

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION TO DETERMINE NEED FOR WEST DOCKET NO. 080203-EI
COUNTY ENERGY CENTER UNIT 3 ELECTRICAL
POWER PLANT, BY FLORIDA POWER & LIGHT
COMPANY.

PETITION FOR DETERMINATION OF NEED FOR DOCKET NO. 080245-EI
CONVERSION OF RIVIERA PLANT IN PALM
BEACH COUNTY, BY FLORIDA POWER & LIGHT
COMPANY.

PETITION FOR DETERMINATION OF NEED FOR DOCKET NO. 080246-EI
CONVERSION OF CAPE CANAVERAL PLANT IN
BREVARD COUNTY, BY FLORIDA POWER &
LIGHT COMPANY.

PROCEEDINGS: AGENDA CONFERENCE
ITEM 23

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

DATE: Tuesday, September 4, 2008

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

REPORTED BY: LINDA BOLES, RPR, CRR
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FLORIDA PUBLIC SERVICE COMMISSION

FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 MICHAEL COOKE, GENERAL COUNSEL, SHEVIE BROWN and TOM
3 BALLINGER, representing the Florida Public Service Commission
4 Staff.

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P R O C E E D I N G S

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2 CHAIRMAN CARTER: Commissioners, as we proceed to
3 Issue 23, just kind of a heads-up. I'll be recognizing first
4 Commissioner McMurrian, then Commissioner Skop, and we'll go
5 from there on this Item 23. Okay. Did I say 23? Yeah, I'm
6 right.

7 MR. BROWN: Good morning.

8 CHAIRMAN CARTER: Good morning. You're recognized.

9 MR. BROWN: Thank you. My name is Shevie Brown
10 on behalf of staff.

11 Item 23 is staff's recommendation regarding FPL's
12 petition for determination of need for West County
13 3, conversion of the Riviera plant and the conversion of the
14 Cape Canaveral plant.

15 Commissioners, before we get into the introduction,
16 staff would like to propose some oral modifications within the
17 recommendation for some errors that we found, and we would like
18 to present those to you for your consideration, please.

19 CHAIRMAN CARTER: Okay. Let's walk through those.

20 MR. BROWN: The first set deals with deleting (18)
21 from Rule Number 25-22.082, and at your indulgence I'll show
22 you where the pages are for those errors.

23 CHAIRMAN CARTER: You're recognized.

24 MR. BROWN: Okay. On Page 4 in the second paragraph
25 we'd like to delete the citation of (18).

1 CHAIRMAN CARTER: Okay.

2 MR. BROWN: Same thing on Page 7, and that's at the
3 top of the page.

4 CHAIRMAN CARTER: Again, that's (18)?

5 MR. BROWN: Correct.

6 CHAIRMAN CARTER: Okay.

7 MR. BROWN: Okay. On Pages 24 in the recommendation
8 statement, again, all these that I'm coming through, this set
9 here is attributed to getting (18) deleted from these areas.

10 CHAIRMAN CARTER: That's on Page 24.

11 MR. BROWN: 24 in the recommendation statement.

12 Correct.

13 Okay. Page 25, the last paragraph there.

14 CHAIRMAN CARTER: Page 25, last paragraph.

15 MR. BROWN: Yes. Correct. And also, I apologize,
16 but on the bottom of Page 24 as well there's a citation there
17 for (18). Page 33, in the recommendation statement and at the
18 bottom of the page as well. And on Page 34, the last paragraph
19 there, Line 3.

20 Okay. And finally the next set is we're going to be
21 deleting a sentence on Pages 33 and 44, and I'll guide you to
22 those areas as well.

23 CHAIRMAN CARTER: Okay.

24 MR. BROWN: The last sentence in the recommendation
25 statement beginning with "FPL should be required to annually

1 report the budgeted versus actual construction expenses for all
2 three projects," we'd like to propose to delete that sentence.

3 CHAIRMAN CARTER: Where are you now?

4 MR. BROWN: I'm sorry. On Page 33.

5 CHAIRMAN CARTER: Page 33?

6 MR. BROWN: Correct.

7 CHAIRMAN CARTER: Okay. Is that the --

8 COMMISSIONER EDGAR: Can you repeat that?

9 MR. BROWN: Yeah. That's on the recommendation
10 statement, it's Issue 17, Page 33, the very last sentence there
11 beginning with "FPL should be."

12 CHAIRMAN CARTER: Oh.

13 MR. BROWN: We'd like to strike that sentence.

14 CHAIRMAN CARTER: In the recommendation paragraph.

15 COMMISSIONER ARGENZIANO: Starting -- Mr. Chair.
16 Starting from where? Could you read, read me what you're
17 deleting, please?

18 MR. BROWN: Okay. "FPL should be required to
19 annually report the budgeted versus actual construction
20 expenses for all three projects."

21 COMMISSIONER ARGENZIANO: Okay. That's the only
22 thing you're deleting there?

23 MR. BROWN: On that page, correct. And the last one
24 is on Page 41 in the recommendation statement.

25 CHAIRMAN CARTER: Okay.

1 MR. BROWN: And that begins with "Costs in addition
2 to those identified in this need determination proceeding
3 should not be recoverable unless FPL can demonstrate that such
4 costs were prudently incurred due to extraordinary
5 circumstances."

6 COMMISSIONER ARGENZIANO: Okay. Mr. Chair?

7 CHAIRMAN CARTER: Yes, ma'am.

8 COMMISSIONER ARGENZIANO: Now you're deleting that
9 from this but not anywhere else?

10 MR. BROWN: Correct. Correct. That belongs in
11 another area in the recommendation where it's, where we go and
12 discuss that.

13 COMMISSIONER ARGENZIANO: Okay.

14 COMMISSIONER SKOP: Mr. Chair?

15 CHAIRMAN CARTER: First Commissioner Skop, then
16 Commissioner Edgar.

17 COMMISSIONER SKOP: Thank you.

18 A question to staff on the deletion as with respect
19 to Page 33, the last sentence. Again, I was comfortable with
20 that language. The same language also appears, if I page back,
21 it would be on, I believe, Issue 9, at the bottom of that
22 recommendation.

23 But I guess my concern would be why is -- actually,
24 no, I'm sorry. It must have changed. I stand corrected. Why
25 does staff -- is staff deleting that? Is that language

1 elsewhere in --

2 MR. BROWN: Yes.

3 COMMISSIONER SKOP: Okay.

4 MR. BALLINGER: It's discussed in Issue 8,
5 Commissioner Skop.

6 COMMISSIONER SKOP: Okay. Thank you.

7 CHAIRMAN CARTER: Commissioner Edgar.

8 COMMISSIONER EDGAR: I was just going to make that
9 same point, that that is discussed in Issue 8 just for
10 clarification. Thank you.

11 CHAIRMAN CARTER: Commissioners -- staff, before you
12 go, let's see if there are any more questions.

13 Okay. You're recognized.

14 MR. BROWN: Okay. At this time we'd like to proceed
15 with the introduction.

16 CHAIRMAN CARTER: You're recognized.

17 MR. BROWN: Again, my name is Shevie Brown on behalf
18 of staff.

19 And, again, the petition, this recommendation regards
20 FPL's petition for determination of need for the proposed West
21 County Energy Center 3, conversion of the Riviera plant and
22 conversion of the Cape Canaveral plant.

23 As discussed in Issue 2, FPL has demonstrated a need
24 for additional capacity in year 2013. As discussed in Issue 5,
25 renewable generation and conservation measures are not

1 sufficient to mitigate the identified need for additional
2 utility generation. Typically when a company seeks to satisfy
3 a need for additional resources using natural gas facilities, a
4 petition of need would be submitted three years before the
5 facility's in-service date. However, as discussed in Issue 6,
6 these three projects can be thought of as an optimization of
7 FPL's base generation expansion plan. Unique economic
8 opportunities and site-specific circumstances have intertwined
9 the three projects; therefore, staff has analyzed three
10 projects as a single package.

11 The reductions in the amount of oil and gas usage and
12 greenhouse gas emissions for the three projects combined are
13 estimated to result in net savings of approximately
14 \$1.2 billion for FPL's ratepayers by the year 2040.

15 The total cost of the proposed West County 3 is
16 estimated at \$864.7 million and will provide 1,219 megawatts of
17 capacity. The Riviera conversion total cost is estimated at
18 \$1.3 billion, while the Cape Canaveral total cost is estimated
19 at \$1.3 billion. The conversions will add approximately
20 1,069 megawatts of incremental capacity.

21 FPL issued an RFP for West County 3 consistent with
22 the requirements of Rule 25-22.082 known as the Bid Rule on
23 December 13th of last year. FPL's analysis of the proposals
24 revealed that West County 3 was more than \$600 million
25 cumulative present value revenue requirements less, excuse me,

1 less costly than the next best alternative.

2 Pursuant to Rule 25-22.082(15), costs in addition to
3 those identified in this need determination proceeding for West
4 County 3, again, that's the \$864.7 million, would not be
5 recoverable unless FPL could demonstrate that such costs were
6 prudently incurred.

7 FPL asked for an exemption of the Bid Rule for the
8 Riviera and Cape Canaveral conversions. If the Commission
9 denies FPL's request for exemption, then all issues related to
10 the Riviera and Cape Canaveral conversions will become moot.

11 Therefore, we're suggesting that the Commission vote
12 on Issues 9 and 17 before addressing the other issues. FPL
13 demonstrated that the conversion projects will likely result in
14 a less expensive supply of electricity and should be granted an
15 exemption from conducting a request for proposal process
16 pursuant to Rule 25-22.082.

17 As discussed in Issue 8, FPL has already agreed to
18 report actual versus estimated costs for all three projects on
19 an annual basis. Therefore, staff recommends that in addition
20 to those, in addition -- excuse me. Therefore, staff
21 recommends costs in addition to those identified in this need
22 determination proceeding for the conversion projects, those
23 costs are \$2.4 billion, would not be recoverable unless FPL
24 could demonstrate that such costs were prudently incurred.

25 In conclusion, staff recommends approval of the

1 proposed West County 3 and conversion projects. The reductions
2 in the amount of oil and gas usage and greenhouse gas emissions
3 are estimated to result in net savings of approximately
4 \$1.2 billion for FPL's ratepayers by 2040. At this time we are
5 prepared to address any of your concerns.

6 CHAIRMAN CARTER: Commissioner.

7 COMMISSIONER ARGENZIANO: The recommendation that you
8 just read that said that they would not be able to recover
9 unless costs were prudently incurred, did you leave out another
10 word of the recommendation or am I in the wrong place?

11 MR. BROWN: No. We left out another word that was in
12 the recommendation. Correct.

13 COMMISSIONER ARGENZIANO: Why did you do that?

14 MR. BROWN: Well, first, we -- what FPL did was they
15 submitted an RFP for the West County 3 conversion.

16 COMMISSIONER ARGENZIANO: No. Don't get me wrong.

17 MR. BROWN: Okay.

18 COMMISSIONER ARGENZIANO: What I'm reading in my book
19 that I have is that the other word that you left out in your
20 recommendation says that they should not be, the costs should
21 not be recoverable unless FPL can demonstrate that such costs
22 were prudently incurred and due to extraordinary circumstances.
23 That's still your recommendation?

24 MR. BROWN: Correct. Yes.

25 COMMISSIONER ARGENZIANO: That's why I couldn't

1 figure out why you only read me part of that.

2 MR. BROWN: Right.

3 COMMISSIONER ARGENZIANO: And, Mr. Chair, if I could.

4 CHAIRMAN CARTER: You're recognized.

5 COMMISSIONER ARGENZIANO: I need a definition of what
6 extraordinary means because I don't think we have one in the
7 statutes. And I'm not sure, and I have to raise this at this
8 point, I'm not sure that we have statutory authority to do
9 that, to divert from what the statute clearly indicates. So I
10 need some guidance here from staff.

11 MR. COOKE: Commissioner, we're using the words
12 "extraordinary circumstances" as taken from the rule, and it's
13 complicated and I won't -- I'm sure we'll have good discussion
14 on this.

15 COMMISSIONER ARGENZIANO: But trust me, Mike, I
16 understand complicated. I can handle complicated.

17 MR. COOKE: I understand. I mean, I just, I'm trying
18 to sort out how much to speak to at this particular moment.

19 I agree that the term "extraordinary circumstance" is
20 not defined. I agree it's also not used in our statute. I
21 believe our rule is a valid rule in that it directly relates to
22 the authorities conferred upon us. So we're taking it from the
23 rule, but I agree it is undefined.

24 COMMISSIONER ARGENZIANO: Okay. Okay. I, I know
25 it's undefined. But as a past member of the legislative

1 branch, I am, I have been one who's very aware of statutory
2 authority. You can cite me any rule you want to cite. If you
3 can't be specific to the statute that gives you the authority
4 in that rule -- and that's what I'm trying to get at. I read
5 the statutes, Mike, so I get very clear. And it may be the
6 greatest thing to do, but if you don't have statutory authority
7 to do it, then we are not the policymakers and I'll be darned
8 if I'm going to go and do something that is not statutorily
9 available to me to use.

10 So what I read throughout that whole statute, and you
11 start with 366.061, it is very clear even in storm recovery,
12 even in site planning and managing and licensing, throughout
13 the whole statutes that the Legislature intended for, for us,
14 have said that we shall allow for prudent and, prudently
15 incurred expenses. And now what I see we're doing is deviating
16 a great deal from what the statute says, and I don't see what
17 you're relying on statutorily to do that.

18 MR. COOKE: Commissioner, we are relying on 366.061.

19 COMMISSIONER ARGENZIANO: Where?

20 MR. COOKE: Well, I agree, it is essentially -- and
21 partly the words extraordinary -- well, the word "prudence" is
22 in effect a case-by-case determination based on facts. So
23 "extraordinary circumstances" is an outgrowth of "prudence."
24 And to the extent it's creating any sort of confusion or angst
25 about statutory authority -- I don't believe it's necessary and

1 I believe staff essentially views it as part of the prudence
2 analysis.

3 In other words, in this case we're asked to look at
4 cost-effectiveness under 403.519, for example, and essentially
5 reasonableness and prudence of cost recovery down the road. In
6 order to look at costs, when a company comes in at a particular
7 point in time and gives us cost information, then part of our
8 prudence review when cost recovery is sought would be to look
9 at what do they, what did we rely on, what did they tell us at
10 the time they first came in, and have changes occurred and, if
11 so, were they dealt with prudently? And I think this is just a
12 way, the use of the term "extraordinary circumstances" is a way
13 to explain prudence under that type of scenario. I don't think
14 it's necessary to be in this order because I think it's simply
15 subsumed within prudence review. But I do believe our rule is
16 a valid rule and it's based on 366.01, .06 rather, (1),
17 403.519 -- I'm very comfortable with our authority to have
18 crafted the rule.

19 I also know in the, in the history of the rulemaking
20 staff made this argument to the then Commission that it was
21 unnecessary, that it's essentially a prudence analysis. And
22 for whatever reasons, for purposes of compromise with merchant
23 plants that were promoting the rule, the language was
24 incorporated.

25 COMMISSIONER ARGENZIANO: Mr. Chair, I have to

1 respectfully disagree.

2 CHAIRMAN CARTER: You're recognized.

3 COMMISSIONER ARGENZIANO: And everything I read in
4 the statute indicates to me that we do not have the authority
5 to change or to say that now we are not going to give you what
6 is prudently incurred unless it's extraordinary, especially
7 when we can't even define what extraordinary is.

8 So I respectfully disagree, and I get right to nuts
9 and bolts. I am not, I have not been trained as an attorney
10 and, boy, you can confuse me with a lot of words, but I can
11 read the statutes and I understand what the intent is and
12 throughout the whole statute it indicates to me that we shall.
13 There is no deviation there. So I have a real problem. I
14 would suggest that if -- I like staff's recommendation, but
15 removing the word "extraordinary circumstances" and that would
16 be my motion at this point, unless we can get into some proof.
17 I need more definitive proof. And to be honest with you, and,
18 again, with all due respect, everything I read through here --
19 and I said, as I said before, it may be the greatest thing to
20 do, but if we have no statutory authority to do it, and I don't
21 even understand what the definition of what extraordinary shall
22 now mean, I think this is the wrong road and I do move to
23 strike "extraordinary circumstances" out of --

24 CHAIRMAN CARTER: I'll come back to you for your
25 motion. Commissioner McMurrian. I'll come back to you for

1 your motion.

2 COMMISSIONER McMURRIAN: Thank you, Chairman. And I
3 have those same concerns. I mean, maybe, I probably wouldn't
4 articulate them the same way, but I have the same concerns
5 about the wording in Issues 9 and 17. And I guess just to,
6 to -- maybe before doing that I'd say that I agree with the
7 staff recommendation on the other issues, but 9 and 17 is where
8 I have the concerns too, and it's also because of the due to
9 extraordinary circumstances language.

10 And I went back and I looked at the transcripts from
11 the hearing and we had a lot of discussion about this very
12 issue at the end of the hearing and Commissioners alluded to
13 the need for staff's analysis on that point of policy and law.
14 I think it's kind of both. And I said then, "It's my belief,
15 and I'm hoping for a lot of clarity when we get the staff
16 recommendation on this, that just because we might waive the
17 Bid Rule process, that we wouldn't be waiving protections that
18 we are statutorily able to afford under our other statutory
19 provisions." And I'm still there and that's after reviewing
20 the -- I looked at 366.061 as well and looked back at the rule,
21 and particularly the part of the rule that sets up the waiver
22 process. Because the Bid Rule itself contains that (18) and
23 you all have referenced it, of course, in the rec that if one
24 of the three criteria in that (18) is met, then the Commission
25 shall, I believe is the way it states it, waive that rule's

1 requirements. In the staff rec they've noted that two of the
2 criteria have been met. I think in FPL, in FPL's brief they
3 suggested all three have been met. But it really doesn't
4 matter if it's two or three, really as long as one, because
5 it's a list of three things with an or, at least that's in my
6 nonlawyer opinion that it would be. So in my mind we shall
7 waive the rule's requirements and I know that that's consistent
8 with staff's recommendation.

9 But I think going to the "due to extraordinary
10 circumstances" is going a step too far. I realize it comes
11 from the rule. I just, I believe it's setting up an
12 inappropriate standard. It's a new standard for cost recovery
13 at a later time.

14 At the point assuming that this gets approved and FPL
15 comes to us for cost recovery at some point, they're going to
16 have to prove extraordinary circumstances. And I was trying to
17 think of an example of why that could be problematic, and I
18 guess the example I came up with was labor costs, and I think
19 that's probably one of the things that we've talked about
20 before, that labor costs do tend to rise.

21 If, for instance, we get to that point and FPL made
22 the, made the argument that labor costs were rising, that
23 probably would be true throughout the industry, it probably
24 wouldn't matter which kind of proposal we went with that would
25 be true, it's hard to call that an extraordinary circumstance

1 and it's hard to figure out. But I think it would be an
2 appropriate -- as long as they showed that those costs were
3 prudently incurred, I think that they should get recovery of
4 those prudent labor costs. But I think you open the door to
5 say that's not an extraordinary circumstance because labor
6 costs are generally on the rise, and I think that it just
7 creates a standard that is very unworkable. And, again, it's
8 not really defined.

9 So in my mind I totally agree with Commissioner
10 Argenziano that that, that shouldn't be in there. I don't
11 think it's only unnecessary, I agree with you it's unnecessary,
12 but I would go a step further and say it's inappropriate. I
13 don't really think we should be adding that kind of a standard
14 in there for the reasons I said before.

15 We had a lot of discussion back at that hearing about
16 whether the ratepayers would be protected if we waived that
17 rule and particularly that (15) in the rule, and it's my belief
18 that we do not need (15) in order to adequately protect the
19 ratepayers. And I think, again, I think that's a valid
20 concern. But I think with the language under 366.061 that
21 Commissioner Argenziano referenced, we, that provides
22 overarching authority to look at the sheer prudence. And there
23 was language, I believe Commissioner Edgar used those words
24 during the hearing, and I think that it does that. And we're
25 certainly not going to waive Chapter 366. So, again, I think

1 that those protections are in place.

2 I won't go into it unless, unless we need to, but
3 there were some examples of the Bid Rule being waived before.
4 We talked about that a little bit at the hearing, too. In
5 particular there was the Progress uprate. We waived the Bid
6 Rule in that situation. And the order in that case had some
7 language that let them know that we were going to scrutinize
8 the costs going forward if they went above the, the estimates
9 that we relied on in making the need determination decision.
10 But, again, that's all under our authority in 366. We can put
11 a sentence in there that says we're going to continue to
12 scrutinize them or we cannot put the sentence in. But the fact
13 remains we have the authority to do that.

14 So in my opinion the ratepayers have been protected
15 in all of those need determination decisions because of the
16 statutory provision in 366.061.

17 So, Chairman, I guess I should just get to the point.
18 I would definitely agree with Commissioner Argenziano that with
19 respect to Issues 9 and 17, and I believe that's the only two
20 issues now that it comes up with, that we should strike the
21 words "and due to extraordinary circumstances" out of our
22 decision. So thank you, Chairman.

23 CHAIRMAN CARTER: Thank you.

24 Commissioner Skop.

25 COMMISSIONER SKOP: Thank you, Mr. Chairman.

1 Again, I also feel the need to address some of the
2 discussion that we've had so far.

3 I guess with respect to Issues 9 and 17, I'm not
4 willing to waive (15) of the Bid Rule, and in relevant part --
5 and, again, you know, I do agree with some of the discussion on
6 extraordinary circumstance, what defines extraordinary. You
7 know, extraordinary to me is your project is hit by a hurricane
8 or some other situation. But just getting back on point,
9 again, I have, I'm troubled by waiving (15) of the Bid Rule.
10 In relevant part, (15) of the Bid Rule requires that if the
11 public utility selects a self-build option, costs in addition
12 to those identified in the need determination proceeding shall
13 not be recoverable unless the utility can demonstrate that such
14 costs were prudently incurred and due to extraordinary
15 circumstance.

16 Again, I know there's some tension regarding
17 extraordinary circumstance, but, again, the rule was adopted
18 long before I got to the Commission. Both staff and I share
19 the same underlying concern but take different approaches
20 towards imposing the same requirement. For me it makes no
21 sense to waive a requirement of a Commission rule that is
22 directly on point only to reiterate the same requirement from
23 the rule that was just waived. And in this regard and on
24 behalf of FPL's 4.5 million customers I feel that it would be
25 less than responsible for this Commission to unilaterally waive

1 (15) of the Bid Rule.

2 You know, in summary, I respectfully suggest that a
3 vote to waive (15) of the Bid Rule would be a vote against the
4 consumer. I know that extraordinary seems to be a word that
5 we've already mentioned. But, you know, the issue with the way
6 the rule is written is that it basically states that if the
7 utility selects the self-build option, that costs in addition
8 to those identified in the need determination proceeding shall
9 not be recoverable. And to me that provides a baseline in
10 terms of if the utility said it can -- you know, the total
11 estimated project cost is, you know, \$1.115 million, that's the
12 baseline for viewing the costs that, you know -- and I think
13 that's where staff gets into the issue of addressing the
14 budgeted versus actuals. Because, again, if you don't -- you
15 know, to me the language of (15) of that rule basically holds
16 them to the costs that they presented in the course of the need
17 determination proceeding, subject to, you know, them making the
18 case that, you know, there were cost escalations due to
19 reasonable circumstances or what have you.

20 And, again, my purpose in this is, is not to, is not
21 to hamstring FPL. It's only to fairly uphold the Commission
22 rules that seem to be directly applicable to the issues before
23 us. And I can understand the tension and the lack of
24 definition as to, you know, what is extraordinary, but, I mean,
25 in the past this rule has been applied. On the WCEC 3 Unit,

1 FPL is bound to it because it's, as our General Counsel stated,
2 it's a valid Commission rule. They went through the RFP and
3 they're bound to that requirement on the WCEC 3 unit. So,
4 again, it's not to hamstring FPL.

5 Certainly the Commission is very reasonable. We look
6 at, you know, everything in totality. If there are
7 circumstances, i.e. rising labor costs, rising material costs,
8 force majeure events, other issues that come up in the cost of
9 wanting to do something, certainly the Commission, the
10 Commission's reasonable in looking at why actual costs exceeded
11 the estimated or budgeted costs on a forward-going basis. But
12 unless you have some sort of initial benchmark that you can
13 form a basis of judgment from, it would just seem to me that,
14 you know, just mere prudence doesn't, doesn't put in any real
15 sort of initial cost pursuant to the rule, and I think that's
16 the tension that I have in following the rule but equally
17 recognizing the concerns of my colleagues. So thank you.

18 CHAIRMAN CARTER: Commissioner Argenziano.

19 COMMISSIONER ARGENZIANO: Yes. Thank you, Mr. Chair.

20 I have to say a couple of things and I'm going to try
21 to do them as respectfully as I can.

22 First, Commissioner Skop, I appreciate your work on a
23 lot of issues here, but I have to tell you there have been
24 people supporting consumers long before you arrived on the
25 scene. So please be very careful about labeling anybody, any

1 of us, or I'm speaking for myself, as being anticonsumer in any
2 way. I don't appreciate that.

3 Number two, have you ever heard of Statute 120.536?
4 And thanks to Senator Williams when he did this many, many
5 years ago, and it pertains to rulemaking, and the reason the
6 Legislature did this was to make sure that our bureaucracies,
7 which we are one, do not become policymakers. So my concerns
8 about the extraordinary language, extraordinary circumstances
9 are well on point. And I believe that if we ask JAPC, we would
10 find that we may not have that statutory authority to go beyond
11 and now say that you cannot incur, we cannot, we will not or we
12 will deviate from what the statute says we shall do.

13 And to, to the point of being irresponsible, we may
14 agree that there are different, or we may disagree with
15 opinions, but I think it's wrong, Commissioner Skop, for you to
16 accuse me, because that's basically what you did, if I disagree
17 with you, of being irresponsible. I think that my, my take
18 here -- and I do appreciate what you're saying and your point
19 of view, I just don't agree with it. I don't think that we
20 have the statutory authority, and I think that to me is, is
21 first, that you look at first. So I don't think it's being
22 irresponsible.

23 I think that if staff has convinced me that FPL has
24 proved that they will save money by incorporating the three
25 plants, that they are exempt from the Bid Rule. I respect that

1 decision and I think you're right. And if it saves the
2 consumer money, I'm happy with that. I'm not going to nit-pick
3 and say, okay, if it's going to save money -- and on the other
4 hand what I'd like staff to do is maybe show how much it would
5 cost the consumer if we went out for bid for each one of those
6 since we know they're pretty much identical, and I think that
7 issue has been solved for me. So I don't think it's
8 irresponsible to want to save the consumer money, knowing that
9 these plants are going to be built pretty much the same way and
10 they've met their requirement.

11 So, again, I'd say just be careful. We can have
12 different opinions. And, and, you know, I mean, just be
13 careful in that because long before I heard your name mentioned
14 I had been fighting for consumer issues, and I don't take
15 kindly to any insinuation that I'm not. I'm just trying to do
16 what I believe is the right thing. Now the extraordinary
17 language may sound great, it may be the right thing to do
18 ultimately in thinking with the way staff is trying to get to
19 where they want to go to. And I understand the pressures on
20 staff, trust me. But if you don't have statutory authority to
21 do that, then, sorry, in my opinion you just can't go there.

22 CHAIRMAN CARTER: Commissioner Skop.

23 COMMISSIONER SKOP: Thank you, Mr. Chair.

24 And to Commissioner Argenziano and my colleagues, I
25 meant no disrespect. Again, I did not say the word

1 "irresponsible" per se. "Less than irresponsible." But,
2 again, I can understand how that might be mis --

3 COMMISSIONER ARGENZIANO: Less than irresponsible may
4 be worse.

5 COMMISSIONER SKOP: But, again, again, you know, not
6 to belabor the point, I understand the differing views of my
7 colleagues with respect to the term "extraordinary." To me it
8 just boils down to, you know, trying to read the rule. I
9 recognize that there may be some tension. I heard our General
10 Counsel state that the rule that we have, in his legal opinion
11 we have a valid rule. And to me, you know, irrespective of --
12 I know statute trumps rule. But, again, I'm trying to do the
13 best that I see as I see it, and I recognize there are
14 differences of opinion which I respect.

15 Just to one point of how I got to why (15) should not
16 be, you know, waived in accordance with the entire rule is that
17 (18) of the rule states that the Commission shall exempt the
18 utility from compliance with the rule or any part of it, which
19 is such -- or any part of it for which such justification is
20 found. So I think to me at least that provides a little bit of
21 a basis for saying, you know, we can, based on good showing,
22 you know, we can relieve them from their obligations under
23 certain parts of the rule as this Commission sees fit. And
24 maybe it's a matter of, you know, tweaking the language as we
25 see fit to do so.

1 But, you know, certainly I think that my perspective
2 was that to me, even though, again, staff, you know, had the
3 same concern that's kind of expressed in the language of their
4 recommendation, at least for me it makes not a whole lot of
5 sense to waive that requirement, the express requirement that's
6 in a Commission rule, a valid Commission rule that seems to be
7 directly on point, only to kind of reiterate or parse and
8 import that language back into the staff recommendation. So I
9 think that's the tension I have.

10 I mean, I want to get the right result, I want to be
11 fair to FPL, I want to be fair to the consumers. I think that,
12 you know, the discussion is healthy. But, again, I think that
13 at least from my perspective the intent of that provision,
14 which, again, I do feel to be directly on point, states that if
15 a self-build option is selected, they're held to the costs that
16 are presented in the need determination. And I think that's,
17 that's my, my key concern is that, you know, basically I think
18 the intent behind that is to say that if they came forward and
19 said that, you know, the WCEC 3 project was going to be this
20 amount, the Riviera plant conversion was going to be this
21 amount and the Canaveral conversion was going to be this
22 amount, that those are the estimates that they are initially
23 held to and hope to strive for. Because without any dollar
24 amounts there, it's just basically the costs are what the costs
25 are, subject to prudence.

1 And I think that the, with all due respect, that the
2 rule speaks a little bit more to the totality of that because,
3 again, prudence, as stated in that provision or section of the
4 rule, basically states that, you know, shall not be recoverable
5 unless such costs are prudently incurred. So to me, at least
6 in my view, prudence is a mere subset of the intent.

7 And I do fully respect and appreciate that there may
8 be tension between a statute and the rule. Again, I had not
9 considered that. But, again, I'm relying to some extent on the
10 basis of the rule that was enacted through past rulemaking and
11 the representations of General Counsel that, that he feels that
12 the rule is valid in effect, so.

13 CHAIRMAN CARTER: Commissioners, I'm about to head
14 back to Commissioner Argenziano for a motion because I agree
15 with her, this language "extraordinary circumstances" should
16 not be a part of it.

17 Commissioner Edgar, I'm sorry. Commissioner Edgar,
18 then I'll come back to you for your motion. Commissioner
19 Edgar.

20 COMMISSIONER EDGAR: Thank you. I was afraid that
21 maybe I had missed my chance. Thank you.

22 Very briefly. And I wanted to make this comment
23 before we got to the motion stage, so thank you, Mr. Chairman.

24 I had some concerns about the language regarding
25 extraordinary and similar to how the rule and the statute work

1 together that has been already very well discussed.

2 But also just to point out, I was unclear in my own
3 legal reading as to whether "extraordinary circumstances" was
4 meant to describe prudent or was in addition to prudence, and
5 to me it was just not clear and could be a source of confusion
6 down the road. And I know we try to be clear when we do these.
7 So to me it just kind of muddied it rather than clarified, even
8 if it was intended to clarify. To me it muddied it. So when
9 we get to the motion stage I will be very supportive of the
10 rest of the staff recommendation with the removal of this
11 language that we've been discussing regard, let me slow down,
12 regarding extraordinary circumstances.

13 I would put out there, and I guess I'll pose this to
14 staff first, is that last sentence, if indeed that's the
15 direction that the Commission decides to go, is that last
16 sentence in Issues 9 and 17 even needed at all? In other
17 words, when we get to the motion stage, and this is just for
18 discussion, would it perhaps make as much sense or to be as
19 clear or clearer to remove that entire sentence that begins
20 "Since the construction of"? And I guess the reason I'm posing
21 that is that whole sentence -- to me, you know, the statute is
22 that we will look at prudent, prudent, we will do a prudent
23 review, a prudency review. That sentence to me doesn't
24 directly pertain on point to the issue of Issue 9 and 17, which
25 is the potential exemption from the, from the rule. I don't

1 know if I'm being very clear. But, so that's, that's my
2 comment. And I would ask staff if they could describe to me if
3 indeed that sentence is needed in that, those two issues for a
4 reason that I'm not seeing.

5 MR. BALLINGER: Tom Ballinger with Commission staff.

6 Hearing the discussions, I think if you remove that
7 entire reference and don't mention cost recovery or future cost
8 recovery, down the road you're perfectly fine. This is a need
9 determination proceeding. Staff was merely trying to be
10 consistent with West County 3 that went through the Bid Rule
11 and some of the provisions of that as a package. Quite
12 frankly, you can do it without any mention of cost recovery in
13 the future and you'd be perfectly fine. We're at this point
14 dealing with a need determination for three plants. Cost
15 recovery will be down the road.

16 CHAIRMAN CARTER: Commissioner Argenziano.

17 COMMISSIONER ARGENZIANO: Let's make it clear on the
18 record that that doesn't alleviate FPL from showing us prudent.

19 MR. BALLINGER: No, ma'am.

20 COMMISSIONER ARGENZIANO: I want that stated now.
21 We're not removing that. That just falls back to our, what we
22 have statutorily.

23 MR. BALLINGER: Not at all.

24 CHAIRMAN CARTER: Our normal, normal prudence review.

25 COMMISSIONER ARGENZIANO: Right.

1 MR. BALLINGER: Correct.

2 CHAIRMAN CARTER: I'll come back -- Commissioner
3 Edgar. I'll come back to you, Commissioner.

4 COMMISSIONER EDGAR: Thank you. I'm sorry. Because
5 I wanted to round out my thought before we maybe move on to
6 another. Thank you, Mr. Chairman.

7 And to follow up on that comment, as, you know, I've
8 talked on other issues that I like need determinations to be
9 crisp and clear, and so my question about maybe removing that
10 sentence is absolutely in no way intended to be any reflection
11 of how we would deal with costs. In other words, to me it just
12 seems like it kind of blurs the issues, and that absolutely I
13 would add the statement in my mind and I think as the order is
14 issued will be clear that the statutory authority and
15 obligation of this Commission to review costs under the
16 language of the statute regarding prudence absolutely pertains
17 and every protection that that entails. And I'm done now.
18 Thank you.

19 CHAIRMAN CARTER: Thank you.

20 Commissioner Skop.

21 COMMISSIONER SKOP: Thank you, Mr. Chair.

22 And, again, hearing the discussion, I recognize the
23 tension, I hope, centers merely upon the phrase "due to
24 extraordinary circumstances."

25 I guess where, what I would be comfortable with --

1 and, again, I'm certainly flexible if I feel that, you know,
2 that compromise can be achieved. I think that my concern that
3 I think would embody those expressed by my colleagues but also
4 embracing my concerns, if, if it would go something along
5 "Costs in addition to those identified in the need
6 determination proceeding shall not be recoverable unless the
7 utility can demonstrate that such costs were prudently
8 incurred."

9 I recognize prudence as the, the central issue, all
10 costs must be prudent, but somehow I'm trying to relate the
11 intent of, you know, if you give the Commission your best
12 estimate, and pursuant to the testimony that was filed here in
13 this case, that on the direct testimony of Cindy Tyndall on
14 Page 4, Lines 2.3, "FPL is confident in the accuracy of its
15 construction cost estimates and projected unit capabilities,"
16 seems to me that, you know, that there should be some sort of,
17 you know, baseline number. And, again, I don't want to belabor
18 the point. I mean, I'm comfortable, you know, whatever the
19 Commission decides. I mean, each of us have our respective
20 opinions and, you know, can all cordially agree to disagree.

21 But my concern is, at least from what I'm seeing,
22 that the intent of the rule -- and, again, the fallout issue
23 from that is on WCEC 3 they went through the RFP process, so
24 they're bound by that extraordinary circumstance language. So
25 if we're going to unilaterally address it, we probably need to

1 do it on WCEC 3 too, not just the conversion plants. But I
2 think that my concern is somehow pegging -- and it's embodied
3 in the order and, you know, I would ask, you know, staff too
4 that they've expressed the cost of the plants in dollars per
5 kilowatt hour. You know, I would also, you know, hope that
6 they could express those in the total dollars that are
7 expressed in the testimony.

8 But I guess my central concern is, is what good are
9 the estimates? And I recognize there's a need determination
10 versus a cost recovery type issue, but it seems to me that the
11 intent of the rule, granted there may be some disagreement to
12 the extraordinary circumstance clause, the intent of the rule
13 is to hold them initially to the estimates that they present
14 during the course of the need determination proceeding, at
15 least that's my reasonable interpretation of the intent.

16 And, again, I did go back and look at the order that
17 adopted the rule, and the Commission, for the reasons it saw
18 fit at the time, you know, saw fit to incorporate that language
19 that is causing so much tension here today.

20 But, again, if the, if the issue is due to
21 extraordinary circumstance, you know, that's something that,
22 you know, I'm willing to compromise and, and yield on. But,
23 again, my concern would be and my question to my colleagues
24 would be two-fold.

25 First, how do we tie the cost estimates that were

1 provided in the course of the need determination proceeding and
2 make them a baseline subject to prudence? And, secondly, what
3 do we do if, on the Bid Rule issue that we're having so much
4 tension with on the WCEC 3, because they're bound by that same
5 language on WCEC 3?

6 CHAIRMAN CARTER: Commissioner McMurrin.

7 COMMISSIONER McMURRIAN: Thank you. I'll take a stab
8 at least at that first one. Because as you were, as you were
9 talking about the concern of the cost estimate going away or
10 that it gets thrown out, I mean, it's my experience that you're
11 not throwing away the number. Just because -- we have a number
12 and we've used that number, the number is in the testimony, to
13 make a decision about the determination of need and whether
14 it's the most cost-effective alternative. That number doesn't
15 go into a vacuum just because we don't have, and I'm not
16 meaning to be flippant, but just because we don't have it set
17 out here that there would be extraordinary circumstances or
18 even that you don't spell out the prudently incurred thing.
19 That's, that's a factor of the law regardless of what we put in
20 that sentence.

21 And it's my experience that when we get to a cost
22 recovery stage that staff is always going to start with that
23 number. Perhaps the number goes down even. I realize that
24 probably doesn't happen very often. But, again, I think that
25 staff is always going to go back to the need determination

1 order and look at what the estimates were and that is going to
2 be the basis for their discovery. In fact, it's probably the
3 basis for the company's testimony as to what their more recent
4 estimate of the costs would be for the purposes of cost
5 recovery. So in my mind it doesn't matter if you have any part
6 of that sentence there. The fact remains that they have to
7 show prudence at that point of cost recovery and that that
8 number still is alive and well when we get to that stage.

9 CHAIRMAN CARTER: Commissioner Skop.

10 COMMISSIONER SKOP: And just as a follow-on, again, I
11 am trying to, to kind of facilitate and better understand and
12 appreciate the concerns of my colleagues.

13 Would I be correct, if we could just use a
14 hypothetical, and I think that some language was, to embrace
15 Commissioner Edgar's concern and I think Commissioner
16 McMurrian's also, but on Page 24, Issue 9, would it be correct
17 to understand as a hypothetical for the basis of some voting
18 which may occur on this issue, is it merely the will of my
19 colleagues to strike, to insert a period after the word
20 "incurred" and strike "and due to extraordinary circumstances"?
21 Would that make everyone comfortable or is there still some
22 more problems on top of that in terms of the staff
23 recommendation?

24 CHAIRMAN CARTER: Commissioner Argenziano. Well,
25 Commissioner Edgar.

1 COMMISSIONER EDGAR: I was suggesting that perhaps --
2 my suggestion would be to remove that entire sentence beginning
3 at "Since the construction" until the period because I don't
4 see that it adds anything or ties directly on point to the
5 language of the specific Issue 9.

6 COMMISSIONER SKOP: And just as a follow-up to that.
7 With respect to the concern "extraordinary circumstance," which
8 I think that we're starting to reach some consensus on, with
9 respect to the, you know, the WCEC 3 project, although there
10 wasn't a request for a specific waiver, that still
11 "extraordinary circumstance" language under (15) of the rule
12 would still apply. So if we're going to do something to, to
13 address that, we should probably as a Commission address it
14 across the board. I'm not exactly sure how we would do that
15 because it wasn't specifically requested. But, you know, if
16 you go through the bid process, that language has not been
17 expressly waived by the Commission. So that language in my
18 view would still be applicable unless we do something about it.

19 MR. COOKE: Commissioners?

20 CHAIRMAN CARTER: Mr. Cooke.

21 MR. COOKE: I think what I'm hearing is a consensus
22 that if we're going to waive the Bid Rule with respect to the
23 conversion projects, we're simply going to waive the Bid Rule.
24 We're not going to waive a part of it and keep that (15) in.

25 CHAIRMAN CARTER: That's exactly what we're saying.

1 MR. COOKE: So I think what is being suggested is
2 taking that sentence out in those portions that deal with the
3 waiver of the Bid Rule, 9 and 17, I think address it. They met
4 the Bid Rule with regard to the West County 3. It's implicit
5 in meeting the Bid Rule that that (15) is applicable. I don't
6 believe the recommendation -- well, certainly the order doesn't
7 need to say anything more than that the company met the Bid
8 Rule with regard to West County 3.

9 COMMISSIONER ARGENZIANO: Because then it just falls
10 to statute and what we have the authority to do and what we, we
11 have been doing.

12 CHAIRMAN CARTER: That's correct.

13 COMMISSIONER ARGENZIANO: That's the way I see that.

14 CHAIRMAN CARTER: That's simple and it's succinct and
15 it's exactly what we're saying.

16 Commissioner Skop, you're recognized.

17 COMMISSIONER SKOP: I agree that the order would
18 state that they met the Bid Rule. But, you know, reviewing
19 that provision of the Bid Rule, which, you know, clearly speaks
20 directly on point to if the utility selects the self-build
21 option, which, again, is applicable to WCEC 3, so assuming they
22 went through the process, they met the Bid Rule, you know, that
23 language in (15) I think despite our best intentions still
24 remains on the, on the board. So, I mean, I think that there
25 would probably have to be something that, you know, dealing

1 with getting rid of the extraordinary circumstance on that, on
2 that issue. Otherwise, you know, it could come back to -- you
3 know, I'll let Mike talk to that, but.

4 CHAIRMAN CARTER: Mr. Cooke.

5 MR. COOKE: I think that meeting the Bid Rule,
6 implicit in that is meeting that (15). Unless this Commission
7 is going to sit today and decide that the rule is invalid, then
8 meeting the Bid Rule -- they met the entire Bid Rule and the
9 entire Bid Rule applies, and I don't recommend that we try to
10 invalidate the rule. I think we still are addressing
11 Commissioner Argenziano's concerns because if it turned out
12 that the rule was invalid, if somebody did challenge it, then
13 all we've said is they've met this rule and at that point I
14 guess that rule would be inapplicable.

15 So I'm very comfortable with what I'm hearing the
16 majority of this Commission saying by addressing the order and
17 simply saying in the order that with regard to West County 3
18 the Bid Rule was satisfied and applies, and we waived it with
19 regards to the conversion projects. And there may a more
20 artful way of saying that, but that's essentially the gist, I
21 believe.

22 CHAIRMAN CARTER: That, that clarifies and codifies
23 in my mind what I was saying, Commissioners. I think that's
24 pretty much what we were saying. And I think that if we get
25 beyond that, we start to complicate matters and bring in things

1 that we don't have agreement on.

2 Commissioner Argenziano.

3 COMMISSIONER ARGENZIANO: I think at this point my
4 motion would be to delete that whole last sentence since we are
5 covered by the statutes and there's no, there's no need to --

6 CHAIRMAN CARTER: In both places, the sentence. Yes.

7 COMMISSIONER ARGENZIANO: In 9 and 17, and that's my
8 motion.

9 CHAIRMAN CARTER: And to accept the rest of the --

10 COMMISSIONER ARGENZIANO: Yes.

11 CHAIRMAN CARTER: Okay.

12 COMMISSIONER ARGENZIANO: Yes. I'm sorry. And to
13 accept the rest of staff's recommendation.

14 CHAIRMAN CARTER: Commissioner Edgar.

15 COMMISSIONER EDGAR: I second, and would just add for
16 clarification that that also includes the oral modifications
17 that our staff gave us at the beginning of the discussion.

18 COMMISSIONER ARGENZIANO: Yes.

19 CHAIRMAN CARTER: Commissioners, we're in debate.
20 We've got a motion and a second. We're in debate.

21 Commissioner Skop, you're recognized in debate.

22 COMMISSIONER SKOP: Thank you, Mr. Chairman.

23 And I respect the motion and the second. I would be
24 more comfortable just striking the end, "due to extraordinary
25 circumstances." I recognize that under statutory authority we

1 have, we have broad general ratemaking powers. I guess that
2 I'm still undecided as to which way I'll vote on the motion.
3 But, like I say, I do appreciate the discussion and the attempt
4 of the Commission to reach consensus on this issue.

5 CHAIRMAN CARTER: Commissioner Argenziano.

6 COMMISSIONER ARGENZIANO: And just to reiterate that
7 that does not eliminate that need for prudence, that is still
8 there. It just doesn't have to be written here. That's what
9 we have to do anyway.

10 CHAIRMAN CARTER: Right. That's part of our
11 normal --

12 COMMISSIONER ARGENZIANO: Just to relieve the
13 comfort, discomfort from Commissioner Skop that it's still in
14 place.

15 CHAIRMAN CARTER: That's part of our normal activity
16 that we would do in carrying out our responsibilities.

17 COMMISSIONER ARGENZIANO: And we wouldn't do it any
18 other way.

19 CHAIRMAN CARTER: No other way. No other way.

20 Commissioners, any further in debate? And I think
21 we've had an, had an open dialogue and a discussion, and I
22 think that based upon the facts as they lay out in front of us
23 in this case here this is the best possible alternative.

24 Any further debate? Commissioner Skop.

25 COMMISSIONER SKOP: Just a point of information. I

1 guess are we, are we directly speaking to Issues just 9 and
2 17 for the pending motion?

3 CHAIRMAN CARTER: The entire case, moving on the
4 entire case.

5 COMMISSIONER SKOP: Okay. Okay.

6 CHAIRMAN CARTER: Is that correct, we're taking up
7 all the issues?

8 COMMISSIONER EDGAR: Mr. Chairman, my understanding
9 of Commissioner Argenziano's motion that I seconded was that it
10 incorporated all issues with the changes that we have discussed
11 and described, with the oral modifications and the removal of
12 that one sentence on Issues 9 and 17.

13 CHAIRMAN CARTER: 17. That is correct.

14 Yes, sir.

15 COMMISSIONER SKOP: Okay. Thank you. I just guess
16 we can proceed to the vote then.

17 CHAIRMAN CARTER: Okay. Any further debate,
18 Commissioners? Hearing none, all those in favor of the motion,
19 let it be known by the sign of aye.

20 Aye.

21 COMMISSIONER EDGAR: Aye.

22 COMMISSIONER McMURRIAN: Aye.

23 COMMISSIONER ARGENZIANO: Aye.

24 CHAIRMAN CARTER: All those opposed, like sign.

25 COMMISSIONER SKOP: I'm just dissenting with respect

1 to Issues 9 and 17.

2 CHAIRMAN CARTER: Show it done.

3 Thank you, Commissioners.

4 (Agenda Item 23 concluded.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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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 10th day of September,

2008.

Linda Boles
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FPSC Official Commission Reporter
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