

CARLTON FIELDS
ATTORNEYS AT LAW

ORIGINAL

ONE HARBOUR PLACE
777 S. HARBOUR ISLAND BOULEVARD
TAMPA, FLORIDA 33602-5799

MAILING ADDRESS:
P.O. BOX 3239, TAMPA, FL 33601-3239
TEL (813) 223-7000 FAX (813) 229-4133

February 23, 1998

FEDERAL EXPRESS

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

980283-EI

Re: Florida Power Corporation's Petition for Declaratory Statement

Dear Ms. Bayó:

Enclosed for filing please find an original and fifteen copies of Florida Power Corporation's Petition for Declaratory Statement.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Sincerely,

Chris S. Coutroulis

98 FEB 24 AM 9:02
MAIL ROOM
RECEIVED
SERVICES DIVISION

- ACK _____
- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG _____
- LIN _____
- OPC _____
- RCM _____
- SEC _____
- WAS _____
- QTH _____

Enclosures

cc: James D. Wing, Esquire
Counsel for Metropolitan Date County (w/accompanying Petition)

DOCUMENT NUMBER-DATE
02568 FEB 24 98

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Metropolitan Dade County, Order No. 24734, Together with Order Nos. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, Establish that Energy Payments thereunder, including when Firm or As-Available Payment is Due, Are Limited to Analysis of Avoided Costs based upon Avoided Unit's Contractually-Specified Characteristics,

by Florida Power Corporation

PETITION FOR DECLARATORY STATEMENT

Florida Power Corporation ("FPC" or the "Company") hereby petitions the Florida Public Service Commission ("the Commission"), pursuant to Rule 25-22.020, et. seq., F.A.C., as follows.

FOR A DECLARATORY STATEMENT that, under Order No. PSC-97-1437-FOF-EQ entered in Dkt. 961477-EQ, Nov. 14, 1997 (the "Lake Docket"), the Public Utilities Regulatory Policy Act ("PURPA"), Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C, the Commission interprets its Order No. 24734 entered in Dkt. 910401-EQ, July 1, 1991 (the "Approval Docket"), approving the Negotiated Contract for the Purchase of Firm Capacity and Energy between the Company and Metropolitan Dade County (the "Negotiated Contract" or "Contract" between FPC and "Dade"), to require that FPC:

T#592900.6 022398 9:49 am

DOCUMENT NUMBER-DATE

02568 FEB 24 1998

1

FPSC-RECORDS/REPORTING

- (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
- (B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments;
- (C) Use the actual chargeout price of coal to FPC's Crystal River ("CR") plants 1 and 2, resulting from FPC's prevailing mix of transportation, rather than the mix of transportation in effect at the time the Contract was executed or some other mix, to compute the level of firm energy payments to Dade.^{1/ 2/}

^{1/} It should be noted that the Lake Order is the subject of a petition filed by NCP Lake Power, Inc. and Lake Cogen, Ltd., protesting the proposed PSC action. FPC has opposed that petition. In light of the language and reasoning in the Lake Order expressing the Commission's views concerning the determination of energy payments, the need for the declaratory statement requested by this Petition will remain regardless of what action is taken on Lake's pending petition.

^{2/} Although FPC has filed this Petition as a request for a declaratory statement and believes that is the appropriate procedural vehicle for resolving these issues, if the Commission is of the view that the scope of this proceeding should be expanded, FPC would not object to converting the matter to one brought under Fla. Stat. 120.57. FPC would only request that, notwithstanding such a revised procedural format, the Petition proceed expeditiously in light of the ongoing dispute with Dade and Montenay (as described below).

NAME AND BUSINESS ADDRESS

The petitioner's name and business address are:

Florida Power Corporation
3201 34th St. South
P.O. Box 14042
St. Petersburg, FL 33733-4042

All notices, pleadings and correspondence should be directed to:

Chris S. Coutroulis, Esquire
Florida Bar No. 300705
Robert L. Ciotti, Esquire
Florida Bar No. 333141
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER
Post Office Box 3239
777 S. Harbour Island Blvd.
Tampa, Florida 33602

James A. McGee, Esquire
Florida Bar No. 0150483
FLORIDA POWER CORPORATION
3201 34th St. South
Post Office Box 14042
St. Petersburg, Florida 33733-4042

CONTEXT AND BACKGROUND

The 1991 Approval Docket

1. On March 19, 1991, FPC presented to the Commission eight negotiated contracts it had reached with Dade County, Lake Cogen, Pasco Cogen, Auburndale Power Partners (El Dorado), Orlando Cogen Limited, Ridge Generating Station, Mulberry, and Royster. As contemplated by these contracts, FPC asked the Commission to approve the stream of energy payments to be made thereunder. On July 1, 1991, by Order No. 24734, the Commission issued its order of approval.

The 1994 Pricing Docket

2. On July 21, 1994, FPC initiated the Pricing Docket, petitioning the Commission for a declaratory statement that FPC's reliance on the pricing mechanism specified in § 9.1.2 of the negotiated contracts with certain QFs complied with Rule 25-17.0832(4)(b), F.A.C., and the Commission's 1991 Order No. 24734 approving those contracts. On October 31, 1994, FPC amended its petition to seek a determination that its manner of implementing the pricing mechanism in § 9.1.2 was lawful under § 366.051, Fla. Stat., and complied with Rule 25-17.0832(4)(b), F.A.C. as well as Commission Order No. 24734.

3. A number of affected QFs, including Dade, filed motions to dismiss on the ground that the Commission lacked jurisdiction to consider the petition. By its Order dated February 15, 1995, the Commission granted those motions and dismissed the petition. Although stating that § 9.1.2 of the negotiated contracts "establishes the method to determine when cogenerators

are entitled to receive firm energy payments or as-available energy payments," the Commission concluded that, absent a showing of fraud, misrepresentation or mistake, it would not exercise continuing control to interpret the meaning of a disputed term in a negotiated contract it had previously approved. However, as the Commission later noted, the Order in the Pricing Docket "recognized the Commission's continued responsibility for cost recovery review." Lake Order at 3. No appeal was taken from the Commission's Order.

The Commission's Order Rejecting the Lake Settlement

4. As the Commission is aware, following the dismissal of FPC's petition in the Pricing Docket, the Circuit Court for Lake County entered summary judgment against FPC stemming from the Company's methodology for determining when firm or as-available energy payments are due under § 9.1.2. NCP Lake Power, Inc. v. FPC, Case No. 94-2354-CA-01 (Lake Cir. Ct.). The Lake Court held that, in determining whether to pay at the firm or as-available rate, FPC must make payments "with reference to modeling the operation of a real, operable 1991 Pulverized Coal Unit, having the characteristics required by law to be installed on such a unit as well as all other characteristics associated with such a unit...." It found that FPC had breached the Lake Contract by determining whether to pay the firm or as-available rate using only the characteristics specified in the contract.^{3/}

5. On December 6, 1996, after the Lake Court's Order was entered, FPC and Lake entered into a settlement agreement, compromising their dispute. The agreement was presented

^{3/} With respect to energy payments, FPC's Contract with Dade is identical, in all material respects, to its contract with Lake.

to the Commission for approval by FPC's petition in Dkt. No. 961477-EQ, dated December 12, 1996. By Notice of Proposed Agency Action, dated November 14, 1997, the Commission exercised its jurisdiction to decline approval of the settlement on the grounds that the payments to Lake thereunder would be too high in relation to the Commission's view of avoided costs and the energy payments that would otherwise be due under the parties' existing contract as previously approved. The Lake Order, as well as the governing statutes and rules cited above, provides the impetus for the instant petition.

FPC's Determination of Avoided Energy Costs

6. Florida Power is obligated to ensure that its ratepayers pay no more than avoided cost for energy. Thus, consistent with its understanding of the Lake Order, as well as PURPA, Fla. Stat. § 366.051, and Rule 25-17.0832, FPC looks to the Commission's Order in the Approval Docket and the energy pricing provision of the Negotiated Contract to determine the energy payments made to Dade.

7. Section 9.1.2 of the Contract defines the pricing mechanism for determining, on an hour-by-hour basis, when Dade is to be paid the Firm Energy Cost and when Dade is to be paid the As-Available Energy Cost. It also provides the mechanism for calculating the level of the Firm Energy Cost. Section 9.1.2 provides as follows:

Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with the Contract In-Service Date, the QF will receive electric energy payments based on the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii)

during all other hours, the energy cost shall be equal to the As-Available Energy Cost.

8. On July 18, 1994, Florida Power notified Dade that, effective August 1, 1994, it would be implementing the pricing mechanism specified in the Contract to establish the periods when as-available energy payments, rather than firm energy payments, would be made. FPC has been paying Dade for energy under its Negotiated Contract in this fashion since August, 1994, and continues to do so. Also, over the years since the Negotiated Contract was signed, FPC has instituted changes in its transportation of coal to CR 1 & 2, increasing the mix of rail transportation vis a vis barge to those facilities.

9. FPC determines the operational status of the avoided unit against which Dade's Negotiated Contract is priced by modeling it in FPC's computer dispatch pricing runs. In conducting the computer analysis of its system, Florida Power implements the Contract pricing mechanism in a manner consistent with the established methodologies for dispatching units and calculating avoided energy costs. The status of the avoided unit, as defined by the payment options elected in each of the negotiated contracts which were the subjects of the Approval Docket (Options A, B or C),^{4/} is determined by a production cost model (WesCouger, a type of economic optimization model; formerly Unit Commit), which is standard practice in the electric utility industry. The production cost model enables FPC to "dispatch" its generating

^{4/} Option A, which Dade chose, provides for energy payments based on operating characteristics specified in Section 9.1.2 (the Avoided Unit Fuel Reference Plant fuel price, times a 1.0 Fuel Multiplier, times the Avoided Unit Heat Rate, plus the Avoided Unit Variable O&M). Option B provides the same energy payment except that the Avoided Unit Variable O&M is removed and included in the capacity payment. Option C provides the same energy payment except that the Avoided Unit Variable O&M and 20% of the Avoided Unit fuel price are removed and included in the capacity payment.

plants (i.e. determine their on/off status) and manage its power purchases on a least-cost basis during each hour. The model operates by comparing the cost of the avoided unit to all other available resources and selecting a group of units and power purchases that minimize the total cost of meeting the demand for electricity. In so doing, the model determines whether the "avoided unit" as contractually defined is on or off, and also determines the level of the as-available energy payments when the model indicates that the avoided unit does not operate.

10. More specifically, to implement § 9.1.2, FPC first determines the cost of the amount of power in a given hour FPC generated from its own resources. Then, FPC increases system load to include the amount of power provided by various cogenerators, including Dade, that same hour. An additional system resource is added to FPC's generation in this step: a unit with the characteristics and numeric values specified in the Dade (and other similar) cogen contracts in § 9.1.2 and the referenced appendices. Thus, for this resource, FPC utilizes the applicable monthly chargeout price of fuel, the fuel multiplier, the average heat rate, and the variable operation and maintenance expense specified in the Negotiated Contract.^{5/} The operational status of the avoided unit (i.e., whether it would be scheduled on-line or off-line) is based solely on these specified proxy characteristics as set forth in § 9.1.2 and its referenced appendixes. The determination of the avoided unit's operational status is not affected by the myriad of other or additional characteristics, which are not contained in the Negotiated Contract but which could have been associated with a coal unit, had it actually been built instead of avoided.

^{5/} Variable O&M, as specified in the contract, is included for this unit as well as for FPC's actual steam generation units. Variable O&M is also a component of the firm energy price as specified in 9.1.2.

11. The production cost model is then run again. If the avoided unit, represented by the proxy characteristics set forth above, would have been dispatched (i.e., turned on) at any level of output, Dade and the other similarly situated cogens receive the firm energy price for all the power they supplied to FPC in that hour. If this unit would not have been dispatched at any level of output, the energy provided by Dade and the other similarly situated cogens is added to the as-available block size for those hours. An as-available energy price is then calculated and paid to Dade and the other similarly situated cogens for the power they provided that hour.

12. The methodology used by FPC is required by § 9.1.2 because that section serves as a pricing proxy for determining when firm or as-available payments are due. It does this by calling for an hour-by-hour determination of the on/off status of the avoided unit, based upon the enumerated four characteristics of that unit that are specifically set forth in the Contract and reflect its avoided cost. FPC believes it would be improper to assume a myriad of other or additional characteristics or values for them that are not contained in the Contract, or to consider them in making the on/off determination. FPC also believes that its method for dispatching the avoided unit, based solely on the enumerated characteristics in the Contract, is consistent with the way the Commission has interpreted Rule 25-17.0832(5), the energy pricing rule that governs *standard offer contracts*.^{6/} The methodology yields a result that closely approximates FPC's avoided energy cost, since it compares, on an hourly basis, FPC's system marginal cost

^{6/} Prior to amendment in 1997, the Rule appeared as 25-17.0832(4).

with the avoided energy cost from the unit (represented by the Contract's firm energy price), and, with limited exceptions,^{7/} effectively pays the lesser of the two.

13. In calculating the level of the firm energy payments when they are due under § 9.1.2 of the Contract, FPC utilizes the actual delivered price of coal at the Fuel Reference Plant specified in the Contract, namely CR 1 & 2. The mix of transportation of coal, as between rail and barge, has changed over time in favor of rail, thereby lowering overall transportation costs to CR 1 & 2 and hence the level of the firm energy payments calculated in accordance with the formula in § 9.1.2. The Contract nowhere constrains FPC's ability to alter the transportation mix to CR 1 & 2 in order to reduce the delivered price of coal to these units, and it is entirely appropriate -- and indeed expected -- for FPC to take such action.

^{7/} For example, during shoulder hours, when system loads are increasing or decreasing, Dade may receive the firm energy price even though it is slightly higher than the as available price, since more efficient FPC units have not yet been optimally dispatched and the avoided unit is not entirely off. Moreover, under the implementation of § 9.1.2 in the Contract, the cogenerator will receive payment at the firm energy cost for all power that it supplies in a particular hour, even though the "avoided unit" may have been partially dispatched during that hour. Finally, the cogenerators are added to the as-available block size to determine the as-available energy cost only after a determination has been made that cheaper sources of power are available elsewhere on FPC's system and, hence, the "avoided unit" was not dispatched at all. When this occurs the size of the capacity block that must be met increases, potentially requiring more expensive sources of power to meet that capacity and, as a result, driving up the as-available energy price to the point that it might exceed the firm energy price. Nonetheless, the cogenerators will be paid at the higher as-available cost because the "avoided unit" was "off." As can be seen, these limited exceptions work to the benefit of the cogenerators.

Dade's and Montenay's View

14. Dade and the operator of its solid waste resource recovery facility, Montenay-Dade Ltd., through its general partner Montenay Power Corp. (collectively "Montenay"), do not agree that FPC's methodology is called for by § 9.1.2 and the Commission's Order approving the Negotiated Contract.

15. According to Dade and Montenay, the Negotiated Contract does not even set forth the method for determining when firm or as-available payments are due. Their position is that FPC must make firm energy payments for all hours that a real, operable "bricks and mortar" generating unit would have operated. In modeling this "real" unit, Dade and Montenay contend that the Company should not consider the express terms of § 9.1.2 and the enumerated proxy characteristics therein, but should instead determine its operational status by taking into account a myriad of other or additional operating characteristics and constraints that may have been associated with such a unit had it actually been built. These characteristics are nowhere contained in the Contract. Dade and Montenay similarly take the position that Rule 25-17.0832(5)(b), which applies to standard offer contracts, contemplates that a determination of the applicable avoided unit's operational status must likewise be made by dispatching a fully characterized unit as though it had actually been built, and not on the basis of a narrower set of proxy characteristics used to represent the unit and its avoided cost.

16. In addition, Dade and Montenay urge that FPC is prevented from shifting its mode of coal transportation so that the cost of coal to CR 1 & 2 is reduced from that which existed at the time the Negotiated Contract was executed unless, by changing the transportation mix, FPC reduces its overall transportation costs to all its Crystal River coal facilities (CR 1 & 2, and

CR 4 & 5). Dade and Montenay urge that, because the coal component of § 9.1.2 looks to coal costs for CR 1 & 2 only, in the absence of such an overall effect, the result of shifting transportation would be to lower payments to Dade and Montenay while not altering FPC's overall coal transportation cost.

17. Dade's and Montenay's positions, both with respect to the firm versus as-available determination and the coal transportation mix, are directly at odds with the Commission's Order denying approval of the settlement in Lake, as well as PURPA, Fla. Stat. 366.051, and Rule 25-17.0832.

18. As the Commission is aware, the dispute between FPC and Dade is the subject of *on-going litigation -- in federal and state court -- where the gravamen of plaintiffs' claims is that FPC has allegedly underpaid Dade, and is continuing to underpay it, for energy supplied under the Contract, and that these underpayments are part of an anticompetitive scheme in violation of federal antitrust law.*^{8/} This past summer, both FPC's and plaintiffs' cross motions for summary judgment in the state court action on the contract issues were denied by Order dated September 19, 1997. Unified discovery is ongoing with respect to both cases. Pursuant to the federal court's scheduling order, the federal case has been set for the court's October 19, 1998 trial calendar. The state court action has not yet been set for trial, but may be tried in advance of the federal action since the issues in that case are subsets of the issues in federal court.

^{8/} In addition, as part of their antitrust claims, Dade and Montenay allege that FPC's initiation of the Pricing Docket before the PSC in 1994 constituted "sham" litigation and a further anticompetitive act.

**THE COMMISSION'S ORDER IN LAKE, AS WELL AS THE SUPREME COURT'S
OPINION IN PANDA, ESTABLISH THAT THE COMMISSION HAS
JURISDICTION TO INTERPRET ITS EARLIER ORDER APPROVING
DADE'S NEGOTIATED CONTRACT WITH RESPECT TO ENERGY PRICING**

19. In its Order denying approval of the Lake Settlement, the Commission considered arguments advanced by the cogenerator that it lacked jurisdiction to disapprove the settlement because such a determination would necessarily involve it in interpreting what the Contract meant at the time it was initially approved, and that would be inconsistent with its Order in the Pricing Docket holding that it had no such jurisdiction. (Lake Order at 12) The Commission rejected those arguments, determining that its jurisdiction was broader than it had believed at the time the Pricing Docket Order was entered. (Id. at 16) The Commission cited to several more recent decisions from other jurisdictions, holding that a commission does have jurisdiction to interpret the legal meaning of a term in a PURPA contract it previously approved, irrespective of whether it is a negotiated contract:

The decision rendered by the New York Commission with respect to the Crossroads contract [a negotiated contract], and the decision by the Federal District Court suggests that the Commission's jurisdiction in the area of clarifying/explaining/interpreting its contract approvals is not as limited as previously thought.

Id. at 16.

[D]ecisions of the New York Public Service Commission are illustrative of the Commission's continuing jurisdiction to interpret and clarify its approvals. ...

* * *

[A]ll three New York determinations have a common and irrefutable similarity with the contract proposed for modification: All involve a question that turns on what was meant when the contract was approved, and not on the determination of disputed facts and the application of those facts to an unambiguous contract

provision. In this docket, the resolution of the energy pricing issue, in so far as the cost-effectiveness of buy-out/modification is concerned, turns on what the contract meant at the time it was approved. No party has cited to any authority which suggests that this type determination is not within the Commission's jurisdiction.

Id. at 11-12.

20. Agreeing with the New York decisions, the Commission concluded that a request to confirm that FPC is properly paying for energy under an approved negotiated contract (such as the one with Lake or Dade) "is inextricably linked to what the Commission approved ...," and that it has jurisdiction "over matters addressing the interpretation and clarification of past policies and approvals." Id. at 10.

21. These observations by the Commission are consistent with the Florida Supreme Court's recent decision in Panda-Kathleen, L.P. v. Clark, et al. as the Florida Public Service Commission, and Florida Power Corp., 701 So. 2d 322 (Fla. 1997). In that case, the Court reasoned that the "Commission's approval of a contract term conflicting with the Commission's rule as to avoided cost ... would have violated PURPA and section 366.051, Florida Statutes (1991)." Id. at 328. This is because PURPA and the Commission's rules governing negotiated contracts permit cogenerators to "sell energy to utility companies at but not exceeding full avoided cost, ... [which] is the cost that a utility avoids by purchasing electrical power from a QF rather than generating the electrical power itself or purchasing the power from another source." Id. at 324. Thus, as Panda makes clear, the Commission has jurisdiction to clarify its orders and to construe its rules in order to ensure that contracts and payments thereunder do not exceed avoided cost.

**UNDER THE COMMISSION'S ORDER IN LAKE, FPC IS LIMITED TO
PAYING DADE FOR ENERGY BASED UPON AVOIDED COSTS AS REFLECTED
IN THE CONTRACT BY THE AVOIDED UNIT'S SPECIFIED CHARACTERISTICS**

22. FPC believes that, under the reasoning of the Lake Order, the Commission's approval of the Negotiated Contract limits FPC to paying Dade for energy based upon avoided costs as reflected in the Contract itself. Thus, FPC must determine the avoided unit's operational status -- which governs whether the firm or as-available payment is due in any given hour -- on the basis of the proxy characteristics specified in § 9.1.2, rather than on the basis of other or additional characteristics that may have been associated with such a unit had it actually been built. (As noted, the Lake Contract is identical to the Dade Contract with respect to its energy payment provisions). Specifically, the Commission wrote:

FPC's modeling of the avoided unit, which results in a mixture of firm and as-available energy prices, more closely approximates actual avoided energy costs and is consistent with this Commission's order approving the existing contract. As with all avoided cost calculations, Section 9.1.2 of the Contract was constructed as a pricing proxy and was not intended to be fully representative of a real operable "bricks-and-mortar" generating unit.

Id. at 4-5.

In this case, approval of the original contract recognized that energy payments would be calculated using the parameters specified in the Contract and were not fixed.

Id. at 9.

23. These statements by the Commission clearly indicate that FPC is limited to paying Dade for energy based upon the avoided unit's contractually-specified characteristics, not other or additional characteristics that may have been associated with an actually-built, operable, bricks and mortar unit. The Contract's characteristics govern the operational status of the

avoided unit (and thus whether the firm or as-available rate is to be paid). That being so, it likewise follows that the Commission will evaluate requests for cost recovery of energy payments based upon its interpretation of the Contract as approved because "where cost recovery review finds that a utility is requesting recovery of QF payments that exceed its full avoided costs, those costs are subject to disallowance." Id. at 13.

RULE 25-17.0832(5)(B), WHICH GOVERNS ENERGY PAYMENTS UNDER STANDARD OFFER CONTRACTS, FURTHER SUPPORTS THE CONCLUSION THAT THE COMMISSION'S APPROVAL ORDER CONTEMPLATES ENERGY PAYMENTS THAT ARE DETERMINED WITH REFERENCE ONLY TO THE AVOIDED UNIT'S CONTRACTUALLY-SPECIFIED CHARACTERISTICS

24. On its face, Rule 25-17.0832(5)(b), as amended to its present substantive form in 1990, closely resembles § 9.1.2 of the Contract, and both Dade and FPC agree that the proper construction of that Rule, which governs energy payments under standard offer contracts, is instructive with respect to § 9.1.2. In fact, John Seelke, FPC's former manager of cogeneration, later a paid consultant with some of the cogenerators in litigation with FPC, has testified that the Rule was the basis for the language of § 9.1.2. Seelke dep. Dade litigation, "Seelke Dep.," at 766 (a copy of the cited portions of the Seelke deposition transcript are attached as Ex. A). It is thus appropriate for the Commission's statement to comment on the correct construction of Rule 25-17.0832(5)(b) as it applies to energy payments, since that is not only highly relevant to the on-going dispute between FPC and Dade, but is also relevant to the proper interpretation of the Commission's Order approving the Negotiated Contract.

25. The history and subsequent construction of the Rule clearly shows that the Rule does not require full-scale modeling. Prior to the amendment to Rule 25-17.0832(5)(b) in 1990,^{9/} the Rule explicitly required utilities such as FPC to pay cogenerators for energy based on a cost comparison of a contract's firm energy price with the utility's as-available (i.e., system incremental) energy cost. This is the so-called "lesser-of" methodology and, under it, there is no computer simulation of whether the avoided unit would or would not have operated.

26. In 1989-90, the Commission held rule-making hearings to consider whether to approve an amendment to Rule 25-17.0832(4)(b) [now 25-17.0832(5)(b)] suggested by staff. At those hearings, a number of the Commissioners were concerned that the language of the proposed amended rule appeared to require fully characterized modeling of the avoided unit, which would leave open numerous terms and much room for dispute and complication. PSC Dkt. No. 891049-EU; Hearing Transcript, Rule Hearing Vol. IV, p. 444-45 (a copy of the cited portions of the hearing transcript are attached as Ex. B). As Tampa Electric Company's witness described that perception:

[The proposed rule] seems to imply that in our dispatch of our system, we would have to do some additional calculations which would require dispatching a hypothetical avoided unit, and so our dispatchers, on an hourly basis, would have to actually put in the characteristics of an avoided unit in their dispatch and make many additional calculations in order to determine whether that avoided unit would have operated.

^{9/} As noted, before 1997, the Rule appeared in the Florida Administrative Code as 25-17.0832(4)(b).

Tr. 445. But Seelke responded to these concerns and corrected the misperception, explaining that the amendment to the rule did not change its essential character and that full-scale modeling of the avoided unit was unnecessary:

. . . I think that both the proposed rule and the existing rule hit the same spot but is just stated differently . . . [T]o do the lesser of we would have to figure out whether the unit would have been. We would have to have the heat rate and what not. And I think, in terms of whether it would have been economically dispatched in the language in the proposed rule . . . it's a comparison of cost. So I would interpret them to come to the same point as well. It's just semantics as to whether we are actually going -- and I think Gordon, maybe you were looking at it as if we actually had to dispatch it, and I was never going to do that, conceptually. I was just going to look at the cost and get to the same point.

Tr. 462-463 (emphasis supplied).

27. The fact that the proposed amendment essentially was a refinement to the "lesser of" cost comparison rather than a complicated operational dispatch exercise was noted throughout the hearing. For example, the "intent" of the proposed amendment was described by Seelke as a "simple comparison that [can be] incorporated into our economic dispatch and pricing," which compares "whether the avoided unit has a cost that's lower than the incremental cost curve . . . for that particular hour." Tr. 449. Seelke contrasted the simple comparison called for by the Rule to a complex operational dispatch exercise which "you would not want to take on." Id. Similarly, the dispatch determination for a combined cycle avoided unit was explained as "being the combined cycle's cost, which is a function of its heat rate and fuel cost, which gets compared with your system incremental cost. So it's really a cost comparison." Tr. 448.

28. At several points in the hearing, Seelke conceded that Staff's proposed rule change (which he has testified is substantively the same as the rule in the form actually passed) is the

lesser-of approach and, in fact, that a consensus to that effect was reached among the various witnesses appearing before the Commission. Seelke Dep. p. 775-76; 781. For example, Commissioner Easley directly asked: "Well, what I am hearing is that the lesser of, or whatever the easiest language with the block, gets you to the same thing, and that nobody has any big objection to that." Seelke responded: "Right exactly." Tr. 463-464.

29. Earlier, Seelke described the new proposed rule and the old explicit lesser-of rule as "six of one, half dozen of the other." Tr. 464. Thus, in summarizing where the participants had ended up, Commissioner Easley explained:

Well, it sure sounds to me like you don't need an awful lot of post-hearing comments other than to make sure in your own calculations that it is half a dozen of one and six of the other. My inclination would be to go with whatever is the easiest way of getting you to the same answer.

Tr. 463.

30. Seelke now suggests that one ambiguous passage in Florida Power's post-hearing submission reversed his and the other witnesses' clear explanations to the Commission at the rule making hearing concerning the operation of the amendment. Based on this, Seelke now says the Rule as amended by the Commission does require full-scale modeling of the avoided unit -- and not the simple cost comparison described above -- even though there is no evidence that the Commission intended to do anything other than to accomplish the consensus reached at the hearing. Seelke Dep. p. 789-92. FPC strongly disagrees with Seelke's revised view. The important point, however, is that the Commission, not any individual, has the jurisdiction to interpret what its own rules mean -- and it has done so here.

31. The Commission's application of the Rule (as amended after the rule-making hearing) demonstrates that it interprets the Rule as not requiring full-scale modeling of the avoided unit. In its 1991 order (No. 24989, Dkt. No. 910004-EU) approving several utilities' (including Florida Power's) standard offer contracts, the Commission specifically recited the characteristics required by the Rule to determine capacity and energy payments. The only characteristics in the Commission's order relevant to energy payments and thus, as the Commission explained, required to comply with the Rule for calculating energy payments, are the type of fuel and its cost, the average annual heat rate, and variable O&M, including an escalation rate. No other energy pricing characteristics are contained in Order No. 24989.

32. Thus, as FPC understands it, Rule 25-17.0832(5)(b) plainly does not require -- and has not been construed by the Commission as requiring -- full-scale modeling of the avoided unit. Rather, to determine energy payments, it requires a consideration of the four proxy characteristics set forth in Order No. 24989. These characteristics are precisely the same as those found in § 9.1.2 of the Contract and upon which FPC relies in implementing its modeling.

33. In light of the relationship between Rule 25-17.0832(5)(b) and § 9.1.2, as set forth above, FPC submits that the Commission's statement -- that the Energy Pricing Rule applicable to standard offer contracts does not require full-scale modeling of the avoided unit -- would be highly relevant to the contractual disagreement between Dade and FPC.

**UNDER THE COMMISSION'S ORDER IN LAKE, FIRM ENERGY PAYMENTS
UNDER THE CONTRACT ARE CALCULATED BASED UPON AVOIDED COSTS
AS REFLECTED BY THE CHARGEOUT PRICE OF COAL AT
CR 1 & 2, INCLUDING THE ACTUAL TRANSPORTATION COST**

34. FPC also believes that, under the reasoning of the Lake Order, in determining the level of firm energy payments to Dade, it must take into account the actual transportation cost for coal to CR 1 & 2. In the Lake Order, the Commission discussed pricing for coal under the Lake contract and the proposed settlement which altered that pricing mechanism. The Commission stated:

Though the Settlement Agreement eliminates any potential for litigation concerning FPC's coal procurement actions, staff believes this was unnecessary. The contract contains no provisions governing the modes of transporting fuel to the Reference Plant. Furthermore, FPC should take any and all actions which, legally, lowers the cost of providing electricity to its ratepayers [T]his lower cost should be reflected in FPC's calculation of avoided costs.

Id. at 5. These statements by the Commission clearly indicate that, in determining the level of FPC's firm energy payment to Dade when that payment is due under the Contract, FPC should reflect the actual coal transportation cost to CR 1 & 2, not the transportation cost associated with the mix between barge and rail when the Contract was signed, or transportation cost calculated on any other basis.

THE NEED FOR A DETERMINATION AS PRAYED FOR IN THIS PETITION.

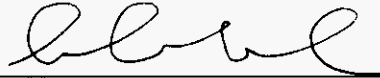
35. In light of all the foregoing, to interpret the Contract as calling for payments in excess of the amounts generated by the methodology used by FPC -- as Dade urges -- would result in payments above avoided cost, in violation of PURPA, the Florida Supreme Court's decision in Panda, and Commission Rule 25-17.0832, which looks to the applicable contract's

"rates, terms and other conditions" as the determinants of avoided cost. In the absence of the Commission's declaratory statement as sought by this Petition, FPC could find itself in a posture where it must pay for energy -- however erroneously -- at a level which is inconsistent with these authorities and the Commission's Order approving the Negotiated Contract, as well as in excess of avoided cost as reflected in the Negotiated Contract. Based on the precedent set in the Commission's Order in the Lake Docket, and the other legal authorities discussed above, this, in turn, could result in a denial of cost recovery by the Commission.

WHEREFORE, FPC requests that the Commission issue a statement that, under Order No. PSC-97-1437-FOF-EQ, PURPA, Fla. Stat. § 366.051, and Rule 25-17.0832, F.A.C, the Commission interprets its Order No. 24734 approving the Negotiated Contract with Metropolitan Dade County to require that FPC:

- (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
- (B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when Dade is entitled to receive firm or as-available energy payments;
- (C) Use the actual chargeout price of coal to FPC's CR 1 & 2 resulting from FPC's current mix of transportation, rather than the mix of transportation in effect at the

time the Contract was executed or some other mix, to compute firm energy payments to Dade.



Chris S. Coutroulis, Esquire
Fla. Bar No. 300705



Robert L. Ciotti, Esquire
Fla. Bar No. 333141
**CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.**
One Harbour Place
P.O. Box 3239
Tampa, Florida 33601-3239
Telephone: (813) 222-7000
Facsimile: (813) 229-4133

AND

James A. McGee, Esquire
Fla. Bar. No. 0150483
FLORIDA POWER CORPORATION
3201 34th St. South
P.O. Box 14042
St. Petersburg, FL 33733-4042

Attorneys for Florida Power Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 96-0594-CIV-LENARD

-----X

METROPOLITAN DADE COUNTY, :
a political subdivision :
of the State of Florida, :
and MONTENAY POWER CORP., :
a Florida corporation, :
as General Partner of :
MONTENAY-DADE, LTD., a :
Florida limited : VIDEOTAPED
partnership, :
: DEPOSITION OF:
Plaintiffs, : JOHN L. SEELKE
: vs. : VOLUME VI
: :
FLORIDA PROGRESS : Pages 708 - 852
CORPORATION, a Florida :
corporation, FLORIDA :
POWER CORPORATION, a :
Florida corporation, and :
ELECTRIC FUELS CORPORATION, :
a Florida corporation, :
: Defendants. :
-----X

TAKEN BY: Attorney for Plaintiffs

DATE: Friday, July 18, 1997

TIME: Commencing at 9:30 a.m.

PLACE: Holland & Knight
Barnett Tower, Suite 1600
One Progress Plaza
St. Petersburg, Florida

REPORTED BY: Donna W. Everhart
CSR, RPR, CP, CM
Certified Shorthand Reporter
Notary Public
State of Florida at Large

COPY

1 Q. Without violating any Public Service
2 Commission rule?

3 A. Correct.

4 Q. I believe you testified, though, that as
5 someone who was extensively involved in the
6 preparation of that contract, it was your intention
7 in Section 9.1.2 of the contract to implement the
8 approach as you understood it of the revised Public
9 Service Commission rules relating to energy pricing
10 to cogens?

11 A. Correct. Can I add a little appendix to
12 that answer? In fact, the standard offer language
13 that was eventually adopted for Florida Power's
14 standard offer contract had the same language as
15 the negotiated contracts with respect to Section
16 9.1.2.

17 Q. Can we agree that the lesser-of approach
18 is hardly unusual or unknown in cogen contracts
19 with utilities?

20 A. It's not unusual with respect to Florida.
21 Again, I'm not sure about other states.

22 Q. Many contracts in Florida are priced
23 based upon a lesser-of approach?

24 A. Many of the -- the standard offer
25 contracts that I've seen are priced on a lesser-of

1 approach. I've seen others that are not.

2 Q. All right. And you haven't seen cogens
3 going out of business because they had a lesser-of
4 contract, have you?

5 A. No. That presumes, though, that they
6 knew they had a lesser-of contract going into the
7 contract. I mean, there's a -- and this is, again,
8 the heart of the dispute that I see existing here
9 is what was agreed to --

10 Q. We're going to get to that.

11 A. -- at the outset.

12 Q. I'm going to give you plenty of
13 opportunity --

14 A. Okay.

15 Q. -- to talk about that some more. Let's
16 continue with a few preliminaries. You also
17 discussed the value of deferral method of pricing
18 cogen contracts; do you recall that generally?

19 A. Yes.

20 Q. And that method backloads the capacity
21 payments so that in the later years of the contract
22 those payments are much higher than in the earlier
23 years?

24 A. That's correct.

25 Q. Is it accurate that that value of

1 deferral method doesn't have anything to do with
2 the use of a lesser-of methodology for energy
3 pricing or some other methodology for energy
4 pricing; it's a separate concept?

5 A. It's a separate concept, yes. I would
6 agree with that.

7 Q. And you weren't trying to suggest that
8 there was some relationship there?

9 A. I hope not.

10 Q. Is it correct that the purpose and intent
11 of the lesser-of rule was to approximate a
12 utility's avoided energy cost for the purpose of
13 paying cogenerators?

14 A. When it was drafted, at that time -- and
15 I probably participated in the drafting of that
16 rule too -- it was an attempt to approximate. And
17 I think the key word here is approximate.

18 Q. All right. Is it fair to say it was also
19 an attempt to approximate the way the avoided unit
20 would have operated?

21 A. Oh, boy. Yes, in a way. And, again,
22 it's the use of the word approximate. I'm going
23 to -- I'm going to -- it was attempting to -- no,
24 let me back up. It didn't attempt to approximate
25 how the unit would have operated. It really

1 attempted to set pricing that was close to the
2 pricing that might have been experienced from a
3 real unit, but it was not -- again, the operation
4 of a real unit and the payments under a real unit
5 were not based on whenever its average price
6 changed to the lesser-of, became less than the
7 as-available price.

8 Q. Well, you would agree that lesser-of was
9 an approach to approximate avoided cost.

10 A. It was an approach to approximate avoided
11 cost. And what happened when the rule changed,
12 Chris, is that the approximation -- in fact, when I
13 looked at the approximation -- and others agreed --
14 that approximation was not a good approximation in
15 hindsight. And the new language that was
16 eventually adopted was a better approximation.

17 Q. Okay. Let's talk about that new
18 language. As I understand your testimony, you're
19 saying that the Commission changed the rule from
20 lesser-of to something else; right?

21 A. Correct.

22 Q. And I believe you indicated to the jury
23 here that that was a change that you advocated;
24 correct?

25 A. Correct.

1 Q. You thought it was pretty important?

2 A. Yes.

3 Q. You submitted pre-filed testimony to the
4 Commission in connection with its rule change
5 proceeding in which that rule and other rules were
6 changed; correct?

7 A. Correct.

8 MR. COUTROULIS: And I believe that's
9 been marked as an exhibit. Do you have that, Bob?

10 MR. CIOTTI: Yeah, I do.

11 BY MR. COUTROULIS:

12 Q. Were you the only FPC witness who
13 submitted pre-filed testimony?

14 A. Yes.

15 MR. COUTROULIS: Let's go off the record
16 for a second while we find this.

17 (Discussion held off the record.)

18 MR. COUTROULIS: Okay. Back on the
19 record.

20 BY MR. COUTROULIS:

21 Q. Mr. Seelke, you have Exhibit 84 in front
22 of you. Is that a copy of your pre-filed testimony
23 in the rule-making proceeding?

24 A. Yes.

25 Q. Is it correct that in your pre-filed

1 testimony you never referred to a change in the
2 rules being made from the lesser-of?

3 A. That's correct.

4 Q. You just don't address that issue at all
5 in the pre-filed; correct?

6 A. That's correct.

7 Q. Now, you do comment on quite a few other
8 issues. For example, you talk about the QF's
9 enhanced ability to develop a viable project
10 through the ability to eliminate risk discounts and
11 capacity payments and to receive levelized as well
12 as early capacity payments; correct?

13 A. Correct.

14 Q. And you talk about the QF's ability to
15 change its billing methods once every five years;
16 true?

17 A. That's true.

18 Q. And you talk about the QF's having their
19 payments from the utility reflect an offset against
20 the bill they get from the utility for things like
21 backup power?

22 A. Correct.

23 Q. And you talk about the various utilities'
24 ability to tie capacity and energy payments to
25 their individual utility avoided cost parameters

1 rather than to the statewide unit?

2 MR. WING: I think you meant QF's
3 ability. I think you said utilities' ability.

4 BY MR. COUTROULIS:

5 Q. I did mean QF's. No, I'm sorry, that's
6 not right. Utilities. Let me -- let me start
7 again. You talk about the utilities' ability to
8 tie capacity and energy payments to their
9 individual avoided cost parameters rather than to
10 the statewide avoided cost parameters; correct?

11 A. That's true.

12 Q. And that was a big point about this whole
13 rule-making proceeding, was it not, moving away
14 from the statewide avoided unit to individual
15 utility avoided costs?

16 A. That's correct.

17 Q. And you also talk about provisions
18 governing energy interchange transactions; correct?

19 A. Correct.

20 Q. But nowhere do you discuss moving away
21 from the lesser-of rule?

22 A. That's true.

23 Q. Even though you viewed that as important?

24 A. Well, this rule-making was -- true. And
25 this rule-making took place -- we had a short time

1 to prepare testimony, is my recollection. We
2 didn't get all the issues on the table at the
3 outset of the rule-making.

4 Q. And that issue got left out of your
5 pre-filed?

6 A. It got left out of the pre-filed.

7 Q. You did regard these proceedings as
8 important?

9 A. Oh, they were important.

10 Q. Very important?

11 A. Yes.

12 Q. You would not have wanted to mislead the
13 commissioners in your oral remarks before them,
14 would you?

15 A. No, I would not have wanted to.

16 Q. Or in your pre-filed testimony?

17 A. That's true.

18 Q. Now, you do recall appearing in front of
19 the Commission and speaking to various aspects of
20 the rule-making that was going forward?

21 A. Yes.

22 Q. Do you recall whether you were under oath
23 on January 11, 1990, when you spoke to the proposed
24 staff's rule regarding energy pricing?

25 A. Yes.

1 Q. Were you under oath?

2 A. Yes.

3 Q. And is it fair to say you wanted to be as
4 precise and accurate as you could be at that time?

5 A. Yes.

6 Q. Isn't it true that you told the
7 Commission that both the proposed staff rule and
8 the existing lesser-of rule hit the same spot but
9 stated a little differently?

10 A. I believe I did. I have looked at my
11 comments that were -- the transcript of that
12 proceeding. And while I -- my objective was to be
13 as clear and precise as I wanted -- as I -- as you
14 stated earlier, I don't believe I met that goal on
15 that particular day.

16 Q. All right. In fairness, why don't we get
17 your remarks and take a look at it so you'll have
18 it in front of you.

19 MR. COUTROULIS: This has not been
20 marked, I believe; correct?

21 MR. CIOTTI: That's correct.

22 MR. COUTROULIS: So we will mark this as
23 the next exhibit.

24 BY MR. COUTROULIS:

25 Q. Can you please identify Exhibit 151?

1 A. It's a transcript of the rule hearing on
2 January 11, 1990.

3 Q. And this was a discussion about staff's
4 proposed rule which would read, quote, "To the
5 extent that the avoided unit would have been
6 economically dispatched, had the avoided unit been
7 in the utility's dispatch, avoided energy costs
8 associated with firm energy shall be the energy
9 cost of the purchasing utility's avoided unit";
10 correct?

11 A. I believe so. Can you -- are you looking
12 at a particular page?

13 Q. I can show you a document if you'd like
14 to refresh yourself on that.

15 A. Yes, I would.

16 Q. You do recall that the version of the
17 rule as actually passed was slightly different from
18 the staff's proposed version?

19 A. Yes.

20 Q. You testified about that in some of your
21 previous sessions?

22 A. Yes.

23 Q. Although I believe you testified that the
24 rule as passed compared to the staff's proposed
25 rule was substantively the same?

1 A. It was very similar, yes.

2 Q. Okay. Substantively the same?

3 A. Yes.

4 MR. COUTROULIS: Let's mark this as the
5 next exhibit, please.

6 BY MR. COUTROULIS:

7 Q. You have in front of you Exhibit 152.

8 Mr. Seelke, I believe I showed you this exhibit in
9 your OCL deposition as well?

10 A. Yes.

11 Q. It appears to be a markup of the staff's
12 proposed rule against the rule as actually passed.
13 If you'd take a look at that. Can you agree that
14 the staff's rule stated, "To the extent that the
15 avoided unit would have been economically
16 dispatched, had the avoided unit been in the
17 utility's dispatch, avoided energy costs associated
18 with firm energy shall be the energy cost of the
19 purchasing utility's avoided unit"?

20 A. Yes.

21 Q. Okay. Now, if you would direct your
22 attention, please, to Exhibit 151. Is that a
23 transcript of a hearing that took place before the
24 Commission on January 11, 1990?

25 A. Yes.

1 Q. And you participated in that?

2 A. Yes.

3 Q. And you were under oath at the time?

4 A. Yes.

5 Q. Can you please look at page 449. Let me
6 direct your attention to line 13. And let me ask
7 you first if these remarks are remarks that you
8 made. And if you need to look back to check that,
9 that's fine.

10 A. They appear to be my remarks, yes.

11 Q. Can you please read your own words
12 beginning on line 13 with the word "we'll," W-E
13 apostrophe L-L.

14 A. "We'll just look at the incremental cost
15 curves every hour and see whether the avoided unit
16 has a cost that's lower than the incremental cost
17 curve, which means it would have been dispatched,
18 or if the unit -- avoided unit's cost is higher
19 than the incremental cost curve that exists for
20 that particular hour, it would not have been
21 dispatched."

22 Q. Go on.

23 A. "That's a sort of simple comparison that
24 we can incorporate into our economic dispatch and
25 pricing. And that's a little -- I think that meets

1 the intent of this proposed staff rule."

2 Q. Did you make that comment at the
3 commission hearing?

4 A. Yes.

5 Q. Please turn to page 463. Let me direct
6 your attention to line 1, beginning with the word
7 "and I think." Do you see that? Line 1.

8 A. Yes. Okay.

9 Q. Are those your remarks? And if you need
10 to look at the previous page, that's fine.

11 A. Yes, they are.

12 Q. At the place I directed you, can you
13 please read out loud what you said to the
14 Commission.

15 A. "And I think in terms of whether it would
16 have been economically dispatched in the language
17 in the proposed rule, I wouldn't propose that the
18 actual dispatch -- that we actually dispatch the
19 unit as a cost. It's a comparison of cost."

20 Q. So you stated, I wouldn't propose that we
21 actually dispatch the unit as a cost, it's a
22 comparison of cost; correct?

23 A. Correct.

24 Q. And then can you continue on that same
25 page through the end of line 12, and please read

1 your remarks out loud.

2 A. "So I would interpret them to come to the
3 same point as well. It's just a matter of
4 semantics as to whether we are actually going --
5 and I think, Gordon, maybe you were looking at it
6 as if we actually had to dispatch it, and I was
7 never going to do that, conceptually, I was just
8 going to look at the cost and get to the same
9 point. So it's six of one and half a dozen of the
10 other."

11 Q. And you made that remark under oath to
12 the Commission --

13 A. Yes.

14 Q. -- on that date; correct? Now, further
15 on down the page, there is a remark attributed
16 to -- attributed to Commissioner Easley on line 23,
17 and he said, "Well, what I am hearing is that the
18 lesser-of, or whatever is the easiest language with
19 the block, gets you to the same thing, and that
20 nobody has any big objection to that." And what
21 did you say, sir?

22 A. I said, "Right, exactly."

23 MR. WING: I'm going to object because
24 you have left off the colloquy beginning with line
25 13 just above that where Commissioner Easley talks

1 about the possibility of post-hearing comments and
2 to verify if what Mr. Seelke is saying at that
3 point really is the case. And I think to be fair
4 you ought to read that into the record as well.

5 MR. COUTROULIS: Mr. Wing, you're free to
6 ask Mr. Seelke questions on redirect if you like.

7 MR. WING: Well, I object to doing this
8 totally out of context.

9 BY MR. COUTROULIS:

10 Q. Now, you were telling the Commission that
11 the staff's recommended rule was essentially the
12 same as a lesser-of determination at that hearing,
13 were you not, Mr. Seelke?

14 A. Yes, I was. But, in fact, in reviewing
15 this transcript later on --

16 Q. You're saying you were wrong?

17 A. I was wrong.

18 Q. Okay. Isn't it a fact that you
19 acknowledged that there was a consensus among the
20 people present at the hearing that the staff
21 version of the rule reached essentially the same
22 result as the lesser-of rule?

23 A. My comment on line -- on page 464 would
24 lead you to that conclusion. The remarks that we
25 talked about earlier were not intended to lead to

1 that conclusion.

2 Q. Which remarks? The remarks that you
3 read?

4 A. Yes.

5 Q. But my question now, sir, is whether you
6 acknowledge that there was a consensus among the
7 people present at the hearing that the staff
8 version of the rule reached essentially the same
9 result as the lesser-of rule?

10 A. Yes, there was.

11 Q. Okay. And you agreed with that consensus
12 at the hearing, did you not?

13 A. Yes.

14 Q. Now, is it correct that what you're
15 saying about the improper -- about the proper
16 interpretation of the new rule in this deposition
17 that it requires full-scale modeling of the avoided
18 unit is not what you told the Commission back in
19 1990 when it was considering adopting the rule
20 change?

21 A. That's true.

22 Q. You didn't discuss at the Commission any
23 need to model the avoided unit and you did not
24 discuss how to go about full-scale modeling of the
25 avoided unit as though built, installed, operated,

1 and fully characterized; correct?

2 A. No, that's not true.

3 Q. Sir, why is that not true?

4 A. That's not true. Because it goes back to
5 the interpretation of the remarks that I made
6 earlier and which, unfortunately, I characterized
7 differently at the end. The concern being
8 expressed by -- let me go back to where I first
9 read remarks about --

10 Q. Sure. The first thing I called your
11 attention to was page 449.

12 A. Okay.

13 Q. I believe we started at line 13.

14 A. That's correct. The concept that's
15 discussed in line 13 is similar to -- and I'd have
16 to go back to a memorandum that I did for
17 Mr. Watson and perhaps amplify what I intended
18 there. That's explained more fully.

19 Q. Just so we're clear, Mr. Watson is one of
20 the attorneys who was representing Pasco?

21 A. Pasco, yes.

22 Q. And you were consulting with them?

23 A. That's correct.

24 Q. All right.

25 A. The concept here is that if you wanted to

1 determine whether a unit would have been operated,
2 that you didn't necessarily -- that one simple way
3 to do that was to look at the incremental cost of
4 the system --

5 Q. Yes.

6 A. -- the as-available energy cost --

7 Q. Yes.

8 A. -- and ask yourself would the unit have
9 had an incremental energy cost between its minimum
10 and maximum load point that would have been equal
11 to or greater than that as-available, but not the
12 unit's average cost, the unit's incremental cost.
13 When I say whether the unit has a cost that's lower
14 than the incremental cost curve, the concept that's
15 left out here and what I believe I intended was an
16 incremental cost concept, not an average cost
17 concept. And unfortunately, in this hearing
18 process the discussion that we're talking about
19 here, Chris, involves calculus concepts, which are
20 virtually impossible to transmit to a Commission in
21 a hearing process.

22 The concept, if we go back to -- and I
23 can explain this fully in a memorandum that I did
24 to Mr. Watson -- using just the incremental cost
25 data, incremental cost curves of a unit, which are

1 not present in a pricing formula, just using those
2 cost curves and incremental fuel cost data, we can
3 make a very good approximation on whether the unit
4 would have been operating or not operating without
5 going through a full-scale model dispatch.

6 Q. That's not what you said here though, is
7 it?

8 A. No, that's not what I said. And that's
9 why we had post-hearing comments.

10 Q. All right. But what you're now saying is
11 if you were to compare system incremental cost,
12 which is the as-available energy cost, to
13 incremental cost of the avoided unit, that would be
14 a way to approximate when the avoided unit would
15 run and when it would not run?

16 A. That's correct. And, in fact, that
17 whole --

18 Q. Excuse me.

19 MR. WING: Wait. No, wait. Wait. Go
20 ahead. You can finish your answer.

21 A. Well, let's let -- let me let Chris
22 finish, and then I'll --

23 BY MR. COUTROULIS:

24 Q. I want to -- I want to let you finish as
25 well. This is cross-examination, but I'm trying to

1 be as --

2 A. Sure.

3 Q. -- as fair as I can, so I apologize if we
4 talk over each other, but we'll try to do the best
5 we can.

6 If you were comparing system incremental
7 costs to incremental costs of the avoided unit,
8 that would be a simple cost comparison, but it
9 would be different from the lesser-of where you
10 compare average cost of the avoided unit against
11 system incremental cost?

12 A. That's correct.

13 Q. Okay. You still wouldn't be looking at
14 other operational parameters of the avoided unit?

15 A. No, you could look at other operational
16 parameters.

17 Q. But not necessarily?

18 A. But not necessarily.

19 Q. All right.

20 A. Because -- and if I can go back to a --
21 this concept is more fully explained in a
22 memorandum that I did for Mr. Watson that's dated
23 November of 1994.

24 Q. Do you need to get that memorandum in
25 order to explain this?

1 A. Well, I'd like to -- I'd like to show
2 this. Yes, I would, I'd like to -- I'd like to
3 refer to that.

4 Q. But do you need -- do you need the
5 memorandum in order to refresh your recollection
6 about this, how this works?

7 A. Yes. I would like to see the
8 memorandum --

9 Q. All right.

10 A. -- to refresh my recollection.

11 Q. Do we need to go off the record to do
12 that?

13 A. Let's do that for just one minute.

14 Q. I will let you do that.

15 (Discussion held off the record.)

16 MR. COUTROULIS: We're back on the
17 record.

18 BY MR. COUTROULIS:

19 Q. And you now have in front of you a copy
20 of this memorandum that you indicated you needed to
21 look at?

22 A. That's correct.

23 Q. And for the record, that's something -- a
24 memorandum, actually, that you wrote to Attorney
25 Ansley Watson representing Pasco dated November 11,

1 1994; correct?

2 A. Correct.

3 Q. And when you wrote this memorandum, you
4 were acting as a consultant to Pasco and being
5 compensated for your time accordingly; correct?

6 A. That's correct.

7 Q. All right.

8 A. One of the concepts here that could have
9 been implemented -- and I'm explaining in this
10 memorandum, I'm on page 7, Paragraph 5, which is
11 referring to the same types of issues we've been
12 talking about. It's referencing my quote on page 8
13 of FPC's petition, which this is a petition in this
14 Docket No. 940771-EQ, which I don't have that in
15 front of me, but I believe we're talking about the
16 same kinds of language that this refers -- that
17 particular reference refers to the rule-making
18 proceeding and quotes my discussion on the same day
19 here. So I believe we're talking about the same
20 concept here.

21 But this -- if one went through a look
22 at -- and this example what I did is I actually
23 took incremental cost of this coal -- of the coal
24 plant that is in the CFR contract and incremental
25 fuel cost and developed an estimate of how many

1 hours a unit might be turned off, if you will,
2 considered off just based on a cost comparison of
3 incremental cost of the unit versus system
4 as-available energy cost.

5 Q. Just so we're clear, the CFR contract is
6 not the same contract form as the Dade contract, is
7 it?

8 A. No, it's not.

9 Q. The CFR contract has an incremental -- an
10 incremental heat rate curve, does it not?

11 A. Yes.

12 Q. The Dade contract doesn't have one at
13 all?

14 A. That's true.

15 Q. Okay.

16 A. The concept here, though, that I was
17 expressing at the rule-making hearing was to
18 compare the cost, the incremental cost as we've
19 discussed earlier, the incremental cost of the unit
20 versus the system incremental cost, which would
21 give you a judgment as to whether the unit would
22 have been off or on. It would have given you an
23 estimate. And in this particular case, one can
24 estimate how many off hours might occur just based
25 on a strict cost comparison. But that method

1 ignores operational considerations, and I'm quoting
2 from page 8.

3 Q. Page 8 of your memo?

4 A. Of my memorandum here. Regarding
5 start-up and shut-down. And, for example, if the
6 cost dropped -- I'm not quoting at this point, but
7 ~~it's a lesser-of, not~~
8 mean you'd shut the unit off for an hour. And
9 there were -- you can take into account minimum
10 down time with this method. And -- and override,
11 if you will, when a unit might have been shut
12 down. So this method allows one to model, in
13 effect, on a realtime basis the implementation of
14 contract language of a real unit.

15 Q. What you're talking about here is a
16 comparison of incremental cost of the avoided unit
17 versus incremental cost of the system?

18 A. That's right.

19 Q. And that's not what you do on a
20 lesser-of?

21 A. That's not what you do on lesser-of. And
22 the error that I made in here was acknowledging
23 that the two concepts were the same.

24 Q. You said they were six of one, half a
25 dozen of the other?

1 A. That's right.

2 Q. That means the same; right?

3 A. That's right.

4 Q. So you were wrong when you said that?

5 A. I was wrong on that. That's right.

6 Q. You didn't intentionally mislead the
7 Commission, did you?

8 A. No. It was a long day, I'm sure, and I
9 just -- and I think the decision was made at that
10 point in time the company, and I -- Betty Easley,
11 as I recall, was on a let's get -- we were on a
12 time frame to get things moving along with the
13 Commission. It was not the time to start
14 explaining calculus to the Commission and the
15 concepts I've discussed here. The time to do that
16 was in post-hearing comments.

17 Q. But you certainly wouldn't want to say
18 something is the same as a lesser-of, despite the
19 fact you don't want to explain calculus to the
20 Commission, if you were sitting there thinking to
21 yourself it's not lesser-of, so you were confused,
22 were you not?

23 A. No, I wasn't confused. I think at that
24 point in time I made a statement that was not
25 correct and accurate, and --

1 Q. Several statements that weren't correct
2 and accurate?

3 A. No. The only statement I made that was
4 not correct and accurate.

5 Q. Okay. So the statement -- the statement
6 that we read before on page 449, that is correct
7 and accurate?

8 A. That is correct if you consider that
9 we're looking at the -- whether the avoided unit
10 has a -- if you would insert in your reading of
11 that sentence, look at the incremental cost curves
12 every hour to see whether the avoided unit has an
13 incremental cost that's lower.

14 Q. So for that statement to be accurate, I
15 have to insert some words?

16 A. You'd have to insert that word in there,
17 right.

18 Q. Okay. And what about for the statement
19 it's six of one, half a dozen of the other, what
20 would I have to do to make that accurate?

21 A. You'd have to take it out of there.

22 Q. Okay. And where you agreed with
23 Commissioner Easley and said "right, exactly," we'd
24 have to take those words out too; right?

25 A. Which -- where is that? Yeah.

1 Q. We'd have to change "right, exactly" on
2 page 464 to wrong, would we not?

3 A. Yes, we'd have to say wrong.

4 Q. Okay. And when you said on page 463, one
5 of the other places we looked at, on line 8, "I
6 think, Gordon, maybe you were looking at it as if
7 we actually had to dispatch it, and I was never
8 going to do that, conceptually, I was just going to
9 look at the cost and get to the same point," is
10 that right or wrong?

11 A. That's correct.

12 Q. So you were never going to dispatch it,
13 you were just going to do a cost comparison?

14 A. I was going to do a cost comparison, but
15 my cost comparison would have taken into account
16 the parameters that would result in the same -- it
17 would have gotten to the same point of a full
18 economic dispatch.

19 Q. And those parameters would include
20 start-up and shut-down, for example?

21 A. They would include -- which would --
22 those parameters would have included those costs
23 which would have been reflected in the minimum up
24 and down time consideration.

25 Q. You didn't talk about minimum up and down

1 time --

2 A. No, we didn't talk about that.

3 Q. -- at this hearing, did you?

4 A. No.

5 Q. Or start-up and shut-down cost?

6 A. No.

7 Q. Or ramp rates?

8 A. No.

9 Q. Or the spot price of coal?

10 A. No, didn't talk about that. But that's
11 all incorporated -- spot price of coal is
12 incorporated in the concept of incremental cost of
13 the unit. If you insert the word "incremental" on
14 page 449 in front of the word "cost," the avoided
15 unit cost, if it's the avoided unit incremental
16 cost, then that concept of spot coal prices is
17 incorporated in it automatically.

18 Q. Okay. So if we incorporated a word that
19 wasn't there, you're saying maybe somebody would
20 have figured out that that new word encompassed a
21 lot of other things within it as well?

22 MR. WING: Object to the form.

23 BY MR. COUTROULIS:

24 Q. Right?

25 A. Yes.

1 Q. Now, you wrote this memo to Mr. Watson
2 four and a half years after -- after this hearing
3 before the Public Service Commission?

4 A. Yes.

5 Q. Okay. By the way, you indicated before
6 that maybe you were tired. In fact, when you made
7 these remarks, it was pretty early in the morning
8 because this hearing started at 8:30, didn't it?
9 If you look at page 442, it says "Hearing
10 reconvened at 8:30 a.m."; right?

11 A. Yes, it does.

12 Q. And that's on page 442, and the remarks
13 we were looking at conclude by page 464, so you're
14 talking about 22 pages. How long would it take
15 to --

16 A. It was --

17 Q. -- make 22 pages of remarks at a hearing
18 like this?

19 A. I'm sure we were still in the, you know,
20 in the morning session, so --

21 Q. Okay. Pretty early in the morning?

22 A. Probably.

23 Q. Okay.

24 A. But we'd been going for three days.

25 Q. Okay. Now, did the rule change that the

1 Commission adopted move away from the statewide
2 avoided unit and go to the individual utility's
3 avoided cost?

4 A. Yes.

5 Q. And that was something that you thought
6 was a good idea?

7 A. Yes.

8 Q. And the rule change accomplished that?

9 A. That's correct.

10 Q. Do you recall whether the rule change
11 also changed the as-available block size that you
12 would use to calculate the as-available price?

13 A. Yes, it did.

14 Q. And that was something you were
15 advocating as well, was it not?

16 A. Yes.

17 Q. You were suggesting that the as-available
18 block size should be variable so that every
19 cogenerator being paid the as-available rate in any
20 given hour would be included in the block size?

21 A. That's correct.

22 Q. And actually you talk about that on page
23 450; right?

24 A. 450 of the --

25 Q. Of the hearing, yes, sir. Yes. Let me

1 direct your attention to lines 21 and 22.

2 A. Yes.

3 Q. Okay. Now, do you know if Florida Power
4 actually does that?

5 A. Do you mean do they do that today?

6 Q. Yeah. Maybe I can sharpen my question a
7 bit. Do you know whether or not when Florida
8 Power, in administering these cogen contracts like
9 the Dade contract, makes a determination that the
10 avoided unit would be off whether it adds the
11 amount of cogen power to the as-available block
12 size for purposes of calculating the as-available
13 price?

14 A. No, I don't know if they do or not.

15 Q. Do you know whether or not Florida Power
16 pays Dade based on the same type of lesser-of
17 approach that existed before the rule change?

18 A. The information that I was given with
19 respect to the payments would indicate that that
20 was the case. But there was not a clear statement
21 of exactly what the payment methodology was, as I
22 recall, by Florida Power.

23 Q. Do you know if we were, for example, to
24 look at the payments being made to Dade, whether
25 we'd find payments at certain hours at the

1 as-available price where the as-available price is
2 higher than the firm price?

3 A. I don't know if you would or not.

4 Q. Okay. Fair enough. Now, at this
5 Commission hearing, Mr. Seelke, is it correct that
6 there was also a discussion about paying for part
7 of a cogenerator's energy at the firm rate and part
8 at the as-available rate depending on the level of
9 dispatch that the avoided unit would have been run?

10 A. I don't recall that. It may have been.

11 Q. Okay. We'll get to the Dade contract in
12 a moment, but as you understand the Dade contract,
13 does it call for a simple on/off determination?

14 A. Yes.

15 Q. So as you understand that contract, if
16 the avoided unit, using whatever method is proper
17 to make the determination, would have been on at
18 any level, then the cogenerator gets paid the firm
19 price for all of the power that it sends to Florida
20 Power?

21 A. That's right.

22 Q. So, for example, let's say you had 500
23 megawatts of cogen power that had signed up against
24 these contracts in a given hour, and let's just say
25 hypothetically that the avoided unit would have

1 been operating at its minimum load level, and let's
2 say hypothetically that's 100 megawatts, even
3 though Florida Power, had it built the unit, would
4 only have been meeting its system needs from that
5 unit to the tune of 100 megawatts, all 500
6 megawatts of cogen power are paid at the firm
7 rate --

8 A. That's correct.

9 Q. -- as though the avoided unit had been
10 operating at 500 megawatts?

11 A. True.

12 Q. And the reason for that is to make the
13 contract easy to administer; correct?

14 A. Yes.

15 Q. Did you want to make a comment?

16 A. I wanted to make one comment.

17 Q. Yes.

18 A. The cost impact of that is not very
19 great.

20 Q. Is that because of differences in the
21 heat rate?

22 A. Yes. Because the actual heat -- the
23 actual average cost of operating a unit at 100
24 megawatts is very high. It's higher than the firm
25 energy rate.

1 Q. But as you sit here, you can't say that
2 if instead of in my example paying the cogenerators
3 at the firm rate for all 500 megawatts, you had
4 paid them firm only for 100 megawatts and
5 as-available for the 400, and in paying them firm
6 for that 100 you would use the appropriate heat
7 rate, you can't say that that would be a wash, can
8 you?

9 A. Yes, I can. Let me explain why. Because
10 the study that was done by Al -- it was an exhibit
11 I was shown here. I can't remember his name.

12 Q. Art Nordlinger?

13 A. Art Nordlinger, excuse me. The study
14 that was done by Art Nordlinger -- Nordlinger, is
15 that how it's pronounced?

16 Q. I think so.

17 A. Okay. Art's study got to the heart of
18 that issue and said let's look at the contracts in
19 term of what we're paying them under the -- what
20 you just characterized as this pay them the full
21 cost even if it would have been dispatched lower,
22 let's look at that versus the actual -- a
23 400-megawatt unit that was fully modeled.

24 Q. Was that the dispatchability study --

25 A. Yes.

1 Q. -- you talked about?

2 A. Yes.

3 Q. Isn't it true that there was some --

4 MR. WING: Did you -- did you finish
5 your answer?

6 A. Well, the result of that study, as I
7 recall, showed that the modeling of the on/off
8 switch, if you will, in the contract and the
9 payment of a fixed price was virtually identical to
10 the full dispatchability pricing, if you will, of a
11 coal plant.

12 BY MR. COUTROULIS:

13 Q. Based on whatever assumptions
14 Mr. Nordlinger may have made at the time?

15 A. Correct.

16 Q. And isn't it true that Ms. Brousseau did
17 some studies that reached a different conclusion
18 about that?

19 A. She did.

20 Q. So there wasn't a uniformity of view
21 about this?

22 A. No, there was not, in terms of that was
23 one of the issues there.

24 Q. Okay. Now, you mentioned the
25 post-hearing comments, and I think Mr. Wing did as

1 well. Why don't we take a look at those.

2 MR. COUTROULIS: Have these been marked
3 yet?

4 THE DEPONENT: Plaintiff's Exhibit 86.
5 BY MR. COUTROULIS:

6 Q. Can you identify that document, please.

7 A. It's a document dated February 8, 1990,
8 it's entitled "Post-Hearing Comments of Florida
9 Power Corporation in Docket No. 891040-EU," which
10 is the rule-making docket we've been discussing.

11 Q. Now, on page 7 in Point 5, you talk about
12 Florida Power Corporation's proposed firm energy
13 language is substantially similar to the staff's
14 proposal. Do you see that?

15 A. Yes.

16 Q. That's a comparison of the language in
17 the rule as it actually got passed compared to the
18 staff's version of the rule which was the subject
19 of that hearing we've been talking about?

20 A. Yes.

21 Q. And those are the two that you said were
22 substantively the same?

23 A. Yes.

24 Q. Okay. Now, you write -- well, let me
25 back up for a second. Did you write this comment?

1 A. I think I drafted this entire section,
2 yes.

3 Q. Okay. You write on page 5 -- and I'm
4 looking at your remarks under Point 5 in the first
5 paragraph, second to last line. Quote, "Our
6 language is broader and can account for operation
7 which deviates from strict marginal operating cost
8 economics," quote. Do you see that?

9 A. Yes.

10 Q. Isn't it true, Mr. Seelke, that what you
11 were referring to there was the exceptional
12 circumstance where Florida Power Corporation would
13 not dispatch its capacity based on incremental fuel
14 cost of its units which is the usual way that
15 utilities do it, but might have to consider some
16 other aspects as well; for example, the need to
17 operate a unit during low load periods or minimum
18 load periods; is that correct?

19 A. Yes. Things other than marginal cost
20 came into play, just the strict incremental cost.

21 Q. For example, in your Pasco position, I
22 think you gave as an example that you might have a
23 unit that you have to operate during low load
24 periods and that might not reflect strict
25 incremental fuel cost dispatch?

1 A. That's true.

2 Q. But the usual way you dispatch units is
3 based on fuel cost; correct?

4 A. Correct. Let me --

5 Q. Okay.

6 A. Let me, though, amplify it.

7 Q. Sure.

8 A. There's two aspects of dispatching. One
9 is when a unit has been started, what's the best
10 level to operate it at. That's a pure marginal
11 fuel economic consideration. The second is whether
12 to have the unit on line or not. That involves
13 more than just marginal fuel economics.

14 Q. That has to do with what level you would
15 run it at?

16 A. No. That has to do with -- whether you
17 have a unit on line or not has to do with the
18 start-up and shut-down considerations.

19 Q. Those are those operational parameters
20 you talked about?

21 A. That's right.

22 Q. The ones that you did not discuss with
23 the Public Service Commission?

24 A. That's right.

25 Q. Okay. Now, I think we've agreed that you

1 did not mention the change that you perceived from
2 the lesser-of rule in your pre-filed testimony and
3 you testified incorrectly in front of the
4 Commission when you said that the staff's proposed
5 rule was the same as the lesser-of; correct?

6 A. Correct.

7 Q. But you did think there was a change from
8 lesser-of?

9 A. Yes.

10 Q. All right. Please look at Exhibit 122.
11 It's one of the exhibits that Mr. Wing showed you,
12 and it should be in the book.

13 MR. WING: It seems to end at 95. I
14 don't know what happened to our 96 plus.

15 MR. COUTROULIS: Okay. If we need to go
16 off for you to find that, that's fine.

17 (Discussion held off the record.)

18 BY MR. COUTROULIS:

19 Q. Mr. Seelke, have you had a chance to get
20 a copy of Exhibit 122?

21 A. Yes.

22 Q. That's something you talked about with
23 Mr. Wing in one of your previous sessions?

24 A. Yes.

25 Q. Now, is it correct that the cover page to

*Statewide
plan
re 487
Statewide vs.
under rule re 487*

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

In the Matter of	:	Docket No. 891049-EU
Amendment of Rules 25-17.081,	:	<u>RULE HEARING</u>
25-17.082, 25-17.0825,	:	
25-17.083, 25-17.0831,	:	<u>THIRD - DAY</u>
25-17.0832, 25-17.0833,	:	
25-17.0834, 25-17.087,	:	<u>VOLUME - IV</u>
25-17.088, 25-17.0882,	:	
25-17.0883, 25-17.089.	:	Pages 441 through 578

RECEIVED

Division of Records & Reporting

JAN 30 1990

Florida Public Service Commission

FPSC Hearing Room 106
Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0871

Thursday, January 11, 1990

Met pursuant to adjournment at 8:30 a.m.)

BEFORE: COMMISSIONER MICHAEL MCK. WILSON, Chairman
COMMISSIONER GERALD L. GUNTER
COMMISSIONER JOHN T. HERNDON
COMMISSIONER THOMAS M. BEARD
COMMISSIONER BETTY EASLEY

APPEARANCES:

(As heretofore noted.)

REPORTED BY: CAROL C. CAUSSEUX, CSR, RPR and
JOY KELLY, CSR, RPR
Official Commission Reporters

**DEFENDANT'S
EXHIBIT**
#151
SPELKE 2-10-97

DOCUMENT NO.
00920

1 to those ideas and language when they file their posthearing
2 comments.

3 MS. MILLER: And we'll slip that date a week, also.
4 We'll slip the CSAR, basically, a week on the rest of the stuff.

5 CHAIRMAN WILSON: All right.

6 MS. HARVEY: We've got one final issue that I'd like to
7 address in. Rule 25-17.0832, and that's avoided energy payments.
8 That's on Page 29, starting on Line 17.

9 Staff has proposed that avoided --

10 COMMISSIONER GUNTER: What page are you on?

11 CHAIRMAN WILSON: 29.

12 MS. HARVEY: Page 29. Staff has proposed that during
13 the times that the avoided unit would have been dispatched, that
14 qualifying facilities be paid the energy cost of that avoided
15 unit; and when it wouldn't have been dispatched, that QFs be paid
16 as-available energy. That is my understanding of what the
17 original Rule 25-17.083 was meant to do in pricing firm energy
18 based on the lesser of the energy of the avoided unit and
19 as-available energy costs.

20 We have had some questions and comments that the
21 wording as it is now in the proposed rule is -- would be pretty
22 difficult to actually implement, and I'd like to get some
23 comments from the parties on whether they think they could
24 implement this language. Various questions arise, such as, how
25 do you determine whether the voided unit would have been

1 dispatched in any given hour? What availability factor should be
2 assumed for the avoided unit? Should seasonal maintenance be
3 considered? There is a lot of questions that arise, and I'd like
4 to hear comments from the parties on this issue.

5 MR. GILLETTE: Commissioners, speaking for Tampa
6 Electric, we expressed some concerns to the Staff about the
7 language in the rule because it seems to imply that in our
8 dispatch of our system, we would have to do some additional
9 calculations which would require dispatching a hypothetical
10 avoided unit, and so our dispatchers, on a hourly basis, would
11 have to actually put in the characteristics of an avoided unit in
12 their dispatch and make many additional calculations in order to
13 determine whether that avoided unit would have operated.

14 We're concerned that that complicates our dispatchers'
15 hour-by-hour activities unnecessarily, and that we believe that
16 the "lesser of" language, the language that was in the previous
17 rule which said, "You will pay the cogenerators based on the
18 lesser of the system avoided cost or the cost of the avoided
19 unit," gets you to the same place as the new language with a lot
20 less complication.

21 Some of the difficulty we have with the new language is
22 that Tampa Electric already has cogenerators that are being paid
23 on the statewide standard offer, or will be paid on the statewide
24 standard offer, when those avoided units would have come into
25 service. And we believe that those units, based on the language

1 in the new rule, there are at least two additional calculations
2 that our dispatchers would have to do every hour, and to the
3 extent that there would be another avoided unit that would come
4 out of this hearing for Tampa Electric, there is yet another
5 calculation that our dispatchers would have to do. So we feel
6 like the specter of multiple avoided units for our utilities
7 could really complicate our dispatcher's job. And as Ms. Harvey
8 mentioned, we have a concern that we can run into some real
9 questions on whether or not that avoided unit, that hypothetical
10 unit that we have in our dispatch, really would have been
11 dispatched every hour, and should we have hypothetical forced
12 outages and hypothetical planned maintenance on this unit. So we
13 believe that the "lesser of" language will work on a hourly basis
14 and accomplish what we think the Staff is attempting to
15 accomplish.

16 MR. SEXTON: Without hearing any additional comments
17 from the other utilities on feasibility and stuff, our concern
18 with this rule dealt with, to a large extent, the Commission
19 Staff's proposal to consider combined cycle units as avoided
20 units, and the Commission's decision to do so in the last
21 planning hearing.

22 The essential problem with the way the rule is
23 currently worded in that type of unit is that if the unit is
24 avoided, there is no way to properly price the energy that would
25 have come out of that unit, because there is no real proxy for it

1 on the system.

2 When you have a coal unit, you can do the lesser of
3 because you have got coal units running, and you can identify
4 when you would have expected the avoided unit to be running from
5 a reasonable standpoint, and identify the lesser of because
6 you've got when it's running and when it's not. The base load
7 unit tends to run close to its availability, and with the
8 combined cycle unit running on gas, the energy price is very
9 important, because you are basically trading that off for the
10 capital costs if you're going to be taking a contract for that.
11 And the accuracy of pricing of the energy is important to
12 cogenerators. If you stay with the lesser of, and you don't have
13 a combined cycle unit on system to use as a proxy. You're
14 basically paying as available because there isn't any combined
15 cycle unit that you can say "that unit is on; the avoided unit
16 would have been on. That's your price."

17 Our preference, frankly, just to reduce uncertainty,
18 would just take the projected dispatch of the avoided unit that
19 was used for planning purposes and just spread that across the
20 year. And when that unit would have dispatched, according to the
21 hypothetical, those hours is what you would pay the avoided unit
22 price. The hours that it would not have been running, you'd pay
23 the as-available price. That's a simpler model than actually
24 having to do a hypothetical dispatch and do the additional
25 computations.

1 As far as whether the unit really would dispatch or
2 not, you're basing your prices for cogenerators on the assumption
3 that it's going to dispatch just this model; that it's going to
4 have the availabilities and forced outage rates, and the economic
5 factors that are written down on paper. And I think if it was
6 good enough for planning, it's good enough for putting an energy
7 price in, at least for purposes of saying when you expect it
8 would have run had it been built.

9 MR. SEELKE: Commissioners, I'd like to comment on Mr.
10 Sexton's comments.

11 We're already looking, on our system at contracts with
12 two avoided unit dates; the '92 avoided coal plant and a '95
13 avoided coal plant, both of which have slightly different heat
14 rates to them. And we're already anticipating being able to
15 handle multiple avoided units.

16 From the standpoint of not being able to properly
17 represent a combined cycle if you don't have one on your system,
18 that's really not a problem because it winds up being the
19 combined cycle's cost, which is a function of its heat rate and
20 fuel cost, which gets compared with your system incremental cost.
21 So it's really a cost comparison. And you can do that whether
22 you're burning gas or any other fuel, and if you don't have that
23 on your system, it still can blend into the economics. It's just
24 like we do broker quotes, whether we're buying something from
25 another utility that we don't have on our system is irrelevant.

1 It's a cost issue.

2 So I don't think that's a real concern and we can do it
3 hourly.

4 The economic dispatch, though, involves really two
5 considerations on the unit. One is was the unit started up? And
6 second, what level did it run if it was started?

7 And I think that start-up considerations on multiple
8 avoided hypothetical units would make the dispatcher's life very
9 complicated in terms of calculating recommitment schedules, on
10 and on and on. I can see that would be a spot at which you would
11 not want to take on.

12 The decision, though, if you ignored that complexity,
13 and said "We'll just look at the incremental cost curves every
14 hour and see whether the avoided unit has a cost that's lower
15 than the incremental cost curve, which means it would have been
16 dispatched, or if the avoided units cost is higher than the
17 incremental cost curve that exists for that particular hour, it
18 would not have been dispatched." And that's sort of a simple
19 comparison that we can incorporate into our economic dispatch and
20 pricing. And that's a little -- I think that meets with the
21 intent of the proposed Staff rule.

22 I might -- I've got some suggested wording additions
23 that are not in my comments on the proposed rule that I'd just
24 like go ahead and introduce at this time. It's on
25 25-17.0832(4)(b). Page 29.

1 The language I would like to add starts with Line 28,
2 "To the extent that the avoided unit would not have been
3 economically dispatched, the avoided energy cost shall be the
4 as-available avoided energy cost of the purchasing utility."
5 That's fine. What I'd like to add is this language: "During
6 these periods, firm energy purchased from qualifying facilities
7 shall be treated as as-available energy for purposes of
8 determining the megawatt block size in 25-17.0825(2)(c)," which
9 where the safely energy calculations are referenced. That gets
10 us a block size that's variable for as-available energy
11 calculations, and essentially when the unit would not have been
12 dispatched, the price that's paid -- but the QF is generating --
13 the price that's paid at those hours is basically an as-available
14 price for the energy that's being delivered. And that gives you
15 a variable block size from the standpoint of calculating the
16 as-available energy.

17 MS. HARVEY: We support that. I think that in terms of
18 calculating the as-available energy block size, every qualifying
19 facility who is being paid the as-available energy price should
20 be part of that block size. So I support that language.

21 MR. SEELKE: And when the as-available price is above
22 the voided unit's price, then the block size diminishes by that?

23 MS. HARVEY: Yes. When they are being paid their
24 avoided unit energy cost they should not be part of the
25 as-available energy block size.

1 MR. SEELKE: We are in the same thinking.

2 In terms of addressing availability, forced outage
3 rates and maintenance, I hadn't really considered that until I
4 saw some comments of some other parties here. And I'll have to
5 think about how to do that. It may wind up being for forced
6 outages we merely adjust the block size to an expected value
7 block size. That's one thought on the top of my head. But I'd
8 have to do some thinking, and I'd like to reserve the right to
9 put some language in on our comments that I think I'd like to
10 just go back after the hearing and think about.

11 MR. CORN: John, the only thing, when I think about,
12 and maybe discuss here too, is some of the discussion seems to be
13 centering around the whole block of the units is dispatched.
14 What are we going to do, or how should we approach then if the
15 unit is only partially dispatched?

16 MR. SEELKE: Dennis, that's a good point, and another
17 refinement. If we had the avoided unit, if we specified not only
18 the full load heat rate but incremental heat rates, we could
19 reflect partial dispatch of the avoided unit, which would be --
20 would be another refinement. We could handle that.

21 MR. CORN: Yeah, I see it would be, and if -- that most
22 likely it could be handled -- I just wondered if the price that
23 you would end up paying would be that much different than the
24 price you would get to on the "lesser of" comparison.

25 MR. SEELKE: I don't think it would be that much

1 different because there would be those hours where the
2 incremental heat rate of the unit -- Commissioners, what Mr. Corn
3 is referring to is those hours where it's -- you're in a twilight
4 zone between the unit is off or the unit is fully running, and
5 you've got the -- the avoided unit would have been partially
6 running and partially loaded, and to reflect that refinement
7 requires that we -- instead of having just a flat out operating
8 cost, we reflect the operating cost over the range of possible
9 outputs from the avoided unit

10 MR. CORN: Rather than just having a heat rate set
11 point then you have to have the whole incremental heat rate.

12 MR. SEELKE: You have to have the whole incremental
13 heat rate. And that's how we dispatch our own facilities. I
14 don't think it would be a problem to put it in there. I don't
15 think it would change the pricing that much, because I feel you
16 would be refining the calculation within a band of hours that you
17 were neither fully loaded nor shutdown.

18 MR. CORN: Yeah.

19 MR. SEELKE: I don't mind doing it in order to get a
20 little more accuracy. The computer doesn't mind doing it either,
21 so.

22 MR. BEASLEY: Commissioners, we would suggest to you
23 that the existing language of the rule produces dollar for dollar
24 the same level of compensation that all of these various
25 recalculations and permutations would require. And Mr. Gillette

1 is prepared to explain to you how that would --

2 COMMISSIONER BEARD: Before you do that let me ask
3 Staff, because the first question that pops in my mind is what
4 are we fixing here other than the opportunity for a nuclear
5 engineer to be employed in these calculations? What's broken?

6 MS. HARVEY: Basically what's broken is that we're
7 getting more and more cogeneration there, and we're facing
8 questions if the qualifying facility, or the avoided unit, would
9 have been fully dispatched under the existing language, there is
10 no problem. If the qualifying facility would not have been
11 turned on under the existing language, there is no problem, he
12 gets paid as-available. If the QF would have been partially
13 turned on, then instead of getting paid, say, 50% based on his
14 fuel that that avoided unit would have been turn on, and 50%
15 based on as-available energy costs, he would be getting paid 100%
16 as-available energy costs. So I think he would be getting paid a
17 little bit lower price under the existing rules than if we
18 reflect the dispatch of that avoided unit.

19 COMMISSIONER BEARD: Well, for example, on Christmas
20 Eve what would the cogenerator have been getting paid?
21 Significantly less than they --

22 MS. HARVEY: Yes. On Christmas Eve the
23 incremental --

24 COMMISSIONER BEARD: How would you use that as an
25 example? In other words, we know on Christmas Eve they --

1 MS. HARVEY: They would have been paid the energy cost
2 of their own unit, because the incremental energy cost of the
3 utility was much higher than that of the avoided unit; therefore,
4 he would be paid as if he were fully dispatched based on his own
5 energy cost. Basically it's --

6 COMMISSIONER BEARD: That's right. They get paid the
7 lesser of.

8 MS. HARVEY: And the lesser of is meant to mimic the
9 dispatch of the unit.

10 COMMISSIONER BEARD: That raises the question. There
11 has been comments about cogenerators getting paid -- I guess
12 that's just on as-available they get paid system average period?

13 MS. HARVEY: They get incremental energy cost for
14 as-available. If they are an as-available energy customer they
15 get the incremental cost; what it would cost to generate the next
16 block of power.

17 COMMISSIONER BEARD: Not system average.

18 MS. HARVEY: No.

19 COMMISSIONER EASLEY: How far down do you take these
20 refinements before they are cost effective? I mean, you know, is
21 this one of these things where it levels itself out without all
22 of the refinements, or -- I mean we have been trying to eliminate
23 all the peaks valleys and various and sundry things. With the
24 refinements are we creating peaks and valleys, or will it finally
25 straight line itself?

1 MS. HARVEY: That's basically why I'm asking this
2 question. I think that the language that we've proposed has a
3 potential of much more -- of more accurately paying the
4 qualifying facilities what they should be paid. And the question
5 is refining it to that extent going to cost so much that it's not
6 worth it; that we're already close, very close to being accurate,
7 and that this refinement isn't worth it. And the question is, is
8 it worth it?

9 COMMISSIONER EASLEY: Because I'm hearing about all the
10 refinements but I'm not hearing about whether it's worth it. In
11 fact, one company said it really isn't going to make that much
12 difference.

13 MR. GIACALONE: Commissioners, may I make a proposal or
14 suggestion? Perhaps the easiest way to do it to make it less
15 complex is, you take all the fixed costs and you put it in the
16 fixed portion of the payment, and take the energy cost, take the
17 average -- I think most of us would be willing to live with the
18 average -- that would sort of make it easy for the utilities to
19 calculate. It would certainly make it easier for us to figure
20 out what we're getting paid, and it would make it a hell of a lot
21 less complex.

22 MR. NIXON: Be glad to. (Laughter)

23 MR. SEIDMAN: Oh, please, no. We wouldn't live with
24 that.

25 MR. GIACALONE: The other suggestion, which would make

1 it just as easy, is flow through the actual cost; The actual
2 field cost, let it flow right through.

3 MR. SEELKE: I think that's what we're trying to figure
4 out how to determine is the actual fuel cost, which is a function
5 of how the unit would have been dispatched.

6 MR. GIACALONE: I'm saying the actual fuel cost on the
7 unit that you've got. As consumed.

8 MR. SEELKE: We're talking about a hypothetical unit
9 that would have been built --

10 MR. GUYTON: I'm talking about the unit that I built.

11 MR. SEELKE: Your unit or my unit?

12 MR. GIACALONE: My unit.

13 MR. SEELKE: I'm not going to pay your actual fuel
14 cost.

15 MR. GIACALONE: Why not?

16 MR. SEELKE: You're going to have to compete under an
17 umbrella of total avoided cost. If your fuel costs are out of
18 line, the heck with you.

19 MR. GIACALONE: Suppose there was a mechanism where we
20 could get together --

21 MR. SEELKE: You want to fuel adjustment mechanism for
22 your project and I'm not giving it to you. No way, pal. You
23 want to be a utility; file an application and earn 13% return.

24 CHAIRMAN WILSON: I wish you wouldn't beat around the
25 bush. (Laughter)

1 MR. FREY: I've got some Citrus people who wish there
2 were some more utilities at home.

3 MR. DEAN: Could I ask Mr. Seelke a question about his
4 proposal?

5 Does your proposal account for the fact that there is a
6 lot more blocks of QF -- if hypothetical units are put in your
7 dispatch, your system incremental heat rate never really changes,
8 except for the purposes of paying the lesser of calculation. How
9 do you account for the fact that you add 200, 400, 600, 800 maybe
10 1,000 megawatts of power on different units with different heat
11 rates over the next six to eight years. Then in 1998, when
12 you're doing this calculation, those units have never really been
13 put into your heat rate curve; so you never have really added
14 that last unit.

15 MR. NIXON: Jim, even though those units are not built,
16 that power is being automatically put into our system and all of
17 those firm contracts are being telemetered from the generator for
18 output into our system so we know what they are doing. The units
19 that we have on line are being dispatched to serve the rest of
20 the load that's needed.

21 So, therefore, it's our incremental price of our units
22 that are left that's being compared. So we are not dispatching
23 those units, they are automatically flowing in kilowatt hours
24 into our system, in energy. And now we have a fixed price that's
25 calculated based on a heat rate at cents per million BTUs of fuel

1 cost. So that creates a number that's there. Although it
2 changes monthly but it's consistent every hour. So then it's
3 just a simple comparison with each unit's individual cost
4 compared to your incremental hourly cost.

5 So you could have ten dozen different units with
6 different heat rates and different fuel costs, and all of them
7 could be compared to your incremental system cost hourly, and
8 figure out under the proposed language or the existing language,
9 with just a modification of the block size, to account for that.
10 So it's a comparison that we are talking about, and the utility
11 is going to continually dispatch its system based on its units,
12 and the load that it sees that it needs to supplement.

13 MR. DEAN: But my point is that that is a static
14 analysis; in fact, if you had added that first block of
15 cogeneration, your own system heat rate would have been altered,
16 and with the next block would have been altered again. So what
17 we are doing is fixing it.

18 MR. NIXON: It's already altered.

19 MR. SEELKE: It's already altered by the fact that the
20 units -- if we are serving, and let's suppose that we have 2000
21 megawatts of QF purchases on an hour and we have a load of 6000
22 megawatts, so we had 4000, our incremental heat rate of our
23 generation exceeds 4000 megawatts. It's already altered by the
24 fact that there is 2000 megawatts of purchases coming in. And as
25 we -- I mean, if all those 2000, and suppose they are not

1 telemetered in just assumption, our dispatcher would think he is
2 serving 4000 megawatts of load with his system.

3 MR. NIXON: And the point, to get back to what I think
4 you were saying, if we put them into our dispatch, we would put
5 them in at that average fuel price that we were paying, all
6 right, which is that heat rate times that price of fuel. And
7 let's say that we did that. What happens when the incremental
8 cost goes below that price and we want to call that cogenerator
9 and say, "How about move your unit down?"

10 Well, we won't be able to do that so we will end up
11 paying him. He will stay on the line; we will moderate our
12 units, and, therefore, our incremental costs, incremental hourly
13 costs, at that point should go below the cost of that unit. And
14 that's when we pay him the as-available price.

15 When the incremental cost of our units goes above that,
16 that's when we pay him that lesser of that fuel cost of that
17 unit. So it doesn't need to be in the dispatch to make it work.
18 It will always be a static, even if you included it, it would
19 still be a static comparison because I don't have the control to
20 have him swing his unit.

21 MR. BEASLEY: Commissioner, if I could hand out this
22 chart, it might help to see graphically what we are talking
23 about.

24 CHAIRMAN WILSON: Paul, I wasn't clear from your
25 comments whether you are supporting the Staff proposal or the

1 existing language in the rule, or whether you are in a position
2 to do either one.

3 MR. GILLETTE: Commissioners, while Mr. Beasley is
4 handing those out, I'll go ahead and get started. What this
5 example is designed to do is to demonstrate that, in the case
6 that we show here, that the hourly incremental costs would be the
7 same whether you use the new language, which is the avoided unit
8 operated method, or the lesser of method. And what we are
9 showing here is a little example on the Tampa Electric System
10 where we show that over on the left-hand side the avoided unit
11 operated method, if we assume for a second that our avoided unit
12 is a combined cycle unit, we would dispatch Big Bend first, then
13 Gannon Station, and then the hypothetical combined cycle before
14 our CTs, based on the incremental costs that we show there on the
15 left-hand side of \$15 per megawatt hour for Big Bend; 20 for
16 Gannon; 40 for the combined cycle; and \$60 per megawatt hour for
17 the CT.

18 The third bar there is the load level, and you can see
19 that what our dispatchers would do would be to make one run, one
20 dispatch calculation with the cogeneration in, and one
21 calculation with it out. And the net result is shown on the
22 bottom of the page there. The avoided cost would be one-half at
23 Gannon Station's cost of \$20 per hour; one-half at the combined
24 cycle unit's cost at \$40 per megawatt hour; and the net effect
25 under the Staff's proposed language would be \$30 per megawatt

1 hour.

2 Over on the right-hand side we show the old language
3 the lesser-of language, and you can see that the combined cycle
4 unit is not shown in the dispatch in this case. In that
5 situation the avoided cost calculation would show one-half Gannon
6 Station's cost and one-half ACT's cost. But since the CT has a
7 greater cost, \$60 per megawatt hour, then the avoided unit, which
8 is \$40 per megawatt hour, we would cost that portion of the
9 energy at the combined cycle unit's cost. And the net effect,
10 then, would be the same. We would pay the cogenerators \$30 per
11 megawatt hour.

12 So we believe that the lesser-of language gives the
13 cogenerator, dollar for dollar, the same amount as the new
14 language, while simplifying the calculations significantly.

15 COMMISSIONER EASLEY: Does anybody have any
16 disagreement with that?

17 MR. CORN: I don't necessarily have a different
18 opinion; in fact, I would pretty much support those two
19 calculations. But you should end up with fairly close the same
20 value, as far as an hourly incremental basis.

21 The language that Staff has proposed, and that I think
22 John has modified to incorporate more of this unit being included
23 in the dispatch, is something you always see as part of
24 individual negotiations, particularly if the utility ended up
25 having dispatch control over the unit. What the utility would

1 have to do is come up with a calculation. But as far as doing it
2 on a standard offer basis, the lesser-of comparison, I think,
3 gets you to the same point.

4 MS. HARVEY: I don't know if everyone is finished, but
5 I think that this is probably a good issue to deal with in
6 post-hearing comments. It's one that I think some people would
7 like to have a little more time to think about. It's pretty
8 complicated, and I would suggest that people, if they have
9 opinions on which language they like and why, that they address
10 that in their post-hearing comments.

11 CHAIRMAN WILSON: Paul, are you all in a position to
12 respond today to Staff?

13 MR. SEXTON: I think our initial response is perhaps
14 that Florida Power Corporation's proposal sounds workable, and
15 would achieve the result that we are looking for.

16 MR. BEASLEY: Would that proposal include doing all
17 this unnecessary dispatching? That's our concern.

18 MR. NIXON: No.

19 MR. SEELKE: We can deal with the lesser-of method. I
20 think that both the proposed rule and the existing rule hit the
21 same spot but is just stated differently. And I think the --

22 COMMISSIONER GUNTER: I think one of them requires a
23 little more effort.

24 MR. SEELKE: No, to do the lesser of we would have to
25 figure out whether the unit would have been. We would have to

1 have the heat rate, and whatnot. And I think, in terms of
2 whether it would have been economically dispatched in the
3 language in the proposed rule, I wouldn't propose that we
4 actually dispatch the unit as a cost -- it's a comparison of
5 cost.

6 So I would interpret them to come to the same point as
7 well. It's just a matter of semantics as to whether we are
8 actually going -- and I think, Gordon, maybe you were looking at
9 it as if we actually had to dispatch it, and I was never going to
10 do that, conceptually, I was just going to look at the cost and
11 get to the same point. So it's six of one and half a dozen of
12 the other.

13 COMMISSIONER EASLEY: Well, it sure sounds to me like
14 you don't need an awful lot of post-hearing comments other than
15 to make sure in your own calculations that it is half a dozen of
16 one and six of the other. My inclination would be to go with
17 whatever is the easiest way of getting you to the same answer.

18 MR. SEELKE: I agree.

19 Commissioner, I think the only addition I would -- I
20 think the variable block size for as-available needs to be
21 incorporated in either the existing language or the proposed
22 language, because I think that's a refinement.

23 COMMISSIONER EASLEY: Well, what I am hearing is that
24 the lesser of, or whatever is the easiest language with the
25 block, gets you to the same thing, and that nobody has any big

1 objection to that.

2 MR. SEELKE: Right, exactly.

3 MR. CORN: Right, and we would support also that you
4 need to change the variable block size as well.

5 CHAIRMAN WILSON: Okay. Next?

6 MS. HARVEY: That's all I have on that rule. I don't
7 know if anyone else has any other issues.

8 CHAIRMAN WILSON: Are there any more comments on this
9 rule?

10 MR. HAWK: Yes, Commissioners, I have one comment.

11 In our prepared comments here we talked about an issue
12 that has been discussed before in dealing with remarketing of
13 excess QF capacity and energy. And we think that this particular
14 rule is the one that should address that, or at least try to
15 address this particular issue.

16 CHAIRMAN WILSON: Now, that's the case that came before
17 us on agenda and we decided that we would postpone the decision
18 until we could get through this rule proceeding?

19 MR. HAWK: That's correct. There is an existing rule
20 that talks about this particular situation, allowing if the
21 utility has excess QF capacity and energy to now market it at
22 original cost. And in our AES Cedar Bay situation, a contract
23 that the Commission reviewed, we have brought that before the
24 Commission, particularly for a negotiated contract, we would like
25 to have an opportunity where we have taken a lot of time in