

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

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 150075-EI

PETITION FOR APPROVAL OF  
ARRANGEMENT TO MITIGATE IMPACT  
OF UNFAVORABLE CEDAR BAY POWER  
PURCHASE OBLIGATION, BY FLORIDA  
POWER & LIGHT COMPANY.

\_\_\_\_\_ /

VOLUME 2

Pages 161 through 406

PROCEEDINGS: HEARING

COMMISSIONERS  
PARTICIPATING: COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER RONALD A. BRISÉ  
COMMISSIONER JIMMY PATRONIS

DATE: Tuesday, July 28, 2015

TIME: Commenced at 12:15 p.m.  
Concluded at 4:23 p.m.

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

REPORTED BY: ANDREA KOMARIDIS  
Court Reporter

APPEARANCES: (As heretofore noted.)

PREMIER REPORTING  
114 W. 5TH AVENUE  
TALLAHASSEE, FLORIDA  
(850) 894-0828

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

I N D E X  
WITNESSES

NAME:	PAGE NO.
THOMAS HARTMAN	
Continued Examination by Mr. Moyle	164
Examination by Ms. Barrera	165
DAVID HERR	
Examination by Mr. Butler	170
Prefiled direct testimony inserted	173
Prefiled rebuttal testimony inserted	182
Examination by Mr. Moyle	200
Examination by Mr. Butler	236
KIM OUSDAHL	
Examination by Ms. Moncada	239
Prefiled direct testimony inserted	241
Prefiled rebuttal testimony inserted	253
Examination by Mr. Moyle	264
Examination by Ms. Moncada	276
Examination by Mr. Moyle	277
RAY BUTTS	
Examination by Ms. Moncada	279
Prefiled rebuttal testimony inserted	281
Examination by Mr. Moyle	295
Examination by Mr. Villafrate	319
TRACY PATTERSON	
Prefiled rebuttal testimony inserted	323
GARY D. BRUNAUTL	
Examination by Mr. Truitt	340
Prefiled direct testimony inserted	343
Examination by Mr. Moyle	376
DAN J. WITTLIFF	
Examination by Mr. Truitt	387
Prefiled direct testimony inserted	390
Examination by Mr. Moyle	403

1	EXHIBITS		
2	NUMBER:	ID.	ADMTD.
3	2 through 5 (as identified on Comprehensive Exhibit list)		168
4			
5	61 through 63 (as identified on Comprehensive Exhibit list)		238
6	6 through 8 (as identified on Comprehensive Exhibit list)		238
7			
8	55 (as identified on Comprehensive Exhibit list)		238
9	66 and 67 OPC excerpts	207	238
10	68 Carlyle group press release	235	238
11	9, 56 and 57 (as identified on Comprehensive Exhibit list)		279
12			
13	69 AAI Phase 2 assessment		322
14	58 through 60 (as identified on Comprehensive Exhibit list)		340
15	10 and 11 (as identified on Comprehensive Exhibit list)		386
16			
17	12 (as identified on Comprehensive Exhibit list)		405
18			
19			
20			
21			
22			
23			
24			
25			

1 P R O C E E D I N G

2 (Transcript follows in sequence from  
3 Volume 1.)

4 CONTINUED EXAMINATION

5 BY MR. MOYLE:

6 Q What risk does FPL see associated with the  
7 Cedar Bay facility, assuming you could move forward with  
8 your plans and retire it in 2016? Tell me what risks  
9 are there from 2017 forward.

10 A First of all, we're not necessarily  
11 guaranteeing we're going to shut it down at the end of  
12 2016. That's --

13 Q I understand. That's the plan.

14 A That is our current plan. And we still have  
15 operating risk. We still have the risk of O and M  
16 costs. We still have the risk of dispatching it that is  
17 with all of our generation plants.

18 Q Okay. And my question was: Assume you stick  
19 to your plan, you retire in 2016. Now, we're in 2017.  
20 What risk does FPL have associated with the Cedar Bay  
21 generating facility?

22 A Very little.

23 MR. MOYLE: Okay. That's all I have.

24 COMMISSIONER EDGAR: Thank you. OPC, no  
25 questions?

1 MR. REHWINKLE: No questions.

2 COMMISSIONER EDGAR: Thank you.

3 Staff.

4 MS. BARRERA: Yes, staff has questions.

5 EXAMINATION

6 BY MS. BARRERA:

7 Q Mr. Hartman, Mr. Barrett said you would be  
8 able to answer these questions. Based on the purchase  
9 and sale agreement, among other contracts that FPL would  
10 acquire along with Cedar Bay -- and you've discussed  
11 those contracts with Mr. Moyle -- is an existing  
12 environmental liability insurance policy; is that  
13 correct?

14 A Yes, that's correct.

15 Q And does FPL plan on maintaining this  
16 liability insurance until the ground lease ends?

17 A The existing environmental insurance policy  
18 has on its face coverage through 2018. We're planning  
19 on dismantling the plant in 2017.

20 We would, then, take an evaluation based on  
21 our risk management and our environmentalists as to  
22 whether we needed to continue the environmental policy.  
23 At present, we're only looking at keeping it online and  
24 through its face expiration, 2018.

25 Q Does that include -- would you extend that

1 **policy if you maintained open -- you continued to**  
2 **operate the Cedar Bay facility?**

3 A If we continued to operate the Cedar Bay  
4 facility, you know, past the expiration date that we're  
5 talking about here, certainly we would be extending the  
6 environmental liability policy.

7 Q **Does FP&L intend to recover costs with this**  
8 **policy like any other operating expense?**

9 A That's correct. It's an operating expense  
10 just like our other insurance.

11 Q **Would it be fair to say, then, that in its**  
12 **economic evaluation, FP&L included no other costs for**  
13 **environmental liabilities associated with Cedar Bay**  
14 **beyond the cost of the environmental liability policy?**

15 A Almost. There is a \$4-and-a-half million  
16 amount that we put into demolition of the facility. And  
17 that includes for 2017 for the asset retirement. And  
18 that includes some environmental clean-up of the site.

19 Q **And are FP&L's -- FP&L's ratepayers are not**  
20 **responsible for any environmental liabilities under the**  
21 **PPA as it currently stands, correct?**

22 A That's correct.

23 Q **And would FP&L be willing to hold ratepayers**  
24 **harmless in the event of the environmental liabilities**  
25 **in excess of the insurance policy?**

1           A     I don't know. That's something that would be  
2 well above my level to make a decision on. I, frankly,  
3 see the risks and the coverage that we have here as  
4 almost no different than our existing plants.

5                     One of the things that you may not have  
6 noticed is the purchase and sale agreement has a large  
7 amount that goes into escrow -- I mean, a very  
8 substantial amount. And that doesn't get released for  
9 quite a long time after the closing of this transaction.  
10 That amount is available to also handle some of the  
11 environmental risks.

12           **Q     On Page 6, Lines 12 to 13 of your rebuttal**  
13 **testimony, you state that FP&L, St. Johns River Power**  
14 **Park is subject to the Mercury and Air Toxic Standards,**  
15 **or MATS rule, effective of April of this year; is this**  
16 **correct?**

17           A     That's correct.

18           **Q     And can you briefly describe what the MATS**  
19 **rule standards are?**

20           A     I don't know the standards offhand. Witness  
21 Ray Butts is our expert on that.

22           **Q     Okay. How does the fact that MATS rule**  
23 **standards apply to St. Johns River Power Park affect the**  
24 **Cedar Bay transaction?**

25           A     It really doesn't impact the Cedar Bay

1 transaction at all. This rebuttal testimony was in  
2 response to the testimony of Witness Dawson, who had  
3 proposed a different fuel mix for the plant.

4 And the MATS rule puts in place certain  
5 restrictions as to how we can operate the plant and we  
6 wind up with a -- the assumptions that he had not being  
7 viable for SJRPP.

8 MS. BARRERA: Okay. We have no further  
9 questions. Thank you.

10 COMMISSIONER EDGAR: Thank you.

11 Commissioners, no questions at this time?

12 Redirect?

13 MR. DONALDSON: No redirect. Thank you.

14 COMMISSIONER EDGAR: Okay.

15 MR. DONALDSON: Although, I would like at this  
16 point to enter into evidence Exhibits 2 through 5  
17 and 61 through 63 into the record.

18 COMMISSIONER EDGAR: Any objections?

19 Seeing none, we will enter into the record  
20 exhibits marked 2 through 5, 61, 62, 63.

21 (Exhibit Nos. 2 through 5 and 61 through 63  
22 admitted into the record.)

23 COMMISSIONER EDGAR: Thank you.

24 MR. DONALDSON: Thank you.

25 COMMISSIONER EDGAR: Mr. Hartman, thank you.



1           You're excused.

2                   THE WITNESS:   Thank you.

3                   COMMISSIONER EDGAR:   Okay.  It's approximately  
4           12:22.  So, this is probably a good natural break  
5           point.  So, we will take a lunch break.

6                   Before we do that, let me just say that we  
7           will be -- regardless of where we are, we'll be  
8           taking a break from approximately ten to three to  
9           3:15.  I have some paperwork I need to take care of  
10          around 3:00.  We'll use that as our stretch, water  
11          break in the middle of the afternoon.

12                   I do intend to finish today.  I think that  
13          that's workable and manageable, barring anything  
14          unforeseen.  I don't know that we'll need it, but  
15          we will make arrangements for the air and doors and  
16          that type of thing after 5:00.

17                   When we come back from lunch, we will take up  
18          Mr. Moyle's standing objection regarding further  
19          discussion and questioning on the proposed  
20          settlement.  And then we will move into Witness  
21          Herr.  And with that, we are on lunch break until  
22          1:30.

23                   (Brief recess.)

24                   COMMISSIONER EDGAR:   Good afternoon.  We're  
25          back on the record after the lunch break.



1     **that correct?**

2           A     Yes.

3           **Q     Would you please state your name and business**  
4     **address for the record.**

5           A     David Herr, Duff & Phelps, LLC, 2000 Market  
6     Street, Suite 2700, Philadelphia, P.A. 19103.

7           **Q     Okay. Thanks. And by whom -- I'm sorry. You**  
8     **just said whom you're employed by.**

9                     What capacity do you hold at Duff & Phelps?

10          A     I'm a managing director at Duff & Phelps. I'm  
11     the Philadelphia City Leader as well as the head of the  
12     energy and mining practice for the firm.

13          **Q     Have you prepared and caused to be filed nine**  
14     **pages of prefiled direct testimony and 17 pages of**  
15     **prefiled rebuttal testimony in this proceeding?**

16          A     Yes.

17          **Q     And I would note for the record that the**  
18     **rebuttal testimony contains confidential information;**  
19     **the text of direct testimony does not.**

20                     Mr. Herr, have you prepared and caused to be  
21     filed an errata sheet to your prefiled rebuttal  
22     testimony?

23          A     Yes.

24          **Q     Do you have any further changes or revisions**  
25     **to either your direct or rebuttal testimony at this**

1 **time?**

2 A No.

3 **Q So, if I asked you the questions contained in**  
4 **your direct and rebuttal testimonies today, would your**  
5 **answers be the same?**

6 A Yes.

7 MR. BUTLER: Madam Chair, I would ask that  
8 Mr. Herr's prefiled direct and prefiled rebuttal  
9 testimony be inserted into the record as though  
10 read.

11 COMMISSIONER EDGAR: The witness's prefiled  
12 testimony will be entered into the record as though  
13 read.

14 MR. BUTLER: Thank you.

15

16

17

18

19

20

21

22

23

24

25

1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                   **FLORIDA POWER & LIGHT COMPANY**

3                   **DIRECT TESTIMONY OF DAVID W. HERR**

4                   **DOCKET NO. 15\_\_\_\_\_ -EI**

5                   **MARCH 6, 2015**

6

7   **Q.    Please state your name and business address.**

8    A.    My name is David Herr. My business address is 2000 Market Street, Suite 2700,  
9           Philadelphia, PA 19103.

10 **Q.    By whom are you employed and what position do you hold?**

11   A.    I am a Valuation Consultant for Duff & Phelps LLC (“D&P”). I am a Managing  
12           Director, the Philadelphia City Leader, and the Energy and Mining Industry  
13           Leader for D&P.

14 **Q.    Please describe your educational background and professional experience.**

15   A.    I am in my twentieth year in the Valuation Advisory Services (or “VAS”) group  
16           of D&P including its predecessors, Standard & Phelps Corporate Value  
17           Consulting, PricewaterhouseCoopers LLP and Coopers & Lybrand LLP. In my  
18           role within the VAS group, I have been focused on power and utility valuation for  
19           fifteen years, during which time I have led more than 250 valuations of power  
20           plants and related assets. I have been the D&P Energy and Mining Industry  
21           Leader since 2008. I hold a Bachelor of Science Degree in Finance from  
22           Villanova University where I graduated with a 4.0 GPA. I am a Chartered  
23           Financial Analyst charterholder and am Series 63 and Series 79 Certified,

1           certifications needed to provide Investment Banking Mergers & Acquisitions  
2           services.

3   **Q.   For whom are you appearing as a witness?**

4   A.   I am appearing as a witness for Florida Power & Light Company (“FPL”).

5   **Q.   What is the purpose of your testimony?**

6   A.   The purpose of my testimony is to describe the analysis of the Fair Value (as  
7       defined below) pursuant to US Generally Accepted Accounting Principles  
8       (“GAAP”) of the assets to be acquired by FPL in connection with its proposed  
9       acquisition of CBAS Power Inc. (“CBAS”) prepared by D&P to assist FPL  
10      Management with its accounting for the proposed transaction.

11 **Q.   Are you sponsoring any exhibits?**

12 A.   Yes. I am sponsoring the following exhibits:

- 13       • Exhibit DH-1, which is my curriculum vitae
- 14       • Exhibit DH-2, which is a Summary Report prepared by Duff & Phelps entitled  
15       “Valuation of Certain Tangible and Intangible Assets of CBAS Power Inc.”  
16       (the “Report”)
- 17       • Exhibit DH-3 (Confidential), which is a more detailed form of the Report  
18       providing supplemental, proprietary information about the manner in which  
19       D&P performed its valuation.

20 **Q.   Please summarize your testimony.**

21 A.   FPL engaged D&P to assist with its determination of the Fair Value pursuant to  
22      US GAAP of the assets (the “Subject Assets”) to be acquired in connection with  
23      the proposed transaction with CBAS. Specifically, we assisted Management with

1 the estimation of the Fair Value of the Cedar Bay coal-fired power plant (the  
2 “Cedar Bay Facility” or the “Facility”) and the Power Purchase Agreement  
3 (“PPA”) between FPL and Cedar Bay Generating Company, Limited Partnership  
4 (“Cedar Bay Genco”). We concluded that the Facility has a \$0 Fair Value  
5 because, while FPL can derive unique short-term benefits from ownership of the  
6 Facility, it would be uneconomic to operate as a merchant plant in the current  
7 environment of fuel prices and emissions regulation. On the other hand, we  
8 determined that the PPA has a Fair Value of \$520 million, representing the value  
9 that it could bring to an owner of the Facility who was entitled to continue selling  
10 power to FPL under the terms of the PPA for its remaining term. We also  
11 considered other contracts as listed in the Report which were determined to have  
12 negligible or \$0 Fair Value as part of our analysis.

13 **Q. Please summarize the relevant US GAAP standards pursuant to which your**  
14 **analysis was prepared.**

15 A. There are several standards that are relevant to our analysis. Accounting  
16 Standards Codification (“ASC”) 805, *Business Combinations*, provides guidance  
17 on the requirements related to accounting for a purchase such as FPL’s acquisition  
18 of CBAS and ASC 820, *Fair Value Measurements and Disclosures* provides the  
19 relevant definition of Fair Value. While FPL will account for CBAS pursuant to  
20 ASC 980, *Regulated Operations* subsequent to the acquisition, this guidance  
21 which should be applied by management after consideration of ASC 805  
22 requirements.

23

1 In addition to guidance on the accounting for the transaction, ASC 805 also  
2 includes specific guidance in paragraphs ASC 805-10-55-20 through 805-10-55-  
3 23 regarding measurement of the gain or loss on the effective settlement of the  
4 pre-existing relationship, in this case, the PPA between the Cedar Bay Genco and  
5 FPL.

6  
7 ASC 820 defines Fair Value as “the price that would be received to sell an asset  
8 or paid to transfer a liability in an orderly transaction between market participants  
9 at the measurement date” (“Fair Value”). ASC 820 states that a Fair Value  
10 measurement assumes the highest and best use of the asset by market participants,  
11 which is defined as the most likely group or categories of buyers that would  
12 establish a sale (or “exit”) price for FPL in a sale of CBAS.

13 **Q. Please summarize how these standards were considered and applied to this**  
14 **specific proposed transaction.**

15 A. In ascribing Fair Value, we assumed that a Market Participant, which would likely  
16 be either an independent power producer (“IPP”) or a private equity (“PE”) firm,  
17 would need to continue to operate the Cedar Bay Facility through the remaining  
18 term of the PPA in order to receive the contracted payments. This is consistent  
19 with the terms of the PPA, which is unit-contingent. In estimating the Fair Value  
20 of the PPA, which represents the loss on net settlement as provided for in ASC  
21 805, the relevant comparison is the PPA contract pricing to a replacement, unit-  
22 contingent (i.e., the power must be sourced from the Cedar Bay Facility) contract  
23 at pricing that would provide the owner the ability to cover all variable and fixed



1 operating costs (including maintenance capital). Absent observable, comparable  
2 benchmark contracts, the cost to procure fuel and operate / maintain the Facility  
3 provides an appropriate indicator of a replacement “market” contract.

4  
5 While the Subject Assets will be accounted for pursuant to ASC 980 after the  
6 acquisition, the Fair Value should exclude any impact of rate regulation. Only  
7 FPL could demonstrate that the acquisition of the Subject Assets provides benefits  
8 to customers by terminating the PPA and continuing to operate the Cedar Bay  
9 Facility only for so long as it remains beneficial from an economic and/or  
10 reliability perspective. ASC 820 and related guidance explicitly indicate that  
11 unique benefits, or “buyer specific synergies”, should not be included in the Fair  
12 Value of assets.

13 **Q. Please describe your analysis of the Facility.**

14 A. To estimate the Fair Value of the Facility, we considered the Cost Approach,  
15 which is based on the premise that an asset’s value is based on the cost of  
16 replacing it with an asset with similar functionality (in this case, the ability to  
17 generate 250 MW of power). However, given that there is currently not a market  
18 for its capacity, especially in light of the Cedar Bay Facility’s small size and the  
19 prevalence of relatively inexpensive natural gas, a power plant of similar  
20 functionality would not be constructed, as its profitability would not justify its  
21 construction cost. In cases such as this where economic obsolescence is  
22 indicated, a Discounted Cash Flow (“DCF”) is the appropriate approach to  
23 estimate Fair Value.

1 We prepared a DCF for the Cedar Bay Facility that reflected seasonal, on-peak  
2 operations consistent with the power production over the past 3 years and on-peak  
3 monthly power price forecasts for Florida Reliability Coordinating Council  
4 (“FRCC”) prepared by IHS CERA (“IHS”), an independent energy consulting  
5 firm, and published as of January 2015. Fuel and operating costs were estimated  
6 based on the Cedar Bay Facility’s actual results over the past several years and  
7 2014 budget. Adjustments were made to the coal price incorporating IHS’s  
8 Central Appalachian coal price outlook as well as historical delivery costs to the  
9 Cedar Bay Facility as reported by SNL Energy.

10  
11 Based on the low forecasted power prices in FRCC and the Facility’s high  
12 operating costs (as a relatively small coal plant), the Cedar Bay Facility would not  
13 generate positive cash flow in any year. Specifically, because the annual net  
14 energy margin that Cedar Bay Genco could generate from selling power at  
15 expected merchant power prices is less than the annual fixed costs to maintain and  
16 operate the Facility, a merchant owner of the Cedar Bay Facility would likely  
17 retire the Facility to avoid future expected operating losses.

18 **Q. Please describe your analysis of the PPA.**

19 A. To estimate the Fair Value of the PPA, we also used a DCF analysis. Based on its  
20 unit-contingent nature, the PPA was analyzed with the same operating costs that  
21 were used to value the Facility, but the merchant pricing was replaced with the  
22 contracted energy, capacity, bonus and operating and maintenance pricing  
23 through the end of 2024. Alternatively stated, the Fair Value of the PPA reflects

1 the expected stream of payments that the PPA would provide for its remaining  
2 term, less the costs of owning, operating and maintaining the Cedar Bay Facility  
3 as required to fulfill the PPA unit-contingent obligation in order to qualify for  
4 those payments.

5 **Q. Are there any other differences between the DCF analysis for the PPA and**  
6 **the DCF analysis for the Facility?**

7 A. Yes. The other major difference was in developing the discount rates for the two  
8 analyses. In both cases, we developed a weighted average cost of capital  
9 (“WACC”) appropriate for IPPs and PE firms (not regulated utilities) based on an  
10 estimated cost of debt and a cost of equity developed based on the Capital Asset  
11 Pricing Model (“CAPM”). We used predicted betas as published by BARRA for  
12 IPPs in the CAPM for both discount rate computations. Primary differences  
13 include: (i) the merchant plant cash flows were discounted at a WACC that  
14 reflected less financial leverage (as merchant cash flows are more volatile and  
15 therefore can support less debt); (ii) the CAPM included a greater size premium  
16 (appropriate due to its negligible indicated Fair Value and marginal cash flows);  
17 and (iii) a higher cost of debt consistent with sub-investment grade yields  
18 typically charged to merchant plant owners for project specific debt.

19

20 Overall, the WACC used in the DCF for the PPA was 7% and the WACC used to  
21 estimate the Fair Value of the Facility (absent the benefit of a PPA with a high  
22 credit-quality offtaker) was 11%.

23

1 **Q. Please describe your conclusions.**

2 A. Based on the DCF analysis reflecting the PPA pricing and the costs to operate the  
3 Cedar Bay Facility in order to fulfill the PPA (unit contingent) requirements, the  
4 Fair Value of the PPA can be reasonably estimated at \$520 million. This  
5 indicates that substantially all of the price being paid for CBAS is related to the  
6 net settlement of the PPA.

7  
8 The Fair Value conclusion for the PPA correlates well with the conclusion that  
9 the Fair Value of the Cedar Bay Facility is \$0. Specifically, absent the benefit of  
10 the (favorable) PPA, the annual net energy margin that Cedar Bay Genco could  
11 generate from selling power at forecasted merchant power prices is less than the  
12 annual fixed costs to maintain and operate the Facility. Accordingly, an IPP or  
13 PE firm (as the likely Market Participant) would likely retire the Cedar Bay  
14 Facility to avoid future expected operating losses (absent the favorable PPA).  
15 While FPL may ultimately end up recording and incurring a liability related to the  
16 dismantlement and restoration cost net of salvage, it is common that Market  
17 Participants (IPPs and PE firms) ascribe a Fair Value of \$0 on a net basis when  
18 bidding for businesses such as CBAS, as they generally believe they can defer  
19 costs and accelerate salvage proceeds to effectively minimize the net value impact  
20 of retirement costs, and the ultimate net cost of retirement to a Market Participant  
21 is generally viewed as immaterial to the overall transaction price (of  
22 approximately \$520 million).

23

1 We also considered other contracts to identify whether any intangible assets exist  
2 with a material Fair Value, but all other contracts were deemed to either be “at  
3 market” or have a negligible Fair Value. Specifically, contracts such as the  
4 ground lease have reset provisions whereby, the pricing is reset to “market” terms  
5 resulting in a \$0 Fair Value. In other cases such as the coal supply contract with  
6 Nally & Hamilton and the coal transport contract with CSX, it is understood that  
7 these contracts expire within six months of the anticipated effective date of the  
8 acquisition so any differences between contract and “market” terms will only  
9 persist for a short period of time (and therefore have a negligible Fair Value).

10  
11 In summary, the ASC 805 allocation of purchase price related to FPL’s  
12 acquisition of CBAS can be reasonably stated as \$520 million related to the  
13 termination of the PPA, net book value (on a dollar for dollar basis) assigned to  
14 the acquired working capital, and \$0 related to the Facility.

15 **Q. Does this conclude your testimony?**

16 **A.** Yes, it does.

## ERRATA SHEET

NAME: DAVID W. HERR – REBUTTAL TESTIMONY

IN RE: Docket No. 150075-EI - Petition for approval of arrangement to mitigate impact of unfavorable Cedar Bay power purchase obligation, by Florida Power & Light Company

PAGE (S)	LINES (S)	CHANGE
3	9-10	- replace [REDACTED] with [REDACTED] [REDACTED]  - replace [REDACTED] with [REDACTED]  - add “) as of December 31, 2013” after [REDACTED]
5	1	Insert “senior debt” after “million”
5	1	Delete “of most of the Cedar Bay debt”
5	16	- replace [REDACTED] with [REDACTED]
11	20	- replace [REDACTED] with “\$250”
11	20	Add “senior debt” before “refinancing”

1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                               **FLORIDA POWER & LIGHT COMPANY**

3                                   **REBUTTAL TESTIMONY OF DAVID W. HERR**

4   **DOCKET NO. 150075-EI**

5   **JUNE 17, 2015**

6

7   **Q.     Please state your name and business address.**

8   A.     My name is David W. Herr. My business address is Duff & Phelps LLC (“D&P”),  
9           2000 Market Street, Suite 2700, Philadelphia, PA 19103.

10 **Q.     Did you previously submit direct testimony in this proceeding?**

11 A.     Yes. My direct testimony was submitted on March 6, 2015.

12 **Q.     Have your position, duties, or responsibilities with D&P changed since you last**  
13 **filed testimony in this docket?**

14 A.     No.

15 **Q.     Are you sponsoring any exhibits to your rebuttal testimony?**

16 A.     Yes. I am sponsoring Exhibit DH-4 (Confidential), which provides a graphical  
17 presentation of the factors impacting the increase in the Fair Value (“FV”) of the  
18 Cedar Bay power purchase agreement with FPL (“Cedar Bay PPA” or “PPA”) from  
19 [REDACTED] in December 2012 to \$520 million as of August 30, 2015 as discussed  
20 on pages 9-12 of this rebuttal testimony.

21 **Q.     What is the purpose of your testimony?**

22 A.     The purpose of my rebuttal testimony is to respond to many of the positions and  
23 recommendations contained in the testimony of witness Gary D. Brunault on behalf

1 of the Office of Public Counsel (“OPC”) and witness Michael G. Lane on behalf of  
2 the Florida Industrial Power Users Group (“FIPUG”). Collectively, I refer to these  
3 witnesses as “the intervenor witnesses.” Specifically, I will:

- 4 • Explain certain factors supporting the appropriateness of both the selected [REDACTED]  
5 discount rate used to estimate the Fair Value (“FV”) of the Cedar Bay PPA as of  
6 December 10, 2012 (as presented in the April 5, 2013 D&P document entitled  
7 “Valuation of Certain Tangible and Intangible Assets & Liabilities of Cogentrix  
8 Power Holdings LLC”, hereafter referred to as the “Cogentrix Valuation”) as  
9 well as the 7% discount rate used to estimate the FV of the PPA as of August  
10 30, 2015 (as presented in the March 4, 2015 D&P report entitled “Valuation of  
11 Certain Tangible and Intangible Assets of CBAS Power, Inc.” submitted as  
12 confidential exhibit DH-3, hereafter referred to as the “CBAS Valuation”) in the  
13 context of relevant US Generally Accepted Accounting Principles (“GAAP”)   
14 guidance.
- 15 • Clarify the reasonableness of the inputs reflected in the CBAS Valuation for  
16 purposes of estimating FV pursuant to relevant US GAAP guidance, including  
17 Accounting Standards Codification (“ASC”) 805, *Business Combinations* and  
18 ASC 820, *Fair Value Measurements and Disclosures*.
- 19 • Confirm the reasonableness of the \$520 million FV for the CBAS PPA as of  
20 August 30, 2015.



1 **Q. OPC witness Brunault indicates that the 7% cost of capital used in the CBAS**  
2 **Valuation is too low. Do you agree with his assessment?**

3 A. No. OPC witness Brunault accepts the appropriateness of the majority of the  
4 assumptions reflected on Exhibit D.1 within the CBAS Valuation, but elects to  
5 revert to the leverage assumption in the Cogentrix Valuation. This judgment  
6 disregards both the debt to capital ratio of the Independent Power Producers  
7 (“IPPs”) which represent a pool of potential Market Participants (as defined in  
8 Exhibit DH-3 and ASC 820) as well as the fact that CBAS’s long term debt  
9 (including current portion) is [REDACTED]  
10 [REDACTED].

11

12 The [REDACTED] leverage which OPC witness Brunault incorrectly deemed appropriate as  
13 of August 30, 2015 reflected the specific risks relating to Cedar Bay as of  
14 December 10, 2012 rather than IPP observed leverage. Specifically, when Carlyle  
15 acquired Cogentrix, it assumed [REDACTED] of debt related to Cedar Bay, of which  
16 [REDACTED] [REDACTED] As of the date of the Cogentrix Valuation,  
17 Cedar Bay also lacked a firm contract with RockTenn, its steam offtaker, that it  
18 needed to maintain its status as a Qualifying Facility (“QF”). Absent certainty as of  
19 December 10, 2012 that Cedar Bay would retain QF status beyond January 2016<sup>2</sup>, it  
20 would have been extremely difficult for the Cedar Bay debt to be economically

<sup>1</sup> From Cedar Bay Generating Company, Limited Partnership Financial Statements as of December 31, 2012, note 5.

<sup>2</sup> Twenty-two year contract effective January 25, 1994 per note 8 from Cedar Bay Generating Company, Limited Partnership Financial Statements as of December 31, 2012

1           refinanced.

2

3           It is worth noting that OPC witness Brunault indicated in his own testimony that  
4           “Contractual risks include the possibility of losing QF status...” (page 28, line 10)  
5           were risks to be considered in establishing an appropriate discount rate to estimate  
6           the FV of the PPA, but then he disregarded the fact that risk in his assessment of the  
7           reasonableness of the 7% discount rate used in the CBAS Valuation.

8

9           Similarly, OPC witness Brunault indicated that “FPL may very likely dispatch  
10          Cedar Bay significantly more than at the assumed [REDACTED] capacity factor” (page 28,  
11          line 5-6) if natural gas prices increase, but disregards the fact that continued  
12          domestic growth in natural gas supply could be as likely to put continued  
13          downward pressure on forecasted natural gas prices and result in a lower capacity  
14          factor. The 7% discount rate in the CBAS Valuation reflects both the possibility  
15          that Cedar Bay’s capacity factor could increase in a rising gas price environment,  
16          and the possibility that the capacity factor could decline to the [REDACTED]  
17          [REDACTED] or lower if future gas (and power) prices  
18          are lower than expected.

19

20          The extension of the RockTenn Steam contract to run coterminous with the Cedar  
21          Bay PPA eliminated the contractual risk that was a primary factor justifying the  
22          13% discount rate (which is a key factor impacting the [REDACTED] FV estimate in  
23          the Cogentrix Valuation). In fact, once the risk of early loss of QF status was

1 eliminated, a \$250 million refinancing of most of the Cedar Bay debt was  
2 completed resulting in an increase in total CBAS debt to approximately [REDACTED]  
3 [REDACTED] the majority of which is due in April 2020.<sup>3</sup> This ability to raise substantial  
4 debt financing (in excess of the FV assigned to the PPA in the Cogentrix Valuation)  
5 provides strong evidence of the appropriateness of using the [REDACTED]  
6 to estimate the FV of the PPA, the only adjustment to the discount rate suggested in  
7 OPC witness Brunault's testimony.

8 **Q. FIPUG witness Lane also indicated that the 7% cost of capital used in the**  
9 **CBAS Valuation is too low and suggested on page 5, line 11 of his testimony**  
10 **that the 11% discount rate presented on Exhibit D.2 in the CBAS Valuation is**  
11 **more appropriate to estimate the FV of the Cedar Bay PPA. Do you agree**  
12 **with his comments?**

13 A. No. As clearly noted on the referenced Exhibit D.2, the debt to capital assumption  
14 of [REDACTED] is reflective of a risk profile that would presume [REDACTED] operations  
15 without the benefit of the Cedar Bay PPA. As noted in the prior response, Cedar  
16 Bay's own capital structure (assuming the \$520 million FV and approximately [REDACTED]  
17 [REDACTED] of debt outstanding) reasonably supports the rounded debt to capital of [REDACTED]  
18 that is estimated on Exhibit D.1 of the CBAS Valuation, which is based on the  
19 observed leverage of the IPPs who represent possible Market Participants as  
20 defined in ASC 820.

21

<sup>3</sup> From Cedar Bay Generating Company, Limited Partnership Financial Statements as of December 31, 2013, note 5.

1 FIPUG witness Lane is also incorrect in the statement on page 5, lines 4-5 of his  
2 testimony that “The 2015 report relied on a discount rate of 7%, based on the cost  
3 of capital of Florida Power & Light.” The discount rate is based on observable data  
4 for IPP Market Participant peers, and reflects the risk profile of Cedar Bay being a  
5 coal plant under a long-term contract with FPL, a fact that is accurate for all Market  
6 Participants.

7 **Q. FIPUG witness Lane asserts on page 5 of his testimony that the CBAS**  
8 **Valuation included a tax amortization benefit that was not included in the**  
9 **Cogentrix Valuation. Is that assertion correct?**

10 A. No. FIPUG witness Lane indicates that “the inclusion of a tax amortization benefit  
11 in the 2015 valuation that was not included in the 2014 valuation difference...”  
12 (page 5, lines 14-15), combined with discount rate, “...account for approximately  
13 [REDACTED] of the increase in value from 2013 to 2015” (page 5, lines 16-17). In fact, the  
14 Cogentrix Valuation did include a tax amortization benefit (“TAB”, which was  
15 labeled [REDACTED] on Exhibit D.2 in the Cogentrix Valuation) of  
16 approximately [REDACTED]. I should note that the magnitude of the TAB is a  
17 function of the correct discount rate and the pre-TAB cash flows, so the TABs that  
18 are reflected in the two valuations appropriately differ.

19 **Q. OPC witness Brunault’s direct testimony indicated that the 5% Bonus**  
20 **Capacity Revenue is overly optimistic. What is the basis of the 5%**  
21 **assumption?**

22 A. In fact, the exact data that set forth on Exhibit GB-1 to OPC witness Brunault’s  
23 direct testimony is supportive of the 5% bonus capacity revenue assumption. OPC

1 witness Brunault uses low and negative bonus capacity revenue information from  
2 2007-2011 (when the plant was running at higher capacity factors and was not  
3 owned by Carlyle) to obscure the fact that the average bonus capacity payment for  
4 the most recent 3 years has actually been 6.25% -- significantly higher than the 5%  
5 reflected in the CBAS Valuation.

6  
7 FV (as defined in ASC 820) represents an exit price to a market participant, but it is  
8 worth noting that the exit price would be set by the highest bidder among market  
9 participants. Any bidder who would use historical data reflecting prior ownership  
10 performance during a period with much higher capacity factors would likely be  
11 outbid by market participants who consider the most recent three years of bonus  
12 payments received (which also coincide with a dispatch profile more similar to the  
13 forecasted capacity factors). In my experience, including more than one hundred  
14 power plant purchase accounting and valuation projects performed over the past  
15 decade pursuant to ASC 805 and predecessor regulations, it is common that  
16 capacity factors (and related availability / bonus payments) in transaction deal  
17 models used to develop successful bids for power plants reflect sustained high  
18 performance, particularly (as in this case) if the bonus revenue has been achieved  
19 for three consecutive years. OPC witness Brunault may deem 2.6% to be more  
20 conservative and achievable, but a bid to purchase Cedar Bay using that assumption  
21 would likely fall short of the winning bid submitted (by a Market Participant).

22 **Q. OPC witness Brunault's direct testimony recommends modification to the**  
23 **computation of power prices and fuel costs, based on data provided by FPL**

1           **witness Hartman, would reduce FV by \$21 million. Do you agree with his**  
2           **assessment?**

3       A.    No. Each Market Participant would have its own outlook on coal price and would  
4           not have knowledge of FPL's internally developed view of the future coal price at  
5           St. Johns River Power Park ("SJRP"), so any impact related to shifting the SJRP  
6           reference price would likely be well less than the \$21 million noted on page 19, line  
7           17 of OPC witness Brunault's direct testimony. Given SJRP has sourced the  
8           majority of its coal from Illinois Basin ("IB") mines from 2011 through 2014, the  
9           comment that an IB coal price would be a better alternative to compute the Energy  
10          Revenue is reasonable with respect to a Market Participant with FPL's knowledge.  
11          However, the FPL internally generated forward price information (developed as a  
12          co-owner of SJRP) provided by FPL witness Tom Hartman would not be public  
13          information available to Market Participants (other than FPL) as defined in ASC  
14          820, so independent data sources and CBAS data are more appropriate for  
15          estimating the FV pursuant to ASC 820 guidelines.

16  
17          In assessing the relevant SJRP pricing for use in estimating Energy Revenue, the  
18          [REDACTED]  
19          price. However, the July 2014 Cedar Bay Monthly Operations Summary Report  
20          included reference to a SJRP delivered coal price of \$3.472/MMBtu, well above  
21          the 2015 and most of 2016 forecast, and [REDACTED] includes an  
22          average delivered coal price (from IB to SJRP) for 2013 and 2014 of \$79/ton (or  
23          \$3.43/MMBtu based on the 11,515 heat content). As noted previously, it is likely

1 that Market Participants each would have its own outlook on coal price (both on  
2 absolute terms and on the spread between basins), and the impact to the highest bid  
3 of shifting to an IB price outlook is likely well less than the \$21 million noted on  
4 page 19, line 17 of OPC witness Brunault's direct testimony.

5 **Q. Both OPC witness Brunault and FIPUG witness Lane broadly focused on the**  
6 **magnitude of the increase of the FV of the Cedar Bay PPA from [REDACTED]**  
7 **December 2012 to \$520 million as of August 30, 2015. Please explain the major**  
8 **factor impacting the increase.**

9 A. My Confidential Exhibit DH-4 provides a graphical presentation of the factors  
10 impacting the increased FV. I will discuss those factors below.

11  
12 *Discount Rates*

13 First it is worth noting that the period of time between the valuation dates of the  
14 Cogentrix Valuation and the CBAS Valuation was more than 2 ½ years (rather than  
15 the 2 years referenced). The biggest single change impacting the increase in the FV  
16 of the Cedar Bay PPA is the use of a [REDACTED] discount rate for the CBAS Valuation.  
17 In fact, [REDACTED] of the [REDACTED] of the increase can be linked  
18 directly to the [REDACTED] in discount rate from [REDACTED] to 7%. In addition to the factors  
19 addressed previously in this rebuttal testimony, there are several other  
20 considerations which support the reasonableness of the discount rate decline:

- 21 • In 2003, Goldman Sachs ("GS"), acquired Cogentrix, a privately-owned  
22 company owning approximately 30 power plants and 5 GW of generation  
23 capacity. GS opportunistically sold off the majority of Cogentrix's assets by

1 2007, ending with the Calypso transaction with Energy Investors Funds (“EIF”).  
2 After the sale of the residual ownership interest in Calypso in 2011 to EIF,  
3 Cogentrix consisted of Cedar Bay, two small coal-fired QFs in Virginia, a new  
4 Solar Facility in Colorado and a small Solar Steam plant at the end of its  
5 operational life. GS made the determination that it would realize greatest value  
6 from its residual ownership in Cogentrix only in a sale of the entire remaining  
7 business (rather than continued asset sales that would leave GS the expense of  
8 winding down the Cogentrix management platform and liquidating its position  
9 in certain of the remaining facilities).

10  
11 In this context, it is necessary to consider the relevant guidance of *Unit of*  
12 *Valuation* versus *Unit of Account*. Based on GS’s determination, the asset  
13 grouping which yielded the highest overall net value to GS was a sale of the  
14 entire portfolio (including the management team in North Carolina). An  
15 extensive sale auction process was performed, and Carlyle’s offer was selected  
16 by GS (who had no reason to accept less than the best available price). At the  
17 Cogentrix level, the FV (exit price to a Market Participant) was established for  
18 the entire portfolio as [REDACTED] including assumed debt, and therefore the  
19 sum of the individual plants and PPAs (the *Unit of Account* at which the  
20 transaction would be recorded) needed to not exceed the [REDACTED] purchase  
21 price for the overall Unit of Valuation.

22  
23 It is possible that Cedar Bay could have been sold for greater than [REDACTED]



1 if sold separately in 2012, but GS made the determination that incremental  
2 value from such a sale would be more than offset by the adverse impact on  
3 proceeds or ability to sell the balance of Cogentrix. The component assets  
4 (*Units of Account*) in the Cogentrix Valuation had to total to no more than the  
5 purchase price for the overall *Unit of Valuation* and hence the FV of the five  
6 plants and related intangible assets had to align with the overall [REDACTED]  
7 FV. The [REDACTED] assigned to the Cedar Bay PPA in the Cogentrix  
8 Valuation reflected an appropriate proportion of the purchase price in the  
9 context of its risk and forecasted profitability relative to that of the other four  
10 plants.

- 11 • In the past twelve to eighteen months, there has been a significant increase in  
12 the overall appetite among buyers for contracted power assets. Substantial  
13 private equity capital focused on or allocated to the energy sector has been  
14 raised, and “YieldCos” (public entities committed to providing consistently  
15 growing distributions) have proliferated. While YieldCos may not be the most  
16 likely buyers of CBAS in particular, prices (relative to earnings) for contracted  
17 power plant transactions have increased as a result of the increased competition.  
18 This fact has been amplified by the availability of higher leverage at financially  
19 attractive rates and terms for plants with long-term PPAs (as evidenced by the  
20 aforementioned [REDACTED] refinancing by Cedar Bay in mid-2013).  
21 Altogether, the implied rates of return in transactions involving plants with  
22 contracted cash flows have declined from December 2012 to now as  
23 competition for acquisitions of contracted power generation assets has

1           substantially increased.

2

3           *Capacity Factor*

4           The second major factor relates to the decline in forecasted capacity factor, which is  
5           directly a function of the lower natural gas and market power price expectations in  
6           the CBAS Valuation. The intermediate and long-term expectation for natural gas  
7           prices has declined significantly since 2012, and this “flattening” of the natural gas  
8           price curve makes it much more likely that Cedar Bay will maintain a capacity  
9           factor of approximately [REDACTED] rather than increase to the  
10          [REDACTED] range as had been assumed in the Cogentrix Valuation. Because the  
11          contractual energy price is less than the variable cost (including fuel) of generating  
12          the power, the lower expected capacity factor increases the FV of the Cedar Bay  
13          PPA by approximately [REDACTED].

14

15          *Steam Revenues*

16          Increased expectations regarding steam revenue also impacted the FV of the Cedar  
17          Bay PPA. As previously discussed, a major uncertainty related to Cedar Bay in  
18          2012 centered on the lack of a steam agreement beyond 2015. Carlyle and  
19          Cogentrix had concerns regarding the pricing it might have to accept in a contract  
20          extension with RockTenn, as a steam agreement is needed to retain Cedar Bay’s QF  
21          status. The approximately [REDACTED] annual increase in expected steam revenue  
22          equates to approximately [REDACTED].

23

1 *Bonus Payment / Other*

2 The remaining [REDACTED] of the increase in the Fair Value of the  
3 Cedar Bay PPA relates to a combination of other items such as the increased Bonus  
4 Payment to 5%, which had a [REDACTED] rounded value, and other items like minor  
5 fixed cost differences, increased near-term cash flow which more than offsets the  
6 fewer remaining years in the Discounted Cash Flow (“DCF”) and rounding (as all  
7 of the FV estimates have been rounded to \$10 million).

8 **Q. Are there any other facts that support the reasonableness of the \$520 Million**  
9 **FV for the Cedar Bay PPA?**

10 A. Yes. As previously noted, in the period between the Cogentrix Valuation and the  
11 CBAS Valuation, Cogentrix extended the term of the RockTenn steam offtake  
12 agreement to run coterminous with the Cedar Bay PPA which allowed them to  
13 refinance the assumed Cedar Bay debt and increase its project level borrowing to  
14 approximately [REDACTED]. As it is unlikely that lenders would provide 70% or  
15 80% loan-to-value (“LTV”) on a QF with approximately 11 years of remaining  
16 contract life (in fact both OPC witness Brunault and FIPUG witness Lane indicate  
17 leverage of [REDACTED] would be more appropriate), the refinancing alone, assuming 50%  
18 to 60% LTV, indicates a FV for CBAS and the Cedar Bay PPA of \$450 million to  
19 \$550 million. The leverage recommended by OPC witness Brunault and FIPUG  
20 witness Lane would imply a grossed up value exceeding \$1 billion, but they likely  
21 did not consider the relevance of the refinancing to either the discount rate used in  
22 the CBAS Valuation or the FV of the Cedar Bay PPA, a not uncommon mistake.

23 **Q. Are there any other concerns with the direct testimony of OPC witness**

1           **Brunault or FIPUG witness Lane?**

2    A.    Yes. I take particular issue with FIPUG witness Lane's implication that FPL's  
3           obligation "to pay higher than market rates for the power purchased from Cedar  
4           Bay, the purchase price appears to have been affected by undue stimulus" (page 6,  
5           lines 9-11). FPL has been paying higher than market rates for power from Cedar  
6           Bay for some time. The incentive for FPL to acquire Cedar Bay in 2015 relates to  
7           the amount of savings it can deliver to its customers as detailed in the direct  
8           testimony of FPL witness Hartman, which in turn reflects the increased differential  
9           between the combined price to FPL of all payments pursuant to the Cedar Bay PPA  
10          and the cost of replacement power.

11

12          While the customer savings certainly provide an incentive for FPL to consummate  
13          this transaction, the FV was not based on the Buyer Specific benefits associated  
14          with those customer savings. As correctly noted in OPC witness Brunault's  
15          testimony, the FV in the CBAS Valuation was established using a method  
16          consistent with that used in the Cogentrix Valuation. The assumptions reflected  
17          independently established data combined with historical information from  
18          Cogentrix that would be made available to Market Participants in a sales process.

19    **Q.    Does the testimony of OPC witness Brunault or FIPUG witness Lane change**  
20    **your opinion of the FV of the Cedar Bay PPA?**

21    A.    No, it does not. Based on the analysis presented in the CBAS Valuation, the PPA  
22           can be reasonably estimated at \$520 million. As noted in my direct testimony, this  
23           indicates that substantially all of the price being paid for CBAS is related to the net

1 settlement of the PPA.

2

3 In fact, a point made by FIPUG witness Lane on page 3, line 20-22 of his direct  
4 testimony is relevant: “The Goldman sale of the Cedar Bay generating assets in  
5 2013 represents an arm’s length transaction and provides a strong market  
6 comparable transaction that is useful in the Valuation of the Cedar Bay generating  
7 assets.” What his direct testimony fails to acknowledge is that the negotiated price  
8 of \$520 million between FPL and Carlyle also represents an arm’s length  
9 transaction and provides the same strong corroborative evidence useful in  
10 estimating the FV of CBAS and the Cedar Bay PPA.

11

12 Likewise, OPC witness Brunault “calls into question the fortuity of the FV of the  
13 PPA matching the exact purchase price negotiated seven months earlier” on page  
14 26, lines 4-5. However, a purchase price allocation pursuant to ASC 805 is  
15 generally performed after the purchase price is set, and the alignment of the FV of  
16 assets acquired with the purchase price is an integral part of the process. In the case  
17 of the CBAS acquisition, there are no cash flow benefits being acquired other than  
18 those associated with the Cedar Bay PPA, so the FV of \$520 million for the Cedar  
19 Bay PPA is a reasonable conclusion given the arm’s length transaction price and  
20 lack of other asset (including goodwill/going concern) that could be assigned a FV.

21

22 Much as was the case in the Cogentrix Valuation, the *Unit of Valuation* is a key  
23 consideration in the CBAS Valuation. The sale of the entire CBAS entity allows

1 Carlyle to maximize the value of the component assets of CBAS, and so the  
2 purchase price represents strong evidence of the FV of CBAS overall as the primary  
3 *Unit of Valuation*.

4  
5 FIPUG witness Lane incorrectly attempts to argue against this conclusion on page  
6 5, lines 22-23 of his direct testimony when he stated “The premise of value was  
7 intended to be Fair Market Value...” and further indicates on page 6, lines 15-18  
8 that “Florida Power and Light’s ability to cease purchases of power at higher than  
9 market rates after the purchase of Cedar Bay appears to meet the definition of  
10 undue stimulus and the purchase price does not reflect Fair Market Value.” In  
11 addition to the misuse of Fair Value as defined in ASC 820), FIPUG witness Lane’s  
12 direct testimony demonstrates a lack of appropriate consideration of *Unit of*  
13 *Valuation* and *Unit of Account* in commenting on the FV conclusions to be reflected  
14 in the accounting for the contemplated transaction pursuant to ASC 805.

15  
16 Once the negotiated price of \$520 million for CBAS is determined to be the  
17 appropriate starting point for the Purchase Price Allocation pursuant to ASC 805, it  
18 is then necessary to ascribe that total amount among the *Units of Account* acquired.  
19 While FPL may perceive some backup capacity value to the plant in the short run,  
20 this is clearly a Buyer Specific benefit, and the plant DCF without a contract  
21 demonstrates that the physical plant otherwise has no FV. Therefore, it is  
22 reasonable to conclude that the full \$520 million price to be paid for CBAS is  
23 attributable to the net settlement of the PPA and represents FV.

- 1 **Q. Does this conclude your rebuttal testimony?**
- 2 **A. Yes, it does.**

1 BY MR. BUTLER:

2 Q Mr. Herr, are you also sponsoring  
3 Exhibits DH-1 through DH-3 to your direct testimony and  
4 DH-4 to your rebuttal testimony?

5 A Yes.

6 MR. BUTLER: And again, I'll just note for the  
7 record that Exhibit DH-3 and DH-4 contain  
8 confidential information.

9 I would also note that DH-1 through DH-3 have  
10 been premarked as Exhibits 6 to 8, and DH-4 as  
11 Exhibit 55.

12 COMMISSIONER EDGAR: Thank you.

13 MR. BUTLER: With that, I tender the witness  
14 for cross examination.

15 COMMISSIONER EDGAR: Mr. Moyle?

16 MR. MOYLE: Mr. Butler, you're not going to  
17 help me with a summary?

18 MR. BUTLER: I'll keep asking a few questions  
19 of him to give you a little bit of time there, Jon.

20 EXAMINATION

21 BY MR. MOYLE:

22 Q Good afternoon, Mr. Herr.

23 A Good afternoon.

24 Q What services have you provided in this case?

25 A We assisted FPL management with preparation of



1 the purchase accounting valuation in connection with  
2 their proposed acquisition of CBAS.

3 Q So, is that accounting services you provided  
4 for them?

5 A It's a combination of -- yeah -- yes. But  
6 also, there is a valuation element as well.

7 Q And we had an opportunity to talk during your  
8 deposition. I'm going to ask you some of those  
9 questions there. But you're not a real estate  
10 appraiser, correct?

11 A No.

12 Q You've -- and we're doing both your direct and  
13 rebuttal here. So, I'm going to ask you a couple of  
14 questions about -- about your review of the FIPUG  
15 testimony of Mr. Lane. You reviewed Mr. Lane's  
16 testimony, right?

17 A Yes.

18 Q Okay. And he's -- he's -- he's a real estate  
19 expert who specializes in the valuation of utility  
20 assets, correct?

21 A That is my understanding from reading his  
22 resume, yes.

23 Q And you don't have any qualms or objections to  
24 his qualification as an expert in valuing real estate  
25 properties, correct?

1 A Real estate properties? Correct.

2 Q **Real estate properties of utilities.**

3 A Yes.

4 Q **Yes, you don't have any objections.**

5 A Yes, when you limit it to real estate  
6 properties, I have no objection.

7 Q **Right. And where you may say, well, he may**  
8 **not have as much experience as I have in accounting,**  
9 **that's -- that's, I guess, a point that you would make.**  
10 And I think you made it in your rebuttal, right?

11 A Yes. I would like to clarify. I don't think  
12 he's done any power plant or power purchase agreement,  
13 purchase accounting exercises for either publicly-traded  
14 or privately-owned companies in connection with US GAAP.  
15 My understanding is his experience on accounting  
16 valuation is limited to three water-related utility  
17 valuations.

18 Q **So, he's -- so, he's done some in the context**  
19 **of water utilities; same thing you do.**

20 A I wouldn't say that it would rise to the level  
21 of expert on purchase accounting, no.

22 Q **So, do you -- in order -- are you licensed as**  
23 **an accountant anywhere?**

24 A No.

25 Q **So, I take it from that, then, you don't**

1 **really provide accounting advice, correct?**

2 A No.

3 **Q No, I'm incorrect, you do provide accounting**  
4 **advice, but you're not --**

5 A No, we provide valuation advice in connection  
6 with purchase accounting.

7 **Q And is purchase accounting part and parcel of**  
8 **accounting. Is that a subset of that?**

9 A There are specific statutes within -- or  
10 codifications within accounting rules that focus on  
11 purchase accounting. And that's where I spend more than  
12 half of my time -- probably closer to 75 to 80 percent  
13 of my time.

14 **Q Are you aware of any rules or regulations with**  
15 **respect to experts giving testimony on accounting or**  
16 **engineering with respect to whether they need to be**  
17 **licensed in Florida or not?**

18 A I wouldn't consider myself giving accounting  
19 expertise, but I'm not aware of what the statutes are or  
20 rules are regarding that, no.

21 **Q Okay. What's the term "fair value"? That's a**  
22 **term you use in your line of work, right?**

23 A Yes.

24 **Q And what is that?**

25 A Probably the best way to do it because it is

1 important is I can read you that as it's listed in  
2 multiple of my exhibits if that would be helpful for  
3 you.

4 **Q Whatever you're more comfortable doing.**

5 And just whatever you do, for the record to be  
6 clear, just if you're referring to a document, tell us  
7 what that document is.

8 A On Page 4 of my direct testimony, fair value  
9 is defined in ASC 820, which is the relevant piece of  
10 documentation that dictates fair value, is the price  
11 that would be received to sell an asset or paid to  
12 transfer a liability in an orderly transaction between  
13 market participants at the measurement date.

14 **Q And what's ASC?**

15 A Accounting Standards Codification --

16 **Q And fair value is not the same thing as a fair  
17 market value, is it?**

18 A No.

19 **Q Okay. What's fair market value?**

20 A Fair market value is generally the standard,  
21 which is applied for tax-valuation work pursuant to IRS  
22 regulations.

23 **Q And when appraisers -- an MAI certified  
24 appraiser does a market value, that's different than  
25 fair value as well, isn't it?**

1 A Yes.

2 Q And just so we're clear, you're not an MAI --  
3 I mean, you're not an appraiser. And you -- you and  
4 Mr. Lane have different expertise, different  
5 disciplines, correct?

6 A Yes.

7 Q What is the -- what is your view as to the  
8 fair market value of the assets that are being  
9 transferred in this case? 520, is that right?

10 A Could you clarify the question, please?

11 Q I'm sorry. Fair value.

12 A Do you -- fair value. Okay.

13 Q Yeah.

14 A My view on fair value of the assets being  
15 acquired by FPL is that there is \$520 million associated  
16 with the net settlement of the power purchase agreement,  
17 and zero related to the power plant, and zero or  
18 negligible value related to any other acquired  
19 contracts or intangible assets that came with the  
20 transaction.

21 Q And you're familiar with the power purchase  
22 agreement in the Cedar Bay case, correct?

23 A Yes.

24 Q How many times have you valued it?

25 A Two.

1 Q And you valued it once in this case in 2015,  
2 right?

3 A Yes.

4 Q And that's the 520 number that you just  
5 articulated.

6 A Yes.

7 Q And then you valued it in 2013 as well, right?

8 A The precise date was December 10th, 2012, yes,  
9 of the valuation -- effective date of the valuation.

10 Q And you did a report -- I think the report has  
11 a 2013 date on it, doesn't it?

12 A Correct, the report was issued in '13; the  
13 valuation date was December 2012.

14 MR. MOYLE: If I could get help, please. And  
15 we will mark this --

16 COMMISSIONER EDGAR: This will be 66 -- and I  
17 note that it's confidential -- to be titled excerpt  
18 from OPC, Exhibit 18 to Rudolph prefiled testimony.

19 MR. BUTLER: Madam Chair, I just note for the  
20 record, the reference to prefiled testimony  
21 is probably -- technically correct, but a little  
22 unusual in this event.

23 It is the deposition of Mr. Rudolph that FIPUG  
24 has offered as testimony in this proceeding. So,  
25 where it says that it's Exhibit 18 to Rudolph

1           prefiled testimony -- that's referring to  
2           Mr. Rudolph's deposition that FIPUG offered as  
3           testimony in this proceeding.

4           COMMISSIONER EDGAR: Okay. Thank you for the  
5           clarification.

6           (Exhibit No. 66 marked for identification.)

7 BY MR. MOYLE:

8           **Q     So, I've given you what's been marked as**  
9           **Exhibit 66. I'll represent to you it's an excerpt. But**  
10           **just please identify this for the record.**

11           A     That appears to be the cover page and the  
12           summary of values included in our appraisal report  
13           provided in connection with Carlyle's acquisition of  
14           Cogentrix Power Holdings from Goldman Sachs.

15           **Q     And did you prepare this document and the**  
16           **excerpt?**

17           A     Yes.

18           MR. WRIGHT: Excuse me just one minute.

19           COMMISSIONER EDGAR: Mr. Wright.

20           MR. WRIGHT: Thank you. I just want to note  
21           for the record that -- I'm pretty sure I understand  
22           what Mr. Moyle did here, but this is not the  
23           highlighted confidential version as designated in  
24           Cedar Bay's request for confidential classification  
25           applicable to this document.

1           He has highlighted some information, it  
2           appears, for the purpose of asking the witness  
3           about it, and that's fine. But I want everybody in  
4           the room to understand that pursuant to our pending  
5           request for confidential classification of this  
6           document, this whole page is confidential.

7           COMMISSIONER EDGAR: Mr. Moyle?

8           MR. MOYLE: I think that's right. I think  
9           they've asked that everything in the multi- -- I  
10          don't know, it's a couple hundred -- I don't know  
11          how many pages. But they asked everything to be  
12          confidential. I just -- rather than using a  
13          200-page document or 150 -- I'm trying to get to  
14          the heart of the matter.

15          COMMISSIONER EDGAR: Mr. Wright.

16          MR. WRIGHT: My point is that everything on  
17          this page -- and it's great that Mr. Moyle is using  
18          an one-page excerpt. It obviously makes things  
19          less cumbersome. But everything on this page is  
20          confidential.

21          So, the fact that it's not highlighted on the  
22          exhibit that Mr. Moyle had handed out does not mean  
23          that it's not confidential. That's the point I  
24          want everybody to understand. Thank you.

25          COMMISSIONER EDGAR: Mr. Moyle?



1 MR. MOYLE: Agreed.

2 COMMISSIONER EDGAR: Okay.

3 BY MR. MOYLE:

4 Q So, you valued Cedar Bay PPA as part of your  
5 report, did you not?

6 A Yes.

7 Q And was your task, with respect to determining  
8 fair value -- I mean, you did it consistent with the  
9 definition that you gave earlier, correct?

10 A Yes, in connection with that definition as  
11 well as other related accounting guidance on purchase  
12 accounting.

13 Q So, the number at the top of the little chart  
14 there says Page 447 from the report. Do you see that  
15 number that's highlighted in that chart?

16 A Yes.

17 Q Is that what you determine to be the fair  
18 value of the same purchase power agreement that is at  
19 issue in this case?

20 A Yes.

21 Q And since I'm not able to say that number and  
22 go, wow, I'm going to ask you to characterize the  
23 relative differences between your 520 number and this  
24 number -- not in terms of, like, why or how you got  
25 there. I just want you to characterize, rather than me

1 characterize, the magnitude of difference in fair value  
2 from the number that appears in FIPUG Exhibit 66 and the  
3 number that you're suggesting is the fair value in this  
4 case, 520.

5 COMMISSIONER EDGAR: And could the witness --  
6 if you will, hold for a moment before you answer --

7 Yes, Mr. Wright?

8 MR. WRIGHT: Thank you, Commissioner. I just  
9 want to -- everybody here is -- Mr. Herr is subject  
10 to a confidentiality agreement. So, I would just  
11 ask that you direct the witness not to discuss the  
12 information in any way that a reasonably  
13 intelligent listener or reader could infer anything  
14 about this value from his comments.

15 He can say it's greater than or less than or  
16 something like that, but he can't say anything  
17 quantitative, numeric or anything like that  
18 because, in our view of the world, Cedar Bay's  
19 Cogentrix, Carlyle Funds Group of the world -- we  
20 believe that that could enable an intelligent  
21 listener or reader to infer something about this,  
22 which, in turn, would be a disclosure of our  
23 confidential proprietary business information.

24 Thank you.

25 COMMISSIONER EDGAR: Mr. Butler?

1 MR. BUTLER: I think that we had understood  
2 terminology qualitatively to deal with this. And I  
3 assume that Mr. Wright remains comfortable with  
4 that understanding.

5 MR. WRIGHT: Correct.

6 COMMISSIONER EDGAR: Mr. Herr, are you clear?  
7 Relatively, intelligently.

8 THE WITNESS: I believe I'm clear on that. I  
9 would like clarification on -- you mentioned  
10 Exhibit 66, which is not something I have in the  
11 question. So, could you repeat the question?

12 MR. BUTLER: You do. 66 is what they've  
13 marked --

14 COMMISSIONER EDGAR: That was just handed to  
15 you most recently.

16 THE WITNESS: Okay. It just doesn't have a  
17 No. 66 on it.

18 COMMISSIONER EDGAR: Right.

19 MR. BUTLER: It doesn't. You might want to  
20 write it on there or we can for you, just to be  
21 sure that it's --

22 THE WITNESS: Okay.

23 MR. REHWINKLE: Do you need a pen?

24 THE WITNESS: Yeah.

25 COMMISSIONER EDGAR: Are you comfortable

1           responding to the question or do you need to hear  
2           it again?

3                   THE WITNESS: One more time, please, for the  
4           question.

5                   COMMISSIONER EDGAR: Mr. Moyle?

6 BY MR. MOYLE:

7           Q       Sure. I just would ask that you characterize  
8           the relative differences, using your words, between the  
9           number that is on Exhibit 66, which is your report --  
10          the date of April 5th, 2013, in which you valued the  
11          same PPA that you're asking this Commission to value  
12          today -- how does that number that's in Exhibit 66  
13          compare to the number that you're telling this  
14          Commission is the fair value?

15          A       The value in 2013 was materially lower than  
16          the value that our report indicated in 2015.

17          Q       Okay. And when you say materially lower, are  
18          you aware of the amount that the exhibit that was used  
19          earlier -- did you get into negotiations, how much the  
20          first indicative offer coming from Carlyle was to FP&L?

21          A       I had no involvement until after the agreement  
22          on price was struck between Carlyle and FPL.

23          Q       But you looked at those documents afterwards?

24          A       Predominantly, I looked at the agreement, you  
25          know, that was -- the final agreement, as that

1 stipulated the price between the market participants or  
2 the willing buyer and seller.

3 Q I'm told that you have before you Exhibits 64  
4 and 65. Would you confirm that?

5 A Yes.

6 Q And you've seen 64 and 65 before, correct?

7 A (Examining document.) Yes.

8 Q And just because we talked about this in the  
9 morning, the exhibits you looked at, 64 and 65 -- that  
10 was the Carlyle first offer and then the FPL response  
11 back, correct?

12 A That's my understanding, yes.

13 Q Okay. And Mr. Butler characterized the spread  
14 between those numbers as substantial. You would agree  
15 that the spread between your valuation of 520 and the  
16 valuation that you did in 2013 is much more substantial  
17 than that --

18 MR. WRIGHT: Commissioner, I object. This is  
19 tending to provide information that would enable a  
20 reasonable listener or reader to infer something  
21 about the value that we deem confidential.

22 MR. MOYLE: And I --

23 COMMISSIONER EDGAR: Mr. Moyle.

24 MR. MOYLE: I don't think it does. I mean,  
25 the only adjective is "much." It's not like

1 saying, like, you know, is it 10 percent, 20 -- I  
2 mean, if I started getting into that, I would agree  
3 with Mr. Wright. But in terms of just order of  
4 magnitude, they are trying to say, oh, it's  
5 substantial. It's substantial. Everything is  
6 substantial. Well, everything is not on the same  
7 order of magnitude as --

8 COMMISSIONER EDGAR: So, what is the question?

9 MR. MOYLE: My pending question was whether  
10 the order of magnitude between the Carlyle offer  
11 and the FPL response -- whether that number -- how  
12 it compares to the order of magnitude between his  
13 valuation in 2013 and his valuation today that  
14 there is a much bigger order of magnitude between  
15 the two values of the PPA that he did. I'm just  
16 trying to get him to --

17 COMMISSIONER EDGAR: Sustained.

18 MR. WRIGHT: Commissioner --

19 COMMISSIONER EDGAR: Move on.

20 MR. MOYLE: I have another exhibit.

21 COMMISSIONER EDGAR: Okay. This will be 67.

22 MR. MOYLE: And for the record, I'm handing  
23 him an exhibit that's been marked as Exhibit 67.  
24 It, like the other one, is an excerpt from an OPC  
25 exhibit to Mr. Rudolph's prefiled testimony that

1 FIPUG filed.

2 The whole thing is confidential. There is  
3 claim it's confidential. FIPUG has a pending  
4 objection to that and it's contesting the  
5 confidential nature of this.

6 But for the purposes of today, we're going to  
7 treat the whole thing as confidential. And the  
8 yellow is my yellow, not somebody else's yellow.

9 COMMISSIONER EDGAR: Okay. So, we will mark  
10 this as 67, describe it with the brief title of  
11 excerpt from OPC Exhibit 17 to Rudolph prefiled  
12 testimony noting that the entire excerpt is  
13 confidential for these proceedings.

14 MR. WRIGHT: Madam Commissioner, just for  
15 clarification, in fact, if you look at the document  
16 that we filed under cover of our revised tenant's  
17 request for confidential classification, you had  
18 observed that, in fact, the entire document is not  
19 confidential.

20 We're trying to work with Mr. Moyle --

21 COMMISSIONER EDGAR: I understand.

22 MR. WRIGHT: -- to make sure that he gets the  
23 right versions in, but he has not provided  
24 highlighted copies with the confidential  
25 information identified. He's filed highlighted

1 information with what he wants to ask about.

2 But we're trying to work with him to make sure  
3 that y'all end up with the right versions with the  
4 confidentiality designations, as required by your  
5 rules and order -- in the prehearing order, wind up  
6 in the record.

7 But for now, if you treat it as  
8 confidential -- if you treat the whole thing as  
9 confidential, then --

10 COMMISSIONER EDGAR: When you say the whole  
11 thing, are you referring to this one-page excerpt  
12 or the entire document?

13 MR. WRIGHT: Excuse -- in that context, when I  
14 said the whole thing, I meant the one-page excerpt  
15 that Mr. Moyle has proffered as Exhibit 67. If you  
16 treat it all as confidential, then obviously we  
17 don't have a problem with disclosure.

18 I just do want to make the point that there is  
19 a fair amount of it that is not, in fact,  
20 designated as confidential by Cedar Bay, but we'll  
21 get that squared away in the record ultimately.

22 COMMISSIONER EDGAR: Yes.

23 MR. WRIGHT: Thank you.

24 COMMISSIONER EDGAR: Thank you.

25 Mr. Moyle.



1           MR. MOYLE:  What I have that they filed is  
2           everything is confidential except for the "to" and  
3           "from."  So, let's just treat as confidential, ask  
4           him the questions and I'll --

5           COMMISSIONER EDGAR:  I agree.

6           (Exhibit No. 67 marked for identification.)

7  BY MR. MOYLE:

8           **Q     Sir, have you seen this document?**

9           A     Yes.  Yes.

10          **Q     And I want to direct your attention to the**  
11          **bottom of the document.  There is highlight there.**  
12          **Those are my highlights.  But I think -- I think -- you**  
13          **don't have any reason to believe that that statement**  
14          **relating to the purchase price is not accurate, do you?**

15          A     No.

16          **Q     And if I ask you that same question about**  
17          **describing this number relative to the 520 number -- how**  
18          **would you do that?  Would you put any more adjectives in**  
19          **with the description as compared to your previous**  
20          **answer?**

21          A     Could I ask for a clarification from you on  
22          what you did have in terms of the confidential markup of  
23          this document from Cogentrix, in terms of was the date  
24          that this memo was prepared flagged as confidential?

25          **Q     I'll check.**

1           No, according to the copy we have, the date  
2 was not.

3           A       So, this memo was prepared eight months after  
4 the prior valuation that I -- the valuation date of the  
5 prior value. And when you gross-up the purchase price  
6 as indicated and you add the debt that was in place  
7 based on the refinancing that happened in the first half  
8 of 2013, the implied total value for CBAS was  
9 substantially higher than the amount we assigned to the  
10 PPA in December of 2012.

11           But it is materially lower than the 520 using  
12 the same language; materially higher than the 2012,  
13 eight months later, but still materially lower than the  
14 fair value we assigned in 2015. Because it's important  
15 to realize that a power purchase agreement is an  
16 enterprise total value and --

17           **Q       There is no pending question.**

18           MR. BUTLER: I think he's explaining his  
19 answer to your prior question.

20           COMMISSIONER EDGAR: The witness can finish  
21 his answer.

22           THE WITNESS: I think it's important to  
23 realize that when you're looking at a power  
24 purchase agreement, it's a combination of the debt  
25 and equity financing between behind that power

1 purchase agreement. So, they did do a refinancing  
2 that, when you add that and gross-up this number,  
3 you get to a number that is well above what the  
4 fair value was in December of 2012.

5 And I find that to be a reasonable start to  
6 the path of where we ended up today.

7 BY MR. MOYLE:

8 Q Okay. So, how does that number relate to the  
9 370 million that the Office of Public Counsel has said  
10 ought to be the fair market value? You're aware that's  
11 the position taken by the Office of Public Counsel?

12 MR. WRIGHT: Again, he can use the magic words  
13 that we've agreed he can use in material  
14 relationship, but not anything that would disclose  
15 anything closer to that in numeric terms,  
16 Commissioner.

17 COMMISSIONER EDGAR: Mr. Wright, what are  
18 those magic words?

19 MR. WRIGHT: Materially less than or  
20 materially greater than; or significantly less than  
21 or significantly greater than.

22 COMMISSIONER EDGAR: Mr. Butler.

23 MR. BUTLER: I wanted to ask Mr. Moyle if that  
24 was his question. Are you asking him, Jon,  
25 comparing the two numbers, numerically how

1 different are they? Or were you asking him sort of  
2 conceptually what's different between the two  
3 valuations?

4 MR. MOYLE: More of the former, John.

5 MR. BUTLER: Okay.

6 MR. MOYLE: Really what I want the witness to  
7 answer is, okay, here is what's been marked as  
8 Exhibit 67. OPC is saying 370. Is this number  
9 more than 370 or less than 370. I mean, that's --  
10 at its core, that's where I am.

11 THE WITNESS: I don't think the 370 is a  
12 relevant number. You know, the 370 was their view  
13 on what the value is today. There are two years of  
14 time difference between 2013 and today.

15 And so, yes, I can do the gross-up math. I  
16 don't have the exact debt balance, but I have a  
17 rough idea based on what the refinancing amount  
18 was.

19 MR. WRIGHT: Commissioner, again, tying it to  
20 another number narrows down the scope of the -- of  
21 the potential values in question. We object to  
22 this.

23 You have the numbers in front of you. Staff  
24 have the numbers in front of you. The decision-  
25 makers and your advisors have the numbers. You

1 don't need Mr. Herr's characterization of the  
2 relative magnitude of any of these numbers to OPC's  
3 witness's number.

4 COMMISSIONER EDGAR: You're lodging an  
5 objection to the question?

6 MR. WRIGHT: I'm lodging an objection to a  
7 pending answer that might reveal something relative  
8 to the number in OPC's testimony. Honestly, it's a  
9 modification of what I said earlier; he really  
10 can't talk about it in relation to the 370. He can  
11 talk about it in relation to the purchase price and  
12 the 2012 valuation number that appears in the 2013  
13 report.

14 If he starts talking about it in relation to  
15 other numbers, then it's narrowing down the value,  
16 which tends to reveal our confidential information.  
17 And as I said, you have the information; staff have  
18 the information; Mr. Moyle has the information. He  
19 can write about it in his brief. I'm trying to  
20 protect my client's confidential information.

21 COMMISSIONER EDGAR: Mr. Moyle?

22 MR. MOYLE: And he wants to talk about debt  
23 and all these other things. I don't want to -- I'm  
24 not looking for that information. My simple  
25 question was: OPC says 370 is what ratepayers

1           should pay. And he's done a valuation of the same  
2           PPA. And I want to say, the valuation that you did  
3           that you're referencing in 66, is it bigger than or  
4           less than the OPC number.

5           MR. WRIGHT: Commissioner, the 370 relates to  
6           the 520. The issue before --

7           COMMISSIONER EDGAR: Yes, Mr. Wright.

8           MR. WRIGHT: Thank you.

9           COMMISSIONER EDGAR: Mr. Moyle, as Mr. Wright  
10          said, the information is in front of us and  
11          available to all of those who have the ability to  
12          look at the confidential information in the record.

13          Let's move on.

14   BY MR. MOYLE:

15           **Q     You would agree, all things being equal, since**  
16           **the purchase power agreement has a defined term, the**  
17           **value of the purchase power agreement will generally be**  
18           **reduced over time, correct?**

19           A     All other inputs equal, yes, it reduces over  
20           time.

21           **Q     The fact that I got you to reference in**  
22           **Exhibit 66 -- I'm sorry -- 67 the memo that is dated**  
23           **8/19/13 -- that was a fair market value transaction,**  
24           **wasn't it? I think you referenced that was the Goldman**  
25           **sale to Cogentrix?**

1           A       I think generally it would be defined both as  
2       a fair market and a fair value transaction. I think  
3       that's reasonable.

4           **Q       So, Cogentrix hasn't held this asset very**  
5       **long, have they?**

6           A       That's -- I don't know how to answer that  
7       question. I mean, you can do the math. It's been two  
8       and a half years -- two years and eight months since  
9       they bought it originally. You can determine whether  
10       that's long or short.

11          **Q       Well, how long is the PPA?**

12          A       PPA has ten more years to run.

13          **Q       It was originally 25?**

14          A       That's my understanding, yes.

15          **Q       Okay. So, relative to the life of the PPA,**  
16       **they haven't held it for long, correct; two and a half**  
17       **years --**

18          A       10 --

19          **Q       -- out of 25?**

20          A       10 percent.

21          **Q       Have you done any analysis as to how much**  
22       **money Carlyle stands to make if the Commission**  
23       **approves --**

24          A       No.

25          **Q       -- this deal? Huh?**

1 A No.

2 Q To stick with the term we're using, it's a  
3 significant amount, is it not?

4 A I haven't done an analysis of that.

5 Q Well, you did the analysis back when they  
6 bought it, right?

7 A I determined the fair value of the assets that  
8 needed to be recorded for accounting purposes in 2012 --  
9 or as of December of 2012. And I've done an analysis of  
10 the fair value of the assets that FPL should be  
11 recording as of August of 2015.

12 Q When you did your 2013 analysis, did you know  
13 how much Goldman sold the asset for?

14 A Did I know the price that Cogentrix paid?

15 Q Yes.

16 A Yes, I did.

17 Q And you know the price that is being talked  
18 about today, right?

19 A Yes.

20 Q And to use a characterization about a  
21 substantial gain, could you -- you would agree it's a  
22 substantial gain, correct?

23 MR. WRIGHT: Again, I object. This does not  
24 have to do with the purchase price that's in front  
25 of you today. You have the information. He's



1           trying to characterize it in a certain way. This  
2           divulges confidential information.

3           MR. MOYLE: I'm using Mr. Wright's term,  
4           "substantial." I'm not asking him to --

5           COMMISSIONER EDGAR: I think Mr. Wright's  
6           terms were "materially" or "significantly."

7           MR. WRIGHT: And they were in relation to the  
8           valuation assigned in 2000 -- for 2012 and the  
9           2013 report and the fair value as recorded in  
10          Mr. Herr's 2015 evaluation that is in evidence in  
11          this case.

12          MR. MOYLE: Let me rephrase.

13          COMMISSIONER EDGAR: Rephrase, please.

14   BY MR. MOYLE:

15           **Q     Was it -- you would agree it's a material**  
16           **increase in the transaction price when you consider what**  
17           **Goldman sold the assets to -- in Carlyle in 2013 that**  
18           **you did your analysis for, and the price today that FPL**  
19           **is asking the Commission to approve as the sale price,**  
20           **correct?**

21           A     That comparability is a little bit difficult  
22           as purchase price to purchase price because there were  
23           six assets in the 2012 transaction. So, we made an  
24           initial allocation of the proceeds paid by Carlyle to  
25           Goldman Sachs among those assets; whereas, this is a

1 single transaction. So, the proceeds clearly are  
2 related to CBAS entirely.

3 **Q Was the transaction price that Goldman paid**  
4 **for all of these assets less than or more than the 520?**

5 A Goldman didn't buy the assets.

6 **Q I'm sorry. That they received.**

7 A I'm not sure -- you know, I would have to  
8 sidebar to make sure that I wouldn't be divulging  
9 confidential information with Mr. Wright on that one  
10 because, you know, that -- you know, I'm not sure that  
11 that's something that Carlyle would like divulged.

12 MR. WRIGHT: Commissioner, I believe this  
13 really comes back around to an effort by Mr. Moyle  
14 to get some kind of characterization of something.  
15 But ultimately, it's the fair value that Mr. Herr  
16 developed in his 2013 report as it compares to the  
17 fair value in his 2015 report. That question has  
18 been expressly asked and answered.

19 COMMISSIONER EDGAR: I agree.

20 Mr. Moyle.

21 BY MR. MOYLE:

22 **Q In terms of your rebuttal that you prepared --**  
23 **you understand FIPUG's position in this case, I assume,**  
24 **don't you?**

25 A I've read it. I can't say as I necessarily

1 agree with it, but I've read it.

2 Q So, you've read, for example, that FIPUG's  
3 position is -- you know, I won't use the car analogy.  
4 I'll use a house analogy, but -- maybe we're okay buying  
5 the house, but we don't want to overpay for the house.  
6 If there is going to be a mortgage on the house, we want  
7 to pay as few dollars as we can; is that fair?

8 A Are you asking do I think people who are  
9 buying houses and cars pay as little as possible?

10 Q No, I'm asking if you understand that being  
11 FIPUG's position; that essentially we think that 520 --

12 A Yes.

13 Q -- is overpaying for this asset.

14 A Yes, I understand that's your position. Yes.

15 Q And you also -- you understand that we think  
16 there are good relevant data points out there, one of  
17 them being OPC, that says the most they should be paid  
18 is 370 million. Do you understand that?

19 A I understand that you believe that's a  
20 relevant position. I disagree with that, but I  
21 understand that you believe that's a relevant position.

22 Q And I'm going to ask you about a couple more.  
23 And you can say that about every one, I understand  
24 that's FIPUG's position.

25 The document that I just showed you, when you

1 valued this in 2013, we're -- we think that's an okay  
2 number when you valued it in 2013. Do you understand  
3 that to be FIPUG's position?

4 A I understand that, yes.

5 Q **And the same with the Goldman --**

6 A Yes.

7 Q **-- provision. Okay.**

8 So, we're simply saying, you're paying too  
9 much for this asset. And I just want to be clear,  
10 before I asked you more questions about the rebuttal,  
11 that you understand our position.

12 A Yes.

13 Q **Could you tell me -- do you have a copy of**  
14 **your full un-redacted report that you did in 2013?**

15 A 2013, yes.

16 Q **Okay. When we took your deposition -- and**  
17 **there was a little uncertainty about whether you**  
18 **considered the purchase price as set forth in the 8/9/13**  
19 **memo, correct?**

20 A Yes.

21 Q **And you did consider it -- I was just going to**  
22 **ask you, you know, for the record, to identify where in**  
23 **that report you determined the fair value for the**  
24 **transaction that's referenced in the 8/9/13 memo.**

25 If it will help you -- because your depo is

1 not in -- but I had it on CB0042921, 924, 926, as well  
2 as some other places.

3 A Correct. I was just getting to the pages in  
4 the back.

5 So, it's first reflected on Page 57, which is  
6 the valuation conclusions. That's the page within the  
7 report. I think you gave the correct cites in terms of  
8 the case -- date of references.

9 Q And specifically, how is it called out so  
10 someone looking at it could determine that's the number?

11 A It's called non-controlling interest and has a  
12 parenthetical for the percentage not owned of Cedar Bay  
13 at the point of -- as of December 10th, 2012.

14 Q Okay. If you could, just answer the same  
15 question with respect to the other references.

16 A Yes, it's referenced again as non-controlling  
17 interest on Exhibit A.1, which is CB0042924; and  
18 similarly, it's non-controlling interest on A.3,  
19 CB0042926.

20 Q And with respect to the two reports -- when I  
21 say the two reports, I'm talking about the valuation  
22 reports you did in 2013 and 2015. Are we clear on that?

23 A Yes.

24 Q The role that you were asked to play in these  
25 two reports was the same, correct?

1 A Yes.

2 Q And your approach was essentially the same as  
3 well, correct? You looked at the same factors.

4 A Yes.

5 Q Yeah. Two different clients.

6 A Yes.

7 Q A couple of questions about adjustments you  
8 may have made. Did you make any adjustments for the  
9 regulatory out clause in the purchase power agreement?

10 A We didn't make it a specific adjustment in  
11 either valuation for that.

12 Q How about any adjustments with respect -- now,  
13 are you familiar with the term "equity penalty" or  
14 "equity adjustment"?

15 A Can you clarify exactly what you're referring  
16 to?

17 Q Sure. My understanding is some rating  
18 agencies, Moody's or Standard & Poor's, for purchase  
19 power agreement -- they look at the long-term  
20 obligations as similar to a debt. And they take ratings  
21 actions or make adjustments to companies related to  
22 that. Does that ring a bell with you?

23 A We -- in our cost-of-capital computation, we  
24 factor in a credit quality that's implied by asset and  
25 the off-taker, if that's, I think, responsive to what

1 you're asking.

2 **Q Yeah, I'm not sure -- I'm not sure it is. So,**  
3 **the equity penalty, equity adjustment -- that's not**  
4 **ringing a bell with you?**

5 A That's not something that is an explicit cash  
6 flow item. So, no, there is no specific cash flow  
7 adjustment or cost-of-capital adjustment other than  
8 what's already in our cost of capital.

9 MR. MOYLE: Okay. You had told me in the  
10 deposition that the -- can I just have one second?

11 COMMISSIONER EDGAR: Yes.

12 BY MR. MOYLE:

13 **Q You told me that this facility loses money for**  
14 **each megawatt hour produced; is that right?**

15 A Yes.

16 **Q Explain that -- explain why that happens. Why**  
17 **do you have a power plant that, for every megawatt hour**  
18 **it produces energy, it loses money?**

19 A The structure of the power purchase agreement  
20 provides for a very substantial fixed capacity payment  
21 and fixed O and M payment. And so, those two payments  
22 provide for substantially more recovery.

23 And then the way the formula is written on the  
24 energy side, there is -- you know, effectively, it does  
25 not fully cover its variable costs or its fixed

1 operating cost. And so, the fixed operating costs  
2 ultimately need to be recovered. And they try to  
3 minimize that against the significant fixed capacity  
4 payments.

5 And then they try to minimize as much as  
6 possible the recovery of their energy payments relative  
7 to their cost of variable costs including fuel.

8 **Q This generating plant, without the purchase**  
9 **power agreement, is a very poor business, economically**  
10 **unattractive, correct?**

11 A Yes.

12 **Q And so, when FPL buys it and cancels the PPA,**  
13 **they'll be left with a very economically unattractive**  
14 **asset?**

15 A Yes.

16 **Q And with respect to this agreement, there**  
17 **aren't any other potential buyers for this power plant**  
18 **other than -- than FPL that would pay this kind of money**  
19 **for it?**

20 A No, I disagree with that. I think there would  
21 be buyers based on the magnitude of the fixed payments  
22 and the cash flow that has, now, been generating, given  
23 its improved performance and lower dispatch profile that  
24 its value has gone up for operational reasons over time  
25 as well.



1           Q     When Goldman sold Cedar Bay and some other  
2     assets, they did a bidding process, did they not?

3           A     That's my understand, yes.

4           Q     Okay. There wasn't a bidding process in this  
5     case, was there?

6           A     No, it was bilaterally negotiated is my  
7     understanding.

8           Q     Wouldn't you agree that a bidding process  
9     typically is something any -- any willing, ready, able  
10    purchaser can participate?

11          A     Bidding --

12          Q     As a general rule.

13          A     Generally, a bidding process will yield a  
14    higher price, but I've certainly seen bilateral deals  
15    that have ended up with quite attractive prices as well.  
16                So, I don't think you can characterize one or  
17    the other structured for a deal negotiation as being  
18    beneficial to either party. I think it can vary by the  
19    situation.

20          Q     I've been involved in this line of work for a  
21    number of years. Have you -- do you find it unusual  
22    that the transaction that this Commission is being asked  
23    to decide on -- that if you look at the ownership  
24    history of this asset, this generating plant, that it  
25    appears it's been owned by -- you know, when I say Wall

1 **Street interests, I'm talking about people in an**  
2 **investment banking business and other things. Does that**  
3 **strike you as unusual?**

4 A No.

5 **Q Because those companies are getting into those**  
6 **businesses or in those businesses?**

7 A There are many private-equity companies that  
8 have been in the power industry for quite some time. It  
9 became much -- it was very prevalent as early as 2001  
10 when many of the regions of the country deregulated and  
11 their power became merchant or contracted.

12 **Q So, Goldman Sachs -- they are an investment**  
13 **bank, right?**

14 A Yes.

15 **Q Same question with Carlyle?**

16 A Yes -- well, Carlyle is a private-equity firm.

17 MR. MOYLE: Thank you. That's all I have --  
18 hold on. Just one -- I'm sorry.

19 I do have one other exhibit I would like to  
20 pass out.

21 COMMISSIONER EDGAR: Okay. Our staff will  
22 help distribute.

23 MR. MOYLE: It's 68.

24 COMMISSIONER EDGAR: 68, yes. And this is not  
25 confidential. And we will title Carlyle Group

1           press release 9/6/12, date of 9/6/12, Re: Cedar  
2           Bay.

3           MR. MOYLE: Thank you.

4           (Exhibit No. 68 marked for identification.)

5 BY MR. MOYLE:

6           **Q     You did work on the allocation of the price of**  
7           **this transaction; is that right? I mean, are you**  
8           **familiar with this transaction?**

9           A     Yes, this is a transaction that closed on  
10          December 10th, 2012.

11          **Q     Okay. And I'm giving you a press release.**  
12          **You don't have any reason to disagree with anything in**  
13          **this press release, do you?**

14          A     No.

15          **Q     Okay. And there is a reference in this press**  
16          **release, fifth line down, it says, "Goldman Sachs will**  
17          **retain a minority stake in Cedar Bay."**

18          A     Yes.

19          **Q     Do you see that?**

20                 Is that the minority stake that is referenced  
21          in the August 9th, 2013, memo that we've been discussing  
22          that has been marked as Exhibit 67?

23          A     Yes.

24          MR. MOYLE: That's all I have.

25          COMMISSIONER EDGAR: Thank you.

1 Questions from staff -- well, let's see. OPC,  
2 no questions?

3 Thank you.

4 Questions from staff?

5 MS. BARRERA: Staff has no questions.

6 COMMISSIONER EDGAR: Commissioners, no  
7 questions?

8 Redirect?

9 MR. BUTLER: Thank you, Madam Chair. Just a  
10 couple.

11 EXAMINATION

12 BY MR. BUTLER:

13 Q Mr. Herr, you were asked by Mr. Moyle whether  
14 there had been any RFP or bidding process to the point  
15 where FPL and Carlyle negotiated the PSA that's under  
16 consideration here.

17 Would you have any reason to expect that the  
18 price FPL would have to pay would have gone down if  
19 there had been open bidding opened by Carlyle in the  
20 course of that process?

21 A No.

22 Q You were asked by Mr. Moyle about the value of  
23 the Cedar Bay facility without the PPA. And I think you  
24 characterized it as an uneconomic asset. Do you  
25 remember that?

1           A     Yes.

2           **Q     Okay. Do you understand whether the plant has**  
3 **any value to FPL that is specific and different from the**  
4 **value it might have in the open market?**

5           A     My understanding from reading the testimony of  
6 Witness Hartman as well as Witness Barrett is that it  
7 does provide a reliability benefit that is unique to FPL  
8 and, under accounting rules, unique value, whether they  
9 be economic or un- -- or just reliability based should  
10 not be factored into the fair value under the accounting  
11 guidance.

12          **Q     And you were asked by Mr. Moyle whether, all**  
13 **other things being equal, PPAs would go down in value**  
14 **over time. Do you remember that?**

15          A     Yes.

16          **Q     Would you consider all things to have been**  
17 **equal in comparing the Cedar Bay PPA in 2012 versus**  
18 **2015?**

19          A     No. The expected dispatch is substantially  
20 lower now, which is favorable due to the unique element  
21 of the PPA that they lose money on every megawatt hour  
22 they produce. And at the same time, they've improved  
23 the reliability. So, their bonus payments have gone  
24 up substantially over that same window, both of which  
25 are significantly accretive to value.

1 MR. BUTLER: Thank you. That's all of the  
2 redirect I have.

3 COMMISSIONER EDGAR: Exhibits. Mr. Butler?

4 MR. BUTLER: Yes. Scrambling here. Maybe  
5 Mr. Moyle can have somebody summarize for --

6 COMMISSIONER EDGAR: Let's start with -- I  
7 believe we started with six through eight.

8 MR. BUTLER: Yes, we would move Exhibit 6  
9 through 8 and 55, I believe is --

10 COMMISSIONER EDGAR: All right.

11 MR. BUTLER: -- the one that FPL has, yes.

12 COMMISSIONER EDGAR: Seeing no objection.  
13 Let's move, Exhibits 6, 7, 8, and 55 into the  
14 record.

15 (Exhibit Nos. 6 through 8 and 55 admitted into  
16 the record.)

17 COMMISSIONER EDGAR: Then, Mr. Moyle --

18 MR. MOYLE: We would move 66, 67, and 68.

19 COMMISSIONER EDGAR: Any objections?

20 MR. BUTLER: No objection.

21 COMMISSIONER EDGAR: All right. 66, 67, 68  
22 exhibits will be moved into the record.

23 (Exhibit Nos. 66 through 68 admitted into the  
24 record.)

25 MR. BUTLER: May Mr. Herr be excused?

1 COMMISSIONER EDGAR: He may.

2 MR. BUTLER: Thank you.

3 COMMISSIONER EDGAR: Thank you very much.

4 THE WITNESS: Thank you.

5 COMMISSIONER EDGAR: Mr. Butler, next witness?

6 MR. BUTLER: Thank you. It will be

7 Ms. Ousdahl.

8 MS. MONCADA: Madam Chair, are you ready to  
9 proceed?

10 COMMISSIONER EDGAR: Yes, you may.

11 EXAMINATION

12 BY MS. MONCADA:

13 Q Good afternoon, Ms. Ousdahl. You were sworn  
14 this morning with the rest of the witnesses; is that  
15 correct?

16 A Yes, I was.

17 Q Thank you. Would you please state your name  
18 and business address for the record, please.

19 A Kim Ousdahl, 700 Universe Boulevard, Juno  
20 Beach, Florida.

21 Q By whom are you employed and in what capacity?

22 A Florida Power & Light as vice president,  
23 controller, and chief accounting officer.

24 Q Did you prepare and cause to be filed 11 pages  
25 of prefiled direct testimony and 10 pages of prefiled

1     **rebuttal testimony in this proceeding?**

2           A     I did.

3           Q     **Did you also prepare and cause to be filed an**  
4     **errata sheet for your prefiled direct and one for your**  
5     **prefiled rebuttal testimony?**

6           A     I did.

7           Q     **Other than the changes reflected in your**  
8     **errata, if I asked you the same questions contained in**  
9     **your prefiled direct and rebuttal testimonies, would**  
10    **your answers be the same?**

11          A     They would.

12                MS. MONCADA: Madam Chair, I ask that  
13     Ms. Ousdahl's prefiled direct and her prefiled  
14     rebuttal testimony be moved into the record.

15                COMMISSIONER EDGAR: The prefiled testimony of  
16     the witness will be moved into the record as if  
17     read.

18                MS. MONCADA: Thank you.

19

20

21

22

23

24

25



# ERRATA SHEET

WITNESS: **KIM OUSDAHL - DIRECT**

<u>PAGE#</u>	<u>LINE#</u>	<u>CHANGE</u>
4	3	Change "CBAS" to "the Cedar Bay Facility"
5	7	Change "CBAS" to "CBAS Power Holdings, LLC"

1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                   **FLORIDA POWER & LIGHT COMPANY**

3                   **DIRECT TESTIMONY OF KIM OUSDAHL**

4                   **DOCKET NO. 15\_\_\_\_\_ -EI**

5                   **MARCH 6, 2015**

6

7   **Q.    Please state your name and business address.**

8    A.    My name is Kim Ousdahl, and my business address is Florida Power & Light  
9            Company, 700 Universe Boulevard, Juno Beach, Florida 33408.

10 **Q.    By whom are you employed and what is your position?**

11   A.    I am employed by Florida Power & Light Company (“FPL” or the “Company”) as  
12            Vice President, Controller and Chief Accounting Officer.

13 **Q.    Please describe your duties and responsibilities in that position.**

14   A.    I am responsible for financial accounting, as well as internal and external  
15            financial reporting for FPL. In these roles, I am responsible for ensuring that the  
16            Company’s financial reporting complies with requirements of Generally Accepted  
17            Accounting Principles (“GAAP”) and multi-jurisdictional regulatory accounting  
18            requirements.

19 **Q.    Please describe your educational background and professional experience.**

20   A.    I graduated from Kansas State University in 1979 with a Bachelor of Science  
21            Degree in Business Administration, majoring in Accounting. That same year, I  
22            was employed by Houston Lighting & Power Company in Houston, Texas.  
23            During my tenure there, I held various accounting and regulatory management

1 positions. Prior to joining FPL in June 2004, I was the Vice President and  
2 Controller of Reliant Energy. I am a Certified Public Accountant (“CPA”)  
3 licensed in the State of Texas and a member of the American Institute of CPA’s,  
4 the Texas Society of CPAs and the Florida Institute of CPAs.

5 **Q. Are you sponsoring an exhibit in this case?**

6 A. Yes. I am sponsoring Exhibit KO-1 – Proposed Journal Entries.

7 **Q. What is the purpose of your testimony?**

8 A. The purpose of my testimony is to present to the Florida Public Service  
9 Commission (“FPSC” or “Commission”) the appropriate accounting under both  
10 GAAP and the Federal Energy Regulatory Commission Uniform System of  
11 Accounts (“USOA”) requirements that have been adopted by this Commission,  
12 and regulatory reporting and ratemaking associated with FPL’s proposed  
13 acquisition of the Cedar Bay generating facility (“the Cedar Bay Facility” or “the  
14 Facility”) through a stock purchase and termination of the Cedar Bay Power  
15 Purchase Agreement (“PPA”) (known collectively as the “Cedar Bay  
16 Transaction”). Specifically, my testimony addresses the following:

- 17 1. Purchase accounting for the Cedar Bay Transaction; and
- 18 2. Regulatory reporting and ratemaking treatment associated with the Cedar  
19 Bay Transaction.

20 **Q. Please summarize your testimony.**

21 A. I will provide the required journal entries that FPL intends to record as a result of  
22 the Cedar Bay Transaction in order to comply with GAAP and the USOA along  
23 with an explanation for each entry. In addition, I will describe the regulatory

1 reporting and ratemaking for all costs, including regulatory assets and liabilities,  
2 associated with the Cedar Bay Transaction. As described by FPL witnesses  
3 Hartman and Barrett in their direct testimonies, FPL has demonstrated the benefits  
4 of the Cedar Bay Transaction for its customers and, therefore, the proposed  
5 accounting and regulatory treatment for this transaction should be approved by  
6 the Commission in order to effectuate this beneficial transaction.

7 **Q. Please provide an overview of the Cedar Bay Transaction from an**  
8 **accounting perspective.**

9 A. As described by FPL witness Hartman in his direct testimony, FPL is acquiring  
10 the equity of CBAS Power, Inc. (“CBAS”), the first tier legal entity and its wholly  
11 owned subsidiaries, including Cedar Bay Generating Company, Limited  
12 Partnership (“Cedar Bay Genco”), which holds the Cedar Bay Facility and the  
13 PPA. Immediately prior to closing, all outstanding third party debt will be  
14 defeased and intercompany debt will be canceled. Upon acquisition of the shares  
15 of these entities, FPL will terminate the Cedar Bay PPA. CBAS will retain  
16 ownership, including all rights and obligations, of the Facility through its wholly  
17 owned subsidiary.

18 **Q. Does FPL intend to hold its interest in the Cedar Bay Facility directly or**  
19 **through a subsidiary?**

20 A. Yes. As reflected on Exhibit TLH-3 in FPL witness Hartman’s direct testimony,  
21 FPL intends to continue to hold its interest in the Facility in the same legal entities  
22 it will acquire.

23 **Q. Why is FPL proposing to retain the subsidiary structure?**

1 A. There is a benefit associated with retaining the acquired legal entities. This  
2 structure may protect FPL customers from any unforeseen contingent losses that  
3 could arise from the prior operation of CBAS. Any potential claimants should be  
4 limited to the assets of the subsidiary rather than having a remedy against the  
5 parent FPL.

6 **Q. Please provide an overview of the required accounting for the Cedar Bay**  
7 **Transaction.**

8 A. Under Accounting Standards Codification 805 – Business Combinations (“ASC  
9 805”), the acquirer in a business acquisition is required to recognize all assets and  
10 liabilities at fair value as of the acquisition date. The Cedar Bay Transaction  
11 meets the definition of a business acquisition as defined by GAAP because FPL is  
12 acquiring the shares of legal entities, which along with their assets and contractual  
13 obligations, constitute a business for accounting purposes. For GAAP purposes, a  
14 valuation of the acquired electric plant assets along with other acquired assets and  
15 liabilities is required in order to allocate the purchase price to the assets acquired  
16 and liabilities assumed.

17 **Q. Has FPL or a third party performed that valuation?**

18 A. Yes. Duff & Phelps, LLC (“Duff & Phelps”) performed a valuation of the assets  
19 acquired and the liabilities assumed. FPL witness Herr’s direct testimony  
20 describes that valuation, and a copy of the valuation report is attached as an  
21 exhibit to his testimony.

22 **Q. Why isn’t FPL recording the acquired assets at net book value?**

1 A. The USOA requires that acquired *electric utility* property plant and equipment be  
2 recorded at net book value (Electric Plant Instruction 5, *Electric Plant Purchased*  
3 *or Sold*, in 18 Code of Federal Regulations (“C.F.R.”) Part 101). The Cedar Bay  
4 Facility is a qualifying facility under the definitions prescribed by FPSC Rule No.  
5 25-17.080, *Definitions and Qualifying Criteria*, which requires that the unit “is  
6 not owned by a person primarily engaged in the generation or sale of electricity.”  
7 As such, because FPL is acquiring plant from CBAS, an entity that is not  
8 primarily engaged in the generation or sale of electricity, then Electric Plant  
9 Instruction 5 is not applicable and the USOA does not require FPL to record the  
10 assets at net book value. In the absence of such direction, recording the assets at  
11 fair value is appropriate and consistent with both GAAP and the USOA.

12 **Q What is the fair value of the Facility that FPL seeks to acquire in this**  
13 **transaction?**

14 A. As provided in FPL witness Herr’s direct testimony, this coal plant has no  
15 economic value to a market participant that would seek to sell power from it on a  
16 merchant basis into today’s power market. The only value CBAS had for this  
17 plant was associated with FPL’s PPA, which will be canceled upon effective date  
18 of the transaction. Therefore, FPL will take title to the asset and will record no  
19 book basis for the facility. This is not to say that the plant will not have residual  
20 value to FPL in the first few years, before the Sabal Trail/Florida Southeast  
21 Connection pipelines are in service. However, as Mr. Herr explains, that value is  
22 unique to FPL and should not be considered in determining the fair value of the  
23 Cedar Bay Facility on the open market.

1 **Q. What other assets or liabilities must be recognized associated with the**  
2 **Facility on day one of the transaction?**

3 A. FPL must recognize an estimate of the dismantlement cost (represented as an  
4 asset retirement obligation) of the forecasted retirement of the unit at the end of  
5 2016, which is estimated to be \$4.2 million on a net present value basis, along  
6 with the inventory and working capital on that effective date. The estimate for  
7 dismantlement cost is based on the requirements set forth in the lease agreement,  
8 net of salvage.

9 **Q. What are the journal entries that FPL plans to record as a result of the**  
10 **Cedar Bay Transaction?**

11 A. Page 1 of Exhibit KO-1 provides the estimated journal entry to be recorded by  
12 FPL that will be required upon the stock purchase of CBAS. The entry booked at  
13 closing will be based on actual working capital paid/received.

14 **Q. Please describe the assets and liabilities FPL will record as a result of the**  
15 **Cedar Bay Transaction.**

16 A. FPL will record various assets and liabilities, all of which will be recorded on the  
17 subsidiary's books at fair value at the date of acquisition. Apart from the coal  
18 plant, which will be recognized at zero cost, FPL will also acquire related  
19 inventory and the working capital. Additionally, each of the contracts acquired by  
20 FPL had to be analyzed to determine if the rights or obligations inherent in those  
21 agreements represented current market prices for those products and services. To  
22 the extent contracts represent obligations that are greater than or less than current  
23 market prices, those differences would also be recorded on the day one purchase

1 accounting balance sheet as assets or liabilities. FPL determined that the rail car  
2 lease, coal supply and coal transportation agreements are either at market today or  
3 subject to 2015 reopeners, which would cause them to be reset to market. The  
4 steam sales agreement provides for effective cancelation as there is no  
5 requirement for steam to be provided when the plant does not operate. The  
6 ground lease is currently \$1.7 million per year, but is reset to market beginning in  
7 2015.

8 **Q. Please describe the income tax entry associated with the acquired plant**  
9 **carryover tax basis.**

10 A. The facility has a carryover tax basis of approximately \$8.0 million at the  
11 acquisition date as compared to zero book basis. In accordance with ASC 805,  
12 FPL is required to record the tax effect of this book/tax difference as a deferred  
13 tax asset. The income taxes on the difference would be recorded as a credit to a  
14 regulatory liability (FERC Account 254 – Other Regulatory Liabilities) and be  
15 amortized over the remaining life of the PPA (the amortization period proposed to  
16 be used for all recoveries) to FERC Account 557, Other Expenses. The  
17 regulatory liability and associated amortization would be recorded on Cedar Bay  
18 Genco's books and records.

19 **Q. How will future fuel and operating costs associated with the Cedar Bay**  
20 **Facility be recorded?**

21 A. All fuel and operating costs associated with the Facility will be recorded on Cedar  
22 Bay Genco's books and records in the appropriate electric operation and



1 maintenance FERC accounts and will be included in FPL's consolidated financial  
2 statements.

3 **Q. Will FPL record a loss associated with the termination of the PPA with**  
4 **Cedar Bay Genco? If so, how was it calculated?**

5 A. Yes. Per ASC 805-10-25 (Q&A 13), because the PPA represents a preexisting  
6 contractual relationship between FPL and the acquired entity, Cedar Bay Genco,  
7 FPL must recognize the loss associated with terminating the preexisting  
8 contractual relationship. As discussed in the direct testimony of FPL witness  
9 Herr, this unit contingent PPA would have a fair value of approximately \$520  
10 million to a market participant today. This is primarily because of the large  
11 capacity and fixed O&M payments to which the PPA owner would be entitled to  
12 receive from FPL. Therefore, termination of the PPA upon purchase of CBAS  
13 results in an equivalent loss to FPL as purchaser. As such, the amount FPL is  
14 recording for the loss on the PPA is \$520.5 million.

15 **Q. How does FPL propose to record the loss associated with the termination of**  
16 **the PPA?**

17 A. Consistent with ASC 980, the loss would be recorded as a regulatory asset in  
18 recognition of FPL's proposal to defer and recover that specific cost in future  
19 rates. The recognition of the loss will not be deductible for income tax purposes;  
20 therefore, the amount set up for the regulatory asset will represent the after tax  
21 loss. The loss would be recorded as a debit to a regulatory asset (FERC Account  
22 182.3 – Other Regulatory Assets) and be amortized on a straight-line basis to

1 FERC Account 557, Other Expenses, over the remaining term of the PPA. The  
2 regulatory asset and amortization will be recorded on FPL's books and records.

3 **Q. Is there any specific regulatory book/tax treatment associated with recording**  
4 **the loss on the termination of the PPA?**

5 A. Yes. Because FPL will not be able to recognize a tax benefit for the \$520.5  
6 million purchase price paid for the Cedar Bay Transaction, the loss on the PPA  
7 results in a book/tax difference which will not be recognized in FPL's income tax  
8 provision. FPL, therefore, must collect income taxes associated with the future  
9 revenues related to the recovery of the loss in order to recover the full cost  
10 associated with the termination of the PPA. Accordingly, FPL will record a debit  
11 to a regulatory asset (FERC Account 182.3 – Other Regulatory Assets) and credit  
12 to a deferred tax liability to recognize the future revenues for the income tax gross  
13 up associated with the loss. For regulatory purposes, FPL will amortize the  
14 regulatory asset over the same period as its associated after-tax regulatory asset as  
15 described above to FERC Account 557, Other Expenses. This regulatory asset  
16 and amortization will also be recorded on FPL's books and records.

17 **Q. How does FPL propose to recover the regulatory assets and liabilities**  
18 **described above?**

19 A. As reflected on Page 2 of Exhibit KO-1, FPL proposes to net all the regulatory  
20 assets and liabilities and recover the net regulatory asset through FPL's capacity  
21 cost recovery clause ("CCR Clause") over the remaining PPA period. Recovery  
22 through the CCR Clause is appropriate because that is where FPL is currently  
23 recovering the cost of the unfavorable PPA whose termination will lead to the net

1 regulatory asset. In addition, the amortization of the net regulatory asset and  
2 associated unrecovered balance will be removed from retail base ratemaking and  
3 FPL's earnings surveillance report.

4 **Q. Does FPL propose to earn a return on the unrecovered regulatory assets and**  
5 **liabilities described above?**

6 A. Yes. Except for the income tax related regulatory assets and liabilities, FPL  
7 proposes to earn a return on the unrecovered net regulatory asset balance at FPL's  
8 overall weighted average cost of capital through FPL's CCR Clause. FPL witness  
9 Barrett explains why this is a fair and appropriate rate of return for the regulatory  
10 asset. The return exclusion associated with the income tax related regulatory  
11 assets and liabilities is consistent with how regulatory assets and liabilities are  
12 treated for ASC 740 adjustments applicable to the gross-up of the equity  
13 component of AFUDC, excess deferred income taxes, and investment tax credits.

14 **Q. How does FPL propose to recover the fuel costs associated with the Cedar**  
15 **Bay Facility?**

16 A. FPL proposes to recover the fuel costs associated with the Cedar Bay Facility  
17 through FPL's fuel cost recovery clause ("FCR Clause"). Included along with the  
18 fuel costs, FPL recommends recovery of all associated rail car lease payments and  
19 fuel transportation costs record on Cedar Bay Genco's books through FPL's FCR  
20 Clause. This treatment is consistent with the Commission's decision in Order No.  
21 14546, issued July 8, 1985, in Docket No. 850001-EI-B. In order to avoid double  
22 recovery, these fuel related costs will not be included in retail base ratemaking or  
23 FPL's earnings surveillance report.

1 **Q. Will Cedar Bay Genco be consolidated for retail base ratemaking and**  
2 **reporting purposes?**

3 A. Yes. FPL will include all Cedar Bay Genco amounts in retail base ratemaking  
4 and FPL's earnings surveillance reporting excluding fuel expense, fuel  
5 transportation and rail car lease costs discussed above. In accordance with FPL's  
6 current retail base rate settlement, FPL is not proposing to revise its base rates at  
7 this time and will absorb the costs associated with plant operations until base rates  
8 are set in FPL's next base rate proceeding.

9 **Q. Does this conclude your direct testimony?**

10 A. Yes.

# ERRATA SHEET

WITNESS: **KIM OUSDAHL - REBUTTAL**

<u>PAGE#</u>	<u>LINE#</u>	<u>CHANGE</u>
9	2	Change "CBAS" to "CBAS Power Holdings, LLC"
9	5	Change "CBAS" to "CBAS Power Holdings, LLC"

1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                   **FLORIDA POWER & LIGHT COMPANY**

3                   **REBUTTAL TESTIMONY OF KIM OUSDAHL**

4                   **DOCKET NO. 150075-EI**

5                   **JUNE 17, 2015**

6

7   **Q.    Please state your name and business address.**

8    A.    My name is Kim Ousdahl and my business address is Florida Power & Light  
9            Company (“FPL” or the “Company”), 700 Universe Boulevard, Juno Beach,  
10           Florida 33408.

11 **Q.    Did you previously submit direct testimony in this proceeding?**

12 A.    Yes. My direct testimony was submitted on March 6, 2015.

13 **Q.    Have your position, duties, or responsibilities changed since you last filed  
14           testimony in this docket?**

15 A.    No.

16 **Q.    Are you sponsoring any exhibits to your rebuttal testimony?**

17 A.    Yes. I am sponsoring the following exhibits:

- 18           • KO-2 – FERC Accounting Decisions on Qualifying Facility (“QF”)  
19           Acquisitions; and  
20           • KO-3 – Cedar Bay Journal Entries Under Original Cost Accounting.

21 **Q.    What is the purpose of your rebuttal testimony?**

1 A. The purpose of my rebuttal testimony is to address misstatements and incorrect  
2 positions on accounting issues presented in the testimony of Office of Public  
3 Counsel (“OPC”) witness Myers. Specifically, I will demonstrate that:

4 1. FPL’s proposal to record the Cedar Bay Facility at its fair value rather than  
5 original cost is appropriate and consistent with Federal Energy Regulatory  
6 Commission (“FERC”) precedent. Ultimately, however, the choice  
7 between fair value and original cost has no impact to FPL’s retail customers  
8 if the original cost accounting is handled properly; and

9 2. FPL has correctly determined that its payment to acquire CBAS Power, Inc.  
10 (“CBAS”) is not deductible for income tax purposes.

11 **Q. Please summarize your rebuttal testimony.**

12 A. My rebuttal testimony demonstrates that the Company’s proposed accounting  
13 treatment to record the transaction on a fair value basis, versus original cost, is  
14 appropriate and consistent with FERC precedent. Regardless of whether fair  
15 value or original cost is used, however, proper accounting will yield the same net  
16 result for rate base and thus the choice makes no difference to the rates customers  
17 will pay. In addition, I show that, contrary to OPC witness Myers’ assertion,  
18 FPL’s payment to acquire CBAS is not tax deductible. The Internal Revenue  
19 Code (“IRC”) explicitly states that for federal income tax purposes, an amount  
20 paid to acquire an asset, including stock in a corporation, must be capitalized into  
21 the basis of the acquired asset and is therefore not currently deductible.

22 **Q. On page 14 of OPC witness Myers’ direct testimony, he states that FPL must**  
23 **record the purchase of the Cedar Bay Facility at original cost. Is he correct?**

1 A. No. OPC witness Myers is mistaken on certain important facts and he provides  
2 only selective FERC orders in support of his position, none of which addresses or  
3 acknowledges cases where FERC has permitted use of fair value accounting for  
4 facts and circumstances similar to the Cedar Bay Transaction. With  
5 comprehensive and accurate analysis of FERC precedent, it is clear recording the  
6 Cedar Bay Transaction at fair value is appropriate.

7

8 The use of original cost accounting is codified in the Uniform System of Accounts  
9 and is a longstanding requirement at the FERC and state commissions. Use of  
10 original cost accounting generally ensures that assets devoted to public utility  
11 service cannot result in an increase in book basis when bought and sold thereby  
12 resulting in captive utility customers paying more than the original cost of the  
13 asset. There are, however, exceptions to this practice which provide for fair value  
14 accounting while continuing to ensure customers' interests are protected.  
15 Regardless of the outcome of this accounting issue, the proper application of  
16 FERC accounting precedent will result in the same rate base and thus not impact  
17 FPL's retail rates.

18

19 On Page 12 of his testimony, OPC witness Myers refers to the PacifiCorp  
20 acquisition of Chehalis Power Generating, LLC (Docket No. EC08-82-000).  
21 However, this case does not support his position, because it is based on a FERC  
22 staff legal determination that the Exempt Wholesale Generator ("EWG") in that  
23 case, Chehalis, was devoted to public service prior to the proposed acquisition and



1           therefore, the original cost should be the basis for the purchase accounting entries.  
2           As an EWG that had previously sold wholesale energy under a market-base rate  
3           tariff approved by FERC, the Chehalis facility was deemed to have previously  
4           been devoted to public service and thus it had to be recorded on the acquirer's  
5           books at original cost. That is not the case with the Cedar Bay Facility, which has  
6           operated as a QF, under a QF contract, for its entire operating life to date. To the  
7           best of my knowledge, FERC has consistently applied fair value accounting  
8           treatment to acquisitions of QFs.

9  
10          On page 14 of OPC witness Myers' testimony, he opines that although the Cedar  
11          Bay Facility is a QF, not an EWG, it would still be deemed to be devoted to public  
12          service. He fails to note, however, that the Cedar Bay Facility is interconnected  
13          to Jacksonville Electric Authority, an entity that is not subject to FERC's  
14          jurisdiction. Likewise, the excessively high avoided cost rate charged by the QF  
15          under the Cedar Bay Power Purchase Agreement ("PPA") was established on the  
16          state level, not by FERC. Given these circumstances, FPL believes FERC is  
17          likely to find that the Cedar Bay Facility was *not* devoted to public service and  
18          that fair value accounting is therefore appropriate. OPC witness Myers'  
19          testimony to the contrary is incorrect and fails to properly apply the test FERC  
20          uses to make this determination. Moreover, OPC witness Myers' testimony fails  
21          to cite or address FERC rulings in favor of fair value accounting for acquisitions  
22          of QFs. I have identified FERC rulings on acquisitions of QFs and summarized  
23          them on Exhibit KO-2. In these instances, the logical conclusion is that the

1           acquired QF was not previously devoted to public service and the acquirer  
2           properly recorded the acquired assets and liabilities at fair value.

3   **Q.   Has FPL presented its proposed accounting entries for the Cedar Bay**  
4   **Transaction to FERC for approval?**

5   A.   Yes.   FPL submitted an application for FERC approval of the Cedar Bay  
6   Transaction under Section 203 of the Federal Power Act on March 24, 2015,  
7   which included FPL's proposed accounting entries.  At the request of FERC staff,  
8   FPL had a teleconference with FERC legal and accounting staff on May 11, 2015  
9   to review and discuss the accounting entries, including the basis for such entries.  
10   During this meeting, I provided an overview of and answered questions about  
11   FPL's research of FERC precedent and cases that were consistent with the facts of  
12   the Cedar Bay Transaction and that gave rise to fair value accounting.  At the end  
13   of this discussion, FERC staff did not ask FPL to change its proposed accounting  
14   entries or supplement its application.  FPL has requested that FERC issue an order  
15   authorizing the Cedar Bay Transaction by June 30, 2015.  Typically, such  
16   authorization orders address the applicant's proposed accounting entries and  
17   direct the applicant to submit final accounting entries to the FERC Accounting  
18   office within six months of the consummation of the proposed transaction.

19   **Q.   Even if FERC were to direct FPL to record the Cedar Bay Transaction**  
20   **utilizing original cost accounting, would the entries proposed by OPC witness**  
21   **Myers on Exhibit TMM-1 be correct?**

22   A.   No.   Based on my research and discussions with FERC staff, it is my  
23   understanding that if FERC were to ultimately decide the Cedar Bay Facility was

1 devoted to public service, FERC will direct FPL to record the plant at original  
2 cost, with the difference between fair value and net book value recorded as an  
3 acquisition adjustment. As noted in Exhibit KO-3, FPL would record a negative  
4 acquisition adjustment as a credit to FERC Account 114, Electric Plant  
5 Acquisition Adjustments, for the difference between fair value and the  
6 depreciated original cost of the purchased Cedar Bay Facility. Secondly, based on  
7 FERC precedent, FPL would clear the negative acquisition adjustment to  
8 accumulated depreciation. In fact, this is the exact treatment that FERC ordered  
9 in PacifiCorp's acquisition of the Chehalis facility,<sup>1</sup> which OPC witness Myers  
10 cited but then ignored in preparing his journal entries.

11

12 FERC acknowledges that if a plant on the date of acquisition has a fair value less  
13 than its net book value based on original cost, only the fair value should remain in  
14 rate base to be recovered from customers.<sup>2</sup> Therefore, even if FERC were to  
15 require FPL to use original cost accounting for the Cedar Bay Transaction, no  
16 undepreciated value of the facility would remain to be recovered from customers.  
17 OPC witness Myers' proposed treatment on page 9 and 10 of his testimony is not  
18 consistent with the relevant FERC precedent and should be rejected.

19 **Q. If FPL recorded the entries reflected on Exhibit KO-3, what would be the**  
20 **impact to FPL's request in this proceeding?**

<sup>1</sup> *PacifiCorp*, Docket No. AC09-41-000 (May 22, 2009) (unpublished letter order) in response to letter from PacifiCorp for approval of final journal entries dated March 25, 2009 (Entry Nos. 3 and 4)

<sup>2</sup> *Locust Ridge Gas Co.*, 29 FERC ¶ 61,052, at 61,114 (1984); and *Entergy Corporation*, Docket No. AC06-19-000 (April 26, 2007) (unpublished letter order)

1 A. None. The net effect of the entries would be that the acquired Cedar Bay Facility  
2 would be recorded on a fully depreciated basis with no net book value left to be  
3 recovered from customers. This is the exact same outcome as with FPL's fair  
4 value accounting entries. Under both accounting approaches, the entire purchase  
5 price for the Cedar Bay Transaction would be allocated and recovered as a loss on  
6 the termination of the PPA.

7 **Q. Do you have any other concerns with the entries that OPC witness Myers**  
8 **reflects on Exhibit TMM-1?**

9 A. Yes. OPC witness Myers' entries on Exhibit TMM-1 contain a number of errors.

- 10 1. The Investment in Subsidiaries account must represent the parent  
11 company's investment in the equity of the acquired business. In the  
12 purchase of CBAS, this amount is zero; not \$520.5 million as he reflects  
13 in Entry 1. In fact, OPC witness Myers' Entry 2 proves this, as he  
14 presents no equity accounts and all of the asset accounts are equally offset  
15 by liabilities;
- 16 2. OPC witness Myers then must find a way to balance the erroneous \$520.5  
17 million debit to Investment in Subsidiaries so he records a credit to FERC  
18 Account 253, Other Deferred Credits. However, the credit has no means  
19 to be amortized so it remains on the balance sheet, improperly reducing  
20 rate base in perpetuity;
- 21 3. Entry 6 should include a debit to the regulatory liability established for the  
22 deferred income taxes associated with the book/tax difference on the  
23 acquired Cedar Bay Facility (FERC Account 254) which would reduce the

1 debit to FERC Account 557, Other Expenses by an equal amount. He  
2 credits FERC Account 190, Deferred Income Tax Asset and does not  
3 address the turnaround of the regulatory liability; and

4 4. Entry 7 should be a credit to deferred income tax expense (FERC Account  
5 411), not a credit to FERC Account 557, Other Expenses.

6 **Q. On page 17 of OPC witness Myers' testimony, he opines that the termination**  
7 **of the Cedar Bay PPA is deductible for federal income tax purposes. Is he**  
8 **correct?**

9 A. No. As discussed by FPL witness Barrett in his rebuttal testimony, the Cedar  
10 Bay Transaction is the purchase of 100% of the equity interests in CBAS. As a  
11 result of this transaction, FPL not only will terminate the PPA, but also will take  
12 ownership of and operate the Cedar Bay Facility. Under Generally Accepted  
13 Accounting Principles ("GAAP"), the valuation of the Cedar Bay Transaction  
14 assigns all of the acquisition price to the termination of the PPA, which is not  
15 relevant to the IRS determination of deductibility. GAAP are set by accounting  
16 standard setters under principles deemed appropriate for financial reporting, while  
17 the IRC is legislated by Congress. Differences between the two are accounted for  
18 in accordance with Accounting Standards Codification 740 - Accounting for  
19 Income Taxes.

20

21 For federal income tax purposes, the Cedar Bay Transaction is a purchase of a  
22 business. This purchase and the subsequent termination of the PPA will not result  
23 in a net deduction to FPL and its regulated subsidiaries for income tax purposes.

1 Furthermore, if FPL were able to deduct the purchase price for the Cedar Bay  
2 Transaction, then in order to maintain tax symmetry, CBAS would have had to  
3 recognize income and increase its tax obligation. Both sides concluded that FPL  
4 would not be able to deduct the cost of its acquisition and that, as a corollary, the  
5 sale was not a taxable event for CBAS. Had the parties concluded otherwise, FPL  
6 would have had to pay a much higher price for the Cedar Bay Transaction,  
7 reflecting a different tax outcome.

8 **Q. On page 19 of OPC witness Myers' testimony, he proposes that FPL request**  
9 **a Private Letter Ruling ("PLR") from the Internal Revenue Service ("IRS")**  
10 **"...regarding the deductibility of the termination of the PPA..." similar to**  
11 **the request made by Florida Power Corporation in 1997 related to the buy-**  
12 **out of the Tiger Bay PPAs. Do you agree that the Tiger Bay PLR is relevant**  
13 **to the tax treatment for the Cedar Bay Transaction?**

14 A. No. The facts and circumstances of the referenced Florida Power Corporation  
15 request are substantively different than FPL's Cedar Bay Transaction. The tax  
16 deductible portion of the Tiger Bay Transaction related solely to the amount paid  
17 to terminate the unfavorable contract and did not include amounts paid to  
18 purchase the asset. Unlike Florida Power Corporation in the Tiger Bay  
19 Transaction, from a federal income tax perspective, FPL is not making a payment  
20 to terminate a PPA but rather is purchasing 100% of the outstanding common  
21 stock of CBAS, which indirectly owns the Cedar Bay Facility and the right under  
22 the PPA to receive capacity and energy payments from FPL. The PLR on the  
23 Florida Power Corporation Tiger Bay Transaction (PLR-199913032, 4/5/1999,

1 IRC Sec. 162), stated clearly that “...amounts paid to terminate burdensome  
2 contracts and reduce or eliminate future costs, *without more*, are generally  
3 considered ordinary business expenses” (emphasis added) and are therefore  
4 deductible for income tax purposes pursuant to IRC Section 162. Likewise, it is  
5 also clear that an amount paid to acquire an asset, including stock in a  
6 corporation, must be capitalized into the basis of the acquired asset pursuant to  
7 IRC Section 263 because it “...brings about the acquisition of a business  
8 advantage extending into the indefinite future”<sup>3</sup> and is therefore not currently  
9 deductible. As such, FPL’s stock purchase of CBAS is not deductible for income  
10 tax purposes.

11 **Q. Does this conclude your rebuttal testimony?**

12 A. Yes.

<sup>3</sup> PLR-199913032, 4/5/1999, IRC Sec. 162

1 BY MS. MONCADA:

2 Q Ms. Ousdahl, did you sponsor Exhibit KO-1 to  
3 your testimony?

4 A Yes.

5 Q Did you also sponsor Exhibits KO-2 and KO-3?

6 A I did.

7 MS. MONCADA: Madam Chair, I would note that  
8 Ms. Ousdahl's exhibits have been premarked on  
9 staff's comprehensive exhibit list as Nos. 9, 56,  
10 and 57.

11 COMMISSIONER EDGAR: Thank you.

12 MS. MONCADA: FPL waives oral summary for  
13 Ms. Ousdahl. And she is ready for cross  
14 examination.

15 COMMISSIONER EDGAR: Mr. Moyle?

16 MR. MOYLE: Thank you.

17 EXAMINATION

18 BY MR. MOYLE:

19 Q Good afternoon, Ms. Ousdahl.

20 A Good afternoon.

21 Q Let me reference you to your Exhibit KO-3.  
22 Tell me when you're there, please.

23 A It's two pages?

24 Q Right. It's one of two, right?

25 A Okay.



1           **Q     The first page -- I would ask you to look at**  
2 **the first page.**

3           A     Okay. I'm there.

4           **Q     What's the purpose of this exhibit?**

5           A     My rebuttal testimony was trying to clarify  
6 the accounting confusion that I thought had been left in  
7 the testimony of Witness -- OPC Witness Myers. So, what  
8 I was trying to show here was that either under fair  
9 value accounting or, in this case, original cost  
10 accounting, that once you completed the entries as  
11 required by the Federal Energy Regulatory Commission,  
12 you would end up, in our fact circumstances, with zero  
13 fair value, fully depreciated asset.

14          **Q     And that's consistent with what Mr. Herr just**  
15 **testified to; is that right?**

16          A     No, that's not the testimony of -- well, he --  
17 Witness Herr valued the asset at zero. I'm showing the  
18 accounting for that asset.

19          **Q     Okay. So, if I were to ask you the**  
20 **question -- and I don't want to get too far into the**  
21 **weeds if we can avoid it, but feel like you need to**  
22 **answer the question fully. But how much are ratepayers**  
23 **being asked to pay for this Cedar Bay facility?**

24          A     Well --

25          **Q     If you could, just tell me, you know, the**

1 **bottom line dollar. You know 520 here on Line 1; is**  
2 **that right?**

3 A Yes, \$520 million is the cash price of the  
4 transaction, which is not buying the facility. Again,  
5 it's purchasing the equity interest in the entities that  
6 hold the facility.

7 Q **And who is that? The CB -- the CBAS?**

8 A I have to point to the chart.

9 Q **Right.**

10 A CBAS Power Holdings, the first-tier entity was  
11 the seller. And we're buying the entity CBAS Power,  
12 Inc., and below.

13 Q **Right. And the seller in is in the power**  
14 **plant business, correct? I mean, they own and run the**  
15 **Cedar Bay generating facility; isn't that right?**

16 A I think Witness Herr just testified they are a  
17 private-equity --

18 Q **And --**

19 A -- interest. And they do obviously hold this  
20 generating plant, yes.

21 Q **So, the answer to my question was yes.**

22 A Yes.

23 Q **And with respect to -- there is another item**  
24 **on this exhibit, 326.9 tax gross-up. The ratepayers are**  
25 **going to be asked to pay -- I'm sorry, 326.9; is that**

1 right?

2 A That's correct.

3 Q So, in my opening, I said this deal at the end  
4 of the day is going to cost ratepayers over 850 million.  
5 I got that by totaling up these two numbers. You would  
6 agree that the deal would cost more than 850 to the  
7 ratepayers; is that correct?

8 A Yes, I agree that we'll have to recover the  
9 taxes that we will have to pay on the non-deductible 520  
10 cash payment for the entities. We'll earn a return  
11 solely on the 520. I think that's, yes, clear in our  
12 testimony.

13 Q And I had asked Mr. Herr -- you filed some  
14 rebuttal. You understand FIPUG's position as  
15 essentially saying we just think that you're paying too  
16 much for this asset and that ratepayers ought not to pay  
17 520; they ought to pay less?

18 A I think you've made that very clear today.

19 Q And if the Commission would agree with FIPUG,  
20 ratepayers would have greater savings than all of the  
21 numbers reflected on your charts and in your testimony,  
22 correct?

23 A We would not have a transaction. So,  
24 ratepayers would continue to pay the full amount of the  
25 PPA.

1           **Q     So, this is a take-it-or-leave-it**  
2 **proposition --**

3           A     We don't have another transaction to offer. I  
4 think that's been made clear today, too.

5           **Q     I had asked, I believe it was, Mr. Barrett**  
6 **some questions about a private letter ruling. And he, I**  
7 **think, tried to punt them to you. There have been**  
8 **private letter rulings issued that have suggested that**  
9 **monies paid for purchase power agreement are tax-**  
10 **deductible; is that right?**

11          A     The private letter ruling that's been  
12 referenced in this docket is different in key fact  
13 circumstances; and that is, the tax-deductible portion  
14 of that transaction was for terminating the purchase  
15 power agreement only. It was not associated with the  
16 other part of that transaction, which was the purchase  
17 of the facilities.

18                 In our case, the transaction is clearly the  
19 purchase of the operating entities. And there will be  
20 no tax deduction provided. And we think that's clear.  
21 The counter-party thinks that's clear. And we have a  
22 "will" opinion from tax counsel that says that's clear.

23           **Q     Tax counsel -- they can give you their**  
24 **opinion, but a private letter ruling from the IRS is**  
25 **better than an opinion from a private lawyer, is it not,**

1 **if you had a choice between the two?**

2 A Well, a private --

3 **Q If you could, just yes or no, and then explain**  
4 **if you need to.**

5 A Well, better -- it's more definitive, yes.  
6 But a "will" opinion, as I'm familiar with it, means  
7 that there is virtually no other outcome from the  
8 standpoint of the tax counsel's opinion in this case.

9 **Q As we sit here today, there is a dispute**  
10 **between you and OPC with respect to whether the purchase**  
11 **price is deductible or not; is that fair?**

12 A OPC's witness suggested that it perhaps could  
13 be deductible. We disagree. We think it's quite clear.

14 **Q Do you know the net book value that Cedar Bay**  
15 **has been on the books of Cogentrix for?**

16 A Do I know the amounts?

17 **Q Yeah.**

18 A Well, on the exhibit you just had me referring  
19 to, KO-3, Page 1, we included the amounts of the net  
20 book value as of 12/31/14.

21 **Q What line?**

22 A 19 and 20. It's referenced right below that  
23 entry.

24 **Q And you got that number from Cogentrix; is**  
25 **that right? Just so we're clear, we're not talking past**

1 **each other, what's the net book value number that you're**  
2 **referencing?**

3 A 517.9 is the gross plant value at 12/31/14.  
4 248.3 is the accumulated reserve at that date. The  
5 difference would be the net book value, the 269.6.

6 **Q Do you have an understanding of the term "used**  
7 **and useful"?**

8 A I do.

9 **Q What is it?**

10 A Used and useful, from the context of the  
11 public utility regulation, means that the asset is  
12 deployed in the business of the service of customers in  
13 some portion of fulfilling our responsibilities as a  
14 public utility.

15 **Q And doesn't it go typically when something is**  
16 **used and useful, you have the right to recover for it?**

17 A I think --

18 **Q Or it helps the argument that you have the**  
19 **right to recover for it?**

20 A I would say it a little bit differently. I  
21 think for an asset to be considered utility property, it  
22 has to be used and useful. You know there are  
23 exceptions in plant health for future use that are  
24 believed to meet the requirements to be recovered and  
25 earned a return.

1           For property that's not utility property, it's  
2 typically accounted for below the line.

3           **Q     And you're aware that Mr. Pollock has**  
4 **suggested that this Cedar Bay facility, that the plan is**  
5 **to shut down; that it doesn't meet the qualifications of**  
6 **used and useful, correct?**

7           A     I'm honestly not familiar with Mr. Pollock's  
8 testimony in that regard.

9           **Q     Okay. Let me ask you a similar question with**  
10 **respect to the railcar issue. FPL's plan, I think, with**  
11 **railcar -- you have a series of railcar leases; they run**  
12 **for an extended period of time, correct?**

13          A     That's correct.

14          **Q     Are you familiar with the contractual**  
15 **obligations and how they are going to be handled?**

16          A     Yes. You took me through that in deposition.

17          **Q     Okay. And I talked to Mr. Hartman about it**  
18 **earlier today, right?**

19          A     Yes, you did.

20          **Q     Did I cover all of the contracts that are**  
21 **worth more than a million bucks? We have a rail**  
22 **contract. We have a ground lease.**

23          A     I believe so.

24          **Q     Do you have a arrangement whereby you sell**  
25 **steam or water to a QF?**

1           A     Yes.  There is an arrangement today.  There is  
2 no requirement for us to continue that arrangement or to  
3 provide steam after the transaction is effective.

4           **Q     Is that worth more than a million dollars?**

5           A     I -- I don't know.  Again, it's not  
6 necessarily relevant to our obligations post transaction  
7 effected.

8           **Q     So, what is the plan with respect to the**  
9 **railcar?  You're going to lease the railcars out to**  
10 **third parties?**

11          A     That's what Witness Hartman testified to.

12          **Q     And you are going to argue that that should be**  
13 **recovered through the clause, right?**

14          A     Yes, consistent with our current recovery of  
15 the railcar costs.

16          **Q     And you would take that position even though**  
17 **the cars that are being used will be used by third**  
18 **parties and won't be carrying coal for the benefit of**  
19 **FPL ratepayers, correct?**

20          A     Well, I think the relevance --

21          **Q     If you could, yes or no, and then explain.**

22          A     Yes, I think all of the costs associated with  
23 this transaction should be recovered the way we've  
24 reflected; partially in clause, partially in base,  
25 partially in fuel, and part in capacity, yes.



1           **Q**     And OPC has taken issue with that as well as  
2     **Mr. Pollock, and said the clause isn't the place to**  
3     **recover these; these ought to be recovered differently,**  
4     **correct?**

5           A     I -- can you refer me specifically to the  
6     testimony you're referencing?

7           **Q**     Do you understand that OPC has suggested there  
8     **not -- there not be -- or Mr. Pollock has also suggested**  
9     **there not be clause recovery for the railcars?**

10          A     I --

11                   MS. MONCADA: Madam Chair, I believe the  
12     witness asked him for --

13                   MR. MOYLE: I'll find it.

14                   MS. MONCADA: -- a witness reference or  
15     testimony reference.

16                   COMMISSIONER EDGAR: She did.

17                   Mr. Moyle, can you accommodate that request?

18     BY MR. MOYLE:

19           **Q**     **Mr. Pollock's testimony on Page 11 --**

20           A     I don't have Mr. Pollock's testimony. I  
21     apologize.

22                   MR. MOYLE: May I approach?

23                   COMMISSIONER EDGAR: You may.

24                   Ms. Moncada, do you have that or do you need  
25     Mr. Moyle to show you it to you as well?

1 MS. MONCADA: If he tells me which witness and  
2 which page, I can probably pull it up.

3 MR. MOYLE: Mr. Pollock's testimony, Page 11,  
4 Lines 7 through 13.

5 BY MR. MOYLE:

6 Q He's -- the question is: Is it appropriate to  
7 recover the acquisition costs of the capacity costs of  
8 the recovery clause.

9 A Okay. I'm reading your reference -- I mean,  
10 it's very general. It's not talking about the railcars,  
11 but it talks about he believes it's appropriate to  
12 recover fixed PPA costs through the capacity clause.

13 Q And power plants are traditionally recovered  
14 through the base rates, correct?

15 A The cost of generating facilities themselves,  
16 that's correct.

17 Q And purchase --

18 A I mean, then are some exceptions -- I'm sorry  
19 to interrupt. There are exceptions related to  
20 environmental equipment for generating plant that we  
21 recover through environmental clause.

22 Q And with respect to the railcar issue,  
23 notwithstanding the fact that the railcars are going to  
24 be used by third parties to deliver coal and other  
25 materials to non-FPL customers -- you would maintain

1     **that it's appropriate to recover that through the**  
2     **clause?**

3           A     Yes, I think the company is going to use every  
4     means it can commercially to lower any residual costs  
5     associated with the transaction. We still can  
6     demonstrate that there still should be savings --  
7     substantial savings to customers. And we believe that's  
8     the appropriate recovery vehicle, yes.

9           Q     **Hasn't the Commission historically looked at**  
10    **that and said, if it relates to fuel, if there has been**  
11    **a tieback to fuel, if you can take some action, that**  
12    **will reduce the fuel cost?**

13          A     I'm not sure I understand what you're asking  
14    me, Mr. Moyle.

15          Q     **Do you have case cites or references to where**  
16    **railcars have been allowed to be recovered through the**  
17    **clause?**

18          A     Yes, it's referenced in my testimony.

19          Q     **And do you have a reference where the railcar**  
20    **was being leased to a third party and it was being**  
21    **allowed to be recovered through the clause?**

22          A     No. The idea on subleasing these cars would  
23    be to minimize any residual cost to customers.

24                   MR. MOYLE: Okay. That's all I have. Thank  
25    you.

1 COMMISSIONER EDGAR: Thank you.

2 OPC, no questions? Thank you.

3 Are there questions for this witness from  
4 staff?

5 MS. BARRERA: No questions.

6 COMMISSIONER EDGAR: Commissioners, no?

7 Redirect.

8 MS. MONCADA: Very briefly.

9 EXAMINATION

10 BY MS. MONCADA:

11 Q Mr. Moyle asked you a few minutes ago about  
12 the relative level of savings resulting from paying the  
13 purchase price that's proposed here, \$520 million. And  
14 my question is: Are you familiar with how much customer  
15 savings would result from that?

16 A \$70 million is the estimate given by Witness  
17 Hartman on an NPV basis.

18 Q And what would the impact on that savings be  
19 with reference to getting a tax deduction?

20 A It's rather circular in that when parties  
21 transact arrangements like these, they want to be sure  
22 they understand the tax consequences of the transaction.

23 In the case this PSA, we have cross  
24 indemnities on tax outcomes. So, in the extremely  
25 remote circumstance that there would be a tax deduction

1 provided to FPL under the current agreement, we would be  
2 indemnifying Carlyle because they, of course, would  
3 suffer a payment on a tax gain.

4 So, there would be no impact on customers.

5 MS. MONCADA: I have no more questions.

6 COMMISSIONER EDGAR: Thank you.

7 MR. MOYLE: I just have a couple -- a  
8 follow-up on that line. It was beyond what I had  
9 asked her in direct. It will take one second.

10 COMMISSIONER EDGAR: Maybe two?

11 MR. MOYLE: Figuratively speaking.

12 COMMISSIONER EDGAR: Go ahead.

13 EXAMINATION

14 BY MR. MOYLE:

15 Q The point you just made about FPL indemnifying  
16 Carlyle -- that's a contractual arrangement that you  
17 said, hey, if it turns out that you have a gain, we'll  
18 cover, we'll indemnify you, we'll pay the taxes; is that  
19 right?

20 A Yes.

21 Q And that was something that could have been  
22 negotiated differently, I guess, right?

23 A It's -- there is symmetry. There is tax  
24 indemnification for us, too, to protect our customers.  
25 So, it's not unusual, I don't believe.

1           Q     Could it be characterized as not only as  
2 Carlyle getting a profit on this deal, but FPL and then  
3 the ratepayers are paying their tax liability as well?

4           A     No, it could not.

5           Q     Okay. The questions about the projections on  
6 the fuel -- you were in the room earlier when I asked  
7 Mr. Hartman about projections. And you would agree that  
8 those are projections. They can be right; they can be  
9 wrong, correct?

10          A     Yes, the 70 million net present value savings  
11 is our base case.

12          Q     All right. No guarantees; it could be  
13 nothing.

14          A     It would be unlikely, I think.

15          Q     But you haven't done any --

16                COMMISSIONER EDGAR: Mr. Moyle.

17                MR. MOYLE: -- analysis -- thank you.

18                COMMISSIONER EDGAR: Any re-redirect?

19                MS. MONCADA: No questions.

20                COMMISSIONER EDGAR: Thank you.

21                Exhibits?

22                MS. MONCADA: Madam Chair, I would move into  
23 evidence Exhibits 9, 56, and 57.

24                COMMISSIONER EDGAR: No objections?

25                9, 56, and 57 will be entered into the record.

1 (Exhibit Nos. 9, 56, and 57 admitted into the  
2 record.)

3 COMMISSIONER EDGAR: Are you ready to excuse  
4 your witness?

5 MS. MONCADA: Yes.

6 COMMISSIONER EDGAR: All right. You are  
7 excused. Thank you very much.

8 All right. We will use this for our  
9 midafternoon break. We will come back at 3:15 and  
10 begin with Witness Butts. We're on break until  
11 3:15.

12 (Brief recess.)

13 COMMISSIONER EDGAR: We are back on the  
14 record.

15 Mr. Butler, FPL, your witness.

16 MR. BUTLER: Thank you. We call Mr. Butts.

17 THE WITNESS: Hello.

18 EXAMINATION

19 BY MS. MONCADA:

20 Q Good afternoon, Mr. Butts. You also were in  
21 the room when all of the witnesses were sworn. You've  
22 been sworn; that's correct?

23 A Yes, ma'am.

24 Q Would you please state your name and business  
25 address for the record.

1           A     Ray Butts, 700 Universe Boulevard, Juno Beach,  
2 Florida, zip code 33408.

3           **Q     By whom are you employed and in what capacity?**

4           A     I'm at Florida Power & Light Company. I'm the  
5 director of environmental services oversight -- with  
6 oversight of environmental issues, our air section and  
7 environmental services, and the hazardous-substances  
8 section.

9           **Q     Thank you. Have you prepared and caused to be**  
10 **filed 14 pages of prefiled rebuttal testimony in this**  
11 **proceeding?**

12          A     Yes.

13          **Q     Do you have any changes to your rebuttal**  
14 **testimony?**

15          A     I do not.

16          **Q     If I asked you the same questions contained in**  
17 **your prefiled rebuttal testimony, would your answers be**  
18 **the same?**

19          A     Yes, they would.

20                MS. MONCADA: Madam Chair, I ask that the  
21 prefiled rebuttal testimony of Mr. Butts be  
22 inserted into the record as though read.

23                COMMISSIONER EDGAR: The prefiled rebuttal  
24 testimony will be entered into the record as though  
25 read.



1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                   **FLORIDA POWER & LIGHT COMPANY**

3                   **REBUTTAL TESTIMONY OF RAY BUTTS**

4                   **DOCKET NO. 150075-EI**

5                   **JUNE 17, 2015**

6

7   **Q.     Please state your name and business address.**

8   A.     My name is Ray Butts. My business address is 700 Universe Blvd., Juno Beach, FL  
9           33408.

10 **Q.     By whom are you employed and what is your position?**

11 A.     I am employed by Florida Power & Light Company (“FPL” or the “Company”) as a  
12         Director of Environmental Services.

13 **Q.     What are your present job responsibilities?**

14 A.     I am currently responsible for the analysis, advocacy and communication of  
15         emerging environmental issues and regulations that have the potential to impact  
16         FPL. I also manage the air and hazardous substances sections of the Environmental  
17         Services Department. These sections assist FPL operational facilities with the  
18         implementation of air and waste regulations. The Hazardous Substances Section  
19         also coordinates the remediation of hazardous substances discharges that may occur  
20         from time to time at FPL facilities.

21 **Q.     Would you please give a brief description of your educational background and**  
22 **professional experience?**

1 A. I received Bachelors (1980) and Masters Degrees (1986) in Geology from Auburn  
2 University in Auburn Alabama. I have worked for FPL in the Environmental  
3 Services Department since 1988. I previously worked for the Southern Electric  
4 System at Southern Company Services in Birmingham, Alabama, where I served  
5 for eight years as an Engineering Geologist. While at Southern Company I held  
6 registrations as a Professional Geologist in South Carolina and Georgia.

7

8 I have approximately 35 years of experience in the electric utility industry where I  
9 have been responsible for the development of regulations and legislation, power  
10 plant siting, permitting, licensing, construction and environmental management  
11 projects. In 2010, I was appointed to the Florida State Emergency Response  
12 Commission for Hazardous Materials where I continue to serve.

13 **Q. What is the purpose of your rebuttal testimony?**

14 A. The purpose of my rebuttal testimony is to respond to the positions and  
15 recommendations contained in the testimony of witness Dan J. Wittliff on behalf of  
16 the Office of Public Counsel (“OPC”) and positions stated by witness Jeffry Pollock  
17 on behalf of the Florida Industrial Power Users Group (“FIPUG”). Specifically, I  
18 will:

- 19 • Explain certain factors regarding intervener witness Wittliff’s testimony  
20 claiming that there are missing pages in Appendix 20.1 of the ground lease  
21 between RockTenn and the Cedar Bay generating unit (“the Cedar Bay Facility”  
22 or “the Facility”).
- 23 • Respond to intervener witness Wittliff’s comments regarding his stated

1 concerns with the ground lease.

- 2 • Respond to witness Wittliff's assertion that owners of the Cedar Bay Facility  
3 may be subject to the Comprehensive Environmental Response, Compensation  
4 and Liability Act ("CERCLA") due to historical contamination on the site.
- 5 • Respond to testimony from witness Wittliff recommending that the Florida  
6 Public Service Commission ("FPSC") require FPL to double the amount of  
7 environmental liability insurance the Company plans to hold for past, current or  
8 future environmental contamination that may be encountered on the property.
- 9 • Respond to witness Wittliff's implication that the terms of the ground lease  
10 require a negotiation of cleanup requirements with respect to dismantling or  
11 demolishing the facility; and
- 12 • Reply to statements made by witness Pollock regarding the significance of CO<sub>2</sub>  
13 emissions from the operation of the Cedar Bay Facility.

14 **Q. OPC witness Wittliff testifies that the ground lease between the Cedar Bay**  
15 **Facility and RockTenn is missing pages that include Appendix 20.1 section (ii).**  
16 **Did FPL request information regarding the blank pages during its due**  
17 **diligence?**

18 A. Yes, as part of its environmental due diligence, FPL inquired about the blank pages  
19 included in Appendix 20.1 section (ii) and was advised that Cogentrix's copy also  
20 included the blank pages. FPL ultimately determined, however, that the terms of  
21 the ground lease rendered the content, if any, of the blank pages immaterial for  
22 purposes of evaluating environmental liability. Section 10.2 of the ground lease

1 (CB-15-00410), which addresses indemnification, states that RockTenn would be  
2 contractually obligated to indemnify FPL for *any* preexisting non-compliance  
3 caused by RockTenn, regardless of whether the condition was disclosed in  
4 Appendix 20.1. Additionally, any disclosures contained in Appendix 20.1 would  
5 have been based on data collected more than twenty years ago, before the baseline  
6 environmental assessment conducted by ENSR prior to the construction of the  
7 Cedar Bay Facility. It would have been inappropriate to rely on outdated  
8 environmental disclosures that were developed prior to more recent environmental  
9 assessments of the property that were prepared in accordance with American  
10 Society for Testing and Materials (“ASTM”) Standards that did not exist when the  
11 ground lease was developed. In this instance, FPL instead analyzed data from far  
12 more reliable sources, which I describe later in my testimony. This is preferable to  
13 relying on two-decades-old data.

14 **Q. Has FPL since determined the content of the blank pages in Appendix 20.1?**

15 A. Yes, as more fully described in the testimony of witness Tracy Patterson, there are  
16 no “missing” pages. Appendix 20.1 is intended to identify specific environmental  
17 matters described in Section 20.1 *Environmental Matters* included in the body of  
18 the ground lease. The ground lease incorporates a numbering convention that pairs  
19 the section and sub-section numbers in the lease to the same section and subsection  
20 numbers referred to in the corresponding Appendix.

21 **Q. OPC witness Wittliff refers to groundwater contamination described in the**  
22 **March 10, 2010 letter from the Florida Department of Environmental**  
23 **Protection (“DEP”) approving modifications to the Site Certification document**

1           **for the facility. The witness also refers to a November 2012 Phase I**  
2           **Environmental Assessment prepared for the sites and a 1988 Environmental**  
3           **Site Assessment prepared by the firm ERM. Did FPL review these documents**  
4           **as part of the due diligence review of the Cedar Bay Facility?**

5    A.    Yes. FPL reviewed each of these documents in addition to the other documents  
6           related to the Site Certification of the Cedar Bay Facility on file with the Florida  
7           DEP. FPL also reviewed numerous other documents provided by Cedar Bay  
8           Generating Company (“Cedar Bay Genco”) or from the files of various government  
9           agencies. In addition FPL’s due diligence included an on-site assessment,  
10          employee interviews and records review at the Facility. The site visit was  
11          conducted by a Florida Registered Professional Geologist, a Registered Professional  
12          Engineer and a Certified Environmental Auditor/Hazardous Materials Manager.

13   **Q. Do the documents reviewed in the data room and through other sources**  
14           **confirm the conclusion that contamination at the Cedar Bay Facility was due**  
15           **to historical activities and not a result of actions by Cedar Bay Genco?**

16    A.    Yes. Groundwater contamination observed at the site since before the construction  
17           of the Cedar Bay Facility has been monitored utilizing an extensive groundwater  
18           monitoring plan. The groundwater monitoring plan was established by the Florida  
19           DEP as a part of the Cedar Bay Facility’s Site Certification approval under the  
20           Florida Power Plant Siting Act. Results of the monitoring data are reported to the  
21           Florida DEP in order to track trends in the existing historical contamination and to  
22           characterize any new contamination that may be contributed to the groundwater  
23           from the operation of the Cedar Bay Facility. The data from the monitoring plan

1 reviewed by FPL, reviews by the Florida DEP, and reviews conducted for  
2 subsequent environmental assessments, confirm that no additional contamination  
3 has occurred as a result of the operation of the Facility.

4 **Q. On page 11, lines 4-7 of his testimony, witness Wittliff asserts that the**  
5 **indemnification provisions included in the ground lease are insufficient to**  
6 **protect FPL as a future owner of the Cedar Bay Facility. Is this correct?**

7 A. No. The primary concern expressed by witness Wittliff was that the alleged  
8 missing pages in the Appendix 20.1 Environmental Matters section of the ground  
9 lease may have contained a list of environmental concerns that were not reviewed  
10 or accounted for by FPL. Because witness Wittliff's concern about the blank pages  
11 and other possible environmental concerns that may not have been reviewed is  
12 unsubstantiated, it is clear that FPL's due diligence review has been sufficient to  
13 identify all of the environmental concerns at the Facility. Further, FPL is confident  
14 that the indemnifications included in the ground lease protect the Company from  
15 any future liability associated with the historical contamination. And, in order to  
16 expand this protection against environmental liability FPL will maintain a \$20  
17 million insurance policy that protects against past, present and future environmental  
18 liabilities, known or unknown.

19 **Q. Witness Wittliff indicates that the existing contamination at the Cedar Bay**  
20 **Facility represents a risk of liability for FPL due to potential CERCLA**  
21 **liability. Is such risk a reasonable assessment based on the due diligence**  
22 **review performed by FPL?**

23 A. No. Witness Wittliff's concerns about CERCLA liability at the Cedar Bay Facility

1 are unrealistic. The property has long been on the Florida DEP's list of sites with  
2 existing contamination and through the groundwater monitoring plan is under  
3 constant scrutiny by the Florida DEP. RockTenn and its predecessors have  
4 recognized the presence of the contamination at the Facility and through the ground  
5 lease have clearly accepted their responsibility for the historical contamination at  
6 the site. The site is not listed as a CERCLA facility and there is no indication that  
7 the Florida DEP or Environmental Protection Agency ("EPA") will add the site to  
8 the Superfund list.

9  
10 Further, the Rose Chemical Company example of a CERCLA facility used by  
11 witness Wittliff is not representative of the conditions observed at the Cedar Bay  
12 Facility. Unlike the Rose facility, the over-sight regulatory agency for the Cedar  
13 Bay Facility, the Florida DEP, is aware of the historical contamination and has  
14 required monitoring of the Facility for years. Also, unlike the Rose Chemical  
15 facility, lessees at the Cedar Bay Facility have the benefit of years of continuous  
16 monitoring demonstrating that they are not a contributor to the contamination at the  
17 site. In Superfund cases, Potentially Responsible Parties ("PRPs") are identified  
18 based on their ownership of the affected property or their contribution of  
19 contamination to the property. The Cedar Bay Facility has strong supporting  
20 documentation confirming that the Facility has not contributed to the contamination  
21 at the site.

22

1 It is important to note that the Florida DEP was well aware of the contamination at  
2 this Facility and the lease agreement made between then Smurfit-Stone and Cedar  
3 Bay Genco. The agency has since modified the Facility's Site Certification several  
4 times, for various reasons, including a revision that modified the groundwater  
5 monitoring plan in 2010. During these modifications the Florida DEP has never  
6 raised a concern that this Facility would one day have to be designated as a  
7 Superfund Site. In fact, as part of this Certification, the State of Florida explicitly  
8 recognized that the lessee was not liable for pre-existing, historic groundwater  
9 impacts.

10  
11 The State of Florida Site Certification states:

12  
13 Prior to Smurfit, Rayonier/St. Regis conducted industrial paper operations on the  
14 site. The leased site where the Cedar Bay Facility is constructed and operates was a  
15 dedicated waste disposal area for Smurfit between 1972 and 1991. As a pre-  
16 requisite to site development for the Cedar Bay Facility, ENSR conducted a  
17 detailed site assessment that included groundwater analyses, soil borings and a  
18 compilation of the industrial history of the leased area. As a result of the particular  
19 land use, it was found that there was already an established level of contamination  
20 that existed in the groundwater. There are exceedances of the Department's  
21 drinking water standards for metals (antimony, arsenic, beryllium, chromium,  
22 copper, lead, mercury, nickel and zinc) and sulfate at many of the wells.

23



1 As a result of these findings, prior to operation, Cedar Bay Genco conducted  
2 groundwater monitoring on a monthly basis in order to establish defined baselines  
3 of the parameters in the monitoring wells. As there was authenticated pre-  
4 established levels of contamination, Cedar Bay Genco uses pre-operational  
5 groundwater data for comparison purposes and as a baseline to substantiate that  
6 Facility operations have not impacted the zones of discharge. Both the Florida  
7 DEP's ground water rule 62-520, F.A.C. and Site Certification Condition IV.G.15.  
8 state: "If the concentration for any constituent listed in Condition IV.G.11. in the  
9 natural background quality of the ground water is greater than the stated maximum,  
10 or in the case of pH is also less than the minimum, the representative background  
11 quality shall be the prevailing standard." The Cedar Bay Facility does have  
12 elevated levels of certain contaminates in the background wells, and it is protected  
13 from this background well rule requirement.

14  
15 Finally, in 2006 Cogentrix purchased the Facility. Then in 2012 Cogentrix  
16 refinanced the Facility. In each case the financing efforts included an  
17 environmental review that was found acceptable to the lending institutions backing  
18 the project. It would seem unlikely that a reputable financial institution would have  
19 accepted the risk of financing the Facility if they felt there was a risk the site would  
20 be added to the state's list of Superfund sites.

21 **Q. Witness Wittliff states that FPL's purchase of the Cedar Bay Facility should**  
22 **include additional environmental liability insurance to address unknown**  
23 **environmental liabilities. Is this a prudent approach?**

1 A. No. FPL is perplexed by witness Wittliff's arbitrary suggestion that FPL should  
2 double the environmental liability insurance for the site. He offers no justification  
3 for this proposed increase. In contrast, FPL in fact has evaluated potential remedial  
4 action costs based on its collective historical experience as a power plant operator  
5 and its assessment of the potential areas that may be impacted by discharges in the  
6 future. FPL is confident that its thorough due diligence has clarified that:

- 7 1. Existing historical contamination at the site is well documented and is the  
8 responsibility of RockTenn;
- 9 2. The ground lease for the property indemnifies the Cedar Bay Facility from  
10 historical contamination associated with RockTenn and its predecessor's  
11 activities;
- 12 3. FPL recognizes that future liabilities for the contamination at the site would  
13 be limited to contributions of contaminants resulting from future activities  
14 of the Cedar Bay Facility or FPL. Recent environmental site assessments  
15 indicate there are no known discharges that have resulted from the Cedar  
16 Bay Facility's activities that have not been previously closed to the  
17 satisfaction of the Florida DEP;
- 18 4. FPL has considered possible unknown or future contamination that may  
19 have occurred as a result of activities by the Cedar Bay Facility operations  
20 and, based on its experience, has estimated potential cleanup costs that  
21 could be associated with these activities.
- 22 5. Based on potential remediation costs that could occur FPL is confident the  
23 environmental liability insurance policy to be purchased for the site is

1 sufficient to address potential known or unknown liabilities at the plant site  
2 eliminating any material impacts associated with environmental  
3 remediation.

4 **Q. Witness Wittliff’s testimony suggests that the ground lease requires that**  
5 **dismantling or demolition of the Facility be negotiated with RockTenn. He**  
6 **states that the ground lease contains no express provisions dictating how the**  
7 **cleanup, transfer, and remediation of the site would be handled. Is this an**  
8 **accurate representation of how the ground lease should be interpreted?**

9 A. No. Article XV, *Possession of the Facility Site Upon Termination*, includes sections  
10 15.1 *Surrender of Possession* and Section 15.2 *Removal of Facility* that clearly  
11 dictate the manner and schedule for turning the site over to RockTenn. Section 15.1  
12 establishes the requirement for the lessee to provide a proposal to the lessor of  
13 structures or improvements at the site that would be turned over to the lessor. If the  
14 lessor accepts the terms of the proposal there is a prescriptive schedule under which  
15 the lessee is required to remove remaining structures other than foundations. If the  
16 lessor objects to the proposal of improvements or structures to be left on the  
17 property the lessee will follow the prescribed schedule and remove all structures.

18  
19 Regarding remediation of contamination, witness Wittliff in his testimony properly  
20 characterized the requirements of the obligations of the lessee and lessor under the  
21 ground lease—“what’s mine is mine, what’s yours is yours.” The ground lease is  
22 consistent throughout that the lessee is not responsible for any historical  
23 contamination associated with RockTenn and its predecessor’s activities on the site.

1 During demolition and abandonment of the site, the lessee would only be  
2 responsible for the remediation of contamination attributable to its activities. FPL  
3 believes these responsibilities for cleanup, transfer and remediation of the site are  
4 clearly laid out in the ground lease.

5 **Q. Witness Pollock states that the Cedar Bay Facility is not a significant source of**  
6 **carbon dioxide (“CO<sub>2</sub>”) emissions in Florida. Do you agree?**

7 A. No. Witness Pollock is referring to emissions in terms of mass emissions related to  
8 total tons in Florida. It is true that the total tons of emissions from the Cedar Bay  
9 Facility are approximately 1.0 % of the state’s overall emissions. However, the  
10 EPA’s proposed Clean Power Plan (“CPP”), due to be final later this summer, is a  
11 rate-based rule that establishes an interim and final target rate in pounds per  
12 megawatt-hour (“lbs/MWh”) for each state. Under the current draft CPP, the State  
13 of Florida’s 2012 baseline year emissions rate is 1,200 lbs/MWh. The Florida  
14 interim target rate average in the EPA’s proposed CPP between 2020 and 2029 is  
15 794 lbs/MWh. The State’s final target rate for 2030 is 740 lbs/MWh under the  
16 current draft CPP. In comparison, the EPA’s technical CPP support documents  
17 indicate that the Cedar Bay Facility’s 2012 baseline emissions rate is 2,073  
18 lbs/MWh. The Cedar Bay Facility’s baseline year CO<sub>2</sub> emissions are 2.8 times  
19 higher than the CO<sub>2</sub> rate that the State of Florida is expected to achieve in 2030.  
20 Accordingly, in comparison to the proposed CPP target emissions rates expected for  
21 the State of Florida, it is not accurate to state that the CO<sub>2</sub> emissions from the Cedar  
22 Bay Facility are insignificant.

23

1           Once the CPP is final each state will develop a State Implementation Plan (“SIP”)  
2           designed to achieve compliance with the EPA target emissions rate. The state’s SIP  
3           must be approved by the EPA.

4  
5           The lower CO<sub>2</sub> emissions target will have the effect of decreasing the dispatch of  
6           coal-fired generators on the grid. For utility owned or merchant generators this has  
7           the impact of decreasing the revenues associated with those units, potentially  
8           leading to retirement just on pure economic grounds.

9  
10          The Cedar Bay Facility, however, is different. As dispatch is reduced the  
11          profitability of the unit for its owners *increases*. Under the PPA, the less the Cedar  
12          Bay Facility operates the more money it makes due to the PPA's very high capacity  
13          payments but negative energy margin. Unlike most other coal plants that would be  
14          affected by the CPP, under the PPA, the Cedar Bay owners would financially  
15          benefit if the Facility continues to be available for dispatch even if the Facility is  
16          not called on to run.

17  
18          Because the CPP is not yet final it would be pure conjecture to assume that the  
19          Cedar Bay Facility would retire as a result of the rule. The available evidence is  
20          that the Facility will be economically viable through the end of the PPA. The  
21          impact of the CPP would likely result in increased profits for the owner due to  
22          continued capacity payments for the Facility and increased effective cost per unit  
23          energy produced for FPL’s customers.

1

2 It is the EPA's stated intent to evaluate the progress of each state every two years to  
3 determine the progress toward their reduction of CO<sub>2</sub> emissions in accordance with  
4 their plan. FPL's 2012 CPP baseline emissions rate is 908 lbs/MWh. Based on  
5 FPL's current generation plan the Company will be below EPA's 740 lbs/MWh  
6 target rate for Florida by 2030. However, once included in the Company's CO<sub>2</sub>  
7 emissions database, the incremental emissions from the Cedar Bay Facility would  
8 negatively impact FPL's ability to achieve the state target emissions rate.  
9 Therefore, in addition to the obvious financial benefits to customers associated with  
10 shutting down the Cedar Bay Facility early, the shutdown also contributes to FPL  
11 and the State of Florida's goal to reduce CO<sub>2</sub> emissions rates under the EPA CPP  
12 rule.

13 **Q. Does this conclude your rebuttal testimony?**

14 A. Yes, it does.

1 MS. MONCADA: Thank you.

2 BY MS. MONCADA:

3 Q Mr. Butts, are you sponsoring any exhibits to  
4 your rebuttal testimony?

5 A No.

6 MS. MONCADA: Thank you. Mr. Butts is  
7 available for cross examination.

8 COMMISSIONER EDGAR: Waive summary?

9 MS. MONCADA: Waive summaries.

10 COMMISSIONER EDGAR: Mr. Moyle.

11 MR. MOYLE: Thank you.

12 EXAMINATION

13 BY MR. MOYLE:

14 Q Good afternoon, Mr. Butts.

15 A Good afternoon, Mr. Moyle.

16 Q I wanted to ask you about your understanding  
17 of the site where the Cedar Bay facility is located.

18 A Uh-huh.

19 Q Have you been to this site?

20 A I have not. I have sent several of the folks  
21 on my staff to go to the site. My professional  
22 engineer, professional geologist, and certified  
23 hazardous materials manager have been there.

24 Q Do you know what county in Florida it's  
25 located in?

1           A       I'm not certain. I believe it's in Duval.

2           **Q       Do you know where it is vis-a-vis the**  
3           **St. Johns River and the Atlantic Ocean?**

4           A       It is upstream -- it is on the Broward River,  
5           which then feeds to the St. Johns River.

6           **Q       Okay. And have you looked at it like on**  
7           **Google Maps? I mean, my -- I've been over there. I've**  
8           **seen it. I don't think it's too far from the Atlantic.**  
9           **But do you have any sense as to its distance to the**  
10          **Atlantic Ocean? I don't want to --**

11          A       I haven't actually looked at it on Google  
12          Maps, no.

13          **Q       I said in my opening that the facility is**  
14          **located on a site that has some environmental issues; is**  
15          **that correct?**

16          A       It has environmental contamination in the  
17          ground water at the site, yes. That's been there for  
18          many decades.

19          **Q       Okay. And how did you learn that?**

20          A       We've learned that through our due diligence  
21          that was performed as we began to look at the property,  
22          evaluating records, looking at regulatory agency data,  
23          interviews with folks at the site, looking at the  
24          quarterly monitoring, which has been going at the site  
25          now for 22 years as required by the site certification.



1           **Q     And the exceedances -- I had mentioned, I**  
2           **think, arsenic, lead, mercury. Those are exceedances,**  
3           **correct?**

4           A     There are.

5           **Q     Of the --**

6           A     There are exceedances of what is currently the  
7           state's groundwater drinking standards or secondary  
8           standards. There is a separate baseline established  
9           that the facility is measured against at the site.

10          **Q     Okay. And the Broward River -- do you know if**  
11          **that flows north or south?**

12          A     I'm not sure. It flows towards St. Johns  
13          River.

14          **Q     Okay. Do you know are there surface water**  
15          **withdrawals from the St. Johns River that people use for**  
16          **drinking water?**

17          A     I am not familiar with that, no.

18          **Q     Just don't know one way or the other?**

19          A     I don't know.

20                 MR. MOYLE: Okay. I have an exhibit I would  
21                 like to use --

22                 COMMISSIONER EDGAR: Okay.

23                 MR. MOYLE: -- with this witness, if I could.

24                 I think you'll be glad to note it's not in a  
25                 red folder.

1 COMMISSIONER EDGAR: I am.

2 MR. WRIGHT: Me, too.

3 COMMISSIONER EDGAR: As is Mr. Wright. That's  
4 just what I was thinking.

5 We will number this as Exhibit 69.

6 THE WITNESS: Okay. I'm glad I brought my  
7 glasses, Mr. Moyle.

8 COMMISSIONER EDGAR: Okay. And we will label  
9 AAI Phase 2 environmental site assessment overview.

10 (Exhibit No. 69 marked for identification.)

11 BY MR. MOYLE:

12 **Q I may reference you to this exhibit, but**  
13 **really, sir, I want to ask you your understanding, in**  
14 **terms of the environmental due diligence, the difference**  
15 **between a Phase 1, and a Phase 2, and a Phase 3.**

16 **A Okay.**

17 **Q Are you familiar with the differences between**  
18 **the three?**

19 **A Could you give me a moment to look at the**  
20 **exhibit before we get into questioning here, Mr. Moyle?**

21 COMMISSIONER EDGAR: Yes.

22 MR. MOYLE: Sure.

23 THE WITNESS: (Examining document.)

24 I appreciate that. I'm not familiar with this  
25 document. So, I wanted to look through it.

1           Go ahead.

2       BY MR. MOYLE:

3           **Q     Sure.  And really the pending question, I**  
4       **think, was:  Do you have an understanding of the**  
5       **distinctions between a Phase 1, Phase 2, and Phase 3?**

6           A     I do.

7           **Q     Okay.  So, explain a Phase 1, if you would,**  
8       **please.**

9           A     Okay.  Phase 1 is a site assessment that's  
10       performed typically prior to purchases, prior to sales  
11       to evaluate potential risk at a facility where some  
12       environmental risk may occur.  And it could be in a  
13       building.  It could be a site.

14                   And it's typically non-invasive such that you  
15       don't do sampling.  You're just basically looking at  
16       records, doing interviews, visiting the site, and doing  
17       so in accordance ASTM standards, if you're doing a full-  
18       blown Phase 1.

19           **Q     Okay.  What's a Phase 2?**

20           A     A Phase 2 is, if you find risks at the site  
21       that you believe require additional information to  
22       evaluate the risk, a Phase 2 would involve some  
23       sampling, more invasive studies, more invasive analysis.  
24       You might go in with a drill rig and actually pull  
25       either soil or groundwater samples.  If you were doing

1 this Phase 2 in a building, you might actually pull  
2 samples from within the building, itself.

3 **Q And Phase 3?**

4 A And Phase 3 is if you've gathered information  
5 in your Phase 1 and Phase 2, you think there is  
6 additional need for delineation to go out further and  
7 determine if the contamination might exist further. If  
8 you found some, you can go back, gather more samples.  
9 Or there may be a requirement for actual clean-up of the  
10 facility at some point.

11 **Q This site is on a DEP list; is that right?**

12 A It is.

13 **Q Okay. And what list is that?**

14 A I'm sorry. Say again?

15 **Q What list is that, the DEP list it's on?**

16 A It's in OCULUS, which is DEP's tracking of all  
17 contaminated sites. It shows the site as a site that  
18 has existing groundwater contamination and has been an  
19 industrial facility, heavy industrial, as it is stated.

20 And it has had an on-site waste management  
21 area, an area where they disposed of wastes several  
22 decades ago -- "they" being the predecessors of  
23 RockTenn, who is now the owner of the land.

24 **Q Do you know what operations took place on the**  
25 **site before the power plant was built?**

1           A     Yes.  It was actually a solid waste disposal  
2     facility.  There were lime mud pits near the site and  
3     there were -- it was a construction-demolition-debris  
4     disposal area at this particular site.  And I'm speaking  
5     of the site where the plant is.

6                     Adjacent to that was the operating mill that  
7     goes back to Seminole Craft.

8           **Q     Do you know if the solid waste disposal**  
9     **facility that you referenced accepted municipal solid**  
10    **waste or hazardous waste?**

11          A     No, they did not.  Prior to the construction  
12    of the Cedar Bay, the construction-demolition debris was  
13    removed.  The lime mud pits were removed back to the  
14    land belonging to Smurfit at that time, and they were  
15    closed out.

16          **Q     Okay.  So, I had asked you about municipal**  
17    **solid waste or hazardous and you said no to both, right?**

18          A     I'm not aware of any municipal solid waste,  
19    and none was listed in anything we've evaluated.

20          **Q     Did you all do a Phase 1 on this site?**

21          A     We sent our staff out.  I have subject-matter  
22    experts that work for me.  I mentioned there were  
23    engineers, geologists, hazardous-materials managers --  
24    and sent them out to the site to do a due-diligence  
25    investigation there.

1           We did not perform the classic Phase 1 ASTM  
2 standard review of this site. Typically, the way I  
3 approach these sites is if there is a Phase 1 done, it's  
4 done so because I can't afford to send my resources on a  
5 project because of time, or it's a small site where I  
6 might hire a consultant and have them go do the Phase 1  
7 in accordance with standards, that way I'm tracking how  
8 they are evaluating the site.

9           I have much greater faith in my staff. They  
10 have decades of experience. This is a major project to  
11 us. So, we sent our staff there. They performed their  
12 due diligence and followed the same protocols of the  
13 Phase 1 -- looking at the same criteria, performing  
14 interviews, reviewing the regulatory agency data,  
15 looking at groundwater contamination, monitoring  
16 results.

17           This site was put under a monitoring plan by  
18 DEP as part of the site certification. It's been there  
19 22 years. They are being monitored quarterly. There is  
20 a baseline that is established for this facility that is  
21 tied to the exist- -- to the levels of existing  
22 contamination that were at the site prior to the  
23 construction; not tied to the state's standards for the  
24 various elements that are there, but tied to that  
25 already contaminated baseline.

1           So, the groundwater data is looking at how has  
2 the facility affected the concentrations of contaminants  
3 at the site. And they're being measured against that.  
4 So, those are the -- those are the criteria that we've  
5 been looking at as we go to the site.

6           **Q     And you and I -- we didn't have a chance to**  
7 **talk during your deposition, correct?**

8           A     We did not.

9           **Q     So, I just want to -- I'm not sure I**  
10 **understand the answer to the question. Was a Phase 1**  
11 **done for this project? And I think you said no, but you**  
12 **sent your staff out there and they checked it out; is**  
13 **that right?**

14          A     Right, our -- that's correct, we did not do a  
15 Phase -- what I would consider an ASTM standard Phase 1,  
16 but we followed the same criteria. If we had determined  
17 there was a necessity for a Phase 1, we would bring  
18 someone in to get that type of analysis. But those are  
19 typically needed only when you're looking at financing  
20 that you might need or, in my case, if I don't have the  
21 resources to get it done.

22                 My staff is certainly more capable than the  
23 majority of consultants that one would hire for  
24 performing those kinds of analysis. So, I simply depend  
25 on their criteria, their review.

1           **Q     When you say the financing you might need, I**  
2           **think you're referencing a situation where maybe a bank**  
3           **or somebody would say, you know, I want to make sure**  
4           **this is a good site. Will you do a Phase 1. Is that**  
5           **what you mean by financing?**

6           A     Banks might want a third party to look at it.  
7           That was not necessary in this particular case. We're  
8           quite capable of doing that ourselves. We have a full-  
9           blown environmental services department that could  
10          provide that analysis.

11                     It saves some money for our folks to do it  
12          because I don't have to pay an off-site consultant, and  
13          I get superior quality.

14          **Q     If an outside consultant does it and gets it**  
15          **wrong, they potentially are responsible as well, right?**  
16          **I mean, there are some values to having outside people**  
17          **do it.**

18          A     I don't really see the value of having outside  
19          people do it when I have the people that can do it and,  
20          I think, do it better. I trust their opinions more so  
21          than most of the folks that I would hire.

22          **Q     Do you know what a recognized environmental**  
23          **condition is?**

24          A     Sure.

25          **Q     What is it?**



1           A       It's a condition that might show up in a  
2 Phase 1 or a Phase 2 as an outstanding issue that  
3 someone has identified as this is an environmental  
4 condition that we might be concerned with and would  
5 report on and it should have further evaluation or  
6 correction. Recognized environmental condition under a  
7 Phase 1 might warrant a Phase 2 or additional sampling.

8           **Q       And like the exceedances on arsenic or**  
9 **anything like that, does that classify as a recognized**  
10 **environmental condition?**

11          A       Well, certainly if you're buying property and  
12 you -- yes, if you're buying property and you find those  
13 constituents, they are of concern. But in this  
14 particular case, the facility is leasing the property.  
15 And we are indemnified from the liabilities associated  
16 with that existing contamination.

17                   We certainly wanted to know was it there in  
18 the concentrations that had been reported in previous  
19 Phase 1s. Mind you, there have been several Phase 1s.  
20 The latest was November of 2012. So, we've seen that  
21 data. And we would want to evaluate those environmental  
22 conditions and make sure that they are what we expected.

23          **Q       So, Exhibit 69 that I handed out to you -- and**  
24 **I -- this is an exhibit that was from a website from an**  
25 **environmental firm. I'll represent that to you. But it**

1     **says, you know, in the first sentence, and I quote,**  
2     **"Phase 2 environmental is site assessment reports are**  
3     **sometimes required when a recognized environmental**  
4     **condition is found during the Phase 1 environmental**  
5     **assessment process."**

6             And if I understand what you're testifying to  
7     is that there are some recognized environmental  
8     conditions on this site, correct?

9             A     There are recognized environmental conditions  
10    associated with the ownership of the -- the land that  
11    RockTenn has.  Recognized environmental conditions  
12    related to the Cedar Bay facility -- there really are  
13    none.  We have found that that site is in compliance.

14            They have controls in place to prevent  
15    contamination from getting off site.  They have a lined  
16    coal pile.  They have a lined contact stormwater pond.  
17    They have lined ditches that will convey the stormwater.

18            It's operated very well.  Environmental  
19    records show that any discharge they have had have been  
20    reported and cleaned up appropriately.  So, we found no  
21    environmental conditions that were of concern to us and  
22    found nothing that would suggest that we had to do a  
23    Phase 2 analysis.

24            **Q     Okay.  So, how many recognized environmental**  
25    **conditions did you discover?**

1           A     Actually recognized environmental conditions  
2     that I would highlight as a concern? We had none. We  
3     had areas that we recognized as areas that needed to be  
4     evaluated, areas that had the potential for discharges,  
5     but none that had poor management, poor housekeeping, or  
6     actually had discharges. That is nothing associated  
7     with the facility itself.

8                     And clearly, as you stated, there is  
9     groundwater contamination there, but this facility is  
10    not responsible for that historical contamination. And  
11    the data suggests they have added nothing to the  
12    contamination and, therefore, the facility is not  
13    responsible for any of it.

14           Q     Do you agree with the statement found on  
15    **Exhibit 69 -- this is further down, where it says**  
16    **Phase 2 environmental reports. It says AAI -- that's**  
17    **the company whose website this is from -- conducts**  
18    **Phase 2 reports at sites when there is known or**  
19    **significantly potential soil and/or groundwater**  
20    **contamination.**

21                     You do a Phase 2 if there are known or  
22    potentially significant soil or groundwater  
23    contamination issues; is that fair?

24           A     Mr. Moyle, this is basing this on the fact  
25    that you are -- you would, as one who is looking at a

1 facility, be taking on that contamination. In this  
2 particular case, we're not taking on the liability of  
3 that contamination.

4           Going forward and performing a full-blown  
5 Phase 2 analysis is basically unnecessary. We did not  
6 find the recognized environmental concerns you mentioned  
7 and certainly did not find any reason to believe that  
8 the site would be responsible for the existing  
9 contamination that was there.

10           Further, this site has several monitoring  
11 wells that have been, as I mentioned, in operation for  
12 over 22 years. And they have data going back through  
13 that entire time, unbroken stream of data that does not  
14 indicate any concern with the environmental  
15 contamination that is there.

16           **Q     You made a distinction in answering my**  
17 **questions to say -- these are my words, not yours -- but**  
18 **essentially, that hey, we're a lessee under this deal,**  
19 **we're not owning it; therefore, you don't think the**  
20 **liability attaches; is that fair?**

21           A     We're a lessee with a ground lease that  
22 provides a very robust indemnification. We would be in  
23 the future, yes -- would be that lessee.

24           **Q     Right. So, is it fair that part of your**  
25 **response to my questions is premised on the fact that**

1     **you're a lessee and not an owner?**

2           A     We are not an owner. We would be an owner of  
3     the property. We would be an owner of the Cedar Bay  
4     facility, the plant, but not of the property where the  
5     contamination is that's being monitored by the  
6     Department of Environmental Protection.

7           Q     **Okay. Assume that you were going to be the**  
8     **owner, and not, you know, a lessee, would you -- would**  
9     **you -- would that be different? Would you say we ought**  
10    **to do a Phase 1 or Phase 2, if we're going to be an**  
11    **owner as compared to a lessee?**

12           MS. MONCADA: Madam Chair, I object to this  
13    question. There is nothing in the record that  
14    suggests we would be the owner of the land on which  
15    the facility sits.

16           MR. MOYLE: I've asked the question of him,  
17    and I think his answer is that he believes that, as  
18    a lessee, there is less liability as compared to an  
19    owner and --

20           COMMISSIONER EDGAR: Mr. Moyle, rephrase your  
21    question. Repose it, please.

22           MR. MOYLE: Okay.

23           THE WITNESS: I'm sorry. Did you --

24    BY MR. MOYLE:

25           Q     **No, that's all right. I'm sorry. It's**

1 **getting kind of late in the day.**

2 But I'm just trying to ask you that -- are  
3 there different standards of liability in your  
4 understanding between an owner of a contaminated site  
5 and a lessee of a contaminated site?

6 A Whether an owner of a lessee --

7 **Q If you could, yes or no, and then explain if**  
8 **you need to. It might move us along.**

9 A It's not a yes or no. It's a could be.

10 My point, Mr. Moyle -- and I see where you're  
11 going with it. But my point is, owner or lessee, if you  
12 have a significant and defensible indemnification -- and  
13 this happens quite often. You might actually buy  
14 property that's contaminated and be indemnified for that  
15 contamination by the person you buy it from. So, you  
16 can enjoy that same protection whether you're the owner  
17 or lessee.

18 **Q Do you have that in this case?**

19 A We're not buying the property.

20 **Q As a lessee?**

21 A As a lessee -- as a lessee, I have that  
22 indemnification.

23 **Q To what level?**

24 A To the level that it states that we're  
25 indemnified for any contamination that occurs at the

1 site, even historically that was caused by RockTenn or  
2 RockTenn's predecessor.

3 **Q Is there a monetary amount associated with**  
4 **that to say, however it's capped at "X" -- or you're**  
5 **comfortable that the lease just says, hey, you're**  
6 **indemnified for any actions of somebody not being you.**

7 A There is no monetary amount stated in the  
8 ground lease. It's indemnification.

9 **Q Are you comfortable with that indemnification**  
10 **as providing adequate protection to FPL?**

11 A Very comfortable with that, particularly when  
12 you look at RockTenn, who is a very large company and  
13 capable of standing behind that. They are currently  
14 merging MeadWestvaco. Once that merger goes forward,  
15 they will be a \$16 billion company, the largest in the  
16 U.S. of their kind. That's a pretty good  
17 indemnification, in our view.

18 **Q Okay. There has been questions from staff --**  
19 **you've been in the room today, right?**

20 A I have, yes.

21 **Q You heard staff ask questions about an**  
22 **environmental liability policy?**

23 A The environmental liability --

24 **Q Do you have environmental liability policy?**

25 A We have --

1           **Q     So, are you --**

2           A     -- an environmental liability insurance policy  
3 that will be part of this deal, this sale, yes.

4           That's --

5           **Q     And how much is that for?**

6           A     It's for \$20 million.

7           **Q     And given your answer to my questions about**  
8 **indemnification and there is indemnification, and**  
9 **RockTenn is a big company with a lot of money, do you**  
10 **feel you have a further need for an insurance policy?**

11          A     Actually, the indemnification should be --  
12 yes. The answer is yes. But that would be for  
13 contamination that might occur as a result of plant  
14 activities. We feel very confident that we are covered  
15 under the indemnification for activities that have  
16 occurred associated with the mill in the past.

17          **Q     Okay. You're not offering any opinion today**  
18 **with respect to whether a lessee has liability under --**  
19 **under the Comprehensive Environmental Response**  
20 **Compensation and Liability Act, are you?**

21          A     No, I'm not because this particular site is  
22 not a CERCLA site. It is very unlikely that it would be  
23 a CERCLA site given the conditions that are there. And  
24 it would be even less likely that Cedar Bay would be  
25 pulled into the liability associated with the



1 potentially responsible party in the event that EPA were  
2 to come in and manage this clean-up.

3 **Q You're aware that --**

4 COMMISSIONER EDGAR: Mr. Moyle, I'm going to  
5 ask you to pause in place for a moment, please.

6 (Brief pause.)

7 COMMISSIONER EDGAR: Thank you. Please  
8 proceed.

9 BY MR. MOYLE:

10 **Q OPC Witness Wittliff suggested that existing**  
11 **contamination at the Cedar Bay facility represents a**  
12 **risk of liability to FPL due to potential CERCLA**  
13 **liability. You're aware of that, right?**

14 A I am.

15 **Q And you take a different view on that issue,**  
16 **right?**

17 A Absolutely.

18 **Q With respect -- part of your response is to**  
19 **say it's not listed as a CERCLA facility as we sit here**  
20 **today, correct?**

21 A That's correct, but there are other criteria  
22 involved in that, but it's certainly not listed today.

23 **Q Right. And just with respect -- I mean, there**  
24 **is no statute of limitations of listing a facility or**  
25 **not under CERCLA, is there? There is nothing to say in**

1     **the future that somebody looking at it might, you know,**  
2     **do something different?**

3           A     No, there is not.  Certainly the CERCLA law is  
4     actually the Superfund law, which is intended to be able  
5     to come back to prior responsible parties and seek  
6     recovery for the cost of clean-up.  So, they certainly  
7     could come back if they wanted to.

8           But again, if EPA determined this had to be a  
9     Superfund site, which is unlikely given its criteria --  
10    but they would be coming after those who have caused  
11    that contamination.  And we feel very confident that  
12    Cedar Bay facility would not be caught up in that PRP,  
13    primary responsible party, evaluation.

14           **Q     Do you know if there is a strict liability**  
15    **associated with CERCLA?**

16           A     There is strict liability associated with  
17    CERCLA.  But under that case, you -- strict liability  
18    when EPA is applying that, they are looking for someone  
19    who has caused contamination or spread the contamination  
20    that is there.  Or in the case of lessees, they might  
21    actually bring in a lessee that is preventing the  
22    clean-up of contamination in the event that some clean-  
23    up activity were being managed by EPA.

24           **Q     So --**

25           A     But none of those criteria apply to Cedar Bay

1 facility.

2 **Q Okay. So, but lessees can be brought in**  
3 **under --**

4 A I'm sorry. Say again?

5 **Q Lessees can be brought in under CERCLA?**

6 A Lessees can be brought in under -- excuse me,  
7 Mr. Moyle -- (brief pause). Lessees can be brought in,  
8 as I mention, if they cause some of the contamination,  
9 add to the contamination that is there, and it has to go  
10 on to be a CERCLA site, or they impede the clean-up of  
11 the site. But it's very unlikely in this case.

12 **Q And who lists the site? Is that an EPA**  
13 **decision?**

14 A Who would?

15 **Q So, who would --**

16 A Yeah --

17 (Simultaneous speakers.)

18 A It's not what?

19 **Q It's not delegated to the state; it's an EPA**  
20 **decision?**

21 A Typically, no, the state -- I mean, the state  
22 currently has this site listed as one of their clean-up  
23 sites, one of the contaminated sites. And typically, if  
24 it were going to go CERCLA, EPA was would get involved  
25 and manage that clean-up.

1           Q     You're also aware that the witness for OPC  
2     suggested there be additional environmental liability  
3     insurance to address unknown live environmental issues,  
4     correct?

5           A     I am aware of that. We saw no particular  
6     reason to do that in this case.

7           Q     You said that there -- there is no good reason  
8     to do that?

9           A     We -- we didn't find that there was any  
10    contamination that we felt would exceed the cost of the  
11    clean-up that we projected might occur there.

12                    Certainly, additional environmental insurance  
13    gives you more protection, but it comes at a cost.

14           Q     No, I understand. But I guess on your  
15    testimony, this -- I got this on Page 9, it asked  
16    whether you think additional environmental liability  
17    insurance to address unknown environmentally --  
18    environmental liabilities is a prudent approach. And  
19    you say, no, right?

20           A     I say no.

21           Q     You take issue with Mr. Pollock, that's  
22    FIPUG's witness, where he said that Cedar Bay is not a  
23    significant source of carbon dioxide emissions. You  
24    think it is?

25           A     Yes, I take issue with Mr. Pollock's

1 testimony. Specifically, I think he missed the point  
2 and he was looking at total mass tons associated with  
3 the facility.

4 Our concern today is, under the clean power  
5 plan that EPA has proposed, this rule is a rate-based  
6 rule. And the rate of emissions for CO2 at this  
7 facility are, you know, very high. They are 2.8 times  
8 higher than the rate that EPA is asking the State of  
9 Florida to get to in 2030. So, that's rather  
10 significant.

11 **Q That rule that you mentioned is still a work**  
12 **in progress, is it not?**

13 A The rule will be out soon; August or  
14 September, we are told.

15 **Q Yeah. So, when you reference the rule, you**  
16 **don't know exactly what it's going to look like, do you?**

17 A It's a proposed rule. I think -- I do not  
18 know exactly what it looks like. In fact, I believe  
19 that this rule will have significant changes from what  
20 was proposed.

21 However, in discussions with EPA, they are not  
22 looking at changing their 2030 target rates. And the  
23 one thing that we need to be looking at as one who has  
24 CO2 emissions -- as Cedar Bay facility will have to  
25 evaluate -- there will be a rule.

1 Courts have determined that EPA has the  
2 authority to develop the rule. There is going to be a  
3 rule. Likely, will be litigated, but it -- and parts of  
4 it may be changed, but ultimately, we believe there will  
5 be a rule and there will be risk to fossil-fired  
6 generation.

7 **Q Do you -- who is your direct report at FPL?**

8 A The vice president of environmental services.

9 **Q Who is that?**

10 A Randy LaBauve.

11 MR. MOYLE: Okay. That's all I have. Thank  
12 you.

13 COMMISSIONER EDGAR: Staff?

14 MR. VILLAFRATE: Yes, staff does have  
15 questions. And staff is going to pass out a couple  
16 of exhibits that have already been filed. They are  
17 not confidential, for the record.

18 They -- one is part of Staff Exhibit 29. This  
19 is the one that is Bates Stamped Page 25. It is  
20 FPL's response to staff's first set of  
21 interrogatories, No. 18; the second one being part  
22 of Staff Exhibit No. 41. This is the one Bates  
23 Stamped Page 416, which is part of FPL's response  
24 to OPC's third set of interrogatories, No. 18 as  
25 well.

1                   And Mr. Butts, if you want to take a minute to  
2                   familiarize yourself with these documents, I'm  
3                   happy to give you that time.

4                   COMMISSIONER EDGAR: So, Mr. Villafrate, we  
5                   should each have two documents that staff has  
6                   distributed for you?

7                   MR. VILLAFRATE: Yes.

8                   COMMISSIONER EDGAR: Okay.

9                   THE WITNESS: Very well.

10                  MR. VILLAFRATE: Thank you.

11   EXAMINATION

12 BY MR. VILLAFRATE:

13                  **Q       Is it correct that under the existing power**  
14 **purchase agreement, emissions costs are not passed**  
15 **through to FPL or its customers?**

16                  A       That's my understanding.

17                  **Q       In FPL's response to Staff Interrogatory**  
18 **No. 18 -- that's the one that's Exhibit 41, Bates**  
19 **Stamped 416 at the bottom.**

20                  A       Uh-huh.

21                  **Q       The last sentence states that, "The likely**  
22 **impact of the clean power plan would be increased**  
23 **profits for Cedar Bay's owner and effective increase in**  
24 **cost per unit of energy produced for FPL's customers."**  
25 **Do you believe that statement to be correct?**

1           A       I believe that what would happen is if Cedar  
2 Bay continues to operate, they will certainly have a  
3 capacity payment that would continue to go forward and  
4 our customers would have to pay for that. Obviously,  
5 that adds overall to the cost of generation for that  
6 facility.

7           **Q       Does this likely impact of effective increase**  
8 **in cost per unit of energy assume a reduction in energy**  
9 **purchased by FPL from Cedar Bay?**

10          A       We believe that the same amount of energy  
11 would need to be provided, despite whether the plant  
12 stops generating, but our assessment is that that will  
13 come from more efficient, cleaner combined cycle gas  
14 units that have significantly less emissions and would  
15 cost less because they have less potential risk with  
16 regard to CO2.

17          **Q       Okay. I'm going to ask you a hypothetical. I**  
18 **hope I'm not going too far down the road here.**

19                 But let's assume that Florida implements a  
20 clean power plan with targeted CO2 reductions for coal  
21 generators prior to 2025, which increases costs relating  
22 to all emissions for all fossil-fuel generating units.

23                 Under this scenario, FPL's cost under the  
24 power purchase agreement for dispatching Cedar Bay would  
25 not be affected by the increased costs relating to



1 emissions, correct?

2 A That's correct because the site would pay for  
3 their emissions.

4 Q Okay. So, same assumptions, then, as the last  
5 question. Wouldn't Cedar Bay, therefore, become more  
6 economically viable and a better deal for FPL's  
7 customers than it is today since FPL's other generating  
8 units would incur increased emission costs, but Cedar  
9 Bay's costs under the power purchase agreement would  
10 remain unaffected?

11 A You're getting into an area that I'm not  
12 certain I'm ready -- I'm prepared to answer.

13 MR. VILLAFRATE: Okay. Thank you.

14 Staff has no further questions, then.

15 COMMISSIONER EDGAR: Thank you.

16 Commissioners, no questions?

17 Redirect.

18 MS. MONCADA: No redirect, Commissioners.

19 COMMISSIONER EDGAR: Thank you.

20 And Mr. Butts did not have any exhibits with  
21 his with his prefiled testimony; is that correct?

22 MS. MONCADA: Correct.

23 COMMISSIONER EDGAR: Okay. Then, Mr. Moyle,  
24 that brings us to you.

25 MR. MOYLE: Move in Exhibit 69.

1           COMMISSIONER EDGAR: Any objections to the  
2 exhibit marked as 69? Seeing none, show it  
3 entered.

4           (Exhibit No. 69 admitted into the record.)

5           COMMISSIONER EDGAR: Would you like to excuse  
6 your witness?

7           MS. MONCADA: Yes, please.

8           COMMISSIONER EDGAR: Okay. Thank you very  
9 much. You are excused.

10          FPL.

11          MS. MONCADA: FPL has no more witnesses.

12          COMMISSIONER EDGAR: Okay. My understanding  
13 is that there was some agreement between the  
14 parties to move in the testimony and exhibits for  
15 the next witness, Patterson; is that correct?

16          MR. BUTLER: That's correct, yes.

17          COMMISSIONER EDGAR: Is there any objection?  
18 All right. Seeing none, then the prefiled  
19 testimony of FPL Witness Patterson will be entered  
20 into the record as though read.

21

22

23

24

25

1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                                   **FLORIDA POWER & LIGHT COMPANY**

3                                   **REBUTTAL TESTIMONY OF TRACY LEE PATTERSON**

4                                   **DOCKET NO. 150075 -EI**

5                                   **JUNE 17, 2015**

6

7   **Q.     Please state your name and business address.**

8   A.     My name is Tracy Lee Patterson II, and my business address is 9640 Eastport  
9           Road, Jacksonville, Florida 32218.

10 **Q.    By whom are you employed and what is your position?**

11 A.     I am employed by Cogentrix Energy Power Management, LLC (“Cogentrix”)  
12           as Vice President of Operations. I have held this position since January 2015.  
13           Cogentrix is a privately-owned company that develops, manages and operates  
14           independent power plants in the United States. The company’s current project  
15           portfolio has a generating capacity of approximately 4.6 GW from eighteen  
16           coal, gas-fired and solar facilities. The plant, owned by Cedar Bay Generating  
17           Company, Limited Partnership (“Cedar Bay”) in Jacksonville, Florida (the  
18           “Cedar Bay Facility”), is one of the coal-fired facilities that Cogentrix manages  
19           and operates as part of its portfolio.

20 **Q.    What are your present job responsibilities?**

21 A.     My primary responsibility is to provide oversight and direction to the General  
22           Managers at the Cedar Bay Facility and the Effingham County Power Facility  
23           located near Savannah, Georgia for all matters related to operations and

1 maintenance (“O&M”) of their plants and associated matters such as human  
2 resources, employee health and safety, environmental compliance, and  
3 performance and budgetary matters.

4 **Q. What, if any, positions did you hold with Cogentrix before your current**  
5 **position as Vice President of Operations?**

6 A. I have worked for Cogentrix for 25 years. Most recently, from 2006 until  
7 April 27, 2015, I held the position of General Manager of the Cedar Bay  
8 Facility. From January 2015 to April 2015, I was both General Manager of the  
9 Cedar Bay Facility and Vice President of Operations for Cogentrix.

10 **Q. Please summarize your duties and responsibilities in your position as**  
11 **General Manager of the Cedar Bay Facility?**

12 A. I had primary responsibility for the day-to-day O&M of the Cedar Bay  
13 Facility. My O&M duties and responsibilities encompassed all areas of the  
14 Cedar Bay Facility’s operations and personnel matters, including health and  
15 safety, environmental compliance, contractual compliance relating to  
16 production and reporting requirements of various contracts to which Cedar Bay  
17 is a party, budgeting and variance tracking, as well as long-term planning for  
18 maintenance and operation of the Cedar Bay Facility. Among other things, I  
19 was the principal author of each annual Business Plan prepared for the Cedar  
20 Bay Facility during my time as General Manager.

21 **Q. Please summarize your educational background and professional**  
22 **experience.**

1 A. I attended Middle Tennessee State University in Murfreesboro, Tennessee  
2 from 1970 to 1972. In 1972 I enlisted in the United States Air Force and served  
3 approximately eight years in the intelligence gathering group working under  
4 direction of the National Security Agency. After discharge from the Air Force,  
5 I was in the Nuclear Generation Training Program with the Tennessee Valley  
6 Authority (“TVA”) for the Nuclear Generation Plant Instrumentation and  
7 Controls group. TVA reduced the program and its plans for expanding nuclear  
8 generation in the TVA system after the incident at Three Mile Island. From  
9 TVA, I went to work for an electric cooperative in northwest Colorado at a  
10 generating facility in Craig, Colorado and developed the training program for  
11 Instrument, Controls and Electrical Maintenance group personnel. In 1990, I  
12 began employment with Cogentrix in the instrument and controls team at  
13 several facilities that were then being constructed. I moved into the  
14 Environmental Compliance team in 1995, specializing in air quality  
15 compliance, and I continued with the Environmental Health and Safety team  
16 until 2006 when I took the position of General Manager at the Cedar Bay  
17 Facility in Jacksonville, Florida.

18 **Q. What is the purpose of your testimony in this proceeding?**

19 A. I am testifying on behalf of Florida Power & Light Company (“FPL”), the  
20 petitioner in this case. My testimony addresses and rebuts a number of  
21 statements and assertions made by Mr. Gary D. Brunault and Mr. Christopher  
22 C. Dawson, witnesses on behalf of the Office of Public Counsel, and also one

1 issue raised by Mr. Gary Wittliff, who is also a witness on behalf of the Office  
2 of Public Counsel.

3 **Q. Are you sponsoring any exhibits in this proceeding?**

4 A. Yes. I am sponsoring the following exhibits:

5 Exhibit TLP-1 Cedar Bay: Chronology of Plant Engineering  
6 Improvements (CONFIDENTIAL)

7 Exhibit TLP-2 Performance Statistics for Cedar Bay Generating  
8 Facility (CONFIDENTIAL)

9 Exhibit TLP-3 The Ground Lease Between Cedar Bay Generating  
10 Company and RockTenn (CONFIDENTIAL)

11 **Q. Please summarize the main points of your rebuttal testimony.**

12 A. In their testimonies, Mr. Gary Brunault and Mr. Christopher Dawson made a  
13 number of statements and assertions that attempt to cast doubt on the ability of  
14 the Cedar Bay Facility to meet the operating requirements necessary to earn  
15 the level of the Bonus Capacity Payments under the Power Purchase  
16 Agreement between Cedar Bay and FPL (“PPA”) that were assumed by FPL’s  
17 witnesses David Herr and Tom Hartman. Mr. Brunault bases his assumption  
18 of Bonus Capacity Payments of 2.59% on the average Bonus Capacity  
19 Payments over the past eight years and on misinterpretations or  
20 misunderstandings of the 2014 Business Plan for the Cedar Bay Facility,  
21 asserting that “Nothing stands out to demonstrate that extraordinary efforts are  
22 being undertaken to overcome the effects of aging on the plant’s ability to earn  
23 bonus payments.” (Brunault Testimony p. 7). His assertion plainly ignores the  
24 numerous operating and commercial improvements that Cogentrix has made  
25 over time, including many significant improvements that were made within the

1 past five years, to ensure that the Cedar Bay Facility will operate with very  
2 high reliability throughout the remainder of the PPA term. My testimony  
3 explains that, if anything, Mr. Herr's and Mr. Hartman's assumption of Bonus  
4 Capacity Payments of 5.0% is probably low, based on the current operating  
5 conditions compared to the average of the past eight years and improvements  
6 that Cogentrix continues to implement, as evidenced by the fact that the Cedar  
7 Bay Facility has earned Bonus Capacity Payments greater than 5.0% in each of  
8 the past three years.

9  
10 Mr. Dan J. Wittliff and Mr. Christopher C. Dawson, on behalf of the Office of  
11 Public Counsel, rely on one or more supposedly "missing" pages related to  
12 environmental issues in the Cedar Bay Facility ground lease to contend that  
13 FPL "did not thoroughly inspect the ground lease document" and has  
14 accordingly failed to properly evaluate potential environmental liabilities that  
15 would be assumed by FPL. The ground lease document in question is between  
16 Cedar Bay and RockTenn CP, LLC ("RockTenn"), and includes a set of  
17 appendices attached thereto (collectively, the "Ground Lease"). RockTenn, as  
18 the successor to Seminole Kraft Corporation, owns the site on which the Cedar  
19 Bay Facility is located and leases it to Cedar Bay. As I explain in more detail  
20 below, the Office of Public Counsel's witnesses incorrectly assumed that an  
21 appendix should appear even though the terms of the Ground Lease do not call  
22 for it, and erroneously conclude that there are unknown and potentially costly  
23 environmental liabilities that would be assumed by FPL. In fact, there are no

1 missing pages or a missing appendix, but rather two divider pages on which no  
2 content was ever intended to appear. Accordingly, Mr. Wittliff's and Mr.  
3 Dawson's testimony on this subject is incorrect, and would mislead the Florida  
4 Public Service Commission to believe there is unquantifiable risk to the value  
5 proposition of the transaction.

6 **Q. What testimony and other documents have you reviewed in preparing**  
7 **your rebuttal testimony?**

8 A. Among others, I have reviewed the testimony and relevant exhibits of the  
9 testimonies of Mr. Brunault, Mr. Wittliff, and Mr. Dawson, as well as the PPA  
10 and relevant portions of the Ground Lease. I have also reviewed the testimony  
11 of Mr. David Herr and Mr. Tom Hartman, on behalf of FPL.

12 **Q. At pages 5 through 9 of his testimony, Mr. Brunault discusses his assertion**  
13 **that "the Bonus Capacity Revenue of 5% is too high." Is this assertion**  
14 **accurate?**

15 A. No. Mr. Brunault's assertion is incorrect and it fails to recognize the numerous  
16 actions that Cogentrix has taken and continues to take to ensure that the Cedar  
17 Bay Facility will continue to operate with very high reliability, such that it is  
18 confidently expected to continue to earn Bonus Capacity Payments (Revenues)  
19 of 5.0%, if not greater, for the remainder of the PPA term, which expires in  
20 January 2025. Mr. Brunault's reliance on the average bonus payments over the  
21 eight year period from 2007 through 2014 is inappropriate, and his assertion  
22 that nothing has changed at the Cedar Bay Facility to produce higher  
23 operational reliability is incorrect. His assertion that a 2.59% Bonus Capacity



1 Revenue assumption is more realistic than Mr. Herr's 5.0% assumption is  
2 therefore inappropriate, based on a failure to recognize the sustainable  
3 operational improvements and ongoing maintenance practices incorporated and  
4 put into effect over the period from 2006 to 2013 that will ensure that the  
5 Cedar Bay Facility operates with high reliability, in line with its successful  
6 operations and correspondingly high Bonus Capacity Payment rates realized  
7 from 2012 through 2014.

8 **Q. Please summarize the measures that Cogentrix has implemented to ensure**  
9 **that the Cedar Bay Facility operates with high reliability.**

10 A. Please refer to the graphic in my Exhibit TLP-1. This exhibit demonstrates  
11 how the maintenance projects implemented from 2006-2014 had a significant  
12 and sustainable impact on the Cedar Bay Facility's availability, reliability and  
13 performance. Those projects are listed below and described in further detail  
14 later on in this testimony:

- 15 1. Superheater tube leading-edge protection
- 16 2. Change to the waterwall tube coating program
- 17 3. Replacement of the grid floor nozzles

18 **Q. Please describe how these activities and measures will impact the Cedar**  
19 **Bay Facility's ability to operate with high reliability into the future,**  
20 **specifically through the end of the PPA term, January 31, 2025.**

21 A. The three major projects listed above have had the greatest impact on  
22 improving the Cedar Bay Facility's availability, reliability and performance  
23 and reducing its EFOR. (Equivalent Forced Outage Rate, or "EFOR", is a

1 widely-used and reliable industry measure of the amount of time that a  
2 generating unit is not available for service due to unplanned, or “forced,”  
3 outages.). The leading cause of the Cedar Bay Facility’s higher EFOR in 2006  
4 - 2008 were tube leaks in the waterwalls of the combustor (or boiler) and tube  
5 leaks from the superheater tubes located in the combustor. The tube leaks have  
6 been virtually eliminated due to these three major projects.

7

8 The cause of the superheater tube leaks was erosion on the leading edge of the  
9 tubes, exposing them to the particle laden high pressure gas stream. Cogentrix  
10 began to replace the metal tube shields with a more durable refractory material  
11 starting in the fall of 2006; this program was fully implemented in the spring of  
12 2008. The superheater tube shields were installed using a high resistance, low-  
13 loss refractory and have had zero failures since the project was completed.  
14 They are inspected during each outage along with the other combustor  
15 internals. If any of the refractory shields show indications of erosion they can  
16 be easily replaced with a new section of refractory installed. This project is  
17 effective, sustainable and will provide the same performance through the end  
18 of the PPA in 2025.

19

20 The second significant project was a change to the waterwall tube coatings.  
21 Prior to this change, the Cedar Bay Facility program consisted of applying a  
22 metal coating with a high-chromium content to the tubes. The high-chromium  
23 material was very hard, which one would expect to perform better against

1 erosion. The drawback to that material was that it could not be applied in a  
2 thickness more than 17 mils, which left most of the underlying surface  
3 deformity exposed for eddy effects from the circulating material in the  
4 combustor. Cedar Bay Facility staff experimented with an application of a  
5 high-nickel content metal application that was softer and as such could be  
6 applied to a greater thickness of 75 mils or more. This allowed the tube face to  
7 be left much smoother and prevented the eddy effects of the circulating  
8 material. This project was started with a test area in the fall of 2007 and was  
9 substantially implemented in all three combustors by 2009. The improved  
10 boiler waterwall tube coating program is now managed by performing a  
11 complete thickness mapping of all coated areas in each boiler allowing the  
12 Cedar Bay Facility staff to determine any areas that need additional coating to  
13 maintain the coating thickness. It is no longer necessary to completely strip and  
14 recoat entire sections. The coating program has proven effective, sustainable  
15 and will provide the same performance through the end of the PPA in 2025.

16

17 The third significant project was to replace the grid floor fluidizing nozzles,  
18 which began in 2009. The fluidizing nozzles are the key components in the  
19 lower combustor needed to properly fluidize the circulation material in the  
20 combustor. Improper fluidization of the material can, and usually does, lead to  
21 several problems. Build-up of material caused by improper fluidization will  
22 result in air flow channeling to thinner areas, thereby increasing temperature in  
23 those areas as well as the potential for erosion. High temperature areas in the

1 combustor bed result in higher emissions of nitrogen oxides and sulfur dioxide.  
2 The grid nozzles that were installed beginning in 2009 were a significantly  
3 improved design, allowing simpler and faster replacement when needed and  
4 were spaced farther apart to prevent build-up of circulating material on  
5 adjacent nozzles. This project was completed in 2011. The grid floor is  
6 inspected during each maintenance outage and any grid nozzles that show  
7 signs of erosion are easily replaced. The new nozzle design is effective,  
8 sustainable and will provide the same performance through the end of the PPA  
9 in 2025.

10 **Q. Please explain any other factors that will impact the Cedar Bay Facility's**  
11 **ability to operate with high reliability into the future, specifically through**  
12 **the end of the PPA term, January 31, 2025.**

13 A. There have been several other operational projects that have contributed to the  
14 improved performance of the Cedar Bay Facility. One such other project was  
15 the installation of a new limestone processing system that (1) provided better  
16 particle size control of the material produced and used in the combustor for  
17 sulfur control, and (2) was capable of producing all of the limestone needs for  
18 the 3 combustors requiring only half of the diesel fuel for the drying. This  
19 project was started in 2007 and fully completed in 2008. This limestone  
20 processing system is effective, sustainable and will provide the same  
21 performance through the end of the PPA in 2025.

22

1 Another project remediated several tube failures in the convection pass or the  
2 backpass of each boiler that the Cedar Bay Facility experienced in 2012. The  
3 failures were determined to be the result of several factors, most notably from  
4 the many boiler cycles in the late 1990s and mid-2000s due to boiler EFOR  
5 events with other tube failures. The failures were of a mechanical nature where  
6 the tube itself was cooled by steam flow and the membrane material between  
7 the tubes, which is not cooled, would expand and contract at different rates due  
8 to the cooling effect of the steam flow in the tubes. Cedar Bay Facility staff  
9 implemented changes to the startup and shutdown rates to allow a slower  
10 temperature ramp rate and thereby to reduce the effects of the expansion and  
11 contraction. This has reduced refractory cracking thereby minimizing the cost  
12 of refractory repairs and minimizing EFOR due to tube failures caused by  
13 refractory failure. The slower ramp rates coupled with fewer boiler EFOR  
14 events as a result of other improvements will provide effective and sustainable  
15 management of any tube failures through the end of the PPA in 2025.

16

17 The Cedar Bay Facility staff has also implemented a process to thermally scan  
18 the boilers. Abnormal temperature readings that are identified by this thermal  
19 scanning helps to identify refractory failures. This allows them to be repaired  
20 during scheduled outages rather than causing an EFOR event. Again, this  
21 program will provide effective and sustainable management of any refractory  
22 failures through the end of the PPA in 2025.

23

1           An additional major factor impacting the Cedar Bay Facility’s ability to  
2           operate with high reliability now and into the future, and thereby allowing for  
3           higher Bonus Capacity Payments, is the 2013 amendment to the steam sales  
4           agreement with RockTenn (the “Steam Agreement”). In addition to being the  
5           Lessor under the Ground Lease, RockTenn is the steam host (or “off-taker”)  
6           pursuant to the Steam Agreement. In the spring of 2013, the Steam Agreement  
7           was extended to January 2025 (coterminous with the PPA) and the payment  
8           structure for steam was amended as part of the renegotiation. RockTenn’s  
9           fixed payments under the Steam Agreement were eliminated, while the  
10          variable payments for steam were increased to incentivize RockTenn to  
11          produce steam with its own gas-fired boilers when it is economic for them to  
12          do so, while still taking enough steam from the Cedar Bay Facility to ensure  
13          the Cedar Bay Facility will maintain its Qualifying Facility status. The  
14          amendment in payment structure changed RockTenn’s steam take behavior  
15          significantly, resulting in a 49% reduction in steam take from the Cedar Bay  
16          Facility from 2012 to 2014. The reduced steam take has played a large role in  
17          the recent increase in Bonus Capacity Payments by (a) reducing the operational  
18          burden on the Cedar Bay Facility associated with steam off-take, thereby  
19          increasing reliability, and (b) allowing the Cedar Bay Facility to increase  
20          electrical output during on-peak hours, which is a component of the calculation  
21          for Billing Capacity Factor (“BCF”) that drives Bonus Capacity Payments.

22       **Q.    When did the Cedar Bay Facility fully realize the combined effects of**  
23       **these factors improving its performance?**

1 A. The Cedar Bay Facility only realized the full effect of the combination of these  
2 operational and commercial improvements in 2013.

3 **Q. Please explain the relationship between the Equivalent Forced Outage**  
4 **Rate (EFOR) statistic mentioned by Mr. Brunault and the Billing**  
5 **Capacity Factor upon which the Cedar Bay Facility's Bonus Capacity**  
6 **Payments are based.**

7 A. Please refer to my Exhibit TLP-2. This exhibit shows that as EFOR decreases,  
8 availability and performance under the PPA improves. However, the Cedar  
9 Bay Facility's ability to earn Bonus Capacity Payments depends on its  
10 Capacity Factor (a defined term in the PPA), which we commonly refer to as  
11 the Billing Capacity Factor (or BCF). The relationship between the EFOR and  
12 the BCF is not linear. Billing Capacity Factor takes into account other factors  
13 such as plant dispatch and electrical output.

14 **Q. How, if at all, does Mr. Brunault's citation in his testimony to "an**  
15 **objective" of a 3.5% Equivalent Forced Outage Rate in the 2014 Business**  
16 **Plan relate to whether the Cedar Bay Facility will be able to earn Bonus**  
17 **Capacity Revenues?**

18 A. In the 2014 Business Plan, the 3.5% EFOR is a target for budgetary purposes  
19 and represents what the impact would be on a monthly basis if the Cedar Bay  
20 Facility were to experience a boiler forced outage event once per month. It is  
21 intentionally conservative for budget preparation purposes, to allow Cedar Bay  
22 to prepare for startup costs, fuel needs and related impacts from a boiler  
23 outage. Cedar Bay's expectation was to outperform the 3.5% EFOR, and

1 Cedar Bay did in fact outperform the 3.5% EFOR in 2014, limiting EFOR to  
2 2.0%.

3  
4 The Cedar Bay Facility's ability to earn Bonus Capacity Payments depends on  
5 achieving a high BCF. While a lower EFOR is generally associated with a  
6 higher BCF, as explained above, the relationship is not linear. For example, in  
7 2013, the Cedar Bay Facility had an EFOR of 1.0% but the BCF was 101.8%,  
8 not 99.0%, which is what it would be if the BCF was calculated by simply  
9 subtracting the EFOR from 100.0%. Similarly, in 2014, the Cedar Bay Facility  
10 had an EFOR of 2.0% but a BCF of 101.1%, not 98.0%. Cogentrix manages,  
11 operates, and maintains the Cedar Bay Facility in accordance with its  
12 obligations to FPL under the PPA and also in response to the economic  
13 incentives to maximize the BCF under the PPA. The measures that Cogentrix  
14 has implemented are sustainable and will ensure that the Cedar Bay Facility  
15 will continue to achieve very high reliability and correspondingly high BCFs.

16 **Q. Do you believe that Mr. Brunault's use of an 8-year period to calculate an**  
17 **average expected Bonus Capacity Payment or Revenue rate is reasonable**  
18 **or appropriate?**

19 A. No. This 8-year period fails to recognize the fact that Cogentrix has  
20 implemented significant operational and commercial improvements since the  
21 start of this 8-year period which began to show improved performance under  
22 the PPA beginning in 2009 and more fully demonstrated in 2013-2014.



1 **Q. What, in your view, would be a more representative time period to**  
2 **examine in order to get the best estimate of what the Cedar Bay Facility's**  
3 **Bonus Capacity Payments would be on a going-forward basis?**

4 A. The years 2013 and 2014 would be more representative of my expectations  
5 going forward, because this more recent period accurately reflects the  
6 cumulative impact of the improvements that Cogentrix has put in place since  
7 2006 to maximize Bonus Capacity Payments. I would include only the past  
8 two years because of the significant impact that the pricing structure of the  
9 amended Steam Agreement (executed in the spring of 2013) had on the Cedar  
10 Bay Facility's availability and output. It is readily apparent from Mr.  
11 Brunault's own Exhibit GB-1 that the Cedar Bay Facility has operated with  
12 Bonus Capacity Payment rates greater than 5.0% in each of the past two years.  
13 These results demonstrate the cumulative effects of the improvements that  
14 Cogentrix has implemented over time.

15 **Q. In your opinion, what is the best estimate of the Cedar Bay Facility's**  
16 **Bonus Capacity Payment rate from now through January 2025?**

17 A. The best estimate would be 6-7%, which is in line with Bonus Capacity  
18 Payments achieved in 2013 (7.7%) and 2014 (6.0%). Please refer to Exhibit  
19 TLP-1. 2013 and 2014 are the most representative years for benchmarking  
20 purposes, because those years reflect the full impact of the technical and  
21 operational improvements that Cogentrix has achieved at the Cedar Bay  
22 Facility over the period from 2006 to the present.

23 **Q. Why do you believe that this is the best estimate?**

1 A. I expect the Cedar Bay Facility's Bonus Capacity Payment rate to be between  
2 6% and 7% because of the sustainable nature of the technical and operational  
3 improvements discussed earlier in this testimony. Cedar Bay staff is highly  
4 capable of continuing these programs to enable proactive management of  
5 potential issues in the combustor rather than reacting to continued failures. If  
6 FPL were not to purchase the Cedar Bay Facility, Cogentrix would continue  
7 with its preventive maintenance and operating philosophy, as successfully  
8 implemented over the past several years with proven results. The Cedar Bay  
9 Facility's history of preventive maintenance and low EFORs over the past four  
10 years strongly reinforces its ability to achieve sustained strong performance  
11 throughout the remaining term of the PPA.

12 **Q. Mr. Wittliff and Mr. Dawson, testifying for the Office of Public Counsel,**  
13 **have asserted that there are potentially significant unidentified**  
14 **environmental liability risks that FPL failed to account for in its**  
15 **evaluation of the transaction. Is this assertion justified?**

16 A. No. Mr. Wittliff and Mr. Dawson reviewed the appendices to the Ground  
17 Lease, and specifically those pertaining to environmental matters, and  
18 concluded that the absence of an Appendix 20.1(ii) means that such Appendix  
19 was missing and therefore the full scope of environmental liability under the  
20 Ground Lease could not be properly evaluated for purposes of the transaction  
21 that is the subject of this Docket.

22

1 Article XX, Section 20.1, of the Ground Lease calls for two Appendices, both  
2 of which are present: Appendix 20.1(i) and Appendix 20.1(iii). Both  
3 correspond to representations and warranties as to certain environmental  
4 matters set forth in Section 20.1 except as carved out by the excepted items  
5 listed on the appendices. The Ground Lease (including all appendices and an  
6 amendment thereto dated November 2009) is attached in full as Exhibit TLP-  
7 3. Section 20.1(ii) does not call for a representation/warranty to be qualified  
8 by items excluded on an appendix, and thus there is no corresponding  
9 Appendix 20.1(ii). The two blank pages that appear between Appendix 20.1(i)  
10 and Appendix 20.1(iii) reflect both sides of a divider sheet that was inserted  
11 between the two appendices, and which were captured when the document was  
12 scanned electronically from its hard copy form. A similar divider sheet  
13 appears after each appendix to the Ground Lease. I have received and  
14 reviewed an electronic copy of RockTenn's copy of the Ground Lease  
15 (including the appendices) and that copy likewise contains no Appendix  
16 20.1(ii) and otherwise mirrors Cedar Bay's copy. In summary, there is no  
17 Appendix 20.1(ii), and accordingly, the assertions of the Office of Public  
18 Counsel witnesses are misplaced

19 **Q. Does that conclude your rebuttal testimony?**

20 A. Yes, it does.

1 COMMISSIONER EDGAR: Are there exhibits?

2 MR. BUTLER: There are.

3 COMMISSIONER EDGAR: I thought there might be.

4 MR. BUTLER: There are, yes. We have  
5 Exhibits 58, 59, and 60 for Mr. Patterson. And we  
6 would move those into the record.

7 COMMISSIONER EDGAR: All right. Hearing no  
8 objections, Exhibits 58, 59, and 60 will be moved  
9 into the record.

10 (Exhibits 58 through 60 admitted into the  
11 record.)

12 COMMISSIONER EDGAR: Mr. Butler, any other  
13 items related to Witness Patterson?

14 MR. BUTLER: No, no other matters that I'm  
15 aware of.

16 COMMISSIONER EDGAR: Okay.

17 Then that brings us to OPC.

18 MR. TRUITT: Thank you. We would call  
19 Mr. Gary Brunault.

20 EXAMINATION

21 BY MR. TRUITT:

22 Q Mr. Brunault, were you sworn in this morning  
23 with the other witnesses?

24 A Yes, I did.

25 Q Okay. Can you please state your name for the

1 **record.**

2 A Gary Brunault.

3 **Q Can you state who you work for and your**  
4 **business address.**

5 A Yes, I work for GDS Associates, Inc., 111  
6 North Orange Avenue, Suite 750 in Orlando, Florida  
7 32801.

8 **Q And who are you testifying on behalf of in**  
9 **this case?**

10 A On behalf of the Office of Public Counsel.

11 **Q Okay. Did you prepare and cause to be filed**  
12 **in this docket on June 8th, 32 pages of direct**  
13 **testimony?**

14 A I did.

15 **Q Do you have any changes or corrections to make**  
16 **to your testimony at this time?**

17 A No, sir.

18 **Q If I asked you the same questions in your**  
19 **testimony today, would your answers be the same today?**

20 A They would.

21 **Q And did you prepare and cause to be filed in**  
22 **this docket June 8th as well two exhibits you had listed**  
23 **as Appendix A and GB-1? And I would note for the record**  
24 **they are listed as Exhibits 10 and 11 on staff's**  
25 **comprehensive exhibit list.**

1           A     Yes.

2           **Q     Did you have any changes or corrections to**  
3 **make to your exhibit at all?**

4           A     No.

5                   MR. TRUITT:  Madam Chairwoman, we would ask  
6 the witness's direct testimony be entered into the  
7 record as though read.

8                   COMMISSIONER EDGAR:  Witness's prefiled  
9 testimony will be entered into the record as though  
10 read.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

**In re: Petition for Approval of Arrangement To  
Mitigate Impact of Unfavorable Cedar Bay  
Power Purchase Obligation, by Florida Power &  
Light Company**

**DOCKET NO. 150075-EI**

**FILED: June 8, 2015**

**REDACTED**



**(PER DESIGNATION OF FPL AND/OR COGENTRIX (CEDAR BAY) PENDING FINAL DETERMINATION)**

**DIRECT TESTIMONY**

**OF**

**GARY D. BRUNAUT**

**ON BEHALF OF THE CITIZENS OF**

**THE STATE OF FLORIDA**

**J.R. Kelly  
Public Counsel**

**Office of Public Counsel  
c/o The Florida Legislature  
111 W. Madison Street, Room 812  
Tallahassee, FL 32399-1400**

**Attorney for the Citizens  
of the State of Florida**

1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                   **DIRECT TESTIMONY OF GARY D. BRUNAUT**

3                   **ON BEHALF OF**

4                   **OFFICE OF PUBLIC COUNSEL**

5                   **DOCKET NO. 150075-EI**

6                   **JUNE 8, 2015**

7

8   **Q.    PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS.**

9    A.    My name is Gary Brunault, Principal and Regional Manager of the Orlando Office of  
10        GDS Associates, Inc., and my business address is 111 N. Orange Avenue, Suite 750,  
11        Orlando, Florida 32801.

12

13   **Q.    PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND**  
14        **PROFESSIONAL EXPERIENCE.**

15    A.    I earned a Bachelor of Science degree in Civil Engineering from Tufts University in  
16        1979. I have over thirty (30) years of experience working as a consultant in the  
17        electric utility industry. My professional experience has included consulting in the  
18        areas of power supply planning, generating asset valuation, municipal finance, power  
19        purchase agreement negotiations, litigation support related to contract interpretation  
20        disputes, preparation of cost of service projections for investor-owned electric  
21        utilities, analysis of utility mergers, and rates and regulatory matters. I have attached  
22        a copy of my resume as Appendix A.



1 **Q. WHAT IS THE NATURE OF YOUR FIRM'S BUSINESS?**

2 A. GDS Associates, Inc. ("GDS") is an engineering and consulting firm with offices in  
3 Marietta, Georgia; Austin, Texas; Auburn, Alabama; Manchester, New Hampshire;  
4 Madison, Wisconsin and Orlando, Florida. GDS provides technical and financial  
5 consulting services to a nationwide base of clients, which primarily includes  
6 municipal and cooperative electric utilities, Public Service Commissions and large  
7 consumers of electricity. Areas of expertise include generation support and  
8 management consulting, power supply and transmission planning, rate consulting,  
9 distribution services, least cost planning and litigation support. Generation support  
10 services provided by the firm include plant operational monitoring on behalf of co-  
11 owners of fossil and nuclear power plants, plant ownership feasibility studies, plant  
12 management audits, plant construction cost and schedule analyses, evaluations of  
13 power plant O&M costs and budgeting practices, production cost modeling and plant  
14 outage and replacement power cost evaluations.

15

16 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN PROCEEDINGS BEFORE THIS**  
17 **COMMISSION?**

18 A. This is the first time that I will be providing testimony before the Florida Public  
19 Service Commission, although members of the firm have testified before the  
20 Commission.

1 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN PROCEEDINGS BEFORE**  
2 **OTHER STATE REGULATORY COMMISSIONS?**

3 A. Yes. I have testified before the North Carolina Utilities Commission.  
4

5 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?**

6 A. I am presenting testimony on behalf of the Office of Public Counsel.  
7

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 A. My assignment from the Office of Public Counsel is to examine the reasonableness of  
10 Florida Power & Light Company's ("FPL") determination of Fair Value of the Power  
11 Purchase Agreement ("PPA") between FPL and Cedar Bay Generating Company,  
12 Limited Partnership ("Cedar Bay"), pursuant to the testimony of FPL Witness Herr.  
13 FPL Witness Herr's determination of Fair Value of the PPA of \$520 million was  
14 prepared, at FPL's request, in connection with the contemplated acquisition by FPL  
15 of CBAS Power, Inc. ("CBAS") to assist FPL management with certain financial  
16 reporting requirements and to support the regulatory approval process. More  
17 specifically, according to FPL Witness Ousdahl's testimony (at page 8), the Fair  
18 Value of the PPA will be the basis for FPL's planned recording of a loss associated  
19 with the termination of the PPA upon closing and establishing the regulatory asset  
20 amount that FPL proposes to amortize through rates over the remaining term of the  
21 PPA. My testimony presents several issues that I have identified as a result of  
22 reviewing the Discounted Cash Flow ("DCF") spreadsheet model provided in

1 response to OPC POD Request No. 34, which is the model utilized by FPL Witness  
2 Herr, as well as other discovery documents received from FPL, that call into question  
3 the reasonableness of FPL Witness Herr's determination of the Fair Value of the PPA  
4 and the purchase price FPL proposes to pay for Cedar Bay.

5

6 **Q. WHAT IS THE OVERALL IMPACT OF THE ISSUES THAT YOU HAVE**  
7 **IDENTIFIED?**

8 A. After making all of my suggested corrections and input assumption adjustments to the  
9 DCF spreadsheet model utilized by FPL Witness Herr, the adjusted Fair Value of the  
10 Cedar Bay PPA is no greater than approximately \$370 million, rounded to the nearest  
11 \$10 million, consistent with FPL Witness Herr's DCF rounding approach.

12

13 **Q. AS A PRELIMINARY MATTER, DID YOUR EXAMINATION OF THE DCF**  
14 **SPREADSHEET MODEL UNCOVER ANY DEFICIENCIES IN THE**  
15 **ALGORITHMS THAT ARE USED IN THE DISCOUNTED CASH FLOW**  
16 **ANALYSIS?**

17 A. Other than a couple of minor cell reference issues, which I will discuss later in my  
18 testimony, I did not uncover any major deficiencies in the algorithms utilized. Based  
19 on my familiarity with valuation models, the DCF spreadsheet model utilized by FPL  
20 Witness Herr to arrive at the Fair Value of the PPA over its remaining life is not an  
21 unreasonable analytical tool if utilized correctly and with the appropriate inputs.

1 **Q. PLEASE SUMMARIZE THE VARIOUS ISSUES YOU IDENTIFIED DURING**  
2 **YOUR REVIEW OF THE DCF MODEL AND RELATED DISCOVERY**  
3 **DOCUMENTS.**

4 **A. The four (4) valuation deficiencies that I have identified as a result of my review**  
5 **include:**

- 6 1. Bonus Capacity Revenue of 5% is too high;
- 7 2. Heat rate used for fuel expense at Cedar Bay is too low;
- 8 3. Coal prices should reflect actual supply sources; and
- 9 4. Present value discount rate is too low.

10 I present my discussion of these deficiencies in the following order: (i) revenue  
11 related, (ii) expense related, and (iii) discount rate (which is addressed last, since it is  
12 the last step in arriving at the valuation).

13

14 **VALUATION DEFICIENCY 1:**

15 **BONUS CAPACITY REVENUE OF 5% IS TOO HIGH**

16 **Q. WHAT IS THE BONUS CAPACITY REVENUE AND HOW DOES IT**  
17 **IMPACT THE DCF MODEL RESULTS?**

18 **A. The “Bonus Capacity Revenue” is the term used to describe the “bonus”, or increase**  
19 **in monthly capacity payments made by FPL to Cedar Bay under the PPA to the extent**  
20 **the Billing Capacity Factor exceeds certain threshold levels. As I understand it, under**  
21 **the PPA, as amended, the term Billing Capacity Factor is akin to availability factor,**  
22 **and as such, the actual availability of the Cedar Bay facility to operate in any given**

1 month dictates the level of Capacity Payment. For Billing Capacity Factors greater  
2 than 95%, there is Bonus Capacity Revenue. For Billing Capacity Factors between  
3 87% and 95%, there is no Bonus Capacity Revenue. For Billing Capacity Factors  
4 less than 87%, there is effectively a penalty or reduction in Capacity Revenue. FPL  
5 Witness Herr modeled Bonus Capacity Revenues of 5.0%, which imply assumed  
6 Billing Capacity Factors of 98%. The 5% Bonus Capacity Revenue modeled by Mr.  
7 Herr has the effect of increasing the revenue to Cedar Bay that would be generated  
8 under the PPA, and consequently increasing the Fair Value of the PPA, as compared  
9 to the Fair Value if such Bonus Capacity Revenue were to be projected at lower  
10 levels, or not at all (i.e., by assuming lower availability factors).

11

12 **Q. HAS FPL WITNESS HERR DESCRIBED THE BASIS FOR THE 5% BONUS**  
13 **CAPACITY REVENUE ASSUMPTION IN HIS TESTIMONY OR EXHIBITS?**

14 **A.** No, he did not. FPL Witness Herr has merely listed the “Bonus Capacity Revenue –  
15 calculated as 5.0% of the annual fixed capacity payments” as an assumption on  
16 Exhibit DH-3 (page 44 of 60) to his testimony. It does not appear that he  
17 independently determined the Bonus Capacity Revenue input, but as with certain  
18 other crucial inputs, merely used the information provided by FPL.

19

20 **Q. WHAT HAVE YOU DISCOVERED THAT CALLS INTO QUESTION THE**  
21 **5% BONUS CAPACITY REVENUE ASSUMPTION?**

22 **A.** The document provided by Cedar Bay in discovery, specifically Bates Document No.  
23 CB0081585, sets forth a historical calculation of the actual Capacity Payments made

1 by FPL to Cedar Bay, dating back to 2007. Using this information, I calculated for  
2 the 8-year period of 2007 through 2014 the actual average Bonus Capacity Revenue  
3 percentage that would be comparable to the 5% assumption reflected in Mr. Herr's  
4 DCF analysis, and I arrived at 2.59%. My calculations are set forth in Exhibit GB-1.

5

6 **Q. HAS ANYTHING CHANGED AT THE PLANT THAT WOULD ALLOW THE**  
7 **PLANT TO MORE RELIABLY EARN BONUS CAPACITY REVENUE**  
8 **OVER THE REMAINING LIFE OF THE PPA?**

9 A. No. Nothing stands out to demonstrate that extraordinary efforts are being  
10 undertaken to overcome the effects of aging on the plant's ability to earn bonus  
11 payments. Based on my review of Cedar Bay's 2014 Business Plan (CB0013661),  
12 there have been significant problems over the years with erosion-related tube leaks in  
13 all three boilers, although most of those issues were prior to 2007, which is the first  
14 historical year that I used in my calculations of historical Bonus Capacity Revenue.  
15 As stated in its 2014 Business Plan, Cedar Bay is located in a "very corrosive  
16 environment due to the proximity to the Atlantic." Many of the plant structural  
17 components have been replaced with upgraded materials as they have corroded to  
18 failure, and those replacement actions have improved the reliability at the plant.  
19 Although management has made several improvements and taken corrective action to  
20 address the tube erosion issues, the Cedar Bay plant is now more than 20 years old,  
21 and, as stated in Cedar Bay's 2014 Business Plan, "as the plant ages, equipment  
22 obsolescence becomes an increasing factor in the ability to repair components,  
23 especially electronics."

1 **Q. DID THE CEDAR BAY 2014 BUSINESS PLAN CONTAIN ANY**  
2 **PERFORMANCE METRICS OR PERFORMANCE OBJECTIVES WITH**  
3 **REGARD TO FORCED OUTAGE RATES OR AVAILABILITY FACTORS?**

4 **A.** [REDACTED]  
5 [REDACTED] [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8

9 **Q. WOULD THE 2.59% BONUS CAPACITY REVENUE REPRESENT A MORE**  
10 **REASONABLE ASSUMPTION THAN THE 5.0% PROPOSED BY FPL, FOR**  
11 **PURPOSES OF THE FAIR VALUE OF THE PPA?**

12 **A.** Yes. Given that the remaining life of the PPA is approximately 10 years, use of the  
13 actual experienced performance of the Cedar Bay facility over a fairly comparable  
14 historical time period would represent a more realistic assumption. Despite the most  
15 recent years averaging 5% or more, using the average actual performance under the  
16 PPA for the longer historical period represents a more robust basis for an assumption  
17 for the next 10 years. Also, given that the facility is aging, it is reasonable to expect  
18 that more maintenance issues will arise over the next 10 years, resulting in increased  
19 forced outages, lower availability levels, and lower Bonus Capacity Revenue, perhaps  
20 even “negative” Bonus Capacity Revenue during some periods remaining under the  
21 PPA.

1 Q. WHAT IS THE IMPACT ON THE FAIR VALUE OF THE PPA OF  
2 SUBSTITUTING YOUR RECOMMENDED 2.59% BONUS CAPACITY  
3 REVENUE IN PLACE OF FPL WITNESS HERR'S 5.0% ASSUMPTION?

4 A. All else the same, reflecting the 2.59% Bonus Capacity Revenue assumption would  
5 lower the estimated Fair Value of the PPA by approximately \$18 million.

6

7

**VALUATION DEFICIENCY 2:**

8

**HEAT RATE USED FOR FUEL EXPENSE AT CEDAR BAY IS TOO LOW**

9 Q. YOU MENTIONED SOME MINOR ISSUES WITH RESPECT TO CELL  
10 REFERENCES IN THE DCF SPREADSHEET MODEL. DO THOSE  
11 RELATE TO THE HEAT RATE ISSUE?

12 A. Yes, and I will address those spreadsheet errors first.

13

14 Q. COULD YOU PLEASE ELABORATE?

15 A. First, on the "Inputs" tab of the DCF spreadsheet model that FPL Witness Herr  
16 utilized, Excel Row 38, containing the values of 12,500 for the entire study period,  
17 was mislabeled as "Heat Rate (Btu/kWh)", when it should have been labeled "Heat  
18 Content of Coal (Btu/lb)". That input row was cell-referenced in other formulas  
19 within the spreadsheet, as heat rate in two instances and heat content of coal in  
20 another. By virtue of the coincidence that the assumed *heat rate* value of 12,500 was  
21 the same as the assumed *heat content* value of 12,500, no apparent mathematical



1 errors were revealed. However, correction of this confusion of values was required to  
2 address the heat rate valuation deficiency upon which I will elaborate further.

3

4 **Q. WHAT HEAT RATE DID FPL WITNESS HERR REFLECT IN HIS DCF**  
5 **ANALYSIS FOR PURPOSES OF ESTIMATING THE FUEL COSTS AT THE**  
6 **CEDAR BAY FACILITY OVER THE REMAINING LIFE OF THE PPA?**

7 A. His model reflected the assumed heat rate of 12,500 Btu/kWh.

8

9 **Q. WERE YOU ABLE TO ASCERTAIN THE BASIS FOR MR. HERR'S**  
10 **ASSUMED HEAT RATE?**

11 A. The basis appears to be, based on information contained in column P of the Inputs tab  
12 in the model labeled "Support", the "rounded YTD average as of July 2014 and  
13 Budgeted", referencing a source document listed as "11.3.3 1407 Monthly Operating  
14 Report Cedar Bay" (CB-15-005596-005610).

15

16 **Q. WAS THAT SOURCE DOCUMENT PROVIDED IN DISCOVERY?**

17 A. Yes, I was able to locate that document and tie into the heat rate that Mr. Herr  
18 referenced. The year-to-date actual as of July 2014 "Generation Only" heat rate of  
19 12,358 Btu/kWh and Budgeted "Generation Only" heat rate of 12,520 Btu/kWh (on  
20 CB-15-005604) appear to be the basis for his (rounded) 12,500 Btu/kWh assumption.

1 **Q. WHAT IS THE CORRECT HEAT RATE THAT SHOULD HAVE BEEN**  
2 **USED FOR CALCULATING FUEL COSTS IN THE DCF MODEL?**

3 A. The correct heat rate that should have been used to calculate fuel costs for the  
4 generation of electricity *and steam* in the DCF model should have been the 2014 *net*  
5 *plant* heat rate of 14,224 Btu/kWh, not the *generation only* heat rate of 12,500  
6 Btu/kWh.

7

8 **Q. WHY IS MR. HERR'S USE OF THE 12,500 BTU/KWH HEAT RATE**  
9 **WRONG?**

10 A. The heat rate used by Mr. Herr is a "Generation Only" plant heat rate and will under-  
11 project the amount of coal consumed in generating both the electricity sold to FPL  
12 and the steam sold to the steam host. Since there is no other provision in the DCF  
13 analysis to separately account for fuel used to generate steam, and steam revenues are  
14 included in the analysis, the heat rate which encompasses energy required for both  
15 electricity and steam generation should be utilized and not just the heat rate calculated  
16 for electric generation only. Otherwise, the amount (and cost of) of coal required to  
17 support steam sales would be left out, and this would understate the true fuel cost that  
18 will be incurred at the Cedar Bay Facility to support both sales of electricity to FPL  
19 under the PPA and the steam sales. This is an important and integral element of the  
20 PPA valuation because failure to make the steam sales at the threshold level to the  
21 host (RockTenn) would allow FPL to cancel the PPA with no liability; thus, it cannot  
22 be ignored.

1 **Q. HOW IS THE “GENERATION ONLY” HEAT RATE CALCULATED?**

2 A. Based upon my review of monthly calculations in documents provided during  
 3 discovery by Cedar Bay (spreadsheets CB001923– CB001935), I have concluded that  
 4 the calculation of the “Generation Only” heat rate is a weighted average plant heat  
 5 rate for electric production based upon gross plant generation, adjusted by a  
 6 multiplier that is not defined and is reflected as a hard-coded entry each month (the  
 7 “Generation Only Heat Rate”). The basis for the calculation of the multiplier is not  
 8 clear. While Cedar Bay’s calculations are extremely convoluted and complex, the  
 9 essence of the Generation Only Heat Rate calculation can be accurately summarized  
 10 as follows:

$$11 \quad \text{Generation Only Heat Rate} = \frac{\text{Total Plant BTU} - \text{Steam Net BTU}}{12 \quad \text{FPL kWh} + \text{Process Steam Power}}$$

$$13 \quad \text{Steam Net BTU} = \text{Process Steam BTU} - \text{Condensate Return BTU} + [\text{HR} * \text{Process Steam} \\ 14 \quad \text{kWh}]$$

$$15 \quad \text{Where: HR} = \text{Generation Only Heat Rate} \\ 16 \quad \text{FPL kWh} = \text{kWh delivered to FPL} \\ 17 \quad \text{Process Steam Power} = \text{Process Steam (lbs/300)}$$

18

19 **Q. WHY DOES THE USE OF “GENERATION ONLY” HEAT RATE RESULT**  
 20 **IN THE IMPROPER CALCULATION OF FUEL CONSUMPTION IN THE**  
 21 **DCF ANALYSIS?**

22 A. As shown in the Generation Only Heat Rate calculation above, the BTU’s used to  
 23 generate steam are clearly removed. However, the fuel input BTUs (and  
 24 corresponding expenses) are obviously necessary to generate the steam sold.

1 **Q. WHAT IS NET PLANT HEAT RATE?**

2 A. The net plant heat rate is calculated by dividing the total fuel consumed at the plant  
3 by the kWh delivered to FPL. The amount of power actually delivered to FPL, “Net  
4 Exported Generation”, is the gross generation minus electricity used internally at the  
5 plant.

$$6 \quad \text{Net Plant Heat Rate} = \frac{\text{Total Plant Fuel BTU Consumed}}{\text{FPL kWh Deliveries}}$$

7

8

9 **Q. WHY SHOULD THE NET PLANT HEAT RATE OF THE CEDAR BAY**  
10 **FACILITY BE USED?**

11 A. Using the Net Plant Heat Rate in the calculation of fuel consumption is appropriate  
12 because it can be multiplied by the Net Exported Power (kWh Delivered to FPL) to  
13 arrive at total fuel consumption, just as Mr. Herr’s DCF Analysis does. Calculated  
14 fuel consumption (and corresponding expenses) in the DCF Analysis will increase by  
15 about 14% when using the correct heat rate of 14,224 BTU/kWh, rather than the  
16 12,500 Btu/kWh “generation only” heat rate.

17

18 **Q. HOW DID YOU ARRIVE AT THE NET PLANT HEAT RATE OF 14,224**  
19 **BTU/KWH?**

20 A. The Net Plant Heat Rate of 14,224 Btu/kWh is the weighted average of monthly 2014  
21 net plant heat rate for calendar year 2014. The 2014 monthly net plant data is  
22 contained in the Cedar Bay Monthly Operations Summary Reports and native

1 spreadsheets contained in documents provided by Cedar Bay in response to FIPUG  
 2 POD No.13. Had I used the Net Plant Heat Rate based on “YTD average as of July  
 3 2014”, like Mr. Herr relied upon, the heat rate would have been 14,608 Btu/kWh,  
 4 which is even higher than the calendar year actual for 2014. A calendar year average  
 5 heat rate is a more realistic and reasonable basis for the assumption to be used in a  
 6 10-year projection than an average based on a partial year (January – July).

7

8 **Q. WHAT IS THE IMPACT ON THE FAIR VALUE OF THE PPA OF MAKING**  
 9 **THE CORRECTIONS TO THE DCF SPREADSHEET MODEL AND**  
 10 **UTILIZING A MORE APPROPRIATE HEAT RATE FOR PURPOSES OF**  
 11 **PROJECTING FUEL COSTS FOR CEDAR BAY?**

12 **A.** Taking into account the adjustments made with respect to valuation deficiency 1,  
 13 reflecting the corrections and utilizing a higher, more appropriate heat rate for  
 14 purposes of projecting fuel costs for Cedar Bay would further reduce the Fair Value  
 15 of the PPA by approximately \$35 million.

16

17

**VALUATION DEFICIENCY 3:**

18

**COAL PRICES SHOULD REFLECT ACTUAL SUPPLY SOURCES**

19 **Q. WHAT COAL PRICE DID FPL WITNESS HERR USE IN THE DCF MODEL**  
 20 **TO DETERMINE ESTIMATED ENERGY REVENUES FROM CEDAR BAY**  
 21 **ELECTRIC SALES UNDER THE PPA?**

22 **A.** FPL Witness Herr used a forecast [REDACTED]

23 [REDACTED] coal prices.

1 **Q DOES THIS FORECAST ACCURATELY REFLECT THE CONTRACTUAL**  
2 **BASIS FOR COMPUTING ENERGY REVENUES UNDER THE CEDAR BAY**  
3 **PURCHASED POWER AGREEMENT (PPA)?**

4 A. No, it does not. The contractual basis for fuel pricing in the PPA is stated as follows:

5 "Unit Fuel Cost - the weighted average cost, in dollars per million Btu, of  
6 coal, and oil if applicable, burned at St. Johns River Power Park's Units #1 and  
7 #2. The cost of coal at St. Johns River Power Park shall be calculated from the  
8 data reported on a monthly basis to the FPSC in Schedule A5 entitled "System  
9 Net Generation and Fuel Cost." Start-up oil cost for St. Johns River Power  
10 Park's Units #1 and #2 as reported in Schedule A5 will be included in the Unit  
11 Fuel Cost calculation for any Monthly Billing Period that includes one or  
12 more Facility start-ups as a result of an FPL-required shutdown. The most  
13 recently filed Schedule A5 data shall be used in calculating the Unit Fuel  
14 Cost."

15 According to the EIA Form 923 data base, the current (through February 2015) fuel  
16 supply for the St. Johns River Power Park is composed of a mix of coals originating  
17 in Indiana (contract) and Illinois (spot) both in the Illinois Basin (not CAPP), and  
18 Colombia (imported).

19

20 **Q. WHAT IS A MORE APPROPRIATE COAL PRICE FORECAST FOR USE IN**  
21 **DETERMINING THE ESTIMATED ENERGY REVENUES FROM CEDAR**  
22 **BAY ELECTRIC SALES UNDER THE PPA?**

23 A. A more appropriate price forecast would be the one utilized by FPL Witness Hartman  
24 to support his determination of ratepayer benefits from the proposed transaction.  
25 Specifically, the values in the spreadsheet page provided in discovery as CB-15-  
26 009489, in the column labeled St Johns \$/MMBtu (whose values are identical to those  
27 in the column labeled Cedar Bay \$/MMBtu, which form the basis for the PPA energy

1 dispatch pricing for FPL) should be utilized. Given that the coal consumed at St.  
2 Johns River Power Park is not sourced from the CAPP coal basin, Mr. Herr should  
3 have used the contractual basis for the price of coal in estimating energy revenues  
4 under the PPA (i.e., the St. Johns River coal price forecast).

5

6 **Q. HOW DO THOSE ST. JOHNS COAL PRICES COMPARE TO THE CAPP**  
7 **COAL PRICES ASSUMED BY MR. HERR?**

8 A. Over the 2015-2024 period, the St. Johns River coal price forecast utilized by Witness  
9 Hartman is approximately 9% below the [REDACTED] prices that Witness Herr utilized.  
10 Given that the sources for coal delivered to the St. Johns River Power Plant are from  
11 the lower cost Illinois basin and Columbia, I would expect the St. Johns coal price  
12 forecast to be lower than the [REDACTED] forecast. However, as explained in the  
13 accompanying testimony of OPC Witness Christopher Dawson, even this St. Johns  
14 coal price forecast may be too high.

15

16 **Q. WHAT COAL PRICE DID FPL WITNESS HERR USE IN THE DCF MODEL**  
17 **TO DETERMINE THE ESTIMATED COST TO PRODUCE ELECTRICITY**  
18 **AND STEAM AT CEDAR BAY?**

19 A. FPL Witness Herr used the same forecast [REDACTED]  
20 [REDACTED] coal prices.

1 **Q. IS IT APPROPRIATE TO USE THIS COAL PRICE FORECAST TO**  
2 **DETERMINE THE ESTIMATED COST TO PRODUCE ELECTRICITY AND**  
3 **STEAM AT CEDAR BAY?**

4 A. For years beyond 2015, it may be; however, for 2015, it is not appropriate. Cedar  
5 Bay coal inventory records provided in response to FIPUG 2<sup>nd</sup> POD Request No.13  
6 (CB-15-003941) and information provided to the EIA by Cedar Bay Operating  
7 Services suggests that the cost of fuel delivered to Cedar Bay in 2015 may be  
8 considerably higher than the amount reflected in Mr. Herr's DCF analysis.

9

10 **Q. PLEASE EXPLAIN.**

11 A. The data submitted by Cedar Bay Operating Services to EIA states that at least some  
12 of the coal delivered to Cedar Bay originates at the Balkan Mine in Bell County  
13 Kentucky, which is considered to be in the Central Appalachian area. The EIA data  
14 also lists the contract expiration date for all of the coal delivered to Cedar Bay in  
15 2014 as "1215", or December 2015 (presumably December 31). This leads to the  
16 reasonable conclusion that the cost of coal delivered to Cedar Bay in 2015 through  
17 the end of the contract would be at or above the cost of coal delivered in March 2015,  
18 the last date for which inventory costs are available. Per CB-15-003941, the recorded  
19 average inventory cost as of March 2014 (the latest month available) was  
20 [REDACTED]. The EIA recorded heat content of fuel delivered in March 2014 was  
21 24.47 MMBtu/ton, yielding a coal cost of [REDACTED]. This cost is approximately  
22 [REDACTED] higher than the amount used in FPL's analysis for 2015.



1 Q. IS CEDAR BAY PARTY TO A LONG-TERM COAL CONTRACT?

2 A. Yes. Based on my review of discovery documents, Cedar Bay has a contract with  
3 Nally and Hamilton for the long-term supply of coal, which was renegotiated in 2011  
4 to provide [REDACTED] [REDACTED] [REDACTED]  
5 which would explain why [REDACTED]  
6 [REDACTED]

7  
8 Q. [REDACTED]  
9 [REDACTED]

10 A. [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13  
14 Q. **BASED ON THE INFORMATION YOU HAVE PROVIDED ABOVE, WHAT**  
15 **DO YOU BELIEVE ARE THE APPROPRIATE FUEL COSTS TO BE USED TO**  
16 **DETERMINE FORECASTED CEDAR BAY ENERGY REVENUES UNDER**  
17 **THE PPA AND FUEL COSTS THAT WOULD ACTUALLY BE INCURRED**  
18 **AT CEDAR BAY?**

19 A. For forecasted energy revenues under the PPA, the appropriate coal price forecast  
20 would be the forecast utilized by FPL Witness Hartman, as shown in either the  
21 column labeled St Johns \$/MMBtu or the column labeled Cedar Bay \$/MMBtu on

1 discovery document CB-15-009489, in order to reflect the continued ability of St.  
2 Johns River Power Park to accept lower cost Colombian coal.

3 The 2015 delivered fuel cost used in the determination of Cedar Bay fuel costs  
4 should be increased to [REDACTED] (from \$88.20/ton) which, assuming a heat content  
5 of 24.47 MMBtu/ton, would yield a coal cost of [REDACTED] for 2015. Although  
6 the 2016 assumed [REDACTED] delivered coal cost of [REDACTED] would represent a [REDACTED]  
7 reduction in fuel costs from Cedar Bay's 2015 contract prices of [REDACTED], the  
8 reduction seems reasonable, based on (i) current CAPP spot prices, and (ii) taking  
9 into account [REDACTED]  
10 [REDACTED]

11  
12 **Q. WHAT IS THE IMPACT ON THE FAIR VALUE OF THE PPA OF MAKING**  
13 **THESE CHANGES TO THE FUEL PRICE ASSUMPTIONS FOR BOTH ST.**  
14 **JOHNS RIVER POWER PARK AND CEDAR BAY?**

15 **A.** Taking into account the adjustments previously made with respect to valuation  
16 deficiencies 1 and 2, making these changes to the fuel prices would further reduce the  
17 Fair Value of the PPA by approximately \$21 million.

18  
19 **VALUATION DEFICIENCY 4:**

20 **PRESENT VALUE DISCOUNT RATE IS TOO LOW**

21 **Q. PLEASE GENERALLY DESCRIBE HOW FPL WITNESS HERR ARRIVED**  
22 **AT THE PRESENT VALUE DISCOUNT RATE USED IN THE DCF**  
23 **VALUATION OF THE PPA.**

1 A. FPL Witness Herr used a present value discount rate of 7% based on the weighted  
2 average cost of capital (“WACC”) that he deemed appropriate for valuing the PPA.  
3 Use of the WACC as the basis for discounting cash flows is an industry accepted  
4 approach used in valuing assets and is arrived at based on an estimated cost of debt  
5 and an estimated cost of equity, weighted by the assumed capital structure of the  
6 target market participant and their risk profile. Mr. Herr appears to have assumed a  
7 capital structure of [REDACTED] debt with an after-tax debt rate of [REDACTED] and [REDACTED] equity with  
8 an assumed rate of return on common equity of [REDACTED]. When combined, the WACC  
9 is equal to 7%, rounded to the nearest 0.5%.

10

11 **Q. WHAT HAS CAUSED YOU TO QUESTION THE DISCOUNT RATE**  
12 **UTILIZED BY FPL WITNESS HERR IN THE DCF ANALYSIS OF THE**  
13 **VALUE OF THE PPA?**

14 A. The discount rate chosen for the DCF analysis is arguably the single most important  
15 assumption to be made, and variations in the rate can change the value of an asset  
16 considerably. Also, the discount rate assumption is typically the most difficult to pin  
17 down, given that it is theoretical in nature.

18

19 **Q. WHAT IS THE BASIS FOR MR. HERR’S INPUTS TO THE WACC?**

20 A. FPL Witness Herr (on page 55 of 60 of Exhibit DH-3 to his testimony) appears to  
21 draw a sharp distinction between the capital structures of representative market  
22 participants that would reflect the relative risk of the investment. He claims to have

1 concluded that an appropriate capital structure to use in valuing a merchant  
2 generation asset without a long-term contract (e.g., a PPA) should be [REDACTED] debt and  
3 [REDACTED] equity, and that the appropriate capital structure to be used for "contracted"  
4 generation (e.g., with a PPA) would be [REDACTED] debt and [REDACTED] equity. This rather wide  
5 differential in assumed capital structure, combined with the associated variations in  
6 the assumed cost of debt and rate of return on equity assumed for each of the  
7 respective risk profiles, results in a significant range of discretion for selection of a  
8 WACC (or discount rate). Mr. Herr says he estimated the cost of debt and the cost of  
9 equity based on the Capital Asset Pricing Model ("CAPM"). He apparently assumed  
10 debt rates based on [REDACTED] rated industrial bonds and [REDACTED] betas [REDACTED]  
11 [REDACTED] for selected independent power producers as inputs to the  
12 CAPM. The WACC results range from 7% (for generation with a PPA contract) to  
13 11% (for generation without a PPA, or merchant generation).

14  
15 **Q. SO, ALTHOUGH MR. HERR COMPUTED TWO VERY DIFFERENT**  
16 **RATES, HE CHOSE TO USE THE 7% LOWER RISK PROFILE WACC FOR**  
17 **PURPOSES OF ESTIMATING THE FAIR VALUE FOR THE PPA?**

18 **A. Yes.**

19  
20 **Q. WHAT OTHER DISCOVERY DOCUMENTS DID YOU REVIEW THAT**  
21 **GAVE YOU CAUSE TO QUESTION THE DISCOUNT RATE THAT FPL**  
22 **WITNESS HERR CHOSE TO REFLECT IN THE FAIR VALUE OF THE**  
23 **PPA?**

1 A. I reviewed documents provided by Cedar Bay in response to FIPUG discovery --  
2 specifically Bates Document Nos. CB0042859 through CB0042981 which contained  
3 a DCF valuation analysis of the Cedar Bay PPA, dated April 5, 2013, prepared for  
4 Cogentrix Power Holdings LLC ("Cogentrix") by Mr. David Herr, Managing  
5 Director, Duff & Phelps, LLC, who I understand is the same David Herr testifying in  
6 this docket for FPL. For purposes of discussing this 2013 DCF analysis, I will refer  
7 to it hereinafter as the "2013 DCF Report".  
8

9 **Q. WHAT WAS THE STATED PURPOSE OF THE 2013 DCF REPORT?**

10 A. As stated in the cover letter to the 2103 DCF Report, the analysis would be used to  
11 assist Cogentrix management with an allocation of the purchase price of certain assets  
12 acquired by Carlyle Infrastructure Partners, L.P. for financial reporting purposes in  
13 accordance with ASC 805, and incorporate Fair Value guidance presented in ASC  
14 820. The 2013 DCF Report included an analysis of Fair Value for the Cedar Bay  
15 PPA, among other assets, both tangible and intangible.

16  
17 **Q. WAS THIS THE SAME STATED PURPOSE AS THE CURRENT FAIR**  
18 **VALUE ESTIMATION AS DESCRIBED IN FPL WITNESS HERR'S**  
19 **EXHIBIT DH-3?**

20 A. Essentially, yes. Both valuations were to arrive at the Fair Value of the Cedar Bay  
21 PPA, although in the 2013 DCF Report, Mr. Herr's then client, Cogentrix, was the  
22 owner of and had an interest in the Cedar Bay PPA asset seeking to refinance the

1 operation and [REDACTED] while his  
2 current client, FPL, is the proposed purchaser of the facility in this docket.

3

4 **Q. WHAT WAS THE CONCLUSION AS TO FAIR VALUE OF THE CEDAR**  
5 **BAY PPA IN THE 2013 DCF REPORT?**

6 A. In Mr. Herr's 2013 DCF Report, the estimated Fair Value of the Cedar Bay PPA was  
7 [REDACTED] as of December 12, 2012.

8

9 **Q. DID YOU REVIEW THE DCF ANALYSIS, ALONG WITH THE MANY**  
10 **UNDERLYING ASSUMPTIONS, THAT DERIVED THE [REDACTED]**  
11 **FAIR VALUE AND CONTRAST THAT DCF ANALYSIS TO THE ONE**  
12 **PREPARED BY FPL WITNESS HERR IN THE SUBJECT DOCKET?**

13 A. Yes. Although the Excel spreadsheet was not provided in discovery, I was able to  
14 compare Exhibit D.2 of the 2013 DCF Report (in .pdf format) to Mr. Herr's Direct  
15 Testimony Exhibit DH-3, Exhibit B.1 in this docket, which was prepared in  
16 substantially the same format.

17

18 **Q. WHAT DID YOU DISCOVER IN REVIEWING MR. HERR'S 2013**  
19 **VALUATION?**

20 A. Although there were numerous assumption differences from the current valuation  
21 model, including significant differences in capacity factor assumptions, which I will  
22 address later in my testimony, the most significant difference was the present value  
23 discount rate that was utilized. As I discussed earlier, FPL Witness Herr appears to

1 have concluded that a 7% discount rate was appropriate for this docket in determining  
2 the current Fair Value of the PPA, while just 2 years ago, Mr. Herr concluded that a  
3 [REDACTED] was appropriate in determining the same Fair Value of the same  
4 Cedar Bay PPA. To give one a sense for the impacts of such a different discount rate,  
5 all else the same (i.e., putting aside all of the other valuation deficiencies), by  
6 reflecting the [REDACTED] in Mr. Herr's current DCF analysis in place of the  
7 7% discount rate, the \$520 million Fair Value would be reduced to [REDACTED],  
8 representing a reduction of about [REDACTED]

9  
10 **Q. WERE YOU ABLE TO COMPARE THE BASIS FOR THE [REDACTED]**  
11 **[REDACTED] REFLECTED IN THE 2013 DCF REPORT TO THE 7% UTILIZED IN**  
12 **MR. HERR'S CURRENT DCF ANALYSIS?**

13 **A. Yes.**

14  
15 **Q. PLEASE ELABORATE.**

16 **A. It appears that for purposes of the 2013 DCF Report, although Mr. Herr used the**  
17 **same analytical approach in arriving at a discount rate (i.e., the WACC approach used**  
18 **to arrive at 7%), he reflected significantly different capital structure assumptions.**  
19 **More specifically, he appears [REDACTED]**  
20 **[REDACTED] [REDACTED]**  
21 **[REDACTED], both reflecting a higher credit**  
22 **quality debt rating, in recognition of the presence of a long-term PPA with a more**

1 secure revenue stream, as compared to a merchant generator selling into the market.

2 [REDACTED]

3 [REDACTED] (as compared to the [REDACTED] reflected in his current WACC calculation),  
4 also contributing to the higher WACC.

5

6 **Q. RECOGNIZING THAT MR. HERR'S FAIR VALUE ESTIMATIONS,**  
7 **PERFORMED LESS THAN TWO YEARS APART, UTILIZED [REDACTED]**  
8 **[REDACTED], DO YOU HAVE ANY OPINIONS AS TO**  
9 **WHY THIS MIGHT BE?**

10 A. Although I do not have a factual basis for the [REDACTED], I  
11 know of no structural reasons, be it market driven or contractual (with respect to the  
12 PPA), for the [REDACTED] has now taken in this docket. I also have  
13 no basis for believing that [REDACTED]  
14 [REDACTED] However, with respect to the  
15 current engagement with FPL, certainly utilizing [REDACTED] would increase  
16 the Fair Value of the PPA determined in March 2015 to a level that matches the  
17 purchase price of \$520 million that had already been agreed upon by FPL and CBAS  
18 as of August 2014. Assuming FPL were to receive the Commission's approval for  
19 the proposed transaction, which is essentially to recover from retail customer electric  
20 rates the entire Fair Value of the PPA through amortization of a regulatory asset, once  
21 the PPA was terminated, plus a return on the unamortized regulatory asset, FPL  
22 would clearly be interested in the highest Fair Value that could be justified, as long as  
23 they could demonstrate to the Commission that customers rates would be lower on a



1 cumulative present value basis, even by the smallest margin. Furthermore, based on  
2 information received during discovery, it is clear that the \$520 million purchase price  
3 for CBAS was negotiated before the estimated Fair Value of the PPA was prepared,  
4 which further calls into question the fortuity of the Fair Value of the PPA matching  
5 the exact purchase price negotiated seven months earlier.

6

7 **Q. WITH RESPECT TO THE CAPITAL STRUCTURE TO BE USED, SHOULD**  
8 **FPL'S CAPITAL STRUCTURE BE CONSIDERED?**

9 A. Given that FPL is a very real market participant in this transaction, I would say, yes,  
10 their capital structure should have at least been considered in arriving at the capital  
11 structure appropriate for this discount rate.

12

13 **Q. WHAT IS FPL'S CAPITAL STRUCTURE?**

14 A. Based on FPL's Form 1 submitted to the Federal Energy Regulatory Commission in  
15 April 2015, their capital structure is 41% debt/59% equity.

16

17 **Q. GENERALLY, WHAT RISKS HAVE YOU CONSIDERED IN DECIDING**  
18 **WHAT AN APPROPRIATE DISCOUNT RATE WOULD BE TO ARRIVE AT**  
19 **THE FAIR VALUE OF THE PPA?**

20 A. There are several risks that should be considered, including operational risks,  
21 contractual risks, and regulatory risks.

1           Operational risks include risk of mechanical failure or weather-related  
2 disruption that would make the facility inoperable for an extended period of time,  
3 significantly reducing the Capacity Payments, and possibly eliminating them for  
4 some period. In addition, to the extent coal costs under the Cedar Bay PPA were to  
5 be more competitive with natural gas generation, FPL may very likely dispatch Cedar  
6 Bay significantly more than at the assumed [REDACTED] capacity factor. Given that Cedar  
7 Bay's operating margins are negatively affected by increased dispatch by FPL, an  
8 increase in natural gas prices would present additional operating margin risk to a  
9 potential purchaser of Cedar Bay.

10           Contractual risks include the possibility of losing Qualified Facility status or  
11 other failure to meet a contractual term, causing the PPA to be terminated before the  
12 end of the contract life, perhaps due to the steam host going out of business.

13           With respect to regulatory risks, the possibility exists that the Commission  
14 could find that the payments from FPL to Cedar Bay are uneconomic and should not  
15 be recovered, effectively triggering the "regulatory out" clause found in the PPA at  
16 Section 18.4 and causing FPL to be relieved of its payment obligations under the  
17 PPA. The fact that the PPA capacity payments are so much greater than FPL's  
18 current avoided costs should give cause for concern. However, this risk is mitigated  
19 by the fact that, to my knowledge, the Commission has yet to deny recovery of a PPA  
20 payment once authorized. Lastly, federal legislation that would impose carbon  
21 emission costs on the output of the facility or otherwise require/force the premature  
22 retirement of the Cedar Bay Facility represent a risk as well.

1 **Q. WHAT IS YOUR RECOMMENDATION AS TO THE APPROPRIATE BASIS**  
 2 **FOR THE DISCOUNT RATE TO BE UTILIZED IN FPL WITNESS HERR'S**  
 3 **ESTIMATED FAIR VALUE OF THE PPA?**

4 A. Given the current risks associated with the Cedar Bay facility, as outlined above, I  
 5 recommend a blending of the two approaches to arrive at an appropriate discount rate  
 6 to be used in estimating the Fair Value of the PPA. More specifically, I would reflect  
 7 the [REDACTED] for the 2013 DCF Report, but  
 8 utilize Mr. Herr's currently estimated (i) after-tax cost of debt, based on an entity with  
 9 a credit quality rating of [REDACTED] and (ii) a [REDACTED] cost of equity, which is  
 10 consistent with Mr. Herr's risk profile based on today's market environment, per Mr.  
 11 Herr's estimation.

12

13 **Q. BASED ON THAT APPROACH, WHAT DISCOUNT RATE WOULD BE**  
 14 **REFLECTED IN THE FAIR VALUE OF THE PPA, AS OF AUGUST 30,**  
 15 **2015?**

16 A. The calculated WACC, and discount rate that would be reflected would be [REDACTED]

17 That is, the WACC formula would be populated with the following values:

18

19

20

21

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total WACC (rounded) =					[REDACTED]

1 Q. WHAT IS THE IMPACT ON THE FAIR VALUE OF THE PPA OF  
2 CHANGING THE PRESENT VALUE DISCOUNT RATE FROM 7% TO  
3 [REDACTED]?

4 A. Taking into account the adjustments previously made with respect to issues 1, 2 and  
5 3, and without rounding to the nearest \$10 million, changing the present value  
6 discount rate from 7% to [REDACTED] would further reduce the Fair Value of the PPA by  
7 approximately [REDACTED].

8

9 OTHER CONCERNS WITH THE ESTIMATED FAIR VALUE

10 Q. WITH RESPECT TO THE CAPACITY FACTOR ASSUMPTION  
11 DIFFERENCES YOU MENTIONED EARLIER, HOW DIFFERENT WERE  
12 THE ASSUMED CAPACITY FACTORS FOR CEDAR BAY IN THE 2013  
13 VALUATION, AS COMPARED TO MR. HERR'S CURRENT VALUATION  
14 MODEL?

15 A. Capacity factors in the 2013 valuation model averaged [REDACTED]  
16 [REDACTED] while the current PPA valuation model  
17 assumes a static [REDACTED] over the remainder of the PPA term.

18

19 Q. WHAT IS THE SIGNIFICANCE OF THE DIFFERENT CAPACITY FACTOR  
20 ASSUMPTIONS?

1 A. Given that the fuel expense to operate the Cedar Bay facility is not covered by the  
2 energy and steam revenues received, the greater the capacity factor assumed, the  
3 lower the Fair Value of the PPA.

4

5 **Q. WHAT ARE THE PROSPECTS THAT TWO YEARS FROM NOW, FPL**  
6 **WOULD CALL ON CEDAR BAY TO BE DISPATCHED MORE OFTEN AND**  
7 **THE CAPACITY FACTORS WOULD RETURN TO THE [REDACTED] LEVELS?**

8 A. With potential natural gas price volatility, as evidenced by history, and the ability of  
9 St. Johns River Power Park to source low cost coal that is barged in from Columbia,  
10 there is a distinct possibility that the energy strike price on the PPA will be attractive  
11 enough for FPL to dispatch Cedar Bay more often, approaching the [REDACTED] capacity  
12 factor levels.

13

14 **Q. SO, WHAT POINT ARE YOU MAKING?**

15 A. My point is that, if the 10-year capacity factor assumptions can change from  
16 averaging [REDACTED] to only [REDACTED] in less than a two-year timeframe (April 2013 to March  
17 2015), there is significant uncertainty surrounding the assumed capacity factors at  
18 Cedar Bay. To the extent those capacity factors increase, the Fair Value of the PPA  
19 will be considerably affected.

1 Q. WHAT WOULD BE THE IMPACT ON THE FAIR VALUE OF THE PPA IF  
2 MR. HERR WERE TO HAVE ASSUMED CAPACITY FACTORS OF ■■■ AS  
3 COMPARED TO ■■■?

4 A. All else the same, and after making the corrections and adjustments associated with  
5 valuation deficiency 2 and 3 related to heat rates and fuel costs, changing the assumed  
6 capacity factors from ■■■ to ■■■ in all remaining years of the PPA would reduce the  
7 Fair Value by \$70 million.

8

9 Q. ARE YOU SUGGESTING THAT THE ASSUMED ■■■ CAPACITY FACTOR  
10 IS TOO LOW, AND SHOULD BE INCREASED FOR PURPOSES OF THE  
11 PPA VALUATION?

12 A. No, I am not. Rather, I point this out to illustrate the uncertainty relative to the  
13 projected dispatch of Cedar Bay by FPL over the remaining PPA life, and the  
14 potentially significant impacts that assumed capacity factors have on the Fair Value  
15 of this PPA. This uncertainty further supports my recommendation of using a higher  
16 discount rate in the DCF model.

17

18

#### SUMMARY

19 Q. WHAT IS THE COMBINED IMPACT ON THE FAIR VALUE OF THE PPA  
20 OF ALL FOUR OF THE DEFICIENCIES THAT YOU HAVE IDENTIFIED  
21 ARE NECESSARY AS A RESULT OF YOUR REVIEW OF THE DCF  
22 MODELS UTILIZED BY FPL WITNESS HERR?

1 A. After making all of my suggested corrections and input assumption adjustments to the  
2 DCF spreadsheet model utilized by FPL Witness Herr, the maximum adjusted Fair  
3 Value of the Cedar Bay PPA is approximately \$370 million, rounded to the nearest  
4 \$10 million, consistent with Mr. Herr's DCF rounding approach.

5

6 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

7 A. Yes, it does.

1 MR. TRUITT: We waive summary and tender the  
2 witness for cross.

3 COMMISSIONER EDGAR: Thank you.

4 FPL?

5 MR. BUTLER: We have waived cross.

6 COMMISSIONER EDGAR: Okay. FIPUG?

7 MR. MOYLE: It keeps coming back to me, so --

8 COMMISSIONER EDGAR: You're up.

9 MR. MOYLE: We have a few questions for this  
10 witness.

11 COMMISSIONER EDGAR: Okay.

12 EXAMINATION

13 BY MR. MOYLE:

14 Q Good afternoon.

15 A Good afternoon.

16 Q On Page 4 of your testimony on Line 10 --  
17 actually, it starts on Line 8 -- you're asked what is  
18 the overall impact of the issues that you've identified.  
19 And you say, "After making all of my suggested  
20 corrections and input assumption adjustments to the DCF  
21 spreadsheet model utilized by FPL Witness Herr, the  
22 adjusted fair value of the Cedar Bay plan is no greater  
23 than approximately 370 million, round to the nearest  
24 10 million, consistent with FPL Witness Herr's DCF  
25 rounding approach."



1           Are you saying that there could be less than  
2 370 in your testimony?

3           A     Potentially.

4           **Q     So, 370 -- you say it shouldn't be any greater**  
5 **than 370 --**

6           MR. BUTLER: I'm sorry. I'm going to object  
7 to this. This is clearly friendly cross.  
8 Mr. Moyle is trying to establish a point that is  
9 favorable to his position in the case with a  
10 witness who is also favorable to his position in  
11 the case. And I don't believe that it's  
12 appropriate cross examination.

13           COMMISSIONER EDGAR: Mr. Truitt -- your  
14 witness.

15           MR. TRUITT: Procedurally, we would agree with  
16 FPL's objection.

17           COMMISSIONER EDGAR: Mr. Moyle?

18           MR. MOYLE: I respectfully disagree. If you  
19 read the pre-hearing statements, FIPUG's position  
20 with respect to the cost is you ought to look at  
21 the Goldman Sachs number.

22           That's the exhibit that I had Mr. Herr read,  
23 the bottom where it says, [REDACTED]

24 [REDACTED]

25 [REDACTED]

1

2

3 So, our positions are not aligned. FIPUG --

4 MR. WRIGHT: I object and move to strike  
5 Mr. Moyle's last comments. He has just tried to  
6 triangulate the number that we're not supposed to  
7 do -- it's our confidential information.

8 We've talked about this three times. We've  
9 talked about the relationship between the 2013  
10 number and the 2015 number in Mr. Herr's two  
11 studies. That's what's on the table. We're not  
12 talking about the other number that can be used to  
13 triangulate value.

14 MR. MOYLE: And respectfully, I didn't --

15 COMMISSIONER EDGAR: I -- hold on.

16 Ms. Helton.

17 MS. HELTON: The pre-hearing order says that  
18 cross examination shall be limited to witnesses  
19 whose testimony is adverse to the party desiring to  
20 cross examine. Any party conducting what appears  
21 to be a friendly cross examination of the witness  
22 should be prepared to indicate why that witness's  
23 direct testimony is adverse to its interests.

24 And I hear Mr. Wright's concern. And I think  
25 Mr. Moyle has been advised to stay away from any

1 questions which will -- could divulge to an  
2 interested person who is following the case  
3 information that has been at this point in time  
4 deemed to be confidential.

5 So, perhaps, if --

6 MR. WRIGHT: If he wants to talk about the 370  
7 vis-a-vis the 520, those are comparable numbers.  
8 FPL says fair value is 520. The Mr. Brunault says  
9 the value is no more than \$370 million. That's an  
10 okay subject matter as far as we're concerned  
11 vis-a-vis our confidential number. Trying to tie  
12 it to the other value is not.

13 But then, the 370-versus-the-520 implicates  
14 the friend-cross issue, which is not my issue.

15 Thank you.

16 COMMISSIONER EDGAR: Mr. Butler.

17 MR. BUTLER: I will return to it being my  
18 issue.

19 COMMISSIONER EDGAR: We have come full circle.

20 (Laughter.)

21 MR. BUTLER: Yes.

22 Mr. Brunault's testimony is that the value is  
23 not greater than approximately 370 million. So, in  
24 other words, he's not testifying that it couldn't  
25 be lower. I don't see where there is a conflict

1           between his testimony and Mr. Moyle's witness. It  
2           seems to me that it's clearly friendly cross.  
3           There is nothing adverse there.

4           COMMISSIONER EDGAR: Objection sustained.  
5           Move along.

6           MR. MOYLE: Well, if you're in effect ruling I  
7           can't ask him questions, I don't have any more  
8           questions for him.

9           COMMISSIONER EDGAR: No questions along  
10          another line? That's your decision.

11          MR. MOYLE: All right. So, just with respect  
12          to that ruling, I think the exhibits that we have  
13          in there -- I mean, I think we've covered it with  
14          respect to that.

15          Well, I'll try.

16          (Laughter.)

17          COMMISSIONER EDGAR: We're all listening.

18 BY MR. MOYLE:

19           **Q     Page 14, you talk about the heat rate on**  
20 **Page 14, don't you?**

21           A     Yeah, I believe I finish up with that issue on  
22 Page 14.

23           **Q     Okay. And so, you say that the more**  
24 **appropriate heat rate would save ratepayers 35 million?**

25           A     Yes, sir.

1           **Q**     Okay. How does that 35 million relate to  
2 your -- your 370? Is it -- is it part of the  
3 calculation on the 370? Or it would be -- it would come  
4 off the 370 and make it 370 minus 35?

5           A     No. It would be a reduction from the 520 that  
6 Witness Herr testified to. And based on his valuation,  
7 I've taken each of the issues in sequence -- in a  
8 sequence that makes sense to me and incrementally  
9 identified the value of each of those issues.

10                     So, the 35 million would be in addition to  
11 what was discussed in the first issue, which it's on a  
12 previous page. I can't recall exactly where it was, but  
13 it's an incremental change from the 520 down to another  
14 number down to 35 -- 35 million more and then so forth  
15 and so on.

16           **Q**     So, if I were to ask you what is your bottom  
17 line number that you think ratepayers should pay, what  
18 would that be?

19           A     Well, when you say ratepayers should pay,  
20 that's a little distorted from the task at hand. The  
21 task at hand was to assess -- to provide my assessment  
22 of what Mr. Herr's evaluation of 520 was. And I've  
23 identified several issues with respect to the  
24 assumptions and the calculations and made those  
25 corrections.

1           And I would say the estimated fair value,  
2 based on his approach by using more sensible assumptions  
3 than a market participant would have available to them,  
4 would produce numbers that would be more like 370. And  
5 that's the number that I was comfortable with saying  
6 that should be no greater than 370.

7           There may be other issues, if I were to dig in  
8 further, that I could argue. But for purposes of this  
9 testimony, that's what I was comfortable with.

10           **Q     And you were uncomfortable with the discount**  
11 **rate that Mr. Herr used?**

12           A     No.

13           MR. BUTLER: I'm going to object again. This  
14 is clearly friendly cross.

15           COMMISSIONER EDGAR: Mr. Moyle, how is this  
16 adverse?

17           MR. MOYLE: I think this witness -- Mr. Lane,  
18 our witness, suggested a discount rate that was  
19 more appropriate. I don't think this witness has  
20 suggested discount rate matched up to the witness  
21 we had. So, our positions are not aligned in that  
22 regard, based on my recollection.

23           COMMISSIONER EDGAR: All right. I'll allow.

24 BY MR. MOYLE:

25           **Q     So, sir, did you -- you take issue with the**

1 **discount rate used by Mr. Herr?**

2 A Yes.

3 **Q Why?**

4 A I believe it was too low. I believe it didn't  
5 represent the kind of risk that a willing buyer would  
6 assess the value of the facility to be.

7 **Q And when you have a lower discount rate, it**  
8 **makes the price go up, right? The fair value.**

9 MR. BUTLER: I'm going to object again. This  
10 clearly isn't going to contrasting Mr. Brunault's  
11 views to Mr. Lane's views. It's simply buttressing  
12 his notion that the discount rate used by Mr. Herr  
13 in their view is inappropriate.

14 They both have the same view on this subject.  
15 Mr. Moyle is simply buttressing his witness's  
16 testimony on that subject by asking Mr. Brunault  
17 questions along the same line.

18 I was waiting for something along the line of  
19 our witness says it's "X," you say it's "Y;" why  
20 isn't "X" the more appropriate number. I'm not  
21 hearing any of that.

22 COMMISSIONER EDGAR: Mr. Moyle, would you like  
23 to rephrase?

24 BY MR. MOYLE:

25 **Q Do you agree with the discount rate that's**

1 **recommended by Mr. Lane?**

2 A I have to be honest, I have not studied  
3 Mr. Lane's testimony on the discount rate.

4 **Q So, you don't have any reason to agree or**  
5 **disagree?**

6 A I do not. I'm --

7 **Q What's the discount rate that you recommend?**

8 A I believe that's been redacted in the  
9 testimony. I'm not sure I'm allowed to say.

10 MR. MOYLE: I mean, is that confidential?  
11 He's a witness for OPC, and he's making  
12 recommendation of a discount rate. I don't know  
13 why that would be --

14 COMMISSIONER EDGAR: I don't know if that's  
15 confidential or not.

16 Mr. Wright, can you address that?

17 MR. WRIGHT: I just need one moment.

18 COMMISSIONER EDGAR: You may have it.

19 MR. REHWINKLE: Madam Chairman, Page 28 is, I  
20 think, where we need to look.

21 COMMISSIONER EDGAR: Thank you.

22 MR. WRIGHT: Well, there are actually  
23 references to the discount rate also on Page 24 --  
24 yeah -- well, there's references. The discount  
25 rate and related calculations that are also



1 highlighted in the confidential version, redacted  
2 in the public version that relate to debt equity  
3 costs are confidential information.

4 COMMISSIONER EDGAR: Thank you.

5 Mr. Moyle?

6 MR. MOYLE: I guess -- I guess where I'm stuck  
7 is I don't have an understanding when I ask the  
8 witness to say you're an expert witness hired by  
9 OPC, you looked at this, what do you think is the  
10 right discount rate -- I'm not asking him to say  
11 Mr. Herr got it wrong because he used, you know,  
12 this confidential -- claimed confidential discount  
13 rate.

14 I'm just asking him what, in his independent  
15 judgment, is the discount rate he ought to use. I  
16 don't see how in the world that's confidential to  
17 Cogentrix.

18 MR. WRIGHT: It derives from the debt -- his  
19 recommended discount rate on Page 28 derives from a  
20 specified debt equity ratio that is part of  
21 confidential information that can be used to  
22 triangulate to estimated value of our confidential  
23 information.

24 There is a very limited amount of information  
25 that's redacted on Pages 28 and 29, but that is

1 what it is.

2 COMMISSIONER EDGAR: I agree. Let's move on.

3 MR. MOYLE: I think that's all I have. Thank  
4 you.

5 COMMISSIONER EDGAR: Okay. Thank you.  
6 Staff.

7 MS. BARRERA: Staff has no questions.

8 COMMISSIONER EDGAR: Thank you.

9 Commissioners, no questions at this point?  
10 Okay.

11 OPC.

12 MR. TRUITT: No redirect.

13 COMMISSIONER EDGAR: No redirect.

14 And there were exhibits?

15 MR. TRUITT: Yes, we would ask that  
16 Exhibits 10 and 11 be entered into the record.

17 COMMISSIONER EDGAR: Thank you. Seeing no  
18 objection, Exhibits 10 and 11 will be entered into  
19 the record at this time.

20 (Exhibit Nos. 10 and 11 admitted into the  
21 record.)

22 MR. WRIGHT: Madam Chairman?

23 COMMISSIONER EDGAR: Yes, Mr. Wright?

24 MR. WRIGHT: Earlier on, I had filed a  
25 motion -- I filed -- I had stated a motion to

1 strike certain commentary made by Mr. Moyle  
2 relating to Mr. Brunault's number as it  
3 triangulates -- as it may be used to triangulate to  
4 our number. If you want to take that under  
5 advisement, that's fine, but I didn't want it to  
6 slip through the cracks.

7 COMMISSIONER EDGAR: Thank you. I appreciate  
8 that. I will take that under advisement.

9 MR. WRIGHT: Thank you.

10 COMMISSIONER EDGAR: And I appreciate you  
11 raising that.

12 Okay.

13 MR. TRUITT: We ask that Mr. Brunault be  
14 excused, Madam Chairwoman.

15 COMMISSIONER EDGAR: You may be excused.  
16 Thank you.

17 THE WITNESS: Thank you.

18 COMMISSIONER EDGAR: Mr. Truitt?

19 MR. TRUITT: Next, OPC would like to call  
20 Mr. Dan Wittliff.

21 EXAMINATION

22 BY MR. TRUITT:

23 Q Were you sworn in this morning, Mr. Wittliff,  
24 with the other witnesses?

25 A I was.

1           **Q     Could you please state your name for the**  
2 **record.**

3           A     I am Dan J. Wittliff.

4           **Q     And could you please state who you work for**  
5 **and your business address.**

6           A     I work for GDS Associates, Inc., with offices  
7 in Austin, Texas. And the -- do you want the business  
8 address at this point?

9           **Q     Yes, please.**

10          A     919 Congress, Suite 800, Austin, Texas.

11          **Q     And who are you testifying on behalf of in**  
12 **this case, sir?**

13          A     Testifying on behalf of OPC.

14          **Q     And did you prepare and cause to be filed in**  
15 **this docket on June 8th, 12 pages of direct testimony?**

16          A     Yes, I did.

17          **Q     And do you have any changes or corrections to**  
18 **make to your testimony at this time?**

19          A     I do. On Page 7, Line 1, please correct  
20 March 10 to March 3rd, 2010.

21          **Q     Is that the only correction or change, sir?**

22          A     It is.

23          **Q     So, with that correction, if I asked you the**  
24 **same questions today that are in your direct testimony,**  
25 **would your answers be the same?**

1           A     Yes, they would.

2           Q     And did you also prepare and cause to be filed  
3     in this docket on June 8th one exhibit listed as  
4     Appendix A? And I would note for the record it's  
5     Exhibit 12 in staff's comprehensive exhibit list.

6           A     Yes.

7           Q     Do you have any corrections or changes to make  
8     to that exhibit?

9           A     No.

10           MR. TRUITT: Madam Chairwoman, we would ask  
11     that the witness's direct testimony be entered into  
12     the record as though read.

13           COMMISSIONER EDGAR: The witness's prefiled  
14     testimony will be entered into the record as though  
15     read.

16

17

18

19

20

21

22

23

24

25

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for Approval of Arrangement To  
Mitigate Impact of Unfavorable Cedar Bay  
Power Purchase Obligation, by Florida Power  
& Light Company

DOCKET NO. 150075-EI

FILED: June 8, 2015

**REDACTED**



(PER DESIGNATION OF FPL AND/OR COGENTRIX (CEDAR BAY) PENDING FINAL DETERMINATION)

**DIRECT TESTIMONY**

**OF**

**DAN J. WITTLIFF**

**ON BEHALF OF THE CITIZENS OF**

**THE STATE OF FLORIDA**

J.R. Kelly  
Public Counsel

Office of Public Counsel  
c/o The Florida Legislature  
111 W. Madison Street, Room 812  
Tallahassee, FL 32399-1400

Attorney for the Citizens  
of the State of Florida

**DIRECT TESTIMONY**

**OF**

**DAN J. WITTLIFF**

On Behalf of the Office of Public Counsel

Before the

Public Service Commission

Docket No. 150075-EI

**I. INTRODUCTION**

**Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

A. My name is Dan Wittliff. My business address is 919 Congress Avenue, Suite 800, Austin, Texas 78701.

**Q. PLEASE OUTLINE YOUR FORMAL EDUCATION.**

A. I am a 1972 graduate of Southern Methodist University (SMU) where I earned a Bachelor of Science degree in mechanical engineering and membership in Pi Tau Sigma mechanical engineering honorary. In 1975, I earned a Master of Business Administration from the University of Oklahoma where I was elected to membership in the Beta Gamma Sigma business honorary.

**Q. WHAT IS YOUR PRESENT POSITION?**

A. I am Managing Director of Environmental Services for GDS Associates, Inc. in Austin, Texas.

1 **Q. PLEASE STATE YOUR PROFESSIONAL EXPERIENCE.**

2 A. Currently, I serve as Managing Director of Environmental Services with GDS  
3 Associates, Incorporated in Austin, Texas. I have been with GDS since January  
4 2007. I manage complex and multi-media (e.g., air, water, wastewater, and solid  
5 waste) environmental projects. Prior to joining GDS Associates, I was Principal of  
6 Dan Wittliff Consulting, PLLC. This firm provided professional engineering services  
7 in environmental engineering, regulatory affairs, and energy systems.

8 From May 1995 through November 1999, I served as the first Chief Engineer  
9 for the Texas Natural Resource Conservation Commission (TNRCC). Before service  
10 with TNRCC, I served in several supervisory positions with West Texas Utilities  
11 Company, Abilene, Texas managing and monitoring power station performance to  
12 include issues related to air pollution, water treatment, industrial hygiene, and solid  
13 waste disposal.

14  
15 **Q. WOULD YOU PLEASE DESCRIBE GDS?**

16 A. GDS Associates, Inc. ("GDS") is an engineering and consulting firm with offices in  
17 Marietta, Georgia; Austin, Texas; Auburn, Alabama; Manchester, New Hampshire;  
18 Madison, Wisconsin and Orlando, Florida. GDS provides technical and financial  
19 consulting services to a nationwide base of clients, which primarily includes  
20 municipal and cooperative electric utilities, Public Service Commissions and large  
21 consumers of electricity. Areas of expertise include generation support and  
22 management consulting, power supply and transmission planning, rate consulting,  
23 distribution services, least cost planning and litigation support. Generation support



1 services provided by the firm include plant operational monitoring on behalf of co-  
2 owners of fossil and nuclear power plants, plant ownership feasibility studies, plant  
3 management audits, plant construction cost and schedule analyses, evaluations of  
4 power plant O&M costs and budgeting practices, production cost modeling and plant  
5 outage and replacement power cost evaluations.

6

7 **Q. HAVE YOU GIVEN TESTIMONY BEFORE?**

8 A. This is the first time that I will be providing testimony before the Florida Public  
9 Service Commission, although members of the firm have testified before the  
10 Commission. I previously offered testimony in the matter of the Hicks-Elizabeth  
11 CCN Application (Texas SOAH Docket No. 473-14-2252, PUC Docket No. 42087)  
12 on June 17, 2014.

13

14 **II. PURPOSE OF TESTIMONY**

15 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

16 A. My testimony will address environmental issues and concerns involving the proposed  
17 purchase of Cedar Bay Power by Florida Power and Light. In doing so, I will  
18 respond to environmental documents, testimony, depositions, and representations  
19 provided by representatives of Florida Power & Light, Cogentrix, and Cedar Bay  
20 Generating Company concerning the Cedar Bay Power Purchase Obligation by  
21 Florida Power & Light Company.

1 Q. **BY WHOM ARE YOU RETAINED IN THIS PROCEEDING?**

2 A. GDS is being retained by the Office of Public Counsel.

3

4 Q. **PLEASE SUMMARIZE THE SALIENT POINTS YOU WILL ADDRESS IN**  
5 **YOUR TESTIMONY.**

6 A. Specifically, I will (1) identify the documented presence of groundwater  
7 contamination at the Cedar Bay Cogeneration Project site, (2) explain the  
8 indemnifications for pre-existing environmental conditions in the 1991 ground lease,  
9 (3) identify information gaps from the ground lease that were not identified as  
10 missing by Florida Power & Light, (4) explain how the information is essential to  
11 quantifying environmental risk and liability, and (5) point out how parties who caused  
12 little or no site contamination can be drawn into expensive cleanups under the U.S.  
13 Environmental Protection Agency's Superfund program.

14

15 **III. CONCERNS WITH INDEMNIFICATION IN APRIL 29, 1991 GROUND**  
16 **LEASE**

17 Q. **HOW IS THE APRIL 29, 1991 GROUND LEASE BETWEEN SEMINOLE**  
18 **KRAFT CORPORATION AND AES CEDAR BAY LIMITED PARTNERSHIP**  
19 **RELEVANT TO THE PROPOSED PURCHASE OF CEDAR BAY POWER**  
20 **BY FLORIDA POWER AND LIGHT?**

21 A. Even though this lease was executed over 24 years ago, Section 4.1 of the lease  
22 specifies a term of 50 years. Without a valid lease for the land on which the power  
23 plant and its associated facilities are constructed and operate, the plant would almost

1 certainly cease to be a going concern. Further, language in the lease allows for the  
2 continuation of the lease to successors or assignees unless otherwise terminated in  
3 accordance with Sections 12.2, 13.1, and 14.1 of the lease.

4

5 **Q. IN THE COURSE OF YOUR REVIEW OF THE GROUND LEASE, DID YOU**  
6 **IDENTIFY ANY CONCERNS WITH THE TERMS OF THE LEASE?**

7 A. Yes.

8

9 **Q. PLEASE EXPLAIN.**

10 A. At first glance, the indemnification provisions in Section 10 appear to provide broad  
11 and mutual indemnifications to hold each party harmless for past, current, and future  
12 acts or failures to act on general, environmental, and waste disposal liability issues.

13 However, Section 10.2(ii) specifically refers to a Schedule of Environmental  
14 Concerns in Appendix 20.1 as listing instances of Lessor's non-compliance with  
15 environmental laws presumably for the purposes of disclosing pre-existing conditions  
16 with the property. Article XX of the ground lease that Florida Power and Light is  
17 acquiring as part of its Cedar Bay equity purchase contains a Section 20.1 outlining  
18 environmental representations concerning the condition of the property at the time the  
19 lease was signed in 1991 and a Section 20.2 providing environmental covenants.  
20 Paragraph 20.1(i) (Bates no CB-15-00447) states "to the best of its knowledge except  
21 as would not have a Material Adverse Effect and except *as indicated on Appendix*  
22 *20.1 attached hereto* [emphasis added]: a) the SX site is now in compliance and

1 Ground Lessor operations have not been and are now in compliance, with all  
2 Environmental Laws.”

3 When I reviewed the details of this appendix, I found two parts (i) and (iii)  
4 with two blank pages between the end of (i) and the beginning of (iii) and no  
5 explanation as to why there were intervening blank pages and no part (ii). Part (i)  
6 addresses environmental matters in four parts: (a) compliance, (b) release of  
7 hazardous materials, (c) environmental claims, and (d) facts, circumstances,  
8 conditions, or occurrences. Part (iii) addresses environmental permits in two parts:  
9 (a) NPDES Permit 0000400 (issued in 1991) and (b) Consumptive Groundwater Use  
10 Permit (not yet issued at the time of the lease).

11 In a May 28, 2015 email exchange between the Office of Public Counsel and  
12 Florida Power and Light, the company confirmed that they noticed the same thing  
13 regarding the apparent missing information and advised that this was how the  
14 company had received the document from Cedar Bay. The clear implication is that  
15 FPL never reviewed the documents that appear to be missing information with no  
16 explanation as to why, nor is there any indication that FPL requested the missing  
17 information. This is in contrast where the phrase “THE REMAINDER OF THIS  
18 PAGE IS LEFT INTENTIONALLY BLANK” is clearly typed in on page CB-15-  
19 00455 of the ground lease. In addition, page CB-15-00485 of the ground lease shows  
20 Item 3 as “Intentionally Deleted” and page CB-15-00488 of the ground lease shows  
21 Item 10 as “Intentionally Deleted.” Clearly, the ground lease adopted a protocol of  
22 identifying where information is missing or deleted.

March 3, 2010 - AK

1           In addition, other documents such as the March 10, 2010 modification to  
2 conditions of the site certification stipulate that RockTenn’s predecessor -- Smurfit  
3 Stone -- operated a dedicated waste disposal site between 1972 and 1991 on the site  
4 and that exceedances of Florida drinking water standards for nine metals and sulfate  
5 were observed during groundwater sampling at many of the site monitoring wells.

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15           It appears that FPL is relying on the ground lease to shield Cogentrix and its  
16 successors (such as Florida Power and Light) from liability for pre-existing  
17 conditions. It is well known that the plant is built on a brownfield site with pre-  
18 existing contamination and that the site was used by various forest industries for  
19 decades. The ground lease attempts to assign pre-existing conditions under what can  
20 be described as a “what’s mine is mine, what’s yours is yours” remediation doctrine.

21           It also appears that both FPL and Cedar Bay are relying on what can be  
22 considered environmental indemnification provisions in the ground lease and an  
23 assertion that there has been no groundwater contamination from Cogentrix

1 operations at the site to shield them from environmental remediation liabilities. It  
2 further appears that both companies assume that ultimate cleanup and remediation of  
3 the site as a result of dismantling or demolishing the cogeneration facility would be  
4 negotiated with RockTenn, the existing property owner. However, a reading of the  
5 ground lease reveals that it contains no express provisions dictating how the cleanup,  
6 transfer, and remediation of the site would be handled.

7 The recognition of pre-existing contamination in these environmental reports  
8 and depositions as well as the importance of identifying and properly disclosing all  
9 pre-existing conditions and remedial obligations so that an appropriate environmental  
10 risk assessment can be made highlights the need to understand the circumstances  
11 surrounding the missing text in Appendix 20.1 of the ground lease. At a minimum, it  
12 calls for FPL to explain why there is this void. The lack of either the lease documents  
13 or such explanation makes it unnecessarily difficult to determine (1) the potential  
14 environmental liability associated with the lease as well as owning and operating a  
15 power plant on the leased land and (2) the adequacy of environmental liability  
16 insurance to cover this risk.

17  
18 **Q. WHY IS IT IMPORTANT TO IDENTIFY ALL PRE-EXISTING**  
19 **CONDITIONS IN ORDER TO EVALUATE THE POTENTIAL**  
20 **ENVIRONMENTAL LIABILITY AND RISKS THAT FPL MAY INCUR IN**  
21 **ACQUIRING THE CEDAR BAY FACILITY?**

22 **A.** Environmental regulators at the Federal and State levels attempt to recover costs  
23 associated with site remediation under their respective superfund programs should the

1 site be closed or abandoned without what they believe is adequate remediation. The  
2 parties targeted by the agencies to pay for remediation are referred to as potentially  
3 responsible parties (PRP). Based on past experience, the agencies are less concerned  
4 about what the indemnification agreements say on liability than who has been  
5 associated with the facility and has the ability to contribute funds to the remediation.  
6 In this case, Florida Power and Light would present very deep pockets potentially to  
7 clean up contamination which neither they nor Cedar Bay would have actually  
8 caused.

9 The Comprehensive Environmental Response, Compensation and Liability  
10 Act (CERCLA), 42 U.S.C. §1906, was enacted by Congress in 1980 in response to  
11 widely known pollution sites such as Love Canal and Times Beach. Also known as  
12 "Superfund", CERCLA is aimed at cleaning up sites contaminated with hazardous  
13 waste, and preventing contamination of future sites by assigning liability to parties  
14 involved. The liability requires the parties to pay for the cleanup of the sites. While  
15 there are thousands of sites across the country and more than 90 in Florida alone that  
16 have been drawn into the Superfund remediation program, one particular site bears  
17 directly on the power industry and casting a wide net in identifying parties to pay for  
18 the cleanup.

19 In 1982, Martha C. Rose Chemical Company in Holden, Missouri began  
20 receiving electrical equipment from electric companies that was contaminated by  
21 polychlorinated biphenyls (PCB's) which were outlawed by Congress in 1979  
22 because of their toxicity and persistence when released to the environment. Up until  
23 the ban, PCB's were used widely in the electric power industry as a coolant and

1 dielectric in equipment such as transformers, capacitors, voltage regulators, switches,  
2 and reclosers. The company represented to electric companies that the company  
3 would drain the equipment and destroy the liquid and service the containers. The  
4 company even issued certifications of destruction for the material which led the  
5 electrical companies to believe that their liability going forward had been eliminated.

6           Between 1983 and 1986, more than 700 companies, including West Texas  
7 Utilities, sent more than 20 million pounds of equipment and liquids to Rose  
8 Chemical for processing and destruction. In 1986, Rose Chemical declared  
9 bankruptcy and closed its doors. Their senior executives pled guilty to fraud and  
10 received prison sentences for storing most of the material on site when they had  
11 certified to its destruction. Even though 16 companies sent the bulk of the equipment  
12 and material to the site, USEPA identified any company who sent even one small  
13 piece of equipment to the site as a potentially responsible party (PRP). The total  
14 cleanup cost of the site including water and soil contamination was estimated at \$35  
15 million.

16           Rena I. Steinzor, an attorney who represented many public utilities during the  
17 Rose Chemical clean-up negotiations, observed how the EPA used CERCLA's strict  
18 liability to make utilities "pay to clean it up even if [they] did nothing wrong when  
19 [they] disposed of it."

20           The point here is that it is difficult for an entity to escape all liability for  
21 environmental clean-up when that entity has contacts with a contaminated site.



1 **Q. WHAT MODIFICATIONS, IF ANY SHOULD BE MADE TO THE**  
2 **PROPOSED PURCHASE AS A RESULT OF THIS MISSING**  
3 **INFORMATION?**

4 A. The Commission should require Florida Power and Light to produce this information,  
5 increase the assumed costs of remediation and/or assume double the amount of  
6 environmental liability insurance currently associated with this project in order to  
7 cover the additional uncertainty.

8

9 **Q. WHAT SHOULD BE THE IMPACT ON THE FINAL ORDER IN THIS**  
10 **DOCKET AS A RESULT OF THE CONCERNS IDENTIFIED IN YOUR**  
11 **TESTIMONY?**

12 A. The Commission should hold Florida Power and Light to its burden of proof and not  
13 approve the transaction absent complete disclosure and evaluation of the costs that  
14 FPL would incur if it became entangled in site remediation litigation. Part of this  
15 burden is to produce the apparently missing information. Part of FPL's burden is to  
16 fully disclose and evaluate all environmental liabilities and costs. This evaluation  
17 could include increasing the environmental liability insurance currently associated  
18 with this project in order to cover the additional uncertainty – if such coverage can  
19 even be obtained. If the missing information is provided, intervenors, including the  
20 OPC, should have the right to provide supplemental testimony based on receipt and  
21 further analysis of the missing environmental data.

1 Q. DOES THIS CONCLUDE YOUR TESTIMONY?

2 A. Yes.

1 MR. TRUITT: We waive summary and tender the  
2 witness for cross.

3 COMMISSIONER EDGAR: Thank you.

4 FPL has waived?

5 MR. BUTLER: That's correct.

6 COMMISSIONER EDGAR: FIPUG.

7 MR. MOYLE: I have a few questions.

8 EXAMINATION

9 BY MR. MOYLE:

10 Q Sir, could I refer you to your direct  
11 testimony on Page 11. You say that you believe on  
12 Line 5 that the Commission should require FPL to  
13 increase the assumed costs of remediation.

14 Can you explain what that means?

15 A It means that because there is, apparently,  
16 missing information in the ground lease and because  
17 there is risk associated with the site that is, while  
18 unlikely, is nevertheless a risk, that they've already  
19 assumed 20 million covers their environmental risk  
20 without assuming additional exposure; that there needs  
21 to be some accounting for what is, apparently,  
22 unaccounted-for risk.

23 Q So, when you say increase the assumed costs  
24 for remediation, you're not really suggesting how that  
25 be done; you're just saying that it needs to go higher?

1 A Yes.

2 MR. BUTLER: I'm going to object that this is  
3 friendly cross. Not seeing how this is adverse to  
4 Mr. Moyle's position in the docket.

5 COMMISSIONER EDGAR: Mr. Moyle, how is this  
6 adverse?

7 MR. MOYLE: I think we took no position on  
8 some of the environmental issues. So, I'm not sure  
9 necessarily that it is. But I don't know what was  
10 being meant by, when he uses, in his testimony,  
11 increased assumed costs of remediation. I think,  
12 in a 120.57 proceeding that the witness takes the  
13 stand, I think I should be able to clarify the  
14 testimony a little bit.

15 COMMISSIONER EDGAR: I'll allow.

16 BY MR. MOYLE:

17 Q So, sir, I think you answered the question  
18 before the objection, but when you say increase costs of  
19 remediation, you're not -- you're not suggesting how  
20 this would be done, this way, that way, or another way?

21 A No, I'm not.

22 Q And the basis of that recommendation is based  
23 on your studied assessment of what you believe are  
24 environmental liabilities?

25 A Potential environmental liabilities.

1           **Q     One final question: You and the witness for**  
2 **FPL have a disagreement on the CERCLA liability; is that**  
3 **right? Potential CERCLA liability.**

4           MR. BUTLER: I'm going to object, again, to  
5 this as being friendly cross.

6           MR. MOYLE: I'll tell you what, I'll just  
7 withdraw.

8           MR. BUTLER: I note that the point -- I'm  
9 sorry. What's that?

10          COMMISSIONER EDGAR: He has withdrawn the  
11 question, Mr. Butler.

12          That's all? Okay.

13          Staff.

14          MS. BARRERA: Staff has no questions.

15          COMMISSIONER EDGAR: Commissioners? No  
16 questions.

17          Mr. Truitt?

18          MR. TRUITT: We would ask that Exhibit 12 be  
19 entered into the record.

20          COMMISSIONER EDGAR: Seeing no objection,  
21 Exhibit 12 will be entered into the record.

22          (Exhibit No. 12 admitted into the record.)

23          MR. TRUITT: May Mr. Wittliff be excused?

24          COMMISSIONER EDGAR: He may. Thank you.

25          (Transcript continues sequence in Volume 3.)

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

## CERTIFICATE OF REPORTER

STATE OF FLORIDA )  
COUNTY OF LEON )

I, ANDREA KOMARIDIS, Court Reporter, do hereby  
certify that the foregoing proceeding was heard at the  
time and place herein stated.

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

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

DATED THIS 29th day of July, 2015.



---

ANDREA KOMARIDIS  
NOTARY PUBLIC  
COMMISSION #EE866180  
EXPIRES FEBRUARY 09, 2017

THIS IS A COURTESY COPY of EXHIBIT NO. 29, which is already in evidence

DOCKET NO: 150075-EI

WITNESS:

PARTY:

DESCRIPTION: FPL's responses to Staff's 1st set of Interrogatories, No. 18

DOCUMENTS:

PROFFERED BY: Staff

Witness  
Butts. 3:57.

**Q.**

**Please refer to Witness Hartman's Direct Testimony, Page 8, Lines 8 through 14. Please discuss the EPA's Clean Power Plan and its potential impacts to coal-fired generation. As part of this discussion, please address whether coal-fired units in Florida, such as the Cedar Bay Facility, would be required to retire during the 2015 through 2024 timeframe.**

**A.**

At the present time the EPA Clean Power Plan (CPP) is a proposed rule, not a final rule. EPA has announced that it plans to issue the final rule mid-summer of this year. The states then will produce implementation plans, subject to EPA approval. The preliminary state plan is due for submission in mid-summer 2016, and the state is eligible for a one year extension until 2017. If Florida submits as part of a multi-state plan, then the final plan is not due until 2018. The plans are also subject to litigation which could significantly delay implementation. That said, we can comment on EPA's current proposed CPP.

The proposed CPP provides a single target for state emissions of CO<sub>2</sub>. How that target is met is up to the individual states. Nothing in the proposed CPP requires retirement of any particular coal fired generator, although retirement of coal fired generators is one of the means of achieving compliance.

The proposed CPP outlines four basic methods of achieving the target: 1) increased efficiency of coal-fired generating units; 2) re-dispatch of existing natural gas fired generating units to 70% capacity factor; 3) increasing the amount of renewables and nuclear generation on the grid, and 4) increasing energy efficiency.

The last three methods of meeting the emissions target likely would have the effect of decreasing the dispatch of coal fired generators on the grid. For utility owned or merchant generators this has the impact of decreasing the revenues associated with those units, potentially leading to retirement just on pure economic grounds.

Cedar Bay, however, is different. As dispatch is reduced the profitability of the unit for its owners increases. Under the PPA, the less Cedar Bay operates the more money it makes, due to the PPA's very high capacity payments but negative energy margin.

Any Florida rule resulting in the retirement of Cedar Bay prior to the end of the existing PPA is pure conjecture at present. The available evidence is that Cedar Bay will be economically viable to the end of the PPA. The impact of the CPP would likely result in increased profits for the owner due to continued capacity payments for the facility and increased effective cost per unit energy produced for FPL's customers.



THIS IS A COURTESY COPY of EXHIBIT NO. 41, which is already in evidence

DOCKET NO: 150075-EI

WITNESS:

PARTY:

DESCRIPTION: FPL's responses to OPC's 3rd set of Interrogatories, No. 18

DOCUMENTS:

PROFFERED BY: Staff

Witness. 3:57  
Butts-

Q.

One of the claimed benefits of the Cedar Bay Transaction put forward by FPL in Florida Power & Light Company's Petition for Approval of Arrangement To Mitigate Impact of Unfavorable Cedar Bay Power Purchase Obligation ("Petition") is that it "is expected to yield environmental benefits" (see page 6). This benefit is also echoed in the Hartman testimony (see Page 10). Please explain and describe in detail the manner in which emission reductions and/or environmental benefits are incorporated in the Economic Evaluation supporting the claimed Net Customer Savings of \$70M (NPV).

A.

The transaction will result in a substantial reduction in SO<sub>2</sub>, NO<sub>x</sub> and CO<sub>2</sub> emissions from the Cedar Bay facility because it is projected to operate at a much lower capacity factor and will be retired much earlier than if the PPA were to remain in effect. Because emission costs are not passed through to FPL under the PPA, however, no direct economic benefit to customers from the reduced emissions is claimed in the analysis. On the other hand, operating the Cedar Bay facility at a low capacity factor and retiring it early will result in marginally higher emissions from FPL's own facilities. These costs for these increased emissions are incorporated in the economic analysis and reflected as a reduction in the net customer savings.