153

 1 BEFORE THE

 FLORIDA PUBLIC SERVICE COMMISSION

 2

 DOCKET NO. 060658-EI

 3

 In the Matter of:

 4

 PETITION ON BEHALF OF CITIZENS OF THE

 5 STATE OF FLORIDA TO REQUIRE PROGRESS

 ENERGY FLORIDA, INC. TO REFUND CUSTOMERS

 6 $143 MILLION.

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 13 VOLUME 2

 14 Pages 153 through 355

 15

 PROCEEDINGS: HEARING

 16

 BEFORE: CHAIRMAN LISA POLAK EDGAR

 17 COMMISSIONER MATTHEW M. CARTER, II

 COMMISSIONER KATRINA J. MCMURRIAN

 18

 DATE: Monday, April 2, 2007

 19

 TIME: Commenced at 1:30 p.m.

 20 Concluded at 5:38 p.m.

 21 PLACE: Betty Easley Conference Center

 Room 148

 22 4075 Esplanade Way

 Tallahassee, Florida

 23

 REPORTED BY: JANE FAUROT, RPR

 24 Official FPSC Reporter

 (850) 413-6732

 25

 APPEARANCES: (As heretofore noted.)

 FLORIDA PUBLIC SERVICE COMMISSIO

 154

 1 I N D E X

 2 WITNESSES

 3

 NAME: PAGE NO.

 4

 STEVEN M. FETTER

 5

 Direct Examination by Mr. Burnett 156

 6 Prefiled Direct Testimony Inserted 158

 Cross Examination by Mr. Twomey 191

 7 Cross Examination by Mr. McWhirter 196

 Cross Examination by Mr. Brew 207

 8 Cross Examination by Ms. Bradley 215

 Cross Examination by Mr. Burgess 216

 9 Cross Examination by Ms. Bennett 237

 10 DONNA DAVIS

 11 Direct Examination by Mr. Walls 242

 Prefiled Direct Testimony Inserted 244

 12 Cross Examination by Mr. McGlothlin 304

 Cross Examination by Mr. Young 329

 13 Cross Examination by Mr. McWhirter 338

 Redirect Examination by Mr. Walls 347

 14

 15

 16

 17

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 FLORIDA PUBLIC SERVICE COMMISSION

 155

 1 EXHIBITS

 2 NUMBER: ID. ADMTD.

 3 33 242

 4 213 Progress Fuels Corporation 304 353

 Organizational Chart

 5

 214 Progress Energy, Inc. U-9C-3, 312 353

 6 2003

 7 215 March 14, 2005 Agenda, New 315 353

 New River Synfuel

 8

 34 through 53 352

 9

 10

 11

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 13

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 15

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 FLORIDA PUBLIC SERVICE COMMISSION

 156

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

 2 (Transcript follows in sequence from Volume 1.)

 3 CHAIRMAN EDGAR: We will go back on the record. And

 4 I believe when we left off that, Mr. Burnett, it was time for

 5 you to call your first witness.

 6 MR. BURNETT: Yes, ma'am. Thank you. PEF calls

 7 Steven Fetter.

 8 May I proceed, Madam Chairman?

 9 CHAIRMAN EDGAR: Yes, sir.

 10 STEPHEN M. FETTER

 11 was called as a witness on behalf of Progress Energy Florida,

 12 Inc., and having been duly sworn, testified as follows:

 13 DIRECT EXAMINATION

 14 BY MR. BURNETT:

 15 Q Good afternoon, Mr. Fetter. Will you please

 16 introduce yourself to the Commission and provide your address.

 17 A My name is Stephen M. Fetter, and my address,

 18 business address, is 1489 West Warm Springs Road, Number 110,

 19 Henderson, Nevada 89014.

 20 Q Mr. Fetter, who do you work for and what is your

 21 position?

 22 A I have my own energy advisory firm called Regulation

 23 Unfettered, and I am the president.

 24 Q Have you filed prefiled direct testimony and exhibits

 25 in this proceeding?

 FLORIDA PUBLIC SERVICE COMMISSION

 157

 1 A Yes, I have.

 2 Q And do you have a copy of those in front of you?

 3 A Yes.

 4 Q Do you have any changes to make to your prefiled

 5 testimony or your exhibits?

 6 A There is one small change. On Page 10, Line 6, the

 7 verb tense "is" should be "are".

 8 Q Any other changes, Mr. Fetter?

 9 A No.

 10 Q With those changes noted, if I asked you the same

 11 questions in your prefiled testimony today, would you give the

 12 same answers that are reflected therein?

 13 A Yes, I would.

 14 MR. BURNETT: Madam Commissioner, we request that the

 15 prefiled testimony of Mr. Fetter be entered into the record as

 16 if it were read today.

 17 CHAIRMAN EDGAR: The prefiled testimony will be

 18 entered into the record as though read.

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 FLORIDA PUBLIC SERVICE COMMISSION

 188

 1 BY MR. BURNETT:

 2 Q Mr. Fetter, do you have a summary of your prefiled

 3 testimony?

 4 A Yes, I do.

 5 Q Will you please summarize that for the Commission?

 6 A Yes. Madam Chairman and Commissioners, I am

 7 providing testimony in this proceeding in an effort to assist

 8 this Commission on matters of regulatory policy. I offer my

 9 opinions based upon my experience as chairman of a state

 10 utility commission, head of the utility ratings practice at a

 11 major credit rating agency, and as someone who has both

 12 operated under and analyzed fuel adjustment mechanisms.

 13 I want to start with the widely accepted regulatory

 14 principle that utility management decisions are not imprudent

 15 if they fall within a range of reasonable business judgment.

 16 It would be very rare for there to be a single right business

 17 judgment on an issue, especially when the issue is a complex

 18 one. Rather, the norm would be that a range of decisions exist

 19 that an informed management could make and which would

 20 represent a reasonable and prudent decision. As this

 21 Commission knows, it is not a Public Service Commission's job

 22 to manage the utilities they regulate. Thus, when it comes to

 23 prudence reviews, commissions must guard against substituting

 24 their after-the-fact judgment for the decisions management made

 25 at an earlier time.

 FLORIDA PUBLIC SERVICE COMMISSION

 189

 1 Second, hindsight review must be avoided. This is

 2 well understood but easier said than done. It is easy to fall

 3 into the trap of thinking that what occurred was more

 4 predictable than it was at the time a past decision was made.

 5 One should be particularly careful when information relied upon

 6 occurred or was revealed after the time that a decision was

 7 made.

 8 Third, regulatory certainty and finality with respect

 9 to fuel costs are very important to the financial community.

 10 Regulatory policy decisions impacting the timeliness and

 11 certainty of fuel cost-recovery can affect a utility's credit

 12 ratings. This is especially true when the issue is framed as

 13 OPC has done here as reaching back over ten years with

 14 approximately $143 million at stake. A negative result under

 15 the unprecedented circumstances at issue here hold out the

 16 potential to affect both investors and customers since a

 17 weakening of Progress Energy's credit profile increases the

 18 utility's cost of capital, which then gets flowed through into

 19 the rates that customers pay.

 20 There is no reason for this to occur. I understand

 21 that Progress Energy makes regular required filings with the

 22 FERC and this Commission setting out in detail its coal

 23 procurement costs. The utility's records are open and

 24 accessible to the Commission and OPC, and, in fact, Commission

 25 audits have been undertaken and discovery has occurred

 FLORIDA PUBLIC SERVICE COMMISSION

 190

 1 regarding utility fuel decisions. Also, the utility regularly

 2 goes through fuel cost-recovery proceedings leading ultimately

 3 to hearings where costs are passed through to customer bills.

 4 Moreover, the utility has regularly briefed the Commission and

 5 OPC about its fuel procurement in between fuel adjustment

 6 hearings.

 7 This is the way the process should work and finality

 8 should attach at the true-up process absent some material

 9 concealment. In this way, a reasonable balance is struck

 10 between what fuel procurement information is affirmatively

 11 presented before and during the proceeding, and what

 12 information is available for further detail or elaboration upon

 13 request. Indeed, despite frequent statements that costs have

 14 been approved subject to prudence review, there is no

 15 regulatory process in place by which any other prudence review

 16 can occur.

 17 I find it hard to believe that this Commission has

 18 for more than a decade passed on fuel costs for customers to

 19 pay without determining that such costs were appropriate.

 20 Rather, it appears to me that the Commission with staff support

 21 has, in fact, conducted prudence review by the time the fuel

 22 costs are ultimately trued up. No other conclusion makes

 23 regulatory sense. To suggest otherwise imposes impossible

 24 burdens. No utility should remain under perpetual prudence

 25 review with customers having paid costs that may or may not

 FLORIDA PUBLIC SERVICE COMMISSION

 191

 1 have been appropriate.

 2 In sum, if the Commission were to reconsider fuel

 3 costs that have previously been trued up for cost-recovery

 4 going back more than ten years, it would create a regulatory

 5 environment within which no issue is ever finally resolved. I

 6 expect that investors would react to such uncertainty by

 7 requiring higher returns on equity and higher interest payments

 8 on debt instruments, not only for Progress Energy but

 9 potentially for all of the state's investor-owned utilities.

 10 Such a process would be unfair to both investors and customers

 11 and, thus, would represent bad regulatory policy.

 12 Thank you very much.

 13 MR. BURNETT: Thank you, Mr. Fetter.

 14 We tender Mr. Fetter for cross-examination.

 15 CHAIRMAN EDGAR: Mr. Twomey.

 16 MR. TWOMEY: Thank you, Madam Chair.

 17 CROSS EXAMINATION

 18 BY MR. TWOMEY:

 19 Q Mr. Fetter, good afternoon.

 20 A Good afternoon.

 21 Q Mr. Fetter, I assume you are being compensated to

 22 testify in this proceeding, is that correct?

 23 A Yes, I am.

 24 Q And if I may ask, what is your total compensation for

 25 your testimony and appearing here?

 FLORIDA PUBLIC SERVICE COMMISSION

 192

 1 A I am compensated at the rate of $580 an hour.

 2 Q What is the -- 580?

 3 A $580 an hour.

 4 Q And what do you expect your total billings to be?

 5 A I haven't calculated it. At this point, I think it

 6 is somewhere around 35 or $40,000.

 7 Q Okay, sir. Thank you.

 8 At Page 7 of your testimony, at Line 19, you say, "I

 9 would emphasize that I'm not suggesting that I know of any

 10 circumstances that indicate that PEF's coal procurement

 11 decisions could be shown to be 'wrong,' even if judged by later

 12 events now known," correct?

 13 A That is what that sentence says.

 14 Q Okay. Let me ask you this. Wouldn't it also be

 15 true, or isn't it true that you don't -- do you know of facts

 16 and circumstances that you can conclude that the company is

 17 correct in what it has done?

 18 A As I note elsewhere in my testimony, I am not

 19 testifying on the facts regarding their coal procurement. I am

 20 testifying with regard to regulatory policy.

 21 Q Okay. Thank you. Then it would be true that you

 22 don't -- you don't know either way, then, whether their

 23 behavior in their coal purchasing practices have been either

 24 prudent or imprudent, is that correct?

 25 A I'm not testifying on that issue.

 FLORIDA PUBLIC SERVICE COMMISSION

 193

 1 Q Okay. Now, Page 13, the question at Line 16 is how

 2 is the principle concerning substitution of regulatory judgment

 3 for management judgment involved here? And you say in the

 4 first sentence, "It is potentially implicated in any proceeding

 5 that purports to judge the prudence of past utility management

 6 actions." And my question to you is that function purporting

 7 to judge a utility's past practices is inherent in regulation,

 8 is it not?

 9 A Yes, it is.

 10 Q Okay. So you are not critical of that fact?

 11 A The fact that --

 12 Q The fact that commissions of necessity have to go

 13 back and judge a company's prudence in their past actions,

 14 their management decisions?

 15 A No, that is a key part of their job.

 16 Q Okay. Now, part of your testimony is that it is

 17 important for investors to have confidence in the finality of

 18 Commission decisions, correct?

 19 A That is an important asset among the financial

 20 community.

 21 Q And you mentioned that you were with -- was it Fitch?

 22 A Fitch Investors Service.

 23 Q Did you have an occasion to know what the Florida

 24 Commission's -- let me ask you first. Fitch, does it not,

 25 keep -- does it not rank state commissions?

 FLORIDA PUBLIC SERVICE COMMISSION

 194

 1 A You are asking does it not or does it?

 2 Q Does it?

 3 A It does not.

 4 Q It does not. It has not ranked state commissions?

 5 A Fitch does not.

 6 Q Are you aware whether its competitors in bond ratings

 7 rank commissions?

 8 A To the best of my knowledge, they do not.

 9 Q Okay. So you wouldn't know, then, how -- or would

 10 you know how Florida is viewed vis-a-vis the other 49 states?

 11 A Yes, I do. I have my own opinion, and there is also

 12 a regulatory information service that provides information on

 13 issues like that.

 14 Q Isn't it true that over the better part of the last

 15 two decades that Florida, the Florida Commission has been

 16 viewed as supportive?

 17 A It has been viewed as issuing constructive decisions

 18 with regard to investor issues.

 19 Q And if I read your testimony correctly, you suggest,

 20 don't you, that having a supportive commission with

 21 constructive decisions can benefit consumers by lowering the

 22 cost of debt, is that correct?

 23 A Without a doubt.

 24 Q Okay. Isn't there also a danger, Mr. Fetter, that if

 25 commissions are too constructive that the customers can bear a

 FLORIDA PUBLIC SERVICE COMMISSION

 195

 1 burden if equity costs are too high; that is, if equity awards

 2 are too high?

 3 A I'm not sure I understand your question.

 4 Q Well, is there a risk that if a commission is number

 5 one in the country in being supportive of utilities, and awards

 6 higher, the highest equity ratings in the country, that

 7 customers could be harmed in that fashion?

 8 A Well, if the rankings I referred to earlier were just

 9 lining up commissions based on ROEs authorized, then I think

 10 your theory would play out. But it's a -- the rankings reflect

 11 sensitivity to issues like that, but also timeliness and how

 12 their administrative processes are carried out. And so, you

 13 know, there is a trade-off where a highly ranked commission

 14 will, in most cases, help the utilities that it regulates get a

 15 stronger credit rating, which would reduce the costs that

 16 bondholders require in order to make investments within a

 17 jurisdiction.

 18 Q On the debt side?

 19 A On the debt side.

 20 Q I've got you. And, lastly, I'll stop with, I noticed

 21 in your vitae that you lobbied the Michigan Legislature to

 22 exempt the Michigan Commission from the Open Meetings Act?

 23 A Yes, I did.

 24 MR. TWOMEY: Okay. I was just curious about that.

 25 Thanks.

 FLORIDA PUBLIC SERVICE COMMISSION

 196

 1 That's all, Madam Chair.

 2 CHAIRMAN EDGAR: Thank you.

 3 Mr. McWhirter.

 4 CROSS EXAMINATION

 5 BY MR. McWHIRTER:

 6 Q Mr. Fetter, you can't see me; just consider this a

 7 voice from above. Oh, you can see me.

 8 What did you say the name of your company is?

 9 A Regulation Unfettered.

 10 Q I see. Can you give us a brief description of how

 11 you came by that name?

 12 A Well, I was born and given a name, Steven Fetter, and

 13 when I was going -- I actually started publishing regulatory

 14 commentary pieces while at Fitch under the title Regulation

 15 Unfettered. And when I went out on my own, I decided that I

 16 owned the name Regulation Unfettered as opposed to Fitch owning

 17 it, and I called my company that to indicate that through my

 18 activities and testimony I would help to explain regulation to

 19 all interested parties.

 20 Q The connotation of regulation unfettered to me is

 21 that you think less regulation is better rather than more

 22 regulation, or do you think more regulation is better? What is

 23 the connotation you want to give to the people whom you consult

 24 with by that name?

 25 A That name has nothing to do with deregulation or

 FLORIDA PUBLIC SERVICE COMMISSION

 197

 1 restructuring.

 2 Q Do you provide consulting services to -- primarily to

 3 utilities and rating agencies or do you provide it to consumer

 4 groups, as well?

 5 A I have been hired by consumer groups and by

 6 Commissions.

 7 Q What consumer groups have hired you in the past?

 8 A The Maine Public Counsel and the Vermont Public

 9 Counsel.

 10 Q And what utilities have employed you in the last

 11 three years?

 12 A Progress Energy Florida, Georgia Power. If you want

 13 me to give you all the names, it will take awhile, but I'm

 14 willing to, if you would like.

 15 Q Go ahead.

 16 A Entergy, Consolidated Edison, Public Service of

 17 Indiana, Pacific Gas and Electric, Arizona Public Service,

 18 Central Vermont Public Service, Detroit Edison, Nevada Power,

 19 Sierra Pacific Power, Great Plains Energy, Southwest Gas,

 20 Baltimore Gas and Electric, Pepco, Delmarva.

 21 Q I think that is sufficient, Mr. Fetter. It seems to

 22 me that you predominately provide consulting services and

 23 testimony for utilities as opposed to consumer groups. Would

 24 that be a fair analysis?

 25 A I listen to whoever calls, and if I agree with the

 FLORIDA PUBLIC SERVICE COMMISSION

 198

 1 position they want me to put forward, I agree to sign on with

 2 them. And that is what happened with the consumer advocates I

 3 worked with, as well as the commissions I worked with, as well

 4 as the utilities I have worked with.

 5 Q When you provide consulting services, do I understand

 6 from your last answer that they ask you what they want you to

 7 talk about and you testify if you agree with that?

 8 A They usually raise an issue and either ask my opinion

 9 of it or indicate the position that they feel, and I consider

 10 whether I could support what they want said. And if I can't, I

 11 either don't work for them or I indicate to what degree I can

 12 support what they say, and then they decide whether that's

 13 sufficient for them to retain me.

 14 Q In your opinion, as a matter of regulatory policy,

 15 should fuel purchase contracts be confidential or open to

 16 public scrutiny?

 17 A I believe to the extent that they can be open without

 18 jeopardizing the competitive nature of that sector, I think

 19 that is a positive thing. To the extent that it would skew the

 20 market place on those issues, I think protection of

 21 confidential information is appropriate.

 22 Q Can you give me some hypothetical examples of where

 23 you find the boundaries to be for what you just said?

 24 A I'm not sure I understand what kind of hypothetical

 25 you would want.

 FLORIDA PUBLIC SERVICE COMMISSION

 199

 1 Q Well, you said fuel purchase contracts should be

 2 confidential if it -- what was the rest of what you said, if

 3 they should not interfere with the competitive marketplace? Is

 4 that a fair --

 5 A Yes, if it would skew the marketplace by being 100

 6 percent open.

 7 Q I see. Well, what kind of information and under what

 8 circumstances would the marked be screwed by -- skewed by --

 9 I'm sorry about that -- skewed by opening the fuel purchase

 10 information to public scrutiny?

 11 A Where two entities, whether they be utilities or

 12 industrial manufacturers, are both interested in procuring the

 13 same commodity, I think it would not be in the interest of

 14 setting of a fair market if not only those two parties, but all

 15 parties knew what offers were on the table and what terms and

 16 conditions of service were on the table.

 17 Q Well, isn't that how the stock market operates and

 18 how most of the Oasis, open access bulletin boards work? You

 19 publish what the price is and people are able to purchase at an

 20 exchange rate openly available price for the commodity?

 21 A No, that is not how it operates.

 22 Q How do they operate?

 23 A A stock exchange puts out an equity for purchase, and

 24 serves as basically, the clearing agent, and it's publicly

 25 posted. It changes by every three or four seconds, and a

 FLORIDA PUBLIC SERVICE COMMISSION

 200

 1 purchaser can determine whether to attempt to buy a publicly

 2 listed stock.

 3 Q How about the commodity markets, do they work in the

 4 same fashion?

 5 A I think some commodity markets do and others don't.

 6 Q Do you find it against regulatory policy for

 7 commodity markets to give current and future prices for

 8 commodities, spot market and future prices?

 9 A I'm sorry. Do I find that it violates what?

 10 Q Does it interfere with -- or does it skew the

 11 competitive marketplace if people know what the current and

 12 future market prices are for a commodity?

 13 A It can.

 14 Q How would it be not in the public interest for people

 15 to know what the present current price for a commodity is?

 16 A Let me use an example of a hypothetical utility

 17 company that wants to procure a certain fuel at a certain

 18 amount on certain timing, but because of that location of that

 19 utility it is under kind of unusual transportation conditions.

 20 And so, therefore, there may not be as many competitors able to

 21 provide that supply. So if all information, including the

 22 difficulties of transporting that fuel were known in the open

 23 marketplace, then another, not only a utility, but a

 24 manufacturer, anyone could step in and say, listen, we will

 25 give you the same terms that the hypothetical utility offered,

 FLORIDA PUBLIC SERVICE COMMISSION

 201

 1 but transportation wise we will create a smoother transition of

 2 delivery of that fuel to us. So in that case, the hypothetical

 3 utility with the unusual conditions would probably have to pay

 4 more, and that cost would appropriately be flowed through to

 5 customers if that was the only choice the utility had.

 6 Q But then competition would come into play, and it

 7 would tend to reduce the cost to people who could provide the

 8 cheapest transportation, wouldn't it?

 9 A It depends on how many competitors could meet the

 10 unusual conditions of that utility.

 11 Q Tell me your opinion about a regulated utility

 12 dealing with an affiliated nonregulated company. Can you give

 13 me the parameters as to circumstances when purchases of

 14 commodities from an affiliated nonregulated company should be

 15 confidential?

 16 A I would think the Commission should have the ability

 17 to gain information so that it can tell whether the regulated

 18 utility and its customers are being treated appropriately.

 19 Q You indicated that -- are you familiar with how long

 20 it takes to process a fuel recovery case in Florida?

 21 A I generally know the process of setting of a fuel

 22 factor, and then at some point after the end of the year there

 23 is a filing, and then a true-up.

 24 Q But do you know that it's generally about 80 days

 25 from the date that the forecasted prices are filed with the

 FLORIDA PUBLIC SERVICE COMMISSION

 202

 1 Commission that it must make a decision with respect to setting

 2 the factor for the forthcoming year? Are you aware of that

 3 circumstance in Florida?

 4 A I didn't know the 80 days.

 5 Q Well, presume that or assume that for hypothetical

 6 purposes. Do you think 80 days would give intervenors an

 7 adequate time to fully explore the cost of the commodities that

 8 are being purchased for the forthcoming year when, say,

 9 $2 billion worth of fuel is being purchased by a utility?

 10 A I would think that 80 days would give enough time for

 11 notice to be provided by intervenors who had issues.

 12 Q Do you think that intervenors would have enough time

 13 within that stretch to discover the salient facts, employ

 14 experts, and file countervailing testimony to the proposed fuel

 15 factor?

 16 A My experience as explored by the previous questioner

 17 related to executive branch service, legislative service, and

 18 then serving on a commission. And it was my belief that if a

 19 law is in place or a rule or regulation is in place and that

 20 the public interest would be better served by an amendment,

 21 then stakeholders who have an interest should take steps to

 22 approach the decision-maker to modify that process. And so, as

 23 I said, I view 80 days as certainly sufficient time for issues

 24 to be raised that would be of interest to the Commission. And

 25 if there is a legislative deadline that does not allow the

 FLORIDA PUBLIC SERVICE COMMISSION

 203

 1 smooth operation of an effectuation of public policy, then I,

 2 as an interested stakeholder, would certainly attempt to take

 3 steps to smooth out that process.

 4 Q You, as a stakeholder, can take steps to smooth out

 5 the process. What does that mean?

 6 A I might approach the legislature. I might approach

 7 the Commission if it was under by rule.

 8 Q You being a consumer or you being a what?

 9 A Someone who has an interest in that law or rule or

 10 regulation.

 11 Q What should be the time limit then for that consumer

 12 to come in and make his concerns known to the legislature or

 13 the Commission?

 14 A I'm not sure what you mean by a time limit.

 15 Q Well, you indicated that from a rating agency's

 16 viewpoint, rating agencies wanted decisions to be

 17 administratively final and not subject to later unsettling

 18 changes in the fuel costs that were passed through to the

 19 customers. Didn't I understand your testimony to say that?

 20 A Well, not only rating agencies, but any entity that

 21 is investing their own funds in a utility, they want certainty

 22 and finality with regard to regulatory decisions which are made

 23 on a timely basis.

 24 Q Now, with respect to the process in Florida, are you

 25 familiar with the true-up process concept, is that generally

 FLORIDA PUBLIC SERVICE COMMISSION

 204

 1 done throughout the United States?

 2 A True-ups are very common across the U.S.

 3 Q And what that means is if they come in with a

 4 forecast of their estimated prices, and the prices come in

 5 higher during the forthcoming year, then the utility can

 6 collect the higher prices, what its actual costs, out-of-pocket

 7 costs have been, is that correct?

 8 A Or lower.

 9 Q And it goes the other way, too.

 10 A Sure.

 11 Q If the prices go down?

 12 A Sure. That is the whole idea of the true-up.

 13 Q Now, in Florida that process, we generally deal with

 14 the two preceding years when you come in for a fuel true-up.

 15 Have you found that fact that the Commission can go back for

 16 two years to true-up costs to be unsettling to the financial

 17 community?

 18 A I think that that is better understood than the idea

 19 that there have been no -- very few prudency determinations

 20 over the past 20 or 30 years. So I think a two to three-year

 21 window with notice is something that rating agencies could

 22 understand would be -- might be reasonable within the processes

 23 of a particular state.

 24 Q So you think the Commission without disturbing rating

 25 agencies could go back three years, is that it?

 FLORIDA PUBLIC SERVICE COMMISSION

 205

 1 A As I said, with notice and timeliness and reasonable

 2 processes.

 3 Q Well, tell me first of all what you mean by notice?

 4 A That as soon as is reasonable for a party to object

 5 to a fuel determination, either a forecast or actual

 6 expenditures, that that party put not only the Commission on

 7 notice, but the utility that they are challenging on notice.

 8 Q In order to challenge it, then, a consumer group

 9 would have to have the opportunity to go in and examine

 10 confidential information, wouldn't it?

 11 A Or they could, through discovery, gain information

 12 that would allow them to put a challenge on the public record,

 13 and then it would be up to the Commission to set processes so

 14 that all parties could fairly put forth their positions on a

 15 timely basis.

 16 Q What if an unlawful act was discovered, I

 17 would imagine -- would you think it would disturb rating

 18 agencies if they found that an unlawful act that occurred five

 19 years ago, sets as a daisy chain markup that resulted in

 20 unfettered profits to the utility, do you think that the rating

 21 agencies would be concerned about going back to set aside those

 22 unlawful transactions?

 23 A Well, you realize I was head of the Fitch group

 24 during the Enron era, so I think rating agencies could

 25 appreciate the situation where if a hypothetical utility did an

 FLORIDA PUBLIC SERVICE COMMISSION

 206

 1 unlawful act that that might be punished at a later time upon

 2 it being learned that that occurred.

 3 Q So, you think you could go back for three years with

 4 appropriate process and notification for lawful purchases and

 5 further for unlawful purchases, is that, in summary, your

 6 opinion for good regulatory policy?

 7 A Well, how far you go back and the measure of

 8 unlawfulness, I would say there has to be some parity there.

 9 But I think, as I note in my testimony, concealment, fraud, I

 10 don't think there would be an expectation on the rating

 11 agency's part that activities like that should not be able to

 12 be acted upon once they come to public notice.

 13 Q So, in essence, you would say a rule of

 14 reasonableness in our application of regulatory policy as to

 15 how far you can go back on fuel prices would be a good policy

 16 to recommend to this Commission?

 17 A No, I don't think I said a rule of reasonableness. I

 18 said to the extent that the two to three-year is an ongoing

 19 process that everyone understands and that notice can be

 20 provided, you know, that seems to make sense. Fraud or

 21 concealment going further back than that, I have a comfort

 22 level with that. But, you know, when you say rule of

 23 reasonableness, then I think it creates this ambiguity and fog

 24 which allows some parties to say I am going to go back and

 25 challenge 10 or 11 or 15 years. I don't view that going back

 FLORIDA PUBLIC SERVICE COMMISSION

 207

 1 under those conditions would be appropriate, as I testify

 2 within my filed testimony.

 3 Q What if a utility built a boiler and charged

 4 consumers extra for the cost of that boiler in their base rates

 5 in order that it could burn a certain kind of fuel, and then

 6 when that fuel came available at a lower price, failed to

 7 acquire that fuel. Would you think that -- where would that

 8 fall in your ambit of a reasonable period of examination plus

 9 an opportunity to go beyond that in the event of criminal or

 10 other untoward action?

 11 A That sounds like the type of issue that should be

 12 subject to a multi-day hearing with substantial filings for the

 13 Commission to learn all relevant information. It's not a

 14 hypothetical that I can offer an answer to based on a 10 to

 15 15-second rendition of your hypothetical facts.

 16 Q I see. One in which you would have some 212

 17 exhibits, and so forth, to examine?

 18 A It might even have more exhibits than that.

 19 MR. McWHIRTER: I have no further questions.

 20 CHAIRMAN EDGAR: Thank you.

 21 Mr. Brew.

 22 MR. BREW: Yes. Thank you.

 23 CROSS EXAMINATION

 24 BY MR. BREW:

 25 Q Good afternoon, Mr. Fetter.

 FLORIDA PUBLIC SERVICE COMMISSION

 208

 1 A Good afternoon.

 2 Q Do I understand your testimony generally to be

 3 discussing your views of general regulatory policies as applied

 4 to the Florida Commission's fuel practices?

 5 A My views with regard to Florida processes, as well as

 6 my views based on what I think is appropriate regulatory policy

 7 across other jurisdictions.

 8 Q Okay. Good. With respect to the Florida processes,

 9 would you say that you are generally familiar with it or

 10 specifically familiar with it?

 11 A I'd say generally familiar.

 12 Q Generally, did you look at any documents in past

 13 Florida fuel cases?

 14 A I looked at some of the 423 filings and Schedule A

 15 filings, which are filed monthly, I believe, before this

 16 Commission. It's my understanding that there are quarterly

 17 meetings where utilities brief the Commission staff.

 18 Q No, what did you look at?

 19 A I'm sorry?

 20 Q What did you look at?

 21 MR. BURNETT: May the witness finish his answer,

 22 please? I don't believe Mr. Fetter was finished.

 23 CHAIRMAN EDGAR: Mr. Fetter, did you have additional

 24 information that you would like to share on that question?

 25 THE WITNESS: Yes. Thank you, Madam Chairman. It is

 FLORIDA PUBLIC SERVICE COMMISSION

 209

 1 my understanding that there are quarterly meetings where the

 2 state's utilities are able to brief Commission staff and

 3 interested stakeholders. I reviewed Mr. Windham's deposition

 4 where he discussed that he follows these filings, feels that it

 5 is his role to see if there are things that might implicate

 6 prudence or imprudence, and he's in a position where he can

 7 provide information to the Commission or others on Commission

 8 staff.

 9 I found from what I learned about the processes that

 10 they were not very much different than -- when I was in

 11 Michigan we had certain processes where staff had an ongoing

 12 role to garner information with regard to prudence, and then

 13 provide it through channels so that the commission wouldn't be

 14 caught short with regard to prudence issues. And so it seemed

 15 to me that what's going on in this state is that all these

 16 filings that I referred to are not just going on a shelf, but

 17 they are being reviewed towards the end goal of deciding

 18 whether there should be activities related to finding an

 19 imprudent disallowance.

 20 BY MR. BREW:

 21 Q Is that it?

 22 A I'm sorry?

 23 Q Is that it? Are you finished?

 24 A Yes.

 25 Q Okay. Let's talk specifics. The last fuel docket,

 FLORIDA PUBLIC SERVICE COMMISSION

 210

 1 06000-EI (sic), did you look at any of the filings in that

 2 docket?

 3 A Which one?

 4 Q The last fuel docket, 06000-EI?

 5 A As I said, I looked at some 423 and Schedule A

 6 filings. Whether it was in that docket or not, I couldn't say

 7 for sure.

 8 Q How many issues did staff address in their prehearing

 9 statement in that docket?

 10 A I'm sorry?

 11 Q In the last fuel filing, how many issues did staff

 12 address in their prehearing statement? Ten, 50, 100, do you

 13 know?

 14 A Did staff what?

 15 Q Address in their prehearing statement.

 16 A I'm not sure.

 17 Q Did you look at it?

 18 A I didn't look at what issues staff raised.

 19 Q And you wouldn't know whether the level of issues

 20 that staff had and the parties had to address in that docket

 21 was, say, typical of what goes on in a fuel case?

 22 A No, I didn't review what issues were raised.

 23 Q All right. Could I refer you to your testimony at

 24 Page 5, where you describe the purpose of your testimony. Do

 25 you see it?

 FLORIDA PUBLIC SERVICE COMMISSION

 211

 1 A I'm there.

 2 Q And you say at the end on Lines 23 and 24, that your

 3 testimony does not address the factual assertions in OPC's

 4 petition or the testimony of Mr. Sansom, do you see that?

 5 A Yes.

 6 Q Assume for me a moment that the Commission finds that

 7 the factual assertions raised by OPC and Mr. Sansom were

 8 accurate. Is it your testimony that there should be no relief

 9 for consumers?

 10 A It's my testimony that going back ten or eleven years

 11 with a determination of relief would be inappropriate.

 12 Q Let's take the last fuel docket, were you in

 13 attendance when Mr. McGlothlin gave his opening statement?

 14 A Yes, I was.

 15 Q Good. For last year, if the Commission were to find

 16 that OPC's statements were substantially accurate, would you

 17 agree that a $29 million adjustment would be appropriate to

 18 fuel costs?

 19 A I mean, the Commission has to weigh the evidence and

 20 make a determination of what's appropriate.

 21 Q Please don't fight my question. I asked if the

 22 Commission finds those facts, are you saying that there should

 23 be relief or no relief?

 24 A If they find what facts?

 25 Q If they find the facts as alleged by OPC regarding

 FLORIDA PUBLIC SERVICE COMMISSION

 212

 1 excessive coal costs in that year.

 2 A If they find that there was imprudent behavior within

 3 that year, then the Commission should take action to remedy

 4 that situation.

 5 Q Thank you. You mentioned your work in other states.

 6 And, specifically, I thought I heard you say that one of your

 7 clients recently was Public Service of Indiana, is that right?

 8 A Yes.

 9 Q Does Indiana have a fuel clause?

 10 A Yes.

 11 Q Do they currently have a subdocket, Docket

 12 38707-FAC-68-S1?

 13 A I don't know.

 14 Q Would you accept that subject to check?

 15 A Subject to check.

 16 Q And would you also accept that that is a subdocket to

 17 look at the hedging costs of Duke Energy?

 18 A If that is what you tell me, I'll accept it subject

 19 to check.

 20 Q Okay. A couple of years ago did Indiana have a

 21 prudence case in a fuel subdocket associated with the extended

 22 outage of the D.C. Cook Nuclear Power Plant?

 23 A I wasn't involved in that case.

 24 Q You weren't involved in that case. Would you accept,

 25 subject to check, that Docket 38702-FAC-39 was that subdocket

 FLORIDA PUBLIC SERVICE COMMISSION

 213

 1 in Indiana?

 2 A Subject to check, I'll accept that.

 3 Q Mr. Fetter, on Page 24 of your testimony.

 4 A I'm there.

 5 Q Good. You quote extensively from a report that you

 6 say is entitled, "New York Regulators' Consistency Supports

 7 Electric Utility Credit Quality." Do you see that?

 8 A Yes.

 9 Q Did the New York Commission formally have a fuel

 10 adjustment clause before it entered into restructuring, do you

 11 know?

 12 A Say again?

 13 Q Before it entered into restructuring, did the New

 14 York Utilities have fuel clauses subject to the New York PSC's

 15 review?

 16 A I'm not sure.

 17 Q Okay. You have done work recently for Consolidated

 18 Edison of New York, though, right?

 19 A A couple of years ago.

 20 Q Okay. Would you accept that the New York Commission

 21 conducted a prudence proceeding in the 1980s, Case 28598,

 22 addressing the coal costs of Niagara Mohawk Power Company?

 23 A Would I accept that --

 24 Q That such a docket occurred?

 25 A I don't know if such a docket occurred.

 FLORIDA PUBLIC SERVICE COMMISSION

 214

 1 Q Would you accept that docket subject to check?

 2 A That that existed?

 3 Q Yes.

 4 A That docket? Subject to check, I'll accept that such

 5 a docket existed.

 6 Q And would you also accept that in that docket the New

 7 York Commission went back at least eight years with respect to

 8 coal-related costs passed through the fuel clause?

 9 A I'm sure there were circumstances which led to such

 10 an unusual decision.

 11 Q But you are not disputing the fact that a separate

 12 coal related fuel docket occurred?

 13 A I'm accepting subject to check anything you want to

 14 say.

 15 Q Okay. That's fine. Did Missouri conduct a prudence

 16 proceeding related to fuel costs associated with their blowing

 17 up of the Hawthorn coal plant?

 18 A I don't know.

 19 Q Okay. More generally, in your experience,

 20 Mr. Fetter, states that have fuel clauses, would you say it's

 21 unusual for them to create subdockets when circumstances occur

 22 that require more time to consider than the normal F.A.C

 23 process normally allows?

 24 A I think the states take whatever procedural steps are

 25 necessary.

 FLORIDA PUBLIC SERVICE COMMISSION

 215

 1 MR. BREW: Thank you. That's all I have.

 2 CHAIRMAN EDGAR: Thank you.

 3 Ms. Bradley.

 4 CROSS EXAMINATION

 5 BY MS. BRADLEY:

 6 Q Mr. Fetter, are you aware that the Florida PSC is

 7 created by the Legislature here?

 8 A Is your microphone on? I'm sorry.

 9 Q Actually, it's not. That might help. Let me try

 10 again. Are you aware that the Florida PSC is created by the

 11 Legislature here?

 12 A I believe it is.

 13 Q Is that true of Michigan, as well?

 14 A In Michigan it's created by the legislature.

 15 Q And are you aware that the PSC has only the powers

 16 granted them by the Legislature?

 17 A Delegated authority, yes.

 18 Q Okay. Are you aware of what their primary

 19 responsibility or directive from the Legislature is here?

 20 A I don't know the exact terms that the Legislature

 21 would describe it, but I have a sense of what the delegation of

 22 authority to a public utility commission would be.

 23 Q Now, in your testimony you talk about deference given

 24 to management decisions of the utility, but would you agree

 25 that if approval of a management decision conflicts with the

 FLORIDA PUBLIC SERVICE COMMISSION

 216

 1 primary directive or responsibility that the Legislature has

 2 given the PSC, that they have a duty to follow that legislative

 3 directive?

 4 A Well, when I say deference, I'm saying that the

 5 Commission should not substitute its own judgment for

 6 management decision-making. But if management makes a decision

 7 that is at odds with the law, then I think the Public Service

 8 Commission should take steps with regard to that management

 9 decision.

 10 Q When you say take steps, you mean they can regulate

 11 that, take whatever is necessary to correct that?

 12 A Within law and rule.

 13 MS. BRADLEY: All right. No further questions.

 14 CHAIRMAN EDGAR: Mr. Burgess.

 15 MR. BURGESS: Thank you, Madam Chair.

 16 CROSS EXAMINATION

 17 BY MR. BURGESS:

 18 Q Mr. Fetter, my name is Steve Burgess. I'm here on

 19 behalf of the Office of Public Counsel.

 20 A Hello, sir.

 21 Q Hello. And I need to first -- I thought I had a good

 22 handle on your testimony on this, and I'm not sure whether I

 23 might have been confused a little bit by some of your answers.

 24 As I understand it, what you're saying, correct me if I'm

 25 wrong, please, is that the determination of prudence should be

 FLORIDA PUBLIC SERVICE COMMISSION

 217

 1 considered in the true-up proceeding, and anything subsequent

 2 is off limits with regard to that, short of concealment with

 3 your two standards for concealment, is that right?

 4 A I'm saying that true-up is an appropriate time at

 5 which to create finality.

 6 Q Well, I'm trying to understand what you are advising

 7 the Commission in this case. You're saying that it should

 8 consider any transactions that occurred and were subject to

 9 true-up hearings to be -- to have the issue of prudence

 10 adjudicated, is that your point?

 11 A I'm saying what I have seen in the information I have

 12 reviewed in this case is that staff tracks the company's

 13 filings, is in a position to channel information with regard to

 14 prudence or imprudence issues for further consideration, and

 15 that from the structure I see that a true-up proceeding would

 16 be the appropriate point during which such issues would be

 17 reviewed and finality and certainty was reached.

 18 Q Short of a demonstration, a later demonstration of

 19 concealment as you've defined it?

 20 A Concealment and fraud, I think, are bad things, and

 21 no entity regulated or not should benefit from doing such acts.

 22 Q Right, and I appreciate that. Now, when you were

 23 responding to Mr. McWhirter, you also discussed unlawful acts.

 24 Now, there could be unlawful acts that are not within the

 25 definitions that you presented as far as concealment, is that

 FLORIDA PUBLIC SERVICE COMMISSION

 218

 1 right?

 2 A Yeah, like if I cross the street and get a jaywalking

 3 ticket.

 4 Q Well, I assume you are talking about material

 5 unlawful acts. If unlawful acts were demonstrated later, that

 6 that would be grounds for opening issues in addition to your

 7 concealment?

 8 A You added the word material. That is precisely the

 9 type of differentiation that I was concerned with. Just using

 10 the word unlawful could lead to such misunderstandings and

 11 ambiguity.

 12 Q Right. But you are agreeing that it might be beyond

 13 concealment, beyond the two standards of concealment; that is,

 14 a fraudulent statement or a refusal to provide information that

 15 was asked?

 16 A Like I said, there has to be a certain degree of

 17 parity. You can't take an unlawful relatively non-material act

 18 from 15 years ago and say the whole ballgame is open again.

 19 Q And with regard to the questions that you were being

 20 asked, subject to check, and, of course, you didn't -- not

 21 having looked at that information, you're willing to accept

 22 them. But if that is so, if those were accurate descriptions

 23 of fuel dockets in those other various jurisdictions about

 24 which Mr. Brew was asking, wouldn't it be correct that rating

 25 agencies would be aware that this type of evaluation takes

 FLORIDA PUBLIC SERVICE COMMISSION

 219

 1 place across the country with regard to fuel evaluation?

 2 A No, I think the circumstances referred to were very

 3 unusual. I'm certain there were certain circumstances

 4 underlying those situations. And if I could just read from a

 5 rating agency report with regard to this very docket and how

 6 surprised at least one rating agency would be. It's a Fitch

 7 Ratings Report dated December 28th, 2006, entitled, "Florida

 8 Power Corporation Doing Business as Progress Energy Florida."

 9 And it states on Page 2, "While the FPSC already approved fuel

 10 purchases in those years in prior annual fuel filings, a full

 11 hearing on the matter will be held in the spring of 2007. The

 12 outcome of this matter cannot be determined at this time, but

 13 in Fitch's view the fact that the costs were already approved

 14 by the FPSC lessens the risk of an adverse decision. However,

 15 PEF's existing credit metrics could likely withstand an adverse

 16 outcome within the current ratings, but an adverse decision

 17 would indicate a more challenging regulatory environment in

 18 Florida."

 19 Q Yes. But before you started reading that you said

 20 something to the effect you are certain that in those cases

 21 that Mr. Brew asked you about there were certain specific

 22 instances that made it unusual. But when you were answering

 23 the question you said you didn't know anything about them?

 24 A Based on my 20 years experience with utility

 25 regulation, you know, I'm willing to base my reputation on the

 FLORIDA PUBLIC SERVICE COMMISSION

 220

 1 fact that in Niagara Mohawk issues eight years old did not

 2 spring anew out of the blue. And if that is the case, I'm sure

 3 Mr. Brew will brief it as such.

 4 Q But your concern here is more than just issues eight

 5 years old. Your concern, as I understand it, is any issue that

 6 is raised subsequent to the true-up proceeding, unless there is

 7 concealment. Now, that puts it -- there is a wide range

 8 between what I just described and eight years, is there not?

 9 A Well, my understanding is that OPC and others have

 10 been able to track these issues for 20 years. If they had

 11 problems, they could have made challenges. I think it's

 12 important, and my advice to the Commission would be not to

 13 create an environment of gotcha, where entities that feel that

 14 something is wrong can benefit by just sitting on their hands

 15 and waiting not only years, but in a case like this, a decade

 16 before coming forward.

 17 Q May I get an answer to my question? Your suggestion

 18 to the Commission is that any issue of prudence should not be

 19 raised subsequent to the true-up proceeding short of a

 20 demonstration of concealment. And I asked, isn't there a wide

 21 range between that and an eight-year-old case?

 22 A And what I'm saying is the Commission should put

 23 weight on the fact that parties should have an obligation to

 24 take steps, challenging steps contemporaneous with the events

 25 at issue.

 FLORIDA PUBLIC SERVICE COMMISSION

 221

 1 Q And I am going to ask a third time if I can get an

 2 answer to my question. You were being asked by Mr. Brew about

 3 cases that were -- wherein he asked you were you aware of these

 4 cases wherein subdockets were created and examinations were

 5 made subsequent to the initial fuel determination. And I'm

 6 asking you is there a difference between -- is there a

 7 significant difference between the standard you're suggesting,

 8 that is, nothing can be examined short of a demonstration of

 9 concealment following the true-up determination and eight years

 10 later?

 11 See, you keep going back to eight years and

 12 reasonableness. And I'm asking you are some of these issues to

 13 where they may not be the full ten years and eight years you

 14 are speaking of, but around the country are there not

 15 jurisdictions that regularly examine the issue of prudence

 16 beyond the standards that you are recommending that this

 17 Commission adopt?

 18 MR. BURNETT: Objection, compound, confusing, vague,

 19 ambiguous, asked and answered and a mischaracterization of

 20 evidence.

 21 MR. BURGESS: May I respond to the objection? The

 22 witness has been asked -- was asked a specific question. We

 23 started off when I asked him about these cases that he was

 24 asked about by Mr. Brew and what he knew about them. He said

 25 he was certain that they couldn't be -- that there couldn't be

 FLORIDA PUBLIC SERVICE COMMISSION

 222

 1 cases that weren't involving very specific circumstances. And

 2 I said, how do you know that? And he started talking about

 3 conditions that were eight years old. And I asked him, isn't

 4 there a vast difference between going back eight years and the

 5 standard he is talking about. Isn't there some significant

 6 ground in between, and he has not answered that question yet.

 7 MR. BURNETT: Same objection.

 8 CHAIRMAN EDGAR: Mr. Burgess, I'm going to allow you

 9 to try again. I am going to ask you, though, to -- for my

 10 benefit, if not the witness', to ask the questions in a little

 11 shorter questions, because I am having a hard time following

 12 them as well, quite frankly.

 13 And to the witness, please try to answer the question

 14 that is asked. You can start with a yes or no, that is always

 15 helpful if, indeed, it can be answered that way.

 16 Mr. Burgess.

 17 BY MR. BURGESS:

 18 Q Let me ask -- I'm going to move on to another area.

 19 Mr. Fetter, as I understand your standard, then, in

 20 this case, and you have been asked this, if the Commission

 21 finds imprudence, but does not find concealment, it should say

 22 case closed, is that right?

 23 A I believe in answer to Mr. Brew's questions I talked

 24 about a reasonable cycle period, so I think your statement is

 25 wrong.

 FLORIDA PUBLIC SERVICE COMMISSION

 223

 1 Q Okay. So you think that even if there has been a

 2 true-up proceeding, that if a subsequent finding of imprudence

 3 is found by the Commission, that it should make an adjustment,

 4 am I right about that?

 5 A What I said before is if you have information that

 6 you knew before the true-up occurred, and you did not raise it,

 7 and then you attempted to bring it up after the true-up

 8 proceeding -- I know when I was sitting as a Chairman, I would

 9 not be very happy that the party did that, and so I might not

 10 allow it to be considered.

 11 Q So that there are cases, there are circumstances here

 12 if the Commission finds imprudence, but does not find

 13 concealment, that it should just say to the public, we have

 14 found imprudent expenditures, but we intend for you to bear

 15 them?

 16 A No. They probably would say that the challenges were

 17 not timely made, and they should have been raised at an earlier

 18 time based on the information that the parties had in their

 19 possession.

 20 Q One of the issues before the Commission in this

 21 docket is whether there has been any imprudence, is that right?

 22 A Say again.

 23 Q Is one of the issues before the Commission today

 24 whether there is any imprudence on the part of Progress Energy?

 25 A That's my understanding.

 FLORIDA PUBLIC SERVICE COMMISSION

 224

 1 Q Okay. And if they find imprudence without finding

 2 concealment, I'm trying to understand, are you saying that the

 3 customers should have to bear that cost?

 4 A And as I said --

 5 Q May I get an answer and then a full explanation?

 6 A Well, I believe it is the same question I just

 7 answered, but I'm willing to answer it again.

 8 CHAIRMAN EDGAR: Mr. Burgess, why don't you ask the

 9 question again.

 10 BY MR. BURGESS:

 11 Q You've just agreed that one of the issues before the

 12 Commission today is whether Progress Energy has been imprudent

 13 in its fuel procurement practices. If they make the finding to

 14 that issue yes, are you saying that short of a finding of

 15 concealment that the customers should have to bear that cost?

 16 A And I said every administrative agency, just like

 17 every court, has to have processes so that cases don't go on

 18 forever, and there is finality and certainty, not only for the

 19 litigants, but also for entities that are affected by the

 20 litigation. And if the Commission finds that the processes

 21 were abused by the parties making the challenges, I believe

 22 that they can make a judgment totally apart. They could --

 23 they could not even make a determination on prudence if they

 24 feel that the parties through whether statute of limitations or

 25 the legal concept of laches had sat on their rights, then I

 FLORIDA PUBLIC SERVICE COMMISSION

 225

 1 think that is within their purview.

 2 Q Is it your understanding that the recommendations

 3 that you are providing to the Commission; that is, that the

 4 fuel costs should be considered prudent if there was not a

 5 challenge to it during the true-up, short of a subsequent

 6 finding of concealment, is it your understanding that that

 7 standard that you are recommending to the Commission is the

 8 current law in the state of Florida?

 9 A What I'm saying -- certainly there is ambiguity. But

 10 what I'm saying is from what I have seen of the processes,

 11 including the deposition of Mr. Windham, the information about

 12 substantial filings on an ongoing basis monthly, quarterly

 13 meetings, that what is in place is a model for review where, by

 14 the time of true-up, issues, challenges could have been raised.

 15 And if they have not been raised, then I think nothing is on

 16 the table.

 17 Q When you were making a determination as to your

 18 recommendations to the Commission, did you examine what you

 19 understood to be the documents that defined the current law on

 20 the subject?

 21 A When I first did my testimony I had not looked at the

 22 Maxine Mine decision, and I believe the Supreme Court

 23 affirmation, but I did subsequently. And then after reading

 24 Mr. Bohrmann's deposition with his mention of Order Number

 25 12645, I believe, I did read that order, and I found tw

 FLORIDA PUBLIC SERVICE COMMISSION

 226

 1 interesting things within that order.

 2 Q When you read 12465 -- well, let me backup and say is

 3 it your understanding from taking a look at that, that Order

 4 Number 1265 (sic) defines the boundaries of procedure for the

 5 fuel adjustment process for the state of Florida?

 6 A It comments upon them, but there is also comment

 7 within that order about the appropriateness of a future

 8 rulemaking to codify the conditions, and it's my understanding

 9 that such rulemaking has never occurred.

 10 Q So is it your understanding, then, that that means

 11 that that order is of no effect?

 12 A Well, from my experience as a Commissioner in

 13 Michigan and from interacting with commissioners throughout the

 14 country, it's my understanding that one commission cannot bind

 15 a future commission. And so I think with this order being out

 16 there and not having gone through a rulemaking process, then

 17 the decision of appropriateness should be within the minds of

 18 the three individuals who are hearing this case, rather than

 19 deferring to an order from --

 20 Q 24.

 21 A -- 23, 24 years ago.

 22 Q Would you agree that parties, that interested parties

 23 and parties whose interests are affected by Public Service

 24 Commission decisions should be entitled to rely on the law as

 25 expressed by the Public Service Commission?

 FLORIDA PUBLIC SERVICE COMMISSION

 227

 1 A They can read this decision. They can see in this

 2 decision that not only does it refer to the appropriateness of

 3 a rulemaking, and so, you know, if they want to make decisions

 4 about legal rights, that should be a red flag to them that such

 5 rulemaking never occurred. And they also would see a statement

 6 within that order that even back then, 24 years ago, the

 7 Commission sitting at that time said the appropriate limitation

 8 of our jurisdiction is based on whatever statute of limitations

 9 or other jurisdictional limitations applies to our actions as a

 10 matter of law.

 11 Q Whatever statute of limitations exists. Would you

 12 agree that it also said that we, therefore, accept any relevant

 13 proof the utility choses to present at true-up, but we will not

 14 adjudicate the question of prudence nor consider ourselves

 15 bound to do so until all relevant facts are analyzed and placed

 16 before us. We will feel free to revisit any transaction until

 17 we explicitly determine the matter to be fully and finally

 18 adjudicated?

 19 A That is what those five individuals wrote at the same

 20 time they wrote that it would be appropriate to codify those

 21 conditions in a rulemaking.

 22 Q Do you agree that they also said we see no

 23 justification in limiting our ability to scrutinize past

 24 transactions?

 25 A That is a sentence that comes a couple before the

 FLORIDA PUBLIC SERVICE COMMISSION

 228

 1 discussion of statute of limitations or other jurisdictional

 2 limitations.

 3 Q So you agree they did say that.

 4 A Could you -- could you say the sentence again?

 5 Q Yes. We see no justification in limiting our ability

 6 to scrutinize past transactions.

 7 A And then modified by the sentence I read about

 8 statute of limitations limiting their jurisdiction.

 9 Q Would you agree as well that the principles of this

 10 case were tested subsequently in the Maxine Mine case that you

 11 have had an opportunity to examine?

 12 A I did read that decision.

 13 Q And would you agree that in the Maxine Mine case the

 14 Public Service Commission held a hearing in September of

 15 1983 and issued an order in June of 1984?

 16 A June 22nd, 1984.

 17 Q And would you agree that they required refunds of

 18 fuel revenues that were collected in 1980, 1981 and 1982?

 19 A Yes.

 20 Q And would you agree that that ability, that that

 21 jurisdiction of the Commission, that decision of the

 22 Commission, was challenged by Gulf Power Company before the

 23 Florida Supreme Court?

 24 A That is my understanding.

 25 Q Would you agree that the Florida Supreme Court agreed

 FLORIDA PUBLIC SERVICE COMMISSION

 229

 1 with the Public Service Commission, and stated that the fuel

 2 adjustment proceeding is a continuous proceeding and operates

 3 to a utility's benefit by eliminating regulatory lag. This

 4 authorization to collect fuel costs close to the time they are

 5 incurred should not be used to divest the Commission of the

 6 jurisdiction and power to review the prudence of these costs.

 7 The order was predicated on adjustments for 1980, 1981 and

 8 1982, we find them permissible?

 9 A And what I found most interesting about that

 10 decision --

 11 Q May I get an answer? Is that your understanding of

 12 what the court said in that ruling?

 13 A Can you direct me to the sentences you are reading so

 14 I can make sure that you are reading them appropriately?

 15 Q Yes. It's 487 So.2d 1037, under Footnote 3, or under

 16 Headnote 3, Description Headnote 3.

 17 A And you want to say it again, or do you want me to

 18 read it, or --

 19 Q Do you disagree with how I read it, or do you want me

 20 to read it again?

 21 A No, I didn't have it in front of me when you said it.

 22 Q Do you agree that the Supreme Court held that the

 23 fuel adjustment proceeding is a continuous proceeding and

 24 operates to a utility's benefit by eliminating regulatory lag.

 25 This authorization to collect fuel costs close to the time they

 FLORIDA PUBLIC SERVICE COMMISSION

 230

 1 are incurred should not be used to divest the Commission of the

 2 jurisdiction and power to review the prudence of these costs.

 3 This order was predicated on adjustments for 1980, 1981 and

 4 1982. We find them permissible.

 5 A The Supreme Court using its standard of review made

 6 that finding.

 7 Q Would you agree that that has not been -- that that

 8 Supreme Court case has not been overturned?

 9 A To my understanding it hasn't been overturned.

 10 Q Would you agree that that means, then, that that is

 11 the law of the land on this subject?

 12 A That decision related to certain facts. Those facts

 13 being that notwithstanding that there appeared to be imprudent

 14 actions during the 1970s, the Commission limited its remedy to

 15 three years immediately preceding during the time of their

 16 proceeding of 1980, 1981, 1982, and so I find the decision of

 17 the Commission back then and as affirmed by the Supreme Court

 18 as not inconsistent with what I'm saying about contemporaneous

 19 review and notice to the party that's being challenged.

 20 Q So would you agree, then, that the Supreme Court

 21 agreed that the Commission can go back at least three years

 22 beyond the years in which it had before it at the time it began

 23 its examination?

 24 A Based on the -- based on the factual circumstances of

 25 that case.

 FLORIDA PUBLIC SERVICE COMMISSION

 231

 1 Q And would you agree that parties should be able to

 2 rely on that law in conducting their affairs with regard to

 3 Public Service Commission cases?

 4 A Based on the factual circumstances of that case.

 5 Q Now, I understand that you have said that you have

 6 not explored, yourself, all the factual disputes or the factual

 7 disputes associated with this. Would you know of the

 8 circumstances involving Progress Energy or its predecessor,

 9 Florida Power Corp, its licensing under the Clean Air Act in

 10 1996?

 11 A I'm sorry, I lost the question.

 12 Q Do you have any knowledge of how Florida Power Corp

 13 brought forward its licensing application under the Clean Air

 14 Act in 1995 -- 1996?

 15 MR. BURNETT: Objection; vague and ambiguous.

 16 MR. BURGESS: It seems pretty clear to me, does he

 17 have any awareness of how it made its presentation.

 18 CHAIRMAN EDGAR: I'll allow.

 19 MR. BURNETT: For what units?

 20 BY MR. BURGESS:

 21 Q For Units CR4 and CR5.

 22 A No, I don't.

 23 Q So if there was a shift in what Power -- in what

 24 Florida Power Corp could burn, based on that, from what they

 25 originally constructed those plants to burn, you are not aware

 FLORIDA PUBLIC SERVICE COMMISSION

 232

 1 of that?

 2 A That is not the subject of my testimony.

 3 Q If there were a shift, would that be something you

 4 would examine when you were a public service commissioner to

 5 determine whether it was a prudent decision?

 6 A If parties raised it in a proceeding, it would be

 7 looked at.

 8 Q You speak of -- you speak in your testimony on

 9 several occasions of conversations that are held during the

 10 process between Progress Energy and PSC staff and Office of

 11 Public Counsel, correct?

 12 A Can you direct me to that?

 13 Q Yes, I can. You mention it in Page 13, Line 7; Page

 14 15, Line 13; and Page 19, Line 17.

 15 A Okay. I'm at Page 13, Line 7, the Commission

 16 regularly briefed the Commission staff and OPC on fuel

 17 procurement between fuel adjustment proceedings. As I said or

 18 testified to earlier today, it's my understanding that there

 19 would be quarterly meetings at which there were briefings.

 20 Q Okay. And I am just asking you, do you agree that

 21 you spoke of conversations that were continuous and taking

 22 place between the parties outside the actual fuel adjustment

 23 proceedings?

 24 A That's what I have testified to, at least on Page 13.

 25 If you want me to -- you want to give me the other citations?

 FLORIDA PUBLIC SERVICE COMMISSION

 233

 1 Q Page 15, Line 13; Page 19, Line 17.

 2 A It helps to do one at a time.

 3 Q Yes. Page 15 --

 4 A Page 15, line what?

 5 Q Line 13.

 6 A And Page 19.

 7 Q Page 19, Line 17.

 8 A On Page 19, I have conversation in quote marks, so

 9 that would be kind of more theoretical communication going back

 10 and forth. The earlier two citations would refer to the

 11 quarterly briefings.

 12 Q Do you know if in any of these conversations or

 13 briefings Florida Power Corporation alerted the PSC staff to a

 14 shift in the fuel that it could burn in CR4 and CR5?

 15 A I don't know.

 16 Q You were asked at your deposition some questions by

 17 Ms. Bennett about docket -- and when you were a Public Service

 18 Commissioner in the State of Michigan.

 19 A I have a question. If we are going to a new topic

 20 could I take a break? Is that allowed?

 21 CHAIRMAN EDGAR: We can take a break. Let's take

 22 about ten minutes.

 23 (Recess.)

 24 CHAIRMAN EDGAR: Okay. We will go back on the

 25 record. And, Mr. Burgess, if you will continue your

 FLORIDA PUBLIC SERVICE COMMISSION

 234

 1 questioning.

 2 MR. BURGESS: Thank you, Madam Chair. And for your

 3 information as well as that of the witness, I just have one

 4 more line of questions.

 5 BY MR. BURGESS:

 6 Q And that is with regard to information that was asked

 7 by Ms. Bennett during your deposition. It had to do with the

 8 Docket Number U7830 when you were a Michigan Public Service

 9 Commissioner.

 10 A Yes, sir.

 11 Q And am I correct in understanding that with regard to

 12 Consumers Power Company, the Midland -- the Midland production

 13 plant was -- a large part of it was disallowed after there was

 14 some discontinuance of the construction, is that correct?

 15 A It was a nuclear plant, and it was abandoned and

 16 turned into a cogeneration plant. And there was a significant

 17 disallowance related to the nuclear construction.

 18 Q Was the disallowance that the Michigan Public Service

 19 Commission made because of a finding of imprudence?

 20 A Yes.

 21 Q And there was a question that you were asked at your

 22 deposition and you accepted subject to check. Have you gone

 23 back and checked that order?

 24 A No, I haven't read that order.

 25 Q Okay. So am I correct -- well, do you recall that it

 FLORIDA PUBLIC SERVICE COMMISSION

 235

 1 was a request of recovery of $2.1 billion by Consumers Power

 2 Company?

 3 A It was a long time ago and a lot of figures, but if

 4 that's what the order says, I will accept it subject to check.

 5 Q The point that I do want to address, actually, is at

 6 the time, though, you would have known that your disallowance

 7 could and probably would have an impact on the company's credit

 8 worthiness bond rating, is that correct?

 9 A Actually, as I noted at my deposition, it was a very

 10 unusual situation because had the Commission, prior to my time,

 11 not stepped in with extraordinary relief, Consumers Power would

 12 have gone into bankruptcy. And so the Commission stepped in

 13 with extraordinary relief to maintain the company out of

 14 bankruptcy and set in place certain conditions that the company

 15 had to live up to as it worked its way back from its very

 16 weakened financial state.

 17 And I think the 7830 orders -- basically, I was at

 18 the Commission for a little over six years, and these issues

 19 were, basically, with me and my colleagues every day of those

 20 six years. And so the orders that were referred to at my

 21 deposition were after the extraordinary relief was in place and

 22 while the conditions were also in place. And so, as I noted,

 23 it was a very unusual situation where the Commission was more

 24 involved in Consumers Power's affairs than both we would have

 25 liked and, also, what would be normal for a Commission.

 FLORIDA PUBLIC SERVICE COMMISSION

 236

 1 Q Nevertheless, isn't that case an example of where,

 2 even if as a Commissioner you may believe it could have a

 3 detrimental effect on the bond rating, your obligation to the

 4 public may call for a disallowance if you make a finding of

 5 prudence -- of imprudence?

 6 A I guess the differentiation I see is where -- there

 7 the issue was this abandonment of the nuclear plant. And so,

 8 clearly, everyone was on notice from basically the day the

 9 first shovel went into the ground until it was laid down, and

 10 then over the course of ten or so years until the issues were

 11 finally resolved.

 12 As compared to what I note in my testimony, you know,

 13 not only any dollar disallowance, but if this Commission were

 14 to go back ten or eleven years, I would view it, and I think

 15 many would view it, as unprecedented. And I think it could

 16 affect the way this Commission, its positive reputation, not

 17 only among the financial community but also among their

 18 colleagues, I hear positive things.

 19 And so, it is like the double-whammy of, you know,

 20 not only the dollar figure, but also the way the Commission is

 21 viewed with regard to not only this utility but also every

 22 regulated utility. It would be concern on the part of the

 23 financial community as to what direction regulatory policy is

 24 taking within the state of Florida.

 25 Q Thank you. And I have just one more question with

 FLORIDA PUBLIC SERVICE COMMISSION

 237

 1 some trepidation of going back on my representation that I only

 2 had one more line of questioning. But with regard to what we

 3 were discussing earlier about rulemaking for the Commission

 4 order setting the procedure for a fuel adjustment process. Do

 5 you know anything about the Florida statutory requirement for

 6 rulemaking with regard to fuel adjustment, the fuel adjustment

 7 process?

 8 A No, I don't.

 9 MR. BURGESS: Thank you.

 10 Thank you very much, Mr. Fetter. I appreciate it.

 11 THE WITNESS: Thank you, sir.

 12 CHAIRMAN EDGAR: Thank you. Are there questions from

 13 staff?

 14 MS. BENNETT: Yes, there are just a few.

 15 CROSS EXAMINATION

 16 BY MS. BENNETT:

 17 Q Mr. Fetter, would you agree that a role of a public

 18 service commissioner is to strike a fair balance between the

 19 interests of all stakeholders to the regulatory process?

 20 A Yes, I would.

 21 Q And would you agree that the term "stakeholders"

 22 includes both shareholders and ratepayers?

 23 A Among others. It includes basically anyone who would

 24 have an interest in a decision at this body.

 25 Q Would you agree that one of the principle roles of

 FLORIDA PUBLIC SERVICE COMMISSION

 238

 1 regulatory commissions is to conduct prudence reviews of the

 2 utilities and their jurisdictions?

 3 A Yes.

 4 Q Do you agree that at times the utility's definition

 5 of prudence may be different than a regulator's definition of

 6 prudence?

 7 A I guess saying definition complicates it. I think it

 8 would be easier to say that a utility might take an action that

 9 it viewed as prudent, and a regulator might later feel that

 10 putting themselves in the shoes of the utility management, and

 11 only considering facts known to a utility management at that

 12 time, the regulator might feel that the actions taken by the

 13 utility did not fall within a range of reasonable behavior. So

 14 there might be a disagreement.

 15 Q Okay. While you served on the Michigan Commission,

 16 did you ever vote to disallow recovery of expenses by a

 17 utility?

 18 A Yes, I did.

 19 Q For instance, as Mr. Burgess was discussing, while

 20 serving as chair of the Michigan Public Service Commission, you

 21 considered the prudence of 2.1 billion expended by the

 22 investor-owned utility, Consumer Power Company, for an

 23 abandoned construction project, is that correct?

 24 A As I said, with regard to the number, I'm taking it

 25 subject to check, but, yes, that's true.

 FLORIDA PUBLIC SERVICE COMMISSION

 239

 1 Q And while the utility was seeking full recovery of

 2 the $2.1 billion, the Michigan Public Service Commission only

 3 allowed recovery of approximately 760 million, is that correct?

 4 A Subject to check, I'll accept that number.

 5 Q In the past year you have filed testimony as an

 6 expert witness before the Arkansas Public Service Commission

 7 regarding fuel adjustment clauses, is that correct?

 8 A Yes, I did.

 9 Q And in that testimony you stated if the costs for

 10 fuel and power supply are not prudently incurred, there should

 11 be a process to allow challenge of such improper action,

 12 followed by the ability of the regulatory body to order

 13 disallowances and prevent inappropriate recovery. Is that also

 14 correct?

 15 A From what I recall, that sounds like what I might

 16 have written.

 17 Q And would you agree with your testimony today that --

 18 I'm sorry, let me rephrase that.

 19 Would you agree that your testimony before the

 20 Arkansas Public Service Commission is true and accurate today?

 21 A As I noted at my deposition, when we discussed this

 22 phrase, elsewhere in my Entergy Arkansas testimony I

 23 incorporate the concept of timeliness. So adding timeliness to

 24 what you've just read, it reflects my view.

 25 Q Would you agree that it is generally understood b

 FLORIDA PUBLIC SERVICE COMMISSION

 240

 1 rating agencies that one of the principle roles of regulatory

 2 commissions is to conduct prudence reviews of the expenditures

 3 and actions of utilities within their jurisdiction?

 4 A Yes.

 5 Q In your direct testimony on Page 6, and I will give

 6 you a minute to get there, Lines 20 through 22?

 7 A I'm there.

 8 Q You testified that regulators should not substitute

 9 their judgment for that of utility management so long as the

 10 judgment of management was within a range of reasonable

 11 business judgment at the time the judgment was made, is that

 12 correct?

 13 A That's what I testify to.

 14 Q And you agree with that testimony today?

 15 A Yes, I do.

 16 Q But isn't it true that during your term as Chairman

 17 of the Michigan Public Service Commission, the Commission

 18 considered the appropriate disposition of approximately

 19 $1.5 billion of proceeds for the transfer of a portion of

 20 Consumer Power Company's investment in the unfinished Midland

 21 nuclear power plant to the Midland Cogeneration Venture Limited

 22 Partnership?

 23 A As I noted at the deposition, and as I noted earlier

 24 here today, that was a case so unusual that I don't think it

 25 has occurred anywhere else. And that was a case where in

 FLORIDA PUBLIC SERVICE COMMISSION

 241

 1 exchange for extraordinary relief to keep the utility out of

 2 the bankruptcy, the Commission set a list of conditions. And

 3 one of the conditions was the ability to have an impact on how

 4 proceeds coming into the utility would be utilized to

 5 strengthen the financial strength of the utility as opposed to

 6 being able to be used for unregulated activities.

 7 Q Okay. Isn't it true that the Michigan Public Service

 8 Commission in that case required CMS Energy to return

 9 approximately 1.5 billion in proceeds, plus an additional

 10 14.1 million in cash to Consumers Power Company?

 11 A Like I said at deposition, you know, that sounds like

 12 the path taken. I can't confirm the numbers, but subject to

 13 check, I think that sounds like something I would have done

 14 with my colleagues.

 15 Q And isn't it true that you and your colleagues also

 16 ordered Consumer Power Company to use those proceeds to retire

 17 utility debt and to increase spending on capital additions to

 18 improve the reliability of the utility's electric system?

 19 A That sounds like a good thing to do.

 20 MS. BENNETT: I have no further questions.

 21 CHAIRMAN EDGAR: Mr. Burnett.

 22 MR. BURNETT: No redirect, Madam Chairman.

 23 And, if appropriate, we would move into evidence

 24 SMF-1 as Exhibit 33.

 25 CHAIRMAN EDGAR: Exhibit 33 will be entered into the

 FLORIDA PUBLIC SERVICE COMMISSION

 242

 1 record.

 2 (Exhibit 33 admitted into evidence.)

 3 CHAIRMAN EDGAR: And the witness is excused. Thank

 4 you.

 5 THE WITNESS: Thank you very much.

 6 MR. BURNETT: May he be dismissed from the

 7 proceeding?

 8 CHAIRMAN EDGAR: He may be dismissed.

 9 MR. BURNETT: Thank you.

 10 CHAIRMAN EDGAR: Thank you.

 11 And you may call your next witness.

 12 MR. WALLS: Thank you, Madam Chairman. We call Donna

 13 Davis.

 14 DONNA M. DAVIS

 15 was called as a witness on behalf of Progress Energy Florida,

 16 and having been duly sworn, testified as follows:

 17 DIRECT EXAMINATION

 18 BY MR. WALLS:

 19 Q Ms. Davis, will you please introduce yourself to the

 20 Commission and provide your address?

 21 A My name is Donna Davis. My address is 100 East David

 22 Avenue, Raleigh, North Carolina.

 23 Q And who do you work for and what is your position?

 24 A I work for a firm, Comensura, who is contracting

 25 services for Progress Energy Service, and my title is Mines

 FLORIDA PUBLIC SERVICE COMMISSION

 243

 1 Controller.

 2 Q Have you filed prefiled direct testimony and exhibits

 3 in this proceeding?

 4 A Yes, I have.

 5 Q And do you have those in front of you?

 6 A Yes, I do.

 7 Q Do you have any changes to make to your prefiled

 8 testimony and exhibits?

 9 A No, I do not.

 10 Q If I asked you the same questions in your prefiled

 11 testimony today, would you give the same answers that are in

 12 your prefiled testimony?

 13 A Yes, I would.

 14 MR. WALLS: At this time we request that the prefiled

 15 testimony be moved into the evidence as if it were read in the

 16 record today, and I would note that there is both direct and

 17 confidential direct testimony.

 18 CHAIRMAN EDGAR: The prefiled direct testimony will

 19 be entered into the record as though read.

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 FLORIDA PUBLIC SERVICE COMMISSION

 300

 1 BY MR. WALLS:

 2 Q Ms. Davis, do you have a summary of your testimony?

 3 A Yes, I do.

 4 Q Will you please summarize your prefiled testimony for

 5 the Commission?

 6 A Yes. During the years 1996 through 2002, I was

 7 responsible for reporting to this Commission and FERC the coal

 8 and transportation costs incurred by Progress Fuels

 9 Corporation. As a result, I was familiar with, participated in

 10 PFC's coal procurement practices. Our coal procurement policy

 11 and practices from 1996 through 2002 were consistent with the

 12 Commission guidelines set.

 13 PFC issued RFPs for Crystal River 4 and 5 for one or

 14 more years, for 1996, 1998 and 2001. We maintained a bidder

 15 list of over 100 bidders. This bidder list always included

 16 coal suppliers or coal brokers, with domestic, foreign, and PRB

 17 subbituminous coal. Also, our RFPs were published in the coal

 18 publications, and we were known in the industry to be on a spot

 19 basis from month-to-month. PFC's RFPs were sent to all bidders

 20 on the bidder list. PFC's RFPs always included specifications

 21 for bituminous and subbituminous coal. PFC expressed an

 22 expectation for coal quality, but stated only coals exceeding

 23 the sulfur requirement for Crystal River 4 and 5 would not be

 24 considered. All other coals were considered and evaluated.

 25 PFC did evaluate coals in response to the RFPs based

 FLORIDA PUBLIC SERVICE COMMISSION

 301

 1 on a delivered cost and an evaluated busbar cost basis when the

 2 coal offered differed from the preferred quality specification.

 3 We conducted the RFPs the same way in '96, '98, and 2001.

 4 PFC received several bids from PRB suppliers in

 5 response to the 2001 RFP. PFC did not receive any response for

 6 the PRB suppliers in response to the 1996 or the 1998 RFP.

 7 PFC also received numerous spot purchase offers from

 8 time to time from a variety of coal suppliers. It is well

 9 known in the industry that PFC purchased coal pursuant to spot

 10 offers month-to-month. Subbituminous coal suppliers would have

 11 been considered had they offered coal on the spot market, but

 12 to the best of my knowledge, none of these did during my time

 13 frame.

 14 PFC was aware of PRB coals throughout the '96 to 2002

 15 time period and examined it regularly. We understood that PRB

 16 coals were different from bituminous coals, and there might be

 17 a potential for derates and additional costs if they were used.

 18 PFC also examined other fuel sources for Crystal 4

 19 and 5, such as synfuels, petcoke and foreign bituminous coals.

 20 PFC did not favor any coal or coal supplier over

 21 another. We bought the lowest cost offered to us on an overall

 22 evaluated basis. We did evaluate coal shipped by water,

 23 including PRB and foreign coals, using the waterborne market

 24 proxy approved by this Commission. We applied the waterborne

 25 proxy to all coals that would be shipped to Crystal River in

 FLORIDA PUBLIC SERVICE COMMISSION

 302

 1 our coal evaluations during this period of '96 to 2002.

 2 I do want to say that Mr. Sansom's reliance on TECO

 3 FERC Form 423 for PRB delivered prices do not include a cost to

 4 unload the coal at the terminal, store it, or load it onto a

 5 Gulf barge. Those terminals are included in PEF's Form 423 for

 6 delivered prices to IMT. I know this because I have prepared

 7 the forms for both Tampa Electric and Progress Energy Florida.

 8 I have a few words to say about synfuels. Many

 9 utilities in the southeast and eastern United States were

 10 purchasing synfuels during the time period PFC was purchasing

 11 synfuels for Crystal River 4 and 5. PFC affiliates were

 12 involved in the production, marketing and sale of synfuels and

 13 did receive tax credits. PEF, however, was a very small

 14 customer of synfuels from PFC affiliates, and the tax credits

 15 from synfuel sales to PEF were an insignificant part of the

 16 total tax credits that PFC received. PFC affiliates sold many

 17 more tons of synfuels to other customers who, like PFC,

 18 purchased synfuels when it was cost-effective to do so.

 19 I also want to express PFC and PEF met regularly with

 20 this Commission staff and other parties to tell them about what

 21 we were doing and to answer any questions they had. I know

 22 that because I was present at all of those meetings. Our

 23 records on coal procurement, in addition to what we filed with

 24 the staff were available at the asking, and we responded to any

 25 questions that they had. Our coal purchases have been audited

 FLORIDA PUBLIC SERVICE COMMISSION

 303

 1 every year, and we have answered any questions raised during

 2 those audits at our meetings, which would be two to four a

 3 year, with the staff, the Office of Public Counsel, and FIPUG,

 4 and many of the people present in here today.

 5 To sum up, we cannot buy coal that is not offered to

 6 us. If our coal procurement practices are the same during this

 7 entire period of time, and they were, they were adequate to

 8 generate bids from PRB suppliers and foreign bituminous coal

 9 suppliers at certain times, and they did, then they must have

 10 been reasonable and prudent. I believe they were.

 11 Thank you very much.

 12 MR. WALLS: We tender Ms. Davis for

 13 cross-examination.

 14 CHAIRMAN EDGAR: Thank you.

 15 Mr. Twomey.

 16 MR. TWOMEY: Madam Chair, I don't have any questions

 17 of Ms. Davis, but I have a request on behalf of all the

 18 intervenors. And that is that you consider allowing Public

 19 Counsel to cross first for each of the company's witnesses with

 20 our expectation that that will shorten the total time of cross.

 21 Thank you.

 22 CHAIRMAN EDGAR: Thank you, Mr. Twomey.

 23 Mr. McGlothlin.

 24 MR. McGLOTHLIN: Thank you.

 25 CROSS EXAMINATION

 FLORIDA PUBLIC SERVICE COMMISSION

 304

 1 BY MR. McGLOTHLIN:

 2 Q Ms. Davis, at Page 3 and the top of Page 4 of your

 3 prefiled testimony, you state that from '84 to 2005 you held

 4 positions involving the accounting and reporting of PFC's

 5 regulated business and reported fuel costs to the Public

 6 Service Commission and FERC, and that in 2004 you also became

 7 responsible for the accounting of PFC's nonregulated coal

 8 activities, is that correct?

 9 A That's correct.

 10 Q PFC being Progress Fuels Corporation?

 11 A That's correct.

 12 MR. McGLOTHLIN: I'm going to distribute a document

 13 for some questions, and I ask that an exhibit number be

 14 assigned to it.

 15 CHAIRMAN EDGAR: Thank you. That would be 213.

 16 And what would you like to label it, Mr. Mcglothlin?

 17 MR. McGLOTHLIN: Progress Fuels Corporation

 18 Organizational Chart.

 19 (Exhibit 213 marked for identification.)

 20 BY MR. McGLOTHLIN:

 21 Q Ms. Davis, we have provided you with a one-page

 22 exhibit marked 213, and captioned Progress Fuels Corporation

 23 Energy Affiliates for Deliveries to FPC 2002. It's an excerpt

 24 from a staff document. Have you had a chance to look it over?

 25 A Yes, sir.

 FLORIDA PUBLIC SERVICE COMMISSION

 305

 1 Q Do you recognize this to be an organizational chart

 2 showing the corporate structure of Progress Energy and its

 3 subsidiaries?

 4 A Yes, sir.

 5 Q And focusing on Progress Fuels Corporation, by whom

 6 you were employed, would you take a moment and identify for us,

 7 and I'll ask you one at a time, the business of each entity

 8 that is involved there. For instance, under Progress Fuels

 9 Corporation, the first block to the left under Progress Fuels

 10 Corporation is Homeland Coal Company, Inc. Who is Homeland

 11 Coal Company, Inc.?

 12 A Homeland Coal Company was a company which held an

 13 interest in Powell Mountain Joint Venture.

 14 Q What is their business?

 15 A The business would be for the mining and selling of

 16 coal.

 17 Q And to whom did they sell coal?

 18 A Anyone who would be in the market that would need the

 19 coal which they produced.

 20 Q Would that include Florida Power Corporation?

 21 A At one time. Homeland did not sell coal to Progress

 22 Fuels Corporation; Powell Mountain did.

 23 Q So Powell Mountain Joint Venture would sell coal to

 24 Progress Fuels Corporation and Progress Fuels would buy as

 25 agent for the utility, is that correct?

 FLORIDA PUBLIC SERVICE COMMISSION

 306

 1 A That's correct. They had a contract with the

 2 utilities, not as agent for.

 3 Q All right. The next block over is Kentucky May Coal

 4 Company, Inc. Who is that entity?

 5 A Kentucky May Coal Company, Inc. was purchased in

 6 1985, and they were in the coal mining and terminal business.

 7 Q And that's a subsidiary also of Progress Fuels

 8 Corporation?

 9 A That is correct.

 10 Q Were they in the business of selling coal to Progress

 11 Fuels Corporation?

 12 A Yes, Kentucky May Coal at times have had a contract

 13 with Progress Fuels Corporation. They sold to many people.

 14 Q And that was in Progress Fuels Corporation's capacity

 15 as procurer of coal for Florida Power Corporation, is that

 16 correct?

 17 A Kentucky May did sell to Progress Fuels to sell to

 18 Florida Power Corporation.

 19 Q The first subsidiary under Kentucky May Coal Company

 20 is Cincinnati Bulk Terminals. What is that entity?

 21 A Cincinnati Bulk Terminals was, as is stated, a

 22 terminal. It also sold bulk commodity products, including some

 23 coal.

 24 Q Did they sell of their own capacity or did they have

 25 an agent?

 FLORIDA PUBLIC SERVICE COMMISSION

 307

 1 A Cincinnati Bulk Terminals purchased other coal and

 2 sold.

 3 Q And did they sell to Progress Fuels Corporation?

 4 A They sold a little to Progress Fuels over the years.

 5 Q And that was in Progress Fuels Corporation's capacity

 6 of coal procurer for the utility, is that correct?

 7 A That's correct.

 8 Q What about Kanawha River Terminals, Inc.?

 9 A Kanawha River Terminals is a terminal up on the

 10 Kanawha, and it sells coal and has terminaling services.

 11 Q What do you mean by terminaling services?

 12 A It would be where you transload coal onto barges for

 13 customers.

 14 Q I see. On occasion would it transload coal that was

 15 being purchased and delivered to Florida Power Corporation?

 16 A Yes. We discussed that at length during our

 17 '88 hearings.

 18 Q Who is Black Hawk Synfuel LLC?

 19 A Black Hawk is owned 10 percent by Kanawha River

 20 Terminals here, and it is a company which sells feed stock to

 21 New River Synfuel LLC.

 22 Q And who is New River Synfuel LLC?

 23 A New River Synfuel LLC, as I said, is -- Black Hawk

 24 owns 10 percent of it, another party owns 90 percent of it, and

 25 it produces synfuel.

 FLORIDA PUBLIC SERVICE COMMISSION

 308

 1 Q Black Hawk, I believe you said, sells coal to New

 2 River Synfuel, I imagine for New River Synfuels' use in

 3 preparing the synfuel product, is that correct?

 4 A That is correct.

 5 Q Does New River Synfuel then sell the synfuel product

 6 back to Black Hawk?

 7 A No, sir.

 8 Q To whom does it sell synfuel?

 9 A To many people up and down the river, the Ohio River,

 10 and to anybody who would request to buy synfuel.

 11 Q Including Progress Fuels Corporation?

 12 A Yes, we have sold -- we have purchased some from New

 13 River.

 14 Q In Progress Fuels Corporation's capacity as a

 15 procurer of fuel for Florida Power Corporation?

 16 A Yes. We discussed that quite extensively when this

 17 form was made back in the 2002 period.

 18 Q Under Kanawha River Terminals, Inc., there is a block

 19 for Marmet Synfuel, LLC. What is that entity?

 20 A That is a host plant, an investor-owned plant who

 21 makes synfuel.

 22 Q And does Kanawha River Terminals then have an

 23 ownership interest in Marmet Synfuel, LLC?

 24 A Let me restate that, sir. Marmet Synfuel actually is

 25 owned by Kanawha River Terminals, but it does not produce

 FLORIDA PUBLIC SERVICE COMMISSION

 309

 1 synfuel. There are two host plants, Calla and Imperial

 2 (phonetic), who Marmet Synfuel sells feed stock to to produce

 3 synfuel.

 4 Q Are they shown on this organizational chart at all?

 5 A They are not related to us.

 6 Q I see. There is a block for Dixie Fuels Limited.

 7 Who is that entity?

 8 A Dixie Fuel was a transportation supplier which we

 9 held a partnership in that delivered the coal from -- to the

 10 Crystal River plants.

 11 Q And that is a subsidiary of Progress Fuels

 12 Corporation?

 13 A It was a partnership at one time during this period.

 14 Q A partnership in which Progress Fuels Corporation had

 15 a partnership interest?

 16 A That's correct.

 17 Q And did Progress Fuels Corporation contract with

 18 Dixie Fuels Limited to transport coal that Progress Fuels

 19 Corporation had purchased for the utility?

 20 A Yes, sir.

 21 Q For Florida Power Corporation?

 22 A Yes, sir.

 23 Q There is a block for Progress Rail Services

 24 Corporation. What is that entity?

 25 A Progress Rail Corporation repaired rail cars. They

 FLORIDA PUBLIC SERVICE COMMISSION

 310

 1 had leased rail cars. There was a number of different things

 2 to do with rail cars that they were involved in.

 3 Q And is that a subsidiary of Progress Fuels

 4 Corporation?

 5 A Yes, it is.

 6 Q Did Progress Rail Services Corporation contract with

 7 Progress Fuels Corporation to provide rail services to haul the

 8 coal being purchased for the utility?

 9 A No, sir.

 10 Q And what was the nature of Progress Fuel Services

 11 Corporation's business then?

 12 A A maintenance agreement for the rail cars that

 13 Progress Fuels owned.

 14 Q I see. With respect to Homeland Coal Company, Inc.,

 15 Kentucky May Coal Company, Inc., Dixie Fuels Limited, and

 16 Progress Rail Services Corporation, was there any commonality

 17 to the administration or the physical offices among those

 18 entities?

 19 A During what time frame?

 20 Q Well, let's use the 2002 date to begin with.

 21 A Well, all the companies were owned by Progress Fuels

 22 Corporation or either it was a partnership with Progress Fuels

 23 Corporation. Their books were done at different places. They

 24 were not all done at the same place, the accounting was not all

 25 done at the same place, but they were all either a partnership

 FLORIDA PUBLIC SERVICE COMMISSION

 311

 1 or owned by Progress Fuels. That would be their commonality.

 2 Q What about their physical headquarters, any

 3 commonality there?

 4 A The reason I am hesitating, I'm trying to remember

 5 about Homeland Coal Company, when that changed. At one time it

 6 was in St. Petersburg, their headquarters was, and Kentucky

 7 May, but Dixie was not. And Progress Rails' headquarters was

 8 in Alabama.

 9 Q What about the officers of the corporations that we

 10 have talked about so far, were any individuals officers of more

 11 than one of any of these corporations at any point in time?

 12 A Yes, sir.

 13 Q Can you identify any officers who served either as

 14 president or vice president for more than one of these

 15 companies?

 16 MR. WALLS: Object, as ambiguous to time frame.

 17 CHAIRMAN EDGAR: Can you clarify?

 18 MR. McGLOTHLIN: At any time frame.

 19 CHAIRMAN EDGAR: Can the witness answer the question?

 20 THE WITNESS: I would say our president might have

 21 been an officer on the companies at one time, all the companies

 22 at one time, but that would be the only one I could speak to.

 23 BY MR. McGLOTHLIN:

 24 Q And who was that?

 25 A Mr. Rich Keller.

 FLORIDA PUBLIC SERVICE COMMISSION

 312

 1 MR. McGLOTHLIN: If we can have another moment,

 2 please.

 3 CHAIRMAN EDGAR: Okay. We are at Number 214.

 4 Mr. McGlothlin, will you give us a title?

 5 MR. McGLOTHLIN: Yes. Progress Energy, Inc., U-9C-3,

 6 March 2003.

 7 (Exhibit 214 marked for identification.)

 8 BY MR. McWHIRTER:

 9 Q Ms. Davis, we've provided you a document which has

 10 been identified as 213 (sic). It is a Form U-9C-3 that

 11 Progress Energy filed with the Securities and Exchange

 12 Commission for March '03. Would you turn to Page 2 of 7, which

 13 is entitled Organizational Chart, and take a moment to review

 14 that, please.

 15 A Where is the page number on here?

 16 Q Top left.

 17 A Okay. 2 of 14, is that what you said?

 18 Q 2 of 7.

 19 A 2 of 7.

 20 Q And there is a caption that says, Item 1,

 21 Organization Chart.

 22 A Mine in the right top corner says 1 of 14, and then

 23 continues.

 24 Q If you're looking at that, then Page 4 of 14 is what

 25 corresponds.

 FLORIDA PUBLIC SERVICE COMMISSION

 313

 1 A I'm sorry, I didn't hear you.

 2 Q Page 4 of 14, which is also 2 of 7.

 3 A Page 4 of 14, you said?

 4 Q Yes. You will see Item 1, Organization Chart there.

 5 A Yes.

 6 Q If you will take a moment to review that, I want to

 7 ask you a few questions about it.

 8 A Okay.

 9 Q You've indicated your positions with Progress Fuels

 10 Corporation. What is your involvement, if any, with Progress

 11 Ventures, Inc.?

 12 A Progress Ventures, Inc. an arm of Progress Fuels, but

 13 I don't have really any involvement with them.

 14 Q It is related to Progress Fuels Corporation, though?

 15 A (Indicating affirmatively.)

 16 Q There are some entities listed here that differ from

 17 the 2002 organizational chart, and I want to ask you, if you

 18 can, to tell me the business each is in. CPL Synfuels, LLC,

 19 are you familiar with that entity?

 20 A No, sir, I'm not familiar by that name.

 21 Q Do you know it by another name?

 22 A Unless it -- underneath that is Solid Fuels and Sandy

 23 River, so it may be what Progress Fuels calls the upper level

 24 company.

 25 Q Did you say --

 FLORIDA PUBLIC SERVICE COMMISSION

 314

 1 A It says holding company over in the far right-hand

 2 corner.

 3 Q Okay. Who are Solid Fuel and Sandy River Synfuel?

 4 A Solid Fuel and Sandy River are synfuel-producing

 5 companies owned by Progress Fuels and Progress Ventures.

 6 Q And, if you know, did they sell synfuel to Progress

 7 Fuels Corporation for delivery to the utility?

 8 A They sold a little bit during one year, I believe.

 9 Q Okay. Under the item for Progress Fuels Corporation,

 10 you will see several entities listed, EFC Synfuel, LLC, who is

 11 that?

 12 A That is the holding company for the companies listed

 13 underneath it.

 14 Q All right. Ceredo Synfuel, LLC, who is that.

 15 A That is the synfuel plant at Ceredo, West Virginia.

 16 Q Did Ceredo Synfuel, LLC sell products to Progress

 17 Fuel Corporation?

 18 A No, sir.

 19 Q What about Sandy River Synfuel?

 20 A I think during one year they sold a little bit, but

 21 normally they cannot sell because of their ownership interest.

 22 Q And Solid Energy, LLC?

 23 A Again, the same answer.

 24 Q Kentucky May Coal Company is listed there, and that

 25 is one of the entities on the 2002 organizational chart, but

 FLORIDA PUBLIC SERVICE COMMISSION

 315

 1 the entities listed under KRT Holdings, Inc. differs somewhat.

 2 For instance, Coal Recovery V, LLC, what is that entity?

 3 A Coal Recovery V is a company which held some patents

 4 to the synfuel plant at one time.

 5 Q What about the Colona Newco, LLC?

 6 A I'm not familiar with all of the names as they are

 7 listed. I work more with the operating companies.

 8 Q All right.

 9 A It says that Colona Newco is a holding company.

 10 Q If Colona Newco is the holding company, then, would

 11 the Colona Synfuel Limited Partnership be one of the operating

 12 companies of which you are familiar?

 13 A No, sir. It is not really the operating company.

 14 This would be the different layers of the companies from the

 15 operating company up to Colona Newco.

 16 Q All right.

 17 MR. McGLOTHLIN: Let's have the agenda passed out.

 18 We are going to distribute another document.

 19 CHAIRMAN EDGAR: This will be Number 215.

 20 Mr. McGlothlin, for a title.

 21 MR. McGLOTHLIN: March 14th, 2005, Agenda, New River

 22 Synfuel.

 23 (Exhibit 215 marked for identification.)

 24 BY MR. McGLOTHLIN:

 25 Q Ms. Davis, you have been provided a copy of a

 FLORIDA PUBLIC SERVICE COMMISSION

 316

 1 document that has been marked as 215, proposed agenda, New

 2 River Synfuel LLC. Do you have that before you?

 3 A Yes, sir.

 4 Q You'll see on the first page under the cover sheet

 5 that it indicates that you were a participant on behalf of

 6 Black Hawk Synfuel LLC. Do you see that?

 7 A Yes, sir.

 8 Q And did you attend a meeting on March 14th for which

 9 this served as a proposed agenda?

 10 A Yes, sir, I did.

 11 Q And do I understand correctly that Mr. Weintraub was

 12 also there in a similar capacity on behalf of Black Hawk?

 13 A Yes, sir.

 14 Q The second page refers to a $4 spread for the Synfuel

 15 feed stock spread. Would you tell the Commissioners what that

 16 means?

 17 A Yes, sir. That would be the difference in the cost

 18 of the feed stock and the amount of sale to the ultimate

 19 consumer.

 20 Q In other words, the price of the product would be $4

 21 above the cost of the raw material, is that correct?

 22 A The sale would be $4 less than the raw material.

 23 Q Number 6 refers to a $4 Infinity commission sales on

 24 purchase and sales, do you see that?

 25 A Yes, sir.

 FLORIDA PUBLIC SERVICE COMMISSION

 317

 1 Q Would you explain what that item involved?

 2 A Are you referring to 6A, sir?

 3 Q Yes, 6A, B, and C?

 4 A It refers to the $4 differential between the cost of

 5 the feed stock and the sale to the ultimate consumer.

 6 Q I'm sorry, could you speak up just a little bit? I'm

 7 having trouble.

 8 A It refers to the $4 differential between the feed

 9 stock and the sale to the ultimate consumer.

 10 Q Okay. But this is mentioned as specific to Infinity.

 11 Does it differ in any way from the discussion or the treatment

 12 of the synfuel feed stock spread that was discussed in

 13 Number 5?

 14 A No, sir. The spread is what it is. It is just the

 15 difference in your feed stock cost and whatever the ultimate

 16 consumer pays. Most often that would be a $4 spread.

 17 Q Was there a particular transaction between Infinity

 18 and either New River or Black Hawk that was the subject of this

 19 agenda?

 20 A Would you repeat that question, please?

 21 Q Yes. Was there a particular transaction, either

 22 existing or pending, between Infinity, on the one hand, and

 23 either New River or Black Hawk on the other, that was the

 24 subject of this item on the agenda?

 25 A No, sir, I don't think it was a particular

 FLORIDA PUBLIC SERVICE COMMISSION

 318

 1 transaction. They were just overall looking at the $4 spread

 2 for Infinity. It was not one single transaction.

 3 Q Was the $4 spread between the feed stock and the

 4 final price applicable generally to all of the synfuel

 5 transactions?

 6 A It varied. It wasn't necessarily four, it could be

 7 three, it could be two, it could be five, it could be six.

 8 Q And what would govern the determination of the spread

 9 in a particular transaction?

 10 A The cost at which the synfuel could be sold.

 11 Q Now, who is Infinity?

 12 A It's a sales agent for Panther Coal, and I don't know

 13 if they have other coal companies. I think they did. That is

 14 the way I knew them; they were the sales agent for Panther.

 15 Q And did Progress Fuels Corporation purchase coal from

 16 Infinity for delivery to Crystal River 4 and 5?

 17 A During the time frame '96 to 2002, I do not recall

 18 any.

 19 Q Was Infinity a participant or a bidder to any RFPs

 20 that Progress Fuels Corporation conducted on behalf of the

 21 utility?

 22 A Not between '96 and 2002, during my time period.

 23 Q Do you know whether they were at any point?

 24 A I believe there was some mention in Mr. Pitcher's

 25 testimony that he could address.

 FLORIDA PUBLIC SERVICE COMMISSION

 319

 1 Q And did Black Hawk purchase coal from Infinity for

 2 delivery to the synfuel production plant?

 3 A Black Hawk would not purchase coal from Infinity.

 4 Black Hawk would purchase their coal from KRT.

 5 Q KRT being --

 6 A At cost.

 7 Q Would any subsidiary or affiliate of Progress Fuels

 8 Corporation purchase coal from Infinity as feed stock for the

 9 synfuel production process?

 10 A Yes, sir. They purchased from a lot of suppliers.

 11 That would have been one.

 12 Q If you would, Ms. Davis, turn to DMD-15?

 13 A Yes, sir.

 14 Q And I will do the same. Would you identify this

 15 document captioned 2003 Compliance Coal Costs, which

 16 constitutes your DMD-15?

 17 A Yes, sir. It was a document done by Mr. Edwards, who

 18 was my boss, on February the 9th, 1999. And it is labeled

 19 Exhibit Number DMD-15. It was comparing a forecast for Central

 20 Appalachian Powder River Basin 50/50 blend and South American

 21 coal, what he thought might be happening in 2003, four years

 22 into the future.

 23 Q Right. And focusing on the Powder River Basin

 24 prediction, there is a reference to a transfer of 250 at

 25 McDuffie Terminal. Do you see that?

 FLORIDA PUBLIC SERVICE COMMISSION

 320

 1 A Yes. sir.

 2 Q What is McDuffie Terminal?

 3 A McDuffie would be at Mobile, Alabama. It's a state

 4 terminal.

 5 Q And that was the assumption that Mr. Carter used at

 6 the time he prepared this estimate, that it would be delivered

 7 through the McDuffie Terminal?

 8 A Mr. Edwards at that time --

 9 Q Mr. Edwards, I'm sorry.

 10 A -- was projecting that it might move, and he was

 11 using his projections here, the McDuffie Terminal.

 12 Q Now, if you would turn to DMD-5, Page 21?

 13 A Yes, sir.

 14 Q This is the letter from Kennecott Energy to which you

 15 refer in your prefiled testimony, do you not?

 16 A Yes, I do.

 17 Q It's dated 1998. Was that in conjunction with the

 18 RFP that the company issued in 1998?

 19 A Yes, it was.

 20 Q And in your testimony you say that Kennecott Energy

 21 declined to submit a bid, do you not?

 22 A Yes, I do.

 23 Q First of all, is it true that there is no copy of the

 24 RFP document that was provided to us in discovery for 1998, if

 25 you know?

 FLORIDA PUBLIC SERVICE COMMISSION

 321

 1 A I'm sorry, sir. I don't know what was provided

 2 during discovery. I assume they provided everything.

 3 Q All right. Would you read the second full paragraph

 4 of the letter?

 5 A The full paragraph?

 6 Q Yes.

 7 A Our current coal portfolio is comprised of

 8 subbituminous Powder River Basin coals, with a heating value

 9 ranging from 8400 to 9400 Btu per pound, and a Colorado coal

 10 with a heating value of 10,500 Btu. We continue to pursue

 11 opportunities that might fit your future requirements and would

 12 appreciate remaining on your bid solicitation list.

 13 Q Okay. Focusing first on the first sentence, would

 14 you agree with me that the sense of this sentence is that they

 15 do have some coal for sale of the properties or description

 16 provided in that sentence?

 17 A I would agree that it says they have a current

 18 portfolio. I would not necessarily agree that it is for sale.

 19 Q They provide a heating value ranging from 8400 to

 20 9400 Btus per pound for Powder River Basin coals. Was there

 21 anything about that range of Btu content that would have not

 22 met the criteria of the '98 RFP, if you know?

 23 A The Btu would have met the subbituminous minimum

 24 requirements.

 25 Q What about the Colorado coal with the heating value

 FLORIDA PUBLIC SERVICE COMMISSION

 322

 1 of 10,500 Btus, would that have been an eligible coal in the

 2 1998 RFP, if you know?

 3 A The Btu would have met the requirements, whether it

 4 would have been eligible would have been another question.

 5 Q I see. Is the term "portfolio" one that is commonly

 6 used by participants in an RFP?

 7 A No, sir. I normally don't see that term. Normally I

 8 would see, you know, a bid, an actual bid.

 9 Q The second sentence says we continue to pursue

 10 opportunities that might fit your future coal requirements and

 11 would appreciate remaining on your bid solicitation list.

 12 Would you agree with me that this conveys the sense that they

 13 are of the view that their current portfolio is not responsive

 14 to the RFP?

 15 A Would you repeat that one more time, please?

 16 Q Yes. Looking at the second sentence beginning with

 17 we continue, would you agree with me that the sense of that

 18 sentence is that they have formed the view, for whatever

 19 reason, that their current portfolio is not responsive to the

 20 RFP?

 21 MR. WALLS: Objection, calls for speculation.

 22 MR. McGLOTHLIN: I'm asking how she understands the

 23 letter that was written in response to the 1998 RFP, and she

 24 has characterized it as a decision of the company to decline

 25 the bid which might be equally speculation, so I'm probing

 FLORIDA PUBLIC SERVICE COMMISSION

 323

 1 that opinion that she has formed.

 2 CHAIRMAN EDGAR: You may restate the question, and

 3 the witness is directed to attempt to answer it.

 4 BY MR. McGLOTHLIN:

 5 Q Ms. Davis, would you agree with me that the sentence

 6 we continue to pursue opportunities that might fit your future

 7 coal requirements, conveys the view that they have formed, for

 8 whatever reason, that the portfolio described is not responsive

 9 or acceptable to the utility?

 10 A I think what I would agree is that they are not

 11 offering any coal, because they are saying they would continue

 12 to pursue opportunities. But there is no bid attached to it.

 13 There is nothing else there. And if I receive a -- when I send

 14 out a bid solicitation, I would -- I asked for them to respond

 15 with a price, a term, quantity, and received none of that.

 16 Q But when they say we continue to pursue opportunities

 17 that might fit your future coal requirements --

 18 A Perhaps they are saying they want to stay on the bid

 19 list for the next time.

 20 Q But you disagree with my proposition, which is that

 21 this conveys the view that the portfolio they described in the

 22 first part of the paragraph does not conform or is not

 23 acceptable to the utility? You disagree with that?

 24 A Would you repeat that one more time, please? Your

 25 question is confusing me somewhat.

 FLORIDA PUBLIC SERVICE COMMISSION

 324

 1 Q I'll try. I submit to you that when Kennecott says

 2 on the one hand, here is what we have got, here is our

 3 portfolio and describes it.

 4 A Correct.

 5 Q And then follows that with the sentence that says we

 6 are continuing to look for opportunities that might fit your

 7 coal requirements, that means that they are of the view that

 8 for whatever reason, their current portfolio does not conform

 9 to what the utility is looking for?

 10 A No, I don't agree with you, sir. Because when we

 11 sent the bid solicitation out, it said 8200. So, therefore, I

 12 think they are saying they have a current portfolio, but they

 13 are not offering it. And why they are not offering it, I have

 14 no idea. They didn't send in a bid. They didn't send in a

 15 tonnage. They didn't send in any kind of offer.

 16 Q Turn to DMD-14, Page 2 -- well, Pages 1 and 2.

 17 A Okay.

 18 Q Would you identify this document?

 19 A It was an interoffice memo from Mr. Dennis Edwards to

 20 a Mr. Bernie Cumbie (phonetic).

 21 Q And if you will, turn to Page 2 and read the first

 22 sentence of the paragraph that falls below the summary of

 23 costs?

 24 A In addition to these costs, I believe we should

 25 recognize that we will, in all likelihood, be using Powder

 FLORIDA PUBLIC SERVICE COMMISSION

 325

 1 River Basin coals at 4 and 5 by about 2000, my guess.

 2 Q And when was this prepared?

 3 A February 9th, 1998.

 4 Q Please turn to Page 42 of your prefiled testimony.

 5 A Yes, sir.

 6 Q At Line 11, you say this data shows that TECO's

 7 purchases of PRB coal were never the cheapest, and often one of

 8 the most expensive coals that TECO purchased on a delivered

 9 cost basis to the transfer facility. Do you see that line?

 10 A Yes, I do.

 11 Q If you know, what quality of bituminous coal was TECO

 12 purchasing at the time?

 13 A Well, TECO volume purchases for Gannon and Big Bend

 14 at the transfer facility, so they would have bought low sulfur

 15 and high sulfur coal. And during this time they also bought

 16 this Powder River Basin coal for environmental purposes.

 17 Q And you mentioned the high sulfur coal, that would be

 18 from the Illinois Basin origin?

 19 A Illinois Basin, Central Appalachian, numerous places.

 20 Q Would you agree with me that high sulfur coal will be

 21 priced differently than low sulfur Powder River Basin coal?

 22 A Yes, sir, I have no objection to that. I'm just

 23 saying that the Powder River Basin coal was bought for

 24 environmental purposes, not for price.

 25 Q You mentioned that TECO was buying both low sulfur

 FLORIDA PUBLIC SERVICE COMMISSION

 326

 1 and high sulfur coal for delivery to the terminal. What was

 2 the destination of the low sulfur bituminous coal?

 3 A Gannon.

 4 Q Okay. At Page 38, Ms. Davis.

 5 A Yes, sir.

 6 Q In the middle of the page you say to my knowledge,

 7 during the 1996 through 2002 time period we never received an

 8 offer for a spot sale of subbituminous coal. To your

 9 knowledge, did the company ever seek bids on spot basis from

 10 subbituminous producers?

 11 A I think because we were known to be out in the

 12 industry -- by the industry to be out every month for spot

 13 sales by the Archies (phonetic), the Peabodys, the Amaxes, by

 14 the Rags, everybody knew we were out for coal. So, therefore,

 15 we were always seeking bids from anyone who had coal, foreign,

 16 subbituminous, or bituminous. It was industry knowledge.

 17 Q But to your knowledge, did the company ever actively

 18 solicit spot proposals from producers of Powder River Basin

 19 coal?

 20 A I would consider that actively, if you are out every

 21 month seeking bids from all of those suppliers.

 22 Q In your testimony you discuss some comparisons of the

 23 delivered price of coals to TECO's terminal. In the course of

 24 conducting RFPs, or in the course of preparing your testimony,

 25 did you ever compare the delivered price of Powder River Basin

 FLORIDA PUBLIC SERVICE COMMISSION

 327

 1 coal delivered to Davant to the delivered price of CAPP coal,

 2 or that is Central Appalachian coal, or synfuel to IMT?

 3 A Yes, sir. I looked at TECO's purchases each month, I

 4 looked at Gulf Power's purchases each month, and I looked at,

 5 of course, Progress Fuels because I produced those reports.

 6 Q Can you point to anyplace in your testimony where you

 7 report or treat the comparison that I have just mentioned, the

 8 delivered price of Powder River Basin coal to Davant on the one

 9 hand, to the delivered price of Central Appalachian coal or

 10 synfuel to IMT?

 11 A I know it's in my exhibits where I have charts that

 12 we did on TECO. I don't have a comparison if that's what you

 13 are asking for.

 14 MR. McGLOTHLIN: That's what I'm asking for. Could I

 15 have a moment to review my notes? (Pause.)

 16 BY MR. McGLOTHLIN:

 17 Q Ms. Davis, I believe you are in a position to answer

 18 this question, so answer if you know. As Progress Fuels

 19 Corporation in its capacity of procuring coal for Progress

 20 Energy Florida evaluated bids submitted by producers of Powder

 21 River Basin coal, say, in 2003/2004 RFPs, is it true that in

 22 calculating the delivered price Progress Fuels Corporation

 23 attributed to the producers of the Powder River Basin coal what

 24 has been referred to as a market proxy transportation rate?

 25 A Yes, sir, we did use a market proxy, the proxy that

 FLORIDA PUBLIC SERVICE COMMISSION

 328

 1 was approved by this Commission.

 2 Q And is it true that in arriving at what has been

 3 called an evaluated cost per million Btus, the Progress Fuels

 4 Corporation ascribed to Powder River Basin coal some penalty

 5 associated with expected impacts on boiler performance?

 6 A They did a busbar analysis, yes, sir.

 7 Q And during the busbar analysis, some quantification

 8 of predicted boiler performance was used that served to

 9 penalize or have a negative impact on the competitiveness of

 10 Powder River Basin coal?

 11 A Not only that coal, but any coal that would be

 12 different.

 13 Q That would be different than what?

 14 A It could have been a new coal that we were buying

 15 from Colorado, it could have been anything we do a busbar on

 16 that we are not familiar with.

 17 Q And that was done even though the Crystal River Units

 18 4 and 5 were built with the assumption that they would be

 19 designed to and would burn a blend consisting of 50 percent

 20 Powder River Basin coal?

 21 A I don't think the design had anything to do with it,

 22 sir. They did a busbar on any coal they were not familiar

 23 with.

 24 MR. McGLOTHLIN: Those are all of my questions.

 25 CHAIRMAN EDGAR: Thank you, Mr. McWhirter (sic).

 FLORIDA PUBLIC SERVICE COMMISSION

 329

 1 Mr. Brew.

 2 MR. BREW: No questions.

 3 CHAIRMAN EDGAR: Ms. Bradley.

 4 MS. BRADLEY: No questions.

 5 CHAIRMAN EDGAR: Questions from staff?

 6 MR. YOUNG: Yes, Madam Chairman.

 7 CROSS EXAMINATION

 8 BY MR. YOUNG:

 9 Q Ms. Davis, good afternoon.

 10 A Hello.

 11 Q I will see if I can get you out of here before -- in

 12 20 minutes?

 13 A Okay. Great.

 14 Q Or less than that. In your prefiled testimony you

 15 were Director of Regulatory and Administrative Services,

 16 correct?

 17 A Yes, sir, I was.

 18 Q And that involved -- can you explain that? What does

 19 a person who is Director of Regulatory and Administrative

 20 Services do?

 21 A Yes, sir. I had people under me who did contract

 22 administration, who did analysis for the procurement of coal or

 23 transportation, who did the reporting of the purchases of the

 24 coal and transportation, not only to this Commission, but to

 25 the FERC. I was responsible to come up and work with staff,

 FLORIDA PUBLIC SERVICE COMMISSION

 330

 1 Public Counsel, and FIPUG numerous times during the years, and

 2 then annually, any questions that they might have in going over

 3 what all we were buying. I also was over our central file

 4 section, which is where we kept our records.

 5 Q Okay. As Director of Regulatory and Administrative

 6 Services you worked closely with Mr. Edwards?

 7 A Yes, sir, I did.

 8 Q And that is Mr. Dennis G. Edwards, who was VP of Coal

 9 Procurement?

 10 A Yes, sir.

 11 Q As Vice-President of Coal Procurement, Mr. Edwards

 12 was responsible for coal procurement for the whole -- for all

 13 of Progress Energy Florida, correct?

 14 A For coal procurement for Crystal River 1, 2, 4, and

 15 5.

 16 Q Okay. Thus, Mr. Edwards made the final decisions as

 17 relates to coal procurement for 1, 2, 4, and 5, CR1, 2, 4, and

 18 5?

 19 A Mr. Edwards made those decisions in conjunction with

 20 the folks at Florida Power Corporation at the time.

 21 Q And you were -- in your prefiled testimony you stated

 22 that you worked closely with Mr. Edwards?

 23 A Yes, I did.

 24 Q He frequently copied on communications with PFC

 25 management concerning coal procurement and coal

 FLORIDA PUBLIC SERVICE COMMISSION

 331

 1 transportations?

 2 A Yes, sir, I was.

 3 Q As Director of Regulatory and Administrative Services

 4 for Progress Fuel Cooperation, you never personally discussed

 5 with other utilities the experience they had with burning PRB

 6 coal in their respective plants, correct?

 7 A Not with other utilities.

 8 Q To your knowledge, do you know if Mr. Edwards ever

 9 personally discussed with the other utilities the experience

 10 they had with burning PRB coal in their respective plants?

 11 A I was personally not present if he did that.

 12 Q So that would be a no? That's a no?

 13 A You're saying with other utilities?

 14 Q Yes, ma'am.

 15 A That would be a no. I have no knowledge of that.

 16 Q Okay. Ms. Davis, you never did any research

 17 concerning burning PRB coal in CR4 and 5, correct?

 18 A No, sir, I did not.

 19 Q To your knowledge, do you know if Mr. Edwards did any

 20 research on the effects of burning PRB in 4 and 5 -- I mean,

 21 PRB coal in Units 4 and 5?

 22 A He looked at that coal quite often. He looked at it

 23 many, many times.

 24 Q Ms. Edwards -- Ms. Davis, have you ever heard the

 25 term "derate" before?

 FLORIDA PUBLIC SERVICE COMMISSION

 332

 1 A Yes, sir.

 2 Q What is your understanding of the term "derate?" In

 3 a quick one to two-minute summary, what is your understanding

 4 of the term "derate?"

 5 A You would get less kilowatt hours out of the unit.

 6 Q Have you ever personally discussed the potential

 7 derate of CR4 and 5 as a result of using PRB coals?

 8 A Yes, sir, I have, with Mr. Roy Potter.

 9 Q Pardon me, can you repeat that?

 10 A Yes, sir, I have, with Mr. Roy Potter.

 11 Q Okay. Have you ever discussed it with Mr. Edwards?

 12 A Not that I recall.

 13 Q Now, dealing with the issues of bituminous coal, in

 14 PFC's October 1998 and May 2001 RFP, the coal procurement for

 15 CR4 and 5 had a minimum Btu content of 12,300, correct?

 16 A Would you repeat that one more time, please?

 17 Q In PFC's October 1998 RFP, and dealing with -- in May

 18 of 2001, the coal procurement for CR4 and 5, the RFP stated

 19 that they wanted 12,300 Btu minimum, correct?

 20 A Can I look at that, please?

 21 Q Yes, you may. If you can turn to DMD-3.

 22 A Yes, sir. There it says it is a 12.3 minimum, that

 23 economic analysis will be based on this value.

 24 Q Okay. And in 1998, did you receive any bids from

 25 foreign bituminous coal suppliers?

 FLORIDA PUBLIC SERVICE COMMISSION

 333

 1 A Do you know what exhibit that is under?

 2 Q Just general knowledge. Did you receive any bids

 3 from foreign bituminous coal suppliers?

 4 A I think AMCI Export Corporation had a proposal in

 5 1998, looking at my exhibit.

 6 Q Strike that question, Ms. Davis. The 12,300

 7 specification, how was that specification developed?

 8 A As I stated in my deposition, I came with the company

 9 in '84 and that's -- I believe that has been as long as I can

 10 recall and before the specification on the bid solicitation

 11 that was agreed to by Progress Fuels and Florida Power at some

 12 point in time, if not at origin when the units were built.

 13 Q Can you speak up? I can barely hear you. I'm sorry.

 14 A Yes, sir. I said I know that the specification has

 15 been there since I have been at Progress Fuels Corporation,

 16 since 1984, and perhaps it was there even before, since the

 17 units were built.

 18 MR. YOUNG: Okay. If I can have one minute, Madam

 19 Chairman. (Pause.)

 20 BY MR. YOUNG:

 21 Q Ms. Davis, if I can have you turn to DMD-9, submitted

 22 with your prefiled testimony.

 23 A Yes, sir.

 24 Q Do you recognize your DMD-9?

 25 A Yes, sir.

 FLORIDA PUBLIC SERVICE COMMISSION

 334

 1 Q What is DMD-9?

 2 A DMD-9 are the letters that I have been copied on over

 3 the years for the different correspondence that Mr. Dennis

 4 Edwards would write up and put into the file. Co-offers,

 5 contract options, there are different kind of interoffice memos

 6 in here.

 7 Q Okay. And at the bottom of Page DMD-9?

 8 A Which page, there is 184?

 9 Q I'm sorry, Page 167 of a 184-page document?

 10 A 167, yes.

 11 Q Okay. At the bottom of Page 167, do you see the

 12 paragraph that says with the remaining water delivered D

 13 requirements?

 14 A Yes, sir.

 15 Q The second sentence, can you please read that

 16 sentence for me?

 17 A As you can see from the attached schedule, the South

 18 American bids were the most competitive. The Oxbow and AMCI

 19 coals were low fusion and not suitable for Crystal River 4

 20 and 5.

 21 Q Can you continue reading on. I'm sorry.

 22 A We have evaluated the busbar effects of the Drummond

 23 and Glencore bids and have sent Drummond a draft agreement to

 24 review. I expect to complete an agreement with one of these

 25 suppliers.

 FLORIDA PUBLIC SERVICE COMMISSION

 335

 1 Q Based on that, do you know -- can you recall the

 2 amount of coal that PFC purchased based on those RFPs and the

 3 returned bids?

 4 A Not right offhand.

 5 Q If you can turn to DMD-19?

 6 A Just a moment, please.

 7 Q And specifically looking at Page 4 of 10 on DMD-19.

 8 A Okay. What would you like me to look at?

 9 Q Looking at the -- reviewing the chart that says plant

 10 operator coal transactions annual formats.

 11 I'm sorry. I'm talking too loud.

 12 Please take a second to review that document and

 13 indicate any foreign coal that PFC might have purchased?

 14 A For what years, sir?

 15 Q For 1999.

 16 A Yes, sir.

 17 Q Isn't it true, Ms. Davis, that for 1999 PFC purchased

 18 roughly 99,000 tons of foreign bituminous coal?

 19 A Yes, sir.

 20 Q And the foreign bituminous coal, based on the

 21 1998 RFP solicitation, was the best coal available, correct?

 22 A I don't know if it was the best. It says we have

 23 evaluated the busbar effects of the Drummond and Glencore bids

 24 and have sent Drummond a draft agreement to review. I expect

 25 to complete an agreement with one of these suppliers. So I

 FLORIDA PUBLIC SERVICE COMMISSION

 336

 1 assume at this time Mr. Edwards expected for one of these

 2 suppliers to sign a contract with us.

 3 Q Okay. Looking at that -- focusing on Page 4 of

 4 10 under the 1999 spot contract, spot purchase.

 5 A Yes, sir.

 6 Q The second purchase, Progress Fuel Corporation,

 7 Diamond May coal, what was that -- what was that amount that

 8 was purchased?

 9 A 304 tons on a spot basis, 305 rounded, 305,000.

 10 Q And isn't Progress Fuel Corporation an affiliate of

 11 Progress Energy, Incorporated?

 12 A Yes, sir.

 13 Q So in 1999, you tested foreign bituminous coal, but

 14 only purchased a hundred -- less than 100,000 tons, correct?

 15 A In 1999 there was only 100,000 purchased. I have no

 16 idea why Drummond and Mr. Edwards did not end up with an

 17 agreement looking at this document.

 18 Q Okay. So who would we ask to provide us more

 19 information on that, Mr. Edwards?

 20 A No, sir. I think we provided you the documents that

 21 we have on the bid. I have no documents on why they decided

 22 not to buy, and I don't believe there would be any or we would

 23 have produced them.

 24 Q Going back dealing with PRB coal, you never obtained

 25 any studies or reports on the effects of burning PRB coal in

 FLORIDA PUBLIC SERVICE COMMISSION

 337

 1 CR4, burning PRB coal, correct?

 2 A During the time frame of '96 to 2002?

 3 Q Yes, ma'am.

 4 A Not that I'm aware of.

 5 Q You never reviewed any -- you never reviewed or

 6 contacted any trade organizations requesting information

 7 concerning burning PRB coal, correct?

 8 A I'm not sure of that, sir, he could have. I did not.

 9 Q And to the best of your knowledge, Mr. Edwards did

 10 not either?

 11 A To the best of my knowledge, I don't know.

 12 Q So that is a no?

 13 A No, sir, that is I don't know.

 14 MR. YOUNG: Okay. No further questions, Madam

 15 Chairman.

 16 CHAIRMAN EDGAR: Exhibits? Oh, I'm sorry. It is

 17 getting late. Redirect? I apologize.

 18 MR. WALLS: Can I have just a moment?

 19 CHAIRMAN EDGAR: You may.

 20 MR. McWHIRTER: Before he starts, I had -- people my

 21 age have to step out of the room occasionally, and I had to

 22 step out, but I did have a couple of questions I would like to

 23 ask, if that's satisfactory.

 24 CHAIRMAN EDGAR: Mr. McWhirter.

 25 MR. McWHIRTER: Thank you very much. I won't be

 FLORIDA PUBLIC SERVICE COMMISSION

 338

 1 long. He said it was three hours? No.

 2 CROSS EXAMINATION

 3 BY MR. McWHIRTER:

 4 Q Ms. Davis, you have Exhibit 213 for identification

 5 and 214, and there appears to be a significant difference in

 6 the structure of the affiliates. But as I read the two, 213

 7 relates only to the affiliates of Florida Progress Corporation

 8 and down; whereas, 214 relates to -- it brings into play the

 9 North Carolina affiliate, as well.

 10 Am I correct in assuming that these affiliate

 11 transactions were all in place in December of 2002 and didn't

 12 suddenly spring forward between December 31st, 2002, and the

 13 reporting date of March 31st, 2003? Was that question too long

 14 and laborious? Would you like me to break it up?

 15 A Some of these companies, and I don't have the numbers

 16 of your exhibits, because mine are not numbered, but the

 17 exhibit that says affiliate companies 2003, could have been

 18 formed after the other exhibit that says waterborne

 19 transportation audit. When this audit was done by the

 20 Commission, these were the affiliates that were involved that

 21 were for deliveries to Florida Power Corp. They are not

 22 necessarily the same exhibits. And like I say, some of these

 23 exhibits on the others could have been formed after the merger.

 24 Q Well, I'm just trying to get a handle on it for my

 25 own mind. Electronic Fuels (sic) and then the renamed Progress

 FLORIDA PUBLIC SERVICE COMMISSION

 339

 1 Fuels had subsidiaries that dealt in synfuel, and they had

 2 mining companies that were subsidiaries to first Electronic

 3 Fuels and then Progress Fuels, and they did business with one

 4 another. Is that right?

 5 A Electric Fuels Corporation did business with some of

 6 their subsidiaries which we looked at during cost plus and also

 7 during the 2002 Commission hearings quite extensively.

 8 Q Well, did the subsidiaries sell fuel to Progress

 9 Fuels or did they just -- Progress Fuels acted as an

 10 intermediary to acquire fuel for the benefit of the utility

 11 company?

 12 A Per the Commission ruling, we had a bid process. And

 13 they would bid with other suppliers to deliver, to sell coal to

 14 Progress Fuels. And that fuel that was purchased by Progress

 15 Fuels, through the bids solicitation process, was then

 16 delivered to Crystal River 4 and 5 and sold to Florida Power

 17 Corporation.

 18 Q Well, did Progress Fuels and its predecessor,

 19 Electronic Fuels, did it act as broker or did it buy the fuel

 20 and then resell it to the utility?

 21 A It bought the fuel from the Kentucky Mays or the

 22 Powell Mountains or any other supplier through the bid

 23 solicitation process set up by this Commission.

 24 Q Can you explain why it is beneficial to the consumers

 25 to have an operation where subsidiaries sell to a subsidiary

 FLORIDA PUBLIC SERVICE COMMISSION

 340

 1 and that subsidiary sells to the utility as opposed to just the

 2 Progress Fuels acting as an intermediary and making the

 3 contacts with the sellers?

 4 A Mr. McWhirter, if you recall, back in 1976 Electric

 5 Fuels was formed as a subsidiary of Florida Power Corporation.

 6 Q Right.

 7 A And this Commission at that time approved a contract

 8 between Florida Power Corporation and Electric Fuels. So it

 9 was sometime later when the other subsidiaries were formed,

 10 many years later. And they, like other suppliers, would sell

 11 coal through the bid solicitation process to Electric Fuels.

 12 Q Well, it seems to be a fairly complex structure, and

 13 I'm trying to determine why it's in the best interest of

 14 consumers to have subsidiaries selling to one another. And I

 15 don't want to use the word daisy chain, but selling and then

 16 ultimately the utility buying from subsidiaries after the fuel

 17 has been resold many times. Why can't these subsidiaries

 18 just -- why can't Progress Fuels or its predecessor act as an

 19 agent for the sales?

 20 MR. WALLS: Object; argumentative and speculative.

 21 Assumes facts not in evidence.

 22 A Sir, the coal was sold at cost.

 23 Q Well, what is this four dollars --

 24 A If electric Fuels bought the coal at $25, they sold

 25 it to Florida Power for $25.

 FLORIDA PUBLIC SERVICE COMMISSION

 341

 1 Q I see. So whatever Progress Fuels pays to the

 2 subsidiary, that same price without any markup is passed

 3 through to the utility company. Is that what you are saying?

 4 A Yes, sir, I am.

 5 Q You are not saying that?

 6 A Yes, sir, I'm saying that.

 7 Q Oh, you are saying that?

 8 A Yes, sir.

 9 Q Well, can you explain to me why the structure was set

 10 up that way? What is the benefit of it?

 11 A Again, sir, the original structure was set up in

 12 1976. Electric Fuels in 1984-'85 went out and got into other

 13 coal mining operations, and when they would -- they would bid

 14 like anyone else if Electric Fuels was going out to by some

 15 coal. And it was a contract that the Commission approved that

 16 costs would be passed on.

 17 Q Did these mining companies and synfuel companies know

 18 what the bids were for other purchasers before they made their

 19 bid?

 20 A No, sir, and that has been looked at by the

 21 Commission several times.

 22 Q And they are all made simultaneously, and there is a

 23 Chinese wall between Progress and --

 24 A There is definitely a Chinese wall.

 25 Q Beg your pardon?

 FLORIDA PUBLIC SERVICE COMMISSION

 342

 1 A There is a Chinese wall. The bids come in, they are

 2 in a sealed envelope, they are all opened at the same time.

 3 This staff themselves set up a quite extensive procedure that

 4 we had to follow.

 5 Q Well, although the fuel cost has no markup, as I

 6 understand it, the parent company makes a capital investment

 7 and pays administrative costs for the operations of these

 8 companies, is that correct?

 9 A There was a return on equity on some rail cars, and

 10 there was the administrative cost that was passed on just like

 11 it would have been in a base rates.

 12 Q I'm sorry, I didn't quite catch that. You say that

 13 Progress --

 14 A There was some equity on the rail cars that a return

 15 was earned on for the investment in the rail cars that Electric

 16 Fuels had made, and the administrative cost was no more than

 17 the administrative would have been if it was in base rates at

 18 the utility level.

 19 Q So are you saying that what happens is they pay the

 20 cost that's bid for the fuel, but in addition to that they also

 21 pay for administrative cost plus a return on the investment and

 22 assets?

 23 A 55 percent net of long-term assets.

 24 Q I see. So, how is that administrative cost and

 25 return on assets treated in the fuel filings that Progress

 FLORIDA PUBLIC SERVICE COMMISSION

 343

 1 Energy makes with this Commission?

 2 A It is no longer treated that way, sir. I know they

 3 changed it since I have not been involved, and I'm not sure how

 4 it's handled today.

 5 Q You are not sure how it is treated?

 6 A Not today, sir. It's different today.

 7 Q With respect to tax credits, who gets the benefit of

 8 the tax credits when synfuel is sold to the utility company?

 9 A It depends, sir. Like for Black Hawk, we have a

 10 10 percent ownership, so 10 percent of those tax credits would

 11 come to Progress Energy Corporation on a consolidated basis.

 12 Q Do any portion of those tax credits flow through to

 13 the subsidiary electric utility or do they all go to the parent

 14 company?

 15 A We file a consolidated return, so it's at the

 16 consolidated level.

 17 Q You file a consolidated return?

 18 A Yes, sir.

 19 Q Are you familiar with the accounting procedure that

 20 the utility uses with this Commission when it reports the

 21 income tax that it has paid on its revenues?

 22 A No, sir, I'm not.

 23 Q All right. That would be something I would ask

 24 Mr. Portuondo?

 25 A Yes, sir. That would have to be a utility question.

 FLORIDA PUBLIC SERVICE COMMISSION

 344

 1 Q When these subsidiaries sell to Progress Fuels, are

 2 the prices open for review by the public or are those prices

 3 confidential?

 4 A Prices are filed with the Commission under a two-year

 5 confidentiality agreement, which FIPUG and the Office of Public

 6 Counsel can request to see.

 7 Q So there is a bid process, and are you telling me

 8 that all the bids are submitted simultaneously to Progress

 9 Fuels by all the bidders on a day certain?

 10 A No, sir. When we have an RFP, the RFP goes out, and

 11 you have two to four weeks, normally around four weeks, to

 12 respond to the RFP. And the secretary collects all of those

 13 RFPs and keeps them in a sealed envelope at which time she

 14 would open them when the date on the RFP has come to fruition.

 15 Q Under the procedure used by Progress Fuels, does it

 16 have to accept the lowest bid submitted that meets the RFP

 17 criteria or can it accept any of the bids submitted?

 18 A No, sir. We follow the Commission guidelines on what

 19 we accept. They've set up guidelines that if we do not choose

 20 the lowest delivered price, that we need to look overall at

 21 other things that would affect it, like, is the supplier

 22 reliable, you know.

 23 Q In the previous questions that were asked to you,

 24 you -- and in your testimony you say that you sent out RFPs to

 25 90 different companies, including Kennecott that dealt

 FLORIDA PUBLIC SERVICE COMMISSION

 345

 1 exclusively in Powder River coal. From your studies, did you

 2 notice a marked difference in the price of Powder River coal as

 3 Mr. Sansom has testified to at some point in time from the

 4 Central Appalachian coal that was available to you?

 5 A The price of the coal itself on a stand-alone basis

 6 is less than the price on a stand-alone basis of foreign or

 7 CAPP coal.

 8 Q You were aware of the significant price differential

 9 that has been testified to earlier today?

 10 A There is a large differential in the price, there is

 11 a large differential in the Btu, but that is not the only point

 12 you would consider. You have to consider transportation and

 13 the supplier, what kind of reserves they have. There is a lot

 14 of things that you would consider before you would make a

 15 selection.

 16 Q Well, the bottom line is what has been referred to as

 17 the busbar cost of producing electricity out of the fuel that

 18 you purchase, is that right?

 19 A If you look at the busbar price on the solicitation

 20 that we did have, it is at the same as the CAPP coal.

 21 Q So those analyses went on. But as I understand it,

 22 there was a problem with the railroads up until about 2002 and

 23 2003, and that problem was resolved which reduced the

 24 transportation cost significantly. Are you aware of that?

 25 A I am aware that during the time I was involved,

 FLORIDA PUBLIC SERVICE COMMISSION

 346

 1 '96 to 2002, which most of the time that I was involved there

 2 was a problem with the railroad, but I did not have the details

 3 on it.

 4 Q Were you aware of the impact that might have on the

 5 busbar cost?

 6 A Well, transportation, number one, if you can't get it

 7 or if it is high, it would naturally have an effect on the

 8 price.

 9 Q Did you make any extraordinary effort to go out and

 10 solicit the Powder River coal at that time, or just send out

 11 your normal RFP?

 12 A Well, the RFP went out to over 100 people, and in

 13 some cases 135 people, so I didn't make any extraordinary

 14 efforts for any one individual out of that 135 people.

 15 Q Now, on Page 40 of your testimony, you indicate that

 16 all the records reflecting details of evaluations before --

 17 well, for the 1996 to 2002 time period have all been discarded,

 18 is that correct?

 19 A The records have been discarded according to the

 20 record retention period, yes, sir.

 21 Q I' m sorry. Would you say that again?

 22 A The records have been destroyed, yes, sir, in

 23 accordance with the record retention policy that Progress Fuels

 24 has.

 25 Q Is there any way that we can determine what your

 FLORIDA PUBLIC SERVICE COMMISSION

 347

 1 evaluation showed during that time period?

 2 A I gave you the evaluation for 1998 and 2001 and '96.

 3 What records I have, I gave you evaluations. They were

 4 produced in discovery.

 5 Q But all the other records have been destroyed?

 6 A Prior to '96?

 7 Q No, between 2006 -- '96 and 2002.

 8 A I have given you all the records that we have, sir,

 9 through discovery that you have requested.

 10 MR. McWHIRTER: I have no further questions, and I

 11 appreciate you accommodating me.

 12 CHAIRMAN EDGAR: Thank you, Mr. McWhirter.

 13 And now, Mr. Walls, redirect.

 14 MR. WALLS: I will try to be very brief.

 15 REDIRECT EXAMINATION

 16 BY MR. WALLS:

 17 Q Working backwards, Ms. Davis, you were asked some

 18 questions by Mr. McWhirter, and if you first look at the

 19 reference on Page 40 regarding the records of PEF, I believe he

 20 phrased the question as all the records were destroyed. If you

 21 look at Line 7, what does your answer say?

 22 A No, some were discarded well prior to the

 23 commencement of this proceeding.

 24 Q And have you, in fact, attached a number of documents

 25 regarding the evaluations and Mr. Edwards' review process of

 FLORIDA PUBLIC SERVICE COMMISSION

 348

 1 coals during the '96 to 2002 period in your exhibits?

 2 A Yes, sir.

 3 MR. McGLOTHLIN: Object to leading the witness on

 4 redirect.

 5 THE WITNESS: I think I said that to Mr. McWhirter a

 6 few moments ago. I produced documents for '96, '98 and 2001.

 7 BY MR. WALLS:

 8 Q I believe you were also asked some questions by

 9 Mr. McWhirter about the return that EFC received. Can you

 10 explain on whose assets did EFC get authorization to get a

 11 return on?

 12 A This Commission authorized us to earn 55 percent

 13 return on long-term assets invested in capital for the delivery

 14 of coal to Crystal River, and there were numerous hearings on

 15 that.

 16 Q And I believe you were asked a number of questions by

 17 staff regarding the evaluation of PRB coals, and you were asked

 18 if you had any discussions with Mr. Edwards regarding derates.

 19 And you identified that you had discussions with Mr. Roy

 20 Potter. Who was Roy Potter?

 21 A He was a manager of technical services. He was over

 22 all of our lab. He did all of the quality analysis for all the

 23 coal that went into Crystal River.

 24 Q And what were your discussions, if you recall, with

 25 him regarding the characteristics of PRB coals?

 FLORIDA PUBLIC SERVICE COMMISSION

 349

 1 A We would discuss at times, I would ask him about PRB

 2 coal, because he was very highly thought of in the analysis.

 3 And I would ask him why -- you know, why would we have a

 4 derate? And he would go over about the quality of the coal was

 5 much lower than what we normally burned, and it would have a

 6 derate on the boilers.

 7 Q I believe Mr. McGlothlin asked you a question about

 8 Mr. Edwards' 2003 compliance coal cost document that you

 9 attached as DMD-15?

 10 A Just a moment, please. Yes, sir.

 11 Q And I believe he asked you questions about

 12 Mr. Edwards' evaluation of Powder River Basin and referred you

 13 to the McDuffie terminal. Do you see that?

 14 A Yes, sir.

 15 Q Do you recall those questions?

 16 A Yes, sir.

 17 Q Are you aware of any differences between the McDuffie

 18 terminal and the terminal in IMT?

 19 A Yes. McDuffie is a state terminal, and I know we

 20 have looked at it a number of times, and there was a lot of

 21 things that we could get at IMT that we couldn't do at

 22 McDuffie. McDuffie was very busy. They didn't offer -- or

 23 they didn't offer priority berthing, which is real important to

 24 us.

 25 Q And why is priority berthing important to you?

 FLORIDA PUBLIC SERVICE COMMISSION

 350

 1 A For demurrage purposes. When a vessel comes in, we

 2 need to get it in and get it out. We have demurrage at IMT.

 3 We have demurrage on Dixie. You need to coordinate that. So

 4 you need to get your vessel in and out. Of course, the quicker

 5 you can get it, get the Dixie vessels out to Crystal River the

 6 more coal you can deliver to Crystal River.

 7 Q And what is demurrage, can you explain that?

 8 A It is a charge for the ship waiting over a specific

 9 amount of time.

 10 Q Ms. Davis, you were asked a question about a document

 11 which has been marked 215. It was the proposed agenda for New

 12 River Synfuel LLC, March 14, 2005, agenda. Do you recall that?

 13 A Yes, sir.

 14 Q And can you tell the Commission whether that meeting

 15 on March 14th, 2005, had anything at all to do with Crystal

 16 River Units 4 and 5?

 17 A Absolutely nothing.

 18 Q I also believe you were asked questions about whether

 19 when you evaluated PRB coals and other coals, whether you

 20 applied the waterborne market proxy. Do you recall those

 21 questions?

 22 A Yes, sir, we did.

 23 Q And what was your understanding of the development of

 24 the waterborne market proxy?

 25 A Back in 1992, the Commission wanted us to go on a --

 FLORIDA PUBLIC SERVICE COMMISSION

 351

 1 us and TECO to go on a proxy rather than a cost basis for

 2 transportation. And they developed the waterborne market proxy

 3 for domestic coal, and then sometime later we were buying

 4 foreign coal again, and they developed a market proxy for

 5 foreign coal or distressed coal that would come into IMT.

 6 Q And are PRB coals domestic coals?

 7 A Yes, sir.

 8 Q Now, when they developed this waterborne market proxy

 9 for foreign coals, how was that developed?

 10 A What we did at the time, we worked with staff and

 11 mostly Office of Public Counsel. And what we did, is we came

 12 up with the cost of the IMT and Dixie charges as a percent of

 13 the total domestic charges and used that percent.

 14 Q And was that use of the applicable portions of the

 15 waterborne market proxy to foreign coal shipments approved by

 16 the Commission?

 17 MR. McGLOTHLIN: I'm going to object to the leading

 18 of the witness on redirect.

 19 CHAIRMAN EDGAR: Can you rephrase?

 20 MR. WALLS: Yes.

 21 BY MR. WALLS:

 22 Q Was that a use of certain portions of the waterborne

 23 proxy?

 24 A Yes, sir.

 25 Q And was that approved by the Commission?

 FLORIDA PUBLIC SERVICE COMMISSION

 352

 1 A Yes, sir.

 2 Q When the waterborne market proxy applied, what

 3 happened if PFC's waterborne transportation costs were actually

 4 higher than the market?

 5 A Then we would lose money.

 6 Q And was that a risk to PFC at the time the waterborne

 7 market proxy was developed?

 8 A Yes. We all discussed that during our numerous

 9 meetings that we had, staff, Public Counsel, and ourselves, and

 10 the Commissioners during the hearings.

 11 Q Were there any domestic or foreign coals purchased by

 12 PFC from 1996 to 2003 that the waterborne market proxy was not

 13 applied to as the transportation costs?

 14 A No, sir, it was applied, or a portion of it was

 15 applied in all cases.

 16 MR. WALLS: That's all the questions I have.

 17 CHAIRMAN EDGAR: Now let's take up the exhibits.

 18 MR. WALLS: Yes. I would like to move in evidence

 19 DMD-1 through DMD 20, which are Exhibits 34 through 53.

 20 MR. McGLOTHLIN: I move 213, 214 and 215.

 21 CHAIRMAN EDGAR: Okay. Let's go ahead and enter

 22 Exhibits 34 through 53.

 23 (Exhibits 34 through 53 admitted into the record.)

 24 CHAIRMAN EDGAR: And, Mr. Walls, any objections to

 25 Exhibits 213, 214 and 215?

 FLORIDA PUBLIC SERVICE COMMISSION

 353

 1 MR. WALLS: No objections.

 2 CHAIRMAN EDGAR: Okay. Those exhibits will then also

 3 be entered into the record.

 4 (Exhibits 213, 214, and 215 entered into evidence.)

 5 CHAIRMAN EDGAR: The witness is excused. Thank you.

 6 MR. BURNETT: Madam Chairman, may she be dismissed

 7 from the proceeding?

 8 CHAIRMAN EDGAR: She may.

 9 MR. BURNETT: Thank you.

 10 CHAIRMAN EDGAR: Okay. To state the obvious, we have

 11 covered in one day opening statements and three witnesses. We

 12 have approximately 18 witnesses to go in two days. So put your

 13 seat belts on, and we will see if we can move through it

 14 tomorrow at a little brisker pace. We will begin tomorrow at

 15 9:30, and we look forward to seeing you all then. We are on

 16 break until tomorrow morning.

 17 MR. BURNETT: Madam Chairman, I'm sorry, I know you

 18 hit the gavel and --

 19 CHAIRMAN EDGAR: I did. Mr. Burnett.

 20 MR. BURNETT: At the risk of our wrath, would you

 21 consider 8:30?

 22 CHAIRMAN EDGAR: Mr. Burnett, I would consider it,

 23 and I rarely have wrath, but, no, we will begin at 9:30.

 24 MR. BURNETT: Yes, ma'am. Thank you.

 25 CHAIRMAN EDGAR: We are done for the day. Thank you.

 FLORIDA PUBLIC SERVICE COMMISSION

 354

 1 (The hearing adjourned at 5:38 p.m.)

 2 (Transcript continues in sequence with Volume 3.)

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 FLORIDA PUBLIC SERVICE COMMISSION

 355

 1

 2 STATE OF FLORIDA )

 3 : CERTIFICATE OF REPORTER

 4 COUNTY OF LEON )

 5

 I, JANE FAUROT, RPR, Chief, Office of Hearing

 6 Reporter Services, FPSC Division of Commission Clerk and

 Administrative Services, do hereby certify that the foregoing

 7 proceeding was heard at the time and place herein stated.

 8 IT IS FURTHER CERTIFIED that I stenographically

 reported the said proceedings; that the same has been

 9 transcribed under my direct supervision; and that this

 transcript constitutes a true transcription of my notes of said

 10 proceedings.

 11 I FURTHER CERTIFY that I am not a relative, employee,

 attorney or counsel of any of the parties, nor am I a relative

 12 or employee of any of the parties' attorney or counsel

 connected with the action, nor am I financially interested in

 13 the action.

 14 DATED THIS 12th DAY OF APRIL, 2007.

 15

 16 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 JANE FAUROT, RPR

 17 Official FPSC Hearings Reporter

 FPSC Division of Commission Clerk and

 18 Administrative Services

 (850) 413-6732

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