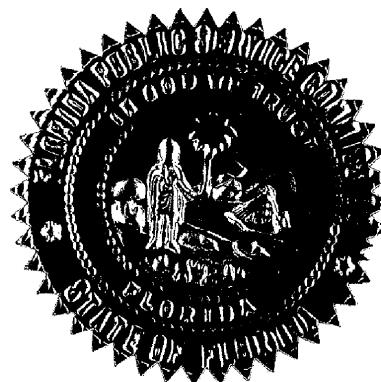


1 BEFORE THE
2 FLORIDA PUBLIC SERVICE COMMISSION

3 DOCKET NO. 050007-EI

4 In the Matter of
5 ENVIROMENTAL COST RECOVERY
6 CLAUSE.
7
8
9



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11 A CONVENIENCE COPY ONLY AND ARE NOT
12 THE OFFICIAL TRANSCRIPT OF THE HEARING,
13 THE .PDF VERSION INCLUDES PREFILED TESTIMONY.

14 VOLUME 2

15 Page 184 through 331

16 PROCEEDINGS: HEARING

17 BEFORE: CHAIRMAN BRAULIO L. BAEZ
18 COMMISSIONER J. TERRY DEASON
19 COMMISSIONER RUDOLPH "RUDY" BRADLEY
20 COMMISSIONER LISA POLAK EDGAR
21 COMMISSIONER ISILIO ARRIAGA

22 DATE: Monday, November 7, 2005

23 TIME: Commenced at 9:30 a.m.

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

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

APPEARANCES: (As heretofore noted.)

DOCUMENT NUMBER-DATE

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I N D E X

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P R O C E E D I N G

(Transcript continues in sequence from Volume 1.)

CHAIRMAN BAEZ: Mr. Perko.

JAVIER PORTUONDO

was called as a witness on behalf of Progress Energy Florida, having been previously sworn, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. PERKO:

Q Okay. Good morning, Mr. Portuondo. Could you please state your name and business address for the record?

A Javier Portuondo, P.O. Box 14042, St. Petersburg, Florida.

Q By whom are you employed and in what position?

A Progress Energy Service Company in the position of manager of regulatory services for Florida.

Q Mr. Portuondo, did you submit prefiled direct testimony in this docket on April 1st, August 8th, and September 8th?

A Yes, I did.

Q And are you sponsoring Exhibits JP-1, JP-2 and JP-3, which were attached to those testimonies?

A Yes, I am.

Q Do you have any corrections to make to your prepared testimony or exhibits?

1 A No, I do not.

2 Q If I were to ask you the same questions in your
3 testimony today, would your answers be the same?

4 A Yes, they would.

5 MR. PERKO: Mr. Chairman, I would ask that Mr.
6 Portuondo's testimony be inserted into the record as though
7 read.

8 CHAIRMAN BAEZ: Without objection, show the prefiled
9 direct testimony of Javier Portuondo entered into the record as
10 though read.

11 MR. PERKO: And I would also ask that Exhibits JP-1,
12 JP-2, and JP-3 be admitted into the record. And I apologize, I
13 don't have the master list.

14 MS. STERN: They are in the record.

15 CHAIRMAN BAEZ: I'm sorry, those are on the exhibit
16 list.

17 MS. STERN: Those exhibits have already been
18 stipulated into the record.

19 CHAIRMAN BAEZ: Okay. They have already been marked
20 and entered.

21

22

23

24

25

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

PROGRESS ENERGY FLORIDA

DOCKET NO. 050007-EI

Environmental Cost Recovery
Final True-Up for the Period
January through December, 2004**DIRECT TESTIMONY OF
JAVIER PORTUONDO**

April 1, 2005

1 **Q. Please state your name and business address.**

2 **A.** My name is Javier Portuondo. My business address is Post Office Box 14042, St.
3 Petersburg, Florida 33733.

4

5 **Q. By whom are you employed and in what capacity?**

6 **A.** I am employed by Progress Energy Service Company, LLC as Director of
7 Regulatory Services - Florida.

8

9 **Q. Have your duties and responsibilities remained the same since you last**
10 **testified in this proceeding?**

11 **A.** Yes.

12

13 **Q. Have you previously filed testimony before this Commission in connection**
14 **with Progress Energy Florida's Environmental Cost Recovery Clause**
15 **(ECRC)?**

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

1 A. Yes, I have.

2

3 **Q. What is the purpose of your testimony?**

4 A. The purpose of my testimony is to present for Commission review and approval,
5 Progress Energy Florida's (PEF's) Actual True-up costs associated with
6 Environmental Compliance activities for the period January 2004 through
7 December 2004.

8

9 **Q. Are you sponsoring any exhibits in support of your testimony?**

10 A. Yes. I am sponsoring Exhibit No. ___ (JP-1), which consists of eight forms. Form
11 42-1A reflects the final true-up for the period January 2004 through December
12 2004. Form 42-2A consists of the final true-up calculation for the period. Form
13 42-3A consists of the calculation of the Interest Provision for the period. Form 42-
14 4A reflects the calculation of variances between actual and estimated/actual costs
15 for O&M activities. Form 42-5A presents a summary of actual monthly costs for
16 the period on O&M activities. Form 42-6A reflects the calculation of variances
17 between actual and estimated/actual costs for Capital Investment Projects. Form
18 42-7A presents a summary of actual monthly costs for the period for Capital
19 Investment Projects. Form 42-8A, pages 1 through 5, consist of the calculation of
20 depreciation expense and return on capital investment for each project that is being
21 recovered through the ECRC.

22

23 **Q. What is the source of the data that you will present by way of testimony or**
24 **exhibits in this proceeding?**

1 **A.** Unless otherwise indicated, the actual data is taken from the books and records of
2 PEF. The books and records are kept in the regular course of our business in
3 accordance with generally accepted accounting principles and practices, and
4 provisions of the Uniform System of Accounts as prescribed by this Commission.

5
6 **Q.** **What is the final true-up amount for which PEF is requesting for the period**
7 **January 2004 through December 2004?**

8 **A.** PEF is requesting approval of an under-recovery amount of \$13,065,380 for the
9 calendar period ending December 31, 2004. This amount is shown on Form 42-
10 1A, Line 1.

11

12 **Q.** **What is the net true-up amount PEF is requesting for the January 2004**
13 **through December 2004 period which is to be applied in the calculation of the**
14 **environmental cost recovery factors to be refunded/recovered in the next**
15 **projection period?**

16 **A.** PEF has calculated and is requesting approval of an over-recovery amount of
17 \$5,961,886 reflected on Line 3 of Form 42-1A, as the adjusted net true-up amount
18 for the January 2004 through December 2004 period. This amount is the difference
19 between the actual under-recovery amount of \$13,065,380 and the actual/estimated
20 under-recovery of \$19,027,266, as approved in Order PSC-04-1187-FOF-EI, for the
21 period of January 2004 through December 2004.

22

23 **Q.** **Are all costs listed in Forms 42-1A through 42-8A attributable to**
24 **environmental compliance projects approved by the Commission?**

1 A. Yes, they are.

2

3 Q. How did actual O&M expenditures for January 2004 through December 2004
4 compare with PEF's estimated/actual projections as presented in previous
5 testimony and exhibits?

6 A. Form 42-4A shows that total O&M project costs were \$6,299,964 or 21.5% lower
7 than projected. Following are variance explanations for those O&M Projects with
8 significant variances. Individual project variances are provided on Form 42-4A.

9 **O&M Project Variances**

10 **1. Substation Environmental Investigation, Remediation, and Pollution**

11 **Prevention (Project No. 1):** Project expenditures were \$313,684 more than
12 projected. This variance is due primarily to costs incurred for conducting
13 inspections mandated by the Florida Department of Environmental Protection
14 (FDEP) and for costs associated with unplanned events which required
15 immediate action to protect surface waters and groundwater. In one instance,
16 the Company incurred approximately \$285,000 of unanticipated expenses to
17 remediate a large oil leak caused by equipment failure at a substation site.
18 Although PEF planned to remediate nine substation sites in 2004, due to
19 delays in obtaining FDEP approval of the remediation plan, which was not
20 received until early December, only three sites were actually completed. The
21 remaining six sites were rolled over into the 2005 work plan.

22 **2. Distribution System Environmental Investigation, Remediation, and**

23 **Pollution Prevention (Project No. 2):** This project was \$1,326,821, or
24 16.4% lower than projected. This variance is due primarily to work delays.

1 The remediation of all three-phase sites was completed, but approximately
2 126 out of 364 projected single-phase sites remained. This work was shifted
3 into the 2005 work plan.

4 **3. Pipeline Integrity Management Program (Project No. 3a):** Pipeline
5 Integrity Management (PIM) O&M project expenditures were \$626,258 lower
6 than projected. This variance is due primarily to project cost savings being
7 realized and a shift of work into the 2005 work plan due to preparation and
8 participation in the regulatory audit performed by the U.S. Department of
9 Transportation's (DOT's) Office of Pipeline Safety. During the design phase
10 of one of the PIM projects, PEF identified a more cost-effective and
11 environmentally preferable option, resulting in an overall cost savings of
12 \$285,000. Lower contractor costs for baseline inspections and other PIM
13 related projects completed in 2004 also contributed to overall favorable
14 project costs of approximately \$60,000. Further, due to deferral of work
15 associated with the PIM leak detection systems and workload requirements for
16 the DOT audit mentioned above, approximately \$66,000 of expenditures were
17 delayed and will be rolled over into the 2005 work plan. Another \$50,000
18 related to piping assessment was determined not to be part of the PIM baseline
19 and will not be recovered.

20 **4. Above Ground Tank Secondary Containment (Project No. 4):** Project
21 expenditures were \$3,666, for a 100% variance. These costs are for contractor
22 fees to manage and oversee tank projects and ensure that all project costs are
23 prudent and reasonable. PEF used an outside contractor in 2004 to analyze the

1 work plan and assess the need for on-going expenditures. The contractor
2 reviews the work scope and cost effectiveness of each project and ensures that
3 the project meets the requirements of the regulation. The work plan is
4 reviewed to validate that the work scope is compliant with the regulations and
5 that both contractors and materials meet FDEP regulations.

- 6 **5. SO2 Emissions Allowances (Project No. 5):** Project expenditures were
7 \$4,664,234, or 23.4% lower than projected. This variance is primarily
8 attributable to a reduction in tons of SO2 emissions at Bartow and Anclote
9 resulting from shifting to lower sulfur oil partially offset by higher cost per ton
10 prices for allowances purchased.

11
12 **Q. How did actual Capital expenditures for January 2004 through December**
13 **2004 compare with PEF's estimated/actual projections as presented in**
14 **previous testimony and exhibits?**

- 15 **A.** Form 42-6A shows that total Capital Investment project costs were \$113,363 or
16 14.1% lower than projected. Actual costs and variance by individual project are
17 provided on Form 42-6A. Following are variance explanations for those capital
18 projects with significant variances. Return on Capital Investment, Depreciation and
19 Taxes for each project for the period are provided on Form 42-8A, pages 1-5.

20 **Capital Investment Project Variances:**

- 21 **1. Emission Allowances:** Recoverable costs were \$113,911, or 22.7% lower than
22 projected. This variance is due to lower SO2 allowance inventory levels
23 resulting from less allowances purchased than projected. Purchases were

1 delayed as the Company's need was reduced due to a shift to lower sulfur oil at
2 certain generating sites.

3

4 **Q.** **Does this conclude your testimony?**

5 **A.** Yes, it does.

1 BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

2 DIRECT TESTIMONY OF

3 JAVIER J. PORTUONDO

4 ON BEHALF OF

5 PROGRESS ENERGY FLORIDA

6 DOCKET NO. 050007

7 AUGUST 8, 2005

8

9 **Q. Please state your name and business address,**10 **A. My name is Javier J. Portuondo. My business address is Post Office Box 14042,**11 **St. Petersburg, Florida 33733.**

12

13 **Q. By whom are you employed and in what capacity?**14 **A. I am employed by Progress Energy Service Company, LLC as Manager of**15 **Regulatory Services - Florida.**

16

17 **Q. Have your duties and responsibilities remained the same since you last filed**18 **testimony in this proceeding?**19 **A. Yes.**

20

21 **Q. Have you previously filed testimony before this Commission in connection**22 **with Progress Energy Florida's Environmental Cost Recovery Clause**23 **(ECRC)?**

1 A. Yes, I have.

2

3 **Q. What is the purpose of your testimony?**

4 A. The purpose of my testimony is to present, for Commission review and
5 approval, Progress Energy Florida's Estimated/Actual True-up costs associated
6 with Environmental Compliance activities for the period January 2005 through
7 December 2005.

8

9 **Q. Have you prepared or caused to be prepared under your direction,
10 supervision or control any exhibits in this proceeding?**

11 A. Yes. I am sponsoring Exhibit No. __ (JP-2), which consists of PSC Forms 42-
12 1E through 42-8E. These forms provide a summary and detail of the
13 Estimated/Actual True-up O&M and Capital Environmental costs for the period
14 January 2005 through December 2005.

15

16 **Q. What is the Estimated/Actual True-up amount that PEF is requesting
17 recovery for the period of January 2005 through December 2005?**

18 A. The Estimated/Actual True-up amount for 2005 is an under-recovery, including
19 interest, of \$11,994,307 as shown in Exhibit No. __ (JP-2), Form 42-1E, Line 4.
20 This amount will be added to the final true-up over-recovery for \$5,961,886 for
21 2004 shown on Form 42-2E, Line 7-a., resulting in a net under-recovery of
22 \$6,032,421 as shown on Form 42-2E, Line 11. The detailed calculations

1 supporting the estimated true-up for 2005 are contained in Forms 42-1E through
2 42-8E.

3

4 **Q. Please explain the calculation of the ECRC Estimated/Actual True-up**
5 **amount you are requesting this Commission to approve.**

6 **A.** Forms 42-2E and 42-3E show the calculation of the ECRC Estimated/Actual
7 True-up amount for the period of January 2005 through December 2005.

8

9 **Q. Are any of the costs listed in Forms 42-1E through 42-8E attributable to**
10 **Environmental Compliance projects that have not previously been**
11 **approved by the Commission?**

12 **A.** Yes. The costs include projected expenditures associated with four programs
13 for which PEF is seeking approval in this docket. These new programs are
14 discussed and supported in the testimony of Kent D. Hedrick and Patricia Q.
15 West.

16

17 **Q. Are there any other new programs for which PEF is seeking recovery under**
18 **the Environmental Cost Recovery Clause.**

19 **A.** Yes. As discussed in Ms. West's testimony, on May 6, 2005, PEF filed a
20 Petition for Approval of Environmental Cost Recovery for activities being
21 implemented to comply with the U.S. Environmental Protection Agency's new
22 Clean Air Interstate Rule (CAIR) and the Clear Air Mercury Rule (CAMR).
23 PEF anticipates incurring approximately \$2,000,000 in capital expenditures for

1 this program in 2005. However, these expenditures are classified as AFUDC
2 and therefore are not included in the recoverable costs reflected in the schedules
3 submitted with my testimony. Such costs will be recovered when the associated
4 pollution controls are placed in service.

5
6 **Q. How do the Estimated/Actual project expenditures for January 2005
7 through December 2005 compare with original projections?**

8 **A.** As shown on Form 42-4E, total O&M project cost are projected to be
9 \$8,968,687 or 29% higher than originally projected. Total recoverable capital
10 investments itemized on Form 42-6E, are projected to be \$1,933,979 or 188%
11 higher than originally projected. Below are variance explanations for those
12 approved O&M projects and Capital Investment Projects with significant
13 variances. Individual project variances are provided on Forms 42-4E and 42-6E.
14 Return on Capital Investment, Depreciation and Taxes for each project for the
15 Estimated/Actual period are provided on Form 42-8E, pages 1 through 11.

16

17 **1. Distribution System Environmental Investigation, Remediation, and
18 Pollution Prevention (Project #2) - O&M**

19 Project expenditures are estimated to be \$460,825 or 6% higher than
20 previously projected. This variance is due to remediation activities rolled
21 over from the 2004 work plan into 2005 as a result of work delays. This
22 project is discussed in Kent D. Hedrick's testimony.

23

1 **2. Pipeline Integrity Management (Project #3a) – O&M**

2 Project expenditures are estimated to be \$208,000 or 20% higher than
3 previously projected. This variance is primarily due to unanticipated
4 activities undertaken to ensure pipeline protection for areas found to have
5 inadequate cover or other risk reduction measures, in accordance with the
6 PIM regulations and the company's PIM Plan. This project is discussed
7 further in the testimony of Patricia Q. West.

8

9 **3. Pipeline Integrity Management – Bartow/Anclote Pipeline (Project #3b)**
10 **– Capital**

11 Project expenditures are estimated to be \$144,921 or 46% higher than
12 previously forecasted. This increase is primarily attributable to a reclass of
13 expenses in 2005 which were erroneously charged to another project in 2004.
14 This project is further discussed in the testimony of Patricia Q. West.

15

16 **4. SO2 Emissions Allowances (Project #5) – O&M**

17 SO2 expenses are estimated to be \$8,364,147 or 39% higher than originally
18 projected. This variance is driven by higher market prices for allowances
19 which is partially offset by lower projected tons. The price remains elevated,
20 due to increased demand associated with the Clean Air Interstate Ruling
21 (CAIR). The actual average purchase price for 2005 allowances is \$676 per
22 ton versus the projected average price of \$351 per ton. As reflected in
23 Exhibit #___(JP-3), prices for SO2 allowances ranged from \$459 per ton in

1 September 2004 to a high of \$842 per ton in May 2005. The 2005
2 reprojection shows a net decrease of 31,582 tons compared to the original
3 projection filed in September 2004, primarily attributable to burning lower
4 sulfur oil.

5

6 **5. Phase II Cooling Water Intake (Project #6) – O&M**

7 Project expenditures are estimated to be \$338,775 or 56% lower than
8 originally forecasted. This variance is primarily due to the FDEP granting an
9 approval to defer work for one year at Crystal River, resulting in this work
10 being rolled over into the 2006 work plan. This project is further discussed
11 in Patricia Q. West's testimony.

12

13 **Q. Does this conclude your testimony?**

14 **A. Yes, it does.**

1 BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

2 DIRECT TESTIMONY OF

3 **JAVIER PORTUONDO**

4 ON BEHALF OF

5 PROGRESS ENERGY FLORIDA

6 DOCKET NO. 050007-EI

7 SEPTEMBER 8, 2005

8

9 **Q. Please state your name and business address.**

10 **A. My name is Javier J. Portuondo. My business address is Post Office Box 14042,**
11 **St. Petersburg, Florida 33733.**

12

13 **Q. By whom are you employed and in what capacity?**

14 **A. I am employed by Progress Energy Service Company, LLC as Manager of**
15 **Regulatory Services - Florida.**

16

17 **Q. Have your duties and responsibilities remained the same since you last filed**
18 **testimony in this proceeding?**

19 **A. Yes.**

20

21 **Q. Have you previously filed testimony before this Commission in connection**
22 **with Progress Energy Florida's Environmental Cost Recovery Clause**
23 **(ECRC)?**

1 A. Yes, I have.

2

3 **Q. What is the purpose of your testimony?**

4 A. The purpose of my testimony is to present, for Commission review and
5 approval, Progress Energy Florida's calculation of the revenue requirements and
6 its Environmental Cost Recovery (ECRC) factors for application on customer
7 billings during the period January 2006 through December 2006. My testimony
8 addresses the capital and operating and maintenance ("O&M") expenses
9 associated with PEF's environmental compliance activities for the year 2006.

10

11 **Q. Have you prepared or caused to be prepared under your direction,
12 supervision or control any exhibits in this proceeding?**

13 A. Yes. I am sponsoring Exhibit No. __ (JP-3), which consists of PSC Forms 42-1P
14 through 42-7P. These forms provide a summary and detail of the projected
15 O&M and capital environmental cost recovery expenses for the period January
16 2006 through December 2006.

17

18 **Q. What is the total recoverable revenue requirement relating to the projection
19 period January 2006 through December 2006?**

20 A. The total recoverable revenue requirement including true-up amounts and
21 revenue taxes is \$23,503,878 as shown on Form 42-1P, Line 5 of my exhibit.

22

1 **Q. What is the total true-up to be applied in the period January 2006 through**
2 **December 2006?**

3 **A.** The total true-up applicable for this period is an under-recovery of \$5,960,421.
4 This consists of the final true-up over-recovery of \$5,961,886 for the period
5 from January 2004 through December 2004 and an estimated true-up under-
6 recovery of \$11,994,307 for the current period of January 2005 through
7 December 2005. The detailed calculation supporting the estimated true-up was
8 provided on Forms 42-1E through 42-8E of Exhibit No. __ (JP-2) filed with the
9 Commission on August 8, 2005. Subsequent to that filing, PEF is withdrawing
10 its request for approval on the Groundwater Reclassification Program and as
11 such has made an adjustment of \$72,000 for the 2005 costs as shown on Form
12 42-1P, Line 2.b.

13

14 **Q. Are all the costs listed in Forms 42-1P through 42-7P attributable to**
15 **Environmental Compliance projects previously approved by the**
16 **Commission?**

17 **A.** No. PEF's 2006 ECRC projection includes both new projects and expansions of
18 existing projects that have not been previously approved by the Commission.
19 On May 6, 2005, PEF filed a Petition for Approval of Environmental Cost
20 Recovery for activities being implemented to comply with the U. S.
21 Environmental Protection Agency's new Clean Air Interstate Rule (CAIR) and
22 the Clean Air Mercury Rule (CAMR) Program (No. 7). See Docket No.
23 050316-EI. PEF anticipates incurring approximately \$52,964,514 in capital

1 expenditures for this program in 2006. Those expenditures that meet the criteria
2 for AFUDC are not included in the recoverable costs reflected on Form 42-3P
3 and such costs will be recovered when associated pollution controls are placed
4 into service. Further discussion on this program is included in the testimony of
5 Patricia Q. West.

6
7 In addition, as discussed in the Estimated/Actual True-up testimony filed on
8 August 8, 2005, PEF requested recovery of four new programs in this docket.
9 Those programs include the new Sea Turtle Lighting program (No. 9), the
10 Arsenic Groundwater Standard program (No. 8), the Groundwater
11 Reclassification program, and the Underground Storage Tanks program (No.
12 10). As mentioned above, PEF is withdrawing its request for approval of the
13 Groundwater Reclassification program.

14
15 The Substation and Distribution System O&M programs (Nos. 1 and 2) were
16 previously approved by the Commission in Order No. PSC-02-1735-FOF-EI.

17
18 The Pipeline Integrity Management Program (No. 3) and the Above Ground
19 Tank Secondary Containment Program (No. 4) were previously approved in
20 Order No. PSC-03-1230-PCO-EI.

21
22 The SO₂ Emissions Allowances (No. 5) were moved to the ECRC Docket from
23 Docket 030001 beginning January 1, 2004 at the request of Staff to be consistent

1 with the other Florida IOUs. Recovery of SO₂ Emission Allowances was
2 previously approved in Order No. PSC-95-0450-FOF-EI.

3

4 The Phase II Cooling Water Intake 316(b) Program (No. 6) was previously
5 approved in Order No. PSC-04-0990-PAA-EI.

6

7 **Q. Have you prepared schedules showing the calculation of the recoverable
8 capital project costs for 2006?**

9 **A.** Yes. Form 42-3P contained in my exhibits summarizes the cost estimates
10 projected for these projects. Form 42-4P, pages 1 through 10, shows the
11 calculations of these costs that result in recoverable jurisdictional capital costs of
12 \$1,449,706.

13

14 **Q. Have you prepared schedules showing the calculation of the recoverable
15 O&M project costs for 2006?**

16 **A.** Yes. Form 42-2P contained in my exhibits summarizes the recoverable O&M
17 cost estimates for these projects in the amount of \$16,076,841.

18

19 **Q. Have you prepared schedules providing the description and progress
20 reports for all environmental compliance activities and projects?**

21 **A.** Yes. Form 42-5P, pages 1 through 10, contained in my exhibits provides a
22 project description and progress report, as well as the projected recoverable cost
23 estimates, for each program.

1

2 **Q. What is the total projected jurisdictional costs for environmental**
3 **compliance activities in the year 2006?**

4 **A.** The total jurisdictional capital and O&M costs of \$17,526,546 to be recovered
5 through the ECRC are calculated on Form 42-1P, contained in my exhibit.

6

7 **Q. Please describe how the proposed ECRC factors were developed.**

8 **A.** The ECRC factors were calculated as shown on Forms 42-6P and 42-7P contained
9 in Exhibit No. __ (JP-3). The demand allocation factors were calculated by
10 determining the percentage each rate class contributes to the monthly system peaks
11 and then adjusted for losses for each rate class. The energy allocation factors were
12 calculated by determining the percentage each rate class contributes to total
13 kilowatt-hour sales and then adjusted for losses for each rate class. This
14 information was obtained from Progress Energy Florida's July 2003 load research
15 study. Form 42-7P presents the calculation of the proposed ECRC billing factors
16 by rate class.

17

18 **Q. What are Progress Energy Florida's proposed 2006 ECRC billing factors by**
19 **the various rate classes and delivery voltages?**

20

21 **A.** The computation of Progress Energy Florida's proposed ECRC factors for
22 customer billings in 2006 is shown on Form 42-7P, contained in Exhibit No. __
23 (JP-3). In summary, these factors are as follows:

24

1 MR. PERKO: Thank you. We would tender the witness
2 for cross examination.

3 CHAIRMAN BAEZ: Very well. Well, I'd start with
4 Public Counsel, only they are not at the table, if they have no
5 questions for the witness. Mr. McWhirter.

6 CROSS EXAMINATION

7 BY MR. McWHIRTER:

8 Q Mr. Portuondo, I presume you heard my stirring
9 opening statement?

10 A Yes, I did.

11 Q You are not generally considered the company's
12 cost-of-service witness, but in this case you have recommended
13 that when service to nonfirm customers is determined that you
14 use a 12 coincidental peak and 1/13th average demand
15 methodology. Will you give us just a brief explanation of
16 what that methodology is?

17 A The methodology looks at the 12 coincident peaks,
18 takes the average of the 12 coincident peaks to allocate
19 production demand and takes 1/13th of that production demand
20 and allocates it on an energy basis.

21 Q And we are dealing only with the fixed costs that
22 are attributable to the generating plant of the utility, and
23 we are not talking about the transmission system or the
24 general expenses of the company?

25 A We are not.

1 Q And would you explain to the Commission the
2 difference between what we call firm customers and nonfirm
3 customers?

4 A A nonfirm customer is one that has volunteered to
5 either curtail or be interrupted at a time of a capacity
6 deficiency or emergency. And in exchange for that
7 conservation opportunity that the company has, which is the
8 avoidance of building generation, those customers are provided
9 a credit through the energy conservation clause.

10 Q And with respect to those customers -- well, with
11 respect to most of your customers, are you familiar with a
12 term called obligation to serve?

13 A Yes, I am.

14 Q And what does that mean?

15 A It means I have an obligation as a regulated
16 monopoly to serve the customers within my service territory.

17 Q In the situation in which you don't have adequate
18 capacity to serve all of the customers because of a forced
19 outage or some other unanticipated event, do you have an
20 obligation to serve the nonfirm customers?

21 A Yes. The only time that I do not have an obligation
22 to serve the nonfirm customers is during a point in time where
23 I have no more capacity on the system. And at that point,
24 then I can exercise the interruptible option or the
25 curtailable option that they have agreed to in their tariffs.

1 Q And in return for that agreement, they get a
2 differential on their bill, is that correct?

3 A Yes. The demand credit is a conservation program
4 for which customers get a credit through their energy
5 conservation clause.

6 Q I'm going to hand you a document that --

7 MR. McWHIRTER: I would like to get a number on this
8 exhibit, Mr. Chairman, if I may.

9 CHAIRMAN BAEZ: I believe that would be -- give me
10 the next number, Ms. Stern, if you have it handy.

11 MS. STERN: Yes. The next number is 28.

12 (Exhibit 28 marked for identification.)

13 BY MR. McWHIRTER:

14 Q Are you familiar with Exhibit 28, Mr. Portuondo? It
15 was taken from the cost of service MFR that your company filed
16 in the base rate case.

17 A Yes, I am.

18 Q All right. The first line in that is the total
19 investment in base rate and rate base that the utility has, is
20 that correct?

21 A That is correct.

22 Q And I notice at Line 3 you have present revenue
23 credits. Is this the credits that you were talking about?

24 A No, it is not.

25 Q All right. Explain what this \$55 million is?

1 A The 55 million that you are referring to represents
2 other operating revenues. Those are revenues that the company
3 receives for items such as pole attachments, rent from
4 electric property, late fees, interest on delinquent accounts,
5 those are the revenues that are identified on Line 3.

6 Q And is there a conservation surcharge? Does that go
7 into the 55 million?

8 A No.

9 Q Where do the customers get the credits for their
10 agreement not to receive service during times of capacity
11 limitation?

12 A As I mentioned earlier, that is a DSM program. It
13 falls under the conservation docket. It is not a function of
14 base rates which this document represents.

15 Q Straighten me out now. They get a credit on their
16 bill, is that right?

17 A Yes, they do.

18 Q And where does the revenue come from that is
19 provided on their bill?

20 A The revenue associated with their contribution to
21 energy conservation is removed from the total revenues
22 collected and assigned to the conservation clause. It is not
23 part of this proceeding here. It is not part of this base
24 rate proceeding. It is not part of the environmental docket.

25 Q I understand that it's not part of the environmental

1 docket, but when -- the revenue credit here, that is not the
2 conservation?

3 A That is not.

4 Q Where does that show up in the revenue that is
5 attributed to each customer class? Does it show up in your
6 cost of service at all?

7 A No, it does not show. This is a cost of service for
8 base rates.

9 Q All right. And this is the same cost of service
10 that you use for the environmental clause that you proposed to
11 use for this case, is that correct, the 12CP and 1/13th?

12 A Yes, the costs incurred in the environmental docket
13 are allocated consistent with costs incurred in base rates.

14 Q All right. I'm going to hand you a second document
15 which I will request the Chairman to mark as Exhibit 29.

16 (Exhibit 29 marked for identification.)

17 BY MR. McWHIRTER:

18 Q Now, this is also extracted from your MFR E1. And
19 would you tell the Commission what that document represents?

20 A It appears to be the allocation of our cost of
21 service amongst the different classes of customers, as well as
22 the derivation of the unit charges for each underlying
23 product, whether it is an energy charge, customer charge,
24 meter charge, so on.

25 Q All right. Now, let's look at Line 1, production

1 capacity, and you have a subset Line 2 and Line 3 of the 12CP
2 and the AD component, is that correct?

3 A That is correct.

4 Q All right. On the production plant on Line 4, the
5 total investment the utility has in its generating production
6 plant is \$581,308,000, is that correct?

7 A Yes.

8 Q And at the caption of table -- or Exhibit 29, you
9 show that the summary of the development of functionally unit
10 costs with proposed revenue credits. So the credits are
11 already, in this case, in this when you do it for a base rate
12 case, is that correct in this study?

13 A I think you are confusing, again, what the
14 definition is of revenue credits. It is not the credit that
15 the customers, nonfirm customers receive for their status as a
16 nonfirm customer. Revenue credits in a base rate proceeding
17 refers to those items that I indicated earlier, such as pole
18 attachment fees. Those are costs that are charged to the
19 customers that caused that expense to be incurred.

20 Q So what you are telling me with respect to Exhibit
21 29 is the revenue credits here don't have anything to do with
22 the credits that customers receive for -- receive for their
23 agreement not to have firm service.

24 A That is correct. There is nothing in the base rate
25 proceeding that deals with that nonfirm credit, because it is

1 a conservation program; and, therefore, it is not part of base
2 rates. It is dealt with in the energy conservation docket.

3 Q All right. When a customer gets his bill on the
4 first day of the month or whenever he gets his bill, it has a
5 credit on there for his agreement not to receive firm service.
6 And the bill, before the credit, is based upon the rate base
7 that you show in Exhibit 29 and Exhibit 28, is that correct?

8 A That is correct.

9 Q And what you are telling us is that that credit
10 flows through some other source of funds. It flows to the
11 utility through the conservation surcharge and then the
12 customer gets a credit?

13 A Yes. The credit is a component of the energy
14 conservation clause.

15 Q And that credit is based upon the value of the
16 production plant, is it not?

17 A No. That credit, to my understanding, is based on
18 the avoided production plant that is derived from not having
19 to build to serve that load.

20 Q To say that another way, this \$581 million
21 investment in production plant would be greater than \$581
22 million if you had to build the avoided plant?

23 A That is correct.

24 Q And how often is the avoided plant determination
25 made?

1 A It is reviewed every year by the company in the
2 conservation docket. As you are aware, there are two credits
3 now in play, the grandfathered IS-1/CS-1, which we don't look
4 at any more because that is grandfathered in. Then you have
5 the IS-2 and CS-2 which is looked at for cost-effectiveness by
6 the company on an annual basis. And if we determine that is
7 no longer cost-effective, then we would propose to the
8 Commission that that be adjusted.

9 Q Does the avoided cost of generation change when fuel
10 costs go up?

11 A It would.

12 Q Does the credit to customers change in any fashion
13 when fuel costs go up?

14 A Well, if the determination is that the credit needs
15 to be adjusted upward or downward, that determination would
16 occur in the conservation docket as a result of whatever
17 factors may be prevalent at the time the analysis is taking
18 place.

19 Q In this case, as I understand it, you have about
20 \$500,000 in environmental costs that are attributable to the
21 generating plant?

22 A Yes. None of those costs have to do with increasing
23 capacity of the plant, so they would not be a factor in the
24 determination of whether the credit goes up or down.

25 Q But it is an increase in the cost of the plant, is

1 it not?

2 A It's an increased cost of existing generation, not
3 an avoided plant.

4 Q I understand that. But this \$581,308,000 is going
5 to go up to \$581,800,000 as a result of this environmental
6 case?

7 A No. This is the base rate. I mean, that cost is
8 being dealt with in the environmental docket. So they would
9 not be charged in base rates for something that is being
10 recovered in the environmental docket, nor would it have an
11 impact on the nonfirm credit.

12 Q But it is a capital investment in this production
13 plant, is it not?

14 A Existing plant. The determination of the credit, as
15 I understand it, is what is the avoided cost of a new plant.

16 Q I'm not talking about the credit. I'm talking only
17 about the cost of the generating plant.

18 A The cost of existing generation plant.

19 Q Yes. It's going to go up by 500,000?

20 A That is correct.

21 Q And that is the same plant that the customers don't
22 have the right to use, if you have lack of capacity and you
23 are a nonfirm customer?

24 A No, I disagree. I think the facilities are being
25 used by the nonfirm customers. I think we have agreed that as

1 a conservation measure we are providing customers a credit so
2 as to avoid building additional generation. So, again, it's a
3 conservation incentive to the nonfirm customers because they
4 feel they have the ability to curtail or interrupt, so we
5 provide them that incentive through the credit, and thereby it
6 results in our avoiding building a new combined cycle, let's
7 say, as an example.

8 Q A combined cycle plant is the avoided plant?

9 A I don't know. I'm just throwing that out. Whatever
10 it is. I don't get into that.

11 Q You have been involved in the conservation cases in
12 a limited degree over the years, have you not?

13 A Yes.

14 Q And one of the things that is determined as to
15 whether a program is cost-effective or not is -- as a rule of
16 thumb it has to be -- the savings have to be at least 1.2
17 times the cost. Are you familiar with that rule of thumb?

18 A Not intimately. Mr. Masiello is the expert on that.

19 Q But the question is, in my mind, when you do an
20 avoided cost study every year for the new cost of an avoided
21 plant, one of two things would happen: One, either the
22 coverage of the effectiveness would go up from 1.2 to a higher
23 number or the credit would increase. Is there any other
24 alternative?

25 A I guess what I'm trying to communicate is that it

1 has no relevance to this proceeding. That analysis, that
2 whole issue is something that should be dealt with in the
3 energy conservation. The costs that have been presented here
4 in the environmental docket and their allocation to customer
5 classes has been performed in accordance with the Commission's
6 regulations, and the nonfirm credit doesn't apply at all.

7 Q When you have a base rate case you determine the
8 credits that you receive for interruptible service and for DSM
9 service, don't you?

10 A No, I do not. In a base rate proceeding the nonfirm
11 credit is not relevant. The nonfirm credit is only relevant
12 in the conservation docket.

13 Q Have you ever encountered a situation in which the
14 credit was increased for an existing program as opposed to
15 just the coverage increasing?

16 A I guess I don't understand that question.

17 Q In your recollection of recollected history of being
18 involved in rates and conservation cases, has the credit ever
19 gone up?

20 A Has the credit gone up? Not to my knowledge.

21 Q So the incentives were initially set about ten years
22 ago, is that correct, based on the avoided cost of a plant
23 that was then in place?

24 A No. I believe sometime back when the IS-2 and CS-2,
25 I'm not sure when that was updated, but I would imagine that

1 that was based on the information at that time. But, again, I
2 continue to get back to this is not a matter for this docket.

3 MR. McWHIRTER: That's all the questions I have of
4 this witness. I tender the witness, and I will not offer the
5 exhibits based upon the testimony received.

6 CHAIRMAN BAEZ: Thank you, Mr. McWhirter.

7 Next I have Mr. Wright. You don't have any
8 questions?

9 MR. WRIGHT: That is correct, Mr. Chairman, no
10 questions.

11 CHAIRMAN BAEZ: And, Mr. Beck, did you have -- did
12 you have questions of the witness?

13 MR. BECK: No, sir, thank you.

14 CHAIRMAN BAEZ: Okay.

15 MS. STERN: Staff has some questions.

16 CHAIRMAN BAEZ: Oh, I'm sorry.

17 MS. STERN: That's okay.

18 CHAIRMAN BAEZ: I apologize. I've got to look over
19 that way more. Ms. Stern, go ahead.

20 CROSS EXAMINATION

21 BY MS. STERN:

22 Q Just two questions. First, in the cost-of-service
23 study that Progress did in its recent rate case, most recent
24 rate case, are the interruptible classes allocated their full
25 production plant cost responsibility?

1 A Yes, they are.

2 Q Okay. Did Progress calculate the cost allocation to
3 rate classes in this clause using the same method that it used
4 to calculate base rates?

5 A Yes, we did.

6 MS. STERN: Thank you. That's all.

7 CHAIRMAN BAEZ: Mr. Perko.

8 COMMISSIONER DEASON: Mr. Chairman, I have a
9 question.

10 CHAIRMAN BAEZ: Commissioner.

11 COMMISSIONER DEASON: Mr. Portuondo, on Exhibit
12 Number 28, and I realize, I fully realize and understand your
13 position that this allocation methodology is for a base rate
14 proceeding, and its relevance in regard to an environmental
15 cost-recovery clause is questioned. But, nevertheless, Exhibit
16 28, as I understand this, this was taken from your MFRs,
17 correct?

18 A Yes, sir.

19 Q And as you file those MFRs, if you look down at Line
20 15, there is a class revenue requirement index of .87,
21 correct?

22 A Yes, sir.

23 Q And I would take it from that that any class that
24 has an index greater than .87 it could be argued is paying
25 more than their fair share of allocated costs. And those

1 classes with an index of less than .87, it could be argued
2 that they are paying less. Is that -- could that be taken
3 from this exhibit?

4 THE WITNESS: Yes, sir.

5 COMMISSIONER DEASON: And included in those
6 categories of less than .87 are curtailable and interruptible
7 customers, correct?

8 THE WITNESS: That is correct.

9 COMMISSIONER DEASON: That's all I have,
10 Mr. Chairman.

11 CHAIRMAN BAEZ: Commissioners, any other questions at
12 this point?

13 Mr. Perko.

14 MR. PERKO: No redirect.

15 CHAIRMAN BAEZ: If there are no further questions,
16 the witness is excused.

17 Thank you, Mr. Portuondo.

18 The next witness is Ms. Dubin.

19 MR. BUTLER: That's right. Thank you.

20 KOREL DUBIN

21 was called as a witness on behalf of Florida Power and Light
22 Company, having been previously sworn, was examined and testified
23 as follows:

24 CHAIRMAN BAEZ: Good morning, Ms. Dubin.

25 DIRECT EXAMINATION

1 BY MR. BUTLER:

2 Q Good morning. Would you please state your name and
3 address for the record?

4 A My name is Korel Dubin.

5 Q And your business address?

6 A 9250 West Flagler Street, Miami, Florida.

7 Q And you have been previously sworn, is that correct?

8 A Yes, I have.

9 Q Okay. By whom are you employed and in what
10 capacity?

11 A I'm employed by Florida Power and Light Company as
12 manager of regulatory issues in the regulatory affairs
13 department.

14 Q Do you have before you the following direct
15 testimony that has been prefiled in this docket, final true-up
16 January 2004 through December 2004, dated April 1, 2005;
17 estimated actual true-up January 2005 through December 2005,
18 dated August 8th, 2005; and projections January 2006 through
19 December 2006, dated September 8th, 2005?

20 A I do.

21 Q Okay. Were the testimony and accompanying exhibits
22 to those testimonies prepared under your direction,
23 supervision, or control?

24 A Yes, they were.

25 Q Do you have any corrections to make to your

1 testimony or exhibits?

2 A No, I do not.

3 MR. BUTLER: Mr. Chairman, I ask that Mr. Dubin's
4 prefiled direct testimony be inserted into the record as though
5 read.

6 CHAIRMAN BAEZ: Without objection, show the prefiled
7 direct testimony of Witness Dubin entered into the record as
8 though read.

9 MR. BUTLER: And Ms. Dubin's exhibits have been
10 pre-assigned Exhibit Numbers 18 to 20 in the comprehensive
11 exhibit list and have been previously stipulated into the
12 record.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
FLORIDA POWER & LIGHT COMPANY
TESTIMONY OF KOREL M. DUBIN
DOCKET NO. 050007-EI
APRIL 1, 2005

Q. Please state your name and address.

A. My name is Korel M. Dubin and my business address is 9250 West Flagler Street, Miami, Florida, 33174.

Q. By whom are you employed and in what capacity?

A. I am employed by Florida Power & Light Company (FPL) as the Manager of Regulatory Issues in the Regulatory Affairs Department.

Q. Have you previously testified in the predecessors to this docket?

A. Yes, I have.

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to present for Commission review and approval the Environmental Compliance True-Up Costs associated with FPL Environmental Compliance activities for the period January through December 2004.

1 **Q. Have you prepared or caused to be prepared under your direction,**
2 **supervision or control an exhibit in this proceeding?**

3 A. Yes, I have. It consists of eight forms. Form 42-1A reflects the final true-
4 up for the period January through December 2004. Form 42-2A consists
5 of the final true-up calculation for the period. Form 42-3A consists of the
6 calculation of the interest provision for the period. Form 42-4A reflects the
7 calculation of variances between actual and estimated/actual costs for
8 O&M Activities. Form 42-5A presents a summary of actual monthly costs
9 for the period for O&M Activities. Form 42-6A reflects the calculation of
10 variances between actual and estimated/actual costs for Capital
11 Investment Projects. Form 42-7A presents a summary of actual monthly
12 costs for the period for Capital Investment Projects. Form 42-8A consists
13 of the calculation of depreciation expense and return on capital investment.
14 Form 42-8A, Pages 33 through 38 provides the beginning of period and
15 end of period depreciable base by production plant name, unit or plant
16 account and applicable depreciation rate or amortization period for each
17 Capital Investment Project.

18

19 **Q. What is the source of the actuals data which you will present by way**
20 **of testimony or exhibits in this proceeding?**

21 A. Unless otherwise indicated, the actuals data are taken from the books and
22 records of FPL. The books and records are kept in the regular course of
23 our business in accordance with generally accepted accounting principles

1 and practices, and provisions of the Uniform System of Accounts as
2 prescribed by this Commission.

3

4 **Q. Please explain the calculation of the Net True-up Amount.**

5 A. Form 42-1A, entitled "Calculation of the Final True-up" shows the
6 calculation of the Net True-Up for the period January 2004 through
7 December 2004, an over-recovery of \$505,074 which I am requesting to be
8 included in the calculation of the Environmental factors for the January
9 2006 through December 2006 period.

10

11 The actual End-of-Period over-recovery for the period January 2004
12 through December 2004 of \$401,281 (shown on Form 42-1A, line 3)
13 adjusted for the estimated/actual End-of-Period under-recovery for the
14 same period of \$103,793 (shown on Form 42-1A, line 6) results in the Net
15 True-Up over-recovery for the period January 2004 through December
16 2004 (shown on Form 42-1A, line 7) of \$505,074.

17

18 **Q. Have you provided a schedule showing the calculation of the End-of-**
19 **Period true-up?**

20 A. Yes. Form 42-2A, entitled "Calculation of Final True-up Amount", shows
21 the calculation of the Environmental End of Period true-up for the period
22 January 2004 through December 2004. The End of Period true-up shown
23 on page 2 of 2, Lines 5 plus 6 is an over-recovery of \$401,281.
24 Additionally, Form 42-3A shows the calculation of the Interest Provision of

1 \$11,292, which is applicable to end of period true-up over-recovery of
2 \$401,281.

3

4 **Q. Is the true-up calculation consistent with the true-up methodology**
5 **used for the other cost recovery clauses?**

6 A. Yes, it is. The calculation of the true-up amount follows the procedures
7 established by the Commission as set forth on Commission Schedule A-2
8 "Calculation of the True-Up and Interest Provisions" for the Fuel Cost
9 Recovery Clause.

10

11 **Q. Are all costs listed in Forms 42-4A through 42-8A attributable to**
12 **Environmental Compliance Projects approved by the Commission?**

13 A. Yes, they are.

14

15 **Q. How did actual expenditures for January through December 2004**
16 **compare with FPL's estimated/actual projections as presented in**
17 **previous testimony and exhibits?**

18 A. Form 42-4A shows that total O&M project costs were \$444,596, or 7.1%
19 lower than projected and Form 42-6A shows that total capital investment
20 project costs were \$472,462, or 6.2% lower than projected. Following are
21 explanations for those O&M Projects and Capital Investment Projects with
22 significant variances. Individual project variances are provided on Forms
23 42-4A and 42-6A. Return on Capital Investment, Depreciation and Taxes

1 for each project for the actual period January 2004 through December
2 2004 are provided on Form 42-8A.

3

4 **1. Continuous Emission Monitoring Systems (CEMS) - O & M**
5 **(Project 3a)**

6 Project expenditures were \$42,048, or 5.9% higher than anticipated. Costs
7 of \$92,000 associated with the Maintenance of Above Ground Storage
8 Tanks Project were inadvertently charged to the CEMS Project. CEMS
9 costs were actually less than projected due to lower than projected CEMS
10 spare parts purchases.

11

12 **2. Maintenance of Stationary Above Ground Fuel Storage Tanks -**
13 **O & M (Project 5a)**

14 Project expenditures were \$204,940, or 21.7% higher than anticipated.
15 Material and labor costs for painting storage tanks at the Martin Plant were
16 higher than projected. Additionally, a larger percentage of insulation had to
17 be removed and replaced from above ground piping than planned due to a
18 leak that was discovered during a routine inspection. Containment dikes in
19 the fuel oil terminal also required resodding to ensure the integrity of the
20 dikes.

21

22 Labor requirements at the Turkey Point Plant were higher than projected.
23 Project work was delayed due to hurricane restoration efforts. Due to the

1 project delay, more labor was required in order to ensure the project work
2 would be completed in 2004.

3

4 **3. Oil Spill Cleanup/Response Equipment - O&M (Project 8a)**

5 Project expenditures were \$54,668, or 32.9% lower than anticipated. This
6 variance is primarily due to the cancellation of the annual Corporate Oil
7 Spill Response Drill due to the response to an actual event caused by the
8 discharge of fuel by a private watercraft in Lake Worth Inlet in the proximity
9 of Riviera Plant. The United States Coast Guard determined that the
10 response to the actual event in Lake Worth constituted a drill and therefore
11 made the planned drill unnecessary.

12

13 **4. Resource Conservation and Recovery Act (RCRA) Corrective**
14 **Action - O&M (Project 13)**

15 Project expenditures were \$19,609, or 19.6% lower than projected. Project
16 work was delayed due to hurricane restoration efforts. RCRA work
17 resumed in November but was not completed by year-end. This work was
18 deferred to 2005.

19

20 **5. NPDES Permit Fees - O&M (Project 14)**

21 Project expenditures were \$10,376, or 7.3% lower than anticipated. This
22 variance is primarily due to St. Lucie Plant paying NPDES permit fees for
23 2003 and 2004 in 2003.

1 **6. Substation Pollutant Discharge Prevention & Removal –**
2 **Distribution - O&M (Project 19a)**

3 Project expenditures were \$144,802, or 12.1% lower than anticipated.
4 Project work was delayed due to hurricane restoration efforts. As a result,
5 equipment clearances required to perform the work activities could not be
6 obtained. This work was deferred to 2005.

7

8 **7. Substation Pollutant Discharge Prevention & Removal -**
9 **Transmission - O&M (Project 19b)**

10 Project expenditures were \$31,428, or 4.0% higher than anticipated. The
11 workload was accelerated in the first and second quarters of 2004 when
12 equipment clearances were more easily obtained due to good weather.

13

14 **8. Wastewater Discharge Elimination and Reuse – O&M (Project**
15 **20)**

16 Project expenditures were \$10,000, or 100% lower than projected. The
17 installation of the Electrostatic Precipitator (ESP) systems at the Port
18 Everglades Plant may result in less ash sluice water going to treatment
19 basins, thereby reducing the amount of treated ash sluice water available
20 for reuse. Once the ESP systems become operational, analyses will be
21 performed to determine the amount of sluice water available for reuse at
22 the plant. The project has been deferred until information resulting from
23 the analyses is obtained.

1 **9. Amortization of Gains on Sales of Emission Allowances –**
2 **O&M**

3 The variance of \$64,172, or 9.1% higher than projected is primarily due to
4 higher than anticipated gains from the DOE sales of emission allowances
5 in 2004. Proceeds from the Scherer Plant auction sales (vintage year
6 2004) were received and posted in August.

7

8 **10. Pipeline Integrity Management (PIM) – O&M (Project 22)**

9 Project expenditures were \$87,625, or 39.8% lower than projected. Costs
10 associated with the response and repair of the Martin 30" pipeline failure
11 were lower than projected for two reasons. First, smart-pigging costs were
12 lower than projected. Second, the results of the smart-pigging indicated
13 the need for less extensive confirmation digs than were originally projected.

14

15 **11. Spill Prevention, Control, and Countermeasures (SPCC) – O&M**
16 **(Project 23)**

17 Project expenditures were \$102,487, or 55.3% higher than projected.
18 Costs associated with the UST Replacement/Removal Project were
19 inadvertently charged to the SPCC Project.

20

21 **12. UST Replacement/Removal – O&M (Project 26)**

22 Project expenditures were \$148,050, or 100% lower than projected.
23 Project work associated with the tank removal at the Ft. Lauderdale Plant

1 scheduled for September 2004 was re-scheduled for 2005 due to hurricane
2 restoration efforts. This work was completed in February 2005.
3 Additionally, costs associated with the UST Replacement/Removal Project
4 were inadvertently charged to the SPCC Project.

5

6 **13. Lowest Quality Water Source (LQWS) – O&M (Project 27)**

7 Project expenditures were \$46,206, or 15.3% lower than projected. This
8 variance is primarily due to a delay in the water treatment process for the
9 Reclaimed Water Use at the Cape Canaveral Plant. The plant was not
10 able to use the lowest quality water source during 2004, which resulted in
11 lower than projected expenditures.

12

13 **14. CWA 316(b) Phase II Rule – O&M (Project 28)**

14 Project expenditures were \$247,813, or 49.6% lower than projected. Final
15 contracting with the selected vendors was delayed due to the hurricane
16 restoration efforts and was deferred to 2005.

17

18 **15. Pipeline Integrity Management (PIM) – Capital (Project 22)**

19 Project depreciation and return on investment were \$1,525, or 100% lower
20 than projected. This is a result of deferring preliminary engineering costs
21 for the leak detection system on the Martin 30" pipeline, which were
22 projected to be incurred in 2004. Leak detection technology is expected to
23 improve significantly in the near future. The compliance schedule for the

1 PIM Project can accommodate deferral of the preliminary engineering work,
2 therefore, those activities have been deferred in order to give FPL an
3 opportunity can evaluate the potential impacts of the technological
4 improvements.

5

6 **16. Spill Prevention, Control, and Countermeasures (SPCC) –**
7 **Capital (Project 23)**

8 Project depreciation and return on investment were \$118,504, or 12.3%
9 lower than anticipated. Project work scheduled for 2004 was deferred due
10 to the EPA's 18-month extension of the deadline for compliance with the
11 revised Spill Prevention, Control & Countermeasures Rule. Because of
12 this extension, FPL has been able to defer double-wall piping projects at
13 Sanford Plant Unit 3 and Riviera Plant Unit 3 to 2005 and at the Cape
14 Canaveral Plant to 2006. Additionally, a project at the Manatee Plant to
15 protect wetlands in close proximity to fuel oil lines has been deferred
16 pending the outcome of a EPA litigation regarding the definition of
17 navigable waters.

18

19 **17. Manatee Reburn – Capital (Project 24)**

20 Project depreciation and return on investment were \$80,652, or 13.3%
21 lower than anticipated. Piping designs required revisions which caused
22 delays in procurement. Additionally, reburn injector design was delayed
23 due to the need to acquire a new contractor. The existing contractor could
24 not meet the necessary reburn injector design requirements.

1 **18. Port Everglades Electrostatic Precipitator (ESP) Technology –**
2 **Capital (Project 25)**

3 Project depreciation and return on investment were \$269,991, or 31.2%
4 lower than anticipated. This variance is primarily due to timing differences
5 – a larger portion of the project expenditures will occur later in the project
6 than originally planned, thereby decreasing the return on investment.
7 Negotiations with vendors produced a more definitive project schedule
8 which resulted in the deferral of some project work scope originally planned
9 for 2004 into 2005 and 2006.

10

11 **Q. Does this conclude your testimony?**

12 A. Yes, it does.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
FLORIDA POWER & LIGHT COMPANY
TESTIMONY OF KOREL M. DUBIN
DOCKET NO. 050007-EI
August 8, 2005

Q. Please state your name and address.

A. My name is Korel M. Dubin and my business address is 9250 West Flagler Street, Miami, Florida, 33174.

Q. By whom are you employed and in what capacity?

A. I am employed by Florida Power & Light Company (FPL) as Manager of Regulatory Issues in the Regulatory Affairs Department.

Q. Have you previously testified in this docket?

A. Yes, I have.

Q. What is the purpose of your testimony in this proceeding?

A. The purpose of my testimony is to present for Commission review and approval the Estimated/Actual True-up Costs associated with FPL Environmental Compliance activities for the period January 2005 through December 2005.

- 1 **Q. Have you prepared or caused to be prepared under your direction,**
2 **supervision or control an exhibit in this proceeding?**
- 3 A. Yes, I have. The exhibit consists of eight documents, PSC Forms 42-1E
4 through 42-8E, included in Appendix I. Form 42-1E provides a summary of
5 the Estimated/Actual True-up amount for the period January 2005 through
6 December 2005. Forms 42-2E and 42-3E reflect the calculation of the
7 Estimated/Actual True-up amount for the period. Forms 42-4E and 42-6E
8 reflect the Estimated/Actual O&M and Capital cost variances as compared
9 to original projections for the period. Forms 42-5E and 42-7E reflect
10 jurisdictional recoverable O&M and Capital project costs for the period.
11 Form 42-8E (pages 1 through 36) reflects return on capital investments,
12 depreciation, and taxes by project.
- 13
- 14 **Q. Please explain the calculation of the ECRC Estimated/Actual True-up**
15 **amount you are requesting this Commission to approve.**
- 16 A. Forms 42-2E and 42-3E show the calculation of the ECRC
17 Estimated/Actual True-up amount. The calculation for the Estimated/Actual
18 True-up amount for the period January 2005 through December 2005 is an
19 overrecovery, including interest, of \$4,710,480 (Appendix I, Page 4, line 5
20 plus line 6). This Estimated/Actual True-up overrecovery of \$4,710,480
21 consists of January through June 2005 actuals and revised estimates for
22 July through December 2005, compared to original projections for the
23 same period.

1 **Q. Are all costs listed in Forms 42-1E through 42-8E attributable to**
2 **Environmental Compliance projects previously approved by the**
3 **Commission?**

4 A. Yes, with the exception of the inclusion of the Hydrobiological Monitoring
5 Program (HBMP) and the Clean Air Interstate Rule (CAIR) Compliance
6 Projects which are discussed and supported in the testimony of Randall R.
7 LaBauve.

8
9 **Q. How do the Estimated/Actual project expenditures for January 2005**
10 **through December 2005 period compare with original projections?**

11 A. Form 42-4E (Appendix I, Page 7) shows that total O&M project costs were
12 \$2,762,870 or 30.3% lower than projected and Form 42-6E (Appendix I,
13 Page 10) shows that total capital investment project costs were \$2,509,266
14 or 16.0% lower than projected. Below are variance explanations for those
15 O&M Projects and Capital Investment Projects with significant variances.
16 Individual project variances are provided on Forms 42-4E and 42-6E.
17 Return on Capital Investment, Depreciation and Taxes for each project for
18 the Estimated/Actual period are provided as Form 42-8E (Appendix I,
19 Pages 13 through 48).

20
21 **1. Air Operating Permit Fees (Project No. 1) - O & M**

22 Project expenditures are estimated to be \$35,080 or 1.8% lower than
23 previously projected primarily due to lower than projected estimates of fuel

1 oil/gas usage rates across the FPL fleet of plants. Permit fees are based
2 on emissions which are proportionate to the type of fuel used at each plant
3 and variables fluctuate daily, based on weather conditions and fuel type.

4

5 **2. Continuous Emissions Monitoring Systems - CEMS (Project**
6 **No. 3a) - O&M**

7 Project expenditures are estimated to be \$35,539 or 5.0% lower than
8 previously projected primarily due to fewer than expected purchases of
9 CEMS spare parts for the remainder of 2005.

10

11 **3. Maintenance of Stationary Above Ground Fuel Storage Tanks**
12 **(Project No. 5a) - O&M**

13 Project expenditures are estimated to be \$133,794 or 29.9% higher than
14 previously projected. This project includes performing required repairs
15 identified during tank inspections. The variance is primarily due to an
16 updated estimate of the costs associated with the required repairs, based
17 on the results of tank inspections.

18

19 **4. Disposal of Noncontainerized Liquid Waste (Project No. 17a) -**
20 **O&M**

21 Project expenditures are estimated to be \$29,015 or 10.8% lower than
22 previously projected. Work associated with ash pond repair at the
23 Manatee Plant was required, which deferred project work scheduled for

1 2005. Additionally, ash removal at the Riviera and Sanford Plants has
2 been deferred until 2006 due to the low quantity of existing ash in the
3 accumulation ponds which did not justify dewatering and disposal.

4

5 **5. Substation Pollutant Discharge Prevention & Removal –**
6 **Distribution (Project No. 19a) - O&M**

7 Project expenditures are estimated to be \$197,824 or 20.6% lower than
8 projected. Due to the impact of heavy rain occurring April through May, the
9 project experienced a significant reduction in the amount of work activity
10 that could be conducted. In addition, an unexpected turnover in contract
11 personnel delayed work activities for the project.

12

13 **6. Substation Pollutant Discharge Prevention & Removal –**
14 **Transmission (Project No. 19b) - O&M**

15 Project expenditures are estimated to be \$738,929 or 66.5% lower than
16 projected. Due to the impact of heavy rain occurring April through May, the
17 project experienced a significant reduction in the amount of work activity
18 that could be conducted. In addition, an unexpected turnover in contract
19 personnel delayed work activities for the project.

20

21 **7. Amortization of Gains on Sales of Emissions Allowances –**
22 **O&M**

23 The variance of \$1,332,585 or 598.5% higher than projected is primarily

1 due to much higher than anticipated sales prices at the DOE auction of FPL
2 Emission Allowances. The higher prices translated into more gains to be
3 amortized in 2005 than projected.

4

5 **8. Pipeline Integrity Management (Project No. 22) - O&M**

6 Project expenditures are estimated to be \$65,888 or 37.7% lower than
7 projected. The leak detection system on the Martin 30" pipeline has been
8 deferred and the project has been delayed from 2005 into the future. FPL is
9 expecting new technology in the near future that is potentially more cost
10 efficient and technologically sound.

11

12 **9. Spill Prevention, Control, and Countermeasures - SPCC**
13 **(Project No. 23) - O&M**

14 Project expenditures are estimated to be \$348,924 or 279.6% higher than
15 projected. The Environmental Protection Agency (EPA) has extended the
16 deadlines for SPCC compliance. SPCC Plans will now be due in August
17 2005 and the facility upgrades will be due in February 2006. Costs
18 associated with the development of SPCC plans which were included in the
19 original projections have shifted to 2006.

20

21 **10. Port Everglades Electrostatic Precipitator – ESP (Project No.**
22 **25) - O&M**

23 Project expenditures are estimated to be \$461,244 or 100.0% higher than
24 projected. This variance is due to the hiring of additional personnel to

1 conduct operation and maintenance activities related to the ESPs at Port
2 Everglades which was not included in the original projections.

3

4 **11. Underground Storage Tank (UST) Replacement/Removal**
5 **(Project No. 26) - O&M**

6 Project expenditures are estimated to be \$457,957 or 80.6% lower than
7 projected primarily due to the rescheduling of tank projects until late 2005
8 and into 2006. The delay is primarily driven by Hurricane restoration work
9 performed in the first half of 2005.

10

11 **12. Lowest Quality Water Source (LQWS) (Project No. 27) – O&M**

12 The variance of \$75,246 or 19.9% lower than projected is primarily due to a
13 delay in the issuance of the Wastewater Permit from the Florida
14 Department of Environmental Protection (FDEP) for the Cape Canaveral
15 Plant.

16

17 **13. CWA 316(b) Phase II Rule (Project No. 28) – O&M**

18 Project expenditures are estimated to be \$578,934 or 24.9% lower than
19 projected. The current estimate for the preparation of the Proposal for
20 Information Collection is lower than originally projected. Additionally, data
21 gathering will begin later than originally planned and the expense for
22 contract supervision is lower than originally planned.

23

1 **14. Selective Catalytic Reduction (SCR) Consumables (Project No.**
2 **29) – O&M**

3 Project expenditures are estimated to be \$204,670 or 42.1% lower than
4 projected. The cost of anhydrous ammonia fluctuates according to
5 operating conditions and commodity pricing. Original estimates were
6 based on a commodity price of \$0.28 per pound. The current price of
7 ammonia is \$0.17 per pound.

8
9 **15. Continuous Emission Monitoring Systems - CEMS (Project No.**
10 **3b) - Capital**

11 The variance in depreciation and return is \$25,704 or 1.7% lower than
12 projected. The replacement of the CEMS CO2 emission analyzers at FPL
13 generating units is being postponed to 2006 due to vendor support delays
14 and installation issues associated with a pilot study at the Sanford Plant.

15
16 **16. Maintenance of Stationary Above Ground Fuel Storage Tanks**
17 **(Project No. 5b) - Capital**

18 The variance in depreciation and return is \$33,039 or 1.8% lower than
19 projected. Due to hurricane restoration efforts throughout FPL's service
20 territory, project work was postponed and deferred to 2005. This difference
21 in the 2004 estimated/actual filing carried over to the 2005 projection filing
22 and caused depreciation and return to be lower than originally projected for
23 2005.

1 **17. Wastewater Discharge Elimination & Reuse (Project No. 20) -**
2 **Capital**

3 The variance in depreciation and return is \$43,241 or 15.6% lower than
4 projected. Due to restoration efforts at the Martin Plant resulting from
5 Hurricanes Jeanne and Frances, the installation of the Boiler Blowdown
6 Sump at Martin Unit 2 which was projected for 2004 was not completed by
7 year end. This difference in the 2004 estimated/actual filing carried over to
8 the 2005 projection filing and caused depreciation and return to be lower
9 than originally projected in 2005.

10

11 **18. Pipeline Integrity Management (Project No. 22) - Capital**

12 The variance in depreciation and return is \$94,974 or 100% lower than
13 projected. The leak detection system on the Martin 30" pipeline has been
14 deferred, thus no expenditures were made.

15

16 **19. Spill Prevention, Control, and Countermeasures - SPCC**
17 **(Project No. 23) - Capital**

18 The variance in depreciation and return is \$511,023 or 22.3% lower than
19 projected. The EPA has extended the deadline for facilities to be in
20 compliance with the revised Spill Prevention Control & Countermeasures
21 Rule by 18 months. The new date for completing the implementation of
22 facility upgrades is August 18, 2006. The double wall piping projects at
23 Sanford Unit 3 and Riviera Unit 3, which require a unit outage to implement

1 upgrades, have been deferred until 2006. The Cape Canaveral double
2 wall piping project has been deferred until 2006. Additionally, a project at
3 the Manatee Plant to protect wetlands in close proximity to fuel oil lines is
4 being deferred pending the outcome of an EPA lawsuit regarding the
5 definition of navigable waters.

6

7 **20. Manatee Reburn (Project No. 24) - Capital**

8 The variance in depreciation and return is estimated to be \$105,325 or
9 5.7% lower than projected. This variance is due to delays in instrument and
10 control, design, and mechanical drawing design changes which have
11 pushed equipment installation out until late 2005 and early 2006.

12

13 **21. Pt. Everglades Electrostatic Precipitator (ESP) Technology**
14 **(Project No. 25) - Capital**

15 The variance in depreciation and return is estimated to be \$1,692,416 or
16 29.5% lower than projected. An estimate of \$375,000 was inadvertently
17 included in the 2004 estimated/actual filing which carried over to the 2005
18 projection filing and caused depreciation to be lower than originally
19 projected in 2005.

20

21 **Q. Does this conclude your testimony?**

22 **A. Yes, it does.**

1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

2

FLORIDA POWER & LIGHT COMPANY

3

TESTIMONY OF KOREL M. DUBIN

4

DOCKET NO. 050007-EI

5

SEPTEMBER 8, 2005

6

7

8 **Q. Please state your name and address.**9 A. My name is Korel M. Dubin and my business address is 9250 West Flagler
10 Street, Miami, Florida, 33174.

11

12 **Q. By whom are you employed and in what capacity?**13 A. I am employed by Florida Power & Light Company (FPL) as Manager of
14 Regulatory Issues in the Regulatory Affairs Department.

15

16 **Q. Have you previously testified in this docket?**

17 A. Yes, I have.

18

19 **Q. What is the purpose of your testimony in this proceeding?**20 A. The purpose of my testimony is to present for Commission review FPL's
21 Environmental Cost Recovery Clause (ECRC) projections for the January
22 2006 through December 2006 period.

1 **Q. Is this filing by FPL in compliance with Order No. PSC-93-1580-FOF-**
2 **EI, issued in Docket No. 930661-EI?**

3 A. Yes. The costs being submitted for the projected period are consistent
4 with that order.

5

6 **Q. Have you prepared or caused to be prepared under your direction,**
7 **supervision or control an exhibit in this proceeding?**

8 A. Yes. It consists of seven documents, PSC Forms 42-1P through 42-7P
9 provided in Appendix I. Form 42-1P summarizes the costs being
10 presented at this time. Form 42-2P reflects the total jurisdictional costs for
11 O&M activities. Form 42-3P reflects the total jurisdictional costs for capital
12 investment projects. Form 42-4P consists of the calculation of depreciation
13 expense and return on capital investment for each project. Form 42-5P
14 gives the description and progress of environmental compliance activities
15 and projects for the projected period. Form 42-6P reflects the calculation
16 of the energy and demand allocation percentages by rate class. Form 42-
17 7P reflects the calculation of the ECRC factors.

18

19 **Q. Please describe Form 42-1P.**

20 A. Form 42-1P (Appendix I, Page 2) provides a summary of projected
21 environmental costs being presented for the period January 2006 through
22 December 2006. Total environmental costs, adjusted for revenue taxes,
23 amount to \$26,359,013 (Appendix I, Page 2, Line 5a) and include

1 \$31,263,335 of environmental project costs (Appendix I, Page 2, Line 1c)
2 decreased by the estimated/actual true-up over-recovery of \$4,418,213 for
3 the January 2005 - December 2005 (Appendix I, Page 2, Line 2), and
4 decreased by the final true-up over-recovery of \$505,074 for the January
5 2004 – December 2004 period (Appendix I, Page 2, Line 3).

6

7 **Q. Has FPL made any revisions to the true-up amounts included in the**
8 **total Environmental costs to be recovered in the period January 2006**
9 **– December 2006?**

10 A. Yes. The estimated/actual true-up over-recovery of \$4,710,480 for the
11 period January – December 2005 which was filed on August 8, 2005, has
12 been revised to reflect a shift in the classification of the 2005 cost
13 estimates for the Clean Air Interstate Rule (CAIR) Compliance Project from
14 Capital to O&M. Projected Capital costs of \$296,000 shown on Appendix I,
15 Pages 37 and 38 of the August 8, 2005 estimated/actual true-up filing,
16 relate to initial engineering work which will determine the method(s) that will
17 be implemented to comply with CAIR, and litigation expenses related to
18 FPL's challenge of CAIR. Since these costs are general in nature and are
19 not specific to a particular plant, they are more representative of O&M
20 costs and should be expensed. Therefore, the 2005 Capital recoverable
21 costs have been reduced by \$8,235 in depreciation and return calculated
22 on the estimated Capital expenditures of \$296,000 related to the CAIR
23 Compliance project, and the estimated CAIR Compliance project costs of

1 \$296,000 have been added to the O&M recoverable costs. The impact of
2 this shift reduces the 2005 estimated/actual true-up over-recovery by
3 \$292,267, from \$4,710,480 to \$4,418,213. The revised 2005
4 estimated/actual true-up over-recovery of \$4,418,213 is included in Form
5 42-1P (Appendix I, Page 2, Line 2).

6

7 **Q. Please describe Forms 42-2P and 42-3P.**

8 A. Form 42-2P (Appendix I, Pages 3 and 4) presents the environmental
9 project O&M costs for the projected period along with the calculation of
10 total jurisdictional costs for these projects, classified by energy and
11 demand. Form 42-3P (Appendix I, Pages 5 and 6) presents the
12 environmental project capital investment costs for the projected period.
13 FPL is using the 2002 capital cost and capital structure from the
14 December, 2002 Surveillance Report to calculate the return on assets
15 included in FPL's Environmental Cost Recovery Clause. FPL will
16 recalculate the return on assets using the 2006 capital cost and capital
17 structure from the December 2006 Surveillance Report as part of the final
18 true-up for the 2006 ECRC costs. Form 42-3P also provides the calculation
19 of total jurisdictional costs for these projects, classified by energy and
20 demand.

21

22 The method of classifying costs presented in Forms 42-2P and 42-3P is
23 consistent with Order No. PSC-94-0393-FOF-EI for all existing projects.

24

- 1 **Q. Please describe Form 42-4P.**
- 2 A. Form 42-4P (Appendix I, Pages 7 through 44) presents the calculation of
3 depreciation expense and return on capital investment for each project for
4 the projected period.
- 5
- 6 **Q. Please describe Form 42-5P.**
- 7 A. Form 42-5P (Appendix I, Pages 45 through 81) provides the description
8 and progress of environmental projects included in the projected period.
- 9
- 10 **Q. Please describe Form 42-6P.**
- 11 A. Form 42-6P (Appendix I, Page 82) calculates the allocation factors for
12 demand and energy at generation. The demand allocation factors are
13 calculated by determining the percentage each rate class contributes to the
14 monthly system peaks. The energy allocators are calculated by
15 determining the percentage each rate contributes to total kWh sales, as
16 adjusted for losses, for each rate class.
- 17
- 18 **Q. Please describe Form 42-7P.**
- 19 A. Form 42-7P (Appendix I, Page 83) presents the calculation of the proposed
20 ECRC factors by rate class.
- 21
- 22 **Q. Are all costs listed in Forms 42-1P through 42-7P attributable to**
23 **Environmental Compliance projects previously approved by the**

1 **Commission?**

2 A. Yes, with the exception of the Hydrobiological Monitoring (HBMP), Clean
3 Air Interstate Rule (CAIR) Compliance, and the Best Available Retrofit
4 Technology (BART) Projects. The HBMP and CAIR Compliance Projects
5 were presented in the testimony of R. R. LaBauve filed on August 8, 2005,
6 and FPL petitioned for Commission approval of those projects in its 2005
7 ECRC estimated/actual true up petition that was filed on that date. The
8 BART Project is discussed in the testimony of R. R. LaBauve included in
9 this filing, and FPL's 2006 ECRC projection petition seeks Commission's
10 approval for that project.

11

12 **Q. What are the impacts on FPL's ECRC filing resulting from the**
13 **Stipulation and Settlement Agreement, dated August 26, 2005, that**
14 **has been approved in Docket No. 050045-EI?**

15 A. Per that Stipulation and Settlement Agreement, FPL has removed from
16 base rates and clauses the embedded portion of the gross receipts tax of
17 1.5% beginning in 2006. That amount will be added to the existing
18 separate line item charge for the collection of gross receipts taxes, thereby
19 consolidating the entire recovery of the 2.5% gross receipts tax into a
20 single line item on customers' bills. Additionally, new capital costs for
21 environmental expenditures recovered through the ECRC have been
22 allocated consistent with FPL's current cost of service methodology.

23

1 Q. Does this conclude your testimony?

2 A. Yes, it does.

1 BY MR. BUTLER:

2 Q Would you please summarize your testimony, Ms.
3 Dubin?

4 A Yes. Good morning, Commissioners. The purpose of
5 my testimony is to present for the Commission's review and
6 approval the environmental cost-recovery final true-up for the
7 period January through December 2004, the estimated actual
8 true-up for the period January through December 2005, and the
9 environmental cost-recovery factors for the period January
10 through December 2006. This concludes my summary.

11 MR. BUTLER: I tender Ms. Dubin for cross
12 examination.

13 CHAIRMAN BAEZ: We can start with the colonel. Do
14 you have -- no, you don't have questions. Mr. Beck.

15 MR. BECK: Yes. Thanks, Mr. Chairman.

16 CROSS EXAMINATION

17 BY MR. BECK:

18 Q Good morning, Ms. Dubin.

19 A Good morning.

20 Q Ms. Dubin, I'd like to ask you a few questions about
21 the expenses Florida Power and Light has incurred or expects
22 to incur to challenge the EPA's clean air interstate rule.
23 Could you turn to the appendix to your August 8th testimony,
24 please, at Page 9?

25 A I'm sorry, Mr. Beck.

1 Q Page 9, the appendix to your August 8th testimony.

2 A Okay.

3 Q And do you have that there?

4 A Yes, I do.

5 Q And on Line 31 of the exhibit, you have a total of
6 \$27,500 for what it says CAIR compliance, is that right?

7 A Yes.

8 Q Are those costs incurred to challenge the EPA's CAIR
9 rule or are they for some other purpose?

10 A They are a combination of -- they are all the O&M
11 costs associated with the project during that period.

12 Q So it is partly for the legal fees and partly for
13 other expenses?

14 A Yes.

15 Q What portion is for legal fees?

16 A The legal fees included in that are -- just one
17 second. The total amount of litigation costs in the 2005 and
18 2006 period are roughly \$170,000.

19 Q Okay.

20 A And that breaks down to 120,000 in 2005 and about
21 50,000 in 2006.

22 Q Okay. The portion that you gave us for 2005 exceeds
23 the amount shown on this page of your exhibit, does it not?

24 A Yes, I believe that on the September 8th testimony
25 there was a correction made for that.

1 Q Okay. So this also includes what you had previously
2 classified as some capital costs for 2005?

3 A Yes. That adjustment was made, as well.

4 MR. BECK: Okay. Thank you. That's all I have.

5 CHAIRMAN BAEZ: Mr. McWhirter.

6 CROSS EXAMINATION

7 BY MR. McWHIRTER:

8 Q Ms. Dubin, you're seeking \$26 million for
9 environmental costs this year?

10 A Yes.

11 Q And of those environmental costs, can you tell me
12 what portion is attributable to improvements in your
13 generating capacity?

14 A Improvements in our generating capacity?

15 Q Well, costs attributable to your generating
16 capacity.

17 A The costs that we are seeking recovery for are
18 environmental compliance costs.

19 Q And they all relate to the generating capacity?

20 A They all relate to existing plants.

21 Q And you heard Mr. Portuondo's testimony of how the
22 12 CP and 1/13th methodology works. Does it work the same way
23 for the Florida Power and Light system?

24 A Yes. Environmental capital costs are allocated to
25 customers on a 12CP, 1/13th basis.

1 Q So if a customer is a nonfirm customer of Florida
2 Power and Light, that customer receives the same cost
3 attributed to him or her or it as a firm customer does, is
4 that correct?

5 A Yes, for environmental costs. They have already
6 received a credit for their nonfirm service in base rates.

7 Q Now, Mr. Portuondo said they didn't get it in base
8 rates, they got it in the conservation charge.

9 A There is a little bit of difference between the way
10 Progress does it and we do. We provide that credit for
11 nonfirm services as a credit to base -- in base rates.

12 Q And that credit is based upon the cost of an avoided
13 unit?

14 A Yes.

15 Q And the cost of the avoided unit, does it change
16 when the cost of fuel goes up?

17 A No, it does not.

18 Q And what is your avoided unit?

19 A I don't know, Mr. McWhirter.

20 Q Okay. Is it a combined cycle unit with coal?

21 A I believe so.

22 Q Huh?

23 A I believe so.

24 Q And when you talk about an avoided unit, I would
25 presume that that unit would run for a period of time if it is

1 going to be avoided, is that not true?

2 A I would assume that.

3 Q And do you know whether or not fuel costs in the run
4 time are considered at all in the avoided cost?

5 A I believe they are.

6 Q So then it would be fair to say that avoided fuel
7 costs as well as avoided capital costs are part of the
8 consideration in determining the avoided cost?

9 A The avoided unit, the avoided cost is factored into
10 the credit that the customer receives in base rates.

11 Q All right. So, if avoided cost goes up, and there
12 is not a base rate case, would it be fair to say that there is
13 no consideration given in rates to the fact that the avoided
14 cost has gone up?

15 A Well, the analysis -- there's an analysis done on
16 the total cost of electricity to determine whether or not it
17 is cost-effective. And then the avoided cost is then
18 translated into a credit for a customer and they receive that
19 credit in base rates.

20 Q All right. And so we have noticed that the gas
21 prices have gone up somewhat this year, is that correct?

22 A Yes, sir.

23 Q And with your company, what is the amount they have
24 gone up this year, what percentage have they increased,
25 something like 50 percent?

1 A Yes, they have increased quite a bit.

2 Q And in order to get the benefit of this avoided cost
3 increase for the nonfirm customers, they will have to wait
4 until your next base rate case, which is scheduled for the
5 year 2010?

6 A They are -- nonfirm customers are credited in their
7 base rates today for the avoided cost. What we are talking
8 about here, I believe, is the environmental docket where this
9 credit doesn't apply. We are not avoiding any unit here. We
10 are talking about environmental compliance costs for units
11 that exist or a plant.

12 Q Well, a generating plant is composed of bricks, and
13 mortar, interest cost, and labor cost, essentially, isn't that
14 correct?

15 A Yes.

16 Q All right. And when you add environmental costs to
17 that, those environmental costs are bricks, and labor, and
18 interest costs, is that right, the same kind of costs?

19 A Yes.

20 Q And if there is no -- you're not seeking the
21 recovery of those costs through base rates, you are seeking to
22 recover those costs in this case, are you not?

23 A We are seeking recovery of environmental compliance
24 costs through the environmental cost-recovery clause and
25 environmental compliance costs for existing units, not

1 anything we're avoiding. And they are calculated or allocated
2 to customers based on 12 CP, 1/13th. They are on demand. To
3 suggest that there should be some other credit in
4 environmental is, basically, making an additional credit
5 providing no additional benefits to customers.

6 Q But isn't there an additional cost that is imposed
7 upon the customers?

8 A And those customers are compensated for it in their
9 credit in base rates.

10 Q But they are not compensated with respect to these
11 improvements. They are compensated in your base rate case,
12 but not in the environmental?

13 A And that's what this nonfirm customer is getting.
14 It's getting a credit in their base rates for avoiding -- for
15 avoiding having to build this other unit. And then other
16 customers are paying for that, because it is less expensive
17 for them to pay for that than it is to pay for the unit they
18 are avoiding. To suggest there should be another credit in
19 the environmental clause is, basically, charging other -- the
20 other general body of customers some additional charge with no
21 additional benefit.

22 Q But hasn't the value of the conservation gone up as
23 a result of the avoided cost going up?

24 A I believe they're being -- they're being credited
25 for that in their base rates.

1 Q They are being credited for what it was the last
2 time you had a base rate case. When was that, 1993?

3 A We just had a stipulation and settlement agreement
4 where those charges had been fixed.

5 Q But the charge -- the credits didn't change, they
6 stayed the same, didn't they?

7 A They are based on that evaluation on the
8 cost-effectiveness of that project.

9 MR. McWHIRTER: That's all the questions I have,
10 Mr. Chairman.

11 CHAIRMAN BAEZ: Thank you, Mr. McWhirter.
12 Mr. Wright.

13 MR. WRIGHT: I have no questions of this witness,
14 Mr. Chairman. Thank you.

15 CHAIRMAN BAEZ: Very well.

16 MS. STERN: Staff has no questions.

17 CHAIRMAN BAEZ: Commissioners, do you have questions
18 at this point?

19 Mr. Butler.

20 MR. BUTLER: Just a couple of brief redirect,
21 Mr. Chairman.

22 REDIRECT EXAMINATION

23 BY MR. BUTLER:

24 Q Ms. Dubin, is FPL seeking to recover in this docket
25 any environmental costs associated with the avoided unit on

1 which the interruptible credits is based?

2 A No. FPL is only seeking environmental compliance
3 costs for existing units.

4 Q If FPL were to reduce the environmental costs that
5 it recovers from customers with an interruptible feature to
6 their rate, where would that amount of reduction be made up so
7 that FPL would fully recover its environmental costs?

8 A Basically, you would have to -- hundreds of
9 thousands of dollars would then have to be allocated to the
10 other general body of customers, including residential classes
11 to pick up for a credit, an additional credit with no
12 additional benefit.

13 MR. BUTLER: Thank you. That's all that I have.

14 CHAIRMAN BAEZ: Thank you, Mr. Butler.

15 Thank you, Ms. Dubin.

16 THE WITNESS: Thank you.

17 CHAIRMAN BAEZ: Commissioners, I think that is the
18 end of our --

19 MS. STERN: Yes.

20 CHAIRMAN BAEZ: -- testimony on 07. And I will
21 remind you all that one of the stipulations that was approved
22 was to have some closing arguments by the parties on --

23 MS. STERN: On the legal issue.

24 CHAIRMAN BAEZ: -- the legal issue which you heard a
25 little bit about earlier. If you don't mind, at this point why

1 don't we give the court reporter a break, and everyone else as
2 well. We will recess for ten minutes and come back, and then
3 the parties can prepare their closing arguments in the
4 meantime. Thank you.

5 (Brief recess.)

6 CHAIRMAN BAEZ: We'll reconvene the hearing.

7 Commissioners, as I mentioned before the recess, one
8 of the stipulations that was approved at the outset of the
9 case was regarding the parties' opportunity, in lieu of
10 briefing, because we do have a short -- a very short time
11 frame on these dockets, traditionally, in lieu of briefing the
12 legal issue that we would hear some oral argument on the legal
13 issue from the parties.

14 And, Ms. Stern, can you remind me, was there any
15 agreement among the parties, either at prehearing or
16 subsequently, as to what the time limits would be or any other
17 ground rules?

18 MS. STERN: The time limits are five minutes for each
19 party. And staff recommends that since FPL is the petitioner,
20 FPL goes first, and then go down the line to see who else has
21 closing arguments.

22 CHAIRMAN BAEZ: Very well. And again -- and
23 Mr. Glenn, I apologize for the stupid question probably, but
24 are you involved in the oral argument on the legal issue or
25 not, just so that I can get my bearings whether this is

1 another, you know, across the board for the utilities. It
2 appears not to be at this point.

3 MR. GLENN: No.

4 CHAIRMAN BAEZ: So it is just Mr. Butler on behalf of
5 his client and Public Counsel and other intervenors, as well?
6 Very well.

7 Mr. Butler, five minutes.

8 MR. BUTLER: Thank you, Mr. Chairman.

9 In May of 2005, the EPA adopted the Clean Air
10 Interstate Rule, commonly referred to as CAIR. Broadly
11 speaking, CAIR requires electric generating units, or EGUs, to
12 reduce emissions of sulfur dioxide and nitrogen oxides when
13 those EGUs are shown to be significantly contributing to
14 violations of national ambient air quality standards in
15 downwind areas. The EPA has chosen to make this significant
16 contribution determination under CAIR on a statewide basis.

17 Using computer modeling, the EPA concluded that the
18 State of Florida as a whole was a significant contributor to
19 air quality violations in certain Georgia and Alabama
20 counties. Based on this conclusion, the EPA has subjected
21 EGUs throughout Florida to CAIR's emissions restrictions. If
22 FPL's EGUs remain subject to CAIR, it will have to install
23 pollution control equipment and/or buy emission allowances to
24 continue operating those units over the next decade.

25 Complying with CAIR in its present form likely will

1 cost FPL and ultimately its customers hundreds of millions of
2 dollars. Florida is already in compliance with the EPA's air
3 quality standards, and CAIR is not needed to keep Florida in
4 compliance. The EPA's sole justification for including
5 Florida's EGU in CAIR is the EPA's computer modeling.

6 FPL does not believe that the EPA's modeling is a
7 valid basis for subjecting all of Florida to CAIR. FPL has
8 had computer modeling performed by recognized experts using
9 the EPA's own models and data, which shows that there is no
10 substantial connection between emissions from Southern Florida
11 and air quality in downwind states. In other words, the EPA
12 would require FPL to make huge expenditures on air emissions
13 controls and allowances for its EGUs in Southern Florida which
14 are not needed to protect air quality in Florida, and which
15 will not meaningfully improve the air quality in any other
16 state.

17 On its own and as a member of an association of
18 Florida electric utilities, FPL has petitioned the EPA for
19 reconsideration of CAIR and has also petitioned the D.C.
20 Circuit Court of Appeals to review CAIR. FPL has requested
21 approval in this docket to recover the 2005 and 2006 costs of
22 challenging CAIR. Those costs total about \$170,000.

23 None of the parties has disputed the prudence of
24 FPL's CAIR challenge or that it is being undertaken to benefit
25 FPL's customers. Nonetheless, certain intervenors have taken

1 the position that the CAIR legal expenses are, quote, a
2 prudent expense chargeable to base rates, but should not be
3 recovered through the ECRC, end quote. In other words, they
4 are challenging FPL's request as a matter of law and policy.

5 I would like to explain briefly why their position
6 is without legal merit and would set bad policy. There is
7 clear and direct Commission precedent for recovering CAIR
8 legal costs through the ECRC. In Order Number
9 PSC-96-1171-FOF-EI, the Commission approved the stipulation
10 allowing Gulf Power to recover through the ECRC legal expenses
11 that it incurred to challenge Florida Department of
12 Environmental Protection proposals. The Commission observed
13 that, quote, our staff and Gulf took the position legal
14 expenses directly associated with environmental compliance
15 activities approved by the Commission that are incurred in
16 order to benefit the company's ratepayers should be recovered
17 through the ECRC. However, the Commission will continue to
18 examine each such expenditure on a case-by-case basis in order
19 to determine the prudence of its recovery through the clause,
20 end quote. In Order Number PSC-97-1047-FOF-EI, the Commission
21 approved a similar stipulation regarding legal expenses
22 incurred in connection with the Clean Air Act, the same law
23 that is the EPA's authority for CAIR.

24 The Commission has also allowed recovery through the
25 fuel adjustment clause of legal expenses when they are

1 reasonably related to fuel costs and are reasonably expected
2 to result in reduced fuel costs. For example, in Order Number
3 PSC-93-0443-FOF-EI, the Commission allowed FPL to recovery the
4 costs of arbitrating a dispute over the terms of a uranium
5 contract. This rationale is directly applicable to FPL's
6 request to recover the CAIR legal costs. In short, FPL is not
7 asking the Commission to plow new ground. To the contrary,
8 FPL's request to recover CAIR legal costs is clearly in line
9 with existing Commission precedent.

10 You may hear intervenors assert that FPL's legal
11 costs are not, quote, environmental compliance costs, unquote,
12 as defined by Section 366.8255. This assertion is belied by
13 the wording of the statute and ignores the realities of
14 environmental compliance.

15 First, Section 366.8255(1)(d), defines environmental
16 compliance costs very broadly. The statute says that this
17 term includes, quote, all costs or expenses incurred in
18 complying with environmental laws or regulations, including,
19 but not limited to, enumerated categories of costs. In other
20 words, the statute is open-ended as to the types of costs that
21 can be recovered as environmental compliance costs, and it
22 encourages the Commission to be inclusive.

23 Second, asserting that legal costs incurred to
24 challenge environmental laws or regulations are not
25 environmental compliance costs, is simply at odds with the way

1 that prudent businesses handle environmental compliance.
2 Businesses routinely negotiate with environmental agencies
3 about what they will have to do in order to comply. These
4 negotiations can run the gamut from simply debating
5 implementation details, to questioning whether particular
6 compliance measures are necessary, to questioning the
7 underlying scientific or legal premises for the environmental
8 law or regulation in question. Regardless, of the specifics,
9 the goal is the same, to comply with valid environmental
10 requirements at the lowest cost and with the least disruption
11 to normal business activities.

12 The Commission has a strong interest in encouraging
13 utilities to engage in this type of negotiation, so that
14 utility customers don't have to pay more in compliance costs
15 than is necessary. If the Commission were to adopt a policy
16 that disallowed ECRC recovery of legal costs, however, it
17 would achieve the exact opposite result. Utilities would be
18 entitled by statute to recover their costs of environmental
19 compliance, but they could not recover the cost of minimizing
20 their compliance burden. FPL's CAIR legal costs provide an
21 excellent illustration of how short-sighted such a policy
22 would be.

23 As I noted earlier, FPL is only seeking to recover
24 about \$170,000 in legal costs for 2005 and 2006. If FPL's
25 rule challenge is successful, many of FPL's EGUs would no

1 longer be subject to CAIR, and the compliance burden for the
2 others would be reduced substantially. This could mean
3 hundreds of millions of dollars less compliance costs.

4 Clearly, the Commission should encourage utilities
5 to spend thousands of dollars in order to save millions of
6 dollars. The Commission can and should do so by approving
7 FPL's recovery of CAIR legal costs in this proceeding.

8 Thank you.

9 CHAIRMAN BAEZ: Thank you, Mr. Butler.

10 Mr. Beck.

11 MR. BECK: Thank you, Mr. Chairman.

12 My name is Charlie Beck with the Office of Public
13 Counsel.

14 Commissioners, the counsel for Florida Power and
15 Light is absolutely correct that we are not challenging the
16 reasonableness or prudence of expenditure of funds for Florida
17 Power and Light to challenge the EPA. The issue is whether it
18 is an environmental compliance cost that fits within the
19 statute. If it is not, then it is part of their overhead and
20 maintenance costs that are generally covered by the company's
21 base rates. I have handed out, which was at one time going to
22 be a cross-examination exhibit, but a copy of the statute for
23 you to look at.

24 Commissioners, Statute 366.8255, defines
25 environmental compliance costs as all costs or expenses

1 incurred by an electric utility in complying with
2 environmental laws or regulations. Now, the statute could
3 have been written as all environmental costs -- or all
4 environmental-related costs that a utility incurs, but it is
5 not. The statute is simply one that allows the companies to
6 have a separate surcharge to the environmental cost-recovery
7 statute for compliance costs.

8 Florida Power and Light in its testimony of Mr.
9 LaBauve tells you what it is that FPL incurred and why they
10 did it. FPL, he states in his testimony, is compelled to
11 challenge the CAIR by addressing the deficiencies in the EPA's
12 emission modeling analysis and its arbitrary assumptions.

13 Well, Commissioners, a challenge to the EPA
14 challenging their assumptions made in promulgating a rule and
15 challenging their modeling analysis is not a cost of complying
16 with a law or a rule. It is one of challenging an
17 environmental rule. So, it just simply on its face -- I mean,
18 this is a very simple argument, it is not an environmental
19 compliance cost. It's a cost that we concede is prudently
20 incurred, but it's part of their O&M expense and a legal
21 expense, just like any others that the company incurs and
22 recovers through base rates.

23 Now, besides the issue of whether it's a compliance
24 cost, which it's not, there is also an issue of whether legal
25 costs, even if they were in compliance, qualify. Now, the

1 statute does say it includes, but is not limited to, a number
2 of items. And there are seven items listed in the statute,
3 you will see, under (d). Legal costs is not one of them. It
4 very easily could have been had the Legislature intended to
5 have legal costs included with compliance, but it is not
6 listed. Now, I know there is some precedent for the
7 Commission allowing legal costs, but, quite frankly, it is not
8 listed on the items that are incurred, and we don't think it
9 should be included there, either. So since it is not a
10 compliance cost, the Commission should not allow it in this
11 case and allow the company to recover it through their base
12 rates.

13 Thank you.

14 CHAIRMAN BAEZ: Mr. Perry.

15 MR. PERRY: Thank you. Timothy Perry on behalf of
16 the Florida Industrial Power Users Group.

17 I am got going to retread some of the same ground
18 that was very adeptly covered by Mr. Beck, but I would just
19 like to point out a few inconsistencies in Mr. Butler's
20 argument.

21 First of all, Mr. Butler cited to you two
22 stipulations in the environmental cost-recovery clause as
23 support for passing these expenses through the clause in this
24 case. As you know, the parties haven't stipulated to the
25 inclusion of these costs through base rates. A stipulation

1 can create a special situation where you have the cost going
2 through uncontested, and you don't have the same -- sometimes
3 you don't have the same level of review, and it can allow you
4 to do things that sometimes are -- that by agreement of the
5 parties that the Commission may not be able to otherwise
6 order. And what FPL didn't do is cite to you a specific case
7 where the parties did not stipulate to legal costs being
8 recovered through the environmental clause and where those
9 costs were subsequently recovered. There aren't any cases.

10 Now, Mr. Butler also tried to analogize a fuel case
11 where you might create some type of savings in the fuel clause
12 as a reason for passing through these costs here. But I think
13 as you well know, the environmental cost recovery clause is a
14 special situation as compared to the fuel clause, where you
15 have a statute that governs the recovery of those costs. And
16 the cases, therefore, from the fuel clause are just not
17 directly analogous to the environmental clause. So I would
18 suggest that that case is not on point either.

19 Other than that, I think Mr. Beck has covered all
20 the other points I intended to make, and I'll conclude my
21 statements with that.

22 Thank you.

23 CHAIRMAN BAEZ: Thank you, Mr. Perry.

24 Mr. Wright.

25 MR. WRIGHT: Thank you, Mr. Chairman.

1 Briefly, I just want to say that we, the Florida
2 Retail Federation, strongly agree with Public Counsel's
3 argument that this is not a compliance cost that is
4 recoverable under the ECRC.

5 Thank you.

6 CHAIRMAN BAEZ: Commissioners, questions of the
7 parties?

8 COMMISSIONER ARRIAGA: May I?

9 CHAIRMAN BAEZ: Commissioner.

10 COMMISSIONER ARRIAGA: I have a question for staff.
11 Have you been able to determine if these legal costs are in the
12 base rate?

13 MS. STERN: No, we're not -- we're not sure if they
14 are in base rates or not. Well, we know that FP&L has
15 required, has asked and been granted the ability to recover
16 legal cost in base rates. We are not sure if the cost FPL
17 wants to litigate the CAIR issue are incremental.

18 COMMISSIONER ARRIAGA: So if we were to approve this
19 request by FPL, there is a possibility that there is a double
20 credit?

21 MS. STERN: That is a problem, yes.

22 COMMISSIONER ARRIAGA: Okay. Can I proceed, Mr. --

23 CHAIRMAN BAEZ: Yes, absolutely.

24 COMMISSIONER ARRIAGA: Mr. Butler?

25 MR. BUTLER: Yes.

1 COMMISSIONER ARRIAGA: You said that if this is
2 successful, your challenge to the rule, EPA rule, it will be
3 saving the consumers a lot of money.

4 MR. BUTLER: Yes.

5 COMMISSIONER ARRIAGA: But what if it is not?
6 Wouldn't it be the case that if this is lost in the court, if
7 the challenge does not proceed, wouldn't it be right to say
8 that the consumers would then be bearing the cost of your legal
9 action?

10 MR. BUTLER: That is a possibility, certainly. No
11 one can ever know in challenging any sort of legal matter what
12 the outcome is going to be in advance. FPL is very confident
13 of its legal position, and that it will bear fruit either
14 through decisions of a court or through negotiations with the
15 EPA, which is certainly another possibility and one of the
16 reasons that the petition for reconsideration and the petition
17 for review were filed. But obviously we don't know for sure
18 how those will turn out.

19 One thing that I would like to address just very
20 briefly what staff had said a moment ago. One of the reasons
21 I mentioned -- my first two words in my statement, closing
22 statement, were in May 2005 when EPA adopted the Clean Air
23 Interstate Rule, FPL filed its rate case in March 2005. It
24 did not know what EPA was going to with CAIR until May 2005.
25 No, there are not legal costs for challenging CAIR in FPL's

1 base rate filing.

2 COMMISSIONER ARRIAGA: Thank you.

3 CHAIRMAN BAEZ: Commissioners.

4 COMMISSIONER DEASON: I have a follow-up question for
5 staff.

6 CHAIRMAN BAEZ: Okay.

7 COMMISSIONER DEASON: Given the timing of the
8 adoption of the rule and the timing of the rate case filing by
9 FPL, is there still doubt in staff's mind as to whether the
10 legal costs associated with the rule challenge are or are not
11 in base rates?

12 MR. BREMAN: Commissioner, my name is Jim Breman.

13 The debate that staff is still having is the
14 fungibility of base rates, because base rates doesn't speak
15 specifically to any one activity, but a collection of
16 activities that are typically ongoing at some average level.
17 So the tension that exists between base rates is when base
18 rates are set, you don't know the specific activity that it is
19 set to recover. It's just an average cost for a group of
20 activities. The environmental clause is a little bit -- is
21 substantially different in that it is project specific. So
22 the test that you are being asked to deal with, according to
23 Mr. Butler, is to look at the MFRs and find the line item in
24 the MFRs that they filed last year that has this name of this
25 activity that they are doing at the budget level that we are

1 talking about, \$170,000.

2 COMMISSIONER DEASON: Well, let me ask this question.
3 Is it ascertainable as to whether these costs are somehow
4 included in base rates by some type of an audit or analysis of
5 the trends of litigation costs that have been recovered
6 historically in base rates, or is this an unanswerable
7 question?

8 MS. STERN: This is ascertainable by an audit.

9 MR. BREMAN: Well, the audit will show whether or not
10 there is the specific activity there, but it won't answer the
11 general philosophical question that is in tension, the one
12 between base rates, which is generalized and not specific to
13 any one activity, and the environmental clause which is
14 specific. The resolution in the past has been a policy
15 question of netting, where you take the total amount for legal
16 expenses, one option, is take the total amount for legal
17 expenses in the rate case, and if the company hasn't spent all
18 of it, then nothing is recovered through the environmental
19 clause. If the company has spent all of its budgeted amount in
20 base rates for legal expenses, then there is a recovery level
21 in the environmental clause. That is one option to deal with
22 the tension. But you can't really address the two different
23 regulatory philosophies succinctly purely.

24 COMMISSIONER DEASON: Can I follow up with
25 Mr. Butler?

1 CHAIRMAN BAEZ: Absolutely.

2 COMMISSIONER DEASON: Mr. Butler, how do we address
3 the philosophical question of what is embedded in base rates
4 versus what the incremental cost of the compliance program
5 would be?

6 MR. BUTLER: Mr. Breman's suggestion certainly is one
7 approach for other types of costs, and you have used it for
8 environmental study costs, I know, in similar context in this
9 docket. I mean, I would go back, though, to what I was -- the
10 point I was trying to make here initially, which is that it is
11 true with base rates that a lot of times the projections aren't
12 identified with enough specificity that you can tell exactly
13 what is in broad categories of base rate costs. And so if
14 there is a potential that people would have anticipated a
15 particular cost, you can't necessarily tell whether it is in
16 there because you don't have enough detail to ferret that out
17 from the MFRs or the support.

18 The point that I was trying to make here is that in
19 this instance I think that it is kind of ascertainable by
20 negative implication. I guess you could say that the, you
21 know, challenge costs or the costs of challenging CAIR were
22 not in there. Now, FPL just didn't know there was going to be
23 something to challenge, and I won't get into a lot of details,
24 but one of the things that surprised FPL was CAIR in its final
25 rule ended up being somewhat different than CAIR in the

1 proposed rules.

2 And if you look at our petition for reconsideration,
3 petition for review, you will see one of our big arguments is
4 complaining to the agency that we were kind of sucker punched
5 or, you know, surprised by finding some of the things in CAIR
6 that the company didn't expect to be there. So I really feel
7 in this instance that one can be quite confident that no one
8 at FPL was setting aside an amount identified or unidentified
9 for a CAIR legal challenge when it was putting together the
10 legal budget that's in the 2006 MFRs.

11 CHAIRMAN BAEZ: Questions?

12 COMMISSIONER BRADLEY: Yes, I have a question.

13 CHAIRMAN BAEZ: Commissioner Bradley.

14 COMMISSIONER BRADLEY: A question of staff. Staff,
15 would you just briefly elaborate -- well, would you briefly
16 define the Clean Air Interstate Rule and what its intended
17 purpose is?

18 MS. STERN: Yes. The Clean Air Interstate Rule is a
19 new rule by the Environmental Protection Agency which is
20 designed to protect areas from downwind influences, areas where
21 they are not attaining pollution standards because what is
22 happening is pollution from downwind is being blown into those
23 areas. And it pertains to 28 states in the eastern United
24 States. And the EPA, based on modeling that the EPA has done,
25 they've said that Florida is contributing to downwind

1 non-attainment areas. Therefore, Florida has to reduce its
2 emissions as per the CAIR rule.

3 COMMISSIONER BRADLEY: So --

4 MS. STERN: Sources in Florida have to reduce their
5 emissions --

6 COMMISSIONER BRADLEY: Right. Right.

7 MS. STERN: -- in accordance with the CAIR rule.

8 COMMISSIONER BRADLEY: And did I understand you
9 clearly to state that this is new territory, that we are
10 charting new territory as we deal with this particular federal
11 rule?

12 MS. STERN: Well, what the -- the rule is new. The
13 issue here before the Commission, whether the legal costs
14 should be recovered through the environmental cost-recovery
15 clause is new territory in that the Commission has never made
16 an affirmative decision. It has always been stipulated in the
17 past. And I might add that stipulations are not binding on the
18 Commission and are not necessarily based on record evidence. I
19 think the new topic here is a legal one, this issue. Why we
20 are having the oral argument is should environmental compliance
21 costs be allowed to be passed through the environmental
22 cost-recovery clause.

23 MR. BUTLER: Chairman Baez.

24 COMMISSIONER BRADLEY: Right.

25 MR. BUTLER: I'm sorry.

1 COMMISSIONER BRADLEY: And what I'm trying to figure
2 out is how these legal costs could be associated with base
3 rates but be defined as an environmental cost-recovery clause.

4 MS. STERN: Yes, that is the problem that staff and
5 some of the intervenors and FPL -- you know, that has been
6 raised here. It is hard to tell if these costs are in base
7 rates or not. FPL is allowed to recover legal costs, like the
8 costs of initiating lawsuits in base rates. There is an
9 allocation for that in base rates. Staff's question is --

10 COMMISSIONER BRADLEY: They are allowed to recover
11 what, legal fees?

12 MS. STERN: Yes. They are allowed to recover the
13 cost of litigation in base rates. Staff's --

14 CHAIRMAN BAEZ: Can I just interrupt with a question?

15 MS. STERN: I'm sorry, yes.

16 CHAIRMAN BAEZ: Now, you identified them as the legal
17 costs that are at least acknowledged generally as part of base
18 rates to initiate litigation, and does that include initiating
19 litigation against the Commission, for instance? I mean, I
20 would assume that's the case, but --

21 MR. BREMAN: It depends on how you interpret rate
22 case expense, Commissioner. But that could be viewed as --

23 CHAIRMAN BAEZ: Well, no, let's don't even -- let's
24 don't even go there, and let's not even use this. But if there
25 is -- if there is a ruling by the Commission with which a

1 utility does not agree, then, obviously, there is -- there is
2 post-Commission legal redress that can be sought. Are those
3 the kinds of expenses that are contemplated, as well?

4 MR. BREMAN: I can't answer the full spectrum of
5 that, maybe because I'm not a sworn witness and investigated
6 the matter properly.

7 CHAIRMAN BAEZ: To your --

8 MR. BREMAN: But I can say that there is damage
9 claims in civil suits like that in base rates.

10 CHAIRMAN BAEZ: Right.

11 MR. BREMAN: So there is litigation expenses having
12 to do with the normal course of business in base rates.

13 CHAIRMAN BAEZ: Whatever that means.

14 MR. BREMAN: Whatever that means.

15 CHAIRMAN BAEZ: Fair enough.

16 Commissioner Bradley, I'm sorry I interrupted. Did
17 you have --

18 COMMISSIONER BRADLEY: Right. And I'm trying to --
19 I'm still trying to get clear in my mind what the issue is
20 here, because when I think of base rates I think of generation,
21 new and expanded generation, the construction of power plants.
22 I don't think of environmental costs that are imposed by the
23 federal government. And I'm thinking that -- it would seem to
24 me that the legal fees that are associated with base rates
25 would be based purely upon base rate activities and not upon

1 environmental costs that are imposed by the federal government,
2 and most certainly not the costs that are associated with us
3 trying to defend ourselves against the pollution that is caused
4 by other states that's coming into the state of Florida that
5 might -- well, not might be, but most certainly are increasing
6 the intensity of our pollution but not originating in this
7 state.

8 MS. STERN: The legal expenses in base rates are
9 considered a general cost of doing business. You know, a
10 company sometimes has to defend itself against a lawsuit, and a
11 company sometimes finds it appropriate to initiate a lawsuit.
12 Staff does not take issue with the concept that litigation is a
13 part of doing business and should be recovered through base
14 rates.

15 In its testimony, I believe FPL has made one cursory
16 conclusory statement that the costs aren't recovered in base
17 rates. It is not backed up by anything in their schedules.
18 It is the burden -- it is FP&L's burden to prove that there is
19 no double recovery, and it is staff's position at this time
20 that FPL hasn't carried that burden.

21 MR. BUTLER: May I respond?

22 CHAIRMAN BAEZ: Mr. Butler, you have been waiting
23 patiently. Go ahead.

24 MR. BUTLER: The parties stipulated to FPL's
25 testimony going into the record. If there was any question

1 about statements that are made in there, that would have been
2 the purpose of cross-examining the witnesses about those
3 statements. And, you know, our testimony asserts, you know,
4 consistently with what I said earlier, that, you know, largely
5 because of the timing, there just simply isn't anything in base
6 rates for those legal expenses.

7 The one final point I wanted to make, please, Mr.
8 Chairman, and I apologize earlier if I gave a misimpression.
9 I was trying to cram about ten pounds of ideas in a
10 five-minute sack here. But the references to the
11 stipulations, I agree that when the Commission stipulated with
12 Gulf Power or approved a stipulation between staff and Gulf
13 Power allowing recovery of legal expenses, that it does not
14 necessarily establish a precedent that you have to do that, or
15 that that is necessarily the right thing to do.

16 The reason I was wanting to point it out is that,
17 clearly, a lot of the argument certainly from Mr. Beck and
18 others was that you can't do that. That you are precluded by
19 statute from approving recovery of FPL's legal expenses. You
20 certainly would not have been approving those stipulations if
21 those stipulations represented something that was in violation
22 of the statute that is the basis for environmental
23 cost-recovery. And that was really the reason that I had made
24 reference to those stipulations.

25 Thank you.

1 CHAIRMAN BAEZ: Commissioners --

2 MS. STERN: Can I add something?

3 CHAIRMAN BAEZ: Hold on a second, Ms. Stern.

4 Are there any other questions at this time? I know
5 I have a few. I haven't finished with mine, but --

6 Ms. Stern.

7 MS. STERN: Yes. I just wanted to address the
8 comment that Mr. Butler just made, and that the Commission --
9 the Commission's approval of a stipulation is not necessarily
10 an endorsement that the stipulation is in accordance with the
11 law. And there is case law that has gone to the Supreme Court
12 where the Supreme Court has upheld stipulations that are
13 apparently in violation of the law because the court favors the
14 settlement of disputes. And the court won't look at
15 necessarily if there is a violation of the law or not, they
16 look at, well, there was a settlement of the dispute and none
17 of the parties to the settlement are objecting. So, it is
18 not -- the fact of the stipulation is not evidence in and of
19 itself that it complies with the law.

20 CHAIRMAN BAEZ: Right. That there may be portions of
21 stipulations that this Commission has accepted that don't
22 necessarily --

23 MS. STERN: That's correct.

24 CHAIRMAN BAEZ: -- comply -- that are not relevant to
25 the authority of the Commission to grant otherwise. Is that

1 fair?

2 MS. STERN: That, also. Yes.

3 CHAIRMAN BAEZ: Okay. I've got a couple of
4 questions, and I wasn't trying to be flip in trying to get a
5 handle on what kind of contemplated litigation is part of doing
6 business, and I'm fully comfortable with what that has -- what
7 the responses to that were, even if it does include, you know,
8 defending itself from Commission action. It is part of doing
9 business. That is what the process is there for.

10 One of the questions that I had, and perhaps it is
11 for our legal counsel for starters, is I'm comfortable with
12 the notion of lumping litigation together as part of legal
13 costs in base rates. It doesn't rise to a level of this
14 Commission as a policy agreeing with or necessarily endorsing
15 the legal actions that a given utility may take. By that, I
16 mean we do not delve into a company's decision to defend
17 against a particular lawsuit, nevermind the particular legal
18 theories that they employ and so on. It is their cause. We
19 allocate a reasonable expense level for them to be able to
20 make those decisions on their own.

21 Conversely, we have identified a particular
22 litigation that's the subject of this discussion. So now we
23 know what the monies arguably would be used for. What kind of
24 legal exposure, what kind of legal effect do we entertain for
25 ourselves in terms of supporting a particular position? How

1 does it translate if this Commission agrees to pass those
2 costs on through a recovery clause? How does that translate
3 to our endorsement as a matter of policy of the company's
4 positions, the positions that they would be advancing and
5 challenging the CAIR statute?

6 MS. STERN: I don't think that it indicates to anyone
7 that the company is on FP&L -- that the Commission is on FPL's
8 side or against FP&L's side, if that is the question you are
9 asking. I think it just means that if the costs are passed
10 through base rates or the clause, that somebody has looked at
11 them and said they are reasonable and prudent. Even in base
12 rates there is an opportunity not to --

13 CHAIRMAN BAEZ: And, again, I go back to the
14 difference between speaking of those costs being allocated
15 through base rates, which is some blanket approval of some
16 expense level in a situation like this where, clearly, the
17 object of the expense is clear. And that object necessarily
18 includes, you know, some advancement of what an appropriate
19 policy may or may not be before a federal agency. Maybe I'm
20 complicating things too much, but I guess I'm concerned about
21 the kind of -- how it could come back with us. How it could
22 come back to this agency and what kind of statement we are
23 saying. In essence, you know, go ahead, we agree with it, you
24 know, because it is a prudency, some kind of prudency. Doesn't
25 that reach into the substance of the lawsuit in some sense?

1 MS. STERN: I mean, I think it can to a certain
2 extent. I guess, for example, if a party opposing FP&L were to
3 say this is a frivolous lawsuit and win that, it could come
4 back to the Commission, and it could be shown that, look, the
5 Commission allowed the costs of a frivolous lawsuit or the
6 Commission approved the costs of a frivolous lawsuit to be
7 recovered in either base rates or the clause.

8 CHAIRMAN BAEZ: And we were speaking in theory here?

9 MS. STERN: Yes. Yes. And I'm not suggesting that
10 it is a frivolous lawsuit.

11 CHAIRMAN BAEZ: And that raises another question,
12 which I will probably get back to. But are you at least -- are
13 you at least comfortable that we are not doing -- that we would
14 not be doing anything to endorse a challenge that -- we are not
15 taking on litigation by proxy, necessarily.

16 MS. STERN: No. I don't believe we are. And given
17 the status of the case as is, I don't think that anybody could
18 legitimately claim that we are on FPL's side or not on FPL's
19 side, no matter what decision we make.

20 CHAIRMAN BAEZ: So even though --

21 MS. STERN: Because if --

22 CHAIRMAN BAEZ: So even though the purpose of the
23 litigation or certainly the purpose of the costs to be
24 recovered are clearly identified, it is no different an effect
25 than when we approve costs, general costs for litigation or

1 legal costs as a matter of course during base rates.

2 MR. BREMAN: I would suggest -- I would suggest that
3 if you do end up allowing it through the clause at this time,
4 it would be subject to whatever discovery occurs in the future.
5 And if it turns out that it is or was a frivolous event, then
6 you can go back and ask for the amount to be refunded to
7 customers as a matter of policy.

8 CHAIRMAN BAEZ: All right. A question for Mr. Beck
9 and Mr. Perry. There seems to be at least -- and maybe I'm
10 including issues that are irrelevant. I don't believe I am,
11 but if it is, I'm sure you will let me know. There's some --
12 at least on the face of it, the notion of spending thousands to
13 save millions, or what could be hundreds of millions
14 potentially seems on its face a good and prudent idea. There
15 seems to be some perverse incentive created in not allowing
16 this type of recovery under these circumstances, or similar
17 circumstance to this, for a utility to say compliance costs are
18 bricks and mortar and interest, I think as Mr. McWhirter
19 earlier characterized them, so if it is easier to recover
20 hundreds of millions, then why spend -- you know, what
21 responsibility do we have to spend -- to try and challenge it,
22 I guess. Can you --

23 MR. BECK: Mr. Chairman, like I said at the beginning
24 of the argument, we are not disputing the reasonableness or
25 prudence of FPL going forward and doing this. But there is a

1 pot of money that -- I think it's an unanswerable question, as
2 Commissioner Deason asked. There is an amount for legal
3 expenses in a rate case and in base rates, and it covers
4 various items. It doesn't -- you don't list down specific
5 suits and say this. I mean, during the period that base rates
6 are going to be in effect through the agreement, it is going to
7 be through 2009, you couldn't possibly, you know, say specific
8 suits are included or excluded. There is a general level of
9 funds included in base rates.

10 I think the question you have to ask, then, is
11 whether it is covered or not, does it comply with the statute?
12 And a challenge to the EPA rule, I just don't see how you can
13 possibly say that is a compliance cost. I mean, it is an act
14 of defiance, if you will, and I don't mean that badly.

15 MR. BUTLER: No.

16 MR. BECK: I mean, we're not disagreeing, but it is
17 not compliance. And I think it's really that simple. It's not
18 in the statute.

19 CHAIRMAN BAEZ: But, again, in order -- and I guess
20 that just goes back to my question. If we're going to -- if we
21 are going to say compliance is compliance, then there is no
22 incentive created or there is a disincentive created to say,
23 you know what, here is an environmental compliance cost that I
24 can try and fight to avoid. But since my base rate allocation
25 for legal costs is only so much, why don't I just save me some

1 money and this one is subject to compliance cost, and let's let
2 the -- I mean, is there that kind of game that can be played
3 otherwise?

4 MR. BECK: I understand, Mr. Chairman, what you are
5 saying, but I think that is for the Legislature to address.
6 And they decided compliance. They didn't say all
7 environmental-related costs, because they could have said that.
8 They didn't. I think that where you find the answer to that is
9 how the statute is written.

10 CHAIRMAN BAEZ: Mr. Perry.

11 MR. PERRY: And moreover, I mean, I would -- I mean,
12 they sought to make the reasonable and prudent decision. I
13 mean, they can't just say, okay, I'm going to go forward and,
14 you know, pass these compliance costs through if it looks like
15 that there is a reasonable basis for a challenge. I mean, they
16 deal with regulatory agencies as a routine matter. Of course
17 they deal with the Florida Department of Environmental
18 Protection, the EPA, and others. And, although, you now, I
19 don't work for the company, I don't specifically what is
20 allocated in their rate base rates, but I can't help but
21 imagine that there is a pot of dollars in there that is
22 allocated for dealing with all of these different regulatory
23 agencies, including the EPA, and that that money would at least
24 contemplate both intervening in dockets and dealing with a
25 situation such as this. And I think that they can't just

1 slough off their duty to do what is right, because they have a
2 statute that allows them to pass through compliance costs.

3 CHAIRMAN BAEZ: Is there any part of -- is there any
4 part of being able to identify the specific purpose of
5 litigation as a representative of the customers and actually
6 see in this case, in this instance, clearly where the money --
7 where the money is going as a way of assurances that monies are
8 being spent, as opposed to what is traditionally the case in a
9 base rate proceeding as to, as you suggested, establish a pot
10 of dollars with -- at least from what I have heard, no specific
11 supervision, just acknowledging that there is a general cost of
12 doing business, and that these are the dollars allocated to it?
13 Is there any advantage to one way or another? I mean, as a
14 consumer, I guess, to being able to see at least in one
15 instance where your dollars are going?

16 MR. PERRY: I understand. I understand where you are
17 coming from, but it also --

18 CHAIRMAN BAEZ: I'm not coming from anywhere. I'm
19 asking a question.

20 MR. PERRY: Well, I mean, I understand what the
21 question is. But I think that it comes -- I mean, it almost
22 sets up a situation where it, you know, gives them the
23 incentive to just kind of pick and choose lawsuits and try and
24 run them through the various clauses.

25 CHAIRMAN BAEZ: I think that is what I -- I think

1 that's a question that I asked Mr. Beck later. Isn't there an
2 incentive now to pick and choose lawsuits, especially those
3 that you would otherwise undertake in the area of environmental
4 compliance that may not be counted as a general cost of doing
5 business because you do have the refuge of, as Mr. Beck
6 suggested, compliance which, in essence, by compliance and not
7 defiance of a rule, you know, you just throw up your hands and
8 say, you know what, the price is what the price is and we had
9 to do it, and so there.

10 COMMISSIONER BRADLEY: Mr. Chairman.

11 CHAIRMAN BAEZ: Commissioner Bradley, you've got a
12 question?

13 COMMISSIONER BRADLEY: Along that same line, and I'm
14 grappling with this from a public policy perspective. And I
15 heard what Mr. Beck stated, and I heard what FIPUG -- what
16 FIPUG's attorney just put on the table. And I listened with
17 interest. I listened to your question. But as a public
18 policy-related matter, it would seem to me that if this rule
19 can be challenged and challenged successfully, that the general
20 body of ratepayers would stand to save a tremendous amount of
21 expenses as it relates to the environmental issue that we are
22 discussing here. If not challenged legally, then what does
23 that basically mean? That it becomes a pass-through in the
24 full amount?

25 CHAIRMAN BAEZ: And, again, I wasn't finished with my

1 questions, so I haven't had a chance to ask Mr. Butler some
2 questions, as well.

3 COMMISSIONER BRADLEY: And I'm putting it out there.
4 I probably need to direct that at staff.

5 CHAIRMAN BAEZ: Ms. Stern.

6 MS. STERN: I guess, you know, FPL said, you know,
7 it's going to cost them hundreds of thousands of dollars, or at
8 least at this point it's a \$170,000 pass-through that they are
9 asking to be passed through the clause to save possibly tens of
10 millions or hundreds of millions. And I want to point out that
11 that is an absolute best-case scenario. That is if FPL wins
12 everything hands down. And that may happen, but I am not sure
13 that is the best assumption to make when deciding this issue.
14 That is by far the most optimistic assumption.

15 The other thing I would like to point out is that
16 the 170,000 is just the beginning of a lawsuit which could go
17 on for a number of years. And it is not just attorney's fees,
18 it is modeling fees, it's the cost of doing climatological
19 modeling, and that could get to be quite expensive.

20 CHAIRMAN BAEZ: More expensive than the lawyers?

21 MS. STERN: I don't know. Well, that's --

22 CHAIRMAN BAEZ: I can't believe it.

23 MS. STERN: It could, I think, yes. But, I guess the
24 other thing I wanted to point out and just -- you know, we are
25 all familiar with statutes that assign attorney's fees. And

1 those statutes, the way they work, a lot of them, is that
2 whoever initiates the lawsuit, if they lose, they pay the
3 attorney's -- whoever initiates the lawsuit, if they lose, they
4 pay the attorney's fees of the other side. And that's to
5 discourage lawsuits. It's to keep people from -- it's to
6 encourage people to file lawsuits that they are pretty -- or,
7 you know, mostly sure they are going to win. And it just keeps
8 -- it is a check on unfettered litigation.

9 And what I think that OPC and FIPUG are trying to
10 get at is just, you know, is just that balance. You know, on
11 the one hand we're saying if FPL wins, you know, then the
12 ratepayers are a lot better off in the best case scenario.
13 But if they lose, then the ratepayers are footing the bill for
14 everything. But there is sort of an intermediate ground,
15 which is they pay, you know, ratepayers only cover the fee if
16 FP&L wins.

17 CHAIRMAN BAEZ: Mr. Butler, what -- I almost sound
18 ashamed saying it, but \$170,000, I guess in the context of the
19 dollars that get thrown around here on a usual basis, seems
20 like a pretty small sum. Why would you not carry that and wait
21 until the end of litigation to try and make the case for
22 recovery, or would it make a difference?

23 MR. BUTLER: Well, I mean, literally we didn't,
24 because I think we recorded it in the way that the costs which
25 one seeks for recovery are normally recorded. I mean, we are

1 expected to include as projections or as estimated actual
2 true-ups at the appropriate times the costs that are incurred
3 in that period. So, the decision, frankly, to include it, I
4 think, was more just a matter of following the Commission's
5 ordinary procedures for, you know, bringing costs to your
6 attention for recovery.

7 You know, I don't think that it would be the right
8 signal to send to FPL and other utilities to have a sort of,
9 you know, a gamble that if the company wins, it gets to
10 recover its costs; if it loses, it gets nothing. I do think
11 that you will have an opportunity, you know, now and in the
12 future to review the prudence of what we have chosen to
13 undertake. Both the fact of, you know, challenging CAIR and
14 the way that FPL has gone about challenging it, and how it has
15 paid for challenging it. All of those are open to
16 consideration. None of them, I think, is foreclosed at this
17 point.

18 You've got estimated actual 2005 and purely
19 projected 2006 costs, so you've got two more cycles of this
20 where they will be playing out as final true-up amounts and
21 that is where I would think that it would be appropriate to
22 review whether FPL did the right thing.

23 CHAIRMAN BAEZ: Well -- and, now, let me ask you a
24 question on that. I mean, you heard me ask staff, or at least
25 try and elicit from them their view of what this Commission's

1 involvement would be in terms of essentially endorsing a
2 lawsuit, what is probably already a lawsuit.

3 Now you are suggesting that this Commission would
4 have access for the ability to review on a year by year -- on
5 a yearly basis, I guess, at hearings like this, whether you
6 are doing a good job on the litigation. Am I putting words in
7 your mouth?

8 MR. BUTLER: I think that's pretty much it. I mean,
9 the standard, obviously, is whether the utility's costs are
10 prudently incurred, which is probably a little bit different
11 than doing a good job and doesn't involve as much endorsement
12 by you one way or the other in reaching conclusions as you
13 would be if you were concluding whether we were doing a good
14 job or not. But, certainly, you would be looking at things.
15 And if there was something where the utility just went off, you
16 know, on a rabbit trail, pursuing something that there was no
17 good reason to have pursued or it did so with arguments and
18 with approaches that just didn't make any sense and spent a lot
19 of money on something that was clearly going to be
20 unproductive, I think that would be imprudent, and you would
21 properly, you know, disallow a recovery of that amount.

22 I don't think that you would be sending a signal
23 about the appropriateness of pursuing litigation by reaching
24 that sort of decision in a context where a utility really had
25 gone off on a rabbit trail, nor do I think that approving

1 costs as prudently incurred where a utility has undertaken a
2 reasonable challenge sends any sort of imprimatur or stamp of
3 approval from the Commission that this is the right thing to
4 do and the utility has your support in it, anything of that
5 sort. It is simply the usual review of independent management
6 decisions to determine whether they meet the threshold of
7 prudence.

8 CHAIRMAN BAEZ: This threshold of prudence -- well,
9 let me not ask that one.

10 Mr. Perry, I had one question for you. You alluded
11 to the fact that Mr. Butler had not cited to any cases where
12 the PSC -- well, my question is this: Are there any cases
13 where the PSC has denied recovery outside of the stipulations?

14 MR. PERRY: For the environmental cost-recovery
15 clause, I couldn't find a case where they made a ruling one way
16 or the other.

17 CHAIRMAN BAEZ: Okay.

18 MR. PERRY: It is only -- I think only the approval
19 of the stipulations that were cited, and then --

20 CHAIRMAN BAEZ: The only times that we've dealt --
21 the only context in which we have dealt with these --

22 MR. PERRY: In the environmental clause. And I think
23 it's a different creature than some of the other dockets.

24 CHAIRMAN BAEZ: Okay. I don't have any other
25 questions, Commissioners. If there are no other questions, we

1 can --

2 COMMISSIONER ARRIAGA: May I?

3 CHAIRMAN BAEZ: Commissioner Arriaga.

4 COMMISSIONER ARRIAGA: Mr. Butler.

5 MR. BUTLER: Yes.

6 COMMISSIONER ARRIAGA: I'm trying to determine the
7 issue of prudence. And we have agreed, or I have heard you say
8 and Public Counsel has said, also, that if you prevail in this
9 case, consumers will be benefitted, correct?

10 MR. BUTLER: That's right.

11 COMMISSIONER ARRIAGA: Is there a benefit to FPL in
12 pursuing this? What is the benefit to FPL? I understand the
13 benefit to the consumer. What is the benefit to the utility?

14 MR. BUTLER: The benefit to FPL is that FPL has a
15 policy of pursuing what is the most effective appropriate way
16 of complying with environmental requirements irrespective of
17 where the dollars fall into what pot of recovery. And FPL had
18 made a decision that this rule really seemed to be imposing
19 costs that could unfairly burden the company and ultimately
20 customers, but just saddle the company with a higher cost of
21 doing business of producing power than it needed to be saddled
22 with, and chose what it considered a prudent measure to
23 question whether EPA really was doing the right thing in doing
24 so.

25 In terms of the just sort of direct today costs and

1 benefits, frankly, there isn't any, because FPL's costs of
2 compliance will end up being recoverable under the ECRC
3 whether it challenges this rule or not and certainly whether
4 it prevails in the rule challenge or not. So there is not a
5 direct incentive. And, of course, that is part of the thing
6 we were trying to point out is that we just want to be in a
7 position where if we're spending money to try to be sure
8 that -- not that we are not going to comply. We comply with
9 all the environmental laws that apply to the company. But
10 that we only do what we need to to comply, and that we do so
11 in as cost-effective a way as possible. You know, if we are
12 going to be generating that benefit for customers, we would
13 just like to have the opportunity of recovering prudent costs
14 spent in order to achieve that result.

15 COMMISSIONER ARRIAGA: So we have agreed that both
16 will be benefitted, the consumer and the utility by you
17 prevailing -- by FPL prevailing in this case?

18 MR. BUTLER: I agree the benefit, in terms of cold
19 hard cash, is a lot more on the consumer side than the utility,
20 because it would simply be a reduction in what we would
21 otherwise be recovering from customers in sort of a
22 dollar-for-dollar reduction. But, certainly, there are
23 benefits to the company in meeting it's objective of managing
24 its business in a cost-effective manner.

25 COMMISSIONER ARRIAGA: All right. Let's look at the

1 other side of the coin. Let's assume you do not prevail, then
2 the burden is 100 percent on the consumer?

3 MR. BUTLER: Well, I think that's right. I think
4 that's something, though, that, again, you know, if you are
5 looking for achieving sort of a parity of risks and benefits, I
6 don't see any other outcome. I mean, frankly, one of the
7 things as a lawyer I think about is that there are
8 circumstances certainly where lawyers are not able to recover
9 their fees if they lose. But in those circumstances -- of
10 course, what I'm thinking of is contingency fee arrangements --
11 the thing that encourages the lawyers to go into those is that
12 if they win they get a whole lot more than just their costs of,
13 you know, pursuing the litigation. So there is, you know, a
14 large upside to them of prevailing.

15 What you are suggesting is an arrangement where --
16 there is no real upside to FPL. If it prevails it simply gets
17 all of its costs of pursuing the litigation, no more, no less.
18 But you would be saying if it doesn't prevail, it doesn't
19 recover the costs of pursuing the litigation. I don't think
20 that there are very many lawyers, certainly, that would be
21 interested in a contingency fee arrangement where if they win
22 all they get is their normal hourly fee for doing the
23 litigation, and if they lose, they get nothing. And that, in
24 my mind, is somewhat analogous to the situation that you are
25 suggesting where FPL would end up only recovering its actual

1 costs of litigation if it prevails, but would get nothing if
2 it loses.

3 COMMISSIONER ARRIAGA: May I continue, Mr. Chairman?

4 Mr. Beck, I have heard you say that this is prudent,
5 that OPC agrees that this is a prudent expense. So do you
6 understand, as I'm trying to understand, that if the attorneys
7 for FPL prevail, the benefit to the consumer in cash is
8 important?

9 MR. BECK: I don't dispute that at all. I'll agree
10 with that.

11 COMMISSIONER ARRIAGA: So isn't it important to have
12 a good set of attorneys fighting for a possibility of obtaining
13 a benefit to the consumer?

14 MR. BECK: Yes.

15 COMMISSIONER ARRIAGA: So what is the challenge?

16 MR. BECK: It is not allowed by the environmental
17 cost-recovery clause statute.

18 COMMISSIONER ARRIAGA: So procedure is more important
19 than the cash tangible benefit to the consumer?

20 MR. BECK: No, no. It's whether it's allowed by the
21 statute or not, and we don't believe it is.

22 COMMISSIONER ARRIAGA: Okay. Thank you.

23 COMMISSIONER BRADLEY: You said that you don't
24 believe that it is.

25 MR. BECK: It's not. It allows recovery of

1 environmental compliance costs.

2 COMMISSIONER BRADLEY: And I'll tell you what I'm
3 struggling with still: Base rate, rate base, environmental
4 cost-recovery, legal expenses, base rates, legal expenses,
5 environmental cost challenges. It would seem to me that it
6 would make it -- it would be a much cleaner process if we had
7 -- if we clearly send a message that if the company challenges
8 an environmental mandate that is sent or put out by one of the
9 federal agencies, or an agency in general, it has the ability
10 to do that and prevails, then the ratepayers in general
11 benefit. But, also, the clear message would be that we are
12 going to clearly have those legal expenses identified within
13 the environmental clause rather than putting it into rate base.
14 That, to me, seems to be much easier to keep up with and to
15 identify for our regulatory purposes.

16 And I heard what you said about the possibility of
17 it not being in the statute. But I think -- and what I'm
18 grappling with is the benefit to all the ratepayers. If the
19 company prevails, then that means that the ratepayers are
20 going to have to bear less of a burden in terms of a dollar
21 amount to deal with this particular issue. If it does not,
22 then that means that -- I don't think we've lost very much.
23 And the nature of this process is to deal with -- well, we are
24 economic regulators, and we are trying to get the best service
25 at the best price for all the ratepayers.

1 And I guess what we are confronted with here is the
2 public policy decision that we are going to have to make a
3 call on. And, I mean, prudence is what we are going to
4 determine is the cost after the bills are submitted, is the
5 cost prudent? And I heard you say you are not -- that is not
6 your issue.

7 MR. BECK: Correct, Commissioner. We do not dispute
8 the prudence of their engaging in these activities.

9 COMMISSIONER BRADLEY: But I would think that a part
10 of prudence would be to try to get the best deal for the
11 general body of ratepayers. That's just what I'm grappling
12 with.

13 CHAIRMAN BAEZ: Commissioners, questions or a motion?

14 COMMISSIONER DEASON: Mr. Chairman, it seems to me
15 that there is two fundamental issues that we are going to need
16 to address. It may be beneficial to address them one at a
17 time. It seems to be a threshold issue of the statute, what
18 discretion, if any, it gives to the Commission in determining
19 what is or is not a compliance cost. And then there is a
20 secondary question of recovery. If we pass that hurdle and say
21 that we think we have the discretion to consider it, then it is
22 a question of whether these costs are already recovered by some
23 other mechanism, i.e., base rates. And then kind of interlaced
24 in all of this it seems to me there is some questions of the
25 burden of proof and maybe a question of correct incentives.

1 But it seems to me that we need to address the legal
2 question first, and that may dispose of the whole thing if we
3 determine that the statute does not give the Commission the
4 discretion to even consider recovery of the litigation costs
5 as a component of compliance. So with that, I would propose
6 that we address that to begin with, if that is acceptable.

7 MS. STERN: Can I interrupt for one second, please?
8 If that concludes the closing arguments, it is time to close
9 the record, and then --

10 CHAIRMAN BAEZ: Before we take up the recommendation?
11 Okay.

12 MS. STERN: I wasn't sure if we were moving right
13 into the recommendation phase or not.

14 CHAIRMAN BAEZ: And let me just make sure that there
15 are no further questions from the Commissioners at this point.
16 Okay. We can go ahead and close the record. So why don't
17 you --

18 COMMISSIONER DEASON: Are we going to receive a
19 recommendation from staff?

20 CHAIRMAN BAEZ: Commissioners, what would be the way
21 to proceed is as soon as -- did we just close the record?

22 MS. STERN: Yes. And so the record on the hearing is
23 closed, and now there are -- it is time to take the
24 recommendations on all the issues in dispute, the legal issue
25 and the nonfirm credit issue.

1 CHAIRMAN BAEZ: Commissioners, there are about five
2 issues -- five other issues remaining in dispute in this
3 docket, and what I would propose is that we receive a
4 recommendation on this legal issue since it is fresh in our
5 mind and fresh off of our questions and discussion, and then
6 proceed to the other outstanding issues.

7 So, Ms. Stern, if you would go ahead.

8 MS. STERN: Okay. We have three alternative
9 recommendations to make on this issue. I will run through them
10 real quickly, because I think we have discussed the merits and
11 the pros and cons of them all, and then we will make a primary
12 recommendation.

13 The first is that FPL is not allowed to recover the
14 costs through the clause; they are allowed to recover them
15 through base rates, because the lawsuit is not an
16 environmental compliance cost. It is not being conducted --
17 it is not required by an environmental law or regulation to
18 protect the environment, pure and simple, the statute doesn't
19 allow it.

20 At the opposite end of the spectrum is, yes, all
21 prudently-incurred costs should be passed through the clause
22 for the reasons that FPL has expressed, and as we have
23 discussed the downside of this is that it encourages the
24 utility to undertake riskier lawsuits. And if you know you
25 are going to be reimbursed for all the money that you may

1 lose, at gambling, for example, then you might be more
2 inclined to take more risks.

3 The upside is that FPL, apparently, would be -- if
4 they are reimbursed for all of their lawsuits they would
5 have -- they would be inclined to more willingly undertake
6 lawsuits, if I heard Mr. Butler correctly. And they may
7 hesitate to undertake lawsuits if they aren't reimbursed
8 through the clause.

9 The final recommendation we have, which is what is
10 staff's primary recommendation, is that you allow costs to go
11 through the clause now, but the costs will have to be refunded
12 at the end of the litigation if FPL can't show that the
13 compliance savings, the compliance costs saved were reduced by
14 the litigation, and that they exceeded the amount spent on
15 litigation. And staff favors this recommendation because it
16 provides an incentive for the utility to pursue litigation
17 that it has a good probability of winning and not to pursue
18 riskier litigation, and it also fairly balances the risks of
19 the ratepayers and the utility. It doesn't ask the ratepayers
20 to take on all the risks of every lawsuit that FPL decides to
21 enter into.

22 CHAIRMAN BAEZ: Ms. Stern, can I stop you? Can you
23 repeat that last recommendation, and then I'm going to have a
24 question for you to clarify.

25 MS. STERN: Okay. The last recommendation is we

1 would allow the costs to go through now. FP&L will continue to
2 file every year the cost of litigation and, you know, the cost
3 of modeling. And assuming that they are reasonable, we will
4 allow them to go through. And at true-up time, assuming that
5 they are prudent, they will be, you know, recovered. So we
6 will allow those costs to go through year-by-year. But at the
7 end of the litigation, FPL has to show that they have saved the
8 ratepayers compliance costs, that the costs of compliance have
9 gone down for the ratepayers and has gone down by more than the
10 cost of the litigation. It is like a cost-effectiveness test.
11 FPL has to show that the litigation was cost-effective.

12 CHAIRMAN BAEZ: And what would you -- let's take that
13 one step further, now. Now, that's a situation that
14 contemplates it running through the clause.

15 MS. STERN: That is correct.

16 CHAIRMAN BAEZ: What if it is disallowed for running
17 through the clause? Is it still recoverable?

18 MS. STERN: I'm sorry.

19 CHAIRMAN BAEZ: Is it still -- I mean, does it lapse
20 back into the base rate component?

21 MS. STERN: Well, there would have to be a showing
22 that it is incremental to base rates. But Mr. Breman, I think,
23 has something to say.

24 CHAIRMAN BAEZ: How does --

25 MR. BREMAN: I'd like to clarify the question. If

1 you deny, but don't -- if you deny without prejudice, in other
2 words, allowing the utility two years from today, whenever it
3 finishes its legal challenges, and it comes to fruition, and
4 you know what the outcome is, if your vote is to deny today
5 without prejudice, they can come back and ask for, subject to
6 the outcome of the cost-effectiveness -- I'm having -- what is
7 your question?

8 CHAIRMAN BAEZ: Well, the third option suggests some
9 kind of all-or-nothing proposition for the company, by way of
10 having to prove that the litigation actually saved money in
11 order to be recoverable in its entirety. Now, if those
12 expenses -- let's look beyond. Let's say that burden wasn't
13 carried. What happens to those legal fees? I mean, could they
14 possibly be netted off of other reserves for legal fees or --

15 MR. BREMAN: The amounts recovered for that activity
16 would be refunded to customers. It has nothing to do with
17 whatever other activities the company might be engaged in.

18 CHAIRMAN BAEZ: Okay. All right.

19 Commissioners, any other questions as to the
20 recommendation?

21 COMMISSIONER DEASON: I have a question. If your
22 primary recommendation is to allow recovery now, is it your
23 position that you disagree with Public Counsel's argument that
24 we do not have the discretion to allow recovery of these types
25 of costs as compliance costs?

1 MS. STERN: I think that we don't -- we don't
2 disagree -- we agree with them. I think this is a difficult
3 position to maintain on appeal. If this were appealed, it
4 would be difficult to defend. It would be defended on grounds
5 that the Commission has authority to implement policy, and a
6 commission's interpretation of its own statute will be upheld
7 unless clearly erroneous would be the standard of review. And
8 we would have to argue that this is not a clearly erroneous
9 standard of review. We could rely in part on some of the
10 arguments that Mr. Butler made and on our broad policy-making
11 authority. I don't think that it would be an easy decision to
12 uphold on appeal. But I'm not sure that --

13 COMMISSIONER DEASON: My question is simple. Is it
14 your opinion we do or do not have discretion to allow recovery
15 of these costs?

16 MS. STERN: Okay. No, in my legal opinion, we do not
17 have the discretion. The statute is clear and unambiguous.

18 COMMISSIONER DEASON: Okay. Well, then why is it
19 your primary recommendation to allow recovery now?

20 MS. STERN: Because it balances the -- it fairly
21 balances the risks and the interests of the parties, and we are
22 pushing the Commission's discretion, you know, slightly beyond
23 the limits.

24 CHAIRMAN BAEZ: Commissioners, any other questions?

25 COMMISSIONER DEASON: Mr. Chairman, I'm prepared to

1 make a motion.

2 COMMISSIONER BRADLEY: Is it staff's position that
3 this Commission has the authority to promulgate a rule based
4 upon its interpretation of what its legal parameters are as it
5 relates to this particular statute?

6 MS. STERN: It is staff's legal position that,
7 strictly speaking, this is not an environmental compliance cost
8 and should not be passed through the clause. But based on the
9 Commission's policy-making authority and broad discretion in
10 its policy-making authority, we can recommend our preferred
11 alternative. And that is a recommendation based on legal staff
12 and technical staff's input.

13 COMMISSIONER BRADLEY: Well, what I am struggling
14 with still is do we disallow this recovery and create a
15 situation that automatically sets up a situation for the
16 general body of ratepayers to just have to absorb this cost of
17 the Interstate Clean Air Rule because it just gets passed
18 through, which creates, in my opinion, a quandary for the state
19 of Florida. Because then we are -- we put ourselves in a
20 position of having to clean up or react to dirty air that is
21 coming from someplace else that we have no control over. And I
22 don't -- I don't know how we ever will achieve a certain air
23 quality if we are trying to clean up air from Georgia, but
24 charging, you know, our citizens for cleaning up air in the
25 retrofitting of plants here in the state of Florida. I'm just

1 struggling with this as a public policy issue more so than a
2 legal issue.

3 MS. STERN: Well, I don't think that we are really
4 debating the merits of the CAIR rule itself. This rule does
5 exist, and FPL is challenging whether or not Florida
6 contributes to pollution in Georgia and Alabama. So it is
7 challenging the rule's application to Southern Florida. And
8 I'm not sure, though, that, you know, the issue before -- I'm
9 not sure I entirely understand your question. I'm hoping that
10 by saying the issue before us is just whether the cost of
11 litigation should be passed through the clause, the cost of
12 FP&L challenging the regulation should be passed through the
13 clause.

14 COMMISSIONER BRADLEY: Well, when I say that I am
15 struggling with this more so from a public policy perspective,
16 I'm trying to decide if it is more cost-effective for us to
17 challenge the rule or less cost-effective for -- or more
18 cost-effective for us to just allow the rule to take place.

19 MR. BREMAN: That is the primary reason why staff is
20 recommending what it is. We don't know the answer to that
21 question today. We are not going to know it until everything
22 is finished, all the litigation is finished. We are not going
23 to know that. So what we are doing is we are saying we can't
24 answer the question today. We will just wait and see what the
25 outcome is.

1 MR. MELSON: Mr. Chairman.

2 CHAIRMAN BAEZ: And I just want to -- go ahead,
3 Mr. Melson. You might answer my question.

4 MR. MELSON: Let me try to take a swipe at it. I
5 think the legal issue you're faced with is whether this
6 qualifies as an environmental compliance cost as it is defined
7 in the statute. At this point all we have to go on is the
8 language of the statute. That is not language that this
9 Commission has ever been called on to construe before.

10 If in reading that language -- and I think you all
11 had a copy of it in front of you -- if you believe that
12 language is clear and unambiguous and leaves no room for
13 recovery of legal fees, that would be one possible decision.

14 Another possible decision is that that language,
15 like much language in these statutes, is not as clear as it
16 seems, and that a proper construction of it, taking into
17 account some of the policy considerations, would be broad
18 enough to include legal fees. And let me -- and I think
19 either one of those is probably defensible on appeal because
20 the court defers in the first instance to the agency's
21 construction of its own statute.

22 Let me tell you, any time you are dealing with
23 environmental compliance costs, you are going to have legal
24 fees involved in some way in determining how does this statute
25 apply, how does this rule apply, what do we need to do. And

1 at least in the range where you think the statute requires you
2 to do something, that is pretty clearly recoverable. We are
3 now down toward the other end of the spectrum where there is a
4 question -- it sounds as though whether EPA has properly
5 implemented the statute, and you have got a tension
6 potentially between the statute and the rule, and the company
7 is simply trying to use the legal means at its disposal to
8 resolve that issue.

9 If you view it that way, I think you could
10 appropriately interpret the statute to include it. On the
11 other hand, if you believe the statute on its face is clear and
12 unambiguous, then you would reach a different result. I think
13 staff is trying to come up with a middle ground that
14 recognized that there is room for argument about what this
15 statute really means.

16 CHAIRMAN BAEZ: Two questions. Because you sort of
17 answered it, but I want to make sure that I understand staff's
18 recommendation. And I think I agree with Commissioner Deason,
19 there are two issues here. First, interpreting the statute,
20 and second, the recovery, you know, as a matter of policy on
21 the recovery issue. And so your recommendation essentially
22 says, your primary anyway, essentially says, no, we don't have
23 authority in interpreting the statute. It is clear and
24 unambiguous that legal costs -- that at least the legal costs
25 that are the subject of this issue are not allowable as

1 compliance expenses. That would be interpreting the statute.

2 MS. STERN: Yes, that would be our secondary, not our
3 primary alternative recommendation, that legal costs now, you
4 know, don't go through the clause. They have not been
5 approved.

6 CHAIRMAN BAEZ: But there is a second part to your
7 recommendation that we can still allow recovery subject to the
8 conditions that you had --

9 MS. STERN: Well, what we had was a primary and an
10 alternate recommendation.

11 CHAIRMAN BAEZ: All right.

12 MS. STERN: The primary was the cost-effectiveness
13 thing where we said let the costs go through.

14 CHAIRMAN BAEZ: Okay. Right.

15 MS. STERN: If it shows -- if FP&L --

16 CHAIRMAN BAEZ: But does that primary necessitate an
17 interpretation of the statute that we do have the authority to
18 do it? Okay. I just -- I wanted to make --

19 MS. STERN: Yes. Yes, it does.

20 CHAIRMAN BAEZ: I hate getting alternative
21 recommendations orally. You know, you can't see them. I can
22 never keep them straight. All right. I hear you.

23 Commissioners, I guess if I understand all that has
24 been said correctly, and then trying to boil it down, I think
25 the recommendation is essentially either -- as Commissioner

1 Deason suggested, we either have the authority or we don't.
2 You are going to have to interpret the statute for yourselves,
3 and how you feel about it. If there is one -- if there is one
4 interpretation that would give you the authority to allow
5 recovery and another one wouldn't. Staff's recommendation, if
6 you do decide that recovery should be allowed because you have
7 interpreted the statute appropriately, they are suggesting a
8 -- I don't know what you would call it, not a true-up point,
9 but certainly --

10 MR. BREMAN: A cost-effectiveness test.

11 CHAIRMAN BAEZ: -- a cost-effectiveness test at the
12 end of the litigation, by which the company would have the
13 burden of showing this Commission that the expenses that were
14 laid out actually saved the ratepayers money. So there you
15 have the recommendations.

16 COMMISSIONER BRADLEY: I thought there were three.

17 CHAIRMAN BAEZ: No, there is just the primary and
18 alternative.

19 COMMISSIONER BRADLEY: There are two, a primary and
20 an alternative?

21 MS. STERN: There is also the possibility -- we are
22 not recommending this, but you also have the alternative to
23 vote in accordance with FP&L that all the costs go through
24 unconditionally.

25 CHAIRMAN BAEZ: Okay.

1 COMMISSIONER ARRIAGA: Mr. Chairman.

2 CHAIRMAN BAEZ: Commissioner Arriaga.

3 COMMISSIONER ARRIAGA: Please help me understand your
4 position, okay?

5 CHAIRMAN BAEZ: My position?

6 COMMISSIONER ARRIAGA: No, no.

7 CHAIRMAN BAEZ: Okay. I'm sorry.

8 COMMISSIONER ARRIAGA: You are very clear,
9 Mr. Chairman. You are always clear.

10 CHAIRMAN BAEZ: I was looking down. I didn't see
11 where you were looking.

12 COMMISSIONER ARRIAGA: Are you saying in
13 recommendation number one that this Commission does not have
14 the authority?

15 MS. STERN: Yes. In one of our recommendations we
16 say that the statute does not allow recovery of this type of
17 legal costs, the costs to initiate a lawsuit.

18 COMMISSIONER ARRIAGA: Right. If that were the case,
19 then why would you propose alternative number three? We still
20 don't have authority.

21 MS. STERN: You mean alternative number three
22 being --

23 COMMISSIONER ARRIAGA: The one that --

24 MS. STERN: The cost-effectiveness test?

25 COMMISSIONER ARRIAGA: Yes. I mean, you are asking

1 us -- you are telling us we don't haven't authority, but let me
2 give you a middle ground where you do have the authority. I
3 don't understand.

4 MS. STERN: We are saying that the Commission has the
5 option -- one possible way of looking at the statute is that
6 you don't think it is clear and unambiguous. You think there
7 is room for making policy and developing policy on this topic.
8 And, therefore, you have some latitude to -- that gives you the
9 latitude to entertain the cost-effectiveness test that we have
10 talked about. It's within your discretion.

11 CHAIRMAN BAEZ: Commissioner, let me -- and I sense
12 your frustration with having too many choices, and I often get
13 that when I'm at a restaurant someplace. Yes, somebody just
14 ought to tell me what to eat. I wish my mom were here. The
15 fact that you have alternatives is actually a good thing,
16 and --

17 COMMISSIONER ARRIAGA: Absolutely.

18 CHAIRMAN BAEZ: -- I would encourage you to see it
19 that way, if you don't, if you are having trouble feeling that
20 way. What the staff is trying to do is anticipate all
21 possibilities. And I think that just goes to point out how, as
22 Mr. Melson suggested, you can read the statute one way or the
23 other. It is all depending on how you feel personally. So the
24 staff is just trying to lay out alternatives for us in the
25 event that we interpret the statute one way or the other. We

1 do have to get some comfort from them that based on an
2 interpretation we can do what we feel we need to. So there.

3 Questions, comments, motions, emotions?

4 COMMISSIONER BRADLEY: Yes. And I'm looking at Power
5 and Light's response to this, and their response is that they
6 should only be allowed to recover prudently incurred
7 environmental compliance costs as it relates to legal expenses,
8 is that correct?

9 MS. STERN: Yes, that is correct.

10 COMMISSIONER BRADLEY: And one of the alternatives
11 that staff has proposed is that -- does your alternative
12 include prudently incurred costs or does it --

13 MR. BREMAN: That is the main objective of the
14 cost-effectiveness test. There has to be a way to finally
15 conclude that it was a prudent event. So when the litigation
16 is all over and said and done, we need to go back and review on
17 a total basis was it prudent to pursue it. Because there might
18 come a time, say sometime next year, where it becomes very
19 obvious that going forward is not the right thing to do
20 anymore. And at that time, then the company should stop. So
21 we are not going to have the answer, because the answer is
22 going to keep changing as facts change.

23 COMMISSIONER BRADLEY: Would that recommendation also
24 serve the purpose of discouraging a company from pursuing legal
25 action as it relates to this particular issue that we are

1 discussing?

2 CHAIRMAN BAEZ: Not necessarily, no.

3 COMMISSIONER BRADLEY: What does it do? What is the
4 difference between your recommendation and what Power and Light
5 is proposing?

6 MR. BREMAN: It clarifies for the company the
7 standard that it's going to be held to.

8 CHAIRMAN BAEZ: And, Jim, this is just to be clear,
9 on a year-to-year basis?

10 MR. BREMAN: Absolutely.

11 CHAIRMAN BAEZ: So assuming a five-year litigation
12 period, it is possible to recover four years and not five or
13 three and not -- so once we have made an issue of it is prudent
14 to go forward, those monies are passed through and they are not
15 subject to jeopardy on the back end?

16 MR. BREMAN: Yes, sir. As always these are projected
17 expenses.

18 CHAIRMAN BAEZ: A series of one-year contracts, if
19 you will. Okay.

20 Commissioners, if there are no further questions, we
21 can entertain a motion at this point.

22 COMMISSIONER DEASON: Mr. Chairman, I am prepared to
23 make a motion. At least, maybe, we can get some more
24 discussion.

25 CHAIRMAN BAEZ: Uh-huh.

1 COMMISSIONER DEASON: But, first of all, I'm real
2 hesitant to the say this, but I feel compelled to do so.

3 CHAIRMAN BAEZ: Compel away.

4 COMMISSIONER DEASON: I guess I'm a little
5 disappointed that this issue is even in front of us. Now, we
6 have had a great deal of philosophical and legal discussion,
7 and maybe it's beneficial, because maybe in the future when we
8 get an issue in front of us, we will have gone through this and
9 it will be a sound basis to go forward.

10 Mr. Chairman, in all honestly, \$170,000 is not the
11 dollar issue that I think merits this much discussion, other
12 than from a philosophical legal standpoint, but --

13 CHAIRMAN BAEZ: It is possible --

14 COMMISSIONER DEASON: -- I'm disappointed that FP&L
15 just did not say we think it is the right thing to do to
16 challenge this rule, and it is going to cost us \$170,000, but
17 that is probably not even going to change our recovery factor
18 if it is included or excluded, we are just going to do the
19 right thing.

20 Now, having said that, I understand that FPL has a
21 legal right to pursue it. Maybe some could argue that they
22 have an obligation to their stockholders to pursue it. So,
23 I'm not second guessing that. I guess I'm just expressing
24 some frustration that we have got these billions of dollars
25 that we have to -- issues that we have to decide that we have

1 spent so much time on \$170,000.

2 But having said that, the issue is important from a
3 legal standpoint, and I'm prepared to make a motion that this
4 Commission has the discretion to interpret the statute so as
5 to include consideration of prudently incurred litigation
6 costs as part of compliance costs. And the reason I say that
7 is that, as Mr. Melson pointed out earlier, there are going to
8 be a certain amount of legal costs involved in complying with
9 a rule or statute. The question is, if that is challenged, is
10 that a compliance cost? I think it is part of the definition
11 of compliance.

12 One could argue that in order to comply, you have to
13 have an understanding of the rule, and whether the rule is
14 consistent with the statute under which the rule was adopted.
15 If there is a legitimate argument that it is not -- that it
16 goes beyond or is not compliant with the underlying
17 authorizing statute in order to be compliant, it seems to me
18 that there is almost an obligation to challenge.

19 Also interlaced in this statute is a requirement
20 that this Commission only allow the recovery of a utility's
21 prudently incurred environmental compliance costs. I could
22 conceive an argument at some point to where if a utility, such
23 as FPL, or another utility did not challenge a rule and spent
24 the hundreds of millions of dollars, and at some point later
25 it was clarified that that rule was beyond the statutory

1 authority, and that another utility challenged it, and their
2 compliance bill was much less, would there be an argument
3 saying, FPL, you imprudently incurred hundreds of millions of
4 dollars because you did not challenge the rule, and it should
5 have been clear on its face to you that you were overcomplying
6 with the statute.

7 So to make a long story short, I believe that the
8 Commission has the discretion to consider these types of
9 compliance costs. Now, this would be just step one in our
10 two-step test that we have here, but that would be the motion.

11 CHAIRMAN BAEZ: Let's entertain the motion that is
12 strictly the interpretation of the statute, Commissioners.

13 COMMISSIONER BRADLEY: I would second the motion.

14 CHAIRMAN BAEZ: And there is a second. All those in
15 favor say aye.

16 (Unanimous affirmative vote.)

17 CHAIRMAN BAEZ: Any nays? No. Okay, good.

18 Commissioner Deason, then now maybe we can get -- or
19 Commissioners generally, maybe we can get down to the recovery
20 issue. There are, to my understanding, at least on the part
21 of staff, there are two. There is a wholesale, yes, or there
22 is that series of one year -- you know, you review that
23 \$170,000 projected figure on a year-to-year basis with the
24 contemplation that at some point it is entirely possible that,
25 you know, you're --

1 COMMISSIONER DEASON: Well, maybe I'm unclear as to
2 that third option, what we really gain from that that we don't
3 really already have, an inherent authority in these cost
4 proceedings to have ongoing jurisdiction. I just don't see
5 where it's an advantage in staff's recommendation to go through
6 this yearly cost-effective evaluation. And I think it sends
7 the wrong signal to management in making decisions of whether
8 these costs should be litigated or not. It is not whether you
9 win or lose. Did you prudently make the decision to challenge?
10 Did you pursue that challenge in a prudent way? Did you make
11 reliable coherent arguments? And you may win or lose, but did
12 you conduct the litigation in a professional, cost-effective
13 way?

14 I just have real problems about allowing cost on
15 whether you win or lose a case in court. I'm not so sure that
16 is a sound basis to go forward.

17 CHAIRMAN BAEZ: And I don't want to put words in
18 staff's mouth. I'm not sure that that was the implication,
19 that it was an all or nothing result-based review. But I think
20 I agree with you when you say, well, okay, then exactly how do
21 you -- well, this 170 was prudent, next year's isn't, and on
22 what basis. So I find it a little bit unworkable. It
23 sounds -- it sounds good because it does keep some level of
24 accountability on a going-forward basis, but I'm not sure --

25 COMMISSIONER DEASON: And I think that is part of our

1 ongoing jurisdiction over the clause. And at some point if
2 this case gets unmanageable, and just becomes a big sinkhole,
3 and millions of millions of dollars are being thrown down it, I
4 think we're in the position to reconsider that. And not only
5 that, maybe even reconsider some monies that had previously
6 been found to be prudent.

7 CHAIRMAN BAEZ: Sure.

8 COMMISSIONER DEASON: I don't necessarily think it is
9 a good thing to routinely go in and encounter that type of
10 review, but depending the facts of the situation.

11 CHAIRMAN BAEZ: And the ability is always there.

12 COMMISSIONER DEASON: I think the ability is there
13 for us to do that.

14 CHAIRMAN BAEZ: Very well.

15 COMMISSIONER BRADLEY: I will second it.

16 CHAIRMAN BAEZ: I'm not sure that we have --

17 COMMISSIONER DEASON: That's a motion at this point.

18 CHAIRMAN BAEZ: Commissioners, any statements or
19 questions or comments?

20 COMMISSIONER EDGAR: Let me jump in for a moment.
21 Thank you, Mr. Chairman. Just to say as evidenced from my vote
22 on the first motion, did disagree with the more narrow
23 interpretation of the statute. I do think that we have broader
24 discretion. And I also think more on point, having worked with
25 our federal environmental protection agency some in the past

1 that --

2 CHAIRMAN BAEZ: They are not always correct, are
3 they?

4 COMMISSIONER EDGAR: -- some litigation in terms of
5 rules and interpretation and modeling is part of compliance and
6 coming into compliance. So I disagree with the interpretation
7 of the statute on both points there from what I think I heard
8 from the discussion from the parties and the discussion here at
9 the bench.

10 CHAIRMAN BAEZ: Very well.

11 COMMISSIONER EDGAR: With that said, what I was
12 struggling with is this discussion of at this point in time in
13 my mind is it most appropriate to funnel these costs through
14 the clause, again, at this time. Does it raise to the
15 threshold with what is before us now? And I'm not sure that it
16 does, realizing that there is the allowance in base rates for
17 some legal costs. So if I'm hearing right, this discussion of
18 an ongoing, perhaps, review with the opportunity to take it up
19 further down the road has some appeal.

20 COMMISSIONER BRADLEY: Ongoing. I think I heard from
21 Commissioner Deason, and I thought he was putting forth a
22 motion that would allow for the recovery, but that would also
23 include -- would allow this Commission to be involved on a
24 continuous basis if a lawsuit is ongoing for three, four, five
25 years. And we would only give consideration to prudently

1 incurred costs. And if at some point we, through discovery,
2 determined that the costs are not beneficial, or efficient, or
3 effective, then this Commission would have the authority to
4 also review and to not allow those costs. But I think what you
5 were discussing is that we would stay involved actively in
6 determining prudence and effectiveness and efficiency.

7 COMMISSIONER DEASON: My earlier comments were more
8 of a general nature in regards to the question of just whether
9 the Commission has the discretion. And if we do, how we would
10 proceed. But having said that, I think that, obviously, if
11 it's applicable in the general, it would be applicable in this
12 specific situation as well. And that there is an ongoing
13 obligation of this Commission of exercising our ongoing
14 jurisdiction to continue to have that review.

15 The question that I have is to whether these
16 specific costs that are in front of us right now, this
17 \$170,000, if these costs are somehow already being recovered
18 in base rates or not. I don't have a firm answer to that. I
19 don't think anyone -- I mean, we have heard arguments. I
20 think Mr. Butler makes a very plausible argument that the
21 timing would state that, no, these costs are not included.
22 But, then, the inclusion of litigation costs in base rates are
23 not for specific cases, but for ongoing operations of a
24 utility of this size and the types of services that they
25 provide.

1 I'm of the inclination to say that these costs are
2 not part of base rates, just because of the timing. But at
3 the same time, if it can be shown through an audit or a review
4 that we have made allowances of challenges to environmental
5 rules in the past, and that it is somehow built into whatever
6 is included in ongoing O&M expenses and base rates, I would be
7 amenable to getting that information. I think that is going
8 to take some further review, some obtaining of information
9 that's not presently in front of us at this time. So, if we
10 were to allow the recovery of the \$170,000, I would make it
11 contingent upon that type review taking place, and the
12 Commission revisiting it at some future time based upon
13 whatever information that review would show.

14 COMMISSIONER BRADLEY: Is that a motion?

15 COMMISSIONER DEASON: I would move that we would
16 allow recovery of the \$170,000 contingent upon a review to take
17 place as to whether any or all of that \$170,000 is part of a
18 base rate recovery through an ongoing allowance of
19 environmental compliance litigation costs.

20 COMMISSIONER BRADLEY: Second.

21 CHAIRMAN BAEZ: There is a motion and a second to
22 allow -- and, again, Commissioner Deason, I want to understand
23 your motion. We are dealing with this year's allowance only?

24 COMMISSIONER DEASON: (Indicating yes.)

25 CHAIRMAN BAEZ: And then you would have that review

1 completed before -- I mean, the question that you put out, or
2 the question that you feel needs to be answered would be we
3 would have an answer for next fuel --

4 COMMISSIONER DEASON: It would be my desire to have
5 an answer to that by the next fuel adjustment proceeding. And,
6 obviously, that is a question that not only our staff would be
7 involved in, I would think that there would be -- to the extent
8 that any party wanted to conduct discovery and to provide
9 information to the Commission in the form of expert testimony,
10 that that is something that is certainly available. And I'm
11 sure that the Commission would be pleased to get that
12 information.

13 But as far as right now, the \$170,000 would be
14 allowed to be recovered. And if there are going to be
15 additional litigation costs throughout the course of this
16 challenge, which I would anticipate that would be the case,
17 that those amounts would have to be identified and presented
18 to the Commission for consideration at a future hearing.

19 CHAIRMAN BAEZ: Commissioners, you all heard the
20 motion and an explanation of what is contemplated by it. There
21 is a motion and second. All those in favor say aye.

22 COMMISSIONER DEASON: Aye.

23 COMMISSIONER BRADLEY: Aye.

24 COMMISSIONER ARRIAGA: Aye.

25 CHAIRMAN BAEZ: Aye.

1 COMMISSIONER EDGAR: Nay.

2 CHAIRMAN BAEZ: All right. And a nay. The motion
3 carriers 4-to-1.

4 Now, we can move on to --

5 MS. STERN: We have four other issues.

6 CHAIRMAN BAEZ: Four other outstanding issues.

7 MS. STERN: But they are dealing with the same topic.
8 They are the nonfirm credit issues.

9 CHAIRMAN BAEZ: Very well.

10 MS. STERN: And I will tell you what those issue
11 numbers are. 9B, 9D, 10D, and 10E. And Elizabeth Draper will
12 be making the recommendations.

13 CHAIRMAN BAEZ: 9B, 9D, 10B, and 10E.

14 MS. DRAPER: And 10F, Commissioners. Elizabeth
15 Draper with the staff. It is Issues 9B, 9D, that's for
16 Progress. And for FP&L, Issues 10D and 10F.

17 Commissioners, these four issues deal with the
18 allocation of certain environmental costs. Staff, FIPUG, and
19 the utilities agree on how the costs should be allocated.
20 However, FIPUG raised an additional point to that issue that
21 nonfirm credits are appropriate for the environmental
22 cost-recovery clause.

23 We heard testimony from the utility witnesses that
24 the levels of the existing credits are reviewed annually in
25 the conservation docket and are based on the awarded cost of

1 new production plant. The credits are being recovered from
2 all ratepayers through the energy conservation clause. Staff
3 does not believe it is appropriate to address the issue of
4 nonfirm credits in this docket. No evidence has been
5 presented that the current credits are no longer appropriate
6 or that additional credits in this docket are appropriate.
7 That concludes my recommendation.

8 CHAIRMAN BAEZ: Ms. Draper, just to be clear, the
9 recommendation is on a wholesale basis for these outstanding
10 issues?

11 MS. DRAPER: Yes, all four of them.

12 CHAIRMAN BAEZ: All right. Commissioners, you have a
13 recommendation on 9B, 9D, 10B, and 10F.

14 COMMISSIONER DEASON: Mr. Chairman, I would move
15 approval of staff's recommendation.

16 COMMISSIONER BRADLEY: Second.

17 CHAIRMAN BAEZ: And a second. There is a motion and
18 second. All those in favor say aye.

19 (Unanimous affirmative vote.)

20 CHAIRMAN BAEZ: And that is all the outstanding
21 issues from 07?

22 MS. DRAPER: Yes, sir, that's it.

23 MR. BREMAN: Not exactly.

24 CHAIRMAN BAEZ: Okay.

25 MR. BREMAN: We have the generic issues that absorb

1 the consequences of your votes on the company-specific issues.

2 CHAIRMAN BAEZ: So you need administrative --

3 MR. BREMAN: Issues 2, 3, 4, and 7 are the generic
4 issues that aren't fully addressed at this time. All the
5 numbers presented by the companies in those issues are
6 consistent with your vote today, even Issue 7, which is the
7 factors that would be implemented. So staff would recommend
8 that you approve the companies' numbers as shown.

9 CHAIRMAN BAEZ: As shown on 2, 3, 4, and 7?

10 MR. BREMAN: Yes, sir.

11 CHAIRMAN BAEZ: Commissioners, staff has represented
12 that consistent with our previous votes and the stipulations
13 that the numbers represented on Issue 2, 3, 4, and 7 are, in
14 fact, consistent with those votes, and they are recommending
15 approval as stated. Is there a motion?

16 COMMISSIONER DEASON: So moved.

17 COMMISSIONER BRADLEY: Second.

18 CHAIRMAN BAEZ: Moved and seconded. All those in
19 favor say aye.

20 (Unanimous affirmative vote.)

21 CHAIRMAN BAEZ: Do we have any other issues? That's
22 it?

23 All right. I want to thank staff and the parties
24 for their input, and all the hard work on this docket. And
25 you, Commissioners, as well.

1 Commissioners, it is almost 1:00 o'clock. I think
2 we can break for lunch and come back at -- let's come back at
3 2:00, and we will reconvene at 2:00 o'clock and begin the 01
4 docket.

5 MR. BUTLER: Thank you, Mr. Chairman.

6 (Hearing in Docket 050007-EI concluded.)

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

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

9

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


14

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

19

DATED THIS 16th day of November, 2005.

20



21

JANE FAUROT, RPR

22

Official FPSC Hearings Reporter
FPSC Division of Commission Clerk and
Administrative Services
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