

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 090372-EQ

PETITION FOR APPROVAL OF  
NEGOTIATED PURCHASE POWER  
CONTRACT WITH FB ENERGY,  
LLC BY PROGRESS ENERGY  
FLORIDA.

\_\_\_\_\_ /



PROCEEDINGS: AGENDA CONFERENCE  
ITEM NO. 8

COMMISSIONERS  
PARTICIPATING: CHAIRMAN NANCY ARGENZIANO  
COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, June 29, 2010

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

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

DOCUMENT NUMBER-DATA

05455 JUL-29

FPSC-COMMISSION CLERK

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

2 **CHAIRMAN ARGENZIANO:** And we are going to  
3 move on to Issue 8. Let everybody get in place.

4 (Pause.)

5 Everyone ready?

6 **MS. CRAWFORD:** Thank you. Jennifer  
7 Crawford for legal staff.

8 Commissioners, Item 8 is the motion for  
9 reconsideration filed for US Funding Group, LLC.  
10 Staff is available for questions. I understand  
11 parties for Progress Energy and FB Energy are also  
12 available, should the Commission have questions for  
13 them.

14 **CHAIRMAN ARGENZIANO:** Thank you.

15 Commissioners? Commissioner Skop.

16 **COMMISSIONER SKOP:** Thank you, Madam  
17 Chair.

18 For reasons that I will explain, I  
19 respectfully disagree with the legal analysis in the  
20 staff recommendation, and at the appropriate time  
21 I'd like to be recognized to make a motion to deny  
22 the motion for reconsideration thereby affirming the  
23 Commission's prior order.

24 In this case their granting a motion for  
25 reconsideration would be improper because there is

1 no mistake or fact -- excuse me. There is no  
2 mistake or issue of law that has been appropriately  
3 overlooked.

4 The procedural posture as I understand it  
5 from Page 2 of the staff recommendation is the  
6 Commission took PAA action on the petition and for  
7 FB Energy's and Progress petition, and it was  
8 subsequently protested by the Funding Group.  
9 Subsequent to that, FB Energy filed a motion to  
10 dismiss. That motion came to the Commission and was  
11 decided on the merits for lack of standing. So, the  
12 legal sufficiency of the pleading was in question.

13 Now, the argument asserted by the  
14 petitioner in this case, being the funding source,  
15 is that Florida Statute -- let me get to it real  
16 quick -- 120.569, Subsection C -- actually (2)(c)  
17 provides an opportunity after the fact, after a  
18 decision has been made, rendered on the merits, to  
19 go back and basically retry an issue that the  
20 Commission has already decided. And I want to take  
21 a look, specifically, at the statute because the  
22 argument advanced by the petitioner completely  
23 misconstrues the statute in a manner in which the  
24 statute was never intended, and that can be gleaned  
25 from a plain reading of the statute.

1           The purpose of this statute is to focus on  
2 the required content of the pleading, not the legal  
3 sufficiency of the pleading. And if we -- for  
4 example, if a motion were to -- by the uniform rules  
5 were to require that elements A, B, and C had to be  
6 plead, and it was submitted to the Commission and  
7 only elements A and C were included, then under  
8 Florida Statute 120.569(2)(c) the Commission shall  
9 review the petition, determine it's not in  
10 conformance with the uniform rules, and shall  
11 dismiss allowing leave to amend. So that focuses on  
12 the content of the petition in accordance with the  
13 uniform rules.

14           And I will read the Statute (2)(c),  
15 "Unless otherwise provided by law, a petition or a  
16 request for hearing shall include those items  
17 required by the uniform rules adopted pursuant to  
18 Section 120.545(b)(4). Upon receipt of a petition  
19 or a request for hearing, the agency shall carefully  
20 review the petition to determine if it contains all  
21 of the required information. A petition shall be  
22 dismissed if it is not in substantial compliance  
23 with these requirements or has been untimely filed."  
24 And then it goes on to say, "The agency shall  
25 promptly given written notice to all parties of the

1 action taken on the petition and shall state with  
2 particularity its reasons if the petition is not  
3 granted and shall state the deadline for filing an  
4 amended petition, if applicable."

5 So what has happened here is that the  
6 petitioner -- when the motion to dismiss was filed,  
7 in its responsive pleading the petitioner put in a  
8 placeholder which, you know, is being construed to  
9 put -- excuse me. A placeholder in their pleading  
10 which is now being used to try and amend after the  
11 fact in the wake of an adverse ruling that was  
12 decided on the merits, i.e., the denial of the -- I  
13 mean, the granting of the motion to dismiss. And,  
14 you know, this seems to be somewhat -- and I'll get  
15 into a little bit of an explanation -- of abuse of  
16 process, because the petitioner's underlying request  
17 deals with a land use issue, an easement that is  
18 founded in zoning and real property that the  
19 Commission does not have jurisdiction over.

20 But moreover, the statute is being used to  
21 provide or interpreted in a manner that provides a  
22 do-over or a get-out-of-jail-free card to go back  
23 now in the face of an adverse ruling that was  
24 determined on the merits by this Commission to say  
25 we get to go amend after the fact because we don't

1 like the result that was determined on the merits.

2 That's not what that statute says. The  
3 statute completely focuses on the content of the  
4 pleading, not the legal sufficiency. And when the  
5 Commission ruled, it was based on the legal  
6 insufficiency, i.e., lack of standing. It was  
7 decided on the merits, and our order specifically  
8 addressed that issue.

9 Now, where we are at with this is that the  
10 petitioner's interpretation of the statute is  
11 clearly erroneous and it is misconstruing the  
12 statute in a manner in which a plain reading of the  
13 statute does not provide for in any manner.

14 Secondly, the case law that they cite can  
15 be readily distinguished from this instant case,  
16 because in the case that they cited, which I have  
17 before me, which is the City of Winter Park, there  
18 was no decision on the merits. The administrative  
19 law judge said we're just dismissing. Didn't give a  
20 reason; never got there; just kind of threw it out  
21 and said that the pleading was well taken.

22 So this case really is not on point to the  
23 situation that happened, because the Commission  
24 rendered a decision on the merits for dismissing the  
25 case for lack of standing. It was like the

1 Commission typically does. So it seems to me that  
2 the petitioner is essentially grasping at straws  
3 trying to use a placeholder nugget that they put  
4 into their responsive plead to the motion to dismiss  
5 only to request a do-over in the wake of an adverse  
6 ruling, and that's clearly not how the procedural  
7 process works.

8           What should have happened if the  
9 petitioner was diligent is that when they filed  
10 their motion to protest or their request to protest  
11 and there was a responsive motion to dismiss, then  
12 the petitioner at that time could have requested a  
13 deferral, which they did not do. They could have  
14 requested leave to amend from the Commission, which  
15 they did not do. They also could have requested a  
16 voluntary withdrawal without prejudice to amend  
17 their complaint and come back, assuming they still  
18 had sufficient time.

19           What they did was just chose to roll the  
20 dice, stick a little clause in the responsive  
21 pleading that says, basically, as staff noted, in  
22 its response the Funding Group requests if we grant  
23 FB Energy's motion to dismiss, the Funding Group be  
24 allowed to file a timely amended petition curing any  
25 identified defect in accordance with the statute.

1 That is not what this statute says, and that is an  
2 abuse of the process. You don't get a do-over if  
3 you don't make your case on the merits the first  
4 time.

5 So in the totality of this, and looking at  
6 the Florida Statutes annotated, the interpretation  
7 in subsequent case law from the First DCA clearly  
8 supports this interpretation. And in 2008, the  
9 First DCA on 988 So.2d 107 basically stated,  
10 "Because an insurers petition did not include the  
11 statement of material facts in dispute it was  
12 properly dismissed. However, the insurer should  
13 have been allowed to amend its petition under the  
14 statute."

15 So, again, it focuses on content, not the  
16 legal sufficiency. The content was all there. The  
17 Commission rendered a decision on the merits, and  
18 that decision was adverse to the petitioner because  
19 they lacked standing under the two-prong test of  
20 Agrico. So just because they put a clause in the  
21 responsive pleading doesn't allow the statute to be  
22 misinterpreted in a manner for which it was never  
23 intended, and a manner which undermines the ruling  
24 that was decided on the merits by the Commission.

25 And the staff recommendation did not



1 really detect nor correct this misperception. So  
2 I'm trying to say that the statute and the manner in  
3 which it is being used is being misconstrued by the  
4 petitioner, and that a motion for reconsideration is  
5 not appropriate because there were no mistake of  
6 fact or law that were overlooked by the Commission  
7 when we rendered the motion to dismiss.

8 So, like I say, there is some other  
9 additional case law in Florida Statutes annotated  
10 that clearly support that, and I'll briefly mention  
11 the one additional case. Okay. It was -- this was  
12 from the Third DCA in 2003, which, again, is after  
13 the case they cited, but it was accorded the  
14 opportunity to conform its petition to the uniform  
15 rules in accordance with Florida Statutes annotated  
16 120.569.

17 Okay. So the bottom line is is the DCAs,  
18 or District Courts of Appeal has subsequently  
19 interpreted this statute that if you are missing a  
20 required element of the pleading the agency shall  
21 dismiss and grant leave to amend, and then come back  
22 within a certain period of time so the petitioner  
23 doesn't get a harsh result. Okay. But what the  
24 statute does not do is the statute does not speak to  
25 the legal sufficiency. If you have all the required

1 elements and you take that decision to a decision on  
2 the merits, then you don't get a do-over in the wake  
3 of an adverse result, and that is what the  
4 petitioner is trying to accomplish here.

5 So, Madam Chair, I'm happy to look to, you  
6 know, Mr. Wright or the parties or legal to take a  
7 look at that. But, again, the statute here is being  
8 misconstrued in a manner in which a plain reading  
9 would not support nor is it supported by controlling  
10 case law. Thank you.

11 **CHAIRMAN ARGENZIANO:** Mr. Wright.

12 **MR. WRIGHT:** Thank you, Madam Chairman and  
13 Commissioners. Schef Wright appearing on behalf of  
14 Florida Biomass Energy, LLC.

15 I want to say I am in the unusual, ironic,  
16 and somewhat unenviable position of agreeing with  
17 everything that Commissioner Skop just said except  
18 the result of not going forward as per the staff's  
19 recommendation. I mean, straight up they blew it.  
20 They have had since December to plead facts  
21 sufficient to establish their standing. They, US  
22 Funding Group, have not done so. Period. End.

23 Everything Commissioner Skop said is  
24 correct. In practical terms, and I don't disagree  
25 with what Commissioner Skop said that the statute is

1 not ambiguous on this point, but there is a strong  
2 preference in Florida law for avoiding -- and all  
3 law, really -- for avoiding harsh results. And  
4 there is a risk to us, and this is why we would be  
5 agreeable to and sort of suggesting, in fact, in our  
6 response to their motion for reconsideration the  
7 relief as recommended by the staff, except we would  
8 go seven days, not 15. But, really, they have had  
9 since December.

10 But there is a risk that the Florida  
11 Supreme Court where this appeal would go could say,  
12 nah, the Commission really should have given them  
13 leave to amend to file -- you know, to plead  
14 whatever standing facts they could possibly plead.  
15 I would agree that is a small risk, but it's a risk,  
16 and to play that out would likely cost us, I mean, a  
17 rock bottom minimum of six to eight months, and  
18 probably more like 10 to 12 months.

19 We believe, and we put this -- we believe  
20 this on information and belief, but we do believe  
21 that Funding Group's tactics here are dilatory. We  
22 believe they are trying to string this project out  
23 so as to adversely impact my client's, Florida  
24 Biomass Energy's ability to develop this project.  
25 Further delay with an appeal, even what I would

1 suggest would be a facially meritless appeal hanging  
2 over our heads makes our lives more difficult.

3 We don't believe that they can plead facts  
4 to establish standing, we just believe that it would  
5 be better, all things considered, to give them  
6 another week from hopefully tomorrow when the order  
7 might be issued, give them another week to file  
8 something, tee it up, and settle it once and for  
9 all. That way there would be no cloud hanging over  
10 us as to some pending appeal.

11 Thank you.

12 **CHAIRMAN ARGENZIANO:** Commissioner Skop  
13 and then Ms. Triplett.

14 **COMMISSIONER SKOP:** Thank you.

15 You know, Mr. Wright's perspective is  
16 based on trying to avoid appeal on behalf of his  
17 client, which I respect that position. Granted the  
18 motion before us, however, is a motion for  
19 reconsideration, which specifically requires the  
20 Commission from a legal perspective to ascertain  
21 whether there was a mistake of fact or law. And,  
22 clearly, as Mr. Wright has admitted, there is no  
23 mistake of fact or law. It is not a harsh result.  
24 If anything it's an abuse of the statute and the  
25 process.

1 I am reasonably certain that based on what  
2 I have read in prior pleadings that the dispute  
3 amongst the parties is better resolved in a county  
4 court in civil litigation, a real property issue or  
5 a zoning issue not before the Commission. I do  
6 believe that they are trying to string this along  
7 and hold this proceeding that FB Energy and Progress  
8 have entered into. And I think that the  
9 Commission's purview is to ensure that the process  
10 is not abused, to promote administrative efficiency,  
11 not to do things over that were already decided on  
12 the merits. And so I do respect Mr. Wright's  
13 concerns, but those are advanced on the interest,  
14 self-serving interest of his client, not the legal  
15 sufficiency of granting or denying the motion for  
16 reconsideration. Thank you.

17 **CHAIRMAN ARGENZIANO:** Mr. Wright, do you  
18 want to respond to that, and then I'd like to go to  
19 Ms. Triplett and then to staff.

20 **MR. WRIGHT:** Well, again, I agree. You  
21 know, we believe that Funding Group has attempted to  
22 abuse your process and we believe these are dilatory  
23 tactics. We just believe it would be better to get  
24 that resolved. And our suggestion in our response  
25 to their motion for reconsideration was in the

1 nature of a request that the Commission issue --  
2 which is like a motion, that the Commission issue a  
3 procedural order giving them an extra week to  
4 respond.

5 I would suggest -- it's a difficult  
6 situation, frankly, it really is, because they have  
7 completely failed to plead fact even though they  
8 have had at least three shots at doing so that might  
9 establish their standing. Nonetheless, and not  
10 withstanding that, we really believe it would be  
11 better and would respectfully ask you to just issue  
12 the procedural order, give them a week to respond,  
13 and let's tee it up to see what they do. They may  
14 not do anything, in which case we'll really be done.  
15 But it's a difficult situation. We believe this is  
16 best all the way around. You know, if there is an  
17 appeal that will take that much more time, et  
18 cetera. Thank you.

19 **CHAIRMAN ARGENZIANO:** How about we go to  
20 Ms. Triplett, and then we'll come back to you.

21 **MS. TRIPLETT:** Thank you, Madam Chair.  
22 Dianne Triplett on behalf of Progress Energy  
23 Florida.

24 We agree that this is a difficult  
25 situation to evaluate, but I find myself leaning

1 towards -- and maybe this is just because I'm more  
2 risk averse, being an attorney, but I agree with the  
3 staff's recommendation that in an abundance of  
4 caution we allow procedurally for that opportunity  
5 to amend, knowing that in all likelihood they will  
6 not be successful in amending. But I think the APA,  
7 like Florida state courts, routinely allow for one  
8 more shot even though -- and I defended cases where  
9 I know that plaintiffs are not going to be able to  
10 amend and state sufficient facts, but the  
11 opportunity is still provided. So I think that  
12 would be the more prudent course here.

13 **MR. WRIGHT:** Very briefly, if I might,  
14 just ask you or offer this. I believe the  
15 Commission could issue an order on its own motion  
16 saying we do not believe that there has been -- that  
17 there has been any mistake of law or fact. However,  
18 in an abundance of caution to ensure -- really to  
19 ensure against the risk of further protracted  
20 proceedings and to settle the standing issue once  
21 and for all, the Commission orders that they've got  
22 a week to respond and tee it up from there.

23 **CHAIRMAN ARGENZIANO:** Commissioner Skop  
24 and then staff, please.

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

1 Chair.

2 Again, the tension here, again,  
3 Ms. Triplett and Mr. Wright are representing the  
4 interest of their client. They are being risk  
5 averse to the extent that they would like to avoid  
6 an appeal if, in fact, an appeal ever materializes  
7 is based on this proceeding and transcript thereof,  
8 which I think that there has been significant  
9 showing that the petitioner was not diligent, and  
10 there is no legal basis to grant a motion for  
11 reconsideration because there was no mistake of fact  
12 or law that the Commission failed to consider.

13 So while I respect parties being risk  
14 averse and managing their risk, what's important to  
15 this Commission so that we don't get admonished on  
16 appeal is that we follow the statute. And the  
17 statute clearly does not say that you get a second  
18 bite at the apple in the wake of an averse ruling  
19 when you weren't diligent to begin with. So for  
20 giving them leave to amend their petition to allege  
21 ultimate facts that were already once decided on the  
22 merits with respect to standing is completely  
23 contrary to the plain reading of the statute. And,  
24 you know, staff has even mentioned that it appears  
25 from the petition that the defect cannot be cured



1 based on the two-prong analysis in Agrico.

2           Again, it's a tension between, you know,  
3 sometimes you just say boo and we are supposed to  
4 run and hide versus sticking to the letter of the  
5 law. And the letter of the law here clearly states  
6 they had an opportunity, they've met the required  
7 content, it was subject to a motion to dismiss which  
8 this Commission decided on the merits. The order  
9 was proper. It included the reason for the granting  
10 of the motion to dismiss. There is no error, there  
11 is no mistake of law, there is no mistake of fact.  
12 And while I appreciate the position, that is not  
13 what the statute says. This is an abuse of process.

14           **CHAIRMAN ARGENZIANO:** Staff.

15           Commissioner Edgar.

16           **COMMISSIONER EDGAR:** I was just going to  
17 say -- thank you, Madam Chair -- that at this  
18 moment, it could change, but at this moment I am not  
19 completely comfortable with the alternative  
20 suggestion that Mr. Wright has proposed. So if we  
21 are going to consider that, I would like to discuss  
22 that further. I have some concerns about that.

23           But I would like to hear from our staff in  
24 response to some of the concerns that Commissioner  
25 Skop has raised as to the legal basis for the

1 recommendation that is before us.

2 **MS. CRAWFORD:** I shall do my best. I  
3 don't disagree with Commissioner Skop's reading of  
4 the statute. However, clearly because that is what  
5 I recommended, I do believe there is a tension  
6 between the statute language and the due process  
7 concerns that are at stake. And what I looked  
8 specifically at is dismissal of the petition shall  
9 at least once be without prejudice for the  
10 opportunity to cure whatever the defect is unless it  
11 conclusively appears from the face of the petition  
12 that the defect cannot be cured. That is a fairly  
13 stern wording, unless it conclusively appears from  
14 the face of the petition.

15 What US Funding Group is arguing is that  
16 they should have been given the opportunity to amend  
17 their protest to show that they do have standing.  
18 And what they argue is that there was no information  
19 present to conclusively establish that Funding Group  
20 isn't a customer of Progress, that Funding Group  
21 cannot allege other substantial interest or more  
22 broadly plead interests, and that Funding Group  
23 cannot plead more broadly the statutes and rules  
24 applicable to the decision and how its substantial  
25 interests fall within the zone of interest protected

1 by 120.57 proceedings.

2 Looking at, for instance, the 2003  
3 Brookwood case, which I believe Commissioner Skop  
4 has alluded to, it mentions that all doubt should be  
5 resolved in favor of granting process. And that, I  
6 think, has been the history of this Commission. If  
7 the Commission would prefer to take a more strict  
8 reading of the statute and deny the motion for  
9 reconsideration, I think it's well within its  
10 discretion to do so.

11 However, based on Commission practice and  
12 history of affording ample process, I believed that  
13 was the best route to go, especially since the  
14 parties who stand to be substantially affected by  
15 the request for a hearing have indicated that would  
16 be their preference, as well. So that was staff's  
17 reasoning in presenting the recommendation it did.  
18 And if I've missed a question, please let me know.

19 **CHAIRMAN ARGENZIANO:** Any other questions?

20 Commissioner Skop.

21 **COMMISSIONER SKOP:** Thank you, Madam  
22 Chair.

23 Again, I think that, you know, parsing the  
24 statute is a dangerous game. Clearly the statute  
25 speaks in its totality about the content of the

1 pleading, not the legal sufficiency of the pleading.  
2 In the context of dismissal of the petition at least  
3 once shall be without prejudice. That is to avoid  
4 the harsh result.

5 Basically, if you read that statute in its  
6 entirety, if the uniform rules say you have to plead  
7 A, B, and C, but the petitioner only plead A, then  
8 they are granted -- the Commission shall dismiss the  
9 petition granting leave to amend under the statute  
10 and giving them sufficient time to refile so it has  
11 all the required elements. So that is basically  
12 avoiding summary judgment for the petitioner and a  
13 harsh result.

14 It is not saying in any way, form, or  
15 fashion, nor should be it construed from a plain  
16 reading of the statute that after a decision has  
17 been made on the merits in the wake of lack of  
18 diligence by the petitioner by failing to take a  
19 deferral, by failing to request leave to amend, by  
20 failing to take an involuntary withdrawal without  
21 prejudice -- I mean a voluntary withdrawal without  
22 prejudice to go amend and come back, they just roll  
23 the dice and say, you know what, we're going to put  
24 this little placeholder in there and we get a free  
25 do-over in the wake of an adverse result.

1           That's not the way our legal system is  
2           founded. If they were not diligent, clearly they  
3           had opportunity. They squandered that opportunity  
4           and now they're trying to bootstrap this statute in  
5           a case that has nothing to do with their argument to  
6           try and find another way in to continue their  
7           dilatory tactics. And that is an abuse of the  
8           process.

9           If you look at the original motion that  
10          they filed, which was requesting or protesting the  
11          order, they do assert zoning issues, which last  
12          nothing to do with the Commission's jurisdiction.  
13          They talk about an easement, and this property is,  
14          you know, a half mile away allegedly from the  
15          proposed plant site. But, you know, if you have an  
16          easement by necessity, I mean a local court can  
17          grant that. So that's not -- that is a circuit  
18          court issue, that is not -- property issues and  
19          zoning issues are not within the jurisdiction of the  
20          Florida Public Service Commission. We deal with  
21          energy issues.

22          We approved a proposed agency action on  
23          the power purchase agreement for the contract. It  
24          was subsequently protested, subject to a motion to  
25          dismiss, which was granted on the merits. The

1 content of the pleading was sufficient, so either  
2 one of two things is happening here. Either our  
3 order was deficient, which I don't believe it was,  
4 or we didn't ensure that all the requirements of the  
5 uniform rules were met, or we're just saying in an  
6 abundance of caution for no good reason we are just  
7 going to go let them have a do over.

8 You know, that is analogous to a plaintiff  
9 in a civil trial going to court and getting a  
10 million dollar verdict and the defendant says we  
11 don't like it, we want a do-over. That's just an  
12 absurd result. And I respect the position of the  
13 parties, and I respect the adversity of appeal, but  
14 there is no guarantee that this will be appealed,  
15 particularly in light of what some of the discussion  
16 has been here today. Because I think any appellant  
17 would be literally shaking in their shoes to go try  
18 and pull this off, noting that the plain reading of  
19 the statute is supported by subsequent controlling  
20 case law does not support their position. It is not  
21 a good faith argument. So that's my position.

22 **CHAIRMAN ARGENZIANO:** Mr. Kiser.

23 **MR. KISER:** Thank you, Madam Chairman.

24 I pretty much stand right squarely behind  
25 Ms. Brubaker's analysis and her position. I would

1 like to point out that between the Florida Criminal  
2 Rules of Procedure, the Florida Civil Rules of  
3 Procedure, those are clearly designed to be very  
4 definitive and many times harsh results can happen.  
5 However, the Administrative Code, the Administrative  
6 Law for Florida from day one has always been  
7 intended that it would be a little more lax. It  
8 would not have quite the definitive requirements.  
9 There are a number of areas, swearing in expert  
10 witnesses, a number of other procedures that apply  
11 in administrative law that don't apply in civil and  
12 criminal proceedings. So there's clearly a  
13 different standard that allow more discretion, more  
14 leeway in your administrative processes. And,  
15 therefore, I think that's one of the reasons why we  
16 are suggesting this approach because you can make  
17 those distinctions. So that's the only thing I want  
18 to make clear that everybody understand, there  
19 really is a difference between those sets of rules.  
20 One was designed from day one to be more lax than  
21 the others.

22 **CHAIRMAN ARGENZIANO:** One minute, please.

23 In taking into consideration Commissioner  
24 Skop's reading of the statute, and I understand  
25 that, and then listening to staff about how, kind of

1 the history here to afford ample process to make  
2 sure --

3 **MR. KISER:** Right.

4 **CHAIRMAN ARGENZIANO:** -- what would be the  
5 harm, if you could just help me here, and I  
6 understand Commissioner Skop, perfectly what he is  
7 saying, but I have also sat through proceedings here  
8 where we have kind of weighed either due process or  
9 ample process in order to -- I guess would it help  
10 us if we took staff's recommendation to remove all  
11 doubt by giving us that time and what would be the  
12 downside to doing that.

13 **MR. KISER:** Well, I suppose in an  
14 exaggerated situation, if it was so common that the  
15 Commission was blinking every time somebody cited  
16 one of the administrative rules, that they really  
17 didn't matter, at some point you could potentially  
18 get in a situation where a party could come in and  
19 argue, well, this Commission has been all over the  
20 board. The rules really don't mean a whole lot.  
21 They are just kind of simple guidelines and not  
22 really rules. That would be an extreme case that  
23 someone, you know, at some point might want to try  
24 to cite this or other ones as the rules really don't  
25 apply, and you can just kind of make things up as



1 you go along, but that would be in a very extreme  
2 case.

3 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

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

6 Mr. Kiser, with respect to the granting of  
7 the motion to dismiss, what in your legal opinion is  
8 the specific fact or law that the Commission  
9 overlooked or failed to consider in rendering that  
10 order?

11 **MR. KISER:** I don't know that right now  
12 that I could come forward with one that would  
13 satisfy you. I think that Ms. Brubaker has stated  
14 that, you know, in an abundance of caution, just to  
15 eliminate any possible doubt, and hopefully shorten  
16 the process, and shorten the amount of process  
17 that's involved in this decision that we go ahead  
18 and take that extra step. So I don't know that I  
19 could give you an answer on that one.

20 **COMMISSIONER SKOP:** You would agree, would  
21 you not, that in an abundance of caution is not the  
22 legal standard for granting a motion for  
23 reconsideration, is that correct?

24 **MR. KISER:** I'm not aware. I'm only aware  
25 of the ones that you have sited before. I don't

1 know if Ms. Brubaker has an example that she could  
2 site or not.

3 **CHAIRMAN ARGENZIANO:** Ms. Brubaker.

4 **MS. CRAWFORD:** If I were asked the  
5 question, I believe that the mistake of fact or law  
6 would be that the Commission's order should have  
7 specifically afforded an opportunity to amend the  
8 protest.

9 **MR. KISER:** Yes, I would agree with that.

10 **COMMISSIONER SKOP:** No amendment was  
11 requested until the decision was rendered on the  
12 merits after the fact.

13 **MS. CRAWFORD:** Yes, I understand.

14 **COMMISSIONER SKOP:** This is sounding very  
15 squirrely, Commissioners. But, again, I'm going to  
16 make the motion when I have the opportunity to do  
17 so.

18 **CHAIRMAN ARGENZIANO:** Commissioner Edgar.

19 **COMMISSIONER EDGAR:** Thank you, Madam  
20 Chair.

21 I, as always, appreciate the depth and  
22 thoroughness that Commissioner Skop has brought to  
23 the discussion today. And similar perhaps, not to  
24 put words in your mouth, but perhaps similar to an  
25 earlier statement that Mr. Wright made, I am in

1 agreement with most of it, but not necessarily the  
2 result.

3 And in that what I mean is I also have  
4 strong concerns about always potential abuse of  
5 process and also try to make our decisions and weigh  
6 in for administrative efficiency, believing that  
7 that is best, of course. In this instance, though,  
8 I don't think that the issues that are before us  
9 rise to the level of abuse of process, or that to go  
10 forward as the staff has recommended would be in  
11 violation of administrative efficiency.

12 So with that, I do believe -- it is my  
13 opinion that we do have the discretion under the  
14 statute to move forward as the staff has  
15 recommended, and that remains my preference, and at  
16 this point what I would vote for.

17 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

18 **COMMISSIONER SKOP:** I'm ready to make a  
19 motion.

20 **CHAIRMAN ARGENZIANO:** Just let me give  
21 my -- what I feel. I feel that -- I understand  
22 whole-heartedly what you're saying, Commissioner  
23 Skop, but I have seen us here before sometimes look  
24 at the statute and sometimes stick to it strictly  
25 and other times say, okay, there's some logic in

1 moving a different way. I am for affording ample  
2 process, and I think that is what we are doing here  
3 today if we go with staff's recommendation.

4 So I'm kind of leaning towards going with  
5 staff's recommendation in order to have no doubt and  
6 move forward with it, but that's not to discount at  
7 all what my colleague, Commissioner Skop, is saying.  
8 He is right on point, and I understand that, but I  
9 think that sometimes we each are right on point and  
10 look at things a different way and move forward a  
11 little differently.

12 I don't think it's an abuse of process.  
13 It could be. And as Mr. Kiser has mentioned, it  
14 could come back in our face. And you say it is an  
15 extreme, and it could, and I think then we'd have to  
16 take a second look. But I think for today I may  
17 lean towards staff recommendation, and not  
18 discounting, again, what my colleague, Commissioner  
19 Skop, has mentioned, because he is right there. But  
20 I do see some flexibility, and I feel more  
21 comfortable with removing all doubt and maybe moving  
22 with staff's recommendation.

23 Having said that, Commissioner Skop.

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

1                   And I appreciate the views of my  
2 colleagues. I think from a legal analysis  
3 standpoint, you know, I probably can't concur with  
4 what may be the majority view on this. The  
5 petitioner has been afforded all forms of due  
6 process. Their lack of diligence does not excuse  
7 the Commission granting them additional due process  
8 that is not warranted either by controlling case law  
9 or by statute.

10                   You know, the issue as I see it here is,  
11 you know, Mr. Wright has concurred basically that my  
12 interpretation of the statute is correct. He has  
13 even mentioned it's abuse. It's just the preference  
14 of his client to avoid a potential appeal. But,  
15 ultimately the issue before the Commission is  
16 whether to grant or deny a motion for  
17 reconsideration, and that requires a legal standard.  
18 And that legal standard is that the motion needs to  
19 identify a specific fact, point of fact or law that  
20 the Commission overlooked or failed to consider in  
21 rendering its order. We did not do this.

22                   The case law that was cited is not on  
23 point. It can be readily distinguished from the  
24 Commission's order which clearly articulated the  
25 basis for the Commission's denial -- I mean,

1 granting of the motion to dismiss, which was lack of  
2 standing because the petitioner failed to meet the  
3 two-prong test as articulated in Agrico. Okay. So  
4 by warranting this leave to amend after the fact,  
5 which is trouncing on the statute to begin with, the  
6 end result will be they'll plead something, we'll go  
7 through this process again, and there is no  
8 guarantee that they are not going to appeal this  
9 further the next time if they get an adverse result.  
10 So it's like how many adverse results do you have to  
11 get before you get to the end of the process.

12 So I respect the views of my colleagues.  
13 Certainly, you know, there is discretion. But on  
14 this one, you know, I'm looking specifically at the  
15 legal standard whether to grant or deny a motion for  
16 reconsideration. That standard in my professional  
17 legal judgment has not been met, and I would  
18 basically at this point, Madam Chair, move to deny  
19 the staff recommendation on Issues 1 and 2.

20 **CHAIRMAN ARGENZIANO:** Is there a second?  
21 There's no second.

22 **COMMISSIONER SKOP:** The motion fails.

23 **CHAIRMAN ARGENZIANO:** The motion fails,  
24 yes.

25 Just one other question. If they come

1 back under your recommendation as the statute  
2 indicates that -- hold on one second. If they come  
3 back, then they would have to -- actually, what they  
4 would be showing us is if they thought there was a  
5 defect or something that wasn't conclusively found  
6 before?

7 **MS. CRAWFORD:** They would need to plead  
8 conclusively, definitively that they have standing  
9 and that their pleading does sufficiently meet the  
10 standards for requesting a Chapter 120.57 hearing.

11 **CHAIRMAN ARGENZIANO:** And if they can't  
12 come up with that, then it's up to this Commission  
13 to decide whether that's found or not, right?

14 **MS. CRAWFORD:** That is correct.

15 **CHAIRMAN ARGENZIANO:** Okay. All right.  
16 Do I have a motion?

17 **MR. WRIGHT:** Madam Chairman.

18 **CHAIRMAN ARGENZIANO:** I'm sorry. Mr.  
19 Wright.

20 **MR. WRIGHT:** If it might, I would just  
21 like to reiterate our request is articulated in our  
22 response, that they be allowed only seven days, not  
23 15. Thank you.

24 **CHAIRMAN ARGENZIANO:** Commissioner Edgar.

25 **COMMISSIONER EDGAR:** Madam Chair -- and I

1 was going to mention that point. If I may, to  
2 staff, the difference between seven days and 15 days  
3 isn't something that I feel strongly about, and I do  
4 recognize also just the practicality that there is a  
5 holiday, perhaps, in that time frame as well. But  
6 is there either through practice or rule language or  
7 statute language, of course, a basis for seven days  
8 versus 15?

9 **MS. CRAWFORD:** There is not. The reason I  
10 recommended 15 over seven is simply that of trying  
11 to accommodate both interested parties having  
12 sufficient time to accommodate the pleading. But I  
13 can commit to getting this order, whatever the  
14 Commission decides to do today turned around very  
15 quickly, ideally tomorrow, and will commit to moving  
16 very quickly on whatever additional process is  
17 afforded pursuant to the Commission's vote today.

18 **COMMISSIONER EDGAR:** Thank you.

19 Madam Chair and Commissioner Skop, at this  
20 time I would offer a motion that we approve the  
21 staff recommendation as it is before us on all  
22 issues.

23 **COMMISSIONER SKOP:** And that's for the 14  
24 or the seven days?

25 **COMMISSIONER EDGAR:** That would be the 15



1 days, as it's written.

2 **COMMISSIONER SKOP:** All right. So we  
3 don't have to pass the gavel, I will second the  
4 motion, but I will not be voting in favor of it.

5 **CHAIRMAN ARGENZIANO:** Thank you. So we  
6 have a second.

7 All those in favor, aye.

8 (Vote taken.)

9 **CHAIRMAN ARGENZIANO:** All those opposed?

10 **COMMISSIONER SKOP:** Aye.

11 **CHAIRMAN ARGENZIANO:** Show the motion  
12 adopted. Thank you very much.

13 **COMMISSIONER SKOP:** Madam Chair, on that  
14 one.

15 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

16 **COMMISSIONER SKOP:** I just want to state  
17 for the record, again, my dissent on this was based  
18 on the lack of legal sufficiency to grant the motion  
19 for reconsideration. Thank you.

20 **CHAIRMAN ARGENZIANO:** Thank you.

21 \* \* \* \* \*

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

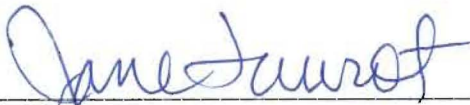
STATE OF FLORIDA     )  
                                  :  
                                  :        CERTIFICATE OF REPORTER  
COUNTY OF LEON        )

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

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

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

DATED THIS 1st day of July, 2010.



-----  
JANE FAUROT, RPR  
Official FPSC Hearings Reporter  
(850) 413-6732