

# I. Meeting Packet



**State of Florida**  
**Public Service Commission**  
**INTERNAL AFFAIRS AGENDA**

Wednesday, August 14, 2013

9:30 am

Betty Easley Conference Center, Room 140

---

---

1. Presentation by Dr. Rick Harper, Florida Senate – Florida's Position in the New Energy Economy. (Attachment 1)
2. Presentation by Al Latimer, Enterprise Florida. (No Attachment)
3. Federal Energy Regulatory Commission (FERC) Order on Compliance Filings by Southeastern Regional Transmission Planning (SERTP) companies. Guidance is sought. (Attachment 2)
4. Executive Director's Report. (No Attachment)
5. Other Matters. (No Attachment)

BB/mj



# Florida's Position in the New Energy Economy

Florida Public Service Commission  
Internal Affairs Meeting  
August 14, 2013

Rick Harper, Ph.D.  
Senior Policy Advisor on Economic Development  
Florida Senate, and,  
Executive Director,  
UWF Office of Economic Development and Engagement



# AMERICA'S GROWTH CORRIDORS: The Key to National Revival

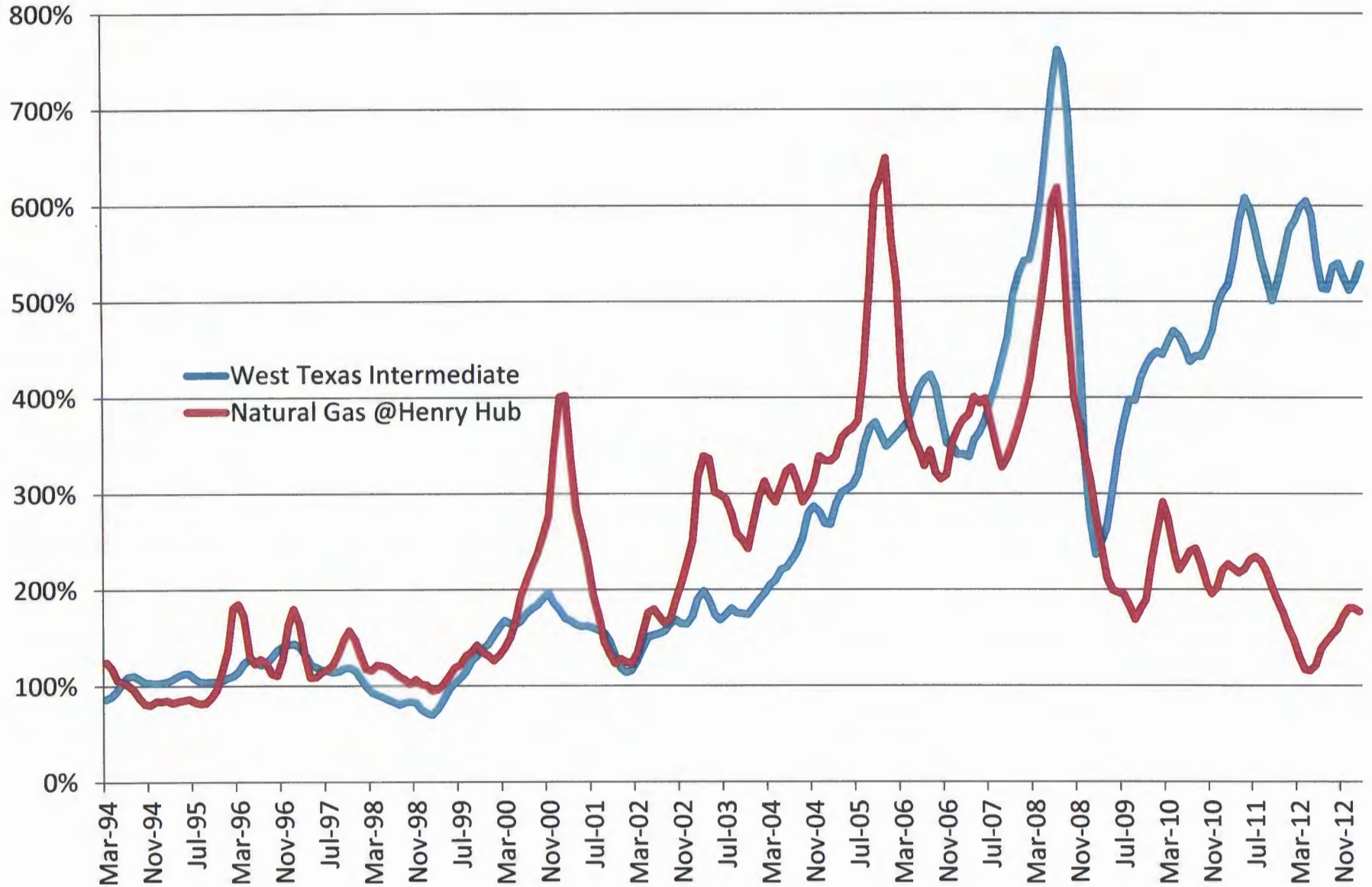
Joel Kotkin  
*Adjunct Fellow, Manhattan Institute*

The four growth corridors are:

1. The Great Plains region, made up of Montana, Wyoming, Colorado, New Mexico, Texas, Oklahoma, Kansas, Nebraska, and the Dakotas
2. The "Third Coast" stretch of counties whose shores abut the Gulf of Mexico and which range through Texas, Louisiana, Mississippi, and Florida
3. The "Intermountain West," consisting of counties in the north of New Mexico and Arizona, parts of eastern California and western regions of Montana, Wyoming, and Colorado, as well as the non-coastal eastern regions of Oregon and Washington and all of Idaho, Utah, and Nevada
4. The "Southeast Manufacturing Belt" of counties in eastern Arkansas, all of Tennessee, and large swaths of Kentucky, the Carolinas, Georgia, Alabama, Mississippi, and southwestern Virginia

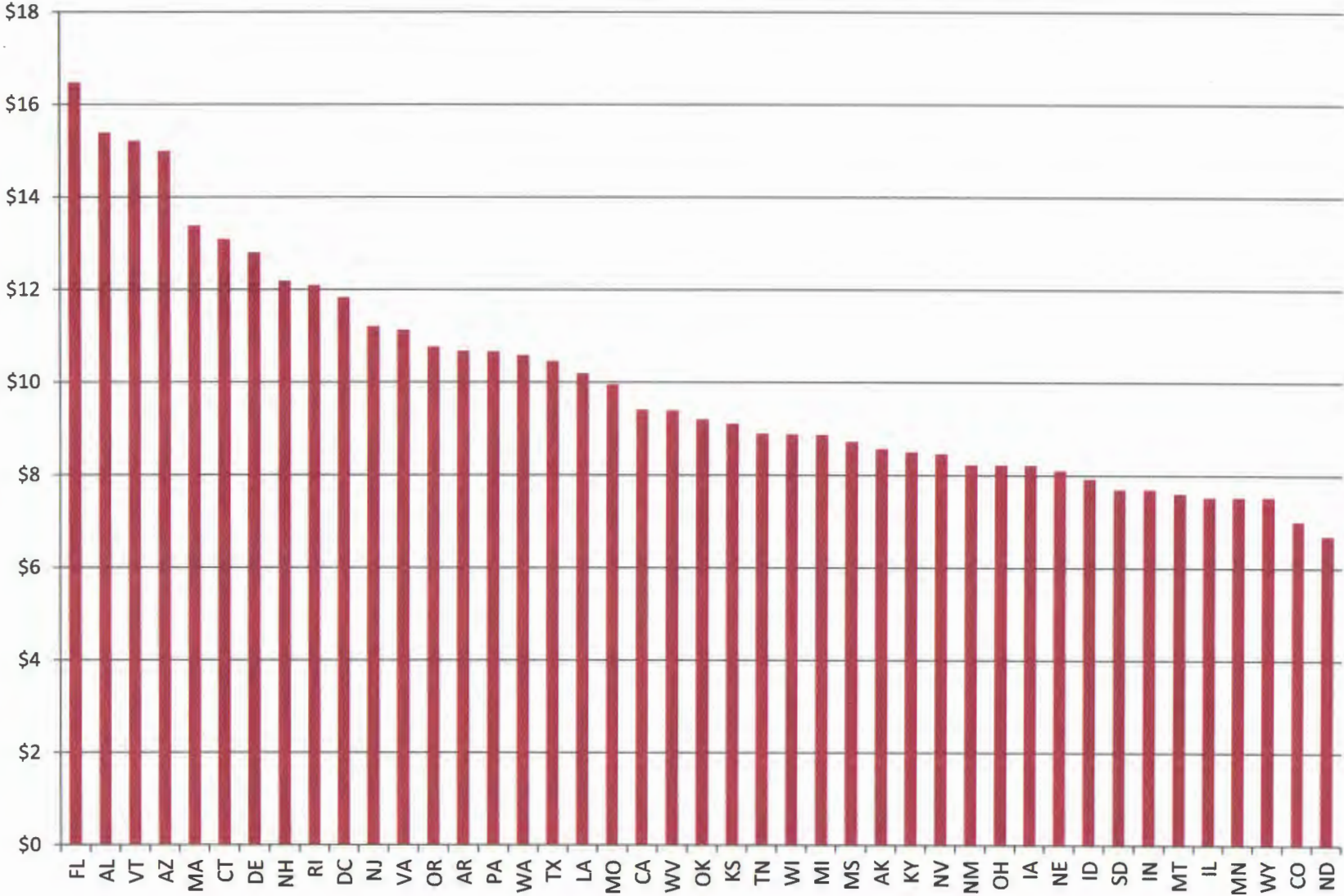
# US Oil (WTI) and Natural Gas Prices as % of 1994 average

March 94 - Feb 13, 3-month moving average



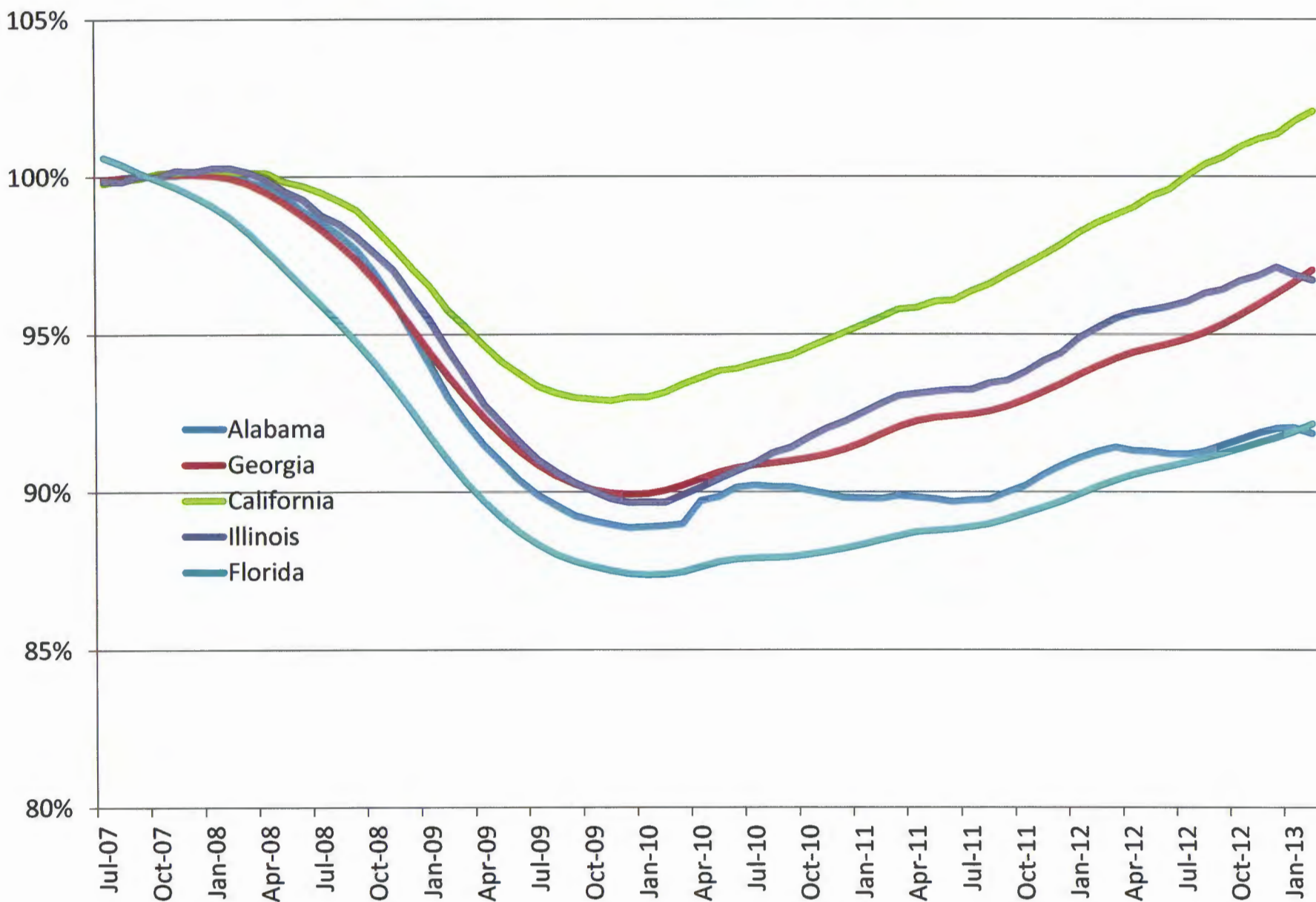
# Residential Natural Gas Prices, \$/000cuft

U.S. Energy Information Administration, Dec 2012



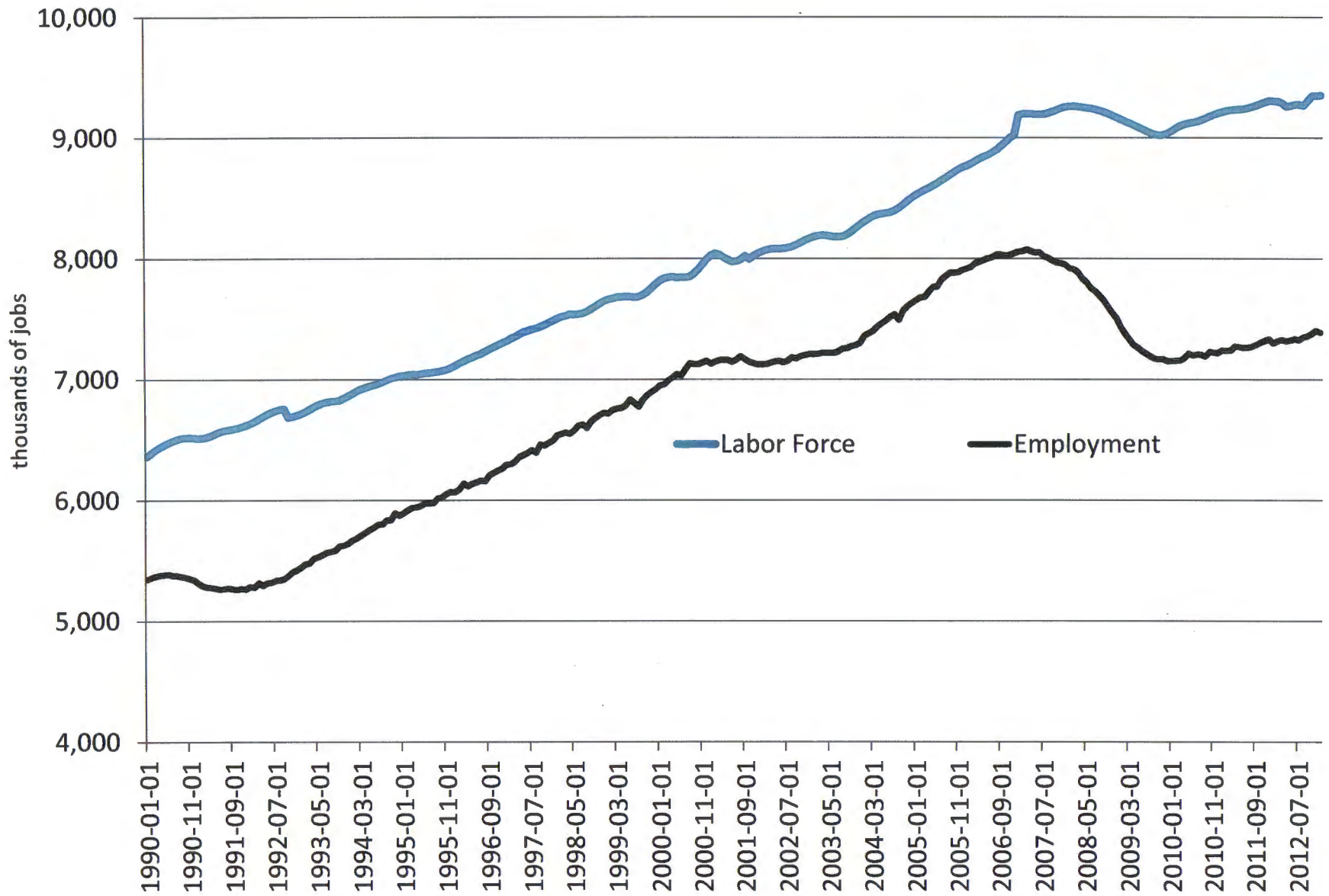
source: <http://www.eia.gov/state/rankings/?sid=FL#/series/28>

### Economic Activity Index: Levels Since July 2007

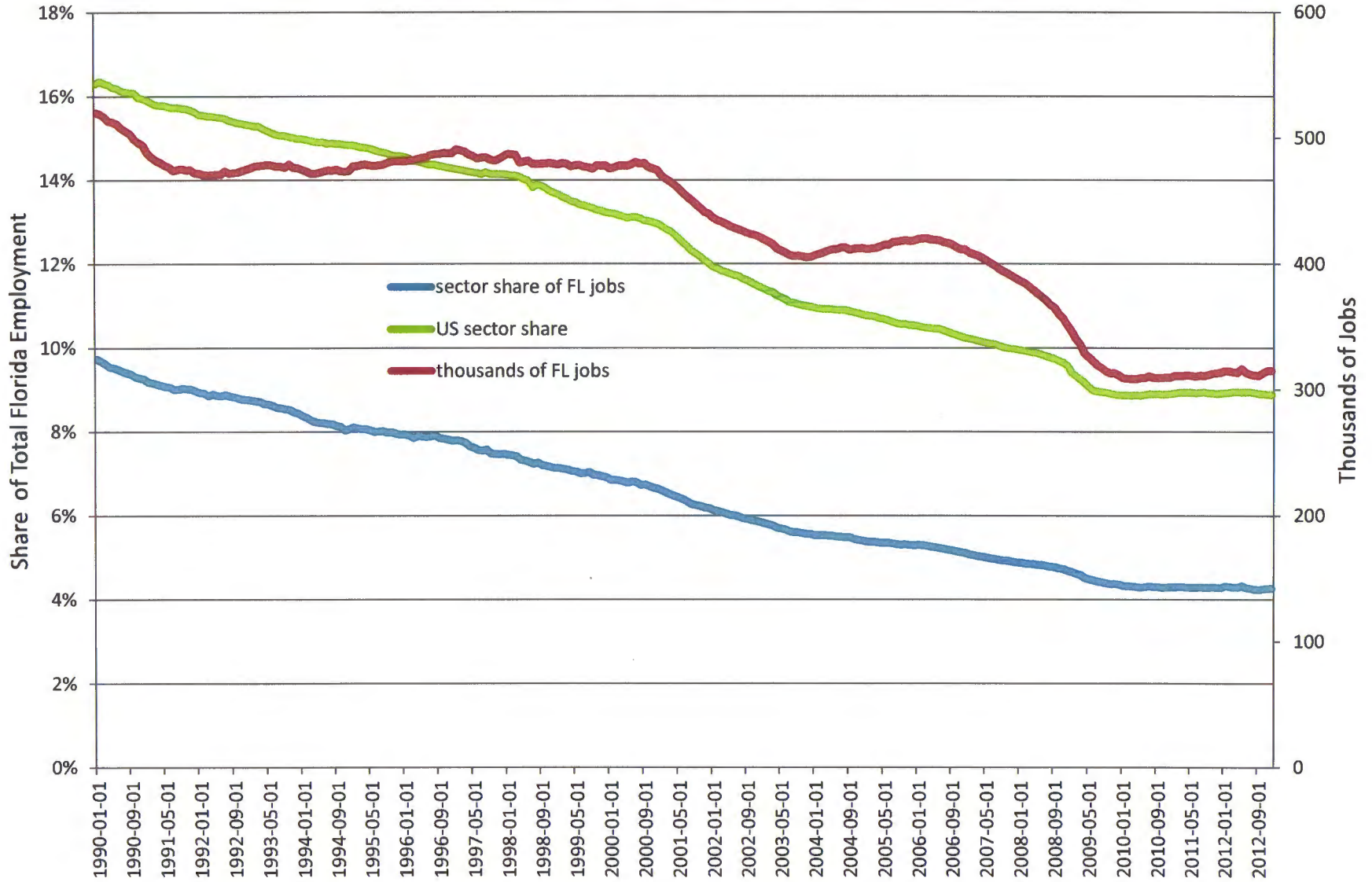


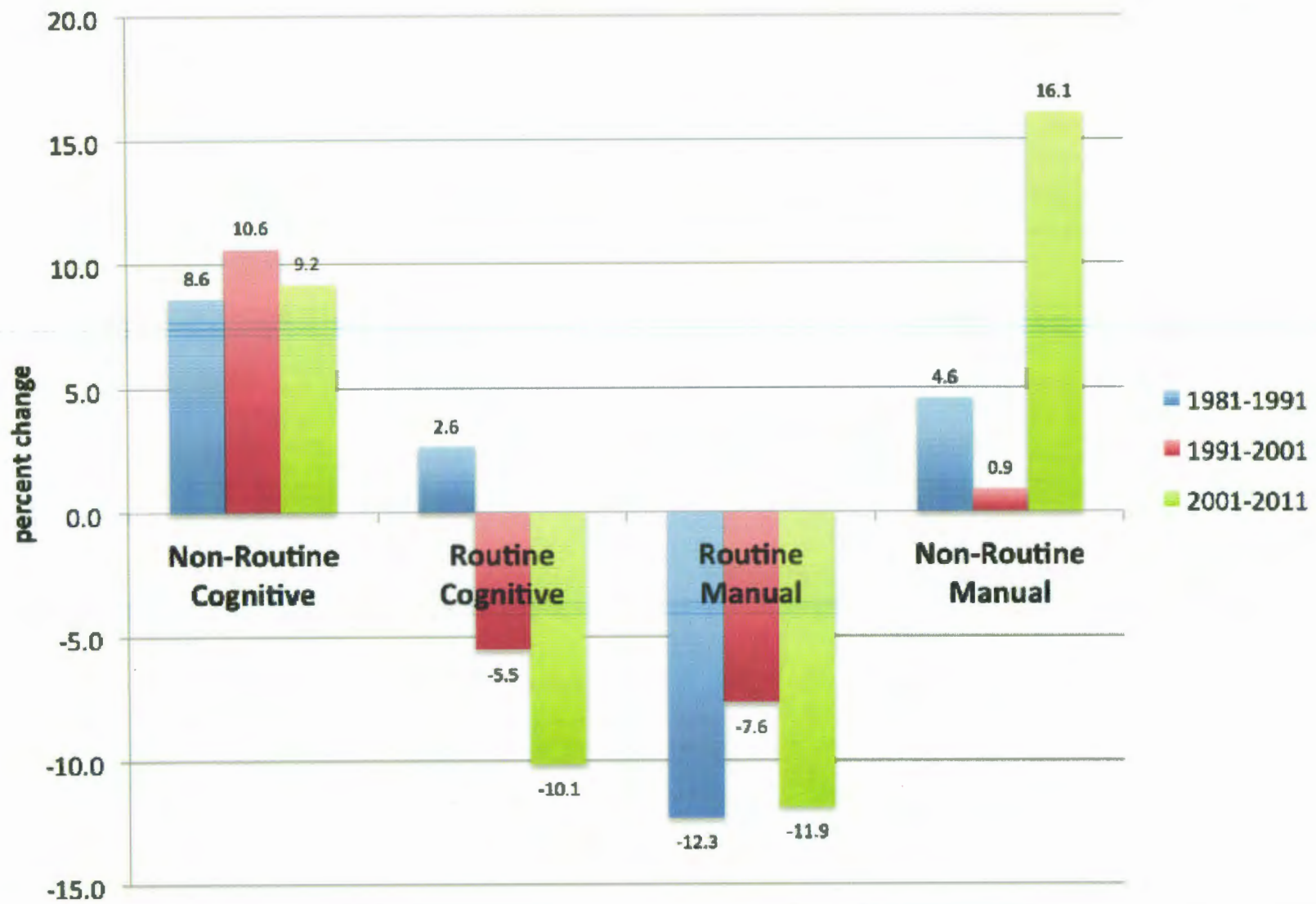


# Florida: Labor Force and Employment, 1/90 - 12/12



Florida Manufacturing Employment, Jan 1990 - Dec 2012, s.a.

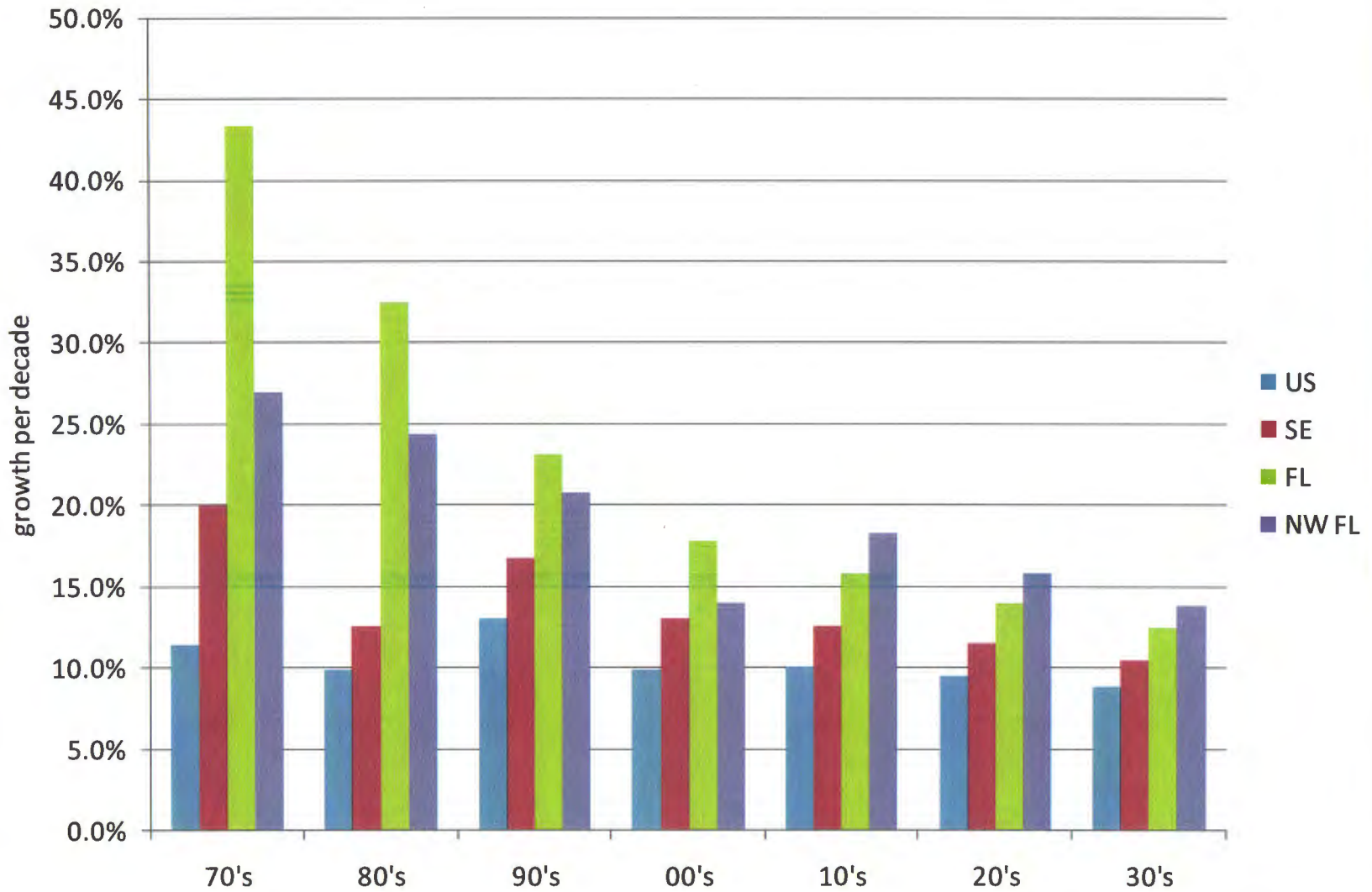




From Chriszt, and Jamiovich and Siu

# Actual and Projected Growth Rates by Decade

source: Woods and Poole 2010







# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

---

**DATE:** August 7, 2013

**TO:** Braulio L. Baez, Executive Director

**FROM:** Cindy B. Miller, Senior Attorney, Office of the General Counsel *CM*  
Benjamin Crawford, Public Utility Analyst II, Office of Industry Development & Market Analysis *S.M.C.*  
Mark A. Futrell, Director, Office of Industry Development & Market Analysis *BC*  
Phillip O. Ellis, Engineering Specialist III, Division of Engineering *ME*  
Paul V. Vickery, Chief of Reliability & Resource Planning, Division of Engineering *AV* *JJ*

**RE:** Federal Energy Regulatory Commission (FERC) Order on Compliance Filings by Southeastern Regional Transmission Planning (SERTP) companies

**Critical Information:** Please place on August 14, 2013, Internal Affairs. Direction is sought regarding rehearing of the FERC order. The deadline for filing requests for rehearing is August 19, 2013.

---

On July 18, 2013, the Federal Energy Regulatory Commission (FERC) issued its 128-page Order on the Compliance Filings for the Southeastern Regional Transmission Planning (SERTP) companies (Compliance Order). FERC found that these utilities have partially complied with the requirements of Order No. 1000. The utilities were directed to submit to FERC additional compliance filings within 120 days of the date of the Order. FERC's actions on the SERTP Compliance filings were similar to those taken a month earlier for the Florida Regional Coordinating Council filings.

The SERTP region is quite large. In the SERTP region, Florida is only one of many states with jurisdiction over one of the entities. The SERTP filings are from Louisville Gas and Electric Company and Kentucky Utilities Company; Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company (collectively, Southern Companies); and Ohio Valley Electric Corporation. The remainder of the SERTP region is composed of FERC nonjurisdictional entities, such as the Tennessee Valley Authority.<sup>1</sup> Gulf Power Company's service territory is the only part of the SERTP region within the state of Florida.

Staff has identified concerns with the SERTP Compliance Order which impact transmission planning and the Florida Public Service Commission's (FPSC) jurisdiction, and recommends that the FPSC seek rehearing of the Order. Requests for rehearing must be submitted to FERC by August 19, 2013.

---

<sup>1</sup> In addition, Duke Energy Carolinas, a jurisdictional entity, has requested to be included in the region.

The SERTP Order is quite similar to the Compliance Order for the Florida Reliability Coordinating Council (FRCC) region in that it requires top-down regional planning and rejects the roll-up of utility plans. Also, it appears to force a Regional Transmission Organization (RTO)-type structure. A difference in the SERTP Order is that it does not strike references to state statutes. However, the utilities in the SERTP companies' compliance filings did not seek to reference Florida statutes. This may be due to the large scope of the region, which covers many states.

### **Background**

FERC Order No. 1000, issued on July 21, 2011, adopted new regional and interregional processes nationwide for transmission planning and cost allocation. The FPSC was among dozens of states, utilities, and other stakeholders requesting that FERC rehear and clarify its Order. In its request for rehearing and clarification of FERC Order No. 1000, the FPSC raised three issues:

- (1) FERC infringed on state jurisdiction in the transmission planning sections;
- (2) FERC infringed on state jurisdiction in the cost allocation sections; and
- (3) FERC should address the lack of clarity in FERC Order No. 1000, should define "benefits," and clarify that benefits must be quantifiable pursuant to existing state and federal law.

In the 593-page Order No. 1000-A, issued May 17, 2012, FERC denied rehearing and chose not to clarify the ambiguities. FERC argued that, regardless of the effects of its order on cost allocation, it did not infringe on state jurisdiction because the states still retained jurisdiction over retail rates. Additionally, FERC elected not to clarify the definition of benefits or to require benefits to be based on existing state or federal law. Instead, FERC stated that each region should define benefits based on whatever parameters it deems appropriate.

Both Order Nos. 1000 and 1000-A establish a new paradigm for addressing regional transmission. Transmission stakeholders are placed in the role of developing plans to comply with FERC's new requirements. Then, FERC approves, modifies, or rejects the compliance plans. State commissions are allowed to participate in the process but only as stakeholders, and the compliance plans ultimately go to FERC for review.

A number of entities, including the Alabama Public Service Commission, appealed Order Nos. 1000 and 1000-A to the D.C. Circuit Court of Appeals. The FPSC intervened in support of the Alabama Commission in the appeal before the D.C. Circuit Court. The joint initial briefs of the petitioners and intervenors, including the FPSC, were filed on May 28, 2013. FERC's answer briefs are due on September 25, 2013. The appeal will not be decided until 2014, with final briefs due in December 2013.

On June 20, 2013, the FERC issued the Compliance Order for the FRCC utilities. On July 19, 2013, the FPSC filed a request for rehearing of that Order. On July 22, 2013, Duke

Memorandum  
August 7, 2013

Energy Florida also filed a request for rehearing. The SERTP and FRCC companies have also made interregional filings with FERC on July 10, 2013.

### **FERC's Order On SERTP's Compliance Filings**

Notwithstanding the pending appeal, SERTP utilities were required to make compliance filings pursuant to Order No. 1000, due February 8, 2013. FERC has begun issuing orders regarding compliance with Order No. 1000. As stated above, FERC issued its 128-page Order on the Compliance Filings for the SERTP companies on July 18, 2013. Gulf Power is part of SERTP.

Staff has identified concerns with the Compliance Order which may impact the FPSC's jurisdiction and transmission planning in Florida. First, FERC challenges the long-standing approach to transmission planning in Florida, which begins with utility plans that are then used to develop regional plans. In paragraph 59 of the Compliance Order, FERC states that when the utilities implement a regional plan, it is not sufficient for a transmission planning region to merely "roll-up" local transmission plans without analyzing whether the region's needs, when taken together, can be met more efficiently or cost-effectively by a regional transmission solution.

FERC concludes, in paragraph 61, that the SERTP companies must themselves conduct a regional analysis. Section 186.801, Florida Statutes, however, requires each utility to submit a separate ten-year site plan. Also, Sections 366.04(2)(c), 366.05(8), 366.055(1), 366.055(3), and 366.05(8), Florida Statutes, address FPSC authority over grid reliability and integrity. Thus, FERC's directive appears to be in conflict with Florida law.

Second, FERC applies an overarching framework for the compliance filing that infringes on the FPSC's authority over transmission planning and reliability. It appears to require a Regional Transmission Organization (RTO)-like approach. The FPSC rejected the notion for the FRCC utilities of an RTO in Order No. PSC-06-0388-FOF-EI, In re: Review of Grid Florida Regional Transmission Organization Proposal. It is noteworthy that FERC Commissioner Tony Clark issued a dissenting statement that questioned the benefit of Order No. 1000 in regions like Florida that have not organized themselves into RTOs and Independent System Organizations (ISOs).

Third, the FERC has taken an approach in its regional compliance orders that forces each region into a top-down RTO-like structure without regard to how the region or its utilities are organized. FERC has taken this approach despite assurances in Orders No. 1000 and 1000-A that it would allow for regional differences.

### **Request for Rehearing of FERC's Order**

Staff recommends that the FPSC request rehearing of the FERC's Order on Compliance Filings. Requests for rehearing must be filed within 30 days of the issuance date of the Order, which in this instance is August 19, 2013.



Memorandum  
August 7, 2013

Section 385.713, Code of Federal Regulations, requires that any request for rehearing “state concisely the alleged error in the final decision or final order.” The errors staff believes should be raised in a request for rehearing are:

1. The FERC erred by exceeding the requirements of FERC Order No. 1000 and its authority under the Federal Power Act and by infringing on Florida’s role in transmission planning.
2. The FERC erred by creating an overarching framework with requirements that push the utilities, including Gulf Power, to form an inefficient RTO-like structure, without authority to do so.
3. The FERC erred by violating its Order No. 1000 directive which committed to regional flexibility.

Attached is a draft rehearing request for the FPSC’s consideration.

CBM:tf

cc: Curt Kiser  
Chuck Hill  
Lisa Harvey

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Louisville Gas and Electric Company and Kentucky Utilities Company	)	Docket No. ER13-897-000
	)	
Alabama Power Company	)	Docket No. ER13-908-000
	)	
Ohio Valley Electric Corporation	)	Docket No. ER13-913-000

**FLORIDA PUBLIC SERVICE COMMISSION'S  
REQUEST FOR REHEARING OF ORDER ON COMPLIANCE FILINGS**

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure, the Florida Public Service Commission (Florida Commission) hereby moves for rehearing regarding the FERC's infringement on the Florida Commission's jurisdiction on transmission planning and reliability authority by the FERC Order on Compliance Filings (Compliance Order), issued on July 18, 2013.

**I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS**

**1. The FERC erred by exceeding the requirements of FERC Order No. 1000 and its authority under the Federal Power Act and by infringing on Florida's role in transmission planning.**

**2. The FERC erred by creating an overarching framework that pushes the utilities to form an inefficient Regional Transmission Organization (RTO)-like structure, without authority to do so.**

**3. The FERC erred by violating its Order Nos. 1000 and 1000-A directive which committed to regional flexibility.**

## II. ARGUMENT

The Florida Commission continues to be concerned that the FERC appears to seek an approach to transmission planning and cost allocation which would infringe upon state authority, would impose additional costs on Florida consumers without corresponding benefits, and would establish a duplicative transmission planning structure. The State of Florida retains a vertically integrated, state regulated approach to the electric industry, whereby the Florida Commission holds substantial authority to ensure an adequate and reliable bulk power grid. Florida, including the Gulf Power area, is unique in its exposure to hurricanes.

In Order No. 1000, the FERC offered assurances that public utility transmission providers would be allowed flexibility in developing regional transmission planning processes. Despite FERC's assurances, however, the Compliance Order requires that the Southeast Regional Transmission Planning Council (SERTP) region conform to a narrow framework that fails to account for the unique characteristics of its electric industry. Order No. 1000 was replete with statements that the FERC would allow for regional differences and that the FERC would not interfere with state jurisdictional authority or state integrated resource planning processes.<sup>2</sup> These commitments have not been fulfilled in the Compliance Order. The Florida Commission seeks rehearing on three issues where the FERC erred in the Compliance Order.

**1. The FERC erred by exceeding the requirements of FERC Order No. 1000 and its authority under the Federal Power Act and by infringing on Florida's role in transmission planning.**

In paragraph 59 of the Compliance Order, FERC states that it is not sufficient for a transmission planning region to merely "roll-up" local transmission plans without analyzing whether the region's transmission needs, when taken together, can be met more efficiently or

---

<sup>2</sup> Order No. 1000 at Paragraphs 61, 154, 156, 604, 624, 754.

cost-effectively by a regional transmission solution. The Compliance Order requires the Parties to develop a single transmission plan for the region that reflects their determination of the set of transmission facilities that more efficiently or cost-effectively meets the region's transmission needs. The regional transmission plan reflected in the filing of the SERTP utilities represents "bottom-up" planning, wherein a regional plan is developed by analyzing and consolidating the plans of individual utilities, as well as any proposed transmission resource by a third party. This approach was contemplated, and apparently endorsed, in Order No. 1000. The requirement to establish a "top-down" plan appears to exceed the requirements of Order No. 1000 and FERC's authority under the Federal Power Act, and infringes on Florida's transmission planning process.<sup>3</sup>

*FERC Order No. 1000 Requirements*

FERC Order No. 1000 allowed for a "bottom-up" individual utility transmission plan approach. Paragraph 158 of Order No. 1000 expressly states: "[W]e note that a public utility transmission provider's regional transmission planning process may utilize a "top down" approach, a "bottom up" approach or some other approach so long as the public utility transmission provider complies with the requirements of this Final Rule." Paragraph 321 of Order No. 1000 also contemplated the "roll up" of transmission plans. Thus, the requirement in paragraph 59 of the Compliance Order for a top-down plan appears to be contrary to Order No. 1000, which recognized that "bottom-up" planning is acceptable.

*Florida Commission's Authority Over the Transmission Grid*

The requirement in paragraph 59 of the Compliance Order for a "top-down" regional plan also infringes on the Florida Commission's express statutory authority over the transmission

---

<sup>3</sup> *Motor Vehicle Mfrs. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983) (finding it arbitrary and capricious for an agency not to "articulate a satisfactory explanation for its action").

## ATTACHMENT A

grid. Pursuant to Section 366.04(2)(c), Florida Statutes, the Florida Commission has the authority to require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes. Section 366.04(5), Florida Statutes, grants the Florida Commission jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to ensure an adequate and reliable source of energy for operational and emergency purposes in Florida, and to avoid uneconomic duplication of generation, transmission, and distribution facilities. Section 366.05(7), Florida Statutes, authorizes the Florida Commission to require reports from all electric utilities to ensure the development of adequate and reliable energy grids.

The Florida Commission has authority under Section 366.05(8), Florida Statutes, to hold proceedings if there is probable cause to believe that inadequacies exist with the grid. The Florida Commission may require installation or repair of necessary generation or transmission facilities, whereby mutual benefits will accrue to the electric utilities involved. Furthermore, costs associated with infrastructure repairs or additions must be distributed in proportion to the benefits received.

Section 366.055(1), Florida Statutes, requires the Florida Commission to ensure that energy reserves of all utilities in the Florida grid are available at all times to maintain grid reliability and integrity. Pursuant to Section 366.055(3), Florida Statutes, the Florida Commission has the authority to require an electric utility to transmit electrical energy over its transmission lines from one utility to another or as a part of the total energy supply of the entire grid, in order to ensure the efficient and reliable operation of Florida's energy grid. The requirement for a "top-down" regional plan hampers the Florida Commission's ability to evaluate the sufficiency of each individual utility's plan for transmission.

*Florida's Transmission Planning and Siting Process*

Section 186.801, Florida Statutes, establishes a ten-year site plan process in Florida. These ten-year site plans, which address integrated resource planning, are submitted by utilities in the state. The statute sets out a "bottom-up" process for each utility in Florida to submit to the Florida Commission a plan for approval. In the ten-year site plan, each electric utility, including Gulf Power, must submit to the Florida Commission its estimated power-generating needs and the general location of its proposed power plant sites, including needed transmission additions, over the next ten years. These plans address reliability, economic and public policy considerations. The Florida Commission then must deem each plan as "suitable" or "unsuitable" and may suggest alternatives to the plan. Then, when a transmission line siting application is filed pursuant to the Florida Transmission Line Siting Act (TLSA) in Chapter 403, Florida Statutes, this plan will be considered in determining the need for the line. When the Florida Commission receives a petition for determination of need for a transmission line, pursuant to Section 403.537, Florida Statutes, substantially affected parties may challenge the project. The Florida Commission then approves or denies that project.

Order No. 1000 also stated that FERC will not intrude on state authority over transmission siting. However, as stated above, the Compliance Order appears to be inconsistent with Order No. 1000. By undermining Florida ten-year site plan process, there is also a potential impact on Florida's siting authority.

By foreclosing a primary use of the "roll-up" of local transmission plans without additional steps, the FERC Compliance Order appears to impede the ability of the companies and the Commission to comply with the requirements of Florida law. The FERC's decision appears to result in duplicative transmission planning processes which adds costs to consumers in Florida.

The Florida Commission's oversight of transmission planning in Florida serves to protect ratepayers in Gulf's territory and to ensure that local planning regions are not unfairly or unreasonably burdened by transmission plans that result in allocated costs to ratepayers for which they receive little benefit. In addition, the Florida Commission has the state authority to address reliability issues in the Gulf territory to protect customers.

*FERC's Jurisdiction Under the Federal Power Act*

Pursuant to Section 201(a) of the Federal Power Act (FPA), the FERC's regulation of interstate transmission and wholesale power sales is limited to only those matters which are not subject to regulation by the states.<sup>4</sup> The Courts have emphasized this limited authority.<sup>5</sup> Section 215 of the FPA, 16 U.S.C. Sec. 824o, grants the FERC jurisdiction to approve and enforce compliance with bulk transmission reliability standards. However, nothing in Section 215 of the FPA preempts the authority of the Florida Commission to take action to ensure the safety, adequacy, or reliability of electric service within our state, as long as such action is not inconsistent with any bulk power reliability standard. Section 217 of the FPA allows FERC to "facilitate" planning, not to direct it. As illustrated above, Florida has well-established processes and state authority that are being disregarded.

**2. The FERC erred by creating an overarching framework that pushes the utilities to form an inefficient Regional Transmission Organization (RTO)-like structure, without authority to do so.**

While some states have ceded some authority to the FERC due to the creation of RTOs/ISOs, the Florida Commission has retained this authority. Florida remains a state with vertically integrated utilities, and no part of the state is a member of an RTO or ISO. Florida law

---

<sup>4</sup> The FERC is provided limited backstop authority under the 2005 Energy Policy Act to site transmission when a National Interest Electric Transmission Corridor is established. No such corridor has been established in Florida.

<sup>5</sup> *Conn. Light & Power v. FPC*, 324 U.S. 515, 529-530 (1945).

## ATTACHMENT A

provides the Florida Commission with express authority to make decisions with respect to determining the need for a transmission project and for the recovery of costs through retail rates.

The Compliance Order holds the SERTP filers to a standard that moves the companies toward an RTO-type structure and goes far beyond that present in Order No. 1000. The Compliance Order invents an obligation on transmission providers to actively develop transmission projects beyond those proffered by qualified transmission providers. Order No. 1000 contained no such mandate, as now required by paragraph 61 of the Compliance Order. Paragraph 328 of Order No. 1000 only established a mandate for regions to evaluate proposals that may either be superior to existing plans, or may provide economic or public-policy benefits beyond existing plans.

Thus, the Filing Parties are required to conduct a regional analysis themselves to identify whether there are more efficient or cost-effective transmission needs. They must file the process they will use to identify more efficient or cost-effective transmission solutions and explain how the region will conduct that regional analysis through power flow studies, production cost analyses, and/or other methods. This requirement, which was not present in Order No. 1000, costs money and adds an overlay to the existing analyses.

These requirements also appear to conflict with FERC Order No. 2000 on Regional Transmission Organizations, issued December 20, 1999. There, FERC acknowledged, at page 166, it should pursue a voluntary approach to participation in RTOs. Now, however, the FERC is trying to do indirectly what it may not do directly.<sup>6</sup>

FERC's challenge to Florida's statutory-based transmission planning construct raises the specter of an RTO-like framework in order to meet FERC's expectation. The duplicative Federal process appears inefficient. This inefficiency itself appears contrary to Florida law that

---

<sup>6</sup> *Towns of Concord, Norwood, and Wellesley, Mass. V. FERC*, 955 F. 2d 67, 71 n. 2 (D.C. Cir. 1992).



## ATTACHMENT A

requires the efficient operation of the Florida energy grid, pursuant to Section 366.055(3), Florida Statutes.

FERC's directives also diverge from the Florida Commission's own experience. On May 9, 2006, the Florida Commission issued Order No. PSC-06-0388-F0F-EI, *In re: Review of Grid Florida Regional Transmission Organization (RTO) Proposal*, 2006 Fla. LEXIS 243 (2006), in which the Commission declined to create an RTO in Florida. That order stated that "continued development of GridFlorida does not appear to be cost-effective, and that it would not be prudent or in the public interest to continue the development of GridFlorida." *Id.* at \*32.

From 2001 to 2006, the Florida Commission extensively studied this issue in response to FERC Order No. 2000. Following numerous workshops, technical conferences, and related hearings, the Florida Utilities involved in the GridFlorida proposal, which are the same FERC-jurisdictional utilities that make up the FRCC region, hired ICF Consulting to conduct an analysis of the costs and benefits of an RTO in Florida. ICF Consulting characterized the prospects of such a structure as "bleak," finding that one proposal would have costs exceed benefits by more than \$700 million dollars over the first 13 years of operation, while a "more advanced" proposal would have costs exceed benefits by \$285 million over the same period.

After the release of that study, the Florida Commission accepted the withdrawal of the GridFlorida proposal, finding that it did not appear to be in the best interests of the people of the State of Florida. The Florida Commission is greatly concerned that the requirements of the Compliance Order, many of which reach much further than Orders No. 1000 or 1000-A, will result in the confirmation of the concerns expressed by FERC Commissioner Clark in his dissenting opinion. As a result of the imposition of a duplicative RTO-like structure, Florida ratepayers may be asked to incur additional wholesale costs without commensurate benefits from such a structure.

This experience regarding an RTO gives the Florida Commission concern about the imposition of such a structure, whether it is in the FRCC region or the SERTP region. Thus, we ask the FERC to temper the imposition of its overarching Order No. 1000 framework on the SERTP region.

**3. The FERC erred by violating its Order No. 1000 directive which committed to regional flexibility.**

The requirements of the Compliance order are at odds with what the FERC claimed it would do in Order No. 1000, which is to grant flexibility to regions, as stated in paragraphs 61, 604, 624 and 745 of Order No. 1000.

Commissioner Clark stated in his dissent that he does not see how the FERC can reconcile the Compliance Order with the statement in Order No. 1000-A, at Paragraph 267, that “various regions of the country differ significantly in resources, industry organization, market design, and other ways so that a one-size-fits-all approach to regional planning would not be appropriate.” As he noted, “the SERTP Sponsors’ region is unique as it pertains to transmission planning – and the Commission’s boilerplate response fails to accommodate the unique characteristics of this non-market, non-RTO region.” The Florida Commission agrees. The Compliance Order clearly fails to recognize that many of the SERTP Sponsors, such as Gulf Power in Florida, remain vertically integrated.

In addition, there are remarkably similar provisions in the SERTP Compliance Order and the Florida Reliability Coordinating Council Compliance Order. This boilerplate or cookie-cutter approach appears to contradict the Order No. 1000 assurances of regional flexibility.

**III. CONCLUSION**

Wherefore, the Florida Commission respectfully urges the FERC to grant rehearing on the issues identified above, and honor state statutory authority over transmission planning, siting, and reliability.

Respectfully submitted,

/ s /

Cynthia B. Miller, Esquire  
Office of the General Counsel

FLORIDA PUBLIC SERVICE COMMISSION  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850  
850 / 413-6201  
[cmiller@psc.state.fl.us](mailto:cmiller@psc.state.fl.us)

DATED: August \_\_, 2013

## II. Outside Persons Who Wish to Address the Commission at Internal Affairs

***OUTSIDE PERSONS WHO WISH  
TO ADDRESS THE COMMISSION AT***

***INTERNAL AFFAIRS  
August 14, 2013***

<b><u>Speaker</u></b>	<b><u>Representing</u></b>	<b><u>Item #</u></b>
Rick Harper	Florida Senate	1
Al Latimer	Enterprise Florida	2
Andy Tunnell*	Gulf Power	3

\*Mr. Tunnell does not wish to address the Commission, but is available if there are questions.

# III. Supplemental Materials for Internal Affairs

**NOTE:** The following material pertains to the discussion held after Item 3 of this agenda.

*In Re: Aiken County, et al.*  
D.C. Circuit Court of Appeals  
Decided August 13, 2013

Circuit Judge Kavanaugh: “This case raises significant questions about the scope of the Executive’s authority to disregard federal statutes. The cases arises out of a longstanding dispute about nuclear waste storage at Yucca Mountain Nevada . . . Here, the Nuclear Regulatory Commission has continued to violate the law governing the Yucca Mountain licensing process. We therefore grant the petition for a writ of mandamus.”

Background

The case involves the Nuclear Waste Policy Act, which was passed by Congress and signed by President Reagan in 1983. The law provides that the Nuclear Regulatory Commission (NRC) “shall consider” the Department of Energy’s license application to store nuclear waste at Yucca Mountain and shall issue a final decision approving or disapproving the application within three years of submission. The statute allows the NRC to extend the deadline by an additional year if it issues a written report explaining the reason for the delay and providing the estimated time for completion.

In June 2008, the Department of Energy submitted its license application to the NRC. DOE then attempted to withdraw the license application. The National Association of Regulatory Utility Commissioners, among others, intervened and objected to DOE’s withdrawal of its application. The Florida Public Service Commission filed an amicus in support of NARUC’s objection. The Atomic Safety and Licensing Board decided that DOE could not withdraw its application. DOE appealed that decision to the NRC. The NRC’s five Commissioners were split 2-2, with one recusal when they reviewed the Atomic Safety and Licensing Board’s decision, so the decision stood. However, the NRC concluded that no action would be taken to restart the project. Aiken County, the State of Washington, the State of South Carolina, and NARUC then petitioned for a writ of mandamus.

As recently as Fiscal Year 2011, Congress appropriated funds to the NRC so that it could conduct the statutorily mandated licensing process. The NRC has at least \$11.1 million in appropriated funds to continue consideration of the license application. Yet the deadlines have passed, and the NRC has simply shut down its review and consideration of the Department of Energy’s license application.

Since 2010, the petitioners have sought a writ of mandamus to require the NRC to comply with the law and to resume processing the Department of Energy’s license application for Yucca Mountain. Mandamus is an extraordinary remedy that takes account of equitable considerations. It may be granted to correct transparent violations of a clear duty to act.

In 2011, a prior panel of the Court indicated that if the NRC failed to act on the Department of Energy’s license application, mandamus would likely be appropriate. In 2012, the Court held a mandamus petition in abeyance. The Court stated that it allowed time for Congress to clarify this issue if it wished to do so.

## The Decision

The Court states that “[s]ince we issued that order more than a year ago on August 3, 2012, the [NRC] has not acted, and Congress has not altered the legal landscape. As things stand, therefore, the [NRC] is simply flouting the law. In light of the constitutional respect owed to Congress, and having fully exhausted the alternatives available to us, we now grant the petition for writ of mandamus against the Nuclear Regulatory Commission.”

## The Analysis

The Court looks to “settled, bedrock principles of constitutional law” for its analysis. Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute. The President may not decline to follow a statutory mandate or prohibition simply because of policy objections. If Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.

In this case, the NRC declined to continue the statutorily mandated Yucca Mountain licensing process. None of NRC’s justifications was persuasive to the Court. First, the NRC claimed that Congress has not yet appropriated the full amount of funding necessary for the NRC to complete the licensing proceeding. The Court responded that Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project.

Second, the NRC speculates that Congress will not appropriate additional necessary funds in the future for it to complete the licensing process. Thus, the NRC argues it would be a waste to continue to conduct the process now. The Court opined that an agency may not rely on political guesswork about future Congressional appropriations as a basis for violating existing legal mandates.

Third, the NRC pointed out that appropriations from Congress for the Yucca Mountain project have been relatively low or zero in recent years. However, the Court stated that says nothing definitive about what a future Congress may do.

The Court reiterates that the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreements with Congress. The Court notes that even the President does not have unilateral authority to refuse to spend the funds. Thus, the Court concludes the NRC’s inaction violates the Nuclear Waste Policy Act.

The Court also reviewed the President’s independent authority to assess the constitutionality of a statute. The President may decline to follow a statutory mandate if the President concludes that it is unconstitutional. In this case, the NRC has not asserted that the



relevant statutes are unconstitutional. Also, the Executive's power to decide whether to initiate charges of legal wrongdoing and to seek punishment (prosecutorial discretion) does not include the power to disregard other statutory obligations that apply to the Executive Branch.

The Court stated that it has repeatedly gone out of its way over the last several years to defer a mandamus order against the NRC and thereby give Congress time to pass new legislation that would clarify this matter. However, now it has "no good choice but to grant the petition for a writ of mandamus." The Court describes this as a case with serious implications for the country's constitutional structure: "It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive agencies to disregard federal law in the manner asserted in this case." The Court added that unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the NRC must promptly continue with the legally mandated licensing process.

#### Concurrence by Senior Circuit Judge Randolph

Judge Randolph notes that although the NRC had a duty to act on the licensing application, former Chairman Gregory Jaczko "orchestrated a systematic campaign of noncompliance. He states that Mr. Jaczko "unilaterally ordered Commission staff to terminate the review process in October 2010; instructed staff to remove key findings from reports evaluating the Yucca Mountain site; and ignore the will of his fellow Commissioners."

#### Dissent by Chief Judge Garland

Judge Garland states that granting the writ will direct the NRC to do a "useless thing." He states that the NRC has not refused to proceed with the Yucca Mountain application. Rather, by unanimous votes of both the NRC and its Atomic Safety and Licensing Board, it has suspended the application proceeding until there are sufficient funds to make meaningful progress.

He states that given the limited funds that remain available, issuing a writ of mandamus amounts to "little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again." He states that "[t]his exercise will do nothing to safeguard the separation of powers, which my colleagues see as imperiled by the NRC's conduct."

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Argued May 2, 2012

Decided August 13, 2013

Ordered Held in Abeyance August 3, 2012

No. 11-1271

IN RE: AIKEN COUNTY, ET AL.,  
PETITIONERS

STATE OF NEVADA,  
INTERVENOR

---

On Petition for Writ of Mandamus

---

*Andrew A. Fitz*, Senior Counsel, Office of the Attorney General for the State of Washington, argued the cause for petitioners. With him on the briefs were *Robert M. McKenna*, Attorney General, *Todd R. Bowers*, Senior Counsel, *Thomas R. Gottshall*, *S. Ross Shealy*, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *William Henry Davidson II*, *Kenneth Paul Woodington*, *James Bradford Ramsay*, *Robin J. Lunt*, *Barry M. Hartman*, *Christopher R. Nestor*, and *Robert M. Andersen*.

*Jerry Stouck* and *Anne W. Cottingham* were on the brief for *amicus curiae* Nuclear Energy Institute, Inc. in support of petitioners.

*Charles E. Mullins*, Senior Attorney, U.S. Nuclear Regulatory Commission, argued the cause for respondent.

Parties/Staff Handout  
Internal Affairs/Agenda  
on 8/14/13  
Item No. 3

*Discussion after*

With him on the brief were *Stephen G. Burns*, General Counsel, *John F. Cordes Jr.*, Solicitor, and *Jeremy M. Suttenger*, Attorney.

*Martin G. Malsch* argued the cause for intervenor State of Nevada. With him on the briefs were *Charles J. Fitzpatrick* and *John W. Lawrence*.

Before: GARLAND, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *Senior Circuit Judge* RANDOLPH joins except as to Part III.

Concurring opinion filed by *Senior Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Chief Judge* GARLAND.

KAVANAUGH, *Circuit Judge*: This case raises significant questions about the scope of the Executive's authority to disregard federal statutes. The case arises out of a longstanding dispute about nuclear waste storage at Yucca Mountain in Nevada. The underlying policy debate is not our concern. The policy is for Congress and the President to establish as they see fit in enacting statutes, and for the President and subordinate executive agencies (as well as relevant independent agencies such as the Nuclear Regulatory Commission) to implement within statutory boundaries. Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress. Here, the Nuclear Regulatory Commission has continued to violate the law governing the Yucca Mountain licensing

process. We therefore grant the petition for a writ of mandamus.

## I

This case involves the Nuclear Waste Policy Act, which was passed by Congress and then signed by President Reagan in 1983. That law provides that the Nuclear Regulatory Commission “shall consider” the Department of Energy’s license application to store nuclear waste at Yucca Mountain and “shall issue a final decision approving or disapproving” the application within three years of its submission. 42 U.S.C. § 10134(d). The statute allows the Commission to extend the deadline by an additional year if it issues a written report explaining the reason for the delay and providing the estimated time for completion. *Id.* § 10134(d), (e)(2).

In June 2008, the Department of Energy submitted its license application to the Nuclear Regulatory Commission. As recently as Fiscal Year 2011, Congress appropriated funds to the Commission so that the Commission could conduct the statutorily mandated licensing process. Importantly, the Commission has at least \$11.1 million in appropriated funds to continue consideration of the license application.

But the statutory deadline for the Commission to complete the licensing process and approve or disapprove the Department of Energy’s application has long since passed. Yet the Commission still has not issued the decision required by statute. Indeed, by its own admission, the Commission has no current intention of complying with the law. Rather, the Commission has simply shut down its review and consideration of the Department of Energy’s license application.

Petitioners include the States of South Carolina and Washington, as well as entities and individuals in those States. Nuclear waste is currently stored in those States in the absence of a long-term storage site such as Yucca Mountain.

Since 2010, petitioners have sought a writ of mandamus requiring the Commission to comply with the law and to resume processing the Department of Energy's pending license application for Yucca Mountain. Mandamus is an extraordinary remedy that takes account of equitable considerations. The writ may be granted "to correct transparent violations of a clear duty to act." *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotation marks omitted); *see also Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, slip. op. at 17 n.10 (U.S. 2013) (noting that if the federal Election Assistance Commission did not act on a state's statutorily permitted request, "Arizona would be free to seek a writ of mandamus to 'compel agency action unlawfully withheld or unreasonably delayed'") (quoting 5 U.S.C. § 706(1)).

In 2011, a prior panel of this Court indicated that, if the Commission failed to act on the Department of Energy's license application within the deadlines specified by the Nuclear Waste Policy Act, mandamus likely would be appropriate. *See In re Aiken County*, 645 F.3d 428, 436 (D.C. Cir. 2011). In 2012, after a new mandamus petition had been filed, this panel issued an order holding the case in abeyance and directing that the parties file status updates regarding Fiscal Year 2013 appropriations. At that time, we did not issue the writ of mandamus. Instead, in light of the Commission's strenuous claims that Congress did not want the licensing process to continue and the equitable considerations appropriately taken into account in mandamus

cases, we allowed time for Congress to clarify this issue if it wished to do so. But a majority of the Court also made clear that, given the current statutory language and the funds available to the Commission, the Commission was violating federal law by declining to further process the license application. And the Court's majority further indicated that the mandamus petition eventually would have to be granted if the Commission did not act or Congress did not enact new legislation either terminating the Commission's licensing process or otherwise making clear that the Commission may not expend funds on the licensing process. *See Order, In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012).

Since we issued that order more than a year ago on August 3, 2012, the Commission has not acted, and Congress has not altered the legal landscape. As things stand, therefore, the Commission is simply flouting the law. In light of the constitutional respect owed to Congress, and having fully exhausted the alternatives available to us, we now grant the petition for writ of mandamus against the Nuclear Regulatory Commission.

## II

Our analysis begins with settled, bedrock principles of constitutional law. Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a

final Court order dictates otherwise. But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.

Those basic constitutional principles apply to the President and subordinate executive agencies. And they apply at least as much to independent agencies such as the Nuclear Regulatory Commission. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525-26 (2009) (opinion of Scalia, J., for four Justices) (independent agency should be subject to same scrutiny as executive agencies); *id.* at 547 (opinion of Breyer, J., for four Justices) (independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law").

In this case, however, the Nuclear Regulatory Commission has declined to continue the statutorily mandated Yucca Mountain licensing process. Several justifications have been suggested in support of the Commission's actions in this case. None is persuasive.

*First*, the Commission claims that Congress has not yet appropriated the *full* amount of funding necessary for the Commission to *complete* the licensing proceeding. But Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a

project. See *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (when statutory mandate is not fully funded, “the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint”). For present purposes, the key point is this: The Commission is under a legal obligation to continue the licensing process, and it has at least \$11.1 million in appropriated funds – a significant amount of money – to do so. See Commission Third Status Report, at 2 (Apr. 5, 2013).

*Second*, and relatedly, the Commission speculates that Congress, in the future, will not appropriate the additional funds necessary for the Commission to complete the licensing process. So it would be a waste, the Commission theorizes, to continue to conduct the process now. The Commission’s political prognostication may or may not ultimately prove to be correct. Regardless, an agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates. A judicial green light for such a step – allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action – would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive’s power at the expense of Congress.

*Third*, the Commission points to Congress’s recent appropriations to the Commission and to the Department of Energy for the Yucca Mountain project. In the last three years, those appropriations have been relatively low or zero. The Commission argues that those appropriations levels demonstrate a congressional desire for the Commission to shut down the licensing process.



But Congress speaks through the laws it enacts. No law states that the Commission should decline to spend previously appropriated funds on the licensing process. No law states that the Commission should shut down the licensing process. And the fact that Congress hasn't yet made additional appropriations over the existing \$11.1 million available to the Commission to continue the licensing process tells us nothing definitive about what a future Congress may do. As the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated. See *TVA v. Hill*, 437 U.S. 153, 190 (1978) (doctrine that repeals by implication are disfavored "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act"); *United States v. Langston*, 118 U.S. 389, 394 (1886) ("a statute fixing the annual salary of a public officer at a named sum . . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years"); cf. 1 GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 2-49 (3d ed. 2004) ("a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation").

In these circumstances, where previously appropriated money is available for an agency to perform a statutorily mandated activity, we see no basis for a court to excuse the agency from that statutory mandate.

*Fourth*, the record suggests that the Commission, as a policy matter, simply may not want to pursue Yucca Mountain as a possible site for storage of nuclear waste. But Congress sets the policy, not the Commission. And policy

disagreement with Congress's decision about nuclear waste storage is not a lawful ground for the Commission to decline to continue the congressionally mandated licensing process. To reiterate, the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress. *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . ."); 18 Comp. Gen. 285, 292 (1938) ("the question with the accounting officers is not the apparent general merit of a proposed expenditure, but whether the Congress, controlling the purse, has by law authorized the expenditure").<sup>1</sup>

---

<sup>1</sup> Like the Commission here, a President sometimes has policy reasons (as distinct from constitutional reasons, *cf. infra* note 3) for wanting to spend less than the full amount appropriated by Congress for a particular project or program. But in those circumstances, even the President does not have unilateral authority to refuse to spend the funds. Instead, the President must propose the rescission of funds, and Congress then may decide whether to approve a rescission bill. *See* 2 U.S.C. § 683; *see also Train v. City of New York*, 420 U.S. 35 (1975); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969), reprinted in *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 279, 282 (1971) ("With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.").

10

III<sup>2</sup>

We thus far have concluded that the Commission's inaction violates the Nuclear Waste Policy Act. To be sure, there are also two principles rooted in Article II of the Constitution that give the Executive authority, in certain circumstances, to decline to act in the face of a clear statute. But neither of those principles applies here.

*First*, the President possesses significant independent authority to assess the constitutionality of a statute. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 3 (Take Care Clause). But that principle does not help the Commission.

To explain: The President is of course not bound by Congress's assessment of the constitutionality of a statute. The Take Care Clause of Article II refers to "Laws," and those Laws include the Constitution, which is superior to statutes. *See* U.S. CONST. art. VI (Constitution is "supreme Law of the Land"). So, too, Congress is not bound by the President's assessment of the constitutionality of a statute. Rather, in a justiciable case, the Supreme Court has the final word on whether a statutory mandate or prohibition on the Executive is constitutional. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (Presidential Recordings and Materials Preservation Act is constitutional); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (congressional statutes that together preclude President from seizing steel mills are constitutional); *see generally Marbury v. Madison*, 5 U.S. 137 (1803).

---

<sup>2</sup> Judge Kavanaugh alone joins Part III of the opinion.

So unless and until a final Court decision in a justiciable case says that a statutory mandate or prohibition on the Executive Branch is constitutional, the President (and subordinate executive agencies supervised and directed by the President) may decline to follow that statutory mandate or prohibition if the President concludes that it is unconstitutional. Presidents routinely exercise this power through Presidential directives, executive orders, signing statements, and other forms of Presidential decisions. *See, e.g., Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (based on Article II, Presidents Bush and Obama refused to comply with statute regulating passports of individuals born in Jerusalem); *Myers v. United States*, 272 U.S. 52 (1926) (based on Article II, President Wilson refused to comply with statutory limit on the President's removal power); *see also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (President has "the power to veto encroaching laws or even to disregard them when they are unconstitutional") (citation omitted); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199, 199-200 (1994) (Walter Dellinger) (describing as "uncontroversial" and "unassailable" the proposition that a President may decline to execute an unconstitutional statute in some circumstances); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 2d ed. 1836) ("the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution") (statement of James Wilson).<sup>3</sup>

---

<sup>3</sup> In declining to follow a statutory *mandate* that the President independently concludes is unconstitutional, the President generally may decline to expend funds on that unconstitutional program, at least unless and until a final Court order rules otherwise. But in

But even assuming *arguendo* that an independent agency such as the Nuclear Regulatory Commission possesses Article II authority to assess the constitutionality of a statute and thus may decline to follow the statute until a final Court order says otherwise,<sup>4</sup> the Commission has not asserted that the relevant statutes in this case are unconstitutional. So that Article II principle is of no help to the Commission here.

---

declining to follow a statutory *prohibition* that the President independently concludes is unconstitutional (and not just unwise policy, *cf. supra* note 1), the Appropriations Clause acts as a separate limit on the President's power. It is thus doubtful that the President may permissibly expend more funds than Congress has appropriated for the program in question. *See* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause); *see also OPM v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."). It is sometimes suggested, however, that the President may elect not to follow a statutory prohibition on how *otherwise available appropriated funds* are spent if the President concludes that the prohibition is unconstitutional, at least unless and until a final Court order rules otherwise. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 740 (2008). This case does not require analysis of those difficult questions.

<sup>4</sup> It is doubtful that an independent agency may disregard a statute on constitutional grounds unless the President has concluded that the relevant statute is unconstitutional. But we need not delve further into that question here. *Compare Humphrey's Executor v. United States*, 295 U.S. 602 (1935), with *Myers*, 272 U.S. 52, and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

*Second*, it is also true that, under Article II, the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of a federal law. But that principle does not support the Commission's inaction here. To demonstrate why, the contours of the Executive's prosecutorial discretion must be explained.

The Presidential power of prosecutorial discretion is rooted in Article II, including the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 2, cl. 1 (Pardon Clause); U.S. CONST. art. II, § 3 (Take Care Clause); *see also* U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder Clause). The President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law.<sup>5</sup> The President may decline to prosecute or may pardon because of the President's own constitutional concerns about a law *or* because of policy objections to the law, among other reasons.<sup>6</sup> *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate,

---

<sup>5</sup> The power to pardon encompasses the power to commute sentences. *See Schick v. Reed*, 419 U.S. 256, 264 (1974).

<sup>6</sup> One important difference between a decision not to prosecute and a pardon is that a pardon prevents a future President from prosecuting the offender for that offense. Prosecutorial discretion, meanwhile, might be exercised differently by a future President – subject to statute of limitations issues or any due process limits that might apply when an offender has reasonably relied on a prior Presidential promise not to prosecute particular conduct.

and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ."); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause."); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 125 (1984) (Theodore B. Olson) ("the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law"); *id.* at 115 ("The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals."); Congressman John Marshall, Speech to the House of Representatives (1800), *reprinted in* 18 U.S. app. at 29 (1820) (The President may "direct that the criminal be prosecuted no further. This is . . . the exercise of an indubitable and a constitutional power."); *see also United States v. Klein*, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

In light of the President's Article II prosecutorial discretion, Congress may not *mandate* that the President prosecute a certain kind of offense or offender. The logic behind the pardon power further supports that conclusion. As has been settled since the Founding, the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even *before* a charge or trial. *See Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The Executive

can relieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes . . . .”). So it would make little sense to think that Congress constitutionally could compel the President to prosecute certain offenses or offenders, given that the President has undisputed authority to pardon all such offenders at any time after commission of the offense. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 179 (2005) (“greater power to pardon subsumed the lesser power to simply decline prosecution”).<sup>7</sup>

The Executive’s broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution’s separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior – more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of a federal law.<sup>8</sup> The Framers saw the separation of the power to prosecute from the power to legislate as essential

---

<sup>7</sup> If the Executive selectively prosecutes someone based on impermissible considerations, the equal protection remedy is to dismiss the prosecution, not to compel the Executive to bring another prosecution. See *United States v. Armstrong*, 517 U.S. 456, 459, 463 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); cf. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973).

<sup>8</sup> Congress obviously has tools to deter the Executive from exercising authority in this way – for example by using the appropriations power or the advice and consent power to thwart other aspects of the Executive’s agenda (and ultimately, of course, Congress has the impeachment power). But Congress may not overturn a pardon or direct that the Executive prosecute a particular individual or class of individuals.



to preserving individual liberty. See THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”); 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”). After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President’s prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed (and still further protection comes from later review by an independent jury and Judiciary in those prosecutions brought by the Executive).<sup>9</sup>

---

<sup>9</sup> It is likely that the Executive may decline to seek *civil* penalties or sanctions (including penalties or sanctions in administrative proceedings) on behalf of the Federal Government in the same way. Because they are to some extent analogous to criminal prosecution decisions and stem from similar Article II roots, such civil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power. See *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (“The Commission’s enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”) (quoting U.S. CONST. art. II, § 3); *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985); *Confiscation Cases*, 74 U.S. 454, 457 (1868); see

To be sure, a President's decision to exercise prosecutorial discretion and to decline to seek charges against violators (or to pardon violators) of certain laws can be very controversial. For example, if a President disagreed on constitutional or policy grounds with certain federal marijuana or gun possession laws and said that the Executive Branch would not initiate criminal charges against violators of those laws, controversy might well ensue, including public criticism that the President was "ignoring" or "failing to enforce" the law (and if a court had previously upheld the law in question as constitutional, additional claims that the President was also "ignoring" the courts). But the President has clear constitutional authority to exercise prosecutorial discretion to decline to prosecute violators of such laws, just as the President indisputably has clear constitutional authority to pardon violators of such laws. *See, e.g.*, 1963 Attorney Gen. Ann. Rep. 62, 62-63 (1963) (President Kennedy commuted the sentences of many drug offenders sentenced to mandatory minimums); Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43-44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (President Jefferson both pardoned those convicted under the Sedition Act and refused to prosecute violators of the Act); President George

---

*also Butz v. Economou*, 438 U.S. 478, 515 (1978); *Seven-Sky v. Holder*, 661 F.3d 1, 50 & n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (referring to possibility that a President might exercise prosecutorial discretion not to seek civil penalties against violators of a statute). That said, it has occasionally been posited that the President's power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution) and thus might yield if Congress expressly mandates civil enforcement actions in certain circumstances. *Cf. Heckler*, 470 U.S. at 832-33.

Washington, Proclamation (July 10, 1795), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 181 (James D. Richardson ed., 1896) (President Washington pardoned participants in the Pennsylvania Whiskey Rebellion).<sup>10</sup> The remedy for

---

<sup>10</sup> As a general matter, there is widespread confusion about the differences between (i) the President's authority to disregard statutory mandates or prohibitions on the Executive, based on the President's constitutional objections, and (ii) the President's prosecutorial discretion not to initiate charges against (or to pardon) violators of a federal law. There are two key practical differences. *First*, the President may disregard a statutory mandate or prohibition on the Executive only on constitutional grounds, not on policy grounds. By contrast, the President may exercise the prosecutorial discretion and pardon powers on any ground – whether based on the Constitution, policy, or other considerations. *Second*, our constitutional structure and tradition establish that a President is bound to comply with a final Court decision holding that a statutory mandate or prohibition on the Executive is constitutional. But in the prosecutorial discretion and pardon context, when a Court upholds a statute that regulates private parties as consistent with the Constitution, that ruling simply *authorizes* prosecution of violators of that law. Such a Court ruling does not *require* the President either to prosecute violators of that law or to refrain from pardoning violators of that law. So the President may decline to prosecute or may pardon violators of a law that the Court has upheld as constitutional. To take one example, a President plainly could choose not to seek (or could commute) federal death sentences because of the President's own objections to the death penalty, even though the Supreme Court has upheld the death penalty as constitutional. See Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1189-90 (2012) (“President Jefferson ended pending prosecutions under the Sedition Act and pardoned individuals previously convicted under that Act, even though the courts had upheld the Act’s constitutionality. . . . [I]t can hardly be said that his pardons

Presidential abuses of the power to pardon or to decline to prosecute comes in the form of public disapproval, congressional “retaliation” on other matters, or ultimately impeachment in cases of extreme abuse.

So having said all of that, why doesn’t the principle of prosecutorial discretion justify the Nuclear Regulatory Commission’s inaction in this case? The answer is straightforward. Prosecutorial discretion encompasses the Executive’s power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions against individuals or entities who violate federal law. Prosecutorial discretion does not include the power to disregard other statutory obligations that apply to the Executive Branch, such as statutory requirements to issue rules, *see Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (explaining the difference), or to pay benefits, or to implement or administer statutory projects or programs. Put another way, prosecutorial discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch.<sup>11</sup>

---

disregarded a duty to enforce or defend a congressional statute, given that the pardon power, by its nature, involves undoing the prior enforcement, via conviction, of a statute. And although the abatement of pending prosecutions failed in one sense to enforce the Sedition Act, given the breadth of prosecutorial discretion – whether rooted in the Constitution, in the presumed intention of Congress, or in some combination of the two – it is hard to view Jefferson as having disregarded a congressional mandate.”) (footnotes omitted).

<sup>11</sup> Of course, for reasons already discussed, the President may decline to follow a law that purports to *require* the Executive

This case does not involve a Commission decision not to prosecute violations of federal law. Rather, this case involves a Commission decision not to follow a law mandating that the Commission take certain non-prosecutorial action. So the Executive's power of prosecutorial discretion provides no support for the Commission's inaction and disregard of federal law here.

#### IV

At the behest of the Commission, we have repeatedly gone out of our way over the last several years to defer a mandamus order against the Commission and thereby give Congress time to pass new legislation that would clarify this matter if it so wished. In our decision in August 2012, the Court's majority made clear, however, that mandamus likely would have to be granted at some point if Congress took no further action. *See Order, In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012). Since then, Congress has taken no further action on this matter. At this point, the Commission is simply defying a law enacted by Congress, and the Commission is doing so without any legal basis.

We therefore have no good choice but to grant the petition for a writ of mandamus against the Commission.<sup>12</sup>

---

Branch to prosecute certain offenses or offenders. Such a law would interfere with the President's Article II prosecutorial discretion.

<sup>12</sup> In his dissent, Chief Judge Garland cites several cases to explain his vote against granting mandamus in this case. Of the eight cases he cites, however, five did not involve a statutory mandate with a defined deadline, as we have here. In the other three cases, the Court made clear that either the agency had to act or the Court would grant mandamus in the future. *See In re United*

This case has serious implications for our constitutional structure. It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by

---

*Mine Workers of America International Union*, 190 F.3d 545, 554 (D.C. Cir. 1999) (“however modest [an agency’s] personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction”); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (denying mandamus partly because “this is not a case where an agency has been contumacious in ignoring court directions to expedite decision-making”); *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (mandamus inappropriate where it would interfere with agency priorities set by applying agency expertise but noting that “[w]here the agency has manifested bad faith, as by . . . asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities”). Consistent with those precedents, we followed a cautious approach in our decision more than a year ago when we declined to issue mandamus against the Commission at that time. But the Court’s majority clearly warned that mandamus would eventually have to be granted if the Commission did not act or if Congress did not change the law. Since then, despite the clear warning, the Commission has still not complied with the statutory mandate. On the contrary, the Commission has reaffirmed that it has no plans to comply with the statutory mandate. In the face of such deliberate and continued agency disregard of a statutory mandate, our precedents strongly support a writ of mandamus. Our respectful factbound difference with Chief Judge Garland, then, is simply that we believe – especially given the Court’s cautious and incremental approach in prior iterations of this litigation, the significant amount of money available for the Commission to continue the licensing process, and the Commission’s continued disregard of the law – that the case has by now proceeded to the point where mandamus appropriately must be granted.

the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress, and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here. To be sure, if Congress determines in the wake of our decision that it will never fund the Commission's licensing process to completion, we would certainly hope that Congress would step in before the current \$11.1 million is expended, so as to avoid wasting that taxpayer money. And Congress, of course, is under no obligation to appropriate additional money for the Yucca Mountain project. Moreover, our decision here does not pre-judge the merits of the Commission's consideration or decision on the Department of Energy's license application, or the Commission's consideration or decision on any Department of Energy attempt to withdraw the license application. But unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process. The petition for a writ of mandamus is granted.

*So order ed.*

RANDOLPH, *Senior Circuit Judge*, concurring: I join all of the majority opinion except part III, which I believe is unnecessary to decide the case.

I also believe some background information is needed to understand what has occurred here. The Nuclear Waste Policy Act states that the Commission “shall consider” the Yucca Mountain license application and “shall issue a final decision approving or disapproving” the application “not later than” three years after its submission. 42 U.S.C. § 10134(d). The Department of Energy filed the Yucca Mountain application in June 2008, *see* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008), and Congress later provided substantial appropriations for the licensing process, *see* U.S. NUCLEAR REGULATORY COMMISSION, NUREG-1100, VOL. 26, CONGRESSIONAL BUDGET JUSTIFICATION FOR FY 2011 94–95 (2010). Although the Commission had a duty to act on the application and the means to fulfill that duty, former Chairman Gregory Jaczko orchestrated a systematic campaign of noncompliance. Jaczko unilaterally ordered Commission staff to terminate the review process in October 2010; instructed staff to remove key findings from reports evaluating the Yucca Mountain site; and ignored the will of his fellow Commissioners. *See* U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN’S UNILATERAL DECISION TO TERMINATE NRC’S REVIEW OF DOE YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION 7–10, 17, 44–46 (2011). These transgressions prompted an investigation by the Commission’s Inspector General, as well as a letter from all four of the Commission’s other members expressing “grave concerns” about Jaczko’s performance in office. *See* Matthew Daly, *Nuclear Agency’s Commissioners and Chief Trade War of Words*, WASH. POST, Dec. 10, 2011, at A18. After we heard oral argument in this case, Jaczko resigned.



Today's judgment should ensure that the Commission's next chapter begins with adherence to the law. In the Nuclear Waste Policy Act Congress required the Commission to rule on the Yucca Mountain application, and it appropriated funds for that purpose. The Commission's duty is to comply with the law and our duty is to make sure it does so. "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

GARLAND, *Chief Judge*, dissenting: Mandamus is a “drastic and extraordinary remedy reserved for really extraordinary causes.” *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). Even if a petitioner can show that it has a “clear and indisputable” right to the writ, issuing the writ remains “a matter vested in the discretion of the court.” *Id.* at 381, 391. Likewise, “mandamus[] does not necessarily follow a finding of a [statutory] violation.” *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (second alteration in original) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991)). To the contrary, this court has not hesitated to deny the writ even when an agency has missed a statutory deadline by far more than the two years that have passed in this case. *See id.* at 546, 551 (declining to issue the writ, notwithstanding that the agency missed an “express” statutory deadline by 8 years in “clear violation” of the statute).<sup>1</sup> Finally, and most relevant

---

<sup>1</sup>*See also, e.g., In re Core Commc’ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (noting that the court had declined to issue the writ after the agency failed to respond to the court’s remand for 3 years, but issuing the writ when the delay reached 6 years); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003) (vacating and remanding the district court’s determination that a 5-year delay was unreasonable, due to the district court’s failure to consider the agency’s resource constraints); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir. 1998) (declining to order agency action notwithstanding a 10-year delay in issuing a rule and a 20-year delay in achieving the rule’s statutory objective); *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1146-47, 1150 (D.C. Cir. 1992) (noting that the court had declined to issue the writ after a 3-year delay, but issuing the writ when the delay reached 6 years); *In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945-47 (D.C. Cir. 1988) (declining to issue the writ despite the agency’s 3-year delay since the ALJ’s initial decision, and 5-year delay since the start of agency proceedings); *Oil, Chem. & Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (declining to issue the writ after a 5-year delay).

here, “[c]ourts will not issue the writ to do a useless thing, even though technically to uphold a legal right.” *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936).<sup>2</sup>

Unfortunately, granting the writ in this case will indeed direct the Nuclear Regulatory Commission to do “a useless thing.” The NRC has not refused to proceed with the Yucca Mountain application. Rather, by unanimous votes of both the Commission and its Atomic Safety and Licensing Board, it has suspended the application proceeding until there are sufficient funds to make meaningful progress. *See* Mem. and Order at 1-2 (N.R.C. Sept. 9, 2011); Mem. and Order (Suspending Adjudicatory Proceeding) at 3 (A.S.L.B. Sept. 30, 2011); NRC Br. 53; NRC Resp. Br. 5; Oral Arg. Tr. 36. Five months prior to that suspension, Congress had given the Commission only the minimal amount it requested to “support work related to the orderly closure of the agency’s Yucca Mountain licensing support activities.” NRC, CONG. BUDGET JUSTIFICATION FOR FY 2011, at 95 (2010); *see* Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1423, 125 Stat. 38, 126 (2011). The following year, Congress completely zeroed out the Commission’s funding for the project. And the year following that -- after we held this case in abeyance so that Congress could indicate whether it intended to fund the project going forward, *see* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012) -- Congress once again appropriated no money for Yucca Mountain activities.

---

<sup>2</sup>*See Weber v. United States*, 209 F.3d 756, 760 (D.C. Cir. 2000) (declaring that the writ “is not to be granted in order to command a gesture”); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 458 (D.C. Cir. 1977) (holding that “equity should not require the doing of a ‘vain or useless thing’”).

As a consequence, the agency has only about \$11 million left in available funds. No one disputes that \$11 million is wholly insufficient to complete the processing of the application. By way of comparison, the Commission's budget request for the most recent year in which it still expected the Yucca Mountain proceeding to move forward was \$99.1 million. *See* Inspector Gen. Mem. at 8 (June 6, 2011) (describing NRC's FY 2010 performance budget request, which Congress did not grant).<sup>3</sup> The only real question, then, is whether the

---

<sup>3</sup>To put the size of the application process in concrete terms, at the time the NRC suspended its licensing proceeding, 288 contentions -- claims that must be resolved before the application can be granted -- remained outstanding. *See* Mem. and Order (Suspending Adjudicatory Proceeding) at 3 (A.S.L.B. Sept. 30, 2011); *see also* Mem. and Order at 2 (N.R.C. June 30, 2009) (noting that the Yucca Mountain proceeding "is the most extensive . . . in the agency's history"). Over 100 expert witnesses had been identified for depositions, to address contentions on such diverse subjects as hydrology, geochemistry, climate change, corrosion, radiation, volcanism, and waste transport -- and those were just for the first phase of the proceeding. *See* Mem. and Order (Identifying Participants and Admitted Contentions), Attachment A at 1-10 (A.S.L.B. May 11, 2009); Dep't of Energy Mot. to Renew Temporary Suspension ("DOE Mot.") at 5 n.14 (A.S.L.B. Jan. 21, 2011).

Nor is funding for the NRC the only problem. The Department of Energy (DOE) is the license applicant and an indispensable party in the application process; it bears the burden of proof on each of the remaining 288 contentions. *See* 10 C.F.R. § 2.325. But Congress has zeroed out DOE's Yucca Mountain funding for three years running. It, too, has only a comparatively small amount of carryover funds available -- enough for less than two months' participation. *See* U.S. Amicus Br. 6; *see also infra* note 4.

Of course, processing the application is itself only the tip of the iceberg. Completing the project, including constructing the Yucca

Commission can make any meaningful progress with \$11 million.

The Commission has concluded that it cannot. *See* NRC Resp. Br. 5; U.S. Amicus Br. 9; *see also* NRC Br. 42. And we are not in a position -- nor do we have any basis -- to second-guess that conclusion. Two years ago, citing insufficient funds to proceed and the need to preserve the materials it had collected, the NRC shuttered the licensing program, dismantled the computer system upon which it depended, shipped the documents to storage, and reassigned the program's personnel to projects that did have congressional funding. *See* Mem. and Order at 1-2 (N.R.C. Sept. 9, 2011); NRC Br. 3; Pet'rs Br. 16; Oral Arg. Tr. 45. The Commission believes it will take a significant part of the \$11 million to get the process started again. *See* Oral Arg. Tr. 45-49; *see also* U.S. Amicus Br. 6.<sup>4</sup> Nor would that leave the Commission with the remainder to spend on moving the application along, however slightly. In light of the NRC's previous three years of appropriations experience, the only responsible use for the remaining money would be to spend it on putting the materials back into storage -- in order to preserve them for the day (if it ever arrives) that Congress provides additional funds. *See* Oral Arg. Tr. 48-49.

---

Mountain facilities themselves, would require another \$50 billion, none of which has been appropriated. *See* Oral Arg. Tr. 63.

<sup>4</sup>The Department of Energy is in a position similar to that of the NRC. The DOE office with responsibility for the Yucca Mountain project ceased operations in September 2010. *See* DOE Mot. at 4-5. "An active licensing proceeding would thus require DOE to, among other things, re-hire employees, enter into new contracts for necessary services, and re-create capabilities . . ." *Id.* at 5; *see also supra* note 3.

In short, given the limited funds that remain available, issuing a writ of mandamus amounts to little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again. This exercise will do nothing to safeguard the separation of powers, which my colleagues see as imperiled by the NRC's conduct. *See* Court Op. at 7, 21-22. And because “[i]t is within our discretion not to order the doing of a useless act,” *Sierra Land & Water*, 84 F.2d at 232, I respectfully dissent.<sup>5</sup>

---

<sup>5</sup>*Cf. In re Barr Labs.*, 930 F.2d at 76 (“Congress sought to get generic drugs into the hands of patients at reasonable prices -- fast. The record before us reflects a defeat of those hopes. There are probably remedies[, including] more resources. . . . [N]one is within our power, and a grant of [the] petition [for mandamus] is no remedy at all.”).

# IV. Transcript

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

**STATE OF FLORIDA  
PUBLIC SERVICE COMMISSION**

Internal Affairs Meeting  
Wednesday, August 14, 2013  
Betty Easley Conference Center, Room 140



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

1  
2           **CHAIRMAN BRISÉ:** Good morning. We're  
3 going to go ahead and call this Internal Affairs  
4 agenda to order. It is August 14th, 2013. And we  
5 are going to change the order around just a little  
6 bit, if you all don't mind. We're going to take up  
7 Item Number 3, which is the FERC Order on Compliance  
8 filings, and we're going to go ahead and have Cindy  
9 Miller and her team address that for us.

10           **MS. MILLER:** Thank you. Cindy Miller with  
11 the Office of General Counsel. With me is Ben  
12 Crawford of the Office of Industry Development and  
13 Market Analysis.

14           This item relates to a new Federal Energy  
15 Regulatory Commission, or FERC, compliance order,  
16 and this time it is for the Southeastern Regional  
17 Transmission Planning Region, which is known as  
18 SERTP, and this includes the Southern Company and,  
19 in turn, Gulf Power.

20           The order presents some of the same issues  
21 as we saw in the Florida Reliability Coordinating  
22 Council compliance order. We have provided a draft  
23 request for rehearing in case the Commission chooses  
24 to file such a request.

25           Basically the issues relate to the

1 requirements on transmission planning, especially  
2 for top-down planning which is in contrast with the  
3 Commission's ten-year site plan statute.

4 In addition, there is the concern that the  
5 FERC is attempting to impose an RTO-like structure  
6 without the authority to do so or without sufficient  
7 justification. By requiring regional power flow  
8 analyses and other separate analyses at the regional  
9 level it seems FERC may be trying to do indirectly  
10 what it couldn't do directly: force utilities into  
11 an RTO-type structure.

12 Lastly, we are concerned about the lack of  
13 regional flexibility in vertically integrated  
14 states. This new superimposed structure appears to  
15 add an inefficient level of additional activity.  
16 Any request for rehearing is due by August 19th.

17 **CHAIRMAN BRISÉ:** All right. Thank you  
18 very much.

19 Commissioners, the floor is open for  
20 discussion, questions, or comments.

21 Commissioner Balbis.

22 **COMMISSIONER BALBIS:** Thank you, Mr.  
23 Chairman.

24 And, you know, I want to repeat some of  
25 the comments that I made when we went through this

1 process for the FRCC region, and I have a couple of  
2 questions for staff. How many states and which  
3 states are included in this region?

4 **MS. MILLER:** There are 12 states in the  
5 region, if I've counted correctly: Alabama,  
6 Georgia, Indiana, Iowa, Kentucky, Mississippi,  
7 Missouri, Ohio, Oklahoma, Tennessee, and Virginia,  
8 as well as Florida.

9 **COMMISSIONER BALBIS:** Okay. And how many  
10 of those states is Gulf Power's system connected to?

11 **MR. CRAWFORD:** I was just -- in addition  
12 to the previous question, I was going to note that  
13 the Duke and, and, Duke Energy Carolinas and, and  
14 Duke Energy, the older body, have also petitioned to  
15 join the SERTP region. That has not been ruled on  
16 by FERC yet, but that would add most of North  
17 Carolina and part of South Carolina as well.

18 **COMMISSIONER BALBIS:** Okay. So 14 states.  
19 And of those, how many is Gulf Power connected to?

20 **MR. CRAWFORD:** Well, the Southern Company  
21 system is most of Georgia and Alabama, a portion in  
22 Florida that Gulf is in, and a large portion of  
23 Mississippi as well.

24 **COMMISSIONER BALBIS:** Okay. So only  
25 three of the 14 states is Gulf Power connected to.

1           **MR. CRAWFORD:** That's correct.

2           **COMMISSIONER BALBIS:** And I, you know, I  
3 just want to tie that into my previous comments.  
4 Not only does it appear that the federal government  
5 is, you know, limiting state rights in our  
6 jurisdiction, but the additional bureaucratic level  
7 that will be imposed and the fact that this region  
8 does not take into account the unique  
9 characteristics of Florida, the fact that we're a  
10 peninsula with very little interconnectivity gives  
11 me concern. And my main concern is truly just  
12 financial. I mean, we may result in the State of  
13 Florida customers paying for projects in Indiana,  
14 for example.

15           **MR. CRAWFORD:** Yeah. Yeah.

16           **COMMISSIONER BALBIS:** And that does not  
17 make any sense to me. So I want to, you know, just  
18 voice my concerns to the Commission. And I  
19 certainly am in favor of requesting a rehearing  
20 similar to what we did with the FRCC region for  
21 those reasons that I've listed, and previously with  
22 the FRCC. So I look forward to any other comments  
23 from my colleagues.

24           **CHAIRMAN BRISÉ:** Commissioners?

25           Sure, Commissioner Edgar.

1                   **COMMISSIONER EDGAR:** I would like, and I  
2 know that my sheet here says "only available for  
3 questions," and I don't have a specific question yet  
4 anyway, but I would like to ask if there's somebody  
5 from Gulf here who could, could just speak to us  
6 generally from their perspective on this issue, if  
7 that's all right.

8                   **CHAIRMAN BRISÉ:** Sure. Absolutely.

9                   **MR. TUNNELL:** Yeah. Sure. My name is  
10 Andy Tunnell with Balch & Bingham on behalf of Gulf.  
11 And on behalf of Gulf we do strongly support staff's  
12 recommendation that y'all seek rehearing as noted in  
13 Tony Clark's dissent to the order. I mean, FERC is  
14 applying this one-size-fits-all approach. And so,  
15 you know, the cookie cutter order that we got is  
16 almost identical to the order that the Florida  
17 utilities received. We do support the request for a  
18 hearing that y'all filed there, and, you know, did  
19 so to protect the FRCC ratepayers. I hope y'all do  
20 the same for Gulf.

21                   You know, at the end of the day we're very  
22 concerned that FERC is pushing us towards a planning  
23 process that we're really concerned just won't work.  
24 We do, you know, bottom-up planning, we do the IRP  
25 planning from the bottom. FERC seems to be pushing

1 us to something that doesn't reflect that market  
2 structure where you're doing a top-down look that,  
3 you know, seems to redo all the IRP planning we've  
4 already done before. So very concerned and do hope  
5 that y'all will pursue a request for hearing. And  
6 if y'all have any questions, I'll be glad to --

7 **COMMISSIONER EDGAR:** Thank you. No  
8 specific question at this point. I appreciate those  
9 comments. Thank you. I agree with Commissioner  
10 Balbis. I similarly have made comments on these  
11 issues in the past or related issues. I have  
12 concerns about additional potential cost to Florida  
13 ratepayers without additional benefits at least that  
14 we can see at this point in time.

15 I have, as I think we all have, I've had  
16 the opportunity to talk on other issues, not a  
17 docketed item, generally with each of the FERC  
18 Commissioners. And I have a great deal of respect  
19 and admiration for each of them, but yet their role  
20 and responsibility is slightly different than ours.  
21 And in this instance I do have concerns about the  
22 approach. And as I had said, I think, at the last  
23 item, I also am interested in, you know, in addition  
24 to this hearing type process, what other means we  
25 can use appropriately to raise these issues and

1 concerns with that federal agency and hopefully have  
2 them be heard and recognized.

3 **CHAIRMAN BRISÉ:** All right. Any further  
4 comments, questions? Commissioner Graham.

5 **COMMISSIONER GRAHAM:** Well, I, I ditto the  
6 remarks from Commissioner Balbis. This is like the  
7 same problem that we just had. One of the things  
8 that's different in this one -- on this one though  
9 is more of the merchant providers. If I can get  
10 staff to talk a little bit more about that part of  
11 it.

12 **MR. CRAWFORD:** Did you have a specific  
13 question regarding merchant providers?

14 **COMMISSIONER GRAHAM:** No. Just overall.  
15 I mean, what's going to change because of this?

16 **MR. CRAWFORD:** Well, one of, one of the  
17 initiatives FERC has been pushing fairly strongly as  
18 part of this whole Order 1000 process is to try and  
19 provide more opportunities for merchant transmission  
20 providers to get involved in the process and to be,  
21 essentially be able to become formally part of a  
22 regional transmission plan.

23 And one of the -- under the proposals  
24 we've seen both from FRCC and SERTP, merchant  
25 providers can provide, can develop an alternative

1 transmission plan to something that's in the  
2 official plan or can propose something that they  
3 think will serve some economic need or some public  
4 policy need and can have that plan developed, or it  
5 can have that plan analyzed as part of the, as part  
6 of the regional transmission plan and possibly  
7 supplant some part, you know, some specific  
8 transmission project that's already part of, of that  
9 regional transmission plan.

10 Both the SERTP and the FRCC have their own  
11 processes for -- the SERTP has a, I know they have  
12 the 1.25 benefit cost ratio, which means essentially  
13 that a project has to save at least 20% off the  
14 project that it's replacing. But they both have  
15 sort of a review process to, you know, analyze,  
16 analyze a project, ensure that the developer is  
17 going to be able to bring the project to completion,  
18 and to evaluate how it will fit in and make sure it  
19 doesn't have any unintended consequences or  
20 something like that. Does that answer, I guess,  
21 what you're looking for?

22 **COMMISSIONER GRAHAM:** How does, how does  
23 the finance work behind a lot of this stuff or how  
24 are these people reimbursed?

25 **MR. CRAWFORD:** They would receive rates,



1 essentially receive transmission rates they would  
2 charge to use the transmission that would be part  
3 of -- they would charge -- does that come under  
4 generator or the, or the buyer side? Do you  
5 remember off the top of your head?

6 **MS. MILLER:** Maybe I can step back a  
7 little bit. I think that FERC is trying to level  
8 the field so that the incumbent providers are not at  
9 an advantage over merchants. And in terms of how  
10 the rates go, they go to FERC and there's a cost  
11 allocation process. And I think it goes to -- in  
12 this case it's the wholesale, the wholesale  
13 companies where it's divided. So it doesn't go to  
14 the, directly to the retail.

15 **MR. CRAWFORD:** Yeah. Yeah.

16 **MS. MILLER:** But it can be eventually --

17 **MR. CRAWFORD:** Yeah. But -- yeah.

18 **MS. MILLER:** -- forced to the retail rate.

19 **COMMISSIONER GRAHAM:** Well, I guess my  
20 question is what specifically changes because of  
21 what they're trying to do here when it comes to the  
22 merchant providers?

23 **MR. CRAWFORD:** Well, right now, right now  
24 the merchant providers don't necessarily have an  
25 established role in the process in these, in these

1 regions. There's -- the -- going back to some of  
2 the earlier FERC orders, they -- anybody can sort of  
3 bid to be part of the existing transmission system.  
4 You have, you have what are known as open access  
5 tariffs and -- or open access transmission tariffs  
6 so that anybody can become part of an existing  
7 transmission network. But there isn't -- in regions  
8 where you've got vertically integrated utilities,  
9 which, of course, both the SERTP and FRCC regions  
10 are part of, there is not necessarily an established  
11 role for, for the merchant providers. Now there are  
12 places where somebody can bid on a project if a, if,  
13 if an RTP is put out or something like that. But  
14 there's not necessarily a formal rule where they can  
15 be, their proposals necessarily have to be  
16 considered.

17 Now if a utility was asking for cost  
18 recovery and it was known there was a less -- for a  
19 transmission project and it was known there's a  
20 cheaper alternative out there, that could, that  
21 could come up then. They could, you know, there  
22 would be -- there are places they can bring up that  
23 they could do the same job cheaper in the existing  
24 process, but it's not as formalized as it would be  
25 under the Order 1000 process.

1           **MS. MILLER:** In the regional plan their  
2 projects have to be considered.

3           **MR. CRAWFORD:** Yeah. Essentially there  
4 has to be a formal process where, for example, for  
5 the SERTP region, if, if a line is put in between  
6 Georgia and Florida, for example, that's part of  
7 this regional process, if, if a merchant  
8 transmission provider thinks that they can do the  
9 same project for 25% cheaper or something, then they  
10 can put in a bid as part of this regional  
11 transmission process that says we can, that says we  
12 can do this cheaper, and that proposal has to be  
13 considered with the same weight that something that,  
14 say, Southern Company wanted to build was given.

15           And if it cleared, if it qualified under  
16 the terms of the regional transmission plan, then it  
17 would have to be incorporated into the regional  
18 transmission plan in place of the original Southern  
19 project. Now if it doesn't pass the reviews, of  
20 course, the original project can go through. But  
21 that's, that's one of the changes that's coming from  
22 the FERC Order 1000.

23           **COMMISSIONER GRAHAM:** Okay. That was a  
24 little confusing to me before, and it's not that  
25 much clearer now.

1 (Laughter.)

2 **MR. TUNNELL:** Mr. Chairman, can I say  
3 something along those lines?

4 **CHAIRMAN BRISÉ:** Sure.

5 **MR. TUNNELL:** You know, we aren't just  
6 concerned about the process that FERC is setting up.  
7 I mean, Commissioner Balbis referred a little while  
8 ago about the additional bureaucracy. You know,  
9 right now if you go through the resource planning,  
10 if we have a new generating resource, for example,  
11 that y'all identify as appropriate, you know, we  
12 would go ahead and have the transmission lines and  
13 the plans to integrate that unit. And what FERC has  
14 essentially set up is now you have this opportunity  
15 for, you know, a rethink and a redo at the, at the  
16 regional level.

17 And so just the process in itself that,  
18 you know, you think that you've got this -- you  
19 know, historically you've had a seamless  
20 transmission between resource planning and  
21 transmission planning. And so now FERC has  
22 superimposed this new regional look on top. And it  
23 just -- you know, regardless of what you think  
24 about, you know, vertical integration and bringing,  
25 you know, allowing these merchant guys to come in

1 just in terms of process of, you know, potential for  
2 contention and litigation, you know, we're very  
3 concerned that that bureaucracy is really going to  
4 slow down and could even, you know, rethink and redo  
5 the economics of the resource planning we did  
6 before.

7 So we're concerned, you know, with the  
8 process. And even if you go to the, you know, the,  
9 you know, the benefits of vertical integration, we  
10 still believe there are benefits of vertical  
11 integration. You know, transmission remains a  
12 natural monopoly. This isn't like on the generation  
13 side where it's been demonstrated that you can have  
14 competition in generation. You know, transmission  
15 remains a natural monopoly.

16 And I know the North Carolina Commission,  
17 they did a study, investigation about the potential  
18 impacts of bringing in these nonincumbent  
19 developers, and they, they concluded it presented  
20 all sorts of different risks to North Carolina  
21 ratepayers.

22 And so, you know, we have concerns with  
23 the model to begin with. But just, just doing this  
24 rethink and adding this additional level of process  
25 at the top, very concerned at the end of the day

1 that it's just going to really slow things down.

2 **MR. CRAWFORD:** And something I'd add to  
3 what, what Mr. Tunnell said is that right now in RTO  
4 regions the merchant transmission situation wouldn't  
5 change very much. A lot of them already have, you  
6 know, they have processes set up like that where  
7 somebody could bid into the, into the regional  
8 process. This, this change would be part of the  
9 sort of overall framework we've been discussing of  
10 transitioning areas where we have vertically  
11 integrated utilities into a much more RTO-like  
12 structure where you sort of do detach the  
13 transmission planning from any of the organizational  
14 structures that exist right now and any -- and that  
15 includes any kind of local oversight of those in a  
16 lot of cases.

17 **CHAIRMAN BRISÉ:** Cindy, what is there --  
18 can you explain the tension that exists between our  
19 statutory structure here and what the FERC is trying  
20 to, to do? I think that that will help put  
21 everything in focus with respect to what our  
22 responsibility is based upon the statutes that we  
23 operate under.

24 **MS. MILLER:** Right. And that has been our  
25 concern is that you have a number of statutes that

1 talk about what you do within Florida. FERC, of  
2 course, has a role nationally. And there's a lot of  
3 tension there because if they go, of course, with  
4 the national approach, it counters what we're doing  
5 here.

6 I mean, I've thought about this so much.  
7 I've thought is there some way to harmonize the two?  
8 And it seems pretty difficult because if you're  
9 going with a regional approach that is demanding a  
10 top-down approach with regional analyses and all and  
11 now in this case 12 to 14 states, how does that fit  
12 with a bottom-up approach here? Well, individual  
13 utility plans are filed and there's an approach that  
14 looks at the individual utility plans. And so  
15 there's that tension.

16 But in addition, there's some tension in  
17 case law which I'm not crazy about mentioning but I  
18 should. Some of the case law has been very rough  
19 that says, well, transmission generally is  
20 interstate because electrons flow across the  
21 borders. And so, you know, we do not know how good  
22 a chance of success if this were to come into, you  
23 know, play as we keep moving forward. It's very  
24 difficult.

25 There's some Federal Power Act statutes.

1 In 2005, the Energy Policy Act added some, some  
2 responsibilities for FERC. They said on  
3 transmission planning they may facilitate it. They  
4 didn't say they could regulate it, but they could  
5 facilitate it. So in a court case we're arguing  
6 about that. Well, does that mean they just oversee  
7 it all and regulate it? And I know the utilities  
8 and also the state commissions are saying, no, it  
9 just means you get to help, you get to facilitate.  
10 So there's a lot of tension.

11 And I know you all know that NARUC passed  
12 a resolution on this expressing concern about what  
13 FERC Order 1000 did, and the compliance orders, even  
14 more particularly the concern about the compliance  
15 orders. So there's a lot of movement and a lot of  
16 concern being expressed. Ultimately that tension  
17 could be resolved in favor of FERC.

18 **CHAIRMAN BRISÉ:** Well, we don't know that.

19 **MS. MILLER:** We do not know that.

20 **CHAIRMAN BRISÉ:** We don't know that. And  
21 I think this week there was a ruling on -- was it  
22 the NRC -- which many thought that we were going to  
23 lose, but we ended up winning there.

24 **MS. MILLER:** Yes.

25 **CHAIRMAN BRISÉ:** So there may be



1 recognition that states do play a vital role, and  
2 that if things are supposed to work a particular way  
3 and it makes sense for it to work in that particular  
4 way, people have paid into stuff, this is a  
5 different type of situation, but there would be  
6 recognition of the value of that. So we don't know  
7 what will happen. We wouldn't want to sort of  
8 prejudge that at this point.

9           So my perspective is, is quite simple.  
10 Our job is to protect the interests of Florida. And  
11 I think, as we did with, with the last set, we're  
12 going to, if my colleagues agree, sort of be  
13 consistent in our approach. Those are the  
14 discussions, are discussions that maybe are to be  
15 had another day. But where we are today, by us  
16 pursuing this, basically it's consistent with our  
17 statutes and consistent with the way we operate in  
18 Florida.

19           Commissioner Edgar.

20           **COMMISSIONER EDGAR:** Thank you, Mr.  
21 Chairman, and I agree completely. I would just also  
22 add from my perspective that it is important every  
23 opportunity we have to additionally raise the issue  
24 that as our geography and being a vertically  
25 integrated system, that that situates us differently

1 than many of those states in the midwest and other  
2 areas that have agreed to regional competitive  
3 operations and authorities. And so to, to continue  
4 to highlight that issue and that difference I think  
5 is important.

6 **CHAIRMAN BRISÉ:** Absolutely.

7 **COMMISSIONER EDGAR:** And important for  
8 Florida and important for the southeast in general.

9 **CHAIRMAN BRISÉ:** Sure. Commissioner  
10 Balbis.

11 **COMMISSIONER BALBIS:** A follow-up on  
12 Commissioner Edgar's comment. And I think that's a  
13 really good point, and I'm wondering if, you know,  
14 my colleagues agree that on page 6 of Attachment A  
15 where staff goes into the argument that we add an  
16 additional statement regarding Florida's unique  
17 geography and/or lack of interconnection because on  
18 many levels, even the common sense level, I mean  
19 that should be included in the argument as to why  
20 this is not applicable to Florida. So I think, you  
21 know, it's mentioned in the memo in perhaps the  
22 preamble portion of it. But I think, if we -- if  
23 you agree, adding an additional statement there in  
24 the first paragraph of the argument would be  
25 appropriate.

1           **MS. MILLER:** Thank you. We, we agree that  
2 that would, would help in the arguments that Florida  
3 is making.

4           **CHAIRMAN BRISÉ:** Okay. All right. Any  
5 thoughts, additional thoughts on that?

6           Okay. So I think we've had good  
7 discussion on this item. We're probably in the  
8 proper place for a motion. So whoever is making the  
9 motion, remember to include --

10          **MS. MILLER:** And I should ask, we're still  
11 refining it and adding some case cites, beefing up a  
12 little bit, so I hope we have a little bit of leeway  
13 there.

14          **CHAIRMAN BRISÉ:** Sure. Sure. That will  
15 be included in whoever makes the motion.

16          **COMMISSIONER BALBIS:** Mr. Chairman, I'd be  
17 more than happy to make the motion on this.

18          **CHAIRMAN BRISÉ:** Go right ahead.

19          **COMMISSIONER BALBIS:** I move to --

20          **COMMISSIONER EDGAR:** I'm stunned.

21          (Laughter.)

22          **COMMISSIONER BALBIS:** -- to authorize  
23 staff to make the, the revisions as noted to add the  
24 additional statement on interconnectivity and  
25 Florida's unique geography. Also make the

1 non-substantive bolstering changes on citing  
2 additional case law, et cetera, and to authorize the  
3 Chairman's office to facilitate that and to get this  
4 out on time.

5 **COMMISSIONER GRAHAM:** Second.

6 **CHAIRMAN BRISÉ:** All right. It's been  
7 moved and seconded. Any further discussion?

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

9 (Vote taken.)

10 All right. Thank you very much.

11 **MS. MILLER:** Thank you.

12 **MR. KISER:** Mr. Chairman.

13 **CHAIRMAN BRISÉ:** Yes, sir.

14 **MR. KISER:** Since you've got another part  
15 of the program, I don't know if you want to go right  
16 to her other part while they're all sitting up here  
17 now. That's the part on the court case yesterday.

18 **CHAIRMAN BRISÉ:** Oh, yeah. Go ahead and  
19 cover that right now.

20 **MS. MILLER:** Do you want me to -- okay.  
21 All right. We've got some handouts. Speaking of  
22 the court case, everybody is pretty excited about  
23 it, so we prepared a summary yesterday, and also we  
24 have copies of the case. And I think this is a  
25 pretty wonderful case on the rule of law.

1           The name of the case is *In Re: Aiken*  
2 *County*, and I think we made 20 copies. Here we go.

3           The D.C. Circuit Court of Appeals did not  
4 like what the Nuclear Regulatory Commission did when  
5 it did not move on the Yucca Mountain repository  
6 license application. And the Court said that it was  
7 flouting the law and that it couldn't do that.

8           Excuse me. This chair is so low.

9           So, anyway, we've prepared this summary  
10 and we have got copies of the case here for you. So  
11 the case relates to the Yucca Mountain repository  
12 licensing process, the Nuclear Waste Policy Act, and  
13 the Nuclear Regulatory Commission flouting the law.

14           The Court says that the NRC has to  
15 continue with the legally mandated Yucca Mountain  
16 licensing process. The NRC put up a number of  
17 reasons why they shouldn't have to do so, and the  
18 Court found none of them persuasive. The Court said  
19 there's still \$11.1 million remaining in the fund to  
20 use for the licensing process and that they have to  
21 proceed. And it's called a writ of mandamus, and  
22 this is basically the Court saying you have to do  
23 this. It's an extraordinary remedy and it's, you  
24 know, not all that common.

25           But the Court said that they have tried to

1 find a way to give time for Congress to take action.  
2 They said we really -- we have these other cases  
3 before us and we waited to see if Congress would  
4 clarify that you did not have to proceed with the  
5 Yucca Mountain licensing. But Congress has not done  
6 that and so we have no choice but to tell you to  
7 proceed with the licensing.

8 We talked with a number of people about  
9 what might happen next. And the NRC may try to seek  
10 a stay. They may try to get a rehearing en banc in  
11 front of more commissioners -- more judges at the  
12 D.C. Circuit Court of Appeals. They may go to the  
13 Supreme Court. If they don't get a stay, however,  
14 they have to proceed with the licensing.

15 So this has been an issue we've been  
16 involved, this, this Florida Commission has been  
17 involved in for many, many, many years.

18 In this case we are in the NRC proceeding.  
19 We were not in the court proceeding on this one.  
20 We're in a separate court proceeding about the, how  
21 the NRC -- well, if DOE is not proceeding and the  
22 NRC is not proceeding, that there should be a  
23 suspension of the funds, of the fee assessment on  
24 the ratepayers.

25 So we have been very glad to see this

1 case. The Court said that there are a few instances  
2 where the President may choose not to follow law;  
3 however, this is not one of them. In order for the  
4 President to choose not to follow law there has to  
5 be an unconstitutionality claim about a law. But  
6 here they said there is the law, there's no reason  
7 that you don't follow it, and you have to proceed.

8 **MR. KISER:** Mr. Chairman? I'm sorry.

9 **CHAIRMAN BRISÉ:** Commissioner Graham.

10 **COMMISSIONER GRAHAM:** So it seems like the  
11 only thing that's really forcing them to move  
12 forward is that \$11.1 million.

13 **MS. MILLER:** And it's --

14 **COMMISSIONER GRAHAM:** So what happens when  
15 that is exhausted?

16 **MS. MILLER:** And it is a small amount.  
17 Everyone believes that that could be used very  
18 quickly.

19 I think we're back in Congress's court in  
20 my view, and Curt may have a different view. But if  
21 Congress were -- if the money were to run out -- I  
22 don't know. Maybe I shouldn't speculate. But if  
23 the money were to run out, they use it all up, it  
24 seems the court -- the ball is back in Congress's  
25 court.

1           **CHAIRMAN BRISÉ:** Curt?

2           **MR. KISER:** Mr. Chairman, I wanted to  
3 point out a couple of things.

4           One, it was a 2-to-1 decision. And the  
5 one judge who dissented basically said, Well, I  
6 agree they're supposed to proceed. They're  
7 basically ignoring the law. You know, however, he  
8 said, you know, there is a position out there that  
9 if proceeding would mean nothing, you don't have to,  
10 and he basically hung his dissent on that because of  
11 the money. The estimate for moving forward is  
12 about, you know, 99 million to do something and  
13 there's 11 sitting there. So obviously that won't  
14 move very, very long.

15           And the Congress has been deadlocked  
16 because the Senate, the Senate Majority Leader,  
17 Harry Reid from Nevada, you know, he has put his  
18 stake in the ground and said this is not gonna  
19 happen, over my dead body. And he's been the one  
20 that's kind of pushed the President to, to not move  
21 forward in this area. And at the current time,  
22 without a change in the elections, there's probably  
23 not the votes in the Senate to overturn Senator  
24 Reid. But there is another election in another  
25 year, and if, by chance, the membership would



1 change, then there's still an option that they could  
2 do it.

3           The House on the other side has  
4 continually put money in the Appropriations Act to  
5 continue to fund this. And, of course, it goes down  
6 to the Senate and dies, so you have the stalemate.  
7 And without the elections changing the makeup of the  
8 senate, it probably will, they'll run through those  
9 funds and then that'll be it, they just don't have  
10 it, and in that case -- I mean, Harry Reid, his  
11 comment after the decision was "This decision means  
12 nothing." Because he, he feels comfortable that  
13 that money will run out quickly and he'll still be  
14 there and have control and that'll be it, that'll be  
15 the end of it, and it'll just kind of languish.

16           But it's real clear, I mean, for people  
17 that have been sitting back, and I think the Court  
18 went to great lengths to say, well, the reason we  
19 sat on this was to give Congress more time. We've  
20 run out of patience. You know, it's time to state  
21 the principle of law. This was -- this is the  
22 current law, they have to proceed forward, you have  
23 to spend the money, and they issued the mandamus.  
24 And like you said, we'll have to wait for the appeal  
25 period to see what they do.

1           But it's been a pretty significant issue  
2 because I haven't seen anything in current times  
3 that have been more obvious of just absolutely  
4 flaunting the law. I mean, in the earlier court  
5 cases the Court said very clearly, You can't do this  
6 without a change in Congress. Congress specifically  
7 named this location, they've spent billions of  
8 dollars to fix it up and get it ready to go. And  
9 you, unless Congress changes the mandate, NRC, you  
10 have no right just to say, no, we're not going to do  
11 it. And this pretty much reaffirms all of that. So  
12 we'll wait to see what happens.

13           **CHAIRMAN BRISÉ:** All right. Thank you.

14           Commissioners, anything further on this?

15           (No response.)

16           All right. Thank you very much.

17           Okay. We're going to move back to items  
18 number 1 and then 2.

19           Part of today's conversation is going to  
20 look at economic development and how the sector that  
21 we regulate plays a role in our state's economic  
22 development, and recognizing the importance of  
23 keeping the lights on, keeping water running, and  
24 making sure that people can communicate with each  
25 other, and keeping the gas on, and how that sort of

1 undergirds all of the economic activity that happens  
2 in our state. And we have some very capable people  
3 here with us today to help us go through that  
4 conversation and have a better understanding of, of  
5 our impact on the state as a whole.

6 Our first presenter today is Mr. Rick  
7 Harper, and he is the Senior Policy Advisor on  
8 Economic Development in the Office of the Senate  
9 President. He also serves as Executive Director of  
10 the University of West Florida, Office of Economic  
11 Development and Engagement. Previously Mr. Harper  
12 served as Director of University of South Florida's  
13 Haas Center for Business Research and Economic  
14 Development, and represented Northwest Florida on  
15 Governor Jeb Bush's Council of Economic Advisors.

16 Mr. Harper has published scholarly  
17 research in the area of government policy and its  
18 effect on the business environment. He earned his  
19 Ph.D. in economics from Duke University and his  
20 bachelor's from Guilford College.

21 Dr. Harper, thank you for being here with  
22 us today.

23 **DR. HARPER:** Thank you very much, Chairman  
24 Brisé, Commissioners, staff, guests. Thanks for the  
25 invitation to speak to you briefly this morning

1 about some of the competitive issues that Florida  
2 faces; our position vis-a-vis the rest of the  
3 nation; and, in today's era of increased  
4 international trade, our position vis-a-vis our  
5 competitors globally.

6 So you have in your package eight slides,  
7 and I guess we should look at these on paper. Do  
8 you want to put them up on the PowerPoint as well?

9 **MR. BAEZ:** Are they loaded?

10 **CHAIRMAN BRISÉ:** Are they loaded? If  
11 they're loaded, we're ready to go. If you could do  
12 that.

13 **SPEAKER:** They are loaded.

14 **CHAIRMAN BRISÉ:** Great. I thought that  
15 would be second nature for us to have them up.

16 **DR. HARPER:** So I'd like to begin by, just  
17 by way of introduction -- oh, thank you. Great.

18 (Pause.)

19 Okay. Thanks very much. I'd like to begin  
20 by presenting work that Joel Kotkin, a well-respected  
21 demographer, has presented talking about the next 50  
22 years for America. Kotkin identifies four growth  
23 corridors across the United States -- I guess his, his  
24 graphic there is a little bit faded out under, under  
25 the heading there -- but he identifies energy intensive

1 regions. He identifies areas as well that pertain  
2 directly to Florida. He calls us the third coast as we  
3 stretch from Texas, Louisiana, Mississippi, and  
4 Florida. I'm not sure why he left Alabama out of that,  
5 but.

6 (Laughter.)

7 But we have enormous potential for growth in  
8 manufacturing in other areas, and a lot of it's due to  
9 the energy situation that we expect to see over the  
10 next number of years.

11 What I've done here is graphed the price of  
12 West Texas Intermediate and then natural gas at the  
13 Henry Hub, that data series going back to January of  
14 1994 from the Federal Reserve, and I have set the  
15 1994 average price for each of those series to be equal  
16 to 100%. And then what you can see over time is the  
17 growth pattern of prices in oil in the blue and the  
18 growth pattern in prices in natural gas in the red.

19 I would point out that as you look at the  
20 vertical axis to see what that percentage increase is,  
21 you see that for oil relative to 1994 we are now at  
22 five times the price of oil; natural gas, we are  
23 pushing a doubling in price. And I would add that if  
24 you just put the Consumer Price Index for all urban  
25 consumers up there, over the period 19 -- if we set

1 1994 to be 100, then by the end of 2012 the Consumer  
2 Price Index had increased by 57%. So natural gas has  
3 increased slightly more than the Consumer Price Index  
4 and much less than oil prices overall.

5 What's notable to me about this chart is  
6 the fact that in the most recent years we've seen a  
7 lessening of volatility in natural gas prices.  
8 We've also seen really since 2009 a divergence  
9 between oil prices and gas prices that I think is  
10 largely related to the increased production in the  
11 United States of natural gas, and the fact that we  
12 do not yet have substantial natural gas export  
13 facilities in the United States. The Federal  
14 Reserve office in New Orleans told me last week that  
15 there are about \$95 billion worth of projects for  
16 natural gas export terminals in the pipeline right  
17 now. But that's an extensive approval process, a  
18 time-consuming process. And I think we can expect  
19 to see natural gas prices continue to diverge from  
20 oil prices for at least a decade to come, which when  
21 you compare our energy prices then to prices in the  
22 rest of the world, particularly our European  
23 competitors, I've heard leaders in European  
24 manufacturing say that their energy costs can be  
25 tripled or quadrupled in Europe relative to what

1 they are in North America, and that gives us a  
2 built-in competitive advantage.

3 So the challenge that we face here, a  
4 challenge that we face, if we go over to the  
5 residential side, this is residential natural gas  
6 prices measured in dollars per 1,000 cubic feet, and  
7 the challenge for Florida is, of course, that we are  
8 the highest price in terms of for residential users  
9 on average of all the 40 some states for which good  
10 quality data was available to construct this, this  
11 chart.

12 And, of course, if you look at -- I mean,  
13 in terms of taxation and competitiveness and the  
14 cost of providing essential government services, you  
15 really pick your poison in terms of how you finance  
16 those expenses. Florida has one of the lowest tax  
17 burdens in the nation. We are in the bottom 10% in  
18 terms of the number of state employees per thousand  
19 residents of the state. We are a low tax state  
20 among our national peers. And so a part of the low  
21 tax burden -- the absence of personal income tax, a  
22 relatively modest corporate profits tax rate, and  
23 low spending per person -- is made up in other taxes  
24 and fees, of course.

25 And I would welcome your input, but it

1 appears to me that one of the primary reasons here  
2 is, for this pricing structure is that municipal  
3 governments may attempt to recoup some revenue that  
4 they would not otherwise see from other sources  
5 through higher natural gas prices to residents.  
6 It's largely an invisible tax to consumers.

7           So I'd like to move on and talk about some  
8 of the challenges that we face in Florida and  
9 specifically our economic performance, and then I'd  
10 like to take a look at challenges in the job market.

11           So here is a picture of economic activity  
12 level since the July 2007 time frame. You see that  
13 we started in the recession. The National Bureau of  
14 Economic Research marks the start month of the Great  
15 Recession as December of 2007. You can see that  
16 Florida was hit hardest. The states that I selected  
17 here, I selected two neighboring states, Alabama and  
18 Georgia, and I selected two other large states that  
19 we might reasonably expect to compete with for job  
20 recruitment efforts in California and Illinois, and  
21 I looked at the index of economic activity for those  
22 six states. And it's not surprising to think that  
23 Florida dropped farther and faster than other states  
24 because if you have grown at three times the average  
25 population growth rate of the rest of the nation



1 over a period of many decades since World War II,  
2 then you're going to have a larger housing sector  
3 and construction sector than the rest of the nation  
4 because you have to construct the housing stock, the  
5 new office space, the new commercial space for these  
6 new residents to use. And then when we're hit with  
7 a recession centered on housing and construction,  
8 Florida is going to fall faster and farther than  
9 other states. We see that loud and clear.

10 However, the recovery process has been  
11 underway really since December of -- for Florida  
12 since December/January time frame, 2009/2010. We've  
13 seen job growth since January of 2010 until the  
14 present time, but we still face challenges in the  
15 jobs market.

16 California, I mean, we don't think of  
17 California as being a stellar performer. Why are  
18 they higher than the other states? That's trade  
19 linkages to Asia; that's the importance of the  
20 technology sector where California has a  
21 disproportionately heavy share; and the housing  
22 market has responded more rapidly to, to growth in  
23 California than in other states.

24 Here in the northern part of Florida we  
25 get compared a lot to Alabama, which has had several

1 big announcements recently in terms of industrial  
2 production, but what you see is that job growth and  
3 economic activity in Alabama does not surpass that  
4 of Florida. In fact, if we look since 2000, we see  
5 that actually the Alabama coastal metro area of  
6 Mobile has gained substantially fewer jobs than  
7 even our North Florida metro areas of Pensacola,  
8 Ft. Walton Beach, Panama City, Tallahassee,  
9 Jacksonville.

10 Now I'd like to move on to the major  
11 challenge that we face, which is in the labor  
12 market. And what we see here are data from two  
13 different surveys: The household survey, which asks  
14 people were you active in the labor market, looking  
15 or employed on the 12th day of the month; and then  
16 the black line comes from the establishment survey  
17 where we take a, at the time about a one-third  
18 sample of businesses, which then every year is  
19 benchmarked to include all reporting businesses.  
20 And we see that the challenge that we still have,  
21 there's a pretty consistent gap between labor force  
22 and employment as we grow from 1990. We see that  
23 the gap shrinks during the boom period as  
24 unemployment in Florida falls to 4% and below. We  
25 have had job growth in Florida since January of

1 2010, and so, yes, the labor market is responding,  
2 the labor market is growing. This job growth from  
3 January of 2010 and onward has averaged about 10,000  
4 jobs per month for Florida. That's below the 13,000  
5 jobs per month that we averaged from January of 1990  
6 until the first part of the last decade, but it is,  
7 it's good growth and we're glad to have it, of  
8 course.

9 But the challenge, of course, is that that  
10 vertical distance between the number of people who  
11 are employed versus the number of people who count  
12 themselves active in the labor market is still  
13 large, it's too large, and that's the real challenge  
14 that we face is putting Florida families to work so  
15 that they can then earn the income which they will  
16 spend and allow other entrepreneurs to create new  
17 businesses.

18 **CHAIRMAN BRISÉ:** Do you mind, do you mind  
19 if we jump in?

20 **DR. HARPER:** Oh, please, jump in, Mr.  
21 Chairman.

22 **CHAIRMAN BRISÉ:** When you talk about those  
23 type of jobs that, that some folk are out there  
24 trying to get, from your perspective are those jobs  
25 that have, are those jobs that have left and aren't

1 coming back or are those jobs that were filled and  
2 are going to be filled again? If you can talk a  
3 little bit about that.

4 **DR. HARPER:** Absolutely. And the next  
5 slide, thank you for introducing that topic,  
6 here's -- I want to look specifically at the  
7 manufacturing sector. Here we've had an important  
8 policy initiative that the Governor successfully  
9 passed, the machinery and equipment tax exemption  
10 for firms in the manufacturing NAICS code.

11 And so -- but the history of job creation  
12 in manufacturing speaks to the Chairman's point.  
13 What we see, I've got two vertical axes here. The  
14 right-hand one is the number of jobs in Florida  
15 measured in thousands. And what we see with the red  
16 line is that from 1990 until a generation later,  
17 until the end of 2012, we see that the number of  
18 jobs in Florida has shrunk from about 520,000 down  
19 to about 320,000 and that that shrinkage does not  
20 occur uniformly through time. Instead, employment  
21 manufacturing shrinks during recessions. Here we  
22 have the '91 recession, we have the '01 recession,  
23 and then we have the Great Recession. That's where  
24 we had job loss in manufacturing.

25 But Florida's experience, if you look at

1 the vertical left-hand axis, Florida's experience is  
2 exactly the same as the experience of the rest of  
3 the nation, that what we see is that manufacturing  
4 jobs in the U.S., the green line used to be above  
5 16% of total employment back in 1990. It has now  
6 shrunk so that by the end of 2012 total employment  
7 in manufacturing is only about 9.5% of U.S. jobs.

8 The same thing has happened in Florida.  
9 We were never intensive in manufacturing in Florida.  
10 So we started out lower at about 9.5% and we have  
11 shrunk to about 4.5%.

12 And so to address the Chairman's question  
13 directly, the structure of the job market in Florida  
14 is changing over time, as it is nationally, and the  
15 jobs that we've lost are likely not coming back. If  
16 we had more time to show more sectors, you'd see  
17 that education and healthcare are really the growing  
18 -- "eds and meds" are where the job growth is.

19 Also, our export industry in Florida is  
20 leisure and hospitality. That's the folks that come  
21 to the theme parks, it's the folks that come to our  
22 beautiful beaches. And so what we've seen is that  
23 as our visitor counts have risen from 83 to 85 to  
24 90 million over time, the jobs that support that  
25 activity have shown similar rates of growth.

1           So we're doing the exact same thing that  
2 the nation is: We're shifting from jobs where  
3 people provide inputs to the manufacturing process,  
4 they've been replaced by technology, as I'll show  
5 you, and they've been replaced by offshoring. And  
6 those jobs have gone away, never to return, and  
7 instead we're becoming more of a service-oriented  
8 economy. And the key is going to be to find high  
9 quality jobs in education, healthcare, leisure, and  
10 hospitality.

11           Yes, Commissioner.

12           **COMMISSIONER GRAHAM:** But isn't that a  
13 concern in itself, the fact that we're not making  
14 anything anymore?

15           **DR. HARPER:** Actually the value of  
16 manufactured output in the U.S. continues to rise,  
17 but what's happening is that businesses are  
18 producing more output with less people. Instead of  
19 having a factory floor with 1,000 people with  
20 wrenches and welding equipment, now what you have is  
21 a highly automated workplace. The rule of thumb in  
22 manufacturing is that if you can buy an industrial  
23 robot for less than two years' salary for the person  
24 that it replaces, then that's a good break-even  
25 analysis and you do it.

1           And with the cost of automation falling  
2 constantly because of Moore's Law that the price of  
3 computing falls roughly in half every 18 months,  
4 industrial robots, automated processes are getting  
5 cheaper and cheaper every day; whereas, the cost of  
6 hiring people to do that work due to uncertainties  
7 about the cost of healthcare, uncertainty about the  
8 cost of fringe benefits, even in a world where wages  
9 are essentially stagnant on an inflation adjusted  
10 basis, we see that labor is becoming more expensive  
11 over time.

12           And replacing labor either with automated  
13 processes, or if you look at containerization and  
14 global trade -- it only takes 15 days to get a  
15 container from Hong Kong to L.A. Long Beach or  
16 Oakland or, or Seattle or Vancouver -- and that  
17 means that given the ease of controlling remote  
18 processes via computer-assisted design and  
19 transmission over the Internet, that the shipping  
20 environment has experienced dramatic cost decreases.  
21 The estimates are that containerization over the  
22 past four decades has reduced the cost of  
23 international transport of goods by about 95%. I  
24 mean, that's the same thing the Erie Canal did 200  
25 years ago for shipping grain from the midwest to New

1 York City.

2           And as result, there's no longer a  
3 meaningful cost differential imposed by  
4 transportation either in terms of dollar costs or in  
5 terms of shipping time. And so when manufacturers  
6 are faced with the choice of implementing new  
7 automated processes or outsourcing globally to a  
8 less expensive place, if it does require a labor  
9 input, then that means that those jobs are never,  
10 ever coming back to the United States because unless  
11 we raise tariff barriers and trade barriers against  
12 our foreign competitors or limit the growth of  
13 automation, we're not going to see those jobs back  
14 again.

15           So the key is that our young people have  
16 to master the skills to thrive in this environment.  
17 They have to be the ones who can either implement  
18 complex -- design and implement complex processes or  
19 master complex processes. And then the rest of the  
20 labor force will be providing more services, and  
21 that leads to the following sorts of changes.

22           This is work done by people -- MIT has  
23 really led the way in looking at changes in the  
24 nature of the job market. This particular work is  
25 from Mike Chriszt at the Atlanta Federal Reserve



1 Bank. And if you separate jobs not according to  
2 industry classification, that is NAICS codes, which  
3 we usually do, but instead separate them by standard  
4 occupational code, SOC code, and look at the nature  
5 of the tasks and separate jobs into those that do  
6 non-routine tasks and those -- versus routine and  
7 those that do cognitive versus manual sorts of  
8 tasks, and what you see is that non-routine  
9 cognitive tasks, so these are, these are highly  
10 skilled people doing highly non-routine stuff that  
11 requires a lot of discretionary decision-making, we  
12 see that for three-decade-long periods they've  
13 experienced job growth that's roughly in line with  
14 population growth. You know, the U.S. population  
15 grows about 1% a year and jobs in those fields for  
16 non-routine cognitive tasks have grown at about that  
17 rate.

18 So consider two jobs: Consider two  
19 radiologists, one of whom wields the new Gamma Knife  
20 to do surgery that is less invasive than before but  
21 is highly technical and requires the years of med  
22 school and residency versus a normal radiologist who  
23 reads scans looking for abnormalities in adjacent  
24 cells. Think of a Pap smear that can then be  
25 transmitted over the Internet to use a cheaper

1 radiologist in India or it can be read by an  
2 algorithm on a computer because computers are great  
3 at recognizing patterns. And so you see the job  
4 prospects for interventional radiologists versus  
5 scan-reading radiologists are wildly divergent.  
6 Even though they've been through the same 12 years  
7 of higher education and training, because of the  
8 nature of the tasks that they do their job prospects  
9 have changed.

10 So the fellow who reads the scan, that  
11 would be a routine cognitive task, it can be  
12 routinized, and therefore that job growth has been  
13 negative. They've been losing jobs at 1% per year.

14 And then the folks who do routine manual  
15 stuff -- think of the great migration out of the  
16 south to the Rust Belt that occurred in the early  
17 part of last century when Detroit was actually the  
18 technology leader for the first half of the last  
19 century and created hundreds of thousands of new  
20 jobs in the automotive industry. Well, those were  
21 the first things to be automated because it was  
22 relatively easy to automate the paint shop in the  
23 factory, to automate the welding and vehicle  
24 assembly. And so those jobs have gone away, they've  
25 shrunk, and what's left are the folks who do things

1 which are manual in nature but are difficult to  
2 automate because they're non-routine. I mean, we  
3 would think of home healthcare, you'd think of  
4 restaurant service as being manual in nature but  
5 difficult to automate, and so we've seen an  
6 explosion in jobs. They've grown much faster in the  
7 most recent decade than other types of jobs because  
8 we need face-to-face contact with those people. We  
9 haven't yet figured out how to automate -- well, we  
10 partially automate cleaning our pools but we can't  
11 automate the yardwork.

12           And so that means then that the job market  
13 of the U.S. in the 21st century has a hollowing out  
14 of what have traditionally been middle class jobs.  
15 The folks who have non-routine cognitive skills are  
16 going to make world-class wages because they have  
17 bigger markets to sell in that are global and they  
18 receive -- they're able to agglomerate more parts of  
19 the market into their own -- I mean, superstars in  
20 sports are now worldwide icons rather than just in  
21 the U.S. market. That same sort of winner-take-all  
22 sort of pyramid structure occurs in more and more  
23 industries as they expand their markets globally.  
24 And so we have people at the top, we have people at  
25 the bottom, and then we have a hollowing out in

1 between, which is the challenge that we face in the  
2 job market, so.

3 **COMMISSIONER GRAHAM:** Non-routine manual,  
4 that's my plumber and my mechanic? Is that why they  
5 charge me more?

6 **DR. HARPER:** That's correct. Your  
7 plumber, your mechanic, your yard guy, your pool  
8 guy, your caterer, and so these are all the jobs  
9 that are exploding in quantity, but they're highly,  
10 highly competitive and so wages are stagnant in  
11 these fields.

12 So to close on an optimistic note here,  
13 what we see is that --

14 (Laughter.)

15 **COMMISSIONER EDGAR:** I was waiting for  
16 that.

17 **DR. HARPER:** Here it is. So even though  
18 growth rates -- so this is population growth and  
19 this is decade by decade from the '70s on out to  
20 projections in the, the aughts, the teens, the '20s,  
21 and the '30s, this is for all the 3,150 counties in  
22 the United States. And I've split them out here:  
23 The U.S. in the blue; the southeast in the red;  
24 Florida in the kind of chartreuse; and then  
25 northwest Florida where we are today, from

1 Tallahassee over to the Alabama line as being  
2 northwest Florida.

3 And what we see is that as growth for the  
4 U.S. stays relatively constant at about 1% per year,  
5 declining slightly as families have fewer children,  
6 the southeast continues to have more rapid growth  
7 than the U.S. as a whole, but it's also declining.

8 Florida, which during the '70s was growing  
9 at four times the U.S. growth rate, then three  
10 times, then double the U.S. growth rate, our growth  
11 rate is declining; however, it will stay faster than  
12 the growth in the U.S. I -- my professional opinion  
13 is that the problems of growth are better than the  
14 problems of stagnation. And so we see that Florida  
15 will continue to have growth. And, in fact, the  
16 region of the state that includes Tallahassee is  
17 expected over the coming decades to have growth that  
18 is even more rapid than the state, than the  
19 southeast, and the nation.

20 And, Mr. Chairman, those are my remarks.

21 **CHAIRMAN BRISÉ:** Thank you.

22 Commissioners, any further questions?

23 Mr. Kiser, you have a question?

24 **MR. KISER:** On your chart that you showed  
25 the economic activity levels as of July of 2007 --

1           **DR. HARPER:** Sure.

2           **MR. KISER:** -- you kind of talked through  
3 the Great Recession.

4                   Back in 2006 and 2007 I was chairman of  
5 the Collins Institute, and we did the study on *Tough*  
6 *Choices*.

7           **DR. HARPER:** Right.

8           **MR. KISER:** And I would add that one of  
9 the major reasons that Florida dropped so much  
10 faster and harder was because we had the hurricanes  
11 of '04 and '05. And those big insurance claims came  
12 to be paid in the next two to three years, so we had  
13 a lot of economic activity with insurance claims,  
14 billions of dollars, and that kind of -- while the  
15 rest of the nation started feeling that recession  
16 first, we didn't. And -- but once those payouts  
17 were done, boom, then our sales tax revenues dropped  
18 substantially. And so that's another reason why we  
19 were hit harder.

20                   The other issue that you raised was having  
21 to do with the housing bubble. And, again, during  
22 that time period the inventory for houses was about  
23 2.5 years -- houses, condos, et cetera -- and  
24 usually you don't like to have any more from six to  
25 nine months. And so we knew that once that

1 recession hit it was going to be harder for Florida  
2 because we had so much more inventory in  
3 construction that was gonna have to be, you know,  
4 moved back into the economy at some point, so our  
5 recovery was going to be longer in the construction  
6 industry.

7 So that -- those are the, you know, in  
8 addition to the reasons you gave, I think it also  
9 shows exactly why we did fall so far and so deep.

10 The other question, the question that I  
11 had was on the talking about the West Coast of  
12 California versus the rest of us when it comes to  
13 shipping, how do you see the impact of the opening  
14 of the bigger Panama Canal helping our coast?

15 **DR. HARPER:** To answer the second part  
16 first, I see that the, the new post Panamax  
17 generation of container ships is going to have  
18 relatively little positive effect for South Florida  
19 and for the central Gulf Coast of Florida because  
20 containers and seaborne freight wants to stay on the  
21 ship as long as it can. I do see substantial  
22 possibilities for JAXPORT, but we will see those  
23 containers move up the East Coast. They are loaded  
24 in precision fashion so that as, as the inventory  
25 reaches the new port, it's, it's taken off the ship

1 and then the remaining containers moved to the next  
2 port where the next layer is taken off the ship.  
3 And then as the ship works its way back around and  
4 back through the Panama Canal, then it will be  
5 loaded up again.

6 But I don't see a particular reason to  
7 think that that will benefit Florida because if we  
8 take our containers off in Miami, then we still have  
9 a good 400-mile transit to get north of the state of  
10 Florida. And so I see the possibility of  
11 transshipment where we have super ports like  
12 Freeport, Bahamas. There's a possibility there for  
13 disgorging the containers and loading them on to  
14 smaller ships.

15 But a container port thrives, lives or  
16 dies based on its ability to utilize expensive  
17 capital equipment. You know, if container cranes  
18 are running six to eight million dollars a pop, then  
19 you have to keep that infrastructure busy 24/7 in  
20 order to amortize the, the huge expense of that  
21 capital outlay over the maximum number of containers  
22 shipped through your port. To me that points  
23 towards a relatively smaller number of larger and  
24 more efficient container ports, and I don't see that  
25 that necessarily plays to Florida's advantage.



1           Now having said that, the overall trend  
2 for growth in global trade is that global trade over  
3 the past several decades has grown much faster than  
4 other major components of the U.S. economy,  
5 including consumer spending, including business  
6 investment spending, and government spending.  
7 International trade is the growth sector, and so  
8 that in and of itself will be the rising tide that  
9 lifts Florida's 14 deepwater ports.

10           And so as Latin America grows, I think  
11 that's the opportunity rather than the Panama Canal.  
12 Another thing to expect is that Panama will raise  
13 ship -- transshipment tariffs on, on the bigger  
14 freights.

15           And then back to your point about the  
16 nature of Florida's slowdown, we did measurements  
17 actually after Ivan hit Pensacola and found that  
18 taxable retail sales actually grow for a period of  
19 12 to 15 months. They stay at a level that's  
20 about -- in the case of Pensacola, in the particular  
21 damage implied by Ivan, 25 to 35 percent over what  
22 you would have expected given trend levels of  
23 growth. And you're absolutely correct that once  
24 everybody has replaced their blue roof with a new  
25 roof and bought the dishwasher and bought the car to

1 service their business because they had the huge  
2 influx of cash and deposits at -- we saw the growth  
3 in deposit volume at banks across Florida. But,  
4 yes, the recession started earlier for Florida  
5 because we had an enormous flurry of activity in the  
6 housing market, which led to excessive inventory and  
7 a steeper downfall.

8 **CHAIRMAN BRISÉ:** So I'm going to ask you  
9 to put on your crystal ball for a second. You  
10 talked about the export, exporting of the natural  
11 gas component.

12 If that ever comes to full fruition, all  
13 right, what type of impact do you think that that  
14 will have on pricing signals here within the United  
15 States?

16 **DR. HARPER:** Well, currently the U.S. has  
17 experienced just a, a revolutionary change as  
18 opposed to an evolutionary change in energy costs.  
19 We are now much cheaper than the rest of the world  
20 for energy, and combine that with a relatively  
21 benign wage inflation environment, great  
22 infrastructure, the U.S. is poised for the  
23 manufacturing expansion. And so as the market for  
24 natural gas becomes more of a worldwide market and  
25 allows shipping, then you'll see once again natural

1 gas prices move much more in lockstep with other  
2 energy prices, particularly oil. And when that  
3 happens, prices will rise in the U.S., they will  
4 fall in the rest of the world, and we will lose part  
5 of that competitive advantage in manufacturing that  
6 we're going to experience.

7 So the bottom line for manufacturing  
8 growth is that we're going to see great growth in  
9 value produced. It's going to be a great time to be  
10 an owner of a productive facility. However, new  
11 facilities are going to be increasingly economizing  
12 on the use of labor, and so it won't be a boon to  
13 Florida household consumption and incomes, but  
14 rather it'll be a great time to, to be a factory  
15 owner.

16 We will see it in the supply chain. The  
17 supply chain is where all the increased activity is  
18 going to take place; in shipping, in packaging, in  
19 logistics we will see substantially more jobs, but  
20 not so much in manufacturing. So at the end of the  
21 process when we start to export, prices in the U.S.  
22 will rise and they'll fall in the rest of the world.

23 **CHAIRMAN BRISÉ:** Okay. Any further  
24 questions, Commissioners? All right.

25 **DR. HARPER:** Thanks very much for your

1 time.

2 **CHAIRMAN BRISÉ:** Dr. Harper, thank you  
3 very much for, for being here with us today.

4 **DR. HARPER:** My pleasure. Thank you.

5 **CHAIRMAN BRISÉ:** Okay. Our next presenter  
6 this morning is Mr. Latimer, Al Latimer. He is the  
7 Senior Vice President of Strategic Partnerships for  
8 Enterprise Florida, with over 25 years of economic  
9 development and nonprofit management experience. He  
10 currently oversees investor development board  
11 administration, community competitiveness,  
12 stakeholder relations, and military and defense  
13 programs. Previously Mr. Latimer served as Vice  
14 President of Government Relations for the Florida  
15 Chamber of Commerce and Executive Director of the  
16 Jacksonville Sports Authority, where he recruited  
17 and staged major sporting events that helped advance  
18 the city's reputation as a preeminent sports venue.

19 Mr. Latimer is a Governor appointee to the  
20 Florida Biomedical Research Council, holds a  
21 bachelor's in Business Administration from Walsh  
22 College, and is a native Floridian, which is a rare  
23 thing.

24 All right. Well, thank you.

25 **MR. LATIMER:** Thank you, Mr. Chairman,

1 Commissioners. I'm glad to be here to --

2 **COMMISSIONER EDGAR:** Do you have any  
3 optimism for us?

4 (Laughter.)

5 **MR. LATIMER:** In the, in the sense that  
6 you can be very proud of the utilities that you  
7 regulate. They are very, very good partners for  
8 Enterprise Florida, and I hope that's optimistic  
9 enough.

10 I think you all know that Governor Scott  
11 is the Chairman of the Enterprise Florida board.  
12 And when Governor Scott was elected, one of the  
13 things he wanted to do was to create or lay the  
14 foundation so that Florida could become more  
15 competitive in creating jobs, wanted us to have a  
16 system that was more competitive, faster responding.  
17 And, to his credit, what he did was talk to a lot of  
18 groups. He talked to business consultants, site  
19 selection consultants, he talked to economic  
20 development professionals from other states. And  
21 one of the groups he spoke to was the public  
22 utilities. And, you know, as a result, Governor  
23 Scott had conversations -- used that opportunity as  
24 a conversation to talk about how they could become  
25 more involved in the new streamlined system.

1           So subsequent to that conversation the  
2 Governor and the Legislature did work together,  
3 streamlined the economic development system, and the  
4 Governor then scoured the country to hire the best  
5 economic development professional he could. He  
6 found that individual in Gray Swoope from  
7 Mississippi.

8           Now, you know, there are a lot of jokes  
9 about Mississippi, but, you know, to, to  
10 Mississippi's credit they have an outstanding  
11 relationship with their economic development  
12 partners. In fact, Gray Swoope calls economic  
13 development a team sport.

14           One of the first things he did was sit  
15 down with our utility partners, you know, explained  
16 what his vision was, the direction he wanted to move  
17 in, and asked them to come aboard, asked them for  
18 their buy-in. And, you know, and I can say that we  
19 have seen a substantial increase in the amount of  
20 partnering between Enterprise Florida and the public  
21 utilities in the state of Florida. And I'm going to  
22 give you some examples.

23           The first one, not really that  
24 significant, but I'm in investor development, so  
25 it's, it's very significant for me. But the public

1 utilities serve on the Enterprise Florida board.  
2 They invest, you know, for that opportunity. The  
3 funds that our board members invest in Enterprise  
4 Florida allow us to do a number of things. We, we  
5 go on foreign trade missions, we have six to eight  
6 of those a year. The Governor leads a number of  
7 those trade missions. And we are trying to help  
8 Florida companies expand their worldwide sales.

9           The -- they also in that position sit with  
10 CEOs from a broad range of industries in Florida to  
11 help us develop the best policies and strategies we  
12 can to compete against other states for job creation  
13 opportunities.

14           The public utilities also, because they  
15 have a very unique perspective, work very closely  
16 with their business clients. They know when those  
17 clients are planning to expand. They also know when  
18 those clients are talking to other states. And it  
19 is very helpful for us to have that pipeline or that  
20 dialogue about those opportunities because if we  
21 don't get in on the front end, there's an  
22 opportunity, or not opportunity, there's a --  
23 there's the potential, potential that we could lose  
24 them. So getting in early, finding out their needs,  
25 assessing those needs and our ability to resource

1       them is very, very critical to us, taking advantage  
2       of that kind of information, that kind of  
3       intelligence.

4               The utility partners also work with our  
5       local communities in resource facilitation.  The  
6       economic development organizations, we've got 67 --  
7       Enterprise Florida has 67 primary partners in every  
8       county, one per county.  It doesn't make a great  
9       deal of sense for us to have multiple primary  
10      partners in economic -- excuse me -- in every county  
11      because we would simply overwhelm a business.  So we  
12      facilitate, you know, a uniform, streamlined  
13      approach to contacting and working with businesses.

14             The local communities need a lot of  
15      handholding, need a lot of nurturing, need a lot of  
16      advice and counseling, and our utility partners  
17      provide that.  Florida Power & Light has a website  
18      called *Powering Florida*, and on that website it's  
19      got a ton of useful information that not only  
20      businesses can access, but also local communities  
21      can access to learn how to maximize their  
22      opportunities to land a project.

23             That website as well as Duke Energy and  
24      Gulf Power, they also have what's called site  
25      certification programs.  And what that is designed



1 to do is to have more buildings and sites, what we  
2 call product, readied for the marketplace. The  
3 marketplace is very discriminating. A company that  
4 is looking for a building of a certain size, you  
5 know, with certain road access that carries certain  
6 tonnage, they want that, they want that facility to  
7 be able to -- they want to be able to identify that  
8 property as fast as possible. So the utility  
9 companies are working with these local communities  
10 to get that inventory listed and get it marketed so  
11 that companies know very early on in their research  
12 what we have to offer and, you know, what  
13 accommodations we can make to support their need for  
14 such a facility.

15 Also in terms of marketing, the utility  
16 companies are very, very good marketing partners of  
17 ours. You may have heard that, you know, Enterprise  
18 Florida this year created a business brand. We have  
19 probably the most famous tourism brand in the world  
20 in VISIT FLORIDA, and, you know, it, it just, it  
21 drives tourism to Florida like nobody's business.  
22 But we want to take that same approach when it comes  
23 to business; we want people in Florida -- excuse  
24 me -- people around the world, around the country to  
25 know that Florida is a great place for business. In

1 fact, Florida is the perfect climate for business,  
2 which is the business brand.

3 Our utility partners participate with  
4 us -- excuse me, I'm all choked up about it  
5 (laughter) -- they participate with us in, in, in  
6 the marketing of that brand and also just our  
7 marketing efforts in general.

8 So we also have lead generation activities  
9 throughout the year where we will go to different  
10 places around the country and we will invite the  
11 business consultants, site selection consultants in  
12 those areas. We will go visit organizations that  
13 traditionally supply prospect leads to the economic  
14 development community, and our utility partners  
15 participate with us in those business prospect lead  
16 generation opportunities. And so by us working in a  
17 combined effort, a collaborative effort, we are able  
18 to produce more leads than we would if we were just  
19 doing this all on our own.

20 So, again -- also, very significantly,  
21 Florida Power & Light has an economic development  
22 commercial rate and they provide that rate to  
23 companies that are going to increase their kilowatt  
24 usage and create jobs at the same time. And that's  
25 a very, very significant tool that we have in our

1 toolbox to companion against the state incentives as  
2 we work to, you know, put the pieces together to  
3 close the deal for a prospective client.

4           The last thing is community  
5 competitiveness. And Gray Swoope, when he came  
6 onboard, said, you know, if we are going to maximize  
7 our opportunities to create jobs statewide, then we  
8 need to, you know, create a program where our every  
9 community is trying to maximize their effort to  
10 produce jobs. And so the, our utility partners --  
11 Florida Power & Light is helping in that effort by  
12 going into regional areas and inviting local  
13 government officials to come in and teach them -- or  
14 I guess I shouldn't say teach because they're all  
15 self-professed economic development experts, but we  
16 are helping them better understand economic  
17 development and how it works and how they can play a  
18 role in job creation and how they can best support  
19 their local economic development team.

20           We also have -- at Enterprise Florida we  
21 are creating a program to support community  
22 competitiveness at that local level -- the program  
23 is actually called Next Level -- and our utility  
24 partners are working hand in hand with us. We're in  
25 the development phase and we are towards the end of

1 that phase, but they are working with us hand in  
2 hand to design that program so that it is the most  
3 beneficial program it can be to supporting and  
4 advancing our communities to the next level of job  
5 creation.

6 Mr. Chairman, Commissioners, I'm happy to  
7 answer any questions. Thank you.

8 **CHAIRMAN BRISÉ:** Thank you.

9 Commissioners, any questions?

10 Okay. So I'll ask the first one. How  
11 competitive -- obviously when you all try to recruit  
12 companies to come in, one of the factors is, you  
13 know, what is, what are the utility rates overall?  
14 How competitive, how competitive are we as a state?  
15 And obviously we have different regions and  
16 different companies in different parts of the state,  
17 but how competitive, how competitive are we with the  
18 rest of the nation?

19 **MR. LATIMER:** To be honest with you, if  
20 you ask any business, they're going to tell you  
21 utility rates could be a lot cheaper, you know.

22 So, so let me, let me, let me answer your  
23 question this way.

24 **CHAIRMAN BRISÉ:** If you ask any homeowner,  
25 that's the reality: "I'd like it for free."

1                   **COMMISSIONER GRAHAM:** We hear it all the  
2 time.

3                   (Laughter.)

4                   **MR. LATIMER:** You know, you know, at  
5 Enterprise Florida we work to identify the, you  
6 know, the requirements that are most important to a  
7 company as they are assessing a Florida location or  
8 a Florida expansion. You know, if you let every  
9 company just start talking, they're going to tell  
10 you incentives are absolutely the most important,  
11 you know, piece of the deal and then maybe a  
12 reduction in utility rates is the most important  
13 part of the deal.

14                   But, you know, once we talk through it,  
15 you know, once we give them an opportunity to talk  
16 and us listen, you know, we may find out that it is,  
17 quite honestly, a labor force concern, it is the  
18 price of land, it is the size of the market. It  
19 could be any number of those things. So to, you  
20 know, to look at utility rates in isolation I think  
21 is not a fair comparison. Okay?

22                   **CHAIRMAN BRISÉ:** Any other questions?

23                   **MR. BAEZ:** I had a question.

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

25                   **MR. BAEZ:** How much -- if you had to, if

1 you had to assign a, a time value to it, how much of  
2 your time is involved in -- you alluded to job  
3 retention, you alluded to getting, you know,  
4 business intelligence to try and keep the jobs in  
5 Florida.

6 **MR. LATIMER:** Right.

7 **MR. BAEZ:** How much, how much are you  
8 finding yourself dedicating more time to that  
9 function rather than, rather than job creation in a  
10 manner? I'm assuming you treat them both somehow  
11 the same.

12 **MR. LATIMER:** We, we do treat, we do treat  
13 them both the same. And, quite honestly, as you  
14 might imagine, during the Great Recession the amount  
15 of companies looking to move, you know, from one  
16 state to another state were not insignificant. So a  
17 very large percentage of our time was focused on,  
18 you know, working with those Florida businesses that  
19 were looking to grow their business here in Florida.

20 Can we do more? Can we invest more of our  
21 time in that area? Probably. But we rely on our  
22 local partners, you know, as part of the statewide  
23 network to be, you know, to help us in that regard,  
24 to make sure that they are helping us assess the  
25 needs of the community -- excuse me -- the

1 businesses in their communities and then  
2 communicating that information to Enterprise  
3 Florida.

4 But at the same time we are proactively  
5 reaching out to them to find out, you know, what's  
6 going on in their communities. And that's also an  
7 area where our public utility companies are so  
8 valuable too, as you know. You know, they work  
9 very, very closely with us in, you know, identifying  
10 companies that are already here, like Florida, would  
11 like to stay in Florida and grow in Florida, and,  
12 you know, there's just a few discussion items they  
13 like to talk to us about that would help, you know,  
14 help their decision to stay and grow.

15 **MR. BAEZ:** Thank you.

16 **COMMISSIONER GRAHAM:** Would you like to  
17 share with us the discussion items?

18 (Laughter.)

19 **MR. LATIMER:** It can be a regulatory  
20 issue; it could be, quite honestly, road  
21 improvement; it could be assemblage of land, you  
22 know, they're looking to expand and five owners own  
23 a piece of property that would be the ideal  
24 expansion site for them.

25 **COMMISSIONER GRAHAM:** I mean, but those

1 problems are not unique to Florida. I mean, those  
2 problems are everywhere.

3 **MR. LATIMER:** That is correct. That is  
4 correct.

5 **COMMISSIONER GRAHAM:** Well, are there --  
6 is there anything that -- I mean, because we all  
7 agree, we're preaching to the choir here, we all  
8 think this is a fantastic place to live. We think  
9 we've got a great climate, beaches and all that kind  
10 of stuff. But if you can put your finger on one or  
11 two things why we may losing people, especially  
12 people that are here looking to expand, losing them  
13 to somewhere else, or are we even losing anybody  
14 that is looking to expand?

15 **MR. LATIMER:** Sure. You, you know, you  
16 always lose businesses. For example, some states  
17 have incentives that are based on state income tax  
18 and they can rebate a portion of those state income  
19 taxes to the companies. Florida doesn't have state  
20 income tax, and so we're at a disadvantage when  
21 we're competing against companies that have that  
22 resource in their portfolio.

23 So there's, you know, quite honestly  
24 there's nothing -- I don't see Florida instituting a  
25 state income tax soon, so we just have to, you know,



1 work and --

2 **COMMISSIONER GRAHAM:** Start a tax so we  
3 can give it back.

4 **CHAIRMAN BRISÉ:** A portion of it back.

5 (Laughter.)

6 **MR. LATIMER:** We just have, we just have  
7 to sell our other advantages.

8 **CHAIRMAN BRISÉ:** All right. Curt?

9 **MR. KISER:** If you were here before, you  
10 heard me comment a little bit on the Collins  
11 Institute that I was involved in and we did a fair  
12 amount of work in some of this area. And what we  
13 found was that when we tried to compare Florida, we  
14 found it was more, made more sense to compare us to  
15 competition in the southeast as opposed to the whole  
16 country. And in focusing on the southeast, the main  
17 competition that we dealt with was North Carolina  
18 and Virginia. That seemed to be more where our  
19 competition was.

20 And one of the items that seemed to jump  
21 out at us was the property tax. In Florida, there's  
22 been such a shift in the property tax to help  
23 individuals and shifted over to the business side,  
24 and that seemed to be maybe one of the biggest  
25 differences in the southeast that we -- when it came

1 to looking at the, at the tax angle, the property  
2 tax seemed to be the most difficult mainly because  
3 we've shifted all the stuff over to the homestead  
4 exemption. Of course, every time you do that, that  
5 money that's shifted off the homeowner gets shifted  
6 to the business side. Do you -- have you had any --  
7 have you looked at that at all on the property tax?

8 **MR. LATIMER:** To be honest with you, not  
9 really. I mean, since the Governor has, you know,  
10 phased out the corporate income tax, I think  
11 businesses are realizing a lower tax burden and are  
12 pretty pleased with their viability.

13 **MR. KISER:** When it comes to new business  
14 growth, is it pretty much even across the board?  
15 For example, do minority businesses, are they, are  
16 they getting into -- are they doing as well? And if  
17 so, is there any minority groups that are doing  
18 better than, than others?

19 **MR. LATIMER:** As a, as a part of the  
20 restructuring that took place in, you know, when the  
21 Governor took office, the Florida Black Business  
22 Investment Board was merged into Enterprise Florida.  
23 So we do have a, you know, you know, a connection  
24 and a resource function to minority businesses.

25 **MR. KISER:** Yes.

1           **MR. LATIMER:** And I think minority  
2 businesses largely are, you know, are starting  
3 businesses at the same rate that they did, you know,  
4 as before. There are -- of course, the, the primary  
5 issue continues to be access to capital.

6           **MR. KISER:** Yes. That was the reason for  
7 the creation of the business board was that it was  
8 the one item that seemed to be lacking to help them.

9           **MR. LATIMER:** Right.

10          **MR. KISER:** And I just wondered, that was  
11 my next question I was going to follow-up with, has  
12 all the changes in the banking laws, et cetera, a  
13 lot of it caused by some of the stuff that went on  
14 in the Great Recession, has that made it even more  
15 difficult or has that not seemed to have been an  
16 issue?

17          **MR. LATIMER:** It, it definitely has made  
18 it more difficult.

19          **MR. KISER:** Okay.

20          **MR. LATIMER:** But at Enterprise Florida  
21 what we've done is we have applied for and received  
22 a small business grant from the federal government.  
23 We have about \$97 million that flowed through that  
24 program that we can use for loan guarantees and then  
25 loan participations to support, you know, small and

1 minority business growth.

2 **MR. KISER:** Good.

3 **CHAIRMAN BRISÉ:** All right. Any further  
4 questions or comments?

5 All right. Mr. Latimer, thank you very  
6 much for your presentation today.

7 **MR. LATIMER:** Okay. Thank you very much.

8 **CHAIRMAN BRISÉ:** Mr. Baez.

9 **MR. BAEZ:** Thank you, Chairman,  
10 Commissioners.

11 Real brief. The -- we're starting to  
12 swing into the fall, and committee meetings, I  
13 think, are slated to start in September --

14 **MR. KISER:** September.

15 **MR. BAEZ:** -- late September. So we're  
16 busy preparing our legislative budget requests, so  
17 we'll be asking for time with each of your offices  
18 to get in and brief you on the details in the  
19 coming, in the coming weeks or so.

20 And just as a, as a last housekeeping  
21 matter, the last Internal Affairs, I've been saying  
22 it for some time, but the last Internal Affairs  
23 scheduled in this room is August 27th, and I'm  
24 asking everybody in the, in the crowd not to, not  
25 tear up carpet as souvenirs or anything like.

1 Management has expressly forbidden it.

2 (Laughter.)

3 So that's all I have. I wanted to thank,  
4 I wanted to join in thanking our guests that came  
5 through and did -- thanks to all of them for working  
6 with us to try and set this up. I think it's  
7 something that's valuable as a, as a macro  
8 perspective for all of us. So, you know, I join in  
9 gratitude.

10 **CHAIRMAN BRISÉ:** All right. Anything on  
11 other matters?

12 **MR. KISER:** We're going to lose a longtime  
13 legislative employee in the House. Lucretia Collins  
14 is -- I think she may have already left the office.  
15 But she has gone into retirement and the committee  
16 has not replaced her yet.

17 The last word we heard was that Keating, I  
18 mean, Cochran Keating was potentially a replacement,  
19 but we haven't heard whether that's happened or  
20 somebody new. So she's been someone we have worked  
21 closely with for many years, and she, of course, has  
22 been in that spot in the House for probably 30  
23 years. So we'll be having a new person there.

24 **CHAIRMAN BRISÉ:** Thank you.

25 All right. If there's nothing else for

1 the good of the order, I want to thank everyone for  
2 their participation again today. And it's always  
3 good to take a step back and sort of see how we fit  
4 into the larger puzzle and ensure that with every  
5 decision that we make we continue to think about the  
6 larger puzzle and that we all have a role to play in  
7 contributing to the benefit of our overgall state  
8 economy.

9 So with that, Commissioner Edgar moves we  
10 rise.

11 (Internal Affairs concluded at 11:32 a.m.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 STATE OF FLORIDA )  
2 COUNTY OF LEON ) CERTIFICATE OF REPORTER

3  
4 I, LINDA BOLES, CRR, RPR, Official Commission  
5 Reporter, do hereby certify that the foregoing  
6 proceeding was heard at the time and place herein  
7 stated.

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

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

18 DATED THIS 29<sup>th</sup> day of August, 2013.

19  
20  
21  
22  
23  
24  
25  
Linda Boles

LINDA BOLES, CRR, RPR  
FPSC Official Commission Reporters  
(850) 413-6734