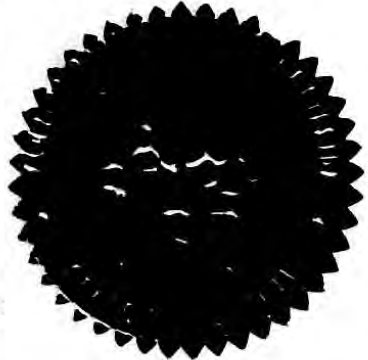


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of
Petition for approval of early
termination amendment to negotiated
qualifying facility contract with
Orlando Gas and Electric Utility
Florida Power Corporation.

:
: DOCKET NO. 961184-BQ
:



PROCEEDINGS: TELEPHONE CONFERENCE
BEFORE: COMMISSIONER SUSAN F. CLARK
Prehearing Officer
DATE: Wednesday, October 20, 1997
TIME: Commenced at 1:30 p.m.
Concluded at 3:25 p.m.
PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida
REPORTED BY: N. NUTHE POTANI, CSR, RPR
Official Commission Reporter

DOCUMENT NUMBER-DATE
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1 APPEARANCES:

2 JAMES A. MOORE and JEFFERY FROSCHELE,
3 Florida Fever Corporation, Post Office Box 14042, 3201
4 34th Street South, St. Petersburg, Florida 33733,
5 appearing on behalf of Florida Fever Corporation.

6 MARTIN M. CHILDS, Steel, Hector & Davis,
7 215 South Monroe Street, Suite 601, Tallahassee,
8 Florida 32301, appearing on behalf of Orlando Cogen
9 Limited.

10 JOHN ROGER BOWE, Deputy Public Counsel,
11 Office of Public Counsel, 111 West Madison Street,
12 Room 812, Tallahassee, Florida 32399-1400, appearing
13 on behalf of the Citizens of the State of Florida.

14 WILLIAM GEORGE HARTING, Florida Public
15 Service Commission, Division of Legal Services, 2540
16 Shumard Oak Boulevard, Tallahassee, Florida
17 32399-0870, appearing on behalf of the Commission
18 Staff.

19 DAVID E. SMITH, Florida Public Service
20 Commission, Director, Division of Appeals, 2540
21 Shumard Oak Boulevard, Tallahassee, Florida,
22 32399-0870, appearing on behalf of Commissioner Clark.

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I N D E X

MISCELLANEOUS

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ITEM

PAGE NO.

CERTIFICATE OF REPORTER

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P R O C E E D I N G S

(Hearing convened at 1:30 p.m.)

COMMISSIONER CLARK: We'll call the prehearing to order. Would you please read the notice?

MR. HERTING: Pursuant to notice dated October 6, 1997, this time and place have been set for a prehearing conference in Docket 961184-EQ, petition for approval of early termination amendment to negotiated qualifying facility contract with Orlando Cogen Limited, Ltd. by Florida Power Corporation.

COMMISSIONER CLARK: Let's take appearances.

MR. MOORE: Jim Moore and Jeffery Froeschle with Florida Power Corporation.

MR. CHILDS: Matthew Childs of the firm of Steel Hector & Davis, appearing on behalf of Orlando Cogen Limited.

MR. HOWE: I'm Roger Howe with the Office of Public Counsel.

MR. HERTING: Cochran Keating on behalf of the Public Service Commission Staff.

MR. SMITH: I'm David Smith appearing as counsel to the Commissioner.

COMMISSIONER CLARK: Okay. I had the opportunity to talk to Mr. Cochran briefly, and it was

1 his suggestion that we start with the motions rather
2 than go directly to the prehearing order.

3 And I think there are a number of motions I
4 already have, and then I think there were a couple --
5 one I just got and maybe one that came in over the
6 weekend.

7 Mr. McGee, what motions of yours do we have
8 to take up at this time?

9 MR. MCGEE: I believe we have the motion
10 that I just handed out, which was for leave to file
11 supplemental rebuttal testimony.

12 COMMISSIONER CLARK: Okay.

13 MR. MCGEE: We have another motion that's
14 listed on Page 19 of the draft prehearing order that
15 refers to a motion for informal prehearing schedule.
16 I think that question is probably moot at this point.

17 COMMISSIONER CLARK: Okay. What else?

18 MR. MCGEE: That's all of Florida Power's
19 motions.

20 COMMISSIONER CLARK: Well, wait a minute.

21 Did you have interrogatories?

22 MR. MCGEE: We had interrogatories to which
23 Staff objected and moved for a protective order.

24 COMMISSIONER CLARK: Right. Do you still
25 want the discovery?

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MR. McGEH: Yes. I didn't include that because it was Staff's motion.

COMMISSIONER CLARK: All right. Orlando Cogen?

MR. CHILDS: We have two motions. I think that Mr. McGee made reference to the motion for informal prehearing schedule being pending as one that is probably moot. I think it relates to the response, or the Staff objection to the taking of deposition.

To try to clarify it, Commissioner, there are two motions, or two items that are identified as outstanding motions that relate specifically to Orlando Cogen. They relate to a request for deposition and discovery as well as the motion to present testimony using the two Staff individuals.

COMMISSIONER CLARK: And you still want to move forward with those?

MR. CHILDS: I beg your pardon?

COMMISSIONER CLARK: As far as you're concerned, those are still live issues?

MR. CHILDS: Well, I think they are. I understood that the ruling either was, or was about to be, made and Mr. Keating called me this morning about discussing it. And I've felt that I didn't want to waste your time or other people's time arguing a

1 motion in which you were prepared to rule.

2 I do think, however, that it relates
3 directly to our position on the request to present
4 evidence.

5 COMMISSIONER CLARK: You mean your issues?

6 MR. CHILDS: Our request to present evidence
7 using either the depositions of or calling them as
8 witnesses, the two individuals from Staff.

9 COMMISSIONER CLARK: Okay.

10 MR. CHILDS: I do not want to waive my
11 rights on that. So although you may have ruled or are
12 about to rule on the discovery, I at least wanted to
13 call to your attention the reason for our argument on
14 that point.

15 COMMISSIONER CLARK: I really wanted to know
16 if you wanted to still pursue it. I guess I
17 thought --

18 MR. CHILDS: I think I do.

19 COMMISSIONER CLARK: Mr. Howe?

20 MR. HOWE: Commissioner Clark, we have one
21 motion that was filed on October 15th, and we would
22 like that addressed at this proceeding.

23 COMMISSIONER CLARK: That's the motion on
24 the protest.

25 MR. HOWE: Yeah. That's a motion asking

1 that the Commission declare that an issue in the
2 proposed agency order be deemed stipulated or, in the
3 alternative, that an issue identified in Florida Power
4 Corporation's protest be stricken.

5 COMMISSIONER CLARK: Mr. McGee, what about
6 that? I understand you haven't provided testimony on
7 that point. Can we stipulate it?

8 MR. MCGEE: Well, I think if you -- I guess
9 I'm not sure what the effect of the stipulation would
10 be or how it would be worded. The concern we had is
11 that the PAA order identified the time when net
12 present value benefits would be received would be -- I
13 think it would be, 2019.

14 That really is just sort of a mathematical
15 fallout of the net present benefit analysis that's
16 performed. And we have several in the case; Florida
17 Power's original one. One is Mr. Schuster's
18 testimony. Mr. Stallcup has one. Mr. Schuster's
19 rebuttal has two. So I'm not sure what would be
20 gained by stipulating --

21 COMMISSIONER CLARK: Well, let me ask, what
22 analysis -- based on the analysis you present, when
23 does the net present value begin to be returned? Is
24 that when it's realized by the ratepayers?

25 MR. MCGEE: I'm not sure what point Roger

1 sees in that. So maybe you would need to ask him
2 that.

3 COMMISSIONER CLARK: All right. We'll just
4 leave it pending and see if we can figure it out.

5 I am going to deal with the motions first.
6 Staff has objected to Florida Power Corporation's
7 first set of interrogatories propounded to the Staff.
8 And these were propounded to both Mr. Stallcup and
9 Mr. Dudley, correct?

10 MR. HENSING: I believe they were just
11 addressed to Staff in general.

12 COMMISSIONER CLARK: All right.

13 MR. HENSING: But they did refer at that
14 time to the analysis done. In the alternative, Staff
15 recommendation in the FAA proceeding, and that
16 recommendation was prepared by Mr. Stallcup and
17 Mr. Dudley.

18 COMMISSIONER CLARK: Let me see if I
19 understand. Mr. Stallcup's deposition has been taken
20 and he has responded to some subsequent
21 interrogatories.

22 I guess my question to Power Corporation is,
23 do you still want answers to the interrogatories you
24 filed, and do you still want to take the deposition of
25 Mr. Dudley?

1 **MR. MOORE:** We did not ask to take
2 **Mr. Dudley's deposition. We had one set of**
3 **interrogatories that we propounded to Staff. The**
4 **information from those would certainly be less timely,**
5 **less useful now than before, but it would still be**
6 **beneficial information.**

7 **COMMISSIONER CLARK:** So you still want to
8 **pursue it?**

9 **MR. MOORE:** Yes.

10 **COMMISSIONER CLARK:** So we're dealing with
11 **Florida Power Corporation's first set of**
12 **interrogatories propounded to the Staff. How many**
13 **interrogatories were there?**

14 **MR. MOORE:** There were eight.

15 **COMMISSIONER CLARK:** And these
16 **interrogatories are different than the ones**
17 **Mr. Stallcup subsequently answered?**

18 **MR. MOORE:** The subsequent one was one
19 **single interrogatory that related to his testimony,**
20 **whereas the discovery that was initially submitted was**
21 **to the reasoning behind the FAA order.**

22 **MR. FROMMELT:** There are actually nine
23 **interrogatories to begin with.**

24 **MR. MOORE:** I stand corrected.

25 **COMMISSIONER CLARK:** As I see it, all of

1 these, or the majority of them, deal with the Staff's
2 alternative analysis. And clarify for me, which one
3 was adopted. The alternative analysis or -- yes.

4 Okay. And that was the substance of the order, right?

5 MR. HERTING: That's correct.

6 COMMISSIONER CLARK: I'm going to grant the
7 request for the protective order with respect to these
8 interrogatories. It seems to me that the order speaks
9 for itself. The basis for our decision is in the
10 order. It's inappropriate to go behind the order, and
11 I think to some extent it invades the deliberative
12 process with respect to this proceeding to have the
13 Staff answer these questions.

14 Mr. Smith, that is sort of my reaction to
15 the request. It seems to me it's inappropriate
16 discovery. Staff is not parties to the matter. I
17 think that was settled by South Florida Natural Gas.
18 And I think for reasons we've stated in discovery
19 orders, that kind of discovery upon the Staff is
20 inappropriate.

21 Anything else?

22 MR. CHILDS: Could I? I assume you're going
23 down these one at a time, and you're going to
24 ultimately get to the one that has to do with FPL's
25 notion to present live testimony, which involves --

1 **COMMISSIONER CLARK:** With the adverse
2 witnesses.

3 **MR. CHILDS:** Yes. And I would like to
4 comment on that, and maybe do so before you shut the
5 door on what the advice is and try to explain a
6 little, I think, different perspective.

7 **COMMISSIONER CLARK:** All right. I guess to
8 some extent I've read them all, and my view is that
9 the discovery requested and your suggestion that they
10 be adverse party witness, I guess my inclination at
11 this point is to deny it as inappropriate discovery.
12 So to that extent, if you want to present some
13 argument, go ahead.

14 **MR. CHILDS:** Okay. The discovery that
15 Florida Power & Light sought to take of the Staff --

16 **COMMISSIONER CLARK:** Now you're confusing
17 yourself.

18 **MR. CHILDS:** And I just read the first page
19 here again, and we need to change that, too, of the
20 draft.

21 The request to pursue the discovery and to
22 call the Staff individuals as witnesses is related to
23 the PAA order issued by the Commission. And let me
24 try to explain the reason that I think that it's not
25 an abuse of the discovery process and, in fact,

1 essential. And, unfortunately, I think that the use
2 of the words "abuse" and "abusive" in terms of
3 discovery in a party's actions can be taken the wrong
4 way.

5 But the alternative Staff recommendation
6 presented to the Commission at agenda without
7 discussion contains some bottom-line conclusions based
8 upon an analysis performed. The analysis -- a series
9 of analyses.

10 The analyses performed were not performed by
11 Florida Power Corporation. They were not performed by
12 the primary Staff, the best that I can tell, nor were
13 they made available to anyone, nor in some respects
14 are any of those analyses yet available. Therefore,
15 the conclusions presented in the alternative Staff
16 recommendation are conclusions based upon analyses
17 prepared by the alternative Staff.

18 The Commission chose at agenda to go with
19 those analyses. With all due respect, we dispute some
20 of those conclusions, but can't know the extent of it
21 without some discovery.

22 In addition, the Commission's rules and your
23 order, your order on FAA, directs people who are --
24 potentially have their substantial interest affected,
25 may be affected, or will be affected, to petition

1 under the Commission Rules 25-22.029, which requires
2 persons who would be affected to file a petition for a
3 120.57 hearing. I mean, you're asking for a hearing,
4 and it asks that you file that hearing -- file that
5 petition as required in Rule 25-22.036.

6 25-22.036 requires the statement of disputed
7 issues of material fact, which was done by Florida
8 Power Corporation. They disputed the facts, and they
9 disputed as fact, as material fact, the elements -- or
10 attempted to -- the elements of the staff analysis
11 that was not disclosed.

12 And the rule requires -- this is the
13 Commission's rules on filing a petition -- for the
14 Commission to grant the petition, which is to
15 request -- a request for a 120.57 hearing or deny it,
16 if it's untimely, or substantial interests aren't
17 affected. It really hasn't done either of those at
18 this point formally. My point, though --

19 COMMISSIONER GRAY: Wait a minute. "It,"
20 the Commission, hasn't?

21 MR. CHIRBA: Well, there's been a petition,
22 and that was followed by notice of procedural order
23 saying we're going to hearing.

24 But the rule requires that -- as was pointed
25 out earlier and as were pointed out in the notion that

1 Mr. McGee said might be moot -- that the petition and
2 that motion point out that under the rule, the
3 Commission is to decide, after it reviews the
4 petition, whether to have a 120.57(1) hearing, which
5 is what you have if there's a disputed issue of
6 material fact, or whether to have a 120.57(2).

7 COMMISSIONER CLARK: I think we're having a
8 120.57(1) hearing.

9 MR. CHILDS: I do too, but I think what has
10 happened is, is that in terms of from our perspective,
11 it's sort of like it's Catch 22, or inscrutable. You
12 have an analysis that's presented. You have the
13 conclusions of an analysis that's presented to the
14 Commission. You have a requirement under the rule to
15 identify disputed issues of material fact, failing
16 which, they are stipulated, and then a request for
17 evidence so that you can, in fact, dispute those
18 issues; and that's denied.

19 And, Commissioner, there's no--

20 COMMISSIONER CLARK: Wait a minute. What's
21 denied?

22 MR. CHILDS: The request to find -- to have
23 information to dispute the analysis that was presented
24 to the Commission.

25 COMMISSIONER CLARK: Well, you can dispute

1 it by presenting your own analysis.

2 MR. CHILDS: I don't know how it was done.

3 COMMISSIONER CLARK: Well, I guess my
4 thought is, is that you do a public records. If
5 pursuant to what you get from the public records,
6 you're concerned with a finding in there that you
7 think may be based on the wrong analysis, you employ
8 an expert to determine that.

9 MR. CHILDS: Well, I have done a public
10 records search, and my reaction is, is that you cannot
11 tell from a public records search the total basis for
12 the analysis that was prepared by Staff.

13 And, Commissioner, there is no intent to
14 attempt to intrude into the deliberative process.
15 Intent is to say -- and I started this as early as I
16 could saying, would you please give me your tape or
17 your spreadsheet showing the calculation; and they
18 did.

19 The problem is, is that the tape or the
20 spreadsheet doesn't have all the columns, and it's not
21 self-evident how the calculation is done. It's not
22 self-evident what the assumptions are. Some of those
23 are addressed now independently, but --

24 COMMISSIONER CLARK: What do you mean some
25 of them are now addressed --

1 **MR. GRIMS:** Well, there was a statement by
2 the staff that they had used Florida Power
3 Corporation's Ten-year Site Plan fuel forecast and
4 that the Ten-year Site Plan had been approved by this
5 Commission. And I think there Schuster has testimony
6 that said, no, they didn't use the Ten-Year Site Plan
7 fuel forecast; that was not the forecast that was
8 used.

9 But the point I'm trying to get to is if a
10 party is required to identify disputed issues of
11 material fact, and that's what the order says and
12 that's what the rule says, and you do that, falling
13 which, you have stipulated to the issue, and then the
14 knowledge of the basis for the calculation is
15 exclusively within the mind of, or individual papers
16 and mind combined of an individual that's employed by
17 the staff, then I think it's difficult to say you
18 can't reach them, because that would intrude into the
19 position of the staff.

20 **COMMISSIONER GRIMS:** Well, I guess that what
21 you take issue with is there is no basis for reaching
22 that conclusion based on the order and based on the
23 public records that's been produced. That's what you
24 dispute.

25 **MR. GRIMS:** I don't think -- well, I don't

1 think that's evidence, that a --

2 **COMMISSIONER CLARK:** Well, I would agree,
3 then you have to come up with your expert witness that
4 says absent that, you can't reach the conclusions that
5 were reached. Absent that kind of information, the
6 conclusion itself is infirm.

7 **MR. CHILDS:** Well, I don't know how to do
8 that without knowing what they did. I mean, it's to
9 prove the neglect of something we can't identify and
10 say, well, it's wrong, it has to be wrong for some
11 reason. But if you don't know how you -- why you're
12 attacking it or what the elements of the analysis
13 were, I don't know how you put on a credible case
14 other than to say, I disagree with that; which is a
15 different case than saying that you -- I mean, a
16 disagreement is totally different than attempting to
17 prove that the basis for the analysis was incorrect.

18 I mean, I think someone might be able to
19 say, I disagree with the approach; I disagree with
20 what I think the assumption might be, but I don't know
21 what the assumption is.

22 **COMMISSIONER CLARK:** Mr. Howe, do you have
23 anything to add?

24 **MR. HOWE:** Yeah, I think I'd like to put a
25 horse in this race. Commissioner Clark, I think what

1 you're running into here is the first instance where
2 you're seeing a conflict between past APA practice and
3 the new changes to the Administrative Procedure Act.

4 Under old practice, a protest of proposed
5 agency action created a de novo proceeding, and I
6 think everybody understood that all bets were off and
7 the company had to prove up its position. With the
8 new provision in the APA -- I believe it's
9 120.8013(b) -- the Commission, I assume at its own
10 behest, has gotten a statute that says any matter is
11 not disputed, is stipulated.

12 The quandary arises, what happens when a
13 conclusion the Commission has reached in its proposed
14 agency action order did not originate with the
15 company's petition, but instead is based on a
16 calculation by the Staff and a methodology used by the
17 Staff.

18 From my perspective, I believe the way the
19 two, the old provisions and the new, can be read
20 together is that any matter not disputed is stipulated
21 to the extent that it is a matter inherent in the
22 company's petition. But to the extent that it's a
23 matter that came up outside the company's petition,
24 all bets are off and let the company put on its case,
25 or whatever party has the burden of proof, the party

1 seeking affirmative relief.

2 And from that perspective, it wouldn't
3 matter what Staff said. The protest would have
4 dissipated anything Staff said -- I mean, that they
5 created, as opposed to just an interpretation of the
6 company's petition; and let the company then put on
7 its case and prove it.

8 COMMISSIONER CLARK: You're suggesting
9 there's a difference between if the matter is not
10 disputed, then it's deemed stipulated?

11 MR. BOWE: Yes, but I think that should be
12 limited to the matters the company asserts or that are
13 implicit within the company's filings where Staff has
14 kind of created something -- I use the term "out of
15 whole cloth." I don't mean it in a bad way.

16 I mean, Staff has done its job and really
17 analyzed, and in this case done sensitivity studies
18 and so forth; but it's nothing that is inherent in the
19 company's petition. And so to challenge that as a
20 basis for what the Commission decided in its proposed
21 agency action order, one reading of the new provision
22 in the APA would be that the company has to -- or a
23 protesting party has to identify that as a disputed
24 issue or it's deemed stipulated; and so what you get
25 is not a matter that the company put forth being

1 stipulated, but a matter that the Staff did.

2 And I think this is going to be the first
3 instance where the Commission is going to have to
4 reconcile the case law under the APA that says a
5 protest creates a de novo proceeding and this
6 provision that says any matter not disputed is deemed
7 stipulated, and where does Staff's work fall in
8 those -- that category.

9 **COMMISSIONER CLARK:** Okay. Anything else,
10 Mr. McGee or Mr. Childs?

11 **MR. FROSCHELS:** Have you ruled on the
12 interrogatories, yet? It wasn't --

13 **COMMISSIONER CLARK:** No.

14 **MR. FROSCHELS:** You have not. Florida Power
15 would argue that Staff is trying to improperly enlarge
16 the scope of their protection under discovery.

17 They were a party to the proceeding and they
18 made no --

19 **COMMISSIONER CLARK:** Wait a minute. Wait a
20 minute. What did you say?

21 **MR. FROSCHELS:** They said that they were a
22 party to the proceeding in their own notion. They
23 claimed -- if I can find it here. They stated that
24 they were a party although they were not a -- their
25 substantial interests would not be affected by any

1 ruling in the case, but nonetheless they were a party.

2 And there's nothing in the rules that
3 provides any kind of a different treatment for
4 discovery where a party, maybe it isn't substantially
5 affected by the decision, but it's still a party.
6 There's no exception to discovery for that part and,
7 therefore, it would be Florida Power's position that
8 they would be subject to discovery.

9 And in this case the question would be, is
10 the discovery requested relevant and is it not
11 privileged. And Florida Power has argued in its
12 response that it is not -- that it is, in fact,
13 relevant. The questions that are being asked are very
14 pertinent to the proceeding.

15 In fact, Staff in a sort of arguing it both
16 ways has claimed that they're on the one hand
17 irrelevant, on the other hand they're so relevant that
18 they're involved in the decision making process of the
19 Commission and, therefore, we shouldn't have access to
20 them. So it's not exactly clear where Staff's
21 position is on that issue. We would argue that
22 they're very clearly relevant.

23 They go to a critical issue in the case,
24 several issues; the intergenerational fairness and the
25 sensitivity studies and, therefore, they're very

1 relevant.

2 And there's no claim that they're privileged
3 in any way. There's been no claim that there's any
4 particular privilege that would be claimed by Staff in
5 any way. So, therefore, the only question would come
6 down to, is there an undue burden placed on Staff by
7 having to respond to the discovery; and Florida Power
8 would argue that there isn't.

9 There are some questions that any party to
10 any proceeding would reasonably expect -- could
11 reasonably expect to be asked. That there was -- the
12 only issue that they raise relevant to that argument
13 would be that they are -- the decision making process
14 could be affected.

15 However, it wasn't to the extent that
16 Florida Power was expecting anyone to testify;
17 therefore, there wouldn't be any result that the
18 person answering the interrogatories couldn't testify.

19 So any burden to the Staff of having to
20 respond to the interrogatories would be greatly
21 outweighed by Florida Power's need to get the
22 materials which would not be available from any other
23 party, any other person. And the simple providing of
24 the spreadsheets would not necessarily be sufficient,
25 either simply because they would -- they give raw

1 data, but they do not explain how that raw data was
2 manipulated to come to the conclusions that these
3 Staff persons came to.

4 And for that reason we would believe that
5 Florida Power's need would outweigh the burden on the
6 Staff and that they should be provided -- the
7 information should be provided to the company.

8 **COMMISSIONER CLARK:** All right.

9 Mr. Cochran, do you want to respond to that?

10 **MR. HERRING:** I think the issue here is not
11 whether the Staff's FAA analysis was adequate or how
12 it was performed. The issue is the risk of the
13 ratepayer savings under this proposal.

14 Staff's recommendation, Staff's post-hearing
15 recommendation in this proceeding, is limited to
16 matters in the record. It has provided in its
17 testimony the analysis that it believes completes the
18 record, an analysis of the risk to the ratepayer
19 savings of this proposal.

20 I believe that the issue under the new APA,
21 issues that aren't disputed I would agree are
22 stipulated. I believe that this issue is an issue
23 that remains an issue in dispute, and that issue is
24 the issue of the risk of the ratepayer savings, not
25 the adequacy of Staff's FAA analysis. I believe that

1 the order speaks for itself.

2 COMMISSIONER CLARK: Mr. Smith?

3 MR. SMITH: Do you want to go back to the
4 beginning of the --

5 COMMISSIONER CLARK: Well, I guess -- you
6 know, to some extent Mr. Childs has raised an issue
7 that probably affects a decision on the
8 interrogatories, and maybe we should deal with that
9 first. And that being that the notion of whether it's
10 a disputed issue of fact that they don't know whether
11 they dispute it without being able to analyze it, I
12 guess it strikes me as that what is disputed is the
13 ultimate facts upon which a decision would be based.

14 And I understand that those are disputed,
15 and then it is up to Fover Corp and whoever might be
16 supporting them to come forward with those facts that
17 they believe underpins their view that our decision on
18 that fact was wrong. It's not necessary to disprove
19 or to prove the negative with respect to Staff's
20 analysis.

21 MR. SMITH: I think I agree with your
22 analysis of it. I really can't quite understand why
23 this can't be -- if you believe that it's an issue, I
24 think you have to identify it; and I really don't
25 quite understand why the information available is not

1 adequate to decide one way or another whether that's
2 something you want to raise to be decided.

3 I mean, if the Staff doesn't put on a case
4 to support its analysis, I suppose then they would do
5 that at their own risk if you were making it an issue
6 in the case. And I'm not really clear why you
7 wouldn't want to simply dispute the issue and put on a
8 case.

9 **COMMISSIONER CLARK:** Let's deal first with
10 the interrogatories. I appreciate the fact that the
11 Staff may have labeled themselves a party, but I don't
12 see them as being a party in the sense of a party
13 whose substantial interests are affected.

14 I view them in the manner set out in the
15 South Florida Natural Gas, that they are in effect
16 investigatory Staff, our alter ego whose job it is to
17 make sure that there is a complete record on which to
18 base our decisions, and it is the order which is --
19 and for that reason, the same standards that you would
20 apply to a party whose substantial interests are
21 affected, I don't think are applicable.

22 And I would refer to our previous decisions
23 that we've had on discovery on the Staff,
24 notwithstanding the one in the Southern States case
25 where discovery was allowed on the Staff. I think I

1 indicated in the dissent why I felt that decision was
2 wrong to begin with.

3 And, therefore, I will grant the protective
4 order with respect to the first interrogatories,
5 Florida Power Corporation's first interrogatories,
6 propounded on the Staff.

7 The same would be true for -- I'm sorry
8 we're now on Orlando Cogen, right? Well, to the
9 extent, Mr. Childs, you indicated that Staff's
10 objections are premature because the precise nature of
11 OCL's question cannot be anticipated in advance, I
12 think you'll agree with me you can only object to a
13 question at deposition if it is a privileged matter,
14 and that you have to answer all questions.

15 I continue to believe that it's
16 inappropriate to allow a deposition to go forward
17 absent a showing that the need for the deposition
18 outweighs the considerations with respect to the
19 deliberative process -- and I can't think of the other
20 things. Just a minute. (Pause) The need to protect
21 the governmental process.

22 So I believe with that, I am granting the
23 motion for protective order with respect to the
24 deposition of Ken Dudley. I understand the deposition
25 of Mr. Paul Stallcup has already taken place.

1 **MR. CHILDS:** It has not taken place --

2 **COMMISSIONER CLARK:** With respect to these
3 issues?

4 **MR. CHILDS:** I tried very hard not to get
5 into these issues.

6 **COMMISSIONER CLARK:** I think the discovery
7 of Mr. Stallcup is appropriate with respect to the
8 testimony he has filed, and I assume that's what you
9 did.

10 **MR. CHILDS:** That's what I tried to do.

11 **COMMISSIONER CLARK:** Then the motion for
12 protective order also extends to Paul Stallcup with
13 respect to those items that are beyond what would be
14 appropriate having filed prefiled testimony.

15 **Mr. Childs,** do you want to be heard further
16 on the motion to present live testimony?

17 **MR. CHILDS:** I don't want to argue your
18 ruling at all and, you know, I assume that your ruling
19 would follow through in that I couldn't take the
20 deposition, that I couldn't call him as a witness to
21 testify in the same matters before the Commission.

22 **COMMISSIONER CLARK:** Right.

23 **MR. CHILDS:** So I don't intend to argue
24 that. I do have this question, Commissioner, with all
25 due respect to your ruling, that I'm attempting to

1 evaluate in order to preserve that issue, and also the
2 necessity and extent of a proffer at the appropriate
3 time. And I'd like to work with the staff and the
4 other parties so that we don't burden Commissioners on
5 that point.

6 COMMISSIONER GRANK: Yes. Mr. Childs, as I
7 understand from what you have argued, and PPC and
8 Mr. Howe, that to some extent it turns on the new APA
9 and what comes out with protests; and I understand in
10 order for you to pursue that on appeal you would have
11 to proffer.

12 MR. CHILDS: Right.

13 COMMISSIONER GRANK: I'm not exactly sure
14 how you would do that.

15 MR. CHILDS: Well, I think that the time for
16 a proffer, unless there's disagreement, is at the time
17 of the hearing.

18 COMMISSIONER GRANK: I do, too.

19 MR. CHILDS: And that is what I would
20 propose, if it's agreeable with you, is between now
21 and the time of the hearing that we would attempt to
22 come up with a most expeditious way to preserve that
23 without interfering with the Commissioners or the
24 process, unless you want to be kept apprised of --

25 COMMISSIONER GRANK: No. I think just at

1 this -- the hearing is not this Thursday and Friday,
2 but next Thursday and Friday; is that right? And it's
3 just Commissioner Garcia and I, right?

4 MR. HERTING: That's right.

5 COMMISSIONER CLARK: So I will be presiding,
6 and if you will just remind me at the beginning that
7 this was a matter that we needed to resolve. And if
8 the procedure for doing it cannot be resolved ahead of
9 time, well, we'll have to -- if you'd let me know, I
10 would like to resolve it ahead of time so we don't
11 take that hearing time to deal with it.

12 MR. CHILDS: Okay.

13 COMMISSIONER CLARK: Okay. Mr. Howe, you
14 have the motion for an order declaring the provision
15 of a PAA order is deemed stipulated or, in the
16 alternative, motion to strike part of the protest. I
17 don't think I have a copy of that order, do I?

18 MR. HERTING: Of the motion?

19 COMMISSIONER CLARK: Let me see. Just a
20 minute. It would be OPC's motion. Let me see if I
21 have it. (Pause) I think I don't have it. I'm
22 speaking about the motion declaring a provision of the
23 order stipulated.

24 MR. HERTING: You said you don't have it?

25 COMMISSIONER CLARK: No, I do not.

1 (Document handed to Commissioner Clark by
2 Mr. Keating.)

3 COMMISSIONER CLARK: Mr. McGee, is this in
4 any way related to your motion to file supplemental
5 rebuttal testimony?

6 MR. MCGEE: No.

7 COMMISSIONER CLARK: Okay. Mr. Howe, do you
8 want to be heard on this?

9 MR. HOWE: Yes, please. Commissioner Clark,
10 I was just speaking with Mr. Childs, and I would like
11 to make you aware that OCL has raised an issue, it
12 appears, on Page 11 of the draft prehearing order
13 whether the proposed buyout will provide net benefits
14 sooner than 20 years in the future.

15 I want to make you aware of that as I
16 address this. It's the last issue at the bottom of
17 Page 11. The fact that it's there does not affect my
18 motion, I do not believe, and does not affect the
19 argument, but I wanted you to be aware that it is
20 there.

21 COMMISSIONER CLARK: All right. Go ahead.

22 MR. HOWE: Commissioner Clark, in the
23 Staff's recommendation before the proposed agency
24 action and in the vote sheet on the proposed agency
25 action, the Commission said, and I quote. This is

1 from the vote sheet. "The buyout is inconsistent with
2 the objectives of the reverse auction bids
3 solicitation and will not produce net savings before
4 the year 2019."

5 That same statement is repeated as a
6 conclusion in the Commission's order. Florida Power
7 Corporation in its petition on proposed agency, its
8 protest, raised that as an issue and stated that the
9 company -- one of its disputes is that its petition
10 will show benefits sooner than 22 years. Well, in
11 simple fact, it cannot.

12 I mean, as Mr. Nokes said earlier, it's just
13 a mathematical computation, but I think it's an
14 important computation. I think it's substantive. I
15 think a fair reading of the Commission's order is that
16 taking everything Florida Power Corporation had to say
17 in its petition as true, there will be no net savings
18 before the year 2019, and on that basis the petition
19 is denied.

20 The company identified the 22-year issue in
21 its protest, but it has not addressed that issue in
22 its preliminary list of issues and positions, in its
23 prehearing statement, or in its prefiled testimony.

24 I don't believe it is a matter that can be
25 in dispute and, as such, under the new provision in

1 the APA, it is a matter that should be deemed
2 stipulated since it is not an issue that will be heard
3 at hearing.

4 Now, if you'd like, I can continue and
5 address my feelings about the fact that OCL has
6 identified the issue.

7 COMMISSIONER CLARK: Go ahead.

8 MR. BROWN: OCL essentially adopted Florida
9 Power Corporation's disputed issues, and I believe
10 they so stated in their intervention in this case. If
11 OCL wanted to address this issue, it could have put on
12 a witness to address it. It could have called
13 Mr. Schuster of Florida Power Corporation and prefiled
14 his testimony on the issue if it chose.

15 It's not a matter that depended upon or
16 depends upon OCL's ability to call Staff witnesses to
17 the stand to address when Florida Power Corporation's
18 petition and proposal will show net benefits. Under
19 the company's proposal as filed, there can be no net
20 savings before the year 2019. It is not in dispute
21 and it should, therefore, be stipulated.

22 In the alternative, which would get you to
23 the same result, that part of Florida Power
24 Corporation's protest should be stricken, given that
25 it has chosen not to address the issue.

1 **COMMISSIONER CLARK:** Mr. McGee?

2 **MR. HOGUE:** I guess I have two points,
3 perhaps three. Mr. Hove's statement that there can't
4 be net benefits until the year 2019 is a strange
5 conclusion because, as he admitted earlier, it's
6 really the mathematical result of a net present value
7 analysis; and we have a number of analyses that yield
8 different conclusions.

9 **COMMISSIONER CLARK:** Different dates?

10 **MR. HOGUE:** Different dates.

11 **COMMISSIONER CLARK:** All right.

12 **MR. HOGUE:** And I think it's kind of in an
13 intuitive way. You can sense that if --

14 **COMMISSIONER CLARK:** Mr. McGee, it would
15 help me a lot if you can point to the analysis, if
16 it's in prefiled testimony or an exhibit, where that
17 date is different.

18 **MR. HOGUE:** I'm advised that the years
19 change, but it's not shown as an explicit column. You
20 have to calculate the break-even point. But,
21 nonetheless, the point I'm getting at is that there
22 was a particular analysis that the Commission had --

23 **COMMISSIONER CLARK:** Well, Mr. McGee, let me
24 just tell you, if you disputed it and you can show me
25 or show Mr. Hove a document where it illustrates that,

1 then we've got it covered.

2 MR. NORMAN: Well, yes. We have

3 Mr. Schuster's Exhibit No. 7 to his direct testimony,
4 Mr. Schuster's Exhibit No. 10, 11, and 12 to -- 10,
5 11, 12 and 13 to his rebuttal testimony, and we have
6 other proffered exhibits in his supplemental direct
7 testimony that we have not addressed yet.

8 All these analyses show different levels of
9 benefits, and depending on the magnitude of the
10 benefits, the break-even point will occur sooner or
11 later, and that's using the break-even point in
12 Mr. Howe's sense.

13 The other point that I wanted to make is
14 that from Florida Power's standpoint, the buyout will
15 produce net savings in every year beginning in 2014.
16 Mr. Howe is simply pointing out that the cumulative
17 net savings don't balance out until under the analysis
18 that we had before that's in the PA, which is no
19 longer being advocated.

20 In that analysis, it showed that cumulative
21 net savings first appearing in 2019, but it showed
22 that there were net benefits -- meaning there were
23 benefits exceeding costs -- in every year beginning in
24 2014.

25 COMMISSIONER GRANT: Mr. Howe?

1 **MR. HOWE: Commissioner Clark --**

2 **MR. CHILDS: Can I make a comment before**
3 **Mr. Howe does?**

4 **Quickly. First of all, this is an issue**
5 **that we have identified. It is an issue that we**
6 **propose to address to the Staff witnesses. At least**
7 **for purposes of preserving it as an issue for that**
8 **purpose, that is for proffer, I think it's**
9 **appropriate.**

10 **I also think that with all due respect to**
11 **Mr. Howe, his argument about how we might have put on**
12 **our case is what he might argue we should have done.**
13 **And we chose to do it differently, and I don't think**
14 **that that means, therefore, that the issue goes away**
15 **because we chose a witness that he thinks we shouldn't**
16 **have pursued.**

17 **COMMISSIONER CLARK: Mr. Howe?**

18 **MR. HOWE: Commissioner Clark, Florida Power**
19 **Corporation filed the prefiled direct testimony and**
20 **exhibits of Lee G. Schuster. They filed them on**
21 **August 27th, 1997.**

22 **At the end of his exhibits it has the**
23 **Exhibit 7 that Mr. Childs referred to. This is**
24 **essentially the same exhibit, the same document that**
25 **the Commission had before it. It's essentially the**

1 some document appended to the company's petition.
2 This document shows that the customers will be
3 required to pay \$9,881,000 a year for five years; 1997
4 through the year 2001.

5 And then accepting everything in the
6 company's proposal as true, the customers will start
7 seeing savings in the year 2014. But the conclusion
8 the Commission reached in its order was that there
9 would be no net savings under the company's proposal
10 before the year 2019.

11 COMMISSIONER CLARK: Mr. Howe, is net
12 savings different than net benefits?

13 MR. HOWE: I believe they are. As the
14 Commission used it in the order and in the Staff
15 recommendation attached to the order, I think it's
16 very clear that it's that point at which on a net
17 present value basis the customers will be in the
18 positive.

19 In other words, the net present value of the
20 first five years' cost is \$40,411,000. The net
21 savings that will come in the year 2000 -- I'm
22 sorry -- the savings that will come in the year 2014,
23 15, 16, 17 and 18 on a net present value basis stated
24 in 1997 terms do not equal 40,411,000.

25 Under the company's proposal, the customers

1 will not see net savings before the year 2019.
2 Mr. McGee referred to Mr. Schuster's rebuttal
3 testimony. That's not my point. The company has
4 raised an issue and must address that issue if it is
5 to prevail. The time for the company to file its
6 direct testimony has passed.

7 I would also draw to the Commissioner's
8 attention Mr. Schuster's prefiled testimony at Page 2
9 in which he states, Lines 23 through 25: "The purpose
10 of my testimony is to explain FPC's position regarding
11 the disputed issues of fact and policy identified in
12 FPC's petition on proposed agency action filed
13 February 17th 1997."

14 In that petition at Page 4, Florida Power
15 Corporation states: "Florida Power asserts that the
16 disputed issues of fact or mixed issues of fact and
17 policy include but are not limited to the following."

18 And paragraph C says that the proposed
19 buyout of the OCL contract will provide net benefits
20 sooner than 22 years into the future. That was an
21 issue identified in the protest.

22 Mr. Schuster in his prefiled testimony said
23 he's here to identify all those issues, and then just
24 doesn't.

25 COMMISSIONER CLARK: Okay. Staff, do you

1 want to be heard on this? You don't have to have a
2 dog in this fight.

3 Mr. Smith, do you have anything to add?

4 MR. SMITH: Yes. I guess I'd just like to
5 ask why it wouldn't be more appropriate if you believe
6 that they haven't -- if you believe they've attempted
7 to state this issue and your position is that it's
8 stipulated, why wouldn't you -- and you believe, in
9 fact, that the position that is presented is contrary
10 to their thing, that there's a real issue, why
11 wouldn't it be appropriate to do something like in the
12 nature of a summary judgment or a motion for judgment
13 on the pleadings, rather than using the procedural
14 mechanism of the APA?

15 It seems to me if the APA change was meant
16 to say that anything that the Commission or an agency
17 decides as an issue in the case that is subsequently
18 left unprotected will be deemed stipulated, I'm not
19 sure it means if they attempt to raise something and
20 you decide that they really haven't made their case
21 for dispute that it is deemed stipulated.

22 I think it may be -- you may have a basis
23 for a motion for summary judgment. I don't know that
24 I believe that just the procedural mechanism as such
25 is adequate.

1 **MR. HOWE:** We thought about that, David, and
2 the reason was the explicit language in the statute.
3 What it states is -- and keep in mind that the
4 statutes that -- sections that now apply to
5 administrative hearings have changed a little bit. So
6 it says "Notwithstanding Sections -- and by the way,
7 I'm reading from Section 120.8013(b).

8 **"Notwithstanding Sections 120.569 and**
9 **120.57, a hearing on an objection to a proposed action**
10 **of the Public Service Commission may only address the**
11 **issues in dispute. Issues in the proposed agency**
12 **action which are not in dispute are deemed**
13 **stipulated."**

14 **Now, I don't think that this statute can be**
15 **fairly construed to say that a party can protest,**
16 **raise an issue to keep the statute from applying, and**
17 **then not address the issue.**

18 **COMMISSIONER CLARK:** Okay. Mr. Howe, it
19 seems to me that what you've suggested is their
20 analysis won't yield any other date but 2019. That
21 may be true. I expect you would test that on
22 cross-examination. I think it's premature at this
23 point.

24 **They've protested. In their protest they**
25 **say they've presented evidence, and I'm going to take**

1 that as being the case and not grant the motion to
2 strike or deem it not stipulated -- deem it
3 stipulated.

4 MR. BOWEN: Commissioner Clark, I understand
5 your ruling. I would just put you on notice at the
6 hearing you will hear me object to any attempt by the
7 company to elicit from Mr. Schuster a statement on
8 that issue that is not contained in his prefiled
9 testimony.

10 COMMISSIONER CLARK: Okay.

11 MR. BOWEN: Prefiled testimony or exhibits,
12 I assume?

13 MR. BOWEN: Or exhibits to his prefiled
14 testimony.

15 MR. BOWEN: Correct.

16 COMMISSIONER CLARK: That takes care of that
17 motion. What's the next one? Do we need to go to the
18 OCL's proposed issues?

19 MR. KENTING: I believe we still have
20 Florida Power Corporation's motion for leave to file
21 supplemental rebuttal testimony.

22 COMMISSIONER CLARK: Is there an objection
23 to that motion? It was only filed today.

24 MR. KENTING: Because it was just filed
25 today, Staff would like to have a little time to --

1 **COMMISSIONER CLARK:** All right. We're going
2 to reserve ruling on that motion. Mr. Howe, are you
3 prepared to respond to this? Do you object to it?

4 **MR. HOWE:** Yes, I do.

5 **COMMISSIONER CLARK:** Mr. Childs, do you
6 object to it?

7 **MR. CHILDS:** We do not.

8 **MR. HOWE:** And if I might say why. In the
9 Commission's order modifying the procedural schedule,
10 the petitioner's direct testimony was filed
11 August 27th, as I had stated earlier. Intervenor's
12 testimony was filed September 10th, Staff testimony
13 September 24th, and rebuttal testimony October 8th.

14 I do not believe the company's motion in
15 this case makes any showing that it could not have
16 deposed Mr. Stallcup or, through traditional discovery
17 means, obtained the information it now relies on.
18 What Florida Power Corporation is saying is that based
19 on Mr. Stallcup's -- I'm looking at Page 2 --

20 **COMMISSIONER CLARK:** Mr. Howe, do you want
21 to argue this now, or do you want to --

22 **MR. HOWE:** I'm ready. Yeah.

23 **COMMISSIONER CLARK:** Oh. All right.

24 **MR. HOWE:** Okay. I'm sorry.

25 **COMMISSIONER CLARK:** So I don't have to wait

1 for your --

2 MR. BROWN: No, you can hear from me now, and
3 that will be the last --

4 COMMISSIONER GRANK: Okay. Well, maybe I
5 should hear from Mr. Nodoo first. Let me ask a
6 question. You've asked for more time?

7 MR. BROWN: That's correct.

8 COMMISSIONER GRANK: Well, I'm willing to
9 hear from the parties on it, and I'll probably reserve
10 ruling on it. If I do, will you want an opportunity
11 to file something written?

12 MR. BROWN: I don't believe so. I think this
13 one can be handled --

14 COMMISSIONER GRANK: All right. We'll hear
15 from you, and that way we'll be able to rule on it
16 more quickly, and maybe we can even include it in the
17 prehearing order.

18 Mr. Nodoo, I'll hear from you and then I'll
19 hear from Mr. Howe. Did you want to present argument?

20 MR. NODOO: Yes, ma'am. We've asked to be
21 granted leave to submit rebuttal, supplemental
22 rebuttal testimony to Mr. Schuster because -- and I
23 mean to say this in a respectful way. I don't think
24 there was anything that was done in an intentional
25 manner.

1 But Mr. Stallcup's testimony, with respect
2 to the portion that describes the development of this
3 risk adjusted discount rates was misleading. And it
4 had that effect -- it had that misleading effect
5 because it described how they were calculated, and it
6 described it in such the conventional manner that one
7 might expect. He talked about the components of the
8 his risk adjusted discount rate as being a risk
9 premium added to a risk-free rate.

10 We did engage in discovery. We asked for
11 the worksheets that supported his calculations as well
12 as the LOTUS spreadsheet file. And in looking at
13 that, we found out that the risk premium had, in fact,
14 been subtracted from a rate that already had no risk
15 in it, and I think very logically concluded, looking
16 at his testimony on how he indicated that that was
17 calculated, concluded that there had been a mistake
18 made.

19 And Mr. Schuster then filed his rebuttal
20 testimony in a way that described the mistake and then
21 provided an exhibit which attempted to use
22 Mr. Stallcup's own method but simply apply it
23 correctly to show what the results would be produced
24 from that.

25 Prior to filing his testimony, we also

1 advised Staff that we believed we had found a mistake,
2 a significant mistake, in Mr. Stallcup's testimony,
3 and the day before the testimony was due, the response
4 that we received was that Mr. Stallcup intended for
5 the results that were achieved.

6 And two days after the filing of this
7 testimony, Mr. Stallcup's deposition was scheduled,
8 and it was only at that time that we found out why it
9 was that that seemingly --

10 COMMISSIONER CLARK: Well, let me ask you
11 this, Mr. McGee: At the time Staff indicated they
12 were going to rely on the testimony and it did produce
13 the intended result, why didn't you file a motion for
14 supplemental testimony at that time? When was that
15 deposition taken?

16 MR. MCGEE: The deposition was taken on
17 October 10th.

18 COMMISSIONER CLARK: Okay.

19 MR. MCGEE: And at that time we had an
20 understanding of what it was that Mr. Stallcup was
21 basing this unexpected feature to his analysis where
22 he subtracted a risk premium.

23 We did some research ourselves, ran some
24 numbers, and it took us that time, that period of
25 time, to determine that, in fact, we had some real

1 concerns with both the use of the method that he
2 suggested would justify the subtraction, but even more
3 importantly, the way he applied the method in what we
4 regard is a very extreme manner that produces some
5 extreme results; and at that point we realized it was
6 essential that we have the opportunity to present our
7 view on that, but more importantly, to make sure that
8 the Commission was aware that these unusual procedures
9 and methodologies were underlying the analysis that
10 Mr. Stallcup was asking you to rely on.

11 COMMISSIONER CLARK: Anything else?

12 MR. HOWE: No.

13 COMMISSIONER CLARK: Mr. Howe?

14 MR. HOWE: Commissioner Clark, Florida Power
15 Corporation's filing of Mr. Schuster's supplemental
16 rebuttal testimony is 13 pages long plus, one, two,
17 three, four, five, six, seven, eight pages of
18 exhibits.

19 I would suggest a couple things. One is I
20 believe the company could have addressed it sooner.
21 It didn't have to wait to this late date. But,
22 secondly, I'd invite your attention to some of the
23 testimony itself.

24 At the bottom of Page 2 the question is
25 asked, "Wasn't Mr. Stallcup's calculation of risk

1 adjusted discount rates adequately explained in his
2 testimony." The adequacy of the explanation in his
3 testimony was something to put in the original
4 rebuttal.

5 On Page 4, it asks the question, "Based on
6 the information provided in Mr. Stallcup's deposition,
7 what is your assessment of the risk adjusted discount
8 rates used in his NPV analysis?"

9 COMMISSIONER CLARK: Page 4?

10 MR. BOWEN: Page 4. Look at the answer. And
11 I would suggest that certainly the beginning part of
12 this answer could have been filed in response to his
13 original testimony.

14 It states, beginning on Line 4,
15 "Mr. Stallcup's methodology of adjusting discount
16 rates downward for above average risk is
17 counterintuitive, untested in practical application,
18 and controversial among economic experts."

19 Florida Power Corporation isn't saying they
20 didn't know that Mr. Stallcup had adjusted it downward.
21 They didn't know why he had adjusted it downward.

22 The next sentence says "Moreover, his
23 particular application of this methodology by making a
24 downward adjustment to a risk-free rate is a logical
25 contradiction that has no support even among the

1 academic advocates of the methodology." This could
2 have been addressed in response to Mr. Stallcup's
3 testimony, original testimony.

4 Keep in mind that Florida Power
5 Corporation's witness Mr. Schuster goes to great
6 lengths to explain why Mr. Stallcup is wrong because
7 he made a negative adjustment instead of a positive
8 risk premium adjustment, that he's wrong because he
9 made a negative adjustment.

10 So Florida Power Corporation was not in the
11 dark that Mr. Stallcup used a negative adjustment in
12 his analysis. The only thing they didn't know was the
13 reason. And without first learning that reason,
14 Florida Power Corporation's witness took Mr. Stallcup
15 to task before -- because Florida Power Corporation
16 thought he was clearly wrong that such an adjustment
17 could not be made.

18 Now that they have learned the reason, they
19 want to bolster their testimony and, in effect,
20 impeach their earlier testimony. I think it's
21 inappropriate.

22 MR. HOSHE: Could I make one brief response
23 to this?

24 COMMISSIONER CLARK: Yes. Mr. Childs, I
25 didn't mean to pass over you, but it was not your

1 notion.

2 **MR. CHILES:** If you don't mind, I would like
3 to make a brief comment.

4 **COMMISSIONER CLARK:** All right. And then
5 I'll let you respond, Mr. Howe, and then to we'll go
6 to Mr. McGee.

7 **MR. CHILES:** I took the deposition and I
8 read -- of Mr. Stallcup, and I read the testimony, and
9 I asked for public records data and asked for
10 discovery, too, as it related to this testimony.

11 The discovery we asked for, I think, in
12 terms of what you could know and should know. And I'm
13 not going to make these comments in the sense of being
14 critical of the Staff's response.

15 The point is the suggestion by Mr. Howe of
16 what you could or should have known earlier is correct
17 in a theoretical sense. In a practical sense, it's
18 not correct. We were attempting to work out with the
19 Staff the deposition arrangements with the witness.
20 That matter was pending for some time. The matter, at
21 least from our perspective as it relates to the public
22 records search, was pending for some time.

23 It was a matter of days, but under the
24 schedule here, that's important. So I think that as a
25 suggestion of what you could have done earlier, that

1 my observation is the time is very short.

2 I have reacted to the testimony similarly in
3 the sense that I attempted to pursue it in the
4 deposition that your testimony said you did one thing,
5 as I read it, and it appears you did another. So I
6 was in the deposition attempting to reconcile it. I
7 wasn't sure what the witness meant to do. Now that's
8 my reaction to the testimony.

9 So I think that in terms of saying what you
10 could have done or should have done, that it is not
11 quite so clear-cut as Mr. Howe's argument suggests it
12 is.

13 COMMISSIONER CLARK: Mr. Howe, do you want
14 to respond?

15 MR. HOWE: Yes, ma'am. The reason I feel
16 it's fairly clear-cut is in the rebuttal testimony
17 filed by Florida Power Corporation, Mr. Schuster's
18 rebuttal testimony on October 8th, two days before
19 Mr. Stallcup's deposition, at Page 3, beginning on
20 Lines 15, it reads: "However, in calculating the
21 actual risk adjusted discount rates used in his
22 analysis of the OCL buyout (Stallcup Exhibit FWS-4),
23 the risk premium is mistakenly subtracted from the
24 risk-free rate."

25 All that Florida Power Corporation is

1 attempting to do with this supplemental testimony is
2 bolster that argument. In other words, this isn't a
3 surprise to Florida Power Corporation. They knew
4 Mr. Stallcup's deposition, that he had done a
5 subtraction instead of an addition. They thought it
6 was wrong. All this rebuttal testimony is is an
7 attempt to show why he's wrong again.

8 COMMISSIONER CLARK: Okay. Let me ask a
9 question. Is Staff prepared to respond at all?

10 MR. HERTING: No. Mr. McGee did let me know
11 this morning that he was going to file this. I did
12 not get a copy of it until now, and --

13 COMMISSIONER CLARK: If I allow the
14 supplemental rebuttal testimony, do you need to
15 conduct further discovery?

16 MR. HOWE: No.

17 COMMISSIONER CLARK: Staff, will you need
18 to?

19 MR. HERTING: I don't believe so.

20 COMMISSIONER CLARK: Mr. Smith, do you want
21 to give me any advice on this?

22 MR. SMITH: Well, I certainly think it's
23 your call as far as whether or not you allow the
24 testimony. It seems to me rebuttal testimony should
25 be basically confined to the direct testimony to

1 address those issues. You get one shot, and normally
2 you don't get to keep supplementing the testimony.

3 **COMMISSIONER CLARK:** At this point I'm
4 inclined to allow the rebuttal, the supplemental
5 rebuttal; and I think it's in part due to the fact
6 that we're somewhat trying to muddle through what we
7 have to do under the new APA and, also, in the lack of
8 clarity prior to this time with respect to whether or
9 not Staff could -- there could be discovery on Staff
10 and to what extent.

11 But, Mr. Howe and Mr. Keating, I would
12 indicate to the extent you need to conduct further
13 discovery, you better let me know tomorrow and we'll
14 deal with that. Okay. Any other motions?

15 **MR. HOWE:** Commissioner Clark, it's not a
16 motion that I had filed, but I notice it's a matter
17 that I had raised in my prehearing statement that is
18 really not expressed in the draft prehearing order;
19 and I wanted to know if you wanted to address that.

20 One of the last thing things we're supposed
21 to do is state whether we can comply with the
22 prehearing order -- the order establishing procedure.
23 I'm sorry. And I noted there that my office cannot,
24 to the extent that it limits our witnesses' ability to
25 address all the matters that come up at hearing.

1 **This is something that has happened to our**
2 **office repeatedly in hearings. For example, in the**
3 **last Tampa Electric hearing, matters came up during**
4 **the company's direct case, and when we attempted to**
5 **have our witness address matters outside the scope of**
6 **his prefiled direct testimony but which were raised --**
7 **one of the issues by Commissioner Deason questioning**
8 **the company's witness -- we were told that our witness**
9 **is limited to his prefiled direct testimony.**

10 **In this particular case I anticipate that**
11 **Mr. Schuster is probably going to go well outside his**
12 **direct testimony. Mr. Childs is perhaps going to**
13 **offer live testimony we haven't heard yet, and so to**
14 **the extent that that --**

15 **COMMISSIONER CLARK: Wait a minute. I**
16 **already said we're not having the Staff witnesses as**
17 **adverse witnesses. So I assume, Mr. Childs, you're**
18 **not presenting any other live testimony?**

19 **MR. CHILDS: No, we're not.**

20 **MR. HOWE: Well, then I would expect that**
21 **Mr. Childs is going to try to develop some of his**
22 **issues through cross-examination of Mr. Schuster, and**
23 **we are likely going to hear some answers that are not**
24 **in Mr. Schuster's prefiled direct testimony.**

25 **COMMISSIONER CLARK: Okay.**

1 **MR. HOWE:** And I believe our witness and our
2 side has an absolute right to address each and every
3 relevant issue that is addressed in the company's
4 direct case, whether it's in their prefiled direct
5 under cross-examination, redirect examination, or even
6 from questions from Commissioners.

7 **COMMISSIONER CLARK:** Well, there's something
8 in the prehearing order you can't agree with. What is
9 that again?

10 **MR. HOWE:** It's the provision in the
11 prehearing, the order establishing --

12 **COMMISSIONER CLARK:** I need a page.

13 **MR. HOWE:** The order establishing procedure
14 that says we should put all our evidence in our
15 prefiled direct. And we are finding ourselves time
16 and time again in a situation where the company, for
17 example, modifies its petition when it first takes the
18 stand, or in answer to a question on cross or so
19 forth. And we find ourselves with a witness who has
20 not been allowed to address a matter that the
21 Commission may refer to in the record to make a
22 finding of fact; and so the record, we believe, ends
23 up quite one-sided because of that.

24 **COMMISSIONER CLARK:** Well, Mr. Howe, you're
25 asking me to address a concept in the abstract, and

1 those points you raised were dealt with at the hearing
2 as to whether or not it appeared to be appropriate
3 procedure to allow you to question them or not.

4 I would expect when it comes up you'll make
5 the appropriate motion and we'll deal with it then.

6 MR. HOWE: Yes, ma'am. I was just bringing
7 it to your attention now because it is not reflected
8 in the draft prehearing order.

9 MR. HERTZ: I believe that that's all of
10 the motions that are outstanding. (Pause)

11 COMMISSIONER CLARK: We're on the prehearing
12 order. Is that correct?

13 MR. HERTZ: Yes.

14 COMMISSIONER CLARK: Are there any changes
15 to the first three pages?

16 MR. CHILDS: Commissioner, I have had one
17 that I've already indicated as to who I'm representing
18 here.

19 I have also attempted to give to
20 Mr. Keating -- or we've transmitted the changes that
21 we thought needed to be made to the draft that he had
22 put together previously. I have not gone through to
23 see if he's had a chance to incorporate all those, but
24 assuming that that will be taken, and unless something
25 jumps up, I will just sit quietly while we go through.

1 **MR. HERTING:** These changes have been
2 incorporated in this draft.

3 **MR. CHILES:** Okay.

4 **COMMISSIONER CLARK:** All right. Now,
5 changes to the order of witnesses, we'll delete
6 Mr. Dudley, and Stallcup as being adverse, but we'll
7 deal with the appropriate proffer at the hearing.

8 **MR. HOWE:** Commissioner Clark, on the
9 subject of witnesses, you might notice that there's a
10 statement after the witnesses concerning a position
11 I've taken.

12 **COMMISSIONER CLARK:** Where?

13 **MR. HOWE:** On Page 5.

14 **COMMISSIONER CLARK:** Oh. Subpoena.

15 **MR. HOWE:** Yes. And Commissioner Clark, I
16 want the latitude to call a Florida Power & Light
17 witness if necessary because of a statement that was
18 made in the Palm Beach Post.

19 But based on some filings, the testimony,
20 and responses the company has made, are we in
21 agreement, Mr. NoSee, that Florida Power Corporation
22 does not have a financial interest in -- and I guess
23 "financial" is too broad a term -- that the company
24 will neither gain nor lose in the sense of cost
25 recovery if its petition is denied?

1 **MR. HOWE:** No, I don't think we're in
2 agreement on that.

3 **MR. HOWE:** Okay. Then I would reserve the
4 right to subpoena an appropriate FP&L witness to show
5 what -- how the industry views the effect of these
6 cogeneration contracts.

7 **COMMISSIONER CLARK:** Well, you can try it, I
8 suppose. You know, if you asked me to rule on it
9 right now, I'd say no. Your position is clear, it
10 seems to me, it's a legal position.

11 The cost with respect to these plants, if
12 100% of it goes through, then it's a factual basis on
13 which you can make your argument that they're not
14 entitled to protest. You know, in my view that could
15 be said of every expense.

16 **MR. HOWE:** This is a cost recovery issue.
17 And, Commissioner Clark, I'd remind you that the date
18 on which this article came out was September 16th,
19 which I believe was after we had filed our testimony.

20 **COMMISSIONER CLARK:** Well, Mr. Howe, when
21 are you going to let me know if you're going to call
22 anyone? I guess to me it boils down to is it really
23 necessary.

24 **MR. HOWE:** Well, Commissioner Clark, I think
25 it's -- I'd like to think that it wouldn't be.

1 However, I believe the company is going to take the
2 position that it is not equivalent. In other words,
3 the cost recovery does not shield the Florida Power
4 Corporation from incurring any costs from these
5 cogeneration contracts.

6 COMMISSIONER CLARK: Well, we're going to
7 leave that matter pending for just a minute. Let's go
8 on to the basic positions. Any changes there?

9 MR. BOWE: I have just a very minor typo at
10 the very end of OPC's position. It's in the very last
11 sentence. Just remove the comma after the word
12 "although".

13 COMMISSIONER CLARK: Okay. Any changes to
14 Issue 1?

15 MR. BOWE: Commissioner Clark, you might
16 note in my position on this issue, I think the way
17 this -- we're addressing this right now is if there's
18 only one matter before the Commission.

19 As I understand the company's petition,
20 original petition in this docket, it was asking for
21 two things. It was asking for approval of the buyout
22 with Orlando Cogen and, secondly, it was asking for
23 permission to recover the cost of the buyout from its
24 customers.

25 So I think maybe all these issues are going

1 to perhaps need to be put in that kind of a framework;
2 in other words, should the buyout be approved, and
3 then get into the issue of whether the company has
4 shown ratepayer benefits. And you'll note that --
5 I've tried to note that with respect to our position
6 on the first issue and Issue 4.

7 COMMISSIONER CLARK: Well, Mr. Howe, what is
8 it you want me to do?

9 MR. HOWE: Well, I just wanted to bring it
10 to your attention, Commissioner. I'm a little
11 confused about the way the company is addressing this
12 proceeding.

13 Like I said, in their petition apparently
14 they're asking for approval of the buyout and
15 requesting cost recovery. However, the way the issues
16 are identified, I believe the Commission could find
17 itself in a position where it's denying, for example,
18 the company's -- if it were to deny the company's
19 request for cost recovery, it would also have to be
20 denying the company's request that the buy --

21 COMMISSIONER CLARK: You don't see why
22 they're made two issues?

23 MR. HOWE: I think they have to be made two
24 issues. I think the way all these issues are set up,
25 they're as one.

1 **COMMISSIONER CLARK:** I appreciate that. So
2 no changes to Issue 1? Issue 2? Issue 3?

3 **MR. HERTZ:** Commissioner Clark, Staff
4 believes that Issue 3 is inappropriate, because a
5 decision on this issue is not necessary to resolve
6 this case. Alternatively, we believe that the issue
7 could be addressed under Issue 2.

8 **MR. CHILDS:** Well, can I comment on that?

9 **COMMISSIONER CLARK:** Who proposed the issue?

10 **MR. HERTZ:** I believe Florida Power
11 Corporation proposed the issue.

12 **COMMISSIONER CLARK:** All right. Mr. McGee,
13 then Mr. Childs. Mr. Howe, do you object to this? Do
14 you have a position on whether or not it should be an
15 issue?

16 **MR. HOWE:** I took a position on the issue.
17 But, no, I do not believe it has to be an issue in
18 this proceeding.

19 **COMMISSIONER CLARK:** Mr. McGee?

20 **MR. MCGEE:** We ask that this be made an
21 issue, because in our view, the Commission not only
22 doesn't have the standard, but, in fact, has acted in
23 ways from an intergenerational standpoint to go to
24 both ends of the spectrum in terms of front-loading
25 cost and back-loading cost.

1 And if we're expected to comply with some
2 goal for intergenerational fairness, which was the
3 term that was coined in the Staff recommendation that
4 the Commission adopted, then we think it's important
5 there be an articulation by the Commission on that,
6 and if there isn't a standard, then we think that
7 ought to be expressed, also.

8 **COMMISSIONER CLARK:** Mr. Childs?

9 **MR. CHILDS:** It seems to us that this is an
10 appropriate issue in the sense it has been applied
11 previously in this case as a basis for denying the
12 petition. I think it raises directly the issue of
13 whether there is a policy of the Commission relating
14 to intergenerational fairness and, if so, can that
15 policy be sustained and supported in this proceeding.
16 If not, then I think there's an issue about whether
17 it's properly applied.

18 And I think that it's -- that if there's
19 going to be a standard or policy applied, that it's
20 fair, the indications are it's been previously applied
21 and, therefore, I believe it's appropriate; previously
22 applied in the disposition of the petition in this
23 case.

24 **COMMISSIONER CLARK:** Staff?

25 **MR. FERTIG:** Staff believes that the

1 intergenerational equity or fairness issue is -- that
2 it's really a factor that the Commission has
3 considered and it's something -- and I think in Public
4 Counsel's position I would agree with some of what
5 they say -- that it's something that while not
6 directly required to be considered by the Commission,
7 it's something that in any of type of proposal where
8 there's either future customers or present customers
9 are going to be --

10 **COMMISSIONER CLARK:** All right. I'm
11 inclined to not have it as an issue. I think it is
12 subsumed within Issue No. 2, but I will allow the
13 parties to amend their positions to include the notion
14 that without having done this, it's inappropriate to
15 rely on such a standard or such a policy.

16 Anything with regard to Issue 4? Issue 5?

17 **MR. BOWE:** Excuse me, Commissioner Clark.
18 Again, with Issue 4, it's whether the contract should
19 be approved for cost recovery.

20 Mr. McGee and Mr. Childs might correct me if
21 I'm wrong, but as I read the company's original
22 petition, there's a condition in there that the
23 contract amendment will not take effect if the
24 Commission does not approve it.

25 However, there is no provision that says the

1 contract will not take effect if the Commission does
2 not allow it for cost recovery, and so I think the
3 Commission in this proceeding has to address those as
4 two separate issues.

5 COMMISSIONER CLARK: Mr. Howe, I'll hear
6 from the parties. I see them as the same issue. Why
7 in the world would we approve it if we're not going to
8 allow cost recovery? I mean, it's a different way of
9 saying the same thing.

10 MR. HOWE: No, ma'am. I would disagree, and
11 the reason I would disagree is even without cost
12 recovery, Florida Power Corporation may find it's in
13 its own financial best interests to go forward.

14 COMMISSIONER CLARK: Well, they don't need
15 our approval, then.

16 MR. HOWE: They need approval for the
17 modification.

18 COMMISSIONER CLARK: Okay. Mr. McGee or
19 Mr. Childs, do you want to respond?

20 MR. MCGEE: Our petition requested approval
21 for cost recovery. And I concur with you; they're one
22 and the same thing, the Commission's rule that
23 requires approval of contract amendments.

24 COMMISSIONER CLARK: Mr. Childs, do you have
25 anything?

1 **MR. CHILDS:** I think you have a rule that
2 directly says you have to approve it for -- you have
3 to evaluate the contracts, modification of contracts,
4 and it has to be approved for cost recovery.

5 **COMMISSIONER CLARK:** Staff?

6 **MR. CHILDS:** 25-17.0836.

7 **COMMISSIONER CLARK:** Staff, you have nothing
8 to add? I'm going to allow it. I'm going to keep the
9 issue the way it is, and I understand -- you can leave
10 the bracketed language.

11 **MR. HOWE:** No. Just delete the bracketed
12 language, then, from my position.

13 **COMMISSIONER CLARK:** Issue 5? Issue 6? (No
14 response.)

15 All right. OCL's proposed issues.

16 **MR. CHILDS:** Well, only on Issue 6. It
17 seems to me that that's an issue when a matter goes to
18 agenda. I don't understand why that would be an issue
19 when we're going to hearing about whether the docket
20 should be closed. I mean, that's kind of when --

21 **COMMISSIONER CLARK:** But I think we list it
22 as an issue. I mean, I suppose we can argue this one.

23 **MR. HOWE:** I think we've always listed it
24 as an issue.

25 **COMMISSIONER CLARK:** Yes. Are you

1 suggesting, Mr. Childs, it doesn't need to be listed
2 as an issue, but it can be listed as an issue on the
3 recommendation without having identified it as part of
4 the hearing?

5 MR. CHILDS: That's what I thought you
6 always did. I don't know how to answer the question.
7 Should it be closed until I know what the decision is
8 that you make? I mean, if we're --

9 MR. HERTING: I think --

10 COMMISSIONER CLARK: We sometimes don't -- I
11 mean, it would seem that it would always be, yes, it
12 should be closed, but there are proceedings where we,
13 as part of the hearing, it's not recommended to close
14 it until some other issue or some other condition,
15 what is subsequent, takes place. So I'm going to
16 leave it.

17 All right. OCL's proposed issues; there are
18 three of them.

19 MR. HERTING: I think we have a few more. I
20 think there are a few more than three.

21 COMMISSIONER CLARK: I'm sorry. I skipped a
22 page.

23 MR. HERTING: Six, seven.

24 MR. CHILDS: These issues are the issues
25 intended to be the issues that were identified in the

1 petition for hearing on proposed agency action, so
2 that the issue is not being waived as we go forward.

3 MR. HERRING: I believe that all of OCL's
4 proposed issues are subsumed in one way or another in
5 the issues -- in the first five issues that were
6 identified.

7 In addition, three of the issues, I believe
8 the issues listed on Page 12, address Staff's -- the
9 alternate Staff recommendation. And as part of the
10 position, OCL has stated that their position awaits
11 pending discovery, and I think that we've addressed
12 the discovery already, and that discovery probably
13 won't be coming; and I don't know if these issues are
14 necessary.

15 COMMISSIONER CLARK: Mr. Childs, how is it
16 you wanted to handle these issues?

17 MR. CHILDS: These are the issues as to
18 which I intend to address further with the Staff and
19 the other parties how to make a proffer to --

20 COMMISSIONER CLARK: In the terms of a
21 proffer. And do any of these issues go forward
22 whether or not you have a witness or whether or not
23 your view of procedure is adopted?

24 MR. CHILDS: I think that the issues go
25 forward in order to preserve the issue. I think they

1 go -- in the context of me being able to make a
2 proffer, I think they go forward in this sense, too,
3 that the rationale for perhaps not providing someone
4 to address them is that, you know, this is a decision
5 that was made, and if there's no opportunity -- or
6 effort to address the issue, then you have to decide
7 whether the original decision was correct.

8 I think I mispoke, however, that the first
9 issue is not part of that petition for hearing. I
10 think that is a new issue that I raised, and I think
11 it's an issue under the Commission rule on approval of
12 these --

13 COMMISSIONER CLARK: Mr. Childs, the first
14 issue being whether the proposed buyout of the OCL
15 contract meets the standards of the rule?

16 MR. CHILDS: That's correct. I don't think
17 that that was part of the petition by Florida Power
18 Corporation; is that correct?

19 MR. HOSHE: That's correct.

20 MR. CHILDS: That's a new issue, and it is
21 appropriate, because it seems to me that the
22 Commission specifically adopted a rule directing all
23 the utilities that if they were going to amend the
24 contract with a qualifying facility, they had to come
25 to the Commission if it was a material modification;

1 and they also directed the procedure to be followed
2 and the standard to be applied in determining whether
3 the approval of the modification for cost recovery
4 purposes should be granted.

5 And so I want to frame this as an issue that
6 I think is appropriate to be addressed. I think it's
7 a mixed question because I think there's some legal
8 points associated as well.

9 COMMISSIONER CLARK: Mr. Childs, explain to
10 me why that isn't under Issue 4?

11 MR. CHILDS: Okay. Just a minute. (Pause)
12 First of all, I mean, I guess it's not under Issue 4
13 because I think this raises the general question of
14 should it be approved as opposed to the issue of
15 whether it meets the standards of the rule; and
16 that's --

17 COMMISSIONER CLARK: Well, wouldn't your
18 answer be, "Yes, it should be approved because it
19 meets the standards of the rule"?

20 MR. CHILDS: Well, I think my issue is
21 really that it should be approved and only the
22 standards of the rule are relevant.

23 COMMISSIONER CLARK: Well, I think --

24 MR. CHILDS: I intended, really, to put it
25 there because I don't think that the other issue is

1 being addressed that way.

2 I mean, the rule, for instance, says the
3 modifications and concessions of the utility and
4 developer shall be evaluated against both existing
5 contract and the current value of the purchasing
6 utility's avoided cost. That's the standard. That's
7 what the Commission had hearings on before when it
8 adopted the rule.

9 COMMISSIONER CLARK: Let me ask a question.
10 If we amend Issue 4, just say "be approved for cost
11 recovery pursuant to Rule 25-17.0036," is that
12 adequate?

13 MR. HERTZ: I don't think we'd have a
14 problem with that.

15 COMMISSIONER CLARK: Mr. Childs?

16 MR. CHILDS: That's fine.

17 COMMISSIONER CLARK: Okay. Let's make that
18 change.

19 The next is issue is the 22 years. I'm
20 inclined to leave that as an issue, given the fact
21 that we had a motion to strike and it is part of the
22 protest. Is it already covered in another issue?

23 MR. HERTZ: Yeah. I would suggest that
24 perhaps it's covered in Issue 1 or Issue -- I'm
25 sorry -- in Issue 2.

1 **COMMISSIONER CLARK:** Mr. Childs?

2 **MR. CHILDS:** You know, I guess over the
3 years I've always kind of wondered what -- the process
4 on incorporating issues, because what it effectively
5 does, it says, I don't like the way you want to
6 address the case so I'll move your issue into mine.
7 And that's unfortunately the job you have to wrestle
8 with.

9 Here I don't think that any of them that are
10 related to the original petition on proposed agency
11 action ought to be moved anywhere, because those are
12 the specific issues that were pending as to which a
13 hearing was requested. Those are the issues that,
14 theoretically I thought, under your rule we're going
15 to hearing over. Well, at least those.

16 **MR. HERTING:** We conducted an issue
17 identification meeting, and I thought that was the
18 main purpose of that meeting, so when we got to a
19 prehearing we wouldn't have to --

20 **COMMISSIONER CLARK:** I'll tell you. We've
21 deleted Issue 3. Why don't we make that one Issue 3,
22 because I think it does logically go after 2. Or it
23 doesn't necessarily go after 2, but it relates to 2.

24 The issues on Page 3, they will be part of
25 the proffer, as will the issue at the top of Page 13.

1 What about "The order fails to consider
2 whether it is appropriate to address potential
3 strandable costs"? Is that part of the proffer, too?

4 MR. CHILDS: I don't know. I'm sorry. I
5 have to go look to mine. Can I come back to that?
6 I'm going to try to look that up, Commissioner.

7 COMMISSIONER CLARK: All right. OPC?

8 MR. BONE: Commissioner Clark, I should tell
9 you why I identified these issues. These are mostly
10 to keep alive the issues we raised in our motion to
11 dismiss. We feel that since the company has filed
12 testimony, these issues remain valid.

13 COMMISSIONER CLARK: Well, the Commission
14 has already ruled on the first issue and the second
15 issue.

16 MR. BONE: Yes, ma'am. And the point is
17 since the company has filed testimony, we've had a
18 chance to refer to it, we intend to -- in other words,
19 we have not retreated from our original position. We
20 thought it would be fair to identify it here and let
21 you know our views, but we understand the --

22 COMMISSIONER CLARK: All right.

23 MR. BONE: -- Commission has already ruled.

24 COMMISSIONER CLARK: We'll take them out as
25 issues, but I understand you will -- to the extent you

1 still believe you were correct, you may pursue that on
2 appeal.

3 MR. HOWE: Yes.

4 COMMISSIONER CLARK: Okay. Any changes to
5 the witnesses? I guess, for -- well, we'll take out
6 OCL's witness, and that will be part of the proffer.

7 MR. HOWE: Just for clarification on the
8 proffered items, Commissioner Clark, should our office
9 and Florida Power Corporation be taking positions on
10 those proffered issues?

11 COMMISSIONER CLARK: Just a minute. (Pause)
12 Ask your question again, please.

13 MR. HOWE: I'm not real clear on how you're
14 directing that those issues be handled. I understand
15 that they go with the proffer that Mr. Childs will
16 perhaps introduce at the hearing. Do you want us, our
17 office, to have on record a position on those issues?

18 COMMISSIONER CLARK: You know, what might be
19 helpful is, as far as I'm concerned, what would be
20 appropriate is either for you to come up with a
21 written proffer that you intend to present at the
22 hearing, allow Mr. Howe and the Staff and FPC to see
23 that so that they can prepare a written response, and
24 we can take it up at the beginning of the hearing.

25 Mr. Howe, what I'm suggesting is that you

1 all get together and decide what's the best way to
2 deal with the proffer. If you can't, then Staff will
3 have to get a hold of me and let me know.

4 I would imagine that you'd make a proffer of
5 the witnesses and what you expected the witnesses to
6 present, why you think it's appropriate for you to
7 have been allowed to do that, and the issues that
8 should have been included to be part of that proffer.

9 MR. CHILDS: Some of this is going to have
10 to be conclusory, because it would be based upon the
11 opportunity to understand and to take the depositions.
12 So I can't -- I'm going to have to be somewhat
13 conclusory as to what generally I think the evidence
14 would show that I think is relevant to a decision one
15 way or the other.

16 COMMISSIONER CLARK: And I would assume
17 that's what people do when they do proffers.

18 MR. CHILDS: Just a general conclusion.

19 COMMISSIONER CLARK: All right. Back to the
20 one issue we left pending for you.

21 MR. CHILDS: There is Issue I of the
22 petition by Florida Power Corporation, the -- whether
23 the order fails to consider whether it is appropriate
24 to address potential strandable costs at this time.
25 That is not an issue that I would be able to have

1 addressed through the deposition of the Staff
2 witnesses.

3 So I will note that it was made, but I don't
4 have a basis to preserve it other than as a legal
5 issue. It's not an evidentiary issue.

6 COMMISSIONER CLARK: Okay. So we can delete
7 the issue?

8 MR. CHILDS: I think so.

9 COMMISSIONER CLARK: Mr. Howe, going back to
10 your reserving the right to subpoena --

11 MR. HOWE: I withdrew that.

12 COMMISSIONER CLARK: Have we taken care of
13 everything we need to take care of, Mr. McGee?

14 MR. MCGEE: I think we were last on the
15 witness -- excuse me -- on the exhibit list, and I
16 just wanted to make sure we were reminded that we need
17 to include Mr. Schuster's supplemental rebuttal --

18 COMMISSIONER CLARK: We will.

19 MR. MCGEE: -- which are LGS-17 through 23.

20 COMMISSIONER CLARK: Okay. Anything
21 further?

22 MR. CHILDS: I would like to have the
23 opportunity for an opening statement to the
24 Commissioners before the evidence starts.

25 COMMISSIONER CLARK: How long do you want?

1 **MR. CHILES:** About ten minutes.

2 **COMMISSIONER CLARK:** Mr. Howe?

3 **MR. HOWE:** I would agree.

4 **MR. HOWE:** (Nodding head.)

5 **MR. HERTING:** We have no objection.

6 **COMMISSIONER CLARK:** Well, let me ask the
7 question: I'll allow Mr. Childs ten minutes and
8 Mr. McGee ten minutes. How much do you want?

9 **MR. HOWE:** Thirty.

10 **COMMISSIONER CLARK:** You know, it's the
11 notion of sides versus parties.

12 **MR. HOWE:** Ten or 15 would be fine.

13 **COMMISSIONER CLARK:** All right. I'm going
14 to allow ten minutes a party. Mr. Howe, let me know
15 if you need to go further. I know you know that
16 brevity helps your case, so we'll just note ten
17 minutes a side -- I'm sorry -- a party. Anything else
18 we need to take up?

19 Is there any view on how long the hearing
20 may take? I'm just curious. I really don't --

21 **MR. HERTING:** That may be better addressed
22 by the parties than Staff.

23 **COMMISSIONER CLARK:** We have two days,
24 right?

25 **MR. HERTING:** There are two days set aside.

1 **COMMISSIONER CLARK:** All right. That's
2 fine. Is there anything else I need to take up
3 Mr. McGee?

4 **MR. HOWE:** None that I'm aware of.

5 **COMMISSIONER CLARK:** Mr. Childs?

6 **MR. CHILDS:** No, thank you.

7 **COMMISSIONER CLARK:** Mr. Howe?

8 **MR. HOWE:** I believe I have to get some
9 positions to the Staff on a couple issues, correct?

10 **COMMISSIONER CLARK:** There were two -- well,
11 yes. You have the opportunity to modify position on
12 Issue 2 because Issue 3 has been deleted, and we've
13 added 3, which is the 22-year issue; but that's all.

14 **MR. HOWE:** Yes. As I understand, under the
15 OCL issues the first issue was combined with Issue 4
16 and the second issue was going to be expressed after
17 Issue 3.

18 **COMMISSIONER CLARK:** Right.

19 **MR. HOWE:** And I can state -- for the record
20 now I think I can safely state that our position on
21 the second OCL issue is "no".

22 **COMMISSIONER CLARK:** Okay.

23 **MR. HOWE:** And with respect to -- let's see.
24 Issue 4 -- are we going to combine the wording, or is
25 that just a --

1 **COMMISSIONER CLARK:** I think Issue 4 -- what
2 is currently Issue 4 and will remain Issue 4, I guess,
3 at the end of the sentence "be approved for cost
4 recovery pursuant to Rule 25-17.0036, Florida
5 Administrative Code" will be added. If you need to --

6 **MR. HOWE:** I will not need to change. Our
7 position will be "no".

8 **COMMISSIONER CLARK:** Okay. Mr. Childs,
9 nothing else? Mr. Howe, nothing else? Staff?

10 **MR. HERTING:** I believe we'll also need to
11 get positions on -- or revised positions on those
12 issues from Florida Power Corporation if they have a
13 revised position.

14 **COMMISSIONER CLARK:** Okay. And I would urge
15 you to work out how the proffer will be accomplished,
16 and if you need me to make a ruling, just get a hold
17 of my office.

18 With that, this hearing is adjourned. This
19 prehearing is adjourned.

20 (Thereupon, the hearing concluded at
21 3:25 p.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

3 I, H. NUTME POTANI, BS, CSR, RFR Official
4 Commission Reporter,

5 DO HEREBY CERTIFY that the Prehearing
6 Conference in Docket No. 961184-BQ was heard by the
7 Prehearing Officer at the time and place herein
8 stated; it is further

9 CERTIFIED that I stenographically reported
10 the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 77 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 DATED this 24th day of October, 1997.

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H. NUTME POTANI, BS, CSR, RFR
Official Commission Reporter
(904) 413-6732