bound by the result, and maybe I don't either. But, if
6 we agree to a process going in that we believe is fair,
7 objective, transparent, whatever other good adjectives you want
8 to put on that that you would think yield the correct result,
9 if at the end of that if we, absent a finding that the
10 implementation was flawed, we probably are going to be bound by
11 that. I mean, I would not be in a position to say, oh, yes, we
12 approved this process and you followed it and you implemented
13 it exactly, but we don't like the end number, therefore we are
14 going to scrap it.

15 CHAIRMAN BAEZ: No, no. And that is by no means
16 my -- you know, it may be unpopular at the end of the day, it
17 may sound one way or the other, but certainly that is not my
18 implication. What my concern is is that we don't have any
19 further -- any further review of how the process -- you know,
20 and that is why I want to understand what kind of process is
21 implied by your request for -- by the company's request for
22 clarification. Because if it is one in which, you know, and
23 just speaking in theory, you know, they say, all right,
24 Commissioners, this is what we propose to do. This is the RFP
25 that we propose to issue, and what the rules are going to be,

1 nd what the criteria is going be, and all of that great stuff.

2 And you are going to take it and say, you know what,
3 t looks good. But you haven't test drove this RFP process
4 ret. And, I mean, I hate to see it, and I don't want to sound
5 cynical, but issues inevitably arise. And I can't say that
6 some of those issues may not have merit or not. I think that
7 s something to consider at the time that they arise.

8 COMMISSIONER DAVIDSON: Maybe we are in the same
9 spot. I think we heard the same thing and interpreted it
10 differently. What I had heard was they didn't want to, sort
11 of, necessarily be bound not so much by the results, but by the
12 process. For me, I don't want to be bound, I guess, by the
13 results of an RFP on this docket that would come in higher than
14 the market rates we have already set.

15 CHAIRMAN BAEZ: Then we are not on the same page, I
16 can tell you that. I respect your comments at the agenda
17 conference that day, but I don't agree with them, because as I
18 said --

19 COMMISSIONER DAVIDSON: Well, that's fine. It's good
20 to sort of articulate where --

21 CHAIRMAN BAEZ: Where I'm coming from in particular
22 is I want to be able to see at the end. You know, I believe
23 that the company needs to make their case at the end that the
24 process was implemented correctly as they had suggested or
25 presented ahead of time to staff, or to the Commission, or

1 however it works out. But I think that the question of whether
2 that process was a valid one was an open and transparent one.
3 That determination cannot come ahead of time without seeing the
4 results of it. And if that is one of questions that comes out
5 or that is answered as part of the cost-recovery proceeding,
6 whatever it may be, then the number is what it is. You know,
7 the number is what it is. But I think on that way, there is a
8 risk on the part of the company should they go forward at all,
9 if they really can't make this work.

10 COMMISSIONER BRADLEY: Well, Mr. Chairman, there also
11 is a risk on the part of someone else, and I don't know exactly
12 who that might be. What I'm hearing is that -- I'm hearing the
13 assertion that the utility is paying more for coal than what
14 they are allowed to recover right now. **And that the next time**
15 **the bid goes out, the bid is going to reflect that assertion.**
16 And I guess what I'm hearing is that the utility company is
17 asking us for clarification of the fact that if the bid
18 reflects that assertion, and they can prove that assertion, are
19 we going to have a problem with the numbers that are in the
20 bid. Now, that is what I'm hearing, and maybe I'm hearing
21 something --

22 CHAIRMAN BAEZ: I think that is a fair, you know --

23 COMMISSIONER DAVIDSON: And at some point I would be
24 interested in staff's, sort of, understanding of what they
25 thought we did, as well.

1 COMMISSIONER BRADLEY: And for the sake of certainty
2 and transparency, I think I hear the company asking us for
3 clarification as to how we are going to react if the assertion
4 is proven.

5 COMMISSIONER DEASON: Well, let me just say
6 something. I think we need to put the entire proceeding in
7 some context, or at least the way I perceive it. And if I'm
8 wrong, tell me. But in a simplified review of what happened is
9 we said that the process that TECO followed was inadequate,
10 because they made that decision that the RFP was inadequate and
11 we had to rely on other information, other tools. Good
12 evidence, good information, but it was not our desire. We went
13 in saying that we wanted a fair, open, objective --

14 CHAIRMAN BAEZ: Fill the blank.

15 COMMISSIONER DEASON: -- RFP that we feel like that
16 gives the best result. That is the best tool that we could use
17 to come up with the right number. We didn't have that, so we
18 relied on the next best tool that we felt gave us a good
19 number. And I'm comfortable with the number that we came up
20 with based upon what we had before us. But I think we need
21 to -- if clarification is needed, I'm willing to give it, being
22 that we still believe that the best tool is an adequately
23 structured and implemented RFP. And if that process is
24 followed, and, sure, there is going to be debate as to what is
25 the correct process, but there needs to be -- there needs to be

1 a process to ordain that process. And we can hear the various
2 parties' positions as to what needs to be in that RFP, or what
3 needs to be eliminated. But once an RFP is decided upon, I
4 think it is only fair to let that RFP go forward. And if it is
5 implemented correctly, and there may be some debate as to
6 whether what was set out as the RFP was implemented correctly,
7 but if we get beyond that and give people a reasonable
8 opportunity to come in and debate as to whether the
9 implementation was done correctly, once you give everybody that
10 opportunity and you reach a decision as to whether the RFP was
11 structured correctly and whether it was implemented correctly,
12 if you bless that at some point, the number is the number. And
13 it doesn't matter whether it is higher or lower, it is still
14 the best tool that we feel is going to reach the best number.

15 CHAIRMAN BAEZ: Which is why I had analogized it to
16 sort of what we go through with the bid rule to add capacity.
17 There is a protest season, if you will, as to the terms and,
18 you know, the nonimplementation aspects of the RFP. If the
19 criteria are clear, if the -- you know, all these situations.
20 There is some preliminary discussion and some preliminary input
21 and some preliminary determination as to the reasonableness of
22 the terms of the RFP, but there are still certain circumstances
23 that can come into play on the need determination basis.

24 Now, I'm not trying to suggest to you all
25 Commissioners that that is the process that we need to follow,

1 out it sounds a lot like what you are describing such that
2 really the only questions on the cost-recovery side are whether
3 it was implemented properly in a nondiscriminatory manner and
4 an appropriate manner because the criteria and all the other
5 terms of the RFP have somehow been agreed to by the
6 stakeholders and all the parties.

7 COMMISSIONER DEASON: But let me clarify one other
8 thing that I said, though, is that given all the caveats that
9 are put forward, if at some point the Commission reaches a
10 decision that the number is the number, I think that is the
11 number on a going-forward basis. We don't take that number and
12 retroactively use it and say, well, if we had known the results
13 of this RFP a year ago we would have had this number,
14 therefore -- I mean, we have the best number, and this is the
15 number that we are going -- assuming we deny the
16 reconsideration, the number is the number. And we are going to
17 use that number until there is some reason that we feel
18 justifies a change on a going-forward basis.

19 COMMISSIONER DAVIDSON: I agree with that, that it is
20 a going-forward.

21 CHAIRMAN BAEZ: Oh, yes, that it is a going-forward.
22 Absolutely.

23 COMMISSIONER DAVIDSON: And I agree that RFP is
24 always a good process, too. I guess my only question is the
25 time frame, I guess, is what I'm talking about. It is sort of

1 in the context of this.

2 CHAIRMAN BAEZ: Just for argument sake, maybe it can
3 clear it up for me what you all are saying on this particular
4 aspect of it. If we ruled 16 or 15 was the magic number once
5 upon a time, all right, until the rebid comes in and gets set,
6 even if it comes in at 17, and if that is part of a transparent
7 process as Commissioner Deason suggests, that is a number that
8 we have to be willing to live with, that 17 is not going to get
9 applied retroactively. Is that what you are referring to?

10 COMMISSIONER DEASON: Uh-huh.

11 CHAIRMAN BAEZ: I can agree with that.

12 COMMISSIONER BRADLEY: Well, the more we discuss this
13 whole issue of clarification --

14 CHAIRMAN BAEZ: The less clear it becomes.

15 COMMISSIONER BRADLEY: Well, I think it is becoming
16 clear in my mind. I think it is probably fair to everyone.
17 Because, I mean, as Commissioner Deason just implied, it could
18 go either way. The number could be less, the number could be
19 more. And for the sake of creating certainty, I think we need
20 to give some strong consideration to clarifying or making it
21 crystal clear as to what we actually are saying in our order.
22 It could be a crap shoot.

23 CHAIRMAN BAEZ: And, I'm sorry, I just didn't catch
24 the retroactivity in all of that.

25 MR. WILLIS: We didn't intend any retroactivity.

1 What I said was for the period covered by the RFP process,
2 which would be a future period.

3 MR. KEATING: Commissioner, I think the real issue is
4 if the company goes out and issues an RFP for service to take
5 effect prior to the end of their existing agreement with TECO
6 Transport, and this is where the staff recommendation
7 references Commissioner Davidson's comments from the prior
8 agenda, where it was clear to us that, at least in Commissioner
9 Davidson's opinion, that was not a process that -- at least at
10 that time from his understanding, that if the number came in
11 higher midstream that the ratepayers shouldn't pay more, from
12 that point on for that five-year contract period than they
13 would have paid if the process had been done correctly up
14 front. And I did want to point out that the order --

15 COMMISSIONER BRADLEY: Wait a minute. But if the
16 numbers come in lower, what is the outcome?

17 CHAIRMAN BAEZ: You get the lower.

18 MR. KEATING: I suppose you get the lower number.
19 And the reason it is not -- Commissioner Davidson's comment was
20 really the only one that directly hit on that issue that I
21 could see in the transcript and in writing the order. So the
22 order does not speak to what happens if you come in higher or
23 lower. It didn't seem to be something that there was a meeting
24 of the minds on when we rendered that order. But the only
25 indication we had from the transcript was Commissioner

1 Davidson's comments, and there weren't any --

2 COMMISSIONER DEASON: I mean, why would anybody rebid
3 if they were only subject to downside risk? I mean, why would
4 TECO even go to -- let's face it, an RFP is not a pleasant
5 thing to go through; not for them, or the parties, or for us.
6 But, I mean, it is not inconceivable to me, and you even used
7 the term mitigate, attempt to mitigate the impact of the
8 cost-recovery. To me the order is clear. Now, maybe there was
9 some language that makes it unclear, I don't know, but to me
10 the order was clear. So, to that extent, I don't think that it

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22 is the exact process you are going to use, but I think it does
23 give a lot of guidance.

24 COMMISSIONER BRADLEY: Let me ask this question, and
25 this whole process of bidding is generating a lot of thought.

1 Companies that bid, sometimes their figures are off, and they
2 ask for a change of order or change of circumstances in order
3 to make adjustments, but what is there that is going to make a
4 bid by an outside company binding if they overlooked some
5 irrelevant numbers, and all of it sudden discover that, you
6 know, I can't perform at this price and make a profit?

7 COMMISSIONER DEASON: Well, usually there is some
8 type of a performance bond required, and that is part of the
9 RFP itself. And I guess if that is not sufficient, I guess,
10 you know, it is like any other default on a contract, there is,
11 you know, the court remedy. And that is another reason you may
12 have -- some qualified bidders may have to have a certain
13 standing, a financial standing, a bond rating, or balance -- I
14 don't know, but that goes into the structure of the RFP, which
15 are things that can be debated and determined as to what -- you
16 don't want -- when you structure the RFP, you don't want to
17 structure it so that you inappropriately diminish the number of
18 potential bidders so that you don't have a fair and
19 representative bid. At the same time you don't want to open it
20 up to everybody so that somebody that could win a bid and there
21 is no way in the world that they could actually meet the
22 requirements of the contract. And that is part, to me, of
23 trying to determine up front what is the correct RFP process.

24 MR. McWHIRTER: Mr. Chairman, there is kind of a
25 problem in that Tampa Electric entered into a five-year

1 contract with TECO Transport, and that five-year contract has
2 take-or-pay provisions in it. And TECO Transport may say we
3 are entitled, if you rebid this process, we have got this
4 contract, and we are entitled to damages, and we are going to
5 be damaged \$50 million.

6 And so TECO says in its fair RFP process that whoever
7 bids on this has to be responsible for paying the penalty to
8 TECO Transport. I would suggest to you that I would feel very
9 uncomfortable if that happened. You might have a very fair bid
10 process and people given the opportunity to bid, but this \$50
11 million penalty that they would face would certainly result in
12 higher prices.

13 So, I would think that before any process started,
14 TECO Transport ought to say it would be willing to give up all
15 the profits that it had projected and had put in its financial
16 statements and so forth under the five-year contract that was
17 previously awarded that you said you couldn't set aside.

18 CHAIRMAN BAEZ: Well, wouldn't a term like that come
19 out in the discussion? Wouldn't you know that a term like that
20 tied to the RFP, wouldn't you know that ahead of time?
21 Certainly you would have to know it ahead of time.

22 MR. WILLIS: Commissioner, your suggested minimum
23 requirements which Mr. Keating referred to in Item 5 says it
24 has to provide to the parties to the fuel clause docket, the
25 Commission staff a copy of the RFP at least six weeks prior to

1 its release to potential respondents to provide an opportunity
2 or review and comment.

3 I think the process that you set out here as a
4 minimum was the process that we are suggesting that we follow,
5 that details like that are discussed. And I certainly don't
6 think that you ought to add more and more burden on this
7 process as Mr. McWhirter suggests.

8 COMMISSIONER DEASON: Well, I think we are kind of
9 getting beyond --

10 COMMISSIONER BRADLEY: The scope.

11 COMMISSIONER DEASON: -- the scope of what we are
12 here today to decide. I mean, we are almost getting to the
13 point where we are litigating what should be in the RFP, and
14 even if there is going to be an RFP.

15 CHAIRMAN BAEZ: Right.

16 COMMISSIONER DEASON: And I think to the benefit of
17 the parties, we did in our order delineate what we thought were
18 deficiencies in the original RFP and perhaps remedies to those
19 deficiencies, but I don't think that was an exhaustive list.
20 And we certainly didn't make any finding that if all of those
21 deficiencies were met that you would have an adequate RFP. But
22 I think a lot of what we are talking about today probably needs
23 to wait until if and when we do have an RFP in front of us as
24 to what would constitute an appropriate RFP, and give all
25 parties an opportunity to have input in that, as well. But we

1 are not here to litigate that today.

2 CHAIRMAN BAEZ: No, I agree. I'm just wondering if
3 there hasn't been enough clarification at this point, what we
4 are willing to clarify to.

5 COMMISSIONER DEASON: I like the existing language in
6 the order.

7 COMMISSIONER DAVIDSON: I'm fine with that, as well.

8 CHAIRMAN BAEZ: I mean, having gone through the whole
9 back and forth and trying to figure out where everybody was, I
10 think, you know --

11 COMMISSIONER BRADLEY: And I tell you what my
12 quandary is, and I know we are just on one issue, but the
13 second issue that we are going to deal with also is seeking
14 clarification.

15 CHAIRMAN BAEZ: Issue 3 you mean?

16 COMMISSIONER BRADLEY: Yes. Issue 4.

17 CHAIRMAN BAEZ: I'm sorry, Issue 4.

18 COMMISSIONER BRADLEY: And, you know, that was my
19 problem when I started to read this. I just knew that once the
20 discussion began that we were going to get into a discussion
21 similar to what we are having here today and open up or expand
22 our discussion possibly past where we might need to be.

23 COMMISSIONER DAVIDSON: Well, I will tell you, for
24 the same reason that was sort of my understanding of what we
25 specifically voted out. I mean, I'm not moving that, but I was

1 prepared to just move staff in its entirety, because I recall
2 that specifically sort of being discussed and laid out.

3 COMMISSIONER BRADLEY: As it relates to --

4 COMMISSIONER DAVIDSON: On Issue 4, and that is
5 consistent with what everyone said here that there should be a
6 fair, open RFP process.

7 COMMISSIONER BRADLEY: And my thinking, and I'm still
8 up to be convinced, was that we deny staff on both issues. I

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11 already done.

12 MR. KEATING: Commissioners, I can point out with
13 respect to Issue 4, staff felt like that the clarification that
14 CSX sought was implied by the language that is in the order. I
15 can read that portion of the order. It simply says, "Thus,
16 whether Tampa Electric chooses to rebid all or any portion of
17 its existing coal transportation requirements prior to or in
18 connection with the termination of its current contract with
19 TECO Transport, we believe that Tampa Electric must conduct any
20 such rebid through an open competitive RFP process."

21 By that language "prior to or in connection with" we
22 intended that that portion of the order applied not just to a
23 rebid during the term of the current contract, but the rebid
24 that would take place if the current contract were to remain in
25 effect through the end of 2008 and be renewed for 2009.

1 CHAIRMAN BAEZ: But the bottom line is that this
2 whole case became about because an RFP went south, according to
3 our determination, and that is --

4 COMMISSIONER DAVIDSON: Yes.

5 CHAIRMAN BAEZ: I don't think it is beyond -- I don't
6 think it is beyond anyone's logical interpretation of the whole
7 discussion to think that, oh, what a surprise that they are
8 requiring a fair, open, and reasonable RFP process for at least
9 the for sure next time around, whether it be 2009, if this --
10 you know, if the current contract stays in place and there is
11 no prior rebid.

12 So I will tell you, Commissioner Bradley, I don't
13 have a problem with making that particular clarification.
14 Because if it wasn't in the order, if the notion of it wasn't
15 in the order already, and I believe Mr. Keating has tried to
16 give us comfort that it already was, it should be. I didn't
17 see that one as giving me so much trouble.

18 COMMISSIONER BRADLEY: And I'm not disagreeing with
19 that, but I guess my concern is that by changing or dealing
20 with anything, basically what we have done is to reopen this
21 whole matter, and basically we have had a major discussion here
22 about what --

23 CHAIRMAN BAEZ: Well, let's do this.

24 Mr. Willis, I guess you could be most easily
25 identified as a counter-party to CSX's motion for

1 clarification. Do you have any objection on Issue 4?

2 MR. WILLIS: We had not stated an objection to Issue
3 4. We don't believe that it is required. I think your order
4 is clear, and the discussion from the bench makes that clear.
5 And if no change was made in the order, I think we understand
6 what you meant to do.

7 CHAIRMAN BAEZ: Okay.

8 MR. WRIGHT: Mr. Chairman.

9 CHAIRMAN BAEZ: Mr. Wright. And I don't want to get
10 into oral argument on this motion. I thought it was relatively
11 noncontroversial, but --

12 MR. WRIGHT: So did I, for the simple reason that all
13 we are asking you to do is to state in the black and white of a
14 final order what your vote sheet stated in black and white and
15 that you voted on. You know, I don't know what is going to
16 happen in 2007, or 2008, or who is going to be around when this
17 comes up again. We would just like it in an order so that if
18 it comes up it is a motion to enforce a clear order rather than
19 now with it having been on the vote sheet and not reflected in
20 the order, a potential argument from the utility saying, well,
21 obviously the Commission meant to delete it. We voted on it,
22 we litigated it, we think we are entitled to have it in the
23 order and that is our request. Thank you.

24 CHAIRMAN BAEZ: Very well.

25 Commissioners, any more questions or a motion?

1 COMMISSIONER DEASON: Well, I kind of hesitate to do
2 this, but I'm going to ask a couple of questions.

3 CHAIRMAN BAEZ: By all means.

4 COMMISSIONER DEASON: Mr. Willis, what is ambiguous
5 or unclear, what needs to be clarified in the language that
6 appears on Page 9 of staff's recommendation wherein it states,
7 "Tampa Electric at its own discretion may choose to rebid all
8 or any portion of its existing coal transportation requirements
9 in an attempt to mitigate the impact of the cost-recovery
10 disallowance discussed above."

11 MR. WILLIS: The uncertainty comes from the
12 contemporaneous statements made from the bench and from staff
13 that if we went through that process, and the results came out
14 higher, then the process was that you were not able to, in
15 fact, mitigate. So it is the contemporaneous statements that
16 gives us the discomfort and which we seek your discussion here
17 today about what you meant. And for the same reasons Mr.
18 Wright suggests, we think that it is only fair for you to state
19 what you -- clearly state what you meant.

20 COMMISSIONER DEASON: Yes.

21 COMMISSIONER BRADLEY: Well, let me ask this
22 question. Can we ask for reactions from FIPUG and --

23 MS. CHRISTENSEN: Public Counsel.

24 COMMISSIONER BRADLEY: Right. Do you all object to
25 it?

1 MS. CHRISTENSEN: To clarification? It is our
2 position that we don't believe that it is necessary on the
3 Commission's order. We believe that it is fair and clear as to
4 what the Commission expects on any rebid process. We would
5 just go a step further that if the company were to engage in a
6 rebid process that was fair, open, and competitive, but the
7 results ended up higher than what they currently have contract
8 for, the electric company in the best interest of its customers
9 would not choose to elect to pay a higher rate. But that may
10 be an argument for a rebid process, if they choose to do that
11 during the current period of the five-year contract.

12 COMMISSIONER DAVIDSON: And I will tell you my intent
13 there, Chairman, in sort of making that comment was that, just
14 hypothetically, had TECO at time zero engaged in a perfect bid
15 process, what we would consider a reasonable bid process, and
16 at time ten engaged in a bid process, if market conditions had
17 changed such that for whatever reason a number of the input
18 factors would result in a higher price, the customer shouldn't
19 bear that.

20 Meaning if at time zero the market was just much
21 better from a customer standpoint, and had they gone through
22 what we considered a reasonable bid process, great, we would
23 sign off on that. But if the market conditions change because
24 of this -- my thought was the customer shouldn't pay the price
25 for what we deem to be an unreasonable bid process coupled with

1 a worsening market for coal transport, and all of a sudden
2 through a reasonable bid process the price is, in fact, higher.

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6 get to do it, because we just don't like -- you know, so
7 customers didn't bear the burden of a declining market between
8 the time of the unreasonable process and what might be a
9 reasonable one.

10 COMMISSIONER DEASON: I need some clarification at
11 this point.

12 CHAIRMAN BAEZ: Sure. We have got to stop using that
13 word. It just gets us in trouble. (Laughter.)

14 COMMISSIONER DEASON: It seems to me that we have an
15 amount that was in the contract, just call that X, that amount
16 was litigated, we determined there should be an adjustment
17 downward from that contract, and we made the adjustment. That
18 was the decision that the Commission did based upon the
19 evidence that we had. Not an RFP, but based upon other
20 evidence in the record, which is substantial and competent
21 evidence, and certainly I think was a good basis to make the
22 adjustment. So that is something less than X. We'll call that
23 Y. Now --

24 COMMISSIONER DAVIDSON: This is going to be
25 algebraic.

1 COMMISSIONER DEASON: Yes, it is going to be
2 algebraic. There is a difference between those two amounts.
3 And, you know, what is it, \$15.3 million is the adjustment.
4 So, if there is a rebid -- and I guess this is directed to
5 TECO -- if there is a rebid, are you concerned that you do a
6 rebid and that if it falls between Y and X the Commission is
7 bound, based upon some statements, to grant you some relief in
8 that? Or are you also looking go beyond X; that is, if we do a
9 rebid and it is higher than the contract you have signed for
10 the five-year period, that you want to be able to go beyond
11 that and have something, X plus something? What do you want?

12 MR. WILLIS: Certainly in the first instance we would
13 think that the process would follow, if it was between X and Y.
14 Secondly, necessarily to have a rebid, you wouldn't have a
15 contract then. You would be bidding whatever was for the
16 future period and the result would be whatever it is.

17 COMMISSIONER DEASON: So are you saying then that
18 your affiliate would be willing to walk away from that contract
19 and just become a bidder and not look for some damages or
20 whatever?

21 MR. WILLIS: We certainly have got to deal with TECO
22 Transport just like you would deal with any other carrier. And
23 you have full control over the accounting for that. Whether
24 you recognize any amounts that we had to pay to get out of that
25 or whatever, you would certainly have the control over how that

1 would be done. But necessarily, to have a rebid, you would
2 have to basically wipe the slate clean.

3 COMMISSIONER DEASON: Okay.

4 MR. WILLIS: I thought that was what you were saying
5 with respect to a rebid and mitigation.

6 COMMISSIONER DAVIDSON: Chairman, I've got two
7 questions, if I may, while you are thinking. I didn't want to
8 interrupt you.

9 CHAIRMAN BAEZ: No, go ahead.

10 COMMISSIONER DAVIDSON: Two questions, and let me
11 just sort of ask them both and am interested in a response.
12 First one, why would TECO Transport, which was sort of an
13 arm's-length sort of company that you are doing business with,
14 walk away from a contract that is really good for it? That is
15 question one.

16 Question two: In the differential between X and Y
17 that Commissioner Deason pointed out, if a rebid process was
18 ultimately gone through for some future time, which presumably
19 would include part of the term of the contract that TECO
20 Transport would have to say, all right, we will get rid of the
21 contract and go through a new RFP.

22 In that X versus Y differential, would TECO be
23 willing to adhere to some factor which would sort of look at
24 the actual sort of market for coal transport between when the
25 RFP was first done, assuming it would have been done

1 reasonably, let's assume, you know, again, time zero. If the
2 market has somehow deteriorated, would TECO be willing to sort
3 of have brought into the RFP process that factor so that at
4 least the customers aren't incurring the downside of a market
5 change between an unreasonable RFP and a reasonable RFP?

6 MR. WILLIS: Well, first of all, we don't know
7 whether TECO Transport will relinquish that contract. That is
8 something we will have to deal with. But we didn't want to go
9 deal with that if we knew that once we did that all that could
10 happen would be for us to be hurt worse than we are already
11 hurt.

12 Secondly, the process that you suggest I can't really
13 respond to right off the bat. But I would think that, first of
14 all, you recognize that our position throughout the case was
15 that market -- that the contract price was at or below market.
16 So there is a real question about whether we are looking at a
17 difference through time, but I would think that what you
18 suggest is fairly problematic, but it is not something that I
19 could definitely say right here today.

20 COMMISSIONER DAVIDSON: It may be completely
21 unworkable, I just was sort of thinking about it as we were
22 talking here. But you understand my concern.

23 MR. WILLIS: Yes.

24 COMMISSIONER DAVIDSON: Thank you.

25 COMMISSIONER BRADLEY: I only heard from OPC as to

1 what their reaction is to TECO's request for clarification. I
2 would like to hear from Mr. McWhirter, from CSX, and Mr.
3 Twomey.

4 MR. WRIGHT: CSX opposes Tampa Electric's request for
5 clarification. I think the order is clear as to what TECO may
6 do. And, frankly, I don't think they need clarification to
7 conduct a rebid. They can conduct a rebid anytime. It's part
8 of the ongoing management responsibilities of every regulated
9 utility to continue to manage their construction projects and
10 their contracts in the best interest of their ratepayers.

11 The real problem we have is that they are trying to
12 get you to bless today, in this case, cost-recovery based on
13 something in the future. If they want to file a petition for a
14 rebid, they can file a petition for a rebid, and we can
15 litigate, everybody. Tampa Electric, CSX, the residential
16 customers, and so on can all litigate what is appropriate for
17 inclusion in the RFP, or whether there should be one, and what
18 the effects on cost-recovery should be from the outcome --
19 based on the outcome of any such rebid. But that is an issue
20 for another day.

21 I think your order is clear as to what TECO may do,
22 and I don't think any clarification is required. The real beef
23 we have is that they are asking you to approve cost-recovery in
24 advance, and that staff addressed that very clearly and
25 articulately in their recommendation.

1 COMMISSIONER DEASON: Mr. Chairman, just let me say
2 that, you know, the Commission has found ourselves in the
3 position where we have -- we have made an adjustment to a
4 contract. We cannot determine the contract to be null and void
5 or to cancel it, that is not within our jurisdiction or our
6 prerogative. We can make a downward adjustment as to what we
7 allow to go through to customers, and that is what we have done
8 based upon competent, substantial evidence.

9 While making that decision we have basically said
10 that we do not think that the existing contract is in the
11 customer's best interest. So, if TECO chooses to try to get
12 out of that contract or to rebid that contract, I think that we
13 have lost -- me, personally, I think we have lost any basis to
14 say then that becomes the threshold, or that becomes the
15 benchmark that we measure anything against, because we have
16 already determined it is unreasonable.

17 So, in essence, if there is a rebid, and if it is
18 done fairly with an open process and everybody having due
19 process and input and the number comes out higher, you know, I
20 just think that that becomes the number. And, while I would
21 like to be able to say, oh, if it is higher than the existing
22 contract, well, then on its face that is imprudent, how can
23 we -- we can't have our cake and eat it, too. Either that is a
24 good contract or it is not a good contract. We have made a
25 downward adjustment saying that it is not a good contract. Now

1 the ball is back in TECO's court. They either live with that,
2 they continue to pay that contract amount and only recover
3 .5.3 million less, or else they try to get out of that contract
4 and rebid it. And if they rebid it correctly, that becomes
5 then the correct benchmark to go forward it seems to me. That
6 is just my opinion.

7 CHAIRMAN BAEZ: But there is a fine point to be made
8 that I don't -- which is why my face kind of twisted a little
9 while ago. You know, although I agree with you, and as I said
10 before, you know, certainly what my vote meant to me was an
11 effort to put to rest all of these, you know, all the claims
12 and all the allegations and all the circumstances that may well
13 have happened in one form or another that made the bid process
14 less than optimum, all right, for those involved. So, for me
15 it was about process. And I can make a concession to having
16 the prices be what they will be whether they are high or they
17 are low. I mean, everybody has to agree that that is the case
18 and take that risk. So that is my decision.

19 What concerns me, Commissioner Deason, is that the
20 decision to rebid has to be a risk to the company. And by that
21 I mean this: Yes, you can try and cut into the \$15 million
22 deficit on the contract price, that is your risk. But in
23 particular, to the extent that TECO Transport were to exact
24 some kind of liquidated damages for terminating the contract,
25 then all of a sudden that starts becoming a back door to get

1 all the shortfall off. Do you see what I'm driving at? And I
2 don't -- and I can't say that I could agree with that. So I
3 don't know if by my words I'm imposing some kind of
4 disqualification ahead of time, and that is really not my
5 intent, but I'm trying, I'm trying to at least transmit the
6 uncertainty or the discomfort that I have with the idea that
7 the cost of getting -- the cost of getting out of that
8 contract, so that you can rebid it and cut into that \$15
9 million penalty, if you will, that has been imposed through
10 cost-recovery shouldn't be your risk to take. Do you follow
11 what I'm saying?

12 MR. WILLIS: I follow your position; yes, sir.

13 CHAIRMAN BAEZ: And I don't know how we clarify that.
14 I don't know how you feel about that, or if it even makes any
15 sense.

16 COMMISSIONER BRADLEY: I think what you just said is
17 very clear.

18 COMMISSIONER DEASON: You know, you cannot allow
19 inappropriate cost-recovery by another name, i.e., liquidated
20 damages.

21 CHAIRMAN BAEZ: Exactly. And I just want to make
22 that clear so that it doesn't get into it. Perhaps it is a
23 consideration as to what doesn't get into an RFP.

24 MR. WILLIS: I think that that is certainly
25 consistent with the statement that Commissioner Deason made

1 just a moment ago.

2 CHAIRMAN BAEZ: All right. Sometimes you understand
3 him better than I do. Commissioners, I don't have any other
4 questions.

5 COMMISSIONER BRADLEY: Mr. Twomey.

6 CHAIRMAN BAEZ: I'm sorry, Mr. Twomey.

7 MR. TWOMEY: Thank you, Mr. Chairman, just briefly.
8 To answer your questions directly, Commissioner Bradley, my
9 clients support your staff's recommendation in its entirety,
10 which would be with respect to TECO's request for clarification
11 not to give it to them. With respect to the railroads, to give
12 it to them.

13 And if I may just very briefly say this, I think, to
14 give perhaps some analogous situation that might more clearly
15 demonstrate what I understand Commissioner Davidson's concerns
16 to be. Let's say this company, or let's say a hypothetical
17 company had a contract for the purchase of oil to burn in one
18 of its generating units, and it expired a year ago or whatever
19 time the coal transportation contract expired here. And that
20 at that time had there been a fair and open transparent bidding
21 process, it would be conceded that the price of oil would be
22 \$30 a barrel, let's say, hypothetically. And that by choosing
23 to use the methodology that was later determined by this
24 Commission not to be fair, open, transparent, and one likely to
25 result in a fair competitive bid process, you disallowed the

1 \$40 or whatever they were requesting, and you chose \$30.

2 And then they came in 18 months later or 24 months
3 later and they had if not a perfect bid process, an acceptable
4 one to the Commission and to the other parties. But because of
5 changed circumstances which we have seen in our markets in the
6 last couple of years, the price of oil has risen to \$50 a
7 barrel. That's a fair price at the time of the rebid, but had
8 they taken advantage of the circumstances and had a fair bid
9 process 24 months earlier they could have captured oil for the
10 benefit of their customers at \$30 a barrel, let's say
11 hypothetically, for the next five years.

12 And I think that perhaps more clearly illustrates the
13 concern I think Commissioner Davidson has. Because if they go
14 out and come up with an acceptable bid process in the next 12
15 months and they go ahead and do it, it's likely even from a
16 general reading of the media, the press, that the expansion of
17 the economies of China, India, and others will have heated up
18 the markets for transportation with the result that a
19 competitive, fair competitive price next year might be
20 substantially more than what you found it to be based upon
21 using the methods you had to.

22 So, I think Commissioner Davidson has a legitimate
23 concern, and it is one that we share. That if they go ahead
24 and have an open process, it may result in prices that are
25 necessarily higher for all the customers. And that would lead

1 me to conclude that since they made the bed that they are
2 sleeping in now, that I would argue, continue to argue that
3 they should probably have to live with the consequences of
4 their five-year contract without worrying about liquidated
5 damages and that kind of stuff, and who is going to pay for it,
6 and get the bidding process right between now and the next
7 renewal.

8 MR. WILLIS: Mr. Chairman, I think you can see the
9 reason we need clarification. The positions taken by --

10 CHAIRMAN BAEZ: Be careful what you wish for, Mr.
11 Willis.

12 MR. WILLIS: -- CSX and Mr. Twomey, reading your
13 language in the order, comes to directly opposite conclusion of
14 what Commissioner Deason stated. So that is why we need
15 clarification.

16 CHAIRMAN BAEZ: Well, Commissioners.

17 COMMISSIONER BRADLEY: Mr. McWhirter.

18 CHAIRMAN BAEZ: No one else making a move?

19 MR. McWHIRTER: I have no further comment.

20 COMMISSIONER DAVIDSON: Because I think it will move
21 the ball along and will help Commissioner Deason articulate his
22 motion, I'm going to move staff in its entirety. Well, we have
23 moved Issue 1, so Issue 2, 3 and 4, move staff.

24 COMMISSIONER DEASON: I can second the motion. And
25 the reason is that I think that the order speaks for itself.

1 To me the language is clear. I know what it means. I know
2 what I voted for, and I will be willing to articulate that when
3 and if it becomes an issue. And I think that some of the
4 ambiguity came about by comments that were made legitimately
5 so, and there is a basis for those comments that were made
6 during the agenda conference discussion.

7 We have had the agenda conference discussion here,
8 and all the parties have gotten benefits of what everybody has
9 said, and you can just take it for what it is worth. But I
10 don't see any need to add any language to the order or take
11 away any language from the order. But I am in agreement that
12 the language, the clarification requested by CSX should be
13 granted, and so I can support that.

14 COMMISSIONER BRADLEY: And I concur with what
15 Commissioner Deason just said, and I think that all parties
16 have had the benefit of hearing this discussion that we have
17 had today, so with that I am ready to vote also.

18 CHAIRMAN BAEZ: Sometimes clarification is had
19 without actually giving clarification.

20 COMMISSIONER DEASON: Absolutely.

21 CHAIRMAN BAEZ: Well, I hope all the parties can take
22 that to heart.

23 There is a motion and a second to approve staff on
24 all issues. All those in favor say aye.

25 (Unanimous affirmative vote.)

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CHAIRMAN BAEZ: Thank you all.

MR. TWOMEY: Thank you.

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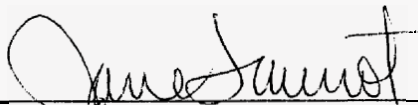
COUNTY OF LEON)

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 9th day of March, 2005.



JANE FAUROT, RPR
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