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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF PUBLIC COUNSEL,

Petitioner,

FILED 1/2/2020
DOCUMENT NO. 00020-2020
FPSC - COMMISSION CLERK

vs.

DOAH CAST NO. 19-6137RP

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent.

and

FLORIDA POWER & LIGHT COMPANY and GULF POWER
COMPANY,

Intervenors.

_____ /

PROCEEDINGS: Administrative Hearing
Volume 1, Pages 1 - 174
BEFORE: Honorable James H. Peterson, III
DATE: December 20, 2019
TIME: Commenced: 8:30 A.M.
LOCATION: DIVISION OF ADMINISTRATIVE HEARINGS
1230 Apalachee Parkway
The DeSoto Building,
Hearing Room 3
Tallahassee, Florida
REPORTED BY: DEBRA R. KRICK
Court Reporter and
Notary Public in and for the
State of Florida at Large
PREMIER REPORTING
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25

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16
17
18
19
20
21
22
23
24
25

INDEX TO WITNESSES

WITNESS	PAGE
TOM BALLINGER	
Direct Examination by Ms. Fall-Fry	64
Direct Examination by Mr. Moyle	74
Cross Examination by Ms. Harper	81
Cross Examination by Mr. Nordby	85
MARSHALL WILLIS	
Direct Examination by Ms. Fall-Fry	92
Cross Examination by Mr. Moyle	124
Cross Examination by Mr. King	138
Cross Examination by Mr. Gonzalez	141
Cross Examination by Mr. Bernier	155
Redirect Examination by Ms. Fall-Fry	161
Redirect Examination by Mr. Moyle	167

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXHIBITS

JOINT EXHIBITS:

NO.	DESCRIPTION	ADMITTED
1-50	Joint exhibits as identified in the prehearing stipulation	53
51	Deposition of Marshall Willis, taken 12/16/2019, with attachments	62
52	F.S. 366.96	107
53	Rule 25-6.0342	160

FOR OPC:

1-24	OPC exhibits as identified in the prehearing stipulation	54
------	--	----

FOR PSC:

1-7	PSC exhibits as identified in the prehearing stipulation	55
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*Huh-uh is a negative response

*Uh-huh is a positive response

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

2 THE COURT: Well, it's a big group. It's
3 bigger than I am used to as of late.

4 Today is Friday, I believe, the 20th of
5 December. We are here for an administrative
6 hearing in the case of the Office of Public
7 Counsel -- where is Public Counsel here?

8 MS. FALL-FRY: Right here.

9 THE COURT: Right there.

10 And intervenor, Florida Industrial Power Users
11 Group, represented by the Moyle firm over there,
12 versus Florida Public Service Commission as
13 Respondent, and Florida Power & Light Company, Gulf
14 Power Company and Duke Energy Florida, LLC, as
15 intervenors.

16 My name is James Peterson. I am the
17 Administrative Law Judge that's been assigned here
18 today, and I will be presiding over the hearing
19 today.

20 I assume it's going to be a one-day hearing.
21 What do we think? Office of Public Counsel, one
22 day hearing?

23 MS. FALL-FRY: We are prepared for one day.

24 THE COURT: Okay. Are we going to have a
25 realtime reporting, is that what we have here? Is

1 it realtime? Because, you know, the statute
2 requires us to have a ruling within 30 days of the
3 end of the hearing, and if we end today, that means
4 it will be due the -- let's see, that would be --
5 let's see, 30 days would be the --

6 MS. FALL-FRY: January 19th.

7 THE COURT: -- the 19th of January, so -- and
8 your proposed recommended orders would be due 10
9 days from today. So the parties -- I don't know
10 what you are going to do as far as an expedited
11 transcript, you think we can get it all done in
12 that time?

13 MS. FALL-FRY: I believe so.

14 THE COURT: Okay. Now, would the parties and
15 is their representatives please identify
16 themselves, starting with the Office of Public
17 Counsel?

18 MS. FALL-FRY: I am A. Mireille Fall-Fry with
19 the Office of Public Counsel, here with Tad David,
20 Charles Rehwinkel and J.R. Kelly, the Public
21 Counsel.

22 THE COURT: Okay. So the last names again of
23 the others were?

24 MS. FALL-FRY: David, Rehwinkel and Kelly.

25 THE COURT: Kelly, okay.

1 The Intervenor aligned with the Petitioner,
2 Florida Industrial Power Users Group, Mr. Moyle.

3 MR. MOYLE: That's right.

4 Good morning, Your Honor. Jon Moyle on behalf
5 of Florida Industrial Power Users Group, FIPUG.
6 And Karen Putnal is with me as well. I would like
7 to note that she will be involved as well in this
8 case.

9 THE COURT: Okay. Anyone else from -- this is
10 from -- are you aligned with Florida Industrial
11 Power Users Group?

12 MS. HARPER: No, sir.

13 THE COURT: Okay. So Florida Public Service
14 Commission?

15 MS. HARPER: Yes. That's us.

16 Your Honor, I am Adria Harper with the Public
17 Service Commission, and I am here with Andrew King
18 and Samantha Cibula.

19 THE COURT: And where is Ms. Cibula? Okay,
20 because I saw your name on the pleadings as the
21 main one.

22 MS. HARPER: Also our General Counsel is here,
23 Keith Hetrick.

24 THE COURT: Mr. Hetrick?

25 MR. HETRICK: Yes, sir.

1 THE COURT: Okay. Intervenors aligned with
2 the Public Service Commission, first Florida Power
3 & Light Company, FPL.

4 MR. GONZALEZ: Yes, Jason Gonzalez with Shutts
5 & Bowen, representing FPL and Gulf. And I am here
6 with my law partner, Dan Nordby and Amber Nunnally,
7 and we also have Ken Rubin who is in-house counsel
8 with FPL.

9 THE COURT: Is Mr. Rubin at the table there?

10 MR. RUBIN: I am right here, Your Honor.

11 THE COURT: Okay. Mr. Rubin, and who else
12 is --

13 MR. GONZALEZ: Also Dan Nordby --

14 THE COURT: Yes, Dan Nordby.

15 MR. GONZALEZ: -- and Amber Nunnally, who is
16 also with Shutts & Bowen.

17 THE COURT: Is she here?

18 MS. NUNNALLY: Right here.

19 MR. GONZALEZ: Our witness Dave Bromley is
20 also here.

21 THE COURT: Okay. How about Duke Energy
22 Florida, LLC?

23 MR. BERNIER: Morning, Your Honor. Matt
24 Bernier with Duke Energy Florida.

25 THE COURT: Okay. Anyone else?

1 MR. BERNIER: No, sir.

2 THE COURT: I get my power from Duke Energy if
3 that's a problem. I don't think it's a contractual
4 problem.

5 MR. BERNIER: Not with me.

6 THE COURT: One thing I appreciate I just say
7 Duke Energy on the, you know, on the check that I
8 send in.

9 Tampa Electric Company, or TECO.

10 MR. MEANS: Good morning, Your Honor. Malcolm
11 Means with Ausley McMullen here on behalf of Tampa
12 Electric, and I also have here with me Jim Beasley
13 from the Ausley McMullen firm.

14 THE COURT: Mr. Beasley.

15 MR. BEASLEY: Yes, sir.

16 THE COURT: And I saw Jeffry Wahlen was as
17 least listed, is he not here today?

18 MR. MEANS: He is not here today.

19 MR. NORDBY: Judge, Dan Nordby from Shutts &
20 Bowen.

21 THE COURT: Yes, sir.

22 MR. NORDBY: Russell Badders from Gulf Power
23 in-house counsel is here as well.

24 THE COURT: From Gulf Power, yeah, let's see
25 go which one -- and his name in-house was -- what

1 was his name?

2 MR. NORDBY: Russell Badders.

3 THE COURT: Okay. The issue at this
4 proceeding is whether proposed rules 25-6, et
5 cetera, I am not going to list all of the numbers,
6 but there are one, two, three, four, five rules at
7 issue, the 6.030 and some subsections, and the
8 6.031 and a couple of subsections.

9 As part of this proceeding, the petitioner and
10 party aligned with the petitioner must show that
11 they have standing to challenge the proposed rules,
12 and I understand that.

13 The -- in this case, the burden of proof, the
14 Office of Public Counsel, must demonstrate under
15 Section 120.56(2)(a) by a preponderance of the
16 evidence that it will be substantially affected by
17 the proposed rules, or the folks they represent, I
18 am assuming the consumers.

19 Respondent is contesting that intervenors
20 Florida -- how am I going to refer to them?
21 Florida Industrial Power, they are contesting
22 intervenor standing to challenge the proposed
23 rules; therefore, Florida Industrial Power must
24 proof under Section 120.56(2)(a) by a preponderance
25 of the evidence that it will be substantially

1 affected by the proposed rules.

2 I see there is a last minute, but I understand
3 they came in last minute last week, request to
4 dismiss and I am going to discuss that whether we
5 are going to -- I think what we are going to do is
6 probably take that and weave that into the facts as
7 they come before us today as opposed to -- you
8 know, I am not going to rule on that off the cuff,
9 okay.

10 So, petitioner is challenging the proposed
11 rules as opposed to existing rules, therefore,
12 respondent must prove under Section 120.56(2)(a) by
13 a preponderance of the evidence that the proposed
14 rules are not an invalid exercise of delegated
15 legislative authority as to, you know, the
16 objections raised in the petition to determine the
17 invalidity of the proposed rules, and those are
18 again 25-6.030 and 25-6.031.

19 So I see there is pending motions, and the
20 motions are both filed -- let's see I have them
21 here -- by Florida Power & Light Company, so who is
22 going to argue?

23 MR. NORDBY: Judge, Dan Nordby from Shutts &
24 Bowen. I will argue the one directed to the
25 Florida Industrial Power Users Group standing. I

1 may call them FIPUG, if that's acceptable.

2 THE COURT: That's -- let's see, it's Florida
3 Industrial, I am going to call them Florida
4 Industrial, because I get mixed up with acronyms,
5 but you can do that.

6 And, you know, to shorten it, I have read the
7 motion, and the motion is really, you know, points
8 towards their lack of standing, which they have to
9 prove in this case anyway, you know, as someone
10 representing a group. Is there anything more other
11 than what's set forth in the written motion that
12 you would like to point out?

13 MR. NORDBY: Very briefly, Judge. I
14 appreciate that you have read the motion.

15 THE COURT: Sure.

16 MR. NORDBY: And I know you have read as well
17 the Public Service Commission's objection to their
18 have intervention, which set out at greater length
19 all of the case law and standing.

20 THE COURT: Right.

21 MR. NORDBY: The primary point made in our
22 motion is that given the witnesses and exhibits
23 disclosed in the parties' joint prehearing
24 stipulation, FIPUG, Florida Industrial Power Users
25 Group, cannot prove their standing. There is no

1 opportunity for them to provide competent,
2 substantial evidence that's not hearsay that would
3 support their standing to participate in this
4 proceeding. For that reason, we would object to
5 their participation at the outset.

6 If they don't have standing, if they don't
7 have a witness who can testify that they have a
8 substantial number of members who would be
9 substantially affected, we would object to their
10 having counsel here on behalf of a party without
11 standing to cross examine witnesses and delay what
12 already is a trial that we are trying to compress
13 into a single day.

14 I don't have other legal argument beyond that,
15 but wanted to set the stage in addition what's in
16 our written filing that they don't have anyone on
17 their witness list who is capable of providing
18 evidence as to their standing. And in your order
19 granting intervention, you specifically disclosed
20 that they would be required to provide --

21 THE COURT: Sure.

22 MR. NORDBY: -- proof of standing at the final
23 hearing. They may point to some interrogatory
24 answers this they, themselves, served, which of
25 course would be hearsay in this proceeding, and not

1 hearsay that would merely explain or supplement
2 otherwise admissible evidence. So there would be
3 no competent, substantial evidence in the record
4 that would support their standing.

5 THE COURT: Mr. Moyle or Ms. Putnal.

6 MR. MOYLE: Well, I think your initial
7 comments coming in were on the mark at the start
8 here. We understand what our burden is, and we
9 will make every effort to try to meet it.

10 We do have a verified answer to interrogatory
11 that will come into evidence that says, you know,
12 FIPUG is an organization of large industrial
13 members. That we have been participating in
14 proceedings before the Florida Public Service
15 Commission, before the Legislature, before the
16 Florida Supreme Court for decades. It details, you
17 know, the number of members, and it provides, we
18 believe, information that's sufficient to establish
19 our obligation and burden of standing.

20 We are going to object, and the PSC, the
21 practice of the PSC is just about everything comes
22 into the record. I think the better course would
23 be let the record develop, and we understand what
24 our burden is, and we will endeavor to try to do
25 it. If we do it, then we do, and if we don't, we

1 don't. But I think rather than prematurely make a
2 decision you should let the record develop.

3 THE COURT: And on that ground just right now,
4 denied without prejudice, they still need to prove
5 standing.

6 And I did note that in the prehearing
7 stipulation that Florida Industrial did, indeed,
8 participate in the November 5th hearing and
9 presented evidence and argument in opposition with
10 the proposed rules already. They are already in
11 here. That doesn't mean that they win on their
12 standing requirement, but I will hear it, and I do
13 know the standards for the standing, but I am sure
14 you will point them out to me again.

15 So what we will do is we will just leave that
16 to standing. The participation of Florida
17 Industrial I don't think is going to slow down
18 these proceedings, and I think it would be slow if
19 we took that issue upfront and tried to deal with
20 that, so I am not going to do that. I am just
21 going to let it interweave, but your motion is duly
22 noted, and maybe the evidence isn't there, so we
23 will find out.

24 MR. NORDBY: Thank you, Judge.

25 Will there be an opportunity to take that up

1 again after the close of their case in chief, after
2 they have had the opportunity to put on any
3 evidence?

4 THE COURT: If you would like to reassert it
5 and point out, but you will also have a chance
6 to -- you mean as far as them not even preparing a
7 proposed final, not a proposed recommended order?

8 MR. NORDBY: Exactly, if they have not put
9 forward sufficient proof of standing at the close
10 of their case in chief, then we would object again,
11 and understanding your ruling to their
12 participation in the remainder of the proceeding,
13 cross-examination of witnesses in the respondent's
14 case and so forth.

15 THE COURT: I mean, that's -- Mr. Moyle.

16 MR. MOYLE: Well, I guess that kind of gets us
17 into another issue, I think, but my understanding
18 is is that in this case that the Office of Public
19 Counsel has put forward a petition and kind of a
20 prima facie case, So in terms of who goes first, I
21 was under the impression -- I think in the
22 stipulation it says that the Public Service
23 Commission is going first with respect to who's
24 putting on evidence when.

25 So, you know, we would like to ask some of the

1 questions of the Public Service Commission
2 witnesses. You know, I think a question of the
3 Public Service Commission about FIPUG is surely
4 something that can be asked, and those folks know
5 FIPUG and can surely participate and answer that
6 question.

7 I think, from my understanding of it, the way
8 this is going to play out is opening statements,
9 and then we will have an opportunity for the Public
10 Service Commission to put on their case, and then
11 FIPUG, after the Public Counsel, Office of Public
12 Counsel puts on their case.

13 THE COURT: Yeah, and, you know, I don't know
14 that we can tease out a party. If there is an
15 opportunity and you want to make that argument, but
16 I am thinking the way the proceedings will go
17 today, there will probably still be an opportunity
18 to give evidence throughout. I don't know, you
19 know, as far as this, that and the other. We will
20 just see.

21 If there is an opportunity and you feel that
22 it's right, I am not going to prevent you,
23 obviously, from making the motion, and I will hear
24 it.

25 MR. NORDBY: I am sure, Judge.

1 THE COURT: But without prejudice and subject
2 to, again, Florida Industrial has to show standing
3 in this proceeding, as really all parties. I think
4 the Office of Public Counsel has to show standing
5 as well. And that's been objected to.

6 So I think we are going to hear that evidence,
7 and I can probably -- I will probably deal with it
8 in the final order as opposed to here today, but we
9 will see.

10 MR. NORDBY: Thank you, Judge. I don't have
11 anything further on that motion.

12 THE COURT: Okay. We do have the motion in
13 limine, the scope of expert testimony.

14 I have read that motion. I can hear it, but I
15 can tell you my -- I don't mean to tell you what my
16 ruling is before you have a chance to argue it, but
17 it might shorten the time.

18 I will allow you to raise the objections as
19 the testimony proceeds. If he didn't disclose and
20 you can show that he didn't disclose, I was just
21 wondering, did the expert -- did you asked the
22 question: Are there any other opinions, and you
23 feel that there might be opinions that were not
24 disclosed that are going to be issued here today,
25 and we will take those up when we do, you know,

1 when they come up.

2 That's my ruling on that. If you want further
3 argument, I think my ruling would still be the
4 same.

5 MS. NUNNALLY: Yes, sir. Amber Nunnally from
6 Shutts & Bowen on behalf of Florida Power & Light
7 and Gulf Power.

8 We did want to point out that at Mr. Willis'
9 deposition, that's OPC's witness that they
10 disclosed that they intend to call today, he was
11 asked if he did have any additional opinions or any
12 additional testimony that he would offer today, and
13 he said he did, but that information was not
14 disclosed after further questioning, and it wasn't
15 disclosed in any further written discovery from
16 OPC. So we do have reason to believe that he may
17 testify to things today that were not disclosed
18 during discovery, and as you know, that's --

19 THE COURT: I haven't seen his deposition.
20 Did he say: I do have other opinions but I am not
21 going to tell you what those are, or did he --

22 MS. NUNNALLY: He said: I have additional
23 things that I may testify to, and his counsel would
24 not allow us to ask any further questions about
25 what those may be, and said that it was privileged,

1 actually.

2 THE COURT: Well, I mean, you know -- in other
3 words, I think my ruling stands the same. It's not
4 deny --

5 MS. NUNNALLY: Understood.

6 THE COURT: -- it's denied in that it's not
7 going to be limine, but at the same time, as it
8 comes up, you can make argument and I will
9 certainly listen to it.

10 MS. NUNNALLY: Understood.

11 THE COURT: I mean, you know, your point of
12 trial by ambush was well taken, and if it's
13 something that should have been disclosed that
14 wasn't and it's a new opinion, we will deal with
15 it.

16 MS. NUNNALLY: Okay.

17 THE COURT: Okay.

18 MS. NUNNALLY: There is one other aspect of
19 our motion we did want to mention, which is that we
20 asked for you to limit Mr. Willis' expert opinion
21 testimony solely to the subject of accounting.
22 During his deposition, he acknowledged that that's
23 his only area of expertise, but he did offer some
24 opinions about how the utility companies can or
25 should act with respect to storm hardening plans

1 and projects, but that would be unreasonable for
2 him to testify as an expert on those subjects
3 because he acknowledged he is not an expert in
4 engineering and he has never worked for one of the
5 public utility companies, so there would be no
6 reasonable basis for him to offer an expert opinion
7 on those subjects.

8 So we would just ask that you enter a general
9 order -- or enter an order prohibiting him from
10 testifying as an expert on anything other than
11 accounting.

12 THE COURT: Again, to tease that out at this
13 stage is really impossible. I need to hear the
14 testimony and see -- some of it may be lay witness
15 testimony that goes along with his expertise, and
16 maybe he will be able to give, you know, at least,
17 you know, fact evidence with that regard as opposed
18 to his expertise.

19 So we will see, I mean, we will see how it
20 teases out, but --

21 MS. NUNNALLY: We will be prepared.

22 THE COURT: -- accountants' expertise
23 sometimes have other aspects that involve an
24 industry that they have been involved in. I don't
25 know. I haven't heard the witnesses. I haven't

1 reviewed his resume, nor have I heard a voir dire
2 of him, but we will make those decisions as his
3 testimony comes up, okay?

4 MS. NUNNALLY: Thank you.

5 THE COURT: Okay. So let's see where we are
6 here.

7 There is -- I am assuming there is no
8 invocation of the rule, sequestration, is there?
9 Does anyone want to do that?

10 MS. FALL-FRY: No, Your Honor.

11 THE COURT: So everybody is good within 30
12 days of the hearing -- within 10 days of this
13 hearing to prepare your proposed final order?

14 MR. NORDBY: We would candidly prefer longer
15 time if you would entertain that.

16 THE COURT: I am just looking at the
17 requirements of the statute, and I believe it says
18 that I need to render an opinion 30 days after the
19 ruling -- I mean, after the hearing. So I don't
20 know a way around that. I think there is probably
21 ways that we could fudge that, but I don't believe
22 there is -- unless someone wants to give me some
23 good, you know, legal argument on that.

24 MR. NORDBY: Judge, I agree. The statute
25 requires a final ruling within 30 days. Some past

1 rule challenges in which I have participated, the
2 parties have submitted their proposed final orders,
3 say, 20 days after the hearing, with the transcript
4 filed earlier than that. I know that gives you
5 less time with the benefit of our proposed orders,
6 but --

7 THE COURT: It does. I mean --

8 MR. NORDBY: -- if you would entertain that.

9 THE COURT: Yeah, and as far as entertaining
10 that, if someone needs -- someone needs to give me
11 a legal argument. Maybe it's those cases that say
12 anyone can waive anything, but I don't know if it
13 applies to this particular provision.

14 MR. NORDBY: Judge, I think the Uniform Rule
15 106.215 allows you the ability to set the deadlines
16 for post-hearing filings. That doesn't affect the
17 date by which you must rule, but I believe that
18 that would give you the discretion to set our
19 deadlines for filing our proposed orders.

20 THE COURT: 106 what?

21 MR. NORDBY: I believe it's 28-106.215, the
22 authority of the presiding officer to set deadlines
23 for proposed hearing memoranda and proposed orders.

24 THE COURT: Within the time designated by me,
25 because it doesn't -- you don't have a statutory

1 time for your PFOs.

2 MR. NORDBY: That's correct, Judge.

3 THE COURT: I might split the difference with
4 you. I will consider it, you know, 15 and 15, so,
5 you know, we will both have the same. So we will
6 see.

7 MR. NORDBY: Thank you, Judge.

8 THE COURT: Okay. Agreed exhibits. I see
9 there are a lot of joint exhibits. I saw the
10 Office of Public Counsel was concerned that they
11 hadn't had a chance to -- that they didn't think
12 the parties had appropriately raised objections, is
13 that still outstanding, that issue?

14 MS. FALL-FRY: That's correct.

15 There has been some confusion as whether the
16 joint stipulated exhibits are truly stipulated or
17 whether there are some reservations to some of the
18 exhibits, and we are just trying to seek clarity
19 because it was near five o'clock so we just let it
20 roll the way it was.

21 THE COURT: Okay. Well, true exhibits still
22 doesn't take care of the hearsay issue, right?

23 MS. FALL-FRY: Correct.

24 THE COURT: I mean, everybody understands
25 that, and I don't know how you play it out in your

1 administrative proceedings, but generally I say
2 that, you know, I can take in -- even if it's not
3 objected to, if it's hearsay, it's still not good
4 evidence for purposes of my findings, but, I mean,
5 this is, you know, primarily going to be legal
6 argument. I understand that. But I am sure there
7 are some facts that color it.

8 So with that, I -- do you want to go down the
9 list, or do we want to just take them as they come
10 in? What would you like to do? I have got the
11 list here.

12 MR. NORDBY: Judge, Dan Nordby, from Florida
13 Power & Light.

14 I think you stated the basis for our
15 reservation there. We don't object that the
16 exhibits are what they are, but I may object to
17 their relevance, or to hearsay, depending upon the
18 purpose for which those exhibits are offered.

19 THE COURT: Right.

20 MR. NORDBY: So the hearing transcripts at the
21 rulemaking hearing, we don't object that those are
22 true and accurate transcripts of the rulemaking
23 hearing, but we would object to an attempt to
24 introduce rulemaking hearing transcripts as
25 substantive evidence -- substantive non-hearsay

1 evidence in this proceeding.

2 THE COURT: Well, I mean, are the
3 transcripts -- are any of the transcripts based on
4 sworn testimony that was before the Commission?

5 MR. NORDBY: I don't believe the testimony was
6 sworn at the Commission.

7 MR. KING: No, it wasn't sworn.

8 THE COURT: So there may --

9 MS. FALL-FRY: But to be clear, these are all
10 the -- everything that was in the joint stipulation
11 list were all of the public hearings. They weren't
12 sworn, but they are the public hearings and the
13 rulemaking record of the Commission. They are all
14 State records.

15 THE COURT: I mean, part of that -- I mean,
16 part of the issue here is were rulemaking
17 proceedings followed?

18 MS. FALL-FRY: Yes.

19 THE COURT: So, I mean, for that aspect, I can
20 certainly -- I don't know what hearsay that we
21 would tease out of it, but we will see. You know,
22 I understand. If it's just pure hearsay, it's not
23 going to stand up on appeal.

24 So let me see, opening statements, I think we
25 are there. Was there -- are there any other

1 preliminary matters?

2 MS. HARPER: Your Honor, I just wanted to
3 clarify that it was our understanding that the
4 Office of Public Counsel would go first with their
5 case since they are the petitioner, understanding
6 that we have the burden, PSC, but that is what I
7 think we discussed.

8 THE COURT: Well, everybody has a little bit
9 of a burden here. I think I laid that out. I have
10 a burden.

11 So is that the way -- you know, what you can
12 do is you can wait for your case in chief, or
13 everybody can give me an opening statement right
14 now, or we can split it up. What's your druthers?
15 You would like to start with an opening statement?

16 MS. FALL-FRY: Yes. We were also planning to
17 start, so that was fine with us. There was one
18 more thing about a witness we wanted to address.

19 THE COURT: Okay.

20 MS. FALL-FRY: One of the -- one of Public
21 Counsel -- I am sorry, one of Public Counsel's
22 witnesses is from the PSC. We know he has a time
23 commitment today. We were hoping we could call him
24 out of order understanding that, just so he could
25 be released sooner, if that works for everyone, if

1 it doesn't --

2 THE COURT: It's one of your witnesses?

3 MS. FALL-FRY: It's our witness, but he works
4 for PSC.

5 THE COURT: You a want to wall call him right
6 away -- well, you are first on, right?

7 MS. FALL-FRY: Right, but I just --

8 THE COURT: You mean even before -- are you
9 saying like right now?

10 MS. FALL-FRY: Not before opening statements,
11 but it would be -- we wouldn't have properly laid
12 the predicate for him or anything. We will just be
13 calling him --

14 THE COURT: Take him out of turn, so to speak,
15 I guess.

16 MS. FALL-FRY: Yes.

17 THE COURT: I mean, is that okay with
18 everybody if we take --

19 MS. HARPER: That's fine with the Commission.

20 THE COURT: Okay. So that will be your
21 witness number one, I am assuming.

22 MS. FALL-FRY: Yes.

23 THE COURT: Okay. So how do you want to do
24 opening statements? Do you want to have Office of
25 Public Counsel and then followed by the Public

1 Service Commission's opening statement, and we will
2 just do all the opening statements to address?

3 I have read -- you know, I have read the
4 prehearing stipulation, so he these can be really
5 thumbnail because as we, you know, so --

6 MS. FALL-FRY: It will be short and sweet.

7 THE COURT: Okay. Would you like to just all
8 do that?

9 MR. NORDBY: I think that order is fine. One
10 question, we have assumed there will be no closing
11 arguments. Our orders will be -- our proposed
12 orders will be our closing, so I just wanted to
13 clear that before we do this, I would like to know.

14 THE COURT: Correct. No closing arguments,
15 but Mr. Nordby might want to say -- try to convince
16 me that Florida Industrial should not even be
17 allowed to present a proposed final order, I think.

18 MR. NORDBY: Thank you.

19 THE COURT: Okay. So with that, how about
20 Ms. Fall-Fry, if you would like to give an opening
21 statement.

22 MS. FALL-FRY: Thank you. Yes, I would.

23 As I say, I am A. Mireille Fall-Fry, on behalf
24 of Public Counsel.

25 We are here today to discuss rulemaking and

1 ratemaking, specifically the authority granted by
2 the Florida Legislature to the Public Service
3 Commission as the Agency that has jurisdiction to
4 regulate and supervise each public utility with
5 respect to its rates and services. Rates and
6 services.

7 Just last year, the Legislature determined
8 that it was in the public interest to strengthen
9 electric utility infrastructure to withstand
10 extreme weather conditions by promoting the
11 overhead hardening of electrical transmission and
12 distribution facilities, the undergrounding of
13 certain electrical distribution lines and
14 vegetation management.

15 The Legislature determined that protecting and
16 strengthening these transmission and distribution
17 electric utility infrastructure from extreme
18 weather conditions can effectively reduce
19 restoration costs and outage times to customers,
20 and improve overall service reliability.

21 The Legislature further determined that it was
22 in the State's interest for each utility to
23 mitigate restoration costs and outage times, and
24 that all customers benefit from the reduced cost of
25 storm restoration.

1 When they passed the law that became Section
2 366.96, the Legislature provided for cost recovery
3 to help ensure that all public utility customers
4 would be able to avail themselves of the
5 aforementioned benefits; that's costs and services.

6 To receive the cost recovery from customers
7 for their prudently incurred historical costs,
8 separate and apart from base rates, the law
9 requires utilities to file storm protection plans
10 with a systematic approach the utility will follow
11 to achieve the objectives of reducing restoration
12 costs and outage times associated with extreme
13 weather events and enhancing liability.

14 The law requires the utilities to file a plan
15 that provides sufficient detail for the Public
16 Service Commission to determine the extent to which
17 the plan will reduce restoration cost and outage
18 times, the extent to which the plan is feasible,
19 the estimated cost and benefits, and the estimated
20 rate impact.

21 Additionally, the Legislature prohibited the
22 recovery of storm plan costs that are recovered
23 through base rates. The Legislature provided that
24 the Commission adopt rules to implement this law.

25 Rates and service. Your Honor, the Office of

1 Public Counsel is statutorily obligated to
2 represent the interest of the ratepayers in this
3 state. We are not here to question the statute.
4 We are here to ensure that the rule is faithfully
5 implemented, and that the citizens do not overpay.
6 We are here about rates and services, ratemaking
7 and rulemaking.

8 The Commission's proposed rules do not ensure
9 that the Commission can fulfill its statutory
10 obligation to estimate the rate impact of storm
11 protection plans, nor do they ensure that the
12 Commission can determine whether a utility is
13 attempting to recover storm protection costs that
14 are currently recovered in base rates as storm
15 hardening costs.

16 Others may try to turn the question before
17 Your Honor into a complex, complicated, hyper
18 technical proceeding about engineering and other
19 things, but it really is a simple question of
20 statutory interpretation. Do the proposed rules
21 faithfully implement the statute? That is the
22 question before you today. And we submit that the
23 answer is an unmistakable no.

24 The proposed rules allow for recovery of
25 projected costs that are not authorized by the

1 statute and do not ensure that the customers will
2 not pay twice for the same storm enhancement.

3 Thank you.

4 THE COURT: Next, you are aligned with --

5 MR. MOYLE: Sure.

6 Good morning. As stated earlier, Jon Moyle on
7 behalf of the Florida Industrial Power Users Group.

8 We will introduce this as a verified
9 statement, but a little bit more about my client,
10 FIPUG.

11 We've been around for decades. We have
12 participated at the Public Service Commission, at
13 the Florida Supreme Court, at the Legislature.
14 It's a group of large users of electricity.
15 They -- electricity is one of their big variable
16 costs, and so when there are rate proceedings,
17 particularly when, like this case, you are going to
18 have a rate increase, we believe the evidence will
19 show that there is going to be rate increases
20 associated with this proposed rule. It impacts
21 them, and we will make every effort to show that to
22 you for the purposes of accomplishing our
23 requirement to demonstrate standing.

24 You are going to hear -- really, we are going
25 to focus on two issues in this case, and that will

1 be something that will be brought out on
2 cross-examination.

3 One is, is the ability of the utility to
4 recover from ratepayers costs that have not been
5 realized or incurred, forecasted costs. Projected
6 is the term. Projected costs.

7 And there may be occasions where projected
8 costs are something that is allowable, but you need
9 to have statutory authority for your rule, and
10 there is no statutory authority to say that you can
11 take money from FIPUG members and other ratepayers
12 before you have actually spent it, put it in the
13 ground, and the asset is what they call used and
14 useful.

15 Used and useful is something in the regulatory
16 parlance that says ratepayers should not have to
17 pay for things until they are in the ground and
18 providing a service. And there is a few reasons
19 for that.

20 One is something called intergenerational
21 transfer. And I don't mean to burden you and load
22 your wagon up with a lot of terms and regulatory
23 ideas right off the bat, but intergenerational
24 transfer essentially says if the Moyles are
25 receiving the benefit of something, we should pay

1 for it in our electric bills. We shouldn't have to
2 pay for something that's going to come on in five
3 years because the Moyles may not be here in five
4 years. We may have moved to Iowa, or we may not be
5 around. So the idea of intergenerational transfer
6 is something that -- and I will ask some of the PSC
7 witnesses a little bit about that, but that ties
8 back into why projected costs are, we would argue,
9 not good policy.

10 You are not in a policy-making rule position
11 here, but the point simply is, is that the
12 Legislature did not say to the Commission you can
13 allow the utilities to recover projected costs.
14 They didn't say it, yet the rule allows it. And we
15 think that that is improper and there is no
16 legislative authority for it. And you need
17 legislative authority under the MAP/TAP provisions
18 and others that the rule is sufficient in that
19 respect.

20 The other point that we are going to spend
21 some time talking about is a Statement of Estimated
22 Regulatory Costs. It's called, you know, a SERC.
23 You will hear a discussion about a SERC. But I
24 think the key word in there for our purposes, and
25 that FIPUG will highlight, is costs, Statement of

1 Estimated Regulatory Costs.

2 And there is a statute that says in certain
3 circumstances you have to prepare a SERC. And it
4 says -- and I will just quote it. It's 120.54(b)1:
5 An agency must prepare a statement of estimated
6 regulatory costs of the proposed rule if it's going
7 to have an impact on small business and if the
8 proposed rule is likely to directly or indirectly
9 increase regulatory costs in excess of 200,000 in
10 the aggregate in the state and within one year
11 after the implementation of the rule.

12 The regulatory costs, I think the Commission
13 and the utilities take the position that regulatory
14 costs should not be viewed in a way as to what the
15 impact is going to be on ratepayers. We reject
16 that.

17 We think that when the Legislature put in
18 place the idea of regulatory costs, that they
19 wanted to understand what the impact was going to
20 be on others. I mean, they called out small
21 businesses, they called out cities and counties,
22 and that the Commission, in their rulemaking, erred
23 by not providing information, even though
24 information was out there, the utilities didn't do
25 a great job of answering questions about what are

1 the costs on the ratepayers. But we think that the
2 failure to not provide information about costs on
3 ratepayers, which we believe will show evidence
4 that the costs on the ratepayers are going to be in
5 the billions of dollars, that the failure to put
6 that in a SERC was a material error and
7 independently is grounds for invalidating the rule.

8 I will ask some questions of the PSC witnesses
9 about regulatory compact. And the regulatory
10 compact is generally viewed as a situation that
11 involves a regulator, a utility and the customers.
12 It's a three-party understanding and arrangement
13 that govern utility behavior.

14 And in this case with respect to the Statement
15 of Estimated Regulatory Costs, the SERC, it appears
16 that the important party, the ratepayers, have been
17 ignored with respect to what the cost of this rule
18 is going to be.

19 Now, you will hear -- the utilities will say,
20 well, the cost of this, even if it's in the
21 billions, is really imposed by the statute and not
22 the rule. And we don't think that, No. 1, is
23 right, because we don't think the statute is
24 self-executing. You don't all of a sudden get to
25 recover all of this money from the ratepayers just

1 by the statute. The rule is what allows that, and
2 the rule sets forth all these conditions.

3 So we think the rule is vital to recovery of
4 these costs and because of that, then the SERC
5 requirements do apply.

6 So as we get into that, I think you will hear
7 there is nothing in the statute that says just
8 because there is a statute that seems to impose
9 costs, that that provides that the Commission does
10 not have to follow the statute otherwise in
11 preparing a proper SERC.

12 You will also see evidence that the Commission
13 prepared a whole bunch of questions to the
14 utilities that track the SERC. Is it going to have
15 an impact on small businesses? Is it going to have
16 an impact on cities and counties? They tracked the
17 SERC statute really closely and clearly, but then
18 all of a sudden all of those questions never got
19 asked, and I will ask the PSC witness why they did
20 not.

21 I think what you may hear is that, well, there
22 was some other benefits in the statute. But just
23 because there is other benefits in the statute
24 doesn't forgive the requirement to prepare a SERC
25 properly, and so we are going to spend a lot of

1 time and focus on the SERC. I just wanted to take
2 a few minutes and preview that for you so that you
3 will understand kind of the points that we think
4 are important for your consideration.

5 Thank you.

6 THE COURT: Thank you.

7 Public Service Commission.

8 MR. KING: Good morning, Your Honor. My name
9 is Andrew King, and I represent the Florida Public
10 Service Commission.

11 The Commission will demonstrate today that it
12 followed all the applicable rulemaking procedures
13 as prescribed in Section 120.54 when it proposed
14 these rules, and we will show that the proposed
15 rules at issue here are valid exercises of
16 delegated legislative authority.

17 We also believe that it will become clear
18 today, and we've already heard argument about this,
19 that OPC and FIPUG do not have the requisite
20 standing to challenge these proposed rules. We
21 will show that the proposed rules only apply to
22 Florida's investor-owned electric utilities, and
23 neither of the proposed rules require changes in
24 customer rates.

25 The Commission is going to present two major

1 witnesses today to support the proposed rules. Our
2 first major witness will be Robert Graves. And he
3 is going to explain proposed Rule 25-6.030. We
4 call that the plan rule because that has to do with
5 the approval of the storm protection plans.

6 Mr. Graves will explain that the plan rule
7 requires the utilities to provide adequate
8 information for the Commission to assess the
9 utility's Storm Protection Plan under the statutory
10 criteria. That's Section 366.96(4).

11 A large portion of the testimony that you are
12 going to hear today is going to be about the
13 granularity of the detail required to be filed by
14 these rules. The evidence will show that the
15 granularity of project level detail that OPC wants
16 will be inaccurate, it will be costly to create and
17 it will cause customer confusion.

18 And the second witness -- the second major
19 witness we are going to bring up will be Jim
20 Breman. Mr. Breman is going to talk about the
21 second rule, Proposed Rule 25-6.031, we call that
22 the clause rule. And I think more importantly Mr.
23 Breman is going to explain the longstanding
24 Commission process for how cost recovery clauses
25 operate, and this is going to be important for the

1 statutory interpretation question.

2 We believe that when the Legislature used the
3 term "Cost Recovery Clause", that's a term of art
4 and it meant something by that. And what it
5 intended was that the Commission use this
6 longstanding process that it has used in all other
7 cost recovery clauses and we used it in this Cost
8 Recovery Clause, too. That's why when -- and Mr.
9 Breman will talk about how when he helped draft
10 that rule, he wanted to be consistent with that
11 longstanding policy, that longstanding process, and
12 Section 366.96.

13 So the last thing I will talk about is that
14 today I think you are going to hear testimony
15 information about a staff recommendation. You may
16 hear about draft staff documents before the rule
17 was proposed. These things are red herrings. What
18 we are here today to determine is the validity of
19 the rule that the Commission proposed, not the
20 draft rules that the staff may have recommended.

21 And I think, again, just to sum up what we are
22 going to demonstrate today is that the proposed
23 rules, the Commission's proposed rules, are valid
24 exercises of delegated legislative authority, and
25 when the Commission proposed them, they used a

1 process that complied with all the statutory
2 requirements of Section 120.54.

3 Thank you.

4 THE COURT: Next we have -- let's see, we are
5 going down the line.

6 MR. GONZALEZ: Jason Gonzalez for FPL and
7 Gulf.

8 THE COURT: Okay, yes.

9 MR. GONZALEZ: Thank you, Your Honor.

10 On behalf of FPL and Gulf, I would like to
11 focus my time on three issues that OPC has
12 emphasized, and we agree completely with everything
13 that Mr. King has said on behalf of the PSC, and we
14 will many extensively address all of the issues
15 raised in the petition in our final order.

16 First I just want to talk about Office of
17 Public Counsel's claim about the Storm Protection
18 Plan rule being invalid because it doesn't require
19 that granular level of detail that Mr. King just
20 mentioned, and this goes to subsections (3)(d) and
21 (e) of the plan rule, the 030 rule. And we have to
22 start with the statute in this analysis, and what
23 level of detail the Legislature required, not what
24 OPC or FIPUG may prefer.

25 The statutory requirement is in 366.96

1 subsections, or subparagraphs (3) and (4). And
2 Ms. Fall-Fry just earlier mentioned the required
3 statutory elements and factors, so there is no need
4 for me to repeat them. Those are the factors, and
5 those are all encompassed in this rule as proposed.
6 It does exactly what the Legislature had authorized
7 and required.

8 I am not going to go through each of those
9 things. They are in subsection (d) of the rule,
10 but they are call all encompassed, and they are all
11 squarely within -- those statutory factors.

12 OPC makes a few conclusory allegations in its
13 petition about the rule being vague or failing to
14 establish adequate standards. But if you look
15 closely at the petition and what you will hear
16 today is they don't, at any time, actually identify
17 a specific provision in the text of the statute
18 that they show is contrary to what's in the rule.

19 What OPC claims is that the three years of
20 this project level detail is required by statute,
21 but in subsection (d) of the proposed rule, only
22 one year is required, and then you have program
23 level detail for a whole grouping of projects in
24 year two and three, and so OPC says that the text
25 of the rule is not sufficient. And what they argue

1 is kind of an odd interpretation of one of the
2 factors in the statute, 366.96, and it's in
3 subparagraph (4)(d).

4 And what that sentence of the statute actually
5 says is the Commission should consider the
6 estimated annual rate impact resulting from
7 implementation of the plan during the first three
8 years. It did not specify the level -- the
9 granular level of detail that OPC says is required.
10 So that's important because we have to measure this
11 under the statute.

12 Not only does the statute not require it, as
13 Mr. King said, you are going to hear extensive
14 testimony that the project level detail,
15 particularly in the years two and three. When you
16 go that far out, it's not only unnecessary to
17 create and evaluate those rate impact estimates,
18 that project level detail can't even be produced
19 with reasonable accuracy in years two and three.

20 And the OPC witness, in his deposition on
21 Monday, he readily acknowledged, even before I
22 asked him about it, Mr. Willis, and I think you
23 will hear a little bit about it today. He readily,
24 proactively acknowledged, we would like that
25 information, but we know it won't be accurate. We

1 know there will be things, all of these variables
2 change in the future years.

3 And you are going to here from our witness for
4 FPL, Mr. Dave Bromley, who is going to explain --
5 and I won't go into all of the factors because you
6 will hear them on the stand -- of why engineering
7 projects two and three years out and trying to put
8 that detail together with all the things the change
9 in a particular project, maybe having to move it to
10 a different location, reconfigure it, because when
11 they get out in the field, there is variables and
12 things have to be changed, and so this rule
13 requires that level of detail for the first year.

14 And OPC, again, has acknowledged that, that
15 there is an inaccuracy, and there is great expense
16 that's required. So there are very good reasons
17 why the rule was written the way it was, and
18 certainly complies with the statute. It's not a
19 legal basis to invalidate it.

20 But in any event, what you're also going to
21 hear is they can get -- when we get to the second
22 rule, the cost recovery rule, and get into the
23 proceeding where a utility has petitioned for cost
24 recovery in a clause proceeding, OPC and FIPUG and
25 the PSC, they are going to have that project level

1 detail for the year that is going to be under
2 review for that cost recovery. They are going to
3 get it through discovery, but all the parties
4 acknowledged that the burden in those proceedings
5 will always be on the utility to show that it's met
6 all the statutory requirements.

7 So in their petition and in the rule, as it
8 explicitly requires, that the petition be supported
9 by the testimony, the evidence in support of it;
10 and the burden being on the utility company, they
11 are going to get that information right upfront in
12 those proceedings. And if they are not satisfied
13 with the level of detail, then they have discovery
14 in the proceeding. So they are going to get the
15 information that they are complaining is not
16 required well in advance of the Storm Protection
17 Plan rule.

18 Your Honor is also probably going to hear from
19 OPC that they want this three years of project
20 level detail because it's somehow necessary
21 information to determine if the company -- if a
22 utility company is double dipping. If they are --
23 if they've already recovered some of these costs in
24 their base rate, and they want to make sure that
25 they are not double dipping when they come back for

1 this storm protection plan cost recovery. There
2 are two problems with that argument.

3 First, the statute prohibits, explicitly
4 prohibits double dipping, and then the proposed
5 rules specifically prohibit double dipping. As I
6 mentioned, the burden is on the utility company.
7 Everybody has agreed, clearly, the burden is on the
8 utility companies with their petition to support it
9 with testimony right up front. And then there is
10 discovery to further flesh out any of that. So
11 OPC -- the PSC will meet their burden on the
12 validity of the first rule.

13 Turning now to the last issue I would like to
14 address, which is OPC's claim that the cost
15 recovery rule is invalid because it allows recovery
16 of the costs incurred in the coming year. There
17 are several flaws with their theory the cost
18 recovery rule contravenes the statute, and you
19 going to hear testimony about this, but there is
20 some legal argument here I just wanted to add.

21 It's Section 366.96(7) of the statute
22 authorizes this -- the rule being adopted to allow
23 the utilities to recover for the prudently incurred
24 transmission and distribution storm protection plan
25 costs. And again that is exactly what this the

1 second rule does, 031 rule.

2 The first flaw in OPC's claim is really kind
3 of an interpreted error. OPC is reading the word
4 "incurred costs," or the phrase "incurred costs" to
5 mean the same thing as paid or paid in the past
6 costs. Incurred or incur is not a synonym of paid
7 and payment, and you can't find any thesaurus that
8 say those mean the same thing, and Black's Law
9 dictionary defines incur and incurred as payments I
10 bring on myself.

11 When a utility is files their cost recovery
12 petition, they are saying here are the projects and
13 programs that the company plans to do in the coming
14 year, and this is what they are going to cost.
15 This is what we are going to take on in the coming
16 year, and this is what we need recovery for.

17 The statute does not say that a utility may
18 only recover what it has already paid out in the
19 past, but this brings me to the second major flaw
20 in the claim by OPC, and Your Honor will hear
21 testimony on this.

22 The cost recovery process in this proposed
23 rule has several steps. You have got to read the
24 whole rule all the way through to the end, but
25 there are several steps, and they conclude at the

1 end or after that year of cost recovery, and they
2 conclude with this final true-up.

3 So it is a process of multiple steps, and we
4 can't myopically focus just on the very first step
5 of the petition going into that year. You have to
6 look at the whole thing, and when you get to the
7 end, there is this final true-up.

8 So the record will demonstrate the PSC has met
9 its burden on this. And you will also hear in the
10 other cost recovery provisions, whether it be the
11 environmental or nuclear, the same type of cost
12 recovery multistep processes in place. The PSC has
13 been doing this for a long time, and the
14 customer -- and it's fair to the customers and the
15 utilities, the ratepayers and the utilities,
16 because you have this final true-up in the ultimate
17 determination at the end of it.

18 Thank you.

19 THE COURT: Next, was that -- Mr. Nordby, are
20 you going to do Gulf Power, or was that for both?

21 MR. GONZALEZ: That was on behalf of both.

22 Thank you.

23 THE COURT: That was both, okay.

24 Duke Energy.

25 MR. BERNIER: Thank you, Your Honor. Matt

1 Bernier for Duke Energy.

2 We are going to have a long day today, so I am
3 not going to belabor you with a lot of argument
4 here. I agree with what you have heard so far from
5 the Public Service Commission and from FPL and Gulf
6 Power. We do not see anywhere in the statute that
7 the level of information that OPC and FIPUG are
8 searching for, or are saying is required, that is
9 found anywhere in the text of the statute.

10 And we also agree that through the proposed
11 storm cost recovery clause rule, the only costs
12 that will ever be allowed to be incurred or
13 collected are the prudently incurred costs, and
14 that complies with the statute.

15 We find that these rules are valid exercises
16 of the delegated legislative authority and they
17 should be approved.

18 Thank you.

19 THE COURT: Thanks.

20 TECO.

21 MR. MEANS: Good morning, Your Honor. My name
22 is Malcolm Means, and I am an attorney with Ausley
23 McMullen here on behalf of Tampa Electric Company.

24 Tampa Electric Company is intervening the
25 respondent Florida Public Service Commission in the

1 proposed rules. Tampa Electric is a public utility
2 that will be subject to the proposed rules
3 implementing Section 366.96 of the Florida
4 Statutes.

5 Tampa Electric believes that the proposed
6 rules are a valid exercise of the Commission's
7 delegated legislative authority for the reasons
8 already mentioned by Mr. King.

9 I will not be calling any witnesses or
10 offering exhibits today, but I may wish to
11 cross-examine the other parties' witnesses
12 depending on the testimony provided. I would like
13 to reserve an opportunity to submit a proposed
14 final out setting out our assessment of the
15 evidence and argument presented here today.

16 Thank you.

17 THE COURT: Sure. Thank you.

18 And is that it? I think everybody has given
19 their opening statement.

20 A matter of housekeeping. I mentioned the
21 joint exhibits. They are listed out. What I did,
22 instead of trying to write each one down as they
23 come in, I have got them just as they are listed in
24 the list of exhibits in the prehearing stipulation.

25 How do you want to proceed? Do you want to

1 proceed we put them in as we go, or do you want to
2 get them in now?

3 MS. FALL-FRY: We think it's helpful to get
4 them in now, but we don't have objections --

5 THE COURT: Okay. How about -- okay, the
6 first, the joint exhibits, does anyone object to
7 joint Exhibits 1 through 50? So they are all in?

8 MS. HARPER: We do not object -- PSC does not
9 object.

10 THE COURT: Okay. Are there any objections?

11 MR. NORDBY: The reserved objection as to
12 hearsay, subject to those consideration.

13 THE COURT: Hearsay is, I guess I know it when
14 I see it, or know it when I hear it, those are
15 always reserved, so I am just going to show them
16 all in.

17 (Whereupon, Joint Exhibit Nos. 1-50- were
18 received into evidence.)

19 THE COURT: And then there is individual party
20 exhibits. We've got next, is it C-1 through C-24,
21 any objections to those? Okay, we've got -- yes.

22 MR. NORDBY: Judge, on behalf of FPL, our
23 objection on that one is similar. They may be --
24 some of these exhibits may be relevant for some
25 purposes but not for others. Some of them may

1 contain hearsay. So with those objections
2 reserved, we don't object generally to the
3 admission.

4 THE COURT: Okay. We will just accept them
5 all then, noted -- as far as relevance, you might
6 want to point out as they are discussed that they
7 aren't relevant.

8 (Whereupon, OPC Exhibit Nos. 1-24 were
9 received into evidence.)

10 THE COURT: And if you do have specific
11 hearsay objections, you could point them out in the
12 record. You don't have to. You could do it, you
13 know, in your proposed final orders, but it might
14 make it less onerous if you do it when they come
15 up.

16 MR. NORDBY: Thank you, Judge. And we will
17 note that during the course of the proceeding.

18 THE COURT: Sure.

19 MR. NORDBY: I think that I agree with you,
20 that's a more efficient way to do that.

21 THE COURT: Okay. Exhibits PSC-1 through
22 PSC-7, any objections?

23 MS. FALL-FRY: No, Your Honor.

24 MR. MOYLE: No.

25 THE COURT: Okay, they are all in as well.

1 (Whereupon, PSC Exhibit Nos. 1-7 were received
2 into evidence.)

3 THE COURT: And then I don't see any others.
4 So all the exhibits are in.

5 Are -- do the parties anticipate any further
6 exhibits?

7 MR. MOYLE: FIPUG has some exhibits that are
8 listed as well.

9 THE COURT: Are they listed? Did I --

10 MR. MOYLE: I think they are.

11 MS. FALL-FRY: They are listed. They are not
12 numbered, but they begin on page 10.

13 THE COURT: Oh, I don't have page 10, not on
14 my exhibit list. That's the -- let me look at
15 that.

16 Page 10 -- oh, I see them. They aren't
17 numbered. Do you have them before me in a book?

18 MR. MOYLE: I have them. I was prepared to
19 just put them in with the witnesses.

20 THE COURT: Okay. We will number them as they
21 come in.

22 So are they -- does everybody agree to their
23 admission?

24 MS. HARPER: PSC objects to those exhibits,
25 Your Honor.

1 THE COURT: Okay.

2 MS. HARPER: All of them.

3 THE COURT: All of them.

4 What's the grounds for objection?

5 MS. HARPER: Relevance and hearsay.

6 THE COURT: Relevance and hearsay. Well, the
7 hearsay is what it is, and we certainly, you know,
8 in these proceedings take hearsay, but just
9 cooperative purposes.

10 MS. HARPER: Right.

11 THE COURT: As far as relevance, I mean, like
12 for instance --

13 MS. HARPER: Well, for -- not to cut you off,
14 but there is links to Florida Channel 2010 sessions
15 on a bill that has nothing to do with the proposed
16 rules.

17 THE COURT: House Development Community
18 Affairs --

19 MS. HARPER: These are 2010 videos.

20 THE COURT: Mr. Moyle.

21 MR. MOYLE: Yeah, I don't think we are going
22 to use those, but those -- what those were, for
23 relevancy purposes, those were, to the extent that
24 we had a debate about the regulatory costs, the
25 Statement of Estimated Regulatory Costs, those

1 links have the Florida debate and the House debate,
2 and are going go to be used if need be --

3 THE COURT: On regulatory -- on a SERC issue
4 at the public -- pertaining to this law?

5 MR. MOYLE: That's right, the Statement of
6 Estimated Regulatory Costs.

7 THE COURT: On that, yes.

8 MS. HARPER: But not PSC SERCs. Not PSC
9 Statement of Estimated Regulatory Costs. Some
10 general bill on SERCs from 2010 is not relevant.

11 THE COURT: It may not be. You know, I will
12 be able to look at that as we come, and if you have
13 a specific reference that you can talk about, and
14 Mr. Moyle has indicated that he is not going to put
15 these in -- he has them, but he hasn't numbered
16 them yet. Let's just take them as they come --

17 MR. MOYLE: That's fine.

18 THE COURT: -- and I will rule on the
19 objections.

20 MR. NORDBY: Judge, if I can just be heard
21 briefly on this.

22 THE COURT: Yes.

23 MR. NORDBY: This was a bill in 2010 that
24 amended the Administrative Procedures Act. FPL
25 certainly doesn't object to Mr. Moyle making legal

1 argument about what the APA means, but we would
2 object to the introduction of exhibits or video
3 testimony about what a House committee said about
4 what the APA means. This is a proceeding on a
5 specific PSC rule, not about what the APA means
6 generally.

7 THE COURT: We're not -- yeah, the statutory
8 interpretation of the APA, is that what we're
9 doing?

10 MR. MOYLE: Well, the point that I may use
11 these for, probably not, but it's the SERC point,
12 the Statement of Estimated Regulatory Costs,
13 because the Legislature amended it and said, hey,
14 we want -- if you are going to have costs,
15 regulatory costs, we want you to identify them.
16 And that's the point that we are focusing on in
17 this proceeding, and these legislative clips relate
18 to that.

19 THE COURT: Well, you know, to the extent, I
20 guess, if legislation on SERC and other issues is
21 ambiguous and we need to go to external sources
22 maybe, but it would have to show an ambiguity, I
23 think, before I go there, right?

24 MR. NORDBY: And, Judge, I would agree with
25 that. And if Mr. Moyle's client had standing, we

1 would not object to them making legal arguments on
2 that point. Our objection is their introduction as
3 substantive evidence in this case. Certainly, any
4 attorney here can make legal arguments about what
5 the statute means without having to introduce
6 evidence about that.

7 THE COURT: Right, other than I think you can
8 do extrinsic evidence for statutory interpretation
9 should there be an ambiguity should I not -- should
10 the plain -- I mean, we all go by the plain meaning
11 of the statutes. If there is something that's not
12 plain, and there is something that could help us
13 understand, I may be inclined, but we will see.
14 You know, relevance reservation is certainly there,
15 so we will see -- we will rule on it when we see
16 it, or when it's attempted to be introduced.

17 Now, let's see, on the other matter --

18 MR. GONZALEZ: Well, Your Honor, one final
19 document that we would like to have introduced into
20 evidence is the deposition transcript of Marshall
21 Willis and the attachments. It's the only
22 deposition taken in this case. It was just on
23 Monday.

24 THE COURT: Who was -- was that the expert?

25 MR. GONZALEZ: This is the witness for Office

1 of Public Counsel, Marshall Willis.

2 THE COURT: That there is an objection to his
3 expertise, or is he not going to be here?

4 MR. GONZALEZ: Well, I would just like -- he
5 is going to testify today.

6 THE COURT: Right.

7 MR. GONZALEZ: And in the interest of
8 shortening our cross-examination, we would just
9 like to have, subject to the hearsay considerations
10 and all those objections and our objections to his
11 comments, I would just like the entire transcript
12 in the interest of completeness and me not to have
13 ask him two hours of questions and instead of
14 asking him about --

15 THE COURT: Do the parties agree to that
16 procedure? Because usually depositions are really
17 for impeachment purposes. You can throw in -- I
18 guess is he aligned with the party, or is he part
19 of the --

20 MR. GONZALEZ: He is part of OPC, and then,
21 you know, and numerous administrative --

22 THE COURT: So you are saying maybe a
23 statement of a party opponent that comes in --

24 MR. GONZALEZ: Right. We typically have all
25 stipulated to all the deposition transcripts coming

1 in in the last several of these.

2 THE COURT: Okay.

3 MR. GONZALEZ: And I don't know that there
4 will be any objection to that. And I think in the
5 interest of shortening his cross-examination, they
6 would probably prefer that. I just think in the
7 interest of completeness, it would be --

8 THE COURT: Do I have it here?

9 MR. GONZALEZ: I have three copies of it here.

10 THE COURT: Is it -- have you not submitted --
11 are these books up here the things that --

12 MR. GONZALEZ: These are the joint exhibits.

13 THE COURT: Joint is here.

14 MR. GONZALEZ: And I think these are the OPC
15 exhibits.

16 THE COURT: OPC is here.

17 MR. GONZALEZ: And this is Mr. Willis'
18 deposition.

19 THE COURT: Okay. And Mr. Willis' deposition,
20 it looks as though you kept him a while.

21 MR. GONZALEZ: I think I was generally --

22 THE COURT: Okay. So without objection, I
23 guess that will come in as well, right?

24 MR. GONZALEZ: Thank you.

25 THE COURT: Mr. Willis' deposition. I will

1 call that -- do we want to call that -- do we want
2 to call it a joint exhibit again?

3 MR. GONZALEZ: We pick up with the last joint
4 exhibit.

5 THE COURT: It will be Joint 51, I think.

6 MS. FALL-FRY: That's fine with us.

7 (Whereupon, Joint Exhibit No. 51 was received
8 into evidence.)

9 THE COURT: Okay. And then -- and you can put
10 it in your proposed final orders, if you want to,
11 all the acronyms, but I would -- what I would do is
12 I would call Florida Industrial as opposed FI --
13 what did you want to use -- some other acronym, I
14 would call them Florida Industrial.

15 As far as the Florida Public Service
16 Commission, PSC is good.

17 Office of Public Counsel, OPC is fine.

18 FPL, yeah, you could call it Florida Power if
19 you want to.

20 Gulf Power, I would prefer Gulf Power as
21 opposed to GPC.

22 Duke Energy, how about Duke Energy instead of
23 DEF. I am just saying, as I write my orders, I
24 tend to un -- I tend to use real words.

25 TECO, though, for some reason, TECO -- you

1 know, I used to work in Tampa. Everybody knows
2 TECO, so we will use TECO.

3 So that's, when you are looking back at the
4 transcript, if you want to use those as opposed to
5 the acronyms, that would be nice.

6 So we are going to take a -- I think we are
7 going to take a witness from the Public Service
8 Commission, but it's the Office of Public Counsel's
9 witness. Ms. Fall-Fry, if you would call your
10 first witness?

11 MS. FALL-FRY: Thank you, sir. We call Tom
12 Ballinger to the stand, please.

13 THE COURT: Have a seat right here. These are
14 mine as well. Let me see if I --

15 MR. GONZALEZ: There is a separate witness
16 copy.

17 THE COURT: The deposition I need.

18 MR. GONZALEZ: The deposition, he will not
19 need this, but I will put it up here.

20 THE COURT: Okay. So I have -- I think I
21 have -- let's see, joint exhibits.

22 Okay. Would you state your name for me,
23 please?

24 THE WITNESS: Yes, my name is Tom Ballinger.

25 THE COURT: Would you raise your right hand?

1 Whereupon,

2 TOM BALLINGER

3 was called as a witness, having been first duly sworn to
4 speak the truth, the whole truth, and nothing but the
5 truth, was examined and testified as follows:

6 THE WITNESS: I do.

7 THE COURT: Ms. Fall-Fry.

8 MS. FALL-FRY: Thank you.

9 DIRECT EXAMINATION

10 BY MS. FALL-FRY:

11 Q Mr. Ballinger, where are you employed?

12 A I am the Director of Engineering at the
13 Florida Public Service Commission.

14 Q Were you in attendance at the June 25th rule
15 development workshop?

16 A Yes, I was.

17 Q Do you remember making a comment at that
18 workshop regarding the project level detail?

19 A I made several comments at that workshop.

20 Q Would it help if you -- we have it as Exhibit
21 1 in the binder. Would it help you to refer to it?

22 A Sure. I have some excerpts too from it that
23 you provided earlier.

24 Q Yes.

25 A If you would point me to a page.

1 Q Page 28, lines 15 through 21, please.

2 A This is June 25th?

3 Q Yes.

4 A I don't have that page. So which exhibit is
5 it?

6 Q It's Exhibit 1 in our binder, the white
7 binder.

8 A This binder?

9 Q Yes?

10 THE COURT: Page 28 of the transcript?

11 MS. FALL-FRY: Yes.

12 THE WITNESS: Okay, this is an exchange with
13 Mr. Rubin and myself it looks like.

14 BY MS. FALL-FRY:

15 Q Yes. Would you mind reading that?

16 A You want me to read the question and answer?

17 Q Lines 15 through 21, please.

18 A Okay.

19 "And I think the little clarification on why
20 we went to projects, it goes to the bill's language
21 about the Commission being able to modify a plan. And
22 to us that means --" I am sorry, to what lines did you
23 want me to go?

24 Q Keep going until line 21, please.

25 A Thank you. I apologize.

1 "And to us that means we have to have pieces
2 to move around. So the more pieces we have, the way we
3 can modify a plan, and I think why we are going to
4 projects."

5 Q Would you mind explaining your thoughts there?

6 A Yes. At that time -- you have to take this in
7 context of the rules and the statute. The Commission
8 had previously hardening rules, hardening plans the
9 utilities had done that the Commission developed under
10 its broad authority for regulation and adequacy of the
11 grid back in 2004-2005 period. So these rules now that
12 came from the Legislature were more specific directions
13 to the Commission. So we were looking at amending our
14 procedures with the possibility of repealing our
15 hardening rules.

16 Specifics in this new legislation gave the
17 Commission the authority to modify plans of a utility.
18 It was staff's thinking to try to make the process more
19 efficient that if we are going to modify plans, the more
20 details granularity we have, we can move pieces around
21 to get -- to see what we need to do. That was our
22 initial thought going into this in the initial workshop.

23 Q Thank you.

24 Would you mind turning to page 46?

25 THE COURT: Before you move on, hardening

1 rules, explain.

2 THE WITNESS: Yes, sir. I apologize.

3 Hardening is a term used basically to
4 strengthen the system. Changing wood poles out
5 with concrete poles, for example, the electrical.

6 THE COURT: The very purpose supposedly for
7 this statute is hardening the infrastructure?

8 THE WITNESS: Exactly. This was something
9 that the utilities had been doing for years
10 already.

11 THE COURT: Okay. Go ahead. I am sorry, just
12 making sure.

13 MS. FALL-FRY: Oh, no, we want you to
14 understand.

15 THE WITNESS: I am sorry, what page?

16 BY MS. FALL-FRY:

17 Q Page 46, please.

18 A Okay.

19 Q Do you remember making comments at the same
20 workshop about needing details in the second and third
21 year of the plans?

22 A Yes.

23 Q Could you read on lines eight through 16?

24 A Sure. This is as I interrupted Mr. Graves
25 here, who was chairing the workshop.

1 If I can jump in, Robert. Again, we're going
2 with what the bill is asking us to do, and the one part
3 is the rate impact for the first three years. So I
4 think the granularity needs to be there for those years
5 as much as possible. I understand as you go in time it
6 gets only -- it gets a little less and less, but I don't
7 think year one is the only one we have. Years two and
8 three is going to have some specificity in it.

9 Q And was your statement there again about staff
10 needing the detail in order to be more efficient in
11 following the law as required?

12 A Yes.

13 Q On the next page, lines two through 10, could
14 you read that, please?

15 A That's a broader spectrum. So we may have
16 some things there, but I don't want us to -- us to lose
17 sight that I think we need this level of detail, at
18 least for the first three years, if we are going to be
19 able to do anything to evaluate the rate impact
20 effectively and to be able to modify, as we've been
21 presumably given the authority, if this goes through.
22 Again, that's what we are reacting to.

23 Q Could you explain that a little bit more?

24 A Yes, ma'am.

25 We -- again, the PSC -- these -- the statute

1 was requiring the PSC to adopt administrative rules. So
2 these are filing requirement rules for utilities to
3 start a process which will go on then to an
4 administrative hearing with the Commission, with
5 discovery and testimony and the like. So the purpose of
6 these rules was to set up the administrative procedures
7 to establish minimum filing requirements for utilities.

8 At this time, we were thinking in order to
9 minimize the amount of discovery possibly needed, or
10 controversy, to get as much detail as possible in the
11 initial filing. So it was a way to try to make the
12 rules as administratively as efficient as possible from
13 our standpoint.

14 We were looking forward, not just as a
15 one-time rule, but going forward. You have this rule
16 also coupled with the clause rule, which was discussed
17 also at these workshops. So staff is looking at how to
18 administratively make this efficient.

19 It's very similar with what we do with
20 utilities when they file other petitions for recovery.
21 If it's a novel idea, or something not really laid out
22 in the rules, typically we will meet with the utilities
23 and parties and discuss what their pleading will be, and
24 get some idea of what to include then, and get
25 suggestions to include in their initial filing to help

1 the process move more efficiently.

2 Q And you have worked at the Commission for
3 quite a long time, correct?

4 A 34 years.

5 Q So you have a lot of experience with working
6 with the rules and the statutes as you have to implement
7 them?

8 A Yes, ma'am.

9 Q And when you speak about rule development and
10 at these workshops, you are giving your experience and
11 expertise in how to best develop those rules for the
12 purposes of staff; is that right?

13 A It's a couple of things. It's looking at the
14 requirement in the statute, to make sure we meet though.
15 It's looking at the administration of the staff going
16 forward, and workloads, and how that will affect our
17 whole process. So, yes, the administration of the staff
18 as well.

19 Q And when you are speaking at these, even
20 though they are not sworn, you are telling the truth
21 from your perspective, correct?

22 A I swore to it today.

23 Q Thank you.

24 If we turn to our second exhibit in that book.
25 It's the August 20th workshop.

1 A Okay.

2 Q Do you remember making a comment at that
3 workshop about needing specificity in the plan to make
4 the tracking of projects through the plan process?

5 A Yes.

6 Q It's on page 17, could you read lines 15
7 through 23, please?

8 A Give me a moment to read the question and what
9 I was reacting to.

10 Q Sure.

11 A Okay, it was several questions from Mr.
12 Rehwinkel I was responding to, so what lines again?

13 Q 15 through 23.

14 A I think, on the other one with specific
15 projects, we are looking -- we are thinking it of it as
16 linear projects. That's why we said a specified area.
17 We think it's targeted, so as much specificity as you
18 can to an area to give us that -- all the way through
19 the bottom?

20 Q All the way through line 23, ending with
21 "plan."

22 A And it's more of for tracking of projects, to
23 see what's coming as they go through a clause or not in
24 the clause, that kind of thing, and to reported to the
25 Legislature on the progress of your plan.

1 Q And there, were you talking about tracking
2 projects through the plan to the clause?

3 A Yes.

4 Q Would you turn to page --

5 A Could I add a clarification to that as well
6 why we were tracking it?

7 Q Sure.

8 A Previous, it might have been either previous
9 to this or in the first workshop, there was a discussion
10 about what constitutes a modified plan, because this
11 goes in concert with the clause.

12 The clause is an annual proceeding where we
13 look at cost recovery. The plan is a 10-year plan
14 provided by the utilities every three years. It's
15 update dated every three years. And these two mesh
16 together if they have to go together. We were looking
17 at this to try to see what kind of synergies we could
18 get between the two.

19 Q Is it easier for staff to track the projects
20 if there is more specificity in the plan through the
21 clause since the plans aren't updated as frequently?

22 A Is it easier? I don't know. I think it gives
23 us -- it could raise areas to pursue through discovery.
24 For example, if one project was projected to be in and
25 now it's not in the clause anymore, you could inquire

1 about why, or why it was delayed, things of that nature.

2 Q Could you turn to page 41?

3 A Okay.

4 Q Lines 14 through 23. And if you want to read
5 it to yourself to get context again, that's fine.

6 A I think I was having a conversation with Mr.
7 Bromley of FPL and about the detail. You want me to
8 read lines 14 through 21?

9 Q 23.

10 A So we struggled again, I go back to the
11 Legislature say -- I don't believe I actually said this,
12 but I am going to read what it says here. So we are
13 struggled again, I go back to the Legislature to say we
14 have to give consideration of the three-year rate
15 impact. And to get that, I need some detail of how the
16 rate impact was developed to see what can be moved and
17 what's going on. Are you ramping up from 200 to 600 to
18 800 projects, you know, those kinds of things. I know
19 it's a tough challenge, but that's what we were trying
20 to grapple with here.

21 Q Do you want to give the correction you think
22 should be there?

23 A That's good enough for now.

24 Q Okay. One last one, could you turn to page
25 54?

1 A Okay.

2 Q Lines eight through 16.

3 A You said eight through 16.

4 Q Yes.

5 A Let me -- I want to make it clear, our vision,
6 if you will of this, is a plan just that. It's a plan.
7 It's an overarching plan for their hardening. I fully
8 suspect that the first plan to come in, 80 to 90 to 95
9 percent of the cost of that plan will be in current base
10 rates. They are current things they are doing now, such
11 as pole inspections, perhaps, or vegetation management
12 is a key example.

13 MS. FALL-FRY: That's all we have.

14 THE WITNESS: Thank you.

15 MR. MOYLE: I have --

16 THE COURT: Mr. Moyle.

17 DIRECT EXAMINATION

18 BY MR. MOYLE:

19 Q Good morning, Tom.

20 A Good morning, Mr. Moyle.

21 Q FIPUG participated in the rule development
22 process of this rule we are talking about today,
23 correct?

24 A Correct.

25 Q And I wanted to just ask you a couple of

1 questions, and I hope maybe a couple of comments on
2 things to the judge, and I think you probably agree, but
3 regulatory compact, could you describe that, please?

4 A Regulatory compact is a utilization utilities
5 are expected to prudently manage their systems through
6 the investment of infrastructure to provide reliable
7 service for their customers. And the compact would be
8 that they can -- be allowed the opportunity to recover
9 that at a reasonable rate return.

10 Q And the compact involves three parties, does
11 it not, the utility, the regulator and the customer?

12 A My personal opinion, I think it may be the
13 two, the utility and the customer, and the customer
14 would fall out of the regulator's decision.

15 Q Don't the customers play a key part with
16 respect to what we are here today about with respect to
17 the rule, and ultimately the ratepayers will be paying
18 the rates?

19 A They are impacted by the rates, but our rule
20 direct what utilities do, not what customers do.

21 Q What's used and useful?

22 A Term of art used, I think you described in
23 your opening statement as something in service to
24 provide service to customer, utility services.

25 Q And isn't that something typically that is

1 strived for in regulatory setting, that you don't charge
2 customers for things that are not used and useful?

3 A Correct, but I -- as you are aware of,
4 especially with electric companies, when we set rates,
5 we use what's called a projected test year. So
6 utilities would typically file, let's say in year 2019,
7 for projected costs in year 2020 what they will be,
8 because by the time you go through the process you are
9 in 2020. So you are setting estimated costs for plan
10 O&M, and things of that nature, and the rates are
11 actually set based on projections.

12 Q And intergenerational transfer, can you
13 describe that for the Court?

14 A I think you did a good job in your opening
15 statement for that.

16 Q I'm not sure that will work for evidentiary
17 purposes, but I appreciate it.

18 A Okay, then I will go on.

19 I think it is the concept, if you will, of
20 people today paying for something that they may not see
21 the benefits of in the future.

22 Q And this rule, as you put it forward, it
23 allows for utilities to recover for things that have not
24 necessarily been put in the ground, correct? It allows
25 for projected costs?

1 A You are going to a little beyond. I think you
2 are going into the clause rule, and Mr. Breman will be a
3 good witness for that, but I will give you my
4 interpretation of it.

5 The way the clauses work, you have three --

6 Q I just -- the question simply is if you know.
7 I can ask Jim when he comes up --

8 A I know.

9 Q -- if it does allow for the recovery of future
10 costs, yes, no?

11 A It does, and then it trues it up to actual
12 costs.

13 Q Okay. And there is nothing in the statute
14 that says the Commission can -- gives them authority to
15 charge for projected future costs in this statute, this
16 undergrounding statute, correct?

17 MR. KING: Objection, Your Honor, that calls
18 for a legal conclusion.

19 MR. MOYLE: If he knows. I mean, you know,
20 the statute speaks for itself, so I just asked, if
21 he knows. He was involved in the rulemaking. Part
22 of our argument is it exceeds the statutory
23 authority. I am asking him if he knows of anything
24 in the statute that says utilities can recover for
25 future costs.

1 THE COURT: Overruled.

2 THE WITNESS: The statute says, I believe says
3 recover prudently incurred costs, and also directs
4 the Commission to develop rules through the Cost
5 Recovery Clause. Clauses do just that. They allow
6 as a three-part process of projected, actual and
7 then actual true-up.

8 BY MR. MOYLE:

9 Q And when it says incurred, that's in the past,
10 is it not?

11 A It's kind of -- I -- yes. I do it as analogy
12 like this: You estimate your taxes for the following
13 year so you have deductions taken out of your paycheck,
14 but at the actual end of the year, you pay the actual
15 taxes. So you estimated your costs going forward, and
16 then you actually pay them, and that's what you
17 incurred.

18 Q You have gotten way beyond my comfort zone
19 with an analogy to taxes, but anyway, you had to put in
20 place this rule, and the statute is not self-executing,
21 correct?

22 A Correct. I believe we had by October 31st to
23 propose a rule.

24 Q All right. And with respect to my client,
25 Florida Industrial Power Users Group, you are aware that

1 they are an association comprised of large
2 commercial/industrial power users within the state who
3 take electricity from the state's IOUs, correct? Hasn't
4 the Commission found that in numerous orders granting
5 intervention?

6 A I am aware that the Florida Industrial has
7 been granted intervention in several PSC proceedings.

8 Q And that the Commission has found, and it is
9 an association with large commercial/industrial power
10 users in the state of Florida?

11 A I will take, subject to check, that that
12 appears in some PSC order.

13 Q And you are aware that FIPUG, over the years,
14 has entered into settlement agreements with utilities?

15 A Yes, sir.

16 Q And you are not aware of the Commission ever
17 having said FIPUG doesn't have standing in any
18 proceeding, are you?

19 A I am not aware of any.

20 Q And FIPUG is a regular participant in clause
21 proceedings, and proceedings in which rates are
22 impacted, correct?

23 A Yes, sir, we see each other often.

24 Q Right. And rates obviously have an impact,
25 not only on FIPUG members, but increased rate has an

1 impact on all customers; correct?

2 A Depending how they are allocated, yes.

3 Q And this rule -- this rule, particularly the
4 part that Jim is responsible for, that will have impacts
5 with respect to rates on customers, correct?

6 A I don't believe the rule itself will. The
7 rule itself is an administrative filing requirement of
8 utilities of what minimum information to file. The
9 actual rates will be decided at an evidentiary hearing.

10 Q Right, but with respect to what it tells them
11 to file, it tells them to file certain information that
12 will be considered by the utility when making a decision
13 about rates; correct?

14 A Correct.

15 Q Right. So whether it's directly or
16 indirectly, the rule impacts rates?

17 A Again, it's just the minimum starting point,
18 if you will, of a process that can go on with the
19 discovery and testimony and things of that nature.

20 MR. MOYLE: One minute, if I could, Your
21 Honor.

22 That's all I have. Thank you.

23 THE COURT: Okay. Cross-examination, starting
24 with the PSC.

25 MS. HARPER: Yes, Your Honor. Yes, sir just a

1 couple of questions.

2 CROSS EXAMINATION

3 BY MS. HARPER:

4 Q Mr. Ballinger, OPC asked you some questions
5 about statements that you made during previous workshops
6 on these rules, and I would like to just ask you a
7 couple of questions and follow up on that if that's
8 okay.

9 The first question I want to ask you has do
10 with the rules as they are proposed today by the
11 Commission. The rules that are before us now,
12 specifically the plan rule, I believe that's what you
13 focused more on. So does the plan rule proposed by the
14 Commission require utilities to provide both program and
15 project level detail?

16 A Yes, for year one.

17 Q Can you please explain what the proposed rule
18 requires as to detail?

19 A I do not have the rule in front of me. I need
20 that to refresh my memory.

21 Q Okay.

22 THE COURT: Do we have this as an exhibit, the
23 rule itself? I think it's attached --

24 MS. HARPER: I believe it's in the joint
25 exhibits, yes.

1 THE COURT: It is an exhibit? What exhibit?

2 MR. GONZALEZ: J-34.

3 MS. FALL-FRY: Right.

4 THE COURT: J-34?

5 MS. FALL-FRY: Yes.

6 THE COURT: Okay.

7 THE WITNESS: Okay. We got them.

8 BY MS. HARPER:

9 Q Do you need me to repeat my question?

10 A No. You wanted to know what the detail is
11 required in year one?

12 Q I want you to explain the level of detail in
13 general that's required by the proposed rule, the plan
14 rule we are talking about, 030.

15 A All right. I am looking at the construction,
16 estimated construction start dates and completion dates
17 for projects.

18 Any affected facilities. In other words, if
19 you were going to replace an overhead line with an
20 underground line, you are replacing some existing
21 facilities, things of that nature.

22 What the performance was of that existing
23 circuit. In other words, were the customers having
24 reliability issues on a day-to-day basis, and that may
25 be a reason why you are doing this hardening.

1 And our cost estimate of the project.

2 Q Okay.

3 THE COURT: So were you looking at a specific
4 provision of the rule?

5 THE WITNESS: Yes, sir. I am looking at --
6 let's see, subpart (5)(e) -- (5)(e)1 actually.

7 THE COURT: And this is -- is this 6.030?

8 THE WITNESS: Yes, sir.

9 THE COURT: Five --

10 THE WITNESS: (5)(e), as in Edward, 1.

11 THE COURT: Okay.

12 THE WITNESS: It starts from the first year of
13 the plan.

14 MR. KING: It's (3)(e).

15 THE COURT: (3)(e).

16 MR. KING: Right.

17 THE WITNESS: Three -- there is a five -- I am
18 sorry, you are right, it is. I apologize, three is
19 in parenthesis. So it's (3), contents of the Storm
20 Protection Plan, sub (e), part 1.

21 THE COURT: Okay.

22 THE WITNESS: I apologize.

23 THE COURT: No, that's okay.

24 BY MS. HARPER:

25 Q Mr. Ballinger, can you please read your -- you

1 read (e)1 there under (3). Can you please read (e)2 for
2 the second and third years?

3 A For the second and third years of the plan,
4 project related information in sufficient detail, such
5 as estimated number and costs of projects under every
6 specific programming, to allow the development of
7 preliminary estimates of rate impacts as required by
8 paragraph (3)(h) of this rule.

9 Q So then does this rule require both program
10 and project level detail?

11 A Yes, it does.

12 Q Does this rule require enough information as
13 adequate for the Commission to make an estimate on rate
14 impact?

15 A Yes, it does.

16 Q Does this rule approve any costs? In other
17 words, if the plan is approved under this rule -- if a
18 utility's plan is approved under this rule, are any
19 costs approved?

20 A No. And that was -- that was clearly
21 discussed at the workshops, that the approval of a plan
22 is not an approval of actually building and to implement
23 that plan. It is just that, a plan. It's for
24 information for the Commission to unfold.

25 Q And does the approval of a plan under this

1 rule change customers rates?

2 A No.

3 MS. HARPER: No further questions.

4 THE COURT: I guess we will just go in line as
5 we have gone, FPL and Gulf Power, Mr. Gonzalez?

6 MR. NORDBY: Judge, Dan Nordby from Shutts &
7 Bowen. I just have a few brief questions.

8 THE COURT: You are going to do that?

9 MR. NORDBY: Yes, sir.

10 CROSS EXAMINATION

11 BY MR. NORDBY:

12 Q Good morning, Mr. Ballinger. How are you?

13 A Fine. How are you?

14 Q I just want to ask you a couple of brief
15 follow-up questions.

16 You were asked some questions by the Office of
17 Public Counsel's attorney about the rule workshops you
18 participated in. Do you recall that testimony?

19 A Yes.

20 Q Those rule workshops were intended to develop
21 the rules, is that correct?

22 A Correct. It's a typical process we do for
23 rulemaking, take input from parties, affected agencies
24 and other people, staff. It's a way of gathering
25 information.

1 Q So who was there to provide the information
2 you were seeking to gather as you as staff developed the
3 rules?

4 A I believe the workshop attendance had the
5 Office of Public Counsel, had all the investor-owned
6 utilities. It had, I believe, the Florida Retail
7 Federation. Might have had Florida Industrial was
8 there. I don't believe any environmental agencies or
9 organizations were there such as Southern Alliance for
10 Clean Energy, I don't recall if they participated or
11 not.

12 Q So in the excerpt of the transcript that you
13 were asked to read by the Office of Public Counsel, at
14 one point you said that granularity would be helpful,
15 quote, "as much as possible." Do you recall saying
16 that?

17 A Yes.

18 Q And in the portion that you read from Office
19 of Public Counsel, Exhibit 2, you said, quote, as much
20 specificity as you can. Do you recall saying that?

21 A Yes.

22 Q Who did you want to gather that information
23 from about what was possible, and how much specificity
24 could be provided?

25 A Who were we gathering it from?

1 Q Yes.

2 A The utilities. And I think earlier, it was at
3 the June 20th -- I am sorry, the August 20th workshop,
4 we talked about that, and we didn't want utilities to go
5 recreate or go and create something that they didn't
6 have.

7 Again, we are trying to keep this process
8 efficient. We saw this as a substitute, if will you,
9 for our current hardening plan and our current hardening
10 rules. This was not a major overhaul of our system that
11 we had in place.

12 Q Did you, in fact, accept information from the
13 utilities at the rule workshops?

14 A Yes. They provided even draft rule language,
15 which we typically solicit from everybody.

16 Q And did you also accept commentary and
17 information from Public Counsel representatives at the
18 rule workshops?

19 A Yes, we did.

20 Q Did the Commission provide an opportunity for
21 postworkshop submission of written comments?

22 A I believe we submitted -- we solicited both --
23 written comments from both workshops. So, yes, two
24 rounds of that.

25 Q Ultimately, does the plan rule that the

1 Commission proposed have enough detail for the
2 Commission to make an informed decision on the approval
3 of a plan?

4 A I believe it does.

5 Q Okay. I want to ask you a few questions about
6 the questions you received from Mr. Moyle now. Turning
7 to a different topic.

8 Do you personally know how many members FIPUG
9 claims to have?

10 A I do not.

11 Q Do you personally know how many of those
12 members are customers of investor-owned utilities?

13 A I do not.

14 Q Do you personally have any information as to
15 the degree to which these rules would affect FIPUG's
16 alleged members?

17 A Could you repeat the question?

18 Q Sure, and I will rephrase it. I will ask a
19 better question.

20 Do you personally have any information as to
21 how these rules might affect the members that FIPUG
22 claims to have, the degree to which it might affect
23 their rates in any way?

24 A As I said earlier, in my view, these rules are
25 administrative rules to utilities directing them what to

1 file. The outcome, yes, will affect FIPUG members, but
2 not the rules themselves. So I think back to the
3 evidentiary proceeding, much like any other proceeding
4 at the Commission.

5 Q So just to clarify, that effect would not be
6 these rules, it would be the proceedings that occur
7 under these rules, is that correct?

8 A Correct.

9 Q Okay. Do either of these rules, themselves,
10 raise or lower any customers electric utility rates?

11 A No, not the rules themselves.

12 MR. NORDBY: I don't have anything further.

13 Thank you.

14 THE COURT: Yes, sir.

15 MR. MEANS: No questions, Your Honor.

16 THE COURT: TECO? Mr. Means?

17 MR. MEANS: That me, Your Honor.

18 THE COURT: I'm sorry. Wait just a minute.

19 Mr. Bernier, yes.

20 MR. BERNIER: We have no questions.

21 THE COURT: Okay.

22 MR. BERNIER: Thank you.

23 THE COURT: Sorry. You are at the table and I
24 was trying to -- okay.

25 So is there any redirect?

1 MS. FALL-FRY: Just a second. No thank you.

2 THE COURT: Mr. Moyle?

3 MR. MOYLE: No redirect.

4 THE COURT: Well, thank you very much.

5 THE WITNESS: Thank you, Your Honor. I
6 appreciate the accommodation of my schedule.

7 MS. FALL-FRY: Absolutely.

8 THE COURT: Have a good day.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 THE COURT: Ms. Fall-Fry, next witness.

12 MS. FALL-FRY: If it pleases Your Honor, may
13 we take a break?

14 THE COURT: Yes. On breaks, I was just
15 thinking of breaks myself, you know, what we should
16 do is try to really limit them to five or six
17 minutes. I know there are a lot of us, so it may
18 be longer, but a group this size breaking sometimes
19 takes too long. We've got a lot today.

20 I don't know, are we going to be in the
21 evening, do you think? What do the parties think
22 about that?

23 MS. HARPER: I hope not, but a five-minute
24 break sounds reasonable to us.

25 THE COURT: Okay. Five to seven or eight

1 minutes, you know, try to get back before 10
2 minutes, okay?

3 Take a break.

4 (Brief recess.)

5 THE COURT: We are back on the record. Is
6 everybody here that's participating? Is Duke
7 Energy represented?

8 MR. BERNIER: I lost track of time. I
9 apologize.

10 THE COURT: Okay. Ms. Fall-Fry, your next
11 witness.

12 MS. FALL-FRY: We call Marshall Willis to the
13 stand.

14 And before he is sworn, Your Honor, I think
15 the parties have all worked out that we have
16 accepted him as an expert in rulemaking and
17 regulatory accounting, so we don't need to go
18 through voir dire unless Your Honor would like to.

19 MR. GONZALEZ: That essentially resolves FPL
20 and Gulf's concerns in our motion in limine that he
21 may testify on the engineering issues related to
22 the project level detail.

23 THE COURT: Okay.

24 MR. GONZALEZ: Yeah.

25 THE COURT: You have withdrawn the limine?

1 MR. GONZALEZ: I think, based on our agreement
2 now, he is not going to try to offer expert
3 testimony on that, so that -- I think we are
4 satisfied with that.

5 THE COURT: So that's why you are withdrawing
6 because it's not going to be an issue.

7 MR. GONZALEZ: We pretty much agree he is not
8 going to be an expert.

9 THE COURT: Well, if he veers into that, you
10 can remind me, okay?

11 MR. GONZALEZ: Thank you.

12 THE COURT: So, Mr. Wills, if you would raise
13 your right hand, please?

14 Whereupon,

15 MARSHALL WILLIS
16 was called as a witness, having been first duly sworn to
17 speak the truth, the whole truth, and nothing but the
18 truth, was examined and testified as follows:

19 THE WITNESS: I do.

20 THE COURT: With that, Ms. Fall-Fry, your
21 witness.

22 DIRECT EXAMINATION

23 BY MS. FALL-FRY:

24 Q Good morning.

25 A Good morning.

1 Q You are currently employed at OPC, correct?

2 A That is correct.

3 Q Could you tell us what OPC is?

4 A I am sorry, I didn't hear you.

5 Q Could you tell us what OPC is?

6 A Office of Public Counsel is an office that is
7 established by the statutes in the State of Florida, and
8 they are basically mandated to appear on behalf of the
9 consumers of utility companies before the Florida Public
10 Service Commission in all matters, which would include
11 this one.

12 Q And what are your responsibilities at OPC?

13 A My position title, or my position description
14 is that of Chief Legislative Analyst. As far as my
15 positions goes, I am there basically to give my expert
16 opinion to Public Counsel, to give my analysis when
17 necessary on the cases they assign me, as well as
18 testimony when required. I also provide training to not
19 only some of our new accountants that have come onboard,
20 but also to attorneys on staff.

21 Q Okay. And in your experience, could you
22 explain to us how electric utility companies generate
23 revenue?

24 A Utility companies generate revenue by charging
25 their retail customers for electrical or electric

1 consumption through their bills.

2 Q And generally speaking, what components make
3 up the bills that customers may see?

4 A Well, it would include a base charge, which is
5 predominantly one of the largest charges in the bill.
6 There will also be clauses such as the fuel charge, the
7 Environmental Cost Recovery Clause, Capacity Cost
8 Recovery Clause, Conservation Cost Recovery Clause.
9 There used to be a Nuclear Cost Recovery Clause, but I
10 don't believe anybody is really charging at this point
11 through that. There -- and of course this will be the
12 new, the Storm Protection Plan Cost Recovery Clause.

13 There also would be probably other charges on
14 the bill for people who are -- or companies who are
15 incurring storm recovery, they will be called
16 surcharges. And there will local charges on the bill
17 for taxes, franchise fees.

18 Q Let's take those bit by bit.

19 What are base rates that you mentioned?

20 A Base rates are the portion of the bill that a
21 company charges that are normally designed through the
22 rate case rulemaking process. And in doing that, the
23 base rate portion would include a determiner, which is
24 part equity, part debt cost on a utility's investment in
25 property that needs to serve customers, which would be

1 their generating facilities or transmission distribution
2 facilities; their general plant, which would be office
3 biddings, cars, trucks of that sort.

4 Once you come up with the actual dollar rate
5 of return they need to support the capital costs of the
6 company, you would add to that the operating expenses of
7 the company, which would include items like salaries,
8 maintenance, overhead, depreciation, would include
9 currently storm enhancement costs through the storm
10 hardening plans, a process approved by the Commission
11 for the year.

12 Once you add that all together, you come up
13 with a revenue requirement that a company believes they
14 need, and that gets further allocated into customers
15 bills through charges.

16 Q Okay. And you also mentioned the different
17 clause recoveries.

18 A Yes.

19 Q Does every customer pay the charges to
20 utilities that are imposed through those clauses?

21 A Yes, they do.

22 Q Do any of those clause recovery charges ever
23 lower base rates?

24 A Not the base rate portion, no.

25 Q Let's talk more about the Environmental Cost

1 Recovery Clause that you mentioned. Can you explain
2 that more?

3 A The Cost Recovery Clause was a clause that was
4 implemented by the Commission by statute. The
5 Legislature passed a law which implemented that
6 particular clause. It was designed to recover the cost
7 of mandated environmental projects that were mandated by
8 a governmental agency such as the federal government, or
9 a state government, the State of Florida, to pass
10 through that clause.

11 Q Can you explain how you are aware of that
12 clause?

13 A Because of my 38 years with the Public Service
14 Commission.

15 Q And you explained a little bit on what the
16 clause was designed to cover, but could you go into a
17 little more detail?

18 A Well, it's designed to cover specific projects
19 that a company brings to the Commission through an
20 application. And in that -- in that actual clause, it
21 talks about projected costs. Actually uses the language
22 projected in the Environmental Cost Recovery Clause.
23 And the Commission uses its normal three-year cycle
24 process of developing the clause where you use the --
25 for instance, let's just take an example to make it

1 simple.

2 If a company files for something to through
3 the Environmental Cost Recovery Clause for this year,
4 which would be -- well, let's just say the coming up,
5 2020, they would file for that for rates to go into
6 affect on January 1, 2021.

7 In that, they would ask for the costs that are
8 going to be projected in 2021. There would be a true-up
9 of actual estimated in 2020 because everything wouldn't
10 actually be known for 2020. It would also true-up costs
11 that have been in place since 2019. That would be that
12 three-year cycle.

13 Now, in the Environmental Cost Recovery
14 Clause, it also had a requirement in that clause that
15 rates would have to be reduced if a company -- if it was
16 actually in base rates. And that was really at the
17 point in time that the law was implemented that that
18 came into effect. But if a company decided they wanted
19 to put a project through the Environmental Cost Recovery
20 Clause and it happened to be in base rates, the law
21 basically requires there be a base rate reduction at the
22 same time the clause was increased to take care of that
23 project.

24 Q Okay. So you mentioned projected costs and
25 incurred costs. What are the projected costs?

1 A Well, projected costs to me are costs to be
2 projected in the future. That's what I was talking just
3 talking about in the Environmental Cost Recovery Clause.
4 It would cover the projected years of '21 and the
5 partial projected for '20.

6 Q And how is that different than the incurred
7 costs?

8 A To me, if it talks about incurred costs, it's
9 historical. And I heard an analogy earlier, but I would
10 do a different analogy.

11 I buy a house, I get a mortgage for that
12 house, but I take possession of that house on the day
13 that I buy it but I incur a mortgage at the same time,
14 but I have actually bought a house. I have got
15 possession of it. It's done. It's completed. It's
16 constructed. I have got it. I may pay the mortgage on
17 that for 15, 30 years, but it's a historical cost that I
18 actually own that.

19 Q Are you familiar with the statute at issue in
20 this case?

21 A I am sorry?

22 Q Are you familiar with the statute at issue in
23 this case, 366.96?

24 A Yes.

25 Q And what does that statute do?

1 A The current storm protection?

2 Q Yes.

3 A The statute basically requires that a company
4 file, first, a plan for 10 years for the immediate
5 future, immediate 10 years. Along with that, it says
6 for the first three years of that plan, they have to
7 file cost projections, or basically rate projections of
8 the rate impact for the first three years that the plan
9 is filed.

10 It also allows for recovery of costs, which is
11 the other part of the rule that the Commission staff is
12 proposing. To recover the costs, they are basically put
13 forth through the plan at some point in time, and it
14 established through that the Storm Protection Plan Cost
15 Recovery Clause.

16 Now, the one thing that's a little different
17 between this clause and the environmental protection
18 clause is that this clause didn't say that it has to
19 come out of base rates on day one. It just says there
20 will not be double recovery for projects that are
21 already in base rates. And it basically says you can't
22 do it. Don't put anything that's already in base rates
23 in the clause. It's only there to recover anything
24 above and beyond what's already being recovered through
25 base rates.

1 Q And why would the statute need to specify
2 that? Are there currently storm hardening or storm
3 enhancement costs in base rates?

4 A Yes, there are. The Commission, since 2007,
5 has been approving storm hardening plans, and they have
6 done it every three years on a three-year cycle. Those
7 costs can only be collected through base rates up to
8 this point. That would be the only way a company could
9 have collected those costs.

10 Q And the IOUs -- are the IOUs currently
11 recovering costs for those storm hardening activities?

12 A Yes, they are.

13 Q Through base rates?

14 A Yes, they are.

15 Q What types of projects are included in those
16 storm hardening activities?

17 A Well, traditionally, the costs have been pole
18 inspections, replacements. There have been for
19 vegetation management. There is hardening activities
20 for hardening overhead lines, hardening underground.
21 We've already heard Mr. Ballinger talk about that.
22 Those costs are ongoing. I think he indicated they are
23 ongoing. A lot of those costs would have already been
24 recovered, or are being recovered through base rates.

25 Q And while you were employed at the PSC, did

1 you work on dockets concerning the storm hardening
2 plans?

3 A The division that I worked in when I was with
4 the Commission was regulation, my staff members did work
5 on the Storm Hardening Plan, yes.

6 Q And as -- in your supervisory capacity, did
7 you participate in the review of those plans?

8 A Yes, as director of the division, I did. I
9 reviewed my staff's worked, signed off on those
10 recommendations.

11 Q And since you testified that they are
12 currently included in base rates, does that mean that
13 ratepayers are currently paying for those activities?

14 A Each year they pay for a level of activities
15 of storm enhancement based on their plan.

16 Q And do you know --

17 THE COURT: I would like you to explain
18 further the difference between the Environmental
19 Cost Recovery Clause the way it impacts base rates
20 compared to this law, this new law, how is it
21 different?

22 THE WITNESS: It's basically different in that
23 when a company would come forward with a
24 environmental protection project they wanted to put
25 through a clause, they had to do -- at the same

1 time they implemented an increase in the clause,
2 they had to reduce base rates accordingly, so there
3 will be no double recovery whatsoever.

4 It would go straight from base rates into the
5 clause, if it happened to be in base rates. If it
6 wasn't in base rates, there wouldn't be a reduction
7 in base rates.

8 That happened when the clause was implemented
9 in '94, the Commission had to go through several
10 proceedings to make sure that base rates were
11 reduced because the law required it to be reduced
12 when those projects came out of base rates and went
13 into a clause.

14 THE COURT: It's reduced based on duplicate of
15 services? Why -- how is it --

16 THE WITNESS: It was reduced based on
17 duplicate capital costs. It's the recovery of
18 those capital costs. The rate of return,
19 depreciation on those capital costs, that's what
20 actually came out of base rates at that point, and
21 those costs would go into the clause. You might
22 consider it as two separate rate proceedings. It's
23 just to make sure that what you are billing through
24 the clause isn't going into base rates.

25 This particular statute came out, and it

1 basically said we are not -- it doesn't allow the
2 Commission to go in and lower base rates for
3 anything that's already in base rates. And
4 companies have been doing storm enhancement
5 activities for many, many years, and they are
6 already including an expense and a revenue
7 requirement to recover that actual investment they
8 have in capital costs, and the expenses for
9 vegetation management, they have been doing that
10 for years.

11 The law basically -- the intent, from what my
12 reading of it is, is that the Legislature would
13 like the companies to speed up that process. They
14 would like more storm hardening at a faster rate.
15 And to do that, they are going to incur more
16 projects, more money, and they need a way to pass
17 that through without a rate case. That's what the
18 clause was for.

19 With the implementation of this law, they are
20 going to have storm enhancement costs in base
21 rates, and they are going to have some newer costs
22 hopefully going through the clause.

23 And that brings up the problem that we have in
24 that we have to make sure that there is no double
25 recovery that a project that is in -- is actually

1 in base rates right now isn't slipped into the
2 actual Cost Recovery Clause at the same time,
3 because if that happens, it's going to be recovered
4 through base rates and also being recovered the
5 same way through the clause. The customers will
6 end up being double charged for it.

7 THE COURT: Thank you.

8 And you can look -- if you were to look at the
9 Environmental Cost Recovery Clause statutorily and
10 compare it to 366 on these new hardening costs and
11 cost recovery --

12 THE WITNESS: Yes, sir.

13 THE COURT: -- you would be able to see the
14 difference?

15 THE WITNESS: You would. One of the primary
16 differences in the actual statutes themselves, the
17 Environmental Cost Recovery Clause actually -- and
18 if I could refer to the clause, I could --

19 THE COURT: Sure.

20 THE WITNESS: I happen to have a copy here.

21 THE COURT: And what is that statute, the
22 Environmental Cost Recovery Clause?

23 MS. FALL-FRY: It's 366.8255.

24 THE COURT: .82 --

25 MS. FALL-FRY: 55:00.

1 THE COURT: -- 55, which is not at issue here.
2 We are just looking at it, yes.

3 Do we have a copy of it, by chance? It's
4 okay. It isn't necessary.

5 MR. KING: Your Honor, we have a copy of it as
6 one of our exhibits --

7 THE COURT: Oh, you do?

8 MR. KING: -- if you want us to pass it out.

9 THE COURT: Where would that be?

10 MR. KING: It is exhibit -- I believe it's 2,
11 PSC-2.

12 THE COURT: Okay. Let's see, do I have -- do
13 I have a PSC book up here?

14 MS. CIBULA: No, we don't have a PSC book.

15 THE COURT: Okay.

16 MS. CIBULA: We were going to hand them out
17 later.

18 THE COURT: Well, I have got the rule, and I
19 guess I have 366.82 -- it's in here somewhere,
20 right? Is that in -- we might as well get down to
21 it so I can see what the arguments are.

22 Where is the other statute that's at issue
23 here, the main statute? Do we have that in any of
24 the exhibits?

25 I have got it open to the rule -- or the rules

1 at 34 of -- Joint Exhibit 34. Is there a joint
2 exhibit on the statute underlying the rule at
3 issue? I think I have got -- I think you have got
4 it in your --

5 MR. KING: I know there is a copy of 366.96,
6 it's attached --

7 THE COURT: It's attached to your joint --
8 your prehearing stipulation.

9 MR. KING: Yes.

10 MS. HARPER: It is in the prehearing
11 stipulation.

12 MR. KING: It is in the prehearing
13 stipulation.

14 THE COURT: Let me look at that.

15 MS. PUTNAL: Your Honor, I have one.

16 THE COURT: You have got one handy?

17 MS. PUTNAL: Yes.

18 THE COURT: Give me one that's handy.

19 MS. HARPER: It starts on page 13 as well of
20 the prehearing stipulation.

21 THE COURT: Yeah. You might want to put it in
22 as an exhibit. Let's go ahead -- since Ms. Putnal
23 has been kind enough to give me a copy, why don't
24 we put it in as Joint Exhibit 52.

25 (Whereupon, Joint Exhibit No. 52 was received

1 into evidence.)

2 THE COURT: And that is 366.96, okay. I have
3 got -- I have got both before me.

4 THE WITNESS: Okay. If you would like me to
5 continue.

6 THE COURT: Please.

7 THE WITNESS: If you look at Florida Statute
8 366.8255, which is the environmental cost recovery
9 statute --

10 THE COURT: Yes.

11 THE WITNESS: -- and you go to subsection
12 (2) -- and I can read the whole subsection.

13 THE COURT: No, I see it. You can explain it.
14 I have got the subsection.

15 THE WITNESS: Okay. What I would like to draw
16 your attention to is the very last sentence in
17 subsection (2), which basically says an adjustment
18 for the level of costs currently being recovered
19 through base rates or other rate adjustment clauses
20 must be included in the filing.

21 What that means is when the company files for
22 the Cost Recovery Clause, they must also file for a
23 reduction in base rates if that item they are
24 asking for to go through the clause happens to be
25 in base rates.

1 If you look at the subsection (3) right below
2 it, you will note that it says the environmental
3 compliance cost recovery factor must be set
4 periodically, but at least annually, based on
5 projections of the utility's environmental
6 compliance costs during the forthcoming recovery
7 period. It must be adjusted for variations and
8 losses, that's the losses they are talking about.

9 If you compare that language, and you go back
10 to the new statute, 366.96, or the storm protection
11 plan cost recovery, I would point you to subsection
12 (7) of that law where it says:

13 After a utility's transmission and
14 distribution storm protection plan has been
15 approved, proceeding with actions to implemented
16 the plan shall not constitute or be evidence of
17 imprudence. The Commission shall conduct an annual
18 proceeding to determine the utility's prudently
19 incurred transmission distribution storm protection
20 plan costs and allow the utility to recover such
21 costs through a charge separate and apart from its
22 base rates to be referred to as the Storm
23 Protection Plan Cost Recovery Clause. If the
24 Commission determines costs are prudently incurred,
25 those costs will not be subject to disallowance or

1 further prudence except for fraud, perjury, or
2 intentional withhold of key information by the
3 utility company.

4 If you -- let me find the exact language where
5 it says --

6 THE COURT: (8), I think, talks about base
7 rates, subsection (8).

8 THE WITNESS: Yes. That's the portion that
9 will be not comparable to the environmental
10 protection statute, where it said that you are
11 required to lower base rates for anything currently
12 being charged in base rates. Subsection (8)
13 basically says -- no, that's not what I am talking
14 about.

15 THE COURT: That's the same, isn't it? In a
16 way, it's the same in that you can't double-dip?

17 THE WITNESS: Yes. Well, that is, but that's
18 the -- specific (8), I don't read that to say that
19 the Commission can lower base rates. If the
20 Commission could lower base rates through the
21 statute, I don't think we would have this problem.
22 We could determine that the costs are in base rates
23 if we have the information before us to do that, we
24 could pull it out of base rates, and we wouldn't
25 have the problem of possible double recovery of

1 obviously being in both.

2 THE COURT: Under the first statute, you can
3 actually pull them out of base rates --

4 THE WITNESS: Yes.

5 THE COURT: -- or is that only if they are
6 included in the environmental recovery?

7 THE WITNESS: Exactly. If the Commission puts
8 them in the clause, if the company wants it to run
9 it through the clause, the environmental protection
10 clause, they are required to lower base rates at
11 the same time they increase the clause to put that
12 in there.

13 Under this statute, there is no such
14 provision. There is no reduction, so there will be
15 costs that are flowing through base rates at the
16 same time that additional costs are going into the
17 clause.

18 And that's -- that's one of our concerns that
19 it will cause some form -- or it could cause some
20 form of double recovery if we don't have the
21 information available to make sure it doesn't
22 happen up front.

23 When the law says that there cannot be double
24 recovery, if a charge such as that actually got
25 into the clause that was also in base rates, it

1 would be a violation of the statute at that point.

2 THE COURT: Okay. I will just leave further
3 exploration for cross-examination.

4 THE WITNESS: Okay.

5 THE COURT: Thank you.

6 THE WITNESS: For instance, going back to the
7 language that's in the actual Environmental Cost
8 Recovery Clause that I spoke of before, where it
9 talked about incurred costs. It's my opinion that
10 if the Legislature wanted to look at projected
11 costs, they would have done something similar to
12 the other -- another clause they had here, which is
13 the Conservation Cost Recovery Clause, where they
14 said that the Commission shall include costs to be
15 incurred. And it basically refers to projected
16 costs, costs to be incurred.

17 And I could actually --

18 MR. NORDBY: Judge, to the extent that the
19 witness is testifying and giving an opinion on what
20 the Legislature could have done, he is not tendered
21 as an expert on legislative drafting and what they
22 could have done.

23 THE COURT: Right. And I can hear argument on
24 it, but I am going to overrule that objection. He
25 is just trying to explain his understanding as

1 someone that, over the years, has worked in rate
2 setting.

3 Overruled. Go ahead. You can tell me.

4 THE WITNESS: And then I don't believe you
5 have a copy of this actual statute, but it's the
6 Conservation Cost Recovery Clause, and in that
7 one --

8 THE COURT: No, I think I -- oh, you mean
9 the -- beyond this one?

10 THE WITNESS: Yes, beyond that one. I talked
11 previously -- I discussed previously about the
12 different clauses that the Commission has in place.

13 THE COURT: Yes.

14 THE WITNESS: This is also a legislative
15 mandated clause, the Conservation Cost Recovery
16 Clause.

17 THE COURT: Can you tell me what statute that
18 is if you are going to talk about it?

19 THE WITNESS: It is Chapter 366.82.

20 THE COURT: Just 366.82?

21 THE WITNESS: Right.

22 THE COURT: I would assume, if it's going to
23 be legal argument, that you will at least include
24 that in your proposed final order, the copy, so
25 that we can do this if we are going to go there.

1 MS. FALL-FRY: Yes, sir.

2 THE COURT: So go ahead.

3 THE WITNESS: And this statute actually has
4 language in it, and I will read the actual
5 language.

6 It says: Reasonable and prudent unreimbursed
7 costs projected to be incurred, or any portion of
8 such costs, may be added to the rates which would
9 otherwise be charged by a utility on approval.

10 But it uses the actual word "projected to be
11 incurred," which is not like the language that's in
12 the Storm Protection Cost Recovery Clause. It
13 doesn't use the word "projected to be incurred."
14 It just says "cost to be incurred."

15 As an accountant, I would say that's
16 historical to me. If somebody told me to put costs
17 in there the utility has incurred, we are talking
18 about historical costs.

19 THE COURT: So this is a pay and chase,
20 whereas the other is a project?

21 THE WITNESS: Yes.

22 THE COURT: All right.

23 THE WITNESS: And, in fact, if the rules were
24 designed to only look at historical in a clause
25 proceeding, we would not have the problem that we

1 are talking about as far as not having the detail
2 in the projected language.

3 MS. FALL-FRY: If I can continue with my
4 direct?

5 THE COURT: Please.

6 BY MS. FALL-FRY:

7 Q When you were answering Judge Peterson's
8 questions, you mentioned the inability to take it out of
9 base rates compared to the environmental clause. Could
10 you go back to the environmental clause language?

11 A Yes.

12 Q Could you look at the language of sub (3),
13 where it says the environmental cost recovery factor
14 must provide for a periodic true-up of the utility's
15 actual environmental compliance costs with the
16 projections on which past factors have been set?

17 A Yes, I just read that.

18 Q Is it my understanding -- is it your
19 understanding that that language that provides for a
20 true-up in the ECRC doesn't exist in the language for
21 the storm protection plan?

22 A That language, rather, is not in the statute
23 for the storm protection plan cost recovery clause.

24 Q So is that why it's a problem that, if there
25 is double recovery in base rates, there is no provision

1 in the statute that permits for a true-up process?

2 A Well, the way the statute was written, I
3 believe, is historical in nature. It didn't intend
4 there would be a true-up because those costs are already
5 known. So if they are known in historical, they would
6 be filing for costs they've already incurred, they would
7 not necessarily have a true-up.

8 Q Let's go back to these storm hardening plans.
9 What level of detail is contained in the current storm
10 hardening plans?

11 A According to the proposed rules, the detail is
12 specific detail, project level detail for the first
13 year, and that's under (3)(e) of the --

14 Q Let me clarify. I asked you about storm
15 hardening, not storm protection.

16 A Oh, the storm hardening. I am sorry, I
17 misunderstood you.

18 Storm hardening plans have been approved by
19 the Commission since 2007, every three years. And under
20 those plans, there isn't really any specific project
21 level detail. It is basically done by more detail in
22 the first year, but estimates -- estimated dollars per
23 program, such as overhead, undergrounding, they would
24 basically be estimates, and a range of estimates in the
25 storm hardening plan.

1 Q So let's take one of the programs like
2 vegetation management. That's a program that's
3 currently in storm hardening that's also going to be in
4 storm protection, is that correct?

5 A The law allows for vegetation management
6 within storm protection.

7 Q So how will the Commission and affected
8 customers be able to identify which specific projects
9 under the program of vegetation management that are
10 currently in storm hardening plans compared to projects
11 that would be included in the storm protection filings?

12 A The Commission would have to look at what's
13 currently being charged by utility companies at least
14 over the several years for vegetation management.
15 Currently, the majority of them, I believe, are on a
16 three-year cycle, where they cycle through all of their
17 vegetation management areas and clear it every three
18 years, and actually sometimes on a quicker basis.

19 But they were putting forth their plans the
20 monetary amount they are going to do that, but in
21 vegetation management, they actually also, according to
22 that rule for storm protection hardening plans, they
23 give us the number of line miles that they intend to
24 clear.

25 So it's a little easier for vegetation

1 management to be able to look at that. We have the
2 number of line miles they intend to clear based on what
3 they are going to present in the future. If they want
4 to put any additional amount through the Storm
5 Protection Plan Cost Recovery Clause, we would know that
6 if we had line miles, if they have done it in the past
7 couple of years, we can do an average of some method to
8 come up to assure that what they are putting through the
9 plan there are additional miles and not the ones that
10 have already been cleared.

11 Q Is that true for the other types of programs
12 for storm hardening and storm protection?

13 A No, that's a little more difficult.

14 In storm hardening plans, the information
15 there is based upon dollar values. It doesn't say what
16 projects are included. It doesn't say where those
17 projects are going to be. It doesn't label an actual
18 estimated cost for a project. It just does it on its
19 own basis.

20 Q So under the current proposed rules for the
21 storm protection plan in the recovery clause how is the
22 PSC, or OPC, or affected customers going to be able to
23 determine what they are already paying for?

24 A Well, in my opinion, to be able to do that, we
25 are going to have to have, not only project level detail

1 for the first year, but we will need project level
2 detail for years two and three to be able to make sure
3 that there is no double recovery.

4 The Commission, as well as intervenors, will
5 need that opportunity to know what those projects are,
6 to know what the estimated costs are for those projects,
7 the amount that's going to be included in the Storm
8 Protection Plan Cost Recovery Clause, because that plan,
9 I believe, even though it's not stated in the actual
10 rule for the actual plan itself, I believe it's going to
11 be encompassing, not only what they intend to put
12 through the clause, but I think it's going to have
13 everything that's in the storm hardening plans right now
14 that are being flowed through base rates and being
15 recovered there.

16 And if that happens, if they don't get the
17 separation right, because we are just not dealing with
18 one year. We are dealing with the way the staff has the
19 clause set you up right now in the 031 rule, and you
20 have that three-year cycle. Let's take an example.

21 If they were to file for 2020 with the plan,
22 it allows them to almost simultaneously file for a
23 clause recovery proceeding. In that clause recovery
24 proceeding, they will be requesting to recover the costs
25 in 2020, which would be project level detail. They

1 would also be asking to recover the projected costs for
2 2021. And according to their rule, it's going to be on
3 a program basis.

4 We are going to have a difficult time trying
5 to figure out what in that program might be in base
6 rates and what really should be deployed through the
7 clause. And that's why we believe that staff had it
8 right. If you went through this projected method, staff
9 had it right in their original recommendation, that we
10 needed project level detail, understanding that their
11 project level detail is not going to be as accurate in
12 two and three.

13 But as an accountant, as a prior member of the
14 Commission, and my experience with the Commission for 38
15 years, and 43 now going through the Public Counsel, I
16 find it very -- I would find it very difficult to be
17 able to separate those costs and assure the Commission
18 that there is no double recovery without having
19 knowledge of what the projects intend to be, and some
20 estimate of what those costs for those projects are
21 going to be rather than a program basis where they are
22 starting to go through the clause.

23 The clause recovery factors for the storm
24 protection plan has language in it for the first year
25 that says the company can present program and project

1 level detail. The rest of it says they can present
2 program level detail. There is no assurance from the
3 031 rule that they are going to be presenting detail
4 sufficient for not only the Commission staff to deal
5 with it but for any intervenors such as the Office of
6 Public Counsel, which is mandated by statute to be
7 involved.

8 Without that information, I couldn't assure my
9 own boss, Mr. Kelly, that there is not going to be some
10 form of double recovery. And if there is an actual
11 double recovery, where they are trying to collect it
12 through base rates and through the clause, even if you
13 could fix it through the true-up process, there is
14 already a violation of the law because you have already
15 included it where, in customers rates, they are paying
16 it, they are recovering it, even if you could refund it
17 in the future if you find it in the future, you have
18 already violated the statute. That's the problem.

19 Q One more line of questions. Are you familiar
20 with the term AFUDC?

21 A I am familiar with AFUDC. And that's an
22 acronym, which I know we are trying to -- we obviously
23 aren't trying to do here. It stands for the Allowance
24 for Funds Used During Construction.

25 The Commission has a rule, and had it when I

1 was there in my 38 years, it has a twofold test. And
2 let me explain what it is first before I get into the
3 test.

4 The allowance for funds used during
5 construction is basically nothing more than the carrying
6 costs. It's to allow a company to add on to a project
7 that they are constructing the premium cost of funding
8 that construction through equity debt dollars. They are
9 basically tacked onto the costs. They are included in
10 the investment portion when the project goes into
11 service, and it basically adds to the actual costs that
12 the company is going to get to recover. There is
13 nothing wrong with that because it's in the cost. If a
14 company is doing that construction and it meets the
15 qualifications of the rule, they should be allowed to
16 recover that.

17 The -- and getting down to the actual
18 requirements of it, there is a two-phase process the
19 company has to meet to be able to apply that in their
20 construction project.

21 The first is it has to be a half a percent --
22 at least a half a percent or more of gross plant, which
23 is account 101, which is all their plants put together
24 undepreciated, plus account 106, which is plan
25 unclassified. You add those two together, you take a

1 half percent of that, if the project meets that amount
2 of money, that dollar value that you come up with, or is
3 above that, then that meets the first phase of the test.

4 The second phase is that the project has to be
5 constructed over a period of longer than 12 months. If
6 the construction period is list than 12 months, which
7 you meet the first one, you cannot apply AFUDC to that
8 project. But if it meets those two criteria of the
9 rule, you can apply the carrying costs to a project.

10 Now, how that relates to the clause, the
11 companies are charged with coming up with rate impact
12 for the first three years. There are actually going to
13 be rate impacts to consumers. If they are designed or
14 they are being asked to come up with these rate impacts,
15 the rate impacts would have to include this carrying
16 cost on AFUDC for allowance for funds used during
17 construction.

18 We don't know that projects within these
19 programs when they come up with -- these rate impacts
20 are not bundled together to actually meet, artificially
21 meet the standards of the rule. There is no way for us
22 to tell if they are on a program basis, so it's really
23 difficult. And I can't tell you right now how a company
24 would actually do those calculations based on a program
25 to decide how much of those carrying costs, or what

1 level of carrying costs should be applied to the
2 investments they are going to be putting through a
3 program. That's how the AFUDC works.

4 Q I have one final question for you.
5 Can you please explain what carrying costs
6 are?

7 A I am sorry, I didn't hear that.

8 Q I am sorry.
9 Can you please explain what carrying costs
10 are?

11 A What carrying costs are?

12 Q Yes.

13 A That's what I have been trying to explain, the
14 AFUDC. It's -- a carrying costs is nothing more than
15 the financing that you put through for an investment.
16 If you are doing a construction project, for instance,
17 they are undergrounding a line. It's a construction
18 project. If it meets all the criteria, you are going to
19 add a carrying cost which is equal to their equity debt
20 cost, basically their overall rate of return for that
21 project is going to be tacked on to the overall costs.

22 MS. FALL-FRY: Thank you.

23 THE COURT: Mr. Moyle.

24 MR. MOYLE: Thank you.

25 CROSS EXAMINATION

1 BY MR. MOYLE:

2 Q Good morning, Marshall.

3 A Good morning.

4 Q I think it would just help benefit and
5 complete the record if you just would give a quick
6 summary of your work experience.

7 A Sure.

8 THE COURT: Haven't we already accepted him as
9 an expert in the area?

10 MR. MOYLE: I think so. But I think it's also
11 important to note that -- I mean, he has been at
12 the Public Service Commission --

13 THE COURT: 34 years?

14 MR. MOYLE: Forever and a day, and how did you
15 ends up, if I could, getting to the Office of
16 Public Counsel.

17 MS. FALL-FRY: His resume is the in record.

18 THE COURT: What's that?

19 MS. FALL-FRY: I was reminding him that his
20 resume is in the record.

21 THE COURT: Yeah, we do have a resume we want
22 to look at. Do you want to adopt it?

23 MR. MOYLE: I may --

24 MS. FALL-FRY: It's Exhibit 19.

25 THE COURT: Exhibit 19, and it's your resume.

1 Do you want to get them to adopt it? If we have
2 these hearsay open --

3 MR. MOYLE: Sure.

4 BY MR. MOYLE:

5 Q Is Exhibit 19 your resume? Can you put your
6 hands on it?

7 A I do not know where Exhibit 19 is.

8 THE COURT: It's a joint exhibit 19?

9 MS. FALL-FRY: It's in Citizens, it's in the
10 white.

11 THE COURT: Oh, it's in the white, Exhibit 19.
12 Here it is. This one, do you have it? Here it is.

13 THE WITNESS: Yes, I do.

14 THE COURT: Is that your resume?

15 THE WITNESS: That is my resume.

16 THE COURT: Is it accurate?

17 THE WITNESS: Yes, it's accurate.

18 THE COURT: Is there something you would like
19 to add to it?

20 THE WITNESS: Nothing in particular. It
21 pretty much says what my life has been like for the
22 last 43 years.

23 THE COURT: Is there anything you would like
24 to take away from it?

25 THE WITNESS: No, sir.

1 THE COURT: Okay.

2 MR. MOYLE: Thank you. I don't know if we --
3 I think we satisfied the hearsay issue, so thank
4 you.

5 BY MR. MOYLE:

6 Q Marshall, I want to just follow up on a few
7 questions you have been asked, and also ask a couple of
8 questions about the Industrial Power Users Group.

9 Let me start with, there was discussion on the
10 Environmental Cost Recovery Clause, and we've been
11 talking about projected costs. And the Environmental
12 Cost Recovery Clause, I don't think you touched on this,
13 but 366.8255, paragraph 2, do you have that in front of
14 you?

15 A Yes, I do.

16 Q And the first sentence, I will read it, and
17 you just tell me if I read it correctly, says: An
18 electric utility may submit to the Commission a petition
19 describing the utility's proposed environmental
20 compliance activities and projected environmental
21 compliance costs in addition to any Clean Air Act
22 compliance activities and costs shown in the utility's
23 filing under Section 366.825.

24 Did I read that correctly?

25 A Yes, you did.

1 Q And the use of the word "proposed" and
2 "projected," that contemplates something in the future,
3 does it not?

4 A Yes, to me it does, yes.

5 Q Okay. And with respect to the statute in
6 question that we are here today, we call it the storm
7 hardening statute that passed last legislative session,
8 I think that's also been identified as an exhibit
9 that --

10 THE COURT: We've got 52 -- Joint 52.

11 MR. MOYLE: Joint 52.

12 BY MR. MOYLE:

13 Q That doesn't have similar words in it, does
14 it, proposed and projected, with respect to a utility
15 being able to make filings and recover costs going
16 forward?

17 A It does not have the word "projected" in it.
18 I don't see the word "proposed."

19 Q And does -- the rule that is being proposed
20 and being challenged here, it does talk about a utility
21 being able to recover for projected costs, does it not?

22 A Yes, it does. That's what the rule allows
23 for.

24 Q Right.

25 There has been a little discussion about

1 true-ups, and I think you may get some questions about,
2 well, if it's trued up -- well, just tell the Court
3 about a true-up. What does that do?

4 A Well, going back to the way the clause works,
5 it's a three-year cycle, and I tried to explain that a
6 minute ago.

7 For instance, if you are dealing with a clause
8 that starts on -- that's filed on January 1 of 2020 --
9 it actually isn't filed on January 1, but it's filed in
10 2020. In that particular filing for that year, they are
11 going to ask, in the projected method of these clauses,
12 they are going to ask for their projected costs to be
13 incurred in 2021. They are going to ask for a true-up
14 of what they already asked for the year before, which
15 would be costs for 2020, which now would be partially
16 actual, five months, seven months projected still.

17 The third part is a final true-up of costs
18 that they had back in 2019, which they should have
19 already completed all of those. They should be actual
20 costs by now, so therefore, 2019 would be known, and
21 that would be finalized and shut out.

22 The next year after that, the clause just goes
23 through a three-cycle again. It just starts the same
24 way with new years.

25 Q And over your years and years in the

1 regulatory environment, don't most ratepayers like to
2 keep money in their own pocket and hold onto it for as
3 long as they can rather than project paying out things
4 on a projected basis?

5 A I have --

6 MR. NORDBY: Object in that it calls for
7 speculation.

8 THE COURT: What was the question again? I am
9 sorry.

10 MR. MOYLE: I'm just asking him if, in his
11 experience working for the Commission and for
12 Office of Public Counsel, whether ratepayers prefer
13 to hold onto their own money and not pay it until
14 they have to, as compared to paying it on a
15 projected basis.

16 THE COURT: Am I a ratepayer?

17 MR. MOYLE: I think for Duke.

18 THE COURT: Are you talking about the
19 ratepayer, you are talking about Duke Energy -- I
20 am a ratepayer. You are asking if people like to
21 hang on to their money?

22 MR. MOYLE: That's right.

23 THE COURT: I think he can answer that
24 question. I think I could too, but go ahead.

25 THE WITNESS: As a ratepayer myself, but not

1 for Duke Energy, but the City of Tallahassee, yes,
2 I would like to hang onto my money as long as I can
3 rather than pay it out to someone else.

4 BY MR. MOYLE:

5 Q Okay. Thank you.

6 And the projected, the recovery of the
7 projected doesn't do that. It requires the ratepayers
8 to pay money that is going to be something that may be
9 incurred in the future, correct?

10 A The projected means you are going to be
11 including costs now for projects to be projected in the
12 next year.

13 Q Okay. I just wanted to ask you on the
14 question about regulatory compact. Do you have an
15 understanding of the regulatory compact, and if it
16 encompasses three people versus two people?

17 A I have never looked at the regulatory compact
18 that way. To me, the regulatory compact is utilities
19 for the right to be able to provide service to a
20 specific territory, which makes a monopoly for having
21 that right to do that. Basically, they submit to
22 regulation by the Public Service Commission to allow
23 their rates to be set because the Public Service
24 Commission steps in as competition in that matter. So
25 that's my understanding of the regulatory compact.

1 Q And the utility owes obligations to the
2 ratepayer, do they not, as part of what they do, the
3 ratepayers are a key part of the utility and the
4 provision of electric service?

5 A Well, they are if the company wants revenues.
6 Yes.

7 Q Yeah. And IOU, that stands for investor-owned
8 utility, correct?

9 A Investor-owned utilities, that's correct.

10 Q And they are private companies, stockholders,
11 and they want revenues?

12 A Yeah, that's basically the terminology.
13 Investor-owned utilities means they are owned by
14 stockholders.

15 Q All right. Let me ask you a couple of
16 questions about Florida Industrial Power User Group.
17 You are familiar with FIPUG, are you not?

18 A Yes, I am.

19 Q And that is in part because you were at the
20 Commission, per your resume, for decades?

21 A Yes.

22 Q And you also have been working for the Office
23 of Public Counsel, correct?

24 A Yes.

25 Q Okay. And you are aware that FIPUG is an

1 association that has large commercial and industrial
2 users, correct?

3 A Yes, I am.

4 Q And you are also aware that the members get
5 their power from the State's investor-owned utilities,
6 correct?

7 A Yes, the majority -- I don't know that all
8 members do. They might get them from co-ops, or
9 somewhere else, but I do know that there are members
10 that would get their power from --

11 Q And with respect to -- let's talk about that
12 about co-ops. If you get power from a co-op or a muni,
13 the PSC does not regulate rates for co-ops and munis, do
14 they?

15 A Not the rates charged. They would rate it for
16 a discriminatory rate.

17 Q So to the extent there is an organization
18 that's participating in -- FIPUG participates in all the
19 clause proceedings, does it not?

20 A Yes, FIPUG does intervene in all the clauses.

21 Q Right, that affect rates of electric
22 utilities?

23 A Yes.

24 Q And it's a reasonable inference, is it not,
25 that people who are concerned about IOU rates are

1 receiving power from IOUs, correct?

2 A That would be -- yes, that would be correct.

3 Q Okay. And you are also aware that over the
4 years that FIPUG has entered into settlement agreements
5 with the utilities, some have included the Office of
6 Public Counsel, some have not; is that right?

7 A That's correct.

8 Q And some of those agreements have gone to the
9 Florida Supreme Court, and the Florida Supreme Court has
10 accepted jurisdiction and rendered decisions on those
11 cases; is that right?

12 A That's correct.

13 Q And you are not aware of any situation which
14 the Florida Public Service Commission has ever not found
15 that FIPUG has standing to participate in a proceeding,
16 correct?

17 MR. GONZALEZ: Objection. This is not
18 relevant to the standing in this proceeding. These
19 are different types of proceedings he is asking
20 about. It has no relevance to standing.

21 THE COURT: I don't know if it has no
22 relevance. It may have tangential relevance. I
23 will go ahead and let you ask the question.

24 THE WITNESS: You would ask the question
25 again, please?

1 BY MR. MOYLE:

2 Q Sure. You are not aware of any situation in
3 which the Public Service Commission has denied standing
4 to FIPUG?

5 A Not that I remember.

6 Q Right. And not only with respect to FIPUG
7 members, but all customers, this rule, because it will
8 result is -- likely result in higher rates, has a
9 substantial impact on customers, does it not?

10 A Customers will be paying higher bills because
11 of this law, yes.

12 Q Right. And have you seen estimates or numbers
13 about how much this new law, the undergrounding, is
14 going to ultimately cost customers?

15 A I have heard what some companies have said.
16 You know, I listened to all the stockholder conferences
17 that they put on, investor conferences. I have heard
18 numbers that are jumbled around there. There may be
19 three to four -- you know, in one case, I listened to
20 FPL, they talked about \$3 to \$4 million may go through
21 this clause in the next three years. But I don't think
22 it's all the clause. I think it's probably what's going
23 to go through base rates and what's going to go through
24 the clause. So how much will actually go through the
25 clause, it's hard to tell. Until they file their cases,

1 I don't know.

2 Q Have you been made aware of any estimates with
3 respect to FPL about the total impact of undergrounding
4 lines, whether that will be in the millions, hundreds of
5 millions or billions of dollars?

6 A I don't know that. I know it's going to be a
7 lot of money, but I have no idea what the actual amount
8 will be.

9 MR. MOYLE: May I just have a minute?

10 BY MR. MOYLE:

11 Q I just -- one other point I want to ask you
12 about. With respect to the contention that some of the
13 points that you have raised concerns about on double
14 recovery and the level of detail, that that can be
15 addressed in discovery, what's your response to that
16 point?

17 A Well, my 38 years experience with the
18 Commission and the Office Public Counsel for three
19 years, there is probably getting discovery -- just
20 because you ask for discovery doesn't mean you are going
21 to get it. And this is something that I have talked
22 about before, I did it in my deposition.

23 If we ask for it -- if we don't get it in the
24 rule as part of the filing requirements, which I heard
25 Mr. Ballinger talk about, this rule is a filing

1 requirement. If we don't get it in the rule and then we
2 ask for it later on as part of discovery, saying we need
3 that information on project level detail, a utility can
4 object to it. They can say, we don't want to give you
5 that. We can't give you that, for some between we can't
6 give it give it to you.

7 We ask for a motion to compel to get that
8 discovery. It has to go to the Commission for a hearing
9 officer. The prehearing officer can look at the rule
10 and say, well, it's not required, and they could deny
11 that request.

12 So there is no guarantee just because we ask
13 discovery we are going to get what we asked for. In
14 fact, on a day-to-day basis, we ask for discovery all
15 the time and we get objections to that discovery.

16 Q In your expert opinion, do you believe that
17 it's better to address the particulars in a rule as
18 compared to saying, well, we can deal with that, you can
19 ask questions and handle it through discovery further
20 down the road?

21 A My preference during the Commission, when I
22 was at the Commission for 38 years, was to basically
23 say, if you get right in the rule, it's going to make
24 the whole process easier. If you are going to need the
25 information -- that's why, in the rate case process, we

1 put forth minimum filing requirements.

2 And I think, if you look at the Environmental
3 Cost Protection Clause, there is no rule there, but the
4 Commission issued an order saying here are the minimum
5 filing requirements that had to be brought forth to put
6 the case forward.

7 This is going to be the minimum filing
8 requirements, and this rule says nothing about you have
9 to get project level detail. It says you get project
10 level detail for one year, you get program level detail
11 for two years.

12 Q And at one point during the draft, there was a
13 requirement for project level detail, but it came out;
14 is that right?

15 A Yes. During the -- when the Commission staff
16 took their first staff recommendation to the Commission
17 they recommended project level detail for all three
18 years. The Commission denied that request and told them
19 they didn't need it, but they allowed them do it for one
20 year.

21 Q Okay. And OPC supported that additional
22 request, and the utilities opposed the request; is that
23 right?

24 A We supported that portion of the
25 recommendation. We did not support the idea that this

1 was a projected clause that it could be run through and
2 require a recovery or projected.

3 MR. MOYLE: Thank you. That's all I have.

4 THE COURT: Mr. King.

5 CROSS EXAMINATION

6 BY MR. KING:

7 Q Good morning, Mr. Willis. I think it's still
8 morning.

9 We covered a lot of ground so far, so I am
10 sorry if my questions are a little bit scattered, but I
11 am going to try to touch on a few different subjects
12 that you mentioned so far.

13 I wanted to start with your discussion about
14 where you compared 8255 with 96. Sorry, that's ECRC
15 with this statute. And you talked about there being an
16 8255 method for reducing base rates, correct?

17 A That's correct.

18 Q Okay. Would it be fair to say the purpose of
19 that is to prevent double recovery?

20 A Absolutely.

21 Q Okay. In Section 366.96, is there an explicit
22 prohibition against double recovery?

23 A There is.

24 Q And in the rule, and this is the clause rule
25 031, is there an explicit prohibition on double recovery

1 in the rule as well?

2 A It says there cannot be double recovery, yes.

3 Q Okay. Would you agree that the utilities have
4 the burden to prove that costs are not double recovered?

5 A They do, but the Commission also has the
6 obligation to verify what the companies put forth. And
7 the intervenors certainly want to verify what the
8 companies file.

9 Q And if we move over to the project level
10 detail that you have been talking about in the clause
11 rule, 031, would you agree that in (7)(b), so this is
12 the estimated --

13 A Could you hold on just a minute so I can get
14 there?

15 Q Sure.

16 A Okay, I am there.

17 Q The estimated true-up for the current year,
18 would you agree that the utilities are required to file
19 project level detail?

20 A The exact language, what you are referring to
21 is (7)(b), estimated true-up for current year, it
22 actually says that -- it has the language for program
23 and project filed in the utility's cost recovery
24 petition. So, to me, that language says they can file
25 both.

1 Q And, right, so they can to file both?

2 A You can file program and project information.

3 Q And, okay.

4 A It would be nice if it said you must file
5 project level information only.

6 Q And in the 030 rule, looking at -- and I am
7 looking specifically at subsection (3)(e)2, could you
8 read that for me?

9 A It says: For the second and third years of
10 the plan, project related information in sufficient
11 detail, such as estimated number and cost of projects
12 under every specific program, to allow the development
13 of preliminary estimates of rate impacts as required by
14 paragraph (3)(h) of this rule.

15 Q Okay. So you mentioned AFUDC, correct?

16 A Yes.

17 Q And in mentioning that, you said the reason
18 that you were talking about AFUDC was because of the
19 requirement for the Commission to make a rate impact for
20 the plans?

21 A Correct. Yes.

22 Q And would you agree that the language you just
23 read says that they have to file project level detail
24 sufficient to make a rate impact estimate?

25 A That's what it says.

1 THE COURT: That's base rate impacts?

2 THE WITNESS: This would not be base rate
3 impacts for this portion of the rule. This would
4 be the estimated costs for the rate impact that the
5 utility would be putting forth for the cost of the
6 plan.

7 When they are talking about a rate impact
8 here, it doesn't mean the actual base rates that a
9 customer would pay. That would come under 031,
10 which is where these costs would get passed through
11 under the clause.

12 MR. KING: That's all the questions I have,
13 Your Honor.

14 THE COURT: For Mr. Gonzalez, you are doing
15 the cross?

16 MR. GONZALEZ: Yes, sir. I have a few.

17 CROSS EXAMINATION

18 BY MR. GONZALEZ:

19 Q Mr. Willis, your background and expertise is
20 in rulemaking and accounting, not engineering; correct?

21 A That's correct.

22 Q And when I mean engineering, I mean
23 engineering in an electric utility grid and other
24 utility facilities.

25 A Yeah. I will tell you right up front, I am

1 not an engineer.

2 Q Okay. And isn't it correct that you don't
3 know if the utility companies currently possess three
4 years of project level detail for storm hardening
5 projects?

6 A I don't, but I don't know that they don't, or
7 could not.

8 Q And on whatever dates in the future that the
9 utility companies would submit storm protection plans to
10 the PSC for review, modification or approval, you don't
11 know if, at that time, the utilities will possess
12 accurate project level detail for the subsequent three
13 years, correct?

14 A I do not know.

15 Q Okay. And the same question with respect to
16 whether three years of project level detail can be
17 created by these utility companies with accuracy, can
18 they -- you don't know if they could create that with
19 accuracy to present to the Commission at the time that
20 they are potentially submitting these plans, correct?

21 A I don't, but I know that utilities have a lot
22 of smart individuals working for them.

23 Q That is true.

24 You expressed during your deposition some
25 concerns that three years of project level detail is not

1 required -- if it's not required up front in the plan
2 rule, that the Office of Public Counsel will not have
3 enough information to determine in the Storm Protection
4 Plan Cost Recovery Clause proceeding whether the utility
5 has engaged in double dipping. Do you recall that
6 testimony of your concern?

7 A Yes.

8 Q Okay. And I am going to skip around a little
9 bit.

10 Do you recall testifying a little earlier that
11 without more detail, there will be, you said a
12 possibility of double recovery?

13 A Yes.

14 Q Okay. Now, I think in response to Mr. King's
15 question you did acknowledge the statute at issue here,
16 the enabling statute, authorizing statute, prohibits
17 double recovery; correct?

18 A Yes, it does.

19 Q Explicitly?

20 A Yes, it does.

21 Q And the proposed rules explicitly prohibit
22 double recovery, correct?

23 A That's correct. But I would also point out,
24 for instance, the Environmental Cost Recovery Clause has
25 a specific double -- not a specific provision, but it

1 said base rates will be reduced.

2 When that was implemented, there was one
3 company that came forward with a project where it was
4 included in base rates but they tried to put it through
5 the clause. So just because it says that, it's the
6 Commission's responsibility to verify everything a
7 company puts forth.

8 Q And we are not here in the proceeding where
9 those facts will be evaluated and determined as to
10 whether there has been a double recovery. That's not
11 the proceeding we are on today, correct?

12 A No. Today we are here on the actual rules.

13 Q Compliance with those legal mandates we talked
14 about, they will be determined in those future
15 proceedings under the 031 Storm Protection Plan Cost
16 Recovery Clause rule, correct?

17 A Yes, sir.

18 Q And all the information that you are saying
19 that you want the plan rule to require in a storm
20 protection plan, all of that will be required evidence
21 and available through discovery in those clause
22 proceedings, correct?

23 A I don't know that they will be.

24 Q Okay. And I think you testified about this.
25 Your concern that you are not sure it will be is based

1 on your concern that, perhaps, a discovery request will
2 be denied or dishonored; is that correct?

3 A Yes.

4 Q Under the proposed rules, do the utilities
5 submitting the storm protection plans have the burden of
6 convincing the PSC that the plans are adequately
7 detailed?

8 A The burden is on the company.

9 Q Okay. And even under the existing Storm
10 Hardening Plan rule for year one, doesn't a utility
11 company, such as FPL, identify the specific projects it
12 will undertake in year one?

13 A In year one, it requires detailed project
14 level information.

15 Q Okay. Same as these proposed rules will
16 require, the one year, correct?

17 A I would hope so, yeah.

18 Q Okay. And in response to Mr. King's question,
19 I think you testified that the utility submitting the
20 storm protection plans have the burden of convincing the
21 PSC that their plans will not include any double
22 recovery, correct?

23 A The burden is on the company to do that.

24 Q Okay. Under the proposed rules, have you been
25 given any information -- do you have any information

1 today to make you believe that -- give you any certainty
2 that discovery requests in one of these future clause
3 proceedings will be dishonored?

4 A No, because we haven't asked for discovery
5 yet. But I can tell you, in the past we have asked for
6 discovery and we have been denied on some of that
7 discovery.

8 Q And you believe that information is necessary
9 for a determination to be made properly in those
10 proceedings, correct?

11 A Are we referring to in the past or --

12 Q In the future, you think that information
13 would be necessary, and the discovery of the information
14 would be necessary?

15 A I would not ask for discovery in the future
16 that I didn't need.

17 THE COURT: On the discovery issue, have you
18 been denied discovery for project level detail
19 requests?

20 THE WITNESS: I have not had the opportunity
21 to request discovery on project level detail except
22 for in this docket, and we weren't allowed to ask
23 for that information. We actually propounded
24 interrogatories to obtain that information, but
25 because of the timeframe, the companies weren't

1 allowed to answer that.

2 That's the one time, but before that, there
3 have been occasions where, when I worked for the
4 Commission for 38 years, intervenors would ask for
5 information. Companies would object. The
6 Commission would have to rule on whether or not
7 they got that information, and sometimes they would
8 not be allowed to, for whatever reason.

9 But just because you asked for discovery in a
10 commission proceeding, there is no guarantee you
11 are going to get an answer to that discovery.

12 BY MR. GONZALEZ:

13 Q And with respect to this discovery in this
14 proceeding, OPC, and you, seem to have a lot of concern
15 about this level of detail in these plans. Under the
16 existing storm hardening plan, has OPC ever participated
17 in one of these proceedings, under the existing one?

18 A Based on what we discussed in my deposition, I
19 don't believe they have. But you have to understand
20 that the storm hardening plans, all of that cost was
21 going through base rates, and Public Counsel has
22 participated in every base rate proceeding.

23 There wasn't a chance for any kind of
24 double-dip, you might say, there, because whatever was
25 in base rates was in base rates.

1 Q Well, the storm hardening rule has been in
2 place since 2007, correct?

3 A I am sorry, I didn't hear the question.

4 Q The storm hardening plan rule, the existing
5 rule, has been in place since 2007, hasn't it?

6 A Yes, it has.

7 Q And there have been multiple proceedings with
8 storm hardening plans being approved by PSC?

9 A Yes, every three years.

10 Q And so OPC has never participated in any of
11 those proceedings, correct?

12 A I don't believe so.

13 Q And you are testifying that because, if I
14 understand you correctly, the base rate proceedings are
15 what is used to determine all these costs, but we are
16 going to have a separate proceeding under this second
17 cost recovery clause rule that's going to determine
18 whether or not there has been double dipping, correct?

19 A We hope that would occur.

20 Q It just sounds like your objection is more to
21 whether or not the proposed rule will be followed and
22 the participants will do their job in scrutinizing the
23 information and requiring parties to meet their burden,
24 isn't that really what the objection you are raising is?

25 A My objection is that we may not have the

1 information necessary to make that determination
2 accurately enough.

3 Q Do you agree that IOU base rates in effect
4 were set on the basis of projected costs?

5 A Yes, they were. And every place that I am
6 aware of when I worked at the Commission, they were
7 always based on a projected test year.

8 Q Okay. And with respect to the AFUDC, to
9 collect AFUDC for any construction projects, wouldn't
10 you agree it will be the utility's burden to prove that
11 it's applicability?

12 A It's always the company's burden to prove.

13 Q Okay. And the Commission will decide whether
14 or not to approve recovery of AFUDC, correct?

15 A They are the ultimate deciders, yes.

16 Q And there are factors that they will consider
17 to go through to make that determination, correct?

18 A They are the ones who make the determination.

19 Q And they base it on testimony and evidence?

20 A Evidence in the record.

21 Q Okay. And the Commission also has an
22 obligation under the statute and rule to prohibit
23 recovery in the storm protection cost recovery clause if
24 anything is already being recovered in those base rates,
25 those have to be prohibited, correct?

1 A That's a requirement in the law.

2 Q Okay. You testified that OPC represents
3 electric utility customers, is that correct?

4 A That's correct.

5 Q And the effect of these proposed rules on
6 customers that OPC represents is the basis for OPC's
7 standing in this rule challenge, correct?

8 A These rules will result in rates that these
9 customers will have to pay.

10 Q So yes?

11 A Yes.

12 Q Will the adoption of the proposed rule,
13 25-6.030, the plan rule, will that raise rates paid by
14 an electric utility customer? Is that what I am
15 understanding your last answer to be, that it will --
16 the adoption of this rule will immediately cause a rate
17 increase?

18 A Not immediately. It will result in the
19 future, because the costs that are in these storm
20 protection plans will ultimately end up going through
21 the clauses.

22 Q After some further proceedings, correct?

23 A That's correct.

24 Q This proceeding is not going to change
25 anybody's utility rate, correct?

1 A The proceeding today will not, but it will
2 have the effect of changing those in the future.

3 Q Will the adoption of the proposed rule,
4 25-6.031, the storm protection plan cost recovery clause
5 rule, raise utility rates on any utility customer at the
6 conclusion of this proceeding?

7 A At the conclusion of this proceeding, no.

8 Q Okay.

9 A It will in the future.

10 Q Have you discussed -- well, it will -- let me
11 make sure we understand. You think it will in the
12 future after some future proceeding where that will be
13 considered, correct?

14 A I don't believe any of you all would be here
15 today if you didn't anticipate filing for these clauses,
16 so I am pretty sure.

17 Q But it's a future proceeding, this isn't going
18 to change any rates today?

19 A They will not change rates today.

20 Q Okay. Have you discussed your testimony in
21 this case with Mr. Moyle, with FIPUG?

22 A No.

23 Q Did you talk with anybody else at FIPUG about
24 your testimony?

25 A No.

1 Q Do you have personal knowledge of FIPUG and
2 its members' interests in these proceedings?

3 A I know that FIPUG has members which are
4 phosphate companies, big box companies. I do know they
5 have some of the companies, I actually know the name of
6 one company, but I am under an NDA not to reveal that so
7 I can't.

8 Q Can you side any members of FIPUG?

9 A No.

10 Q What -- what's -- who is the NDA with?

11 A I can't tell you that. I am under a NDA that
12 says I cannot release that name.

13 Q Well, I am sure it has provisions in it that
14 you can't release the information unless required to in
15 a legal proceeding, correct, or administrative --

16 A There is a provision in that NDA that says I
17 cannot release the name of that company.

18 THE COURT: You have a nondisclosure
19 agreement -- the Office of Public Counsel has a
20 nondisclosure agreement with the party that's a
21 member of Florida Industrial?

22 THE WITNESS: No. This happened to be during
23 a period of time between my employment with the
24 Public Service Commission, when I had my own
25 consulting firm for three years, I actually had

1 clients out there. One of those happened to be one
2 of FIPUG's customers.

3 THE COURT: Oh, okay. So that's the only
4 member you know of that's a member of --

5 THE WITNESS: That's the only member, yeah,
6 that's the only member I know of.

7 BY MR. GONZALEZ:

8 Q That's one you know of that you can't
9 disclose. You also mentioned a phosphate company, is
10 that different than the one --

11 A I -- yes. I have heard they have phosphate
12 companies, big box company.

13 Q Who is the phosphate company?

14 A I don't know.

15 Q Who is the box company?

16 A I don't know.

17 Q Where did you hear this information?

18 A I heard that throughout my career at PSC.

19 Q Any more detail about who these members are?

20 A No idea. I can't tell you who they are.

21 Q Any other type of company other than a box
22 company or a phosphate company?

23 A They are all basically large -- large
24 companies.

25 Q So you heard this by rumor, but you don't know

1 who any of their members are other than the one you
2 signed a nondisclosure agreement on?

3 A Well, I heard Mr. Moyle many times at
4 proceedings where he was explaining who he represented,
5 and he was allowed to intervene on their behalf, so
6 obviously --

7 Q It sounds like this is all hearsay, the
8 members, correct?

9 A Except for the one that I know that I can't
10 reveal, yes.

11 Q Do you know how many members they have?

12 A No, I do not.

13 Q Can any utility customer be harmed today by
14 the Commission's approval of the storm protection plan
15 rule if it's approved in this proceeding?

16 A Today?

17 Q Yes.

18 A Not --

19 Q Or if it -- when the Administrative Law Judge
20 issues his final order, will a customer be immediately
21 harmed at that point?

22 A Not immediately, no.

23 MR. GONZALEZ: No further questions.

24 THE COURT: Let's see, next is Mr. Bernier for
25 Duke.

1 MR. BERNSTEIN: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. BERNIER:

4 Q Good morning, Mr. Willis.

5 A Good morning.

6 Q Almost afternoon, we are getting there.

7 Just a couple of questions. You said a couple
8 of times that the adoption of these rules are going to
9 end up with rate impact for the customers, is that
10 correct?

11 A They will, yes.

12 Q Is there any provision in the statute or the
13 rule that requires any company to file for cost recovery
14 through the clause?

15 A No, there isn't, but I would suspect that
16 since you are here, you will be filing.

17 Q Understood, but you don't know?

18 A I don't have that knowledge.

19 Q And we are not required to?

20 A You are not required to.

21 Q If a company were to put forward a storm
22 protection plan that had no incremental work or cost
23 above what is currently in base rates, would they be
24 entitled to cost recovery?

25 A In base rates.

1 Q In base rates, but --

2 A In base rates -- pardon? I didn't hear the
3 last --

4 Q Would they be entitled to any additional cost
5 recovery through the clause?

6 A No, they would not.

7 Q Okay. And just real quickly, if you could
8 turn back to Section 366.2855, the environmental cost
9 recovery statute that we have talked about a couple of
10 times.

11 A I am there.

12 Q Okay. I think you said a couple of times, and
13 I just want to make sure that I understand where you are
14 going here, that the statute requires base rate
15 reductions; is that correct?

16 A Yes.

17 Q Okay. Could you just show me where that is?
18 You might have said it and I might have missed it.

19 A If you look at subsection (2). The very last
20 sentence in subsection (2) is where I started testifying
21 here today, it says: An adjustment for the level of
22 costs currently being recovered through base rates or
23 other rate adjustment clauses must be included in the
24 filing.

25 What that means is the way the Commission

1 interpreted that, and they did in the Gulf Power case,
2 that if something is already currently in base rates and
3 you want to put it in the clause, you have to reduce
4 base rates by the like amount of your payment in the
5 clause. And that happened.

6 Q Would another interpretation you don't have to
7 put it through the clause at all?

8 A No. You don't have to participate in the
9 clause at all. They could have left it in base rates.

10 Q And subsection (5), the last sentence, doesn't
11 that say: Any costs recovered in base rates may not
12 also be recovered in the environmental cost recovery
13 clause?

14 A Are you talking about subsection (5)?

15 Q I am.

16 A It basically says the same thing. In the
17 future, if you want to include environmental costs, you
18 can put it in base rates; but if you put it in -- if you
19 put it in base rates, you can't have it in the clause.

20 Q But you can't double-dip?

21 A Right, you can't double-dip.

22 Q Which is essentially what 366.96 is?

23 A That is, but the other provision is in there
24 about lowering rates if you want to put it in there.

25 Q Right, understood.

1 Can you turn to subsection (2) of that rule?

2 A Which rule?

3 Q Excuse me, the same statute, 366.96.

4 A Subsection (2)?

5 Q That's right.

6 You talked about a couple of different
7 provisions in this rule, but I'm on the second sentence
8 here, the second sentence of subsection (2), could you
9 read that?

10 A The one starts with "if approved?"

11 Q That's correct?

12 A If approved, the Commission shall allow
13 recovery of the utility's prudently incurred
14 environmental compliance costs, including the costs
15 incurred in compliance with the Clean Air Act, and any
16 amendments thereto or any change in the application or
17 enforcement thereof, through an environmental compliance
18 cost recovery factor that is separate and apart from the
19 utility base rates.

20 Q Doesn't that section, that sentence, mean that
21 ultimately through the environmental cost recovery
22 clause, the only costs that can ultimately be
23 approved -- or excuse me -- recovered are prudently
24 incurred costs?

25 A That's what it says. Prudently incurred

1 costs.

2 Q And that's what 366.96 says?

3 A I am sorry, which what section what is?

4 Q 366.96, the SPP statute.

5 A It has a provision that you cannot -- can you
6 point me to the part you are talking about, the section?

7 THE COURT: Section (8), I believe.

8 BY MR. BERNIER:

9 Q It is subsection (7), thank you.

10 A Subsection (7).

11 Q And all I am asking is doesn't that section
12 include the prudently incurred language that you have
13 been talking about here today?

14 A Yes, it does.

15 MR. BERNIER: Okay. That's all I have. Thank
16 you.

17 THE COURT: TECO?

18 MR. MEANS: No questions, Your Honor.

19 THE COURT: Okay. I would like to ask, what
20 are the current -- the utility hardening rule, what
21 is that one?

22 THE WITNESS: The current utility, what they
23 call a storm hardening rule?

24 THE COURT: Storm hardening rule, yes. What
25 number is that? Where is that? Is it the same as

1 this or is it in -- we talked about it a couple of
2 times.

3 THE WITNESS: It is not. It is actually
4 25-6.0342, electric infrastructure storm hardening.

5 THE COURT: 25 --

6 THE WITNESS: 25-6.0342.

7 THE COURT: And that's just a separate rule,
8 because you had pointed out some differences, and I
9 could look at that rule and see that.

10 THE WITNESS: Yes. If you would like to have
11 a copy, I have a clean copy right here, if somebody
12 would like it.

13 THE COURT: I don't know if we want to accept
14 it. I don't need it as an exhibit but I can look
15 at it.

16 THE WITNESS: Pardon me.

17 THE COURT: What I will do is I will just call
18 this Joint 53, just it case, okay? There was a
19 little bit of testimony on it. Joint 53.

20 (Whereupon, Exhibit No. 53 was received into
21 evidence.)

22 THE COURT: Anything else from this witness?

23 MS. FALL-FRY: May we redirect?

24 THE COURT: Oh, yes. Of course.

25 MS. FALL-FRY: Thank you.

1 REDIRECT EXAMINATION

2 BY MS. FALL-FRY:

3 Q Let's work our way backwards, if you don't
4 mind.

5 In your experience -- you were at the Public
6 Service Commission when the ECRC was passed, correct?

7 A Yes, I was.

8 Q In your experience, did you see any companies
9 not come through for recovery through the clause and
10 leave those costs in base rates?

11 A Well, through the process of the environmental
12 cost recovery clause, I think all Florida public
13 utilities has used it in some manner. Florida Public
14 Utility doesn't generate its own power.

15 Q And in your 38 years at the Commission or your
16 five years since, have you seen any company completely
17 stay out of cost recovery clause proceedings?

18 A Yes, there are several that don't have the
19 nuclear cost recovery factors in their -- if they don't
20 own nuclear power plants or are not building nuclear
21 power plants or combined cycle classification plants,
22 which that statute would allows the to recover through
23 that clause. But for those that do have those expenses,
24 yes, they put through the clauses.

25 Q And is it your understanding that the statute

1 requires the Commission to have the clause proceedings
2 annually?

3 A Yes.

4 Q Going back to the difference between storm
5 hardening and storm protection, you responded to
6 questions about OPC's participation in storm protection
7 plans. Could you explain the difference between those
8 storm protection plans that are included in base rates
9 and why OPC may not have gotten involved in the storm
10 hardening plans?

11 A Sure. And I tried to allude on that earlier.

12 I wasn't part of OPC when those storm
13 hardening plans were being approved, but I can imagine
14 since there was no base rate impact because the rate
15 impact was going to go through base rates eventually,
16 that's when they would actually look to the prudence of
17 those costs.

18 In fact, if you look at the orders that the
19 Commission issued on the storm hardening plans, there
20 was language at the last part of those orders that said
21 just because we approved the plan doesn't mean that we
22 approved the prudence of the projects or the costs going
23 through here.

24 So it was basically -- the storm hardening
25 plans were to try and make sure the companies were

1 gearing towards hardening their infrastructure after the
2 '04-'05 storm seasons. This is a bit different. This
3 is now allowing cost recovery of a plan that the
4 Legislature has put forth. So it's not just a plan.
5 It's also the recovery aspect of projects that will be
6 put through the plan.

7 Q And for everyone in the room who may not
8 understand ratemaking nearly as well as you do, can you
9 explain the difference between what's recovered through
10 base rates and how that might change on a customer's
11 bill and how often it might change on a customer's bill?

12 A Well, base rates would only change in a
13 customer's bill through a rate proceeding with the
14 Commission. The Commission has to approve every base
15 rate change, and the utility company cannot charge rates
16 that the Commission hasn't approved. So it would have
17 to be through a full fledge proceeding before the
18 Commission of some nature to change base rates, and that
19 doesn't happen every year.

20 Normally, these companies have been on a cycle
21 of three years, three to four years filing rate cases.
22 They all -- somehow since my tenure there, have decided
23 to file all those in the same year. When we were on
24 staff, that was a lot of work in one year.

25 Q And does OPC participate in those proceedings?

1 A Yes, every one of them, to my knowledge, they
2 have.

3 Q And can you say what basis IOUs were set?

4 A I am sorry?

5 Q Can you say on what basis current IOUs were
6 set?

7 A What basis?

8 Q Yes.

9 A It's based on -- well, a lot of them right now
10 are based on settlements before the Commission. FPL,
11 Duke and TECO all have settlements before the
12 Commission.

13 Q And did OPC participate in those settlement
14 agreements?

15 A Yes, they did.

16 Q And going back to questions from PSC, Mr. King
17 asked you if project-related information --
18 project-related information in sufficient detail. In
19 your years at the Commission, had you ever seen this
20 term before?

21 A In sufficient detail?

22 Q Yes.

23 A Sufficient detail doesn't tell me what detail
24 they are going to file. It just says in sufficient
25 detail. That's kind of vague to me. I mean, it's up to

1 the companies what they a want to file when it says
2 sufficient detail, it's what it's requiring. Each
3 company looks at it and decides what they believe is
4 sufficient detail.

5 Q And was that language in the staff proposed
6 version of the rule, the sufficient detail, was that in
7 the staff proposed version of the rule?

8 A Off the top of my head, I can't tell you that.

9 Q Okay. That's fine.

10 MS. FALL-FRY: Thank you. No further
11 questions.

12 THE COURT: Where is the sufficient detail
13 clause you are talking about? Is that in the cost
14 recovery?

15 MR. KING: It's no the 030 rule, the plan
16 rule.

17 THE COURT: 030, but what --

18 MR. KING: I think it's (3)(e)2. I believe
19 that's what OPC was referring to.

20 MS. FALL-FRY: Yes.

21 THE COURT: The second and third years,
22 project related information in sufficient detail
23 such as estimated number and cost of projects under
24 every specific program; is that the sufficient
25 detail that you are talking about?

1 MS. FALL-FRY: Yes. I was referring back to
2 the questions by Mr. King.

3 THE COURT: This goes back to (3)(h), okay.
4 Thanks.

5 Is that it?

6 MS. FALL-FRY: That is it.

7 Thank you, Mr. Wills.

8 (Witness excused.)

9 THE COURT: How are we doing with time? What
10 do you say on a lunch break? How much to keep us
11 on track? Does anyone have any suggestions?
12 Because I don't know. I am not presenting. I am
13 just up here. One hour? Do you think one hour?

14 MS. HARPER: Is OPC --

15 THE COURT: We are still getting done this
16 after?

17 MS. HARPER: I am sorry, does OPC have anymore
18 witnesses they wish to call?

19 MS. FALL-FRY: We are going to call Shelby
20 quickly. We can finish with her in 10 minutes. I
21 don't know if anybody else wants to talk to her,
22 and then we are done.

23 THE COURT: Did you want to finish that? That
24 would be good.

25 MS. HARPER: That would be my preference.

1 THE COURT: How long is that witness going to
2 be?

3 MS. FALL-FRY: Actually, we might not be. Can
4 we have a few minutes to confer?

5 THE COURT: You can have -- yeah, you can
6 confer.

7 MR. MOYLE: I have a couple of redirect
8 questions of Mr. Willis.

9 THE COURT: Oh, I am sorry. Yeah, I forget
10 that we've got the intervenor. While they are
11 conferring, I think you could, unless -- while they
12 are conferring, you could go ahead with your
13 redirect.

14 MR. MOYLE: I am fine with that.

15 REDIRECT EXAMINATION

16 BY MR. MOYLE:

17 Q Mr. Willis, FPL counsel suggested that cost
18 detail can't all be known up front, or may change over
19 time or slip. Why, as a CPA and former bureau chief, is
20 it important to you to have the level of detail
21 regarding project cost up front?

22 A Well, as I explained before, that's so the
23 Commission staff and the intervenors will be able to
24 make sure the costs that are already currently being
25 recovered through base rates will not all of a sudden be

1 slipped up through into recovery through the clause.

2 Q Right. And that's that double recovery term
3 you are talking about?

4 A That's correct.

5 Q And with respect to rulemaking, isn't
6 rulemaking generally a time when an agency puts a little
7 more flesh on the bones of something of a statute, and
8 the Legislature passes the statute and says heading this
9 direction, and the rule provides more detail; is that
10 your general understanding of the rulemaking?

11 A Well, in my 38 years with the Commission,
12 that's what we were required to do. We wanted rules to
13 actually put forth the requirements companies would have
14 to file, because in this one rule, the Commission has
15 six months to deal with it when it's filed. They have
16 to issue a final determination in six months. If you
17 don't get the information up front, you have very
18 limited time for discovery.

19 Q Right. And if the Legislature said no double
20 recovery, and then the rule simply parrots that and says
21 no double recovery without providing detail, it doesn't
22 necessarily then get into the granularity that would be
23 desired to assure that there is no double recovery,
24 correct?

25 A It's just mimicking what the statute says.

1 Q And in your professional judgment, would a
2 approach to have been lay things out and get more
3 information so, again, not only does the utility have to
4 say no double recovery, but the Commission can fulfill
5 its obligation; is that right?

6 A Repeat the last part of your question again.

7 Q Yeah. I am just -- you know, the whole double
8 recovery issue, I am trying to understand what you would
9 have said this is a better way do it. Give me some more
10 information. I mean, that's essentially the point, as I
11 understand it, that you are making with respect to the
12 current rule and how it handles double recovery.

13 A Well, it's a simplistic way of putting it,
14 yes. I mean, I am asking for this information to be put
15 in the rule up front so that we get it, and there is no
16 question -- we won't have to ask for it later on. There
17 is no question we will get it.

18 Q Right. I do best on simple.

19 In terms of the effect on ratepayers, if there
20 is not sufficient guardrails up against double recovery,
21 that could have an effect on ratepayers, could it not?

22 A Well, yes, it could. You could be paying for
23 it both in base rates and through the clause.

24 Q And this rule is the time in which double
25 recovery is being addressed, correct?

1 A It's the time where we hope to get the
2 information to make sure that doesn't occur.

3 Q Exactly.

4 And the same question, I mean, we talked some
5 about projected costs, counsel for one of the
6 intervenors said, well, this rule doesn't raise
7 anybody's rates necessarily, but this rule does set up
8 mechanisms and provide what could be recovered for
9 things like projected costs, so it does have an impact
10 on ratepayers of all bills, including FIPUG members?

11 A That's correct. It will have a future effect,
12 yes.

13 Q And then one other point, and I know we are
14 getting close to a break, but I think the notion that,
15 well, they may not use this clause. In your
16 professional opinion, there is something called
17 regulatory lag, correct?

18 A Yes.

19 Q And doesn't the clauses work to sort of
20 prevent regulatory lag?

21 A Yes, they do.

22 Q Just tell the judge about regulatory lag and
23 what that means, and how -- why the utilities, if you
24 believe that they will use this clause, why they will.

25 A Well, regulatory lag is where you might be

1 incurring the costs now and you don't have base rates to
2 recover that yet because you haven't been through a
3 proceeding to recover it, so there is a lag in getting
4 your rates raised to recover something.

5 The clauses were set up so that you could have
6 a three-year cycle where you could put in there as a
7 projected cost, because in these cases the law allowed
8 it, and the law said. The Commission properly followed
9 the law and said, yes, we could include projected costs,
10 so they put it into a clause for a three-year cycle, and
11 it takes care of regulatory lag.

12 Q And that benefits utilities because they can
13 get money sooner as compared to waiting to have to file
14 a base rate case?

15 A That's right.

16 Q And so given that, to their financial benefit,
17 it's been in your experience that over the years they've
18 used it, all the clauses that were available to them?

19 A It's been my experience, yes.

20 Q And it's your view that this clause will also
21 be used by the utilities?

22 A I would imagine it would, yes.

23 Q And you were asked by OPC about its
24 participation in base rates. FIPUG has participated in
25 all the base rate proceedings over the years as well?

1 A Yes.

2 MR. MOYLE: That's all I have. Thank you.

3 THE COURT: Okay. We've got one more witness?

4 MS. FALL-FRY: No, sir.

5 THE COURT: That's it?

6 MS. FALL-FRY: Yes.

7 THE COURT: You are done?

8 MS. FALL-FRY: OPC rests.

9 THE COURT: Okay. So it's a convenient time
10 to break for one hour, if that's -- if you would
11 like less, I will give you less so we can get more
12 in this afternoon, but we can go late.

13 MR. MOYLE: Yeah, I guess technically, because
14 I am aligned, it would be my time to call folks,
15 but if the PSC's SERC witness is going to take the
16 stand, then, you know, I am good, I could just
17 handle that at that point in time.

18 THE COURT: Is PSC's -- you mean the next
19 witness would be PSC's witness?

20 MR. MOYLE: They have three or four witnesses,
21 one of them relates to the SERC, and I just want to
22 make sure that that witness --

23 THE COURT: That that witness appears?

24 MR. MOYLE: Yes.

25 THE COURT: Is the SERC witness is going to

1 appear? Are you calling the SERC witness?

2 MS. HARPER: We weren't prepared to -- or we
3 were not planning on calling that witness, but I
4 believe he is present.

5 THE COURT: Is that witness available and
6 present, and you are going to call him?

7 MS. HARPER: Yes.

8 THE COURT: You are going to call him?

9 MR. MOYLE: I will call him.

10 THE COURT: So that's how -- after lunch, we
11 will start with Florida Industrial calling the
12 PSC's SERC witness, whoever that may be.

13 MR. MOYLE: Great. We will be back here at
14 1:00. Have a nice lunch.

15 (Lunch recess.)

16 (Transcript continues in sequence in Volume
17 2.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, DEBRA KRICK, Court Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED this 26th day of December, 2019.



DEBRA R. KRICK
NOTARY PUBLIC
COMMISSION #GG015952
EXPIRES JULY 27, 2020