

FPSC-RECORDS/REPORTING

PARTICIPATING: JACK SHREVE and HAROLD MCLEAN, Office of Public Counsel. RICHARD D. MELSON, Lake Utility Services, Inc. LILA JABER and TIM VACARRO, FPSC Division of Legal Services. MARSHALL WILLIS, FPSC Division of Water & Wastewater.

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1	PROCEEDINGS
2	COMMISSIONER DEASON: Okay. Item 50.
3	MR. VACCARO: Commissioners, Item No. 50 is
4	Staff's recommendation to deny the Office of Public
5	Counsel's motion to dismiss Lake Utility Services'
6	application for rate increase and for increase in
7	service availability charges.
8	COMMISSIONER DEASON: Mr. McLean?
9	MR. MCLEAN: Good afternoon, Commissioners.
10	I'm Harold McLean, Office of Public Counsel. With me
11	is Mr. Shreve, the Public Counsel, and Charlie Beck, a
12	fellow assistant to Mr. Shreve. And I suppose I can
13	begin we're going to split our time, if it's all
14	right with the Commission.
15	COMMISSIONER DEASON: Is there a time set to
16	address this?
17	MR. VACCARO: No, there isn't. Oral
18	argument was not specifically requested.
19	COMMISSIONER DEASON: Commissioners, do you
20	want to establish a time frame?
21	How much time do you need, Mr. McLean?
22	MR. SHREVE: Two hours per side should be
23	enough. (Laughter)
24	COMMISSIONER DEASON: I will give an hour
25	and a half to Mr. McLean
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MR. SHREVE: I think a lot of it's going to 1 depend on the Commission's questions. I don't know 2 that we need --3 COMMISSIONER DEASON: We'll just proceed, 4 and if it gets to be problem with time, I'll just 5 indicate there's a problem with time. 6 MR. McLEAN: Good afternoon, Commissioners. 7 On September 10th, this Staff, which now recommends 8 against dismissal, recommended for dismissal. 9 You all didn't vote on that recommendation 10 11 back on that September thing. You'll remember that 12 the main issue then was whether the company could withdraw its case. 13 You decided that, indeed, they couldn't. 14 But an as an ancillary to their recommendation, this 15 Staff, same folks, recommended that this case be 16 dismissed. And I'd like to review with you some of 17 the reasons that your Staff went over when they made 18 that recommendation. For your reference, they can be 19 found on Page 7 and 8 of that recommendation. 20 They characterize the test year is not 21 reasonable. They characterize the case as having 22 presented a regulatory quagmire. They pointed out 23 that the MFRs had to be filed twice in their entirety. 24 They pointed out that the Staff had to do a 100% 25

review due to lack of supporting documentation. 1 Staff also said they spent double time on 2 this case, more than double the time it would take for 3 any other case. They said that they were greatly 4 frustrated. And, of course, the Staff recommended at 5 that point that the case be dismissed. 6 7 We are suggesting that the conditions have not become better since that recommendation, but in 8 fact that they have become worse. Commission 9 10 auditors, according to the testimony which is filed in 11 this case of your own Staff, namely Trish Merchant, 12 says that the company is currently earning 144.8%, I believe; right at 140% return on equity. We say 13 that's a little excessive. 14 15 Staff again reiterates that the test year is no good, and this time Ms. Wood adds -- I'm sorry; 16 Ms. Merchant -- adds that that test year can't be 17 fixed. 18 The company's documentation, which they have 19 furnished our office, shows that they're 20 considerably -- in a considerable overearning 21 position, and those documents impeach the annual 22 reports which they filed with this Commission. 23 24 The company's documentation which they have furnished to our office show that the billing 25

1 determinants cannot possibly be reconciled with the 2 reported revenue.

Back at that September 10th -- I believe it 3 was an Agenda Conference, Commissioner Clark was moved 4 by the Staff's continuing plea for documentation which 5 they could not get from this company. Commissioner 6 Clark at that point in time said to all hands 7 assembled that perhaps next time when we came back up 8 here to an Agenda Conference, if the Staff couldn't 9 get that documentation which it had asked for at that 10 time, that perhaps that would be an appropriate time 11 to dismiss the case. 12

And, Commissioners, that's where we find ourselves today. If you look at the testimony of Ms. Merchant which she has recently filed in the case, Page 5, Line 12, you will find -- at least the way I read the testimony -- is they have yet to receive documentation upon which they can recommend to you that rates be set now.

In addition to that, amazingly enough and for the first time in my memory, Staff says to you folks through the testimony of Ms. Merchant that this case was so imprudently filed as to the point that you shouldn't even allow rate case expense for it. Now, in fairness to Staff, I don't mean to

1 say that their recommendation today is in that grave a
2 contrast with what they filed before, because in
3 fairness to Staff, Staff recommendation today -- and
4 the company's responses specifically directed at our
5 specific motion to dismiss, and it discusses whatever
6 frailties that motion they say have.

7 I say that you can dismiss this case on your 8 own motion or on our motion, if you wish. It doesn't 9 matter a great deal to us which particular route you 10 take.

Addressing myself just for the moment to the legal aspects of our motion to dismiss, the Staff says, Commissioners, you can not look beyond the four corners of the petition. In one paragraph actually they say "the petition," and in the next paragraph they say "application".

And I think that's a fairly important thing, because what they did was they took a small paragraph from the utility's petition, which contains four or five conclusory statements, and say -- in which the company says, Commission, we need some relief here and we're entitled to it.

Okay. Well, it takes a little bit more than that to survive a motion to dismiss. I want to suggest to you that in the context where we practice,

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1	anyway, that the application involves MFRs; it
2	involves everything that's filed in the case. They
3	don't call them minimum filing requirements for
4	nothing. They're part and parcel of the filing.
5	We take no issue at this point, and for
6	purposes of this motion to dismiss with the specific
7	allegations of their petition, take it as true, if you
8	wish. Take the application as true, if you wish, but
9	it is a 1995 test year.
10	Which brings me to the second point. They
11	say our motion isn't timely; it's got to be filed
12	within 20 days. Well, I'm inclined to argue subject
13	matter jurisdiction, as I have before without
14	discernible effect, but consider this: How could we
15	have moved 20 days after this case was filed that the
16	test year wasn't stale? It wasn't stale.
17	1995 test year wasn't stale in 1996, but
18	here we find ourselves in 1999. Why? For among many
19	other reasons, the company took forever to get their
20	case right before the Commission. As your own Staff
21	says, they had to file the MFRs twice.
22	COMMISSIONER CLARK: Mr. McLean, should what
23	we be doing is not granting your motion to dismiss,
24	but granting a summary judgment?
25	MR. McLEAN: I've been taught not to snatch

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1	defeat from the jaws of victory, I think, so if you
2	prefer to do that, that's okay by me.
3	COMMISSIONER CLARK: Well, it's
4	MR. McLEAN: I think the correct thing for
5	you to do is to dismiss it on your own motion. You
6	can find procedural shortcomings with our motion if
7	you wish, but if you decide that you can't grant a
8	motion to dismiss on staleness of a test year because
9	it wasn't alleged to be stale four years ago when it
10	was filed, then you're in kind of a trap, aren't you?
11	I don't think that will work.
12	If you I'm not sure that there are no
13	issues of material disputed fact, whatever the buzz
14	words are, but the point is that the quality of the
15	case before you is terrible.
16	Your own Staff says so. In the strongest
17	language that I have ever seen in a Staff
18	recommendation, the Staff says this case is no good;
19	throw it out; and they're overearning. The bleeding
20	is going on now, as we speak.
21	The company may have been overearning the
22	whole time, and your Staff recommendation, which
23	disappoints me, says, well, let's wait until some
24	future time and subject this money to refund once we
25	make absolutely sure that they are overearning.

I think there's a better course for you to 1 take, and that is, if you suspect, and if you have 2 strong reason to suspect, and if you have excellent 3 professional staff members telling you they're in an 4 overearnings position now, err on the side of 5 preserving your jurisdiction; because if you let this 6 7 money slide under the dam, as some would say, you can't grab it. You can't get it later. 8 If you assert jurisdiction today -- I'm 9

10 saying you should dismiss this case on your own motion 11 and you should return rates to where they were when 12 this case began immediately. We've waited too long 13 for that.

And, lastly, you ought to subject some money to refund now, because with your own Staff person saying 144% return on equity, something is wrong out there somewhere, and you should seize that money; not for the customers ultimately, but perhaps for the customers when you determine whether these overearnings are real.

If you wait until August, September, October to do that, you can't come back and get this money. That's what we went through in that litigation docket with Florida Cities.

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In any case, to sum up for my part --

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1	Mr. Shreve will furnish you all with a little bit more
2	of the inconsistencies of the case and so forth but
3	to sum up for my part, dismiss it on your own motion.
4	It's consistent with your September 10th
5	recommendation from Staff, upon which you never voted,
6	and it's a bad case. The data is the data before
7	you are flawed, according to your own Staff. So I
8	think it's the only action you can really take.
9	Thank you.
10	COMMISSIONER CLARK: Let me ask Staff a
11	minute, are we limited in dismissing on our own
12	motion, are we limited to the notion of doing it
13	within 20 days? What are the bases on which we could
14	dismiss on our own motion?
15	MR. VACCARO: I think on your own motion
16	that you would not be limited to the rule on the
17	20-day limit.
18	COMMISSIONER CLARK: Okay.
19	MR. VACCARO: There's prior case law. It's
20	Reedy Creek. That particular case has to do with
21	reconsideration, but that particular case, the Court
22	held that the Commission, which was not a party, was
23	not bound by a rule regarding a 15-day limit on
24	reconsideration. So I think, making an analogy to
25	this case, that you would not be limited to 20 days.
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1	COMMISSIONER DEASON: Mr. Shreve?
2	MR. MELSON: Mr. Chairman, before
3	Mr. Shreve I thought we were here today on a motion
4	to dismiss.
5	I've heard Mr. McLean argue for some
6	additional affirmative relief that's not in the motion
7	to dismiss. I don't know what Mr. Shreve intends to
8	add that relates to the motion to dismiss, but I'd
9	hope that we stay on the issue that's here today and
10	not allow this to wander into the merits of the case,
11	which is not what we're here on.
12	COMMISSIONER DEASON: Okay. Very well.
13	Mr. Shreve.
14	MR. SHREVE: What I intend to talk about is
15	the responsibility of the Commission, which I think
16	ultimately the probably the only choice you have is
17	to dismiss it, and even that will not be fair to the
18	customers.
19	And I think this does go to the dismissal.
20	In 1995 the annual report of the company reported
21	\$583,286 as a rate base; the annual report. The test
22	year for the purpose of the MFRs was 1995. There they
23	reported a rate base of 1 million, \$1.1 million.
24	In the annual report they reported an ROR of
25	8.31% now, this is '95 which came to an ROE of

In the MFRs, which had a test year of '95, 7.21%. 1 same as the annual report; the ROR was 4.5% with a 2 negative ROE. 3 In 1996 -- and your Staff has also asked the 4 company for explanations as to why the billing 5 determinants on the gallons sold did not match the 6 7 revenues, and to my knowledge there has been no explanation that has ever been given to them, and 8 9 they've tried to do that. In 1997, the annual report showed revenue of 10 11 85,000 -- no, I'm sorry -- a rate base of \$474,000 --I'm sorry -- a revenue of \$474,000, but if calculated 12 13 from the billing determinants on the gallons sold, which I don't know how else you get the revenue, 14 \$537,000. 15 The increase in revenues from 1995 reported 16 17 by the company in their annual report was \$265,000. In 1998, according to the company's best figures that 18 19 they furnished to us -- and this came from the Staff 20 review of the company's books, I believe -- \$747,000 in sales of water. 21 Probably from '95 on this company was 22 23 There were two PAAs put out recommended overearning. by the Staff, which you put out. The first one was 24 25 protested by the company. We then prepared to go to

1 hearing.

Then there was a settlement offer made to 2 the Commission by the company, which you voted out, 3 which gave them another rate increase over the first 4 PAA; and that vote was after the 1997 annual report 5 came out, which the company clearly had to be aware 6 that they were overearning by far at that time. 7 Ι don't -- I think the company had a duty to keep you 8 apprised of the situation of the growth in that area 9 and the increase in their revenues. 10

I don't think Mr. Melson had any idea that any of these calculations were coming out this way. It's hard to tell even if the company did, but they should have if they didn't. They're a large company, and they should have known what all of these were coming out.

I think you need ask your Staff what the situation is of this company, how you're going to rectify the situation that this company should have been in an overearning situation with an overearnings case for a couple of years.

Now, dismissing the case is not going to solve all of that problem. There's another additional argument; the company is going to incur quite a bit of rate case expense. The company takes the position the

Staff forced them into the rate case. They Staff says they didn't, and we don't need to be in that argument at all. But the customers have no reason to carry that burden whatsoever when the company is in an overearnings position at this point.

Commissioner Clark mentioned a summary 6 7 judgment. That might be something to look for in the 8 future. I think there you would need additional 9 information if you were going to come out with a summary judgment lowering the rates, and coming out of 10 1998 setting rates on a going-forward basis is what 11 you'd have to do. I don't think there's really any 12 question about it. 13

14 If you're not going to dismiss the case, I 15 think you should put the company in a position of 16 under oath telling you that the information that has 17 been furnished to you is accurate and accurately 18 portrays the situation that this company is in at this 19 point, because you have to set rates on a 20 going-forward basis.

You have a problem. I don't even know that dismissing the case is going to solve it, but every day that goes by gets worse.

Thank you.

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COMMISSIONER DEASON: Mr. Melson.

MR. MELSON: Commissioners, I don't quite 1 know where to begin. I think the fact that Mr. Shreve 2 has essentially testified to things that I assume he 3 thinks he can prove at hearing, the mere fact that 4 he's had to do that shows that this is not a proper 5 motion to dismiss. 6 The test for a motion to dismiss, as the 7 Staff says in their recommendation, is whether taking 8 the facts in the petition, in this case the 9 10 application and the MFRs, as true is a case made, Mr. Shreve has even --11 COMMISSIONER CLARK: Mr. Melson, let me just 12 ask you a question sort of first off. 13 14 MR. MELSON: Okay. COMMISSIONER CLARK: It strikes me that at 15 some point, some of the information gets so old 16 anybody can tell you that the case needs to be 17 dismissed. 18 MR. MELSON: Commissioner Clark, I'm not 19 sure -- and this case has had a long and tortured 20 21 history --COMMISSIONER CLARK: It has. 22 MR. MELSON: -- that I'm not anxious to 23 recount in detail. As recent as the protest that 24 25 Mr. Shreve filed to the second PAA order in 1998,

Public Counsel did not raise test year as an issue. 1 We believe the test year issue was never 2 protested originally and that it, therefore, is deemed 3 stipulated. And I recognize that that is a legal 4 5 argument that we're going to have to make. If this case goes forward to hearing, it's one that I feel is 6 7 right as a legal matter. 8 And essentially what Mr. Shreve is doing is giving you reasons that you should now try to get rid 9 of a case that, like it or not, I don't think you 10 11 properly can get rid of. COMMISSIONER DEASON: Mr. Melson, even if we 12 consider that issue stipulated -- which I think is 13 14 debatable -- but that would be stipulated between the parties. It's not binding in any way upon the 15 Commission; is that correct? 16 17 MR. MELSON: I don't believe so. Under Chapter 120.80(13), matters that are not in dispute 18 19 are deemed stipulated. And I don't believe the 20 Commission in the trial of a PAA case can go back and open up matters that have not been opened up in a 21 22 protest. 23 COMMISSIONER DEASON: Well, you know more about the law than I do, but I respectfully disagree. 24 25 I think the Commission has responsibility,

not only the jurisdiction, the responsibility to 1 investigate any matter which it believes is in 2 3 question. And it seems to me, on its face, a 1995 test year in 1999 certainly should be something that 4 should be brought in question. If not by the parties, 5 if they're precluded because it's somehow stipulated, 6 it seems to me the Commission has a responsibility to 7 ask that question. 8 You would disagree with that? 9 I disagree that that's what the MR. MELSON: 10 statute says. Whether that's what the statute ought 11 to say or not, I don't think that's what the statute 12 I think the statute says the issues in the case 13 says. are defined by the protest, and --14 COMMISSIONER DEASON: And the Commission is 15 16 bound to only look at those issues and nothing else, even though we have the statutory responsibility to 17 protect customers? When it gets down to the bottom 18 19 line, that is our job. MR. MELSON: When it gets down to the bottom 20 21 line, your job is to be fair to the utility and to the 22 customers. And one of the rules you've got to operate under is Chapter 120, and Chapter 120 says that issues 23 24 in a PAA case, issues not put into dispute, are deemed 25 stipulated. And we believe that binds the Commission.

Now, Commissioners, you may tell me that's
 wrong and a court may tell me that's wrong, but that
 issue has never been decided; and we think we've got
 the better side of it.

COMMISSIONER CLARK: Well, I think what
Commissioner Deason is arguing is sort of the end
result doctrine.

8 It seems to me that applying your suggestion 9 means that we are hamstrung in the sense that we would 10 have to approve rates that anyone would conclude are 11 not fair, just, and reasonable because it's based on 12 data that's four years old.

MR. MELSON: Well, Commissioner, at this point you haven't heard the testimony, and you may conclude after hearing the testimony that's a case -in fact, rebuttal testimony hasn't even been filed yet. I mean, you're hearing a one-sided version.

I don't think this at the end of the day is going to be an easy case for any of us, but I don't think at this point the dismissal either on Public Counsel's petition or on your own motion is the right thing to do.

This case is scheduled for hearing next month. I don't see anything to be gained by acting precipitously today before you have the witness in

front of you, before you have the entire case in front 1 of you. 2 COMMISSIONER CLARK: Well, are you and your 3 clients prepared to go to hearing with sort of, it 4 seems to me, a tough case to prove in the sense of it 5 being -- just intuitively it seems like the data has 6 got to be old? And, you know, it strikes me is we go 7 forward and incur all this expense, you know, it's --. 8 MR. MELSON: Commissioner Clark, we, I 9 think, at a low level are still engaged in some give 10 and take with Mr. Shreve's office on possible 11 settlement. We're still engaged internally in 12 evaluating where we go. 13 As I sit here today, we oppose the motion to 14 dismiss. 15 MR. SHREVE: Commissioners, if you're not 16 going to dismiss this case, perhaps to make everything 17 fair, we would be glad to stipulate that whatever ROE 18 that you determine in the rate case -- probably by the 19 graph -- is what would be used for the past years that 20 this has been pending, and that the company would keep 21 everything up to that ROE and return everything above 22 23 it. COMMISSIONER DEASON: Mr. Melson, are you 24 25 concluded?

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1	MR. MELSON: Yes, sir.
2	COMMISSIONER DEASON: Do you have a response
3	to Mr. Shreve's suggestion?
4	MR. MELSON: I think to the extent that we
5	want to engage in settlement negotiations, that's
6	appropriate for us to do between ourselves and not in
7	front of the Commission. I'm not prepared today to
8	commit to anything.
9	COMMISSIONER DEASON: Staff?
10	MR. VACCARO: I'd just like to point out a
11	few things, Commissioners.
12	First of all regarding Staff's
13	recommendation, we formulated that strictly in terms
14	of the utility's I'm sorry in terms of OPC's
15	motion to dismiss and what the standards are. So in
16	that regard we do agree with Mr. Melson that at least
17	in terms of OPC's motion to dismiss, that this case
18	should not be dismissed. However, if you would like
19	to dismiss the case on your own, I think you still
20	have that right.
21	Regarding whether or not we go to hearing on
22	this case, it seems to me that at this point that the
23	utility is going forward on a technicality, and that's
24	basically whether or not 1995 is stipulated or not.
25	I think regardless of whether or not 1995 is

stipulated, the bottom line is the end result 1 doctrine; and you still have an obligation to set 2 rates which are fair just and reasonable under .081. 3 And to that extent, Staff does believe that the 4 Commission has the right to look at anything it 5 regards as pertinent in this case. 6 COMMISSIONER CLARK: This hearing is 7 scheduled for when? 8 MR. VACCARO: March, 10th and 11th. 9 COMMISSIONER CLARK: Okay. 10 MR. SHREVE: Commissioner, one of the 11 problems you have --12 COMMISSIONER CLARK: And we're not going to 13 put it off again, are we? 14 15 MR. VACCARO: No. MR. SHREVE: Then I hope you'll instruct 16 everybody, including your staff, to make sure that you 17 have the proper information to have fair, just, and 18 reasonable rates, which are going to -- which is going 19 20 to -- you're going to need the information coming out 21 of 1998. We don't have that yet. 22 COMMISSIONER DEASON: Are we going to get 1998 information? 23 MR. MELSON: Commissioner Deason, the Staff 24 25 went to Northbrook, Illinois to do an audit, to get

1998 information. My understanding is they, in the 1 midst of that process, sort of redefined what they 2 were doing and came away with a compilation. 3 At this point there are no pending discovery 4 requests from my client seeking additional 5 information, and --6 COMMISSIONER DEASON: And you intend not to 7 put any 1998 information into the record; is that 8 correct? 9 MR. MELSON: There is no 1998 information in 10 our direct testimony. I have to be honest with you. 11 12 I don't know whether we intend to put it in rebuttal or not. That's still under discussion. 13 COMMISSIONER DEASON: But you have the 14 burden of proof, and that's in your direct case, not 15 your rebuttal case; correct? 16 MR. MELSON: We believe we have the burden 17 of proof on the five issues that were identified in 18 the Commission's most recent order in this docket as 19 20 still being open for litigation, and we have put testimony in on those five issues. 21 I don't think I've got a burden to prove 22 23 things that are beyond what the Commission has said are at issue. 24 MR. WILLIS: Commissioners, if I could 25

1	respond to that. Staff has obtained 1998 information
2	that's not audited. We were at one point
3	accomplishing a 1997 a calendar year audit of the
4	company, but in order to file testimony in this case
5	with 1998 data, we asked the auditors to stop the 1997
6	audit and obtain information from the company's books
7	to basically update all the information that we had
8	for '96, '97, up through 1998.
9	That information was obtained, and it has
10	been put into our testimony which we have already
11	filed for this case, and that's what we're going
12	forward with. Now, what the company does with the
13	rebuttal is something else; but we're ready to put a
14	case on in March.
15	COMMISSIONER DEASON: Is the potential
16	outcome of this case a rate reduction, or we're
17	limited only to the issues, as Mr. Melson describes
18	them, which only can be interpreted as to the amount
19	of a rate increase or no increase?
20	MR. WILLIS: Well, I guess I could address
21	that on a as a technical sense.
22	Staff is recommending in its testimony
23	and I don't know how far I should get into this but
24	we're taking the position in this case that the case
25	basically the rate increase requests should be
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1	denied.
2	COMMISSIONER DEASON: And is there the
3	potential for actual rate reduction?
4	MR. VACCARO: I think there is that
5	potential there, because if you look at the issues in
6	this case and you set rates in the end that are fair,
7	just, and reasonable, I think it's open on the tables
8	to whether or not those rates are going to be
9	increased or whether they're going to go back to what
10	they were before PAA, or whether they're going to go
11	lower. I think it remains to be seen.
12	MR. SHREVE: We think there certainly is, on
13	a fair, just, and reasonable rate basis, on a
14	going-forward basis. The customer growth has
15	increased over twice. The revenues have increased
16	about three times. And there certainly should be, if
17	you're going forward with this case, a rate reduction
18	possibility, and possibly a large one.
19	COMMISSIONER DEASON: Well, Mr. Shreve, Let
20	me ask you this question.
21	MR. SHREVE: Yes, sir.
22	COMMISSIONER DEASON: If there is that
23	possibility and that you think you can make that
24	showing in the case, why then should we dismiss this?
25	Why shouldn't we go to hearing if that case can be
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1	proved and actually result in a rate reduction and a
2	refund of all of the increase to this point?
3	MR. SHREVE: Okay. For one reason, I think
4	we can get a rate reduction. We could get that on
5	another docket if we had to. You still don't have all
6	the information. I know the Staff has a part of it,
7	but I don't think you have all the information for
8	'98. Perhaps we can have it by then.
9	Every day or month the company is
10	overearning, even excluding that part from the interim
11	increase, and you're going to lose that. What should
12	be done is an immediate holding of those moneys
13	subject to refund.
14	And just to I mentioned that you voted
15	out a rate increase at a time when they were
16	overearning, and the Staff it was based on the
17	Staff recommendation and a settlement offer by the
18	company. The reason for that was that the company
19	filed an annual report, which really was not proper,
20	and it represented an ROE of .41%, where even the
21	recalculation would put them up in the 13%, just using
22	the Staff using the company figures; and if you
23	used the calculated billing charts, you're talking
24	36%.
25	If the company had filed proper annual
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reports, which it was my understanding this Commission 1 is supposed to use that to determine whether or not 2 they're overearning, then there would have been an 3 overearning and an amount set subject to refund, other 4 5 than the interim rate increase a couple years ago. So by getting rid of the case, we can't --6 we can't go back and get that money, I don't think. 7 We may try and find some way to do it. But you can 8 9 proceed, go ahead and put money subject to refund in the future and come in and properly set rates. 10 COMMISSIONER DEASON: You think that's the 11 better course of action is to dismiss the case and 12 then go to a proceeding to identify moneys that can be 13 subject -- placed subject to refund, and then go to a 14 hearing to determine if there should be a rate 15 reduction and a refund? 16 MR. SHREVE: Unless you can immediately put 17 money subject to refund down to the proper rate. 18 Otherwise, the company is going to be overearning 19 20 every day. COMMISSIONER DEASON: But this is going to 21 22 hearing in April -- or March? MR. VACCARO: March, 10th and 11th. 23 24 COMMISSIONER CLARK: 10th and the 11th. Less than a month. 25

COMMISSIONER DEASON: That's going to be 1 fairly -- that's extremely quick, given the history of 2 this case. 3 You don't think, then, that that would be 4 5 the better of --MR. SHREVE: If you're going to do that, I'd 6 7 like for you to go ahead and put money subject to refund down to the point on the graph that would be 8 9 determined to be a -- for ROE at this point. We've already lost an awful lot of money out there. 10 MR. WILLIS: Commissioners, could I 11 interject something here? This case has been a 12 troublesome thing as to whether somebody ought to 13 dismiss this case or we ought to get a hearing and 14 come up with something final. 15 In my own opinion, I'm almost to the point 16 17 now we ought to just proceed to trial on it; and the 18 reason being, over the period of time since this case was filed, this company, as you've heard, has had an 19 20 extreme growth in customers. The problem we're having here is this 21 company also collects contributions, and contributions 22 23 have been eroding rate base. No matter how much money they put into rate base, we're having a quick erosion 24 of it due to the amount of contributions being 25

1 collected.

Part of what we're addressing here is to take away the contributions, because at this point our calculations show that this company is over 100% contributed at this point. Now, whether that's proven out at trial or not is another thing, but our calculations show they're over 100% contributed, right at about 105.

9 My point about going to hearing is that to 10 me it's the quickest way to go in and cut 11 contributions off. Otherwise, we'd have to come back 12 to you with a recommendation to subject service 13 availability charges to some sort of escrow account, 14 refund, protection, whatever, and enter into an 15 overearnings proceeding and go forward.

16 If we go to hearing, we at least get to 17 touch on the cause of the eroding rate base. My 18 problem here is that we've got to do something with 19 this company to get its rate base back up.

If we go to hearing and we talk about the CIAC charges, you'll hear testimony on that; and if your decision is to agree with Staff and take away the service availability charges, rate base will continue to rise, because this company has to continue to put in investment.

They forecasted with the growth. They've 1 got to do it. They've got to have some form of high 2 storage or some form of storage down there which is 3 going to cost money. That's going to bring the rate 4 base back in line. What we as Staff don't want is to 5 have a circumstance where you have rates falling down 6 7 and then have to rise them back up the next year. I can tell you from this point that the 8 interim, in all likelihood, may have to be refunded. 9 10 Where they're going to be at that point, you probably could come up with a reduction in rates; but the 11 12 following year, if you also cut your service availability off, you may be into a position of having 13 to raise rates back up again; and I don't know that 14 15 anybody wants to be in that position. 16 COMMISSIONER DEASON: Well, those are issues 17 we'll address at --18 MR. WILLIS: And those are issues which --**COMMISSIONER DEASON:** -- the appropriate 19 20 time. But my concern is a simple one: Are we going to have the information to set fair, just, and 21 22 reasonable rates based upon current information, 23 taking all of those things that you just described 24 into consideration, or are we pre -- is it going to be 25 predetermined, if the only information we have is '95

and it's not going to be updated in any way in any 1 manner, that the outcome of this case is being 2 predetermined just simply because of the dated test 3 4 year? 5 MR. WILLIS: No. We're entering with 6 testimony. We've already filed our testimony. It has 7 1998 data in it. 8 MR. SHREVE: But that testimony says you will not have the information needed to make a 9 decision based on '98. 10 11 COMMISSIONER JACOBS: For all the reasons that you just described, I think it's even more 12 critical to get -- because ultimately when they put 13 14 those new facilities in they're going to come in with an updated rate base and updated test year, and the 15 consumers will find themselves bearing the burden of 16 17 that. My problem is that we're finding ourselves 18 19 in a situation here where the consumers should be 20 getting a benefit, and they're not. So I quess where I'm coming down is perhaps moving on with this 21 22 hearing. 23 I'm being swayed more and more to the idea that there's something here that -- you know, to 24 looking at holding rates subject to refund, but -- and 25

even more so; because ultimately that's going to 1 happen. I mean, if they're having that kind of growth 2 that they're having down there, that's going to 3 4 happen. But those consumers who have been paying for 5 that all of this time are going to gradually -- I 6 mean, they're going to get lost in the shuffle, and 7 the new customers coming on are going to -- you know, 8 9 are getting a bargain. 10 MR. VACCARO: I would note, though, that if we go to hearing at this point, the rates, the interim 11 rates are being held subject to refund. 12 I agree with Commissioner MR. SHREVE: 13 Jacobs on this. There is a lot of money being held 14 here that is not subject to refund, and I don't think 15 the company is going to be in any position -- and I 16 17 can understand that -- to agree that everything be held subject to refund. All we're talking about is 18 the interim rates. 19 And Mr. Willis expressed himself as to 20 21 getting some of the rate base straightened in these contributions, but this Commission or this Staff 22 23 doesn't have any business trying to charge the 24 customers more than a fair return when their company is not entitled to it. And if that's where we're 25

going, you better dismiss this case and get it over
 with, because you do not have enough money held
 subject to refund.

You're entitled to a rate reduction, but it sounds like that's not where the Staff wants go to because they don't want to -- even though the customers have been paying more than they should have in the past -- doesn't want to go down with lower rates at this point because they may have to raise them in the future.

11 COMMISSIONER DEASON: Well, I'm not trying 12 to put words in Mr. Willis' mouth, but I understood 13 him to say that it's something we're going to have to 14 consider is, is if there are going to be changes in 15 rate base on a going-forward basis if there's going to 16 be a change in the CIAC policy. It's just something 17 that needs to be considered, but even --

18 MR. SHREVE: Well, I thought he said that he 19 didn't want to get lower rates when you're going to 20 have to be raising rates.

21 **COMMISSIONER DEASON:** Do we have the 22 authority to place money subject to refund? We have 23 to go through a proceeding to establish that, do we 24 not?

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MR. VACCARO: Yes, we would have to --

1	COMMISSIONER DEASON: And there's no way to
2	do that before we go to hearing in March.
3	MR. VACCARO: I don't believe so, and if we
4	did that, it would be PAA.
5	MR. WILLIS: Commissioners, we're going to
6	be auditing the 1998 calendar year. We've already put
7	that audit request in. That's going to happen, but
8	it's not part of this docket.
9	You know, we're of a mind that there's a
10	continuing problem here, and we're going to have to be
11	looking at 1998 in conjunction with 1999 to look at
12	what's coming on line to look at future earnings. And
13	we're not dropping this off. We're not dropping it
14	off by any means, no matter what comes out of this
15	case.
16	COMMISSIONER CLARK: Does it make sense to
17	go ahead with the hearing, and then when is the
18	recommendation due?
19	MR. VACCARO: The recommendation is due
20	May 20th.
21	COMMISSIONER CLARK: Could we sort of
22	MR. SHREVE: Why don't you have a decision
23	made from the bench at the hearing?
24	COMMISSIONER CLARK: Here's my concern; that
25	I think you've brought some points forward that
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advocate going to hearing as soon as possible, but it 1 strikes me that we also ought to be putting rates 2 subject to refund as soon as possible, too. Can we do 3 that? Can we do that in tandem? 4 I mean, let's go ahead with the rate case, 5 but say we also believe that --6 7 MR. VACCARO: I think we would need to have a recommendation that --8 9 COMMISSIONER CLARK: Well, sure. MR. VACCARO: -- the utility was 10 11 overearning. I don't know if we could get that to you 12 before we actually went to hearing. 13 COMMISSIONER CLARK: So we go to hearing, and our expectation would be in the May -- and part of 14 15 your recommendation would be also whether or not at that time we should suggest holding rates subject to 16 17 refund. MR. SHREVE: On a going-forward basis? 18 COMMISSIONER CLARK: 19 Yes. 20 MR. SHREVE: After the hearing? 21 COMMISSIONER CLARK: Right. COMMISSIONER DEASON: But how much time 22 23 would that actually cover by the time we go to hearing and we have a decision to set rates, hopefully at a 24 fair, reasonable and just level on a going-forward 25

1 basis --

2 COMMISSIONER CLARK: Oh, I see what you're 3 saying.

COMMISSIONER DEASON: -- how much time would 4 5 that cover? Maybe a couple of months at the most? And I'm not saying that it's insignificant, but we 6 7 need to evaluate where the priorities are and how much Staff resources that would take trying to establish 8 9 that, as opposed to Staff resources actually litigating the case and trying to establish the rates 10 and trying to determine all the necessary adjustments 11 to it, to establish rates on a going-forward basis? 12 MS. JABER: Here's the -- the overearnings 13 process is like this: We would have to file a 14 recommendation that initiates the overearnings 15 investigation, and it's at that time that moneys are 16 17 held subject to refund; and that's a procedural matter. 18 But then Staff would, at the conclusion of 19

the overearnings investigation, recommend that they are or not overearning, and that's a PAA decision. What I was just asking Mr. Willis is how much time they need. I think --

24 COMMISSIONER CLARK: It doesn't need to be a
25 PAA decision if we hold a hearing first.

1 MS. JABER: Well that -- but that -- was intent of combining it that we're actually skipping 2 3 the whole PAA process by looking at these issues in this case. 4 MR. WILLIS: Well, my problem with that is 5 that normally in overearnings cases we look at prior 6 earnings plus prospective earnings, because we're 7 already setting rates for the future. And you would 8 have to look at 1999 and what's going to happen in 9 1999, and that's going to encompass in the investment 10 11 in the fact that this company is, in all likelihood, going to have a very low level of contributions coming 12 13 in at that point and high growth. 14 That all has to be brought into account somehow in the overearnings. We can bring to you 15 fairly quickly a --16 COMMISSIONER DEASON: Placing money subject 17 to refund is based -- usually based upon historical 18 analysis, is it not? 19 20 MR. WILLIS: Right. We -- I mean, the 1998 21 annual report isn't in yet. That's what we normally

22 base it on.

We have information now from an audit. 23 We can bring you a recommendation, and I imagine at this 24 25 point we ought to go back and regroup and decide

whether we need to do that, or --1 COMMISSIONER DEASON: But if you do a PAA, 2 by the time it gets issued and protested and then that 3 goes to hearing, hopefully we would have already 4 5 decided the main case. MR. WILLIS: Well, money subject to refund 6 7 would not be PAA. That's basically placing money subject to refund, just like we do for interim. 8 MS. JABER: Yeah; that's just a procedural 9 It's the ultimate decision that's PAA. matter. 10 COMMISSIONER DEASON: Okay. So we can place 11 the moneys with a prima facie showing that there's --12 MS. JABER: Exactly. 13 MR. SHREVE: I'm confused. Are you talking 14 about putting money subject to refund in this case, or 15 are you talking about the review that's going to take 16 17 place and put money subject to refund in a future case? 18 COMMISSIONER DEASON: I thought we were 19 talking about this case, putting money subject to 20 21 refund as quickly as possible. 22 MR. WILLIS: Well, Commissioners, that would be a separate docket. We'd be opening a separate 23 docket for future overearnings in this thing, and that 24 would go over and beyond what the rates were prior --25

COMMISSIONER DEASON: What would be the 1 purpose of that if we're going to establish rates in 2 this case on a going-forward basis? Then those rates 3 would be fair and reasonable, and there would be no 4 reason to put money subject to refund if the 5 effectiveness of placing it subject to refund is after 6 7 the effectiveness of the rates established in this case. 8 MR. WILLIS: Well, we can do it in either 9 one. 10 11 MS. JABER: Commissioners, I need to bring 12 something to your attention. We don't have a final order, and Accounting 13 is telling me that they can't make adjustments with 14 the last rate case, and we don't have an annual 15 report. So it sounds like we do need to regroup and 16 come back at the next agenda with a recommendation for 17 18 you. 19 COMMISSIONER DEASON: As it pertains to 20 placing moneys subject to refund? 21 MS. JABER: Yes. 22 MR. SHREVE: I'd like to read a -- one 23 statement out of your Staff's testimony, which I think is pretty well correct. 24 25 I have little confidence that even the

current reported amounts could be relied on to 1 establish reasonable rates. You haven't been able to 2 rely on an annual report that they've filed yet. I 3 think what you need is to get an affidavit from the 4 5 Mr. Wentz (phonetic) that all of the information that he has furnished to the Commission is correct. 6 It's impossible. 7 (Pause) 8 COMMISSIONER DEASON: Commissioners, what's 9 your pleasure? COMMISSIONER CLARK: Well, I'm inclined to 10 move Staff on this, but with the understanding that 11 they'll come back to us on the next Agenda with 12 respect to being -- maybe moving to hold things 13 subject to refund. Is that what you're suggesting? 14 MR. WILLIS: Commissioners, we can come back 15 16 with a rec to do -- either do it or not to do it, if you want. I don't know that -- I'm not -- I would be 17 hesitant to say we can get it on the next Agenda. 18 That gives us very little time to put something 19 20 together and file it. It may be -- well, if we don't get on the next one, it will be prior -- or after the 21 22 hearing in this case. 23 COMMISSIONER DEASON: The next Agenda is the 24 16th of March. I'm just not sure we're going to be accomplishing a lot -- if we're going to go to 25

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1	hearing, and if the potential outcome and I'm not
2	trying to prejudge anything but if the potential
3	outcome, if it is can be shown that rates need to
4	be reduced and that is a potential outcome if
5	rates can be reduced, why isn't that sufficient?
6	Mr. Shreve, why is that not sufficient?
7	MR. SHREVE: Well, I don't know. We'd have
8	to total up how much money the customers are going to
9	lose that they shouldn't have to pay in up to that
10	point.
11	COMMISSIONER DEASON: But giving you the
12	benefit of but we cannot go through the process of
13	putting additional moneys subject to refund until
14	after we go to hearing on this case.
15	MR. SHREVE: If you as you said, I think
16	if you go to hearing on this case and you set the
17	proper rates, then what are you going to set subject
18	to refund if you have the proper rates, as you've
19	determined, that are fair, just, and reasonable?
20	I don't think you're going to have the
21	information, first of all, to set rates at that
22	hearing; but maybe you will.
23	COMMISSIONER DEASON: So it goes back, then,
24	that
25	MR. VACCARO: We've intended to
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COMMISSIONER DEASON: -- if you think it's 1 2 not sufficient information to set fair, just and 3 reasonable rates --MR. SHREVE: I think we could --4 5 COMMISSIONER DEASON: -- in this case --6 MR. SHREVE: I think we could probably come 7 out with lower rates coming out of the hearing, if you 8 have the proper rates and set things -- set the rates on a going-forward basis that are fair, just, and 9 reasonable. I think there's very little question 10 11 about that, and I think the Staff will have to admit 12 that. At this point, I guess I'm looking at the 13 two years that the customers have been paying when 14 they should have been in a rate reduction case instead 15 of being in a rate increase case. And it seems to me 16 17 the company has some burden to keep this Commission aware and the Staff aware of what's happening, rather 18 19 than filing annual reports that report an inaccurate, improper return on equity and earnings. 20 Now, maybe I'm wrong about that, but I think 21 22 it should be investigated and found out. 23 COMMISSIONER DEASON: Is our Staff planning on looking at the accuracy of the annual reports that 24 25 have been filed; and, if so, how and when? Is it part

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1	of this case, or is it something separate?
2	MR. WILLIS: Commissioners, we're going to
3	be looking at the 1998 report when it's filed. We
4	have not had the '96 or the '97 audited. We were
5	doing the 1997, audited at one point, but we decided
6	to take our resources where they could be better used
7	at the moment and move that towards getting our
8	testimony filed and moving to the 1998, which would
9	affect overearnings going forward.
10	We believed that putting resources back for
11	1997 at that point was not in our best interests at
12	the time. We can do that in the future. We really
13	don't have much faith in the numbers for 1997.
14	COMMISSIONER DEASON: In the annual report.
15	MR. WILLIS: In the annual report. Or 1996.
16	We have, as outlined in our prior recommendation and
17	this one, we have problems with the company's data; we
18	have problems with the booking. We continue to have
19	these problems.
20	COMMISSIONER DEASON: Well, what's our
21	normal procedure? Just for the moment assume that we
22	weren't in this rate proceeding; this company was
23	filing annual reports, and somehow, it came through an
24	audit or whatever, it came to our attention they were
25	filing inaccurate annual reports. What would we do in
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that situation? 1 2 MR. WILLIS: Well, for one, after it came to 3 our attention, we would probably show cause the company; and there is a show cause as part of this 4 5 proceeding, I believe. 6 MR. VACCARO: No, there is not; no. But we 7 are looking at the propriety of the company's records 8 and requiring them to -- and requesting that an audit be done of the '98 annual report. 9 COMMISSIONER DEASON: But we don't even have 10 the '98 annual report yet. 11 MR. VACCARO: No. The annual report isn't 12 due until, I believe, March 31st. 13 COMMISSIONER DEASON: So that couldn't be an 14 15 issue in this proceeding. MR. VACCARO: No, as far as --16 COMMISSIONER DEASON: As far as the accuracy 17 of the '98 annual report, we don't even have it yet. 18 19 MR. WILLIS: Well, that's true. Commissioner, you might want to MR. SHREVE: 20 ask your Staff, based on the figures given by the 21 22 company in the annual report and the gallons sold, what the earnings for '97 was using the company's 23 24 figures. 25 COMMISSIONER DEASON: Is that something

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1	that's already in Staff's testimony? Is that
2	something Staff's looked at?
3	MR. WILLIS: It's something we've looked at.
4	COMMISSIONER DEASON: Well, it will come out
5	at the hearing. I'm not trying to get into the merits
6	of the issues.
7	But I guess it just boils down to my
8	final my ultimate concern is that are we going to
9	have the necessary information to set fair, just, and
10	reasonable rates on a going-forward basis if we go to
11	hearing on March the what is it 9th and 10th, or
12	11th and 12th; whatever it is are we going to have
13	the information that we need to set rates? Because if
14	we don't, it seems to me we have no alternative but to
15	dismiss this case.
16	MS. JABER: Here's the answer to your
17	question. We've got prefiled Staff testimony that
18	apparently says that there's a problem with
19	contributions and service availability charges and
20	that the utility is apparently overearning.
21	We can't answer your question in the
22	affirmative because none of that testimony has been
23	cross-examined. We haven't cross-examined the
24	utility. Public Counsel hasn't cross-examined any of
25	those witnesses. We can't sit here today and give you
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1 | a guarantee.

What I can tell you is if it looks like at the conclusion of the hearing that there are some weaknesses, we could recommend that the record be reopened. We can recommend that you continue the hearing. It's -- we can't give you a --

7 COMMISSIONER DEASON: Could we put money 8 subject to refund at the conclusion of the hearing to 9 get more information later on? If we feel like there 10 is overearnings, but we're not exactly sure as to how 11 much, but we can estimate a fair amount, put that 12 subject to refund, and then go to subsequent hearing 13 to tie down the exact amount that has --

MS. JABER: Right, we can do that.
MR. WILLIS: Yes, we could do that.
COMMISSIONER DEASON: There's just no easy

17 answer to this case.

18 MS. JABER: No. And I don't want to mislead 19 you by trying to give you a guarantee that just --

20 **COMMISSIONER CLARK:** I would agree with you, 21 Commissioner Deason, but I think going to hearing will 22 get us one step closer where we need to be, and 23 that's -- we, you know, may only be able to get the 24 contributions in aid of construction fixed, but I 25 think it will get us one step closer. We'll get the

interim rates back and we'll be one step closer to 1 2 getting the pot right, and that's why I think we 3 should --COMMISSIONER DEASON: What happens --4 5 COMMISSIONER CLARK: -- because we've 6 delayed this too long. 7 COMMISSIONER DEASON: What happens to rate case expense if the decision is made in this case that 8 9 there is -- zero increase is justified, and the fact the potential exists for rate reduction, what happens 10 11 to the rate case expense? MR. WILLIS: I think that's up to you. 12 MS. JABER: Yeah, the --13 MR. WILLIS: -- to decide whether it should 14 be disallowed or not. 15 MS. JABER: Right. The case law suggests 16 that you have broad discretion in terms of determining 17 the appropriate rate case expense, and just very 18 19 recently the Florida Cities EPA case where you denied the limited proceeding, you said that was imprudent 20 and, therefore, rate case expense should not be 21 22 allowed; and you gave them, in fact, zero in rate case 23 expense. 24 COMMISSIONER DEASON: That's another 25 consideration is the rate case expense in this matter,

1	and I
2	MR. WILLIS: It's all what
3	COMMISSIONER DEASON: what the results
4	are going to be okay.
5	MR. SHREVE: Commissioner, I agree with you
6	completely, and I think one thing that has to be
7	explored is why are we here in this rate case at all.
8	It certainly was not because of the customers.
9	You need to look at that. Look at the
10	inaccuracies of the information furnished by the
11	Commission. The Staff you actually put an order
12	out two over two years ago, I believe, telling the
13	company to get their books straight. That came from
14	the Staff.
15	I don't think there should be any rate case
16	expense, particularly when a company is coming in for
17	a rate increase at a time when they don't deserve it.
18	MR. MELSON: Commissioner Deason, let me
19	point out to you that Mr. Shreve has changed his
20	position on rate case expense.
21	Public Counsel did not protest rate case
22	expense in the second PAA. Their position up until
23	this point has been that means the amount of rate case
24	expense in that settlement offer is the amount and it
25	cannot be adjusted up and down.
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It's curious that he's now saying it can be 1 adjusted down when he's told us we don't have the 2 right to seek to adjust it upwards. I think we're 3 getting a lot of inconsistencies. 4 MR. SHREVE: Commissioner, it is 5 inconsistent, and it's because we have now found out 6 that the company has filed misinformation with this 7 Commission, and I'll continue to change to the 8 position I think I should at any time when we discover 9 false information. 10 MR. VACCARO: And you've certainly got 11 unusual circumstances with this case, and I think you 12 should have wide latitude on the issue of rate case 13 14 expense. 15 COMMISSIONER DEASON: Commissioners, is there further questions or a motion? 16 COMMISSIONER CLARK: Move Staff. 17 18 COMMISSIONER JACOBS: I second it, with the caveats that we got today on things that we can do at 19 20 hearing to deal with refunds. 21 COMMISSIONER DEASON: Well, I'm going to 22 support the motion and the second. Let me tell you 23 why. I think that this matter has got to be resolved. 24 It's been delayed long enough. 25 I think we need to go to hearing, and I

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1	think that it's probably the most expeditious way to
2	determine what rates should be, what refunds should
3	be. And if need be, we can, as part of this, place
4	money subject to refund, if necessary, on a
5	going-forward basis and even have additional hearings
6	if we can't establish enough get enough information
7	in this docket to be comfortable that we're
8	establishing fair and reasonable rates.
9	So this is the best vehicle to get that to
10	that outcome, and that's the reason I'm supporting the
11	motion. So show that Staff's recommendation is
12	approved on Item 50.
13	We'll go back to Item 48.
14	(Whereupon the discussion on Item 50
15	concluded.)
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1 STATE OF FLORIDA) CERTIFICATE OF REPORTER 2 COUNTY OF LEON) I, H. RUTHE POTAMI, CSR, RPR, FPSC 3 Commission Reporter, 4 DO HEREBY CERTIFY that the Agenda Conference in Docket No. 960444-WU was heard by the Florida 5 Public Service Commission at the time and place herein stated; it is further 6 7 CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed by me; and that this transcript, 8 consisting of 50 pages, constitutes a true transcription of my notes of said proceedings. 9 10 DATED this 18th day of February, 1999. 11 m 12 H. RUTHE POTAMI, CSR, RPR 13 Official Commission Reporter (904) 413-6734 14 15 16 17 18 19 20 21 22 23 24 25