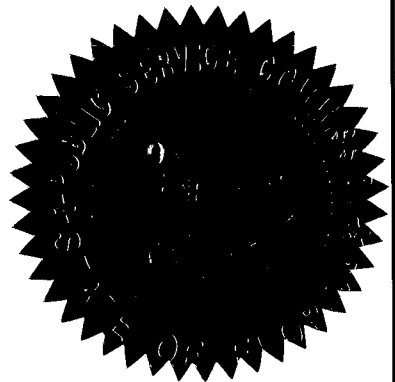


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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:           AGENDA CONFERENCE  
                                  ITEM NO. 8

BEFORE:                   CHAIRMAN LISA POLAK EDGAR  
                                  COMMISSIONER MATTHEW M. CARTER, II  
                                  COMMISSIONER KATRINA J. McMURRIAN  
                                  COMMISSIONER NANCY ARGENZIANO  
                                  COMMISSIONER NATHAN A. SKOP

DATE:                     Tuesday, July 31, 2007

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

REPORTED BY:            LINDA BOLES, RPR, CRR  
                                  Official FPSC Reporter  
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1 PARTICIPATING:

2                   MICHAEL A. COOKE, GENERAL COUNSEL, PETE LESTER and  
3 BILL McNULTY, representing the Florida Public Service  
4 Commission Staff.

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

1  
2 CHAIRMAN EDGAR: Okay. We are back on the record and  
3 we are going to take up Number 8, which is also a posthearing  
4 decision limited to discussion by Commissioners and staff. And  
5 I'll look to our staff to get us started.

6 MR. LESTER: Good morning, Commissioners. I'm Pete  
7 Lester with staff.

8 Item 8 is a posthearing item regarding OPC's petition  
9 to require Progress Energy Florida to refund \$143 million to  
10 customers. The main assertion in OPC's petition is that it  
11 should have burned a coal blend containing 50 percent Powder  
12 River Basin coal in its Crystal River Units 4 and 5 during the  
13 period 1996 through 2005. OPC notes these units were designed  
14 to burn a blend containing up to 50 percent subbituminous coal  
15 such as PRB coal. For the period 1996 through 2005 OPC  
16 calculates the excess fuel cost to be \$134.5 million.

17 PEF's response is that it was prudent in purchasing  
18 coal for the period. The company states that it objectively  
19 evaluated bids and bought coal based on the lowest delivered  
20 price. PEF states that Units 4 and 5 would experience  
21 significant derates had it burned a 50/50 blend with PRB coal.

22 FIPUG, AARP, PCS Phosphate and the Attorney General's  
23 Office have intervened and generally support Public Counsel's  
24 positions. In addition to the refund, AARP, FIPUG and PCS  
25 Phosphate recommend that the Commission fine PEF.

1           Issue 1 involves whether PEF was prudent in  
2 purchasing coal for the period 1996 through 2005. Because your  
3 decision affects the remaining issues, staff recommends that  
4 you decide Issue 1 first.

5           Issue 1 is broken down into topic areas such as  
6 environmental permitting, coal procurement practices and so on,  
7 and the Commission need not vote on those topics, or on each  
8 topic.

9           Issue 2 is the policy issue involving what to do if  
10 PEF is found to have been imprudent in purchasing coal.

11           Issue 3 addresses whether the Commission can legally  
12 require a refund.

13           Issue 4 is the recommended refund amount and  
14 methodology.

15           And Issue 5 addresses whether the Commission should  
16 oppose -- impose a fine.

17           For Issue 1 staff is presenting a primary  
18 recommendation that PEF was imprudent in purchasing coal for  
19 the period 2003 through 2005. Based on its 2001 solicitation  
20 that showed PRB coal to have the lowest delivered cost, PEF  
21 should have positioned itself so that it could burn a blend  
22 with 20 percent PRB coal starting in 2003. For the three years  
23 the savings for customers would have been approximately  
24 \$12.4 million.

25           The alternative recommendation for Issue 1 is that

1 PEF was prudent in purchasing coal for all ten years in  
2 question. PEF has demonstrated that it bought coal based on  
3 the lowest total delivered cost consistent with coal quality  
4 specifications and reliability of supply. PRB coal has  
5 performance and maintenance properties that require a  
6 deliberate approach before switching coal types. Consideration  
7 of switching coal types is particularly important given that  
8 Units 4 and 5 are baseload units.

9 Staff recommends that you consider Issue 1 first.  
10 Depending on your decision for Issue 1, Issues 2 through 5 may  
11 be moot. We're prepared to go through the topics or proceed as  
12 you please.

13 CHAIRMAN EDGAR: Thank you. And, Commissioners, as  
14 you've heard our staff say, they have suggested that when we  
15 come time to voting that we probably begin with Issue 1. It  
16 may be, depending on how the discussion goes, that if we take  
17 up the additional items, that we take them out of order. We'll  
18 just see what, what makes sense as we go through our questions  
19 and discussion. I'm thinking right now though to kick us off  
20 we can have as wide ranging, as many questions and discussion  
21 on whatever related topics you think might be helpful. And  
22 then as we move through that, we'll try to focus it in and get  
23 to the point where we're ready to take up the issues that will  
24 require a vote. So, Commissioners. Commissioner Skop.

25 COMMISSIONER SKOP: Thank you, Madam Chair. And I

1 would ask, given my illness, that fellow Commissioners  
2 basically give me a little latitude here just because, yes, I'm  
3 definitely sick, and I got in at 3:00 last night from our  
4 Lifeline in South Florida event.

5           Madam Chair, fellow Commissioners, as you know, I did  
6 not participate in the hearing associated with the docketed  
7 matter before us today. Having thoroughly reviewed the record,  
8 however, up to and including the reference to the Florida  
9 Gators winning yet another national championship, transcript  
10 359, Lines 8 through 18, I'm fully prepared to opine and offer  
11 my suggestions as to how this matter should be properly  
12 adjudicated by this Commission. I will base that on sound  
13 technical, legal and financial reasoning.

14           Upon reviewing the record, I find that the arguments  
15 advanced by the Office of Public Counsel, OPC, AARP via Mike  
16 Twomey, the Attorney General, Florida Industrial Power Users  
17 Group and White Springs Agricultural Chemical, White Springs to  
18 be persuasive. That being said, the primary concern then  
19 becomes what's the appropriate remedy?

20           Additionally, the theory advanced by AARP, Mike  
21 Twomey, with respect to imposing a meaningful statutory penalty  
22 within the procedural posture of a fuel proceeding is also an  
23 innovative argument.

24           While reserving judgment on that argument or on the  
25 merits -- excuse me. While reserving judgment on the merits of

1 that argument for another day, an important corollary under  
2 Section 366.03, Florida Statutes, implies that a utility still  
3 has an overarching fiduciary responsibility to ensure that all  
4 rates and charges to consumers are fair and reasonable,  
5 irrespective of any prior order by this Commission; i.e.,  
6 waterborne proxy.

7 Finally, with respect to the position statements of  
8 the parties, I'm not sure that anyone could articulate a  
9 summation argument better than that presented by Florida  
10 Industrial Power Users Group.

11 Moving directly to the point, the procedural posture  
12 of the instant case is that of a fuel clause proceeding. The  
13 attendant circumstances surrounding the loss of flexibility to  
14 burn a fuel blend utilizing PRB causes me great concern.  
15 Although well documented and argued throughout the record, OPC  
16 seemingly underestimates the significance of this important  
17 aspect of this case.

18 In reviewing the record before me, I conclude briefly  
19 the following, and I'm sure I could go on, which we will get  
20 into, but concluding the following, that the issues associated  
21 with the failure to maintain fuel blend flexibility are  
22 inextricably intertwined with the inability to leverage fuel  
23 cost savings for the benefit of the customers. And I'll speak  
24 more on that as we go on.

25 Secondly, consumers paid for this flexibility in the

1 rate base and lost the benefit of the bargain, and this is  
2 analogous to the concept of legal waste, by virtue of  
3 Progress's departure from sound engineering practices and  
4 material admissions. And I'd like to draw briefly the  
5 Commission's attention to that in the transcript. This would  
6 be Mr. Putman's testimony at Page 423 -- I mean 1423, Lines 17  
7 through 22. And I quote, "One critical example is the failure  
8 of Progress Energy to conduct the acceptance test of the new  
9 Crystal River units with the design fuel of 50 percent PRB coal  
10 and 50 percent CAPP coal. This unconscionable and totally  
11 unexplained failure has led to all the issues under discussion  
12 in this proceeding." I think that's a very, very important  
13 point that's raised.

14           Moving forward, I also reject the avoided cost  
15 arguments that Progress advances associated with the benefits  
16 of the uprate. Simply put, there's sufficient testimony in the  
17 record to duly support the fact that the uprate can be  
18 maintained by burning a 70/30 blend when it's cost-effective to  
19 do so. And, again, that's supported on numerous instances by  
20 Witness Sansom, PEF's own consulting engineer, Sargent & Lundy,  
21 and PEF's own witness. And if you do the weighted average  
22 associated with that fuel blend, you come right into the heat  
23 rate that's in direct testimony.

24           Also, I reject the Progress arguments associated with  
25 regulatory uncertainty of us doing certain things in terms of



1 looking back, administrative finality, hindsight review,  
2 retroactive ratemaking and due process. Simply put, the  
3 financial community is smart enough to recognize when there's  
4 sufficient reason to do so, i.e., an extraordinary circumstance  
5 under case law of Richter v. Florida Power Corporation, that  
6 certain things have to happen. And, again, that shouldn't be  
7 cast under regulatory uncertainty as staff, I think, has  
8 prudently given great discussion and analysis to on Page  
9 81 through 87 of the staff recommendation, and the case law  
10 review of the controlling cases, and the arguments that were  
11 rejected by motion by this Commission and subsequently argued  
12 by Progress in the posthearing briefs.

13 I guess where I'm at with this is I need to educate  
14 my colleagues, and I would ask for some patience and some  
15 indulgence there in my ability to do so, based on technical  
16 information that's clearly contained within the record, and  
17 then looking at legal points and financial points, and then  
18 moving forward to what is the appropriate remedy that's fair  
19 and equitable to all parties, Progress, the consumers, OPC, all  
20 the stakeholders. Because, again, as a regulator I strive to  
21 be fair and equitable.

22 Looking at this from the point of the issues being  
23 inextricably intertwined, again, the conduct associated with  
24 designing a plant and all the things that happen kind of lends  
25 itself very well into the position that Progress found itself

1 in in terms of its integration into affiliate companies to  
2 provide its own fuel when it only had access to CAPP coal.  
3 Okay. There is no mine that they owned that had PRB coal, but  
4 they were pretty well integrated to provide solely CAPP coal.  
5 And, again, the decisions associated with the conduct,  
6 associated with the plant design and some collateral issues  
7 that we'll get into put them in that position, and that lends  
8 credibility, direct credibility to some of the arguments  
9 advanced by the OPC.

10           Moving to the genesis of this project, and, again, I  
11 think that it's clearly reflected in the record, and I could go  
12 on citing to numerous instances, I've got this thing flagged ad  
13 nauseam, but the bottom line is, is a design point for a fuel  
14 blend is a critical, as stated in the record, is a critical  
15 point of the design process and it's something that's not taken  
16 lightly. Hundreds of thousands of dollars, if not millions, go  
17 into achieving that point. So at the point of the design it  
18 was designed around a 50/50 blend. And apparently PRB wasn't  
19 cost-effective then even when it was designed, so that's a  
20 question in itself, but it was designed for fuel burn  
21 flexibility.

22           Now when it came time to put these plants online,  
23 and, again, that's the reference to Putman's testimony, 1423,  
24 Lines 17 through 22, you have something called acceptance  
25 testing performance guarantees that are clearly articulated in

1 the record. And you would normally, I think, as stated in the  
2 record by, by expert testimony, strive to test, performance  
3 test and acceptance testing around those fuel blend design  
4 points. That was simply not done. That was a monumental  
5 departure from sound engineering practice. Okay?

6 Now I do recognize, in all fairness to Progress, that  
7 Progress got an uprate that was probably unexpected, and that  
8 was from burning 100 percent CAPP coal. And I'm okay with that  
9 because that was a benefit to the consumer. But the bottom  
10 line is the whole charade or red herring or smoke and mirrors  
11 associated with the avoided cost of that uprate in the context  
12 that that should negate everything that's happened doesn't fly  
13 with me, it doesn't work, not getting there. And the sole  
14 basis for that is had the flexibility that was built into this  
15 plant been preserved, today had they preserved that and done  
16 their burn tests and everything else, kept their permits, they  
17 could burn when it's cost-effective, by their own testimony,  
18 supported by the testimony of two other witnesses, burn a 70/30  
19 blend and still maintain the overpressure rating that's  
20 necessary to leverage the uprate, as well as leverage the fuel  
21 savings costs.

22 So where we're at in this, again, trying to educate,  
23 a substantial departure from sound engineering practice by not  
24 testing at the design point at acceptance testing, they gave up  
25 the guarantees because they got the efficiency, they got the

1 uprate and they were only looking at 100 percent CAPP coal.  
2 But that's not my point. The point is, is flexibility.  
3 Whether you use it or never use it, that's not the point.  
4 Consumers paid for the flexibility. And that flexibility could  
5 be leveraged at any time when there was an evaluated cost  
6 benefit to burning the blend of fuel. And they don't have that  
7 flexibility today.

8           So, again, it's kind of like a string of departures  
9 from sound engineering practices from the get-go. But that  
10 goes further because they gave up the flexibility further in  
11 the permits, Title 5 permits. Okay. Not once, but twice.  
12 There's record testimony via the internal memo that's  
13 referenced, transcript at 287 and Exhibit 48, that they knew  
14 that they were going to intend to burn the PRB. And that's on  
15 Page 28 of staff's recommendation, if I can draw your quick  
16 attention there. And, again, I --

17           CHAIRMAN EDGAR: I'm sorry. Commissioner Skop, at  
18 what point are you trying to get us to look at? I didn't hear  
19 the page.

20           COMMISSIONER SKOP: I'm sorry. Page 28 of the staff  
21 recommendation.

22           CHAIRMAN EDGAR: Thank you.

23           COMMISSIONER SKOP: Mid-page where it talks about  
24 Witness Davis and PFC's Vice President for Coal Procurement  
25 Dennis Edwards' quote, "I believe we should recognize that we

1 will, in all likelihood, be using PRB coals at CR4, CR5 by  
2 about 2000, my guess, Transcript 287."

3           Again, it should have been known or readily apparent  
4 to them that at some point the evaluated price would have  
5 favored using the fuel mix blend, but, again, they didn't  
6 preserve that flexibility. So this case surrounds itself by  
7 the flexibility. It's not so much the, leveraging the fuel  
8 savings. Because if you don't have the flexibility and haven't  
9 preserved the flexibility, you're unable to leverage and  
10 capture the fuel savings.

11           So, again, I ask, I ask for patience because, again,  
12 I am sick and I'm trying, trying to get through this in an  
13 articulate manner, but I am struggling.

14           So moving forward, again, design point, didn't do  
15 acceptance and performance testing, gave up your contractual  
16 guarantees, they settled on using 100 percent CAPP coal,  
17 consumers lost the benefit of the bargain for something they  
18 paid for, and there's, there's a little bit of record testimony  
19 in two regards on what the cost that was built into the plant  
20 was to have the flexibility to, to perform the fuel blend.  
21 And, again, we'll get to that a little bit down the line and,  
22 you know, and I'll try and move this forward a little bit.

23           But the bottom line is there were a string of events,  
24 and that course of conduct left Progress in a position where it  
25 was detrimentally reliant on CAPP coal that was supplied by its

1 affiliates. So, again, one course of conduct leads to another,  
2 and it's not hard to make a presumption or inference.

3 Now, again, fashioning the appropriate remedy. I  
4 think this is where staff's recommendation comes into play a  
5 little bit because there are some, some good aspects of staff's  
6 recommendation on certain regards. But I will say that I do  
7 find primary staff recommendation to be unduly conservative and  
8 I completely reject the alternative staff recommendation. I  
9 just can't get there. Nor can I get to OPC's \$143 million  
10 figure. I can't get there technically.

11 But, again, a big, big, big, big part of this is  
12 looking at the inherent flexibility that consumers lost the  
13 benefit of the bargain on by Progress's action and looking at  
14 this in the totality of the circumstances, not in an isolated  
15 microcosm, not armchair quarterbacking, but looking at case law  
16 precedent, looking at the facts contained within the record and  
17 trying to sort through a he said/she said analysis, because  
18 there's a lot of that in there. And, again, I find the  
19 testimony of Witnesses Sansom, Barsin and Putman to be very,  
20 very credible in this instance.

21 So trying to fashion a fair and equitable remedy to  
22 all parties is somewhat difficult because this is probably one  
23 of the most complicated cases that I think the Commission will  
24 see in a long time. There's a lot of technical data in there,  
25 it's hard without a technical background not to be jaded, not

1 to have the wool thrown over your eyes. Again, I think it's  
2 very, very important to be fair and give credit where credit is  
3 due to Progress for the unexpected uprate. That's great. But  
4 by their own admission, by the own admission of their  
5 consulting engineer and consistent with Sansom's testimony they  
6 can achieve the same uprate benefit and leverage fuel costs at  
7 savings to the customer by burning a blend. And they, frankly,  
8 haven't done that and to this day they do not have the  
9 flexibility.

10           So quickly getting, making my point, having walked  
11 everyone through kind of where I want to go -- I mean, in an  
12 early Supreme Court case John Marshall had a vision in Marbury  
13 v. Madison, and he took the court in the direction where he  
14 thought it needed to go. Similar to that, again, I think that  
15 I have to come up with a fair and equitable remedy. And,  
16 again, I think, you know, I'm willing to offer my suggestions  
17 out how, as to how this matter should be properly adjudicated  
18 by this Commission. I think that that involves looking outside  
19 of the box. And some of that was kind of inspired in me by  
20 AARP's brief, not that I agree with it fully, but, again,  
21 that's some innovative thinking that went into that, the  
22 reasoning.

23           And so what I look at is, again, these issues are  
24 inextricably intertwined. There's a substantial amount of  
25 record testimony that supports what I'm going to try and reason

1 in terms of an alternate recommendation. Again, it was not  
2 proposed by staff. It's something that I've come up with based  
3 on the record evidence and based on asking staff to look at the  
4 inherent sensitivities of making analysis supported by record  
5 evidence and looking in the context of what would happen if  
6 they simply changed some of their underlying assumptions.

7           And I think that the fair and equitable remedy that I  
8 would suggest to this Commission is, is threefold. There's  
9 three distinct parts to that.

10           And I'll start, if I may, Madam Chair, with the first  
11 part. If you will look, if I could draw the Commission's  
12 attention to the supplemental analysis that I had asked staff  
13 to perform, and, again, based on record evidence, one of the  
14 first documents that you will see is the option including the  
15 30 percent PRB blend. Again, that's supported by record  
16 testimony in numerous instances. Again, it's consistent with  
17 staff's recommendation to the extent that you only changed that  
18 percentage assumption. Everything else is consistent with  
19 staff's primary recommendation in terms of the calculations  
20 that were performed that are contained in the staff  
21 recommendation. But if you look at that, based on the  
22 assumption of 30 percent PRB, which can maintain the  
23 flexibility of the uprate while leveraging fuel cost savings  
24 for the consumers, it takes the refund amount to, based on the  
25 calculations that staff performed, to approximately 25,600,000



1 -- \$25,062,308. Now if you look at the supplement interest  
2 calculation to that, again, that's approximately 3 point --  
3 \$3,232,365 in terms of interest. So all in, you're at about  
4 \$28 million, assuming a 30 percent blend that's adequately, in  
5 many instances, supported by the record, supported by the heat  
6 content of the coals at those ratios. Again, there's adequate  
7 support in the record.

8           And I don't think staff would even disagree that  
9 that's an outlandish assumption by any means. Again, staff was  
10 being conservative by the 18 percent burn that was done. But,  
11 again, there is sufficient testimony in the record to reflect  
12 that maybe staff could be less conservative in their analysis.  
13 And I think part of that is -- one part of the remedy that I  
14 would suggest would deal with revising staff's assumption in  
15 terms of the blend that could be used and locking that in, that  
16 it became cost-effective to do so in 2001. And, again, I could  
17 attack the waterborne proxy, but I'm not going to go there  
18 because of numerous administrative finality issues and other  
19 things that it's just not the way to go. So, again, trying to  
20 be fair and equitable to all parties, I think that the proper  
21 blend is 30 percent, absent any conflicting testimony. You can  
22 preserve the uprates, so you're leveraging that benefit, but  
23 you're also leveraging the cost savings that are available to  
24 consumers by being able to take advantage of the lower cost of  
25 the blended fuel.

1           Now I'm going to move on to one other aspect of  
2 something I also reject. Progress makes a lot of arguments  
3 about blending coal and its proximity to the nuclear reactors.  
4 Again, I don't find a lot of those arguments to be credible.  
5 Again, I think they overemphasize and it's -- you know, they  
6 talk about catastrophes and all kinds of bad scenarios.  
7 Prudent coal handling can reduce those, as reflected by the  
8 expert testimony. So, again, I just wanted to come back to  
9 that one issue that I'd previously forgotten to mention.

10           Secondly, and this is where I need to draw the  
11 Commission's attention, and this is where you might need the  
12 parachute or the ejection seat or what have you, but if I could  
13 draw the Commission's attention, please, to staff  
14 recommendation on Page 11 at the bottom, mid-page. In Order  
15 15486, issued 23, December, 1985, in Docket No. 840001-EI-A, In  
16 Re: Investigation into Extended Outage at Florida  
17 Power & Light, St. Lucie Unit No. 1, in that situation the  
18 Commission was faced with an analogous procedural posture.  
19 They were in a fuel clause proceeding and apparently there was  
20 an outage and they were trying to recover for the cost of  
21 replacing the generation due to that outage. And what had  
22 happened there, is my recollection, and I have the full case in  
23 front of me, was that they actually looked back into something  
24 that was in the rate base and they drew a prudency  
25 determination. And, again, the second prong of where I want to

1 go in an equitable remedy, and I don't know whether my fellow  
2 colleagues will agree with me, but, again, I think that part of  
3 my job is to educate and lay out some sound technical, legal  
4 and financial reasoning, is that analogous to the instant case  
5 where we're in a fuel clause proceeding, and that's the way the  
6 case is currently styled, looking back into the rate base it's  
7 not unprecedented by this Commission. And I know -- I take  
8 that with, with a big, big reservation because you have to do  
9 it for the right reasons, as articulated in Richter v. Florida  
10 Power Corp, where an administrative agency, in the headnote,  
11 may alter a final decision only under extraordinary  
12 circumstances.

13           Now analogizing the instant case to what happened in  
14 Florida Power & Light, St. Lucie Unit No. 1, again, fuel clause  
15 proceeding, looked back 16 years into the past to a technical  
16 issue, a technical design issue, the thermal shield, and they  
17 concluded that not only the decision to design a unit to  
18 include the thermal shield was prudent, but subsequent actions  
19 to maintain that shield were prudent.

20           And I'm going to look real quick at Page 8 of that  
21 order. Quote, "For the reasons that follow, we find that FPL's  
22 decision to include a thermal shield in the design of  
23 St. Lucie 1 was prudent when we consider the information known  
24 to the decision-makers at the time of the relevant decisions.  
25 Likewise, we have determined that FPL's operation of the unit

1 prior to the extended outage was prudent and reasonable, as was  
2 its repair and return to service. Accordingly, we have found  
3 that the replacement fuel costs incurred were reasonable and  
4 prudent and properly recovered through the fuel cost recovery  
5 clause."

6 I guess what I'm getting at here is there is  
7 Commission precedent for doing what I'm going to suggest that  
8 we do as the second prong of fair and equitable remedy. Here  
9 we're in a fuel clause proceeding and there is a technical  
10 issue associated with the flexibility that was built into the  
11 design, and was it prudent to design in the manner and to  
12 design the units to burn a mix of fuels? And I'm not going to  
13 say one way or another, but the bottom line is, is that, you  
14 know, assuming for the sake of discussion that decision was  
15 prudent, which I think it probably was, I mean, I think that  
16 the testimony supports that, but the bottom line is, is that  
17 the flexibility was subsequently squandered, analogous to the  
18 legal concept of waste by the tenant (phonetic) holder. They  
19 didn't do the acceptance testing, they didn't do a fuel burn  
20 mix; clearly a sound departure from sound engineering  
21 practices, as referenced by Witness Putman on 1423, Lines 17  
22 through 22. It's just something that you don't do.

23 But to go beyond that, to have internal documents  
24 suggesting that you're going to, you're going to burn PRB, and  
25 to give up your flexibility not once but twice under Title 5,

1 in addition to the other conduct alleged with setting up  
2 separate affiliates to provide your own fuel -- I mean, there  
3 is no record evidence showing that they ever looked at  
4 procuring a PRB mine. So, again, I think it's very, very, very  
5 important to look at the impact of the loss of this  
6 flexibility. And, again, consumers paid for something, and  
7 I'll get to that in a second, but they lost the benefit of the  
8 bargain. And it's not fair to me, and, again, I'm doing this  
9 under supporting case law and Commission precedent, it is not  
10 fair to me for consumers to lose the benefit of the bargain  
11 which could be further leveraged by having the flexibility to  
12 burn a fuel blend which would ultimately save the consumers  
13 more in fuel costs. It's not fair for somebody to benefit from  
14 that capital investment.

15           And what I'm looking at -- and, again, this, I'd like  
16 to draw the attention to other, the other legal-sized sheets  
17 that staff has prepared based upon asking them to perform some  
18 analysis on what-ifs based solely upon record evidence. To me  
19 it's just inherently fair if somebody makes a capital  
20 investment to maintain flexibility and squanders it, that they  
21 should not be disgorged of the return on equity associated, or  
22 the profit, if you will, associated with that capital  
23 investment. It's just -- they've wasted under the legal  
24 concept of waste and they shouldn't be rewarded for that.

25           And the second prong of my approach would

1 essentially -- under the, the Commission precedent in FPL  
2 St. Lucie 1 as well as controlling case law in the State of  
3 Florida under Richter to the extent that you need an  
4 extraordinary circumstance to overcome administrative, a final  
5 decision or administrative finality, because, again, this plant  
6 has been in the rate base. And I'm asking that we do something  
7 that is fair and equitable, and I think it's supported by sound  
8 legal reasoning. I'm not really, really going out on a limb  
9 here. But to me it's just inherently unfair that consumers pay  
10 a price for flexibility. That flexibility was squandered.

11           And, again, when you look at the totality of the  
12 circumstances, not doing testing, giving up the permits,  
13 putting your position where you detrimentally relied on CAPP  
14 coal, but then you have the allegations of self-dealing through  
15 affiliates and all those other things that OPC raises, and,  
16 again, under, under GTE v. Deason, related party transactions  
17 require heightened scrutiny. Although a transaction between  
18 related parties is not per se unreasonable, it's the utility's  
19 burden to prove that its costs are reasonable. Again, to me  
20 it's inherently unfair for a capital investment to be made and  
21 put in the rate base on the backs of consumers and for that  
22 investment to be squandered because the flexibility was not  
23 maintained.

24           So, again, I think it's fair and equitable, although  
25 I can't get to the \$143 million under OPC's reasoning because

1 of my technical review, it seems inherently unfair that  
2 Progress should benefit from the return on equity or perhaps  
3 even the, the weighted average cost of capital that would  
4 encompass equity and debt on that investment that was made for  
5 the fuel flexibility. So that's the second triad.

6           Again, just in summation, the first triad would be  
7 the 70/30 blend which would result in the revised refund that  
8 staff had calculated is based on prior assumptions articulated  
9 in the record.

10           Second would be basically looking back. But in order  
11 to do that, there is precedent under, you know, People's Gas  
12 and such that the administrative commission can on its own  
13 motion do things. And I feel there is sufficient evidence in  
14 the record to support taking this decision sua sponte based on  
15 my alternate recommendation. However, because of procedural  
16 safeguards -- and I'm sure what I'm saying is probably catching  
17 a lot of people by surprise about right now. But, again,  
18 that's innovative thinking that I'm bringing to the table here,  
19 but I'm striving in bringing that thinking to be fair and  
20 equitable. That to take it sua sponte and decide it today  
21 would deny Progress due process on that issue solely on the  
22 basis of there may be some question as to what amount was paid  
23 to build the flexibility into the plants for the fuel burn.  
24 And I think that there is testimony from Witness Barsin and  
25 Putman regarding those costs, and some were estimated at

1 \$44 million. So if you -- for each unit.

2 But if you look at what staff did, staff did some  
3 scenarios, sensitivities just to get an order of magnitude on  
4 what happens if you were to look at taking the step of  
5 disgorging the return on equity associated with the squandered  
6 investment. And if you look at that from 1985 where apparently  
7 this went into the rate base until current day, assuming --  
8 and, again, there is one other small assumption that I think is  
9 well documented by taking judicial notice of the returns on  
10 equity that were in effect per prior Commission orders. And,  
11 again, that's where due process probably comes into play a  
12 little bit here too. But if you look at the return on equity,  
13 disgorging them over the time period of interest -- and, again,  
14 interest rates were much higher back then than they are today.  
15 And if you look at the interest plus the principal, it's about  
16 53 point, 53, excuse me, \$53.3 million.

17 Now if you were to go a little bit further and look  
18 at the weighted average cost of capital under that same capital  
19 investment, again, that's \$44 million. That's -- we're only  
20 looking at kind of one unit, but, again, that's open to  
21 question. The impact of that would be \$56.5 million, and when  
22 you add interest to it it's \$111 million. So I'm not  
23 suggesting that this is right or wrong, but I'm just suggesting  
24 that it's inherently unfair for somebody to profit off the  
25 backs of something consumers paid for when they gave away the



1 farm, and to me that's not right. And I'm willing to, to apply  
2 innovative legal thinking when it's on sound legal precedent  
3 and technical thinking to try and do what's fair and equitable  
4 not only for Progress -- because, again, I'm giving them the  
5 benefit of the uprate. Okay? I appreciate that. You're  
6 getting more out of the unit. But, again, it's possible to get  
7 the uprate and burn a fuel cost that's cheaper to consumers,  
8 and that's well documented within testimony.

9           So the final prong of what I would propose in  
10 addition to my, my alternative remedy would be that currently  
11 to this day Progress still does not have the flexibility to  
12 leverage the cost savings associated with burning a fuel blend.  
13 And, again, consumers paid for it in 1982 and 1984 in the  
14 design of the plant, and that was subsequently squandered.  
15 And, again, the legal concept I'm using is waste. They were  
16 entrusted to do the right things with that capital investment  
17 and they didn't maintain the flexibility.

18           So with that being said, they need to restore the  
19 flexibility to burn the fuel mix blend so they can benefit and  
20 capture the savings that are available to consumers when on an  
21 evaluated basis PRB is cost-effective to use. Again, you're  
22 maintaining the uprate.

23           So, again, in summation, and then I'll defer to any  
24 questions or also I may have a question for, for our General  
25 Counsel, and I'm sure my fellow Commissioners will also, but in

1 summary, the fair and equitable remedy that I'm proposing,  
2 again, consists of three distinct parts.

3 First, it's an adjustment to staff's primary  
4 recommendation and calculation on the blend. Instead of using  
5 an 80/20, I think that 70/30 is supported. It doubles the  
6 refund based on staff recommendation.

7 Secondly, I think that we need to -- again, these  
8 issues are inextricably intertwined. I think it's inherently  
9 unfair for Progress to benefit off the backs of consumers when  
10 they squandered the flexibility that was built into that plant.

11 So my second prong would be to reopen the record for  
12 the limited purpose, and I mean very, very, very limited  
13 purpose of taking additional testimony from Witness Barsin and  
14 Putman and Progress with respect to the flexibility cost that  
15 was built into this plant. Right now I'm pretty comfortable  
16 because you've got two witnesses and they come up to some  
17 expert opinion that it's \$44 million per unit, and I'm willing  
18 to go there. But, again, I think that that's tempered by  
19 procedural safeguards that are owed to Progress in terms of due  
20 process to reopen the record. Not to have a separate  
21 proceeding because, again, that brings in all, all sorts of  
22 issues associated with another layer of administrative  
23 finality. But, again, if we in this procedural posture that  
24 we're in, we're in a fuel clause proceeding, and I think that  
25 there is precedent on the, on the Commission's own motion to

1 expand the proceeding under the precedent that I've mentioned  
2 for FPL/St. Lucie for the limited purpose of reopening the  
3 existing record to take very, very, very discrete testimony to  
4 definitize what the capital expenditure should be. Okay?

5           And by doing that, you do have by taking judicial  
6 notice of prior Commission orders the average weighted cost of  
7 capital and you also have the average cost of common equity and  
8 you know that. So it's basically taking the capital investment  
9 and applying the proper percentage to it and doing calculations  
10 that you have similar before you.

11           The third prong would be making Progress restore that  
12 flexibility, and I think that that should be done and it should  
13 not be incurred by the ratepayers. They squandered it. They  
14 need to replace it, they need to get their permits in place,  
15 they need to position themselves so they're able to leverage  
16 the flexibility that this plant had in it inherently and that  
17 was paid for by consumers. And by doing so, they can leverage  
18 those fuel costs. And, finally -- that's prong three.

19           But finally I do need to go back to something that  
20 staff recommended with respect to Issue 1 is there seems to be  
21 an issue associated with 2006 and 2007 fuel savings. And I  
22 would also suggest that perhaps, and I'm trying to find out, on  
23 Issue 1 on Page 16 at the bottom where staff mentions, "In  
24 addition, the Commission should direct PEF to supplement its  
25 2006 final true-up testimony in Docket No. 070001-EI to address

1 whether the company was prudent in its 2006 and 2007 coal  
2 purchases for CR4 and CR5." So, again, I'm striving not to be  
3 cavalier but to be fair and equitable. And I think it's  
4 important to look at this in the totality of the circumstances,  
5 recognizing, as we've articulated many times this morning,  
6 about following and adhering to Commission precedent and the  
7 importance of doing so. We have that precedent. We have case  
8 law supporting that final orders can be amended with  
9 extraordinary circumstances.

10 Consistent with witness testimony that's all through  
11 the record there were some very, very, very sound departures  
12 from, I mean, very significant departures from sound  
13 engineering practices associated with not doing the performance  
14 and acceptance testing when this plant came online. You just  
15 don't make those deviations. It's like, you know, taking a  
16 nuclear submarine and not hoping that it'll get you down to  
17 crush depth in one piece and back up to the surface. You just  
18 don't depart from things like that. I've got 13 years of  
19 engineering experience and I'm scratching my head here  
20 wondering why and how such things happened.

21 And I recognize the benefit of the uprate. But,  
22 again, to say that there's avoided costs that should negate all  
23 this, it's smoke and mirrors, it's a red herring. I'm not  
24 buying it, and I will dissent vigorously if -- you know, should  
25 we go a different way.

1           But one other point that I wanted to make in passing,  
2 and I don't think that I have it before me so -- oh, actually,  
3 yes. Page 22 of staff recommendation, there's staff  
4 acknowledgment there's a lack of contemporaneous evidence and  
5 lack of documents associated with, you know, what decisions  
6 were made and why. And, again, the burden is on Progress to  
7 show that their actions were prudent. And, you know, if we  
8 were to look at the rate base, which I think we have precedent  
9 to do, I mean, I don't think it -- the FPL case is directly on  
10 point. And, again, I don't subscribe to the argument that it  
11 provides regulatory uncertainty or that the financial community  
12 won't understand what we're doing. Because, again, what I'm  
13 trying to provide here is a fair and equitable alternative  
14 remedy that's based on sound technical, legal and financial  
15 reasoning, and I think Wall Street and the financial community  
16 is smart enough to understand that. So the whole things of  
17 evils that would result by us taking some action on behalf of  
18 consumers and trying to do what's right in the interest of all  
19 parties, I'm not going to buy the doomsday scenario that that's  
20 going to cause a host of problems with regulatory uncertainty  
21 because I think it's very limited what, what we might choose to  
22 do. But, again, the lack of documents, the lack of  
23 justification supporting the decision, I also think that weighs  
24 against Progress.

25           And so I would ask my fellow colleagues to ponder

1 what I've proposed here because I do think it is innovative,  
2 but by no means is it a quantum leap. It's based on sound  
3 technical, legal and financial reasoning. I think it's the  
4 right thing to do.

5 But, again, the lack of documentation associated with  
6 how decisions were made and looking at the totality of the  
7 circumstances, again, a course of conduct put you in a, in a  
8 posture where you were detrimentally relying on burning  
9 100 percent CAPP coal. And by mere convenience Progress had  
10 taken steps to establish a whole host of affiliates to supply  
11 that coal. They didn't diversify into PRB mines based on the  
12 executive internal memo that said we expect to use PRB, they  
13 didn't go there. It's just CAPP coal.

14 So, again, I think it's very, very important, I think  
15 the issues are inextricably intertwined, and I think that we  
16 need to give due consideration to maybe thinking a little bit  
17 outside of the box on this one as opposed to just rubber  
18 stamping staff's primary recommendation, because that does not  
19 go far enough for me. But I do respect a lot of the things in  
20 staff's recommendation, particularly the legal analysis that  
21 spoke to administrative finality, hindsight review, retroactive  
22 ratemaking, due process. I thought that was very instructive  
23 and dispositive of the state of the law. And I think you  
24 couple that with the FPL case and Commission precedent, and  
25 certainly what I'm encouraging or suggesting that we do as a

1 Commission I don't feel is in any way atypical or outlandish.  
2 And with that, Madam Chair, thank you very much.

3 CHAIRMAN EDGAR: Thank you, Commissioner Skop. And  
4 we'll give the rest of us a chance to jump in and see where we  
5 go.

6 Commissioner Carter.

7 COMMISSIONER CARTER: Thank you, Madam Chairman. Let  
8 me just assure you that I will be far more brief than my  
9 distinguished colleague.

10 Staff has in my opinion done an outstanding job of  
11 combing through a voluminous record, including multiple volumes  
12 of prefiled testimony, discovery and hours upon hours of  
13 hearing testimony and cross-examination, and has given us a  
14 well-reasoned recommendation that strikes, in my opinion, the  
15 appropriate balance between the financial interests of Progress  
16 Energy Florida's customers and the due process interests of the  
17 company.

18 We're called upon to determine whether Progress  
19 Energy Florida's coal procurement practices from 1996 to 2005  
20 were prudent. In other words, we must decide whether a  
21 reasonable utility manager could have made the same decisions  
22 that Progress Energy Florida's management made under the same  
23 circumstances with certain knowledge reasonably imputed. I  
24 think that there's no, there's likely no debate among my fellow  
25 Commissioners whether we have the authority to review the

1 prudence or procurement decisions that are passed through the  
2 fuel clause and have been subjected to true-up procedures. No  
3 debate about that.

4           The language of our orders have been clear and proud  
5 decisions of the Commission, and the courts are very  
6 persuasive. Indeed, we have an obligation to review the  
7 prudence of poorly made fuel procurement decisions that harm  
8 the interests of ratepayers. However, I believe that it is the  
9 duty of this Commission to use great care when revisiting  
10 matters that might have viewed, that many might have viewed as  
11 settled because the impacts of our review can be felt beyond  
12 this particular case and can have unpredictable consequences  
13 for ratepayers. With this idea in mind, I have chosen to  
14 engage in a conservative review of the record before us and  
15 limit my decisions to those that are clearly supported by the  
16 record.

17           First, did Progress Energy Florida act prudently in  
18 purchasing coal for Units 4 and 5 from 1996 to 2005? When we  
19 look back into time to evaluate decisions made by utility  
20 managers five or more years in the past, we're not looking back  
21 at the decisions of those operating another arm of government  
22 and applying a set standard of behavior. Progress Energy  
23 Florida is a business. Although it is heavily regulated, it is  
24 still a business and it must react to its environment and to  
25 events as they unfold without the availability of hindsight.



1 It is very easy to sit in this chair and say that I would have  
2 done something differently. Still, it is very difficult to  
3 avoid the record evidence that Progress Energy Florida's  
4 management recognized the competitive pricing of PRB coal  
5 beginning in 2001 and failed to take steps that would have  
6 allowed the company to take advantage of it on behalf of their  
7 customers. While I don't think a smoking gun of any sort  
8 exists in this case which conclusively demonstrates that  
9 Progress Energy Florida acted imprudently, a series of  
10 communications and management control issues resulted in  
11 avoidable management error that in turn resulted in imprudent  
12 fuel purchases. After receiving its first economically  
13 competitive offer for PRB coal in 2001, the company failed to  
14 seek a modification of its Title 5 permit, which would have  
15 allowed it to conduct the appropriate test burns to utilize  
16 certain blends of CAPP coal and PRB coal, this despite some  
17 indication as early as 1999 that PRB coal was becoming more  
18 cost-effective and despite that the company saw the  
19 modification of its permit that year to burn synfuel. This  
20 failure resulted in an inability to take advantage of a  
21 changing market.

22 I therefore agree with staff's primary recommendation  
23 that Progress Energy Florida's Unit 4 and 5 fuel procurement  
24 was imprudent for the period from 2001 through 2006 and that  
25 Progress Energy Florida paid excessive fuel costs from 2003

1 through 2005.

2           Secondly, should the Commission order a refund for  
3 ratepayers, and, if so, what amount? Though I recognize that a  
4 full-blown endorsement of OPC's theory of the case could  
5 reverberate throughout the capital markets, I believe that a  
6 reasonable, limited prudence review is within the events  
7 contemplated by such markets when evaluating risk. The scope  
8 of primary staff's recommendation is within the scope of prior  
9 cases such as the Maxine Mine case, and it is unlikely to cause  
10 the kind of shock that would seriously impact the cost of  
11 capital.

12           I also find that staff's primary recommendation of a  
13 refund of \$13.8 million, including excessive coal costs, SO2  
14 allowance costs and interest incurred from 2003 through 2005  
15 represents the outer boundary of what is appropriate in terms  
16 of a refund that is fair to the customers, fair to the company  
17 and acceptable to the capital markets. The recommendation  
18 assumes blend rates of no more than 20 percent PRB coal to  
19 avoid a derate which would have been extremely costly to the  
20 customers. That a 20 percent blend rate would avoid a costly  
21 derate is adequately supported by the record. To go beyond  
22 what is truly supported by the record risks casting an air of  
23 uncertainty over the regulatory environment in Florida, and I  
24 cannot support such an action.

25           In conclusion, I support staff's primary

1 recommendation in its entirety. Though I believe that some  
2 refund is called for in this case, I cannot fully support OPC's  
3 theory of the case, and I view staff's primary recommendation  
4 as an outer limit of what this Commission ought to do in terms  
5 of a refund.

6 Thank you, Madam Chairman.

7 CHAIRMAN EDGAR: Thank you, Commissioner Carter.

8 Commissioner McMurrrian.

9 COMMISSIONER McMURRIAN: Thank you. And I should  
10 have mentioned earlier that this is my aide's last agenda.  
11 Jeremy Susac, I know that many of you have gotten to know him,  
12 and I hope you don't mind me taking the opportunity, I should  
13 have, I should have done it earlier. Jeremy has accepted a  
14 position with the Department of Environmental Protection as the  
15 Director of their Energy Office. So I just wanted to announce  
16 that. I'm sure everyone has heard by now, and I just wanted to  
17 congratulate him and have everyone give me sympathy. But,  
18 anyway, thank you, Jeremy.

19 I have a few comments as well, and I guess probably  
20 what I'm about to say is going to represent why there are five  
21 of us up here and that a lot of times we think very differently  
22 about some issues, but I think there's value in this divergence  
23 of thought.

24 The case presented for refund was always based on the  
25 position that Progress Energy should have been burning its

1 designed blend, 50 percent bituminous and 50 percent  
2 subbituminous PRB coal between '96 and 2005. That position has  
3 not proven persuasive following a hearing in which that  
4 position was fully vetted by the parties. Now comes a new  
5 proposal from our staff that Progress should have been burning  
6 a different blend, 80 percent bituminous and 20 percent  
7 subbituminous PRB between 2003 and 2005, given a couple of  
8 years of prep for that.

9           Let me say though that I applaud staff's willingness  
10 to independently propose what they found to be a reasonable  
11 position based on some record information. In fact, they may  
12 have hit the target. The problem I have is that none of us  
13 were on notice that we would be reviewing whether Progress's  
14 not using an 80/20 blend was imprudent.

15           Early in this case staff sponsored testimony of  
16 Bernie Windham. Bernie's testimony, as you all know, shared  
17 information about foreign coal. While Bernie's testimony  
18 itself shied from making conclusions about the data presented,  
19 the existence of that testimony provided notice to all parties  
20 of an avenue that might have been pursued by the staff. I'm  
21 not saying that the notice it provided gave comfort to the  
22 parties. In fact, Progress moved unsuccessfully to strike that  
23 testimony. But my point is that the parties had a full  
24 opportunity to rebut and/or respond to that information in  
25 Bernie's testimony.

1           With respect to the 80/20 proposal, the parties have  
2 not had that full opportunity. Particularly in a case where  
3 we're trying to piece together events as far back as '96 and  
4 determine whether Progress's coal purchases were prudent based  
5 on the facts that they reasonably could have known at that  
6 time, I would prefer we provide ample due process there.

7           And as a side note, I realize that our process is,  
8 you know, after the fact, after there's a Commission staff rec,  
9 that there's no opportunity for the parties to give any kind of  
10 input on that, and that's, there are good reasons for that.  
11 But in this case I believe that there hasn't really been an  
12 opportunity to go on record about the 80/20 proposal.

13           For that reason, I plan to support the alternative  
14 staff rec in Issue 1. I'm just not convinced, and perhaps I  
15 might be if the 80/20 proposal were fully vetted, but I'm not  
16 convinced that the primary staff rec is the right way to go.  
17 This concern is complicated by the difficulty in applying the  
18 appropriate standard of review in a prudence case such as this  
19 one, and that's whether the utility acted prudently and  
20 reasonably in light of the facts that it knew or should have  
21 known at the time it made its decision.

22           And as an example of that, in determining whether or  
23 not the utility -- in determining whether the utility was  
24 imprudent to not have begun a permit amendment application and  
25 test burns for PRB coal in 2001, for example, I can't take into

1 account the 2005 Sargent & Lundy study results that suggested  
2 perhaps 30 percent and under might be viable because that  
3 wasn't available to Progress at the time of 2001.

4 I also think Witness Fetter made an important point  
5 about the range of reasonableness, and I'll quote from the  
6 record. Actually it's in the staff rec too on Page 31. But  
7 Witness Fetter said, "Management decisions in complex areas are  
8 rarely 'black and white.' Rather, there's a range of  
9 decision-making that prudent, equally-informed managements  
10 could make. Absent a management decision clearly falling  
11 outside this range, there is no basis upon which the regulator  
12 should substitute its judgment for that of the utility's  
13 management." To me this means that it's possible that  
14 Progress's actions were prudent and that staff's proposal, had  
15 it been the course of action followed, might have also been  
16 prudent, but there are several courses of action that might  
17 have, might have been judged prudent.

18 The overall point is I can't say, at least not at  
19 this point, that Progress's not using the 80/20 blend for 2003  
20 to 2005 was imprudent, nor can I say more generally that their  
21 coal purchases over this period were imprudent based on an  
22 either 80/20 or a 70/30 blend as we've heard about from  
23 Commissioner Skop. And, Commissioner Skop, I should say that I  
24 applaud all the hard work you've put into that. I think you've  
25 definitely made some good points to consider and, and we'll be

1 considering that more. But I cannot support the primary staff  
2 rec. Again, at least not with the information that's before me  
3 at this point.

4           What I can say is that based on the parties' evidence  
5 regarding the propriety or lack thereof of burning a 50/50  
6 blend at CR4 and 5, as well as the propriety or lack thereof of  
7 burning foreign coal at CR4 and 5, there's no compelling  
8 evidence of imprudence in my opinion. Therefore, I must side  
9 with the alternative staff rec.

10           Thank you, Chairman.

11           CHAIRMAN EDGAR: Thank you.

12           Commissioner Argenziano.

13           COMMISSIONER ARGENZIANO: Well, I've been reading a  
14 lot and listening a lot, and I have to conclude -- I met with  
15 staff yesterday to get some particulars that were in my mind  
16 straightened out. And while I have to agree with the due  
17 process that Commissioner McMurrian brings up, I think that's  
18 very important and it should be considered if we're moving  
19 outside of, moving to different numbers that they did not have  
20 the opportunity to do, perhaps that's a good point. Due  
21 process is important. But I also look to staff's primary. I  
22 do not agree with the alternative decision. I agree more with  
23 the primary decision that these units were built and paid for  
24 by customers, as Commissioner Skop mentioned many times, with  
25 the purpose that use of the mixture, the different mixture.

1 And I think that Progress did not act prudently in not at least  
2 getting the test burns done, knowing that that's where they  
3 needed to go. And finding out a lot of things in between and  
4 in hearing Commissioner Skop's testimony today, there are many  
5 points that he raised that are legitimate and of good concern.  
6 And, you know, perhaps I ask -- I'm sitting here asking myself  
7 perhaps reopening for limited purposes is a good idea to get  
8 more testimony and to get additional information.

9           So at this point I think I favor the primary  
10 alternative and also Commissioner Skop's suggestions. I don't  
11 know how -- I do have a question, Madam Chair, for Commissioner  
12 Skop that is, that I need to clarify and maybe he can help me.  
13 The 30 percent, if a unit has been, been, and this is out of my  
14 expertise, if it has been changed or added on to over the years  
15 from its original, you know, purchase, can you still count  
16 on -- I mean, how do you get the 30 percent? Can it be that it  
17 may not have worked at a 30 percent in those units if they've  
18 been modified over the years?

19           COMMISSIONER SKOP: Your question is a good one, and  
20 I would respond briefly on a couple of regards. Certainly  
21 there would have been a benefit to performance -- to performing  
22 acceptance testing at the designed blend which was 50/50.

23           Now I don't think I made this clear and I'm happy  
24 that I have the opportunity to do so. Do I think that you get  
25 the uprate at 50/50? No way. Not happening. 70/30, I think



1 you get there. But, again, having the operational experience  
2 and the plant parameters that would, the data that would have  
3 been achieved by acceptance testing and comparing those to the  
4 performance guarantees, that would have given you a baseline  
5 for doing some quick look testing or subsequent fuel burn  
6 testing at some appropriate later point in time where you are  
7 considering making that switch to a blend. You don't just do  
8 it. I mean, power plants are very, very temperamental,  
9 particularly fossil fuel plants, and you don't just go in and  
10 change things overnight.

11 But, again, as numerous witnesses' testimony in the  
12 record support, these were, the plant was built for a 50/50  
13 design point. And, again, any variation thereof should be, or  
14 lesser variation of 50/50 like 70/30 or 80/20 should be  
15 possible. Because, again, it was for 50/50 and they're burning  
16 100 percent CAPP coal. They just went completely off the chart  
17 and didn't even look at the 50/50 ratio and they went to  
18 100 percent. So, again, had they come to the design blend  
19 point 50/50 and done some sensitivity analysis around that  
20 design point, you know, 80/20, that would have been instructive  
21 to how the plant may have been performed or operated at those  
22 alternate fuel blend points. But they didn't do that and, I  
23 mean, that's well documented. They just clearly departed from  
24 that.

25 So getting to specifically your question for a 70/30,

1 they would probably want to do some testing around that design  
2 point. But, again, not having any prior data to rely upon and  
3 operational experience that would have been gained during the  
4 performance testing, they don't have that to rely on. So  
5 they're kind of flying a little bit blind. But they have had  
6 some test burns that were done, and some of those, I think, in  
7 the record stated that -- staff mentioned those were mismanaged  
8 or what have you. But, again, the Sargent -- I mean, they  
9 hired Babcock & Wilcox and all the, all the design people to  
10 design it at 50/50 and that's where it came in at. And they  
11 got the unexpected benefit of the uprate at 100 percent CAPP  
12 coal. But, again, there is credible evidence -- and if they  
13 designed it for 50/50, it's kind of interesting, and this  
14 hasn't been articulated, why they went out late in the game and  
15 hired another consulting engineer to tell them how to run their  
16 plant that it should have already been designed for. But,  
17 again, the 70/30 I don't think is a stretch. I mean, there is  
18 testimony. I think Commissioner McMurrian mentioned that that  
19 was done after. But, again, that flexibility should have been  
20 inherent from 1982 and 1984, the date of commercial operations,  
21 and they completely just didn't do any of the above. I mean,  
22 there's some testimony, and I won't get into it, but there was  
23 no acceptance testing done at the design point parameters.  
24 They just did 100 percent CAPP coal. And that's just a sound  
25 departure, I mean, clearly a significant departure from sound

1 engineering practice. And if that doesn't warrant being an  
2 extraordinary circumstance under the case law of Richter, I  
3 don't know what does. But, again, that's --

4 CHAIRMAN EDGAR: Commissioner Argenziano.

5 COMMISSIONER ARGENZIANO: Well, I think the only  
6 other question I would have for Commissioner Skop, because I  
7 see that he's put a lot of time into this and he makes some  
8 good, valid points, is that one of my concerns was the volatile  
9 nature of the PRB and if they had a legitimate concern there.  
10 And I'm asking I guess in your expertise. I live near that  
11 plant; I don't want to blow up either.

12 (Laughter.)

13 COMMISSIONER SKOP: Again, there are some operational  
14 concerns, again, the combustion or spontaneous combustion and  
15 such. But, again, as record testimony has reflected, good coal  
16 pile practices and such and keeping things clean and  
17 housekeeping measures I think could mitigate that. Now 50/50,  
18 I think that's a little bit more of a risky venture that no one  
19 wants to go there. But certainly smaller mixes -- you know, if  
20 they didn't think they could do 70/30, then why in their  
21 application did they request to do up to 70/30? So if they  
22 didn't think they could do it, why are they applying to do it?  
23 And they're in the best position, not me, to answer that  
24 question.

25 So, again, I'm just going based on my review, my

1 thorough review of the record. I'm seeing a lot of  
2 inconsistencies. And, again, I'm trying to be very responsive  
3 to your questions, but, again, there is some -- any time that  
4 you use PRB there is that concern. It's a valid concern but I  
5 think it's significantly overstated.

6 COMMISSIONER ARGENZIANO: One other question, if I  
7 may. If you could just reiterate for me what you felt your,  
8 the reopening on a limited purpose would, the benefits.

9 COMMISSIONER SKOP: The benefits of reopening, as I  
10 suggested, would merely to be, I mean, merely be to afford  
11 Progress due process. Because, again, this variation is  
12 probably very new to them. But, again, the testimony with  
13 respect to the cost of the capital investment that was required  
14 at the onset of plant design to provide fuel flexibility, I  
15 don't think it's firmly in question but I think there may be a  
16 differing of opinion.

17 So to further establish the record, I would look  
18 toward taking limited additional testimony such that one could  
19 fill in the blank as to what the appropriate number is to  
20 disgorge them of the return on equity. Because, again, to me  
21 it's -- to me, I feel more prominently about the squandering in  
22 a legal waste sense of the flexibility than I really do about  
23 not leveraging. But when you look at the totality of the  
24 circumstances, I can't ignore one and just look at the other.  
25 I just can't in good faith do that. And that's where we may

1 agree to disagree as a Commission, but I can't go there. I  
2 need to look at both because I think they're very, very  
3 important.

4 And, again, with Commissioner Carter, I think I would  
5 commend him for his statements because I don't subscribe to all  
6 the theories of the OPC case. I can't get there. But, again,  
7 I'm trying to look at what's fair and equitable to all the  
8 parties. And to me -- to hang the hat on consumers and say  
9 that they need to pay a return on equity to someone that  
10 squandered away the farm just doesn't work for me.

11 That flexibility, if that flexibility was there today  
12 and the fuel cost savings could be leveraged, they would be  
13 able to leverage the fuel cost savings. But because they don't  
14 have the flexibility and they gave it away early in the  
15 process, they're not able to capture that at any point in time.

16 CHAIRMAN EDGAR: Commissioner Argenziano, did you --  
17 okay. We're going to move on, but we can come back if we need  
18 to.

19 Okay. I know I have a couple of questions for staff.  
20 But before I do that, Commissioner Carter, I think you had a  
21 comment.

22 COMMISSIONER CARTER: Thank you, Madam Chair. I did  
23 have a comment because I noticed Commissioner Skop and  
24 Commissioner Argenziano mentioned about reopening the record.

25 You know, having sat through days of testimony and

1 reading voluminous transcripts, et cetera, and having all of  
2 the parties here, OPC, AARP, you had FIPUG, you had White  
3 Springs, you had -- I think that every question that could have  
4 been asked was asked, and it was asked in my opinion ad  
5 infinitum. So I think we have a clear -- staff has done an  
6 outstanding job of condensing, bringing it down to a point to  
7 where it makes sense. And I think that there's nothing that we  
8 will gain by reopening this case that we don't have now. And I  
9 think that the facts that are before us, which is why I'm  
10 supportive of staff's primary recommendation, is that we do  
11 have the authority to go back and look at, you know, a decision  
12 in terms of, after a prudence review and all like that.

13           We do have a situation where there were some  
14 management decisions made where they -- and I view them as  
15 management decisions that were made by the company, not  
16 necessarily rising to the point of something nefarious or  
17 criminal or anything like that. And, I mean, it's easy to sit  
18 here and Monday morning quarterback, but I think staff has done  
19 a great job of distilling this case down to its pure essence.  
20 It's not as complicated as it may seem. The fundamental  
21 perspective on this is such that any question that, you know --  
22 and with all due respect to my colleague, that question was  
23 already answered in there. You can look at it. And it was not  
24 deemed necessary by OPC, AARP, FIPUG, White Springs or any  
25 other parties or even, even staff.

1           So I think to, to reopen the case would be dangerous  
2 in that you would not allow for due process for the company,  
3 but more importantly is that we have enough facts, you know, we  
4 have enough facts and testimony and exhibits and all to make a  
5 decision before us today and I think we need to. Because to do  
6 so, we're talking about a case that goes back for ten years in  
7 the process of -- trying to go back for ten years. We're  
8 talking about a case that based upon the testimony, based upon  
9 the evidence, based upon Progress's witnesses, based upon the  
10 other parties' witnesses, based upon staff witnesses -- I, you  
11 know, I'm at a loss to see what we did not ask or what we did  
12 not hear in this process. And so I would, I would caution us  
13 to -- I mean, that would -- I don't think that would make sense  
14 for us to do that.

15           Secondly is that I think that -- let me just kind of,  
16 if I may, Madam Chairman.

17           CHAIRMAN EDGAR: I have all day.

18           COMMISSIONER CARTER: Thank you. The -- in our, in  
19 our documents before us here at the Commission on Page 15,  
20 staff rec, it gives, staff gives the bottom line position of  
21 all the parties. Let's just go there for a moment, if we may.  
22 It gives a bottom line position of all the parties. And having  
23 sat through all of the testimony, looked at the witnesses to  
24 see them as they gave their testimony, hear them, judge their  
25 demeanor, look at the documents that were presented, look at

1 the evidence that was presented, it seems to me, and I was in  
2 there with the testimony, I saw the witnesses and all, days,  
3 like I said, there were days, and I also read the testimony  
4 afterwards and reviewed it. I'm at a loss to find anything  
5 other than supportive of staff's primary position.

6 Commissioner McMurrin, you make a lot of sense in  
7 that when you go through the staff rec, you'll find that they  
8 kept saying that they were prudent here, they were prudent  
9 here, they were prudent here, and so it is very difficult at  
10 best to find where they were imprudent.

11 So I saw it from the standpoint of it was a  
12 management decision. And in the management decision there was  
13 a miscommunication, and that miscommunication in my opinion,  
14 because of that miscommunication, that's why I fall with  
15 staff's primary recommendation. That miscommunication by  
16 management cost \$12.4 million. I'm using -- if you look on the  
17 chart here down on staff's primary recommendation, this is  
18 where I, this is where I end up there. Because I do think that  
19 there was a miscommunication by one, by the management, and  
20 that miscommunication may well have led to them not conducting  
21 the test burn or not having the percentages, Commissioner  
22 Argenziano, in terms of the percentage of the burn and all like  
23 that. But fundamentally is that the consumers, the ratepayers  
24 benefited because they had an increase in their efficiency and  
25 they had more megawatts than what -- I mean, that's like, you



1 know, taking, putting a 4-barrel carburetor, of course, they've  
2 probably got turbos on them now, but putting a 4-barrel  
3 carburetor on your car. You get more horsepower, you get more  
4 speed and all. And this benefited the ratepayers.

5 And I think that when you find yourself in a  
6 situation where in the totality of the circumstances ratepayers  
7 benefited, in the totality of the circumstances Progress Energy  
8 made a management decision that, for whatever it's worth,  
9 they're going to have to eat the management decision.

10 But I see no reason for us to go beyond staff's  
11 primary recommendation. It's fair to all parties, Progress  
12 Energy, the ratepayers, the Intervenors, the OPC and all of the  
13 other parties. And it's also fair to the marketplace to let  
14 them know there's a process whereby the Florida Public Service  
15 Commission will make a decision based upon the facts and  
16 circumstances as presented, and it will come out in such a  
17 manner to where we can legitimately point to facts and  
18 circumstances in that document and in those records and in  
19 those exhibits on why we made the decision we made based upon  
20 the statutes and based upon the law and based upon the rules.

21 Thank you, Madam Chairman.

22 CHAIRMAN EDGAR: Thank you.

23 Commissioner McMurrin, did you have a comment?

24 COMMISSIONER McMURRIAN: No.

25 CHAIRMAN EDGAR: No. Okay. Commissioner Skop.

1           COMMISSIONER SKOP: Thank you, Madam Chair. And,  
2 again, I just want to touch upon Commissioner Carter's  
3 comments. I think that they are well-taken. Obviously we have  
4 a difference of opinion.

5           But I do want to draw the Commission's attention to  
6 one thing with respect to administrative finality on Page 82 of  
7 the staff recommendation, third or second paragraph down.  
8 "Even when finality has attached to an order, there is a  
9 significant exception to the application of the doctrine, and  
10 finality will not apply where it is shown that some mistake,  
11 misrepresentation, or fraud, or a matter of great public  
12 interest compels Commission review."

13           If seeking, again, the support here, support staff's  
14 primary -- the support here seems to suggest that staff's  
15 primary recommendation of \$13 million is appropriate.

16           Well, the avenue that I'm suggesting not only doubles  
17 that by a 70/30 blend, which I think is supported by evidence,  
18 but also seeks to leverage the loss of flexibility to the tune  
19 of anywhere from \$26 million to \$53 million on a conservative  
20 basis. And if it's not advocating on behalf of what's fair and  
21 equitable to all the parties, including consumers, and seeking  
22 to recover, you know, that amount or disgorge the return on  
23 equity -- I'm not taking that lightly, I mean, because it's a  
24 big decision, but, again, it's well-reasoned in this particular  
25 fact pattern -- if that's not a matter of public interest or

1 great public interest, I don't know what is. And I really  
2 think that, again, it's not low-hanging fruit, and in a second  
3 I'll ask our General Counsel to opine a little bit about that.

4 But, again, we're talking about double or triple the  
5 refund amount simply looking at disgorging the return on equity  
6 associated with the capital investment that was made to  
7 maintain this flexibility. And so, Madam Chair, if I may, can  
8 I get --

9 CHAIRMAN EDGAR: Okay. Before we have the definite  
10 advantage and benefit of Mr. Cooke's opining, which I'm looking  
11 forward to, I did say a little bit ago that I had a couple of  
12 questions. And if I can jump in, I would like to do so. So  
13 let me -- and we will come back to that, Commissioner Skop, I  
14 assure you, and, Commissioner Carter, for your comments as well  
15 and everybody else's.

16 But just for my own benefit I'd like to ask a couple  
17 of questions of staff that will help me focus in a little more,  
18 and I'm going to start real broad. Only a few questions  
19 though.

20 We've had discussion, Commissioner Skop has raised  
21 discussion about the potential benefits or more prudent action  
22 of a 70/30 blend going back some years, and, of course, we had  
23 the benefit of the petition which suggested a 50/50 blend. The  
24 staff, after reviewing all of the information and the  
25 testimony, et cetera, has suggested that, an 80/20. And I

1 would just like to ask if, and I'm looking at you, Mr. McNulty,  
2 but whomever, if you could for me kind of lay down, and I know  
3 it's in here, but lay out in keeping kind of with all of the  
4 discussion that we've had why the 80/20 was what the staff has  
5 arrived at in the primary recommendation as to the more prudent  
6 action than what actually occurred.

7 MR. McNULTY: Yes, Chairman. Basically what  
8 Commissioner Skop said is correct, is that the, the amount or  
9 the blend of 30/70, 30 percent PRB versus 70 percent Central  
10 Appalachian coal, is what is stated in the record based upon a  
11 study that was conducted by Sargent & Lundy in 2005, supporting  
12 the fact that there would be in all probability no derate below  
13 30 percent. But staff felt it was, that that was a break  
14 point. So, you know, above 30 percent a higher probability,  
15 below 30 percent. We didn't really want to be on the  
16 borderline with a decision having to do with, as material as a  
17 refund assessment.

18 So what we looked at too in conjunction with that was  
19 what has the company been able to achieve with the one viable  
20 test burn that it's conducted? It conducted a test burn in  
21 2006. There's an 18 percent blend. So staff was trying to  
22 find a happy medium between 18 percent, which is a proven  
23 amount -- and, again, that's on a short-term basis. That was a  
24 short-term test burn of two to three days, it's not a long-term  
25 test burn, but it did give an indication that, with no derate

1 at that time that that was sustainable. So where is that fair  
2 medium point in between, and we settled on 20. I would admit  
3 to you that it is somewhat arbitrary. Could it have been  
4 22 percent, could it have been 25 percent? We felt comfortable  
5 with 20.

6 CHAIRMAN EDGAR: Okay. Thank you. And then -- and  
7 if there are questions to jump off from that, I'll look. But,  
8 Commissioner Skop, let me, if I may, just kind of finish my own  
9 train of thought and then we can all jump in again.

10 There is evidence in, or evidence and discussion in  
11 the material before us that Progress had received an RFP  
12 response for 2.4 million tons. Let's see. Page 11, no, excuse  
13 me, Page 30 is what's in front of me in my notes, a footnote on  
14 Page 30, that they had received an RFP response for  
15 2.4 million tons. But I think that what we're talking about  
16 here would have been if indeed they had gone that direction at  
17 that point in time, a significantly smaller quantity, and I'm  
18 just, you know, thinking through the contracting, procurement,  
19 bidding process, often a decrease in quantity is not met with  
20 exactly the same decrease in the cost per price per unit. So  
21 was that figured into the computations that were used to arrive  
22 at the \$13.8 million?

23 MR. McNULTY: Well, yes, in this sense, that the RFP  
24 for the July -- excuse me. The May 2001 RFP called for  
25 425,000 tons as is stated here in the footnote. It did not

1 state a maximum. So when you break down that 2.4 million tons  
2 or 1.2 million tons on an annual basis, you're comparing that  
3 against a number of other bids that were coming in at 500 and  
4 600,000 tons, approximately half of what was bid by the PRB  
5 providers.

6 And it might well be true that there is a price  
7 advantage to going with the larger quantity, and you might  
8 actually have a price discount there and it might make a  
9 difference in terms of an evaluated price. However, I looked  
10 at that and I said, well, the price differential wasn't on the  
11 order of 8 or 9 cents per MMBtu and, excuse me, \$8 or \$9 per  
12 MMBtu. And with that difference -- plus I think mostly what I  
13 kind of honed in on here were statements by the company,  
14 essentially Donna Davis's statements basically saying that the  
15 coal, that the, that the RFP that was conducted showed that PRB  
16 was arguably competitive. And so in her own words she  
17 basically in different ways, in different times within the  
18 testimony stated that this was a competitive result that PRB  
19 had, had placed when, when it was evaluated.

20 COMMISSIONER ARGENZIANO: Madam Chair.

21 CHAIRMAN EDGAR: Commissioner Argenziano.

22 COMMISSIONER ARGENZIANO: To that point versus  
23 quantity versus cost, but from what I understand the company  
24 never even negotiated for less quantity.

25 MR. McNULTY: That's another interesting point in the

1 case here is that, as Witness Davis had brought forth in  
2 testimony, she said that she had this evaluated information.  
3 And we can look at it, it's an exhibit to her testimony.  
4 However, she also stated that it may not represent all of the  
5 information that would have been available, and that the  
6 company had basically eliminated various materials that might  
7 have been available for the period through 2002 that may have  
8 provided additional information, but this is what she could  
9 remember. She had no further information to be able to impart  
10 to us other than the comments she made, again, which really  
11 don't go to much, much beyond the fact that that was a  
12 competitive offering that they received for PRB coal.

13 COMMISSIONER ARGENZIANO: Okay. So, Madam Chair,  
14 then one would not know whether they would have had a  
15 competitive offer if it was a less quantity because they never  
16 asked.

17 MR. McNULTY: Well, I mean, if you look, if you look  
18 at the exhibit, you see every single -- it's a complete list of  
19 all the bids they received. So you can, you can see on an  
20 evaluated basis what those, what those prices were. You can  
21 see exactly where PRB lined up.

22 And as the Chairman was suggesting, there may be a  
23 bit of an inverse relationship between price and quantity as  
24 you would expect. In economic theory, you know, you're going  
25 to offer more tonnage, you expect to maybe get a slight price

1 break. How much that is is all very debatable. But not  
2 debatable anymore; the record is closed.

3 So really what we have are the comments of the  
4 witness, and the witness basically has said that they found  
5 that to be a competitive bid, a competitive offering.

6 You can look at the numbers here and you can see what  
7 the numbers showed, that the, that the two-year offer made by  
8 Arch Coal at \$243 per MMBtu was the most competitive price that  
9 was made available. It was done at more tonnage.

10 CHAIRMAN EDGAR: Commissioner Carter.

11 COMMISSIONER CARTER: Thank you, Madam Chairman. I  
12 wasn't being rude. I just wanted to chime in before  
13 Commissioner Skop asked General Counsel questions on that.

14 I think that where we are in this case came to us on  
15 the motion of OPC, AARP, FIPUG and White Springs. They clearly  
16 delineated what their issues were and Progress Energy Florida  
17 answered those. Staff had questions, we had gone, as I said,  
18 on ad infinitum with deposition, testimony, exhibits and what  
19 have you. And I think that Commissioner Skop's ideas, while  
20 they sound on the surface exciting, they have not been vetted.

21 This case -- the issues as laid out here is based  
22 upon the issues that were brought before us. You know, I think  
23 when we start substituting our judgment for things that we  
24 could have, should have, would have versus what's actually  
25 before us, we run the risk of, one is regulatory schizophrenia.



1 But the other thing we run the risk of is not having a forum  
2 where these businesses and companies can go to the marketplace  
3 and borrow money at a reduced rate so they won't have to put a  
4 tremendous burden on our ratepayers. I was not characterizing  
5 your position when I said that. That was just hyperbole.

6 But I do think that here's what's before us,  
7 Commissioners, is that the issues before us -- and that's why I  
8 tried to confine my comments. One was did Progress Energy act  
9 prudently in purchasing coals for Units 4 and 5 from 1996 to  
10 2005?

11 The second issue -- and that was the issue before us.  
12 The second issue was should the Commission order refunds to the  
13 ratepayers? And if we should order a refund, what that refund  
14 should be. And I think once we get, we get beyond those two  
15 issues, we get far afield, we get into esoteric areas. And I'm  
16 telling you that we really need to judge the cases before us  
17 based upon the issues raised by the parties.

18 Would I like for some more questions to be asked or a  
19 different perspective to be taken? Yes, I would have. But I  
20 don't get to do that. We have to take the parties as they  
21 present themselves before us. And I think we run a real danger  
22 to the marketplace, to the regulatory environment and to the  
23 ratepayers when we do things other than what's in front of us.

24 Now this is not a criticism of Commissioner Skop,  
25 it's just an observation of what our tasks are before us here.

1 And I think -- and that's why I go back to this. I said the  
2 decision that was made in this case by Progress Energy raised,  
3 raised to the level of a management mistake. That's why I'm  
4 firmly locked in to staff's primary recommendation is that you  
5 make a mistake, particularly in this sense, then you should pay  
6 for your mistake because the ratepayers would be paying a  
7 higher rate.

8           But I think the staff has done a noble job, they've  
9 done an outstanding job with the reams of testimony, the hours  
10 of testimony, the exhibits and all to come down, first of all,  
11 that, one is that did they act imprudent in the context of the  
12 years '03 through '05? Yes. And the imprudence was based upon  
13 the fact of the management decision made in terms of the  
14 miscommunication. So if so then, does it rise to the level of  
15 a refund? Yes, it does. And here's what it is. 12.4,  
16 \$12,425,492 based upon the evidence, based upon the  
17 information, based upon the testimony the witnesses presented  
18 before us. And not only that is that in the context of giving  
19 the ratepayers a refund, are they entitled to interest? Yes,  
20 they are. The interest on that is \$1,400,715, giving us a  
21 grand total of a refund of \$13,826,207 -- \$18 million --  
22 \$13,826,207.

23           And I'm locked in on this, Madam Chairman and fellow  
24 Commissioners, I'm locked in on this because we want to do  
25 what's fair. We took an oath to be fair to the consumers, fair

1 to the ratepayers, fair to the industry, but, more importantly,  
2 fair to the process. And I think that -- you know,  
3 Commissioner McMurrian, I wish I could get to where you are  
4 because the staff finds throughout the document where Progress  
5 Energy acted prudently. So I can't say that they acted  
6 imprudently. But I can say based upon the miscommunication of  
7 management, based upon the miscommunication of management, and  
8 when senior management makes a miscommunication, there should  
9 be some repercussions, and that's why I zeroed in on staff's  
10 primary. I think that raises to the level of miscommunication.  
11 That miscommunication, not doing the test burn, not following  
12 up on that, it should cost them something. And I think this is  
13 sufficient, and I think this sends a message to the  
14 marketplace, sends a message to the ratepayers that we will not  
15 tolerate them paying for things that they don't get.

16 Thirdly, it sends a message to the industry and it  
17 sends a message to the process, the capital markets that we're  
18 going to, we're going to do -- and I used a comment in, in mine  
19 that I was going to be conservative. You know, conservative is  
20 not a bad thing. That's not a bad thing, being conservative.  
21 We want, everyone on this Commission, all five of us want  
22 what's in the best interest of the consumers, I can say that  
23 unequivocally, and we want what's in the best interest of the  
24 ratepayers. Why do you say consumers and ratepayers?  
25 Consumers are people that buy things, but the ratepayers are

1 the ones that are paying the freight. So we want to be fair to  
2 the ratepayers. We also want to be fair to the industry, is  
3 that they can have some kind of certainty when dealing with the  
4 process in the regulatory environment.

5 But we also want to be true to our call, and true to  
6 our call is to say when you find a situation here, based upon  
7 this case, based upon the testimony, based upon the evidence,  
8 based upon the facts and the circumstances, there was not a  
9 finding of imprudence on, on Progress Energy Florida's part.  
10 However, there was a finding of a management mistake. And I  
11 say that the management mistake should be compensable to the  
12 tune of the \$12 million on staff's primary recommendation. And  
13 I think for us to get beyond that, Commissioners, to get beyond  
14 that is to put us in a posture where it would be very difficult  
15 for us to dial back. You know, once the genie is out of the  
16 bottle, it's hard to put it back in there. Or to quote a good  
17 friend of mine, once the toothpaste is out of the tube, you  
18 can't put it back in there.

19 Thank you, Madam Chairman.

20 CHAIRMAN EDGAR: Thank you, Commissioner.

21 Commissioner Skop.

22 COMMISSIONER SKOP: Thank you, Madam Chair. I just  
23 want to, to -- one quick response to Commissioner Carter and  
24 then one question to Mr. McNulty. And then if you will indulge  
25 me, I'd like to get General Counsel's opinion on this.

1           And I do thank Commissioner Carter for his great  
2 quotes because they always add liveliness. And, again, we are  
3 a collegial body, and I think it's great that we can agree to  
4 disagree. But, again, I can't accept staff's primary  
5 recommendation because based on my technical knowledge and  
6 legal precedent it just doesn't go far enough for me.

7           Again, I want to draw the, the Commission's attention  
8 to the FPL case where there is precedential Commission  
9 precedent for going back and looking at things that I'm asking  
10 us to do, but, moreover, to some case law from the Florida  
11 Supreme Court, again, People's Gas v. Mason, 187 So.2d 335,  
12 Florida, 1966, again, a matter of great public interest compels  
13 Commission review. Commissioner Carter is supporting staff's  
14 recommendation, primary recommendation, \$13.3 million. I'm  
15 looking at if you look at the cost of equity alone associated  
16 with the failure to maintain flexibility from the original  
17 capital investment that was designed into these plants, and  
18 that flexibility today could be used to leverage the cost  
19 savings that Commissioner Carter is willing to reward or refund  
20 to the consumers, again, that is a much more substantial  
21 number. It ranges anywhere, again, just on a first rough order  
22 of magnitude estimate from \$53 million, and that's just looking  
23 at one plant, from \$53 million all the way up to \$111 million.  
24 I'm not suggesting that, that all of that is, is there for the  
25 taking. But, again, those are substantial numbers.

1           And looking at it with, with an innovative thought  
2 process, if you will, instead of just rubber stamping a staff  
3 recommendation. And, again, you know, AARP's brief was, was  
4 very persuasive and innovative in some of the ideas that they  
5 came up with. But, again, that same innovative thinking on  
6 what can we do, what's right, what's fair and equitable to the  
7 parties? If you take the 70/30 blend, and I've got a question  
8 for Mr. McNulty on that, 70/30 blend, you change staff's  
9 primary assumption to that 70/30 blend, you get \$25 million  
10 plus interest. It's about \$28 million. Okay. I'm not trying  
11 to converge to a midpoint by any means. I've thoroughly vetted  
12 this, perhaps more than any, any, any engineer or lawyer would,  
13 but I'm looking at this and I'm trying to do what's right. I'm  
14 trying to do what's right for all parties; that includes  
15 Progress. I gave them the benefit of the uprate. I  
16 acknowledge that the record does not support that a 50/50 blend  
17 will maintain the benefit of the uprate. But the record  
18 clearly supports that some lesser mix will maintain the benefit  
19 of the uprate and allow you to leverage the fuel cost savings.

20           So, again, my approach that I'm advocating, again, I  
21 don't subscribe to the OPC theory of the case because I can't  
22 get there technically. But between the three triads of the  
23 70/30 which adjusts staff's primary rec and doubles it and then  
24 looking back towards disgorging the return on equity by failure  
25 to maintain the flexibility, which, again, is analogous to the

1 legal concept of waste, and that flexibility still has not been  
2 restored, plus making them restore the flexibility, I think  
3 it's a fair and equitable remedy. I'm not trying to punish  
4 Progress by any means. I'm just trying to do what's fair.  
5 Because it would be -- if I were trying to punish, I could  
6 double these numbers and be advocating for a refund that would  
7 double what OPC is asking for and still have the basis to  
8 support it.

9           But, again, I think we have some Florida Supreme  
10 Court precedent, we have some Commission precedent. It's not  
11 out of the ordinary to do what I'm suggesting. Again, I'm  
12 trying to strive as a regulator, as a new regulator to be fair  
13 and equitable. I'm not trying to punish. I'm just trying to  
14 do what's fair. Mistakes were made and they were quantum  
15 mistakes, departures from sound engineering principles that  
16 somebody shouldn't get the profit on top of those mistakes if  
17 they've squandered the flexibility.

18           But real quick, my question to Mr. McNulty. Again, I  
19 think that you mentioned that staff's approach was conservative  
20 with the 80/20, which was based on the 18 percent blend of a  
21 fuel burn. But, again, I think if you would look with me on  
22 Page 42 of staff recommendation, as I see it, there are three  
23 witnesses that support a 70/30 blend is doable in the record.  
24 I mean, there's strong support for that: Sansom, also Sargent  
25 & Lundy. But also Progress's own witness on Page 42, Witness

1 Toms, for example, Witness Toms reported that if fuel rating  
2 falls below lower than the range of 11,000 to 11,300 Btus per  
3 pound, CR4 and CR5 are not able to operate at overpressure. If  
4 you do the, a weighted average based on the 70/30 blend and  
5 take the heat values of the respective coals that are clearly  
6 contained in the record, you come, you fall squarely in that  
7 range. And I don't think it's a stretch for staff to be  
8 comfortable. I respect that staff didn't want to go out there  
9 on the outer fringes. But certainly somewhere 30 and below is  
10 probably doable, and above 30 is just outlandish to think that  
11 you're going to leverage the benefit of the uprate. So, again,  
12 I'm trying to be fair. I recognize the uprate, but you can't  
13 use that avoided cost benefit to disguise what's really going  
14 on here. So that's where I'm not working.

15 So my question to you is would you agree that there  
16 is substantial support in the record to support that a mix  
17 somewhere right at or under 30 is logical here? And there is  
18 record support for that.

19 MR. McNULTY: I would agree with that, Commissioner.

20 COMMISSIONER SKOP: Okay. And then moving to General  
21 Counsel, could you please opine for the benefit of my  
22 colleagues, if you would, where you feel that the state of the  
23 law with respect to the FPL/St. Lucie case and other  
24 controlling precedents such as Richter with the extraordinary  
25 circumstances that's required to overcome administrative



1 finality would be with respect to what I'm proposing?

2 MR. COOKE: Thank you, Commissioner. It's a  
3 difficult question to deal with. I don't think what you're  
4 proposing is out of the question in terms of legally  
5 achievable.

6 We've had a lot of discussion in this case, in a  
7 motion to dismiss, et cetera, where we addressed issues of  
8 administrative finality, et cetera. It's also discussed in  
9 this record.

10 In terms of the fuel clause proceeding, which is the  
11 current posture of this, it's a different type of analysis.  
12 Because our view is there has been no prudence determination in  
13 our fuel clause proceedings. Therefore, the question of  
14 administrative finality doesn't attach to that because we  
15 haven't determined prudence in fuel clause.

16 Where you are going in terms of the capital costs,  
17 the carrying costs, et cetera, goes into rate base, and those  
18 are subject to base rate proceedings which have occurred in  
19 this case and in which there have been prudence determinations.  
20 Therefore, administrative finality would attach to those  
21 decisions.

22 But as you have pointed out, there are circumstances  
23 in which the courts have recognized that for extraordinary  
24 reasons the Commission's prior order where there's been a  
25 prudence determination may be reviewed and modified. I think

1 it's important to remember that they are extraordinary, it has  
2 to be extraordinary circumstances. I think those cases are  
3 relatively infrequent.

4           And in terms of the reopening of the record, I, I am  
5 very -- I would firmly not recommend making that type of  
6 decision on the record we have before us in terms of the  
7 capital costs, because in this instance I think there really  
8 would be a due process question with regard to going into the  
9 capital costs. I don't see that that was ever at issue in the  
10 proceeding that's taken place to date. I think that in the  
11 Port St. Lucie case that you mentioned where there's a fuel  
12 clause proceeding going on and they go back and they look at  
13 rate base questions, that was specifically teed up as an issue  
14 in that fuel clause process. So the company was specifically  
15 on notice about this shield that was at question there in the  
16 construction and design, et cetera.

17           So I guess to summarize, I think that it is arguably  
18 possible to look back. I think the Commission has a lot of  
19 policy considerations to take into account whether it should do  
20 that in this case. I think that the courts will look very  
21 carefully at whether there is an extraordinary circumstance or  
22 not. I think part of that analysis, and I can't give you -- I  
23 can't tie that up in a nice neat package and tell what you that  
24 consists of. I can give you some examples, sort of a continuum  
25 of what extraordinary circumstances are.

1           On the one hand, in one case there was a change in  
2 the tax law that impacted ratepayers and a prior order of the  
3 Commission whether they should refund a certain amount or not,  
4 and that change occurred shortly after the order at issue was  
5 in question. In that case, the court was comfortable saying  
6 significantly, it's of significant importance, enough  
7 importance to be able to look back. But I think a significant  
8 part of that decision was the amount of time that had elapsed  
9 between the order and what was deemed as an extraordinary  
10 circumstance.

11           At the other end of the continuum there are cases  
12 that look at whether there has been self-dealing, alleged  
13 illegalities, daisy chaining, trying to increase profits  
14 through proper -- improper methods, for example. Those were  
15 the allegations. In that case, the court was comfortable  
16 looking at, looking back, letting the Commission look back a  
17 much longer period of time.

18           So you sort of have to balance whether it really is,  
19 the circumstance, the extraordinary circumstance is really very  
20 important relative to some of the other factors that are  
21 involved in that decision-making. That's the best I can do off  
22 the cuff in terms of trying to explain where we are. But I do  
23 think there is a qualitative difference between looking back in  
24 the fuel clause where administrative finality has not attached  
25 in my opinion and looking back in a base rate type of

1 situation.

2 CHAIRMAN EDGAR: Thank you, Mr. Cooke.

3 We do have, I think, a couple of Commissioners who  
4 have comments, and I actually had not finished with a couple of  
5 questions that I had. But, Commissioner Skop, we'll start with  
6 you since you had posed the question.

7 COMMISSIONER SKOP: Thank you, Madam Chair.

8 Just as follow up to our General Counsel, you  
9 mentioned administrative finality and the, that attaching. But  
10 in that administrative finality wouldn't there be the inherent  
11 flexibility that went into the original design for this plant  
12 to remain there? And I think that goes to the crux of what the  
13 great public interest is, the public interest is having and  
14 maintaining that flexibility. Because if you're, if you don't  
15 have that flexibility and it's been deemed, again, in all  
16 fairness to Progress, if it's been deemed prudent what they  
17 were doing, as someone may suggest, the whole case goes out the  
18 window.

19 So, again, what I'm looking at is I feel that the  
20 inherent flexibility of that design should be, irrespective of  
21 any base rate review or administrative finality, would be  
22 inherent in that because, again, that's what was paid for.  
23 That's how the design, that's the design point of the plant.  
24 And by not having that to leverage, then you're not able to  
25 leverage and burn the cheaper fuel blend. So I guess my

1 question to you is with respect to the inherent flexibility,  
2 would you opine that there is a, was a prudency determination  
3 on that exact issue? And then also secondly, in FPL v., or St.  
4 Lucie 1, they looked at a specific -- they were in a fuel  
5 clause posture but they looked back into the rate base on a  
6 specific technical issue, and not only the technical design  
7 issue, the thermal shield, but the maintenance of that issue.  
8 That's merely what I'm suggesting that we should do here. I'm  
9 looking back, because I have intertwined issues, I'm looking  
10 back to say, hey, was it prudent to design fuel flexibility  
11 into the plant? And I think the answer is yes. But then in  
12 terms of the maintenance aspect, which is in FPL, they didn't  
13 maintain the flexibility.

14           So, again, the great public interest is should a  
15 utility be rewarded via its return on equity for something that  
16 it squandered in a concept analogous to legal waste that  
17 prevents it from leveraging fuel cost savings today or whenever  
18 it's cost-effective to the benefit of the consumer?

19           MR. COOKE: I think it's a reasonable argument. I  
20 can't sit here and say that, you know, we definitely would  
21 prevail on it. But I don't disagree that it is an argument  
22 that addresses whether extraordinary circumstances exist in  
23 this case or not. I think there's a lot of other issues that  
24 will play themselves out if the Commission goes in this  
25 direction in terms of what the actual facts are, what those are

1 determined to be, whether flexibility truly was lost or not,  
2 those types of things. I'm not disagreeing with you. I just  
3 can't sit here and guarantee the Commission that we would  
4 prevail on it.

5 CHAIRMAN EDGAR: Commissioner Carter.

6 COMMISSIONER CARTER: Thank you, Madam Chair.

7 Just kind of -- Commissioner Skop, I think you and I  
8 are saying the same thing, we're just using different  
9 semantics.

10 First of all, you talked about the Commission's  
11 authority to go back. It's in the recommendation. We did go  
12 back. We did go back. It's in there. We're looking at the  
13 years '03, '05. You talk about the Commission's dealing with  
14 the amount of the refund. We did go back and put a refund as  
15 well as interest on it. You talked about being fair to the  
16 parties. Well, we, we are fair to all of the parties.

17 You look at the standpoint in terms of fairness to  
18 all the parties is that when a person files a lawsuit, the  
19 petitioner gives the defendant or the respondent notice of what  
20 he's actually going to litigate. And, you know, if you didn't  
21 put everything in there as the petitioner, that's your problem.

22 Secondly, is that fair to all parties, is that  
23 Mr. McNulty, if I may, Madam Chairman, answered the question,  
24 I'd asked this question earlier, he said that the rate was  
25 18 percent and they would probably go to 24 percent. Now in my

1 remarks I just zero in on 20 percent because it makes -- we  
2 want to be fair to everybody. We want to be fair to the  
3 ratepayers, we want to be fair to Progress, we want to be fair  
4 to the capital markets and we want to be fair to the process.  
5 So, Commissioner, I take issue with you if you think that we're  
6 saying something different. We're not. We're just saying it  
7 in a different way. And I think that we're getting there. And  
8 I think that we don't need to open another case. We just need  
9 to -- it's right here in front of us. Going back, we went  
10 back, '01 to '05.

11           Your other issue was the amount of the refund. We  
12 had to have a basis for the refund. We can't just -- you know,  
13 we have to have a basis for the refund. And the critical thing  
14 about the basis of the refund is that I would be with  
15 Commissioner McMurrin, but for the fact that -- because there  
16 was no determination of imprudence in this matter. However,  
17 because there was a management decision, I think that's really  
18 the only thing that we can hold our heads on, because there was  
19 no finding of imprudence by Progress Energy. There was a  
20 management decision, a miscommunication that was made. And  
21 because of that, that's why I'm, that's why I'm -- I mean,  
22 otherwise I'd be with Commissioner McMurrin like, you know, no  
23 refund, no penalty. But because of this management decision,  
24 this decision was made by senior management, we find that, that  
25 there should be a refund. There should be -- the amount of the

1 refund and interest with the refund.

2 But the thing about it is that this process works and  
3 it has worked. And I think that, as I said to you, that you  
4 and I are saying the same thing, we're just saying it  
5 differently. And I appreciate your passion. I hope you  
6 appreciate my passion too. But I think that we're basically  
7 saying the same thing.

8 And as I said with Mr. McNulty, I zeroed in on  
9 20 percent because he said 18 percent but not more than 24. So  
10 I think it's reasonable for me to say 20 percent. But  
11 30 percent, we can't get there. There's no -- we're not there  
12 with 30 percent. Commissioner Argenziano would lose her house  
13 if they went -- you know, we don't want that to happen. You  
14 know, we want you to be comfortable in your --

15 (Laughter.)

16 But the point of the matter I'm making, fellow  
17 Commissioners, is that all of the points that were made based  
18 upon the issues raised by the parties, the plaintiff and the  
19 defendant in this case, they have been thoroughly litigated,  
20 thoroughly in the regulatory process, they have been vetted  
21 through the process of the exhibits, the witnesses, the  
22 testimony, the record. And I think that -- I mean, like I  
23 said, is that but for the fact that there was a management  
24 decision made, I would be with Commissioner McMurrian with no  
25 refund and no penalty. But because of the decision made by



1 management, and these were senior managers that made that  
2 decision, and because of that I think that they should pay for  
3 that. And that's where I come in with the \$12 million, Madam  
4 Chair.

5 CHAIRMAN EDGAR: Let me just point out that this  
6 Commission did dismiss a motion to dismiss. And so, you know,  
7 some of those arguments we heard, we took up, and, and that's  
8 what brought us to where we are today.

9 So Commissioner Argenziano.

10 COMMISSIONER ARGENZIANO: Yes. I just, I am not  
11 sure, Commissioner Carter, that it is just a management  
12 decision. After all, the primary recommendation says that the  
13 company did not act prudently. So I'm not so convinced that it  
14 was just a management mistake. I mean, and when you look at  
15 little particulars, and I don't know if this is appropriate or  
16 not but it's something I have to take into consideration, the  
17 company has subsidiaries that they buy from. And perhaps this  
18 was a management decision to go towards their own subsidiaries  
19 rather than go to the other source of fuel. I have questions  
20 there. So I'm not so sure it's just that it was a management  
21 decision. And, again, as I said, the primary indication  
22 indicates that they felt that they did not act prudently.

23 On the other hand now, Commissioner McMurrian makes a  
24 point that she is favoring the alternative recommendation  
25 because new information has been brought in, the numbers, I

1 guess, have changed, that did not give the company the due  
2 process to address that.

3           So when I look at that and say, well, if we reopen,  
4 could that be addressed or should it be addressed? So I think  
5 that opens up the door for due process and allows more  
6 information to come in that may not have been asked, even  
7 though there were many, many questions asked and many, many  
8 pieces of information going back and forth.

9           And then ultimately come to the fact that I look at  
10 two Commissioners who are probably leaning towards the primary  
11 recommendation, two who may want to reopen and one who is  
12 leaning towards the alternate. Where does that leave us? With  
13 no decision. So I'm sitting here thinking back and saying,  
14 okay, I understand each one's argument, but we're -- and I do  
15 need to ask one question of the counsel. What happens if we  
16 did not prevail in the courts for the extraordinary conditions?

17           MR. COOKE: I think likely it would be remanded back  
18 to us. What we do has to be based on, you know, proper legal  
19 precedent and if they found that administrative finality had  
20 attached or there was an issue of that nature. But that's a  
21 long way down the road. I mean, I think what Commissioner Skop  
22 is recommending, if we go down that route, is that we do reopen  
23 the record so we would have a chance to flesh that out.

24           And if I may, I know the due process issue was raised  
25 by Commissioner McMurrian also in the context of the primary

1 recommendation, which I'm not troubled by personally. I think  
2 that the issues that were presented, that were articulated were  
3 issues that put everybody on notice that there may be some  
4 point in between the time period that the petitioner was asking  
5 for us to consider and the 50/50 mix that was being asked or  
6 considered. So I think that there was. And, in fact, the  
7 mixture that was discussed, the 20/80 was really brought into  
8 evidence by the company. So I think when you look at this in  
9 context, the question was did Progress Energy, did its  
10 management act prudently in its procurement or its fuel  
11 procurement decision-making during a particular time period? I  
12 don't think that puts the Commission in the position of having  
13 to decide if you don't find you can go back the ten years, you  
14 can't find anything. I think that it is acceptable for the  
15 Commission, if there's competent, substantial evidence in the  
16 record, to find some period shorter than that. And that falls  
17 out and leads to certain refund recoveries, et cetera.

18           So I don't have the due process concerns with regard  
19 to the 80/20 mixture because I do think there is competent,  
20 substantial evidence in the record and that the issues were  
21 broad enough that that was essentially at issue during this  
22 proceeding.

23           COMMISSIONER ARGENZIANO: Madam Chair. Well, I'm  
24 using that as there is a Commissioner with a concern, and what  
25 would -- and I guess this is the simplest way of asking, what

1 would it hurt to go reopen? And I know there's been a lot done  
2 and there's a time frame, but what would it hurt if we have a  
3 Commissioner who has problems with not having the company  
4 address that particular part of it and another Commissioner who  
5 feels he has a lot of testimony that probably could be  
6 introduced?

7 MR. COOKE: It's not a legal -- there's not a legal  
8 impact in those terms that I can think of. I mean, if there's  
9 going to be further examination of these issues, I would reopen  
10 this record and do it in this proceeding.

11 COMMISSIONER ARGENZIANO: Okay. Thank you.

12 CHAIRMAN EDGAR: Commissioner Skop.

13 COMMISSIONER SKOP: Thank you, Madam Chair.

14 I just wanted to respond to something that my  
15 distinguished colleague Commissioner Carter mentioned. With  
16 respect to -- or at least legally distinguish between the  
17 postures that he mentioned. We're in a fuel clause proceeding  
18 and I think that the case law is well settled that there is no  
19 presumption of administrative finality that attaches to that.  
20 What I'm advocating though is a look back similar to FPL/Port  
21 St. Lucie where you look into the base rate. And I think that  
22 there is an extraordinary circumstance that has just come to  
23 this Commission's attention by virtue of the record that  
24 developed before us that raises the issue and this important  
25 issue of public interest. Because, again, squandering the

1 flexibility is not the right, right thing to be doing, and I  
2 think that you can make a colorful legal argument. And, again,  
3 I'm not pressing, but, again, I think that there's some solid  
4 ground there. I'm not trying to go out on a limb and expand  
5 the scope of the existing law. I'm just trying to advocate for  
6 doing what's right and fair. And if you accept primary staff  
7 recommendation, that is a small amount of money. And I just  
8 can't in good faith embrace that because, again, there are  
9 valid, I think, legal issues supported by technical and legal  
10 thought that I've kind of put into this that gets me to the  
11 conclusion that you can make a legal argument and, if you  
12 prevail, it's going to benefit the consumers at the end of the  
13 day.

14           CHAIRMAN EDGAR: We have hit, hit the two-hour mark,  
15 and actually we're still under what was my earlier prediction.  
16 And as I said, I have all day and I love a good discussion at  
17 the bench. However, I generally try to give the court reporter  
18 a break at about two hours. So my suggestion is that we take  
19 15 to regroup, have some protein bars or something to that  
20 effect, take a stretch, and then we will come back and we will  
21 have more and full discussion. So we are on break until  
22 2:00 by the clock on the wall.

23           (Recess taken.)

24           Okay. We are back on the record after our stretch.  
25 And when I asked to take a break, Commissioner Carter, you had

1 a comment or a question, and then Commissioner Skop, and then I  
2 have a question, and then we'll go from there.

3 So, Commissioner Carter, you are recognized.

4 COMMISSIONER CARTER: Thank you, Madam Chairman.

5 I wanted to kind of clarify a point. I was -- I know  
6 I'm kind of a shrinking violet, but I kind of got a little  
7 fired up. What I wanted to say is that I had, on this, when I  
8 was talking about staff's primary recommendation, Commissioner  
9 Argenziano, I kept saying that staff said that there was no  
10 finding of imprudence. What I meant was staff was finding  
11 reasonable; that was the context. So I got, started  
12 interchanging my terms. That's why I said it raised to the  
13 level of a management decision is because throughout the  
14 documents staff found the movements and the actions of Progress  
15 Energy to be reasonable, and as such I was interchanging that  
16 with imprudent. So the perspective is, to correct that is that  
17 I still feel with every fiber in my being that we should be on  
18 staff's primary recommendation. And it says that Progress  
19 Energy was imprudent in purchasing the coal for CR4 and  
20 CR5 during 2001 and 2005. And I use, I still use that  
21 decision, that management decision as a basis for that. And in  
22 all fairness to my distinguished colleagues is that I was using  
23 those terms interchangeably and I misspoke, and I apologize for  
24 that. However, I fundamentally feel that the perspective that  
25 we have here in staff's primary recommendation captures the

1 issues that were raised by the parties, captures the best  
2 interests of the ratepayers, captures the authority and the  
3 jurisdiction of this Commission, and it is fair to all parties  
4 involved. Thank you, Madam Chair.

5 CHAIRMAN EDGAR: Thank you. Commissioner Carter.  
6 Commissioner Skop.

7 COMMISSIONER SKOP: Thank you, Madam Chair.

8 I forgot to mention this earlier, but, again, I think  
9 there is some merit to reopening the current procedure in a  
10 limited fashion. And in conjunction with that, the point that  
11 I failed to articulate and mention was that in parallel with  
12 reopening the proceedings, that would allow the parties to  
13 engage in constructive settlement negotiations which they could  
14 later perhaps bring to the Commission to help us come to an  
15 equitable determination of this dispute. Thank you.

16 CHAIRMAN EDGAR: Thank you.

17 Okay. I'm going to, and I know it's been a long day,  
18 but I'm going to ask a question anyway. I am looking at  
19 Page 90, and at the top of Page 90 in the staff recommendation  
20 that has been prepared for us it talks about testimony from a  
21 witness that said that there was a value of over \$700 million  
22 in savings from '96 to 2005 from the coal that was used during  
23 that period in time. And so I would like to ask the staff to  
24 speak to that point of testimony. And also, if you would, talk  
25 to me a little bit, to us a little bit about the uprate issue

1 and how these two sorts of things work together.

2 MR. McNULTY: Yes, Chairman. The number that you see  
3 there, the \$733 million is referencing Exhibit 86, which is an  
4 exhibit by Progress Energy's Witness Heller. And that  
5 essentially is a totaling of, of all of the, I guess what you  
6 would call the total value of, of the derate. The derate  
7 itself, assessment of that is \$696,963,000.

8 So what you're doing is you're really, you're adding  
9 several numbers together that Witness Heller has, has  
10 generated. You are adding \$51 million, \$51.3 million that is  
11 associated with, it's the actual coal savings calculation, and  
12 to that you're adding the \$696 million, excuse me,  
13 \$696.9 million that's associated with the derate. And then  
14 you're subtracting from that actual reduced SO2 allowance costs  
15 on the order of \$15 million to bring you to the \$733.3 million  
16 in total savings.

17 And the derate number, the big number there, the  
18 \$696.9 million is essentially looking at the circumstance of if  
19 you couldn't, if you couldn't get what the company was able to  
20 achieve from the units on the order of 720 to 730 megawatts for  
21 Crystal River 4 and 5 and you went back to the name plate  
22 capabilities of the power plant, that's 665 megawatts, then you  
23 would have a differential of 124 megawatts. And if you were to  
24 value what your replacement power would cost under different  
25 circumstances, you would end up over the course of 1996 through



1 2005 expending \$696 million more for that replacement power,  
2 peaking power, et cetera.

3 CHAIRMAN EDGAR: Okay. And are those, in the opinion  
4 of staff, are those numbers legitimate, credible?

5 MR. McNULTY: Well, from primary staff's viewpoint  
6 that would be, that would certainly be the upper end of the  
7 number. I would -- you know, it's a question as to how much  
8 additional megawatts could be achieved compared to the design  
9 capability or the, excuse me, the guarantee that was offered in  
10 this case of 665.

11 If you were to go above that, you would have to do  
12 like what we're attempting to do now and see, you know, like if  
13 you could get more power with a, a limited blend and that sort  
14 of thing. So you, you end up having to address that question.  
15 I can't quite get away from that question of, of just going  
16 directly to the 0 percent because that's not consistent with my  
17 recommendation.

18 So if you were to go with a 20 percent blend under  
19 primary staff's recommendation, then that would be a nonfactor  
20 of the \$696 million. If you were to go with a 0 percent blend,  
21 it's very uncertain how much of that, you know, how much of  
22 that would, would materialize. But probably, in primary  
23 staff's view it would probably be a fairly large number. We  
24 just don't have the data, and I don't think there's record to  
25 support exactly what that would be.

1           CHAIRMAN EDGAR: Okay. And could I ask staff on the  
2 alternative recommendation to speak to those numbers as well?

3           MR. LESTER: These numbers are primarily based on the  
4 derate of the 50/50 blend. I believe my best understanding of  
5 what would occur at a 20 percent blend is we don't know. And,  
6 therefore, I've said there's a risk of a derate with a smaller  
7 blend. Because even though the May 2006 test burn was  
8 successful and did not result in a derate, testimony from  
9 Progress Witness Hatt indicated that a much longer test burn  
10 would be necessary to determine the performance at a -- the  
11 performance. So I believe there would be a risk of a derate.  
12 Most of that savings there is a derate number.

13           CHAIRMAN EDGAR: Thank you.

14           Commissioners, I've kind of jokingly said we can stay  
15 all day and we truly can. I have no place else I have to be  
16 tonight. That may not be the case for the rest of you. But  
17 I've said before I truly value and enjoy when we have  
18 discussion that goes back and forth and we learn from each  
19 other and we hash through and thrash through issues. It's one  
20 of the things I find satisfying about the work that we do here.  
21 And we can continue to do that to the, to the extent that each  
22 of you would like.

23           However, while I do have the microphone I would like  
24 to try to bring our attention back a little bit to the issues  
25 that are before us. And, you know, the first issue is did

1 Progress act prudently? And if a decision by the majority of  
2 this body that there, that the answer to that is, no, they did  
3 not act prudently or they acted imprudently, then that brings  
4 us to the question of should there be a refund? And as -- and  
5 then, if indeed there should be, what would that amount be?  
6 And as I think through the issues before the case, that's kind  
7 of what, what they, it all sort of boils down to in probably  
8 the ultimate oversimplification. But that's kind of what it  
9 all boils down to as the issues before us and the issues that  
10 we still are going to need to try to work through today.

11           It strikes me -- I'm reminded a little bit of -- as  
12 you all know, I have two children. And one of the games that  
13 they have recently spent probably way too much of their bright  
14 brains on are the Rubik's cubes. And we all remember those  
15 from back when we were younger. And they haven't changed:  
16 They're not video, they don't beep, they don't make any noise.  
17 It's wonderful. But, you know, it's one of those where you  
18 turn, you make one move and a number of other things are  
19 impacted and you make another move and other things are  
20 impacted. And I'm reminded kind of that analogy or metaphor,  
21 whichever you prefer, when we look at some of these. A change  
22 at some point in time, some number of years ago would have  
23 impacted the price per quantity, would have impacted the  
24 travel, would have impacted the amount of power coming out of  
25 the unit, et cetera, et cetera, et cetera. And as you all

1 know, I voted with the majority in favor of the motion to  
2 dismiss in order to bring us to the point of going into hearing  
3 and hearing more about these issues. I also have stated that I  
4 do believe as one, only as one Commissioner that we do have the  
5 statutory authority and the case law supports it to go back and  
6 review in the situation, in the factual scenario that is before  
7 us, so I'm very comfortable with that, and going through the,  
8 the real-life exercise that we are doing.

9           But I do -- but even with that, I remain somewhat  
10 troubled by this kind of retroactive making one assumption that  
11 would impact four or five other things in a reality that, that  
12 we don't know exactly what that reality would have been. So  
13 with all of that, I, I do have some concerns. I, quite  
14 frankly, see some very strong arguments for the primary  
15 recommendation. I see some very strong arguments for the  
16 alternative. I could probably be persuaded, quite frankly,  
17 either way because I see very, very compelling arguments on  
18 both sides.

19           I do, Commissioner Skop, appreciate strongly the  
20 seriousness with which you have taken on your task and the  
21 issues that we have before us. I do have some concern about  
22 reopening and where that would take us for a variety of  
23 reasons. As Commissioner Carter and others have pointed out,  
24 we spent much time and each of us individually, I know, has  
25 spent much time looking over the record and listening to the

1 testimony at the time and the witnesses and the case law. And,  
2 you know, at some point we, we're put here to make decisions.  
3 And although there are times to give us additional time, there  
4 are also some times, times when we, it's time to make a  
5 decision and move forward both for the customers and for the  
6 companies we regulate to be able to move forward as well. And  
7 in my mind that may be where we are at today, that it may be  
8 decision-making time. As I've said, we can talk about it as  
9 long as you all want. I'm open to it, I'm enjoying it. But I  
10 do kind of feel like we are at the point where it may be time  
11 to make, to make a decision.

12 I always try hard to the best of my ability when we  
13 have some differences of opinion to help us all try to reach  
14 consensus. When we can all agree and have a 5-0 vote, that's a  
15 good thing. But as Commissioner McMurrin pointed out, there  
16 are five of us and we're not always going to agree on  
17 everything, and that's the beauty of part of the process as  
18 well. As has also been pointed out to me frequently, we are  
19 five independently appointed members and we're not always going  
20 to agree.

21 These are really good issues, issues of importance as  
22 we continue to move forward on energy policy issues, and I  
23 guess I'd like to hear a little bit more from my colleagues as  
24 we look at the primary and alternative. But I would like to  
25 draw your attention to the three points that I started with a

1 few minutes ago, that being at some point here I think we're  
2 going to need to take a vote as to whether we believe Progress  
3 acted prudently or imprudently, and then, if so, whether a  
4 refund is due. And, if so, what that amount would be,  
5 realizing that the answer to each, you know, each question may  
6 foreclose the need to go on to the next one.

7 I also -- again, when we talk about, and,  
8 Commissioner Carter, you raised this, what is the statutory  
9 test or statutory threshold or caseload threshold which is, you  
10 know, a reasonable man basically. I think when I met with  
11 staff, they put it to me -- when I asked what is the threshold,  
12 and I believe maybe it was Ms. Bennett who said, well,  
13 basically, I'm paraphrasing, would a reasonable engineer in  
14 that situation have made those same actions and would that be  
15 deemed reasonable? So I guess that raises a question, is a  
16 reasonable engineer the same as a reasonable man? I don't  
17 know. Or a reasonable woman, which, of course, would be the  
18 way I would characterize it.

19 So with that, again, the three points I'd like to  
20 kind of, if I can, get us to focus a little bit on this point  
21 in Issue 1, did Progress act prudently? And then see if that  
22 takes us to the next point, which is is there a refund that we  
23 believe is merited under the circumstances that have been  
24 presented before us?

25 Commissioner Skop.

1           COMMISSIONER SKOP: Madam Chair, just not to rehash  
2 it, I just would briefly like to ask Mr. McNulty three  
3 additional questions to clarify the record and as follow-up to  
4 your questions. But also too, if the Chair would entertain at  
5 the appropriate time, I would like to make a motion to reopen  
6 the proceedings. I don't know if that'll carry or not, but I'd  
7 certainly be willing, in the interest of moving towards closure  
8 on this issue, to get my concern out of the way.

9           CHAIRMAN EDGAR: Okay. Well, let's go ahead and you  
10 are recognized for your questions to staff. And as I've said,  
11 if there are more questions or discussion, we'll get to those  
12 too. But you are recognized, Commissioner Skop.

13           COMMISSIONER SKOP: Thank you, Madam Chair.

14           Mr. McNulty, with respect to the questions that  
15 Chairman Edgar had on Page 90 concerning the financial impact  
16 or the avoided costs associated with the derate of the 50/50  
17 blend, I think that we understand that the primary staff  
18 recommendation assumed that 80/20 was doable and that would  
19 result in no derate; correct?

20           MR. McNULTY: That's correct.

21           COMMISSIONER SKOP: And also I don't think it would  
22 be a quantum leap to say that 70/30 might also be doable at the  
23 outer end for no derate.

24           MR. McNULTY: It's possible. It's not staff's  
25 primary staff recommendation, but it's possible.

1           COMMISSIONER SKOP: I understand. So essentially the  
2 whole smoke and mirrors or the red herring there about, oh,  
3 look at what we've saved the customer by not doing this really  
4 doesn't carry the day to the extent if they had the flexibility  
5 to burn a fuel mix, they would be able to do so and not only  
6 leverage the uprate, but the fuel cost savings; is that  
7 correct?

8           CHAIRMAN EDGAR: Mr. McNulty, I'm going to ask you to  
9 hold, hold your answer, and, Commissioner Skop, we can come  
10 back to you for a clarifying. But we do need to have some back  
11 and forth, I think, to let us kind of bring in. So,  
12 Commissioner Carter, you're recognized.

13           COMMISSIONER CARTER: My only concern before  
14 Mr. McNulty answers that question is there's nothing in the  
15 record about smoke and mirrors, and that characterization puts  
16 staff in a posture to where they're making qualitative  
17 decisions. I think that's inappropriate.

18           I think if my colleague would rephrase the question,  
19 I wouldn't have any problem with that. But I think that when  
20 you start saying things about -- there's nothing in this record  
21 that says smoke and mirrors, and that puts us in a posture  
22 where we're taking -- you know, it's not fair to put staff in  
23 that posture. Staff has no vested interest in this case. So  
24 that concerns me greatly, Madam Chair.

25           CHAIRMAN EDGAR: Commissioner Skop, will you



1 recognize that and perhaps rephrase your question to  
2 Mr. McNulty?

3 COMMISSIONER SKOP: Yes, Madam Chair. And  
4 Commissioner Carter's points are extremely well-taken. And,  
5 again, I will be happy to reframe the question.

6 Mr. McNulty, with respect to staff's primary  
7 recommendation, am I to correctly assume that staff is  
8 recommending that an 80/20 fuel blend could be doable without  
9 any resulting derate; is that correct?

10 MR. McNULTY: Yes.

11 COMMISSIONER SKOP: Okay. And with respect to  
12 evidence or testimony that's clearly within the record by  
13 Sargent & Lundy, as well as Sansom, as well as PEF's own  
14 witness, and as well as PEF's own application to conduct  
15 additional test burns up to 70 percent, is that your  
16 understanding from reviewing that testimony that up to a  
17 30 percent blend could be attained without a derate?

18 MR. McNULTY: They seem to go back and forth between  
19 20 and 30 percent, and at different points they seem to be  
20 estimating and leaning more heavily towards the 20 percent.  
21 But 30 percent is, is definitely listed within the Sargent &  
22 Lundy study as a point below which it is probable that there  
23 would not be a derate.

24 COMMISSIONER SKOP: And as a follow-up, the savings  
25 that you mentioned on Page 90 that would result from a derate

1 would not materialize whatsoever if there was not a derate to  
2 begin with; is that correct?

3 MR. McNULTY: Run that by me again.

4 COMMISSIONER SKOP: Basically on Page 90 the total  
5 value and almost like \$733 million savings from burning a 50/50  
6 blend, I guess, is going to -- speaking to the fact that they  
7 would have to procure additional generation resulting from the  
8 derate that would occur from a 50/50 blend. But under the  
9 scenarios of the primary staff recommendation or other evidence  
10 supported in the record, those costs would not accrue or inure  
11 to the consumers to the extent that you could burn a fuel mix  
12 without the benefit of the derate.

13 MR. McNULTY: That's correct.

14 COMMISSIONER SKOP: Okay. And then secondly with  
15 respect to Page 90, again, we're only looking at it from the  
16 PEF perspective, but I do believe upon my extensive review of  
17 the record there is quite a bit of contrary testimony by  
18 witnesses debating the additional cost to burn or utilize a  
19 fuel mix blend; is that correct?

20 MR. McNULTY: Yes.

21 COMMISSIONER SKOP: And then also finally we  
22 mentioned that there was a test burn at 18 percent and what  
23 have you. But I guess no one has asked the question, but given  
24 the affiliated structures that are currently in place, what  
25 real incentive does the utility have to burn a fuel mix? I

1 mean, so I guess how diligent would, could a reasonable person  
2 expect them to be to want to change?

3 MR. McNULTY: Well, if I were to just opine from my  
4 experience on, on the fuel docket, and if you're asking me to  
5 do that, I'm happy to do so, it's that companies generally are  
6 trying to, as a matter of course, keep their fuel prices as low  
7 as they can. And you can certainly argue as to how much  
8 additional effort they could put into that to make sure that  
9 they get the lowest possible price without jeopardizing the  
10 reliability of power that's provided to their, to their retail  
11 load. So you could certainly argue that.

12 But there is, I do believe there is an inherent  
13 pressure on the utility to maintain lower costs which translate  
14 into lower rates upon, upon each electric investor-owned  
15 utility.

16 COMMISSIONER SKOP: Madam Chair, just one quick  
17 follow-up.

18 Also, too, in that regard, I mean, I do duly  
19 recognize the benefit of the uprate and the fact that these are  
20 baseload units that are heavily loaded. So, again, I am  
21 sensitive to alternate staff recommendation that mentions that  
22 because fossil fuel plants are very, very temperamental. But,  
23 again, their own evidence in the record suggests that a fuel  
24 blend is doable to maintain the benefit of the uprate, but also  
25 leverage the cost savings of the fuel blend itself. Is that

1 correct?

2 MR. McNULTY: Yes. And that's, that's primary  
3 staff's main concern in this case is that, you know, shown that  
4 a 20 percent blend was possible and, and that without a derate,  
5 then you have to ask yourself how aggressively was the company  
6 pursuing the ability to burn that blend when it was  
7 cost-effective to do so? That's the essence of our  
8 recommendation is in the May 2001 RFP you have a Progress  
9 witness in this case stating that it was arguably competitive  
10 pricing that was received. And you can look at it on its face  
11 and it appears to be, you know, a competitive result as well.  
12 You know that the units were built for the purpose of a 50/50  
13 blend and that they had the transportation components in place  
14 to be able to, to get access to that coal, that their  
15 evaluation process was on an evaluated basis of looking at a  
16 busbar cost analysis. And looking at those various components  
17 is the basis of saying, yes, the company had an opportunity  
18 that was presented to them at a certain point in time and they  
19 did not take advantage of that opportunity.

20 COMMISSIONER SKOP: Finally, I promise, Madam Chair,  
21 my last question of the day.

22 So theoretically if they had maintained the  
23 flexibility based upon the design to, to conduct a fuel blend  
24 burn, then not only today would they be able to leverage the  
25 uprate, but also leverage the fuel cost to the benefit of the

1 customer; is that correct?

2 MR. McNULTY: Yes. They would have the capability  
3 today if they had exercised those managerial decisions at an  
4 earlier point in time.

5 COMMISSIONER SKOP: So you're getting the best of  
6 both worlds, the uprate and the fuel cost savings; correct?

7 MR. McNULTY: Yes.

8 COMMISSIONER SKOP: Thank you.

9 COMMISSIONER CARTER: That was two questions.

10 CHAIRMAN EDGAR: Who's counting? Not me.

11 (Laughter.)

12 Commissioner McMurrin.

13 COMMISSIONER McMURRIAN: Notice I never make promises  
14 about how many more questions I have anymore.

15 I'm probably going to be a little bit all over the  
16 place. I think I'll start with some of the questions I think  
17 that Commissioner Skop just asked or the topics that were  
18 brought up.

19 And on the point about affiliate transactions, I  
20 know, I think Commissioner Argenziano said this earlier and  
21 there was a discussion about how those kind of transactions  
22 require extra scrutiny, and I think that's why we're all here,  
23 quite frankly. And I note that on Page 65 of staff's rec the  
24 second to the last paragraph says, "In staff's opinion, the  
25 record does not support that PFC purchases from affiliates

1 resulted from preferential treatment of affiliate companies."  
2 And there was similar discussion of that related kind of a  
3 point under the foreign coal discussion on Pages 58 and 59.  
4 And just to paraphrase that a little bit, with respect to the  
5 testimony that was raised by Witness Windham about foreign  
6 coal, staff analyzed it and found that Progress had indeed  
7 purchased larger quantities of foreign coal in the years that  
8 it become most economical.

9           So I guess what I'm saying is I think that we have to  
10 look with extra scrutiny at affiliate transactions for those  
11 reasons. But it seems like in this case the record we had  
12 before us didn't suggest that they were, you know, at all, at  
13 all decision points they were willing to go with their own  
14 affiliates over some other, some other option. I think with  
15 the PRB there were other factors involved that, of course, have  
16 been discussed in the, in the rec that perhaps presented  
17 additional difficulties perhaps over other forms of coal. And  
18 that's one of the reasons that I can't get to the finding of  
19 imprudence. Because in looking at those decisions, while I  
20 might have done something different or maybe each of us would  
21 have done something different, I don't think it rises to the  
22 level of imprudence.

23           The other thing I probably should talk about a little  
24 bit is the \$44 million issue. And I have been quiet on that,  
25 of course, because I did raise a due process issue and I feel

1 strongly about that with respect to the 80/20 or 70/30. But I  
2 think it's probably, in fairness I probably should talk about  
3 the \$44 million.

4           Some of the questions that were asked of staff about  
5 the savings, I can't put those aside. In my opinion, the  
6 \$44 million was probably money well spent. And I guess I  
7 probably should ask the question, if we, if we accept that the  
8 80/20 blend would have still gotten the uprate, wouldn't  
9 consumers still have also gotten those uprate benefits of  
10 approximately \$700 million?

11           MR. McNULTY: Commissioner, yes, I think that  
12 there's, there's an uprate benefit. I think Commissioner Skop  
13 had indicated as much, that there's -- and correct me if I'm  
14 wrong, Commissioner Skop. I don't want to get in the middle of  
15 this. But my understanding --

16           (Laughter.)

17           COMMISSIONER McMURRIAN: I don't blame you.

18           MR. McNULTY: My understanding is that the additional  
19 funds that were expended did put the, put the company in the  
20 position of being able to get more megawatts out of the power  
21 plant. And, you know --

22           COMMISSIONER McMURRIAN: This is where we talked  
23 about the other day essentially it's a you can have your cake  
24 and eat it too kind of argument. That's staff's argument, that  
25 you felt like the derate was important enough to make sure that

1 there was no derate issue. But primary staff's analysis is  
2 that there also could have been more savings perhaps with using  
3 a blend of PRB coal. And that's the distinction really in  
4 these, these issues, I think. But tell me if I'm correct.

5 MR. McNULTY: I believe you're right in the sense  
6 that if the company had not gone with, you know, the larger  
7 boiler design, and we have an engineer who can kind of fill in  
8 some of the details on this, if they hadn't gone with the  
9 larger boiler design and been able to, to utilize the  
10 additional capabilities of Crystal River 4 and 5 with that  
11 design, that you would not be expected to get the 750 to  
12 770 megawatts which would put out to the grid 730 megawatts.  
13 You would not expect that to take place. And so you certainly  
14 have some advantage of that additional money having been spent.  
15 And you can, you can certainly, as, as Commissioner Skop has  
16 mentioned, you can certainly question whether or not you've  
17 bargained away some of your flexibility in the process. I  
18 think that was the point that was being made.

19 But in direct answer to your question, yes, there is  
20 some level of benefit that primary staff believed was, was  
21 derived from making the extra expenditure. And, again, those  
22 dollars are something that we would perhaps need to explore a  
23 little bit more as to what the total dollar amount is. But --  
24 and that's been suggested in a follow-up or a reopening of the  
25 record. But certainly some benefit was received for, for



1 having made those expenditures, as is supported in the record.

2 COMMISSIONER McMURRIAN: I just, I guess I wanted to  
3 go through it because I just wanted to in fairness -- obviously  
4 reopening the record has its benefits, especially with the  
5 other arguments I made. I think that if we were going to  
6 reopen the record, I would, I would like to give all parties a  
7 chance to talk about the 80/20 proposal. Perhaps some parties  
8 want to go further than 70/30 like Commissioner Skop has  
9 suggested, perhaps maybe there's even some other thing in there  
10 we haven't considered. But I just wanted to, to share that  
11 the, the concerns about the \$44 million investment, I guess I  
12 don't have them because I feel like it was money well spent  
13 either way. Whether you were burning PRB coal or you weren't  
14 burning PRB coal, the customers got the benefit of that uprate.  
15 But then the additional question is going beyond that, with the  
16 PRB coal, could there have been additional benefits? And I  
17 realize that the primary staff rec addresses that.

18 Let's see. There was one other -- oh, I did want to  
19 respond to -- Chairman, I'm sorry.

20 CHAIRMAN EDGAR: No. That's fine.

21 COMMISSIONER McMURRIAN: Thank you.

22 I did want to respond to what our General Counsel  
23 talked about with respect to my due process concerns, and I  
24 think we're just going to agree to disagree here.

25 But in my opinion, the 20 percent was brought into

1 this case to argue against why a 50 percent may be a detriment  
2 to the megawatt output and that that was the context that the  
3 20 percent was brought in, and even some of the other  
4 information about 30 percent in the Sargent & Lundy. So in my  
5 mind it's different to say, well -- and I'm not taking any  
6 issue with the fact that that information came out of the  
7 record, that there were reports and all that led to 20 percent  
8 and 30 percent numbers that we've all heard. But I don't think  
9 it was sort of put out there in the sense of, like, testimony  
10 so that someone could argue against that kind of a blend. And  
11 so that's, that's the basis of those due process concerns  
12 there.

13 I'm not arguing to reopen the record, but at the same  
14 time if the record ends up being reopened, I would ask that  
15 those issues be included because I think that if we're going to  
16 go down that road, why not give the parties the opportunity to  
17 say whether or not they think 80/20 or 70/30 or 75/25 makes  
18 more sense for the ratepayers. That's it.

19 CHAIRMAN EDGAR: We'll go down the line. Anything to  
20 my right?

21 Commissioner Argenziano.

22 COMMISSIONER ARGENZIANO: Just the comments would be  
23 that I don't know that it ever hurts to get more information.  
24 And I know three Commissioners here have sat on these hearings,  
25 and we had only the benefit of reading it and it does make a

1 big difference. Additional information has come up, just as  
2 Commissioner McMurrian has mentioned. So I don't think that  
3 ever getting more information hurts. And I know that while  
4 we're here to make decisions, we're also here to make some  
5 tough decisions. And sometimes those decisions mean that you  
6 have to get more information to make better decisions. And I  
7 think that's the way I'm leaning.

8           And, Madam Chair, it's most like the Rubik's cube too  
9 that you mentioned that if you acquire the data and know the  
10 color sequences and have that additional information, you get  
11 to those one-sided colors and you could make it happen. I'm  
12 not there yet, and additional information could help me to get  
13 that Rubik's cube to where it needs to go.

14           So my only comments would be at this point that while  
15 I, I started out definitely leaning, and I still do lean  
16 towards the primary recommendation, but now with additional  
17 information and with Commissioner Skop's additional information  
18 and also due process to all parties involved, which I think is  
19 important, my now leaning would be towards reopening, limited.  
20 Thank you.

21           CHAIRMAN EDGAR: Commissioner Carter.

22           COMMISSIONER CARTER: Just a comment, Madam Chairman.

23           And notwithstanding the fact that I've heard comments  
24 from three Commissioners talking about this, I think to reopen  
25 this case will set a dangerous precedent, not necessarily just

1 for the Commission but for the marketplace and for the  
2 ratepayers is that this case -- I mean, obviously having been  
3 able to sit here and watch the demeanor of the witnesses, I  
4 think that reading the words on the page gives you a different  
5 view. But I watched the demeanor of the witnesses and all like  
6 that, and I don't see anything from watching those witnesses  
7 testify or looking at the exhibits and hearing the record, I  
8 don't see anything that's so extraordinary about this case that  
9 would require us to make an extraordinary leap to go back and  
10 revisit something. I think that it put us in a posture to  
11 where there won't be any finality.

12           And the other thing too is that I think that when you  
13 consider primary staff's recommendation, they have gone through  
14 and looked at the different burn percentages, gone through and  
15 looked at the management decisions in terms of what a  
16 reasonable plant manager or engineer type would have done at  
17 that point in time, they have gone through and they've actually  
18 gone back in time and looked at this time frame from  
19 '01 through '05 and come up with what I think is a reasonable  
20 perspective on this case.

21           I think this case is not complicated. I think that  
22 this case is fairly straightforward based upon the facts and  
23 circumstances with us, and I would urge my fellow Commissioners  
24 not to go down this road about reopening this case. It's  
25 fraught with peril. Thank you.

1 CHAIRMAN EDGAR: Thank you, Commissioner Carter.  
2 Commissioner Skop.

3 COMMISSIONER SKOP: Again, Madam Chair, as I  
4 previously mentioned, at the appropriate time, at your leisure  
5 I'd like to entertain a motion to reopen the proceedings on  
6 this matter.

7 CHAIRMAN EDGAR: Let me just make a few comments and  
8 then we will move ahead.

9 As Commissioners we wear many hats. We sit as  
10 regulators where we sit at arm's length from the companies that  
11 we regulate. We also sit as individual members and as a body  
12 trying to provide, facilitate the provision of services to  
13 consumers, provision of information, outreach. We try to be  
14 experts on what types of light bulbs people should use and how  
15 to conserve water and on building construction and on fuel mix  
16 and on internet phone service and on a number of things that we  
17 try to provide information to consumers about.

18 We also sit as an arm of the Legislature. We adopt  
19 rules to implement the statutory authority and the statutes  
20 that are given to us, and in many ways we sit as a judicial  
21 body and what in my mind I still think of as hearing officers,  
22 although I think ALJ is the more contemporary term. And at  
23 some point I do think that both petitioners and respondents  
24 need to be given some judicial and administrative decisions.

25 So I concur with the comments of Commissioner Carter

1 in this instance with the facts before us. I don't think that  
2 reopening the record is in the best interest of the ratepayers  
3 or of this state or of our future deliberations.

4 I recognize that every case is different and unique,  
5 and there certainly have been times when I have made the motion  
6 and/or the request to ask the staff to bring us back some  
7 additional information or to defer an item that was scheduled  
8 for final decision. So I recognize the right of every  
9 Commissioner to make that request and pose it to the body and  
10 pose it to the staff. But in this instance I do not think that  
11 that is the prudent decision to make.

12 Commissioner Skop, you're recognized.

13 COMMISSIONER SKOP: Thank you, Madam Chair.

14 Based on the aforementioned discussion, I would like  
15 to bring the motion before the Commission to reopen the current  
16 docketed matter for additional testimony in a limited fashion  
17 as suggested by Commissioner Argenziano, myself and  
18 Commissioner McMurrian. And I would appreciate some procedural  
19 help on how to best frame that motion such that it could be  
20 brought to a vote before the Commission.

21 CHAIRMAN EDGAR: That sounds pretty clear to me, but  
22 we can certainly look to Mr. Cooke to see if he has additional  
23 comments in response to your request.

24 MR. COOKE: Well, we would like as much clarity as to  
25 what issues we should look at if this record is reopened. And

1 I guess I'll take a stab at articulating what I understand or  
2 what I think I heard and I think what you're asking for,  
3 Commissioner Skop, which is the issues you raised with regard  
4 to the rate base types of questions, the loss of flexibility  
5 regarding the failure to perform an acceptance test early on  
6 and how that impacted the ongoing process. I think for  
7 safety's sake you also on your third prong talked about the  
8 cost of additional tests to make sure this flexibility comes  
9 back. I'm not sure if that's in the record or not. And then  
10 the middle prong I think is, coincides with Commissioner  
11 McMurrian's concern regarding the different blends that could  
12 potentially be burned. And I'm not sure that we want to be so  
13 specific as to say test it as to 80/20 versus 70/30, but have  
14 an issue that examines the various blends that might be burned  
15 without derating the system. I think that's what I've heard.

16 CHAIRMAN EDGAR: And my comment would be it's going  
17 to be very difficult to limit. Commissioner Skop, did -- I'm  
18 sorry. Commissioner McMurrian, I saw you as the words were  
19 coming out of my mouth. Were you first?

20 COMMISSIONER McMURRIAN: I had a comment, but I don't  
21 know procedurally when I'm supposed to be making it, if I'm  
22 supposed to wait for a second or if I should make it now.

23 CHAIRMAN EDGAR: You're recognized.

24 COMMISSIONER McMURRIAN: Okay. Commissioner Skop, I  
25 very much appreciate your including my concerns in your motion,

1 but I probably wasn't clear before. The \$44 million, I would  
2 prefer not reopening the record to talk about that. I think  
3 that I have concerns about bringing in a rate base. And having  
4 listened to your precedent that you cited, I have concerns  
5 about sort of mixing rate base items in a fuel proceeding. Now  
6 I realize that if you open it up and you give people that  
7 opportunity to speak to it, then maybe they'd make those kind  
8 of arguments and more. And so at the end of the day I'm not  
9 overly concerned if we end up in that posture, but I would have  
10 to say I wouldn't support opening up the record to deal with  
11 those things. And I just think that's what I was trying to get  
12 at earlier, but I was probably very inartful in how I  
13 articulated that.

14 Of course, with respect to the 80/20 and 70/30 I have  
15 to support, you know, an idea of reopening the record there  
16 after having brought up the due process concerns themselves.  
17 But I do have concerns about the \$44 million. I don't see that  
18 being a productive road to go down, to be, to be quite honest,  
19 for some of the same concerns that Commissioner Carter  
20 mentioned about the signals to the market and things. Perhaps  
21 even reopening it with respect to 80/20 and 70/30 would cast a  
22 lot of doubt on things, but in my mind it's a more narrowed  
23 focus on what's actually before us rather than the question  
24 about the rate base item, bringing that in to a fuel type  
25 proceeding. I think that to the extent we reach back to those



1 kind of assets that far back, that really could signal some  
2 concerns in the market. So I just wanted to be clear there.

3 COMMISSIONER SKOP: May I respond, Madam Chair?

4 CHAIRMAN EDGAR: Commissioner Skop.

5 COMMISSIONER SKOP: Commissioner McMurrin, I always  
6 appreciate your insightful comments. Again, yes, I am trying  
7 to put us in a procedural posture consistent with Commission  
8 precedent which would put the parties on notice that under the  
9 manner in which FPL/Port St. Lucie was styled, it was a fuel  
10 clause that looked back into a base rate technical decision and  
11 made not only a prudency determination about a piece of  
12 equipment, but also the related maintenance and upkeep of that  
13 equipment. Analogizing it to the instant case where in a fuel  
14 clause context there is a technical decision; i.e., the  
15 flexibility and the capital costs associated with building in  
16 that flexibility and then preserving that flexibility such that  
17 it inures to the benefit of the consumer through capturing the,  
18 the, being able to leverage the fuel cost savings.

19 So, again -- and being a new Commissioner as well as  
20 Commissioner Argenziano and not having been party to the  
21 proceeding, putting a limit on, on what a Commissioner might  
22 want to ask -- because I would have asked that question. Had I  
23 been party to that proceeding, I can guarantee you I would have  
24 hammered that issue home. Okay? But by doing that, I'm not  
25 wanting to turn this into a Rubik's cube or witch hunt or

1 anything like that. I'm simply trying to definitize and  
2 articulate some additional information that's articulated in  
3 the record. And I'm comfortable going to decision on that sua  
4 sponte, and I think it would be upheld, frankly. But, again,  
5 at the end of day I'm not the highest court of the State of  
6 Florida, but I am trying to make well-reasoned legal decisions.  
7 And to open the proceedings I think is a good thing to the  
8 extent that it allows Commissioner Argenziano and myself the  
9 ability to ask some pointed questions, but keep it narrowly  
10 tailored such that this doesn't become a multiday proceeding.

11           And, again, I agree wholeheartedly with the due  
12 process on the 80/20, 70/30, so I would just request -- again,  
13 my \$44 million, I think there is a question on how much of that  
14 went into -- the boiler was oversized and there is direct  
15 testimony on that to accommodate PRB blend because you need it  
16 for slagging and fouling and all the other concerns that are  
17 mentioned in the record. So, again, it's distinguishing  
18 between how much of the capital cost of the design was  
19 allocated to fuel flexibility and how much can be reapportioned  
20 to the benefit of the uprate by burning 100 percent CAPP coal,  
21 which was never intended to be burnt in the first place under  
22 the design point.

23           So I would respectfully request a balancing, if you  
24 will, if I do make this motion, that it would encompass not  
25 only your concerns, but concerns that I may have, but also any

1 concerns that Commissioner Argenziano may have to the extent  
2 that we, we are able to flesh out and, and articulate  
3 information such that we can make the best possible decision.  
4 I mean, it may come out in reopening the proceedings that my  
5 concerns are unfounded and I may recede back to a more  
6 middle-of-the-road approach as suggested by other  
7 Commissioners.

8           But the impact to the financial community as it's  
9 touted -- again, we're doing this under prior Commission  
10 precedent, that should be respected, it's supported by Florida  
11 Supreme Court precedent, that a court may amend its final  
12 orders when there's extraordinary circumstances. And  
13 there's -- as I mentioned today, you know, you have witness  
14 testimony saying that's about the most extraordinary thing you  
15 could ever do is not test, performance testing at your design  
16 point. That's a clear significant departure from sound  
17 engineering practice. And there hasn't been a lot of  
18 discussion on why they did what they did and they don't have  
19 records to basically substantiate that, as staff has mentioned  
20 in the staff recommendation. So I would respectfully request a  
21 little bit of latitude. Your points are well-taken, but I  
22 would look to bring this motion and perhaps build consensus  
23 around reopening it in a limited manner, not to make it a  
24 free-for-all, but to give the parties the opportunity as well  
25 as the ability for the parties to engage in constructive

1 settlement negotiations. They could do that in parallel.  
2 Maybe they'll bring something to us and make our life a lot  
3 easier.

4           But, again, I think there is some fragmentation on  
5 the position of where each Commissioner stands. And I, as well  
6 as Chairman Edgar, we like to build consensus. It's good to  
7 have a 5-0 vote. But, again, here we're fragmented, and I'm  
8 just merely trying to get to the bottom of some issues that  
9 given my technical and legal background are very, very  
10 important to me. Because, again, part of our job is upholding  
11 the public interest. And I think there is a substantial public  
12 interest looking at the order of magnitudes between primary  
13 staff recommendation and what other things may kind of come out  
14 of this. I'm not saying we'll go down that path, and, again, I  
15 my recede to a more moderate approach. But I would  
16 respectfully request as my colleague and fellow esteemed  
17 Commissioner that, again, there would be a little flexibility  
18 and latitude.

19           And, again, I would like to make a motion to open the  
20 proceeding and basically maybe constrain it to a time limit and  
21 let whatever questions Commissioners have come into play in  
22 that. For me, I don't want to constrain anyone's hand as long  
23 as we don't extend it past a day or four hours or whatever the  
24 appropriate period of time would be to reopen the proceedings  
25 such that Commissioners could get their questions answered.

1           So, again, I don't know procedurally what the best  
2 way is to frame a motion that would carry the day and make  
3 everyone happy, but, again, I think it would be important to  
4 me, as it is important to you, to get some more testimony or  
5 specifics on the, on the ratios. It's equally important to me  
6 to get a little bit more definitization on how that \$44 million  
7 is kind of allocated and how much of that could maybe be moved  
8 back into the uprate versus how much of it bought fuel  
9 flexibility, if you will, so.

10           CHAIRMAN EDGAR: Commissioner Carter, I will  
11 recognize you in just a moment, if you'd just give me a second  
12 to collect my thoughts.

13           Commissioner Skop, are you recommending that we  
14 reopen the record, come in with witnesses, all parties, and  
15 limit the hours in order to work through that and have all  
16 questions answered?

17           COMMISSIONER SKOP: Madam Chair, either one way or  
18 the other. But, again, I'm trying to make everyone happy. I  
19 think as General Counsel mentioned, there are concerns that he  
20 saw, and I think that I would be comfortable framing it to the  
21 limited aspects which he identified. But, likewise, I'm  
22 equally mindful of Commissioner McMurrian's concern, so I'm  
23 trying to find a happy medium. And if, perhaps if we can't  
24 agree on the issues in terms of the scope that Commissioners  
25 may wish to investigate further or not investigate further,

1 then maybe we could put a time constraint on it and that way  
2 each Commissioner would be able to ask questions that are  
3 important to them on specific testimony. But I think the more  
4 prudent approach would be, as, as our General Counsel  
5 mentioned, to, to discretely identify what issues may come up.  
6 That way all parties are on notice and we have the appropriate  
7 witnesses available to testify on those discrete matters.

8 CHAIRMAN EDGAR: Thank you, Commissioner Skop, for  
9 that clarification.

10 One of the things that we have tried to do in the  
11 past years here is invite full participation and full  
12 questioning, the opportunity for full dialogue, and I hope that  
13 once again I have shown that by the discussion today.

14 I love it when everybody is happy. Nothing makes me  
15 happier than when everybody is happy. And I appreciate your  
16 trying to draw everybody's concerns together and try to, quite  
17 frankly, put a nice bow on it in a way that would meet all of  
18 the concerns raised. I don't know if that's possible in this  
19 instance. If it is and I'm not seeing it, we can keep talking  
20 about it because I would love to be able to see it.

21 But when -- I have to note, as I'm sure everybody  
22 else listening has, that in your comments when you have  
23 addressed the concerns of Commissioner Argenziano, Commissioner  
24 Carter, and Commissioner McMurrin, you have not addressed  
25 mine. And I think that this is a dangerous road to go and I do

1 not support reopening the record. And if that is the will of  
2 the body, I will fully respect it and hope that each of you  
3 will respect that I differ. And that there will be many other  
4 things with which we will agree over the next months and years.

5 But I cannot not point out after hours of discussion  
6 and, quite frankly, me leaving it open all day and as long as  
7 we want to go until midnight to try to reach consensus that you  
8 have not addressed my concerns.

9 So Commissioner Carter.

10 COMMISSIONER CARTER: Let me just say, Madam  
11 Chairman, there won't be a consensus, and let me tell you why.

12 First of all, the perspective is to open it for  
13 limited purposes. I counted at least five issues based upon  
14 what Mr. Cooke said and then there are collateral issues from  
15 that. Commissioner McMurrian said that she would like to take  
16 one of the issues off the table. Commissioner Skop wants to  
17 add that as well as other collateral issues. So limited  
18 purposes to me means one specific issue, not a plethora of  
19 other issues. And I'm telling you we're going down a very  
20 dangerous road.

21 I think the other thing about this, about the limited  
22 issues is that every party to this proceeding had a vested  
23 interest to make their issues known, every party to this, every  
24 party, and staff had an opportunity to ask whatever questions.  
25 I mean, we went on ad infinitum. So every party to this had a

1 vested interest to make whatever issues known they wanted to be  
2 significant, that was to them.

3           Secondly, is that I don't think this is an  
4 appropriate forum for fostering a settlement. If the parties  
5 want to settle, that's their deal. But we've got to make a  
6 ruling. And I think that we're going down a very dangerous  
7 road. You start saying limited purpose, then the court is  
8 going to say, what is your definition of a limited purpose? I  
9 don't see anything in the statute that allows us to even come  
10 up, carve something out with a limited purpose. And then as we  
11 started talking about these limited issues, I counted five. I  
12 stopped counting at five. But I know that there are collateral  
13 issues to that and it's very, very dangerous. So whatever the  
14 motion is or whenever the motion comes, I'm voting against it.

15           CHAIRMAN EDGAR: And I do note that on Issue 1 we  
16 have a number of subissues as just one example of that.

17           Commissioner Argenziano, you are recognized.

18           COMMISSIONER ARGENZIANO: Thank you. And to that  
19 point, five or ten or 15 issues are limited issues compared to  
20 the amount of issues you can pull from this whole, this whole  
21 case, this whole thing that we're looking at. So in my opinion  
22 it can be limited.

23           But I will repeat again, and I respect everyone's  
24 opinion, we're all entitled to our own opinions and that's what  
25 makes this a great country, number one. We're not Afghanistan



1 with one opinion. So I appreciate that.

2 But, again, to express a concern that additional  
3 information never hurts, and I don't know what the fear of  
4 additional information is. And when we talk about going down a  
5 dangerous road, at least if you can articulate to me where the  
6 dangers are, that helps me in deciding whether that's a good  
7 thing to do or not. So I'm not sure that I see it fraught with  
8 peril. That may be a little bit of exaggeration unless you can  
9 articulate that to me. And I heard some of the things, but I  
10 just don't personally agree with that. But, you know, there  
11 are concerns, there are clearly additional questions that I  
12 know I have, and I've heard Commissioner Skop as well as  
13 Commissioner McMurrian, regarding due process. So clearly  
14 there are additional questions. And when you're dealing with a  
15 case like this, and especially the two Commissioners have not  
16 sat on that hearing, there are new questions. And even the  
17 companies deserve to have, to be able to address some of the  
18 new issues that are out there that they did not have due  
19 process that may make a difference to me in hearing and  
20 determining an outcome. And when we're talking about making a  
21 determination for such, for such an incredible case before us,  
22 I think that limiting additional information for anybody's side  
23 is the wrong way to go. I don't see that the perils are there  
24 if it's done properly, and I think that Commissioner Skop has  
25 made it clear to me that there is prior precedent. So it's not

1 something new. It's there and it's been done before. And,  
2 and, you know, all I ask is the ability to get additional  
3 information, and I'm not sure what the fear is of acquiring  
4 that additional information. Thank you.

5 CHAIRMAN EDGAR: I have no fear. I do, I do have a  
6 concern that it is bad policy in this instance.

7 Commissioner Skop.

8 COMMISSIONER SKOP: Madam Chair, and I know  
9 Commissioner McMurrin has, wishes to opine, so I'll make this  
10 brief. But I can narrow the scope of the proceeding to three  
11 distinct issues, and I've drafted those and I would be willing  
12 to make a motion on three distinct issues, not the five or ten.  
13 But I'm willing to do that at the appropriate time. And just  
14 those three issues would be capital costs associated with the  
15 fuel burn flexibility design, the cost of restoring the fuel  
16 flexibility and the, as Commissioner McMurrin mentioned, the  
17 fuel burn ratio. So those three distinct issues, not to depart  
18 from that, that answers, I think, my questions, the concern  
19 that General Counsel raised, as well as Commissioner  
20 McMurrin's question. And I think that's very, very succinct  
21 and not open to a lot of misinterpretation and collateral  
22 issues. I think it's explicit testimony as it relates to those  
23 specific issues that are currently memorialized in the record  
24 as they exist today, just, just basically distilling those and  
25 making them more, more succinct, if you will. Thank you.

1 CHAIRMAN EDGAR: Commissioner McMurrian.

2 COMMISSIONER McMURRIAN: Thank you, Chairman. It's  
3 not lost on me where I'm sitting in the middle of this. But  
4 Commissioner Argenziano asked about dangers, and I guess I  
5 probably should be, try to be a little clearer. And maybe I'll  
6 just say more and not clarify anything.

7 One of the things that has continually come before us  
8 in the last months, maybe even the last year is trying to be  
9 particularly careful about what things are dealt with through  
10 the fuel clause and what things are dealt with through base  
11 rates, and we have some cases actually before us on those kinds  
12 of issues. And, and it's probably not a surprise from things  
13 I've said in the past that I do have concerns about sort of  
14 keeping those two pots, keeping the right things in those two  
15 pots.

16 To me, talking about the \$44 million, if that's the  
17 number, and I know that Commissioner Skop said he's not sure  
18 and that's one of the things maybe you would try to get a  
19 handle on in that kind of a proceeding, it seems to me it still  
20 would be, reopening the record would still be in the context of  
21 a fuel type proceeding. And that in the end if you did show or  
22 if the Commissioners decided that the \$44 million investment  
23 was squandered despite some of the other discussions we've had,  
24 that where does that money go back? It seems like then you're  
25 talking about a refund of base rates through fuel, and I guess

1 that's my concern. I think at the end of the process either  
2 you'll get there, you'll get to that kind of conclusion -- and  
3 Commissioner Skop pointed that out, that maybe it wouldn't,  
4 wouldn't carry anyway. But I'm not sure what you'd gain other  
5 than additional information, more satisfaction that you'd heard  
6 all those arguments. But that's my concern with that argument.  
7 And that in the meantime you've sort of sent a signal to the  
8 markets that things even further back perhaps than the '96 to  
9 2005 time frame that was included in the petition are now at  
10 issue because of the concerns that we've raised in this docket,  
11 that now we're going back to, I guess, 1985 when there was a  
12 return that had begun being earned on that \$44 million or  
13 whatever that number would be. So I guess that's -- in trying  
14 to answer your question about the dangers, that's my concern.  
15 I don't know if it would help to have staff speak to any of  
16 that. Maybe I'm just completely wrong on that, on that aspect,  
17 but that's my concern.

18           And, Commissioner Skop, I very much appreciate, both  
19 of you, appreciate you including the issues I raised. But I  
20 guess in my opinion I would rather reopen it just in order to  
21 address the things that we already have before us in the sense  
22 that staff raised that additional 80/20 proposal. I think that  
23 it would be fair to have the parties give kind of input instead  
24 of just responding. As I said earlier, I think the \$20 million  
25 sort of came up in the context of arguing against -- I mean,

1 the 20 percent came up in the context of arguing against 50.

2 But, anyway, that's --

3 CHAIRMAN EDGAR: Commissioner Skop.

4 COMMISSIONER SKOP: Thank you, Madam Chair.

5 And, Commissioner McMurrian, I do respect that.

6 Again, I don't think it's a departure from established,  
7 well-established Commission precedent to do what I'm suggesting  
8 in terms of expanding the proceedings or putting us in a  
9 different procedural posture, because that's the very thing  
10 that was done by this Commission in the FPL/St. Lucie case.  
11 Because they were in a fuel clause and they looked back at the  
12 prudence of a technical decision, not only the decision at the  
13 time it was built, but maintaining that design, being the  
14 thermal shield.

15 So, again, I'm not trying to commingle. I'm not  
16 trying to increase the number under any pretext. I'm trying to  
17 be fair and equitable. And the component that I mentioned, if  
18 there were a disgorgement based upon a finding that, that the  
19 utility should be denied or disgorged of the return on equity  
20 because they failed to maintain a capital investment that was  
21 paid for by consumers, that that would probably be addressed in  
22 the appropriate rate base proceeding or deferred until the next  
23 rate base.

24 But what I'm just looking at holistically is I agree  
25 there is a need to not to commingle, but there is precedent to

1 look backwards into bifurcated proceedings, a rate base and a  
2 fuel, because they are inextricably related here. Again, the  
3 conduct and the positioning that were associated with these  
4 managerial decisions put Progress in a position to where the  
5 arguments advanced by OPC were even that more plausible because  
6 they're reliant solely upon CAPP coal and they haven't changed  
7 to this day. They can't burn the PRB to this day.

8           So I would just respectfully, if I could limit it to  
9 those three distinct issues. I don't think that there's any  
10 danger in doing that. I don't think it's going to send mixed  
11 or unfavorable market decisions because, again, it's based on  
12 past Commission precedent. I'm merely asking that we do the  
13 same thing that we previously did in the FPL/Port St. Lucie  
14 case, to go look at the technical issue. And in Port St. Lucie  
15 they looked at the technical issue on the design aspect as well  
16 as the ability to maintain that thermal shield. That same --  
17 it's directly on point. Was it prudent to design in fuel  
18 flexibility? Should that have been maintained and preserved  
19 for the benefit of the consumers to leverage fuel costs?  
20 They're exactly analogous. It's directly on point. So that's  
21 what I'm just merely advocating. And, again, it's just there  
22 is substantial support in the record on the \$44 million.  
23 You've got two witnesses. You can make some inferences and  
24 base it upon what testimony you currently find credible. But,  
25 again, in procedural safeguards and due process I feel it's

1 better to take a little bit more additional testimony on that  
2 aspect, and I would respectfully request to include that just  
3 because I didn't have the chance to question any of the  
4 witnesses or Progress on that issue. So I would like to  
5 definitize that.

6 And, again, I think it's well-founded on precedent of  
7 this Commission that should be controlling on the Commission  
8 because it hasn't been changed. We have not had any, to my  
9 knowledge, any subsequent actions where, that should disclude  
10 us from doing the same thing we did in that case. And that was  
11 looking back 16 years under the same aspect that I'm asking us  
12 to, reviewing a technical decision and maintaining that  
13 decision.

14 So merely I would advocate at the appropriate time to  
15 make a motion on three distinct issues to reopen the  
16 proceedings for additional testimony on the capital costs  
17 associated with designing the fuel burn flexibility, the cost  
18 of restoring the fuel burn flexibility and whether that should  
19 be borne by the consumers or the utility, and the fuel burn  
20 ratio, whether 80/20 or 70/30 or what have you. As you  
21 mentioned, address your due process concerns that staff's  
22 import brought into that. And I think those three narrowly  
23 tailored issues are well-founded within controlling precedent  
24 of this Commission. Because I'm not doing anything different  
25 than what the Commission has already done in the past. And I

1 thought that it was exactly on point, the case is well-founded  
2 in staff recommendation, but no one suggested that. So if  
3 anything, we can all agree to disagree, but at least I'm trying  
4 to think innovatively, I mean, for the benefit of my own  
5 curiosity to try and do the right thing to make it fair and  
6 equitable for all of the parties. Thank you.

7 CHAIRMAN EDGAR: Commissioner Skop, I'm not sure if  
8 that was a motion or a question.

9 COMMISSIONER SKOP: Madam Chair, that was just  
10 somewhat of a response to, to Commissioner McMurrian's  
11 concerns, which, which are well-founded. But, again, I do  
12 think as an attorney and looking at Commission precedent that  
13 is sound precedent that I stand on that I'm requesting.

14 So, again, I think that at this time, if you deem it  
15 appropriate, I would like to make a motion to reopen the  
16 proceedings on the limited issues of capital cost associated  
17 with the design of the fuel burn flexibility, the cost of  
18 restoring the fuel burn flexibility and whether that should be  
19 borne by the consumer, and the fuel burn ratios.

20 CHAIRMAN EDGAR: Okay. Commissioners, we have a  
21 motion to reopen the record on this case. Does that mean  
22 that -- or may I ask this, Commissioner Skop, for my own  
23 clarity, encompassed in your motion is that we defer action on  
24 the issues that are before us?

25 COMMISSIONER SKOP: Yes, Madam Chair.



1           CHAIRMAN EDGAR: So contained in your motion there is  
2 not a finding of prudence or imprudence one way or the other?

3           COMMISSIONER SKOP: No, not at this time, Madam  
4 Chair. That would be made upon taking of additional testimony,  
5 as indicated in my motion, and then bringing it to a final  
6 decision.

7           CHAIRMAN EDGAR: Okay. Commissioners, as you have  
8 heard, Commissioner Skop has made a motion that we defer action  
9 on the issues that are before us, that we have been discussing  
10 today, that we direct our staff to reopen the record. And, Mr.  
11 Cooke, I will look to you to make sure we all understand --  
12 that we reopen the record on the three items that he has  
13 described.

14           Commissioners, are there questions about the motion  
15 or is there a second?

16           COMMISSIONER ARGENZIANO: Second.

17           CHAIRMAN EDGAR: Commissioner Argenziano, excuse me,  
18 has made a second. And we are in discussion.

19           Commissioner Carter.

20           COMMISSIONER CARTER: Thank you, Madam Chair.

21           Just for Mr. Cooke, on this case that Commissioner  
22 Skop keeps relaying to -- now when I heard you, I heard you say  
23 that that case was dealing with the capital costs that had to  
24 do primarily with the rate base and they just coincidentally  
25 put in the additional factors there. But it seems that

1 Commissioner Skop is saying this is precedent for mingling the  
2 two. Can you address, speak to that issue, please, sir?

3 MR. COOKE: I'll do my best. My reading of the  
4 order, and it's an order from 1985, indicates that in a fuel  
5 clause proceeding the Commission looked back at design issues  
6 in terms of the design of a nuclear facility, which arguably  
7 would be more in the nature of capital type costs.

8 So I find myself in a position agreeing with both  
9 Commissioner McMurrian and Commissioner Skop. I do think that  
10 there are concerns about mingling the rate base type of  
11 questions in a fuel clause, but I do think that this prior  
12 Commission order suggests that there is some precedent for  
13 that. Now I don't know all of the ins and outs of that  
14 specific matter in terms -- I haven't seen the transcript, et  
15 cetera -- of what goes on there.

16 But I'm not going to -- I do think there is some  
17 precedent to do what Commissioner Skop is asking this  
18 Commission to consider. But it does raise the kinds of issues  
19 that you all have raised, you know. What is the uncertainty?  
20 Was there, was there a preceding, in this case, in the St.  
21 Lucie case was there a preceding base rate proceeding? And, if  
22 so, what impact that might or might not have had. It's a,  
23 purely a Commission order. The outcome of the order was a  
24 finding of prudence on the part of the company, so there wasn't  
25 an appeal of that decision. And whether, you know, that firmly

1 tested all of these issues or not, it's something that we will,  
2 we will have to deal with, assuming that the Commission goes in  
3 this direction.

4 I do agree it is some precedent and I'm not  
5 uncomfortable with using it as precedent, but I'm not going to  
6 predict or guarantee a particular outcome one way or the other.  
7 I think we're opening a box that's going to raise questions and  
8 we will deal with them as we go forward with them. But I'm not  
9 going to sit here and say that the Commission doesn't have the  
10 authority to do what Commissioner Skop is recommending be done.

11 CHAIRMAN EDGAR: Commissioners, we are still in  
12 discussion.

13 Commissioner McMurrrian.

14 COMMISSIONER McMURRIAN: Chairman, might I suggest  
15 that I have a few minutes break to squeeze a little, little  
16 juice out of my advisor one more time before he goes off to  
17 greener pastures?

18 CHAIRMAN EDGAR: You know --

19 COMMISSIONER McMURRIAN: I would like a few minutes.

20 CHAIRMAN EDGAR: -- I generally think that when, when  
21 we're losing part of our team, that we make them work until the  
22 last possible minute, that they're still on the payroll.

23 (Laughter.)

24 And once again, you know, I could use maybe a few  
25 moments to clear the cobwebs. So why don't we take whatever

1 that would be to bring us to half past by the clock on the  
2 wall.

3 (Recess taken.)

4 Okay. We are back on the record. And let's see,  
5 when we left off, we had a motion and we had a second and we  
6 were having some discussions. So I think we'll continue with  
7 our discussion and then we'll get to a vote.

8 Commissioner McMurrrian, I think you had asked for a  
9 few minutes to collect your thoughts. Would you like to kick  
10 us off?

11 COMMISSIONER McMURRIAN: Are we at the --

12 CHAIRMAN EDGAR: Or not. I didn't mean to -- that  
13 wasn't supposed to be a surprise. I can keep talking.

14 (Laughter.)

15 COMMISSIONER McMURRIAN: I guess I should just say I  
16 still have the same concerns that I had earlier with the scope  
17 of the reopening of the record. And so that will probably --  
18 well, will be reflected in my vote, so.

19 CHAIRMAN EDGAR: Okay. Commissioners, any, any other  
20 thoughts before, before I call for the vote? Seeing none,  
21 seeing none. No? Yes? No? Okay. I'm seeing none.

22 All right. Then let me just share this. I've said  
23 it already, but since we have had the opportunity to repeat  
24 ourselves once or twice, I'm going to take full advantage of  
25 that and say again, I do welcome all of our discussion. And

1 that's not necessarily to say that it's done, but I am pleased  
2 that everybody, I hope, has felt comfortable to put forth  
3 differing ideas and thoughts and bouncing back and forth and  
4 learning from each other. I have so much respect for each of  
5 you and look forward to continuing to come together as a  
6 Commission as we address issues in the future.

7 I do have, as I've said earlier, some very strong  
8 concerns about the motion that is before us, but I certainly  
9 respect differing opinions. Commissioner Argenziano, I do not  
10 fear additional information, but I do, I think that this  
11 Commission at times does need to act decisively, and I do think  
12 that, quite frankly, in my just one person's opinion that to  
13 make a decision that is timely and thorough and based upon the  
14 record would in this instance be better policy. But if we go  
15 in a different direction, I will do everything I can to be  
16 helpful with that as well.

17 Okay. So we have a motion. We have a second. We  
18 have had discussion. Before I call the vote, is everybody  
19 clear enough as to what the motion is? Okay. Because  
20 sometimes we have those questions after the fact. All right.

21 So all in favor of the motion, say aye.

22 COMMISSIONER SKOP: Aye.

23 COMMISSIONER ARGENZIANO: Aye.

24 CHAIRMAN EDGAR: Opposed? No.

25 COMMISSIONER CARTER: No.

1 COMMISSIONER McMURRIAN: Nay.

2 CHAIRMAN EDGAR: Commissioner McMurrian, I'm going to  
3 have to ask you --

4 COMMISSIONER McMURRIAN: I said, "Nay."

5 CHAIRMAN EDGAR: Okay. So the motion fails on a, I  
6 can never get this right, 2-3 or 3-2, whichever way you choose  
7 to look at it. So we have had a motion fail on the suggestion  
8 or direction that we reopen the record on some specific  
9 information that was laid out before us.

10 And I think, Commissioners, that brings us back to  
11 the issues that are outlined in the, in the agenda item, which  
12 is eight just in case anybody has forgotten, that is before us.

13 I had said earlier that I thought in my thinking that  
14 maybe the way to approach it was is there a finding of  
15 imprudence? And then, if so, is a refund necessary? And then,  
16 if so, what is the recommended or suggested amount under the  
17 circumstances? If there's a better way to approach that, we  
18 can. And so, Commissioner Carter.

19 COMMISSIONER CARTER: Madam Chairman, in light of our  
20 discussions today and in terms of where we pretty much -- most  
21 Commissioners already have elucidated their perspective in  
22 terms of where they are. So at that, based upon that I would  
23 view that we just move Issue 1 and we can go from there. And  
24 then I would say that in the context of Issue 1 I would  
25 answer -- which says, "Did Progress Energy Florida act

1 prudently in purchasing coal for Crystal River Units  
2 4 and 5 beginning in '96 and continuing in '05," I would use  
3 the answer "No," but -- and here's -- let me explain that.

4 I think that there's been discussion on primary, the  
5 staff's primary recommendation and the staff alternative. I  
6 think that we can answer this question before we get to whether  
7 we go with the primary recommendation or any of them. And I  
8 would put that out there before, before my fellow colleagues  
9 before doing that. But I think that we can answer this  
10 question regardless of which one of the recommendations that we  
11 take. And I --

12 CHAIRMAN EDGAR: I'm going to have to ask you to  
13 restate. I'm sorry. It's been a long day. I apologize. Bear  
14 with me, folks. We'll get there.

15 (Laughter.)

16 Would you do that one more time just so that I --

17 COMMISSIONER CARTER: Yeah, I know. My preference  
18 would be to do otherwise, but.

19 CHAIRMAN EDGAR: Okay. I'm back. I'm ready.

20 COMMISSIONER CARTER: You're ready?

21 CHAIRMAN EDGAR: I'm ready.

22 COMMISSIONER CARTER: Is that on Issue 1 I would ask  
23 that, that we answer in the negative. And then, you know, the  
24 other issues will flow from there in terms of Issue 1, because  
25 my answer is based upon staff's primary recommendation.

1 CHAIRMAN EDGAR: I think I'm with you. So let's,  
2 let's --

3 COMMISSIONER CARTER: Do you understand what I'm  
4 saying? I think we can answer the question without getting  
5 into primary, alternative or whatever.

6 CHAIRMAN EDGAR: Okay. So, Commissioner Carter, did  
7 you make a motion?

8 COMMISSIONER CARTER: Yes, ma'am.

9 CHAIRMAN EDGAR: Okay. And is your motion that you  
10 are putting forth for our consideration to make a finding as a  
11 Commission that in the circumstances that are before us that  
12 Progress did not act prudently, but to not yet address the  
13 question of a refund?

14 COMMISSIONER CARTER: That is correct.

15 CHAIRMAN EDGAR: Okay. And thank you for helping me  
16 walk through that.

17 Okay. Commissioner Skop.

18 COMMISSIONER SKOP: Thank you, Madam Chair. And I  
19 think Commissioner Carter's point is well-taken.

20 I would draw to the Commission's attention, however,  
21 that the framing of the question in Issue 1 is a little bit  
22 inconsistent with the manner in which staff has calculated the  
23 refund, as well as the additional comment that the Commission  
24 should direct Progress to supplement its true-ups to address  
25 the 2006, 2007 time frame. So how are we going to reconcile



1 that issue? Because, again, the issue as the question is  
2 framed deals with the time period from '96 to 2005. I think  
3 the relevant refund period is 2001 to 2005, as well as whether  
4 we take the additional step of looking at '06 and '07. But  
5 moreover, too, irrespective of the path we go down, I just want  
6 to preserve my objections such that on the dissent that they'll  
7 be written into the order to the extent that I may not agree  
8 with all that we're doing, and, again, I will be dissenting on  
9 the opinion of, of the Commission today.

10 CHAIRMAN EDGAR: Okay. Commissioner Skop, I think  
11 you may have gotten ahead of me a little bit.

12 I was trying to be clear that I think that the motion  
13 Commissioner Carter offered for our consideration is worded  
14 somewhat differently than the wording in Issue 1. And we do  
15 often, as we have all seen, adjust the wording to issues in  
16 light of the discussion that we have at the bench. The Issue 1  
17 as it is before me does include in the primary recommendation a  
18 finding of imprudence, to reword slightly, but does also  
19 include a recommended amount. And my understanding was that,  
20 Commissioner Carter, in your motion you were kind of separating  
21 those two pieces.

22 COMMISSIONER CARTER: Yes, ma'am.

23 CHAIRMAN EDGAR: And so, Commissioner Skop, I think  
24 you jumped ahead of us a little bit.

25 COMMISSIONER SKOP: I'm just primarily worried about

1 the date. Because the manner in which it's framed in Issue 1,  
2 the question itself is '96 through 2005, but the primary rec  
3 differs in the time period. And, again, so to adopt  
4 affirmative, yeah or nay, on Issue 1 in itself is a little bit  
5 different because the time frames are different from what's  
6 recommended in adopting primary recommendation on that issue.

7 CHAIRMAN EDGAR: Okay. Commissioner McMurrrian.

8 COMMISSIONER McMURRIAN: My brain is just about  
9 fried.

10 COMMISSIONER CARTER: Come on. Hang in there.

11 CHAIRMAN EDGAR: Come on.

12 COMMISSIONER McMURRIAN: I think I've just about used  
13 it up. You all are going to want to kill me for what I'm about  
14 to throw out, but it seems to me that this is just getting more  
15 confusing, not less.

16 I wonder if -- there's some things I think that have  
17 been brought out by some of the Commissioners today, and just  
18 in trying to deal with this issue, whether or not the time  
19 frames are consistent, I want to put on the table possibly  
20 having staff go back and try to address some of those kind of  
21 procedural issues for us and perhaps defer this to another  
22 agenda or even a special agenda and try to get these little  
23 things worked out. I mean, even, even the due process type  
24 concerns that I raised, I realize that there might even be some  
25 information about whether some parties might even be able to

1 refile at the end of this thing and file a different, you know,  
2 blend, for instance. And I guess that's always someone's  
3 right. But I'm just saying there are just several things that  
4 seem to me to be sort of left hanging, and I'm not really sure  
5 about some of the precedent and things that we've relied on  
6 today, or maybe not relied on, but have been brought up. And I  
7 just want to throw it out there. I'm starting to suffer from,  
8 I think I'm starting to have diminishing returns here in trying  
9 to figure out what we're doing. This escapes me on Issue 1 as  
10 to the time frames we're talking about and how to parse it  
11 between Issue 1 and maybe Issue 2.

12           CHAIRMAN EDGAR: Okay. Let me, let me try this.  
13 Okay. First of all, I, I am compelled to comment that you  
14 realize through the appointment process it's all a test to see  
15 if you can meet the endurance test of actually being a  
16 Commissioner and addressing issues on a day-to-day basis.

17           I may be the cause of any confusion that we are  
18 having now, and, if so, I apologize. In my desire to simplify  
19 I maybe obfuscated unintentionally. So, Commissioner Skop, I  
20 appreciate your clarification as to dates. I was trying to  
21 kind of drill it down to the essence and, Commissioner Carter,  
22 maybe that's what you're responding to. We can address it in a  
23 variety of different ways. Commissioner Carter, it is your  
24 motion. And if you would like to maybe clarify for us, we can  
25 go there and see if that clarifies or not.

1           COMMISSIONER CARTER: Madam Chairman, I think that  
2 based upon what I'm hearing from my colleagues, I'm less  
3 reticent -- well, actually I'm more reticent now to offer the  
4 motions separately. I'm more prepared now to offer a motion  
5 that we adopt staff's primary recommendation. And the reason  
6 being is we're getting to a point to where we start parcelling  
7 different aspects of this out to where if you're going to start  
8 to change in perspectives on that, you really are taking a  
9 position. So I'm going to withdraw that motion. I'm just  
10 going to move staff's primary recommendation on Issue 1.

11           CHAIRMAN EDGAR: Okay. And, again, if, if I  
12 confused, my apologies. It was not my intention. But that is  
13 a motion that I do understand. And, and from looking at  
14 obviously the primary recommendation from our staff and the  
15 item before us, then Issues 3, 4, 5 and 6 kind of naturally  
16 flow from that.

17           COMMISSIONER CARTER: Yes, ma'am. That is correct.

18           CHAIRMAN EDGAR: So may I ask you this, Commissioner  
19 Carter, are you offering the staff recommendation on all of  
20 those issues or just Issue 1 at this time? And, of course,  
21 we'll need to see if there's a second. We will need to see if  
22 there's a second.

23           COMMISSIONER CARTER: Do I need to explain it first?

24           CHAIRMAN EDGAR: I wanted you to do that one more  
25 time so I knew for sure what you're --

1           COMMISSIONER CARTER: Yes, ma'am. I'm offering a  
2 motion on the primary recommendation and the pertinent issues  
3 that flow from that.

4           CHAIRMAN EDGAR: Okay. All right. Thank you. Thank  
5 you, Commissioner Carter.

6           Commissioner Skop.

7           COMMISSIONER SKOP: Thank you, Madam Chair. I agree  
8 with Commissioner Carter. That's one of the things that we  
9 will agree upon today, that it's probably from a procedural  
10 aspect more simple and more direct to adopt the primary  
11 recommendation as he suggested instead of going through the  
12 language and the issue that appears to be somewhat inconsistent  
13 with the primary. So, again, I would commend Commissioner  
14 Carter on reframing that motion, even though I will probably  
15 not be in the majority on this one.

16           CHAIRMAN EDGAR: Okay. Once again, we do strive for  
17 clarity. It takes us a little while to get there, but we  
18 constantly strive for clarity so that we are all as clear as we  
19 can be.

20           Okay. Commissioners, we do have a motion. And is  
21 there a second?

22           Okay. With that then, it's a little unusual, but I'm  
23 going to jump right in and jump ahead. And, Commissioner  
24 Carter, I'm going to pass you the gavel and I'm going to second  
25 the motion.

1 Commissioner Carter, you have the floor.

2 COMMISSIONER CARTER: The motion has been made and  
3 properly seconded. We are now into our discussion phase.  
4 Commissioners wishing to be heard?

5 COMMISSIONER ARGENZIANO: Yes.

6 COMMISSIONER CARTER: Commissioner Argenziano, you  
7 are recognized.

8 COMMISSIONER ARGENZIANO: Okay. And what I just want  
9 to say is that at this point there's no way I'm voting no  
10 against giving the people back a refund where I think that the  
11 company was not prudent, and but with an objection or a great  
12 deal of distress having to do so when I felt there was more  
13 information that I could have obtained. So I want to put that  
14 on record.

15 And, and while I, Chairman, did not say you  
16 specifically fear, anybody fears, I just used that as a  
17 comment, so I want to clarify. Shouldn't fear additional  
18 information.

19 I might also stress is that -- and I want to thank  
20 Commissioner McMurrian for actually giving me her concerns  
21 because that's all I wanted was to figure out where your  
22 concerns were. So if we can articulate to one another what the  
23 concerns are, that really goes a long way in understanding what  
24 may be a problem in moving forward with something that I may  
25 wish to do.

1           But given that, as I said, I will vote for this today  
2 because it is a vote for getting a refund back to the citizens,  
3 but over a real great deal of distress of not being able to  
4 obtain more information. Thank you.

5           COMMISSIONER CARTER: Commissioner Skop, you're  
6 recognized.

7           COMMISSIONER SKOP: Thank you, Mr. Chair.

8           Again, I agree with Commissioner Argenziano on that  
9 for different reasons. Again, I support that a refund is due  
10 to the consumers and customers of Progress. I think that we  
11 differ in the methodology of what that refund should be. And,  
12 again, I feel the refund should be a greater amount. So,  
13 again, in recasting my thinking, and if you guys see a  
14 procedural error, please identify it, but I think I can concur  
15 in part and dissent in part to the extent that I would have  
16 gone further. But I can support the refund on its face as may  
17 be adopted by the Commission in the best interest of consumers.

18           COMMISSIONER CARTER: Just, just before recognizing  
19 Commissioner McMurrian, Mr. Cooke.

20           MR. COOKE: I think what I hear Commissioner Skop  
21 saying is that he's voting, or he is considering voting in  
22 favor of this motion. In other words, that he will support it;  
23 however, he will express, I wouldn't call it a dissent per se,  
24 but essentially as he characterized it maybe some concurring or  
25 additional opinion in the order that suggests he was interested

1 in going further. And I don't think I have a problem from a  
2 legal perspective with that being the outcome of this process.

3 COMMISSIONER CARTER: So technically it will just be  
4 a concurring opinion.

5 MR. COOKE: Right. But he would be --

6 COMMISSIONER CARTER: Is that okay with you, that we  
7 --

8 COMMISSIONER SKOP: Yes, Mr. Chair. I guess it would  
9 be concurring in part with the refund, but dissenting in part  
10 on the amount. But, again, it just may be a concurring  
11 opinion, this matter which the order needs to be framed. But  
12 that's where I am positionally on the record is that I feel we  
13 could have gone farther on behalf of the consumer. And, you  
14 know, I would not have been adverse had all the actions been  
15 prudent to just throwing out the whole thing, because that's  
16 fair in itself. So, again, I think it's a matter of finding  
17 the fair and equitable balance. And, again, I'm supportive of  
18 a refund, of any refund where it's warranted on behalf of the  
19 consumers for the right reasons. But I just feel for the  
20 reasoning that I've articulated today, I feel that it could  
21 have been further in many different regards, and I just want to  
22 get that on the record.

23 COMMISSIONER CARTER: Thank you, Commissioner.

24 And before I recognize Commissioner McMurrian,  
25 Commissioner Argenziano, we will afford you the same



1 opportunity. If you wish to write a concurring opinion to  
2 identify that, I think that will be fine to allow Commissioners  
3 to express their opinion on that. You'll be okay with that?

4 COMMISSIONER ARGENZIANO: Okay.

5 COMMISSIONER CARTER: Okay. Commissioner McMurrin,  
6 you are recognized.

7 COMMISSIONER McMURRIAN: You sure you all don't want  
8 to take me up on the deferral?

9 (Laughter.)

10 It's been, it's been clear since we started this when  
11 we made our initial remarks where I am. And, again, I just go  
12 over what the standard of review is here, and that's whether  
13 the utility acted prudently and reasonably in light of the  
14 facts that it knew or should have known at the time it made its  
15 decision. And having reviewed everything before us here, I  
16 think that the actions that the utility took, I can't say that  
17 they were imprudent in making their coal procurement decisions.  
18 And while there was definitely additional scrutiny in this type  
19 of a case where there were affiliate transactions, I feel like  
20 that concern had been addressed throughout the rec in their  
21 purchases of foreign coal and some of the other purchases they  
22 made of nonaffiliates. And it seemed to me that there wasn't  
23 an air of bias toward affiliate transactions, and I noted that  
24 staff had that same conclusion.

25 So for that reason, I am voting the alternative

1 recommendation, which is, yes, that PEF did act prudently. I  
2 still have the same concerns about due process, and I very much  
3 appreciate the Commissioners trying to address those concerns.  
4 I think that the concerns, on the other hand, about opening it  
5 up with respect to the \$44 million or whatever that right  
6 number is sort of overrode the other issue. And I sort of  
7 mentioned this a second ago, but it seems to me that there is  
8 some opportunity for parties to perhaps refile something based  
9 on a 70/30 case perhaps or an 80/20 or whatever case someone  
10 would want to make. I'm not necessarily inviting that, but I  
11 do realize that there's probably an opportunity there for that  
12 if there's more information needed on those, those kinds of  
13 proposals. So that said, I will be voting the alternative  
14 recommendation and will probably be issuing a dissent of some  
15 sort to codify that.

16 COMMISSIONER CARTER: Thank you for your comments.

17 Madam Chairman, you're recognized.

18 CHAIRMAN EDGAR: Thank you. You know, as we wrestle  
19 with these issues sometimes what each of us thinks is the right  
20 thing is crystal clear and sometimes there are shades of gray,  
21 and I think this is one that has shades of gray.

22 What I can say, just speaking for myself, is that the  
23 motion that was made and that I seconded may not be the perfect  
24 solution to address all concerns, but I do feel like it's a  
25 good decision, a solid decision if, in fact, we go in that

1 direction. And it is one, quite frankly, that I can feel good  
2 and solid about if, if it's not all completely perfect.

3 So, as always, again, I recognize the concerns of my  
4 colleagues and some of the concerns that I have expressed, but  
5 I do think that it is good to move forward. And always there  
6 is the ability for a Commissioner to write a dissent, and I  
7 have done that myself sometimes. So, you know, it's part of  
8 the process and opportunity to get some of these thoughts down  
9 in writing. So I appreciate the opportunity to comment, and  
10 I'm prepared to vote on the motion when we are at that point.

11 COMMISSIONER CARTER: Thank you. Any Commissioner  
12 have any further comment before we call for the vote?

13 Having the motion made properly and seconded and the  
14 Commissioners having an opportunity to have their discussions,  
15 all those in favor of the motion, let it be known by the sign  
16 of aye.

17 CHAIRMAN EDGAR: Aye.

18 COMMISSIONER CARTER: Aye.

19 COMMISSIONER ARGENZIANO: Aye.

20 COMMISSIONER SKOP: Aye.

21 COMMISSIONER CARTER: All those opposed?

22 COMMISSIONER McMURRIAN: Nay.

23 COMMISSIONER CARTER: Okay. Motion passes.

24 Madam Chair.

25 MR. COOKE: Madam Chair, not that I want to confuse

1 things, but I just want to make sure that on Issue 5 that that  
2 was included. I'm interpreting staff's recommendation and  
3 staff's primary recommendation where a primary recommendation  
4 applies.

5 CHAIRMAN EDGAR: Commissioner Carter, we had talked  
6 about all issues flowing from that, and then there was a  
7 discussion about the alternative staff recommendation -- excuse  
8 me, primary.

9 COMMISSIONER CARTER: Primary.

10 CHAIRMAN EDGAR: Primary in its entirety. My  
11 understanding is that included the staff recommendation on  
12 Issue 5. That is our understanding.

13 COMMISSIONER CARTER: Yes, ma'am.

14 CHAIRMAN EDGAR: Commissioner -- Mr. Cooke, thank you  
15 for that clarification.

16 MR. COOKE: Thank you.

17 CHAIRMAN EDGAR: Again, Commissioners, thank you all.  
18 And I am just so pleased that we had a full, positive and  
19 interesting agenda conference for Jeremy's last agenda  
20 conference with us as a Commission staff member. I know that  
21 we all extend our congratulations to him and that we are  
22 pleased that he will be working in a role that we will all have  
23 the opportunity to continue to coordinate and cooperate.

24 So, Commissioners, it's been a great day. Thank you  
25 all, thank you to our staff.

1 Are there any additional closing comments?

2 COMMISSIONER CARTER: Madam Chairman.

3 CHAIRMAN EDGAR: Commissioner Carter.

4 COMMISSIONER CARTER: I'd like to say to my  
5 distinguished colleagues how wonderful it is that we live in  
6 America where we can disagree but we don't, you know, have to  
7 resort to firing squads and things like that and getting your  
8 head cut off. And that's what makes this experiment called  
9 democracy fantastic is that, you know, for well over 200 years  
10 we're the only game in town where we don't have a  
11 constitutional monarchy, nobody is born into privilege in terms  
12 of running our government, every citizen has a right to be  
13 heard. And I think what we did today, you have five distinct  
14 personalities and each one of us have, each one of us has an  
15 opinion and each one of those opinions were significant,  
16 respected by each other. We had a lively debate but we were  
17 not disagreeable, and that's what separates us from the rest of  
18 the world, is that it's fantastic to be an American. And I  
19 want to say to my colleagues how pleased I am that we had a  
20 good discussion, good discourse, good debate, and we did  
21 something good for the ratepayers of the State of Florida.

22 Thank you, Madam Chairman.

23 CHAIRMAN EDGAR: Thank you. And with that, everybody  
24 stay dry. We are adjourned.

25 (Agenda Item 8 concluded.)

1 STATE OF FLORIDA )  
 : CERTIFICATE OF REPORTER  
2 COUNTY OF LEON )


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I, LINDA BOLES, RPR, CRR, Official Commission Reporter, 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' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 7th day of August, 2007.

  
LINDA BOLES, RPR, CRR  
FPSC Official Commission Reporter  
(850) 413-6734