

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 120015-EI

In the Matter of:

PETITION FOR INCREASE IN RATES
BY FLORIDA POWER & LIGHT COMPANY.

VOLUME 31

Pages 4578 through 4716

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COMMISSION
CLERK

PROCEEDINGS: HEARING

COMMISSIONERS
PARTICIPATING: CHAIRMAN RONALD A. BRISÉ
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER ART GRAHAM
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Thursday, August 30, 2012

TIME: Commenced at 4:58 p.m.
Concluded at 9:12 p.m.

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

REPORTED BY: JANE FAUROT, RPR
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APPEARANCES: (As heretofore noted.)

I N D E X

WITNESSES

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EXHIBITS

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P R O C E E D I N G S

1
2 (Transcript continues in sequence from Volume
3 30.)

4 **COMMISSIONER GRAHAM:** Okay. I'll turn this
5 back over to Chairman Brisé.

6 **CHAIRMAN BRISÉ:** Thank you, Commissioner
7 Graham, for stepping in for me.

8 As we promised, we're going to take up some
9 procedural things between the hour of 5:00 and 6:00. I
10 think this is a good break for us to get into some of
11 those things, so this is the order that we are going to
12 go in.

13 We received a motion for time certain for the
14 special agenda, and it was proffered or brought forth by
15 OPC. So at this time we will take that up, and deal
16 with that at this time.

17 Staff. Or, somebody from OPC, do you want to
18 speak to your motion? Someone from OPC want to speak to
19 their motion?

20 **MR. KELLY:** Yes, Mr. Chair. I won't take up
21 much time. We noticed on the CASR there was a definite
22 time, and then when we were looking at the calendar
23 there was some -- it seemed to be some floating dates
24 during the clause hearings, and so we just wanted to
25 make sure that we had a time certain.

1 As we stated in the motion, we had had some
2 consumers, customers ask us at some of the customer
3 hearings when the agenda hearing was going to be,
4 because they wanted to watch it and possibly attend. So
5 that was our intent, to get a time certain, and also, I
6 think, to keep all of the parties from having to come
7 out for three full days and possibly not getting there
8 to the special agenda until Thursday.

9 **CHAIRMAN BRISÉ:** Thank you very much. I
10 noticed that Section VII says that the intervenors, most
11 of them have no position on this matter, with the
12 exception of Mr. Hendricks and Mr. Saporito, which both
13 support the motion.

14 Does staff have a recommendation before I come
15 to the board?

16 **MR. YOUNG:** Yes, sir. We understand the
17 Office of Public Counsel's concerns. However, I'll just
18 ask -- keep in mind that the Commission calendar and the
19 scheduling constraints of the Commission calendar.
20 That's why we had to schedule a day on an hour after the
21 6th or 7th. Given the fact that the clause hearings
22 might end early, we can take up the date at that time.

23 Staff believes that this motion, while we
24 understand the confusion, it's a system design issue,
25 and staff recommends that the motion be denied.

1 **CHAIRMAN BRISÉ:** Okay.

2 Commissioners?

3 Commissioner Brown.

4 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.

5 And this is a question, Mr. Young, for you. I
6 guess since this is post-hearing and participation is
7 limited to Commissioners only --

8 **MR. YOUNG:** Yes.

9 **COMMISSIONER BROWN:** -- I just want to know,
10 is there any detriment to leaving the schedule as is?
11 Really? I mean, I know you support denying the motion,
12 but is there any detriment to the parties or the public?

13 **MR. YOUNG:** Staff doesn't believe there's any
14 detriment to the parties and public. It will be
15 noticed, it will have an FAW notice going out to the
16 parties that the Clerk's going to issue, and the public
17 will have some notice as it relates to the hearings.

18 **COMMISSIONER BROWN:** And it will be televised?

19 **MR. YOUNG:** Yes, ma'am, it will be televised.
20 And the Office of Public Counsel, I believe, will be
21 here to view -- in terms of the representatives of the
22 public will be here to view it.

23 **COMMISSIONER BROWN:** Okay.

24 **CHAIRMAN BRISÉ:** Okay.

25 Commissioners.

1 Commissioner Balbis.

2 **MR. YOUNG:** Also, Mr. Chairman, if I could say
3 one other thing. Ms. Brubaker -- Ms. Crawford, excuse
4 me -- just reminded me that this will be transcribed in
5 full and recorded for the public's viewing and
6 everything else.

7 **COMMISSIONER BALBIS:** I just want -- my mind
8 is still around Dr. Avera's testimony right now, so
9 could someone just please explain. I understand OPC's
10 motion, but explain the difference between website CASR
11 and the schedule I'm looking at now, which shows on the
12 8th the 9:30. So just for an abundance of caution,
13 we've noticed all three dates, so whenever it ends,
14 we'll take it up one hour after. I just wanted to make
15 sure I understand that correctly.

16 **CHAIRMAN BRISÉ:** Right.

17 **COMMISSIONER BALBIS:** Okay. Thank you.

18 **CHAIRMAN BRISÉ:** Okay. Any further
19 discussion, Commissioners?

20 Okay. At this time I'm ready to entertain a
21 motion, if there's a motion.

22 Commissioner Balbis.

23 **COMMISSIONER BALBIS:** I have one question for
24 staff, and then I will make a motion. The current
25 schedule for this docket for having briefs due is the

1 24th, is that correct?

2 **MR. YOUNG:** It's September 21st.

3 **COMMISSIONER BALBIS:** September 21st. Okay.

4 Okay. With that, I move that we deny
5 Citizens' motion for time certain for this special
6 agenda.

7 **CHAIRMAN BRISÉ:** Okay. It has been moved.

8 **COMMISSIONER GRAHAM:** Second.

9 **CHAIRMAN BRISÉ:** Okay. It has been moved and
10 seconded. All in favor.

11 (Vote taken.)

12 **CHAIRMAN BRISÉ:** Okay.

13 The second issue we received is something
14 similar to a motion from Ms. Larson for reconsideration.

15 So, Mr. Young, if you could --

16 **MR. YOUNG:** Yes, sir.

17 Ms. Larson, a pro se litigant in this case,
18 who was dismissed on August 20th for failure to appear
19 to attend the hearing has sent in a request that the
20 Commission reconsider the dismissal and allow her to
21 file post-hearing briefs.

22 I would remind the Commission of the standard
23 upon which motion for reconsiderations are to be taken
24 up, and that is the standard of review on a motion for
25 reconsideration is whether the motion identifies a point

1 of law or fact which was overlooked or which the
2 Commission failed to consider when rendering its
3 decision.

4 In terms of Ms. Larson's motion, I think Ms.
5 Larson indicated that there was a possible
6 miscommunication in terms of on the record, but I have
7 distributed to the Commissioners the transcript
8 concerning Ms. Larson's -- dealing with the dismissal of
9 Ms. Larson, where the presiding officer, Mr. Chairman,
10 indicated that he did not -- she was informed to be
11 here, she did not attend, she was not at the hearing,
12 and thus he dismissed her.

13 I don't believe that Ms. Larson identified a
14 point of law or fact which the Commission overlooked or
15 failed to consider when dismissing her. Thus, staff
16 recommends that her motion -- her request be denied.

17 **CHAIRMAN BRISÉ:** Okay.

18 Commissioners?

19 Commissioner Brown.

20 **COMMISSIONER BROWN:** I move to deny Ms.
21 Larson's request for reconsideration.

22 **CHAIRMAN BRISÉ:** Commissioner Balbis.

23 **COMMISSIONER BALBIS:** I second that motion. I
24 do have a question for staff. If we deny this motion
25 and Ms. Larson does file any correspondence, would it

1 still be entered into the docket correspondence?

2 **MR. YOUNG:** Yes, sir.

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

4 **CHAIRMAN BRISÉ:** Okay. It has been moved and
5 seconded. Any further discussion?

6 Okay. Seeing none, all in favor say aye.

7 (Vote taken.)

8 **CHAIRMAN BRISÉ:** All right. Let the record
9 reflect that Ms. Larson's motion for reconsideration has
10 been denied.

11 The third thing -- did we want to talk about
12 potential stipulations or something?

13 **MR. YOUNG:** Yes, sir. With that, Mr.
14 Chairman, staff will -- on the break, on the dinner
15 break staff will be handing out possible stipulation of
16 issues in this case in terms of several issues. I think
17 it's about 12 to 15 issues or more, I can't remember,
18 for the Commission's consideration at the conclusion of
19 the hearing.

20 **CHAIRMAN BRISÉ:** Okay. Thank you.

21 The third issue that I said I was going to
22 provide information about today was the date that the
23 Commission would take up the settlement. And the date
24 that we are going to take up the settlement is the 27th,
25 Thursday, the 27th, so we are allowing the 27th and the

1 28th to take up the settlement. Okay.

2 **MR. SAPORITO:** Mr. Chairman, is that of
3 September?

4 **CHAIRMAN BRISÉ:** Of September, yes.

5 **MR. SAPORITO:** Well, I would request
6 reconsideration to move that to the week following,
7 because as I have stated to this Commission, I will be
8 out of town for the entire month of September for the
9 reasons I have stated earlier, and it's going to
10 disenfranchise me a little bit, I would think.

11 **CHAIRMAN BRISÉ:** Okay. I don't know who you
12 made aware of that.

13 **MR. WISEMAN:** Chairman, if I could weigh in on
14 this issue, the timing.

15 **CHAIRMAN BRISÉ:** Sure.

16 **MR. WISEMAN:** And I have another issue that
17 I'd like to raise about the order on the proposed
18 settlement, as well. I reluctantly raise this, but
19 that's the day I believe after Yom Kippur, and I will
20 not be able to be here on that day. I won't be able to
21 fly down the night before.

22 And so I would request that obviously we are
23 one of the signatories to the settlement, it's a very
24 important issue to us, and I would ask that it be moved.

25 **CHAIRMAN BRISÉ:** Understood. And one of the

1 reasons why we selected that date was so that it
2 wouldn't fall on Yom Kippur. So, therefore, as we
3 looked at all the dates available to the Commission in
4 September, that was the two days that we found that were
5 available for us to move forward.

6 **MR. WISEMAN:** Well, if you could start -- I
7 don't know what flights are available, obviously, the
8 morning of the --

9 **CHAIRMAN BRISÉ:** 27th.

10 **MR. WISEMAN:** -- 27th, but if you could start
11 it in the afternoon, then I could get a flight that
12 morning.

13 **CHAIRMAN BRISÉ:** Okay. Well, the time we
14 could probably work with. The date is one that is, as
15 we look at our calendar, that is probably the best date
16 that we have available to be able to take it up.

17 **MR. WISEMAN:** Okay. Could we get back to you
18 on the time, then, after I've had a chance to check
19 flight schedules?

20 **CHAIRMAN BRISÉ:** Well, I'll say this, the date
21 is certain, okay? The time we could -- we could look
22 at, and maybe we could have a conversation about the
23 time and so forth and give a time specific to begin
24 going forward.

25 **MR. WISEMAN:** Thank you. I would appreciate

1 that.

2 **CHAIRMAN BRISÉ:** All right.

3 **MR. SAPORITO:** Mr. Chairman, if the date is
4 certain, then I would request leave of this Commission
5 to participate via teleconference call.

6 **MR. WISEMAN:** Mr. Chair, before you address
7 that, could I raise the other issue that I want to
8 raise, because I think it is actually somewhat relevant
9 to Mr. Saporito's request.

10 **CHAIRMAN BRISÉ:** Sure.

11 **MR. WISEMAN:** And it concerns the procedure
12 that has been set up. I think it's fair to say that
13 you've seen all the parties at this end of the table go
14 tooth and nail at each other's witnesses, and at times
15 at each other over the course of the past two weeks.
16 But when it comes to the settlement, we strongly -- I
17 think I can speak on behalf of everybody on this side of
18 the table, we all still strongly support the settlement
19 and believe it's in the best interest of all FPL
20 ratepayers, and the Florida economy, and think it ought
21 to be approved.

22 That being said, it's extremely important to
23 us that if the Commission does approve it that an order
24 approving it will be upheld. What we would most like to
25 avoid is a circumstance where someone claims that their

1 due process rights have been infringed. And on that
2 front, we think an evidentiary hearing, a short one, a
3 day or two, would be very helpful. We think that if
4 parties -- first of all, we've got this somewhat strange
5 procedure that has occurred right now where parties have
6 been authorized to obtain discovery from each other.
7 But if there is no evidentiary hearing, then it's not
8 clear what parties would do with the discovery they
9 receive.

10 We would like an opportunity to have an
11 evidentiary record developed concerning the settlement.
12 Much of the record -- well, this record that is being
13 developed in the litigated proceeding certainly can be
14 part of that record, but we think that all parties,
15 whether they're for the settlement or whether they're
16 against the settlement, should be provided an
17 opportunity to put in evidence into the record that they
18 believe either supports the settlement as being fair or
19 that they think shows the settlement is unfair.

20 And so we would ask for an evidentiary
21 hearing.

22 **CHAIRMAN BRISÉ:** Okay. So, in essence, what
23 you are requesting is to reconsider the order that we
24 set forth?

25 **MR. WISEMAN:** Yes. And to make clear --

1 because I understand what the grounds are for
2 reconsideration, that there has to be an error of law,
3 and what we would request that you consider is what I
4 believe is the Commission's interpretation of
5 SFHHA v. Jaber.

6 If you will recall, I recall because I argued
7 it, that case arose in --

8 **MR. REHWINKEL:** Mr. Chairman, I'm going to
9 have to object. I really have restrained myself from
10 cutting off this argument, but we're right back where we
11 were at the beginning of this hearing. And I had no
12 notice that we were going to have argument on this. I'm
13 not prepared to address what really and truly is
14 substantive argument that assumes presumptions about how
15 this settlement is going to be entertained as if we're
16 ready to sit here and have argument about an evidentiary
17 hearing.

18 It sounds to me like it's a modification of
19 the petition that FPL filed, and I don't want to go down
20 this path. I thought the goal was to get this hearing
21 done before we addressed anything else. And, with all
22 due respect to Mr. Wiseman, I'm not trying to cut his
23 argument off, but now all of a sudden I feel like we're
24 disadvantaged.

25 **CHAIRMAN BRISÉ:** All right. What I will do is

1 since, in essence, what I'm understanding from Mr.
2 Wiseman is sort of a reconsideration of the order that
3 we have set forth, I'll ask staff to address that, and
4 then we will bring it up to the board and the board will
5 deal with it.

6 **MR. YOUNG:** Yes, sir.

7 Staff believes essentially Mr. Wiseman's oral
8 motion for reconsideration should be denied because the
9 party has failed to meet the standard for a motion for
10 reconsideration. As stated throughout the course of
11 this proceeding, the standard for review on a motion for
12 reconsideration is whether the motion identifies a point
13 of law or fact which the Commission overlooked or which
14 the Commission failed to consider -- at the prehearing
15 the presiding officer failed to consider when rendering
16 his decision, and that would be the motion, the second
17 order revising the order establishing procedure, setting
18 procedural schedule for the Commission, consideration of
19 settlement agreement.

20 I think, based on what Mr. Wiseman is arguing
21 is possibly some due process or some opportunity to be
22 heard. The order, as stated on Page 2, says upon
23 conclusion of the evidentiary portion of the hearing,
24 the Commission will announce the date, i.e., the notice,
25 and time set for the sole purpose of taking up the

1 settlement agreement specifically set forth in the
2 order. So the parties will have a notice and an
3 opportunity to be heard on the time set forth by the
4 Commission when taking up the proposed motion -- joint
5 motion for settlement.

6 **MR. WISEMAN:** Mr. Chairman, if I could be
7 heard for one moment on Mr. Young's comments.

8 **MR. LITCHFIELD:** And FPL, please.

9 **CHAIRMAN BRISÉ:** I said we would hear from
10 staff and then we would bring it back up to the board.
11 And the way we are going to proceed, if there are
12 questions that come from the board, the board will ask
13 questions of those who may support or who may oppose the
14 motion. We haven't seen that delineation as of yet.

15 Commissioner Brown.

16 **COMMISSIONER BROWN:** Thank you. This is a
17 question for Mr. Young or Ms. Helton.

18 In acknowledging that we are in a very unique
19 posture, and all of that, and that we have had extensive
20 and copious amounts of testimony and documentation
21 produced during this technical hearing, I was wondering
22 is there a way to, once this technical hearing is
23 closed, to incorporate the testimony, the evidence that
24 was produced during this technical hearing into the
25 settlement discussions?

1 **MS. HELTON:** I think you can. I think it's a
2 policy question whether you want to or not. Obviously
3 you have taken two weeks' worth of testimony here
4 dealing with the petition, as the company filed it. And
5 the company and some of the parties to the case have
6 proposed an alternate resolution to the petition that
7 was filed.

8 And I think that it's -- we have done a good
9 job keeping the settlement discussion out of this
10 record, but I think that it's appropriate for you to
11 consider the testimony that you have heard in deciding
12 whether the settlement is appropriate or not.

13 Does that make sense?

14 **COMMISSIONER BROWN:** No.

15 **MS. HELTON:** My boss, I think, wants to give
16 it a shot.

17 **MR. KISER:** I think the problem, and there was
18 a recent case of 2007 that Commissioner Edgar
19 participated in where a settlement was proposed, in
20 fact, I think FPL was the party, where the Commission
21 didn't take the whole settlement. And in that
22 settlement it had a similar provision to the one that is
23 being talked about, the provision in there that said
24 that the only -- which held together was everything was
25 agreed to in its entirety.

1 Well, the Commission didn't do that. The
2 Commission took parts of the settlement they liked and
3 that's what they voted out. So there have been, to some
4 extent, some similar circumstances in a previous case.

5 In trying to figure out how to bob and weave
6 through this procedural dilemma that we've got, it would
7 appear to me that if there are sufficient votes to take
8 up and want to move on the settlement issues, then at a
9 separate time that that be taken up, an evidentiary
10 hearing be held on those issues that have not been so
11 far part of this record, because that is a problem. If
12 there's issues that are in that settlement that there is
13 no record for here, then it may be vulnerable to attack
14 on appeal that a sufficient record wasn't there for
15 those items.

16 So that's part of the dilemma that we're
17 facing because of the way the various processes took
18 place in this case of having a settlement on top of the
19 Commission's work. And that's kind of where I see us,
20 and you just need to figure out how you want to take it
21 up. And we can advise you what we think will fly and
22 what we think is going to be subject to attack and be
23 very vulnerable.

24 **COMMISSIONER BROWN:** If I can just follow up
25 on that.

1 **CHAIRMAN BRISÉ:** Sure.

2 **COMMISSIONER BROWN:** Mr. Kiser, are you then
3 suggesting that we can still incorporate -- once this is
4 closed, we can incorporate the record from this
5 technical hearing into that additional process?

6 **MR. KISER:** Yes, I think that can be done.

7 **COMMISSIONER BROWN:** Okay. Thank you.

8 **CHAIRMAN BRISÉ:** Commissioner Balbis.

9 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.
10 And I have two issues, and one is really a technical or
11 legal issue that I'm struggling with right now in that
12 we have taken a stance and advised all the parties that
13 we are not going to address the settlement agreement in
14 this technical hearing. So I have had questions that
15 would pertain to the settlement agreement for witnesses
16 that I would have liked to have asked, but I did not
17 because we took that stance.

18 So now if we are going to accept that
19 information in the record for the settlement proceeding,
20 which I think is appropriate, I would still like the
21 ability to ask the questions for issues. If you look at
22 the information that is in the record for this
23 proceeding, there's discrepancies on -- not
24 recommendations, but agreements in the settlement
25 agreement where there's discrepancies in the record that

1 I'd like to see fleshed out. So I don't really care
2 what process that is, but I want the opportunity to ask
3 the questions that I wanted to ask of, you know,
4 witnesses, the parties, et cetera.

5 So that's kind of the legal/technical issue
6 that I'm struggling with, and it ties into the practical
7 side of things in that we are in a unique situation
8 where the Office of Public Counsel is not agreeing to
9 it. So before I'm in a position to approve or deny
10 something, I want to make sure all the questions are
11 asked and answered so that if we make a decision to
12 approve or deny, we can honestly say it's in the best
13 interest of all parties.

14 And I just want to make sure we're at that
15 point. So whether that is having another evidentiary
16 proceeding, whether it is allowing staff to give a full
17 recommendation on this proceeding so we can compare
18 apples to apples and see what's in the best interest of
19 all parties, whichever way we get there, I'd like to get
20 there.

21 **CHAIRMAN BRISÉ:** All right.

22 Any further comments, Commissioners?

23 Okay. Are we at a point where we have enough
24 information to get to a decision point?

25 Commissioner Graham.

1 **COMMISSIONER GRAHAM:** I'm probably opening up
2 a can of worms, but I still want to hear from Mr.
3 Wiseman, and I want to reply to what Keino Young had
4 said earlier. And then I also want to hear what Florida
5 Power & Light had to say before we make a determination.

6 **CHAIRMAN BRISÉ:** All right. I think that that
7 is fair. I want to sort of make the process fair, as
8 well. If we can have a sense, and maybe y'all need two
9 minutes or three minutes to figure this out, those who
10 support the reconsideration, and we'll give you a few
11 minutes to sort of come up with your argument for
12 supporting the reconsideration.

13 And if there are those who oppose the
14 reconsideration, if you could -- you'll have a couple
15 minutes to figure out what your argument will be. And
16 we'll give each side five minutes, and then that will
17 allow an opportunity for whatever the arguments would be
18 for or against, and then that will give us an
19 opportunity to hear what the concepts or ideas are, and
20 then we'll go from there in terms of questions and so
21 forth.

22 **MR. REHWINKEL:** For the record, the Public
23 Counsel objects to this entire process of considering
24 the stipulation reconsideration. We object to it all,
25 because we were without notice, and we think that you

1 are now interjecting the stipulation into the
2 consideration of FPL's petition that was filed on
3 March 19th.

4 **CHAIRMAN BRISÉ:** Well, I guess we could
5 disagree in that I think we're dealing with how the
6 process is going to move forward. I think we opened it
7 up with a date, there was an issue with respect to the
8 date, and now there is a broader issue as to whether the
9 date that we would set is sufficient, and the process
10 that we would set is sufficient. So I think that that
11 is what we're doing at this point.

12 And if my understanding is incorrect, Legal,
13 you can help me out, but I think my understanding is
14 correct.

15 **MR. YOUNG:** I think you're spot on, Mr.
16 Chairman. I think what we're discussing now, after you
17 opened up the date, was South Florida Hospital's oral
18 motion for reconsideration of the second revised --
19 second order revising the order establishing procedure.
20 So that's what we're discussing now.

21 **CHAIRMAN BRISÉ:** Right. And we've taken quite
22 a few reconsideration orders -- I mean, reconsiderations
23 in this process, and I think that we're doing the same
24 thing at this time, so --

25 **MR. SAPORITO:** Mr. Chairman, may I be heard

1 just briefly? And I would just put an objection on this
2 record for the same reason, to protect my due process
3 rights, because what the Chair is asking the parties to
4 consider here, in my view, is whether or not that the
5 board should reconsider its own order.

6 Staff has already advised the board that it is
7 improper because there is no challenge to an error of
8 fact or law, and so that's my objection.

9 **CHAIRMAN BRISÉ:** Understood. Thank you.

10 So you all have the time to go ahead and deal
11 with that. So we'll give about ten minutes or so, and
12 then we'll reconvene at :35.

13 (Recess.)

14 **CHAIRMAN BRISÉ:** All right. We're going to
15 reconvene at this time.

16 I said we'd give five minutes for those who
17 sort of support the motion to reconsider and five for
18 those who oppose the motion.

19 So who's speaking on behalf of those for --

20 **MR. LITCHFIELD:** On the condition that you
21 leave us some time, Mr. Moyle is going to lead off, and
22 then Captain Miller, and FPL, and we'll close out with
23 Mr. Wiseman. I recognize we're going to be speaking
24 very quickly and hopefully very efficiently.

25 **CHAIRMAN BRISÉ:** Okay. Commissioner Graham is

1 going to be managing our time.

2 **MR. WRIGHT:** Mr. Chairman, Commissioner
3 Graham, I would just -- if I could, I would just like to
4 ask exactly what the motion is.

5 **CHAIRMAN BRISÉ:** Okay.

6 **MR. WRIGHT:** Thank you.

7 **MR. WISEMAN:** The motion is to hold a one or
8 two-day evidentiary hearing to take evidence on the
9 fairness of the proposed settlement.

10 **CHAIRMAN BRISÉ:** That is the request.

11 **MR. MOYLE:** I think that is just -- don't hit
12 the clock, but I think that is ultimately where you get
13 to. But I think --

14 **CHAIRMAN BRISÉ:** The clock is running.

15 **MR. MOYLE:** -- is a motion for reconsideration
16 of your order, and the standard on that, has there been
17 a mistake of law or fact, let me just briefly address.

18 We think that there is a mistake of law and
19 that there is disputed issues of fact that are present.
20 You know, is the settlement fair? Some people say yes,
21 some people say no. I think there is some provisions in
22 the settlement that may also raise some issues of fact.

23 Commissioner Balbis said I would have liked
24 the opportunity to ask some questions. I know during
25 the course of this hearing I had questions. I think at

1 the end of the day that you should reconsider and that
2 you should provide evidence. I think it's fair to
3 everyone involved.

4 It's fair to the Commission to have your
5 questions asked and answered; it's fair to the parties,
6 it's fair to the company, and it's ultimately fair to
7 the ratepayers to allow for there to be limited evidence
8 related to the settlement as to whether it's fair or
9 not.

10 So with respect to the point of law, I think,
11 you know, Mr. Kiser talked about an evidentiary hearing.
12 I think that's the best way to proceed, and would
13 encourage you to do that. So thank you for the
14 opportunity to make some comments.

15 **CHAIRMAN BRISÉ:** All right. Captain Miller.
16 Four minutes left.

17 **CAPTAIN MILLER:** Thank you, Mr. Commissioner.

18 As you all know, FEA appears in rate cases
19 throughout the country. I would just like to point out
20 that so far this year I personally have appeared in two
21 settlement cases. One of them was Arizona Public
22 Service in obviously Arizona, and the other one was
23 Excel in Colorado.

24 In both of those settlements they were
25 partially contested, and the Commission gave the

1 intervenors an opportunity to present evidence in the
2 hearings, which ranged anywhere from one to a few days
3 for this testimony. I personally thought that it, you
4 know, gave all parties fair due process rights, and it
5 was a good procedure.

6 **CHAIRMAN BRISÉ:** Mr. Litchfield.

7 **MR. LITCHFIELD:** Thank you, Mr. Chairman,
8 Commissioners.

9 From the outset, FPL has been supportive of
10 any process that would provide sufficient due process
11 for the parties, a reasonable amount of due process for
12 the parties considering the time and the issues, but
13 also putting ourselves in the position and the
14 Commission in the position of being able to make a
15 decision that ultimately could withstand a procedural
16 challenge.

17 We understand at the end of the day that --
18 and I'm not prescient, but I suspect that somebody might
19 be disappointed with whatever decision the Commission
20 ultimately decides. And I think it's in everybody's
21 interest that we take a little evidence and then the
22 Commission can make the decision that the Commission
23 deems is in the best interests of the customers and the
24 company, taking into account all of the issues, and
25 we're not then held hostage to an appeal that is

1 predicated on a procedural infirmity.

2 Under 125.69, which is in the Administrative
3 Code, and pertains to hearings involving disputed issues
4 of material fact, and I think there are disputed issues
5 of material fact, it says that there will be opportunity
6 to respond, to present evidence, and argue on the
7 issues, including cross-examination; that's 120.57(1).

8 Now, if the staff's position is that this is
9 simply a motion -- or a hearing on a motion within a
10 hearing, I still think there is a mixed error of fact
11 and law here in this sense, that the Commission at the
12 outset has said that we don't want to -- we don't want
13 to take direct evidence here on the merits of the
14 settlement agreement. We're going to conduct the
15 technical proceeding as we otherwise would have.

16 Now, I agree with, I think, some of the
17 comments that have been made that clearly that this
18 proceeding has to provide context for the settlement
19 discussion, because you can't really assess the
20 positions of the parties who oppose the settlement
21 without testing the merits of the litigation position
22 that they have filed, and vice versa. So I think
23 clearly that has to be the case.

24 But, you know, as a practical issue, we have
25 to be protective of the process and the basis for any

1 decision the Commission enters. Otherwise, under
2 120.68(7), it says the court shall remand the case to
3 the agency for further proceedings consistent with the
4 court's decision, or set aside agency action as
5 appropriate when it finds -- and I'll just --

6 **CHAIRMAN BRISÉ:** You've got about a minute
7 left.

8 **MR. LITCHFIELD:** -- read a couple of these.
9 There's no hearing prior to agency action if the
10 reviewing court finds that the validity of the action
11 depends upon disputed facts. The agency's action
12 depends upon any finding of fact that's not supported by
13 competent substantial evidence, which we need, and the
14 fairness of the proceedings or the correctness of the
15 action may have been impaired by a material error in
16 procedure or failure to follow prescribed procedure.

17 So we have always supported a reasonable
18 amount of due process to enable all the parties to
19 participate and the Commission to make a fair and
20 reasoned decision based on competent substantial
21 evidence.

22 **CHAIRMAN BRISÉ:** Mr. Wiseman, you have 30
23 seconds.

24 **MR. WISEMAN:** And just to wrap it up. To Mr.
25 Litchfield's point, we've heard from the other side of

1 the table about protecting due process rights and not
2 putting any evidence into this proceeding about the
3 fairness of the settlement. We've done that, we've
4 adhered to that, but now we have to protect due process
5 rights by having a proceeding to allow evidence to be
6 taken concerning the fairness of the process -- of the
7 proposed settlement, and that's all we're seeking.

8 Thank you very much.

9 **CHAIRMAN BRISÉ:** Thank you.

10 All right. Mr. McGlothlin.

11 **MR. MCGLOTHLIN:** Commissioners, first of all,
12 with due respect, you're not in a procedural posture to
13 entertain this argument, this motion.

14 Mr. Chairman, I know your intentions were
15 good, but we were caught by surprise in the middle of a
16 day supposedly devoted to cross-examination with an
17 interlude for pending motions. We get hit with an
18 oral -- a motion for reconsideration of that order.

19 There's no reason why that could not have been
20 a written motion. There's no notice of it coming up
21 today, and a ten-minute break is not sufficient
22 opportunity to respond to it, but I will do my best.

23 But we want to put that objection on the
24 record.

25 **CHAIRMAN BRISÉ:** Duly noted.

1 **MR. McGLOTHLIN:** To entertain the idea of a
2 separate proceeding on this purported settlement gives
3 it a legitimacy to which it's not entitled. Because,
4 first of all, there is a threshold question that we
5 raised and that you have not taken up yet.

6 The threshold question is whether you want to
7 entertain a settlement that our office is not part of,
8 and whether you agree with us that we're a necessary
9 party, or whether, as a matter of policy, you don't want
10 to entertain a settlement that does not include the
11 statutory representative of the people, the citizens.
12 That is something that you take on early before going
13 further, because if you agree with us for either of
14 those reasons, this goes away.

15 Now, secondly, the very notion of a separate
16 proceeding to take evidence on the purported settlement
17 makes our case, because it recognizes that that document
18 includes elements, components that are very different
19 from anything that was in the March petition, the March
20 MFRs, the March prefiled testimony, anything that has
21 been the subject of the two-week hearing you've had
22 before you. And the idea that you can take the record
23 that we've been devoting ourselves to this two weeks and
24 somehow transfer that to the other proceeding you're
25 considering doesn't work because, again, we were not

1 addressing those elements, and so it is not
2 transferable.

3 And, finally, to the extent that you do take
4 on a different proceeding, it has to recognize that it
5 is in the nature of a very different petition, and that
6 has some obligations to it. Test year requests, MFRs,
7 testimony, notice to customers, and a full panoply of
8 due process rights, you're essentially taking what is a
9 request for a different rate case and trying to wedge it
10 into two or three weeks, at the same time, I might add,
11 that we're supposed to be wrapping up this hearing,
12 writing the briefs for this hearing, and taking on the
13 NCRC hearings that are coming down the track.

14 It's unworkable, it's untenable, it's illegal,
15 and it's unnecessary if you agree with our threshold
16 question.

17 **CHAIRMAN BRISÉ:** Okay. Mr. Wright. Two
18 minutes -- I mean, three minutes and 30 seconds left.

19 **MR. WRIGHT:** Okay.

20 Just very briefly. I agree with everything
21 that Mr. McGlothlin said, and we join in his objections
22 and the Citizens' objections. This isn't just a new
23 rate case based on completely -- a different ask for
24 different rates, different numbers than requested by the
25 MFRs that the company filed in March. It's a request

1 for three rate cases.

2 The only thing that's the same between the
3 settlement and the motion is the ask for the Canaveral
4 entries. You've got a change in the March 19th filing,
5 you've got a request for new base rates in 2014, and a
6 request for new base rates in 2016. You've got three
7 rate cases. And I don't think that you can accomplish
8 this legally, lawfully, as Mr. McGlothlin said.

9 And, finally, I just want to add one thing.
10 With regard to Mr. Litchfield's suggestion that you
11 ought to take a little evidence, that's like being a
12 little bit pregnant. And I'll assert to you, and I hope
13 y'all agree that the Commission should not take a little
14 evidence on a petition, which is what it is, that will
15 increase FPL's base rates by a total of \$3.4 billion
16 over four years with cumulative annual rate increases
17 north of \$1.1 billion that would be in effect if the
18 settlement agreement were to be approved.

19 Thank you.

20 **CHAIRMAN BRISÉ:** Mr. Saporito, there's a
21 minute left.

22 **MR. SAPORITO:** To the extent that SFHHA
23 requests that this Commission reconsider its decision in
24 an earlier order, SFHHA has not met its burden as
25 required under the applicable rule and/or legal standard

1 which requires a showing of error of fact or law on the
2 part of this Commission. Therefore, staff has counseled
3 this Commission, the Commission is required to deny
4 SFHHA's motion as a matter of law.

5 To do otherwise would disenfranchise my due
6 process rights in this docket, as this Commission has
7 duly followed the law and the staff's recommendation to
8 deny my earlier motion for reconsideration in this very
9 same docket. Whereas here SFHHA challenges an order of
10 this Commission seeking reconsideration of the
11 Commission's earlier decision in this docket, and where
12 SFHHA has failed to meet its burden under the law to
13 demonstrate an error of fact or law on the part of the
14 Commission, this Commission lacks requisite jurisdiction
15 and authority to reconsider its earlier decision as a
16 matter of law.

17 To the extent that this Commission is now
18 entertaining legal argument from the parties in this
19 docket as to whether the Commission should approve --

20 **CHAIRMAN BRISÉ:** Mr. Saporito, you need to
21 wrap it up.

22 **MR. SAPORITO:** -- or deny SFHHA's request for
23 reconsideration, this Commission lacks requisite
24 jurisdiction and authority to entertain such legal
25 arguments as a matter of law.

1 And, finally, as the Florida Supreme Court
2 ruled in Jaber, OPC must be a signatory to any
3 settlement agreement, and all parties in the matter must
4 have taken part in the settlement negotiations leading
5 up to the settlement agreement.

6 Here in this docket, OPC is not a signatory to
7 the settlement agreement, and I was not invited as a
8 party to this docket to take part in the settlement
9 negotiations leading up to the settlement.

10 **CHAIRMAN BRISÉ:** Mr. Saporito, thank you.

11 All right. Time is up. You know, it was five
12 minutes, so that's it.

13 Commissioner Brown.

14 **COMMISSIONER BROWN:** Mr. Chairman, would it be
15 appropriate to ask the parties questions based on their
16 oral argument at this time?

17 **CHAIRMAN BRISÉ:** Yes, I believe so.

18 **COMMISSIONER BROWN:** Okay. Question for Mr.
19 McGlothlin.

20 You made a comment just a second ago about how
21 having an evidentiary hearing on the settlement would be
22 illegal. Can you please elaborate on how it would be
23 illegal?

24 **MR. MCGLOTHLIN:** Yes. It's tied to our
25 contention that the settlement agreement, the purported

1 settlement agreement is a different animal from anything
2 that has been part of the petition, and it gives rise to
3 the due process requirements of Chapter 120 as well as
4 366 for a utility to request a change in rates and
5 revenues, that the entire scheme is triggered, and that
6 means the minimum filing requirements, prefiled
7 testimony, the same type of thing that you are nearing
8 the end of now.

9 As a matter of fact, I'm glad you asked the
10 question because it gives me -- it reminds me to point
11 out where this Commission is. You're in the 8th inning
12 of a 9-inning game now. This is probably the last day
13 of a two-week hearing of an eight-month process --

14 **COMMISSIONER BROWN:** Probably not. Probably
15 not, based on the time.

16 **MR. McGLOTHLIN:** Well, very near the end of a
17 long process that will lead to first briefs,
18 recommendation, and a decision. You are in a posture
19 where you can adjudicate the March petition on its
20 merits taking into account all of the evidence, all of
21 the arguments, including the arguments and evidence of
22 the other side of the table there.

23 Why would you want to jeopardize that by
24 allowing those parties to hijack this and go to the
25 parallel proceeding on a document that has not satisfied

1 the same requirements that were applicable to the March
2 petition?

3 **COMMISSIONER BROWN:** So basically your
4 response to -- your response that you filed with the
5 Commission, it sounds like those same arguments that
6 you're arguing now were the arguments that you filed in
7 your response.

8 **MR. McGLOTHLIN:** Well, we liked them then and
9 we like them now. Yes, ma'am.

10 **COMMISSIONER BROWN:** A question for Mr.
11 Litchfield regarding your procedural challenge argument.
12 And can you please elaborate on how having an
13 evidentiary hearing will support, I guess, the due
14 process elements associated with having a procedural
15 challenge?

16 **MR. LITCHFIELD:** Well, thank you, Commissioner
17 Brown.

18 First of all, if we don't take evidence on the
19 merits, directly on the merits of the settlement
20 agreement, and the Commission were, in our hopes, to
21 approve the settlement agreement, I think it would leave
22 that order and us in a very poor posture vis-a-vis
23 others to my left who may take the position that the
24 Commission did not have substantial and competent
25 evidence upon which to make that decision.

1 We agreed at the outset that we would not
2 take -- per the Chairman's order, that we would not take
3 direct evidence supporting the merits or contesting the
4 merits of the settlement agreement in this docket, but
5 now we're left with maybe an opportunity not to do that
6 at all, and yet we're going to be deciding whether
7 thumbs up or thumbs down with regard to the settlement
8 agreement.

9 So that's how I think it certainly enhances
10 due process rights of all parties and then protects the
11 process and the ultimate decision, whichever way that
12 goes.

13 **CHAIRMAN BRISÉ:** Commissioner Brown.

14 **COMMISSIONER BROWN:** Thank you.

15 And a question for Mr. Moyle regarding the
16 posture that we are in as we are faced with the motion
17 for reconsideration, a very narrow limited procedural
18 review of the law. Can you please restate how there has
19 been a mistake of law or mistake of fact, in your
20 opinion.

21 **MR. MOYLE:** I think that the mistake of law
22 that has occurred is with respect to the procedural
23 order that was entered that said we're going to take up
24 the settlement and each side is going to have 30 minutes
25 for argument, and we're going to have data requests that

1 people can serve on each other, but then there's no way
2 to get the results of those data requests before you.

3 And that because there is disputed issues of
4 fact, that rather than doing it that way where you have
5 argument, that you need to have evidence to come in.
6 And, you know, there is a disputed issue of fact. As
7 Mr. Litchfield said, 120 seeks evidence in that respect.

8 So the failure of that order to allow the
9 introduction of evidence, we think, is error and
10 subjects the decision, if you were to approve the
11 settlement, to possible reversal on appeal. So we think
12 that's the error of law.

13 So I hope I've explained it clearly. And
14 then, you know, there may be some other issues of fact.
15 West County 3, there has been some testimony here, but
16 that is sort of the basis of the mistake of law.

17 **COMMISSIONER BROWN:** Okay. Thank you.

18 **MR. LITCHFIELD:** May I add to that, 30 seconds
19 or less?

20 **COMMISSIONER BROWN:** Yes.

21 **MR. LITCHFIELD:** Fundamentally, I think the
22 Commission can on its own motion reconsider this order.
23 It's simply a procedural order.

24 But putting that aside, in terms of if we need
25 to formally reconsider, the fundamental error here is we

1 would submit, respectfully, that there wasn't sufficient
2 consideration given to the provisions of 120.569 and
3 120.57(1) in terms of mapping out the procedure by which
4 this second hearing would be conducted.

5 **COMMISSIONER BROWN:** Thank you.

6 **MR. WISEMAN:** Commissioner Brown, I wonder if
7 we could respond to the argument that it would be
8 illegal for the Commission to have an evidentiary
9 hearing on this?

10 **COMMISSIONER BROWN:** I'm open to hearing as
11 much information about this as possible, so go for it.

12 **MR. WISEMAN:** Thank you.

13 As I understood the argument it's that somehow
14 or another the settlement proposal is effectively a new
15 petition and there have to be MFRs because there are
16 different provisions in it. This is no different than
17 there was a settlement, in fact, of the FPL rate case in
18 2005, when there were provisions in that settlement that
19 were not part of the original filing. No one filed MFRs
20 and that settlement was approved.

21 The same thing happened in the last case,
22 when -- I can't remember, was it the 2009 settlement or
23 the 2010 settlement that took time to get there, but it
24 was the same thing. Those settlements had provisions in
25 them that were not in the original filing, but no one

1 suggested that we had to file MFRs.

2 I would suggest that, or I would believe that
3 there are many settlements that have been filed with the
4 Commission that as a matter of getting to a settlement
5 introduced new elements that the parties agreed to that
6 are not part of the original filing. And so the fact
7 that those are not supported by MFRs and that they are
8 something outside of the original filing, that doesn't
9 suggest to me that there is a need to have a new
10 petition, new MFRs, and it would be illegal for you to
11 take evidence.

12 **CHAIRMAN BRISÉ:** Commissioner Balbis.

13 **COMMISSIONER BROWN:** I think Mr. McGlothlin
14 was going respond to that, Mr. Chairman.

15 **MR. MCGLOTHLIN:** Yes, Mr. Chairman.

16 Our office was a party to those 2005
17 settlements, that is one distinction, and only if you
18 have a truly global settlement can you entertain such
19 radically different and new provisions as the purported
20 settlement attempts to inject into this.

21 And it's an invitation to go down a slippery
22 slope, because how many parties does it take to make a
23 settlement? Two? Can Mr. Wright and I settle this case
24 between us? It really requires you to think in terms of
25 the impact it's going have on future cases, as well.

1 **MR. LITCHFIELD:** I would note that SACE
2 opposed the Progress settlement, so that it was not a
3 unanimous settlement, and there were no MFRs filed at
4 all in that case.

5 **CHAIRMAN BRISÉ:** Okay. Commissioner Balbis.

6 **COMMISSIONER BALBIS:** Thank you. I just want
7 a clarification and then I have a question.

8 And, I'm sorry, it's a long night, I forgot
9 your name.

10 **MR. WISEMAN:** Wiseman.

11 **COMMISSIONER BALBIS:** Mr. Wiseman.

12 We asked a clarification as to what your
13 motion was, and your original motion before the break I
14 believe was a reconsideration, and then you made a very
15 clear motion to take up an evidentiary proceeding.

16 What exactly is your motion, because there has
17 been motions about what mistake of fact or law, but I
18 didn't hear that as being your motion.

19 **MR. WISEMAN:** Well, no, I think -- and I
20 apologize if we were unclear about it, or if I was
21 unclear about it. I think there are actually two parts
22 to the motion. There is a motion for reconsideration,
23 and I think Mr. Moyle and Mr. Litchfield discussed the
24 errors of fact and law with respect to that. But the
25 question then is if we're asking you to reconsider, what

1 is that we're asking you to do. And that was the second
2 part that I referred to when I was responding to Mr.
3 Wright's question, which is what we're asking you to do
4 through the motion for reconsideration is grant an
5 evidentiary hearing to take evidence on the fairness of
6 the settlement.

7 **COMMISSIONER BALBIS:** Okay. Thank you.

8 And then I guess the -- or I know the question
9 that I have, we have parties giving different opinions
10 on the procedural path we're taking, and what is legal,
11 and some parties are saying what we're attempting to do
12 is illegal.

13 I would like the person who is responsible to
14 making sure that everything we do is legal, which is Mr.
15 Kiser, to please advise us as to what is the legal
16 process we should take in your legal opinion.

17 **MR. KISER:** Let me address one issue right off
18 the bat. It has been advocated by the Office of Public
19 Counsel that you cannot have a settlement without the
20 Office of Public Counsel as a party.

21 Part of my concern over that statement going
22 unchallenged is that was not the concept when that
23 legislation was passed. As a matter of fact, it was
24 made very clear, because during the time that was being
25 considered there was a big fight obviously between the

1 regulated utilities and different legislators about how
2 much power to give the Office of Public Counsel.

3 One common thread that ran through every
4 provision was that Public Counsel would not have any
5 additional power than any other party. And a number of
6 amendments and efforts to give that office higher
7 standing either were withdrawn or failed because they
8 didn't want that to happen. They had to have equal
9 footing with all other parties, no more and no less.

10 However, having said that, another issue that
11 needs to be raised is what is the standard test for
12 upholding an order? Well, an order of the Commission
13 needs to have competent, substantial evidence, as has
14 been cited by several of the parties. That's in Chapter
15 120. However, the standard for a settlement is what is
16 in the public interest.

17 Well, I think it to be a really difficult
18 challenge to approve a settlement that's in the public
19 interest if the Public Counsel is not on board. I'm not
20 certain that you still can't do that, but I think it
21 makes it really tough because of who that office
22 represents. And if they're not on board on the
23 settlement, then you've got a pretty good argument that,
24 quote, it's not in the public interest. I'm not saying
25 it's impossible, but it makes it really uphill.

1 I believe that the Commission has been on the
2 right track to try to keep this process straight and
3 narrow on the work of this Commission and on the
4 petition as it was initially filed. I do think things
5 happen, settlements come up. Sometimes they happen
6 early and you've got more time to deal with them.
7 Sometimes they happen towards the end. Sometimes
8 settlements have come in even after decisions were made
9 and somehow or another something didn't go right and
10 settlements have occurred even then. In this case it
11 obviously came up right as the hearing started.

12 And I think that, you know, that puts a lot of
13 burden on the Commission to try to keep their process as
14 clean as possible. Because of the parties that are on
15 board and the parties that are not on board, there's a
16 pretty good chance that whatever you vote it's going to
17 get appealed, and we have to have a defensible record
18 and a defensible decision, otherwise all this effort has
19 been for naught.

20 It's been my feeling all along that we needed
21 to proceed, as we have done so far, in keeping the two
22 processes on separate tracks. Obviously at some point
23 you've got to cross that bridge. Now, there are several
24 ways you can do it. For example, you could bring up a
25 motion, whenever it's appropriate in terms of when this

1 process is done, to bring up a motion to see whether or
2 not there is enough support for a settlement. If there
3 isn't, then you can obviously proceed ahead with the
4 continuation of this process.

5 If, however, there is majority support for a
6 settlement that takes up different issues, then you
7 know, okay, we're going to work on that track, and you
8 now set out procedures that you think you can support
9 that will provide a fair hearing process and get a
10 result that can be upheld.

11 In my opinion, because you have not just
12 little issues, but pretty substantial issues that are
13 different and new to what's in the regular -- the
14 initial petition, that you've got to handle that with
15 kid gloves. You're going to have to deal with those
16 issues, because trying to make that argument that's in
17 the public interest when you don't have Public Counsel
18 on board, you may want to be able to rely on the fact
19 that it was sustained by competent and substantial
20 evidence. That would then require that you take some
21 testimony and have a record that you can show the court
22 that this is based on solid, substantial, et cetera.

23 So, I think, you know, whether you make the
24 decision today, down the road, but at some point you're
25 going to have to decide, and you should, which train you

1 want to travel on; which way do you want to go; what's
2 going to be your vehicle. And you need to set that
3 date. And in my opinion, once you come closer to that
4 decision, then you'll know -- we should be able to have
5 fashioned a better process of exactly how much
6 additional work we have to do or whether or not we don't
7 have to do any additional work, we just stay right on
8 the track of this petition proceeding.

9 **COMMISSIONER BALBIS:** Okay. Thank you.

10 And I'll throw this out to my fellow
11 Commissioners. I mean, obviously, we had a
12 clarification of what the motion even was. That started
13 my question. We have significant legal issues we have
14 to go through. I think someone made the analogy we're
15 in the 8th inning here.

16 I'm wondering if it might be best, let's
17 continue with entering evidence in the record for this
18 petition following the ground rules that the Chairman
19 set forth, finish this up, that way it gives all of us
20 time to come up with the proper recommendation of how to
21 move forward with addressing the settlement.

22 So I don't know if it's proper to do that. I
23 mean, obviously it's up to the Chairman, but I think it
24 might be better to let's finish this up, let's have
25 everyone take a moment to understand what the motion is,

1 and come up with a good recommendation so we can make a
2 well-informed decision on the motion.

3 **CHAIRMAN BRISÉ:** Commissioners, other
4 comments?

5 Commissioner Graham.

6 **COMMISSIONER GRAHAM:** I've got a question. I
7 guess I'll address it to Mr. Litchfield.

8 What was the initial thought behind the
9 settlement when it was first filed? How did you think
10 that we were going to dispose of the settlement? Did
11 you just want us to take it up and vote on it, or was
12 there going to be any evidentiary type --

13 **MR. LITCHFIELD:** That's an excellent question,
14 and our expectation was, you recall that we asked to
15 suspend the full technical hearings, but it was with the
16 view that the Commission would conduct some type of
17 evidentiary proceeding similar to what they've done in
18 the past in order to consider the merits of the
19 settlement. And if the settlement was voted up, we
20 would move forward on that basis. If it were voted
21 down, we would fall back to the full technical hearings.

22 That was our initial motion, but we had always
23 contemplated that there would be some basis for the
24 Commission, some evidence taking and some basis for the
25 Commission's decision. We just find ourselves now in a

1 posture of not having had that opportunity to directly
2 address the merits of the settlement in this proceeding,
3 consistent with the Chairman's decision, that we really
4 feel like we now need that on the back end of this
5 proceeding in order to provide the adequate due process,
6 and, again, as I said, to be protective of the process
7 regardless of the decision that the Commission comes
8 back with.

9 **COMMISSIONER GRAHAM:** Another question?

10 **CHAIRMAN BRISÉ:** Sure. Go right ahead.

11 **COMMISSIONER GRAHAM:** This is to OPC. Other
12 than the fact that OPC is not part of the settlement,
13 because we've seen settlements -- even in my short time,
14 I've seen settlements come at the beginning, at the
15 middle, and well after the end, you know, the last
16 Florida Power & Light settlement.

17 Other than the fact that you guys aren't part
18 of the settlement, how is this any different than those
19 other settlements?

20 **MR. McGLOTHLIN:** Could I very quickly respond
21 to the answer you got from Mr. Litchfield?

22 **COMMISSIONER GRAHAM:** Sure.

23 **MR. McGLOTHLIN:** He reminded you that the
24 proponents of the purported settlement first asked you
25 to suspend this evidentiary hearing, and the ruling was

1 that the hearings would go forward, and we've had two
2 weeks of hearings.

3 My argument to you is that that had the very
4 practical effect of virtually rendering the proposed
5 settlement moot, because why else would you go through
6 these labors to have this evidence, and this record, and
7 this input, and then set it to the side and make no use
8 of it and turn to a shortcut proceeding on the purported
9 settlement?

10 I would say two things in response to your
11 question. Yes, settlements can arrive before, during,
12 or at the 11th hour of a case if they are truly global
13 settlements. We are not part of it because we disagree
14 with components of it, and beyond that I would say
15 simply that that is the second reason. We oppose it
16 procedurally, we also oppose it substantively.

17 **COMMISSIONER GRAHAM:** Okay. Thank you.

18 **MR. WRIGHT:** Mr. Chairman.

19 **CHAIRMAN BRISÉ:** Yes, Mr. Wright.

20 **MR. WRIGHT:** Thank you very much. I just
21 wanted to respond to a couple of points articulated by
22 Mr. Wiseman and Mr. Litchfield.

23 Mr. Wiseman said this is not a new petition.
24 I will assert to you that by the fact that they have
25 requested an evidentiary hearing and by the fact that

1 Mr. Moyle acknowledges that there are disputed issues of
2 material fact that makes this ask a petition under the
3 black letter law of Rule 28-106.201, Florida
4 Administrative Code, that implements the administrative
5 procedure act, and all requirements attaching to
6 petitions apply.

7 Secondly, Mr. Litchfield said that SACE
8 opposed the Progress settlement. I do not believe
9 that's true. They weren't wild about it, they had some
10 concerns about it, which you gave them an opportunity to
11 articulate, and they did. They didn't file paper
12 opposing it; they didn't request a hearing; they didn't
13 do anything else in opposition to it.

14 And the fact that no one suggested that MFRs
15 were required in the earlier settlements is a key point
16 here. Everybody agreed on those. That's real different
17 here.

18 Thank you, sir.

19 **CHAIRMAN BRISÉ:** Thank you.

20 Commissioner Edgar.

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

22 I wanted to -- Commissioner Graham basically
23 asked the question that I had been waiting to ask, but I
24 would like to follow up along that line, then.

25 **CHAIRMAN BRISÉ:** Sure.

1 **COMMISSIONER EDGAR:** Mr. Litchfield, I'll pose
2 it to you, but if it's more appropriate for somebody
3 else to respond, that's fine.

4 **MR. LITCHFIELD:** I may punt it to Mr. Butler,
5 but shoot.

6 **COMMISSIONER EDGAR:** I do not -- you know, we
7 have over 600 exhibits and many additional motions and
8 petitions, and I know at the very beginning of this
9 evidentiary proceeding there was some discussion about
10 the hundreds of thousands of documents in addition to
11 the ten parties and the 30-some witnesses.

12 So with that foundation, I share with you that
13 I do not have every document memorized, but my
14 recollection does not include a discussion or request,
15 either a request for or the necessity of an evidentiary
16 proceeding for the Commission to consider the settlement
17 that was filed for consideration. So if that's in there
18 and I have forgotten it because, again, I do not have it
19 all memorized, but I do not recall that document either
20 requesting or -- and it did have dates, I believe,
21 recommended if the hearing had been suspended to go
22 forward, and I do not recall any recommendation or
23 discussion about dates if there were to be an
24 evidentiary proceeding, or a discussion or request for
25 how that would then be recommended to proceed.

1 So if I am correct that that was not initially
2 in there, why at the beginning of some of these
3 discussions was it not requested for an evidentiary
4 portion? In fact, what I recall is there being a
5 request for a bench decision. So this seems different
6 to me, first off.

7 Secondly, it seems to me if there had been a
8 request for an evidentiary proceeding to consider the
9 settlement, that that would have received discussion
10 that I do not recall having because I don't recall there
11 ever being an evidentiary proceeding on a proposed
12 settlement or stipulation. It may have occurred, but I
13 don't recall it.

14 So that in and of itself seems to me to
15 perhaps be a change in precedent. And I probably am
16 going to have other things, but if you -- Mr. Chairman,
17 if it's all right for you to refresh my memory.

18 **MR. LITCHFIELD:** Okay. Thank you. Two
19 separate questions, right?

20 **COMMISSIONER EDGAR:** Yes.

21 **MR. LITCHFIELD:** Okay. I'll take them in the
22 order they were posed.

23 With regard to the petition, this was jointly
24 filed, we requested that the Commission schedule a
25 hearing to commence August 30, 2012, for the purpose of

1 considering any arguments or evidence regarding the
2 settlement agreement.

3 And so we certainly anticipated that the
4 Commission -- frankly, we anticipated that those who had
5 not signed on to the agreement would want some type of
6 evidentiary proceeding. They would not be satisfied
7 with the type of proceeding that most recently -- and
8 I'll move to your second question.

9 Most recently, you're right, they have not
10 been evidentiary in nature. But I think that was
11 probably more a function of circumstances than anything
12 else. As a practical matter, we are faced with disputed
13 issues of material fact, and I think somebody alleged
14 that there is at least some question in this record
15 relative to how West County 3 is being recovered, or
16 would be recovered, and that would be one issue that I
17 think would be fairly addressed in a type of a hearing
18 such as we're proposing and that I think should be
19 contemplated.

20 Have I answered both questions? If not, I
21 want to make sure that I do.

22 **COMMISSIONER EDGAR:** Probably yes and no.

23 **MR. LITCHFIELD:** It wasn't a yes or no
24 question, I take it?

25 (Laughter.)

1 **COMMISSIONER EDGAR:** It was not.

2 Mr. Moyle.

3 **MR. MOYLE:** Thanks. And, just briefly. I
4 mean, I know we've had a lot of discussions, and I know
5 and I think the record will reflect that a number of
6 times, you know, said I want to use the settlement
7 agreement with, you know, a witness. I mean, it was
8 kind of following the lead of, you know, of the Chair as
9 to how to proceed, because I think, you know, we were
10 prepared to do so, but that's okay.

11 But I guess the other point is, you know,
12 while we have divorced the, you know, the issues, and I
13 think have had a pretty clean record, there is a lot of
14 overlap. I mean, we've had thousands and thousands of
15 pages of information and documents, and, you know,
16 largely, I think it has better informed you to
17 ultimately, you know, look at a settlement agreement and
18 say, you know, how does it shake out, is it fair, is it
19 not fair.

20 So, you know, so the notion -- I understand
21 the notion of doing it differently, but there has been
22 just reams and reams of information and testimony that I
23 think, you know, has provided better information so that
24 the ultimate question as to whether an agreement is fair
25 or not can be decided fairly.

1 **COMMISSIONER EDGAR:** Mr. Wiseman.

2 **MR. WISEMAN:** Thank you. Just briefly
3 following up on that point and addressing a statement
4 that OPC made. As well, it's the same issue that
5 actually was discussed by staff earlier.

6 I want to make clear, though, our position is
7 that the record that has been developed in this
8 litigated proceeding should be part of the record that
9 you take up in consideration of the settlement. We're
10 not suggesting that you just take the last two weeks of
11 hearings and take this evidence and throw it away.
12 Quite to the contrary, we want you to consider this
13 evidence.

14 But there is this other issue that has been
15 not litigated, which is the fairness of the settlement.
16 So that's supplemental evidence that we think needs to
17 be addressed, put in the record, and considered
18 conjunctively with this record.

19 **MR. McGLOTHLIN:** May I follow up one more
20 time? You've been very generous with your allowing us
21 to follow one another.

22 **COMMISSIONER EDGAR:** And I'll look to the
23 Chair, but --

24 **CHAIRMAN BRISÉ:** Sure. Go right ahead.

25 **MR. McGLOTHLIN:** The idea that the issue is

1 the fairness of the settlement is more evidence of the
2 different nature of that process than the one you've
3 been holding hearings on before, because the fairness of
4 the settlement does not acknowledge the fact that there
5 are components of the settlement that are foreign to
6 anything you've been hearing about.

7 And you cannot simply gloss over that by to
8 say morph a standard of fairness into the settlement
9 when we have before you hearings that have been held on
10 a specific petition with particular requests, the four
11 corners of the petition, everything encompassed, that
12 they're trying to enforce something very different than
13 that and shortcut your way through it.

14 And the other thing I wanted to respond to is
15 this, Mr. Kiser told you something about the legislative
16 history of our office. There has been some court
17 history, as well. And in *Citizens v. Mayo*, 333 So.2d 1,
18 a 1976 case, the Supreme Court said this: Whatever
19 public format the Commission chooses to provide,
20 however, special conditions pertain in cases where
21 Public Counsel has intervened. This is a consequence of
22 the statutory nexus between the file and suspend
23 procedures and the role prescribed for Public Counsel in
24 rate regulation. Public Counsel was authorized to
25 represent the Citizens of the State of Florida in rate

1 proceedings of this type. That office was created with
2 the realization that the citizens of the state cannot
3 adequately represent themselves in utility matters and
4 that the rate setting function of the Commission is best
5 performed when those who will pay utility rates are
6 represented in an adversarial proceeding by counsel at
7 least as skilled as counsel for the utility company.

8 This is in the context of a request for public
9 hearings as opposed to a settlement, but I think the
10 rationale applies.

11 **COMMISSIONER EDGAR:** Are you finished?

12 **MR. McGLOTHLIN:** Yes. Thank you.

13 **COMMISSIONER EDGAR:** Okay. I wasn't sure.

14 You know, as is often the case sitting up
15 here, I agree with much of what I have heard from both
16 sides. A strong belief in due process for all parties
17 and on all issues, a strong belief that this Commission
18 is charged with and does exercise decisions in the
19 public interest, a strong desire to have a process that
20 is clean and clear and transparent.

21 I could still be, but I am not yet convinced
22 of the argument that for the Commission to consider a
23 proposed settlement of issues that does not have every
24 party as a signatory qualifies as a completely new
25 hearing, new measure, or two or three such. I'm yet to

1 be convinced of that, but I have heard the argument and
2 will continue to consider it.

3 I also am not clear as to how, if this
4 Commission were to determine that it was in the best
5 interest of the process and our decisions to take
6 additional separate evidentiary testimony on issues in
7 that proposed settlement of issues, how really that
8 would occur. It just raises more and more and more
9 process questions for me rather than tying any of them
10 up in a neater or clearer line.

11 So that's where I'm at right now. Again,
12 we'll continue, of course, Mr. Chairman, as you direct
13 to consider on my own and listen and think it through.
14 But it does somewhat seem to me that if we start to, A,
15 I've got a concern about setting a precedent of holding
16 an evidentiary proceeding on a proposed settlement. I
17 think that it is within the Commission's statutory and
18 under administrative -- statutory jurisdiction and under
19 administrative procedure and due process for this
20 Commission to consider proposed settlements, and
21 establishing a duplicate second -- a duplicative second
22 process of that seems to me to somewhat negate the
23 reasons for a settlement to be considered to begin with.
24 So that's kind of where I'm at, and what I'm weighing.

25 I'm going to throw something out, and it's not

1 completely gelled in my mind, so I fully recognize that
2 there may be gaps, and I'm not asking for everybody to
3 respond yet once I do. But in the OEP, which I have
4 now, you know, re-reread that our Chairman issued, it
5 calls for the opportunity for data requests by all
6 parties with time frames set up, and I have heard no --
7 I don't believe I have heard a concern about that. And
8 then it does say that the Chairman will designate a date
9 on the calendar for there to be oral argument and the
10 opportunity for questions.

11 So I'm wondering if there might be a way, Mr.
12 Chairman, and I hate to be one of those
13 cut-the-baby-in-half kind, but maybe that the data
14 request process that you laid out would continue, that
15 the process for oral argument and the opportunity for
16 Commissioners to ask questions would continue, as you
17 had proscribed, and then I'm recalling back not all that
18 long ago, but they do tend to blur, when we had a
19 comprehensive settlement proposal brought before the
20 Commission with another large investor-owned utility
21 here in the state, that we had the opportunity for the
22 Commission to ask questions of the parties, to ask
23 questions of our staff, and even for one or more of the
24 parties to have experts available to answer questions.
25 I think it was Mr. Portuondo at the time on those

1 specific issues.

2 And so I'm wondering if there is a way within
3 the process that is in the OEP and within the dates,
4 recognizing that we need to address some timing issues,
5 but within that process to have that data request
6 process go forward, have them be filed with the
7 Commission, available for our staff to review, available
8 for Commissioners and our independent individual staff
9 to review, opportunity for us then to discuss and be
10 briefed individually with our staff, as we have done
11 with other settlement agreements, and then have that
12 date set where we collectively in the sunshine come
13 together and have the opportunity to ask questions, and
14 that that would flesh out the discussion on the record
15 as to what decisions, if any, were to be made and how
16 they would be made.

17 And, again, I'm thinking this through as I'm
18 talking, which I don't like to do, so there may be some
19 gaps. I do have a hesitancy of additional process,
20 additional process, and stretching out and stretching
21 out. There are deadlines; there are timelines.
22 However, I absolutely want transparency and any due
23 process concerns to be addressed to the best that we are
24 able.

25 And I'm wondering if the process I have tried

1 to think through and outline, Commissioner Balbis, I
2 think would maybe give the opportunity to address some
3 of the concerns that you had raised earlier. That's
4 certainly my intent.

5 And so with that, Mr. Chairman, I'll hand it
6 back off. And, again, per, of course, how you would
7 like to proceed, but I don't want everybody all ready to
8 tell me what's wrong with everything I've said.

9 **CHAIRMAN BRISÉ:** Sure.

10 Commissioner Balbis.

11 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman;
12 and thank you, Commissioner Edgar.

13 And I want to be clear about what my concerns
14 were, because there were statements Mr. Moyle brought up
15 what my concerns were. What I want to have is the
16 ability to ask questions. And the questions that I did
17 not ask during this proceeding because of the Chairman's
18 direction, and everyone abided by that. And to be
19 honest, with the particular questions that I do have,
20 evidence has been entered into the record and I want to
21 be able to ask staff their opinion on these different --
22 the different evidence that's been entered in for my
23 particular questions.

24 And like I said previously, I don't care what
25 process we take. I want to make sure it's legal, but I

1 want to make sure that I have the opportunity to ask
2 questions. Because, again, when we're in a position to
3 approve or deny the settlement agreement, I know I want
4 to be comfortable and all of you want to be comfortable
5 that we've had our questions answered, we're making the
6 decision of what's in the best interests of all parties.

7 So, Commissioner Edgar's thoughts, I think I
8 agree with it, I think it would offer me that
9 opportunity. I don't really need the formal process, I
10 just need to be able to have my questions answered on
11 the specific issues that I have.

12 **CHAIRMAN BRISÉ:** Commissioners.

13 **COMMISSIONER BROWN:** Again, I just kind of
14 want to talk back with Mr. Kiser. Since our general
15 counsel is recommending a full evidentiary hearing, I
16 kind of want to flesh that out a little bit. I
17 understand what Commissioner Edgar proposed, and I agree
18 with a lot of your comments, especially regarding
19 transparency with this process. But I also am concerned
20 about procedural challenges, due process, and so I want
21 to flesh out why our General Counsel really is
22 recommending a full evidentiary hearing.

23 So, Mr. Kiser, can you --

24 **MR. KISER:** Sure. Well, the problem that has
25 been raised and spoken to by several of the counsels

1 here is because there are fairly significant new issues
2 in the settlement that we don't have a record on right
3 now, that makes it vulnerable to attack on appeal. And
4 somehow or another, you've got to get to -- in my
5 opinion, in order to come out with the decision,
6 particularly if it's one that's not based on the
7 original petition, then you're going to have to have
8 something in the record to substantiate that.

9 And, as I alluded to, part of the problem is
10 that the normal standard for approving a settlement is
11 it's in the public interest. Well, when you've got the
12 Office of Public Counsel opposed, and assuming they stay
13 opposed, you're fighting an uphill battle in my opinion.
14 Not that you can't do it, but it makes it really
15 difficult to try to argue on the public interest issue
16 when a group representing the citizens of Florida and
17 have been charged by the legislature with representing
18 the broad interests of the public to argue on the public
19 interest issues, so then you have a real problem meeting
20 the standard to validate a settlement. That's part of
21 the problem.

22 So then the issue is how then do you get stuff
23 in the record that can be used to substantiate and
24 defend the record? Well, I'm sure there are several
25 ways. For example, one would be to ask all the parties

1 to get together and come up with a list of issues that
2 need to be addressed in any further hearing.

3 And since you've got all the different
4 parties, some for, some against, maybe between the
5 groups you can come up with a list of issues. You've
6 got the data request that's already in the order. That
7 will help provide some information. And so you do the
8 best you can to supplement the record knowing that
9 that's going to be one of the attacks that is made on
10 any decision if it is a decision over the settlement and
11 not on just the petition.

12 And, again, before, you know, everybody goes
13 to all that additional extra work, you probably -- my
14 way of thinking is is that really -- do you need to go
15 there if it doesn't have, you know, either a majority
16 vote or close to a majority vote.

17 So at some point it would be, in my opinion,
18 and without having a lot of work that goes nowhere, you
19 need to get to some determination as to whether or not
20 that's the way you want to go or not.

21 **COMMISSIONER BROWN:** Okay. Thank you.

22 And, Ms. Helton, I would like to hear your
23 legal opinion about Mr. McGlothlin's concerns that
24 having an evidentiary hearing would be -- on the
25 settlement would be considered illegal.

1 **MS. HELTON:** I would do that if I could
2 remember what his concerns were. I remember him making
3 that statement, but I don't remember the reason why he
4 did that.

5 If I could say something that hopefully will
6 gel with what my boss just said, and hopefully will gel
7 with what Commissioner Edgar has said on the record. In
8 my mind, and I also have had some extensive
9 conversations with Ms. Gervasi this afternoon, who is
10 right now the staff's appellate expert that's here at
11 the table, all staff is asking, or all that the order is
12 doing in my mind is creating an opportunity for you to
13 hear oral argument on the settlement. It is setting out
14 a process for you to hear from both sides on the
15 settlement. It is giving the parties for the settlement
16 and against the settlement an opportunity to ask
17 questions and staff to ask questions about the
18 settlement.

19 I contemplate, and I think everybody else
20 contemplates that the answers to those questions are
21 valid information to be used in the oral argument to
22 you. If you have questions about what is said to you in
23 the oral argument, I'm certainly not going to tell you
24 that you can't ask those questions and get a response on
25 the record. That's all we've said.

1 In my mind I think there needs to be a little
2 bit of fleshing out through that oral argument about
3 where you are with respect to the settlement as filed by
4 some of the parties. I think we're having a lot of
5 discussion tonight that maybe we don't need to have
6 here. We need to have time to think about it, the
7 parties have time to think about it, to present those
8 arguments to you on, I think the Chairman has said,
9 September the 27th, and I think he's also set aside
10 another day, September the 28th, so we could hear the
11 arguments on the 27th, then you could -- everybody could
12 let it gel, and then come back on the 28th and have an
13 idea of whether you want to vote on the settlement that
14 day or whether you want to proceed with further
15 proceedings, as my boss has said.

16 So all we're saying, in my mind, is let's go
17 forward with an additional process. We've heard the
18 testimony about the petition that has been filed by the
19 company from March. Now, let's go forward and have an
20 additional process to hear argument about the motion to
21 approve the settlement.

22 And I'm going to ask Ms. Gervasi if I have
23 said anything that she wants to add to, or if she --

24 **MS. GERVASI:** I would be want to disagree with
25 either one of my bosses here, and I don't disagree with

1 either of them. I don't see that the order revising the
2 order establishing procedure contains any mistake of
3 fact or law, because what it contemplates is affording
4 all of the parties oral argument after a period of time
5 during which information can be gathered through data
6 requests.

7 And then Commissioners, of course, are always
8 free to ask questions during an oral argument. After
9 which time, like Commissioner Edgar said, staff can have
10 individual meetings with Commissioners to discuss where
11 to go next.

12 I also am hearing that -- I think what I heard
13 is that everybody in the room has said that the
14 settlement agreement contains some issues that are
15 actually not part of the rate case. If there are new
16 issues and if they do have material -- if they are
17 issues of material fact and they are disputed, then I
18 would agree with everybody else in the room that those
19 issues would require -- that Chapter 120 and due process
20 requires that those issues be fleshed out in an
21 evidentiary hearing, but none of that has to be decided
22 now.

23 This order I think is the first step to flesh
24 out all of these things that we're fleshing out now,
25 only more so, after everybody has slept on it, and then

1 we decide do we need to have an evidentiary hearing on
2 those things.

3 The order under reconsideration contemplates
4 that it will be part of this proceeding. If I can find
5 where I read that. It says on Page 1, upon the
6 conclusion of the evidentiary portion of the hearing,
7 the Commission will recess to take up the settlement
8 agreement, and then it will reconvene the hearing to
9 consider the settlement agreement.

10 To me, I think that means that all of the
11 evidence that was taken during the course of this
12 hearing, it's part of the -- the record will be reopened
13 or it will become part of the record so that those
14 discussions can also be had as to how, you know, the
15 evidence taken during the course of this hearing impacts
16 whatever new issues there are in the settlement. So
17 that you can consider all of the evidence in making your
18 decision on the case and afford everybody the due
19 process that is required, if that helps any.

20 I would go ahead and deny reconsideration of
21 the order because I don't think it contains any mistake
22 of fact or law. And when you have your oral argument,
23 the order that comes out of that can be proposed agency
24 action if the Commission determines that an evidentiary
25 hearing would need to be had on those issues of the

1 settlement that differ from the issues contained in the
2 rate case.

3 **COMMISSIONER BROWN:** Thank you, all three.

4 **CHAIRMAN BRISÉ:** Commissioner Graham.

5 **COMMISSIONER GRAHAM:** I'll make the motion
6 what she just stated.

7 **COMMISSIONER BALBIS:** Second.

8 **CHAIRMAN BRISÉ:** Okay. So then the motion is
9 to deny?

10 **COMMISSIONER GRAHAM:** Yes.

11 **CHAIRMAN BRISÉ:** It has been moved and
12 seconded. Any further comments?

13 Okay. No further comments. All in favor say
14 aye.

15 (Vote taken.)

16 **CHAIRMAN BRISÉ:** Okay. Any opposed?
17 Seeing none, the order for reconsideration is
18 denied.

19 Yes, sir.

20 **COMMISSIONER GRAHAM:** I just want to make
21 sure, so we're still on for Thursday the 27th, and
22 you're going to come back with the specific time that
23 we're going to start?

24 **CHAIRMAN BRISÉ:** Yes, sir.

25 **COMMISSIONER GRAHAM:** Okay.

1 **MR. SAPORITO:** Mr. Chairman, I had -- before
2 all this discussion began, I had an oral motion for some
3 latitude from the Chair to participate in that
4 proceeding via teleconference, because I'm going to be
5 out of town for the entire month of September and I will
6 not be able to be here in person.

7 **CHAIRMAN BRISÉ:** Okay. The Chair will take
8 that into consideration.

9 All right. It is 6:48, around there. I'm
10 sure everybody's hungry. And looking at the schedule
11 here, we have -- we still have Dr. Avera on the stand,
12 we have Mr. Dewhurst that's next, then Mr. Ender, and
13 then Ms. Deaton.

14 **MR. LITCHFIELD:** Would it be appropriate to
15 get a sense for how much cross people have with respect
16 to those three?

17 **CHAIRMAN BRISÉ:** I think that that would be
18 appropriate. I mean, we have to take a dinner break. I
19 don't know if we want to do an hour for dinner, but -- I
20 don't think so, either. I think tonight we'll do
21 30 minutes for dinner.

22 All right. Since it is 6:50, we will
23 reconvene about 7:30, 7:40, around there. We'll make it
24 7:40. And at that point we will continue.

25 Yes, sir.

1 **MR. SUNDBACK:** Thank you, Mr. Chairman. I
2 apologize for the imposition on the Commission's
3 patience. I have one housekeeping matter which I would
4 like to bring up, because counsel for FEA has indicated
5 that they have to leave the hearing, and I'd like to get
6 that covered off while they are here.

7 And I apologize again. This is my fault.

8 I wondered if we -- there was some suggestion
9 during his cross-examination with Dr. Avera that he was
10 concerned that the underlying reports might have
11 different growth numbers in them than the numbers that
12 appear in the exhibits of Mr. Baudino and Mr. Gorman.

13 And so to resolve and put to rest that issue,
14 we would like to show Dr. Avera the workpapers of Mr.
15 Gorman and the workpapers of Mr. Baudino and enter them
16 into the record so there is no dispute about where those
17 data came from in those exhibits. Because otherwise
18 there may be a controversy whether those data were
19 accurately reproduced from the technical analyst
20 reports.

21 And since Mr. Gorman is FEA's witness, we
22 wanted to do that before FEA's counsel left.

23 **MR. LITCHFIELD:** Mr. Chairman, a point of
24 clarification. And I may have misheard, and Mr. Guyton
25 may correct me, but I thought I understood Dr. Avera to

1 say that there might be some discrepancy in the
2 electronic files that he worked from, which would not
3 necessarily be the same as the workpapers, so I don't
4 think entering the workpapers is necessarily going
5 resolve that issue. We're not opposed to entering them,
6 but I just don't want it to be left that that would
7 necessarily resolve the issue.

8 **MR. SUNDBACK:** Maybe this will shortcut it.

9 Given Mr. Litchfield's statement, would it be
10 acceptable to the Commission if we simply stipulate into
11 the record as one or two exhibits the workpapers from
12 Mr. Gorman containing the technical analyst reports on
13 which he relied, which were provided in the proceeding,
14 and the technical analyst reports on which Mr. Baudino
15 relied which have the data in them. And at least with
16 regard to that controversy there will be no further
17 confusion.

18 **MR. LITCHFIELD:** I'm not sure -- that wasn't
19 exactly the same pitch, but I don't know if it would
20 help for Dr. Avera to weigh in on this. We want to help
21 clear this up. I'm just not sure that the suggestion,
22 in fact, takes care of it.

23 **MR. SUNDBACK:** Well, Mr. Chairman, it may be
24 that there were -- well, I think this will certainly
25 narrow the controversy at a minimum. What we don't want

1 to do is leave the door open for an argument somewhere
2 after the record is closed that, in fact, the technical
3 analyst reports support the numbers in Dr. Avera's
4 representations in WEA-23 and 24, rather than supporting
5 the data that are apparent on the face of RAB-4 and
6 MPG-4.

7 **CHAIRMAN BRISÉ:** So the request is to have the
8 workpapers come in?

9 **MR. SUNDBACK:** Yes, Mr. Chairman.

10 **CHAIRMAN BRISÉ:** Okay. Considering, I think
11 the discrepancy that exists, I think to me that sounds
12 like a reasonable thing to do.

13 **MR. SUNDBACK:** And if that would be your
14 preference, we'll be -- if FEA is comfortable doing that
15 after the break, if they're -- and they have to leave,
16 we'd be happy to do that based on your guidance. Or if
17 you would like to do that now, we're prepared to do that
18 now, recognizing the dreadful hour.

19 **CHAIRMAN BRISÉ:** Considering that FEA probably
20 -- Captain Miller is probably going to leave during the
21 break, let's go ahead and take care of that right now.

22 **MR. SUNDBACK:** Thank you very much for your
23 indulgence.

24 Mr. Chairman, we would like to have marked
25 with the next appropriate exhibit number copies from Mr.

1 Baudino's workpapers of the technical analyst reports.

2 **CHAIRMAN BRISÉ:** Okay. 625. How many --

3 **MR. SUNDBACK:** There are 25 copies for
4 distribution, Mr. Chairman. Was that your question?

5 **CHAIRMAN BRISÉ:** No, no, no.

6 **MR. SUNDBACK:** I'm sorry.

7 **CHAIRMAN BRISÉ:** How many documents? How many
8 things do we need to -- just one?

9 **MR. SUNDBACK:** That's one for Baudino. Right.
10 For Mr. Gorman, unfortunately, we will have to have
11 three exhibits, one for each source of technical analyst
12 report, if we could, please, sir.

13 **CHAIRMAN BRISÉ:** Okay. So we have 625 for Mr.
14 Baudino's workpapers; and then 626, 627, and 628.

15 **MR. SUNDBACK:** Thank you, Mr. Chairman. And
16 for purposes of identification, so we're all on the same
17 page, could we ask that -- I'm sorry, Mr. Gorman's first
18 workpaper exhibit is 626, is that correct?

19 **CHAIRMAN BRISÉ:** Yes.

20 **MR. SUNDBACK:** We would ask that that be
21 assigned to the SNL reports, 627 be assigned to the
22 ZACKS reports, and 628 be assigned to the Reuters
23 reports, please.

24 **CHAIRMAN BRISÉ:** Okay.

25 (Exhibit Numbers 625 through 628 marked for

1 identification.)

2 **MR. SUNDBACK:** Thank you very much, and I
3 apologize for the imposition on your time.

4 **CHAIRMAN BRISÉ:** Mr. Guyton?

5 **MR. GUYTON:** We would simply like the
6 opportunity to take a look at this before this is moved
7 into the record.

8 **CHAIRMAN BRISÉ:** Sure.

9 **MR. GUYTON:** Thank you.

10 **CHAIRMAN BRISÉ:** Thank you very much. So
11 we'll see you back here at 7:40.

12 (Dinner recess.)

13 **CHAIRMAN BRISÉ:** All right. Good evening.
14 We're back. We're a little bit later than, than I think
15 any of us wanted to be at this point. It is ten minutes
16 to 8:00. I think I got a -- we have quorum -- but I
17 think I got a sense of, of sort of what the consensus is
18 on, on time moving forward what the potential expected
19 time maybe. So we're going to try to work as much as
20 possible tonight so that we can meet our goal of
21 completing tonight.

22 Yes, sir.

23 **MR. WRIGHT:** Mr. Chairman, if it's appropriate
24 at this time, I have a housekeeping matter, and that is
25 the late-filed exhibit requested by Commissioner Balbis

1 when Mr. Chriss was on the stand.

2 **CHAIRMAN BRISÉ:** Oh, okay. Well, can we wait
3 until Commissioner Balbis is here?

4 **MR. WRIGHT:** That's probably a good idea, sir.

5 **CHAIRMAN BRISÉ:** All right.

6 **MR. WRIGHT:** We can take-- sure. We can take
7 it up whenever you say. You're the Chair.

8 **CHAIRMAN BRISÉ:** When he comes, when he comes
9 back, we'll take care of that, or maybe after we're done
10 with Dr. Avera.

11 **MR. MOYLE:** If he could share it with the
12 parties, that might help too, if he wouldn't mind.

13 **CHAIRMAN BRISÉ:** Right. Yeah. I know we're
14 with OPC. Thank you.

15 **MR. WRIGHT:** Mr. Chairman, I think I heard
16 Mr. Moyle request that it be shared. I -- Mr. Maurey
17 has the copies. I'm happy for him to, for him to hand
18 them out now.

19 **CHAIRMAN BRISÉ:** Okay.

20 **MR. WRIGHT:** And since I'm here, let me
21 explain what we got.

22 **CHAIRMAN BRISÉ:** Yeah, we'll, we'll take care
23 of that in due time. Okay?

24 Mr. McGlothlin.

25 **CROSS EXAMINATION**

1 **BY MR. McGLOTHLIN:**

2 Q Good evening, sir.

3 A (Microphone not on.)

4 Does that work?

5 **CHAIRMAN BRISÉ:** Good deal.

6 **BY MR. McGLOTHLIN:**

7 Q Dr. Avera, I'll refer you to your Exhibit
8 WEA-20, page 1.

9 A Yes.

10 Q And in that exhibit you provide the authorized
11 returns on equity for the companies in Dr. Woolridge's
12 proxy group; correct?

13 A Correct.

14 Q And the source of those values was the *AUS*
15 *Utilities Report*?

16 A Yes.

17 Q I believe that same source provides the
18 decision dates for those ROEs?

19 A Yes, it does.

20 Q Okay. If you have that before you or if you
21 want to take these subject to check, I'll ask you a few
22 questions about that.

23 You show an authorized return on equity of
24 11.35% for PG&E?

25 A Yes, sir.

1 Q Would you agree that the date of that decision
2 was March 2007?

3 A That's what is shown on *AUS*. In fact, there
4 was a subsequent settlement that kept the 11.35 in place
5 for two more years. So there was actually a proceeding
6 after the initial setting of the 11.25 -- 35.

7 Q 3/07 is the date given by *AUS*; correct?

8 A That's correct. That was the original order.
9 In California they have annual updates of the rate of
10 return, and they elected not to update it until the
11 proceeding that Dr. Woolridge and I will be in next
12 month.

13 Q There's also, for the utility Cleco, an ROE of
14 10.70?

15 A Yes.

16 Q Was that decided in 10/09?

17 A Yes, sir.

18 Q And Pinnacle West, Pinnacle West, was that in
19 December of 2009?

20 A Well, again, there was a settlement. I think
21 Captain Clark -- or Captain Miller mentioned it. There
22 has been a recent settle in that -- settlement in that
23 case. But this 11 was from the previous case.

24 Q So what date, what date should we consider the
25 decision on for Pinnacle West?

1 **A** Well, I think there has been -- now this, this
2 was taken in July, so it may not be recorded. But the,
3 the 11 was done in '09 or '010, whatever it says,
4 because I was in that case.

5 **Q** Okay. In your discounted cash flow you rely
6 on analyst estimates of growth rates?

7 **A** Yes, sir.

8 **Q** And you use the same type of data for your
9 CAPM approach, do you not?

10 **A** Yes, sir.

11 **Q** You derive the earnings per share growth rate
12 in quantifying the equity risk premium?

13 **A** That's correct.

14 **Q** Do you use long-term growth rates?

15 **A** I use the published growth rates, which are
16 five years.

17 **Q** Okay. Refer you to page 53 of your testimony.

18 **A** I'm there.

19 **Q** If you're there, back up one to 52. You cite,
20 you cite a study at the bottom of page 52 for the
21 proposition that estimates are not optimistically
22 revised, do you not?

23 **A** Are not inherently optimistic, yes.

24 **Q** Yes. I'm referring to your footnote 64, which
25 is an article by Lawrence Brown.

1 **A** Yes.

2 **MR. McGLOTHLIN:** I'm going to ask for some
3 help in distributing a composite exhibit at this point.

4 **CHAIRMAN BRISÉ:** Sure. The number would be
5 629 for identification purposes.

6 (Exhibit 629 marked for identification.)

7 **THE WITNESS:** I believe there may be a mistake
8 here, or a miscitation. The 2005 article is actually
9 associated with footnote 65, which is not the Lawrence
10 Brown article. It is the Ciccone, Stephen Ciccone
11 article.

12 **BY MR. McGLOTHLIN:**

13 **Q** I'm referring you to the study entitled
14 Analyst Forecasting Errors, Additional Evidence.

15 **A** Right. And that's referred to earlier in
16 page 52, and the footnote appears on line 23.

17 **Q** What line number did you refer to earlier?

18 **A** Line 23 of page 52 has footnote 64, which is
19 the Brown article.

20 **Q** And that's the one I'm referring you to.

21 **A** Yes, sir. I thought you had mentioned 2005.
22 That's my confusion.

23 **Q** Do you have Mr. Brown's article in front of
24 you?

25 **A** I do.

1 Q If you will, turn to the second page of the
2 article designated as page 82, I suppose, in the
3 literature.

4 A Yes.

5 Q Do you see the acronym SURPE?

6 A SURPE?

7 Q Yes.

8 A Yes, sir.

9 Q What is that?

10 A Actual quarterly earnings minus predicted
11 quarterly earnings divided by actual quarterly earnings.

12 Q And the author uses that metric in his
13 analysis; correct?

14 A Yes.

15 Q You see the references to quarterly earnings?

16 A Yes.

17 Q That's three months?

18 A Yes.

19 Q That's not five years?

20 A No.

21 Q Would you look at page 83, and would you read
22 the, beginning with the paragraph, last paragraph on the
23 left-hand column, although forecasts.

24 A Although forecasts for the S&P 500 firms
25 exhibit a significant optimistic bias for the 1984-1996

1 period, as a whole the optimistic bias in forecasting
2 quarterly earnings of the S&P 500 firms disappeared as
3 of 1993.

4 Q And later in that paragraph do you see another
5 reference to forecasting quarterly earnings?

6 A Yes, sir.

7 Q Are you satisfied that this particular article
8 talks about quarterly earnings and not five years?

9 A Yes, sir.

10 Q Now, I think perhaps the next article was the
11 one with which we had a bit of confusion, or maybe the
12 confusion was mine, and that is the article by Ciccone.
13 Am I pronouncing that correctly?

14 A Yes, sir.

15 Q You also rely on that article for the
16 proposition that there is no upper bias in the forecast;
17 correct?

18 A Yes, sir.

19 Q Do you -- that is the second article in the
20 composite Exhibit 629. Can you refer to that, please?

21 A I'm trying to get to the front of it. Yes,
22 sir, I have it.

23 Q You see the abstract on page 1?

24 A Yes.

25 Q Read the first sentence, please.

1 **A** Forecast dispersion, error, and optimism are
2 computed using 120,022 quarterly observations from 1990
3 to 2001.

4 **Q** That's a lot of observations, but they're
5 three-month observations, aren't they?

6 **A** Yes, sir.

7 **Q** You also refer to an article by authors
8 Abarbanell and Leheavy. I'm probably mispronouncing
9 their names.

10 **A** Yes, sir.

11 **Q** And you cite them for the same proposition,
12 that there's no upward bias in forecasts?

13 **A** Yes.

14 **Q** If you will turn to what is marked as page
15 108, I suppose, of the literature.

16 **A** I'm there.

17 **Q** Under 2.1, data, please read the first
18 sentence.

19 **A** My copy is missing.

20 **Q** I apologize for that. I've highlighted the
21 first sentence under 2.1 captioned Data. Would you read
22 that, please.

23 **A** The empirical evidence in this paper is drawn
24 from a large database of consensus quarterly earnings
25 forecasts provided by Zacks Investment Research.

1 Q Are you satisfied that this also is based upon
2 quarterly earnings and not five-year earnings forecasts?

3 A Yes. These are reported by the same services
4 and done by the same analysts that do the five-year
5 forecasts.

6 Q Yes. But they're four years and nine months
7 short of five years, aren't they?

8 A That is correct. But it's difficult to do
9 statistical studies because you have to wait five years
10 and then another five years to see what the accuracy was
11 on a five-year forecast.

12 Q Dr. Avera, what is guidance?

13 A Guidance is the information that companies
14 sometimes provide to analysts about what they think
15 their earnings might be.

16 Q And would that be typical of quarterly
17 forecasts?

18 A Some companies give longer term guidance, some
19 give quarterly guidance. Some give guidance that only
20 covers revenue or margins. So there is no -- guidance
21 is not something you report to the SEC, so there's no
22 industry standard about how to do it.

23 Q But basically guidance means that an analyst
24 and the company can communicate during the period under
25 review, and the company provides data and information to

1 the analysts that provide some insight as to what's
2 going on; correct?

3 A Yes. Within the constraints of reg FD, that
4 information has to be made available to everybody in the
5 market.

6 Q Now, the acronym we discussed earlier, SURPE,
7 was that what we called it?

8 A Yes.

9 Q Doesn't that relate to the impact of
10 unanticipated surprises on analysts and investors?

11 A Well, it, it measures to the extent to which
12 the forecasts by the analysts that were published
13 comport with what actually happened once the earnings
14 are in fact reported.

15 Q But it is designed to take into account a
16 measure of the impact of unanticipated developments;
17 correct?

18 A I don't say un -- differences between analyst
19 forecasts and what actually happened. Whether it was
20 anticipated or not, we can't tell from the data.

21 Q Are you -- how many firms give guidance for
22 five years into the future?

23 A I don't know, Mr. McGlothlin.

24 Q And you did not rely on quarterly estimates or
25 forecasts for your analysis, did you?

1 A No. Much of the literature that Dr. Woolridge
2 references also deal with quarterly forecasts.

3 Q Excuse me, sir. You've answered my question.

4 A Thank you.

5 Q If you'll look at page 53.

6 A Yes, sir.

7 Q At footnote 655 you also cite a 2010 *Wall*
8 *Street Journal* article, do you not?

9 A Yes.

10 Q Again, that's to support the proposition that,
11 that there's no upward bias in forecasts?

12 A Yes.

13 Q The last item in the composite exhibit is a,
14 is a *Wall Street Journal* article. Do you recognize that
15 as the one that you were citing?

16 A Yes, sir. I said that too quickly. Yes, it
17 is.

18 Q Would you read the second paragraph?

19 A With 172 of the S&P 500's members having thus
20 far reported quarterly earnings, 143 have beaten the
21 consensus forecast, according to data collected by
22 Thomson Reuters. On average, their numbers came in 21%
23 above the Street's collective wisdom.

24 Q And do you see references to quarters in the
25 second and fourth paragraphs?

1 **A** Yes, sir.

2 **Q** Does it appear to you that the article was
3 discussing quarterly forecasts and not long-term
4 forecasts?

5 **A** Yes, sir.

6 **Q** And now I'll refer you to rebuttal exhibit
7 WEA-22.

8 **A** Yes, sir.

9 **Q** And Mr. Sundback discussed with you to some
10 extent the same format that appears in the next two
11 exhibits, did he not?

12 **A** Yes.

13 **Q** And 22 is your purported corrections to
14 Dr. Woolridge's projected earnings per share growth;
15 correct?

16 **A** That is correct. Eliminating those that would
17 be regarded as outliers by FERC.

18 **Q** And the highlighted values are those that
19 you've excluded from, from the calculation?

20 **A** Yes, sir.

21 **Q** Take a moment and tally them up. How many are
22 there?

23 **A** 22, I believe.

24 **Q** Yes, that's what I got, too.

25 Now, there are some for which you have

1 excluded all four values of the reporting firms;
2 correct?

3 A Yes.

4 Q And the effect of that would be to exclude
5 those companies completely from the analysis, would it
6 not?

7 A Yes.

8 Q And those would be Ameren and what, Entergy,
9 Exelon, and FirstEnergy; am I right?

10 A Yes.

11 Q Now, would you confirm for me that of the 22
12 you eliminated, all 22 had the effect of taking out
13 values that were lower than the average?

14 A Yes.

15 Q How many did you eliminate that pulled up on
16 the average?

17 A There were none that met the FERC criteria of
18 17%.

19 Q I see. So, looking at the value for Hawaiian
20 Electric, which was 14%.

21 A Yes.

22 Q You left that one in?

23 A Yes, sir.

24 Q And that doesn't strike you as a bit
25 illogical?

1 **A** No, sir. It doesn't meet the FERC test of
2 17%.

3 **Q** Are we appearing before the FERC?

4 **A** No, sir. But I use this method consistently
5 because I think it makes sense. Dr. Woolridge uses it
6 when he's at FERC.

7 **Q** Well, yes, I'm sure he does. But he's not at
8 FERC either, is he?

9 **A** No, we aren't. But I think it is a good way
10 of eliminating illogical results, and I do it in all my
11 state cases.

12 **MR. McGLOTHLIN:** I believe that's all my
13 questions. Thank you.

14 **CHAIRMAN BRISÉ:** Thank you, Mr. McGlothlin.
15 Mr. Wright.

16 **MR. WRIGHT:** Mr. Chairman, would you like me
17 to proceed with my cross-examination of Dr. Avera and
18 take up --

19 **CHAIRMAN BRISÉ:** Yes. Cross-examination of
20 Dr. Avera.

21 **MR. WRIGHT:** Thank you, sir. Be happy to.

22 **CROSS EXAMINATION**

23 **BY MR. WRIGHT:**

24 **Q** Good evening, Dr. Avera.

25 **A** Hello, Mr. Wright.

1 Q Good to see you again.

2 A It is good to see you as well.

3 Q I, I have a quick follow-up question to some
4 earlier cross-examination. Do you have Exhibit 622 over
5 there with you? That was an exhibit that you were
6 handed by counsel for the -- or was delivered to you on
7 behalf of the South Florida Hospital and Healthcare
8 Association. It's the three press releases regarding
9 FPL's debt issuances in 2010.

10 MR. GUYTON: Objection to the
11 characterization. I don't think these are all FPL. I
12 think they're some FPL, some are FPL Group. I'm sorry.
13 Group Capital.

14 THE WITNESS: Yes, I have it.

15 MR. WRIGHT: I'll clarify that once he gets
16 his hands on it, Mr. Chairman.

17 CHAIRMAN BRISÉ: Okay.

18 THE WITNESS: Yes, Mr. Wright.

19 MR. WRIGHT: I'm going to save some redirect
20 by my, my friend Mr. Guyton.

21 BY MR. WRIGHT:

22 Q You got the three press releases; right?

23 A Yes, sir.

24 Q The first one is, relates to an issuance by
25 Florida Power & Light Company; correct?

1 **A** Yes.

2 **Q** And the second two I think relate to debt
3 issuances by FPL Group Capital, Incorporated?

4 **A** Yes, that's true. And they are debentures
5 where FPL was a mortgage bond.

6 **Q** Thank you. Okay. I understood you to testify
7 when you were responding to Mr. Sundback's questions
8 that it was a material consideration that the debt
9 issued, as described by FPL and its affiliate -- you
10 will agree FPL Capital Group is an affiliate of FPL;
11 correct?

12 **A** It's a sister --

13 **Q** Sister company?

14 **A** Yes.

15 **Q** Okay. I'll start my question over.

16 I understand, I understood you to testify when
17 were you responding to Mr. Sundback's questions that it
18 was a material consideration in your mind that the debt
19 issued by these two entities, as referenced in
20 Exhibit 622, was issued before the -- actually I guess
21 it, I guess it was just the FPL issue, issue before the
22 Standard & Poor's and Moody's downgrades of FPL credit.

23 **A** Yes. I, I, I pointed that out. I think
24 Mr. Dewhurst is in a better position to talk about the,
25 the market reception of these issues because he's in

1 charge of those. But I just wanted it clear that they
2 occurred before the downgrade.

3 Q I want to ask you this follow-up question to
4 that. Are you contending that the investors in FPL debt
5 were incapable of assessing FPL's risk without the
6 credit rating agencies' updated assessments after the
7 Commission's vote?

8 A No. I think investors followed this
9 Commission's deliberations, as they're following them
10 probably this very night. But I think when you have a
11 formal rating action, it has a tangible effect on the
12 size of the market, because so many investment
13 organizations that buy bonds, like pension plans and
14 employee retirement plans and so forth, have guidelines
15 as to the ratings and the distribution of ratings they
16 can have in their portfolio.

17 Q If you recall, isn't it true that FPL issued a
18 press release on the evening of the Commission's vote in
19 January of 2010, stating that it was disappointed in the
20 Commission's decision?

21 A I don't remember. I know that there were
22 press releases. I don't have it stuck in my head as to
23 when, when different press releases were released. I
24 know it was generally known in the market that there had
25 been a decision in the, in the last case.

1 Q To the best of your recollection, was it also
2 generally known in the market that the credit rating
3 agencies had said publicly that they were reviewing
4 FPL's ratings in light of the Commission's decision?

5 A Yes. I need to check and see the date at
6 which they announced that they were putting FPL on
7 credit watch, because I think -- on the 14th, S&P said
8 negative outlook, and on the 19th of January, Moody's
9 said negative outlook.

10 Q Thank you. And those two events predated the
11 FPL debt issuance that was referenced on the first press
12 release?

13 A Yes, sir.

14 Q In Exhibit 622; correct?

15 A Yes.

16 Q Thank you. Okay. I'd like to talk to you
17 some about your assertions regarding the impacts of the
18 Public Service Commission's January 2010 decision and
19 how that relates to your criticism of the, what you call
20 the opposing witnesses' proposals in this case. Okay?

21 A Yes.

22 Q All right. By the way, you mentioned earlier
23 that Moody's and Standard & Poor's downgraded the
24 company's debt. How far did they downgrade it?

25 A One notch.

1 Q Thank you. Is that like from A to A minus; is
2 that one notch?

3 A Yes. Or A2 to A3. That's a notch for Moody's
4 and Standard & Poor's respectively.

5 Q Okay. Thanks. Did Fitch downgrade FPL's
6 debt?

7 A No. It -- let me check here. I think Fitch
8 put the company on credit watch, but when all was said
9 and done, they downgraded NextEra but not FPL.

10 Q Thank you.

11 **MR. WRIGHT:** I have an exhibit that I'd like
12 distributed, Mr. Chairman.

13 **CHAIRMAN BRISÉ:** Sure. We are at 630.

14 (Exhibit 630 marked for identification.)

15 I'm going to ask that we can be as efficient
16 as possible in our responses and in our questions.

17 **THE WITNESS:** Yes, sir.

18 **CHAIRMAN BRISÉ:** Okay. Thank you.

19 **MR. WRIGHT:** I am striving to do so, Mr.
20 Chairman. I'm just pausing right now while the exhibit
21 is being distributed.

22 **CHAIRMAN BRISÉ:** I understand. I understand.

23 **MR. McGLOTHLIN:** At our request, he's also
24 distributing the missing page from the composite
25 exhibit.

1 **CHAIRMAN BRISÉ:** Thank you. Page 108?

2 **MR. McGLOTHLIN:** That's correct.

3 **CHAIRMAN BRISÉ:** Thank you.

4 **MR. WRIGHT:** Mr. Chairman, just for purposes
5 of the record, this is an exhibit that I have identified
6 as FPL earnings surveillance reports, 2008 to 2012.
7 What these are are copies that I obtained from the PSC's
8 website of the cover letters and the first summary page
9 of a number of FPL earnings surveillance reports,
10 specifically for 12 months ending December 2008, 12
11 months ending December 2009, and then from 2010 through
12 May of 2012, which was the last date available.

13 I'll go ahead and use my favorite term
14 optional completeness. I have, I have complete copies
15 of all these. This is how big they are, and they are on
16 the PSC's website, so hopefully we don't have to go
17 there.

18 **CHAIRMAN BRISÉ:** Thank you.

19 **MR. WRIGHT:** Thank you, Mr. Chairman.

20 **BY MR. WRIGHT:**

21 **Q** Dr. Avera, are you familiar with the Public
22 Service Commission's earnings surveillance reports?

23 **A** I am very generally familiar. I have not
24 accessed them.

25 **Q** Okay. And is it your understanding that, with

1 regard to earnings, the Commission uses the, the
2 statistic or the data, datum known as net operating
3 income?

4 **A** Yes, sir. I understand that.

5 **Q** Okey-doke. I'd like to ask you to look, if
6 you would, at the very first earnings surveillance
7 report in there, which is the one for December 2008.
8 Actually skip that one. We can -- you can talk about it
9 if you want to. But if you'd look at 2009, because
10 that's really the relevant time period here. So you're
11 four pages in. It's a table at the top of which is
12 stated Florida Power & Light Company and Subsidiaries
13 Earnings Surveillance Report Summary December 2009. Are
14 you there?

15 **A** Yes.

16 **Q** Okay. If you'll look at the --

17 **MR. GUYTON:** Before we -- and I apologize for
18 the interruption. But before we go any farther, I, I
19 just need some guidance as to how this relates to
20 Dr. Avera's rebuttal.

21 **CHAIRMAN BRISÉ:** Mr. Wright?

22 **MR. WRIGHT:** Certainly, Mr. Chairman.
23 Dr. Avera, in his rebuttal testimony, asserts that the
24 opposing witnesses' proposals in this case would, quote,
25 lead the FPSC back down the path of draconian cuts in

1 FPL's allowed earnings. He has directly implicated the
2 impacts of the 2010 decision to this case. My question
3 is going exactly to that point.

4 **MR. GUYTON:** On the contrary, this has to do
5 with actual earnings, not allowed earnings, and that's
6 the purpose of my inquiry.

7 **CHAIRMAN BRISÉ:** Mr. Wright?

8 **MR. WRIGHT:** Well, I think what the -- I think
9 it's pretty clear that the company earned what it
10 earned, and that it was allowed to earn what it earned.

11 **CHAIRMAN BRISÉ:** Okay. I'll allow the
12 question.

13 **MR. WRIGHT:** Thank you.

14 **BY MR. WRIGHT:**

15 **Q** If you would, Dr. Avera, if you look at the,
16 let's go ahead and look at the FPSC adjusted column
17 there for December of 2009. You'll see that the, the
18 NOI is a billion 32 million and some dollars; correct?

19 **A** The FPSC?

20 **Q** Yeah. The FPSC adjusted, or if you'd rather
21 look at the pro forma adjusted, that's --

22 **A** Oh, I see. Debt operating. Got it. One
23 billion 32 -- I've got it.

24 **Q** Okay. Now if you'll flip about, about 3/16ths
25 of, 3/16ths of an inch further, further into the

1 document, you'll come to the comparable document for
2 December of 2010.

3 A I am there.

4 Q And you'll agree there that the net operating
5 income reported by FPL for, for that 12 months ending
6 December 2010 is a 1,159,622,793?

7 A Yes, sir.

8 Q And if you'll flip about another 3/16ths of an
9 inch further back, you'll come to the comparable
10 document for December of 2011.

11 A I'm there.

12 Q And that, the value reported there is
13 1,269,373,855?

14 A Oh, I got October. Excuse me.

15 Q Sorry.

16 A We're back to --

17 Q I'm looking for December of 2011, sir.

18 A One billion, two hundred and -- I can't tell
19 if it's 50 or 69. Yes.

20 Q That doesn't make a difference, does it?

21 Okay. And finally, if you turn to the very
22 last page, for the 12 months ended May 2012, you'll see
23 that the NOI is a billion 332 million and some dollars;
24 correct?

25 A Yes, sir.

1 Q Okay. Now, where do you see a path of
2 draconian cuts in this data?

3 A Well, some of this data was after the
4 settlement. But I was referring to the fact that the
5 order of a 10% return was alarming. Value Line said it
6 was a shock. We have witnesses who are proposing
7 numbers between 850 and 925. So I think that to me
8 would be draconian, because it's significantly lower
9 than the 10%, and it's lower than the 11% that the
10 company is able to earn under the settlement.

11 Q Surely you will agree that, that this data
12 does not show a path of draconian reductions in FPL's
13 earnings attributable to the Commission's vote.

14 A Well, I was not referring to the actual
15 earnings. I was referring to the allowed return and the
16 opportunity to earn.

17 Q Well, even before the settlement, the company
18 had the opportunity to earn above 11 -- up to 11%, did
19 it not?

20 A Yes. And I understand it was helped along by
21 weather and other factors.

22 Q In fact, just, just for, just for interest,
23 why don't we look at, just turn partway in, say, maybe
24 to the May 2010.

25 A Yes.

1 Q For that 12 months ended, you'll see the NOI
2 is a billion 130 -- for the 12 months ended May 2010,
3 you'll see the NOI is a 1,133,304,280; correct?

4 A Yes, sir.

5 Q If you look down at the bottom, remembering
6 that this is before the settlement, which was what
7 you're talking about, the return on common equity on an
8 FPSC adjusted basis was 11.28%, was it not?

9 A Yes, sir.

10 Q Thank you. At page 20 and elsewhere in your
11 testimony you discuss the importance of a utility's
12 ability to attract capital; correct?

13 A Yes, sir.

14 Q And in particular in this context you are
15 talking about equity capital, are you not?

16 A Would you point out a line please, Mr. Wright?

17 Q At page 20, lines 15 through 18, it's a real
18 long sentence. I'm just -- I'll read to you the last
19 part of it.

20 It says, Utilities such as FPL must be granted
21 the opportunity to earn an ROE comparable to
22 contemporaneous returns available from alternative
23 investments if they are to maintain their financial
24 flexibility and ability to attract capital.

25 A The answer to your question is no. I'm

1 referring to all capital, not just equity capital.

2 Q Okay. That's, that's fine.

3 You already covered to some extent FPL's
4 ability to issue debt capital with Mr. Sundback. I'd
5 like to talk about equity capital.

6 A Yes, sir.

7 Q Okay. And I bet we can agree that it's
8 important for FPL to be able to attract equity capital.

9 A Yes, sir.

10 Q Okey-doke. And we really do agree with that.
11 Generally, a company acquires equity capital
12 by selling its common shares; correct?

13 A Well, it depends if it is a publicly held firm
14 or a subsidiary of another firm.

15 Q Okay. Well, in this case, relative to the
16 general capital markets in which equity capital for FPL
17 is obtained, won't you agree that the NextEra Energy
18 stock price is the best indication we have of FPL's
19 ability to attract equity capital?

20 A Well, it is an indicator. I'm not sure it's
21 the best because, as I discussed in my direct, there are
22 a lot of things that go into the stock price besides
23 FPL's performance, although FPL's performance is
24 certainly important.

25 Q Okay. Will you agree, generally speaking,

1 that a company's ability to raise equity capital is
2 indicated by its ability to sell its common stock shares
3 at a reasonable price?

4 A That is one indicator, yes.

5 Q If investors expect a stock to produce a
6 normal return, taking into account a company's risk at
7 its current price, then they'd be willing to pay that
8 price; correct?

9 A Yes. They will evaluate the risk and they
10 will pay the price if the earnings prospects are in line
11 with the price --

12 Q And --

13 A -- and the risk.

14 Q I apologize.

15 A Yes. And the risk. So it's a three,
16 three-legged stool.

17 Q Yes, sir. They won't pay any more -- if, if
18 they expect it to earn a normal return, they won't pay
19 any more -- at the current price they won't pay any more
20 than the current price, will they?

21 A That is correct. They will be indifferent at
22 a point where the price equates the risk and the future
23 prospects.

24 Q And if they expect it to return less than a
25 normal return, they wouldn't pay the then posted price;

1 right?

2 **A** That is correct.

3 **Q** Okay. Now, again, recognizing with your
4 qualification that FPL is an important part of NextEra's
5 stock price, I'd like to talk to you a little bit about
6 NextEra Energy's stock price history since the
7 January 2010 rate case decision.

8 **MR. WRIGHT:** And could I ask Mr. McGlothlin
9 just to hand the witness a copy of Exhibit 496, which
10 has already been admitted, Mr. Chairman?

11 **CHAIRMAN BRISÉ:** Sure.

12 **MR. WRIGHT:** Thank you.

13 **CHAIRMAN BRISÉ:** That's Exhibit 496?

14 **MR. WRIGHT:** Yes, sir.

15 **MR. GUYTON:** Schef, would you happen to have
16 another copy? I can try to look through this pile, but
17 if you happen to have another one.

18 Thank you. I have one.

19 **CHAIRMAN BRISÉ:** Mr. Wright, there was one
20 made available.

21 **MR. WRIGHT:** Thank you, Mr. Chairman, and
22 thank you to the benefactor.

23 **BY MR. WRIGHT:**

24 **Q** If I could ask you to look at the very last
25 page of this exhibit.

1 **A** Yes.

2 **Q** You'll agree that -- can we agree that it's
3 appropriate to use the, the adjusted stock price, which
4 is the far right-hand value in the column for comparison
5 purposes?

6 **A** Yes.

7 **Q** That's adjusted for dividends and splits;
8 right?

9 **A** Well, not for dividends, but stock splits or
10 stock dividends, but not cash dividends.

11 **Q** All right. Thank you. Thank you for that
12 clarification.

13 So you'll agree that the price of NextEra
14 Energy's common stock went up 17 cents a share from the
15 day before the Commission's vote to the close on the day
16 of the Commission's vote; correct?

17 **A** Yes.

18 **Q** Okay. And on that day investors would have
19 known that FPL's rates would be set after a final order
20 were issued on the basis of a 10% ROE; correct?

21 **A** Well, I think they knew well before that that
22 the rate case was getting politically embroiled and the
23 prospects were not good for the company.

24 **Q** Okay. But nonetheless, they understood, as of
25 the day of the vote, that the, that FPL's rates after a

1 final order were to be issued would be based on a 10%
2 ROE; correct?

3 A That is correct. That's, that's when it
4 became signed, sealed, and delivered. But I think from
5 a market standpoint the information was in the market
6 well before the final order.

7 Q As of that day, investors didn't have any
8 reason to expect returns any greater than that, at least
9 not from the FPL operations, did they?

10 A Well, no. I disagree.

11 Q Okay. I hate to do it, but I'm going to ask
12 you why.

13 A Because there's more to a final order than the
14 allowed ROE. There's the ability to earn the allowed
15 ROE. There's the capital structure, there's all the
16 things that go with ROE. So I think investors, when
17 they're evaluating a regulatory outcome, look at all the
18 aspects, not just the ROE.

19 Q And so they would have looked at the top end
20 of the range of 11%; correct?

21 A They would have known 11%, but they would have
22 also known 9%, and they would know that this order was a
23 departure from the tradition of the FPSC.

24 Q And they also would have been aware of the
25 Commission's order regarding the disposition of the

1 accumulated depreciation reserve?

2 A Yes.

3 Q Okay. And they would have understood that
4 that would have boosted book earnings; correct?

5 A On the schedule that was set forth in the
6 order.

7 Q Okay. Will you agree that between
8 January 13th and April 22nd the stock price generally
9 fluctuated between around \$42 a share and \$46 a share?
10 In other words, it was below the January 13th value for
11 that three months or so.

12 A That seems to be the case, Mr. Wright.

13 Q Okay. And then on April 22nd, it did exceed
14 the 46.65 level; correct?

15 A Yes. Let's see. April, that's when it went
16 above it.

17 Q Okay. And then between April and July 7th,
18 will you agree that it generally fluctuated between \$45
19 and \$48 a share until July 7th, 2010?

20 A Yes, sir.

21 Q Okay. And you'll agree also that after
22 July 7, 2010, the stock price has been greater every day
23 than it was on January 13th, 2010?

24 A Yes, sir.

25 Q Okay. Will you agree that, as, as a real

1 world approximation, one can measure the approximate
2 risk premium that investors attach to a stock by taking
3 the difference between its return or expected return and
4 the risk free rate in the market?

5 A No.

6 Q I'll take a chance. Why?

7 A Because the Treasury is impacted by a lot of
8 things which are independent of the company and may be
9 transitory, such as Federal Reserve actions, European
10 currency, turmoil.

11 So we're in a situation now where the Treasury
12 rates are abnormally low, there's been a flight to
13 quality, and I think most observers don't think, as the
14 staff said in the last case, that comparisons of the
15 Treasury rates to ROEs is as stable as it once was.

16 Q Well, let me give you a practical example. If
17 I got \$10,000 to invest -- I wish, but suppose I do --
18 and on a given day I can buy shares in a stock that's
19 yielding, let's say, 10%, or I can invest in a Treasury
20 bond that's yielding 4%, doesn't that imply that I
21 assign a risk premium to my purchase of shares of
22 company X of 6%?

23 A Mr. Wright, when you say yielding, do you mean
24 the dividend yield or the total return?

25 Q Total return.

1 **A** The total return? Well, the problem is we
2 can't observe what the total return expectation of the
3 common stock is. That's, that's why we have to go
4 through this exercise of, of figuring out growth rates
5 indirectly, as all the witnesses have done.

6 **Q** Well, if I, if I were to buy -- you, sticking
7 with my example, a projected return of 10% and a
8 Treasury bond rate of 4%, if I were to buy the stock,
9 rationally I would have to believe the risk premium was
10 no greater than 6%.

11 **A** That is correct. But you can't attribute your
12 decision to any other investor unless they also have in
13 mind a 10% yield. And you would have to understand
14 their expectation also, because when Treasury yields
15 change, when they're very low and then go up, the
16 holders of Treasury bonds suffer capital loss.

17 **Q** Okay. I'm going to move on to my last line of
18 questioning. I'd like to talk to you about your
19 testimony on page 13. In particular, your statement at
20 lines 14 and 15, that the FPSC should serve as a
21 substitute for the invisible hand and use the same
22 carrot and stick approach that operates in competitive
23 markets.

24 Now, you're talking about Adam Smith's
25 invisible hand of competition, are you not?

1 A Absolutely. Yes, sir.

2 Q Will you agree that the Commission should
3 similarly attempt to serve as a substitute for the
4 invisible hand from the perspective of customers?

5 A Absolutely.

6 Q In a competitive market, or in competitive
7 markets, customers are free to choose the lowest cost
8 supplier of any good or service; right?

9 A Well, the lowest cost, but also considering
10 the quality. They get to choose which supplier gives
11 them the best value.

12 Q Thank you. That was actually my question. I
13 was trying to shorten it up.

14 If the market for electricity were in fact
15 competitive, customers would be free to choose the
16 lowest cost provider of electric service of what they
17 perceive to be equal quality; correct?

18 A Right. And they would choose FPL.

19 Q Well, I think it's a safe bet that in FPL's
20 service territory they would choose FPL, isn't it?

21 A Well, in Austin we have a station called KLBJ,
22 and they say, this is the station you would watch even
23 if you had a choice.

24 Q Okay. Will you agree that in a competitive
25 market the long run supply curve for the good or service

1 of the market is the long run marginal cost for the good
2 or service?

3 **A** That is under very strict assumptions about
4 the market structure and the cost structure.

5 **Q** Of a competitive market, that those are the
6 assumptions of a competitive market. That's the
7 assumption, those are the conditions of Mr. Adam Smith's
8 invisible hand competitive market, aren't they?

9 **A** No. No. Mr. Adam Smith didn't do that. He
10 was smarter. That's John Marshall -- not John
11 Marshall -- Alfred Marshall, who invented all of that
12 stuff 120 years later.

13 **Q** And in the long run, isn't it true that,
14 because of entry and exit, there will be no economic
15 profits? That is, every supplier who is able to stay in
16 business will cover their variable costs and earn a
17 normal return on investment?

18 **A** That is under --

19 **MR. GUYTON:** Mr. Chair, I'm, I'm really trying
20 to understand how we've gotten so far afield from a
21 regulated market in a discussion of a free competitive
22 market. I think it's beyond the scope, or beyond the
23 pale at this point.

24 **CHAIRMAN BRISÉ:** Mr. Wright?

25 **MR. WRIGHT:** Mr. Chairman, I read you the, I

1 read you, you and the witness his own statement that
2 said -- his statement is the PSC should serve as a
3 substitute for the invisible hand of competition. And
4 I'm pursuing that to what I believe its logical
5 conclusion is.

6 **CHAIRMAN BRISÉ:** Do you have a lot more down
7 this line?

8 **MR. WRIGHT:** No, sir. I'm real, real close to
9 done.

10 **CHAIRMAN BRISÉ:** Okay.

11 **BY MR. WRIGHT:**

12 **Q** My question was, in the long run in a
13 competitive market because of entry and exit, those
14 companies that stay in business will cover their costs
15 and earn a normal return on their investment; correct?

16 **A** No. If they continue to innovate and bring
17 more value, they will earn a high return. Apple earns
18 36% ROE. BlackBerry earns 3% on ROE. That's because
19 most of us in this room choose Apple.

20 **Q** In the long run, assuming no barriers to
21 entry, which is a condition of a competitive market,
22 entry will occur until the point all firms are earning a
23 normal return; correct?

24 **A** That's the theory. But only Coca-Cola can
25 sell Coca-Cola. And now we know that only Apple can

1 sell iPads, not Samsung.

2 **MR. WRIGHT:** That's all I have, Mr. Chairman.

3 Thank you, Dr. Avera.

4 **THE WITNESS:** Thank you, Mr. Wright.

5 **CHAIRMAN BRISÉ:** Thank you, Mr. Wright.

6 Mr. Saporito.

7 **MR. SAPORITO:** Thank you, Mr. Chairman. And
8 I'm sure you'll be pleased to hear that I have four
9 questions for this witness.

10 **CHAIRMAN BRISÉ:** That's good.

11 **MR. SAPORITO:** Five questions for this
12 witness.

13 **CHAIRMAN BRISÉ:** Not so good.

14 **MR. SAPORITO:** And actually two of them follow
15 up, follow up from Mr. Wright.

16 **CROSS EXAMINATION**

17 **BY MR. SAPORITO:**

18 **Q** Would you agree with me that since purchase of
19 shares in NextEra Energy, Inc., is the primary means by
20 which retail investors hold a financial interest in
21 FP&L, that investors would normally assess any
22 associated investment risk by reviewing NextEra Energy,
23 Inc.'s, energy portfolio?

24 **A** Yes. They would look at the whole portfolio,
25 including FPL, of course.

1 **Q** Would you agree with me that NextEra Energy,
2 Inc., has a diverse energy portfolio and represents a
3 low risk investment?

4 **A** Yes. The diversity is favored. And I have
5 read analyst reports which point out the, the
6 appropriate action that NextEra has taken to ameliorate
7 the risk of some of their businesses. Mr. Dewhurst will
8 be in a position to tell you more about that.

9 **Q** Assuming that this Commission assigns a
10 midpoint ROE level at 8.5%, with a 100-basis-point
11 assigned range spanning 50 basis points above and below
12 that level, would you agree with me that FPL has an
13 incentive to be rewarded for performance?

14 **A** It has an incentive to try to dig out of the
15 hole. But I think it would be going against headwinds,
16 because I think such an outcome to this case would be a
17 shock and a disturbing factor in terms of the access of
18 capital, and in the long run the customers would suffer.

19 **Q** All things being equal, would you agree with
20 me that if interest rates decrease, it benefits FP&L?

21 **A** In the short run it does. But the benefits of
22 lower interest costs ultimately are passed on to the
23 customers, and that's one of the great benefits of FPL
24 is its low embedded cost of debt, which is lower than
25 any other company in Florida, I believe.

1 **Q** And my last question would be would you agree
2 with me that the United States Federal Reserve has
3 committed to keeping interest rates down near to zero
4 until the end of 2014?

5 **A** Yes, they have, assuming the Federal Reserve
6 remains in place and its current management is in place,
7 and I hear something on the news that that may be in
8 question.

9 **MR. SAPORITO:** Mr. Chairman, that's all I
10 have. Thank you very much.

11 **CHAIRMAN BRISÉ:** Thank you very much,
12 Mr. Saporito.

13 Mr. Hendricks.

14 **MR. HENDRICKS:** I have no questions for this
15 witness.

16 **CHAIRMAN BRISÉ:** All right.

17 Staff.

18 **MR. YOUNG:** No questions.

19 **CHAIRMAN BRISÉ:** All right.

20 Commissioners?

21 Commissioner Balbis.

22 **COMMISSIONER BALBIS:** Thank you. I have a
23 real quick question.

24 **CHAIRMAN BRISÉ:** Sure.

25 **COMMISSIONER BALBIS:** Mr. Avera, Mr. Sundback

1 spent quite a bit of time pointing out discrepancies or
2 errors in your analysis of other growth rates that were
3 testified by the witnesses, and we took a break and
4 there was discussion on reconciling. Have you
5 reconciled those errors or are those still there?

6 **THE WITNESS:** Yes, sir. I had the right
7 numbers in the wrong places. I got the growth rates for
8 Mr. Baudino and the growth rates for Mr. Gorman confused
9 somehow. And I'm really sorry about that. It really
10 doesn't change the results that much, but it was an
11 oversight on my part. And it will never, ever happen
12 again.

13 But I, I know what happened. I don't know how
14 it happened. I know why I didn't see it, because the
15 numbers came out in about the right place, so they
16 didn't jump out at me as being wrong, because Mr. Gorman
17 and Mr. Baudino have very similar groups and very
18 similar growth rates.

19 **COMMISSIONER BALBIS:** Okay. Would you agree
20 that the determination of an appropriate ROE is an
21 important decision for this Commission?

22 **THE WITNESS:** Yes, sir.

23 **COMMISSIONER BALBIS:** And a 100-point swing in
24 ROE in this case, what is that reflected?

25 **THE WITNESS:** \$160 million, sir.

1 **COMMISSIONER BALBIS:** Okay. And I, I
2 appreciate your apology, but you have to put yourself in
3 our position here, and we get a lot of testimony from
4 different experts that have a wide range of appropriate
5 ROE levels, and we have to come up with the right
6 decision.

7 So although you indicated that it doesn't make
8 a significant impact, but when you have such an impact
9 on 100 basis points, even a tenth of that is
10 significant.

11 **THE WITNESS:** It is, Commissioner Balbis. And
12 I believe we will have to pass out to everyone the
13 corrected numbers so they can see what they are.

14 **COMMISSIONER BALBIS:** Okay. Because your,
15 your testimony makes a lot of qualitative statements on
16 the findings of other witnesses, which, which is fine.
17 But really one of the important aspects of determining
18 ROE are the, the, the models that are used, the
19 quantitative analysis. So, you know, a mistake made
20 there could have significant impact. And maybe it's
21 late in the day and --

22 **COMMISSIONER EDGAR:** It is.

23 **COMMISSIONER BALBIS:** It is, so I should stop.

24 (Laughter.)

25 Okay. Thank you. That's all I had.

1 **CHAIRMAN BRISÉ:** All right.

2 **THE WITNESS:** But if I may, may I respond,
3 Commissioner?

4 **COMMISSIONER BALBIS:** I probably wouldn't at
5 this point.

6 (Laughter.)

7 **CHAIRMAN BRISÉ:** Re -- I don't see anymore
8 lights. Redirect.

9 **MR. GUYTON:** Thank you.

10 **REDIRECT EXAMINATION**

11 **BY MR. GUYTON:**

12 **Q** Dr. Avera, Mr. Moyle asked you about a decline
13 in utility bond yields since the last rate case.

14 **A** Yes, sir.

15 **Q** Okay. What is more important in regards to
16 prospective cost of equity, how much utility bond yields
17 have gone down since the last rate case or what utility
18 bond yields are projected to be?

19 **A** The projections are important because we're
20 all talking about the future. When equity holders buy
21 stock, they don't get the past, they only get the
22 future. When we're setting rates, we don't set rates
23 for the past, we set rates for the future. So that's
24 why, to investors and to the Commission, the future is
25 the most relevant time period.

1 Q Mr. Moyle also asked you about tough economic
2 times. Do you recall that line of questioning?

3 A Yes, sir.

4 Q In tough economic times, is a strong financial
5 position for an electric utility more or less important?

6 A I think it's more important because it helps
7 to attract industry, it helps to attract customers. In
8 my consulting with industrial groups, they care about
9 the financial soundness and security of electric supply.

10 So a company like FPL that has a strong
11 financial profile is an attractive place to locate and
12 it's an attractive place to live, because in the long
13 run you can have lower rates, as FPL does, and you can
14 have more secure electric service.

15 Q Mr. Moyle asked you also a line of questions
16 about the impact of downgrades. Do you recall those
17 questions?

18 A Yes, sir.

19 Q Generally speaking --

20 **MR. MOYLE:** I'm going to object to leading
21 unless he -- (laughter.)

22 **CHAIRMAN BRISÉ:** Mr. Guyton, go ahead.

23 **MR. GUYTON:** Thank you. That's why I was
24 pausing, so I appreciate you giving me a little time
25 here.

1 **BY MR. GUYTON:**

2 Q. In your opinion, is it important for
3 companies --

4 **MR. MOYLE:** It's leading.

5 **BY MR. GUYTON:**

6 Q. Dr. Avera, in your rebuttal of the various
7 company witnesses -- or the various opposition
8 witnesses, what is your understanding about whether any
9 of them have advocated a downgrade, bond rating
10 downgrade?

11 A. No. They all claim that their proposals would
12 not result in a downgrade. They all select a comparable
13 group based on low-risk utilities that are A rated, so
14 they assume that this Commission could drop the ROE and
15 could possibly change the capital structure with no
16 impact on the rating, and that, I believe, is contrary
17 to history.

18 Q. You were asked about Exhibit 618, which is the
19 merchant bond record report?

20 A. Yes. I don't know if I can put my hand on it,
21 but why don't you ask the question while I'm looking.

22 Q. I'm just simply asking you to observe whether
23 spreads are shrinking or expanding currently.

24 A. Currently they are expanding. The spread was
25 at the bottom in July, and it has since been widening.

1 It's wider than when I did my testimony.

2 **MR. MOYLE:** I have an extra copy of the
3 exhibit. Maybe I should give it to him, because it
4 looks like in the exhibit it only goes through the end
5 of 2010.

6 **MR. GUYTON:** I'm fine with the answer if we
7 can move forward.

8 **CHAIRMAN BRISÉ:** Yes, you can move forward.

9 **MR. MOYLE:** Yes, but if he answered in 2011,
10 that's not based on the exhibit.

11 **MR. GUYTON:** Mr. Moyle is testifying now.

12 **CHAIRMAN BRISÉ:** You may move forward.

13 **MR. GUYTON:** Thank you.

14 **BY MR. GUYTON:**

15 **Q.** You were asked a number of questions about
16 your Exhibit WEA-23 and WEA-24?

17 **A.** Yes, sir.

18 **Q.** And before we get to -- before we get to the
19 matters that you have suggested were in error, would you
20 explain to the Commission the approach that you're
21 taking on these exhibits and why you have this data
22 highlighted that you have highlighted.

23 **MR. SUNDBACK:** Mr. Chairman, to the extent
24 that the answer attempts to lay into the record
25 different or new data, we would object. To the extent

1 that this is a generic or conceptual question, we don't
2 have any objection.

3 **CHAIRMAN BRISÉ:** Understood.

4 **MR. GUYTON:** It is the latter, not the former.
5 I am not at this point trying to put any additional
6 information. I'm trying to make sure that the
7 Commission understands the methodology that was being
8 employed here.

9 **MR. SUNDBACK:** Well, Mr. Chairman, I'm doing
10 it as a cautionary matter. We don't know what the
11 witness is going to say.

12 **CHAIRMAN BRISÉ:** Right.

13 **MR. MOYLE:** And the witness has already said
14 that he has a corrected exhibit coming, so I think this
15 is a precursor to that. It's not the role on redirect
16 to put in new evidence, which I fear is coming, so we'll
17 wait until it comes, but --

18 **CHAIRMAN BRISÉ:** Dr. Avera, did you hear the
19 question?

20 **THE WITNESS:** Yes, I did.

21 **MR. WRIGHT:** Mr. Chairman, I'm going to
22 interpose an objection, too, because it sounds to me
23 like Mr. Guyton is trying to elicit new explanatory
24 testimony that should have been covered in the witness'
25 rebuttal and prefiled testimony. If he's going to

1 explain the table and include the table in there, he
2 ought to explain it when he has the opportunity to
3 explain it when he writes the testimony.

4 **MR. GUYTON:** I will restate the question.

5 **CHAIRMAN BRISÉ:** Okay.

6 **BY MR. GUYTON:**

7 **Q.** In several of your answers regarding your
8 Exhibit WEA-23 and 24, you referred to the FERC
9 methodology, did you not?

10 **A.** Yes.

11 **Q.** Would you explain to the Commission what you
12 meant by the FERC methodology?

13 **A.** FERC has a longstanding policy, which I agree
14 with and which I implement in all of my testimony,
15 including that here in Florida, to eliminate DCF
16 estimates that are illogically low, because it indicates
17 that you haven't captured investor expectations. And
18 the way you do that is you look at the implied ROE, and
19 if it's not at least 100 basis points above bond yields,
20 it is illogical to assume that investors would be
21 willing to buy risky stock and only earn 100 basis
22 points or less than they could get from buying the bonds
23 that have a guaranteed without bankruptcy return.

24 **Q.** Thank you. Now, you stated during
25 cross-examination that you had made a mistake on your

1 WEA-23 and your WEA-24. Did you have an opportunity to
2 review that mistake during the break?

3 A. Yes.

4 **MR. SUNDBACK:** Mr. Chairman, we're going to
5 object again on a cautionary basis. To the extent there
6 is an effort to place into the record new data at this
7 point, we would object to the question and the answer.
8 If it doesn't involve placing into the record new data,
9 we'll listen to the question, but we are concerned that
10 this is beyond the 11th hour. And to the extent that we
11 see what is, in essence, a surrebuttal case presented
12 now, which can't be tested, it's not subject to
13 discovery, should have been done long before this, it's
14 untimely.

15 **CHAIRMAN BRISÉ:** Okay. So can we hear the
16 question?

17 **BY MR. GUYTON:**

18 Q. As a result of your review, did you have an
19 opportunity to recalculate your WEA-23 and 24,
20 correcting your mistake?

21 A. Yes.

22 **MR. GUYTON:** We are prepared to hand those
23 out. I've heard the objections. I don't want to be in
24 a position of arguing that you ought to take a look at
25 it before we ask the question. You may want to go ahead

1 and rule on it now.

2 We have a correction that is available to the
3 Commission if the Commission desires it. And we can --
4 before I hand it out, it just seems to me we ought to
5 argue it.

6 **MR. SUNDBACK:** Mr. Chairman, first of all, we
7 can't argue it completely because we don't know where
8 counsel is going with these corrections. But what we
9 can argue is this, the witness was asked 20 days ago
10 when he had -- whether he had any additions, deletions,
11 corrections to his Prefiled Direct or Rebuttal
12 Testimony. He said no. He was asked that again when he
13 got on the stand; he said no.

14 The explanation we have been given, to the
15 extent we were listening carefully, was that he
16 transposed the data from Mr. Gorman and Mr. Baudino.
17 That seems to be, at least at first blush, an irrational
18 statement because Mr. Baudino and Mr. Gorman used
19 different sources. Mr. Gorman used SNL data, Mr.
20 Baudino did not. It's not possible to take data that
21 were derived from SNL from anyplace --

22 **MR. GUYTON:** I'm sorry. I'm sorry.

23 **MR. SUNDBACK:** Excuse me. Can I --

24 **MR. GUYTON:** No, you're not, because you are
25 testifying and not arguing.

1 **MR. SUNDBACK:** No. Mr. Chairman, we only need
2 to look at the exhibits themselves to see that SNL was
3 not used in exhibit -- Mr. Baudino's RAB-4. There was
4 no way to transpose SNL data into Mr. Gorman's exhibit,
5 or the replication -- purported to be the replication of
6 Mr. Gorman's exhibit. So the idea that they were
7 swapped is irrational, illogical, and can't even be
8 sustained on the face of these documents to start with.
9 So why are we embarking on this effort to reconstruct a
10 series of fairly complex computations at the 11th hour?

11 **MR. GUYTON:** I'm going to move to strike that
12 response, because it is pure argument and unsworn
13 testimony. We have an opportunity to correct an error
14 that Mr. Sundback brought to everybody's attention
15 earlier today. We can either choose to correct the
16 record and leave it complete, or we can leave it where
17 it stands now.

18 (Simultaneous conversation.)

19 **CHAIRMAN BRISÉ:** Thank you. Thank you.

20 Mary Anne.

21 **MS. HELTON:** I was afraid you were going to do
22 that. There is an expert witness on the stand that has
23 testified in a direct case, and he has now -- is now
24 here on rebuttal. The Commission typically wants to
25 have the best information before it. However, I find

1 myself a little bit sympathetic to the South Florida
2 Hospital's argument that this is the 11th hour. This is
3 hopefully the last night of the hearing. There is an
4 expert witness that was on the stand that was paid to do
5 a job, and if he has not provided accurate information
6 to be vetted and tested by the parties in discovery,
7 which is our process, and knowing that the company does
8 have the burden of proof here, it does seem to me that
9 it's a little bit unfair to the intervenors.

10 That all being said, you do have a great bit
11 of latitude and a great bit of discretion with respect
12 to the evidence that you take in in this legislative
13 process, and if you would rather have the more accurate,
14 or what's purported to be the more accurate information,
15 you can do that. But if you're asking me, I am
16 sympathetic to the intervenor's objections.

17 **CHAIRMAN BRISÉ:** Okay. So if I understand
18 right, the objection is to -- well, I think there are
19 two aspects to your objection. One is whether the data
20 that would be provided now is actual corrective data
21 versus new data. I think that that's part of it.

22 **MR. SUNDBACK:** That's one element, yes, Mr.
23 Chairman.

24 **CHAIRMAN BRISÉ:** And the second portion is if
25 it's new data, then you don't have an opportunity to

1 question the data.

2 **MR. SUNDBACK:** That is correct, as well. And
3 a third point is we have -- we're supposed to be dealing
4 with experts who exercise care in presenting you with
5 information, and that goes to the weight and the
6 credibility of that witness.

7 If you encourage a practice where it's a
8 no-fault effort, you'll be faced with a lot of data, and
9 you won't know -- everybody will proceed through the
10 case -- we proceeded through the case on the notion that
11 this information was the party's case, and now we find
12 out that it's not really their case.

13 **CHAIRMAN BRISÉ:** I got you.

14 **MR. SUNDBACK:** So we have our own due process
15 and notice concerns about this, Mr. Chairman.

16 **CHAIRMAN BRISÉ:** Thank you.

17 I think I do agree that there was ample time
18 to redress this issue, and it hasn't been redressed.
19 So, therefore, we will not take in new information at
20 this time.

21 Mr. Guyton, I think -- and I think this should
22 serve as a caution to the witness. If you provide
23 testimony and purport to be an expert that you will do
24 your due diligence and do your job appropriately.

25 **THE WITNESS:** Yes, sir.

1 **CHAIRMAN BRISÉ:** Mr. Guyton.

2 **BY MR. GUYTON:**

3 **Q.** Dr. Avera, is there anything wrong with the
4 models that you have employed in your rebuttal
5 testimony?

6 **A.** No.

7 **Q.** You were asked about Exhibits 619 and 620 that
8 had to do with holdings by a single investor in NextEra
9 Energy. Do you recall those questions?

10 **A.** Yes.

11 **Q.** What, if anything, can one discern from a fund
12 increasing its holdings in stock over a period of time?

13 **A.** I think on that information alone there are no
14 inferences that one could make, other than the people
15 for whom they are buying and selling stock have chosen
16 to increase their positions, or new customers have
17 chosen to take positions.

18 **Q.** And how many institutional investors were you
19 asked to comment on the change in their holdings over
20 that period of time?

21 **A.** Just one. But the institution appears in two
22 places, both as a mutual fund and as an investment
23 company.

24 **Q.** I want to ask you about some questions that
25 Mr. Wright asked -- I'm sorry, that Mr. McGlothlin

1 asked.

2 **MR. GUYTON:** My apologies, to both of you.

3 **MR. WRIGHT:** I'll take it as a compliment.

4 Thank you.

5 **MR. GUYTON:** In which case I withdraw my
6 apology.

7 (Laughter.)

8 **BY MR. GUYTON:**

9 **Q.** Mr. McGlothlin posed to you a series of
10 questions about his composite exhibit and quarterly
11 dividends. Do you recall that?

12 **A.** Yes.

13 **Q.** The articles that Dr. Woolridge relied upon in
14 terms of analyst estimates, did they use quarterly
15 dividends or did they use dividends from other periods?

16 **A.** They used earnings, many of them, because
17 there have been very few studies using five-year
18 earnings because of the time lag to get enough
19 observations to have a statistically significant sample.
20 So I believe his articles, as mine, draw inferences from
21 quarterly forecasts where you have a rich population.
22 These forecasts are made by the same analysts and
23 collected by the same services, so the assumption is
24 that you can make inferences about five-year forecasts
25 from what we observe historically about quarterly

1 forecasts.

2 Q. Mr. Wright asked you a series of questions
3 about what has been identified as Exhibit 630, the
4 company's earnings surveillance reports. Do you recall
5 those?

6 A. Yes, sir.

7 Q. And he asked you specifically to take a look
8 at a series of NOI numbers on those reports?

9 A. Yes, sir.

10 Q. Do you know whether or not those net operating
11 income reports are weather-normalized or not?

12 A. My understanding is that they are not, and I
13 think weather is a big factor in the earnings of the
14 company.

15 Q. Okay. And I'm just -- do you have that
16 exhibit in front of you, 630? It's the earnings
17 surveillance reports.

18 A. Yes, sir.

19 Q. Would you turn to the report for
20 December 2010, please.

21 A. I'm just about there. I'm there.

22 Q. And if you would look at Line G, the return on
23 common equity average, that value is what?

24 A. 11 percent.

25 Q. And then if you would look at -- and is that

1 weather-normalized or not?

2 A. I don't believe it is.

3 Q. If you would look at Line H on that same
4 exhibit. That is a return on equity of 9.57?

5 A. Yes, sir.

6 Q. And that's reflected as pro forma adjusted.
7 Do you know whether that's weather-normalized or not?

8 A. I believe it may be.

9 Q. In reviewing the earnings surveillance
10 reports, what import, if any, should be given to the
11 weather-normalized numbers?

12 A. Well, I think considerable, because the
13 question that investors have, again, looking into the
14 future, is what is the future earnings ability of the
15 company, and they assume, generally, that average
16 weather will prevail. So you won't have always hotter
17 than usual as we've had in the last several years.

18 Q. Now, you were asked to take a look at these
19 earnings surveillance reports for the periods of 2010,
20 2011, and 2012. What has enabled FPL to earn 11 percent
21 in 2010 and 2011?

22 A. The settlement allowed FPL the flexibility to
23 apply the excess depreciation reserve to meet their
24 11 percent earnings target.

25 Q. And when does that settlement expire?

1 **A.** At the end of this year.

2 **Q.** And so what happens to that mechanism at the
3 end of this year?

4 **A.** As I understand it, it disappears, and it will
5 be replaced by whatever happens in this rate case.

6 **Q.** Now, you were also asked questions about stock
7 price performance over a period of time, do you recall
8 that?

9 **A.** Yes.

10 **Q.** In your opinion, what is the proper period of
11 time to review stock prices to determine the effect on
12 the company of the Commission's decision in the last
13 rate case and/or the settlement agreement?

14 **A.** I think you need to look as investors do,
15 because investors are looking to the future, and
16 professional security analysts add value by anticipating
17 what's going to happen in the future. They watch rate
18 cases very carefully, they're probably watching tonight,
19 to get an expectation of what is likely to happen.

20 So I think the period of time that the
21 regulatory outcome is starting to get baked into stock
22 prices is when investors start reaching a consensus that
23 the regulatory outcome is going to be adverse or
24 constructive. And that, having been here, I think would
25 have occurred starting in the summer of 2009.

1 Q. And over the period that you think is
2 appropriate to measure the impact on stock price, what
3 was the impact on FPL's stock price?

4 A. I believe the stock price went down a great
5 deal from the summer of 2009 through when the rate case
6 was finally decided, and ultimately when the investors
7 started expecting a positive outcome from the
8 settlement.

9 Q. And do you know the order of magnitude, say a
10 percentage decline?

11 A. I have some numbers for that, but I'll have to
12 find them. But I think it's on the order of 20 or more
13 percent. And Mr. Dewhurst, I believe, probably tracks
14 that more closely than I do.

15 Q. And what would a 20 percent decrease in the
16 stock price of FPL mean in terms of total capital lost
17 to NextEra's investors?

18 A. That would be --

19 **MR. SUNDBACK:** Mr. Chairman, we'd like to
20 object to this. We've refrained from objecting to this
21 series of questions because at the outset they involved
22 the FRF cross-examination, but this has now diverged
23 from the relatively focused topics that were covered by
24 FRF, and we're now instead of focusing on stock prices
25 for particular dates, we're trying to extrapolate that

1 into a total capital impact or valuation impact. So it
2 seems like this is being unraveled at considerable
3 length, and it far exceeds the scope of
4 cross-examination.

5 If this is going to be the standard, we're
6 going to be here quite late. We're going to be here quite
7 late regardless, but it'll be even worse.

8 **MR. GUYTON:** Commissioner, that's my last
9 question on this line. I'm just trying to put the price
10 decline in context.

11 **CHAIRMAN BRISÉ:** I'll allow this question.

12 **A.** The market cap of then FPL Group was north of
13 20 billion, so it would be -- 20 percent would be
14 \$4 billion. And I don't have the numbers for the summer
15 of 2009, but I think it would be well above, because it
16 was 19 billion at the bottom after the order had come
17 out.

18 **MR. GUYTON:** If I might have a moment, I think
19 I'm through, but I just want to check my notes.

20 **CHAIRMAN BRISÉ:** Sure.

21 **MR. GUYTON:** Thank you, Mr. Chairman.

22 Thank you, Dr. Avera.

23 **CHAIRMAN BRISÉ:** Thank you very much.

24 Exhibits.

25 **MR. GUYTON:** As soon as I can put my hands on

1 it, we would like to move Exhibits 436 through 450.

2 **CHAIRMAN BRISÉ:** 436 through 450.

3 Any objections? Okay. Seeing none, we will
4 move 436 through 450 into the record.

5 (Exhibit Number 436 through 450 admitted into
6 the record.)

7 **MR. MOYLE:** I think FIPUG had 618 and we would
8 move it.

9 **CHAIRMAN BRISÉ:** Okay.

10 618. Any objections?

11 **MR. GUYTON:** Mr. Chair, I'm just simply trying
12 to find it. No objection.

13 **CHAIRMAN BRISÉ:** All right. We'll move 618
14 into the record.

15 (Exhibit Number 618 admitted into the record.)

16 **CHAIRMAN BRISÉ:** Mr. Sundback.

17 **MR. SUNDBACK:** Thank you, Mr. Chairman. At
18 this time SFHHA would move the admission of what, if our
19 recordkeeping is correct, has been marked as Hearing
20 Exhibits 619 through 628.

21 **CHAIRMAN BRISÉ:** 619 through 628. Any
22 objections to any of those?

23 **MR. GUYTON:** No objection.

24 **CHAIRMAN BRISÉ:** Okay. So we will move into
25 the record 619 through 628.

1 (Exhibit Numbers 619 through 628 admitted into
2 the record.)

3 **CHAIRMAN BRISÉ:** OPC.

4 **MR. McGLOTHLIN:** OPC moves 629, which was the
5 composite exhibit of several articles and a *Wall Street*
6 *Journal* excerpt.

7 **CHAIRMAN BRISÉ:** All right. Any objections to
8 629?

9 **MR. GUYTON:** No objection.

10 **CHAIRMAN BRISÉ:** Okay. Seeing none, we will
11 move 629 into the record.

12 (Exhibit Number 629 admitted into the record.)

13 **CHAIRMAN BRISÉ:** Mr. Wright.

14 **MR. WRIGHT:** Mr. Chairman, the Florida Retail
15 Federation moves the admission of Exhibit 630.

16 **CHAIRMAN BRISÉ:** All right. Any objections to
17 630?

18 **MR. GUYTON:** I'm trying to put my hands on it.
19 No, we have no objection to the surveillance
20 report.

21 **CHAIRMAN BRISÉ:** All right. So we will move
22 630 into the record, seeing no objections.

23 (Exhibit Number 630 admitted into the record.)

24 **CHAIRMAN BRISÉ:** All right. So that takes
25 care of this witness, Dr. Avera.

1 **MR. GUYTON:** May he be excused?

2 **CHAIRMAN BRISÉ:** Yes. Dr. Avera, you may be
3 excused. Hopefully you have a better night than the
4 rest of us.

5 Mr. Wright.

6 **MR. WRIGHT:** Mr. Chairman, I am prepared, but
7 the Commissioner who requested the late-filed has left
8 the room again.

9 (Transcript continues in sequence in Volume
10 32.)

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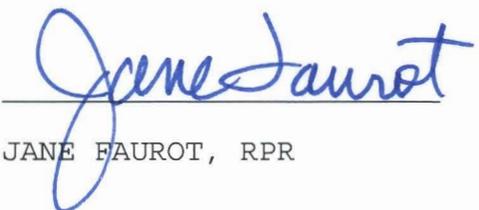
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