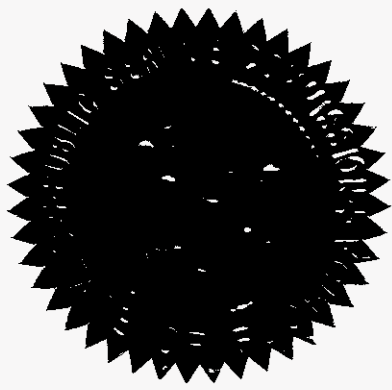


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 090079-EI

In the Matter of:

PETITION FOR INCREASE IN RATES BY
PROGRESS ENERGY FLORIDA, INC.



PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 9

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

DATE: Tuesday, May 19, 2009

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

REPORTED BY: LINDA BOLES, RPR, CRR
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P R O C E E D I N G S

1
2 **COMMISSIONER EDGAR:** Commissioners, that will
3 bring us to Item 9. And again we'll wait just a moment
4 while everyone gets settled and ready.

5 (Pause.)

6 Okay. I'll ask our staff to introduce the
7 item. We are on Number 9.

8 **MR. SLEMKEWICZ:** I'm John Slemkewicz. Item 9
9 is Docket Number 090079-EI, Progress Energy Florida,
10 Inc.'s petition for a rate increase. PEF is seeking a
11 \$499.9 million permanent rate increase and a
12 \$13.1 million interim rate increase. Staff is
13 recommending the suspension of the proposed permanent
14 rate increase and the granting of the \$13.1 million
15 interim rate increase.

16 Staff does have one oral modification to make
17 to Issue 3 on Pages 7 and 10. That has been approved
18 already. It's -- at the end of the recommendation
19 paragraph on Page 7, "Issue 4" should be revised to
20 "Issue 8." And the same thing on Page 10, at the very
21 end of that paragraph it should be "Issue 8" instead of
22 "Issue 4."

23 And there are interested persons requesting
24 permission to address the Commission on Item 9 and
25 participation is at the discretion of the Commission.

1 **COMMISSIONER EDGAR:** Thank you. Let's go
2 ahead and see who all is with us. So let's just kind of
3 briefly take appearances so I know who is, who is here
4 that would like to speak and who you are representing
5 for the record.

6 **MR. BURNETT:** Good morning, ma'am. John
7 Burnett on behalf of Progress Energy Florida. I have
8 with me also Mr. Mike Walls and Mr. Rick Melson.

9 **COMMISSIONER EDGAR:** Thank you.

10 **MR. REHWINKEL:** Good morning. Charles
11 Rehwinkel on behalf of the Office of Public Counsel and
12 primary spokesman for the joint intervenors.

13 **MS. KAUFMAN:** Good morning. Vicki Gordon
14 Kaufman of the Keefe, Anchors, Gordon & Moyle Law Firm.
15 I'm here on behalf of the Florida Industrial Power Users
16 Group.

17 **MR. WRIGHT:** Good morning, Madam Chairman and
18 Commissioners. Schef Wright, Young van Assenderp Law
19 firm, on behalf of the Florida Retail Federation.

20 **COMMISSIONER EDGAR:** Thank you.

21 **MS. BRADLEY:** Cecilia Bradley on behalf of the
22 Attorney General for the citizens of Florida. Thank
23 you.

24 **COMMISSIONER EDGAR:** Thank you.

25 Let me begin here, if I might, noting that we

1 have a number of issues that are part of this item. For
2 those who would like to address us, are any of your
3 comments directed at Issue 1?

4 Commissioners, I'm just wondering if for
5 discussion purposes and to put us in the right posture
6 if it might make sense to go ahead and address that
7 issue before we go into the others. I'm seeing, seeing
8 some nods, and I'm hoping that our staff concurs. I'm
9 seeing some nods there too. Any discussion on Issue 1
10 before we go into the remaining issues? Hearing none,
11 is there a motion?

12 **COMMISSIONER SKOP:** Move to approve staff's
13 recommendation as to Issue 1.

14 **COMMISSIONER McMURRIAN:** Second.

15 **CHAIRMAN CARTER:** Second.

16 **COMMISSIONER EDGAR:** Thank you. Then all in
17 favor of the staff recommendation just on Issue 1, say
18 aye.

19 (Unanimous affirmative vote.)

20 Opposed? Okay. Show Issue 1 adopted.

21 I think that puts us in a better posture
22 perhaps, and so we will begin and see if there are
23 comments from the parties and then, Commissioners, see
24 where that leads us.

25 Mr. Burnett.

1 **MR. BURNETT:** Thank you, Madam Chair.
2 Mr. Walls will make our comments. I do have two
3 handouts. With your leave, if I may approach and
4 present them.

5 **COMMISSIONER EDGAR:** Yes, please.

6 **MR. BURNETT:** Thank you, ma'am.

7 **COMMISSIONER EDGAR:** And, Mr. Walls, I expect
8 that you will do this, but if you would, of course, make
9 a point to describe the handout since we do have two
10 Commissioners participating by phone.

11 (Pause.)

12 Okay. I think we're ready.

13 **MR. WALLS:** Thank you, Madam Chair. First to
14 describe the exhibits, the first one is the 2002
15 stipulation, paragraph four, that includes the express
16 prohibition on both interim decreases and interim
17 increases in rates. And below that is the same
18 paragraph from the 2005 stipulation which expressly
19 prohibits only interim rate increases.

20 The second exhibit is entitled Progress Energy
21 Florida 2009 projection of return on equity which shows
22 the projected ROE for the company without any relief,
23 interim or limited, at 6.89 percent, and with the
24 increase for Bartow repowering at 8.22 percent, and then
25 with the increase for both Bartow and interim relief at

1 8.36 percent.

2 So with that, I'd like to start with a few
3 comments on the interim proceeding. To begin with, PEF
4 supports the staff recommendation that PEF has
5 established a prima facie entitlement to interim rate
6 relief and that interim rate relief is allowed by the
7 Commission-approved stipulation from PEF's last rate
8 proceeding.

9 I'd like to make three points in support of
10 this recommendation. First, PEF has a statutory right
11 under Section 366.071(1) to request interim rates in any
12 general rate case proceeding. That right exists by
13 statute unless it was negotiated away in the parties'
14 stipulation.

15 Second, the intervenors' assertion that the
16 2005 stipulation negotiated away that right is
17 incorrect. Section 4 of the stipulation expressly
18 prohibits the intervenors from seeking an interim
19 decrease in rates. That's because any potential
20 overearning situation is addressed by the settlement's
21 revenue sharing mechanism. However, the parties did not
22 prohibit PEF's right to seek an interim increase in
23 rates. Rather, the 2005 stipulation is silent about
24 PEF's right to interim rate increases. That's because
25 any potential underearning situation is addressed by a

1 trigger mechanism in the settlement that gives PEF the
2 right to seek a rate increase before January 2010 if its
3 earnings fall below a minimum 10 percent ROE. There was
4 no need for the stipulation to then say that PEF had a
5 right to seek relief it already had in the statute.

6 PEF's earnings have fallen below 10 percent, a
7 fact the intervenors do not dispute, and the trigger
8 therefore has been met. Thus, nothing in the
9 stipulation prohibits PEF from asking for interim rates
10 that become effective before January 2010 as part of an
11 application for a general rate increase. This proper
12 interpretation of the 2005 stipulation is demonstrated
13 by the exhibit that compares the 2005 stipulation to the
14 2002 stipulation where in 2002 the parties expressly
15 prohibited both interim decreases and interim increases
16 in rates. The 2005 agreement expressly prohibits
17 interim decreases but omits the express prohibition on
18 interim increases. This omission is a clear indication
19 that the parties to the 2005 stipulation did not intend
20 to prohibit interim rate increases provided the
21 10 percent trigger has been met.

22 Third, intervenors argue that the statute
23 requires interim rates to be measured based on the
24 minimum of the range of the utility's authorized rate of
25 return on equity and the statute does not apply since

1 the stipulation does not expressly establish a range.

2 As staff recognized in its recommendation, the
3 trigger mechanism in the stipulation does establish a
4 required minimum authorized return just like the minimum
5 of the range. The 10 percent trigger established the
6 level below which rates are no longer fair, just and
7 reasonable. If PEF's ROE remains above 10 percent, it
8 cannot seek rate relief before January 2010. If the ROE
9 drops below 10 percent, it can seek rate relief.

10 Therefore, the minimum authorized return is 10 percent.

11 If the intervenors were right that the stipulation does
12 not establish a minimum ROE for purposes of the interim
13 rate statute, then PEF would actually be entitled to a
14 larger interim rate increase than it requested.

15 The relevant part of the statute says that the
16 last authorized return on equity shall be established
17 in, quote, the most recent rate case of the utility, end
18 quote, or, quote, by voluntary stipulation of the
19 utility approved by the Commission, end quote. If the
20 2005 stipulation did not establish a minimum return on
21 equity, then the Commission would have had to look back
22 to the most recent rate order from the company in 1992
23 to find the minimum ROE, in which case the minimum would
24 be 11 percent rather than the 10 percent that PEF
25 believes the parties agreed to as the minimum in the

1 current stipulation.

2 In summary, PEF is simply seeking the interim
3 rate relief that it is entitled to under both the
4 statute and the terms of the 2005 stipulation because
5 its earnings are below the agreed upon authorized
6 minimum return. PEF is harmed if this relief is not
7 granted, customers are not. The interim rates by
8 statute are held subject to refund, thus the
9 Legislature, just like this Commission, understands that
10 collection of funds subject to refund protects
11 customers. Accordingly, we ask that you approve this
12 staff recommendation.

13 **COMMISSIONER EDGAR:** Thank you.

14 Mr. Rehwinkel.

15 **MR. REHWINKEL:** Thank you, Madam Chairman and
16 Commissioners.

17 Before I make my remarks, I would like to
18 point out that the handout that purports to compare the
19 two stipulations leaves out what I consider to be a
20 crucial and determinative paragraph. I don't have my
21 own paragraph, I don't have my own handout, but I would
22 like to describe for you, and I can be corrected if I'm
23 wrong, the differences between the two stipulations.

24 Commissioners, before I do that though I would
25 like to state my view of interim is that there are two

1 types of interim that are available to companies
2 generally. One is a pure earnings-based interim relief,
3 which is what Mr. Walls described in 366.071. That's a
4 statutory right that is limited to general base rate
5 rate increases. I would concede to you that there is
6 another type of interim, the file-and-suspend interim,
7 which is not before you here in this case, it is in the
8 next item, and it is not an earnings-based interim test
9 but it is interim nevertheless. The staff and the
10 company have gone to great lengths to argue that it is
11 available and I would concede to you that it is.

12 But let's look at the two types of
13 stipulations that you have before you. In 2002 you had
14 a stipulation that is correctly portrayed in paragraph
15 four in the handout here that does expressly prohibit
16 interim rate increases. But paragraph seven of that
17 same stipulation, 2002 stipulation in Order PSC 020655
18 had a provision that allowed the company, if the
19 10 percent trigger was reached, to petition the
20 Commission to amend its base rates notwithstanding a
21 revision of Section 4. It doesn't say anything about a
22 limited proceeding.

23 Now a limited proceeding has been interpreted
24 by the Commission to allow by using the file-and-suspend
25 law interim rates pending a final hearing in that

1 limited proceeding. In the 2002 stipulation there was
2 not interim under the limited proceedings statute
3 allowed. In the 2005 stipulation you have a stipulation
4 that expressly says that the revenue sharing mechanism
5 is the exclusive mechanism for determining earnings.
6 And it also has, as the company correctly points out and
7 as the staff goes to great lengths to discuss in their
8 recommendation, it has no express prohibition on interim
9 in the corresponding paragraph, but it does have,
10 contrasted to the 2002 stipulation, the right to PEF to
11 seek a limited proceeding under the limited proceedings
12 statute, 366.076. And the company has done that and
13 they're also asking for interim relief under that; i.e.,
14 rates that would go into effect without a hearing
15 pending final hearing by the Commission.

16 So what you have is you have an earnings test
17 prohibition in the 2005 stipulation. You have silence
18 as to whether interim is allowed. But when you contrast
19 it to the 2002 stipulation, the only harmonious reading
20 of those two is that the interim that is impliedly
21 allowed in the 2005 statute is the nonearnings interim
22 that the company could seek in the case of the Bartow
23 limited proceeding, and we're going to argue that in a
24 different case.

25 But with respect to getting an earnings test

1 based interim, this stipulation flatly prohibits it and
2 the Commission's order recognizes that. You cannot go
3 and -- first of all, we also do not agree that you can
4 compare stipulations. We think it's a bad policy.
5 Stipulations are entered into based on the unique
6 circumstances that are before the parties when they
7 reach agreement. And I think that's well recognized by
8 the Commission that stipulations are unique and they
9 rarely, unless expressly allowed, constitute
10 precedential authority for the Commission and bind
11 future parties.

12 But, nevertheless, if you're going to go down
13 that route, our argument is that the only harmonious way
14 to read this supposed implied authorization for interim
15 relief in two thousand -- under the 2005 stipulation is
16 that it applies to the difference in the two
17 stipulations, which is the availability of interim
18 relief under the limited proceeding statute. I think
19 that is a, that is a glaring oversight in the analysis
20 that you've been presented because it is the only
21 difference between the two that's expressly in there.

22 Commissioners, we are before you here making
23 our arguments on this interim aspect because there's a
24 principle involved here. There's an earnings test that
25 is generally available to the companies to allow their

1 rates to be determined -- for the allowance of a
2 determination as to whether their rates are fair and
3 reasonable. They bargained that away. It's exactly
4 what Mr. Walls said would undermine their statutory
5 right to interim relief, which would be if they
6 negotiated it away. In the, in the agreement that they
7 negotiated for 2005 they negotiated all ability to have
8 earnings evaluated. And the revenue sharing mechanism
9 is, is the only thing that is available to the, to the
10 company for, for a proxy for earnings.

11 Contrary to what the staff submits to you,
12 this is not about whether the company's rates are fair
13 and reasonable. They negotiated that away. In, in
14 doing so it is not for the Commission to reach out and
15 try to interpret the stipulation in a way that kind of
16 bootstraps the interim statute into this stipulation,
17 but that's exactly what is being recommended and urged
18 to you today, and we have a problem with that.

19 Commissioners, there's not a lot of money
20 relatively speaking on this matter, but it is a matter
21 of fundamental importance to us because the interim
22 statute is intended to be read as a recipe for granting
23 of interim relief on an expedited basis based on a very
24 strict formula in the statute. You cannot go and
25 interpret the statute in a way that says, well, it's

1 close enough, it's a proxy, it should be looked at that
2 way. We think that is the wrong way to look at it.

3 Our -- I would also like to make this point.
4 Mr. Walls suggested to you that if the stipulation is
5 determined not to give them an authorized return, then
6 you revert back to the 11.75 return that would be in
7 their last order. That's wrong. What the stipulation
8 does, and I have to reiterate it, is that it does, it
9 covers for the year 2009 -- the year 2009 is covered by
10 purely a revenue sharing mechanism. There is no
11 earnings test available to the company. They have
12 negotiated that away. So what they have is an order by
13 the Commission that says they have no authorized rate of
14 return for the duration of the stipulation. They have a
15 stipulation that says that. So there is no reversion
16 back to pre-stipulation 11.75 ROE. They are purely
17 governed by this stipulation.

18 I also would like to address a subtle point
19 here. They are filing this case outside of the
20 stipulation. In their petition on Page 9 they represent
21 to you that it is filed consistent with the stipulation,
22 which all that means is they are not seeking general
23 base rate relief before January 1, 2010. That is the
24 only thing this stipulation has to do with their
25 request.

1 In staff's analysis, I believe they are in
2 error when they suggest on Page 9 that the -- in the
3 final two paragraphs they suggest to you that our
4 argument taken to its logical conclusion would pose that
5 there are no circumstances under the 2005 stipulation
6 under which PEF could request interim rate relief.
7 Well, I've told you they do have the interim rate relief
8 option under the limited statute, and that is a
9 harmonious and consistent reading of the interim
10 statute, of the stipulation. They say "if the
11 stipulation allows," at the bottom of that next to the
12 last paragraph, "if the stipulation allows PEF to seek
13 an interim increase, then this provision was not meant
14 to preclude PEF from being able to make a prima facie
15 case for requesting interim rates under the statute."
16 That's just plain wrong.

17 The statute, I mean, the stipulation and the
18 order approving the stipulation says they do not have
19 the availability to look to an earnings test in 2009.
20 Again, the interim that is being requested here is not
21 being filed under the stipulation. We suggest to you
22 that it is being filed contrary to the stipulation.
23 It's okay for them to come in and seek permanent relief
24 for January 2010 and beyond, but 2009 is off limits from
25 an earnings test standpoint. But what they're trying to

1 do is reach back into 2009, and the only way they can do
2 that is to somehow negate the earnings prohibition
3 provisions in the statute in paragraph 14 and your
4 order. And the only way they can do that is to try to
5 compare the two stipulations, 2002 and 2005.

6 And I've given you a basis for you to look at
7 those two stipulations and say that it is reasonable on
8 a non-earnings-based interim basis, earnings relief
9 basis to say that they, that they have an interim
10 opportunity and they are seeking it in the next item.
11 But for purposes of interim under the statute, which is
12 a specific recipe in the statute, they have missed the
13 boat. They negotiated their rights away. And I think
14 it's pretty clear in here in your order and our
15 stipulation, and I would suggest to you, Commissioners,
16 that you should not create bad law by trying to
17 interpret the interim statute in a way that says, well,
18 it's close enough, so we should give it to them. The
19 interim statute is very specific, it uses specific
20 language, and they negotiated their right to utilize
21 that specific language away.

22 For \$6.5 million I'd say it is not worth it
23 for you to create a situation where the interim statute
24 begins to stray away from the, stray away from the cut
25 and dried application that you're used to applying.

1 This is, this is a different situation than your, than
2 the Commission has normally faced when you're trying to
3 interpret relief when there is a stipulation that
4 potentially bars it. Now we say it absolutely bars it,
5 but the company and your staff have raised a question
6 about that.

7 At this point I have nothing else to add. I
8 would entertain any questions or respond to further,
9 further argument.

10 **COMMISSIONER EDGAR:** Thank you, Mr. Rehwinkel.
11 I expect that we will have some questions and
12 discussion.

13 Commissioner, do you want, do you want to jump
14 in or would you like to hear from the others first?

15 **COMMISSIONER SKOP:** We'll hear.

16 **COMMISSIONER EDGAR:** Okay. Let's go ahead
17 and, and give the opportunity for each party who has
18 asked to speak to do so, and then we'll have questions
19 and discussion.

20 Ms. Kaufman.

21 **MS. KAUFMAN:** Thank you, Commissioner. I'm
22 not going to repeat what Mr. Rehwinkel said. I just
23 wanted to add a comment or two, and that is that we do
24 agree with him that the stipulation does not permit the
25 interim increase because there's no return on equity

1 specified in our stipulation and, therefore, even the
2 strict requirements of the interim statute cannot apply.

3 But then I also want to step back and look at
4 it from a higher level. This stipulation is still in
5 effect and was meant to be in effect from January '06 to
6 December '09, for four years. And during that time
7 period with limited exception that we're going to talk
8 about in the next item about Bartow, it was the sole and
9 only mechanism by which the company's earnings and
10 revenues were going to be determined. That's what the
11 parties agreed to. And I think, as Mr. Rehwinkel said,
12 it seems to us now that the company is trying to step
13 outside the document that all the parties agreed to in
14 give and take and things gained and things given up in
15 an attempt to increase their rates during the last half
16 of 2009 when the stipulation is supposed to be in
17 effect. So we think that that is inappropriate, and we
18 think that if you look at the language of the
19 stipulation as Mr. Rehwinkel described it to you, you
20 will see that that is strictly prohibited. So we don't
21 think that the request for interim relief is well taken
22 and we think that you should deny it. Thank you.

23 **COMMISSIONER EDGAR:** Thank you.

24 Mr. Wright.

25 **MR. WRIGHT:** Thank you, Madam Chairman.

1 Consistent with Mr. Rehwinkel's representation
2 that he is the principal spokesperson for us consumers,
3 I will be very brief. I just want to say a couple of
4 things, and thank you.

5 First, I agree, we agree with Mr. Rehwinkel's
6 analysis and we oppose the granting of interim rate
7 relief.

8 I want to make a couple of points in response
9 to statements made by Mr. Walls. His assertion that if
10 the company is earning less than 10 percent ROE
11 explicitly creates a fact that their rates are not fair,
12 just and reasonable is patently false. All that is is a
13 negotiated trigger that gives them the right to ask for
14 relief. We in turn have the opportunity to argue for
15 whatever we want to argue for, as do they. They could
16 say they're below 10 percent, the trigger is met, we can
17 ask for 12. We can say, well, if you file and if the
18 agreement says, well, if Progress files, we can ask for
19 less, we can ask for 9. We do not agree that 10 percent
20 ROE is a threshold that determines that Progress's rates
21 are not fair, just and reasonable.

22 Secondly, his assertion that customers are not
23 harmed we similarly believe is false. Now \$6.5 million
24 or \$13 million, you know, 41 cents on a \$1,000 -- a
25 1,000 kWh bill is not a whole lot of money, but it's

1 money out of, out of customers' pockets. That is harm.

2 Finally, I believe that the staff's reliance
3 on the line of reasoning that the request for interim
4 rate relief under 071 is not specifically prohibited is
5 not appropriate and not fair. We didn't contemplate
6 this. You know, the agreement no more specifically
7 authorizes Progress to ask for interim relief than it
8 does specifically prohibit it.

9 What paragraph seven says is that -- what
10 paragraph four says is that Progress may not petition
11 for an increase in base rates except as otherwise
12 provided in seven, paragraph seven and ten. Ten is
13 storm charges, nuclear decommissioning and things like
14 that, RTO charges, I think. Seven is they can file for
15 a general rate proceeding or a limited proceeding under
16 366.076. It does not authorize them to file under
17 366.071. And what this will lead to if we were ever to
18 get to the possibility of a settlement or stipulation in
19 the future is much, much longer stipulations because
20 they will have to come to represent, embody something
21 like a Napoleonic code or a European code of settlements
22 to touch every last single issue. We did not
23 contemplate that they could ask for interim relief.
24 We -- our position is the agreement does not provide for
25 it. It certainly doesn't explicitly provide for it.

1 Thank you.

2 **COMMISSIONER EDGAR:** Thank you, Mr. Wright.

3 Ms. Bradley, would you like to make a comment
4 at this time?

5 **MS. BRADLEY:** I'll also be brief and just
6 state that we are here in support of the Office of
7 Public Counsel's position. I think, as Mr. Wright
8 pointed out, if you review the settlement which we've
9 been all looking at here this morning, it clear, is very
10 clear that even if you buy the "it falls below
11 10 percent" argument, it specifically doesn't say that
12 they could seek the interim rates. It says what they
13 can do and it doesn't provide for interim rates. If
14 that was their intent, we all know you have to ask for
15 it. It has to be specified in the statute, in the
16 stipulation, and it's not present here. So we would
17 certainly urge the Commission to support the stipulation
18 that was entered into by the parties and adopted by the
19 order. It sends a bad message to everyone if these
20 stipulations are not upheld and the order of the PSC is
21 not upheld. So we would urge you to deny this request.
22 Thank you.

23 **COMMISSIONER EDGAR:** Thank you.

24 Commissioner Skop.

25 **COMMISSIONER SKOP:** Thank you, Madam Chairman.

1 Just a question to Mr. Rehwinkel as we move into this
2 discussion, and then I may have a follow-up question for
3 staff as well as Mr. Walls.

4 But, Mr. Rehwinkel, I guess under a typical
5 application for a general rate increase commonly known
6 as a rate case would you agree that a utility would be
7 entitled to interim rate relief pursuant to *Florida*
8 *Statutes* 366.071?

9 **MR. REHWINKEL:** In the absence of a, of a
10 prohibition on earnings test, yes.

11 **COMMISSIONER SKOP:** Okay. But today you
12 assert that PEF is not entitled to such interim rate
13 relief on the basis of the settlement agreement; is that
14 correct?

15 **MR. REHWINKEL:** That's correct.

16 **COMMISSIONER SKOP:** Okay. All right. So I
17 guess what I'm struggling with amongst a couple of
18 issues, but I guess notwithstanding interpretation of
19 the settlement agreement, wouldn't the adoption of your
20 position to deny interim rate relief have a tremendous
21 chilling effect on the willingness of any IOU to engage
22 in future settlement discussions if they were to
23 reasonably conclude that the parties would construe the
24 settlement agreement against them in a manner more
25 restrictive than that provided for under the applicable

1 statutes?

2 **MR. REHWINKEL:** No, not at all. There's a
3 significant amount of give and take that goes into a
4 settlement, Commissioner, what they have negotiated
5 away. But let me just say this, during the pendency of
6 this stipulation their earnings got above 13 percent.
7 Okay? That in our view is an unreasonable level of
8 earnings. But we, we negotiated away the ability to
9 come in and do the exact opposite. The interim statute
10 that we're talking about here allows both ways. You
11 can, you can seek an interim decrease, a reverse make
12 whole where you can take the amount above the top of the
13 range subject to refund and have a hearing on it, or the
14 converse, the company has a right to come in and seek
15 relief on the other side.

16 Both parties negotiated away their ability to
17 have earnings be evaluated whatsoever from January 1,
18 2006, to December 31, 2009. That's an ironclad deal
19 that everyone made. There's puts and takes every
20 negotiation. So I would submit to you there's not a
21 chilling effect whatsoever. You can negotiate away your
22 statutory rights and they have done so.

23 **COMMISSIONER SKOP:** Can you point expressly to
24 where they've negotiated their statutory rights away to
25 the extent that the handout provided that addresses the

1 2002 stipulation specifically includes interim rate
2 decreases and including interim rate increases but the
3 2005 stipulation expressly prohibits only interim rate
4 decreases?

5 **MR. REHWINKEL:** The 2005 stipulation prohibits
6 us from bringing a reverse make whole case against them.
7 It allows them to come in and bring a major item such as
8 Bartow and seek relief.

9 **COMMISSIONER SKOP:** Okay.

10 **MR. REHWINKEL:** It, it does not authorize them
11 to come in and file a rate case and get interim relief.
12 It allows them to file a rate case. They could file a
13 rate case under the 10 percent trigger. They have
14 chosen not to do that. They're filing their rate case
15 outside of the stipulation. And so they take -- outside
16 of the stipulation they take their ability to pierce the
17 2009 year, they take that as they find it in the
18 stipulation.

19 I -- if your question was did they negotiate
20 it away in 2002?

21 **COMMISSIONER SKOP:** My question is where
22 specifically can you point to and identify that they
23 negotiated that right away in light of the assertion
24 made by Mr. Walls referencing the 2002 stipulation
25 versus the 2005 stipulation?

1 **MR. REHWINKEL:** They negotiated away with the
2 language in Paragraph 14 that says, "Effective on the
3 implementation date, PEF will not have an authorized
4 return on equity range for the purpose of addressing
5 earnings levels. And earnings sharing mechanism
6 described will be the appropriate and exclusive
7 mechanism to address earnings levels."

8 **COMMISSIONER SKOP:** So your position, if I
9 correctly understand it, is that the 10 percent
10 threshold does not operate effectively as a trigger
11 pursuant to our staff recommendation and Progress'
12 assertions.

13 **MR. REHWINKEL:** No, I submit to you it does
14 only work as a trigger. It is not an earnings floor.
15 It is not part of an authorized range. That would
16 render this Paragraph 14 a nullity to consider that part
17 of any kind of a range, because it says PEF will not
18 have an authorized return on equity range. That's the
19 language from the interim statute. They gave that up.

20 **COMMISSIONER SKOP:** Well, I think that's your
21 assertion. I think that's for the Commission to
22 determine as to -- I guess this falls on an
23 interpretation of what the agreement says and in
24 relation to the statute. And I guess that the, you
25 know, the parties enter into this agreement in good

1 faith and now we have the same parties that bound
2 themselves to the agreement crying foul about it.

3 So, again, I'm just trying to be fair and
4 equitable. But what I see here clearly is that in the
5 absence of a settlement agreement, and I think this is
6 very instructive on a forward-going basis -- in the
7 absence of a settlement agreement you come in and you
8 are able to apply for interim rate relief pursuant to
9 statute. No problem. But if you enter into a
10 settlement agreement in good faith you run the risk of
11 having the terms construed against you later in the term
12 of the settlement agreement which provides substantial
13 risk to a company and would at least to me have a
14 substantial chilling effect of wanting to negotiate to
15 begin with.

16 **MR. REHWINKEL:** Well, let me say something
17 about that. Again, let's look at how they would
18 construct their interim relief, and there's two things.
19 They are asking you to look at 2008 historical earnings
20 and have that apply to the pendency of their filing in
21 2009. And this company also came in and asked for
22 13 million when they are only entitled to 6.5. They
23 were actually looking for a make whole.

24 **COMMISSIONER SKOP:** I understand that, and
25 that's a separate issue, and I think our staff has

1 appropriately addressed that, so --

2 **MR. REHWINKEL:** But I think it's instructive
3 of the fact that the stipulation puts a lid on any kind
4 of earnings analysis for 2006, '07, '08, and '09.

5 **COMMISSIONER SKOP:** Okay. Madam Chair, just
6 two more quick questions, one to staff and then to
7 Mr. Walls. To our staff, do you have a copy of the most
8 recent earnings surveillance report, and is it possible
9 to distribute that?

10 **MR. SLEMKEWICZ:** Yes, I do have a copy of
11 that.

12 **COMMISSIONER SKOP:** And do you know what the
13 most recent -- under the surveillance report, the most
14 recent earnings level would be?

15 **MR. SLEMKEWICZ:** It was 9.59 percent for March
16 of 2009.

17 **COMMISSIONER SKOP:** Okay. So they are below
18 their 10 percent threshold subject to resolving the
19 disagreement between the parties and the interpretation
20 that OPC and such may have. They are below 10 percent.

21 **MR. SLEMKEWICZ:** Yes, they are currently below
22 10 percent.

23 **COMMISSIONER SKOP:** And then just one
24 follow-up question to Mr. Walls with respect to the
25 graphical handout on the projection of return on equity.

1 I guess the current surveillance report indicates an ROE
2 of, I guess, 9-point -- help me out again, please.

3 **MR. SLEMKEWICZ:** 9.59 percent.

4 **COMMISSIONER SKOP:** 9.59 percent. I guess
5 without the rate relief that's requested for interim
6 rates and without the Bartow repowering, which is the
7 subject of another item that we'll get to, it's
8 estimated that the return on equity will fall to 6.89,
9 is that the correct understanding of the graphical
10 representation?

11 **MR. WALLS:** That's correct.

12 **COMMISSIONER SKOP:** And I guess just one
13 follow on question to that. How would a company be able
14 to attract capital at that realized ROE?

15 **MR. WALLS:** It would be very difficult. I
16 mean, that's the reason we are here asking for this
17 relief. And we thought we bargained for relief below
18 10 percent when our ROE fell below that. That was our
19 agreement.

20 And to your question about the chilling
21 effect, the answer is yes. There will be a chilling
22 effect on future agreements if we haven't expressly
23 waived away statutory rights, which OPC freely conceded
24 they did, but we did not on the interim.

25 **COMMISSIONER SKOP:** Thank you, Madam Chair.

1 **COMMISSIONER EDGAR:** Commissioner McMurrian.

2 **COMMISSIONER McMURRIAN:** Thank you.

3 And I think I want to follow up with
4 Mr. Rehwinkel on some of the points I think that
5 Commissioner Skop was raising. I guess one of the
6 problems I keep having is if the stipulation is to be
7 read as how you suggest it, why would the intervening
8 parties have ever allowed that particular phrase to come
9 out? And I realize it wasn't -- we can argue about
10 whether it was there, and you talked about it's not fair
11 to compare the 2002 to the 2005, but staff had noted in
12 their footnotes as case law that suggests to me that the
13 absence of language can be important, as well. So I
14 guess I will let you speak to that, but it's sort of
15 this nagging thing that you had it on both sides in the
16 2002, and with respect to 2005 and the way you are
17 interpreting it, it seems like it would have been
18 important for the intervenors to leave that phrase in to
19 protect yourselves.

20 **MR. REHWINKEL:** First of all, I think it's --
21 and I'm not suggesting any impropriety here, but I think
22 it's not a good idea to sit and try to unravel the
23 hundreds of things that could have been going on in a
24 negotiation to reach a stipulation. I don't know what
25 was going on in the minds of the people that negotiated

1 that stipulation. You can only read the agreement.

2 And I gave my view on one way to compare this
3 is that -- I think it's relevant to look at what's not
4 in the 2002 stipulation. They didn't have the option to
5 seek limited relief. And limited relief has its own
6 concomitant interim relief opportunity. That's the file
7 and suspend law that the Wilson case and the Mayo case
8 all say, and that the FPL case that we cited also
9 acknowledges.

10 So the fact that the interim language is not
11 in the 2005 stipulation does not mean that they did not
12 negotiate away their right to have an earnings-based
13 interim relief available to them. They are fully
14 seeking their right to have a limited proceeding with
15 interim relief in the next item, and that's consistent
16 with this stipulation. And that's consistent with the
17 no earnings test for 2009, 2008, 2007, and 2006. That
18 is the only way to harmoniously look at those two
19 documents, if you are going to even compare them at all.

20 Our view is that a stipulation should stand on
21 its own, and I don't know how much clearer it can be
22 that there is not availability of earnings-based relief
23 for this company for 2009. Bartow, I would concede that
24 if it was appropriate for them to get relief in the
25 Bartow case that they get it without regard to earnings.

1 They've imposed some level, a small level of earnings
2 governor, if you will, on what they've requested for
3 Bartow, but I don't believe that's required.

4 What they are seeking in this case is specific
5 statutory earnings-based interim relief, and the statute
6 is very specific on that. So to answer your question, I
7 don't think it's appropriate to go and try to look in
8 the minds of people that entered into the agreement.
9 The only thing you can do is interpret the stipulation
10 that's before you.

11 **COMMISSIONER EDGAR:** I'd like to ask a
12 question that approaches this from, I think, maybe a
13 little different angle. And I'm going to pose this
14 right now to both Progress and to OPC. If -- and for
15 the purposes of discussion and my own thought process --
16 if the Commission were to find in concurrence with the
17 staff recommendation on Issue 2, then I'd like to look
18 at the statute a little more. In looking at
19 Section 366.071, Sub 1, could each of you speak to me a
20 little bit about the interrelationship between the first
21 sentence and the last sentence? And what I'm trying to
22 focus on is, you know, the establishment of entitlement
23 for interim relief and how that works together with the
24 discretion of may in the first sentence.

25 (Inaudible. Microphone off.)

1 Yes, please.

2 And because I think what I'm thinking is that,
3 again, if the Commission were to find it, and I know
4 we're not there yet, but if we were to find the answer
5 to Issue 2 to be yes, then I'm looking at the statute,
6 again, more carefully. And I haven't heard as part of
7 this discussion, I don't think, yet, specifically as to
8 what the Commission's discretion is with the may --
9 anyway, the first sentence and the third sentence. So
10 if you could speak to that.

11 **MR. WALLS:** Yes, I can give you my
12 interpretation. I believe the reason they used the word
13 may in the first sentence is to acknowledge that the
14 utility may not establish a prima facie case. The last
15 sentence says, you know, to establish a prima facie
16 entitlement for interim relief the public utilities
17 shall demonstrate. So if that demonstration is not made
18 by the utility, then obviously the Commission wouldn't
19 be bound to accept that.

20 But if you look in Paragraph 2(a), it says
21 basically that the Commission shall authorize the
22 collection of rates sufficient to earn the minimum of
23 the range calculated in accordance with Subparagraph
24 5(b)(2). So, basically, if the utility meets its prima
25 facie entitlement to interim relief, the Commission is

1 then obligated to grant that, of course, subject to
2 refund.

3 **COMMISSIONER EDGAR:** And I'm still thinking
4 through that, in your words, obligation.

5 Mr. Rehwinkel.

6 **MR. REHWINKEL:** I don't disagree with Mr.
7 Walls' interpretation. I have never, in my time, seen
8 the Commission on its own motion grant that in the face
9 of a failure of a company to meet their prima facie
10 burden, but I could be wrong.

11 With respect to 366.071, you know, I mean,
12 it's our position they can't meet it because of the
13 stipulation because of the lack of a range. But I think
14 that in their requesting interim relief they do have an
15 affirmative burden to meet the statutory recipe, if you
16 will. But I have not considered whether the Commission
17 could do this on its own motion or could deny them with
18 respect to the may.

19 **COMMISSIONER EDGAR:** You know, we have had a
20 lot of discussion in this room over certainly the last
21 months, but years, probably, about, you know, if statute
22 says shall, if the statute says may. Of course, we have
23 all heard many of those discussions in many other
24 forums, as well. The may is troubling to me in this
25 instance.

1 **MR. REHWINKEL:** It may also -- if I might, it
2 may also relate to the discretion the Commission might
3 have in the Subsection 4 arena. I don't think in
4 Subsection 4 there is symmetry with respect to a
5 requesting party's entitlement to interim rates. I
6 think on 2(a), if the company meets their prima facie
7 case, I think the Commission is required to authorize
8 interim rates. But in Subsection 4, a party seeking to
9 reduce rates has to make a showing that it's at the
10 mercy of the Commission's discretion to some degree, I
11 believe. That could have some impact on the word may,
12 or the reason why the word may is in there.

13 **COMMISSIONER EDGAR:** Mr. Walls, did you have
14 an additional comment?

15 **MR. WALLS:** Not to that extra point about
16 Subsection 4. I do believe, and I think we are in
17 agreement that if we meet a prima facie case for
18 entitlement to interim relief then the Commission is
19 obligated to grant that because it is subject to refund.

20 **COMMISSIONER EDGAR:** I'm not sure that I
21 understand why the fact that it would be subject to
22 refund means an obligation by the Commission to grant.

23 **MR. WALLS:** Well, the interim relief is
24 designed to cover a period during the pendency of the
25 rate case to cover regulatory lag, so it is meant to be

1 a quick and dirty kind of procedure to allow relief. So
2 the ideal was if they met a prima facie entitlement they
3 would get the relief, and then the issues, if any, about
4 the interim relief could always be addressed in the rate
5 case hearing later on. So the subject of refund
6 protects customers in the extent that those issues are
7 revisited in the later rate case hearing.

8 **COMMISSIONER EDGAR:** I understand all of that.
9 It's the word obligation. Where do you see obligation?
10 I see may grant, or may authorize, and I'm hearing
11 obligation. And may authorize to me does not equate to
12 obligation.

13 **MR. WALLS:** Well, in the last sentence you
14 acknowledged or pointed it says to establish a prima
15 facie entitlement for interim relief, the Commission,
16 the petitioning party, or the public utility shall
17 demonstrate the public utility is earning outside the
18 range of reasonableness on rate of return calculated in
19 accordance with Subsection 5. So we have to establish
20 that prima facie case. If we do so, Subsection 2(a)
21 says in a proceeding for interim increase in rates, the
22 Commission shall authorize within 60 days of the filing
23 for such relief the collection of rates sufficient to
24 earn the minimum of the range of rate of return
25 calculated in accordance with Subsection or Subparagraph

1 5(b)(2). So it says if we meet the prima --

2 **COMMISSIONER EDGAR:** Mr. Walls, I have read it
3 many, many, many times. And what I'm trying to put
4 together, in my mind, is the shall and the may which
5 seem to me to be somewhat inconsistent. You know,
6 discretion or not discretion; obligation or not
7 obligation. I don't see the word obligation. It's not
8 a word I would use in this instance. But, yes, Mr.
9 Burnett.

10 **MR. BURNETT:** Thank you, Madam Chair. I would
11 appreciate to add my thoughts to the mix. Quite
12 frankly, I have never been able to square them. I have
13 always thought that the may was meant to talk about the
14 Commission's discretion to bring this on their own
15 motion, because I have never been able to square up the
16 shall language in the bottom.

17 But, to your point, I cannot square them up.
18 I believe that maybe it's bad drafting perhaps, or the
19 intent there was to apply the may to your discretion to
20 bring it on your own motion. But the shall in 2(a), and
21 the shall in 2(b) seems to be quite direct. So to your
22 point, I cannot square them up and only believe it was
23 meant to modify your ability to bring these on your own
24 accord, your own motion.

25 **COMMISSIONER EDGAR:** I appreciate that. I'm

1 not sure I agree with it, but I appreciate that
2 interpretation, or the possibility of that
3 interpretation, I guess. I guess, in my reading I am
4 wondering if, you know, to establish an entitlement --
5 and I have gone back to, quite frankly, even though I
6 think I know what entitlement is -- to looking it up,
7 and I've got two definitions here. One, to claim as a
8 need. To claim as a need does not necessarily mean an
9 obligation to grant. And the other definition I found
10 is the right to income which may not be abridged without
11 due process, and I would argue that this is due process
12 at this stage right here to have this discussion.

13 So I'm just wondering, you know, if a company,
14 in this case Progress, were to establish the entitlement
15 from my definitions that I've found, again, doesn't
16 necessarily mean shall grant or obligated to grant. If
17 you don't get past the may you don't even get to
18 Subsection 2. Although, of course, I know you are
19 supposed to read it all in its entirety, et cetera.

20 So the may is -- I'm grappling with that as to
21 whether -- and I realize this is an issue separate from
22 the stipulation, but they are broken out into separate
23 issues for discussion in this item.

24 Yes, Mr. Rehwinkel.

25 **MR. REHWINKEL:** Madam Chairman, I think that

1 one way to read that may, and I'm not sure that it was
2 contemplated by the drafters of this statute, but within
3 the context of having a stipulation like the one before
4 you here today, is that in the last sentence it refers
5 to demonstrating that they are earning outside the range
6 of reasonableness on the rate of return calculated in
7 accordance with Subsection 5. I think you have the
8 discretion and probably the obligation to read that you
9 cannot make that determination because of the
10 stipulation because of the cap on any earnings analysis.

11 So I think that any earnings reasonableness
12 test is violative of Section 14 of the stipulation, and
13 the may is one more tool that you have to acknowledge
14 that and to deny the relief that would otherwise be
15 demonstrated, even if defectively based on the lack of a
16 range or rate of return range.

17 **COMMISSIONER EDGAR:** Commissioner Skop.

18 **COMMISSIONER SKOP:** Thank you, Madam Chairman.

19 I'd like to follow along the line of the
20 question that you had with respect to the statute,
21 because I also read that statute and was drawing the
22 same conclusions to the extent whether the may on its
23 own motion whether that just was speaking to the broad
24 discretion of the Commission to remedy a problem, or to
25 try to do the right thing, or arbitrate a dispute if it

1 came down to that.

2 But, assuming, Mr. Rehwinkel, that the
3 Commission adopted your position in noting the current
4 realized ROE and the fact that, you know, Progress is
5 engaging in numerous construction projects and such and
6 has a need to attract capital, what would be your
7 recommended remedy to address what seems to be an issue
8 that the recognized ROE would be the lowest in the
9 nation right now by far? So how do you remedy that
10 problem in the near term instead of waiting for the
11 conclusion and final order of a rate case to provide
12 appropriate relief. In the meantime, do you subject a
13 major utility to credit impairment and limit their
14 ability to attract capital?

15 **MR. REHWINKEL:** Well, first of all, again,
16 they are under a revenue sharing mechanism that
17 supplants any consideration of return on equity. They
18 do not have one, and they -- I don't know what the
19 investors are looking at.

20 **COMMISSIONER SKOP:** I understand that, but
21 let's take this to a higher level. We can talk about
22 the settlement agreement, we can talk about the statute,
23 but then we can get into Supreme Court precedent under
24 Bluefield and Hope about a reasonable rate of return,
25 fair, just, and reasonable. And, you know, if they are

1 going to, as a result of the intervention and the action
2 that you are advocating, if that results, and if the
3 Commission were to adopt your position and that results
4 in an ROE that is below 7 percent, obviously that's
5 going to create a cascading problem there in the near
6 term. How do you address that?

7 **MR. REHWINKEL:** Okay. I address it this way,
8 because I think we have to go back and look. One of the
9 things that the Commission today doesn't have I don't
10 think a good feel for is the tortured, and convoluted,
11 and very contentious history that interim rate relief
12 has over the years. I understand you have looked at
13 some of the cases and all, but it was before the interim
14 statute this recipe here was put in. It was a very
15 contentious matter. There's plenty of Supreme Court
16 precedent on the matter. But what you're doing is
17 you're raising customers rates without a hearing, and
18 that's the fundamental problem that you struggle with.
19 And that's why this statutory formula is here to be able
20 to take that out of the mix.

21 Now, the fact that they have come in and
22 agreed to be bound by an earning -- a revenue sharing
23 mechanism versus earnings is very important. And I
24 think the market, whatever they have done they have
25 looked at that. But I would submit to you that it looks

1 to me like there is 14 basis points difference between
2 getting and not getting interim relief. I would submit
3 to you that does not have any impact on what the market
4 looks at. The market has already looked at this company
5 and said you've reached a stipulation that had other
6 benefits. It had benefits of putting Hines in quickly,
7 and that was done. It has benefits of some depreciation
8 continuation. This is an overfunded depreciation
9 situation.

10 So if you're going to give them a rate
11 increase without a hearing, I think you have to stick to
12 the statute and you have to honor the stipulation.
13 Otherwise, you have to have a hearing, and you have to
14 look at whether depreciation should be looked at in
15 terms of whether they really and truly have a need, a
16 financing need for 2009. They're going to get -- if the
17 schedule holds true, they are going to get some level of
18 earning relief on January 1 through a change in rates.
19 I don't know what that will be, but the 2009 is written
20 off as far as that goes, because they have agreed that
21 they don't have earnings-based relief for 2006, '07,
22 '08, and '09.

23 **COMMISSIONER SKOP:** Okay. Just some
24 follow-ups on that. I guess, assuming for the sake of
25 discussion, and, again, I'm privy to the settlement

1 agreement. I did not negotiate it. Again, I think that
2 there has been concerns expressed and I think this is
3 some of the fallout from that. But, with respect to if
4 the ROE were established and authorized at 11.75, which
5 it is for some other activities within there pursuant to
6 the settlement agreement, then pursuant to the interim
7 rate relief statute, basically you get the 100 basis
8 points below the authorized range, below the midpoint,
9 which would be 10.75 for return on equity, is that
10 correct? If the midpoint were set previously authorized
11 at 11.75, then for interim rates they would be entitled
12 under statute to collect 10.75.

13 **MR. REHWINKEL:** Assuming that was, yes, in
14 effect.

15 **COMMISSIONER SKOP:** Okay. All right. And I
16 guess with respect to -- but what they're asking for
17 here, and I think they noted that in their brief in
18 fairness to them, of something substantially less than
19 that in terms of the 10 percent of the threshold, if you
20 will, they're only seeking to come up to the threshold.

21 **MR. REHWINKEL:** They're seeking to come up to
22 what they consider to be the bottom of a range for
23 purposes of the interim statute.

24 **COMMISSIONER SKOP:** Okay. And then with
25 respect to your concern about the hearing, does this not

1 function somewhat -- again, there has been substantial
2 briefs filed on both of these issues, but I guess my
3 concern is, if I hear you correctly, you're suggesting
4 that we need to wait until January 1st to address what
5 seems to be a legitimate problem. And, again, I'm
6 trying to be fair not only to counsel and the parties
7 that it represents, but also balancing those interests
8 and the interests of consumers with the interests of the
9 company to have fair, just, and reasonable rates. And,
10 again, if you have a sub 7 percent ROE, how are you
11 going to fix that in the near term? Is it going to be
12 too late to wait until January?

13 I mean, are we going to risk a credit
14 downgrade or some other things? I know you're talking
15 about the 14 basis points. And, again, we will spend
16 far more time, as we always do, talking about small
17 issues than we will the bigger issues that will follow
18 today on the same --

19 **MR. REHWINKEL:** Commissioner, there's the old
20 saying that hard cases make bad law. And I think that
21 if you try to go out and contort the statute and make
22 things work where you can give them 14 basis points of
23 relief, that will haunt you for years to come. If you
24 go outside of the statute, this will come back to haunt
25 you. So that's my admonition on that.

1 Just to be frank with you, if you go down that
2 path and you say, well, we're going to ignore the
3 statute, we're going to make this our guide, then what
4 you are doing is you are entertaining the possibility
5 that stipulations will never be entered into again
6 because the Commission will come back and pierce them
7 and say, well, we're going to pick this part, but we're
8 going to leave everything else in place.

9 The company has not come back to you and asked
10 that they be relieved. They have not directly asked
11 that they be relieved from the burdens of the
12 stipulation. They made a deal, they have to honor it.
13 We honored our part of the deal when they were above a
14 reasonable top of the range. We were not before you
15 seeking to have the stipulation cast out and have rates
16 lowered.

17 And, finally, to answer your point about does
18 this constitute a hearing on rates, absolutely not. We
19 have only argued what I would consider to be a legal
20 argument on the stipulation and interim. If you were to
21 have a hearing, that would be effective for purposes of
22 raising rates outside of the interim statute, then you
23 would have to go into looking at what are the factors
24 that are driving their earnings. Is there depreciation
25 reserve, two, three, \$400 million overfunded. Is that

1 in itself could fix their problem, depending on how you
2 looked at it.

3 But we're not here arguing that the facts
4 ought to be changed. We're saying as a matter of law
5 they do not meet the statutory threshold. But even more
6 so, they are barred from seeking interim relief because
7 they have agreed to a revenue sharing mechanism for 2006
8 through 2009. End of story.

9 **COMMISSIONER ARGENZIANO:** Madam Chair.

10 **COMMISSIONER EDGAR:** Yes, Commissioner
11 Argenziano.

12 **COMMISSIONER ARGENZIANO:** Yes.

13 I have some questions, and undoubtedly will
14 have some more before the end of the, I guess, the end
15 of our meeting, discussion. I have several things. I
16 want to go back to what Commissioner Skop said about a
17 chilling effect. I also believe, and I've read this, as
18 you said, Madam Chair, many, many, many times. And I
19 have -- I guess I don't have to be a lawyer to
20 understand the words in front of me. And the words in
21 front of me show that there's no authorized rate of
22 return. And I don't understand -- and I will go back to
23 the chilling effect.

24 If you change what you had intervenors and
25 everybody who signed the stipulation -- we were induced

1 to sign the stipulation over these particulars in this
2 stipulation, and if you change or alter that
3 stipulation, doesn't that also have a chilling effect?
4 And maybe all parties can answer that.

5 And the second question is how do you get
6 around, you know, the range of -- or having no range of
7 return in the stipulation? I mean, how are you
8 stretching that statutorily? I'm having a really hard
9 time understanding that. And I don't see where we're
10 not doing anything other than what Mr. Rehwinkel just
11 said, was contorting and twisting the statute. So
12 somebody really had better get very specific, otherwise
13 I don't see that -- you know, the bigger picture. We
14 are trying to stretch it and run all over the place. I
15 keep going back to the stipulation, and I see the
16 stipulating really basically saying there is no range of
17 ROE.

18 And if Progress wants to interpret the
19 10 percent trigger, which was really intended to be a
20 minimum ROE, and the statute doesn't say minimum range
21 of authorization, authorized range, or imputed minimum.
22 How are we twisting it that far? Maybe everybody can go
23 and answer that starting with the chilling effect.
24 Because I see a chilling effect when you have an
25 agreement and you change the agreement. And I see the

1 struggle to try to say we're not changing the agreement,
2 but, sorry, the words say what they say to me. So I
3 need everyone to go back to the chilling effect, and
4 then tell me how it is -- that we're not contorting the
5 statutes, because I just don't see what Progress is
6 arguing.

7 **COMMISSIONER EDGAR:** Thank you, Commissioner,
8 and we will begin with Progress.

9 **MR. WALLS:** Yes. I would just like to say to
10 begin with that we are here to seek to affirm the deal
11 we made, which was a deal that we could seek relief if
12 our return fell below a minimum 10 percent, which they
13 agree is a trigger. Now, the first thing we have got to
14 say is what do they mean by that as a trigger. It meant
15 that we could come in and ask for base rate relief
16 including interim relief because we did not expressly
17 preclude that. They want to look at both stipulations
18 on their benefit, but come to us and say, well, you
19 can't look at both stipulations.

20 But the point is we had a statutory right to
21 seek interim rate relief. We can only give up that
22 right if we expressly waive it. We did not. OPC
23 admitted that they expressly waived it, and that's the
24 standard. We did not expressly waive our right to seek
25 interim relief. The 10 percent referred to, it says in

1 the statute it means the minimum of the range. That's
2 the key point, what is the minimum authorized return.
3 If we can't seek relief when it is 10.1 percent, which
4 is what we agreed to, but we can seek relief if it's
5 9.9 percent, then what's the last minimum authorized
6 return we're allowed under the stipulation? It's 10.
7 That is the minimum relief. And the statute
8 specifically says at the end that the last authorized
9 return on equity for purpose of this subsection shall be
10 established only in the most recent rate case, in a
11 limited scope proceeding, or by voluntary stipulation of
12 the utility approved by the Commission. That's what we
13 have here, a voluntary stipulation approved by the
14 Commission that recognized that the rates in the
15 stipulation were fair, just, and reasonable with a
16 minimum trigger of 10 percent. Meaning if we fell below
17 that the rates were arguably no longer fair, just, and
18 reasonable and that there was a minimum of 10 percent.

19 I would like to point out the Commission has
20 in the past in an order cited in the staff
21 recommendation recognized that the purpose of the
22 statute, the interim rate statute can be interpreted
23 broadly to grant relief. And I'll read from this. It's
24 is PSC Order 04-0721-PCO-GU, July 26th, 2004, in re:
25 Application for rate increase by Florida Public

1 Utilities Company, where they asked for both petition
2 for permanent rate increase and interim increase.

3 On Page 5, the Commission in addressing the
4 cost of capital for that interim rate increase says,
5 "However, in the last rate case we approved a
6 stipulation by Order PSC 95-0518-FOF-GU issued
7 April 26th, 1995, in which FPUC's return on equity was
8 set at 11.4 percent with no range. In its request for
9 interim rates, FPUC used the return on equity of
10 10.4 percent. This agrees with our traditional method
11 and we find that the 10.4 return on equity is
12 appropriate." So the Commission has done this before,
13 recognizing that when you have the relief or you have
14 the rate of return established in a way that allows you
15 to apply the statute, you apply the statute.

16 And that's what we have here. We have a
17 10 percent minimum authorized return which, by the way,
18 was also in the 2002 stipulation, and in prior
19 proceedings before this Commission these very parties
20 here who now say this is not anything but a trigger, it
21 goes away, which you will find nothing in the agreement
22 that says that is what happens. No, they argued in that
23 proceeding that this was a floor, that it was a minimum
24 level of earnings, and that's what they have said before
25 about this percent. They've acknowledged that it

1 represents the minimum level of earnings the utility is
2 allowed, and that's all we're asking for here.

3 And we have not expressly waived our rate to
4 interim rate relief. They acknowledge that. And there
5 is a minimum authorized return in the stipulation. And
6 all we are asking for is to be entitled to relief under
7 the statute up to that minimum rate of return, and
8 that's what we agreed to in the stipulation.

9 **COMMISSIONER ARGENZIANO:** Can I hear from Mr.
10 Rehwinkel, please.

11 **COMMISSIONER EDGAR:** Commissioner Argenziano,
12 did you want to hear from Mr. Rehwinkel next?

13 **COMMISSIONER ARGENZIANO:** Yes, please.

14 **COMMISSIONER EDGAR:** Thank you.

15 Mr. Rehwinkel, can you respond.

16 **MR. REHWINKEL:** Yes. With respect to the
17 question, I think the first question was about whether
18 there would be a chilling impact on stipulations. I
19 can't speak for the future, but I can tell you that
20 certainly I believe that it would, especially if it's so
21 contrary to a fundamental precept of the stipulation,
22 i.e., no earnings test, no rate relief based on
23 earnings. I think that, yes, that would be a chilling
24 impact. And I would say that there's another item for
25 another day that's part of this three-part filing about

1 accounting treatment that we believe also is contrary to
2 the earnings test prohibition in the stipulation.

3 So if these two go in Progress' favor, I think
4 that there would be a very, very great reluctance to
5 enter into stipulations if they could be undone on such
6 a fundamental foundation as the earnings test.

7 **COMMISSIONER ARGENZIANO:** Can I ask you a
8 question, and I'll ask Progress this also, because
9 Progress just said that -- basically said the 10 percent
10 was a floor set in the stipulation. But is that
11 10 percent a minimum authorized return? I think there
12 is a struggling here of that 10 percent that was in the
13 stipulation, and I don't see that as an authorized
14 return.

15 **MR. REHWINKEL:** Commissioner, it is our strong
16 view that the language of the statute in Paragraph 7
17 that has been read and reread says that if PEF's retail
18 base rate earnings fall below a 10 percent return on
19 equity as reported, et cetera, et cetera, PEF may
20 petition the Commission to amend its base rates. Plain
21 English. You look at this, if 10 percent, then they may
22 petition. That is all that 10 percent deals with. And
23 the FPL case, in 2000 --

24 **COMMISSIONER ARGENZIANO:** Wait, wait, hold on
25 a minute. So what you're saying is that it is wrong to

1 say that the 10 percent is anything but a trigger that
2 would allow a rate case to start, is that what I'm
3 getting?

4 **MR. REHWINKEL:** Yes, that is correct. And I
5 say that for this reason. With very similar language,
6 Florida Power and Light came in, and we cite this case
7 in our pleading, and I think Progress, as well. FPL
8 came in and sought emergency hurricane rate relief to
9 replenish their storm reserve after the 2004 hurricanes.
10 They filed very quickly. They came in with this same
11 language. They were -- the trigger was met, and they,
12 against the Public Counsel's argument that there should
13 be an earnings cap or governor on what they received,
14 the Commission authorized them to get dollar-for-dollar
15 replenishment of their storm damage reserve under this
16 very similar provision that showed that the ROE number
17 was merely a trigger, and that once it was triggered,
18 they got the rate relief without regard to earnings.

19 So in that case there was no earnings floor
20 that said that they get hurricane storm damage reserve
21 replenishment up to the bottom of their range. They got
22 dollar-for-dollar. So I think that interpretation by
23 the Commission says that there is not this floor or
24 entitlement to earn up to that they can come in and seek
25 relief upon. Because, again, the overarching statement

1 is that there is no authorized range and that revenue
2 sharing is the exclusive mechanism for determining
3 earnings.

4 **COMMISSIONER ARGENZIANO:** Thank you.

5 **COMMISSIONER EDGAR:** Mr. Wright.

6 Commissioners, I think we have one more who
7 would like to, and then -- actually, we have more than
8 one who would like to respond to you, so if I may call
9 upon them, and then we will come back to you.

10 **COMMISSIONER ARGENZIANO:** Good.

11 **COMMISSIONER EDGAR:** Mr. Wright.

12 **MR. WRIGHT:** Thank you, Madam Chairman. Very
13 briefly to respond to Commissioner Argenziano's
14 questions.

15 The statute requires that a showing be made
16 that the company would be outside the range of
17 reasonableness. Progress expressly agreed in Paragraph
18 14 that it will not have an authorized return on equity
19 range for the purpose of addressing earnings levels.
20 That's what it says.

21 If the Commission were to find that Progress
22 is earning outside the range of reasonableness, which is
23 requisite under 366.071, the Commission would
24 specifically have undone Paragraph 14 of the
25 stipulation. We don't think that's fair, and that would

1 have an extraordinary chilling effect on our willingness
2 to enter into future stipulations.

3 **COMMISSIONER EDGAR:** Ms. Kaufman.

4 **MS. KAUFMAN:** Thank you, Commissioner.

5 I wanted to address the same point. First of
6 all, as a signatory to the stipulation, it absolutely
7 would have a chilling effect. The stipulation has been
8 in effect three and a half years. All the parties have,
9 you know, relied upon it when it benefited them and when
10 it was to their detriment. And if parties can't count
11 on that, then certainly that's going to have a chilling
12 effect.

13 And Mr. Wright read you the first clause in
14 Paragraph 14. If you look at the second clause, not
15 only does it say that Progress won't have an authorized
16 return on equity range, but then it says the revenue
17 sharing mechanism herein described will be the
18 appropriate and exclusive mechanism to address earnings
19 levels. And, you know, we have had some discussion
20 about looking at the language of the stipulation, and we
21 don't think that it can be any clearer than that.

22 Thank you.

23 **COMMISSIONER EDGAR:** Thank you.

24 And, Ms. Bradley, I think that you wanted to
25 speak.

1 **MS. BRADLEY:** Commissioner Argenziano's
2 question, I guess I would disagree to the extent I don't
3 think it would have a chilling effect. I think it would
4 be a cold hard freeze. You can't expect attorneys to
5 ethically to recommend to their clients to give up
6 rights that they have contracted for if there is no
7 assurance that the benefits that they have contracted
8 for are not going to be provided.

9 I support Office of Public Counsel and the
10 other intervenors. But looking at Paragraph 7 of this
11 contract, Progress fails to read the rest of the
12 provision. They say if it drops below -- their return
13 on equity drops below 10 percent they get interim rates.
14 That's not what it says. It specifically provides that
15 they may petition either as a general rate proceeding or
16 as a limited proceeding under Section 366.075. And I
17 hate to send the attorneys back to basic contract law,
18 because I would hate to go back to law school, but it's
19 just basic contract.

20 If you have a provision that says if this
21 happens you can get A or B, and it doesn't say C, then
22 by the very language of that contract C is not an
23 option. And that's what they are trying to do here.
24 They're not coming in looking for these other provisions
25 that the contract provides, they're looking for an

1 option, interim rates, which is not specified in this
2 contract. They have not contracted for that, and they
3 are not entitled to that under law.

4 So we would ask you to -- urge you to reject
5 their interpretation because it is not consistent with
6 contract law. Thank you.

7 **MR. WALLS:** May I briefly respond to that?

8 **COMMISSIONER EDGAR:** Yes.

9 **MR. WALLS:** We certainly feel the same way
10 about the chilling effect on an agreement that we
11 thought we had reached with these parties. One, to
12 address that language, it is also basic contract law
13 that you look to the provision that deals with the issue
14 most specifically rather than the general provision.
15 That is the provision that deals with what happens when
16 we are entitled to relief, and in our view sets a
17 minimum. But if you want to know what the specific
18 provision is that addresses interim increases or
19 decreases and the right to them, that is Paragraph 4.
20 And basic contract law says the specific controls over
21 the general, and the specific there says that they
22 expressly waived their right for an interim decrease and
23 we did not waive our statutory right to seek an interim
24 increase.

25 And I find it remarkable that these parties

1 are coming in and taking this position that the
2 10 percent trigger, which means we're entitled to seek
3 relief, is not setting an authorized floor because they
4 took the very different same position -- a different
5 position in the storm cost-recovery docket before this
6 Commission based on the same language in the 2002
7 stipulation, which in the first sentence said if PEF's
8 retail base rate earnings fall below a 10 percent ROE as
9 reported on an FPSC adjusted or pro forma basis on an
10 FPC monthly earnings surveillance report during the term
11 of the stipulation and settlement, FPC may petition the
12 Commission to amend its base rates, notwithstanding
13 Paragraph 4.

14 What did they say in that storm docket
15 proceeding? Well, FIPUG put on a witness who testified
16 that there was a 10 percent return on equity earnings
17 floor in PEF's last rate case, which was a reasonable
18 bottom line of earnings. That testimony is attached to
19 our response.

20 Similarly, FRF argued in its brief in that
21 docket that the 10 percent ROE still provides PEF with
22 the ROE that it agreed to as a "floor" in the 2002
23 stipulation. So they took the very opposite position in
24 response to the 2002 language in the stipulation and now
25 they are coming here and telling you that the same

1 language in the 2005 stipulation doesn't represent a
2 floor or minimum level of earnings.

3 **MR. REHWINKEL:** If I might add, Madam
4 Chairman. I don't know that those positions -- and I
5 don't have any knowledge of them. I don't know that
6 they were accepted by the Commission. In fact, I think
7 they were rejected.

8 **COMMISSIONER EDGAR:** Commissioner Argenziano,
9 did you have a follow-up?

10 **COMMISSIONER ARGENZIANO:** Can you hear me?

11 **COMMISSIONER EDGAR:** Yes.

12 **COMMISSIONER ARGENZIANO:** Sorry. You can hear
13 me?

14 **COMMISSIONER EDGAR:** We can hear you.

15 **COMMISSIONER ARGENZIANO:** Okay. I'm having a
16 hard time. Something is blocking in and out of sound
17 here. I guess I will wait and listen to the rest of the
18 discussion and the debate. I just am reading what I'm
19 reading, and I don't see it the same way as Progress. I
20 really don't. I see it as trying to change a
21 stipulation and I have real problems with doing so.

22 And in reading the statute along with the
23 stipulation, I just can't come up with what Progress is
24 coming up with. So I will listen to the rest of
25 discussion and debate.

1 **COMMISSIONER EDGAR:** Thank you, Commissioner.
2 Commissioner Skop.

3 **COMMISSIONER SKOP:** Thank you, Madam Chair.

4 I just wanted to see if possibly we could take
5 a brief break. I know it has been about two and a half
6 hours, and also I have a quick question for staff that I
7 can either do before that or after that.

8 **COMMISSIONER EDGAR:** You were reading my mind.
9 I just wanted to make sure we responded to the comments
10 that Commissioner Argenziano had put on fully or at
11 least to the best of our ability at this point.

12 Commissioner, why don't you pose your
13 question, and then in just a moment we will take a short
14 break.

15 **COMMISSIONER SKOP:** Thank you.

16 With respect to staff, I guess we haven't
17 heard a lot from staff on this. We have heard a lot
18 from the parties. I guess some of the comments made by
19 Mr. Rehwinkel suggest that, you know, taking in terms of
20 -- or Ms. Bradley, also, would imply that staff has got
21 it all wrong in its recommendation and does not know how
22 to construe a contract.

23 So I guess who's right and who's wrong in
24 terms of how did staff come up with its recommendation
25 which, you know, certainly took a lot of time and

1 effort, and I'd like to hear from our staff in fairness
2 to them.

3 **MR. SAYLER:** Commissioners, this is Erik
4 Sayler for Commission Legal staff.

5 Because the parties have placed the
6 stipulation in dispute and there is competing meanings
7 over what the stipulation actually means, they have
8 called upon the Commission to interpret those statutes.
9 And specifically at issue it appears to be Provisions 4,
10 7, and 14. And as the finder of fact, the Commission
11 may interpret all aspects of the stipulation and should
12 do so internally and consistently across the board.

13 It would be inconsistent to interpret that on
14 one hand, the stipulation provides that the parties can,
15 on one hand, ask for interim rates, but at the same time
16 deny them the ability to calculate those interim rates.
17 And Commission staff believes that the stipulation from
18 silence omitted any prohibition against allowing -- or
19 any prohibition against requesting an interim rate
20 increase. Therefore, that was some provision that, by
21 implication, was allowed under the statute, which is
22 366.071, which is the interim rate statute, which
23 expressly allows a utility to come in and ask for a
24 interim rate increase.

25 **COMMISSIONER ARGENZIANO:** Excuse me. Excuse

1 me. Can you hear me?

2 **MR. SAYLER:** Yes, Commissioner.

3 **COMMISSIONER ARGENZIANO:** Can I ask you a
4 question at this point? I guess what I'm struggling
5 with, and I'll say it again, is that what I'm reading in
6 the stipulation and what I'm reading in the statute
7 doesn't jibe with what you just said. I mean, words
8 mean what they say, and I'm not sure that you're trying
9 to not twist that to mean something else. So if you can
10 be more specific on -- maybe when we come back from the
11 break I'll give you a question that is more specific in
12 answering, because I just see that words mean what they
13 say. And you have now taken that beyond what I see the
14 words meaning and what the words are saying in both the
15 stipulation and the statute. So when we come back from
16 the break, hopefully I'll develop a question that maybe
17 can be more articulated that you can respond to.

18 **MR. SAYLER:** Yes, Commissioner. Why don't we
19 go ahead and do the break, and we'll confer and come
20 back.

21 **COMMISSIONER EDGAR:** Okay.

22 Commissioner Skop, anything further?

23 **COMMISSIONER SKOP:** No. I'll reserve those
24 until after the break.

25 **COMMISSIONER EDGAR:** The clock says to me

1 11:35. Let's come back at five minutes to.

2 **CHAIRMAN CARTER:** Thank you.

3 **COMMISSIONER EDGAR:** Thank you. We're on
4 break.

5 (Recess.)

6 **COMMISSIONER EDGAR:** We are back on the
7 record. My understanding is that our staff is
8 continuing to look at some case law, and I know that I
9 for one am getting hungry and I'm hearing that others
10 may as well. So we are going to break for lunch and we
11 will come back and reconvene at 1:00 to begin our
12 discussions on this item. And so we are on lunch break.

13 (Recess taken.)

14 We are back from lunch break and we are back
15 on the record.

16 When we took a break, we had, I believe, posed
17 some questions to our staff. Commissioner Skop, would
18 you like to kick us off?

19 **COMMISSIONER SKOP:** Yes. Thank you, Madam
20 Chair.

21 Just again trying to gain a better
22 understanding as to staff's rationale for the
23 recommendation, again, at issue seems to be the
24 interpretation of the stipulation as well as the
25 statute. And, again, I think there's been some

1 criticism to the extent that, that neither the statute
2 nor the stipulation are being properly construed. So I
3 just wanted to get a better understanding as to staff's
4 recommendation.

5 **MR. SAYLER:** Erik Sayler for Commission legal
6 staff.

7 Commissioner, we, we understand that there's
8 some ambiguity within the stipulation, and that is
9 whether or not they can request interim rates, and
10 that's Issue 2. And Issue 3 is whether or not that, the
11 interim rate statute can be applied. And we understand
12 and see the ambiguity and it's open to two different
13 interpretations, and we came up with the most plausible
14 interpretation that we thought would be out there for
15 interpreting both the stipulation and the statute and
16 that's what we put forward. And we do support our
17 interpretation of both, but we understand that there are
18 different ways to see it.

19 **COMMISSIONER SKOP:** As, as a follow-up to
20 that, I guess one of the issues I'm struggling with, and
21 again I understand the stipulation as well as the
22 provisions of the statutes, but under a normal
23 proceeding for a rate, rate increase, you know, interim
24 rate relief is, is readily available. And I guess what
25 I'm struggling with, and I don't know if this is

1 factored into, you know, the staff's reasonable
2 interpretation to the extent that it comports with how
3 things are normally done in a typical rate case, but
4 interim relief is typically available for addressing
5 those situations.

6 And if I understand this correctly, under the
7 stipulation that they -- and if their earnings had
8 fallen beneath the 10 percent threshold, they were
9 entitled under the stipulation to seek a rate increase
10 via a limited proceeding or a full-blown rate case; is
11 that correct?

12 **MR. SAYLER:** My understanding is that if they
13 fell below the 10 percent threshold, they could come in
14 for a full-blown rate case. And as far as a limited
15 proceeding, I would say that would be for other things
16 such as contemplated for like Bartow or other issues.

17 **COMMISSIONER SKOP:** Okay. Well, I'm looking
18 at, give me a moment, but I believe it was paragraph
19 seven of the settlement agreement. And it states if
20 PEF's retail base rate earnings fall below a 10 percent
21 return on equity as reported by a Commission adjusted or
22 pro forma basis on the PEF monthly earnings surveillance
23 report, which I think staff has provided to us, during
24 the term of the agreement PEF may petition the
25 Commission to amend its base rates, notwithstanding the

1 provision of Section 4 either as a general rate
2 proceeding or as a limited proceeding pursuant to
3 Section 366.076. So it should be an either/or; right?

4 **MR. SAYLER:** Yes, sir.

5 **COMMISSIONER SKOP:** Okay. All right. So,
6 and, again, I'm just trying to gain a better
7 understanding. I mean, staff's recommendation at least
8 to me seems straightforward. I know there's adamant
9 opposition to that from Mr. Rehwinkel and the, and the
10 parties. Again, to me it's a matter of construction,
11 and I'm not so sure that the, the parties kind of
12 contemplated it would be construed this way. I mean,
13 I'm trying to look at it holistically in total and what
14 happens in, in a normal rate case proceeding where you
15 have file-and-suspend and, you know, you get interim
16 rates pretty much as a matter of course.

17 But here the way staff has construed, it seems
18 to parallel what happens normally under the statute;
19 whereas, the way Mr. Rehwinkel and the other parties
20 would construe it that it's precluded by virtue of the
21 settlement agreement. I think that's kind of the
22 tension. But if staff could add just any more
23 clarification to that, then I have one brief question
24 for Mr. Walls.

25 **MS. FLEMING:** Commissioner, I believe -- this

1 is Katherine Fleming, Commission legal staff. I think
2 what you're touching on is under Section 366.071.

3 During -- a utility may seek interim rate increases
4 during the pendency of a final rate case proceeding.

5 We looked at the statute. It's clear that a
6 utility may seek interim rate increases during the
7 pendency of a rate base proceeding if there has not been
8 a waiver to that effect.

9 We then turned to the stipulation itself that
10 the parties have entered into. And specifically under
11 Section 4, which is what we were looking at, there was
12 explicit language prohibiting an interim rate decrease
13 but there was no such language prohibiting an interim
14 rate increase. And that's how staff drew its analysis
15 that the utility is able to seek a base rate proceeding
16 if they fall below the 10 percent threshold as
17 identified under Section 7, and there is no explicit
18 language prohibiting an interim rate increase under
19 Section 4.

20 **COMMISSIONER SKOP:** Okay. So just as a point
21 of clarification, notwithstanding the settlement
22 agreement terminating at the end of 2009 which would
23 require a general rate increase proceeding on its own,
24 that separate and apart from that if the earnings fell
25 under the 10 percent threshold, they would still have

1 the right under the settlement agreement, as staff has
2 interpreted it, to seek either a general rate increase
3 or a limited proceeding to address earnings falling
4 below the 10 percent threshold; is that correct?

5 **MS. FLEMING:** That's correct.

6 **COMMISSIONER SKOP:** Okay. And then just a
7 quick question to Mr. Walls. With respect to the number
8 or the difference between the last two projections on
9 ROE with 822 versus the 836, I believe that's a 14 basis
10 point difference. If the Commission were to adopt the
11 staff recommendation as to Issue 9 with respect to the
12 percentage increase factor, would that difference not be
13 reduced to seven basis points?

14 **MR. WALLS:** As I understand that, it accounts
15 for the staff rec in Issue 9.

16 **COMMISSIONER SKOP:** Okay. All right. Thank
17 you for that clarification.

18 And then I think I had one further question.
19 To Mr. Rehwinkel, I understand your position and I've
20 read, at lunch I went back and read both your brief as
21 well as the rebuttal brief from PEF. There seems to be
22 a lot of concern expressed in your brief as to a prior
23 filing by an IOU in a rate case and the timing and all
24 the things that are going on.

25 You know, the Commission as a whole, my

1 colleagues, staff, we're subject to the same
2 constraints. We just can't tell a company you can't
3 file for something. I mean, they have a legal right to
4 file whatever they choose to file. So I'm trying to
5 better understand that concern and how that falls into
6 being able to adequately address issues that are before
7 us in a timely manner.

8 **MR. REHWINKEL:** Commissioner, with respect to
9 the time constraint issue, that issue is more directed
10 to the Bartow and the accounting issues which are much
11 more fact based and substantive. This is really a legal
12 argument. And, I mean, we'd have to be here today
13 anyway when you're suspending. So our concern was not
14 so much directed at the interim itself. Does that, is
15 that the question you were asking about?

16 **COMMISSIONER SKOP:** Yes. And I think I have
17 one additional question, if, if time will permit me.

18 **MR. REHWINKEL:** I do have, I do have a desire
19 to respond to what Ms. Fleming said with respect to the
20 base rate increase, if you will permit me.

21 **COMMISSIONER SKOP:** Go ahead.

22 **MR. REHWINKEL:** I, I don't know if it was
23 intended to convey this, but I just want to be clear
24 that the petition in 090079, the increase, the
25 \$499 million rate increase request is not, and I think

1 the company will agree with this, is not made pursuant
2 to paragraph seven of the stipulation. And the only
3 thing that's made, that's requested from a rate increase
4 standpoint pursuant to seven is the Bartow limited
5 proceeding request, and that has its own separate
6 non-earnings-based interim request. The interim request
7 that you're dealing with on this item right now has
8 nothing to do with paragraph seven, giving them the
9 right to do it.

10 **COMMISSIONER SKOP:** Okay. Very well, Madam
11 Chair.

12 **COMMISSIONER EDGAR:** Thank you, Commissioner.
13 I think I have a question.

14 **CHAIRMAN CARTER:** Madam Chairman.

15 **COMMISSIONER EDGAR:** Commissioner.

16 **CHAIRMAN CARTER:** While you're, while you're
17 formulating your questions, I've just got a general
18 question for staff on this.

19 **COMMISSIONER EDGAR:** Sure. Commissioner
20 Carter, go right ahead.

21 **CHAIRMAN CARTER:** I'm sorry I didn't ask it
22 before but --

23 **COMMISSIONER EDGAR:** That's okay.

24 **CHAIRMAN CARTER:** I think that the posture
25 that we're in, and I'm asking staff, is that you have

1 the parties to a stipulation that they agreed to and
2 there's a question in terms of interpretation of that
3 and the parties differ on that interpretation.

4 Therefore they've come to the Commission for us to make
5 a determination as to the resolution of that, this
6 agreement in terms of how to interpret the provisions of
7 that stipulation. Is that correct? Is that where we
8 are?

9 **COMMISSIONER EDGAR:** And to staff.

10 **MR. SAYLER:** Yes. Yes, Commissioner.

11 **CHAIRMAN CARTER:** All right. Thank you. That
12 lets me know exactly what the bottom line is.

13 Thank you, Madam Chair.

14 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.

15 **COMMISSIONER ARGENZIANO:** I have a question
16 when you're done.

17 **COMMISSIONER EDGAR:** Commissioner Argenziano.

18 **COMMISSIONER ARGENZIANO:** Well, to the line of
19 questioning that Commissioner Skop just had, it seems to
20 me, and when we're done with this I'll have some
21 comments for the whole, I guess the whole discussion,
22 but to this one particularly it seems to me that staff
23 wants to create something that's not in the stipulation
24 based on the omitted language when I have no idea why
25 they omitted the language. So I'm not sure why we're

1 taking that type of a position. And if they can think
2 on that and then I'll come back with a whole line of
3 questions and my thoughts on the discussion.

4 **COMMISSIONER EDGAR:** Commissioner Argenziano,
5 is that a question posed to staff now?

6 **COMMISSIONER ARGENZIANO:** Well, I'd like them
7 to think about that or others to think about that
8 because it seems to me that they want to create
9 something that's not in the stipulation based on what's
10 omitted that's not in there, and I don't even know why
11 it was omitted. I mean, maybe there was a reason. We
12 have, we have attorneys I'm sure who are very capable
13 attorneys when it came to drawing up stipulations and
14 contracts who maybe, who maybe omitted that purposely.
15 And I'm not sure that staff is not far reaching for
16 something that's omitted and then trying to change what
17 was, what was agreed upon in the stipulation. And if
18 that doesn't do it, I'll just wait and go through all my
19 thoughts that I've jotted down, and that may help, at
20 the proper time.

21 **COMMISSIONER EDGAR:** Staff, is there a
22 comment? If not, we can -- no comment at this time?

23 **MR. SAYLER:** No comment at this time.

24 **COMMISSIONER EDGAR:** Okay. Okay. Then,
25 Commissioner Argenziano, I'm going to try to, try to

1 frame a question, and then we can come back to you here
2 in a moment.

3 To our staff, if, if the answer to Issue 2 is
4 yes, then, as one point, then I'm coming back to, I
5 think it was a point raised by Commissioner Argenziano
6 and maybe others as well about can the statutory
7 requirements to establish the entitlement for interim
8 rates be met if there is not an authorized rate of
9 return?

10 So I guess my question is because there is
11 some question as to whether there is an authorized rate
12 of return as it is laid out as a requirement in the
13 statute, if there is not, then is there a way for the
14 interim rate provision in the statute to be implemented?

15 **MR. SAYLER:** Yes, Commissioner. According to
16 the statute, it says that if the company, if the company
17 hasn't otherwise waived the right to interim rates in a
18 stipulation or something, which is Issue 2, whether or
19 not they've waived it or not, and then in Issue 3 is
20 whether or not the statute, they can find or have
21 established a prima facie case underneath the statute.
22 And the staff believes that if they have established a
23 prima facie case, then interim rates should be
24 authorized.

25 However, the Commission as the finder of fact

1 makes that determination whether they have made their
2 prima facie case. And the statute clearly says that
3 they have to make their prima facie case according to
4 that -- I'll read it. "To establish a prima facie case
5 of interim relief, the public utility shall demonstrate
6 that the public utility is earning outside the range of
7 reasonableness on a rate of return as calculated in
8 accordance with (5)." And (5) lays out the formula by
9 which interim rates are granted. And if the Commission
10 finds that they have not established a prima facie case
11 in accordance with (5), then the Commission does not
12 have to authorize interim rates. And it seems to be
13 turning on the question of authorized rate of return.

14 **COMMISSIONER EDGAR:** Uh-huh. So to expand on
15 that, if, if the language in the stipulation -- the
16 language that's in the stipulation that says Progress
17 will not have an authorized return on equity range, et
18 cetera, et cetera, in provision 14, if that is
19 interpreted as meaning that there is no last authorized
20 rate of return on equity, is there a way for Progress to
21 establish a prima facie case under the statute?

22 **COMMISSIONER ARGENZIANO:** And, Madam Chair, I
23 have a question also.

24 **MR. SAYLER:** That is -- one moment.

25 **COMMISSIONER ARGENZIANO:** Can you hear me?

1 **COMMISSIONER EDGAR:** Yes, Commissioner. I'm
2 going to wait for our staff to respond to mine, and then
3 we will come right back to you.

4 **MR. SAYLER:** To answer that question
5 adequately, do you mind if I walk through the statute a
6 little bit?

7 The -- it says that in setting interim rates
8 the Commission shall determine the revenue deficiency or
9 excess by calculating the difference between the
10 achieved rate of return and its required rate of return.
11 The achieved rate of return is what they're earning
12 currently today. The required rate of return would be
13 what would normally be calculated from their last
14 authorized return on equity. And subsection or (b)
15 defines achieved rate of return or the required rate of
16 return, and under required rate of return the last
17 authorized return on equity means the minimum of the
18 range of the last authorized return on equity
19 established in the most recent individual rate
20 proceeding. And then the statute in its last sentence
21 says the last authorized rate, authorized return on
22 equity for purposes of this subsection shall be
23 established only in one of three ways -- the most recent
24 rate case of the utility in a limited proceeding for the
25 individual utility or by voluntary stipulation of the

1 utility approved by the Commission. And we do have a
2 voluntary stipulation approved by the Commission here.

3 **COMMISSIONER EDGAR:** Okay. And you're looking
4 at 366.071(5)(b)(3)?

5 **MR. SAYLER:** (5)(b)(3). Yes, ma'am. My
6 apologies.

7 **COMMISSIONER EDGAR:** Okay. That's, that's
8 fine. I just wanted to make sure that we were both
9 looking at the same thing.

10 Okay. Commissioner Argenziano, you had a
11 question.

12 **COMMISSIONER ARGENZIANO:** I guess the question
13 was I was trying to find out where in the statute did it
14 indicate what staff said I guess a moment ago if the
15 company hasn't waived? Where is that language in the
16 statute?

17 **COMMISSIONER EDGAR:** She is asking about the
18 statement about if the company has not waived.

19 **COMMISSIONER ARGENZIANO:** Right. Staff had
20 indicated that if the company had waived and indicated
21 to me, I think -- if I'm wrong, that's fine, just
22 correct me -- that in 366.071 that that language would
23 be in there. And I'd like him to point out where in the
24 statute that language is because I'm reading the
25 stipulation and I'm reading the statutes and I don't see

1 that.

2 **MR. SAYLER:** Commissioner Argenziano, you are
3 right. The waiver is not in the interim rate statute.

4 **COMMISSIONER ARGENZIANO:** And the ultimate
5 question then is if there's no authorized ROE, how do
6 you, how do you use that statute to do what you've just
7 described to Commissioner Edgar if there's no authorized
8 ROE? So you need to be more specific on how you're
9 using that statute you did.

10 **COMMISSIONER EDGAR:** To our staff, I think
11 that Commissioner Argenziano is asking, I think, a
12 similar question to what I was posing. And as you, as
13 you walk through the statute, I don't know if --

14 **COMMISSIONER ARGENZIANO:** It wasn't answered,
15 Madam Chairman.

16 **COMMISSIONER EDGAR:** Well, Commissioner, I
17 think what the staff was trying to do is walk, walk me
18 through the different provisions that are in 366.071,
19 which takes you down through (5)(b)(1), (2), (3)
20 basically. But, again, I think that we're kind of
21 posing a similar question or trying to focus in on a
22 similar concern or thought or question. So I'm going to
23 ask our staff to try to more specifically address
24 Commissioner Argenziano's question, if you can. Thank
25 you.

1 **MS. FLEMING:** This is Katherine Fleming.
2 We'll give it a try.

3 Commissioner Argenziano, when we were looking
4 at this issue, we first started with the first step
5 which is looking at the settlement and whether the
6 settlement prohibited Progress from seeking an interim
7 rate increase. We looked under Section 4 and there
8 wasn't any express language prohibiting Progress from
9 seeking an interim rate increase. So that was the
10 substance of Issue 2. Then Issue 3 is whether Progress
11 has made a prima facie entitlement to requesting interim
12 rates.

13 I think the question you're asking is, with
14 respect to the settlement, I believe it's under (14), it
15 states that there is no authorized rate of return. The
16 way staff looked at this with respect to the settlement
17 as a whole, while it's clear that it does not authorize
18 a minimum rate of return, rate of return under (10) of
19 the settlement, it does contemplate that if PEF's retail
20 earnings fall below 10 percent, PEF could seek for a
21 base rate proceeding or a limited rate base proceeding.

22 We've looked at that as a threshold where the
23 utility has an opportunity to file for some sort of rate
24 relief. And we've then turned to (4) which specifically
25 addresses the filing for a rate base proceeding, and it

1 states that rate base proceeding may not be filed for
2 any rates that would take effect prior to January 2010.
3 There wasn't any explicit language prohibiting Progress
4 from seeking an interim rate increase, so staff believed
5 that it was appropriate that they could seek for one.

6 As far as how we got to the ROE calculation,
7 we walked through the analysis in the statute. And if
8 the Commission -- the first determination for the
9 Commission to make is whether the utility has made a
10 prima facie entitlement that it is earning outside the
11 range of reasonableness.

12 **COMMISSIONER ARGENZIANO:** Can you hear me?
13 Can you hear me? Hello?

14 **COMMISSIONER EDGAR:** Thank you, Ms. Fleming.
15 Commissioner, go ahead.

16 **COMMISSIONER ARGENZIANO:** I think what they're
17 just repeating is the same thing over and over gain and
18 not really getting to the heart of what I'm getting at.
19 I'll wait for my statement and I will definitely address
20 the lack of their understanding of what I am really
21 asking and the lack of their specification in answering
22 the questions I have. So I'll wait at the proper time
23 and then just go ahead through my statements and where I
24 see that staff's recommendation is not reasonable.

25 **COMMISSIONER EDGAR:** Okay, Commissioner.

1 Thank you. I think we have a few other questions from
2 the bench, so we will come back to you.

3 Commissioner Skop.

4 **COMMISSIONER SKOP:** Thank you, Madam Chair.

5 And this may go back to the statute itself.
6 But in provision (5)(a), I mean, excuse me, (5)(b)(2) it
7 speaks to the required rate of return shall be
8 calculated as the weighted average cost of capital for
9 the most recent 12-month period, and then they look to
10 the, to the prior authorized ROE for the plug-in number.
11 But it seems to me that, you know, just -- I'm looking
12 at this holistically, and I recognize the, you know, the
13 struggles that, or the tensions that are going on here
14 with staff is trying to make, I guess in its view, a
15 reasonable interpretation of, of how to harmonize this
16 request with what happens in the course of a normal rate
17 increase proceeding. But some of that requires some
18 interpretation, and I don't want to say quantum leaps,
19 but some reasonable thinking to get to that; whereas,
20 Mr. Rehwinkel and his related parties are saying, no,
21 absolutely not, there is no provision for this by virtue
22 of the fact there is no established ROE.

23 I think just trying to look at it at a high
24 level perspective, again what perplexes me here is that
25 in effect we're arguing about something that in a normal

1 rate case we wouldn't be arguing about. It's the
2 settlement agreement by virtue of its drafting or what
3 have you is somewhat leading to, in my mind, an absurd
4 result to the extent that in a normal rate case interim
5 rate relief is granted as a matter of course, but here
6 it's significantly at issue maybe because of the
7 procedural posture we're in. But clearly there is that
8 10 percent threshold that is expressly stated in the
9 settlement agreement. And it seems to me in reading the
10 settlement agreement, you know, the revenue sharing
11 implies to me that there is no earnings cap. But the
12 threshold, as staff I think has kind of interpreted,
13 serves as an earnings floor to the extent that if you
14 fall below the 10 percent, you're entitled to seek a
15 base rate proceeding or you're entitled to seek a
16 limited or an interim proceeding to go address that,
17 that deficit, that deficit, I mean, that -- excuse me,
18 I'm getting tongue-tied -- earnings deficit problem.

19 But looking at (5) (b) (2) in relation to
20 (5) (a), you know, the difference between the achieved
21 rate of return for the public utility and the required
22 rate of return seems to be we know what the achieved
23 rate is. The required rate of return holistically is
24 the weighted average cost of capital plugging in an ROE
25 that we have to somewhat synthesize. And I think

1 that's, if I heard Commissioner Argenziano correctly,
2 the crux of her concern is there is no ROE, just as
3 Mr. Rehwinkel has pointed out.

4 But I think that, you know, stepping away from
5 all that, it would just seem to me very simple that, you
6 know, one would know what the weighted average cost of
7 capital would be and could apply, you know, some good
8 rules of thumb. I think that staff has probably done --
9 and, again, staff's approach may not be the right one,
10 but it's certainly a reasonable interpretation of, you
11 know, how they, you know, approach this, and it may be
12 in light of what happens normally in a rate case. Maybe
13 they're trying to harmonize. But it seems to me that
14 that weighted average cost of capital for the most
15 recent 12-month period could certainly be calculated. I
16 mean, that doesn't seem to be that hard. We know what
17 the short-term costs, I mean, the long-term debt is. We
18 know, you know, the equity ratio. We know a bunch of
19 things that should allow, you know, should we choose to,
20 to look at that, that that would provide that
21 difference.

22 But it seems to me, I mean, holistically we're
23 fighting about an issue, but in the grand scheme of
24 things the dollar value magnitude of that is, is, is big
25 but it's not as big as the Bartow that we'll consider on

1 a forward-going basis. But I guess I'm struggling with,
2 you know, when I initially read staff's recommendation,
3 I was somewhat supportive of it, but I saw that they
4 had, I saw where they had to infer certain things and
5 make certain assumptions to get to the conclusion they
6 did.

7 But I guess what I'm really struggling with,
8 and I probably said this and not as concise because it's
9 been a long day so far, but in a normal rate case
10 interim rates are a matter of course and here they're at
11 issue. And to me it just seems like a complete
12 inconsistent outcome that turns on the interpretation of
13 the settlement agreement or a lack of maybe expressly
14 stating something in a settlement agreement that might
15 have been overlooked by the same parties that agreed to
16 it that are before here, before us today. And as we've
17 heard, there's also two different interpretations of
18 what constitute a chilling effect. I mean, we've seen
19 the company's perspective and we've seen OPC's and the
20 Intervenor's perspective of neither party is going to be
21 inclined to work together based -- if the interpretation
22 doesn't go their way.

23 So, you know, getting to the end result,
24 maybe, you know, the days of full-blown rate cases have
25 reached us now where settlements are maybe not the best

1 thing if they're going to continue to cause issues that
2 arise such as this. I know Commissioner Argenziano has
3 repeatedly expressed the need for full-blown rate cases.
4 And, you know, I like, and I think the Commission as a
5 whole, we, we support settlements when they can be
6 achieved. But this one, it seems like we're -- you
7 know, it just doesn't seem to be a good use of, of
8 resources to hash out over something that is ambiguous,
9 but there could be equally competing rational views of
10 what the right result is. And how I'm trying to
11 harmonize it is what happens in a normal rate case. And
12 to deny somebody what happens in a normal rate case
13 seems to me that it would just, to construe language
14 against them in that manner would just completely throw
15 any trust out the window that I might have in terms of
16 wanting to enter into a future settlement agreement.
17 Again, if --

18 **COMMISSIONER ARGENZIANO:** Excuse me, Madam
19 Chair.

20 **COMMISSIONER EDGAR:** Commissioner.
21 Commissioner Argenziano.

22 **COMMISSIONER ARGENZIANO:** Yes. I'm sorry.
23 I'm having a hard time with my phone. I hope you can
24 hear me all right.

25 **COMMISSIONER EDGAR:** Did you want to

1 interject?

2 **COMMISSIONER ARGENZIANO:** I wanted to add to
3 something that Commissioner Skop says that -- he keeps
4 using the phrase "a normal rate case." This is not a
5 normal rate case and it is very different. And I don't
6 understand his confusion on what -- this is a
7 stipulation and it's not -- it's very different than the
8 normal rate case, and I'm wondering if he's trying to
9 say it is. And I'm not really getting his message other
10 than him saying, you know, a normal rate case. This is
11 not normal.

12 **COMMISSIONER SKOP:** Well, I'd be happy to
13 clarify that. What I'm saying is a normal rate case has
14 been filed which represents the termination of the
15 settlement agreement at the end of December,
16 December 31, 2009. So that's the predicate for the
17 existing rate case. But under the existing settlement
18 agreement as I read it that if Progress's earnings fall
19 below the 10 percent threshold, that they're entitled to
20 seek a limited proceeding or a full-blown rate case to
21 address that, that shortfall. And I think that the, the
22 issue is, as, Commissioner, you've correctly pointed
23 out, is the tension between the provisions of the
24 settlement agreement which have some ambiguities in them
25 and the statute which have some specific requirements

1 and trying to, to harmonize something that is frankly
2 difficult to harmonize. And I think our staff has done
3 a decent job of trying to make some assumptions to
4 arrive at their result. And I'm not saying that that's
5 the right result, but, again, I think that, you know, at
6 least what they've done is one reasonable interpretation
7 of how to remedy the disagreement between the parties.
8 But, again, that may not be the right approach. Again,
9 that's at the will of the Commission. But I agree with
10 you that there is a full-blown rate case that addresses
11 the end of the settlement agreement. But equally too
12 under the settlement agreement they're entitled to seek
13 a limited proceeding to address a revenue shortfall.

14 **COMMISSIONER ARGENZIANO:** It's not like a
15 normal electric or gas rate case. PEF bargained,
16 Progress bargained for that contract. And I just
17 respectfully disagree that, that, that staff came up
18 with a reasonable outcome. I think they were grasping
19 and they, and they reached and twisted, I think, things
20 that they shouldn't have, and I'll be more specific to
21 that. To me, contract controls, so it's not a normal
22 rate case by any means.

23 And I think, Madam Chair, when the time is
24 proper, I have other comments that will maybe be more
25 specific to why I think that's so.

1 **COMMISSIONER EDGAR:** Okay. Thank you,
2 Commissioner.

3 Commissioner McMurrian, did you have a
4 question?

5 **COMMISSIONER McMURRIAN:** I don't know if this,
6 I don't know if it's a question. I think it's more of a
7 comment to some of the things we've been talking about.

8 Commissioner Argenziano talked about the
9 omitted language and I indicated earlier that that was
10 important to me to at least discuss and try to figure
11 out why that wasn't there and the lack of it. And with
12 the case law that staff notes in their, in their
13 footnotes, it seems that it's important that it's not
14 there. And even if you don't compare it to the 2002
15 language, even looking at the 2005 language by itself in
16 paragraph four, the fact that it's on one side of the
17 equation with respect to rate decreases and not on the
18 other side with respect to interim rate increases to me
19 is important.

20 I will say that I think both sides have made
21 good arguments in support of how they read the
22 stipulation and the statutes. I don't think it's as
23 clear as either of them make it out to be. I agree with
24 what Mr. Sayler said about that it's ambiguous in the
25 stipulation and that's why we're all here. They're

1 asking -- and it sort of feels like deja vu, to be
2 honest. They're asking us to look at what they've
3 agreed to, and obviously none of us were there, so it's
4 difficult.

5 But I guess to me what you said about there
6 could be a reason that that language is omitted, that's
7 a pretty persuasive point to me because it seems like
8 they could have very well, and, again, I don't know what
9 happened, but they could have very well, you know, taken
10 that out very deliberately in order to get something
11 else for their efforts. And we don't know what that is.
12 But to me that's persuasive that in the past it's been
13 there, and in particular just looking at this paragraph
14 in 2005 it's only on one side and not the other. In
15 fact, with respect to the, with the side that is there
16 which says, "Any reduction in Progress's base rates and
17 charges including interim rate decreases," and the
18 wording is much less strong on the other side, there is
19 no "any" reference. It does say, "may not petition for
20 an increase in base rates and charges," and then there's
21 no language about including interim rate increases. It
22 seems like that's significant to me and I guess I can't
23 get past that.

24 You've all raised some good points though
25 about Section 14 and about the no range. But I guess I

1 keep having trouble with coming back to seven, and to me
2 seven looks like an earnings test. I think OPC says
3 it's not. But I guess to me when you, if you look at
4 earnings falling below a 10 percent return on equity, as
5 the words say there, to me that speaks to an earnings
6 test. And I think that's what staff is saying, that
7 that paragraph seven has to have some meaning there and
8 that it's pulled out 10 percent ROE for some reason and
9 has allowed general rate proceeding or a limited
10 proceeding to be, to be filed in that situation. I
11 don't know why I can't speak today after lunch. It
12 allows that a general rate proceeding or a limited
13 proceeding to take effect. And in a general rate
14 proceeding the statutes allow companies to seek interim
15 rates, and to me that's how I've read staff's arguments.
16 Like I said, I think there have been good arguments on
17 both sides, but to me it's compelling how staff has laid
18 it out and the fact that that language is not there on
19 that one side of the equation with respect to paragraph
20 four and you do have the 10 percent return on equity
21 listed in paragraph seven.

22 **COMMISSIONER ARGENZIANO:** I'm sorry,
23 Commissioner McMurrian. You keep going in and out. I
24 don't know if Commissioner Carter is having the same
25 problem, but I am.

1 **COMMISSIONER McMURRIAN:** I'm sorry.

2 **CHAIRMAN CARTER:** It is fading in and out.

3 **COMMISSIONER McMURRIAN:** Did he say I was too?

4 Chairman, can you hear me?

5 **CHAIRMAN CARTER:** I can now.

6 **COMMISSIONER McMURRIAN:** Okay. I probably
7 kept turning away from the microphone.

8 I guess what I was saying at the last part is
9 I do see the paragraph seven, Commissioner Argenziano,
10 as an earnings test. OPC definitely disagrees with
11 that, or at least I heard that earlier, and I think I
12 see them nodding heads about that now.

13 But to me, once you -- in that paragraph seven
14 that sets up the 10 percent ROE, that it specifically
15 allows a general rate proceeding or a limited
16 proceeding. And in a general rate proceeding, which is
17 what we've already got underway with this, with this
18 particular docket for the major rate case, you're
19 allowed, a company is allowed to seek interim. I don't
20 think that means that they don't have to make a showing
21 for it. Clearly the statute says they have to make a
22 showing for that and it's up to us to decide. But I
23 believe that that's -- I think that's what staff's
24 analysis was with respect to seven and how -- and why
25 14, even though it clearly says that there's no range

1 of, there's no authorized range of return on equity, you
2 still have to place some import on paragraph seven.
3 And, again, to me it's also very, and I think I said
4 this earlier too, but it's also important to me that in
5 paragraph four that it includes interim rate decreases
6 on the one hand but does not include the interim rate
7 increases on the other. So I hope I went back through
8 what I said. Maybe you heard me that time.

9 **CHAIRMAN CARTER:** I heard you.

10 **COMMISSIONER ARGENZIANO:** Yes, I heard you.
11 It sounded very similar to what Progress said and what
12 staff said.

13 **COMMISSIONER McMURRIAN:** Yes.

14 **COMMISSIONER EDGAR:** Excuse me.

15 Commissioners, any questions or comments at this point?

16 **CHAIRMAN CARTER:** Just a, just a general
17 question, Madam Chairman.

18 **COMMISSIONER EDGAR:** Commissioner Carter.

19 **CHAIRMAN CARTER:** How -- I noticed that we've
20 disposed of Issue 1. How are we proceeding further
21 with, with this, this matter here? Because I think that
22 a lot of us, we've been talking -- I think what we've
23 been talking about primarily was -- was it Issue 2?

24 **COMMISSIONER EDGAR:** I think that my
25 interpretation --

1 **CHAIRMAN CARTER:** I guess I'm fading in and
2 out and I'm sorry about that.

3 **COMMISSIONER EDGAR:** No. That's okay. That's
4 okay. I appreciate you hanging in there with us. My,
5 my read, my analysis is that most of the discussion has
6 revolved around Issues 2, 3 and 8.

7 **CHAIRMAN CARTER:** Okay.

8 **COMMISSIONER EDGAR:** And my words, I would
9 look at 4, 5 and 6 kind of as fallouts from decisions on
10 2, 3 and 8; 7 as a related, of course, but separate
11 issue; 9, 10 and 11 dependent upon the decision on 8 is
12 kind of the way I'm looking at it.

13 So I guess I would say let's go ahead and have
14 whatever further discussion and comments, and then we
15 can see if anybody is at the point of maybe trying to
16 construct a motion to see if that will take us through.

17 So, Commissioner Argenziano, you had said that
18 you wanted to make some comments. Would this be the
19 time?

20 **COMMISSIONER ARGENZIANO:** Can you give me a
21 moment and let someone else go, and I'll return in a
22 minute.

23 **COMMISSIONER EDGAR:** Okay. Commissioner Skop.

24 **COMMISSIONER SKOP:** Thank you, Madam Chair.
25 Again, I think, you know, staff's recommendation again

1 to me was straightforward recognizing that, you know,
2 there were some gap filling measures that needed to be
3 taken to get to staff's recommended result.

4 In terms of Commissioner Argenziano's concern,
5 I understand her concerns. I think what gives me the
6 most concern would be the provision in the statute that
7 requires express ROE. I think staff has at least
8 provided one reasonable interpretation on what you would
9 use in that instance that may or may not control. But,
10 again, I just wanted to -- that's the most troubling
11 thing to me. I think that clearly the stipulation
12 language does not expressly exclude the ability to seek
13 interim relief as has been noted by Commissioner
14 McMurrian.

15 And I'd also note that there is controlling
16 case law, the *Persani* (phonetic) case from the Florida
17 Supreme Court of '65, which basically stands for the
18 proposition if the parties intended a certain provision,
19 it would have been a simple matter to include it. The
20 fact that they did not indicates the intention to
21 exclude a provision. So I think that that, you know,
22 ruling of the court lent some clarity to the extent of
23 the disconnect between the 2002 settlement agreement.
24 And the 2005 or the 2002 said you can't do a decrease or
25 an increase; whereas, the 2005 agreement clearly states

1 that you cannot seek a decrease. So I think that, you
2 know, the fallout issue from that then turns on the
3 requirement of the statute in terms of the express ROE.

4 **COMMISSIONER EDGAR:** Commissioner Skop, I tend
5 to agree.

6 Commissioner Argenziano.

7 **COMMISSIONER ARGENZIANO:** Yes. Can you hear
8 me?

9 **COMMISSIONER EDGAR:** We can.

10 **COMMISSIONER ARGENZIANO:** Okay. First, first
11 let me say to what Commissioner Skop had just said that
12 there is no authorized ROE, so staff has no reasonable
13 way of creating that ROE. There is none. And the other
14 thing I wanted to comment on was Commissioner McMurrian
15 had said that she thinks that seven looks like an
16 earnings test. It's not. It's a trigger to allow
17 filing for petition only. So those arguments just don't
18 cut it with me. They're just not there in my opinion
19 and what I found in both the statutes and the
20 stipulation.

21 Also -- hang on one second. I think everybody
22 knows that I kind of stick to the statutes. And when I
23 do that, it's fair, it's just fairly simple to see for
24 me.

25 Section 4 of the 2005 stipulation says no

1 party will seek to change Progress's base rates unless
2 certain things occur. Well, Section 7 is one of those
3 certain things. It says that "If Progress's return on
4 equity falls below 10 percent, Progress is entitled to
5 file," excuse me, "to file either a general rate
6 proceeding or a limited proceeding." That to me means
7 file a rate case or a limited proceeding.

8 Progress has chosen in Item 9 today to file a
9 general rate proceeding. And then when I read in
10 Chapter 366, "One of the usual components of a general
11 rate proceeding is the right to request interim rates as
12 provided for in Section 366.071." So I go to 366.071,
13 the interim statute. It basically says the company is
14 entitled to interim rates under specified conditions:
15 That the company's ROE has fallen below the minimum
16 authorized range of return on equity from its last
17 proceeding which can be a full rate case, a limited
18 proceeding or a voluntary stipulation. In Progress's
19 case we have a voluntary stipulation.

20 So back to the 2005 stipulation. Section 14
21 of that stipulation explicitly and unequivocally states
22 that Progress will have no authorized range of return on
23 equity. And since I read Section 366.071 to require an
24 authorized range of return on equity, the case is closed
25 in my mind. And it seems to me that Progress and staff

1 are attempting to create an ambiguity, excuse me, an
2 ambiguity in the contract or stipulation which they can
3 use I guess legal principles to resolve. The ambiguity
4 they are trying to create, and that's what I see they're
5 trying to create, if the stipulation says that you can
6 file a general rate proceeding, a rate case, and rate
7 cases include the opportunity for interim rates, then
8 you have to find a way to use the very strict, very
9 prescriptive and very precise language that's in the
10 statute before you can grant the interim rates.

11 Since the stipulation itself seems to omit an
12 element required to establish a right to interim rates,
13 we have to create some way to grant them to resolve the
14 ambiguity we have created precisely so that we can grant
15 the interim rates which would be prohibited in the
16 absence of this ambiguity.

17 I believe the error that staff has in creating
18 the ambiguity in the first place is the right to use the
19 interim rate statute. Instead, staff should conclude,
20 this is what I think staff should have concluded, that
21 since the stipulation was drafted by very highly paid
22 lawyers who clearly know the ins and outs of Chapter
23 366, shouldn't we decide that the parties' failure to
24 provide some way of authorizing interim rates is
25 intentionally omitted, was it not included -- the fact

1 that it was not included, presumed to be omitted, rather
2 than turn this principle on its head and conclude that
3 although the contract is silent, of course, we have to
4 find a way to allow interim rates by manipulating the
5 contract since the case, since in this case the statute
6 is less amenable to that type of manipulation? So,
7 accordingly, I will be voting to reject staff's
8 recommendation and deny Progress's petition for interim
9 rate relief.

10 **COMMISSIONER EDGAR:** Thank you, Commissioner.

11 Commissioners, any other questions or comments
12 at this time?

13 **CHAIRMAN CARTER:** Commissioners, I'm sorry.
14 My phone was fading in and out. But I think that
15 Commissioner Argenziano was very eloquent in, in her
16 presentation which she's just gone through there and it
17 made tremendous sense to me. I'm not on my meds, so you
18 can't prescribe it to that. (Laughter.) But it made --

19 **COMMISSIONER ARGENZIANO:** Commissioner, are
20 you saying you have to be on your meds to agree with me?

21 **CHAIRMAN CARTER:** I hope not. I hope that's
22 not what I'm saying.

23 (Laughter.)

24 But I do think -- and the way, the symmetry in
25 terms of how you laid it out particularly as you go

1 through Issue 9 and in the process of how you laid it
2 out in terms of being able to find -- it's really --
3 that's why I asked the question early on about where are
4 we is that we're here with a stipulation that was
5 settled and agreed upon by the parties, and the parties
6 are interpreting it -- they have different
7 interpretations of it. So they're coming to us because
8 they have a, a conflict on interpretation. So it falls
9 to us to interpret that on, on behalf of the parties
10 because they're asking us as an impartial arbiter to
11 make that decision. So, but, again, I just wanted to
12 say thank you, Commissioner Argenziano. That makes
13 sense to me. Thank you.

14 **COMMISSIONER ARGENZIANO:** Thank you.

15 **COMMISSIONER EDGAR:** Okay. Commissioners, we
16 have, oh my goodness, let's see, 10:30, 11:30, 1:00,
17 2:00, we've spent three and a half hours maybe on this
18 issue. In my mind it presents, you know, clearly, to
19 state the obvious, some very interesting legal
20 questions. Obviously the point that great legal minds
21 can differ on the interpretation when we're putting
22 together numerous contract provisions and statutes and
23 trying to look at all of that in the light of the case
24 law that exists. But I think it's probably time to
25 start looking at the, at the issues, and I'm going to

1 take Chairman Carter's earlier question as a prompting
2 to me to do so.

3 So, Commissioners, what I would suggest is
4 that we try to work our way maybe down through the
5 issues and see where that takes us. As has been pointed
6 out, and I appreciate your willingness to do so at the
7 beginning, we have addressed Issue 1. We have 12 total.

8 Commissioners, is there any discussion or
9 specific question on Issue 2?

10 **CHAIRMAN CARTER:** Madam Chairman, let me ask
11 you this. We're going to take the issues individually;
12 is that correct?

13 **COMMISSIONER EDGAR:** That is my suggestion.

14 **CHAIRMAN CARTER:** Okay. Thank you.

15 **COMMISSIONER EDGAR:** But if, if there is a
16 preference to do it otherwise, I am of course open to
17 that.

18 **CHAIRMAN CARTER:** Thank you. I would
19 appreciate that. And I just wanted on this, if I'm in
20 order, on this issue here, just basically I just -- it
21 just kind of seems like we've been on this forever. But
22 just kind of a general, if staff can give me like a one
23 second on, maybe ten second on this, this stipulation
24 here. Because I think the question is does the
25 stipulation approved allow a request for an interim rate

1 increase. That's what we're dealing with just
2 specifically on Issue 2; is that correct?

3 **COMMISSIONER EDGAR:** Yes, sir.

4 **CHAIRMAN CARTER:** Okay.

5 **COMMISSIONER EDGAR:** Would you like staff to
6 speak to that specifically at this time?

7 **CHAIRMAN CARTER:** Yes, ma'am, I would.

8 **COMMISSIONER EDGAR:** Okay. Again, we've had
9 good, good general discussion. We've jumped a little
10 bit around on the issues. If I could ask our staff to
11 help make sure that we're all focused on the same thing
12 to present briefly Issue 2 specifically.

13 **MR. SAYLER:** Thank you, Commissioner. The
14 question is for Issue 2 whether the stipulation approved
15 by the order allows PEF to, to request an interim rate
16 increase, and that is the narrow issue there.

17 **COMMISSIONER EDGAR:** And the staff
18 recommendation is, is, yes --

19 **MR. SAYLER:** Yes.

20 **COMMISSIONER EDGAR:** -- that the stipulation
21 does allow.

22 **MR. SAYLER:** Staff believes -- right. Staff
23 believes it doesn't expressly disallow it. Yes.

24 **COMMISSIONER EDGAR:** Okay. Commissioner
25 Carter, does that help?

1 **CHAIRMAN CARTER:** Yes, ma'am. Thank you.

2 **COMMISSIONER EDGAR:** You are very welcome.

3 Commissioners, we are on Issue 2.

4 **COMMISSIONER SKOP:** Madam Chair, I don't think
5 Issue 2, it may or may not be controversial, but I would
6 move to approve the staff recommendation as to Issue 2.

7 **COMMISSIONER McMURRIAN:** Second.

8 **COMMISSIONER EDGAR:** Okay. Commissioners, any
9 further discussion specific to Issue 2? We have a
10 motion and a second to adopt the staff recommendation.
11 Hearing no further discussion --

12 **CHAIRMAN CARTER:** Excuse me.

13 **COMMISSIONER EDGAR:** Yes.

14 **CHAIRMAN CARTER:** Just to the interim -- I'm
15 sorry.

16 **COMMISSIONER EDGAR:** That's okay. That's all
17 right, Chairman Carter. We will, we will work through
18 it together. We are on Issue 2, which is very
19 specifically, and I will read it exactly, "Does the
20 stipulation allow Progress to request an interim rate
21 increase?" So this is does the stipulation allow the
22 request? And the motion is in favor of the staff
23 recommendation, which is, yes, that the stipulation does
24 allow the request for an interim rate increase. Okay?
25 So, again, we have a motion and we have a second. Are

1 there any additional questions or discussion before I
2 call for a vote?

3 **COMMISSIONER ARGENZIANO:** Yes. Just to make
4 it very clear so as we go through issue by issue there's
5 no mistake, I want it on record that I'm voting no on
6 all except for 12 as to keep the docket open just in
7 case we get lost somewhere.

8 **COMMISSIONER EDGAR:** Okay. We will take that
9 down for the record and we will try to walk our way
10 through the issues with that in mind.

11 Okay. Commissioner Skop has made a motion.
12 Commissioner McMurrian has seconded it. We have had
13 full discussion and opportunity for question amongst all
14 the parties and amongst ourselves. So all in favor of
15 the motion for Issue 2, say yes.

16 **COMMISSIONER SKOP:** Aye.

17 **CHAIRMAN CARTER:** Aye.

18 **COMMISSIONER EDGAR:** Aye.

19 **COMMISSIONER McMURRIAN:** Yes.

20 **COMMISSIONER EDGAR:** Okay. Show the motion
21 carried on Issue 2. The staff recommendation is
22 adopted.

23 That brings us to Issue 3. And I'll ask our
24 staff, as they so ably did a moment ago, to help us
25 focus in specifically and briefly present Issue 3 to us.

1 **MR. SAYLER:** Issue 3 is has Progress Energy
2 established a prima facie entitlement for interim relief
3 pursuant to Section 366.071? Staff's recommendation is,
4 yes, we believe that the 10 percent threshold adopted by
5 the parties in the stipulation represents a level below
6 which rates are no longer fair, just and reasonable,
7 thereby entitling PEF to petition the Commission to
8 amend its rate base or base rates. And PEF has, or
9 Progress has presented prefiled testimony and
10 documentation supporting that it is earning below the
11 10 percent threshold. Accordingly, staff recommends
12 that the Commission find that Progress has established a
13 prima facie entitlement for interim rate relief and is
14 entitled to the proposed interim rate increase pursuant
15 to Section 366.071 as discussed in Issue 8.

16 **COMMISSIONER EDGAR:** Thank you. And,
17 Commissioner Carter, just to hone in on one of your
18 earlier questions, in my own opinion this is a question
19 that much of our discussion has, has revolved around as
20 we've discussed this item today.

21 Commissioners, any questions or comments
22 specifically on this issue at this time? Commissioner
23 Skop.

24 **COMMISSIONER SKOP:** Thank you, Madam Chair.
25 Just a question to staff. Since the

1 Commission has ruled as to Issue 2 with respect to the
2 stipulation allowing PEF to seek a rate increase, and
3 again they can do that through a base rate proceeding or
4 through a, I'm losing my train of thought, base rate
5 proceeding or a limited proceeding.

6 What -- if the Commission ruled against staff
7 on Issue 3, what recourse would Progress have to seek
8 relief under a limited proceeding and how could that be
9 accommodated? Because I think if I were to understand
10 some of the concerns that have been raised, that the
11 problem likely hinges on the ROE itself and I think
12 you'd have to establish ROE. So I just wanted staff to
13 speak on that. I'm not sure which way.

14 **MS. FLEMING:** Just with respect to this
15 filing, it's an interim rate proceeding. As far as the
16 limited proceeding, I think that's more tailored to the
17 Bartow limited proceeding. If the Commission votes no
18 on Issue 3 that Progress has not shown a prima facie
19 entitlement to interim rates, those, those rates are
20 denied to Progress and they cannot recover those rates.

21 **COMMISSIONER SKOP:** And there is no other
22 recourse for a limited proceeding? I mean, is that like
23 res judicata against them? I mean, because under the
24 stipulation they have the right to seek relief; correct?

25 **MR. DEVLIN:** My understanding, I'd agree

1 with -- Tim Devlin. I would agree with Katherine
2 Fleming that there is no other recourse for this issue
3 of interim. If Issue 3 is denied, there is no other
4 avenue open for Progress other than a rate case and the
5 limited proceeding you have next on the agenda.

6 **COMMISSIONER SKOP:** So there would be no
7 ability for a limited proceeding as to the sole issue of
8 establishing what would be necessary to seek interim
9 rates for -- in the time between now and the rate case
10 is heard and implemented?

11 **MR. DEVLIN:** I don't believe there is. A
12 limited proceeding is just a different vehicle, if you
13 will, for rate relief completely different than the
14 interim statute, which is more in tune with overall
15 revenue requirements. A limited proceeding is more in
16 tune with the next item, Bartow, where you just have a
17 limited issue and limited costs to deal with.

18 **COMMISSIONER SKOP:** Then why in the settlement
19 agreement in Paragraph 7 did it speak to the option of a
20 limited proceeding if you fell under the 10 percent
21 threshold?

22 **MR. DEVLIN:** Well, I believe that that is what
23 we are speaking to with respect to the next item,
24 Bartow.

25 **COMMISSIONER SKOP:** All right. Very well. I

1 guess just for me, Issue 3 is the thorniest one for some
2 of the same reasons articulated by Commissioner
3 Argenziano. But on the flip side of that, I can
4 understand what staff is trying to do, and I'm also
5 cognizant of the fair, just, and reasonable criteria.
6 And it would just seem to me there is a tension there.
7 There is a tension between the statute and what we are
8 required to do under state law, and there is a tension
9 between that and what we're required to do under federal
10 law, under Supreme Court precedent with fair, just, and
11 reasonable. And I think that that is where the
12 discretion of the Commission clearly comes in under
13 366.071, Subsection 1.

14 **COMMISSIONER EDGAR:** Commissioner McMurrian.

15 **COMMISSIONER McMURRIAN:** Thank you.

16 I think I kind of have a question along the
17 same lines about the limited proceeding thing. And we
18 talked about this the other day somewhat, too. But I
19 thought I had heard OPC say earlier when they talked --
20 when Mr. Rehwinkel talked about the two different types,
21 you had the pure earnings type of recovery, and then you
22 had the file and suspend. I thought that I heard them
23 say that the limited proceeding is available, but maybe
24 I'm -- you are not saying here, though.

25 **COMMISSIONER EDGAR:** Commissioner McMurrian,

1 did you pose a question to our staff?

2 **COMMISSIONER McMURRIAN:** Well, I did, but
3 maybe I am putting -- maybe I'm attributing something to
4 OPC that I shouldn't have. Can I ask a question of OPC?

5 **COMMISSIONER EDGAR:** Sure. Oh, absolutely. I
6 just wanted to make sure if you pointed that way that we
7 went there first and then came back. So go right ahead.

8 **COMMISSIONER McMURRIAN:** Okay. Can you
9 clarify for me what you said early about limited
10 proceeding being available. Were you talking about just
11 under the statute -- I mean, under the stipulation in
12 general, or were you meaning with respect to this type
13 of -- well, this type is probably not a good term either
14 in the sense that they have asked for it as interim.

15 If they are trying to resolve the issue that
16 they have with respect to the 2009 period that they are
17 trying to address through this interim filing, is there
18 a way to do that through the file and suspend limited
19 proceeding avenue?

20 **MR. REHWINKEL:** Commissioner, no. And I think
21 there has been a significant amount of confusion about
22 that particular aspect of that paragraph that goes to
23 the core of this. And I think you should ask the
24 company this. This case is not being filed pursuant to
25 Paragraph 7. Bartow, the next item is. The interim

1 relief that they are requesting hangs off of, if you
2 will, the extra stipulation filing that is 0079.

3 **COMMISSIONER McMURRIAN:** Right.

4 **MR. REHWINKEL:** And the wellspring of that
5 authority does not come out of the 10 percent trigger or
6 anything like that. It stands totally apart from it.

7 Our sole argument is that the stipulation is a
8 bar to that on Issue 2. That's our argument. So, no,
9 interim -- file and suspend relief is not available to
10 them, and I think we cite it and the Commission has
11 precedent on this, that .071 is the sole source of
12 interim relief under a general case filing.

13 **COMMISSIONER McMURRIAN:** Okay. That clarifies
14 it for me, then, because I think I understood that
15 perhaps there was a reason that Progress filed it as
16 interim as opposed to limited proceeding, but I didn't
17 understand that they probably should not file it as a
18 limited proceeding. So I think that is clarified for me
19 now. So I appreciate that. And I think that was all.
20 Thank you.

21 **COMMISSIONER EDGAR:** Okay. Commissioners, we
22 are on Issue 3. Any further questions or discussion at
23 this time?

24 Commissioner Skop.

25 **COMMISSIONER SKOP:** Thank you, Madam Chair.

1 I was trying to compile my thoughts on this.
2 Again, the way I see it is on Issue 2 the Commission
3 acknowledged the ability under the stipulation to allow
4 PEF to request an interim rate increase. I think that
5 the tension that is focused through the lengthy
6 discussion on this is clearly on Issue 3.

7 The way that I see it in looking at the
8 settlement agreement is that the settlement agreement
9 provides for no earning cap, but the threshold at least
10 in my view serves as an earnings floor. And that's
11 somewhat analogous to staff's recommendation. But under
12 10 percent, which they are currently earning, entitles
13 them under the settlement agreement to seek relief.

14 Do they meet the full requirements of the
15 statute? I think that's the \$24,000 question. But
16 looking beyond that under controlling federal Supreme
17 Court precedent under Hope and Bluefield, they are
18 entitled to earn a reasonable rate of return, and I
19 think that the gist of this would be that if relief is
20 not granted, they would arguably have the lowest ROE in
21 the nation at the current earnings level. So, again,
22 that's a concern for me. And I think that if I were in
23 a situation where I had a conflict of law between
24 federal controlling case law and statutory provisions
25 that we are bound by, that in some instances where there

1 is ambiguity, we, as a Commission, have to reconcile
2 those two. And it would seem to me that controlling
3 U.S. Supreme Court precedent would control, and the
4 strict adherence to a statutory provision would have to
5 yield if it caused there not to be fair, just, and
6 reasonable rates. And that's, again, just my
7 perspective purely from my own analysis, and that's kind
8 of the way I see it. So at the appropriate time, and I
9 recognize that there is tension on this particular
10 issue, but --

11 **COMMISSIONER ARGENZIANO:** Madam Chair.

12 **COMMISSIONER EDGAR:** Just a moment,
13 Commissioner.

14 Commissioner Skop, go ahead and finish and
15 then we will come back.

16 **COMMISSIONER SKOP:** Yes. I would at the
17 appropriate time, and, again, I will be happy to yield
18 to Commissioner Argenziano, but at the appropriate time
19 I would make the motion to adopt staff recommendation as
20 to Issue 3 based on federal controlling case law.

21 **COMMISSIONER EDGAR:** Okay. Commissioner
22 Argenziano.

23 **COMMISSIONER ARGENZIANO:** Yes. I'm sorry, I
24 had gotten cut off and had to call back in, so I didn't
25 hear the full comments. I think I got cut off at the

1 point where Commissioner Skop was saying that -- was
2 quoting Hope and Bluefield. Which I'd like to make
3 reference to that same case law, Hope and Bluefield, and
4 that what people fail to say when they quote Hope and
5 Bluefield is that its whole premise was based upon the
6 whole economics of the country, the viability of our
7 whole financial institutions, everything included in
8 that. And we fail to mention that.

9 So when we use Hope and Bluefield, why don't
10 we go for the whole kit and caboodle by saying that, you
11 know, in order to adhere to Hope and Bluefield, or to
12 recite it, or to quote it, or whatever we are doing, you
13 need to understand that it's based -- a large part of it
14 is based on the whole economic conditions at the time.
15 That to me seems to be a very important part of that
16 case law.

17 So when we lose sight of that, we go somewhere
18 else with Hope and Bluefield. So in saying that you
19 have to look at the whole state of the economy, which is
20 not like it has ever been before. It has even been
21 described as differently as the Great Depression in the
22 early '20s.

23 So, Commissioner Skop, I beg to differ with
24 you. Without including that part of Hope and Bluefield,
25 which is the largest part of it, you kind of

1 misunderstand what Hope and Bluefield really says.

2 And the other part, what I was coming up to is
3 I didn't hear the rest of what the Commissioner had
4 said, so I was just asking him to kind of give me a
5 synopsis. And I apologize, I just got cut off again for
6 some reason.

7 **COMMISSIONER SKOP:** And, Madam Chair, I would
8 be happy to clarify.

9 Again, I fully concur with your position as to
10 the tension that exists under the statutory provision,
11 and I think that your interpretation was very much spot
12 on in terms of the comments that you made, which
13 Chairman Carter echoed.

14 The problem I have, though, is, again, you
15 know, following the -- construing the statutes strictly
16 versus the staff interpretation, and that's at the state
17 law level, and that's pursuant to statute which we are
18 bound by, but we are equally bound by controlling
19 federal case law under Supreme Court decisions of
20 Bluefield and Hope.

21 And I just wanted to touch upon a point that
22 you made which I think is a very good point. At least
23 my interpretation of those two decisions were that under
24 the United States Supreme Court decisions of Bluefield
25 and Hope, public utilities entitled to earn a fair and

1 reasonable rate of return on the value of property
2 placed in service for the convenience of the public is
3 sufficient to ensure the financial integrity of the
4 utility to maintain its creditworthiness and to attract
5 capital.

6 And putting that in perspective to the
7 prevailing economic conditions that you have brought
8 forth and in the nation, I would respectfully assert
9 that based on the most recent earning surveillance point
10 that the current earnings are below the 10 percent
11 threshold in the settlement agreement, and at 9.59, and
12 expected subject to Commission not taking action, to
13 fall down to below 7 percent for projected ROEs. That
14 is of concern to me in light of the controlling Supreme
15 Court case law. And, again, my concern would be whether
16 those rates could be viewed as fair, just, and
17 reasonable in light of the fact that they would be
18 significantly lower than any ROE in the United States at
19 that point.

20 **COMMISSIONER ARGENZIANO:** May I respond to
21 that briefly, Commissioner?

22 **COMMISSIONER EDGAR:** Commissioner Argenziano.

23 **COMMISSIONER ARGENZIANO:** While I understand
24 what you are trying to get at, and my concerns are, of
25 course, for the health of the company as well as the

1 health of the consumer, I don't agree with you. We have
2 a rate case pending right now in regards to ROE, and we
3 have testimony of different ROEs that are on record as
4 to be acceptable, so you can't -- I think I have a
5 problem with what is fair and what is not at this point.

6 But, also, when you say fair, just, and
7 reasonable, do you understand to me that to deny
8 ratepayers the benefit of a bargain, which is the
9 stipulation, is not fair, just, and reasonable? And
10 that may be just my opinion, but, you know, I'm only 54
11 years old and not an attorney, so that may make a
12 difference. But, yet, I kind of disagree. I think that
13 maybe not being an attorney, I read the words for what
14 they are, and not stretch them out to what they are not.
15 And I just respectfully disagree.

16 **COMMISSIONER EDGAR:** Thank you.

17 Commissioner Skop.

18 **COMMISSIONER SKOP:** Thank you, Madam Chair.

19 And, Commissioner Argenziano, I fully respect
20 your disagreement, and in light of if there were not the
21 controlling federal case law, I would be 100 percent
22 with you in your interpretation of the statute.

23 So, again, I think it is a reasonable
24 difference of opinion, nothing more. But, again, I'm
25 cognizant equally of controlling federal case law

1 that --

2 **COMMISSIONER ARGENZIANO:** I'm not so sure it
3 is controlling, but there is where our disagreements
4 are. But thank you.

5 **COMMISSIONER SKOP:** Thank you.

6 **COMMISSIONER EDGAR:** Okay.

7 Commissioners, we are, again, on -- still on
8 Issue 3, and I will just say this. In my own analysis
9 prior to our discussions today, and all during our
10 discussions today, in my opinion, in my mind, Issue 2
11 was clearer and is clearer, which we have already
12 disposed of. Issue 3 I have struggled with in large
13 part because there seems to me to be some internal
14 inconsistencies or conflicts within the statute, and
15 then looking from the statute beyond then, from the
16 statute to the terminology and some of the language in
17 the stipulation, that some of the results just seem
18 somewhat convoluted both ways.

19 So, again, by virtue of some of the language
20 in both. So this one has been a struggle for me. The
21 discussion has been very helpful, but yet it's also
22 still a little murky. However, I am persuaded by some
23 of the discussion that we have had looking specifically
24 at the language in Subsection 7 primarily, I think.

25 And, so with that, Commissioner Skop, you had

1 offered to make a motion, and I think that the time is
2 now.

3 **COMMISSIONER SKOP:** Thank you, Madam Chair.

4 Based on the discussion, I would respectfully
5 move to adopt the staff recommendation as to Issue 3.
6 And, again, I think that my basis for that motion is
7 resolving the ambiguities via the controlling federal
8 case law as my guiding force in making that motion.

9 **COMMISSIONER EDGAR:** Thank you, Commissioner.
10 Commissioner McMurrian.

11 **COMMISSIONER McMURRIAN:** I'll second that
12 motion. I will just say that, I mean, to me Issue 2 was
13 just as thorny as 3. I guess it depends on how you look
14 at it. And I think the majority of the argument today
15 was about how the stipulation could be read, and like I
16 said earlier, I think there's sort of good arguments on
17 both sides of that.

18 I'm more compelled by staff's reading of it,
19 and so I support the staff recommendation on Issue 3,
20 and will second that, but it's the basis of my seconding
21 of that motion. While I might have some of the same
22 concerns that Commissioner Skop talked about, the basis
23 of my seconding that motion really is laid out in the
24 staff recommendation, because I believe Staff's -- for
25 me Staff's arguments are more compelling than the other.

1 **CHAIRMAN CARTER:** Madam Chair.

2 **COMMISSIONER EDGAR:** Commissioner Carter.

3 **CHAIRMAN CARTER:** We're in debate. I was kind
4 of running around on the Issue 2, but, I would support
5 that. And I would support -- my basis for supporting it
6 would be based upon staff's analysis and interpretation
7 of the statute as it pertains to this. That would be
8 the basis of my support for the motion.

9 **COMMISSIONER EDGAR:** Thank you. I appreciate
10 that comment. Commissioners, we have a motion and we
11 have a second in favor of the staff recommendation for
12 Issue 3.

13 All in favor say aye. Aye.

14 **CHAIRMAN CARTER:** Aye.

15 **COMMISSIONER McMURRIAN:** Aye.

16 **COMMISSIONER SKOP:** Aye.

17 **COMMISSIONER EDGAR:** Opposed?

18 **COMMISSIONER ARGENZIANO:** Aye.

19 **COMMISSIONER EDGAR:** Thank you. The motion
20 carries.

21 Commissioners, that brings us to Issue 4. We
22 have not had specific discussion on this, it is more of
23 a calculation than a legal question in my mind, so we
24 will look to staff once again to briefly present Issue 4
25 specifically to us.

1 **MR. SLEMKEWICZ:** Okay. Issue 4 is what is the
2 appropriate interim test year rate base, and based upon
3 my review of their filing, the \$5 billion rate base that
4 they filed is the appropriate rate base to use in this
5 interim proceeding.

6 **COMMISSIONER EDGAR:** Thank you.

7 Commissioner McMurrian.

8 **COMMISSIONER McMURRIAN:** Thank you.

9 I have one clarification question. With
10 respect to the very last sentence, I believe it is,
11 about the test year data being audited. So am I correct
12 if this 5 billion stands to be adjusted in the rate
13 case, if there are any problems discovered -- well,
14 actually in the rate case, but in looking at the interim
15 period for determining any refund.

16 **MR. SLEMKEWICZ:** That's correct. If there is
17 anything in the audit or anything that we do uncover
18 during the review in the rate case, those adjustments
19 would be made to the 2008 data to determine whether or
20 not there might be a refund due.

21 **COMMISSIONER McMURRIAN:** Okay. And if there
22 was an issue with any amount of the 5 billion, that
23 would be refunded regardless of what the ultimate rate
24 case amount was determined to be for permanent.

25 **MR. SLEMKEWICZ:** I believe that's correct. If

1 we find, you know, errors or adjustments that should be
2 made to the 2008 data.

3 **COMMISSIONER McMURRIAN:** Okay. Thank you.

4 **COMMISSIONER EDGAR:** Commissioners, any
5 further questions on Issue 4? Hearing none.

6 **COMMISSIONER SKOP:** I move to approve staff
7 recommendation as to Issue 4.

8 **COMMISSIONER McMURRIAN:** Second.

9 **COMMISSIONER EDGAR:** Commissioners, we have a
10 motion and a second for the staff recommendation on
11 Issue 4. Hearing no further questions, all in favor of
12 the motion say aye.

13 Aye.

14 **CHAIRMAN CARTER:** Aye.

15 **COMMISSIONER McMURRIAN:** Aye.

16 **COMMISSIONER SKOP:** Aye.

17 **COMMISSIONER EDGAR:** Opposed?

18 **COMMISSIONER ARGENZIANO:** Absolutely not.

19 **COMMISSIONER EDGAR:** Show the motion carried.

20 That brings us to Issue 5. Staff.

21 **MR. MAUREY:** Andrew Maurey.

22 Issue 5 deals with is Progress Energy
23 Florida's proposed return on equity of 10 percent and
24 its overall cost of capital of 7.84 percent reasonable
25 for purposes of determining interim rates. Staff's

1 recommendation is yes.

2 **COMMISSIONER EDGAR:** Commissioners, any
3 questions for our staff or others on Issue 5? Hearing
4 none.

5 Commissioner Skop.

6 **COMMISSIONER SKOP:** Thank you, Madam Chair.

7 I move to approve staff recommendation as to
8 Issue 5.

9 **COMMISSIONER McMURRIAN:** Second.

10 **COMMISSIONER EDGAR:** We have a motion and a
11 second. All in favor of the motion, which is to adopt
12 the staff recommendation on Issue 5, say aye.

13 Aye.

14 **CHAIRMAN CARTER:** Aye.

15 **COMMISSIONER McMURRIAN:** Aye.

16 **COMMISSIONER SKOP:** Aye.

17 **COMMISSIONER EDGAR:** All opposed?

18 **COMMISSIONER ARGENZIANO:** Let's see, four to
19 one.

20 **COMMISSIONER EDGAR:** Yes, ma'am, on Issue 5.

21 That brings us, Commissioners, to Issue 6. We
22 will look to staff.

23 **MR. SLEMKEWICZ:** Issue 6 is what is the
24 appropriate interim test year net operating income, and
25 staff recommends that the \$391,486,000 filed by the

1 company is the correct amount.

2 **COMMISSIONER EDGAR:** Thank you.

3 Commissioners, any questions on Issue 6?

4 Hearing none; Commissioner Skop.

5 **COMMISSIONER SKOP:** Thank you, Madam Chair.

6 I move to approve staff recommendation as to
7 Issue 6.

8 **COMMISSIONER McMURRIAN:** Second.

9 **COMMISSIONER EDGAR:** All in favor of the
10 motion say aye.

11 Aye.

12 **CHAIRMAN CARTER:** Aye.

13 **COMMISSIONER McMURRIAN:** Aye.

14 **COMMISSIONER SKOP:** Aye.

15 **COMMISSIONER EDGAR:** Opposed?

16 **COMMISSIONER ARGENZIANO:** Once again, no.

17 **COMMISSIONER EDGAR:** Show the motion carried.

18 Commissioners, that brings us to Issue 7.
19 Staff.

20 **MR. SLEMKEWICZ:** Issue 7 is the appropriate
21 net operating income multiplier, and the 1.6343 that the
22 company filed is appropriate.

23 **COMMISSIONER EDGAR:** Thank you.

24 Commissioners, any questions on this issue?

25 Hearing none; Commissioner Skop.

1 **COMMISSIONER SKOP:** Thank you, Madam Chair.

2 I would move to approve staff recommendation
3 as to Issue 7.

4 **CHAIRMAN CARTER:** Is there a second?

5 **COMMISSIONER McMURRIAN:** Sorry, I fell asleep
6 again. Second.

7 **COMMISSIONER EDGAR:** Okay. Commissioners, we
8 have a motion and a second for the staff recommendation
9 on Issue 7. All in favor of the motion say aye.

10 Aye.

11 **CHAIRMAN CARTER:** Aye.

12 **COMMISSIONER McMURRIAN:** Aye.

13 **COMMISSIONER SKOP:** Aye.

14 **COMMISSIONER EDGAR:** Opposed?

15 **COMMISSIONER ARGENZIANO:** Aye.

16 **COMMISSIONER EDGAR:** Thank you. Show the
17 motion carried.

18 Commissioners, that brings us to Issue 8.
19 Staff.

20 **MR. SLEMKEWICZ:** Issue 8 is a fallout of
21 Issues 4 through 7 on what is the appropriate amount of
22 the interim revenue increase, and staff recommends that
23 the \$13,078,000 interim increase should be approved.

24 **COMMISSIONER EDGAR:** Commissioners, any
25 questions on Issue 8? Hearing none. Is there a motion?

1 **COMMISSIONER SKOP:** Madam Chair, I would move
2 to approve staff recommendation as to Issue 8.

3 **COMMISSIONER McMURRIAN:** Second.

4 **COMMISSIONER EDGAR:** Commissioners, we have a
5 motion and a second to adopt the staff recommendation on
6 Issue 8.

7 Hearing no further questions, all in favor of
8 the motion say aye.

9 Aye.

10 **CHAIRMAN CARTER:** Aye.

11 **COMMISSIONER McMURRIAN:** Aye.

12 **COMMISSIONER SKOP:** Aye.

13 **COMMISSIONER EDGAR:** Opposed?

14 **COMMISSIONER ARGENZIANO:** Aye.

15 **COMMISSIONER EDGAR:** Show it adopted.

16 **CHAIRMAN CARTER:** Madam Chair.

17 **COMMISSIONER EDGAR:** Commissioner Carter.

18 **CHAIRMAN CARTER:** As we go to Item 9, I'm
19 sorry, sometimes I'm fading in and out. Is that the
20 oral modification as we are -- that is already included
21 within the recommendation on Issue 9?

22 **COMMISSIONER EDGAR:** I appreciate the
23 question; and my understanding, and I will look to
24 Commissioner Skop, is that the oral modification was on
25 Issue 3, and that that would have been included in

1 the --

2 **COMMISSIONER SKOP:** Yes, it was.

3 **CHAIRMAN CARTER:** Okay. Thank you.

4 **COMMISSIONER EDGAR:** Thank you for the
5 question. Absolutely. Okay.

6 Commissioners, that brings us to Issue 9.
7 Staff.

8 **MS. DRAPER:** Elizabeth Draper. Issue 9 reads
9 should Progress Energy's request for a percentage
10 increase factor of 1.7 percent be approved. Staff
11 recommends denial of Progress's petition and recommends
12 that the appropriate calculation yields a .91 percent
13 increase factor, which would allow Progress to recover
14 the interim increase over a six-month period.

15 **COMMISSIONER EDGAR:** Thank you.

16 Commissioners, I think we touched on this
17 briefly earlier in the day. Are there questions?
18 Commissioner Skop.

19 **COMMISSIONER SKOP:** Thank you, Madam Chair.
20 Just a question to staff. At the bottom, or midpoint of
21 Page 16, I guess staff explains that it has been
22 Commission practice to calculate the percentage increase
23 factor based on the annual revenues, and staff, pursuant
24 to rule and the discussion provided on that page, has
25 calculated this in a manner in which the Commission has

1 done it historically. Is that correct?

2 **MS. DRAPER:** Yes.

3 **COMMISSIONER SKOP:** And it has never been done
4 in the manner that was proposed by Progress, is that
5 correct?

6 **MS. DRAPER:** Not to my knowledge, no.

7 **COMMISSIONER SKOP:** And the manner in which
8 Progress has proposed it would be analogous to a
9 completely make whole in six months versus a typical
10 12-month process?

11 **MS. DRAPER:** That is correct. It would allow
12 Progress to retroactively recover January through June
13 revenues.

14 **COMMISSIONER SKOP:** All right. Thank you.

15 **COMMISSIONER EDGAR:** Commissioners, any
16 additional questions?

17 Hearing none; Commissioner Skop.

18 **COMMISSIONER SKOP:** Thank you, Madam Chair.

19 I would move to approve staff recommendation
20 as to Issue 9.

21 **COMMISSIONER McMURRIAN:** Second.

22 **COMMISSIONER EDGAR:** Commissioners, we have a
23 motion and a second for the staff recommendation on
24 Issue 9. All in favor of the motion say aye.

25 Aye.

1 **CHAIRMAN CARTER:** Aye.

2 **COMMISSIONER McMURRIAN:** Aye.

3 **COMMISSIONER SKOP:** Aye.

4 **COMMISSIONER EDGAR:** All opposed?

5 **COMMISSIONER ARGENZIANO:** Aye.

6 **COMMISSIONER EDGAR:** Show it adopted. That
7 brings us to Issue 10. Staff.

8 **MS. DRAPER:** Issue 10 is how should the
9 interim revenue increase for Progress Energy be
10 distributed among the rate classes. And our
11 recommendation is that it should be done according to
12 rule and all existing base rates and charges should be
13 uniformly increased. Interim rates would go into effect
14 with the first billing cycle in July, and staff also
15 recommends that the company give notice to its customers
16 of the interim increase commencing with June 2009 bills.

17 **COMMISSIONER EDGAR:** Commissioners, any
18 questions on Issue 10?

19 Hearing none; Commissioner Skop.

20 **COMMISSIONER SKOP:** Thank you, Madam Chair.

21 I move to approve staff recommendation as to
22 Issue 10.

23 **COMMISSIONER McMURRIAN:** Second.

24 **COMMISSIONER EDGAR:** Commissioners, we have a
25 motion to adopt the staff recommendation on Issue 10, a

1 motion and a second. All in favor of the motion say
2 aye.

3 Aye.

4 **CHAIRMAN CARTER:** Aye.

5 **COMMISSIONER McMURRIAN:** Aye.

6 **COMMISSIONER SKOP:** Aye.

7 **COMMISSIONER EDGAR:** All opposed?

8 **COMMISSIONER ARGENZIANO:** Aye.

9 **COMMISSIONER EDGAR:** Show the motion carried.

10 That brings us to Issue 11.

11 **MR. MAUREY:** Issue 11 asks what is the
12 appropriate security to guarantee the amount collected
13 subject to refund. Staff recommends that the
14 appropriate security to guarantee the funds collected
15 subject to refund is a corporate undertaking.

16 **COMMISSIONER EDGAR:** Thank you.

17 Commissioners, any questions on Issue 11?

18 Hearing none; Commissioner Skop.

19 **COMMISSIONER SKOP:** Thank you, Madam Chair.

20 I would move to approve staff recommendation
21 as to Issue 11.

22 **COMMISSIONER McMURRIAN:** Second.

23 **COMMISSIONER EDGAR:** Commissioners, we have a
24 motion and a second to adopt the staff recommendation on
25 Issue 11. All in favor of the motion say aye.

1 Aye.

2 **CHAIRMAN CARTER:** Aye.

3 **COMMISSIONER McMURRIAN:** Aye.

4 **COMMISSIONER SKOP:** Aye.

5 **COMMISSIONER EDGAR:** All opposed?

6 **COMMISSIONER ARGENZIANO:** Aye.

7 **COMMISSIONER EDGAR:** Show the motion carried.

8 That brings us to Issue 12, close the docket.

9 **MS. FLEMING:** Staff is recommending that this
10 docket remain open pending the Commission's final
11 decision in the base rate proceeding.

12 **COMMISSIONER EDGAR:** Thank you.

13 Commissioners.

14 **COMMISSIONER SKOP:** Thank you, Madam Chair.

15 I would move to approve the staff
16 recommendation as to Issue 12.

17 **COMMISSIONER McMURRIAN:** Second.

18 **COMMISSIONER EDGAR:** All in favor of the most
19 say aye.

20 (Simultaneous aye.)

21 **COMMISSIONER EDGAR:** Opposed?

22 Show it adopted.

23 Commissioners, and to the parties, thank you
24 all for your patience as we worked through this. That
25 concludes our deliberations on this item.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTERS


3 COUNTY OF LEON)

4
5 WE, JANE FAUROT, RPR, and LINDA BOLES, RPR,
6 CRR, Official Commission Reporters, do hereby certify
7 that the foregoing proceeding was heard at the time and
8 place herein stated.

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

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

19 DATED THIS 2nd DAY OF JUNE, 2009.

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24
25


JANE FAUROT, RPR
Commission Reporter
(850) 413-6732



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

The 2002 Stipulation expressly prohibited both interim rate decreases and interim rate increases.

2002 Stipulation:

4. No Stipulating Party will request, support, or seek to impose a change in the application of any provision hereof. The Stipulating Parties other than FPC will neither seek nor support any additional reduction in FPC's base rates and charges, including interim rate decreases, that would take effect prior to December 31, 2005 unless such reduction is initiated by FPC. FPC will not petition for an increase in its base rates and charges, including interim rate increases, that would take effect prior to December 31, 2005, except as provided in Section 7.

Order No. PSC-02-0655-AS-EI, Attachment 1, p. 15.

The 2005 Stipulation expressly prohibits only interim rate decreases.

2005 Stipulation

4. No Party to this Agreement will request, support, or seek to impose a change in the application of any provision hereof. OPC, AG, FIPUG, FRF, AARP, Sugarmill, Hansen, White Springs, and CG will neither seek nor support any reduction in PEF's base rates and charges, including interim rate decreases, that would take effect prior to the first billing cycle for January 2010 (or prior to the first billing cycle for July 2010, if PEF elects to extend this Agreement pursuant to Section 1), unless such reduction is requested by PEF. PEF may not petition for an increase in base rates and charges that would take effect prior to the first billing cycle for January 2010 (or that would take effect prior to the first billing cycle for July 2010, if PEF elects to extend this Agreement pursuant to Section 1) except as otherwise provided for in Sections 7 and 10 of this Agreement. During the term of this Agreement, except as otherwise provided for in this Agreement, or except for unforeseen extraordinary costs imposed by government agencies relating to safety or matters of national security, PEF will not petition for any new surcharges, on an interim or permanent basis, to recover costs that are of a type that traditionally and historically would be or are presently, recovered through base rates.

Order No. PSC-05-0945-S-EI, Attachment A, p. 4.

Progress Energy Florida – 2009 Projection of
Return on Equity

~~Parties/Staff~~ Handout
Internal Affairs/Agenda
on 5/19/09
Item No. 9
090079-E1

6.89%

- Projected ROE

8.22%

- With increase for
Bartow Repowering

8.36%

- With increase for
Both Bartow and
Interim Relief



Parties Staff Handout
Internal Affairs/ Agenda
on 5/19/09
Item No. 9
090079-E1

May 15, 2009

Mr. John Slemkewicz,
Public Utility Supervisor
Electric and Gas Accounting Section
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Dear Mr. Slemkewicz:

Pursuant to Commission Rule 25-6.1352, enclosed please find Progress Energy Florida, Inc.'s Rate of Return report for the twelve months ended March 31, 2009.

The report includes the Company's actual rate of return computed on an end-of-period rate base, the Company's adjusted rate of return computed on an average rate base, the Company's end-of-period required rates of return, and certain financial integrity indicators for the twelve months ended March 31, 2009. The separation factors used for the jurisdictional amounts were developed from the cost of service prepared in compliance with the stipulation and settlement agreement approved in Docket No. 050078-EI, Order No. PSC-05-0945-S-EI.

If you have any questions, please feel free to contact Cindy Lee at (727) 820-5535.

Sincerely,

Will Garrett
Controller, Progress Energy Florida

dc
Attachment
xc: Mr. J. R. Kelly, Office of the Public Counsel

PROGRESS ENERGY FLORIDA
Rate of Return Report Summary
March 2009

Schedule 1

	(1) Actual Per Books	(2) FPSC Adjustments	(3) FPSC Adjusted	(4) Pro Forma Adjustments	(5) Pro Forma Adjusted
I. Average Rate of Return (Jurisdictional)					
Net Operating Income (a) (b)	\$523,842,206	(\$124,422,417)	\$399,419,789	\$0	\$399,419,789
Average Rate Base	\$6,794,335,974	(\$1,600,471,496)	\$5,193,864,478	\$0	\$5,193,864,478
Average Rate of Return	7.71%		7.69%		7.69%
II. Year End Rate of Return (Jurisdictional)					
Net Operating Income	\$523,842,206	(\$124,422,417)	\$399,419,789	\$0	\$399,419,789
Year End Rate Base	\$7,176,264,609	(\$1,607,391,198)	\$5,368,873,411	\$0	\$5,368,873,411
Year End Rate of Return	7.30%		7.44%		7.44%

Footnotes

- (a) Column (1) includes AFUDC earnings.
(b) Column (2) includes reversal of AFUDC earnings.

III. Required Rates of Return	Average Capital Structure	End of Period Capital Structure
FPSC Adjusted Basis		
Low Point	8.27%	8.04%
Mid Point	8.77%	8.54%
High Point	9.27%	9.04%
Pro Forma Adjusted Basis		
Low Point	8.27%	8.04%
Mid Point	8.77%	8.54%
High Point	9.27%	9.04%

IV. FINANCIAL INTEGRITY INDICATORS

A. T.I.E. with AFUDC	3.35	(System Per Books Basis)
B. T.I.E. without AFUDC	2.80	(System Per Books Basis)
C. AFUDC to Net Income	33.77%	(System Per Books Basis)
D. Internally Generated Funds	-8.08%	(System Per Books Basis)
E. STD/LTD to Total Investor Funds		
LT Debt-Fixed to Total Investor Funds	46.34%	(FPSC Adjusted Basis)
ST Debt to Total Investor Funds	0.00%	(FPSC Adjusted Basis)
F. Return on Common Equity		
	9.59%	(FPSC Adjusted Basis)
	9.59%	(Pro Forma Adjusted Basis)
G. Current Allowed AFUDC Rate	8.85%	Docket 050078-EI Order PSC-05-0945-S-EI

I am aware that Section 837-06, Florida Statutes, provides:

Whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his official duty shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084


Will Garrett, Controller Progress Energy Florida

5/14/09
Date

PROGRESS ENERGY FLORIDA
Average Rate of Return - Rate Base
March 2009

	Plant In Service	Accum Depr & Amort	Net Plant In Service	Future Use & Appd Unrecov Plant	Const Work In Progress	Nuclear Fuel (Net)	Net Utility Plant	Working Capital	Total Average Rate Base
System Per Books	\$10,343,584,686	\$4,597,832,688	\$5,745,751,998	\$35,089,957	\$1,952,374,968	\$92,559,024	\$7,825,775,947	(\$275,818,403)	\$7,549,957,544
Less Recoverable:									
ARO	15,237,364	(22,139,658)	37,377,022	0	0	0	37,377,022	(411,740,773)	(374,363,751)
ECCR	881,570	242,187	639,383	0	866,442	0	1,505,825	(560,746)	945,079
ECRC	26,378,192	1,147,966	25,230,225	0	2,511,661	0	27,741,887	79,116,656	106,858,543
FUEL	33,770,804	26,831,738	6,939,066	0	0	0	6,939,066	129,185,823	136,124,889
NUCLEAR	0	0	0	0	0	0	0	59,568,670	59,568,670
Regulatory Base - System	\$10,267,316,756	\$4,591,750,454	\$5,675,566,303	\$35,089,957	\$1,948,996,864	\$92,559,024	\$7,752,212,148	(\$131,388,033)	\$7,620,824,115
Regulatory Base - Retail	\$9,402,279,169	\$4,287,248,633	\$5,115,030,536	\$26,576,589	\$1,750,919,301	\$82,067,013	\$6,974,593,439	(\$180,257,466)	\$6,794,335,974
FPSC Adjustments									
CWIP - AFUDC	0	0	0	0	(1,595,117,928)	0	(1,595,117,928)	0	(1,595,117,928)
GAIN/LOSS ON SALE OF PLANT	0	0	0	0	0	0	0	(8,234,264)	(8,234,264)
CAPITAL LEASE	(224,986,811)	0	(224,986,811)	0	0	0	(224,986,811)	225,581,231	594,419
NUC. DECOM. UNFUNDED - WHOLESALE	0	(2,286,276)	2,286,276	0	0	0	2,286,276	0	2,286,276
Total FPSC Adjustments	(224,986,811)	(2,286,276)	(222,700,535)	0	(1,595,117,928)	0	(1,817,818,463)	217,346,967	(1,600,471,496)
FPSC Adjusted	\$9,177,292,358	\$4,284,962,357	\$4,892,330,001	\$26,576,589	\$155,801,373	\$82,067,013	\$5,156,774,976	\$37,089,502	\$5,193,864,478

PROGRESS ENERGY FLORIDA
Average Rate of Return - Income Statement
March 2009

Schedule 2
Page 2 of 3

	Operating Revenues	Fuel & Net Interchange	O&M Other	Depr & Amort	Taxes Other than Income	Income Taxes Current	Deferred Income Tax (Net)	Investment Tax Credit (Net)	Gain/Loss on Disposition & Other	Total Operating Expenses	Net Operating Income
System Per Books (a)	\$4,997,083,015	\$2,789,079,671	\$794,647,752	\$391,779,243	\$327,348,249	\$80,218,273	\$115,035,108	(\$5,591,499)	\$0	\$4,472,514,797	\$524,568,219
Less Recoverable:											
ARO	0	0	0	(9)	0	0	0	0	0	(9)	9
ECCR	71,605,368	0	70,400,336	176,538	23,713	(2,305,842)	2,693,436	0	0	70,988,181	617,187
ECRC	50,735,622	0	39,013,748	9,595,259	317,025	4,555,550	0	0	0	53,481,581	7,254,041
FUEL	2,758,504,953	2,753,597,079	0	0	1,732,203	1,225,015	0	0	0	2,756,554,297	1,950,656
NUCLEAR	95,322,279	0	3,805,261	75,431,323	123,149	2,300,052	0	0	0	81,859,785	3,662,494
SCRC	40,258,225	0	40,236,365	0	28,998	(3,525)	0	0	0	40,281,838	(5,613)
Regulatory Base - System	\$1,980,658,968	\$35,452,592	\$641,192,042	\$306,676,131	\$325,121,161	\$54,447,023	\$112,341,672	(\$5,591,499)	\$0	\$1,469,569,122	\$511,089,446
Regulatory Base - Retail	\$1,720,252,540	\$7,097,862	\$591,376,720	\$278,994,144	\$315,417,436	\$28,318,869	\$103,270,426	(\$5,140,374)	\$0	\$1,319,336,083	\$400,917,457
FPSC Adjustments											
CORPORATE AIRCRAFT ALLOCATION	0	0	(3,159,772)	0	0	1,222,740	0	0	0	(1,947,033)	1,947,033
FRANCHISE FEE & GROSS REC TAX REVENUE	(235,579,935)	0	0	0	0	(79,302,460)	0	0	0	(79,302,460)	(126,277,475)
FRANCHISE FEES & GROSS REC TAX - TOI	0	0	0	0	(205,416,008)	79,239,225	0	0	0	(126,176,783)	126,176,783
GAIN/LOSS ON SALE OF PLANT	0	0	0	0	0	883,243	0	0	(2,289,677)	(1,406,434)	1,406,434
INST/PROMOTIONAL ADVERTISING	0	0	(2,640,455)	0	0	1,018,555	0	0	0	(1,621,899)	1,621,899
INTEREST ON TAX DEFICIENCY	0	0	(4,536,543)	0	0	1,738,399	0	0	0	(2,798,144)	2,768,144
MISCELLANEOUS INTEREST EXPENSE	0	0	50,287	0	0	(19,398)	0	0	0	30,889	(30,889)
REMOVE ASSOC/ORGANIZATION DUES	0	0	(20,763)	0	0	8,010	0	0	0	(12,754)	12,754
REMOVE DEFERRED TAX AFJDC DEBT	0	0	0	0	0	0	(16,505)	0	0	(16,505)	16,505
REMOVE ECONOMIC DEVELOPMENT	0	0	(25,583)	0	0	9,869	0	0	0	(15,714)	15,714
SEBRING - RIDER REVENUE	408	0	0	0	0	157	0	0	0	157	250
SEBRING - TRANSITION DEPRECIATION	0	0	0	(3,952)	0	1,524	0	0	0	(2,427)	2,427
INTEREST SYNCHRONIZATION - FPSC	0	0	0	0	0	9,157,249	0	0	0	9,157,249	(9,157,249)
Total FPSC Adjustments	(205,579,527)	0	(10,312,830)	(3,952)	(205,416,008)	13,957,113	(16,505)	0	(2,289,677)	(204,081,859)	(1,497,668)
FPSC Adjusted	\$1,514,673,613	\$7,097,862	\$581,083,891	\$278,990,192	\$110,001,427	\$42,275,982	\$103,253,922	(\$5,140,374)	(\$2,289,677)	\$1,115,253,224	\$399,419,789

Footnotes

(a) The addition of earnings from AFUDC charges would increase the system NOI by \$137,070,416 and Jurisdictional NOI by \$122,924,749

Current Month

	Operating Revenues	Fuel & Net Interchange	O&M Other	Depr & Amort	Taxes Other than Income	Income Taxes Current	Deferred Income Tax (Net)	Investment Tax Credit (Net)	Gain/Loss on Disposition & Other	Total Operating Expenses	Net Operating Income
System Per Books (a)	\$394,800,814	\$209,967,251	\$63,216,271	\$60,280,463	\$28,756,334	(\$16,825,489)	\$11,998,002	(\$378,833)	\$0	\$357,013,999	\$37,786,815
Less Recoverable:											
ARO	0	0	0	(0)	0	0	0	0	0	(0)	0
ECCR	5,292,785	0	5,222,721	18,817	1,741	(408,313)	427,410	0	0	5,262,376	30,409
ECRC	8,871,476	0	(1,733,688)	9,548,870	37,060	393,169	0	0	0	8,245,412	626,064
FUEL	238,348,383	207,397,371	0	0	136,646	314,142	0	0	0	207,848,159	500,224
NUCLEAR	28,151,719	0	516,449	24,775,441	26,727	8,620,146	0	0	0	33,938,763	(7,787,044)
SCRC	1,912	0	1,911	0	1	0	0	0	0	1,912	0
System Per Books Excluding AFUDC Earnings and Recoverable	\$146,134,538	\$2,569,880	\$69,208,878	\$25,937,336	\$28,664,158	(\$25,744,633)	\$11,670,692	(\$378,833)	\$0	\$101,717,378	\$44,417,160
Jurisdictional Per Books Excluding AFUDC Earnings and Recoverable	\$151,183,693	\$530,892	\$54,769,776	\$23,714,996	\$27,586,059	(\$16,009,551)	\$10,636,302	(\$348,269)	\$0	\$100,880,205	\$50,303,488

PROGRESS ENERGY FLORIDA
Average Rate of Return - Adjustments
March 2009

Schedule 2
Page 3 of 3

Notes	Rate Base Adjustments	P=Pro Forma F=FPSC	System	Retail
(1)	CWIP - AFUDC	F	(\$1,782,204,134)	(\$1,595,117,928)
(1)	GAIN/LOSS ON SALE OF PLANT	F	(8,980,714)	(8,234,264)
(2)	CAPITAL LEASE-EPS	F	(224,986,811)	(224,986,811)
(2)	CAPITAL LEASE-WORKING CAPITAL	F	225,581,231	225,581,231
(1)	NUC. DECOM. UNFUNDED - WHOLESALE	F	2,286,276	2,286,276
	Total		(\$1,788,304,153)	(\$1,600,471,496)

Notes	Income Statement Adjustments (to NOI)	P=Pro Forma F=FPSC	System		Retail	
			Amount	Income Tax Effect	Amount	Income Tax Effect
(2)	CORPORATE AIRCRAFT ALLOCATION	F	(\$3,457,608)	\$1,333,849	(\$3,169,772)	\$1,222,740
(1)	FRANCHISE FEE & GROSS REC TAX REVENUE	F	205,579,935	(79,302,460)	205,579,935	(79,302,460)
(1)	FRANCHISE FEES & GROSS REC TAX - TOI	F	(205,416,008)	79,239,225	(205,416,008)	79,239,225
(1)	GAIN/LOSS ON SALE OF PLANT	F	(2,635,422)	1,016,614	(2,289,677)	883,243
(1)	INST./PROMOTIONAL ADVERTISING	F	(2,880,391)	1,111,111	(2,640,455)	1,018,555
(1)	INTEREST ON TAX DEFICIENCY	F	(4,902,360)	1,891,085	(4,506,543)	1,738,399
(1)	MISCELLANEOUS INTEREST EXPENSE	F	1,651,702	(637,144)	50,287	(19,398)
(1)	REMOVE ASSOC/ORGANIZATION DUES	F	(22,956)	8,855	(20,763)	8,010
(1)	REMOVE DEFERRED TAX AFUDC DEBT	F	0	(18,000)	0	(16,505)
(1)	REMOVE ECONOMIC DEVELOPMENT	F	(25,583)	9,869	(25,583)	9,869
(1)	SEBRING - RIDER REVENUE	F	(408)	157	(408)	157
(1)	SEBRING - TRANSITION DEPRECIATION	F	(3,952)	1,524	(3,952)	1,524
(1)	INTEREST SYNCHRONIZATION - FPSC	F	0	20,151,956	0	9,157,249
	Total		(\$12,113,250)	\$24,806,642	(\$12,442,940)	\$13,940,608

Notes: (1) Docket No. 910890-EI, Order No. PSC 92-0208-FOF-EI
(2) N/A

PROGRESS ENERGY FLORIDA
Average Rate of Return - Capital Structure
FPSC Adjusted Basis
March 2009

	System Per Books	Specific Adjustments	System Adjusted	Pro Rata Adjustments	FPSC Adjusted Retail	Ratio	Low Point		Mid Point		High Point	
							Cost Rate	Weighted Cost	Cost Rate	Weighted Cost	Cost Rate	Weighted Cost
Common Equity	\$3,312,339,916	\$849,319,872	\$4,161,659,788	(\$1,568,450,939)	\$2,593,208,849	49.93% ***	10.75%	5.37%	11.75%	5.87%	12.75%	6.37%
Preferred Stock	33,496,700	0	\$33,496,700	(\$12,624,273)	\$20,872,427	0.40%	4.51%	0.02%	4.51%	0.02%	4.51%	0.02%
Long Term Debt - Fixed	3,733,144,237	(109,735,257)	\$3,623,408,980	(\$1,365,594,380)	\$2,257,814,601	43.47%	6.29%	2.73%	6.29%	2.73%	6.29%	2.73%
Short Term Debt *	230,160,399	(230,160,399)	(\$0)	\$0	(\$0)	0.00%	1.77%	0.00%	1.77%	0.00%	1.77%	0.00%
Customer Deposits			\$0	\$0	\$0							
Active	182,788,042	0	\$182,788,042	(\$68,889,359)	\$113,898,683	2.19%	6.23%	0.14%	6.23%	0.14%	6.23%	0.14%
Inactive	1,087,676	0	\$1,087,676	(\$409,924)	\$677,751	0.01%						
Investment Tax Credit			\$0	\$0	\$0							
Post '70 Total	13,045,123		\$13,045,123	(\$4,916,460)								
Equity **			\$0	\$0	\$4,361,543	0.08%	10.70%	0.01%	11.70%	0.01%	12.69%	0.01%
Debt **			\$0	\$0	\$3,767,119	0.07%	6.29%	0.00%	6.29%	0.00%	6.29%	0.00%
Deferred Income Taxes	484,834,687	(39,138,574)	\$445,696,113	(\$167,974,443)	\$277,721,669	5.35%						
FAS 109 DIT - Net	(125,912,030)	0	(\$125,912,030)	\$47,453,865	(\$78,458,165)	-1.51%						
Total	\$7,864,984,750	\$470,285,642	\$8,335,270,392	(\$3,141,405,915)	\$5,193,864,478	100.00%		8.27%		8.77%		9.27%

* Daily Weighted Average

**Cost Rates Calculated Per IRS Ruling

***Equity Ratio Including Debt Associated With Qualifying Facilities Contracts (Based on FPSC Capital Structure)

46.21%

Docket No. 050078-EI, Order No. 05-0945-S-EI, Paragraph No. 13