

1 APPEARANCES:

2 JOHN T. BUTLER and SCOTT A. GOORLAND,
3 ESQUIRES, Florida Power & Light Company, 700 Universe
4 Boulevard, Juno Beach, Florida 33408; and CHARLES A.
5 GUYTON, Gunster, Yoakley & Stewart, P.A, 215 South
6 Monroe Street, Suite 601, Tallahassee, Florida 32301,
7 appearing on behalf of Florida Power & Light Company.

8 CHARLES REHWINKEL, JOHN TRUITT, and PATRICIA
9 CHRISTENSEN, ESQUIRES, and J. R. KELLY, PUBLIC COUNSEL,
10 Office of Public Counsel, c/o The Florida Legislature,
11 111 West Madison Street, Room 812, Tallahassee, Florida
12 32399-1400, appearing on behalf of the Citizens of the
13 State of Florida.

14 JON C. MOYLE, JR., KAREN PUTNAL, and VICKI
15 GORDON KAUFMAN, ESQUIRES, Moyle Law Firm, P.A., The
16 Perkins House, 118 North Gadsden Street, Tallahassee,
17 Florida 32301, appearing on behalf of the Florida
18 Industrial Power Users Group.

19 ROBERT SCHEFFEL WRIGHT and JOHN T. LAVIA, III,
20 ESQUIRES, Gardner, Bist, Wiener, Bowden, Bush, Dee,
21 LaVia & Wright, P.A., 1300 Thomaswood Drive,
22 Tallahassee, Florida 32308, appearing on behalf of
23 Florida Retail Federation.

1 APPEARANCES (Continued):

2 JAMES W. BREW, ESQUIRE, Brickfield, Burchette,
3 Ritts & Stone, P.C., 1025 Thomas Jefferson St., NW,
4 Eight Floor, West Tower, Washington, DC 20007, appearing
5 on behalf of White Springs Agricultural Chemicals, Inc.
6 d/b/a PCS Phosphate-White Springs.

7 MARTHA BARRERA, KEINO YOUNG, and KYESHA MAPP,
8 ESQUIRES, Florida Public Service Commission, General
9 Counsel's Office, 2540 Shumard Oak Boulevard,
10 Tallahassee, Florida 32399-0850, appearing on behalf of
11 the Florida Public Service Commission Staff.

12 MARY ANNE HELTON, DEPUTY GENERAL COUNSEL,
13 Florida Public Service Commission, 2540 Shumard Oak
14 Boulevard, Tallahassee, Florida 32399-0850, Advisor to
15 the Florida Public Service Commission.

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P R O C E E D I N G S

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2 **COMMISSIONER BROWN:** This prehearing
3 conference shall commence at 1:35 p.m., November 6,
4 2014, in Docket 140001-EI. Thank you all for
5 accommodating us, given the lack of full electricity and
6 AC. So thank you all so much.

7 Staff, can you please read the notice.

8 **MS. BARRERA:** Yes. By notice, this prehearing
9 is called to order for 1:30, November 6th, 2014, in
10 Docket 140001-EI.

11 **COMMISSIONER BROWN:** Thank you. And can you
12 all please try to use your loudest voices since we still
13 don't have the mikes on. I'd like to take appearances
14 starting with my left.

15 **MR. BUTLER:** Thank you, Commissioner Brown.
16 John Butler and Charlie Guyton and Scott Goorland on
17 behalf of Florida Power & Light Company. Is that loud
18 enough?

19 **COMMISSIONER BROWN:** That's great.

20 **MR. BUTLER:** Thank you.

21 **MR. REHWINKEL:** Commissioner, Charles
22 Rehwinkel, John Truitt, J.R. Kelly, and Patty
23 Christensen for the Office of Public Counsel.

24 **MR. BREW:** Commissioner, good afternoon.
25 James Brew with the firm of Brickfield, Burchette, Ritts

1 & Stone for White Springs Agricultural Chemicals/PCS
2 Phosphate.

3 **COMMISSIONER BROWN:** Thank you.

4 **MR. MOYLE:** Jon Moyle with the Moyle Law Firm
5 on behalf of the Florida Industrial Power Users Group.
6 I'd also like to enter an appearance for Vicki Gordon
7 Kaufman and Karen Putnal.

8 **COMMISSIONER BROWN:** And I know you have a
9 louder voice than that.

10 **MR. MOYLE:** I do. I'll do better next
11 opportunity.

12 **COMMISSIONER BROWN:** Thank you.

13 **MR. WRIGHT:** Good afternoon, Commissioner.
14 Robert Scheffel Wright and John T. LaVia, III, on behalf
15 of the Florida Retail Federation.

16 **COMMISSIONER BROWN:** Thank you. Staff.

17 **MS. BARRERA:** Commissioner, present are Martha
18 Barrera, Keino Young, and Kyesha Mapp on behalf of the
19 Public Service Commission.

20 **MS. HELTON:** And Mary Anne Helton, advisor to
21 the Commission.

22 **COMMISSIONER BROWN:** Thank you so much. And I
23 want to thank Linda Boles, our court reporter, for
24 accommodating us, given the circumstances. Thank you
25 very much.

1 Starting with preliminary matters.

2 Ms. Barrera, are there any preliminary matters we need
3 to address before we get through the Prehearing Order?
4 My understanding is there are several.

5 **MS. BARRERA:** Yes. Staff has no preliminary
6 matters; I just want to add that.

7 **COMMISSIONER BROWN:** Thank you for that.

8 **MS. BARRERA:** There is oral argument on FP&L's
9 motion to deny participation to PCS Phosphate in
10 deferred proceedings and motion to strike the prehearing
11 statement.

12 There's also FIPUG's motion to strike from the
13 01 proceedings FP&L's request that the Commission adopt
14 guidelines for future oil and gas projects and to strike
15 accompanying testimony related to the proposed
16 guidelines. The motion was filed November 5th, 2014.

17 There is also a motion to strike certain
18 portions of Witness Deason's testimony, which was filed
19 about ten minutes ago.

20 **COMMISSIONER BROWN:** Okay. Thank you. So my
21 understanding -- we're going to start with the FPL
22 motion. My understanding though is that PCS Phosphate
23 has not provided a written response, so we will be -- I
24 will be allowing oral argument.

25 **MR. BREW:** Actually, Commissioner, we filed a

1 written response yesterday afternoon.

2 **COMMISSIONER BROWN:** Okay. I have not seen it.

3 **MR. BREW:** You do not have a copy of it?

4 **COMMISSIONER BROWN:** No.

5 **MR. BREW:** Did staff get it?

6 **MS. BARRERA:** No. We don't have a copy
7 either.

8 **COMMISSIONER BROWN:** Staff doesn't have a copy
9 either.

10 Mr. Brew, what time did you file that?

11 **MR. BREW:** 2:58 yesterday.

12 **COMMISSIONER BROWN:** Thank you. I have not
13 had an opportunity to review it. In anticipation though
14 of your comments, I did allow staff to relate to you
15 that I would be inclined to listen to oral argument.

16 Staff, how do you think we should proceed,
17 take a brief recess to --

18 **MS. BARRERA:** I don't know if, I don't know if
19 the computers are working for us to copy -- I did not
20 personally see the -- I mean, I've been looking at my
21 emails -- but in order to print out a copy of the
22 response. But oral argument, I think, will explain; if
23 you grant the parties oral argument, I think Mr. Brew
24 will have a chance to explain.

25 **COMMISSIONER BROWN:** Okay. We're going to go,

1 we're going to proceed ahead. I'm going to allow oral
2 argument starting with FPL. I'm not going to give a
3 time limit, but just please succinctly provide your
4 argument on the motion.

5 **MR. YOUNG:** Madam Commissioner, before we
6 begin, maybe if we can take a break. The motion -- it's
7 my understanding the motion is 15 pages. Maybe we can
8 get -- it's my understanding we have a copy, someone has
9 a copy of it that we can look at, review it, and then be
10 better informed in this time frame.

11 **COMMISSIONER BROWN:** Okay. Thank you. And I
12 hope that our staff will be able to provide some AC
13 during that little break.

14 Okay. So it is 1:40. Let's reconvene at five
15 till.

16 (Recess taken.)

17 Okay. We are going to reconvene this
18 prehearing conference. Thank you all for giving us that
19 brief break. And I've had an opportunity to review
20 PCS's response, very thorough response. Staff, have you
21 had an opportunity to review the written response?

22 **MS. BARRERA:** Yes, Commissioner.

23 **COMMISSIONER BROWN:** Parties, FPL, have you
24 had an opportunity to review the response?

25 **MR. BUTLER:** Yes, we have.

1 **COMMISSIONER BROWN:** Okay. At this juncture I
2 am still going to proceed and grant oral argument,
3 starting with Florida Power & Light, to argue the merits
4 of your motion.

5 **MR. BUTLER:** Thank you, Commissioner. FPL has
6 moved to deny PCS's participation as a party in the
7 deferred proceeding on FPL's gas reserve petition for a
8 simple, straightforward reason. PCS is not a customer
9 of FPL and, therefore, lacks standing with respect to
10 the issues to be resolved in this proceeding.

11 As PCS points out, it's already a party to the
12 fuel clause docket, but let me put that status into
13 context. In 2008, PCS petitioned to intervene in the
14 fuel docket. Its petition was premised entirely upon
15 its status as a customer of Progress Energy Florida, now
16 Duke, and the impact that decisions concerning Duke's
17 fuel clause filings could have on PCS as a customer.

18 PCS has consistently avoided taking positions
19 on FPL-specific issues in the fuel docket. For example,
20 in its prehearing statement for the October 22 hearing
21 in this year's docket, PCS took no position on Issues 2A
22 through 2E and 24A and 24B, which were all of the
23 FPL-specific issues identified for that hearing. FPL
24 did not oppose PCS's intervention in 2008 to protect its
25 interests as a Duke customer and is not opposed to its

1 participation in this year's fuel docket to protect
2 those same interests. Until now, however, FPL has not
3 had reason to dispute PCS's standing to participate as a
4 party with respect to FPL-specific issues because PCS
5 has never attempted to do so.

6 PCS's attempt to participate as a party in
7 this deferred proceeding presents a very different set
8 of circumstances. The deferred proceeding addresses
9 only issues raised by FPL's gas reserve petition, which
10 seeks approval only for an FPL gas reserve project and
11 guidelines that would apply only to future FPL projects.
12 None of the other IOUs has filed a similar petition at
13 this point, and no other IOU is participating in this
14 deferred proceeding. Nothing decided in the deferred
15 proceeding could possibly have a direct impact on PCS's
16 interest as a Duke customer. As such, PCS falls well
17 short of the threshold for standing stated in *Agrico* and
18 its progeny.

19 PCS seeks to distract attention from this
20 obvious lack of substantial interest by speculating
21 about the precedential effect that a decision on FPL's
22 gas reserve petition might have with respect to
23 potential gas reserve proposals in the future by other
24 IOUs, possibly including Duke. But the Commission has
25 properly found on at least two prior occasions that

1 concern over the precedential effect of a decision is
2 too speculative to meet the *Agrico* standing test.

3 FPL's motion cites Order Numbers 16581 and
4 PSC-00-1265 on this point. In Order Number 16581, the
5 Commission stated that, quote, potential adverse legal
6 precedent does not constitute the substantial interest
7 needed for intervention, unquote.

8 Similarly, Order PSC-00-1265 states that,
9 quote, an injury premised on a potential precedent that
10 might have an effect on the counties at some unspecified
11 time in the future is too speculative to confer
12 standing, unquote.

13 The PCS response to FPL's motion that was
14 filed yesterday doesn't really dispute any of the case
15 law FPL cites on standing. Rather, its response is
16 devoted almost entirely to what amounts to a
17 grandfathering argument. PCS has been allowed to
18 participate as a party in fuel clause dockets for years.
19 The deferred proceeding here is technically part of this
20 year's fuel clause docket as opposed to being spun out
21 into a separate docket, and, therefore, PCS should be
22 allowed to participate here.

23 Bottom line, PCS would or should readily
24 acknowledge that it would have no standing to intervene
25 if this case were proceeding under a separate docket.

1 The mere fact that there is not a separate docket and,
2 instead, that we are administratively proceeding in the
3 fuel clause docket does not create legal standing.

4 The simple fact of the matter is that the fuel
5 clause docket cannot function effectively as a unified
6 proceeding that addresses both common issues and
7 utility-specific issues without recognizing the
8 significantly different standing considerations that
9 apply to those two different types of issues.

10 In order both to enjoy the efficiency of a
11 unified fuel clause proceeding and protect all parties'
12 rights in that proceeding, the Commission must
13 distinguish between common issues, as to which all
14 parties have standing, and utility-specific issues, as
15 to which only parties with the requisite substantial
16 interest in the rates and charges of that particular
17 utility have standing. It is this essential distinction
18 that FPL asks the Commission to draw with respect to
19 PCS's unfounded attempt to participate as a party in the
20 deferred proceeding on FPL's gas reserve petition.

21 Observing this distinction with respect to PCS
22 would be consistent with the Commission's decision in
23 Order PSC-02-1250, where an Intervenor was permitted to
24 participate as a party on some, but not all, issues at
25 issue in the docket in question there.

1 For these reasons, FPL -- I'm sorry -- PCS
2 should not be allowed to participate as a party in this
3 deferred proceeding. Thank you for this opportunity to
4 explain FPL's motion. I'd be happy to answer any
5 questions you have about it, and I would like to reserve
6 the opportunity to reply briefly to PCS's oral
7 arguments.

8 **COMMISSIONER BROWN:** Okay. PCS.

9 **MR. BREW:** Thank you, Commissioner. And I
10 thank staff and yourself for taking the time to read our
11 response before we start.

12 From our perspective, this motion was over
13 when you opened this hearing because it -- in the first
14 sentence in the Prehearing Order which calls it Docket
15 140001. The basics here are that whenever PCS and FPL
16 talk about this proceeding, they mean the fuel clause
17 proceeding. There is no deferred proceeding. There
18 were deferred issues. There's no other docket. There's
19 no other docket, so there's no need for PCS to apply for
20 standing in that other docket. The fact is that PCS was
21 granted the right to intervene in fuel clause
22 proceedings many years ago, and it's actively
23 participated, I believe quite constructively, through
24 the years. But the fact is there's never been a
25 challenge to that, nor has there been a need to.

1 Second, the fact remains that a very large
2 component of our costs are fuel charges, so our
3 substantial interests are in no way diminished through
4 the years.

5 The third is that the basic fact of the matter
6 is that the fuel clause is a consolidated docket. All
7 utilities file their testimony on all issues. There is
8 a single hearing, there's a single rec memo, there's a
9 single order.

10 Our intervention, and the Commission has
11 interpreted interventions under the applicable rule,
12 25-22.0239, does not limit intervention. FPL has argued
13 something a minute ago that I've heard for the first
14 time, which is that there should be tiers of standing
15 in the consolidated dockets. I would argue, first of
16 all, that that's not law or practice in front of the
17 Commission at this time and, secondly, that it should
18 never be applied mid case.

19 Next, FPL has known of PCS's interest in this,
20 these particular issues for quite some time. We were on
21 an issues conference call back on July 25th. FPL
22 conferred with us on their joint motion with OPS [sic]
23 to establish this separate schedule. They even
24 conferred with me on their motion to deny us the right
25 to participate, all of which they've done recognizing we

1 are a party of record in the consolidated docket. So to
2 suggest that we are a party of record throughout the
3 entire proceeding up until the point where we say
4 something does not make any sense. It is not consistent
5 with Commission practice in any way.

6 The next -- FPL raised its complaint when we
7 filed the prehearing statement, and they try to argue
8 that that is effectively us asking to participate for
9 the first time. Well, a prehearing statement is not and
10 never has been a point of entry into a docket. It is a
11 required pleading by a party pursuant to the Order
12 Establishing Proceeding [sic]. There are two OEPs in
13 this docket, and we had an obligation as a party of
14 record to respond to each of the OEPs, which is exactly
15 what we did. So we were not asking to be admitted to
16 participate on those issues. As a party of record, we
17 are complying with an obligation placed on us to state
18 our positions on the issues.

19 Also, in the first prehearing statement filed
20 on September 26th in the main body of the fuel clause
21 docket, PCS took a position on each and every issue.
22 The statement of no position is, in fact, stating a
23 position of which it is our option as to what they
24 actually say on it. So it is not correct to say that
25 PCS has in any way had our intervention perceived to be

1 limited in any sense in the fuel clause docket.

2 Finally, I think, just in the briefest
3 possible terms, if FPL did not want PCS to participate
4 in this docket or on these issues, they could have asked
5 that it be spun off into a different docket, at which
6 time we could have petitioned to intervene and raised
7 issues that we thought would be appropriate or timely,
8 but we're not there. Their reference in their motion to
9 a deferred petition is imaginary. The issues that we're
10 talking about have always been in the fuel clause.
11 They've never gone anywhere. And so the notion that
12 there was some need to establish a right to participate
13 is in reference to a proceeding that does not exist.
14 The issues are in the fuel clause, which you
15 acknowledged when we first started here, and has never
16 been in question. Our ability to participate as a full
17 party in the fuel clause is beyond question.

18 The only real objection that we've heard is
19 that there should be secondary tiers of standing in a
20 fuel clause proceeding, an argument that I've never
21 heard before today and for which I can see no legal
22 basis.

23 So to sum up, FPL can't claim that PCS is not
24 a full party to the fuel clause. They -- we do not have
25 in any sense a limited right to intervene in the fuel

1 clause. We are a full party. This is a consolidated
2 docket, so FPL took a flier on arguing that there is a
3 separate proceeding, which is not in any sense accurate.

4 Finally, there is absolutely no doubt that the
5 issues raised in the petition are landmark issues for
6 the Commission. I would think the Commission would want
7 to have the input from any and all parties in the fuel
8 clause docket before it gets to those issues. I would
9 ask that you summarily deny the motion and that we move
10 on to more productive measures. Thank you.

11 **COMMISSIONER BROWN:** Thank you, Mr. Brew. I'm
12 going to give the other parties a brief opportunity to
13 respond. When I say brief, I mean brief, please.

14 **MR. REHWINKEL:** Commissioner, Charles
15 Rehwinkel with the Office of Public Counsel.

16 The fuel clause is different. Order 14546 is
17 the wellspring of the gas reserve petition that FPL
18 filed. That is a generic policy decision that all
19 parties at the time and the Public Counsel and FIPUG, of
20 which PCS was a member, signed on to.

21 The Commission has historically resisted
22 making anything to do with fuel a part of rulemaking but
23 instead has adopted generic policy that applies to all
24 utilities. We think the Commission will benefit by
25 PCS's continued participation, not only going back to

1 the 14546 days but to today, in providing continuity and
2 a large and continually participating customers'
3 viewpoint through cross-examination and briefing of this
4 issue.

5 So that's our basic position. We think there
6 is no precedent, and it will be a bad precedent today to
7 start ejecting a party from a docket. So thank you.

8 **COMMISSIONER BROWN:** Okay. Thank you for
9 being brief.

10 Mr. Moyle.

11 **MR. MOYLE:** We fully support PCS being allowed
12 to participate, as was recognized in an order. This is
13 a significant issue. I think their participation is
14 helpful and should be allowed.

15 **COMMISSIONER BROWN:** Thank you.

16 Mr. Wright.

17 **MR. WRIGHT:** Thank you, Commissioner Brown.
18 We also support, the Retail Federation also supports
19 PCS's participation in this. I believe the basic
20 standing law is that if you have standing to be in a
21 docket, you have standing to participate on all issues
22 in that docket.

23 FPL could have filed a new docket asking for
24 this to be handled, for example, in base rates but, for
25 its own reasons, chose not to do so.

1 I agree with Mr. Rehwinkel that these are very
2 important issues and that the Commission would benefit
3 from and should hear from PCS and all parties who wish
4 to express views on them. Thank you.

5 **COMMISSIONER BROWN:** Mr. Butler, a very, very
6 brief response.

7 **MR. BUTLER:** I will keep it very brief. Let
8 me reiterate the order I had referred to earlier,
9 PSC-02-1250, that specifically refutes the idea that if
10 you're in for one issue, you're in for all issues. It
11 distinguished among issues for which a party did have
12 the requisite substantial interest to have standing and
13 other issues where it did not.

14 You know, our fundamental position is that PCS
15 does not have standing with respect to FPL's, you know,
16 FPL-specific requests for approval of its gas reserve
17 petition. I've not really heard anything from either
18 Mr. Brew or any of the other parties arguing that PCS
19 meets the standing test. They're simply arguing this
20 grandfathering or, you know, in-for-one issue,
21 in-for-all theory that keeps showing itself. I think
22 that would be a very bad practice for the Commission to
23 go that direction because utilities and perhaps other
24 parties to the proceeding would feel the need to be
25 hypervigilant about intervention of parties that appear

1 to have no relation to their part of the docket simply
2 on the off chance that some day, you know, that party
3 might decide to try to participate.

4 And, finally, I'd just go back to, again,
5 pointing out that every argument I've heard is arguing
6 that somehow or another the decision on FPL's gas
7 reserve petition would be precedential and that's
8 important. It may be, but the Commission has spoken
9 definitively on at least two occasions that precedent is
10 not a basis for standing. Thank you.

11 **COMMISSIONER BROWN:** Thank you.

12 Mr. Brew, I do have a question for you, but I
13 will say you referenced my opening citing the actual
14 docket number as this is the 01 docket. I actually was
15 going to open up saying that this deferred proceeding,
16 believe it or not, is specific to FPL issues. However,
17 I appreciate your argument here.

18 So going along those same lines, if this was a
19 separate docket apart from 01, would you argue that PCS
20 Phosphate has standing to participate in this
21 proceeding?

22 **MR. BREW:** Commissioner, I would have to see
23 how the, how the petition was actually posed. But we
24 would not be, in any sense, arguing that we are a
25 customer of FPL, if that's what Mr. Butler is getting

1 to. We would look at whether or not there is another
2 reason and justification for us to participate in that
3 docket based on the issues that were raised. My point
4 is simply that the fact is these issues are here. It's
5 in a consolidated docket.

6 **COMMISSIONER BROWN:** Well, I will point out,
7 Mr. Brew, that this is a separate prehearing entirely
8 apart from the 01 prehearing conference, and the
9 prehearing -- there is a separate hearing. There are
10 also separate discovery parameters, guidelines, et
11 cetera. There will be separate briefs. Everything is
12 separate. So you're calling this a consolidated
13 01 docket, but this is a completely separate issue that
14 is -- and the reason why I granted it to be deferred was
15 because the petition originally requested relief under
16 the fuel, under the fuel 01 docket clause. So that is
17 why I continued it as part of the 01 proceeding solely.
18 So that being said --

19 **MR. BREW:** It still requests relief under the
20 01 docket, and that hasn't changed. The fact that the
21 issues were slipped to accommodate additional discovery
22 by OPC and the other parties to look at those very novel
23 questions did not take it out of this docket. Our
24 standing to participate is based upon the fuel clause
25 docket. Our standing to be in this proceeding is well

1 established. The question that's presented is whether
2 or not you can -- for a party that has, whose standing
3 is established, whether you can, as Mr. Rehwinkel
4 mentioned, eject them from certain issues, and there's
5 no basis for that whatsoever.

6 **COMMISSIONER BROWN:** Okay. And I appreciate
7 your comments, and thank you for highlighting those.

8 Mr. Brew, in this year's fuel proceeding --

9 **MR. BREW:** Uh-huh.

10 **COMMISSIONER BROWN:** -- was your participation
11 specifically limited to the Duke issues as a, as a
12 customer of Duke?

13 **MR. BREW:** Commissioner, I get and have
14 recycled lots of filings by all the utilities. The
15 rates that are set in the fuel clause that apply to Duke
16 are the ones that show up in our bills. But we do look
17 at the pleadings that are made by all the utilities as
18 they're filed and served on us. So, for example, I get
19 lots of pleadings from Gulf Power. The fact that I
20 don't take a position on Gulf Power issues does not mean
21 that we were not entitled to take a look at them and
22 take a position on them.

23 **COMMISSIONER BROWN:** But you don't take a
24 position on them.

25 **MR. BREW:** Not unless, based on our

1 assessment, which is our judgment, there's a reason for
2 us to do so.

3 **COMMISSIONER BROWN:** Okay. Thank you.

4 A couple of questions for staff, anyone,
5 anyone, please, who has the answer, please chime in.

6 Regarding PCS's argument that it is obliged to
7 file a prehearing statement on the deferred issues,
8 pursuant to the August 22nd OEP, it also states that it
9 is legally required to file all pleadings in this
10 proceeding because it is a part of the 01 docket. I
11 added that latter part. Can you please opine on that?

12 **MS. BARRERA:** Yes, Commissioner. I have a few
13 comments. I believe that the idea that this is part of
14 the 01 docket, even though it has been deferred, I agree
15 that we made it a separate -- you made it a separate
16 proceeding. I believe that in the, it was in the
17 interest of expediency that a new docket was not opened.
18 Had a new docket been opened, my understanding is that
19 PCS Phosphate was saying that it would be asked to
20 intervene. Whether or not PCS Phosphate could assert a
21 substantial interest in a different docket with the same
22 issues is questionable.

23 I understand that -- it was understood that
24 the order applied to the deferred issues, and the
25 deferred issues apply specifically to FP&L. What is

1 missing, I think, from these arguments is bringing it
2 back to *Agrico*. And under *Agrico*, you have to show a
3 substantial interest and it has to be of immediate
4 sufficiency. I don't believe, in my humble opinion,
5 that PCS has demonstrated a substantial interest in --
6 as not being a customer in these proceedings.

7 As to the immediacy argument, I think that PCS
8 Phosphate's position is that this would be a global
9 applicable -- decision of the Commission would be
10 applicable to everybody because it's precedential and
11 there will be rules and this kind of thing on the
12 guidelines. I think that's very speculative. And we've
13 held before that when it's so speculative, under *Agrico*,
14 there is no standing.

15 The argument that guidelines would be rules,
16 and that is an issue in this case, is speculative
17 because we don't know what the Commission will rule --
18 whether or not the Commission will want to initiate
19 rulemaking or not on this particular, on the guidelines.

20 I think that possibly if there was a
21 proceeding to set rules, then I think that would be
22 open -- parties would be -- more parties would be open
23 to intervene since that is widespread applicability.

24 So really as to your question, which has taken
25 me a long time to respond to, I think that since this

1 was made a separate deferred proceeding, it was
2 understood by everybody that it would only apply to the
3 parties that had the interest. And the fact that it's
4 not a different docket number, I think it's a
5 distinction without a difference.

6 **MR. BREW:** Could I quickly be heard on that?

7 **COMMISSIONER BROWN:** I was going to follow up
8 with a question, but if you need to, go ahead.

9 **MR. BREW:** With all due respect, that is
10 exactly backwards. Because we have, we have established
11 standing in the docket, the question is whether or not
12 you can exclude us. We don't need to reestablish --

13 **COMMISSIONER BROWN:** Okay. Thank you.

14 **MR. BREW:** We don't need to reestablish that
15 on each issue.

16 **COMMISSIONER BROWN:** You've already stated
17 that. Thank you, Mr. Brew.

18 Okay. And, you know, I understand PCS's
19 argument of the precedential nature. I greatly
20 understand this Commission's decision on this matter, on
21 this issue. Quite frankly though, quite frankly, I
22 think that applies to all of our decisions. Every
23 single issue we ultimately decide does have broad,
24 possibly broad policy implications, so I completely
25 agree on that.

1 I have appreciated reading your written
2 response. Looking at the *Agrico* test though,
3 unfortunately your written response didn't go far enough
4 to address it and really just focused on the continuity
5 of the 01 docket, similar to what Mr. Butler was
6 alluding to grandfathering in. But I don't think I
7 needed to be even more abundantly clear in the OEP, the
8 August 22nd OEP, that this is an FPL-specific issue, but
9 that was the intent when we set out a separate OEP, a
10 separate hearing, a separate prehearing, et cetera.

11 I'm going to take a few -- a day or two to
12 file a written order, but I'm leaning towards agreeing
13 with staff's recommendation on this issue. But I'll
14 take a few, a few days to review it a little bit more.

15 Can we move along though? We have a lot of
16 other matters.

17 **MS. BARRERA:** Yes, ma'am. The next
18 preliminary matter would be there were two more motions
19 that were filed, and these were from FIPUG. It's a
20 motion to strike FP&L's request that the Commission
21 adopt guidelines and a motion to strike the accompanying
22 testimony related to the proposed guidelines, it's one
23 motion. And the second motion is a motion to strike
24 certain portions of Witness Deason's testimony. I --
25 staff would recommend that the parties be afforded a

1 chance to respond to the two motions.

2 **COMMISSIONER BROWN:** To both motions?

3 **MS. BARRERA:** Yes.

4 **COMMISSIONER BROWN:** Okay. I know the last
5 motion FIPUG submitted we received right before this
6 prehearing conference, so I don't think anybody has had
7 an opportunity to review that. So if you'd like to
8 speak on that, we're going to just go first to the first
9 FIPUG motion though.

10 Yes. Okay. Yes. Mr. Moyle, we're going to
11 go to you first on, to be heard. We're going to keep
12 this brief, okay -- to strike. And I've had an
13 opportunity to review it, that one. I have not had an
14 opportunity to review the other one.

15 **MR. MOYLE:** Okay. Well --

16 **COMMISSIONER BROWN:** Stick to one though.

17 **MR. MOYLE:** Given the nature of the prehearing
18 and your decision to reflect and consider it, a lot of
19 things are happening quickly here, so it may be
20 appropriate to likewise, you know, review not only the
21 motions that have been filed, but I think FPL has seven
22 days to file a response. And we have no objection to
23 them filing a response.

24 **COMMISSIONER BROWN:** And I'm going to allow
25 that. I am going to allow that. But I'd like to

1 hear --

2 **MR. MOYLE:** Okay. Sure. Okay. So the first,
3 the first motion, and I'll keep them separate, the first
4 motion is FIPUG's request that the guidelines that FPL
5 is asking this Commission to approve related to future
6 oil and gas exploration projects, that that not be part
7 of this proceeding.

8 And, you know, they use the term "guidelines,"
9 but I don't think that there's a lot of debate, at least
10 from FIPUG's point of view, that, you know, the
11 guidelines will be tantamount to rules, and that they're
12 asking this Commission to give them an indication as to
13 how this policy will be applied in future settings,
14 they're asking, I think, to bind the Commission and
15 future Commissions related to these guidelines. And we
16 think in part, because you just heard Mr. Brew, I think
17 part of the reason that he is trying to intervene is
18 that this issue has great potential to go beyond just
19 the facts of this case.

20 You know, you had indicated, well, this is
21 just related, you know, to this, this Woodford project,
22 and that would be one set of facts, but really it's
23 beyond that. Because when they say, oh, and we want
24 approval of these guidelines that we've attached, you
25 know, we believe that that starts becoming, you know,

1 rulemaking and tantamount to rulemaking. And while, you
2 know, some may say, well, this is, you know, incipient
3 policy under *McDonald*, the Florida Supreme Court has
4 looked at this type of issue and said we think the
5 better practice is to engage in rulemaking.

6 And I would just point to the argument that
7 you just heard and say that underscores the argument
8 that the better practice is to engage in rulemaking.
9 Because Mr. Brew happened to get, you know, notice that
10 this oil and gas, you know, petition and the guidelines
11 were something in play by virtue of the fact that he was
12 a party to the 01 docket. But what about all the other
13 people out there that may have an interest and an issue
14 recognized as novel and potentially expansive to allow
15 utilities to invest in oil and gas ventures out of the
16 state?

17 It seems that the rulemaking process where you
18 have notice and you have opportunity for hearing, that
19 that is the better course of action to consider, you
20 know, guidelines that will, candidly, have, you know,
21 have the effect of rules. And in our brief, in our
22 motion I think we've detailed why we believe it will
23 have the effect of the rules. But that is the basis for
24 the motion filed by FIPUG. So in addition to the
25 comments I made, we would refer you to the motion itself

1 and the written product that we've set forth therein.

2 Thank you for the opportunity to talk on the motion.

3 **COMMISSIONER BROWN:** Thank you. And I will
4 afford FPL an opportunity to speak on it, although my
5 intent is to give you till next Wednesday to file a
6 written response, along with all the parties here. And
7 I hope that is sufficient, given the holiday, upcoming
8 holiday. But if you would like to speak on the matter,
9 you may.

10 **MR. GUYTON:** Yes, Commissioner, very briefly.
11 We'll take advantage of that, and certainly we can
12 respond within the period of time.

13 I think there are, from last night's review, I
14 can tell you that there are at least five bases to deny
15 this motion. I'm going to lay out all five of them and
16 discuss three very briefly.

17 First, FIPUG's motion is facially deficient.
18 It doesn't meet any of the minimum requirements of Rule
19 28-106.204 of the uniform rules addressing motions
20 before administrative agencies.

21 Second, FIPUG's motion is untimely in that it
22 seeks to strike a pleading, and the uniform rules intend
23 that motions of that nature be raised within 20 days of
24 filing either through an answer or in a motion to
25 dismiss. The fact of the matter is they're alleging

1 that there's a rush to judgment here. They've had the
2 benefit of five months to be able to address this
3 argument.

4 The third deficiency is that they have
5 fundamentally misrepresented the relief that is sought
6 by FPL in this proceeding. FPL does not and has not and
7 will not seek an industry-wide standard in this case.
8 It seeks a company-specific approval of guidelines that
9 are only applicable to FPL.

10 Fourth, the very limited case law that's cited
11 by FIPUG simply is inappropriate, it is completely off
12 point, and is not applicable.

13 And finally, the Administrative Procedure Act
14 specifically exempts the Florida Public Service
15 Commission from following rulemaking under the APA when
16 agency statements that relate to cost recovery clauses
17 relating to public utilities are involved.

18 Commissioner, we think that last point is --

19 **COMMISSIONER BROWN:** What rule is that?

20 **MR. GUYTON:** Section 120.80, *Florida*
21 *Administrative Code*, which is part of the APA -- I'm
22 sorry -- *Florida Statutes*. Thank you.

23 Section (13) (a) of that states as follows:
24 "Florida Public Service Commission, agency statements
25 that relate to cost recovery clauses, factors, or

1 mechanisms implemented pursuant to Chapter 366 relating
2 to public utilities are exempt from the provisions of
3 Section 120.54(1)(a)." Now, of course, that's exactly
4 the statute that's cited by FIPUG in their motion that
5 says you don't have any discretion in a rulemaking.

6 Had FIPUG read a little bit farther in the
7 code, they would have found that and they wouldn't have
8 taken the position that you're required and have no
9 discretion to engage in rulemaking because they would
10 recognize that it's exempt in a fuel adjustment clause,
11 the Commission is exempt.

12 Let's look at the two cases that are filed by
13 FIPUG in their motion as well. The first is the *City of*
14 *Tallahassee* case. And they cite the law correctly.
15 They say that if the impact to a particular policy would
16 be industry-wide, then you probably ought to proceed to
17 rulemaking. That's not the case in this case. There is
18 no industry-wide policy sought by FPL in its pleading.
19 FPL has proposed company-specific guidelines that would
20 only be applicable to FPL.

21 And the second case is even more egregiously
22 off point. That's the *Neu vs. Miami Harold Publishing*
23 case. And they cite it for the proposition that the
24 Commission or -- that the Commission, as an agency of
25 the Legislature, cannot bind future Commissions. Well,

1 that's not even close to an accurate representation of a
2 holding in the case.

3 First, the *Neu* case didn't involve an
4 administrative agency. It involved the Legislature.
5 And, second, the holding was very narrow and specific.
6 Here's -- let me read the holding. It says, "A
7 legislature may not bind the hands of a future
8 legislature by prohibiting amendments to statutory law."
9 That's the issue that was before that court. There was
10 no attempt -- or there's no attempt here by FPL to ask
11 the Commission to prohibit amendments to statutory law.
12 We're not even asking you to prohibit amendments to the
13 guidelines. You're certainly free to review them and
14 revisit them at any time should they be approved.

15 Finally, I'll close with what's been
16 misrepresented as to what FPL is actually requesting
17 here. FIPUG suggests that we're seeking permission to
18 venture into an oil and gas business in Oklahoma.
19 That's not what the petition requests. The petition
20 requests that the Commission determine whether entering
21 into a joint venture to supply gas for the use of its
22 customers, A, is prudent and, B, is recoverable through
23 the fuel clause.

24 And in paragraph eight, they say this would be
25 tantamount to a rule, that effectively you would be

1 approving guidelines for anyone else. That's not the
2 case. If Duke or Gulf or any other investor-owned
3 utility wants to proceed with this type of transaction,
4 it will have to do exactly what FPL did, file a
5 petition, file its own guidelines, file its standards,
6 request relief, and entertain its burden of proof as to
7 why it should be granted. Those procedural guidelines
8 are far more and give far more protection to FIPUG and
9 customers than holding a rulemaking.

10 So for all those reasons, we respectfully
11 submit that FIPUG's motion to strike should be denied.
12 Thank you.

13 **COMMISSIONER BROWN:** Thank you.

14 OPC?

15 **MR. REHWINKEL:** Public Counsel has no position
16 at this time. And if we do take a position, we'll do it
17 in writing.

18 **COMMISSIONER BROWN:** Okay. Thank you.

19 Mr. Wright? I'm sorry. Mr. Wright.

20 **MR. WRIGHT:** Thank you, Commissioner. We have
21 no position at this time.

22 **COMMISSIONER BROWN:** Okay.

23 **MR. MOYLE:** If I could just have a brief
24 opportunity to comment on those points.

25 **COMMISSIONER BROWN:** I was going to go to

1 Mr. Brew, since he's still participating in the
2 prehearing conference.

3 **MR. MOYLE:** Okay.

4 **MR. BREW:** No position at this time.

5 **COMMISSIONER BROWN:** Okay.

6 **MR. MOYLE:** And I'll try to be brief. I mean,
7 Mr. Guyton has had a chance to look at some things, and
8 I think we may be having a little bit of a failure to
9 communicate on some points. I don't disagree that FP&L
10 is seeking what the documents say it's seeking. But the
11 point that FIPUG is trying to make is that to the extent
12 that you were to grant that and just say, okay, yes, we
13 think this is good and we approve these guidelines, I
14 don't think that that, that you can then, for the next
15 utility that comes in and is similarly situated and
16 basically takes their pleading and copies it and takes
17 their guidelines and copies it and says please grant
18 this, you know, I don't think you can say no kind of on
19 an arbitrary basis.

20 So the point is that through kind of an
21 incipient policy type process this has the very real
22 effect of establishing policy of the Commission, and
23 that the better way to do that is through rulemaking,
24 not through, you know, ruling in this case with these
25 guidelines. The guidelines don't have to be part of it.

1 They can be spun out. He said there were five problems,
2 you know, with it, didn't articulate what they are.
3 But, you know, if we were at a live hearing, we would be
4 making a motion and making argument, so we'll look
5 forward to seeing that.

6 The point about saying, oh, 28-106.1 says you
7 have to move within X number of days to strike a, you
8 know, a pleading, the guidelines are attached to the
9 petition, and FIPUG was prompted by your Prehearing
10 Order, which says if you want to file to strike
11 somebody's testimony, you have to do it before the
12 prehearing conference. So we filed it to comply with
13 that provision of your Prehearing Order that says
14 motions to strike testimony have to be in at this time,
15 and that's the basis for our action to file it with
16 respect to timing.

17 The point that he references 120.80 on the
18 exemption -- FPL can't have it both ways. They just
19 argued, in opposing Mr. Brew's petition, that, hey, this
20 is really a separate proceeding. You know, this is
21 really an FPL separate proceeding, it's just sort of
22 administratively housed under the fuel clause, really
23 not appropriate as a fuel clause proceeding. Okay.
24 That was -- the transcript will show what they said
25 verbatim. But then when they're arguing against my

1 motion, they come back and they go, well, because this
2 is in the fuel clause, you know, which is just, you
3 know, kind of there, it's exempt. And they shouldn't
4 able to take a petition that, you know, properly should
5 be filed separately and doesn't have a whole lot to do
6 with the fuel clause and insulate it, insulate it from a
7 rulemaking attack by just filing it in, you know, in the
8 fuel clause and say, well, now it's, because we filed it
9 in the fuel clause, we're good to go. It's not subject,
10 you know, to rulemaking. That's putting form way over
11 substance. And based on, you know, the own admissions
12 and the comments of your staff and others, you know,
13 this really is tantamount to a separate proceeding, as,
14 you know, you kind of pointed out with Mr. Brew. So I
15 don't think that 120.80 exception will take them very
16 far.

17 In terms of the company-specific relief, I
18 think I, I think I covered that. I'm not -- you know,
19 we don't -- I'm not saying they're in asking for this
20 relief for Duke and Gulf and TECO. What I'm saying is
21 that if they are granted this relief and these
22 guidelines are approved, you know, I think that will
23 then be something, a template that others will use, and
24 I think you would have a hard time saying no.

25 The point about binding Commissions, I think,

1 you know, we cited that case, but it's pretty much
2 hornbook law that, you know, one legislature can't bind
3 another legislature, one county commission can't bind
4 another county commission, and that's good policy. You
5 know, if you are on this Commission, you don't want to
6 be considering things and saying, well, you really would
7 like to take a left given these facts, but because of a
8 Commission 20 years ago, you know, they did something
9 and you're not able to do that. So I think that
10 tentative law was applicable there and that's the point
11 we're trying to make. If you all approve these
12 guidelines with FP&L, you know, they're likely to be
13 used and it'll be very -- it'll tie the hands of future
14 Commissions. So thanks for giving me a chance to
15 respond.

16 **COMMISSIONER BROWN:** Thank you. Okay. I'm --
17 staff, I'm -- I don't need to hear from you at this
18 juncture on this motion. I'm going to give the parties
19 until Wednesday, close of business on Wednesday to
20 respond, and a subsequent order will be forthcoming.

21 With regard to FIPUG's motion to strike
22 certain portions of FPL witness Deason's testimony,
23 again, that motion was just filed. We'll have to give
24 the parties ample time, and concurrently also Wednesday,
25 November 12th, close of business, to respond to that. I

1 don't think you'll have an opportunity here to even --
2 I'm sure you haven't had a chance to read it.

3 **MR. BUTLER:** Only just very briefly. We
4 really wouldn't be in a position to respond to it
5 substantively now.

6 **COMMISSIONER BROWN:** Okay. Fair enough. So
7 everyone is clear? Wednesday, close of business, to
8 respond to both of those, and a written order will be
9 forthcoming. Okay?

10 Let's move through the draft Prehearing Order
11 at this time. And, Mr. Brew, I have not ruled on the
12 motion, so, again, you're free to participate in this
13 Prehearing Order at this time.

14 So let's move to Section I, the case
15 background. If there are any suggestions or changes or
16 comments, please chime in. I will look to you. If I
17 see none, I will move through it.

18 So going to Section I, case background. Any
19 changes? Okay. Seeing none.

20 Section II, conduct of proceedings. Seeing
21 none, changes.

22 Section III, jurisdiction. Seeing no changes.

23 Section IV, procedure for handling
24 confidential information. Ms. Barrera.

25 **MS. BARRERA:** Staff notes that the OEP

1 provides that when confidential information is used in
2 the hearing, the parties must have copies for the
3 Commissioners, necessary staff, and the court reporter
4 in red envelopes clearly marked with the nature of the
5 contents. And any party wishing to examine the
6 confidential material that is not subject to an order
7 granting confidentiality shall be provided a copy in the
8 same fashion as provided to Commissioners, subject to
9 execution of any appropriate protective agreement with
10 the owner of the material.

11 **COMMISSIONER BROWN:** Okay. Thank you. Any
12 comments, changes, questions?

13 Okay. Section V, prefiled testimony and
14 exhibits, witnesses. Ms. Barrera.

15 **MS. BARRERA:** Commissioner, staff suggests
16 that the witnesses be given three minutes to provide a
17 summary of their testimony.

18 **COMMISSIONER BROWN:** That's adequate. Okay.
19 Any comments?

20 **MR. BUTLER:** I would like to seek
21 reconsideration, I guess. We have --

22 **COMMISSIONER BROWN:** Five?

23 **MR. BUTLER:** Five would be great. If we could
24 do that, it would be much preferred.

25 **COMMISSIONER BROWN:** Okay. Five. Five it is.

1 **MR. MOYLE:** Just for the record, FIPUG would
2 join with FPL in seeking that relief.

3 **COMMISSIONER BROWN:** I know. I figured all of
4 you wanted five. That was my suggestion.

5 All right. Moving on to order of witnesses,
6 Section VI.

7 **MS. BARRERA:** Commissioner, staff understands
8 from Mr. Moyle that FIPUG would like its witness to be
9 heard on December 2nd, 2014, which is the second day of
10 the hearing.

11 **COMMISSIONER BROWN:** Mr. Moyle?

12 **MR. MOYLE:** Yes. I'd let all the parties know
13 that Mr. Pollock, who resides in St. Louis, is, has some
14 issues on the first day. The second day is better. I
15 think it's going to work out that way anyway because
16 FPL, it's their petition and they have four witnesses, I
17 think, that need to go or, you know, there's other
18 witnesses that have to go. Office of Public Counsel has
19 witnesses. I didn't hear back from anybody that that
20 presented a problem, but just wanted to raise that.

21 **COMMISSIONER BROWN:** Yeah. They have three
22 witnesses on direct. The only, you know, the Public
23 Service Commission typically tries to accommodate the
24 schedule of witnesses. The only issue that I can
25 foresee, I can't really guarantee anything because it's

1 quite possible the Chairman will, you know, work past
2 5:00 p.m., so I can't guarantee. You know, it's -- you
3 kind of run the risk of only having him available on
4 that one day. But, again, we try to accommodate, so we
5 will be certain to let the Chairman know.

6 **MR. MOYLE:** Thank you. I appreciate the
7 consideration.

8 **COMMISSIONER BROWN:** Any other?

9 **MR. BUTLER:** I would just observe for the
10 record that we certainly will work with Mr. Moyle to
11 accommodate anything we can with that. We would not
12 want Mr. Pollock to go after our rebuttal witnesses;
13 we'd like to keep the order. But anything short of
14 that, we would be happy to accommodate.

15 **COMMISSIONER BROWN:** Okay. Thank you. Any
16 other parties? Any comments?

17 Okay. Let us -- also I'm assuming there are
18 no witnesses that can be excused. Okay.

19 **MR. MOYLE:** Can I just -- I'm sorry. Can we
20 just make clear, I guess we're going to go in the order
21 presented here. So, indeed, Mr. Pollock will be the
22 last direct witness; right?

23 **COMMISSIONER BROWN:** That is correct.

24 **MR. MOYLE:** Okay.

25 **COMMISSIONER BROWN:** Well, that is correct.

1 Again, Mr. Moyle, I cannot guarantee though that --

2 **MR. MOYLE:** No. I understand.

3 **COMMISSIONER BROWN:** Okay.

4 **MR. MOYLE:** But I wanted to make sure I wasn't
5 going in front of OPC.

6 **COMMISSIONER BROWN:** That is the presumption
7 here. Okay.

8 Section VII, basic positions. Any comments,
9 changes? Seeing none.

10 Section VIII, issues and positions. Staff.

11 **MS. BARRERA:** Commissioner, staff will note
12 that the Order Establishing Procedure requires that a
13 party take a position at the prehearing conference
14 unless good cause is shown as to why that party can't
15 take a position.

16 I believe all parties have stated a position
17 on the issues that were submitted, except for there is a
18 last submitted issue submitted by FIPUG.

19 **COMMISSIONER BROWN:** Do you want to talk about
20 that last-minute issue just submitted by FIPUG at this
21 time, or do you want to move it to -- let's move it --
22 let's go through and deal with it under other matters?

23 **MS. BARRERA:** Other matters.

24 **COMMISSIONER BROWN:** Okay.

25 **MS. BARRERA:** You know, I don't know.

1 **COMMISSIONER BROWN:** Okay. Let's do that and
2 just go through the issues as presented in the draft and
3 see if there are any -- if the parties have any changes
4 or corrections to the existing issues that are in the
5 draft. Any changes, corrections to the existing issues?
6 And the proposed issue that was just submitted, the
7 additional issue will be taken up at the, towards the
8 end of this prehearing conference.

9 Okay. Section IX, exhibit list. Staff?

10 **MS. BARRERA:** Oh, sorry. Staff will note that
11 it has prepared a Comprehensive Exhibit List, which
12 includes all prefiled exhibits and also includes those
13 exhibits that staff wishes to include on the record.
14 Staff is going to check with the parties prior to the
15 hearing to determine if there is any objection to the
16 Comprehensive Exhibit List or any of staff's exhibits
17 being entered into the record.

18 **COMMISSIONER BROWN:** Okay. Any comments,
19 changes, anyone?

20 **MR. MOYLE:** I just have a question.

21 **COMMISSIONER BROWN:** Mr. Moyle.

22 **MR. MOYLE:** Is that something that's available
23 as we speak, the list and the exhibits?

24 **MS. BARRERA:** The staff exhibits list?

25 **MR. MOYLE:** Yes, ma'am.

1 **MS. BARRERA:** I believe we sent a copy. Okay.
2 It has not been sent to the parties. We will send it
3 this afternoon, because it is finalized as far as we
4 know.

5 **MR. MOYLE:** Okay. Thank you.

6 **COMMISSIONER BROWN:** Mr. Rehwinkel.

7 **MR. REHWINKEL:** Yes, Commissioner. I think
8 there's a high likelihood that Mr. Forrest and
9 Mr. Taylor's confidential exhibits attached to their
10 testimony will be the subject of some cross-examination
11 at the hearing. If it's your pleasure, we would, at the
12 appropriate time prior to hearing, identify to staff
13 what, if any, we would want to so that we can, we can
14 make sure that the Commissioners have the right
15 materials before them for that. Is that your, is that
16 your desire that we do that?

17 **COMMISSIONER BROWN:** That is definitely the, I
18 think the proper route. What do you think, Ms. Barrera?

19 **MS. BARRERA:** You can identify the documents,
20 which is fine, although the OEP provides for the party
21 to provide the documents to staff in the red envelopes
22 and to all the parties in the red envelopes. You know,
23 it would be nice to know what documents we're talking
24 about.

25 **MR. REHWINKEL:** I'm talking about the

1 testimony exhibits, not discovery exhibits, that we
2 might make up.

3 **MS. BARRERA:** Oh, okay.

4 **MR. REHWINKEL:** That's all.

5 **MR. YOUNG:** You're talking about testimony;
6 right?

7 **MR. REHWINKEL:** Yes.

8 **MR. YOUNG:** Okay.

9 **MR. REHWINKEL:** We will make sure that we -- I
10 don't know, in the past it's been three to five days
11 ahead of the hearing. Whatever you need to know
12 logistically so that we can let you know.

13 **COMMISSIONER BROWN:** Okay. I will defer to
14 staff on this issue, and staff will be in communication
15 with you on it.

16 **MR. REHWINKEL:** Okay. Thank you.

17 **MS. BARRERA:** I don't have a problem.

18 **COMMISSIONER BROWN:** Okay. Thank you.
19 Anybody else? I thought Mr. Butler had his light on.

20 **MR. BUTLER:** He did to make the sort of picky
21 observation that the Roman numeral IX looks like a X
22 here. I think it needs an I in front of the X.

23 **COMMISSIONER BROWN:** There are several
24 grammatical, typographical errors that I've also
25 identified.

1 **MR. BUTLER:** Okay.

2 **COMMISSIONER BROWN:** And we will, we will be
3 sure to have our attorneys make those changes. Thank
4 you.

5 **MR. BUTLER:** Thank you.

6 **COMMISSIONER BROWN:** Okay. Section
7 X, proposed stipulations. Okay. Staff?

8 **MS. BARRERA:** Staff will note, staff will note
9 that there are no stipulations at this time. We don't
10 expect any, but it would be nice, but we don't expect
11 any.

12 **COMMISSIONER BROWN:** Not likely.

13 Section XI, pending motions.

14 **MS. BARRERA:** Staff will note there are two
15 pending motions, and they will be heard at the
16 November 25th Agenda Conference. And they are the OPC
17 motion to dismiss and the OPC request for oral argument.

18 **COMMISSIONER BROWN:** Uh-huh. Thank you.
19 Section -- yes.

20 **MR. REHWINKEL:** Commissioner, just next week
21 we're going to be, we have a holiday and we're going to
22 be taking two days of depositions at FPL's offices.
23 You've given the parties until Wednesday on the
24 response. I would like to state for the record that
25 with respect to FIPUG's second motion on striking

1 Commissioner Deason's testimony --

2 **COMMISSIONER BROWN:** Is that the second?

3 **MR. REHWINKEL:** The one that you didn't hear
4 argument.

5 **COMMISSIONER BROWN:** Yes. Okay.

6 **MR. REHWINKEL:** We have read that, it may
7 surprise you, but I would like to -- in case we don't
8 get around to filing a written response to that, that
9 for the record the Public Counsel opposes that motion.

10 **COMMISSIONER BROWN:** Okay. Thank you. You
11 threw me off. You threw me off.

12 (Laughter.)

13 **MS. BARRERA:** We were at the pending
14 confidentiality motions.

15 **COMMISSIONER BROWN:** Okay. Thank you.

16 Section XII. Thank you.

17 **MS. BARRERA:** Staff does not believe that
18 there are pending confidentiality motions. There are a
19 couple of notices of intent to file confidentiality
20 requests. They were filed yesterday and on 11/4. So at
21 this time we don't have staff recommendations and such.

22 **COMMISSIONER BROWN:** Okay. And we'll get to
23 those.

24 Section XIII, post-hearing procedures.

25 **MS. BARRERA:** Staff recommends that

1 post-hearing briefs be no longer than 40 pages, and I
2 believe we requested daily transcripts be provided to
3 all the parties.

4 **COMMISSIONER BROWN:** Okay. Are the parties
5 okay with 40 pages? That was --

6 **MR. BUTLER:** I think that would be sufficient.
7 Is there something in the Prehearing Order or
8 elsewhere -- I'm just forgetting, I'm sorry -- about
9 number of words for the --

10 **COMMISSIONER BROWN:** No. No.

11 **MR. BUTLER:** Okay.

12 **COMMISSIONER BROWN:** 40 pages. Do as you see
13 fit with that.

14 **MR. BUTLER:** I'm talking about for the
15 statement of the issue. But nothing on that? Okay.
16 Thank you.

17 **COMMISSIONER BROWN:** No. Just a blanket 40
18 pages limitation. Okay?

19 **MS. BARRERA:** Staff also notes that, pursuant
20 to the OEP for the deferred issues, the briefs will be
21 due December 12, 2014.

22 **COMMISSIONER BROWN:** Uh-huh. Okay. Rulings,
23 Section XIV.

24 **MS. BARRERA:** Does the Commissioner want to
25 address the new issue, or do we want to go into --

1 **COMMISSIONER BROWN:** I was going to address
2 that under other matters.

3 **MS. BARRERA:** Oh, okay. Sorry.

4 All right. We suggest that the Prehearing
5 Officer make a ruling that opening statements, if any,
6 should not exceed ten minutes per side, unless any party
7 chooses to waive its opening argument.

8 **COMMISSIONER BROWN:** Okay. And we've talked
9 about this. Ten minutes it is per side. So FPL will
10 ten minutes, you all will have ten minutes. You may
11 divvy it up as you see fit.

12 Let's go to that new issue.

13 **MR. MOYLE:** So that's -- we have two and a
14 half minutes per; is that, is that right?

15 **COMMISSIONER BROWN:** Ten minutes per side. I
16 know you like to -- you all may share that amount of
17 time adequately.

18 **MR. REHWINKEL:** Can we be heard on that? The
19 Public Counsel has two witnesses that we have actively
20 engaged in this and spent a lot of time. We think it's
21 a significant issue. And I think we would --

22 **COMMISSIONER BROWN:** I agree, it is a
23 significant issue.

24 **MR. REHWINKEL:** We would like our opening to,
25 to be longer than, you know, as Mr. Moyle says, two,

1 three, four minutes.

2 **COMMISSIONER BROWN:** What is adequate?

3 **MR. REHWINKEL:** Well, we would prefer seven to
4 ten minutes for Public Counsel.

5 **COMMISSIONER BROWN:** So you're saying 40
6 minutes, is that what you're saying?

7 **MR. REHWINKEL:** Well, for ourselves, we would
8 at least want seven minutes.

9 **COMMISSIONER BROWN:** Yes, Mr. Wright.

10 **MR. WRIGHT:** I will help everyone out --

11 **COMMISSIONER BROWN:** Thank you.

12 **MR. WRIGHT:** -- by saying that we will not
13 make an opening statement, and that would limit it to,
14 at most, 30 minutes for the consumer side.

15 **COMMISSIONER BROWN:** Okay. At most. Thank
16 you, Mr. Wright.

17 Mr. Moyle?

18 **MR. MOYLE:** FIPUG, two and a half minutes is,
19 I think, a little short. I mean, FIPUG would like to
20 have a little more latitude, given the significance of
21 this issue. It's an important issue.

22 **COMMISSIONER BROWN:** Okay. Mr. Rehwinkel
23 suggested seven minutes. So is seven minutes adequate?

24 **MR. MOYLE:** Per entity? Yes. If you said,
25 you know, other parties get seven, that would work fine.

1 I don't think we'd need it, but it would be much
2 improved over two and a half.

3 **COMMISSIONER BROWN:** And Mr. Brew?

4 **MR. BREW:** Well, for me five minutes would be
5 fine.

6 **COMMISSIONER BROWN:** Okay. So then we have --
7 Mr. Wright has offered to waive his opening. So let's
8 just do 20 minutes per -- ten minutes FPL, 20 minutes
9 total --

10 **MR. REHWINKEL:** We can divide up. Thank you,
11 Commissioner. We appreciate that.

12 **MR. MOYLE:** Thank you.

13 **COMMISSIONER BROWN:** All right. Let's go to
14 the other matter.

15 **MS. BARRERA:** Commissioner, the additional
16 matter is the request by FIPUG to add a new issue. The
17 new issue states, "Does FPL have a fiduciary duty to its
18 ratepayers when pursuing the Woodford project and other
19 similar oil and gas exploration and production
20 projects?"

21 **COMMISSIONER BROWN:** Okay. And, Mr. Moyle,
22 have you provided this written additional issue to all
23 the parties prior to this prehearing?

24 **MR. MOYLE:** I have.

25 **COMMISSIONER BROWN:** Okay. So everyone has

1 seen it; is that correct?

2 **MR. BUTLER:** I've seen it on my iPhone.

3 **COMMISSIONER BROWN:** Any other parties, have
4 you seen -- can you acknowledge if you've seen it?

5 **MR. TRUITT:** We've seen it, yes, Commissioner.

6 **MR. WRIGHT:** We saw it.

7 **COMMISSIONER BROWN:** Okay. Staff, can you
8 address the other -- their position?

9 **MS. BARRERA:** Well, I mean, the parties --
10 we're requesting that if the issue is accepted, the
11 parties be given till the close of business tomorrow to
12 file their positions.

13 As regards to whether the issue should be
14 accepted, staff has a position, but we don't know what
15 the position of the parties are.

16 **COMMISSIONER BROWN:** I'm going to listen to
17 the parties first. I just wanted you to finish the
18 issue.

19 **MS. BARRERA:** Yeah. Okay.

20 **COMMISSIONER BROWN:** Mr. Moyle, it's your
21 issue.

22 **MR. MOYLE:** Thank you. And my apologies for
23 getting it to everyone this morning.

24 The order on procedure, I believe, says that
25 you can bring issues up through the prehearing. So, you

1 know, this was something that we have been contemplating
2 but decided to move forward with it this morning, so I
3 emailed it to everybody. And thank you for the chance
4 to briefly talk about it here today.

5 So we think this issue is important, given
6 this case, and we think clearly it's relevant. FPL
7 suggests that this project in Oklahoma, the oil and gas
8 project in Oklahoma, will benefit ratepayers and is for
9 ratepayers and is a good thing for ratepayers and
10 they're doing it for ratepayers, and FIPUG intends to
11 explore that at the hearing.

12 The Office of Public Counsel and FIPUG and
13 others have suggested that there's an appreciable
14 benefit to shareholders and a less appreciable benefit
15 to ratepayers in this case. The issue of whether a
16 fiduciary duty exists or does not is appropriately
17 considered, because if the answer is -- if FPL takes the
18 position and says, yes, we agree, we owe a fiduciary
19 duty to the ratepayers, you know, candidly, that will
20 provide a clearer indication and a clearer signal that,
21 yes, this is something that, as said in their testimony,
22 is for the benefit of ratepayers. If they say no, then
23 that will be telling as well.

24 So we think it's a probative issue. We think
25 it is a relevant issue to the case. You know, this is

1 kind of, I think, a mixed issue of fact and law that
2 would be decided by the Commission based on the, you
3 know, the facts that are adduced at the hearing. Given
4 the order on procedure, you know, it's timely filed.
5 And in accordance with 120, I think that we have the
6 right to put this issue forward, and we'd appreciate you
7 including it in the hearing.

8 **COMMISSIONER BROWN:** Okay. I'm going to start
9 with my left with FPL.

10 **MR. BUTLER:** Thank you, Commissioner. FPL, in
11 all honesty, has not had a lot of time to think about
12 its position on this issue. But our reaction to it is,
13 first of all, it's not clear at all in the way the issue
14 is stated what FIPUG even means by a fiduciary duty.
15 And that's typically a legal term of art that is often
16 applied in settings very different, you know, very
17 different than this one, and so it's not really clear
18 what FIPUG means.

19 If they are referring to it in one of the kind
20 of traditional legal terms of art sense, I think we
21 really are talking about a legal issue here, not a
22 factual issue to be resolved. If they have something
23 else in mind besides just a conventional, you know,
24 hornbook definition of a fiduciary duty, then I think it
25 is incumbent upon them to explain what they mean so that

1 it's more possible to take positions on it that could
2 be, you know, meaningfully compared to each other than
3 what we're likely to get with the issue stated as it is.

4 I mean, I will say that certainly FPL has
5 duties, as any other utility does, to its customers.
6 They're stated in the statutes and I think they're
7 something that we talk about all the time. I don't
8 think they are called, either in the statute or
9 conventionally, fiduciary duties. So that's kind of
10 what leads to the puzzlement as to exactly what this
11 issue is getting at.

12 **COMMISSIONER BROWN:** Okay. I will get back to
13 you, Mr. Moyle, on that response.

14 Public Counsel.

15 **MR. TRUITT:** OPC, originally we had reached an
16 agreement with FPL on the necessary issues in this
17 docket. We stand by that agreement. We do not take a
18 position on the addition of this issue.

19 **COMMISSIONER BROWN:** Okay. Thank you.

20 Mr. Brew.

21 **MR. BREW:** No position at this time.

22 **COMMISSIONER BROWN:** Okay. Mr. Wright.

23 **MR. WRIGHT:** Thank you. Tentatively I agree
24 with Mr. Butler that I do think it's a legal issue, and
25 it might be good to put some more meat on the bones as

1 to what a fiduciary duty is. But tentatively, again,
2 I'm inclined to think that the issue should be in in
3 whatever form it winds up over the next couple of days.

4 **COMMISSIONER BROWN:** Mr. Moyle, I'm going to
5 let staff have an opportunity to respond, and then you
6 can respond to all of it.

7 **MR. MOYLE:** Thank you.

8 **COMMISSIONER BROWN:** Ms. Barrera.

9 **MS. BARRERA:** Basically staff, mainly me,
10 believes that -- we kind of agree that the fiduciary
11 duty is, it's a vague term because it does have a
12 particular meaning in essence, it may actually -- what
13 the duty, if we're talking about setting reasonable
14 rates and doing, you know, making a prudence decision.
15 I think the issue as to whether or not it would benefit
16 the shareholders as opposed to the ratepayers is also
17 subsumed in the rest of the issues because that would
18 take part of the decision as to whether or not it's
19 prudent. You know, I have no other comments I can make.

20 **COMMISSIONER BROWN:** Thank you.

21 Mr. Moyle, could you go into some more detail
22 about your proposed issue?

23 **MR. MOYLE:** Sure. And let me start --
24 Mr. Butler gave me a compound question in his remarks
25 which I'll answer. He said A or B. A, you know, not

1 really sure what this is and an explanation would help,
2 or, B, is it the legal, you know, definition of
3 fiduciary duty? And the answer to that question is B,
4 you know, the definition of fiduciary duty as it is set
5 forth in Florida jurisprudence.

6 You know, I said in my opening remarks that,
7 in my opinion that this is a mixed question of fact and
8 law. Because certain fiduciary duties like an
9 attorney/client relationship, you know, it's pretty
10 clear from the outset a relationship between a banker
11 and a client. I mean, I think there's a lot of examples
12 that are not subject to some further reflection,
13 consideration, evidence, and facts that are out there.

14 But with respect to this case and these facts
15 in FP&L's testimony, which, you know, it speaks for
16 itself, but FIPUG would characterize it as we are doing
17 this project for the benefit of customers and
18 ratepayers. It is going to be good for you.

19 **COMMISSIONER BROWN:** So if I may interrupt
20 you.

21 **MR. MOYLE:** Yes.

22 **COMMISSIONER BROWN:** So a fiduciary duty, this
23 is above and apart from a prudency determination.

24 **MR. MOYLE:** Well, I think one's an apple and
25 one's an orange. I think that, I think that to -- I

1 don't see them as being subsumed, you know,
2 respectfully. I think, I think this is a separate
3 issue, it's a distinct issue. Because, again, you know,
4 if the answer is yes and there's a fiduciary duty, you
5 know, then if there's a situation where you're looking
6 at -- let's say the guidelines get approved and FPL is
7 looking at a future project, and they look at it and
8 it's like, well, this is really skinny for the
9 ratepayers. I mean, I'm not sure. You know, it'll make
10 them maybe a little bit of money, but it's not, not
11 really that good of a deal for the ratepayers; however,
12 this is probably good for our shareholders because of a
13 750 capital investment, the opportunity to earn
14 10 percent on 750, you know, 75 million a year.
15 Mr. Butler will argue with my math, I think it's a
16 little off, but essentially how I understand capital
17 investments to earn money. You know, if they don't have
18 a fiduciary duty and they look at those set of facts,
19 you know, maybe they go with the let's invest the 75
20 million.

21 **COMMISSIONER BROWN:** I understand. And I --

22 **MR. MOYLE:** Right. And if they do have the
23 fiduciary duty, then I think they look at it and they
24 go, you know, this is too skinny for the ratepayers.
25 We're not going to do it.

1 **COMMISSIONER BROWN:** Okay. Thank you. I
2 appreciate the follow-up there.

3 I understand the intent. Mr. Butler, do you
4 have a response since you posed a question?

5 **MR. BUTLER:** I'm not finding that I'm any
6 closer to understanding what we're going to be answering
7 as a result of Mr. Moyle's comments.

8 I mean, to start with, he mentioned a couple
9 of fiduciary duties that I think are quite distinct, the
10 ones that attorneys owe to their clients, the ones that
11 bankers owe to, you know, the people who have lent or
12 borrowed money from the bank. So we're really just
13 talking, I guess, about general principles.

14 He seems to be articulating some sort of
15 notion of does the -- you know, would FPL have a duty,
16 an obligation of some sort above and beyond special to
17 this, you know, special to this particular project that
18 it would be obliged to meet? But I guess we'll just
19 have to develop an answer as best we understand it. I
20 mean, I'm groping here to start with because I've only
21 seen it for a few hours as an issue.

22 **COMMISSIONER BROWN:** All right. Do you have
23 some guidance on this, how to proceed? I'm not, I'm not
24 prepared to move forward with the inclusion of this at
25 this juncture.

1 **MS. BARRERA:** The only thing I can suggest is
2 that if we provide an opportunity to the parties to
3 submit a position on the issue.

4 **COMMISSIONER BROWN:** Okay.

5 **MS. BARRERA:** And then decide whether or not
6 you feel that the issue should be included or excluded.

7 **COMMISSIONER BROWN:** Do we have a certain
8 timeline?

9 **MS. BARRERA:** I think by tomorrow, close of
10 business maybe, or a little earlier.

11 **COMMISSIONER BROWN:** Are the parties able to
12 meet that time frame of providing a response by close of
13 business -- did you say tomorrow? Tomorrow is Friday.

14 **MS. BARRERA:** Tomorrow is Friday.

15 **COMMISSIONER BROWN:** Is tomorrow Friday?
16 Friday.

17 **MS. BARRERA:** We usually give that to the
18 parties. It's usually just one day to provide
19 additional positions.

20 **COMMISSIONER BROWN:** Okay. Okay.

21 **MR. BUTLER:** May the position include that we
22 oppose inclusion of the issue?

23 **COMMISSIONER BROWN:** Yes.

24 **MR. BUTLER:** Because, honestly, we have a lot
25 of concerns about it.

1 **COMMISSIONER BROWN:** Yes. That's, that was,
2 that's what I'm asking right now.

3 **MR. BUTLER:** Okay. Certainly.

4 **COMMISSIONER BROWN:** Okay.

5 **MR. MOYLE:** So if the position simply is we
6 oppose it --

7 **COMMISSIONER BROWN:** With an explanation.

8 **MR. MOYLE:** If you're convinced that it's an
9 appropriate issue --

10 **COMMISSIONER BROWN:** Then it will be included.

11 **MR. MOYLE:** Right. But they won't have taken
12 a position.

13 **COMMISSIONER BROWN:** Mr. Young.

14 **MR. YOUNG:** Maybe perhaps include in that
15 position that you think the issue is not needed, you
16 take a position in the alternative.

17 **COMMISSIONER BROWN:** Okay.

18 **MR. BUTLER:** We can do that.

19 **COMMISSIONER BROWN:** Is that acceptable?

20 **MR. BUTLER:** Yes.

21 **COMMISSIONER BROWN:** By close of business
22 tomorrow?

23 **MR. BUTLER:** Yes. That's fine.

24 **COMMISSIONER BROWN:** OPC?

25 **MR. TRUITT:** Yes.

1 **COMMISSIONER BROWN:** PCS?

2 **MR. BREW:** (Nods affirmatively.)

3 **COMMISSIONER BROWN:** Thank you. Understand?

4 Okay. Ms. Barrera, are there any other
5 issues?

6 **MS. BARRERA:** No, there are no other -- oh,
7 I'm sorry. Thank you. There are no other pending
8 issues. We're not aware of any.

9 **COMMISSIONER BROWN:** Okay. Parties, any other
10 issues?

11 Thank you all for being so generous with your
12 time here, too. Thank you to our court reporter for
13 bearing with us. And you all have accommodated us and I
14 greatly appreciate it.

15 Thank you, staff. This prehearing conference
16 is adjourned.

17 (Prehearing Conference adjourned at 3:05 p.m.)

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

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

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

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

18 DATED THIS 7th day of November, 2014.

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