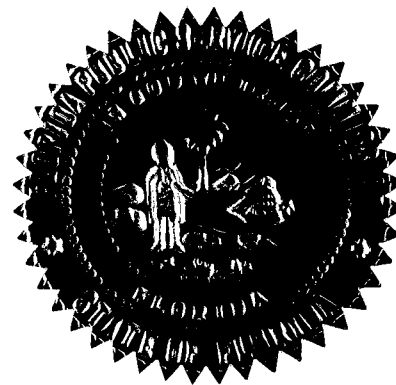


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060658-EI

In the Matter of:

PETITION ON BEHALF OF CITIZENS OF THE
STATE OF FLORIDA TO REQUIRE PROGRESS
ENERGY FLORIDA, INC. TO REFUND CUSTOMERS
\$143 MILLION.



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PROCEEDINGS: PREHEARING

BEFORE: COMMISSIONER KATRINA J. MCMURRIAN
Prehearing Officer

DATE: Wednesday, March 21, 2007

TIME: Commenced at 1:30 p.m.
Concluded at 4:18 p.m.

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

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

DOCUMENT NUMBER-DATE

FLORIDA PUBLIC SERVICE COMMISSION

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4 33733-4042, appearing on behalf of Progress Energy Service Co.,
5 LLC.

6 J. MICHAEL WALLS, ESQUIRE and DIANNE M. TRIPLETT,
7 ESQUIRE, Carlton Fields Law Firm, Post Office Box 3239, Tampa,
8 Florida 33601-3239, appearing on behalf of Progress Energy
9 Florida, Inc.

10 MICHAEL B. TWOMEY, ESQUIRE, AARP, Post Office Box
11 5256, Tallahassee, Florida 32314-5256, appearing on behalf of
12 AARP.

13 JOHN W. MCWHIRTER, JR., ESQUIRE, Florida Industrial
14 Power Users Group, c/o McWhirter Reeves, 400 North Tampa
15 Street, Suite 2450, Tampa, Florida 33602, appearing on behalf
16 of the Florida Industrial Power Users Group.

17 JOE MCGLOTHLIN, ESQUIRE, and STEVE BURGESS, ESQUIRE,
18 Office of Public Counsel, c/o The Florida Legislature, 111 West
19 Madison Street, Room 812, Tallahassee, Florida 32399-1400,
20 appearing on behalf of the Citizens of the State of Florida.

21 CECILIA BRADLEY, ESQUIRE, Senior Assistant Attorney
22 General, Office of the Attorney General, The Capitol - PL01,
23 Tallahassee, Florida 32399-1050, appearing on behalf of the
24 Office of the Attorney General.

25

1 APPEARANCES (continued):

2 JAMES W. BREW, ESQUIRE, Brickfield Law Firm, 1025
3 Thomas Jefferson St., NW, Eight Floor, West Tower, Washington,
4 DC 20007, appearing on behalf of PCS Phosphate - White Springs.

5 LORENA HOLLEY, ESQUIRE, JENNIFER BRUBAKER, ESQUIRE,
6 LISA BENNETT, ESQUIRE, and KEINO YOUNG, ESQUIRE, FPSC General
7 Counsel's Office, 2540 Shumard Oak Boulevard, Tallahassee,
8 Florida 32399-0850, appearing on behalf of the Commission
9 Staff.

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P R O C E E D I N G S

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2 COMMISSIONER McMURRIAN: Call this prehearing to
3 order.

4 Staff, would you please read the notice. Take your
5 time, it's fine.

6 MS. BENNETT: I thought I had pulled it out.

7 COMMISSIONER McMURRIAN: This is probably a good time
8 to tell everyone that I think we are going to be here a little
9 while today.

10 MS. BENNETT: Right on top of the list. On this date
11 and time, the Docket Number 060658-EI has been noticed by
12 Florida Administrative Weekly and by e-mail to the parties that
13 the petition on behalf of the Citizens of the State of Florida
14 to require Progress Energy Florida, Inc. to refund to customers
15 143 million. The prehearing conference for this date and place
16 scheduled.

17 COMMISSIONER McMURRIAN: At this time we will take
18 appearances. And I guess we will start with staff and go that
19 way.

20 MS. BENNETT: On behalf of staff, Lisa Bennett, Keino
21 Young and Lorena Holley. And Jennifer Brubaker.

22 COMMISSIONER McMURRIAN: Thank you.

23 MR. BURNETT: Good afternoon, Commissioner. John
24 Burnett on behalf of Progress Energy Florida. To my left is
25 Dianne Triplett also on behalf of Progress Energy Florida, and

1 to my rear, Michael Walls.

2 MR. McGLOTHLIN: Good afternoon. Joe McGlothlin for
3 the Office of Public Counsel. He is not here today, but I
4 anticipate that Steve Burgess will make an appearance at the
5 hearing.

6 MR. McWHIRTER: John McWhirter on behalf of the
7 Florida Industrial Power Users Group.

8 COMMISSIONER McMURRIAN: Thank you.

9 MR. BREW: Good afternoon. James Brew on behalf of
10 PCS Phosphate White Springs.

11 MR. TWOMEY: Commissioner, Mike Twomey on behalf of
12 AARP.

13 COMMISSIONER McMURRIAN: All right. And I note for
14 the record that pursuant to an order issued on March 15th, FPL,
15 FPUC, TECO, and FRF are all granted active party status in this
16 docket and were excused from participation.

17 Staff, can you help me, are there any other parties
18 to the proceeding that aren't physically present that we need
19 to address one way or the other?

20 MS. HOLLEY: It doesn't appear that -- the
21 representatives from the Attorney General's office, they
22 basically adopted all of OPC's positions, so we will just
23 reflect their positions as such.

24 COMMISSIONER McMURRIAN: Okay. I guess we will
25 proceed to preliminary matters.

1 Staff, are there preliminary matters we should take
2 up before we proceed to the draft prehearing order?

3 MS. BENNETT: The only preliminary matters that staff
4 is aware of are the pending motions. There is a motion to
5 strike by Progress Energy and a request for oral argument on
6 that motion to strike. Also, there is a Progress Energy
7 Florida motion to take up Witness Heller's testimony out of
8 order. I would suggest that we could deal with that motion
9 when we get to the order of witnesses in the prehearing order.

10 COMMISSIONER McMURRIAN: Okay. With regard to the
11 motion to strike, I think we have talked about this before, and
12 I believe you were going to let the parties know that we will
13 take that up at the end of the prehearing conference and allow
14 oral argument on that.

15 I guess at this time we will go ahead and proceed
16 through the draft prehearing order unless any other parties
17 have any preliminary matters they want to bring up at this
18 time.

19 MR. McGLOTHLIN: You may consider this a preliminary
20 matter. I don't believe that the draft of the prehearing order
21 I saw mentioned opening statements. We request an opportunity
22 to make an opening statement and I request to be allowed 10 to
23 12 minutes for that purpose.

24 COMMISSIONER McMURRIAN: And we did have that
25 somewhere where we were going to bring that up, but I think it

1 is just as well to take it up now.

2 MS. HOLLEY: I think it's generally included under
3 the ruling section, and we can include that as such if that is
4 your preference.

5 COMMISSIONER McMURRIAN: Okay. Perhaps we will bring
6 it up then, Mr. McGlothlin, just because it may be impacted by
7 other decisions that we make today.

8 In that case, I guess let's proceed through the draft
9 prehearing order. Are there any changes with respect to
10 Sections I through III, case background, conduct of
11 proceedings, or jurisdiction?

12 MR. MCGLOTHLIN: On Page 3, there's a reference to
13 limit of five minutes for summary of testimony. In this
14 particular case, we have two witnesses whose scope of testimony
15 is very broad, and I believe five minutes would be not a
16 reasonable limitation for them, and I request that each of
17 those gentleman have ten minutes for each of their summaries.

18 COMMISSIONER McMURRIAN: I guess we might as well
19 take this up now.

20 Progress, do you have any response to that?

21 MR. BURNETT: Thank you, Commissioner.

22 Actually ten minutes for each witness sounds fine to
23 Progress, as well.

24 COMMISSIONER McMURRIAN: Any other comments on that
25 from the parties?

1 MR. McWHIRTER: I concur with both that you need more
2 than five minutes. I don't know that ten is enough. Is it
3 enough for Mr. Sansom?

4 COMMISSIONER McMURRIAN: I'm not willing to go past
5 ten. I will go ahead and let you know that. I mean, I have a
6 lot of concerns, and staff at least is familiar with the
7 concerns I have raised in other dockets. You all may not have
8 been parties to those, that I feel like the longer we allow for
9 witness summaries, the more likely it is the witness veers
10 outside the scope of his testimony, and then the ten minutes of
11 the witness summary becomes twenty minutes with all the
12 objections, and so I have some concerns about that. I'm
13 definitely not willing to go past ten minutes. And it may be
14 that certain witnesses need more time and others don't, I don't
15 know. I would be willing to talk about that.

16 MR. MCGLOTHLIN: Well, that is certainly true. And
17 in making the request I had in mind Witnesses Sanson and Barsin
18 whose testimony covers the most ground. The other witnesses I
19 believe we would be willing to live with the five minutes or
20 thereabouts.

21 COMMISSIONER McMURRIAN: Are there any other parties
22 that have concerns about particular witnesses needing more
23 time? By the same token, if we were to do that and give two of
24 OPC's witnesses time to have a longer summary, then we can do
25 that for the other parties, as well.

1 MR. BURNETT: Yes, Commissioner. Again, I felt like
2 I probably needed ten for all. I could certainly try not to
3 use it, if you were so inclined to give it. Or, you know, if I
4 could take a moment I could try to narrow that to certain
5 witnesses. But I could at least think of five of mine that I
6 would like to have ten for.

7 COMMISSIONER McMURRIAN: Before I turn to staff, does
8 anyone else have input on that with regard to any of the
9 witnesses? I know we have one staff witness, so staff is going
10 to want to weigh in.

11 Mr. Twomey.

12 MR. TWOMEY: I'm sorry. Are we supposed to speak up
13 if we want the same treatment as everybody else?

14 COMMISSIONER McMURRIAN: Well, do you have a witness?

15 MR. TWOMEY: Just one.

16 COMMISSIONER McMURRIAN: Yes.

17 MR. TWOMEY: And I'm confident he wouldn't take ten
18 minutes, but he should have that opportunity, I think.

19 COMMISSIONER McMURRIAN: I understand.

20 Maybe let's perhaps come back to that, but, staff,
21 you can go ahead and tell me what your recommendation is on the
22 length of time.

23 MS. HOLLEY: If each of the witnesses listed was
24 given a ten-minute summary, I think it would be under just four
25 hours just on summaries. So I think that might be a little too

1 much. We would prefer maybe limiting it to certain witnesses
2 having a longer amount of summary time, but to the extent
3 possible limiting it to five minutes or under for other
4 witnesses that maybe whose testimony isn't as long as the
5 others.

6 COMMISSIONER McMURRIAN: Perhaps everyone can think
7 about that a little bit more and we will come back to it at the
8 time of rulings, and it gives you a chance -- and at some point
9 we may be taking a break anyway and we will get into that
10 later, and that will give you an opportunity to sort of look
11 through and see if there are certain witnesses. But, of
12 course, I believe that with respect to AARP, for instance, that
13 only has one witness, I think to the extent we give any witness
14 on the other side ten minutes that you would also have ten
15 minutes.

16 MR. TWOMEY: I will repent here and commit to him
17 taking no more than five minutes if he takes that long.

18 COMMISSIONER McMURRIAN: Thank you.

19 Ms. Bradley, did you want to make an appearance? I
20 saw you --

21 MS. BRADLEY: I'm sorry. I'm here, but we don't have
22 any witnesses, so whatever is okay with the other folks is fine
23 with us.

24 COMMISSIONER McMURRIAN: Thank you. I just wanted to
25 give you that opportunity to make an appearance.

1 MS. BRADLEY: Thank you.

2 COMMISSIONER McMURRIAN: You're welcome.

3 Okay, staff, I suppose we will come back to that when
4 we get to the ruling section and we may talk a little bit more
5 about that then, and that will give everyone time to consider
6 the length of time they need for witness summaries.

7 Okay. With respect to Section IV -- let's just take
8 up Section IV. Are there any revisions to Section IV or any
9 comments to the prehearing order? Hearing none, Section V,
10 prefiled testimony and exhibits.

11 And, Mr. McGlothlin, that was where the five minutes
12 came up, right?

13 MR. MCGLOTHLIN: It was actually in an earlier
14 section, I believe.

15 COMMISSIONER McMURRIAN: Okay. Section VI, on the
16 order of witnesses, I believe this is where we would take up
17 Progress's motion with respect to Witness Heller and
18 discussions of whether to take direct and rebuttal at the same
19 time.

20 But, staff, I will let you sort of lead me through
21 the issues we should take up here.

22 MS. BENNETT: The first issue I would suggest we take
23 up is Progress Energy's motion to take Witness Heller's
24 testimony out of order. It is in order to accommodate his
25 observance of Passover, which begins at sundown on Monday,

1 April 2nd.

2 No party has objected to this motion with the
3 understanding from OPC that Mr. Heller's testimony will be
4 heard only after OPC's first witness, which is Mr. Sansom.
5 Assuming there's no further objections from the parties, PEF's
6 motion should be granted and Mr. Heller's testimony will be
7 listed as taken out of order as the second witness on the first
8 day of this hearing, Monday, April 3rd, following OPC's first
9 witness. And that's assuming that no party has an objection.

10 COMMISSIONER McMURRIAN: Do any parties wish to enter
11 an objection at this time?

12 MS. TRIPLETT: Well, actually not an objection, but
13 just a clarification. The motion is really not to necessarily
14 have Mr. Heller testify second, but actually to testify on
15 Wednesday. He agreed that he would make accommodations to come
16 in on Wednesday, because the religious rules are not as strict
17 on Wednesday. And so we just want, whenever he comes, to be
18 able to come at whatever point we are in case we don't get to
19 our case at that point, and then he can be heard on that day.

20 COMMISSIONER McMURRIAN: So if I'm understanding you
21 correctly, we wouldn't necessarily be taking him up after
22 Witness Sansom.

23 MS. TRIPLETT: No, not directly after. I mean, it
24 would be, but I would imagine there would be other witnesses in
25 between.

1 COMMISSIONER McMURRIAN: Right. Okay.

2 MS. HOLLEY: We can reflect him being taken up first
3 on Wednesday, depending on where we are in the order of the
4 witnesses. Would that --

5 MS. TRIPLETT: I only hesitate because I'm not sure
6 what the plane situation -- because he literally will be flying
7 in on Wednesday.

8 MS. HOLLEY: We will reflect him being taken up
9 sometime on Wednesday.

10 MS. TRIPLETT: Yes.

11 COMMISSIONER McMURRIAN: Do parties have any
12 objections given that revision?

13 MR. McGLOTHLIN: No objection. We discussed this
14 with counsel for Progress Energy and we have agreed to it.

15 COMMISSIONER McMURRIAN: Okay. Then we will show
16 that in the ruling section as being granted with that
17 clarification.

18 MS. TRIPLETT: Thank you, Commissioner.

19 MS. BENNETT: And, Madam Commissioner, my
20 understanding is that that would be direct and rebuttal
21 testimony that would be taken at the same time on Wednesday, is
22 that correct?

23 COMMISSIONER McMURRIAN: Progress?

24 MS. TRIPLETT: Yes, that's correct.

25 COMMISSIONER McMURRIAN: That seems like a good time

1 to go ahead and bring up the direct and rebuttal being taken up
2 together. It looks as if with respect to some parties that
3 that doesn't really affect very many witnesses, but I still
4 want to still give you a chance to talk about whether you have
5 a recommendation as to whether you would like them taken up at
6 the same time or you would like them done in the direct and
7 rebuttal order.

8 MR. MCGLOTHLIN: This is Joe McGlothlin for OPC. I
9 feel strongly that we should have the opportunity to present
10 rebuttal separately after the Progress Energy witnesses are
11 heard.

12 MR. TWOMEY: And, Madam Chair, AARP would support
13 Public Counsel in that. Having observed a lot of these
14 hearings, I think the continuity of the natural flow of the
15 cases would benefit by taking them in the proper order.

16 COMMISSIONER McMURRIAN: Progress, do you have --

17 MR. BURNETT: No, ma'am, no objection.

18 COMMISSIONER McMURRIAN: Well, I am, of course,
19 concerned about the length of time that we are sort of setting
20 up for all of these things with the witness summaries and
21 taking direct and rebuttal separately, but it doesn't appear in
22 this case it impacts that many witnesses anyway. It looks like
23 with OPC's witness it is only Witness Sansom that has both
24 direct and rebuttal, am I correct?

25 MR. MCGLOTHLIN: That's correct. And Mr. Sansom

1 rebuts several of the witnesses to follow, so it is rather
2 cumbersome to have him try to anticipate all of that and have
3 it make sense for the listener.

4 COMMISSIONER McMURRIAN: Yes, I agree. I prefer the
5 flow of direct and rebuttal. That's just my preference. And I
6 realize that sometimes in order to save time and when the case
7 justifies it, that we can do that, but we will show that in
8 the -- would that need to be in the ruling section or in this
9 section that we would take the direct and rebuttal separately?

10 MS. BENNETT: We will include it in both the ruling
11 section and in the witness section. We will note who has
12 been --

13 COMMISSIONER McMURRIAN: Thank you. Are there any
14 other issues that we need to take up with respect to the order
15 of witnesses?

16 MS. HOLLEY: Just the possibility of the excusal of
17 witnesses. Staff is working with the parties. We believe that
18 progress and OPC may be able to stipulate to Progress's Witness
19 Lori Cross and OPC's Witness Patricia Merchant. We are still
20 getting confirmation. If that is the case, then we will
21 confirm that none of the Commissioners have any questions for
22 these witnesses, and, if so, we will be able to excuse them.
23 And at this time those are the only two witnesses that we are
24 aware of. We will obviously welcome going forward any other
25 witnesses that the parties may believe they could stipulate to.

1 COMMISSIONER McMURRIAN: Well, let's just ask. Mr.
2 Burnett, do you have any comments regarding specifically
3 Witness Cross and Witness Merchant or other witnesses?

4 MR. BURNETT: No, ma'am. It is my understanding by
5 speaking with Mr. McGlothlin that we are likely to reach a
6 stipulation if we haven't already with respect to Ms. Cross,
7 but I'm not aware of any others.

8 MR. MCGLOTHLIN: I can address that. We are prepared
9 to stipulate to the adjustment to the methodology that
10 Ms. Merchant sponsored that's made by Witness Cross, so that
11 there is no dispute as to how the interest factor should be
12 computed to any refund amount that may be determined in the
13 case, and we don't require Ms. Cross to make an appearance.

14 COMMISSIONER McMURRIAN: Other parties want to weigh
15 in? So if anyone has -- maybe I should put it this way, are
16 there any parties that have an objection to Witnesses Lori
17 Cross and Patricia Merchant being reflected as stipulated with
18 the understanding that staff will contact each of the
19 Commissioners and see if they have any questions for these
20 witnesses that would require them to appear? Anyone? Okay.

21 MS. HOLLEY: We'll notify the parties prior to the
22 hearing if those witnesses are excused.

23 COMMISSIONER McMURRIAN: Thank you.

24 And, also, one remaining issue with respect to the
25 list is regarding the issue numbers, and I think we will have

1 to come back to that after we talk about the issues themselves,
2 but I think we will have to set some kind of a deadline after
3 we get the issues nailed down to have parties give us which
4 issues are addressed by which of their witnesses. So I think
5 that's something we are going to have to do later, and we will
6 talk about setting a deadline for that.

7 On Section VII, basic positions, are there any
8 changes or comments?

9 Mr. Twomey.

10 MR. TWOMEY: Yes, ma'am. I will give to staff and
11 the parties separately a shortened edition to AARP's adoption
12 of Public Counsel's position just restating the belief that if
13 there is a disallowance or refund required that there should be
14 a penalty associated with it.

15 COMMISSIONER McMURRIAN: Any other comments?

16 Well, Mr. Twomey, when will you be able to give staff
17 the revision? Maybe that should go along with the other things
18 that we may have filed, so I guess we can talk about that
19 later. Sorry.

20 Okay. Section VIII, on issues and positions. Give
21 me a moment. I'm not even going to ask if people want to
22 address this section of the order, and assume that all parties
23 probably do want to go through these issues. I guess the best
24 way to do this, given the fact that I've reviewed the memos
25 that the parties have filed on the issues and taken those into

1 consideration, share with you what my thinking is on how to lay
2 this out.

3 After reviewing all the comments, I believe that it
4 would be best to continue with Issue 1 as worded as sort of a
5 general issue, but at the same time have subtopics sort of
6 within Issue 1. And my thinking is not to have questions and
7 worry about the wording and whether it's leaning one way or the
8 other, but to have topic areas to address under Issue 1 to make
9 sure that there is a road map, as Mr. McGlothlin has suggested,
10 for the Commissioners to know what factual issues are at issue
11 within the ultimate decision of whether or not it was a prudent
12 decision. And I'm probably not being clear, and it's going to
13 take us awhile to get that kind of a list arranged.

14 It may be appropriate at this time to take a break
15 and allow people to sort of get their thoughts together about
16 how to do that, including staff, because I haven't given them
17 any notice of this, either. But I guess I will let you speak
18 to that if you have got any questions or concerns you want to
19 raise with me. The remaining issues, I believe we still would
20 look at how to -- we can still look at those and see if there
21 is anyway to amend those. But my priority is with respect to
22 Issue 1 and making sure that the facts in dispute are sort of
23 reflected as subtopics.

24 But, again, I don't prefer going with the wording as
25 it has been laid out by the parties, because I think there are

1 some good arguments on each side as to how the issues are
2 worded are somewhat complicated, let's put it that way. But I
3 guess at this time, if you want to give me feedback on that
4 sort of approach that I would appreciate it, and then we will
5 possibly give time for a break to try to put our thoughts
6 together in that area.

7 MS. BRUBAKER: Commissioner McMurrin, may I ask a
8 point of clarification?

9 COMMISSIONER McMURRIAN: Sure.

10 MS. BRUBAKER: When you say an issue with topics, is
11 it your anticipation that each of those topics would
12 essentially serve as a subissue which would have a number of
13 votes, or a single issue that have topics which help guide and
14 focus the discussion with a single vote on the Issue 1?

15 COMMISSIONER McMURRIAN: That's a good question.
16 What I see as being most helpful is a vote on Issue 1 in its
17 totality, but not separate votes on the topic areas. I think
18 there are a lot of factual issues in dispute that have been
19 laid out by the parties, proposed issues, but I don't see it as
20 necessary to necessarily vote on each of these topic areas.

21 In fact, an example that was given to me was -- and
22 some of you are familiar with this and maybe some not, so I
23 will try to explain it. In water and wastewater cases when we
24 determine whether or not the quality of service is
25 satisfactory, we look into, you know, three sort of subtopics

1 within that that sort of lead us to whether we think that the
2 satisfactory standard or unsatisfactory has been met.

3 And there's no clear guidelines that if you show that
4 it's unsatisfactory in this one area of the three that that
5 leads you to an unsatisfactory conclusion. But the
6 Commissioners are allowed to look at all three aspects and
7 weigh them together and then decide ultimately if it is
8 satisfactory or not. And that's sort of where my thinking is,
9 is that, that you have a good place.

10 The purpose of having the subtopics or the topic
11 areas, it would be clear to the parties that this is a place
12 where I can lay out my arguments with respect to this. For
13 instance, on design specifications of Crystal River 3 and 4,
14 that you can argue what you believe it was designed to do, and
15 the other side can argue what they believe it was designed to
16 do, and it is a good place holder to make those arguments. And
17 then the Commission can look at that, and it is a more clear
18 road map of the issues in dispute in this case, as Mr.
19 McGlothlin suggested. But, no, I wasn't perceiving a vote on
20 each topic area.

21 MR. MCGLOTHLIN: Would you entertain some comments on
22 that?

23 COMMISSIONER McMURRIAN: Certainly. That was my
24 intent was to do that, but you can certainly jump in.

25 MR. MCGLOTHLIN: I believe the topics that you have

1 suggested, I'm willing to work within that framework, and I
2 think it has the potential, perhaps, of finding a way around or
3 through what might be a contentious session as to rewording
4 each phrase or sentence, and so I think that part of it is
5 workable.

6 When you say, though, that you don't anticipate a
7 ruling on each topic, that concerns me. Because, on the one
8 hand, the topics would then address the need to inform and
9 educate Commissioners because it serves as a road map, but at
10 the end of the case there needs to be a ruling on what are some
11 disputed facts.

12 To use an example, let's say one of the topics is
13 price and availability of western sub-bituminous coal versus
14 CAPP coal. And one side says sub-bituminous was available and
15 cheaper, and the other side says not available, and even if
16 available it was more expensive. And that's litigated, and the
17 witnesses come and go, and the staff recommendation is written,
18 prepared, and the Commissioners convene, and the only thing
19 they rule on is was the utility prudent or not.

20 And then the parties can't really ascertain what
21 happened to the factual dispute, which way did the Commission
22 rule. When that topic is one of probably 12 or 15 by the time
23 we get finished, how does the staff prepare a written order
24 that resolves the facts at dispute unless it is teed up and
25 voted on at the end of the case?

1 MR. BURNETT: Commissioner, may I respond and give
2 you some feedback, as well?

3 COMMISSIONER McMURRIAN: Sure. Well, go ahead, Mr.
4 Burnett.

5 MR. BURNETT: Commissioner, I agree with the first
6 part of Mr. McGlothlin. I think that your idea may be a way to
7 avoid what has been a stalemate thus far. However, I think
8 what I hear Mr. McGlothlin saying, though, is it's a good idea,
9 but I still want to go with what I have proposed.

10 I think what I'm envisioning you saying,
11 Commissioner, is that you may have after Issue 1, in
12 determining Issue 1, the Commission may consider the following
13 list, including but not limited to the following, or something
14 like that. And have operational safety, coal pricing, coal
15 availability, a list of high level topics like that that are
16 neutrally stated and that, like you stated, lay out a road map
17 of what the relevant issues are.

18 But I don't know how you would ever be able to vote
19 on those without going back to what has led us to this point,
20 having specific issues that we are going to have to fight about
21 of whether it is neutral or not, whether you have got them all
22 in there. And I think what I hear Mr. McGlothlin asking for is
23 a detailed findings of fact and conclusions of law in your
24 final order rather than the issues.

25 Those are two different things. And I don't know of

1 any requirement that requires this Commission to issue those,
2 nor anything that constrains you from having a high level
3 issue, especially when you are going to put some guidance meat
4 on it as you suggest. So I think what you are proposing is a
5 good idea, and I think with a break -- with cooperation we
6 could certainly work within that paradigm.

7 COMMISSIONER McMURRIAN: Well, I will also add, just
8 because you made we think of it within something you said, it
9 may be that we can't think of every topic that would be covered
10 under Issue 1, and I think it would also include some kind of
11 catch-all at the end where you are allowed maybe more words
12 than you would be on the other topics to basically raise any
13 issues that we haven't identified specifically, because it's
14 going to be hard to identify everything that you may want to
15 sort of single out.

16 And, of course, generally in a staff recommendation,
17 I think they try to address every single point that has been
18 raised by both parties and they sort of go through this anyway.
19 And, in my opinion, even if you have a broad Issue 1, that
20 would have been done in the staff rec, but I do think that it
21 is fair to say that parties want to specifically have enough --
22 really enough words to address the issues that they think are
23 important and to lay out for the Commission those things that
24 sort of lead you to whether or not the actions were prudent.

25 So, I think it is fair to do that. I hear what you

1 are saying, Mr. McGlothlin, and I do think that it might give
2 parties more direction one way or the other if you voted on
3 each topic, but that there are some that appear to me as not
4 being necessary to have a vote. It may be something that you
5 consider in making the overall conclusion of prudence, but it
6 may not be necessary to vote on. I mean, it's not that if 10
7 of the 20 issues are ruled in your favor, or 11 of the
8 20 issues, for instance, are ruled on in your favor, then that
9 necessarily means imprudence. And also the other way around.

10 I think that you have to allow for the Commission to
11 weigh each of those topics and decide which ones are more
12 important to them in the same way I was talking about with the
13 water case, that there are subparts that the Commission
14 considers. For instance, DEP may have had a violation, but it
15 may have been more serious violations versus less serious
16 violations that lead you to determine whether overall did they
17 reach the need to say it was unsatisfactory or not. And I
18 think you have heard some of those discussions, but that is
19 kind of what I'm thinking that you have to weigh these topic
20 areas to make the ultimate conclusions.

21 MR. MCGLOTHLIN: I don't disagree with that, and I
22 agree that it is conceivable that in the case the Commission
23 may find for Progress Energy on a particular factual dispute
24 and yet rule with us on the overall prudence question, or they
25 may find for us on a particular factual dispute and still find

1 for the utility on the overall question. But it is interesting
2 to me and it concerns me to hear counsel say that he wants the
3 Commission not to enter factual findings, because the
4 Commission in this case is acting as a trier of fact. There
5 are factual disputes that have to be resolved, and the
6 resolution of those factual disputes bears on the ultimate
7 decision.

8 Granted that some of the factual disputes may be
9 absolutely dispositive and others may be subsidiary and not
10 dispositive in and of themselves, but I believe in order to
11 have the Commission in a position to make an informed final
12 conclusion, it is necessary to make some findings of fact on
13 the disputes that the parties have joined and precipitated in
14 the testimony that they are going to hear. And I would be
15 willing to try to, you know, all the various things that
16 Progress Energy and OPC have listed, if it might be possible to
17 identify some that don't rise to that level of need, but there
18 are others that I think certainly do.

19 MS. BRUBAKER: Commissioner -- I'm sorry.

20 COMMISSIONER McMURRIAN: I was just going to say
21 perhaps that's something that -- I do think it would be
22 appropriate at some point to take a break, and maybe that's
23 something you can look through the 10 issues that you have
24 proposed and the 26 that Progress has proposed and try to
25 determine, sort of, where these topics would be. If there are

1 certain ones that you think are more important to have a
2 Commission vote on, we can talk about that further. But in
3 having reviewed them myself, in my opinion I think the ultimate
4 issue of were they prudent, and we can talk about the wording
5 specifically of that Issue 1, and how to address some of the
6 subtopics, I still believe that ultimately you are getting to
7 that conclusion. If you get a Commission vote on that, and
8 through the discussion of the topic areas with the Commission,
9 I think that you are going to have a decision that encompasses
10 all of those topics.

11 Mr. Twomey, had already -- Mr. Twomey.

12 MR. TWOMEY: Yes, ma'am. I want to preface my
13 support of Public Counsel by acknowledging they don't need to
14 have all the issues they have requested for, and the company
15 doesn't either. But I wanted to chime in and support Public
16 Counsel generally because if you were in criminal court you
17 would have elements of a crime. In the end, is it guilty or
18 not guilty, but there are elements that have to be kind of a
19 check box to see if all of them were there. The same thing
20 would be true in civil court and torts and contract cases and
21 that kind of thing.

22 And that is what we find here, again, with some
23 limitation. There are certain elements that will determine
24 whether the company's actions are found imprudent or whether
25 they are, in fact, prudent. And I think by having -- it has

1 always been my preference to have more issues rather than not
2 enough. And what it helps in addition is it helps your staff
3 focus their analysis of the evidence for your benefit in a
4 staff recommendation. Additionally, by having more individual
5 elements bite-sized, if you will, it allows the parties to, in
6 their post-hearing statements, because we are limited to a
7 number of words, you know, to be more specifically expressive
8 to the Commission in what we think you should focus on in
9 reaching your decision. And for the benefit of the staff, as
10 well.

11 And then, lastly, as somebody that has probably, in
12 my past life as an employee here, written as many major
13 electric orders as anybody in the state's history, every staff
14 lawyer wants to write a bulletproof order, that is, one that is
15 not capable of being successfully appealed. And I think it
16 benefits your attorneys to have bite-sized chunks that they
17 could write about in their order in series and then come to the
18 conclusion. So I don't know how many you would want to give
19 them, but I would argue that you do more than just the bare
20 minimum.

21 Thanks.

22 COMMISSIONER McMURRIAN: And I hear what you are both
23 saying, Mr. McGlothlin and Mr. Twomey. The only concern I have
24 is we are going to be back at the same place that we were at
25 before, and the issues that you think are important to vote

1 specifically on are definitely not the issues -- and I'm not
2 saying that we all have to have agreement here. I don't expect
3 that we are going to leave this room with any kind of an
4 agreement on exactly what the issue should be nor the rest of
5 the case. And I definitely understand that parties on both
6 side of this issue are very passionate, and these are important
7 issues, and we are going to try to get through them.

8 My concern is trying to make sure that the factual
9 issues are clear to the Commissioners as has been laid out, but
10 at the same time not necessarily having -- essentially some
11 repetitive issues throughout the case. That ultimately we are
12 making a decision on whether or not the company's actions are
13 prudent. But I will let Jennifer Brubaker --

14 MS. BRUBAKER: Thank you for your indulgence. Just a
15 few comments.

16 One, this is a prudence review, and unlike other
17 types of dockets that do come before the Commission, for
18 instance, need determinations, there is no prescription here on
19 what the Commission should look at necessarily, or what weight
20 should be given to each individual factual determination. You
21 know, reasonable minds could disagree about what should carry
22 more weight than others.

23 Nevertheless, the issues are comprised of individual
24 factual findings. These have been touched on by the number of
25 issues that have been raised by the parties, what they feel is

1 appropriate to discuss. And I think that is actually the
2 wisdom in having topics. It provides that kind of guidance and
3 focus, but it gives the Commission the discretion to look at
4 each individual finding. And, of course, these are all
5 discussed in the staff recommendation. They are going to be
6 briefed by the parties. They are going to be in transcript.

7 So as in, for instance, your example of determining
8 quality of service in a water and wastewater case, you look at
9 have they complied with DEP, or is there a consent order out
10 there? What is the customers' satisfaction level? These are
11 step pieces that go to the ultimate issue that is decided. And
12 to me this is no different. The topics do give bite-sized
13 focus to this proceeding.

14 As far as the concerns about the number of words, far
15 be it from me to suggest, but certainly we can expand the
16 number of words that can be given in a summary to address that
17 concern. And as far as having a bulletproof recommendation, I
18 think the topics that you have suggested nevertheless give us
19 absolutely the ability to write a bulletproof recommendation.
20 We are still going to be addressing those matters raised by the
21 parties. I don't think it is necessary necessarily to break
22 them out into individual vote-sized subtopics.

23 COMMISSIONER McMURRIAN: This probably goes without
24 saying, but one side or another doesn't want a bulletproof
25 recommendation, I'm guessing, anyway. A bulletproof order.

1 MR. BURNETT: Commissioner, may I have two words in
2 support of Ms. Brubaker?

3 COMMISSIONER McMURRIAN: Sure.

4 MR. BURNETT: I wholly agree with what Ms. Brubaker
5 has said, and I would just note that the one issue we all agree
6 on is the final determination to this Commission is number one.
7 I mean, it is the question of prudence. That is ultimately
8 what we all end on. And I think in writing a bulletproof order
9 the Supreme Court is going to say did you have competent and
10 substantial evidence to support a finding under the standard of
11 prudence. And like a criminal or a civil case, there is no
12 statute that tells you what prudence is. So I think the one
13 issue that we all ultimately agree on, no matter how we try to
14 skin it or call it, is that is the ultimate question. So I
15 support Ms. Brubaker. Thank you.

16 COMMISSIONER McMURRIAN: Does anyone else want to
17 weigh in before we take a break to give some time to start
18 trying to address what those topics would be? And I realize
19 that's probably going to be a very long and painful exercise.
20 And, Mr. McGlothlin, I think within the context of that and, of
21 course, Progress, as well, if there are issues that you feel
22 strongly about should be separated out, we can still entertain
23 that, but we may want to talk about those specifically, and why
24 they should be separated from the general Issue 1.

25 Does anyone have anything before we take a break?

1 I'm thinking about 30 minutes. Does anyone need more time,
2 less time? Okay. Hearing none, we are temporarily adjourned.

3 (Recess.)

4 COMMISSIONER McMURRIAN: Let's go back on the record.

5 I understand that the parties have been working on
6 these topic areas. I will turn it over to staff to inform me
7 as to where there has been agreement and where there hasn't
8 been.

9 MS. BENNETT: It appears that we have reached an
10 agreement. In addition to the sentence in Issue 1, we would
11 suggest adding, "In determining Issue 1, the Commission may
12 consider including, but not limited to the following:
13 Environmental permitting, coal procurement practices, CR3, CR4,
14 and CR5 operational matters, megawatt capacity, coal
15 availability and costs, affiliates, other factors."

16 COMMISSIONER McMURRIAN: You all are much better at
17 coming up with a list of topics than I am. Because when I
18 started trying to determine this, my list was a good bit
19 longer. And I, of course, hadn't worked them into appropriate
20 categories yet.

21 Let me give each of you a moment, and perhaps I
22 should start with OPC, since you are the petitioner, to address
23 this, and see if you are satisfied with these topic areas. And
24 I do like the wording of not precluded to, so that you are able
25 to bring up something else within your briefs and such.

1 MR. McGLOTHLIN: Yes, we can accept this list for the
2 purposes stated. I did make the comment in the room that
3 operational issues or operational matters in particular covers
4 a lot of ground, and I would hope that we could have some
5 expansion of the limitation on words that we can bring to bear
6 on that in stating our position.

7 COMMISSIONER McMURRIAN: Okay. Other parties?

8 MR. McWHIRTER: I have nothing to add.

9 COMMISSIONER McMURRIAN: Okay. Progress.

10 MR. BURNETT: No, ma'am, we're satisfied with that,
11 as well, for the purposes stated. Thank you.

12 COMMISSIONER McMURRIAN: Well, thank you all for
13 getting together and working on that. I think that gets us
14 where we need to be to make sure that things are covered and
15 laid out for the Commissioners to see where the issues of
16 dispute are, and then ultimately determine the issue of
17 prudence with the general Issue 1. As having worked out Issue
18 1, we should move on to Issues 2, 3, and 4.

19 MS. HOLLEY: One small point of clarification sort of
20 related to what Mr. McGlothlin brought up. We sort of
21 anticipated under each topic having a space for each party
22 showing their, for lack of a better word, position. But rather
23 than say OPC position, we were just going to show the party.
24 Just identify the party and then that is where would you have
25 your statement as to that topic, if that is acceptable.

1 COMMISSIONER McMURRIAN: So, essentially, if I'm
2 understanding correctly, underneath Issue 1, and then you have
3 the sort of preamble, for lack of a better term. And then the
4 subtopics listed, you're saying that instead of the wording
5 that we typically use where it says positions of the parties
6 and then list each, we just delete that positions of the
7 parties?

8 MS. HOLLEY: Well, the parties would be able to
9 provide a position to Issue 1 as the broad issue, but then as
10 to each topic, they would also be allowed to provide a
11 statement. That's my understanding.

12 COMMISSIONER McMURRIAN: And I haven't forgotten what
13 Mr. McGlothlin was saying about the number of words, and I do
14 think we should talk about that, and I suppose we should talk
15 about it before we move on to Issue 2, because it seems likely
16 that we will need -- that it will be more difficult to figure
17 out the number of words for the topic areas and things and the
18 other issues.

19 So, I guess that said, do you have a proposal for the
20 number of words that you are looking at for Issue 1 as an
21 overall statement of position, and then each of the topic areas
22 under that? And, of course, recognizing that with respect to
23 the operational issues, it may be a different number.

24 MR. MCGLOTHLIN: Well, my starting point, and I made
25 this comment in the room, 50 is never enough for anything.

1 But, beyond that, if we could have 150 for the overall position
2 and then 100 for each of the topics below, I think I can live
3 with that.

4 COMMISSIONER McMURRIAN: And just so I am clear, that
5 would also be 100 for the operational issue?

6 MR. McGLOTHLIN: Yes.

7 COMMISSIONER McMURRIAN: Okay. Any other parties on
8 that side?

9 Mr. Burnett.

10 MR. BURNETT: No objection, ma'am.

11 COMMISSIONER McMURRIAN: Staff?

12 MS. HOLLEY: I think we are fine with that. Thank
13 you.

14 COMMISSIONER McMURRIAN: Okay. So we will have
15 150 words for the overall position statement with respect to
16 Issue 1, and 100 words for each topic area under that. And
17 what about anything that may come up, because we have said that
18 it wouldn't be precluded to this list of topics. Are we going
19 to include a wording amount for something else that may come up
20 that they want to break out, or are we just including that as
21 part of the 150 words for the overall Issue 1?

22 MS. BENNETT: The last topic we have is other
23 factors, so they would be allowed 100 words there.

24 COMMISSIONER McMURRIAN: Okay. Is everyone clear?
25 Okay.

1 So I suppose now we should move on to Issue 2. Or
2 before that, is there anything else with regard to Issue 1?

3 MR. MCGLOTHLIN: If you will bear with me, I want to
4 revisit that operational issue as I think about it. If there
5 is no objection, I would like to have 150 for that because it
6 covers so much ground.

7 COMMISSIONER McMURRIAN: Mr. Burnett?

8 MR. BURNETT: No objection.

9 COMMISSIONER McMURRIAN: Everyone is so agreeable
10 today. Thank you. 150 words for the operational topic area.
11 Okay.

12 Issue 2. OPC. If you would like to speak to Issue
13 2, in the memorandum as I understand it, you have no objections
14 to Issues 2, 3, and 4. That is sort of -- not necessarily
15 fallout issues, but as issues following the decision of
16 prudence, or do you have any proposed changes for those issues
17 as worded?

18 MR. MCGLOTHLIN: No, ma'am, no proposed changes.

19 COMMISSIONER McMURRIAN: Any other parties with
20 respect to Issues 2 through 4?

21 Mr. Burnett?

22 MR. BURNETT: No, ma'am.

23 COMMISSIONER McMURRIAN: And I believe we have a
24 couple of specific issues proposed by AARP, as well. Can you
25 tell me what page of the prehearing order those are on?

1 MS. HOLLEY: Those are shown on Page 27 --

2 MR. TWOMEY: Twenty-seven.

3 MS. HOLLEY: -- of the draft prehearing order.

4 MR. TWOMEY: And we can shorten that to one, Madam
5 Chair. If I can address it now.

6 COMMISSIONER McMURRIAN: Certainly.

7 MR. TWOMEY: The issues, I think they are identically
8 stated by Progress and AARP, Issues 25 and 26 for Progress, at
9 the top of the Page 27. If Progress were agreeable, and the
10 others, as well, I think we could just shorten it to one and
11 have it say their 25, "If the Commission determines that PEF
12 willfully violated any lawful rule or order of the Commission
13 or any provision of Chapter 366, Florida Statutes, should the
14 Commission impose a penalty on PEF? And, if so, in what
15 amount."

16 COMMISSIONER McMURRIAN: Okay. Well, Mr. Twomey,
17 just with respect to the how should it be imposed, do you think
18 that that would just be addressed in that?

19 MR. TWOMEY: That could be addressed within that
20 context, in my view.

21 COMMISSIONER McMURRIAN: Any concerns or comments on
22 that proposal?

23 MR. BREW: Commissioner, White Springs had also
24 proposed the same two issues, and we would agree with Mr.
25 Twomey's proposed change.

1 COMMISSIONER McMURRIAN: Thank you.

2 Mr. Burnett?

3 MR. BURNETT: I would be agreeable to that.

4 COMMISSIONER McMURRIAN: I guess this reminds me of a
5 question I had with respect to Issues 3 and 4 as proposed in
6 the original tentative list. Along the same lines as Mr.
7 Twomey's suggestion, could we -- would it be appropriate to
8 sort of combine Issues 3 and 4 in the same way? Because I
9 believe 4 followed on 3 in the same way that Mr. Twomey's
10 second issue followed his first.

11 MS. BENNETT: I think that those could also be
12 combined.

13 COMMISSIONER McMURRIAN: Are there any concerns with
14 respect to that, Mr. Burnett?

15 MR. BURNETT: No, ma'am.

16 COMMISSIONER McMURRIAN: Anyone else? Okay. Perhaps
17 for the record we should state what the issues are. I guess we
18 should talk about how we are going to provide a list, an
19 updated list of the issues to the parties and when they can
20 expect that. And I suppose -- if everyone is amenable, I
21 suppose we don't have to exactly nail down the wording for
22 combining Issues 3 and 4 here as long as we submit that as a
23 part of that. Are there any other proposed issues that we
24 haven't addressed by any of the parties?

25 MS. HOLLEY: Not that we are aware of. The only one

1 that we would add is a close-the-docket issue.

2 MS. TRIPLETT: Commissioner.

3 COMMISSIONER McMURRIAN: Yes.

4 MS. TRIPLETT: I'm sorry, thank you. I don't know if
5 we are just talking about factual issues, but Progress does
6 have legal and policy issues. I just wanted to make sure we
7 don't forget about those.

8 COMMISSIONER McMURRIAN: Thank you. We will address
9 those now. Remind me which page those are proposed on.

10 MS. TRIPLETT: I'm trying to find it.

11 MR. BURNETT: Page 21, Commissioner.

12 COMMISSIONER McMURRIAN: Thank you.

13 Mr. Burnett, if you would like to address those
14 issues now, or -- well, let me just start it this way. Do you
15 believe that the issues that are already proposed in this case
16 will address these issues, or are you maintaining that you need
17 these issues separate?

18 MR. BURNETT: Commissioner, we broke them out because
19 we thought they were specific legal and policy issues and
20 thought that under the order governing procedure we were
21 required to do so. I'm not sure that any of the other issues
22 would go to that. I mean, implicit in all the other issues
23 that we have now is the Commission certainly has to follow the
24 law, so I think the legal issues are always with the factual
25 issues because the Commission is bound to it.

1 Now, if the Commission is clear that they understand
2 that they are constrained by the law, and those issues being
3 part of the law, I think we could drop those. The policy issue
4 I don't think is included in the other ones, unless Issue 2 can
5 be read, "Should the Commission require a refund," and if that
6 is read to encompass the policy issue, I think we can encompass
7 that there, as well.

8 COMMISSIONER McMURRIAN: Are you proposing that with
9 respect to Issue 2 that it would somehow change the wording of
10 that issue as it is reflected in the prehearing order, or are
11 you just talking about how we interpret Issue 2?

12 MR. BURNETT: The latter, Commissioner. That is just
13 a wordy way of saying I think that all of these issues are
14 inherently captured in the original list as we have talked
15 about, but in an abundance of caution we made sure that we
16 raised them and are clear that to the extent the Commission has
17 a different view that they are not, we would ask that they be
18 included as legal and policy issues.

19 COMMISSIONER McMURRIAN: OPC, or AG's office, or
20 anyone else that wants to weigh in with respect to the legal
21 and policy issues that Progress has proposed, and how they
22 relate to Issue 2?

23 MR. McGLOTHLIN: As to PEF Proposed Issue 5, is the
24 Commission barred by prohibition against retroactive
25 ratemaking, Progress Energy raised that in their motion to

1 dismiss, which was denied. The Commission has ruled that it is
2 not barred from considering this evidence and acting on it by
3 virtue of orders which the Commission set out its jurisdiction
4 once this order was affirmed by the Supreme Court. So we think
5 it is a matter of settled law that the proposed refund or
6 adjustment to past charges we request is not retroactive
7 ratemaking, and so the Commission is not barred from the relief
8 we request.

9 As to 6, is the Commission barred by the principle of
10 impermissible hindsight, we made it clear from the outset that
11 we are not asking the Commission to apply the hindsight
12 standard. We have accepted the standard of those facts and
13 circumstances that they either knew or should have known about
14 at the time the decisions were made. So I don't think it is a
15 question of barred, it is a question of are we asking the
16 Commission to apply hindsight, and we will assert that we are
17 not. So I don't mind the hindsight issue, but it's not a
18 question of legal bar.

19 And with respect to should the Commission limit the
20 amount of time it can look back, in that issue, Progress Energy
21 is attempting to change the rules of the game. In 12645, the
22 Commission made clear by rejecting suggestions that it limit
23 the time it can look back, that it's not going to be so
24 limited, and that is exactly the parameter of the fuel
25 proceeding that we are invoking by our petition. And so we

1 think that it is inappropriate in this case.

2 COMMISSIONER McMURRIAN: Mr. McGlothlin, would you --
3 to the extent Progress makes those kind of arguments within the
4 confines of Issue 2 as worded, I mean, do you agree with me
5 they are free to make those arguments within the context there
6 if they so choose, and that -- I think what you are saying is
7 we don't necessarily need a separate issue, you are not
8 particularly opposed to a separate issue.

9 MR. MCGLOTHLIN: Let me refresh myself on what Number
10 2 says.

11 COMMISSIONER McMURRIAN: I will just go ahead and
12 share, while you review that, that when I looked at Issue 2 it
13 seemed like it is something that could encompass the arguments
14 that Progress is trying to raise through these proposed issues,
15 and I believe all four of them. With that in mind, I mean, I
16 would be amenable to discussing having longer position
17 statements under that issue if that would work, and not
18 necessarily having separate issues, because it seems to me that
19 you could make these kind of arguments within Issue 2.

20 MR. MCGLOTHLIN: Commissioner, I had not read Issue
21 2 to encompass such things as the assertion of a legal bar, and
22 my first position is that those are inappropriate issues. If
23 you are going to allow them to be briefed and argued, I would
24 prefer they be separately stated.

25 COMMISSIONER McMURRIAN: Other? Thank you.

1 Mr. Twomey.

2 MR. TWOMEY: I was just going to suggest that to the
3 extent that you decide to have a separate legal issue or policy
4 issue, that whatever is left could be consolidated in one
5 issue. I mean, I think very easily each of the three issues, 5
6 through 7, where it starts, "Is the Commission barred," you
7 could say by -- I would agree with Mr. McGlothlin, knock out
8 retroactive ratemaking, but is it barred by impermissible
9 hindsight, administrative finality, or whatever is left.
10 Otherwise the sentences are the same.

11 MR. MCGLOTHLIN: I just remembered something that I
12 should have said earlier. In my list of issues, I had proposed
13 one that says, and I think this is close to the wording, does
14 the Commission have the authority to grant the relief requested
15 under the facts and circumstances of this case. Because we do
16 acknowledge that within the Commission's orders there is the
17 requirement that the party bring relevant facts to the
18 Commission that had not been presented earlier as justification
19 for reaching to prior periods, and we accept that as what we
20 have to do. And so I suggest that as an alternative to the
21 phrasing that has been suggested by Progress Energy, because we
22 do recognize that there is a factual standard at work here
23 within what the Commission has set out in prior orders.

24 COMMISSIONER McMURRIAN: Mr. Burnett.

25 MR. BURNETT: Yes, ma'am. The issue that

1 Mr. McGlothlin just mentioned, I believe that is OPC --

2 COMMISSIONER McMURRIAN: Issue 8.

3 MR. BURNETT: -- Issue 8. I think I can agree with
4 that, that that would subsume PEF's additional 5, 6, and 7. So
5 certainly we would be agreeable to including that as subsuming
6 those issues. That would just leave the PEF policy issue.

7 COMMISSIONER McMURRIAN: Let's address the legal
8 issues first. I want to turn to staff and see what their
9 recommendation is.

10 MS. BRUBAKER: Actually just to offer the staff
11 perspective, looking at the additional PEF issues, in my
12 opinion they are essentially positions that would go towards
13 Issue 2. Issue 2, "If the Commission determines that PEF acted
14 imprudently in its coal purchases, should PEF be required to
15 refund customers for coal purchases," so on and so forth. In
16 looking at how the Issue is phrased, it reads more like a
17 position. Not to put words in Progress's mouth, but I would
18 assume that the position would be something like, "No, the
19 Commission is barred because of the prohibition against
20 retroactive ratemaking. No, the Commission is barred by the
21 principle of impermissible hindsight. No, the Commission,
22 administrative finality," and so forth and so forth.

23 MR. BURNETT: Commissioner, some thoughts.

24 MS. BRUBAKER: So, you know, it seems to me that
25 those matters, you know, can be argued under Issue 2. If there

1 needs to be an issue of policy or law, I think it's probably
2 best to leave it in a single issue to be argued. But, again,
3 in staff's opinion, Issue 2 covers those matters.

4 MR. BURNETT: And, Commissioner, I agree with
5 Ms. Brubaker. Again, we raised these independently in an
6 abundance of caution. I think it works in Issue 2 that we
7 could brief it as a position. Similarly, I think if you are
8 inclined to have a legal issue, I think Mr. McGlothlin's works
9 for the three legal issues.

10 COMMISSIONER McMURRIAN: Mr. McGlothlin.

11 MR. MCGLOTHLIN: I prefer the separate issue, and I
12 think he and I agreed on some language there.

13 COMMISSIONER McMURRIAN: As most of you know, I like
14 to play attorney from time to time, so I don't mind an
15 additional legal issue. And I think that OPC's Issue 8 is
16 sufficient to cover those issues. I guess that leaves us with
17 Progress' Issue 8 is more of a policy issue. And, Mr. Burnett,
18 if you would speak to whether or not you think that issue can
19 be subsumed within the context of an existing issue as we
20 worded them today.

21 MR. BURNETT: Yes, ma'am, I do, Number 2. Staff's 2.

22 COMMISSIONER McMURRIAN: Mr. McGlothlin?

23 MR. MCGLOTHLIN: I see this issue as I see the
24 earlier ones that have been settled, and that is the Commission
25 in 12645 determined it would not be limited by the time frame,

1 and that it would be a function of the facts, relevant facts
2 that are brought to it. So I think this is covered by the one
3 to which we just agreed. We have to justify an adjustment that
4 covered the period of time we have asserted in the petition.

5 COMMISSIONER McMURRIAN: Anyone else before I turn to
6 staff?

7 Staff, do you have any comments?

8 MS. BENNETT: Issue 2 of the staff's issues was
9 designed to develop the policy arguments, both -- well, of
10 Progress and the Commission's concerns on this topic. So it
11 seems duplicative to have Progress' issue and Issue 2.

12 COMMISSIONER McMURRIAN: That was my -- and that's
13 whenever I brought this up and how I framed it. In reviewing
14 those four issues, I really felt like there was an opportunity
15 to address that within Issue 2. And as you heard me say, I was
16 looking at the possibility of allowing additional wordings, or,
17 if it is similar to what we did in Issue 1, to allow more
18 flexibility in addressing those issues.

19 I'm, of course, not making a decision as to whether
20 or not the issue would prevail, I'm just saying that I think
21 that that seems like a logical place to address the concerns
22 that Progress has raised through these additional issues. It
23 seems to me that you could make the argument that Progress
24 makes in its position under Issue 8 within the context of Issue
25 2, and that you can also make the argument that I believe you

1 are making, Mr. McGlothlin, that this has already been decided.

2 And then just leave it up to the Commission to decide
3 one way or the other with respect to this proposed Issue 8.

4 And I'm not suggesting adding the language of proposed Issue 8,
5 Progress's Proposed Issue 8 to Issue 2. I'm suggesting that
6 you leave it as worded, and that if Progress wants to use its
7 wording in Issue 2 to discuss this issue, to me the question in
8 Issue 2 is should the Commission -- let me flip back.

9 MR. MCGLOTHLIN: Commissioner, I will accept that
10 approach if Progress Energy will.

11 COMMISSIONER McMURRIAN: Thank you. So I think we
12 have -- I think with that -- let me make sure I have it.

13 Mr. Brew, your proposed issues were the same as Mr.
14 Twomey's, if I recall, correct?

15 MR. BREW: That's correct.

16 COMMISSIONER McMURRIAN: And, Mr. McWhirter, did you
17 have any additional issues? I believe that yours followed
18 along with OPC's.

19 MR. MCWHIRTER: Yes, ma'am.

20 COMMISSIONER McMURRIAN: Okay. And I apologize for
21 being rusty, but it's hard to remember out of this many issues
22 which ones were repeated by which parties.

23 And, Ms. Bradley, as well, you didn't propose any
24 additional issues, as I recall.

25 MS. BRADLEY: (Indicating no.)

1 COMMISSIONER McMURRIAN: Okay. I believe that gets
2 us through all the proposed issues. Is everyone clear?

3 MS. HOLLEY: I can run through them, if you would
4 like.

5 COMMISSIONER McMURRIAN: Okay. That would be great.

6 MS. HOLLEY: By my count, I have the preliminary
7 Issues 1 through 4 that originally appeared as attached to the
8 OEP with the addition of the factors that we went through under
9 Issue 1. We have the addition of AARP's penalty issues which
10 is combined into one issue. We have the addition of OPC's
11 Issue 8, which is a legal issue. And we have a
12 close-the-docket issue.

13 COMMISSIONER McMURRIAN: And, Ms. Holley, with
14 respect to the original Issues 3 and 4, we are talking about
15 expanding them into one, so that would now be --

16 MS. HOLLEY: Correct.

17 COMMISSIONER McMURRIAN: And we will adjust the
18 wording.

19 MS. HOLLEY: Right. And we can get a list to the
20 parties e-mailed, not by maybe the end of close of business
21 today, but definitely by today before we leave, so we can
22 e-mail it to the parties. And if we can have positions and
23 witnesses attached to issue numbers no later than either first
24 thing in the morning on Monday or by noon on Monday, then I
25 think we will be okay in terms of getting the final order, the

1 prehearing order issued.

2 COMMISSIONER McMURRIAN: Does anyone have concerns
3 about that that they would like to --

4 MS. HOLLEY: Or earlier if you can.

5 COMMISSIONER McMURRIAN: Of course that doesn't
6 prohibit you from providing them on Friday, I think she is
7 saying. She is going to work on it on the weekend.

8 MS. HOLLEY: Yes.

9 COMMISSIONER McMURRIAN: Okay. The other thing that
10 we probably should address is with respect to those issues that
11 we didn't set an exact number of words for, are we going to go
12 with the typical, and what is staff's recommendation with
13 respect to the number of words on the remaining issues, or do
14 you want me to ask the parties first?

15 Mr. Burnett, do you have a position on how many words
16 under each of these remaining issues? We have addressed Issue
17 1 specifically, but with respect to Issues 2 and then 3 and
18 4 that will be combined, and the penalty issue, and the legal
19 issue.

20 MR. BURNETT: No, ma'am, I would defer to the
21 Commission's pleasure.

22 COMMISSIONER McMURRIAN: Mr. McGlothlin.

23 MR. MCGLOTHLIN: Could we have 100 words per issue?

24 COMMISSIONER McMURRIAN: Mr. Burnett?

25 MS. HOLLEY: That's fine with staff.

1 COMMISSIONER McMURRIAN: Okay. One hundred words
2 each. Okay.

3 I think that brings us to Section IX, the exhibit
4 list. Am I correct?

5 Do parties have changes to the exhibit list?

6 Mr. McGlothlin, do you?

7 MR. MCGLOTHLIN: I saw no changes.

8 COMMISSIONER McMURRIAN: Excuse me?

9 MR. MCGLOTHLIN: I saw no changes.

10 COMMISSIONER McMURRIAN: Okay. Any other parties?
11 Mr. Burnett.

12 MS. TRIPLETT: Just one. I'm sorry, this looks like
13 just a typo on Page 30. Donna Davis' second exhibit, that
14 should be 1996.

15 MS. HOLLEY: Okay. We'll make that change. And with
16 respect to the exhibits, we would only note that staff will
17 prepare a comprehensive stipulated exhibit list prior to the
18 hearing and send that out to the parties, which will include
19 all the proposed stipulated exhibits, which is all the prefiled
20 exhibits identifying with issue numbers. That will be for use
21 at the hearing. And staff is also in the process of compiling
22 a staff composite exhibit which will include numerous pieces of
23 discovery and deposition transcripts, and as soon as that is
24 compiled we will e-mail that to the parties and see if we can
25 get a stipulation as to that, as well.

1 COMMISSIONER McMURRIAN: You know, along those lines,
2 I think we have discussed the possibility of providing
3 composite exhibits on CD-Rom.

4 Ms. Holley, would you like to address that?

5 MS. HOLLEY: Sure. There was some discussion about
6 rather than having the four-foot pile of copies of exhibits at
7 the hearing, of providing the extra copies on CD-Rom. Staff
8 has no problem with it. We would obviously provide at least
9 several working copies for use at the hearing. We are open to
10 discuss this with the parties, whatever you all's preference
11 is. If you all see things in major problems with this, or if
12 you look the idea, that was just something that we had been
13 thinking about.

14 COMMISSIONER McMURRIAN: Any comments?

15 Mr. Brew.

16 MR. BREW: For somebody that has to travel a
17 distance, I, for one, like the idea of having the CD-Rom.

18 COMMISSIONER McMURRIAN: Delta charges \$25 extra if
19 you go over 50 pounds. I know it well. Any other comments?

20 Ms. Holley, how many copies would we have here on
21 hand, or is that something we should just discuss later?

22 MS. HOLLEY: I guess we would kind of have to discuss
23 that. We would obviously want to contact each Commissioner and
24 see what their preference would be with respect to use at the
25 hearing. If they wanted a hard copy available, or if they felt

1 comfortable using the CD-Rom at their computer terminal. And
2 we would obviously have one hard copy for the court reporter,
3 and for the use on cross for witnesses, and maybe a couple
4 extras. But other than that, I think we would probably provide
5 the copies to the parties on CD-Rom if that would be
6 acceptable.

7 COMMISSIONER McMURRIAN: Okay. It looks like we have
8 agreement. I also have a note to ask about demonstrative
9 exhibits, and it seems like this would be a good place to
10 discuss that.

11 MS. HOLLEY: We have just gotten notification from
12 both Progress and OPC that they intend to use certain
13 demonstrative exhibits. Staff doesn't foresee any problem with
14 those. For the most part, those are just exhibits that were
15 included in various witnesses' prefiled exhibits, so there
16 shouldn't be any issues. But if the parties would like to
17 discuss those, we would certainly be open to that right now.

18 COMMISSIONER McMURRIAN: Hearing none, I suppose.
19 Okay.

20 Moving along to proposed stipulations, Section X.

21 MS. HOLLEY: And, again, we are in the process of
22 getting some language agreed upon for the stipulation as to the
23 calculation, the methodology of how to calculate interest on
24 any refund. And hopefully we will have that. We should have
25 that by the time the prehearing order is issued. We will just

1 get with the parties. And then if there is any other proposed
2 stipulations that we don't know about, obviously, we would be
3 happy to work with the parties on that, as well.

4 COMMISSIONER McMURRIAN: Any other comments with
5 regard to that section?

6 Hearing none; Section XI, pending motions.

7 MS. HOLLEY: I believe we have taken care of
8 Progress's witness -- excuse me, motion with respect to Witness
9 Heller, and that will be reflected in the ruling section. We
10 still have pending Progress' motion to strike the testimony of
11 staff Witness Mr. Windham, and their request for oral argument
12 on that motion to strike.

13 COMMISSIONER McMURRIAN: Is this the appropriate time
14 to come back to some of the things that were raised earlier?
15 Mr. McGlothlin, I know there was an issue you had raised that I
16 said we would at least come back to at the point where we take
17 up rulings.

18 MS. HOLLEY: We can take that up when we go to the
19 rulings section.

20 COMMISSIONER McMURRIAN: Okay. Then Section XII,
21 pending confidentiality matters. It looks like we have three
22 outstanding.

23 MS. HOLLEY: Three outstanding, and staff is in the
24 process of processing those, hopefully prior to the hearing.

25 COMMISSIONER McMURRIAN: And post-hearing procedures,

1 Section XIII. I think this is the part where it sets out the
2 number of words for the positions, and I think we have already
3 covered that. And I think we need to discuss the number of
4 pages for the briefs. Do I have any proposals by any of the
5 parties with respect to the number of pages? It seems like in
6 this case that 40 pages may not be adequate.

7 Mr. McGlothlin, do you have a proposal?

8 MR. MCGLOTHLIN: I think I would certainly live
9 within 60 if you are agreeable to that.

10 COMMISSIONER McMURRIAN: Any other parties?

11 MR. McWHIRTER: Fifty is okay.

12 MR. TWOMEY: I support Mr. McGlothlin.

13 COMMISSIONER McMURRIAN: And I believe that was 60,
14 Mr. McGlothlin?

15 MR. MCGLOTHLIN: Yes.

16 COMMISSIONER McMURRIAN: Okay. Mr. Burnett. Or --
17 sorry.

18 MS. TRIPLETT: That's okay. We agree with Mr.
19 McGlothlin, 60 is fine.

20 COMMISSIONER McMURRIAN: Sixty it is.

21 And the rulings section. Ms. Holley, what do we --

22 MS. HOLLEY: Several items. In addition to the
23 motion, Progress' motion on Witness Heller, that will be
24 reflected there, as well as the ruling on the witness
25 summaries. And, if you would like to take it up right now, the

1 oral argument issue that Mr. McGlothlin raised earlier.

2 MR. MCGLOTHLIN: Opening statements, you mean?

3 MS. HOLLEY: Excuse me?

4 MR. MCGLOTHLIN: Opening statements.

5 MS. HOLLEY: I'm sorry, opening statements.

6 COMMISSIONER McMURRIAN: Mr. McGlothlin.

7 MR. MCGLOTHLIN: I request I be allowed as much as 12
8 minutes for an opening statement.

9 COMMISSIONER McMURRIAN: Mr. McGlothlin, is that just
10 for you, or is that with respect to each party, or were you --

11 MR. MCGLOTHLIN: I had only myself, but I would
12 expect others to be given similar latitude.

13 COMMISSIONER McMURRIAN: I should ask the other
14 intervenors. Are you all proposing to make opening statements,
15 as well? Are you seeking 12 minutes? I just want to be clear
16 before we leave.

17 Mr. Twomey.

18 MR. TWOMEY: I think two minutes, max.

19 COMMISSIONER McMURRIAN: Mr. Brew?

20 MR. BREW: Two minutes is fine.

21 MR. McWHIRTER: Seven and a half minutes.

22 COMMISSIONER McMURRIAN: Okay, Mr. McWhirter, 7-1/2
23 minutes. I'm glad I'm not the one watching the clock.

24 Ms. Bradley.

25 MS. BRADLEY: Certainly no more than five.

1 COMMISSIONER McMURRIAN: Progress?

2 MS. TRIPLETT: Given these low numbers, I'm not going
3 to tell you what I would like, because I don't want to get
4 thrown out of here. But we think, at a minimum, 15 minutes,
5 given the complexity and the number of issues.

6 COMMISSIONER McMURRIAN: Do other parties have an
7 objection to Progress having 15 minutes, or do you think it
8 should be --

9 MR. TWOMEY: No.

10 COMMISSIONER McMURRIAN: Mr. McGlothlin?

11 MR. MCGLOTHLIN: Well, I'm tempted to ask for as much
12 as 15.

13 COMMISSIONER McMURRIAN: Mr. McGlothlin, do you think
14 you need 15 minutes?

15 MR. MCGLOTHLIN: I will try to come under that, but I
16 would like to have that latitude.

17 COMMISSIONER McMURRIAN: Staff, what do you think?

18 MS. HOLLEY: Fifteen minutes is fine.

19 COMMISSIONER McMURRIAN: Do we need to lay out the
20 time for each party, or does it just give us an idea to let the
21 Chairman know exactly, you know, sort of what we are looking at
22 with regard to scheduling?

23 MS. HOLLEY: I think I'm getting the indication that
24 we need to lay it out to each party.

25 MS. BRUBAKER: We could lay it out for each party, or

1 I suppose we could have a ruling up to 15 minutes, and
2 certainly brevity is the soul of wit, and we encourage, to the
3 extent that parties can take less time, given the tight time
4 frame we are going to have for the hearing, it is certainly
5 appreciated. But whatever the preference is. If you want to
6 lay it out individually, we could do that. We could say up to
7 15 minutes and simply get with the Chairman about the
8 particulars each party has discussed here.

9 COMMISSIONER McMURRIAN: Well, it strikes me that,
10 given the complexity of these issues, that 15 minutes on each
11 the major parties' side is adequate. And I do realize that
12 with respect to AARP, and White Springs, and the AG's Office,
13 and FIPUG, as well, that amounts to a lot of time on one side,
14 but I think each party ought to have an opportunity to make
15 their comments known.

16 Mr. McWhirter, 7-1/2 minutes does seem a little long,
17 I will say, so I encourage you to try to stay closer to five,
18 but --

19 MR. McWHIRTER: How about 5-1/2?

20 COMMISSIONER McMURRIAN: Done, 5-1/2. Okay. So we
21 are looking at 15 minutes. Progress, did you have any more
22 comments on that? Is 15 minutes going to be adequate?

23 MR. BURNETT: I told Ms. Triplett to ask for 30, but,
24 again, I didn't want her to get thrown out. So we will live
25 with it, Commissioner.

1 COMMISSIONER McMURRIAN: Okay. So 15 minutes for
2 Progress, 15 minutes for OPC, two minutes for AARP and White
3 Springs each, and 5-1/2 minutes for Mr. McWhirter, FIPUG, and
4 five minutes for the Attorney General. I think I got it.
5 Thank you all.

6 Ms. Holley, was there another issue that we needed to
7 decide here?

8 MS. HOLLEY: I believe the only other outstanding
9 issue was the motion to strike. And, I'm sorry, did we get a
10 ruling on the witness summaries?

11 COMMISSIONER McMURRIAN: Oh, no, we did not. Thank
12 you. I had written that down.

13 Mr. McGlothlin, remind me, for witness summaries you
14 wanted ten minutes?

15 MR. MCGLOTHLIN: Mr. Sansom comes up twice, direct
16 and rebuttal. Each time his scope of testimony is large. I
17 suspect he would hae ten minutes each time. Mr. Barsin also
18 has expansive testimony, I request that he have ten minutes for
19 his summary.

20 COMMISSIONER McMURRIAN: Mr. Burnett; Ms. Triplett.

21 MS. TRIPLETT: We just need ten minutes for the
22 following witnesses: Jamie Heller, Rod Hatt, and Wayne Toms.
23 And then the remaining witnesses we are fine with five minutes.

24 COMMISSIONER McMURRIAN: And, Mr. Twomey?

25 MR. TWOMEY: Five minutes.

1 COMMISSIONER McMURRIAN: And who is left? Staff, for
2 Mr. Windham's testimony?

3 MS. BENNETT: Five minutes.

4 COMMISSIONER McMURRIAN: Now that we have gone
5 through those proposals, are there any objections from any of
6 the parties to the proposed amount of time for each witness?

7 MR. MCGLOTHLIN: No.

8 COMMISSIONER McMURRIAN: Hearing none --

9 MS. HOLLEY: Sorry, just to be clear. Mr. Barsin and
10 Mr. Sansom will have ten minutes each time for direct and
11 rebuttal?

12 MR. MCGLOTHLIN: Mr. Barsin only comes up once.

13 MS. HOLLEY: Sorry. And Sansom, though, you want ten
14 minutes per side. And then, Progress, you said ten minutes for
15 Witnesses Hatt and Toms?

16 MS. TRIPLETT: And Heller, as well.

17 MS. HOLLEY: And Heller. And five minutes for the
18 rest of your witnesses?

19 MS. TRIPLETT: Yes, ma'am.

20 COMMISSIONER McMURRIAN: I guess that moves us along
21 to the motion to strike and oral argument. And I believe staff
22 has informed you all that I was inclined to take up oral
23 argument on the motion to strike at the conclusion, and I think
24 we are there.

25 So, staff, what is your proposal for the order?

1 MS. HOLLEY: It was Progress' motion, so they should
2 be able to go first with staff responding. And just to
3 clarify, Mr. Young and Ms. Bennett will each be responding, but
4 to separate issues with respect to the motion to strike. And I
5 believe OPC also filed a response, and we would also recommend
6 that oral argument be limited to ten minutes per side.

7 COMMISSIONER McMURRIAN: And with respect to OPC,
8 they also filed a response. Would they also be speaking to the
9 motion?

10 MS. HOLLEY: Yes.

11 MR. McGLOTHLIN: I will require only about two
12 minutes, Commissioner.

13 COMMISSIONER McMURRIAN: That's fine. I guess we can
14 proceed.

15 MS. TRIPLETT: Thank you, Commissioner.

16 Progress Energy brought this motion to strike Mr.
17 Windham's testimony because if the Commission is allowed to
18 consider it in this proceeding, it will commit procedural and
19 legal error because his testimony is wholly unhelpful to the
20 Commission in the consideration of this matter. The standard
21 for admitting expert testimony is that it has to be helpful to
22 the trier of fact, and we are going to show that Mr. Windham's
23 testimony is, in fact, not helpful to the Commission.

24 Now, the main, core issues in this case are, first,
25 whether Progress Energy's coal purchases were prudent, and,

1 second, should the refund be -- if they were imprudent, should
2 a refund be required. And, third/fourth, is what is the amount
3 of the refund and how should that refund be distributed.

4 Now, a party when it submits a case has to touch on
5 all four issues. And we submit that in this case we actually
6 have two separate cases. First, we have OPC's case and then we
7 have staff's case. And staff's case is necessarily all bound
8 up into Mr. Windham's testimony because he is the only witness
9 they've presented.

10 Now, OPC's case is about whether Progress Energy
11 should have purchased PRB coal during this time period.
12 Staff's case is about whether Progress Energy should have been
13 purchasing either foreign bituminous coal or Colorado coal.
14 Now, these two cases necessarily are separate. Mr. Windham's
15 testimony has to stand alone. And even yesterday in Mr.
16 Sansom's deposition, which Mr. Sansom is OPC's main witness, he
17 testified that he was not hired by staff in this case. Staff
18 is not sponsoring any testimony from him, and he also did not
19 do any analysis based on what Mr. Windham has presented.

20 So, necessarily, these two separate issues, they are
21 separate, and staff's case must be analyzed as such. So let's
22 consider whether Mr. Windham actually does touch on all of
23 these three or four issues in the case such that his testimony
24 will be helpful to the Commission.

25 The first issue, was Progress Energy prudent in its

1 coal purchases. Mr. Windham takes average coal prices that
2 Progress Energy paid in various years and he compares those
3 prices to other utilities, what other utilities paid for
4 foreign coal and Colorado coal. And he says, possibly, often
5 perhaps, Progress Energy paid too much for their coal, paid
6 more than these other utilities. And that is all he says. He
7 admits in his deposition, he admitted in his deposition that he
8 does not have an opinion about whether Progress Energy was
9 imprudent or prudent. He doesn't go any further besides just
10 that the comparison of basically which cost is higher, which
11 amount is higher.

12 And so even if you consider, which we don't agree,
13 but even if you consider his testimony in the best light
14 possible, he maybe is touching on one factor of Issue 1, being
15 the prudence of Progress Energy's coal purchases, and that's
16 it.

17 So, let's consider Issue 2, should the Commission
18 refund any money to the ratepayers. Well, Mr. Windham in his
19 deposition, he admits that he needs more facts in order to
20 determine whether Progress Energy was prudent. He says that he
21 doesn't have everything that he needs; it's not just about
22 delivered price; and he is, therefore, not giving an opinion
23 about Progress Energy's imprudence. So, therefore, necessarily
24 he is not touching on Issue 2, and his testimony cannot be
25 helpful to the Commission.

1 Now, Issue 3, if there is imprudence and a refund
2 should be admitted, how is the refund to be calculated. Well,
3 again, he provides no calculation as to how much coal Progress
4 Energy should have been buying these years, the amount of coal,
5 from whom it comes from, the price. He leaves us with nothing
6 to calculate any sort of damages at all as far as Issue 3 goes.
7 So, again, he comes to no resolution. He provides no helpful
8 analysis as far as Issue 3 goes.

9 And so, basically, if you consider Mr. Windham's
10 testimony, as you must, as a separate issue of whether Progress
11 should have bought foreign or Colorado coal, at best you end up
12 with, okay, perhaps Progress was not reasonable in purchasing
13 the coal that they did. But if you find that, you can't go
14 anywhere with that. The Commission cannot determine how much
15 money should be refunded, they have no way of following through
16 onto the rest of the issues, and so, therefore, it is wholly
17 unhelpful to the Commission and improper for the Commission to
18 consider his testimony.

19 And now in my argument I have been assuming that
20 Mr. Windham's analysis, methodology, his data was, in fact,
21 proper and not flawed. But I was assuming that only for the
22 sake of argument, because, in fact, even considering the very
23 broad legal standard that the Commission can employ in
24 determining whether to admit expert testimony, Mr. Windham's
25 testimony doesn't even reach that threshold because it is so

1 flawed, because he has not taken into account very essential
2 important factors.

3 For example, in his deposition, he admits that he is
4 comparing Progress Energy's coal purchases to utilities that
5 have bought non-compliant coal. Progress Energy can't burn
6 non-compliant coal in its units at Crystal River 4 and 5, so he
7 is presenting data on coal that we can't even purchase. He
8 also admits that he has done no calculations as to from whom
9 the coal should be purchased or how much it should cost and the
10 amount of tons.

11 Furthermore, he admits that there are a lot of other
12 factors that go into determining prudence. So his whole
13 methodology is so flawed that if the Commission were to admit
14 this testimony, then we feel that the Commission would be
15 committing reversible legal and procedural error for that
16 reason.

17 So essentially it boils down to two main reasons why
18 our motion should be granted. First, his testimony is wholly
19 unhelpful because it only touches, at best, on one of the main
20 issues in the case, meaning was Progress Energy prudent. And
21 if the Commission considers that testimony there is nowhere to
22 go at that point. And, secondly, the testimony as it's worded
23 and the analysis that was done is so flawed that it rises to
24 the level of being inadmissible.

25 So for those reasons we ask that our motion to strike

1 be granted. Thank you.

2 COMMISSIONER McMURRIAN: Thank you, Ms. Triplett.
3 Staff.

4 MR. YOUNG: Madam Commissioner, good afternoon.
5 Keino Young on behalf of staff.

6 As it relates to Mr. Windham's testimony, as
7 Ms. Triplett has stated, she's not contesting whether
8 Mr. Windham is an expert. She agrees to that. Second, under
9 Statute 90.702, expert testimony is relevant if it is based on
10 scientific, technical, or other specialized knowledge that will
11 assist the trier of fact in determining an issue that is
12 relevant to the case.

13 Mr. Windham's testimony goes to the issue, as
14 stipulated by all parties, as it relates to coal availability
15 and cost. Whether Mr. Windham's testimony has flawed data goes
16 to the weight the Commission must give Mr. Windham's testimony,
17 not whether it's admissible.

18 As stated, evidence is relevant if it offers any
19 tendency to prove or disprove a material fact. Here
20 Mr. Windham's testimony is offered to prove a material fact.
21 Ms. Triplett talks about Mr. Windham giving data not comparing,
22 to sort of speak, apples-to-apples and oranges-to-oranges.
23 Again, that goes to the weight of the evidence, not whether the
24 evidence is admissible.

25 Second, she talks about the expert testimony needs to

1 hit all three prongs in terms of whether Progress was prudent
2 in its coal procurement, how much of a refund, and I can't
3 remember the third point. Case law suggests, Madam
4 Commissioner, that an expert testimony does not have to hit all
5 three points. It only needs to be directed to a point in terms
6 of helping the trier of fact determine the issue at hand. And
7 for that reason Mr. Windham's testimony is relevant to this
8 proceeding.

9 And I guess if we can get a stipulation, Madam
10 Commissioner, Ms. Triplett did not hit the issue of hindsight
11 review and administrative finality or due process. I think
12 they're stipulating to that if she doesn't argue that today. I
13 don't know if she's stipulating to that or not.

14 MR. BURNETT: Madam Commissioner, if I may. It
15 wasn't our intention to raise any of those arguments with
16 respect to Mr. Windham's testimony. We are making no
17 stipulations on hindsight review or any of the things mentioned
18 by Mr. Young. We are simply saying under the law of
19 admissibility of expert testimony and the case law is it
20 admissible or not.

21 If we are bringing in issues of whether Mr. Windham
22 employs hindsight review, retroactive ratemaking, or violates
23 administrative finality, I would definitely like to argue
24 those. But it was not Ms. Triplett's intention to leave those
25 out, I didn't think they were at issue.

1 MR. YOUNG: And, I apologize. Because she didn't
2 argue it, I thought --

3 MS. BENNETT: And I was prepared in my portion of the
4 oral argument to address striking the testimony, because in
5 their written argument Progress stated that it should be
6 stricken because of hindsight review, at least that's my
7 understanding of their oral argument. That has actually been
8 addressed in part in the motion to dismiss that the Commission
9 considered.

10 Hindsight review is really fully addressed in the --
11 excuse me -- case of Maxine Mines, which was considered by the
12 Commission. It's the precursor to the Gulf case, so it's Order
13 Number 13452. I'm not going to go in-depth, but on Page 7 of
14 that case it talks about what prudence determination the
15 Commission should look at. And it basically says -- give an
16 attorney an opportunity to talk and then she continues, I'm
17 sorry. Prudence review and a determination of prudence is an
18 approach that, according to this order, that limits the review
19 of prudence to -- an approach that limits the review of
20 prudence to contemporaneous events fails to recognize the duty
21 of this Commission to protect the ratepayers' interest and the
22 fact that the utilities are not entitled to recover expenses
23 imprudently incurred.

24 In other words, in Maxine Mines the Commission
25 considered evidence that came up along the way in making a

1 determination of whether or not the utility, Gulf, acted
2 imprudently. So it's not impermissible to look at things that
3 happen along the way after a procurement or a contract is
4 entered into. What is impermissible is to apply the standard
5 for today. What you have got to do is go back and say what is
6 a prudent or reasonable utility manager going to do with the
7 facts and circumstances, or should do with the facts and
8 circumstances in front of them.

9 And, in addition, they argued in their written motion
10 that it violates due process to allow Mr. Windham's testimony
11 in. And, again, that was addressed in Order 12645. The
12 prudence review is not keyed or before the Commission until the
13 issue itself is raised, there's facts presented, and the
14 Commission makes a final ruling on prudence. So that has
15 clearly been addressed by the Commission in 1983 by -- or in
16 1985 by Order Number 12645.

17 COMMISSIONER McMURRIAN: Thank you both.

18 Mr. McGlothlin.

19 MR. MCGLOTHLIN: A couple of quick points. Counsel
20 for Progress Energy said in her argument that Mr. Sansom did
21 not perform an analysis on Mr. Windham's testimony. It isn't
22 necessary for Mr. Sansom to have performed an analysis on the
23 other witness' testimony for that testimony to have independent
24 value if it's relevant.

25 Secondly, while Mr. Sansom's testimony speaks largely

1 and primarily to the assertion that Powder River Basin coal was
2 the cheapest available during the time frame, in his testimony
3 he also alludes to the fact that at points in time foreign coal
4 also was cheaper than the bituminous coal and synfuel that
5 Progress Energy was acquiring largely from its affiliates. So
6 Mr. Windham's testimony is relevant in that it reinforces the
7 testimony of Mr. Sansom in that regard.

8 And, thirdly, at least in the written motion, one of
9 the contentions was that Progress Energy would be prejudiced if
10 it did not receive an extension of time to file rebuttal to Mr.
11 Windham's testimony. That extension was provided. They did
12 file rebuttal testimony. Their procedural rights have been
13 protected, so we oppose the motion to strike.

14 MS. TRIPLETT: Commissioner, may I ask for a brief
15 rebuttal? I don't think I used all of my time, if that's okay.

16 COMMISSIONER McMURRIAN: That's fine.

17 MS. TRIPLETT: Thank you.

18 First, just to the procedural issue, I agree we were
19 granted an extension, but when we filed the motion to strike,
20 we had not secured that extension, so we just wanted to make
21 sure that was covered. And just to address the hindsight
22 review argument, I know I didn't address it in the oral part,
23 but just to respond, our argument is that because Mr. Windham
24 is relying on 423 data, which is data that utilities -- I think
25 it's 45 days after the fact, they report various coal purchases

1 and tonnage and prices to either the FERC or to this
2 Commission. And we are saying that to rely on what other
3 utilities were doing, Progress Energy couldn't have known at
4 the time because even the utilities don't file it until after
5 the fact.

6 But, more importantly, to the argument about that
7 this goes to the weight of the testimony, we don't dispute that
8 there is a lot of discretion, but we are saying that at some
9 point the testimony has to be evaluated. And if it comes down
10 to it just defies common sense and logic of what the actual
11 methodology is to perform that data, then you can, in fact, and
12 should not allow it to come in, because all it is going to do
13 is not be helpful and, in fact, confuse the issues.

14 And finally, to this point about this expert doesn't
15 have to, Mr. Windham does not have to touch on all the issues.
16 If staff had presented another witness to tie everything up to
17 say, okay, you know, by taking Mr. Windham's data about the
18 difference in foreign coal and CAPP coal, and I'm going to
19 spell out how much refund it is, that's fine. But staff hasn't
20 done that.

21 And to Mr. McGlothlin's point about Mr. Sansom's
22 analysis, just because he alludes to the fact that foreign coal
23 might have been cheaper, as well, that doesn't get us there.
24 Because I would like to see the exhibit attached to
25 Mr. Sansom's testimony that says here is what the damages would

1 have been if Progress Energy had been buying foreign coal and
2 it didn't buy foreign coal. And it's not there, because all he
3 focuses on is the PRB coal. So, again, we think that it would
4 be error for the Commission to consider the testimony.

5 Thank you.

6 COMMISSIONER McMURRIAN: Thank you. Just a minute.

7 I think whenever staff informed you all that I would
8 be taking oral argument, I believe, and if it wasn't conveyed,
9 that they also conveyed that I would be taking it under
10 advisement, and I would issue a separate order. And just for
11 the record, Mr. Harris is actually advising me on this issue,
12 given the nature of staff's participation.

13 Staff, I suppose we move on to other matters at this
14 time?

15 MS. HOLLEY: That's correct.

16 COMMISSIONER McMURRIAN: Any other matters?

17 MS. HOLLEY: We know of none.

18 COMMISSIONER McMURRIAN: Mr. McGlothlin, do you have
19 any? Or any other parties.

20 Ms. Triplett?

21 MS. TRIPLETT: No, ma'am.

22 COMMISSIONER McMURRIAN: Okay. Well, thank you all
23 very much for the cooperation today. I think we have moved
24 this along, and I appreciate your willingness to take the time
25 to try to come to some agreement on the issues, and I hope it

1 is a success. And, again, I appreciate your bearing with me
2 today. I'm a little bit behind the curve today, as you can
3 probably tell. I appreciate you spending this time. And I
4 will take the motion to strike under advisement, that ruling
5 should be coming out in the next few days. And, Ms. Holley, do
6 we need to go over the time frames for what the parties owe you
7 all?

8 MS. HOLLEY: We can just reitify (phonetic) that
9 staff will e-mail a list of the final issues and topics to the
10 parties by sometime today, this evening. And if you all could
11 get your positions -- statements to those positions and issues
12 and topics to us, and identifying which witness will testify to
13 which issue, if you can get that all to us no later than noon
14 on Monday or sooner, then I think we can get the prehearing
15 order issued by Wednesday, I believe, is when it is due.

16 COMMISSIONER McMURRIAN: Thank you all.

17 This prehearing is adjourned.

18 MS. HOLLEY: Thank you, Commissioner.

19 (The prehearing concluded at 4:18 p.m.)
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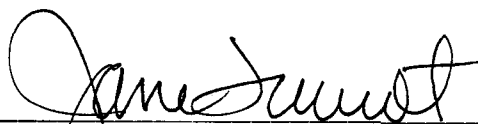
CERTIFICATE OF REPORTER

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

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

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

DATED THIS 26th day of March, 2007.



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