

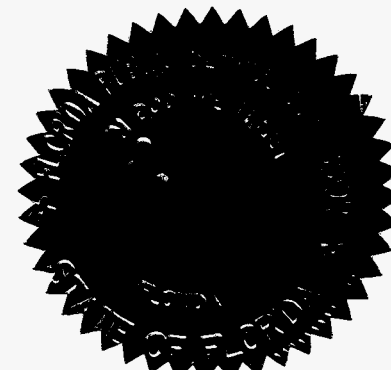
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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In the Matter of

Joint petition for
determination of need for an
electrical power plant in
Volusia County by the
Utilities Commission, City of
New Smyrna Beach, Florida, and
Duke Energy New Smyrna Beach
Power Company Ltd., L.L.P.

DOCKET NO. 981042-EM



VOLUME 1

Pages 1 through 143

PROCEEDINGS: HEARING

BEFORE: CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JOE GARCIA
COMMISSIONER E. LEON JACOBS, JR.

DATE: **Wednesday, December 2, 1998**

TIME: Commenced at 9:30 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JOY KELLY, CSR, RPR
Chief, Bureau of Reporting
H. RUTHE POTAMI, RPR
Official Commission Reporter

DOCUMENT NUMBER-DATE

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REG RECORDS REPORTING

1 **APPEARANCES:**

2 **ROBERT SCHEFFEL WRIGHT and**
3 **JOHN T. LAVIA, III, Landers & Parsons, 310 West**
4 **College Avenue, Tallahassee, Florida 32302, and**
5 **STEVEN G. GEY, Florida State University, and MARK**
6 **SEIDENFELD, Florida State University, College of Law,**
7 **and JOSEPH A. MCGLOTHLIN, McWhirter, Reeves,**
8 **McGlothlin, Davidson, Decker, Kaufman, Arnold & Steen,**
9 **117 South Gadsden Street, Tallahassee, Florida, and**
10 **PATRICK K. WIGGINS, law firm of Wiggins & Villacorta,**
11 **2145 Delta Boulevard, Tallahassee, Florida, appearing**
12 **on behalf of Utilities Commission, City of New Smyrna**
13 **Beach, Florida, and Duke Energy New Smyrna Beach Power**
14 **Company Ltd., L.L.P.**

15 **JAMES A. MCGEE, Florida Power Corporation,**
16 **P. O. Box 14042, St. Petersburg, Florida 33733-4042, and GARY**
17 **L. SASSO, Carlton, Fields, Ward, Emmanuel, Smith & Cutler,**
18 **P.A., Post Office Box 2861, St. Petersburg, Florida 33731,**
19 **appearing on behalf of Florida Power Corporation.**

20 **JAMES D. BEASLEY and LEE L. WILLIS, Ausley &**
21 **McMullen, 227 South Calhoun Street, Tallahassee, Florida**
22 **32302, appearing on behalf of Tampa Electric Company.**

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1 **APPEARANCES CONTINUED:**

2 **WILLIAM B. WILLINGHAM and MICHELLE HERSHEL,**
3 P. O. Box 590, Tallahassee, Florida 32302, appearing
4 on behalf of **Florida Electric Cooperatives**
5 **Association, Inc.**

6 **GAIL KAMARAS,** 1114 Thomasville Road,
7 Suite E, Tallahassee, Florida 32303, appearing on
8 behalf of **Legal Environmental Assistance Foundation,**
9 **Inc.**

10 **JOHN T. BUTLER and CHARLES GUYTON,** Steel
11 Hector & Davis, 215 South Monroe Street, Suite 601,
12 Tallahassee, Florida 32301, appearing on behalf of
13 **Florida Power & Light Company.**

14 **ROBERT J. SNIFFEN and JON MOYLE, JR.** Moyle,
15 Flanigan, Katz, Kolins, Raymond & Sheehan, P.A., 210 South
16 Monroe Street, Tallahassee, Florida 32301, representing **U.S.**
17 **Generating Company.**

18 **DAVID J. WHITE,** 4804 S. W. 45th Street, Suite 100,
19 Gainesville, Florida 32608, appearing on behalf of
20 **Florida Wildlife Federation.**

21 **DONALD F. SANTA, JR.,** Deputy General Counsel, 220
22 West Main Street, Louisville, Kentucky 40232, appearing on
23 behalf of **LG&E Energy Corp.**

24

25

1 **APPEARANCES CONTINUED:**

2 **LESLIE J. PAUGH and GRACE JAYE, Florida**
3 **Public Service Commission, Division of Legal Services,**
4 **2540 Shumard Oak Boulevard, Tallahassee, Florida**
5 **32399-0870, appearing on behalf of Staff of the**
6 **Commission.**

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I N D E X

MISCELLANEOUS - VOLUME 1

3	ITEM	PAGE NO.
4	Oral argument by Mr. Sasso	19
5	Oral Argument by Mr. Guyton	50
6	Oral Argument by Mr. Wright	85
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
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1 Corporation, representing Florida Power Corporation.

2 **MR. BEASLEY:** James D. Beasley with Lee L.
3 Willis of the law firm of Ausley McMullen. We're
4 representing Tampa Electric Company.

5 **MR. SNIFFEN:** Robert J. Sniffen, on behalf
6 of the firm Moyle, Flanigan, Katz, Kolins, Raymond &
7 Sheehan, representing U.S. Generating Company.

8 **MR. GEY:** Steve Gey representing Duke New
9 Smyrna.

10 **MR. SEIDENFELD:** Mark Seidenfeld at Florida
11 State University College of Law representing Duke New
12 Smyrna.

13 **MR. SANTA:** Subject to the pending motion
14 for leave to intervene, Donald F. Santa, Jr., on
15 behalf of LG&E Energy Corp.

16 **MR. WRIGHT:** Robert Scheffel Wright, Landers
17 & Parsons, 310 West College Avenue, Tallahassee, 32301
18 appearing on behalf of the Joint Petitioners, Duke
19 Energy New Smyrna Beach Power Company Limited, L.L.P.
20 and the Utilities Commission, City of New Smyrna
21 Beach, Florida. Also appearing in this case on behalf
22 of the joint petitioners are John T. LaVia, III, of my
23 firm, and Joseph A. McGlothlin of the McWhirter Reeves
24 firm.

25 **MR. WHITE:** David White on behalf of the

1 proposed intervenor, Florida Wildlife Federation.

2 **MR. WRIGHT:** Madam Chairman, I'd also like
3 to enter an appearance Patrick K. Wiggins, law firm of
4 Wiggins & Villacorta, also appearing on behalf of the
5 joint petitioners.

6 **CHAIRMAN JOHNSON:** Thank you. Anyone else?
7 Staff.

8 **MS. JAYE:** Grace A. Jaye on behalf of
9 Commission staff.

10 **MS. PAUGH:** And Leslie Paugh on behalf of
11 Commission staff.

12 **CHAIRMAN JOHNSON:** Are there any preliminary
13 matters?

14 **MS. PAUGH:** There are, Madam Chairman. This
15 morning at 8:15 our general counsel was handed a
16 letter from Senator Lee. This letter is ex parte
17 communication. It was copied to all of the
18 Commissioners. I recommend that pursuant to the
19 Statute 350.042, the parties be given ten days to
20 respond to this letter. It has been entered into the
21 record of this proceeding.

22 **CHAIRMAN JOHNSON:** Thank you. Procedurely,
23 if it's entered into the record, is it still
24 considered ex parte and there's just the process for
25 responding to the ex parte, or once it's entered into

1 the record, how does that affect the record at all?

2 **MR. PAUGH:** If it's entered into the record
3 it's no longer ex parte.

4 **CHAIRMAN JOHNSON:** Okay. Thank you.

5 **MS. PAUGH:** You're welcome.

6 **CHAIRMAN JOHNSON:** Any questions,
7 Commissioners?

8 **COMMISSIONER GARCIA:** I want to be sure
9 we're talking about the same letter. This is the
10 letter from Senator Lee which was handed to me by
11 Staff this morning.

12 **MS. PAUGH:** That's correct, Madam Chairman.
13 Each Commissioner was copied with the letter. We have
14 made 40 copies of it and they are on the railing over
15 here, if any of the parties would like a copy.

16 **CHAIRMAN JOHNSON:** I understand that there
17 are some other matters, some pending motions,
18 unless -- is there a question?

19 **COMMISSIONER JACOBS:** It appears to me that
20 might be something that the parties might want to
21 respond to in brief rather than -- it appears that may
22 be something the parties may want to respond to in
23 brief rather than the evidentiary hearing. Would you
24 agree on that?

25 **MS. PAUGH:** I'm sorry, Commissioner. I

1 don't understand your question.

2 **COMMISSIONER JACOBS:** It would appear that
3 Senator Lee's letter is of a tone that parties might
4 want to respond to this brief, in their briefs, rather
5 than through evidence offered during the hearing.

6 **MS. PAUGH:** In their posthearing brief
7 filings you're suggesting? They certainly have that
8 opportunity, Commissioner.

9 **COMMISSIONER JACOBS:** All right.

10 **CHAIRMAN JOHNSON:** Anything else? Okay. I
11 know we have some pending motions. Counsel, how do
12 you wish for us to proceed? How would you suggest?

13 **MS. PAUGH:** There are pending motions, Madam
14 Chairman. They are the Louisville Gas and Electric
15 Motion for a Qualified Representative, and the Motion
16 to File an Amicus Memorandum. The Amicus Memorandum
17 addresses the motions to dismiss.

18 In addition, oral argument is set this
19 morning for the motions to dismiss pursuant to the
20 Prehearing Order. There are motions to strike which
21 also need to be addressed.

22 I suggest that the order that we take these
23 motions in is the LG&E motion first, the motions to
24 dismiss oral argument and the motions to strike third.

25 **CHAIRMAN JOHNSON:** Counsel, one other

1 procedural matter, have you received a list from
2 customers that wanted to provide public comment or
3 have we not received such list?

4 **MS. PAUGH:** I have not received a document
5 to that effect, but there may be individuals here who
6 wish to comment in the public comments portion of this
7 proceeding.

8 **CHAIRMAN JOHNSON:** Just so I'm clear and we
9 can adjust things accordingly, are there members of
10 the public that will want to testify during the public
11 comment portion of this hearing? (No response.)

12 Let the record reflect there are none. I
13 will make one additional announcement, if we -- when
14 we would start the actual proceeding to that effect,
15 but for now let the record reflect there are no
16 citizens to provide public comment.

17 **MS. PAUGH:** Madam Chairman, before we go on,
18 I believe a representative from the Florida Wildlife
19 Federation is here. And in case they are not aware of
20 it, the Petition for Intervention filed by that
21 organization was denied by an order of the Prehearing
22 Officer yesterday.

23 **CHAIRMAN JOHNSON:** I believe that the
24 gentlemen here, your motion then has been ruled upon?

25 **MR. WHITE:** I received a notice -- I

1 received a notice that the petition of the Save the
2 Manatee Club was dismissed but I did not receive a
3 copy of any order dismissing our motion to intervene.

4 **CHAIRMAN JOHNSON:** Ms. Paugh.

5 **MS. PAUGH:** The Save the Manatee was also
6 dismissed, as well as the Union of Contractors and
7 Builders. All three petitions for intervention were
8 denied. They were filed in Records. They may not
9 have been issued as of yet.

10 **CHAIRMAN JOHNSON:** I'm assuming you were
11 here to argue that motion, but that motion has,
12 indeed, been ruled upon.

13 Any other outstanding matters before we
14 start with the petition to file the amicus?

15 **MS. PAUGH:** That's what I recommend. Before
16 we do that, I would recommend that we address the
17 motion for Mr. Santa to appear as a qualified
18 representative.

19 **CHAIRMAN JOHNSON:** Mr. Santa.

20 **MR. SANTA:** Yes, Madam Chairman. LG&E
21 Energy Corp. is an energy industry holding company
22 headquartered in Louisville, Kentucky. In addition to
23 its two franchised public utility subsidiaries, LG&E
24 owns a number of nonutility subsidiaries, including
25 LG&E Power, Inc. a merchant plant developer. LPI

1 currently owns, operates and is developing a number of
2 nonutility generation projects around the country.
3 While none of these projects are located in the state
4 of Florida, LPI has explored opportunities in the
5 Florida market.

6 Therefore, LG&E has interests that would be
7 directly affected were the utility's motion to dismiss
8 granted, and petitions the Commission for leave to
9 intervene and opportunity to participate this morning.

10 **CHAIRMAN JOHNSON:** Okay. I believe that the
11 first issue was just the issue of qualified
12 representative?

13 **MS. PAUGH:** That's correct, Madam Chairman.

14 **CHAIRMAN JOHNSON:** And if you could just
15 state why you should be considered a qualified
16 representative or why you qualify.

17 **MR. SANTA:** Madam Chairman, I am the senior
18 vice president and deputy general counsel of LG&E
19 Energy Corp. I have been authorized by the corporate
20 secretary and general counsel to represent the company
21 here this morning.

22 **CHAIRMAN JOHNSON:** And you are licensed to
23 practice in?

24 **MR. SANTA:** I'm licensed to practice in the
25 District of Columbia.

1 **CHAIRMAN JOHNSON:** Okay. Counsel.

2 **MS. PAUGH:** Staff's recommendation is that
3 the pleading filed by Mr. Santa meets all of the
4 requirements of Rule 28-106.106(3) for Qualified
5 Representative Status. I have a copy of the rule with
6 me if the Commissioners would like to take a look at
7 it.

8 **CHAIRMAN JOHNSON:** Any questions,
9 Commissioners? Seeing none, we will grant you that
10 status.

11 Now, more to the substantive motion, to --
12 the motion was to file leave -- or motion for leave
13 for file an amicus regarding memorandum of law to
14 address the Commission on a motion to dismiss.

15 **MS. PAUGH:** That's correct, Madam Chairman.

16 Staff reviewed the motion and the memorandum
17 of law filed by Mr. Santa. And Staff's recommendation
18 is that the motion and the amicus memorandum meet the
19 requirements of Florida Rules of Appellate Procedure
20 9.370. That rule states "An amicus may file and serve
21 a brief in any proceeding with written consent of all
22 of the parties or by order of request of the court. A
23 motion to file a brief as amicus shall state the
24 reason for the request and the party, or interest on
25 whose behalf the brief is filed. In addition,

1 pursuant to the case law of the state of Florida,
2 amicus briefs are generally for the purpose of
3 assisting the Court," the Commission in this instance,
4 "in cases which are of general public interest or
5 aiding in the presentation of difficult issues."
6 That's a paraphrase from the case of CG Limited, BASF,
7 A.G. versus The Fish Peddler, Inc. 683 So.2d 522,
8 Fourth DCA 1996. I have copies of that case if the
9 Commissioners are interested in taking a look at it.
10 In short, Staff's recommendation is that the amicus
11 should be granted.

12 **CHAIRMAN JOHNSON:** I know this was just
13 filed on the 23rd. Were there other documents filed
14 in opposition?

15 **MS. PAUGH:** Not to my knowledge, Madam
16 Chairman.

17 **CHAIRMAN JOHNSON:** Is there any opposition
18 from any of the parties? Seeing none, Commissioners,
19 any questions? Show then the Motion for Leave to File
20 the Amicus granted.

21 **MS. PAUGH:** Next I would suggest the
22 Commission hear the oral argument.

23 **CHAIRMAN JOHNSON:** I'm sorry. Mr. Wright,
24 do you have a question?

25 **MR. WRIGHT:** Not a question, Madam Chairman.

1 I just wanted to mention that Mr. Santa and I have
2 discussed his participation, subject, of course, to
3 your ruling, and we would allow him part of our time
4 in the oral argument on the motions to dismiss to
5 present argument reflected in his amicus brief.

6 **COMMISSIONER GARCIA:** If I'm not mistaken,
7 in the Prehearing Order I limited that to some extent.
8 What is the time limit?

9 **MS. PAUGH:** The time limit set in the
10 Prehearing Order are a half hour each for Florida
11 Power and Light and Florida Power, and half an hour
12 for Duke to respond to each for a total of one hour
13 for Duke.

14 **CHAIRMAN JOHNSON:** So that hour allocation
15 you will divide with Mr. Santa?

16 **MR. WRIGHT:** Yes, ma'am.

17 **COMMISSIONER GARCIA:** We also extracted a
18 promise from Schef not to fill all of that hour.

19 (Laughter)

20 **CHAIRMAN JOHNSON:** Okay. Next I believe we
21 have the Motions to Dismiss.

22 **MS. PAUGH:** That's correct, Madam Chairman.

23 **CHAIRMAN JOHNSON:** Florida Power Corp.

24 **MR. SASSO:** Yes. Thank you, Chairman
25 Johnson, members of the Commission.

1 As a preliminary matter, we would
2 respectfully request the Commission consider giving
3 the parties some additional time for this motion.

4 We recognize that we participated in the
5 prehearing conference and discussed and agreed to an
6 hour per side. But in the course of preparing to
7 argue these motions it became abundantly clear that
8 the parties would require additional time to
9 adequately present both sides.

10 I have discussed this with Mr. Wright in
11 advance of the hearing, and he indicated he would have
12 no objection to expanding the time somewhat, and
13 Mr. Guyton likewise.

14 Mr. Guyton and I have attempted to
15 coordinate so that we don't present redundant argument
16 to the Commission. But nonetheless, we would
17 respectfully request that we be given 45 minutes
18 apiece, and that Duke be given equal time for its
19 presentation as well.

20 **CHAIRMAN JOHNSON:** And there was no
21 objection by Duke? You all are being so cooperative
22 this morning.

23 **COMMISSIONER GARCIA:** To be quite honest,
24 Madam Chairman, I have had to go through all of this
25 testimony. And I've obviously read these motions. I

1 think we should get to the heart of the matter and I
2 think the parties can get to the heart of the matter
3 in more than enough time in 30 minutes. I think we
4 have got a hearing. We've only got three days to do
5 that hearing. If we do what the parties want here,
6 it's going to burn up the entire morning. I would
7 just think -- I think we were better served by just
8 getting on with this, but, again, that's your decision
9 and it's only my opinion.

10 **CHAIRMAN JOHNSON:** We might dismiss --
11 depending on that edge for 15 minutes. Just kidding.
12 (Laughter)

13 **MR. SASSO:** We would hope it would be worth
14 the Commission's investment of time. (Laughter)

15 **CHAIRMAN JOHNSON:** How much time would you
16 need?

17 **MR. SASSO:** 45 minutes a side.

18 **CHAIRMAN JOHNSON:** Oh, you did say that.

19 **MR. SASSO:** What I would like to do is I'll
20 attempt to limit my opening remarks.

21 **COMMISSIONER CLARK:** I'm sorry, 45 minutes a
22 side?

23 **MR. SASSO:** I'm sorry. 45 minutes for
24 Mr. Guyton --

25 **COMMISSIONER GARCIA:** Each motion.

1 **COMMISSIONER CLARK:** I was going to say, we
2 can take that 45 minutes a side --

3 **MR. SASSO:** 45 minutes apiece for each
4 moving party and a commensurate amount of time for
5 Duke to respond. I will try to limit my opening
6 remarks to about a half an hour and reserve some time
7 for rebuttal, if that's acceptable to the Commission.

8 **CHAIRMAN JOHNSON:** Given the magnitude of
9 the issues that we're dealing with and there were
10 extensive filings, the issues at least, as they have
11 been framed by Florida Power and Light and Florida
12 Power Corp are pretty detailed, and there is no
13 objection from the other side.

14 Commissioner Garcia, I'm appreciative of
15 your concern. But I will allow the additional time so
16 that we can make sure that these issues are adequately
17 addressed and that the parties have had ample
18 opportunity to express themselves in their positions
19 on the record.

20 **MR. SASSO:** Thank you very much.

21 To begin, again, just to mention that
22 Mr. Guyton and I have attempted to coordinate so that
23 we don't present redundant argument, what we've agreed
24 is that I will focus my argument on the statutory
25 language, legislative history and development of the

1 applicable legislation in the state of Florida. And
2 Mr. Guyton will emphasize the decisions of this
3 Commission and the Florida Supreme Court as they apply
4 to the issues before us.

5 I propose to deal with the legislative
6 matters chronologically because I believe it is
7 important to do so to appreciate fully the meaning and
8 significance of some of these applicable provisions.

9 In doing so, I will focus on three main
10 events. The 1973 enactment of the Power Plant Siting
11 Act and the Ten Year Site Plan requirements which were
12 enacted as part and parcel of the same law. The 1980
13 enactment --

14 **CHAIRMAN JOHNSON:** I apologize for
15 interrupting, and I'll make sure that you're given due
16 consideration to any questions you may have and add
17 some time.

18 It would be helpful for me if you could
19 start off with a general standard of review and what
20 we should be looking at as we make our decision on the
21 motion to dismiss. I understand you're going to go
22 through the history and perhaps an argument as to why
23 or -- why they are not an applicant in your opinion.
24 Help me understand the process and the standard I need
25 to use as I evaluate your argument.

1 **MR. SASSO:** Yes, Madam Chairman.

2 To be specific, this is a pure issue of law:
3 Whether the legislation involved here essentially
4 empowers the Commission to permit Duke to attain a
5 determination of need for a merchant plant. The
6 fundamental question is one of statutory authority.

7 This Commission, of course, is a creature of
8 legislation, and it obtains its authority to act from
9 legislation. And so the threshold issue is does this
10 Commission have authority, under existing legislation,
11 to rule in Duke's favor on its joint petition?

12 The Commission obviously must address this
13 question in the first instance, although ultimately it
14 will be a matter for the courts to decide because the
15 courts have the prerogative of interpreting law. But
16 this is not an area, in our opinion, in which the
17 Commission has discretion. We believe that the
18 legislation is clear. And I will discuss the
19 statutory provisions that make it so. And Mr. Guyton
20 will discuss the decisional law that make clear that
21 the Florida Supreme Court has already authoritatively
22 construed this statute in a sense that binds the hands
23 of this Commission. It based its ruling on the plain
24 language of the statute. That being the case, we
25 believe that the Commission is constrained to deny

1 Duke's joint petition, whether or not the Commission
2 thinks it might be a good idea to have merchant plant
3 development in this state. We don't believe that's a
4 permissible consideration in this proceeding.

5 Now, to address the legislative issues. I
6 would begin by discussing the 1973 enactment of the
7 Power Plant Siting Act and Ten Year Site Plan
8 Requirements. And the first point that I would make
9 there is that the Power Plant Siting Act, as it is
10 commonly known today, and the Ten Year Site Plan
11 Requirements, as they are commonly known today, were
12 enacted originally as the same law, part of the same
13 law. The Ten Year Site Plan obligations were moved
14 later to be codified together with other planning
15 legislation just as a matter of presentation and
16 convenience. But it's significant that they were
17 enacted together as part of the same law. And I'll
18 explain why.

19 Now, this legislation in 1973 applied to the
20 siting of plants and the development of Ten Year Site
21 Plans by electric utilities. And that term was
22 defined to include, quote, "any cities and towns,
23 counties, public utility districts, regulated electric
24 companies, electric cooperatives, and joint operating
25 agencies, or combinations thereof, engaged in or

1 authorized to engaged in the business of generating,
2 transmitting or distributing electrical energy," and
3 that definition is now found in Section 403.503. Now,
4 what may be gleaned from this definition? What do
5 these entities have in common?

6 As this Commission held in the Ark and
7 Nassau case -- and I'm quoting -- "significantly each
8 of the entities listed under the statutory definition
9 may be obligated to serve customers. It is this need
10 resulting from a duty to serve customers which the
11 need determination proceeding is designed to examine.
12 Nonutility generators," such as Nassau and Ark, "have
13 no such need since they are not required to serve
14 customers."

15 So we see that each of the entities
16 contained in the statutory definition may be obligated
17 to serve customers. Another way of putting that is
18 that they serve the public at retail, and, of course,
19 merchant plants do not. The text of the 1973 law
20 confirms this.

21 The law went on to provide that each
22 electric utility must submit a Ten Year Site Plan that
23 estimates its power generating needs, and the general
24 location of its power plants. It's significant that
25 the legislature referred to the electric utilities'

1 own power generating needs. Because only a utility
2 that has an obligation to serve customers can
3 logically speak of its own needs for generating
4 capacity. A merchant plant, of course, does not have
5 needs of its own for generating capacity. It seeks to
6 satisfy the needs of retail utilities which are the
7 only --

8 **COMMISSIONER GARCIA:** How would a
9 co-generator fit into that mix?

10 **MR. SASSO:** Co-generators are similarly
11 situated to the IPP involved in this case.
12 Co-generators do not have standing in and of
13 themselves to site a power plant. They can come in as
14 a co-applicant with retail utility that asks the
15 Commission to determine its need for generating
16 capacity.

17 Now, the statute goes on to say consistent
18 with this that "the Public Service Commission must
19 reserve Ten Year Site Plans to determine need, quote,
20 'in the area to be served', close quote. Again, a
21 clear reference to service territories of retail
22 utilities in the state. So it's evident --

23 **COMMISSIONER GARCIA:** You don't think that
24 that refers to more of a general area of need as
25 opposed to an area of territory to serve?

1 **MR. SASSO:** I think it's clear when one
2 looks at the statutory provisions and this
3 Commission's regulations implementing them that what
4 is at issue here is the geographic area in which
5 service is provided. And we're going to see this
6 theme carried through in other legislation, in FEECA
7 in particular when we discuss that.

8 **COMMISSIONER DEASON:** Let me ask a question.
9 So it's your interpretation of the Ten Year Site Plan
10 provisions that the determination -- that need and how
11 that need is to be served is based upon the geographic
12 area of the utility which has -- which serves on a
13 retail basis.

14 **MR. SASSO:** Yes, that's correct, sir.
15 Basically, the Ten Year Site Plan law and the Power
16 Plant Siting Act, and as I'll discuss in a moment,
17 FEECA, they are part of a comprehensive legislative
18 approach to the determination of need, the
19 identification of need, and the planning to meet that
20 need. And the retail utilities in this state are the
21 focal point of that in this legislation.

22 **COMMISSIONER DEASON:** What about the
23 argument that the Ten Year Site Plan is really a
24 Peninsular Florida issue, and that we look at need as
25 a whole and not on an individual utility basis, i.e.,

1 if a utility does not have sufficient reserve margins
2 in any given year, but they can rely upon reserve
3 margins of other utilities, perhaps other generating
4 facilities, within Peninsular Florida, then the plan
5 is determined to be suitable.

6 **MR. SASSO:** Well, of course, the
7 Commission's responsibility is to ensure there's
8 adequate energy available throughout the state. But
9 it does so in a particular manner. It does so through
10 the regulation of retail utilities that have allocated
11 service territories. And what you're referring to,
12 sir, is sort of the aggregation of the plans of the
13 individual utilities. But the law in so as far as it
14 regulates and speaks to individual electric utilities
15 in a definitional sense, requires that they address
16 their own needs in the areas that they will serve.

17 **COMMISSIONER GARCIA:** So if Florida Corp did
18 not meet what we thought was an adequate margin
19 reserve on its own, then Florida Power Corp should not
20 be able to rely on the Peninsular Florida overflow
21 from one or another of the companies that provide
22 power in the state to meet that need.

23 **MR. SASSO:** No, I'm not saying that, sir.
24 The issue is what provision is Florida Power
25 Corporation making to meet its need. And then one

1 looks at the various resources it can draw on to meet
2 its need. But the focal point is still the need of
3 the utility and it may draw on resources outside of
4 its own generating fleet to do so.

5 **COMMISSIONER DEASON:** The only source of
6 that is from another regulated utility which serves
7 retail customers?

8 **MR. SASSO:** No. A retail utility can
9 purchase power from -- another generating facility can
10 purchase power through firm contracts from other
11 sources.

12 **COMMISSIONER DEASON:** But they have to have
13 a contract with the obligation of the entity to
14 provide power under that contract so that it can be
15 relied upon in the event of a capacity shortfall?

16 **MR. SASSO:** Well, the way that the
17 Commission has approached the demonstration of need is
18 it has required that -- utilities such as Florida
19 Power Corporation, not depend upon nonfirm resources
20 to meet its needs. It can only rely on its own
21 generating units or firm resources. And merchant
22 plants, of course, don't propose to provide firm
23 resources, so Florida Power Corporation cannot rely on
24 nonfirm merchant power to meet its needs under its
25 obligations in this legislation.

1 Now, what does Duke say to demonstrate to
2 the Commission that it is covered under the definition
3 that I've discussed? Well, Duke argues it meets the
4 definition of an electric utility in two respects. It
5 says, first, it is a regulated electric company, as
6 that is used in the statute. And, second, even if
7 it's not a regulated electric company, it's a joint
8 operating agency, as that term is used in the statute.

9 Now, as far as regulated electric companies
10 are concerned, the last time we were here on the
11 declaratory statement proceeding, Duke argued well,
12 we're an EWG, and that's how we are regulated. But,
13 of course, there were no EWGs in 1973. So now they
14 have argued even before 1973 wholesale generators were
15 regulated by the Federal Power Act and therefore
16 regulated under federal law.

17 **COMMISSIONER GARCIA:** Doesn't the statute
18 specifically say electric utility means cities and
19 towns?

20 **MR. SASSO:** Yes, it does. We do not contend
21 that the Utilities Commission of New Smyrna could not
22 come before this Commission and demonstrate that it
23 needs 30 megawatts. But, of course, it wouldn't even
24 have to go through the power plant siting act for 30
25 megawatts. But the municipality, the Utilities

1 Commission of New Smyrna Beach, is not here to support
2 a need for 500 megawatts for its own system. This is
3 really a classic case of the tail wagging the dog.
4 Duke really makes no bones about the fact that it's
5 principally engaging here in a merchant plant
6 operation.

7 Again, referring to this issue of regulated
8 electric company, there's no basis or reason to assume
9 that the state legislature in 1973 in enacting this
10 law, intended to speak to regulation by the federal
11 government. The use of that term, "regulated electric
12 company," in this context clearly reflects an intent
13 simply to affirm the state's jurisdiction over the
14 retail utilities that it regulates.

15 I've provided in the form of Notice of
16 Filing with the Commission a number of authorities
17 that I'm relying on in this argument, including the
18 public law that was enacted in 1973 to adopt the Power
19 Plant Siting Act.

20 **COMMISSIONER JACOBS:** Would you argue that
21 the City of New Smyrna Beach is prohibited from taking
22 advantage of the benefits of the statute even though
23 they don't have to, the benefits being centralized
24 permitting?

25 **MR. SASSO:** Well, I don't have an answer to

1 that question. There is an exemption for plants under
2 75 megawatts.

3 **COMMISSIONER JACOBS:** Right. That means
4 they don't have to --

5 **MR. SASSO:** They don't have to come.
6 Whether they could come really isn't the issue before
7 us for a 30-megawatt facility because that's not what
8 they are seeking to do. They are not seeking
9 authorization to build a 30-megawatt facility. In
10 fact, in a joint petition they say they ruled out such
11 an option. They would not build a 30-megawatt
12 facility. The only way that the Utilities Commission
13 seeks to demonstrate cost-effectiveness of its option
14 here is saying that the 500-megawatt facility is
15 efficient, and so it's an efficient purchasing option
16 for it. But that is like taking a sledge hammer to
17 swat a flea. The Utilities Commission is seeking to
18 support a 500-megawatt facility on the basis of a
19 30-megawatt need and that's clearly inappropriate.

20 Now, the public law that was adopted in 1973
21 contains the following description of the legislation.
22 It says that the purpose of the bill was to provide,
23 quote, "that the regulation of electric utilities is
24 preempted by the state." So it's clear when one looks
25 at the words that the legislature used to describe

1 what it was doing in this law, that it was speaking
2 about state regulation of electric utilities, not
3 federal regulation of electric utilities.

4 And anticipating this, Duke argues we are
5 regulated under Chapter 366. And they rely under the
6 definition in 366.02(2) which says electric utility
7 means, quote, "any municipal electric utility,
8 investor-owned electric utility or rural electric
9 cooperative which owns, maintains or operates an
10 electric generation, transmission or distribution
11 system within this state."

12 Now, to begin with, this definition was
13 enacted in 1989 and hardly provides guidance for what
14 was a regulated electric company this 1973. But in
15 any event, Duke clearly would not operate an electric
16 system as this definition requires, even if this one
17 plant were permitted. Further, if Duke truly were
18 covered as an electric utility under state regulation
19 it would lead to results that even Duke suggests
20 wouldn't suggest apply. Namely, under Chapter 366
21 this Commission, quote, "shall have power over
22 electric utilities for the following purposes. A) To
23 prescribe uniform systems and classifications of
24 accounts. B) To prescribe a rate structure for all
25 electric utilities. C) To require electric power

1 conservation. D) To approve territorial agreements,
2 et cetera.

3 All of these powers that the Commission has
4 over "electric utilities" close quote, clearly pertain
5 to the retail utilities in this state. They do not
6 apply to merchant plants.

7 So Duke's second argument is well, if we're
8 not a regulated electric company, we're a joint
9 operating agency within the meaning of the Power Plant
10 Siting Act definition. They say we really can't
11 identify a definition of that term that would make
12 sense in 1973. So we're going to look at a law that
13 was enacted in 1975 to give content to that term,
14 namely, the Joint Power Act. Well, on its face that
15 is an argument that makes little sense but let's
16 follow it for a while.

17 To begin with, a joint power operating
18 project or joint operating power project under the
19 1975 law is one that is used to jointly finance,
20 construct, operate or own a power project. What Duke
21 and New Smyrna are proposing here is that Duke will
22 build and own and operate the plant and will sell a
23 miniscule amount of its output to the Utilities
24 Commission of New Smyrna. That's not a joint
25 operating power project within the meaning of statute.

1 In any event, the history of that statute
2 reveals a number of flaws in Duke's argument. To
3 begin with, prior to 1975, when the Joint Power Act
4 was enacted, a municipality was not permitted under
5 the Florida Constitution to enter into an arrangement
6 for a joint power project with a private entity like
7 Duke.

8 The Florida Constitution was amended in 1974
9 to permit such arrangements to take place. So in
10 1973, when the Power Plant Siting Act was enacted,
11 merchants could not have been contemplated by the
12 Power Plant Siting Act as a joint operating agency.
13 Municipalities weren't permitted to enter into such an
14 alliance with private entities. Even in 1975, when
15 the Joint Power Act as enacted, the law permitted
16 municipalities to enter into arrangements only with
17 investor-owned utilities then in existence. The
18 statutes expressly limited such alliances to IOUs in
19 existence in 1975. That wasn't changed until 1982.
20 Moreover, until the 1980s a joint power project was
21 not permitted to sell power outside of its own
22 project.

23 So, essentially, Duke is relying on a
24 legislative development that took place in the 1980s
25 to give content to a term that was used 1973. We need

1 look no further than the 1973 status quo to give
2 content to the term. Namely, it involved cooperations
3 among municipal entities or governmental entities in
4 the area of electric service, and as this Commission
5 said, in the area of retail electric service.

6 Now, jumping ahead to 1980, the enactment of
7 FEECA and the Transmission Line Siting Act. To begin
8 with, the Transmission Line Siting Act was enacted
9 that year, and as we've shown in the staff report that
10 we filed with the Commission, that was patterned after
11 the Power Plant Siting Act. We need look no further
12 than the Transmission Line Siting Act itself because
13 it said on its face at that time that it was
14 incorporating by reference the definitions used in the
15 Power Plant Siting Act for the terms "electric
16 utility" and "applicant."

17 Now, it is inconceivable that the Florida
18 Legislature intended in 1980 that merchants would come
19 into the state and build transmission lines even
20 without the authority of eminent domain. Clearly it
21 used these terms and understood them to be used in a
22 Power Plant Siting Act to apply to the retail
23 utilities regulated by this Commission.

24 Now, FEECA was also passed in 1980. Duke
25 concedes that the Florida Energy Efficiency and

1 Conservation Act, FEECA, does not apply to wholesale
2 generators such as itself. We submit that this
3 concession is fatal to Duke's case. Why? Because
4 Section 403.519, the need provision that brings us
5 here today, was enacted as part of FEECA.

6 Now, what is the purpose of FEECA? Well, as
7 the Commission is aware, FEECA was enacted to
8 encourage utilities that served retail customers to
9 promote demand-side management and other conservation
10 measures to reduce consumption by those customers of
11 electricity. And, of course, this goal has no
12 application to merchant plants.

13 Now, this is important, among other things,
14 because 403.519 provides that in considering need,
15 quote, "the Commission shall also expressly consider
16 the conservation measures taken by, or reasonably
17 available to, the applicant or its members which might
18 mitigate the need for the proposed plant." Close
19 quote. This condition, a mandatory condition as part
20 of a need proceeding, logically applies only to a
21 retail utility with an obligation to serve customers.
22 Only a retail utility can mitigate its need for
23 generating capacity by promoting conservation with its
24 customers.

25 Like the Ten Year Site Plan law, FEECA

1 requires each utility to develop a plan for increasing
2 energy efficiency and conservation "within its service
3 area." Close quote. Again, a clear reference to
4 geographical service territories of retail utilities.
5 And most importantly, the statute expressly tied the
6 need provision to retail utilities. Section 403.519
7 was originally enacted in Section 633.86 of FEECA. It
8 was later moved to be codified adjacent to the Power
9 Plant Siting Act just as a matter of presentation.

10 When FEECA was first enacted, Section
11 366.821 said, quote, "For purposes of this part,"
12 referring to FEECA as one unitary law, including the
13 need provision, "utility means any person or entity of
14 whatever form which provides electricity or natural
15 gas to the public."

16 Now, the legislature could have used the
17 existing definitions of electric utility in FEECA
18 because it was applying this law to gas as well as
19 electric, so it fashioned its own. But it was
20 entirely compatible with the existing definitions of
21 electric utilities.

22 When the need provision was later moved to
23 403.519 as a housekeeping matter, 366.821 was
24 corrected and it reads this way today: "For the
25 purposes of Sections 366.80 through 366.85," which is

1 FEECA, "and 403.519, the need provision," which is
2 also part of FEECA, "utility means any person or
3 entity of whatever form which provides electricity or
4 natural gas at retail to the public." It couldn't be
5 clearer that 403.519, the Power Plant Siting Act, the
6 Ten Year Site Plan law, and FEECA, as a whole, all
7 apply to regulation of electric utilities that serve
8 customers at retail within their respective service
9 areas. The need provision, of course, is a condition
10 precedent to a site certification under the Power
11 Plant Siting Act.

12 Now, even after FEECA was enacted in 1990,
13 403.519 was enacted, keep in mind that the Power Plant
14 Siting Act still used the definitions of "applicant"
15 and "electric utility" under which Duke relies. There
16 was no conflict, however, in these terms as I've
17 described. Both statutes apply to the obligations of
18 retail utilities that serve customers.

19 Under all of these Acts, retail utilities
20 are the focal point for the determination of need, the
21 identification of need and the meeting of need.

22 Now, under Duke's construction, however,
23 there would be this hopeless conflict between the
24 definitions used in the Power Plant Siting Act and the
25 definitions used in the need provision which is the

1 point of entry to the Power Plant Siting Act. And we
2 arrive at that conflict only because Duke parses the
3 language. It reads these terms out of context from
4 the whole of the legislation and basically makes a
5 strained construction of why they fit into this
6 scheme, when, in fact, they don't.

7 There's no indication in the law or in the
8 legislative history that when the legislature enacted
9 FEECA, which was expressly limiting the need
10 provision, the point of entry to Power Plant Siting
11 Act to retail utilities, they thought they were
12 somehow reducing the scope of coverage that then
13 existed in the Power Plant Siting Act. In fact, that
14 same year remember they adopted a Transmission Line
15 Siting Act which used those definitions and said it
16 was patterned after the Power Plant Siting Act. The
17 same year they restricted FEECA to retail utilities.

18 It's clear in context that the legislature
19 was using the term "applicant" and "utility"
20 interchangeably in these laws. In fact, 403.519 at
21 the time used both terms in the same section. It
22 talked about a utility making a request for action,
23 for need, and then it talked about an applicant. It
24 used these terms interchangeably and that was clearly
25 the legislature's mind-set.

1 Now, let's move ahead to the 1990
2 housekeeping amendments. In 1990 the legislature made
3 some conforming amendments in the Transmission Line
4 Siting Act and the Power Plant Siting Act. And they
5 substituted the word "applicant" for "utility" in
6 403.519. And Duke's whole case rests on this change
7 as though, "wa-la," at this time merchants were not
8 permitted into the state. However, the legislature
9 did not change 366.821, which still says to this day
10 that for purposes of 403.519 utilities are retail
11 utilities. The need provision. And even after the
12 1990 housekeeping amendments, everybody recognizes
13 that it still takes a utility to get a need
14 determination under 403.519. In fact, this
15 Commission's Rule 25-22.0801 say upon its own motion
16 or by motion of a utility, the Commission will conduct
17 a need proceeding. Yet Duke wants this Commission
18 completely to ignore the mandate of Section 366.821
19 that 403.519 is limited to retail utilities because of
20 this housekeeping amendment.

21 Now, if Duke were right let's consider what
22 this would mean.

23 **COMMISSIONER CLARK:** Mr. Sasso, let me just
24 ask you, why do you characterize that as a
25 housekeeping amendment? Which law is that you're

1 referring to?

2 **MR. SASSO:** This is the 1990 legislative
3 changes to the Transmission Line Siting Act and Power
4 Plant Siting Act.

5 **COMMISSIONER CLARK:** What is the law of
6 Florida you're siting to? Is it 9033? Is it one
7 you've provided us with.

8 **MR. SASSO:** Yes.

9 **COMMISSIONER CLARK:** And it is 9033.

10 **MR. SASSO:** I'm sorry. It's the 1990
11 amendments. And in that filing, Commissioner Clark,
12 we provided the legislative history, which I'll
13 discuss in a moment, relating to these amendments that
14 concerned -- Committee substitute for House Bill 3065.
15 The amendments were to the Transmission Line Siting
16 Act and the Power Plant Siting Act so we'll find the
17 law still in those two statutes.

18 **COMMISSIONER CLARK:** But you characterize it
19 as housekeeping. The whole bill was a revisers bill.
20 It was not an substantive bill?

21 **MR. SASSO:** Let me discuss the legislative
22 issue which will make clear the basis for my
23 characterization.

24 The Staff analysis for that 1990 law says
25 that the legislation, quote, "for the most part

1 conforms to definitions, timing and procedural
2 provisions of the Power Plant Siting Act, and the
3 Transmission Line Siting Act. Similar duties are
4 created for applicants under each Act."

5 In a section-by-section analysis, the
6 section on definition says that Section 403.503 amends
7 the definition section to add or change definitions to
8 make both the PPSA and TLSA consistent. A new
9 emphasis on planning is reflected by the definitions.

10 As I've explained, the planning obligations
11 under the Ten Year Site Plan law, Power Plant Siting
12 Act and FEECA all relate to retail utilities that
13 serve customers in their respective areas.

14 Now, importantly the Staff analysis says
15 that application fees will increase under these
16 changes, but that for utilities, additional costs
17 could be transferred to the ratepayer. It's clear
18 that the legislation -- the legislature, in making
19 these changes, understood that insofar as it was
20 regulated utilities, that these were utilities that
21 had ratepayers.

22 **COMMISSIONER GARCIA:** Where are you reading
23 from?

24 **MR. SASSO:** This is from the materials that
25 I filed under Tab 3 in our Notice of Filing, which is

1 the Final Staff Analysis and Economic Impact Statement
2 relating to these changes.

3 The Staff further concluded that there would
4 be no impact on competition, private enterprise and
5 employment markets. This clearly was not an effort to
6 open up the state to merchant plant construction.

7 If Duke were correct that it were, this is
8 the situation we would have had. We would have had
9 coverage of merchants from 1973 to 1980 under their
10 construction of these definitions, and then FEECA was
11 enacted. And then merchants would be excluded from
12 1980 to 1990 and then they would be led back in again
13 by these conforming amendments of 1990.

14 There's no indication and no reasonable
15 conclusion that the legislature intended to flip-flop
16 fundamental coverage of electric utilities in this
17 manner. What we have in this legislative progress is
18 not a vacillation, but an evolution where we see the
19 enactment of the Power Plant Siting Act and the Ten
20 Year Site Plan law. We see additional planning
21 obligations being placed on retail electric utilities
22 in 1980, and then some conforming amendments made in
23 1990. But it's a natural progression of regulation of
24 retail utilities in this state.

25 Now, Duke has taken a position that our

1 construction -- they've argued in their papers -- that
2 our construction and our legal position is absurd:
3 utter nonsense they called it. Even leads to an
4 unconstitutional result.

5 I believe it's important for the Commission
6 to understand that Duke's retail utility has played an
7 instrumental role in ensuring that the law of North
8 Carolina is in accord with the law in Florida in this
9 regard. We've included in our Notice of Filing
10 decisions from the North Carolina Public Utilities
11 Commission, North Carolina Court of Appeals affirming
12 that decision that make this clear.

13 This case law concerns a situation that
14 arose in 1991 when a power plant developer named
15 Empire Power Company filed an application for
16 certificate of need with the North Carolina Public
17 Utilities Commission. It based its application on
18 general load forecast at various retail utilities, and
19 the developer stated, as the Commission recognized in
20 its decision, that the plant will, quote, "be built at
21 Empire's own risk", close quote, which is Duke's
22 definition of a merchant plant in this proceeding.
23 The developer argued that the plant was needed because
24 it stood ready to enter into contracts with Duke and
25 other utilities, which they didn't particularly want,

1 and that it stood ready to meet a statewide need.

2 Duke intervened in that proceeding and
3 joined with Carolina Power and Light in asking the
4 Commission to dismiss the developer's petition for a
5 certificate of need because they did not have a
6 contract with a retail utility. Public Utilities
7 Commission of North Carolina granted that motion to
8 dismiss without conducting an evidentiary hearing.
9 North Carolina Court of Appeals affirmed. That's
10 still good law in North Carolina.

11 In its brief in the Court of Appeals in that
12 case Duke said the following at Page 8. First, the
13 Commission found that an independent power producer,
14 such as Empire, must present evidence for a contract
15 for the sale of power prior to obtaining a
16 certificate. This is a threshold requirement. Unless
17 Empire can establish that there exists a market for
18 its power, Empire cannot make a showing that the
19 public convenience and necessity requires the
20 construction of its generating system.

21 At Page 29 Duke argued Empire contends that
22 the phrase "public convenience and necessity" means
23 the public at large, not a limited number of
24 utilities. The public at large receives its
25 electricity from utilities certificated under GS

1 Section 62-110. Empire, which has not received a
2 certificate as public utility, cannot serve the public
3 at large. Unless it can show that a utility is
4 willing to buy its power it cannot show a public need.

5 At Page 33 Duke argued, clearly the
6 Commission properly differentiated between utilities
7 and IPPs. Utilities in certificating a facility can
8 show a need for the facility by demonstrating that
9 their own customers require the electricity. The
10 utility has a preexisting duty to sell to these
11 customers. This is not so with an IPP. IPPs have no
12 right or duty to sell to anyone. They can only sell
13 electricity if they can find a utility or other entity
14 to buy it. If there is no buyer, there can be no
15 public need. We could not have said it better. We
16 respectfully request that our motions to dismiss be
17 granted.

18 **CHAIRMAN JOHNSON:** Any questions,
19 Commissioners?

20 **COMMISSIONER CLARK:** Did you address -- if
21 we conclude that they can not go through the Power
22 Plant Siting Act, can they go through local permitting
23 to do the same thing?

24 **MR. SASSO:** Well, the Power Plant Siting Act
25 says that no plant may be built unless it meets the

1 exemption; unless it is certified under the Power
2 Plant Siting Act. Now, they can build a plant that is
3 exempt from the Power Plant Siting Act by virtue of
4 its size.

5 **COMMISSIONER CLARK:** Tell me where that is.

6 **MR. SASSO:** It may take me a moment to find
7 that, Commissioner.

8 **COMMISSIONER CLARK:** I want you to
9 explain --

10 **MR. SASSO:** Here it is. I'm sorry. It's
11 403.506. "No construction of any new electrical or
12 expansion and steam generating capacity of any
13 existing general -- of any existing electrical power
14 plant may be undertaken after October 1, 1973, without
15 first obtaining certification in the manner herein
16 provided." So it's no construction of any new
17 electrical power plant may be undertaken after October
18 1973 without first obtaining certification in the
19 manner as herein provided. Of course, the need
20 certificate is a precondition to conduct of a
21 certification proceeding under the Power Plant Siting
22 Act.

23 **COMMISSIONER CLARK:** So there is no
24 opportunity to go through local permitting to do the
25 same thing?

1 **MR. SASSO:** That's correct. Not for this
2 plant. The other section I mentioned, Commissioner
3 Clark, is at 403.508 which says an affirmative
4 determination of need by the Public Service Commission
5 pursuant to Section 403.519 shall be a condition
6 precedent to the conduct of the certification hearing.

7 **COMMISSIONER CLARK:** What was a joint power
8 project when -- in 1973?

9 **MR. SASSO:** Again, there were no joint power
10 projects in the sense used in the '75 statute. The
11 '73 statute talks about joint operating agencies, and
12 the only ones that were permitted at that time were
13 essentially alliances between and among governmental
14 agencies. A municipality was not at liberty to --

15 **COMMISSIONER CLARK:** Well, who were they?

16 **MR. SASSO:** They could have been or would
17 have been municipal entities working in cooperation
18 with one another, or they might have been other
19 governmental units. "Agency" seems to refer to a
20 governmental unit.

21 But one thing we do know is what they were
22 not. What they were not is an affiliation between a
23 municipality and a private entity jointly to operate,
24 finance, construct or own a power project.

25 **COMMISSIONER CLARK:** Let me ask it a

1 different way. What was the language used in 1973?
2 Was it joint power project?

3 **MR. SASSO:** No. It's joint operating
4 agency.

5 **COMMISSIONER CLARK:** Joint. Were there any
6 joint operating agencies in existence? Is there a
7 definition of joint operating agency?

8 **MR. SASSO:** That is not a defined term in
9 the statute.

10 What this Commission indicated in the Nassau
11 decision was it was an entity that could be obligated
12 to serve retail customers. And it to the extent it
13 involved a municipality, it would have involved a
14 municipality working in alliance with another
15 governmental unit or agency, perhaps a county.

16 **COMMISSIONER CLARK:** Which you said a
17 municipality could not until they got the law changed
18 in '75.

19 **MR. SASSO:** Could not enter into an alliance
20 with a private entity like Duke. It could enter into
21 an alliance with another governmental entity. But
22 under the Florida Constitution at that time, there was
23 a prohibition on a governmental unit using its public
24 authority to benefit a private company. The
25 Constitution was amended in 1974 to permit such

1 arrangements.

2 **COMMISSIONER CLARK:** So the municipalities
3 could have joined with other municipalities, and it's
4 your view that was what was contemplated by joint
5 operating agencies.

6 **MR. SASSO:** That's correct. We certainly
7 know, as I say, what was not contemplated. It did not
8 contemplate this type of arrangement with a merchant
9 plant.

10 **COMMISSIONER CLARK:** Let me ask a bottom
11 line question. It's your view that there will be no
12 wholesale competition in Florida provided by entities
13 other than utilities who provide retail service or
14 entities which have firm contracts with those retail
15 providers from plants built in Florida.

16 **MR. SASSO:** Plants built in Florida, that is
17 correct.

18 **COMMISSIONER CLARK:** Okay.

19 **CHAIRMAN JOHNSON:** Any other questions?

20 **MR. SASSO:** Excuse me, Commissioner, except
21 for those plants that are exempted by virtue of their
22 size.

23 **COMMISSIONER CLARK:** Okay.

24 **COMMISSIONER GARCIA:** Cogeneration units or
25 other generation units that may have had a contract,

1 those contracts were negotiated out of -- and they are
2 still there. They are in the state. They are
3 producing electricity but they are producing it
4 without a contract. Are they not selling power still?

5 **MR. SASSO:** There is a distinction,
6 Commissioner, between what might be done under
7 contract law with plants that are already built, that
8 were already found to be needed and that were already
9 properly certified under the Power Plant Siting Act.
10 It is true that the prohibition, as it were, or the
11 regulation does not extend beyond that. The Power
12 Plant Siting Act and the need provisions must be
13 understood in context. They were to place a limit on
14 the development of new plants. Once they are in
15 existence, there may be some "give in the joints" as
16 it were.

17 **CHAIRMAN JOHNSON:** Mr. Guyton.

18 **MR. GUYTON:** Commissioners, Florida Power
19 and Light Company has raised six separate grounds for
20 dismissal of the joint petition in this case. Any one
21 of those grounds is sufficient by itself to justify
22 dismissal, but collectively they show that the joint
23 petition that you have before you fails to meet
24 minimum pleading requirements under both your rules,
25 statutes and the case law of the state, and, more

1 importantly, it is fundamentally inconsistent with the
2 law of the state of Florida.

3 In my time today I want to focus your
4 attention on what you, as a Commission, and, more
5 importantly, what the Supreme Court of Florida has had
6 to say about the proper construction of the siting
7 act.

8 Now, this joint petition seeks a
9 determination of need for a 500-megawatt unit. Only
10 30 megawatts of that unit is committed to any utility
11 in the state of Florida. 470 megawatts, some 94% of
12 the capacity of this plant, is uncommitted to any
13 specific utility. The joint petition makes no
14 allegation that this 470 megawatts is needed by
15 specific utility in Florida, or that it would be a
16 specific utility's most cost-effective alternative for
17 meeting its needs. That is a fatal omission for the
18 case law in Florida is quite clear as to two points.

19 One, the utility need criteria of Section
20 403.519 are utility- and unit-specific. And two, need
21 for purposes of the Siting Act is the need of the
22 electric utility purchasing the power.

23 About ten years ago, in Order 22341 -- and,
24 Commissioners, I need to pause here a moment and pass
25 out a handout that I intend for you and the parties to

1 have, please.

2 **CHAIRMAN JOHNSON:** While they are passing
3 those out, your first two points, the 470 megawatts,
4 that there's no allegation that those are needed. And
5 your second point was?

6 **MR. GUYTON:** That need for purposes of a
7 Siting Act is the need of the entity ultimately
8 consuming the power, the electric utility purchasing
9 the power. And as you'll see as we go through the
10 cases that's a direct quote out of your prior
11 decision.

12 **CHAIRMAN JOHNSON:** You said something else:
13 cost-effectiveness.

14 **MR. GUYTON:** I said that as to the 470
15 megawatts there is no allegation that it is needed by
16 a specific utility or that it is the most
17 cost-effective alternative to a specific utility.

18 I could take you now to Tab A of this
19 handout I've given you. It's Order 22341. You had
20 the following to say about the need determination
21 criteria of Section 403.519, and this is found at the
22 bottom of Page 315 of Tab A. You said this: "The
23 Siting Act in Section 403.519 require that this body
24 make specific findings as to system reliability and
25 integrity, need for adequate electricity at a

1 reasonable cost, and whether the proposed plant is the
2 most cost-effective alternative available. Clearly
3 these criteria are utility- and unit-specific.

4 Commissioners, this is a pure construction
5 of the Siting Act by the Commission. It was made in a
6 case that involved co-generators but it is a pure
7 construction of the Siting Act by this Commission.

8 Now, Duke New Smyrna would have you believe
9 this decision applies solely to co-generators and
10 doesn't apply to it. Look at the language. You're
11 construing the Siting Act. More importantly, the
12 logic of this decision applies to a wholesale provider
13 of power to an electric utility in the state. But
14 there's also language in this order that suggests that
15 you are dealing with an issue that transcended
16 cogeneration. And I want you to take a look now at
17 the first full paragraph that's on Page 320 of the
18 decision. That reads, and I quote, "Second. An
19 increasing share of the state's electrical needs --"

20 **COMMISSIONER CLARK:** Where are you?

21 **COMMISSIONER GARCIA:** Next page.

22 **MR. GUYTON:** Top of Page 320. The same
23 decision. Tab A.

24 "Second. An increasing share of the state's
25 electrical needs will be supplied by either

1 cogenerators or independent power producers. If we
2 continue to rubber-stamp QF projects with the only
3 criterion being that the price of electricity is equal
4 to or less than that of the standard offer, this body
5 that has effectively lost the ability to regulate the
6 construction of an increasingly significant amount of
7 generating capacity in the state."

8 Then in a third paragraph, a third passage I
9 want to bring your attention to, you observed the
10 following, further down on Page 320. "We adopt the
11 position that, quote, 'need', end quote, for purposes
12 of a Siting Act is the need of the entity ultimately
13 consuming the power. The electric utility purchasing
14 the power."

15 Commissioners, it is clear from this
16 decision that you were intending to address an issue
17 that transcended cogeneration. You were attempting to
18 come with an appropriate interpretation of a siting
19 act that's equally applicable to all wholesale
20 providers of power in the state of Florida. And more
21 importantly you were seeking to preserve your
22 jurisdiction to regulate all of the generating
23 capacity in the state of Florida.

24 Now, subsequent to Order 22341 -- excuse me.
25 You had occasion to restate this holding. You did it

1 in -- in a number of orders, but I want you to bring
2 your attention to Order 24672. It's not in the
3 handout. I'm just simply going to quote the passage.
4 Here's what you had to say in that Order about 22341.
5 "In making this determination we reasoned that the
6 criteria set forth in the Power Plant Siting Act,
7 including the criteria that the plant be the most
8 cost-effective alternative available, are
9 utility-specific." You said it there again.

10 Now Nassau Power Corporation appealed that
11 order, Order 24672, to the Florida Supreme Court.
12 They argued two things. They argued that the
13 Commission had to follow its prior practice of
14 presuming that certain need criteria were met. And
15 two, they explicitly challenged your construction that
16 the need determination criteria of 403.519 were
17 utility specific. Here's how the Supreme Court of
18 Florida responded to both of those arguments. And
19 this now is from Nassau Power versus Beard. It is Tab
20 C in the handout that I've given to you. And there,
21 at Page 1178 --

22 **COMMISSIONER GARCIA:** You said C. It's
23 Tab B. Right?

24 **MR. GUYTON:** It is Tab B.

25 At Page 1178 you had this to say as to those

1 arguments. "In our view, the PSC's prior practice of
2 presuming need, as opposed to determining actual need,
3 cannot now be used to force the PSC to abrogate its
4 statutory responsibilities under the Siting Act. And
5 then you'll note there's a footnote to that sentence.
6 The Commission went on to say this in the footnote at
7 the bottom of the page. "We reject Nassau's
8 alternative argument that the Siting Act does not
9 require the PSC to determine need on a
10 utility-specific basis. They upheld you and said that
11 criteria is utility-specific.

12 In Order 22341 the Commission clearly
13 adopted the position that the four criteria in Section
14 403.519 are utility- and unit-specific, and that the
15 need for the purposes of the Siting Act is the need of
16 the entity ultimately consuming the power. They
17 affirmed you. The court went on to say later in the
18 same footnote, "The PSC's interpretation is consistent
19 with the overall directive of Section 403.519, which
20 requires in particular that the Commission determine
21 the cost-effectiveness of a proposed power plant.
22 This requirement would be rendered virtually
23 meaningless if the PSC were required to calculate need
24 on a statewide basis, i.e., Peninsular Florida,
25 without considering which localities would actually

1 need more electricity in the future." My reference to
2 Peninsular Florida is mine, not the Court's,
3 obviously.

4 Commissioners, in light of your holding in
5 22341, in Order 24672, and more importantly, the
6 decision by the Supreme Court in Nassau Power versus
7 Beard, there's no doubt that the criteria of Section
8 403 are utility-specific, and that the need to be
9 determined in a need determination proceeding is the
10 need of the purchasing utility.

11 Now, the joint petition's complete failure
12 to allege that there's a specific utility that needs
13 94% of the capacity of this unit, or that this is the
14 most cost-effective alternative to a specific utility,
15 makes this petition inconsistent with the holding of
16 the Supreme Court in Nassau Power versus Beard in your
17 prior decision. And that's grounds for dismissal.

18 Now, Duke attempts to avoid this issue by
19 alleging that their unit is, quote, "consistent with";
20 not "needed by" but "consistent with," and is "a
21 cost-effective alternative," not "the most
22 cost-effective alternative," for Peninsular Florida.

23 Peninsular Florida is not an electric
24 utility. It is a compilation. It is a planning
25 convention in which the needs of a number of utilities

1 are compiled, but it is not a specific utility.

2 But setting aside whether or not those
3 allegations really meet what they have to prove,
4 that's another argument in our Motion to Dismiss,
5 those arguments clearly fall short alleging there's an
6 actual need or cost-effectiveness. And it should be
7 noted that these specific allegations run afoul of
8 Nassau Power versus Beard. Remember Footnote 9?
9 There the Court said that it would be -- that the use
10 of a statewide avoided unit, or a statewide need,
11 rather than looking to utility-specific need, would
12 render the cost-effective criteria virtually
13 meaningless. That's exactly what the petitioners do
14 in the joint petition. They seek to look to a
15 Peninsular Florida need rather than an individual
16 utility need. Look at the paragraphs. Paragraph 17,
17 Paragraph 19, Paragraph 21, Paragraph 27. They all
18 refer to a statewide need, a Peninsular Florida need.

19 Also, remember what that the Court said that
20 presuming need was an abrogation of your statutory
21 responsibility. Look at paragraphs 30 and 32 of the
22 Joint Petition. In Paragraph 30 they say "The project
23 will necessarily provide cost-effective power to
24 utilities that provide retail electric service in the
25 state." That's a presumption that they are making.

1 In Paragraph 32 they say "The project will
2 necessarily be a cost-effective power supply." Once
3 again, they are asking you to engage in a presumption
4 which the Supreme Court said would be an abrogation of
5 your responsibilities.

6 **COMMISSIONER DEASON:** Mr. Guyton, let me
7 interrupt for just a second. Why do you think the
8 cost-effectiveness criteria was included in the
9 requirements?

10 **MR. GUYTON:** Because I think the Siting Act,
11 the legislature, in its wisdom, said, "If we're going
12 to site power plants in this state and use the
13 resources of this state and face certain environmental
14 consequences of adding a new power plant, we need to
15 be assured first that that plant is needed from a
16 reliability standpoint, and that it's the most
17 cost-effective alternative for the provision of
18 electricity." And those determinations have to be
19 made as a condition precedent to incurring the
20 environmental consequences of adding a power plant.

21 **COMMISSIONER DEASON:** Do you think there was
22 any consideration to the fact that ratepayers, captive
23 ratepayers, needed to be protected from plants being
24 built that were not cost-effective?

25 **MR. GUYTON:** Yes, Commissioner. That's

1 exactly that. The utilities that were going to be
2 building these power plants that you, as a Commission,
3 need to assure that these power plants were going to
4 be a cost-effective means of providing service to the
5 ratepayers. Yes, I do think that was an important
6 consideration.

7 **COMMISSIONER DEASON:** And then we'll
8 contrast that to the situation we have here where we
9 have a facility that's not going to be in any
10 utility's rate base and ratepayers are not being
11 placed at risk for the recovery of that investment.

12 **MR. GUYTON:** Well, I'm not sure that I would
13 agree necessarily they are not being placed at risk
14 because once one has contracts, one shifts the risk
15 from the developer to ratepayers.

16 **COMMISSIONER DEASON:** Explain to me how this
17 facility, as it is being proposed, places ratepayers
18 at risk.

19 **MR. GUYTON:** Well, it is envisioned they
20 will ultimately enter into contracts with the
21 ratepayers of the state of Florida.

22 **COMMISSIONER DEASON:** That would be an issue
23 at the time that contract -- if it is brought to this
24 Commission for approval, which --

25 **MR. GUYTON:** Which, of course, it won't be.

1 **COMMISSIONER DEASON:** It's a debate as to
2 what our approval means of a contract. But you're
3 saying at that point then ratepayers would be put at
4 risk.

5 **MR. GUYTON:** I think there will clearly be a
6 shifting of the risk from the --

7 **COMMISSIONER DEASON:** But if this is not a
8 cost-effective plant, there would be no contract,
9 would there? Because there would be a more
10 cost-effective alternative for the retail utility to
11 provide power to their customers.

12 **MR. GUYTON:** Think of the consequence of
13 what happens in that situation. The Siting Act is
14 frustrating because it wasn't cost-effective. They
15 couldn't secure the contracts. But you nonetheless
16 went ahead and incurred the environmental consequences
17 of having built the plant in the first place. That's
18 why the legislature said before you get to the
19 environmental determination, go ahead and determine
20 whether there's a need and cost-effectiveness. That's
21 why it's the precondition. That's why you do it
22 first. That's why it's necessary in this instance for
23 there to be a contract; for you to be able to make
24 that determination.

25 **COMMISSIONER GARCIA:** Isn't the reason we do

1 it first is try to protect our ratepayers? Isn't --
2 the point isn't the environmental cost. The point is
3 to protect our ratepayers and to get them the best
4 price possible. And because that money to some degree
5 is being financed by ratepayers, the ratepayers aren't
6 left on the hook.

7 **MR. GUYTON:** That's part of it. But in
8 terms of the scope of the Siting Act, the reason that
9 we do that first is because it's recognized there are
10 going to be environmental consequences of the Siting
11 Act. And the question is -- of adding a power
12 plant.-- the question is, is it worth?

13 **COMMISSIONER GARCIA:** That isn't our
14 concern, is it?

15 **MR. GUYTON:** No, it's not. But remember
16 we're construing a Siting Act, we're construing your
17 function of it.

18 I'm not asking you to -- I'm not suggesting
19 that you consider the environmental consequences. I'm
20 just saying the reason you're asked to determine need
21 and cost-effectiveness first is because there are
22 environmental consequences that will be considered
23 later.

24 **COMMISSIONER GARCIA:** Could you go back. I'm
25 not as fast on the uptake as Commissioner Deason is.

1 Explain to me how the ratepayers are placed at risk
2 with what we have before us?

3 **MR. GUYTON:** Well, several ways.

4 **COMMISSIONER GARCIA:** Okay.

5 **MR. GUYTON:** Although, I'll say -- I'm now
6 moving, if you will, beyond the legal argument in some
7 of the factual distinctions --

8 **COMMISSIONER GARCIA:** Categorize it. I want
9 to understand it so I can follow your thinking.

10 **MR. GUYTON:** One is that there is a risk
11 that wholesale sales that are made by utilities would
12 no longer be made by utilities. Off-system sales by
13 utilities would no longer be made by utilities but it
14 soon will be displaced. Ratepayers benefit from those
15 sales right now. Those are passed 80/20 through to
16 the ratepayers of the state of Florida. You displace
17 that, you lose that, you're creating a risk to the
18 customers of electric utilities.

19 **COMMISSIONER DEASON:** Mr. Guyton, if that is
20 not ultimately the most economic form of generation,
21 in the long run isn't it better for customers to have
22 that generation replaced with more cost-effective
23 generation.

24 **MR. GUYTON:** It depends on which customers
25 you're talking about. For the customers of the

1 purchasing utility, yes. For the customers of the
2 selling utility, no. And, you know, most of the
3 utilities in the state have both.

4 **COMMISSIONER GARCIA:** Explain that to me.
5 Why?

6 **MR. GUYTON:** Because the selling utility
7 right now enjoys the benefit of that revenue stream.
8 If they lose that revenue stream, which flows through
9 the their ratepayers, the ratepayers lose the benefit.

10 **COMMISSIONER DEASON:** But the revenue to one
11 entity is a cost to another.

12 **MR. GUYTON:** Agreed. That's why I said that
13 it would be a benefit to the purchasing utility, but
14 it wouldn't be a benefit to the selling utility.

15 **COMMISSIONER CLARK:** You're saying we'd have
16 stranded investment without having addressed it.

17 **MR. GUYTON:** That's another risk that may
18 potentially be associated with this power plant. But
19 here what I'm talking about --

20 **COMMISSIONER GARCIA:** Without going too far
21 afield, don't we want our utilities and our customers
22 to obtain the cheapest power possible? And doesn't
23 that benefit us either way?

24 **MR. GUYTON:** Absolutely. And there's
25 nothing in the construction that I'm suggesting to you

1 that would preclude that. All we're simply saying is
2 that ultimately there are going to be contracts for
3 this power. You ought to go ahead and determine it up
4 front when you're assessing need and
5 cost-effectiveness, whether or not this is the most
6 cost-effective alternative. You can do it now or you
7 can do it later. The legislature would suggest you do
8 it now. That's what the dictate of a Siting Act is.
9 Do it on the front end rather than waiting until
10 later. It may or may not happen later. As
11 Commissioner Deason pointed out, there may not be
12 contracts. At which case, it wasn't cost-effective
13 and it wasn't needed, and -- but we've suffered the
14 environmental consequences in having constructed a
15 power plant.

16 **COMMISSIONER GARCIA:** And we've had a few
17 hundred million dropped in our state. We may not have
18 a generation unit that's cost-effective but our
19 ratepayers aren't on the hook. Duke's ratepayers are.
20 Not even Duke's ratepayers. Duke's investors are on
21 the hook. I understand your environmental argument.
22 I just want to understand from how we perceive where
23 is the risk to the ratepayer? I understand -- let's
24 get away from the environmental argument. I don't
25 think that's central to us. I know it's part of the

1 siting, but it's not central to us. So the question
2 is more specifically -- and forgive me, you probably
3 have addressed it -- I just don't see where our
4 ratepayers are at risk.

5 **MR. GUYTON:** Well, three ways, and then I'll
6 move on -- briefly. It's a loss of potential sales
7 for some of the selling utilities. They are fairly
8 significant sales within the selling --

9 **COMMISSIONER GARCIA:** You correct me where
10 I'm wrong here: Don't we encourage in our sales that
11 when there is cheap power available, that you turn
12 down your units which may be producing more expensive
13 power and purchase the more efficient or less costly
14 power.

15 **MR. GUYTON:** Yes. And when a selling
16 utility has that and sells it, those benefits run to
17 the ratepayers of that utility. If that utility loses
18 because of the entry of this plant or another one,
19 then the ratepayers are not going to get the benefit
20 of that revenue stream.

21 **COMMISSIONER GARCIA:** Explain that a little
22 bit more specifically.

23 **MR. GUYTON:** It has to do with your split of
24 off-system sales in either the fuel or capacity
25 clause.

1 **COMMISSIONER CLARK:** But if I could say
2 something. What you're saying is -- I hear your
3 argument as saying it has to be cost-effective to the
4 ratepayers who will bear the cost of the unit. That's
5 what you have to determine on your interpretation of
6 power plant siting. And what Duke is saying is it's
7 going to be cost-effective because it's not going to
8 be in rate base and you just take it as needed. Then
9 your point is it becomes not cost-effective to other
10 utilities, such as Tampa Electric, who might have
11 excess power that we've allowed in the rate base. Now
12 they have no opportunity to sell it, so those
13 ratepayers are being adversely affected and it's not
14 cost-effective to us.

15 **MR. GUYTON:** That's right.

16 **COMMISSIONER CLARK:** I point out I think the
17 cost-effectiveness moves from the utility-specific to
18 be a Peninsular-specific.

19 **MR. GUYTON:** No. It moves to specific
20 utilities within the state of Florida.

21 **COMMISSIONER CLARK:** Okay.

22 **COMMISSIONER JACOBS:** Let's take that
23 argument then. Let's say that you have some pockets
24 of need. And Duke would have trooped in -- instead of
25 just one of them, they trooped in a whole series of

1 them, approximated not the whole 500 but some large
2 section of that capacity. And they brought them here
3 and said okay, now we have these municipals,
4 whoever -- may be privates -- who have this need.
5 We're going to put them in this application. Sounds
6 like under your analysis that fits.

7 **MR. GUYTON:** If they brought in a series of
8 entities that needed the power and had signed
9 contracts that showed that it was cost-effective,
10 that's exactly right. You know, we wouldn't be here
11 today if there were a series of contracts that showed
12 that this power plant was needed and cost-effective.
13 That's the missing element here. Under the case law
14 of the state of Florida absent a utility-specific
15 need, you can't secure a determination of need. And
16 the way you do that is for an entity such as this is
17 to enter into the contracts so that you know some
18 essential information: One, who is the purchasing
19 utility. Two, what's their need. And three, under
20 the terms and conditions of the contract is it
21 cost-effective.

22 **COMMISSIONER JACOBS:** Now, if we look around
23 the Peninsular and we see the need but they don't have
24 the contracts, we shouldn't consider that in this
25 application?

1 **MR. GUYTON:** No. Because those entities
2 have no contractual right to rely on that capacity,
3 and they have to have a contract to be able to rely
4 upon it. You don't know the terms and conditions
5 under which it will be sold. They may need it but you
6 don't know if the contract they signed a year, two
7 years, five years from now is going to be the most
8 cost-effective alternative to those entities. You
9 won't know that until you have that contract. That's
10 why you, in your wisdom, and the Supreme Court
11 affirmed you, said for an entity like this, you need
12 to have a contract from which you can determine need
13 and cost-effectiveness.

14 **COMMISSIONER DEASON:** Mr. Guyton, I'm going
15 to shift gears just a little bit. And it's going to
16 be perhaps not consistent, or along the lines of your
17 legal argument. I'm going to talk philosophy with you
18 just a moment. Please indulge me and I hope the
19 Chairman won't take this away from your time.

20 I understand the argument you're making;
21 that within the law and Siting Act, that there's a
22 requirement to determine need before we incur the
23 environmental consequences of building a power plant.
24 It's there. It's in the law. But we're in a new era
25 now. One can debate whether this law applies to the

1 new era or not and that may be the ultimate outcome of
2 your Motion to Dismiss. But on a going-forward basis,
3 let me ask you this question: Anytime there's
4 construction of any -- I assume any construction,
5 there's some environmental impact. For example, let's
6 say there's going to be a new shopping mall built
7 within the state of Florida. There's going to be
8 economic consequences of that. There's going to be
9 environmental consequences of that. I don't know of
10 any agency in the state that the shopping mall
11 developer has to go to and say, "We want to
12 demonstrate that there's a need for another Gayfers,
13 and a need for another Sears, and a need for another
14 JC Penney in this community, so let us degrade the
15 environment a little bit, and we'll try to mitigate
16 the amount of degradation, but there's a need for
17 these new facilities.

18 I assume that the policy and the assumption
19 is that if investors are willing to build this
20 facility and put their money at risk, that is a
21 showing in and of itself and not that there's a need
22 for these -- this new shopping center. So we don't
23 have to go through a determination of need. When they
24 put up the money, that's showing that they think
25 there's enough of a need for these facilities to go

1 through this.

2 So then it's just a question of how do we
3 minimize the impact on the environment? And if they
4 plan to build this facility -- even if it's needed --
5 in a environmentally sensitive area, probably the
6 application for the new shopping mall would be denied
7 and that's a whole other question.

8 It seems to me in the era of monopolistic
9 regulated utilities, there was a question exactly how
10 much at risk the investors' funds were being placed
11 at. Because if a power plant is to be built it goes
12 into a rate base, and the Commission allows a return
13 on it; depreciation is allowed. So there's a question
14 as to really -- when a monopolistic regulated utility
15 wants to build a power plant, whether they are really
16 saying with their own dollars that "We know this plant
17 is needed" because they are not really at risk as much
18 as a competitive entity building a shopping mall would
19 be. And that that was one of the reasons in the Power
20 Plant Siting Act that there was a determination of
21 need and cost-effectiveness because it ultimately was
22 going to end up in a rate base that ratepayers were
23 going to have to pay a return on and depreciation
24 expense recovery of.

25 Now, tell me where I'm wrong or where you

1 agree or disagree.

2 **MR. GUYTON:** Commissioner, I think I
3 generally agree with what you have to say. Let's go
4 through the elements of it.

5 You started out by saying that in a number
6 of instances there's no prior determination of need.
7 And that's generally true, although there are
8 developments of regional impact, and there are some
9 land use and land management statutes. But setting
10 aside those, essentially there's an element in terms
11 of taking a -- looking at economic development -- let
12 the marketplace determine whether there ought to be an
13 investment here. I agree with that.

14 What you have here is a statute that is in
15 direct conflict with that general practice. And this
16 statute says, "No, we're not going to let the
17 marketplace determine need and cost-effectiveness.
18 Public Service Commission, that's your job. That's
19 your job under the Power Plant Siting Act."

20 **COMMISSIONER GARCIA:** But isn't it our job
21 because we have the responsibility to protect the
22 ratepayer? Because we don't want to do it on the end
23 of the project? Because we don't want your company to
24 build a project which is unnecessary, and then we have
25 to fold it into rates or some part of that into rates?

1 Isn't this done exactly the opposite to protect you
2 and your investors and the ratepayers of Florida
3 before that project goes up?

4 **MR. GUYTON:** Both from a cost perspective
5 and a need perspective, yes. You were given this
6 responsibility because you have rate setting authority
7 and because you have Grid Bill authority. And they
8 thought that it was important both from terms of
9 electric system reliability and integrity, as well as
10 cost-effectiveness, that you were the logical
11 candidate to do this.

12 Should that change, because we're moving
13 away from -- what was the term, regulated monopolistic
14 utilities -- Commissioner Deason, we haven't moved
15 from regulated monopolistic utilities in the state of
16 Florida. That's indeed what we have in the state of
17 Florida. There is no movement away from that.

18 **COMMISSIONER GARCIA:** Isn't there movement
19 away from that in generation? I mean this Commission
20 has a rule which forces you to try to find the
21 least-cost alternative when you put generation out.
22 It requires you to bid against someone else to provide
23 your own generation. So to some degree, Commissioner
24 Deason has hit the nail on the head in terms of what
25 we're moving away from, at least in terms of

1 generation.

2 **MR. GUYTON:** Indeed, there has been a
3 movement there for some time. And how that is the
4 Supreme Court -- have you decided this Siting Act
5 should be interpreted in that context? That there
6 still should be a need determination, that there
7 should be a contract with a purchasing utility, and it
8 has to be a utility-specific need. That's the way you
9 decided that as you moved through the cases involving
10 QFs and independent power producers that's still the
11 stay of the law today. If, as a matter of philosophy,
12 we see that there is a need to change that, that's
13 something for the legislature to do.

14 What you have here is a very clear statutory
15 scheme that's been construed not only by you on a
16 number of occasions, but by the Supreme Court, to say
17 this is the proper process. If you want to change
18 that process because you have -- I won't say a new
19 entity because I think you've looked at an independent
20 power producer before in this same context -- if that
21 procedure needs changing, that's not for the
22 Commission to do. The law is well established here.
23 And on a motion to dismiss, that's what we're trying
24 to resolve: What the law is, not what the law should
25 be.

1 **COMMISSIONER DEASON:** Thank you. You
2 precisely answered my question.

3 **MR. GUYTON:** Thank you.

4 I'd like to move to another fundamental
5 reason that the joint petition should be dismissed.

6 Neither Duke New Smyrna nor the Utilities
7 Commission is a proper applicant as to the 94% of the
8 uncommitted capacity of this plant. In 1992 two
9 entities petitioned you for determination of need:
10 Nassau Power Corporation and Ark Energy. They wanted
11 to build power plants to make wholesale sales with
12 Florida Power and Light Company. Neither entity had a
13 contract with Florida Power and Light Company. On
14 your own initiative you dismissed both of those need
15 determinations because in your mind they were
16 inconsistent with Section 403.519. That decision was
17 made in Order No. PSC-92-1210-FOF-EQ, Tab C in my oral
18 argument handout. It's the Ark and Nassau case.

19 In that case -- I'm quoting now from the
20 bottom of 644 -- in that case you found, as to Ark and
21 Nassau, quote, "that the petitions should be dismissed
22 because Nassau and Ark are not proper applicants for a
23 need determination proceeding under Section 403.519
24 Florida Statutes."

25 Commissioners, because this decision is so

1 close with the facts that you have before you today, I
2 want to spend some time reviewing what you had to say
3 and then what the Supreme Court had to say in
4 affirming you. Because this case is a very well
5 reasoned case. It's a thorough analysis of the law
6 and it is dispositive in this case.

7 You started at the bottom of Page 644, top
8 of Page 645, by stating that the definition of an
9 applicant in the Siting Act turned on the definition
10 of an electric utility, which in turn, was one of six
11 types of entities defined in the Siting Act. You then
12 noted that neither Nassau nor Ark was any of those
13 entities which were included in the definition of an
14 electric utility.

15 You went on to explain that each of the
16 entities that constitute an electric utility under the
17 Siting Act had an obligation to serve from which a
18 need arose. Here's what you said. This is in the
19 middle of Page 645, and I think this is the heart and
20 soul of your decision. "Significantly, each of the
21 entities listed under the statutory definition may be
22 obligated to serve customers. It is this need,
23 resulting from the duty to serve customers, which the
24 need determination proceeding is designed to examine.
25 Nonutility generators, such as Nassau sand Ark, have

1 no such need since they are not required to serve
2 customers. The Supreme Court recently upheld this
3 interpretation of the Siting Act. Dismissal of these
4 need determinations is in accord with that decision.
5 See Nassau Power versus Beard." You went on to
6 explain that a purchasing or contracting utility was a
7 indispensable party to a need determination
8 proceeding. And then you concluded with the passage
9 that's at the bottom of Page 645. "This scheme simply
10 recognizes the utility's planning and evaluation
11 process. It's the utility's need for power to serve
12 its customers which must be evaluated in a need
13 determination proceeding. Nassau Power Corporation
14 versus Beard. A non-utility generator has no such
15 need because it is not required to serve customers.
16 The utility, not the cogenerator or the independent
17 power producer, is the proper applicant.

18 Now, there's more rationale, and I'd
19 encourage you to read the remainder of this decision,
20 because you came up with three or four more reasons
21 that those petitions should be dismissed. We don't
22 have time to review them this morning.

23 The Commission decision was appealed to the
24 Supreme Court of Florida. That decision is Tab D.
25 It's Nassau Power Corporation versus Deason. It's Tab

1 D in my handout. And there I'd refer you to the top
2 of Page 398 where the Court characterized the decision
3 below as follows, "The Commission dismissed the
4 petition reasoning that only electric utilities or
5 entities with whom such utilities --"

6 **COMMISSIONER GARCIA:** Mr. Guyton, where are
7 you reading now from?

8 **MR. GUYTON:** From the top of Page 398. Not
9 the top of 398. It's the middle paragraph of
10 Page 398.

11 **COMMISSIONER GARCIA:** I've got it.

12 **MR. GUYTON:** Second half of that middle
13 paragraph.

14 "The Commission dismissed the petition
15 reasoning that only electric utilities, or entities
16 with whom such utilities have executed a power
17 purchase contract, are proper applicants for a need
18 determination proceeding under the Siting Act."

19 Then on the next column on the next page
20 they upheld your construction of the term "applicant."
21 They said "The Commission's construction of the term
22 'applicant' as used in Section 403.519 is consistent
23 with the plain language of the pertinent provisions of
24 the Act, and this Court's decision in Nassau Power
25 Corporation versus Beard."

1 They went on to restate the logic of your
2 decision below. I won't take you through that entire
3 passage in the interest of time, but I want to bring
4 two passages to your attention. Further down on
5 Page 398 of the decision the Court had this to say,
6 "The Commission reasoned that a need determination
7 proceeding is designed to examine the need resulting
8 from an electric utility's duty to serve customers.
9 Non-utility generators, such as Nassau, have no
10 similar need because they are not required to serve
11 customers."

12 And on the next page the Commission said
13 once again that this decision -- or the Court said
14 that this Commission's decision in Ark and Nassau was
15 consistent with Nassau Power versus Beard.

16 As to the 470 megawatts that is uncommitted
17 from this power plant, Duke New Smyrna is in exactly
18 the same position as Ark and Nassau were. They don't
19 have a contract, they don't have customers to serve,
20 they don't have a need that arises from an obligation
21 to serve customers. It is not under your construction
22 of the Siting Act in the Ark and Nassau case, and
23 Nassau Power versus Deason, what the Supreme Court had
24 to say. These entities, Duke New Smyrna, is not a
25 proper applicant under the Siting Act and that's

1 grounds for dismissal.

2 **COMMISSIONER CLARK:** Let me ask a question.

3 **MR. GUYTON:** Okay.

4 **COMMISSIONER CLARK:** They are a proper
5 applicant with respect to, what is it? 30 megawatts
6 they want to provide to New Smyrna.

7 **MR. GUYTON:** Yes, Commissioner, they are.

8 **COMMISSIONER CLARK:** So we can move forward
9 with this and determine just how much need there is.
10 Does that preclude them from building more than is
11 necessary to meet the needs?

12 **MR. GUYTON:** Absolutely.

13 **COMMISSIONER CLARK:** It precludes them from
14 doing that.

15 **MR. GUYTON:** You have to determine the need
16 for the power plant. The power plant is 500
17 megawatts. 94% of this power plant is uncommitted to
18 any specific utility in this state. It would make a
19 mockery of this decision to suggest that you could
20 commit 6% of a power plant and move forward as a
21 proper applicant of the Power Plant Siting Act. If
22 there were a 30-megawatt plant and they chose or opted
23 under the Siting Act to proceed for a 30-megawatt
24 plant, they could do so. But there is no -- and they
25 have to be a proper applicant as to the entire amount

1 of the capacity.

2 Duke New Smyrna is not a proper applicant as
3 to 470 megawatts of its proposed unit. Now, Duke New
4 Smyrna attempts to distinguish this case in three
5 respects. First they argue that the Ark and Nassau
6 decision applies only to cogenerators, or to
7 nonutility generators. And that they are, quote, "a
8 regulated electric company under the Siting Act
9 because they would be a public utility under the
10 Federal Power Act."

11 Commissioners, Duke New Smyrna is in exactly
12 the same position that Ark Energy was in the Ark and
13 Nassau case. Ark represented itself in its petition
14 to you as independent power project. That petition is
15 Attachment E in my oral argument handout. And if you
16 would turn to Page 2 of that attachment, here's what
17 Ark said about its project. The name contract -- this
18 is about two thirds of the way down the page.

19 **COMMISSIONER GARCIA:** First page.

20 **MR. GUYTON:** Second page,
21 Commissioner Garcia.

22 "The named contracting party will be Pahokee
23 Power Partners II Limited Partnership, which will own
24 the facility an independent power project."

25 Commissioners, as an independent power

1 project, Ark, Pahokee would have been a public utility
2 sub subject to regulation of FERC under the Federal
3 Power Act. You found that they were not any of the
4 entities under the definition of an electric utility,
5 including a regulated electric utility. You found
6 that in Ark and Nassau. That determination was upheld
7 in Nassau Power versus Deason.

8 There is a prior construction of the term
9 "regulated electric company." It's right here in the
10 Ark and Nassau decision in Nassau Power versus Beard.
11 And it's controlling.

12 Second, they argue that the Ark and Nassau
13 case, and those entities were actually trying to force
14 FPL to buy power under a contract and that's not
15 applicable here. They're assuming the risk of whether
16 or not there will ultimately be a contract. But when
17 you look at the rational of both the Commission and
18 the Court, the fact that they were trying to compel a
19 contract was not a consideration that entered into the
20 reasoning of the Court. But think about it. If you
21 think about in contrast, this distinction they bring
22 out, Ark and Nassau were actually in a better position
23 to show you need than Duke New Smyrna is. Because
24 there they had identified the purchasing utility.
25 There they identified the terms and conditions and

1 price. And given that you could have made a
2 determination as to need and cost-effectiveness. You
3 don't have that information here.

4 So if there is a distinction it's import is
5 that Duke New Smyrna is worse off than Ark and Nassau.
6 And Ark and Nassau were dismissed.

7 Finally, they seize upon one isolated
8 sentence in the Ark and Nassau decision. I want to
9 read you the entire paragraph, because that sentence
10 says the decision should be narrowly construed. But
11 the entire paragraph shows that what you were trying
12 to do was reserve the question of self-generation.

13 This is back in Tab C at Page 646. Here you
14 said "In granting dismissal we are only construing who
15 may be an applicant for a need determination under
16 Section 403.519 Florida Statutes. We do not intend in
17 any way to restrict the Department of Environmental
18 Protection or Siting Board in their exercise of
19 jurisdiction under the Power Plant Siting Act, or in
20 their interpretation of the Act. It is also our
21 intent that the order be narrowly construed and
22 limited to proceedings wherein nonutility generators
23 seek determinations of need based on a utility's need.
24 We explicitly reserve for the future the question of
25 whether a self-generator may be an applicant for a

1 need determination without a utility co-applicant."

2 Commissioners, I want to address briefly a
3 third argument we've raised in our Motion to Dismiss.

4 The joint petition advances a theory that is
5 fundamentally at odds with the Siting Act. Under the
6 Siting Act it is the Commission, not the marketplace,
7 that determines need and cost-effectiveness. That is
8 so important a determination that it's a condition
9 precedent to moving through the rest of the Siting Act
10 process. Under the Siting Act the rule is very
11 simple: If you don't need it, you don't build it.
12 Absent need, there's no reason to face the
13 environmental consequences of the plant.

14 Now, the Joint Petition is premised on a
15 fundamentally different assumption. It says don't
16 concern yourself too much with traditional concepts of
17 utility need. Don't even look at specific utilities.
18 Instead, Duke New Smyrna will assume all of the risk
19 whether it is cost-effective and needed. Their
20 approach is to let the marketplace determine whether
21 there is a need for the power plant.

22 Commissioners, if that had been the
23 legislature's intent, we wouldn't have had a Power
24 Plant Siting Act. It's an abrogation of your
25 responsibility under Nassau Power versus Beard for you

1 to presume need. It would be a far greater abrogation
2 for you to defer to the market to determine whether
3 there's a need of cost-effectiveness of a power plant.

4 I've covered three of the reasons why this
5 petition should be dismissed. There are three more in
6 our written motion to dismiss. They are all equally
7 compelling. In the interest of time, I'm not going to
8 address them this morning and I'll preserve whatever
9 time I have left for rebuttal. Commissioners, thank
10 you.

11 **CHAIRMAN JOHNSON:** Thank you. Any
12 questions? No additional questions for Mr. Guyton.

13 We're going to take a 15 minute break.

14 (Brief recess.)

15 - - - - -

16 **CHAIRMAN JOHNSON:** We're going to go back on
17 the record. Mr. Wright.

18 **MR. WRIGHT:** Thank you, Madam Chairman, and
19 members of the Commission.

20 In our argument today I'll be presenting
21 argument on state law issues. Mr. Santa will be
22 presenting argument relating to federal and state
23 energy policy issues. Professor Seindenfeld will
24 address federal preemption as we have addressed it in
25 our brief, and Professor Gey will address the commerce

1 clause implications of the arguments posed by the
2 motions to dismiss.

3 **COMMISSIONER GARCIA:** Schef, if you --
4 (inaudible)

5 How much time are you going to take? Just
6 so that I have an idea. Because I think it -- I know
7 the Chairman doesn't eat, but I regularly eat, so I
8 want to make sure that -- (Laughter)

9 **MR. WRIGHT:** Well, my understanding is that
10 we would be allotted an hour and half based on the
11 Chairman's ruling. I don't think we're going take
12 anything like that long --

13 **COMMISSIONER GARCIA:** That's fine.

14 **MR. WRIGHT:** There will be questions from
15 the bench. There's no telling. Plus, if we have time
16 left over and further rebuttal commentary, we'd expect
17 to be allowed to use our time accordingly.

18 **COMMISSIONER GARCIA:** Thank you.

19 **MR. WRIGHT:** Commissioners, on these Motions
20 to Dismiss, Florida Power and Light Company and
21 Florida Power Corporation, the opponents of the
22 project have the burden of demonstrating that there's
23 no basis upon which we can proceed to obtain your
24 decision on the merits of our application. It's just
25 not true that we have to disprove everything. If

1 there's a way for you to let this project go forward
2 to consideration on the merits, you're bound to do so.

3 All facts must be assumed favorable to us,
4 and all inferences that may be derived from what we
5 have alleged must be assumed to be favorable to us and
6 we have alleged them. Even though it's not our
7 burden, we will demonstrate that there are, in fact,
8 no grounds upon which dismissal is appropriate. And
9 there are several grounds upon which we should, and
10 indeed we believe, upon which we must be allowed to
11 proceed to have a hearing on the merits and receive
12 your decision on the application for the determination
13 of need for this project.

14 The best the other side really has to offer
15 you is dicta for cases that address inapposite facts,
16 and in cases where you, the Commission, specifically
17 limited the holdings. The opponents have no holding
18 in the cases sighted to bind you in any way. The
19 interpretations they offer are contrived and would
20 limit your ability to address the legitimate needs of
21 Florida and our state's electric customers.

22 We will explain how we -- both joint
23 petitioners, Duke New Smyrna and the Utilities
24 Commission of New Smyrna Beach, are proper applicants.
25 How and why we fit into the existing regulatory

1 framework. How and why you have jurisdiction over
2 both petitioners as electric utilities under Section
3 366.02(2), and how you have jurisdiction and
4 regulatory authority over both petitioners pursuant to
5 other sections of Chapter 366.

6 We will explain how and why the proposed
7 New Smyrna Beach power project is consistent with the
8 purposes of state and federal energy regulation, and
9 state and federal energy policy, and how and why
10 allowing us to proceed is in harmony with applicable
11 federal statutory law and the United States
12 Constitution.

13 As to the state law issues, Section 403.519,
14 which is the Commission's need determination statute,
15 reads basically as follows, "Upon request by an
16 applicant, or on its own motion, the Commission shall
17 commence a proceeding to determine a need for a
18 proposed electric power plant, subject to the Power
19 Plant Siting Act. Section 403.503 is the definition
20 section of the Power Plant Siting Act, and that
21 defines "applicant" as any electric utility that
22 applies for certification pursuant to the Act. Below,
23 within the same definitional section, the Siting Act
24 defines "electric utility" as cities and towns,
25 counties, public utility districts, regulated electric

1 companies, electric cooperatives, joint operating
2 agencies and combinations thereof, engaged in or
3 authorized to engage in the generation, transmission
4 or distribution of electric energy.

5 Both joint petitioners who are here before
6 you this morning are applicants and both are electric
7 utilities pursuant to the plain language of these
8 definitions. The Utilities Commission of
9 New Smyrna Beach is a city. Duke New Smyrna is a
10 regulated electric company authorized to engage in the
11 business of generating electricity.

12 **COMMISSIONER DEASON:** Mr. Wright, if it's a
13 regulated electric utility, why didn't it file a Ten
14 Year Site Plan that we just reviewed yesterday? Why
15 didn't Duke file a Ten Year Site Plan that we just
16 reviewed yesterday if it's an electric utility?

17 **MR. WRIGHT:** Commissioner Deason, frankly, I
18 discussed -- we received our tariff that authorized us
19 to provide -- approval of our tariff that authorizes
20 us to provide service in June of this year. I
21 discussed with Mr. Jenkins at that time whether we
22 should file a Ten Year Site Plan. He said since we
23 were past the filing date, which was April 1st, and we
24 were arguably not an electric utility within the
25 meaning of that at that time, that he didn't think it

1 was appropriate. Now that we had a tariff, we should
2 file under the next filing date and that is our
3 intention.

4 **COMMISSIONER DEASON:** So why is it that you
5 did not then but you would now. Because you have a
6 tariff? I'm trying --

7 **MR. WRIGHT:** There's a legitimate question
8 as to whether we were exactly an electric utility as
9 of the filing date for this year's round of Ten Year
10 Site Plans.

11 **COMMISSIONER DEASON:** And what was that
12 filing date?

13 **MR. WRIGHT:** April 1st.

14 **COMMISSIONER DEASON:** Okay. And why was
15 there a question April 1st but there's not a question
16 now.

17 **MR. WRIGHT:** I think there's no question now
18 because we have a tariff and we're clearly authorized
19 to engage in the generation and sale of the
20 electricity wholesale as of now. Commissioner Deason,
21 I felt, in a abundance of caution, that I did the
22 right thing. I consulted your chief electric and gas
23 member as to whether he thought we should, albeit that
24 the Ten Year Site Plan would have been late -- whether
25 he thought we should file one this summer. He advised

1 me no, that we should file one at next year's Ten Year
2 Site Plan filing.

3 **COMMISSIONER DEASON:** Explain to me the
4 tariff which now makes it clear that you are an
5 electric utility.

6 **MR. WRIGHT:** I'd be happy to. I would like
7 to add that I think there are other matters, including
8 state law matters, that specifically make us an
9 electric utility.

10 But the tariff is the FERC's approval of
11 Duke Energy, New Smyrna Beach Power Company, Limited,
12 L.L.P.s Rate Schedule No. 1, which authorizes us to
13 enter into power sales agreements at negotiated rates
14 with other utilities. It is a tariff for the sale of
15 wholesale power.

16 **COMMISSIONER DEASON:** We don't know what
17 those rates are going to be until they are actually
18 negotiated.

19 **MR. WRIGHT:** That's correct. Except that
20 you do know what the rates will be for our power sale
21 to the Utilities Commission for New Smyrna Beach.

22 **COMMISSIONER DEASON:** For the 470 megawatts
23 we don't know what that's going to be sold at or to
24 whom.

25 **MR. WRIGHT:** That's correct.

1 **COMMISSIONER DEASON:** Then how do we
2 determine it's cost-effective?

3 **MR. WRIGHT:** I think you can fairly infer
4 and conclude that it's cost-effective by the fact we
5 will sell in the wholesale market to other utilities,
6 and that they will only buy from us when it's
7 cost-effective for them to do so.

8 **COMMISSIONER DEASON:** So if you sell at
9 market, whatever market is, that, by definition, is
10 cost-effective?

11 **MR. WRIGHT:** I think so, from the purchasing
12 utility's perspective. Because if it were not
13 cost-effective, Commissioner Deason, they wouldn't buy
14 it. They would chose to run their own generation or
15 to buy from another supplier.

16 **COMMISSIONER GARCIA:** In fact, we wouldn't
17 let them buy it, Schef, if it was too expensive, would
18 we?

19 **MR. WRIGHT:** I think that you would apply,
20 as you normally do, a prudence review, and perhaps
21 disallow that power.

22 Commissioner Deason, if I might point out,
23 the FERC's approval of our rate Schedule No. 1 was
24 also predicated on a finding that we lacked market
25 power. Had they found we had market power, we would

1 be subject to their full rate regulation.

2 As I said, the Utilities Commission, City of
3 New Smyrna Beach is a city, it is a municipal electric
4 particular system. It is an electric utility by any
5 definition in the statutes. Duke New Smyrna is a
6 regulated electric company authorized by FERC and by
7 our organizing papers to engage in the business of
8 generating electricity and selling it at wholesale.
9 Duke New Smyrna is a public utility under the Federal
10 Power Act, and as I explained we are fully subject to
11 the regulatory authority of FERC, notwithstanding the
12 fact that we have a tariff for market-based rates. If
13 the FERC were to determine that we have market power,
14 they could impose their full panoply of federal rate
15 regulation requirements upon us.

16 Duke New Smyrna and the Utilities Commission
17 of New Smyrna Beach are also electric utilities
18 pursuant to Section 366.02(2) Florida Statutes, and
19 accordingly we are, to a significant degree -- that is
20 Duke New Smyrna is -- to a signature degree an
21 electric company, subject to the Commission's
22 regulatory authority over such electric utilities, to
23 the extent that it extends, including planning and
24 emergency operations authority, plus other Grid Bill
25 authority.

1 In his argument, Mr. Sasso pointed out that
2 we would not, or probably not -- or possibly not be
3 subject to certain requirements within Chapter 366
4 that apply for retail serving utilities. For example,
5 I don't think you could prescribe a rate structure for
6 us for our wholesale sales. We don't serve at retail
7 so that's irrelevant. We're not subject to the
8 conservation requirements. And because we have no
9 retail service area, we would not be subject to
10 territorial disputes. Territorial disputes arise when
11 two competing utilities purport to serve or plan to
12 serve or try to serve the same customers. However, he
13 left out some other powers that you all have under
14 366, including your Grid Bill authority, with respect
15 to planning and emergency operations. And we believe
16 that we are an electric utility subject to your
17 regulatory authority, pursuant to those sections of
18 the statutes.

19 As to 403.519, the statute used to say
20 "utility." It no longer says so. They changed it to
21 say "applicant." "Applicant" is a defined term within
22 the Power Plant Siting Act which I think 403.519 must
23 be read in pari materia with because it prescribes and
24 governs the Commission's role in regulation pursuant
25 to that Siting Act.

1 The legislature used the word "applicant"
2 and used it as I described above, including regulated
3 electric companies authorized to engage in the
4 generation, transmission, or distribution of
5 electricity.

6 I think this distinction and the choice of
7 words that the legislature used is extremely
8 important. The legislature in 1973 specifically used
9 the word "or" in listing or enumerating the types of
10 entities that are included within the scope of the
11 definition of "electric utility" and "applicant." The
12 legislature, in choosing this language and enacting
13 this language, specifically provided for entities
14 engaged only in the business of generating electricity
15 to be applicants under the Siting Act.

16 **COMMISSIONER DEASON:** Mr. Wright, do you
17 think they had in mind it could be a generating-only
18 utility, or do you think they meant -- or when they
19 applied the term "distribution" to capture utilities
20 such as Florida Public Utility's, which is a
21 distribution-only utility?

22 **MR. WRIGHT:** I think the plain language of
23 the statute indicates they probably meant both. Or
24 all three.

25 **COMMISSIONER DEASON:** So you think the

1 legislature envisioned that there were -- or could be
2 generating-only utilities, and that that's what they
3 meant by that and used the term "or."

4 **MR. WRIGHT:** I think that that's -- I can't
5 tell you for sure what was in the minds of the
6 legislators, although we'll talk about that more in a
7 little bit. I can tell you the language that they
8 used specifically included generation-only utilities.
9 Did anybody think about it? I don't know. Did some
10 Staff member who wrote the statute --

11 **COMMISSIONER GARCIA:** Show me that language.

12 **MR. WRIGHT:** Certainly. Look at Section
13 403.503(13)

14 **COMMISSIONER GARCIA:** I'm looking at it.

15 **MR. WRIGHT:** Cities and towns, counties,
16 public utility districts, regulated electric
17 companies, electric cooperatives and joint operating
18 agencies or combinations thereof, engaged in or
19 authorized to engage in, business of generating,
20 transmitting or distributing electric energy.

21 That's similar language, Commissioners, that
22 they used in Chapter 366.02, which refers to entities
23 that own, maintain or operate generation, transmission
24 or distribution facilities within the state.

25 In 1972 the year before the Siting Act was

1 enacted, a case was decided by the United States
2 Supreme Court. Federal Power Commission versus
3 Florida Power and Light Company, in which the United
4 States Supreme Court upheld the Federal Power
5 Commission's regulatory authority over generation and
6 transmission at wholesale in interstate commerce.
7 That statute -- sorry, that case decision of the
8 United States Supreme Court certainly must be presumed
9 as being chargeable to the knowledge of the
10 legislators. They probably did know about that case.
11 They probably did know that that generation was
12 wholesale. And they chose the words "generation" as
13 an independent basis upon which an entity could be an
14 applicant.

15 The point is that --

16 **COMMISSIONER DEASON:** Mr. Wright, in 1972,
17 were there any generating-only utilities which sold
18 power wholesale and did not have any retail customers?

19 **MR. WRIGHT:** Commissioner Deason, I'm sure
20 there were.

21 **COMMISSIONER DEASON:** Could you identify
22 those entities for me?

23 **MR. WRIGHT:** I can't tell you for sure who
24 was in existence at that time. I believe some
25 federal power administrations would have been

1 wholesale only. And I believe at that time there were
2 generation and transmission cooperatives that only
3 sold at wholesale.

4 **COMMISSIONER DEASON:** They only sold what?

5 **MR. WRIGHT:** At wholesale.

6 **COMMISSIONER DEASON:** Were there any located
7 in Florida?

8 **MR. WRIGHT:** Commissioner Deason, I don't
9 know. I think possibly the Southeast Power
10 Administration which sells wholesale out of the Jim
11 Woodruff dam up at Chattahoochee was in existence at
12 that time. I don't know that for a fact.

13 **COMMISSIONER DEASON:** But they were not an
14 electric utility that was subject to the regulation of
15 the Florida Commission obviously.

16 **MR. WRIGHT:** At least not subject to their
17 retail -- to the Commission's retail regulation
18 because they only sell at retail -- wholesale. Sorry.

19 **COMMISSIONER CLARK:** What was the sequence
20 of that?

21 **MR. WRIGHT:** The Federal Power Commission v
22 FPL case was 1972. And this is laid out in the brief,
23 Commissioner Clark. The Siting Act was enacted in
24 1973.

25 **COMMISSIONER CLARK:** Okay.

1 **MR. WRIGHT:** The point is that both joint
2 petitioners before you, the Utilities Commission New
3 Smyrna Beach and Duke New Smyrna, are applicants and
4 electric utilities by the plain language of the
5 statutes. The IOU opponents of the project want to
6 add a lot of language to these statutes that would
7 plainly contravene its plain meaning. They want to
8 add utility-specific to a statute that doesn't even
9 include the word "utility". The word "utility" does
10 not appear in Section 403.519. They want to add the
11 word "retail", or the phrase "serves at retail" to the
12 same statute, and perhaps to Section 366.02(2) as
13 well. They want to add "state regulated" and they
14 want to add a contract requirement. The word
15 "contract" does not appear in 403.519. They want to
16 add that to the statute. Now they want to add the
17 entire amount of the capacity of the proposed power
18 plant as being subject to a contract. And they want
19 to read the word "or" right out of 403.519 and right
20 out of 366.02(2).

21 **COMMISSIONER JACOBS:** Mr. Wright, one of the
22 main premises put forth is the cost-effectiveness
23 argument and you agree that that is appropriate.

24 One of the concerns I have is if you have a
25 facility under which we're unclear the terms at which

1 it would sell its product, how can we ensure that this
2 product would be cost-effective? But more
3 importantly -- and I think in light of recent events
4 this is a critical item -- once that entity is up and
5 running and is engaged in commerce, it will reserve
6 transmission capacity and what we can't be certain
7 will be a cost-effective rate. We now know that has a
8 whole other level of market impact. How would you
9 address that?

10 **MR. WRIGHT:** As to the cost-effectiveness of
11 the purchase, as I explained in the response to
12 Commissioner Deason, the purchases, I think, would
13 have to be cost-effective or no purchasing utility
14 would buy it for resale. And as I explained in
15 response to Commissioner Garcia's questions, if for
16 some reason they were to pay us too much for our
17 power, they would at least be subject to a prudence
18 review to some degree.

19 Now, as to the transmission, the way I
20 understand the transmission laws to work are as
21 follows -- if I'm incorrect, I trust Mr. Santa will
22 straighten me out.

23 We apply for transmission -- Duke New
24 Smyrna, when it seeks to make wholesale sales, will
25 apply for transmission service from the utility or

1 utilities, from whom it intends to purchase that
2 transmission. There is a distinction between
3 short-term and long-term sales -- excuse me, long
4 term -- short-term and long-term transmission service.
5 If it's short term, we will go to the OASIS, or open
6 access same time information system, determine whether
7 the transmission is available; what the price is. If
8 it's available at a price that we think is reasonable
9 and fair, and that is -- allows our transaction to go
10 forward, we can buy short-term transmission capacity
11 on that basis. That exists today.

12 If we want long-term firm transmission
13 capacity on a system, we must make an application
14 pursuant to the transmission providing utility's
15 pro forma tariff in both Florida Power Corporation and
16 Florida Power and Light Company with whom we would be
17 interconnected at the New Smyrna substation owned by
18 the Utilities Commission of the City of
19 New Smyrna Beach. We must make application pursuant
20 to their pro forma tariffs. They are then entitled to
21 do a study and tell us what, if any, transmission
22 upgrades or improvements are necessary, and we're on
23 the hook to pay for those costs.

24 We have identified -- I don't want to go too
25 far afield, but we've identified and will present

1 testimony in the hearing as to what exact transmission
2 facilities we believe are satisfactory and adequate to
3 permit delivery of the power output -- the entire
4 output of this project to other utilities in
5 Peninsular Florida.

6 So basically we're on the hook to pay the
7 short-term transmission rate. If it's not available
8 we can't get it, and we're on the hook to pay the cost
9 of any upgrades that are required in the long term.
10 If there's a dispute as to what's required, say if
11 we'd say \$6 million upgrades will cover the need, and
12 one of the transmission providing utilities says no,
13 it's going to cost you \$11.5 million, we have a
14 proceeding at FERC.

15 **COMMISSIONER JACOBS:** Thank you.

16 **COMMISSIONER CLARK:** If you're looking for
17 the next place to go, why don't you address our
18 decisions that seem to indicate --

19 **MR. WRIGHT:** I missed a word. Sorry.

20 **COMMISSIONER CLARK:** Would you address the
21 decisions that Mr. Guyton brought up?

22 **MR. WRIGHT:** Certainly. That's exactly
23 where I was going.

24 The holdings of the Nassau cases are very
25 simple and straightforward. The holding of Nassau v

1 Beard was that the Commission -- sorry, was that
2 Nassau appealed the wrong order and they were out.
3 That was the holding. The rest was dicta.

4 The holding of Nassau v Deason was that
5 where the Commission's interpretation of its own
6 statute is not clearly erroneous, the Court will
7 uphold. Because the Court said "We cannot conclude
8 that the Commission's interpretation of its statute
9 was clearly erroneous, we affirm." Those were the
10 holdings. The rest was dicta. And I might add, dicta
11 in cases that were on inapposite facts.

12 Those cases involve entities, QFs or IPPs
13 perhaps, who were attempting to force Florida Power
14 and Light Company in both cases to purchase the entire
15 output of those projects for long periods of time. I
16 believe that the subject contract in the Nassau v
17 Beard case was a 30-year contract. I know that the
18 subject contracts in the Nassau v Deason case were
19 30-year contracts with renewal options. The language
20 as to utility-specific was all dicta.

21 **COMMISSIONER DEASON:** You're saying that in
22 the Nassau v Deason case, the both bottom line was
23 that the Court said that it could not be shown that
24 the agency's interpretation was clearly wrong.

25 **MR. WRIGHT:** That's correct.

1 **COMMISSIONER DEASON:** It didn't say our
2 interpretation was right.

3 **MR. WRIGHT:** It said that the standard of
4 review -- their job is to affirm, not necessarily to
5 say whether it's right or wrong -- the Court's job on
6 appeal is to affirm remand or overturn. And they said
7 "Because we cannot conclude that the Commission's
8 interpretation of its statute was clearly erroneous,
9 we affirm."

10 **CHAIRMAN JOHNSON:** Let's go back step by
11 step. And what was our holding?

12 **MR. WRIGHT:** Your holding?

13 **CHAIRMAN JOHNSON:** Yes.

14 **COMMISSIONER CLARK:** In Nassau v Deason was
15 that neither Ark nor Nassau were proper applicants. I
16 don't believe we took the sentence out of context. We
17 can read the whole paragraph to you, as Mr. Guyton
18 did. The Commission -- and I don't know -- I know two
19 of you were on the Commission at that time. I don't
20 know for the edification of the other three. I will
21 tell you that the vote on the Motions to Dismiss
22 Nassau and Ark was 3 to 2. It was a close call. And
23 the Commission expressly, in its Order, stated that
24 that Order was to be narrowly construed to the
25 circumstance in which a nonutility generator or

1 co-generator sought to serve a specific utility's
2 identifying need, and where they had to contract with
3 that dual --

4 **COMMISSIONER GARCIA:** Give me your version
5 of the holding again? I missed it. I'm sorry. I was
6 busy thinking who was the 3/2 and I shouldn't have
7 been. Tell me precisely -- what your interpretation
8 of the holding --

9 **COMMISSIONER DEASON:** I think Commissioner
10 Clark and I disagreed.

11 **COMMISSIONER GARCIA:** There you go. That
12 settles that little question I had. (Laughter)

13 Just give me your holding, what you just
14 gave Chairman Johnson.

15 **MR. WRIGHT:** Your holding, the Commission's
16 holding, by a 3-to-2 vote in the Order below, as we
17 might say, the Commission order that was appealed from
18 to the Court in Nassau v Deason was that neither Ark
19 nor Nassau were proper applicants. You specifically
20 expressly wrote in your order that the order itself --
21 capital "O" order, in your decision, was to be
22 narrowly construed, can be limited to the scenario
23 where an entity proposed to serve a specific utility.

24 **COMMISSIONER GARCIA:** So Mr. Guyton makes a
25 very good point. They weren't proper applicants. How

1 are you different?

2 **MR. WRIGHT:** We are proper applicants. We
3 are both proper applicants under the plain language of
4 the statute. And a couple more --

5 **COMMISSIONER GARCIA:** Distinguish yourself
6 from Mr. Guyton's point these are exactly the same
7 thing.

8 **MR. WRIGHT:** We are not trying to bind FPL,
9 of FPC or Tampa Electric Company or any other utility
10 to pay for our plant pursuant to a long-term contract.
11 We do have a contract with Utilities Commission of New
12 Smyrna Beach, and we really ought not forgot them,
13 notwithstanding the fact they are only in contract
14 with Duke New Smyrna to take 30 megawatts of the
15 plant's output. They are an applicant here. There's
16 nothing in your ruling that --

17 **COMMISSIONER GARCIA:** The distinguish --

18 **MR. WRIGHT:** -- say you have to have --
19 there's nothing in your rulings that say you have to
20 have a contract for the entire output, nor for the
21 life of the project. There's nothing in the law that
22 says that. There's nothing in the rules that say
23 that.

24 **COMMISSIONER GARCIA:** So the distinguishing
25 factor that distinguishes this case is Mr. Guyton held

1 it for the -- the exact opposite proposition that you
2 hold it to, but in your case you distinguish it by
3 saying that in this case, in the Deason case, what the
4 companies were trying to do -- what the applicants in
5 that case were trying to do was get FPL to contract
6 with it to produce power. And in this case you're not
7 asking for it, therefore, it's different.

8 **MR. WRIGHT:** Yes, sir.

9 **COMMISSIONER JOHNSON:** That's our finding?
10 I mean, when we held that they were not proper
11 applicants, what did we base that upon? We said they
12 aren't proper applicants because --

13 **MR. WRIGHT:** Because they were not among the
14 enumerated entities within 403.519 and did not have
15 contracts with those who were.

16 I will tell you your order was issued two
17 days after the Energy Policy Act was enacted, so
18 clearly that was not part of what informed your vote
19 because that took place about three weeks earlier.

20 **CHAIRMAN JOHNSON:** So Mr. Guyton says using
21 that language that you all are not one of the
22 enumerated entities and do not have a contract.

23 **MR. WRIGHT:** That is his position, yes,
24 ma'am.

25 **CHAIRMAN JOHNSON:** So the difference here is

1 how we define enumerated -- whether or not you fit
2 within those enumerated categories.

3 **MR. WRIGHT:** Yeah. Whether we're an
4 applicant. Whether both of us are applicants under
5 the plain language of the statute.

6 **CHAIRMAN JOHNSON:** Mr. Guyton also used the
7 Ark example, and I don't remember one of his
8 attachments, that demonstrated you all were -- you all
9 were the exact same as Ark. Mr. Guyton, which --

10 **MR. GUYTON:** That's Attachment E, Ark's
11 Petition to Determine Need and it's the second page
12 where they say "the facility will be an independent
13 power producer."

14 **CHAIRMAN JOHNSON:** And your argument,
15 Mr. Guyton, was that --

16 **MR. GUYTON:** Was that an independent power
17 producer would be a public utility under the Federal
18 Power Act just like Duke New Smyrna says they are a
19 public utility under the Federal Power Act.

20 And you found that this entity, which would
21 have been a Federal Power -- a public utility under
22 the Federal Power Act -- was not a regulated electric
23 company within the meaning of the Siting Act.

24 **COMMISSIONER GARCIA:** And that's the
25 distinguishing factor for you, Schef. You agree with

1 Mr. Guyton that Ark was not -- did not fall into the
2 category because contracting utility is not there. Is
3 that what you're saying? In other words, our holding
4 wasn't wrong in that case. You don't disagree with
5 what the Commission found. Obviously you'd like it to
6 be broader so you can walk in through the double
7 doors. But in this case you're saying to us that
8 this -- the proposition that this case cites is
9 narrowly construed because this has to do with a
10 contracting party.

11 **MR. WRIGHT:** Yes, sir. By its own terms.
12 By your orders and terms. And I will say I didn't
13 agree with the decision. Then I represented Ark and
14 CSW. But that's neither here nor there.

15 **COMMISSIONER CLARK:** Well, you're saying
16 that it's still in harmony because you could still
17 make that conclusion today and find that you're,
18 nonetheless, an applicant because you are an electric
19 utility under FERC.

20 **MR. WRIGHT:** Public utility under the
21 Federal Power Act and an electric utility under
22 Chapter 366, Commissioner Clark, yes, ma'am.

23 **COMMISSIONER CLARK:** Right. Because it uses
24 the disjunctive "or."

25 **MR. WRIGHT:** That's right.

1 **COMMISSIONER CLARK:** One other thing is you
2 confused me somewhat. What is the date of the -- what
3 is the date of the order? There are several Nassau
4 cases.

5 **MR. WRIGHT:** Yes, ma'am.

6 **COMMISSIONER CLARK:** Nassau versus Deason is
7 the last one.

8 **MR. WRIGHT:** Yes, ma'am.

9 **COMMISSIONER CLARK:** When was that decided?
10 Let me ask it a different way: Was that the one where
11 Commissioner Lauredo and I dissented on who was an
12 applicant?

13 **MR. WRIGHT:** It was. It was decided by the
14 Court in 1994. It was decided by the Commission in
15 October or -- October of 1992.

16 **COMMISSIONER CLARK:** And your position is
17 what's in that holding by the Court is dicta.

18 **MR. WRIGHT:** Yes, ma'am.

19 **COMMISSIONER CLARK:** What about Nassau
20 versus Beard?

21 **MR. WRIGHT:** Same thing, the holding Nassau
22 v Beard was that Nassau Power had appealed the wrong
23 order and they were out.

24 **COMMISSIONER CLARK:** Okay. What Order
25 should they have appealed? The one determining the

1 need for something else?

2 **MR. WRIGHT:** I think the Order that they
3 should have appealed by the Court's decision was Order
4 22341. They attempted to appeal a later Order 23246
5 and the Court said what they were trying to challenge
6 is the finding in 22341. They didn't do so in time.
7 They're out.

8 **COMMISSIONER CLARK:** But what was that
9 Order? DA finding of need.

10 **MR. WRIGHT:** Commissioner Clark, that was
11 the planning hearing order establishing standard offer
12 contract pricing. And in that light, I would point
13 out to you that your orders, the Supreme Court
14 decisions, and your Staff's later writings on this
15 subject have all recognized that Nassau Power was the
16 law of cogeneration. The Nassau Power cases.

17 **COMMISSIONER CLARK:** Was the what --

18 **MR. WRIGHT:** Law of cogeneration.

19 **COMMISSIONER CLARK:** Why you're different is
20 in those cases they were trying to assert an
21 obligation on the part of the retail utilities to
22 purchase their power. Since you're not, you don't
23 fall within those exclusions.

24 **MR. WRIGHT:** Commissioner Clark, I just did
25 not quite follow what you said.

1 **COMMISSIONER CLARK:** Tell me why those cases
2 are inapposite. Is that with an "A?"

3 **COMMISSIONER GARCIA:** That's exactly what he
4 did say. You just restated it, because that's how I
5 understood how you distinguish it. How you
6 distinguish yourself from Mr. Guyton's holdings.

7 **MR. WRIGHT:** We are not trying to force any
8 utility to buy the output of this project. We have no
9 legal right, as QFs do, to force any entity to buy the
10 output of this project. They'll either buy it,
11 presumably, when it's a good deal or they won't.

12 **COMMISSIONER JACOBS:** But you're here
13 basically because you have one that is purchasing?

14 **MR. WRIGHT:** We have one that is. There is
15 a public utility, and under the Federal Power Act and
16 an electric utility under your law, and we believe
17 Duke New Smyrna is a proper applicant in its own
18 right.

19 **COMMISSIONER JACOBS:** How do we get beyond
20 the provision which says that -- that that joint
21 applicant is appropriate only to the extent of need of
22 purchasing utility?

23 **MR. WRIGHT:** I don't see that as a provision
24 anywhere in the statutes, rules or anywhere else.
25 That's something that the IOU's opposing this project

1 are trying to read into that.

2 We've allege -- and this kind of goes to our
3 response to the pleading requirements arguments --
4 we've alleged that Florida needs capacity and this
5 power plant can provide some of that needed capacity.
6 We've alleged that Florida needs adequate electricity,
7 Peninsular Florida specifically, needs adequate
8 electricity at a reasonable cost, and that we will
9 provide that. We have alleged that the state needs
10 cost-effective power and that we will provide
11 necessarily cost-effective power.

12 **COMMISSIONER JACOBS:** So forget the
13 specific -- the utility-specific requirement
14 altogether.

15 **MR. WRIGHT:** Yes, sir. It's not there.
16 And, frankly, as a matter of your jurisdiction, it
17 follows on some comments made by Commissioner Deason
18 earlier, your job is to look out for the whole state.

19 **COMMISSIONER CLARK:** Mr. Wright, you don't
20 think that there were sort of -- there was a dual goal
21 to the Power Plant Siting, first being that we make a
22 determination that it's needed so that the customers
23 of that particular utility aren't burdened with a
24 plant that may not be needed, and that it's not built
25 if it isn't needed?

1 And that the second purpose may be that
2 Florida, as a whole, isn't burdened with plants that
3 nobody needs. It's an environmental issue.

4 **MR. WRIGHT:** I completely --

5 **COMMISSIONER CLARK:** I'm sorry.

6 **MR. WRIGHT:** That's okay. I agree with you
7 that the purpose of the need determination statute is
8 to prevent captive utility ratepayers from being
9 forced to bear the costs of power plants without some
10 a priori determination by the Commission that that's
11 needed and that the costs are reasonable. I also
12 agree with you that the Power Plant Siting Act is an
13 environmental statute. However, I don't think it says
14 that the state is to minimize the number of power
15 plants or limit the number of power plants to that
16 number of power plants that is necessary to meet
17 minimum reliability criteria. What the statute says
18 is that it's the task of the Siting Board and the
19 policy of the State of Florida to balance the need for
20 electricity with the environmental concerns occasioned
21 by.

22 Frankly, I don't think this is really
23 appropriate to this Motion to Dismiss. But we have
24 alleged in our pleadings and in our filings that the
25 construction and operation of this power plant will

1 actually improve environmental quality. And I'd
2 submit to you for your purposes you ought to determine
3 whether things are okay with respect to the
4 ratepayers -- of course, we assert that they are --
5 and let DEP decide whether the environmental impacts
6 are acceptable and let the Siting Board determine
7 whether the environmental impacts are acceptable in
8 doing its job under the Siting Act, i.e., in balancing
9 the need for the electricity with the environmental
10 consequences.

11 It's our position, it's our factual
12 allegation that the construction and operation of the
13 power plant will result in a net improvement in
14 environmental quality in Florida. And I submit to you
15 ought to let the Siting Board decide whether we are
16 right on that.

17 **COMMISSIONER CLARK:** How much is too much?
18 How many plants can we authorize them?

19 **MR. WRIGHT:** We're kind of into a philosophy
20 discussion, but I'm happy to answer your question.

21 **COMMISSIONER CLARK:** I agree we are.
22 Because at some point -- on the one hand we have
23 before us a statute that if you interpret it the way
24 it is suggested here, it gives us a bright line, in
25 effect. It says, you know, you look at it from the

1 determination of how much you need to serve the retail
2 load in this state and maintain some measure of
3 reliability. I think that's a pretty bright line. We
4 may debate where that margin of reserve may be. But
5 what I hear you saying is perhaps it should be
6 something more than that, and let the
7 environmentalist, or the environment agency, decide
8 how much is too much.

9 **MR. WRIGHT:** As to the environmental impact,
10 I think that's exactly how the law works.

11 **COMMISSIONER CLARK:** Then why are we doing
12 this? I mean.

13 **MR. WRIGHT:** Because the law requires it,
14 Commissioner Clark.

15 **COMMISSIONER CLARK:** Why does the law
16 require it?

17 **COMMISSIONER GARCIA:** You're not alleging
18 that it's another one of those ministerial duties we
19 have to carry out just to carry out.

20 **MR. WRIGHT:** No, sir.

21 **COMMISSIONER GARCIA:** Why do we do it then?
22 Don't we do it to avoid encumbering ratepayers with
23 generation that's too expensive. Isn't that our part
24 of the deal?

25 **MR. WRIGHT:** Yes, sir.

1 **COMMISSIONER CLARK:** I don't mean to -- I
2 think you need to make your argument -- at what point
3 would you say that we ought -- would we say you ought
4 not build any more power plants?

5 **MR. WRIGHT:** Commissioner Clark, the answer
6 to that can only be determined on a case-by-case
7 basis. I don't know. I think a fair case can be
8 made, and it's one that I would adopt and submit to
9 you as reasonable, that where you have this project,
10 and perhaps others, that are offering to provide
11 power, that no captive ratepayer can be on the hook
12 for, other than to pay for the electricity from, that
13 their retail serving utilities buy presumably when
14 it's cost-effective for resale to them. That to quote
15 a Staff member in a workshop, the more the merrier as
16 long as ratepayers are protected. Now, you know, --

17 **COMMISSIONER GARCIA:** Mr. Guyton says his
18 ratepayers are going to be hurt. Or maybe not his
19 ratepayers, but TECO's ratepayers. Someone is going
20 to be hurt by your plant.

21 **MR. WRIGHT:** Well, to the extent we run,
22 somebody is going to benefit, and to the extent we
23 run, we're going to be displacing less efficient
24 generation from less efficient power plants, or else
25 we won't sell power. That means two things. That

1 means one, that the actual cost of what's being
2 generated is going to be less than it would have
3 otherwise been had the other entity did it, which
4 means there's a net gain to the state of Florida and
5 we're going to use less fuel altogether, which also
6 means there's a net gain to the state of Florida.

7 **COMMISSIONER CLARK:** Can I follow one more
8 thing.

9 If that's your argument, the more the
10 merrier, should it be that -- I'm sorry.

11 **MR. WRIGHT:** I want --

12 **COMMISSIONER CLARK:** You don't know where
13 that limit is.

14 **MR. WRIGHT:** I don't know where it is,
15 Commissioner Clark. And that's what I was going to
16 say is I don't know where it is. If you get to a case
17 where there's a hardware, you know, actual physical
18 generation assets, reserve margin of 50%, arguably
19 that would be too much. It would be a great problem
20 for you to have because what you'd have would be a lot
21 of -- if they were merchant power plants, anyway,
22 you'd have them bidding against each other, and they'd
23 be bidding their prices down about that much above
24 short run marginal cost. You'd have the most reliable
25 power supply system in the United States, and you'd

1 have people bidding their power supply cost down as
2 close as possible to short run marginal cost, which is
3 going to benefit your ratepayers. Now is 50% too
4 much? Arguably, yes. Its 25% too much? Arguably,
5 no. Where's the line? I don't know.

6 **COMMISSIONER DEASON:** Mr. Wright, wouldn't
7 you say then under -- I take it under your
8 interpretation that the market would control, the
9 point is reached when investors are no longer willing
10 to make the investment. They think the market is
11 saturated. They can't make a profit. So, that is a
12 constraint, is it not?

13 **MR. WRIGHT:** That would certainly be a
14 constraint that operates in the market. I was trying
15 to answer Commissioner Clark's question, which is from
16 your perspective, from the Commissioners' perspective,
17 how much is too much.

18 **COMMISSIONER CLARK:** Well, I guess -- let me
19 just ask a related question and I'll let you go.

20 It seems to me then what your argument leads
21 to is power plant siting, requiring them to get a need
22 from us, should only be something we have to do if it
23 is for the purposes of putting it into the retail rate
24 base. And if it's not for that purpose, why should
25 you come get a need from us? The market will

1 determine how much is appropriate.

2 **MR. WRIGHT:** Commissioner Clark, we're
3 talking about what a law might say at some point in
4 the future, you know, and I can't disagree with you.

5 I had conversations on this subject with the
6 Staff at a workshop last year. They said, Schef, as
7 long as transmission and reliability are covered, what
8 do we care. I said, well, Bob, I think you probably
9 care because you want to keep your jurisdiction, at
10 least for now. You know, should that be law? I don't
11 know.

12 I submit to you the law today is that by the
13 plain language of the statute we are applicants and
14 we're entitled to be here, and that the law today
15 requires you to be an integral part of our permitting
16 process; and that's why we're here. And we believe we
17 have complied with all of your requirements and
18 established more than ample evidence to satisfy every
19 appropriate criterion in the statutes.

20 **COMMISSIONER CLARK:** Well, it just seems me
21 that -- I think some of your arguments, as the
22 opponents have suggested, if you parse through it, you
23 can support your argument. But by making those
24 arguments, it asks, in my opinion, a broader question
25 as if you should just be able to come in as the market

1 bears, and it shouldn't anything we look at in terms
2 of margin or reserve and what is needed to serve the
3 customers in the state. Then perhaps it makes no
4 sense for you to go through a need, yet you're
5 required to go through a need.

6 It strikes me that there may be a problem
7 with the current law. The law isn't the way perhaps
8 it should be, given what's developing in the industry,
9 but we're nonetheless constrained by what's in the
10 law.

11 **MR. WRIGHT:** Commissioner Clark, that's
12 possible, but the law exists as it exists today; and
13 right now this morning we're here on a motion to
14 dismiss as to whether we're a proper applicant.

15 We submit that we are under the law and that
16 we're entitled to be here and entitled to your
17 decision on the merits, you know. If at some point
18 the law changes, we'll deal with it then, but right
19 now we're here in good faith, and we believe in full
20 compliance with your laws and rules, trying to follow
21 the law which you have to discharge.

22 **COMMISSIONER CLARK:** Would we have the
23 opportunity to say, yes, you're an applicant, but we
24 only certify the need for 30 megawatts?

25 **COMMISSIONER GARCIA:** Isn't 30 megawatts

1 under the threshold?

2 **COMMISSIONER JACOBS:** Yes, it is.

3 **MR. WRIGHT:** Commissioner Clark, it's not a
4 determination of the need for megawatts; it's a
5 determination of the need for the proposed power
6 plant.

7 **COMMISSIONER CLARK:** Okay. So you agree --

8 **MR. WRIGHT:** So I would --

9 **COMMISSIONER CLARK:** -- with them; it's the
10 plant or nothing?

11 **MR. WRIGHT:** Yes, ma'am.

12 **COMMISSIONER GARCIA:** Let me --

13 **MR. WRIGHT:** And I would point out in that
14 regard that you all -- I said this before. You
15 need -- not to do -- the Utilities Commission in New
16 Smyrna Beach, 30 megawatts may not be much to Florida
17 Power or Florida Power & Light, but it's an awful lot,
18 and it's an awful lot of savings to the Utilities
19 Commission.

20 They are a proper applicant, they are a
21 proper co-applicant with us and there's no requirement
22 in your statute either that says you have to have a
23 contract at all, let alone the entire output of the
24 capacity.

25 This project -- this power plant is the

1 project, is the power plant that provides the
2 Utilities Commission of New Smyrna Beach the benefits,
3 the savings, the cost-effective reliable power.
4 They're here asking you for it.

5 **COMMISSIONER JACOBS:** You kind of implied
6 that purchases will only occur if it were within
7 economic dispatch of the purchasing utility. What if
8 we were to put that as a condition, either that or
9 emergency power?

10 **MR. WRIGHT:** Commissioner Jacobs, I --

11 **COMMISSIONER JACOBS:** For everything over
12 the 30; for everything over the 30.

13 **MR. WRIGHT:** I don't -- here's -- I'll tell
14 you what I think. I think that -- I would say I think
15 that would not be an appropriate condition to put on a
16 determination of need, because it really goes to what
17 you want -- I think to what you think to apply to the
18 prudence of purchases in future transactions.

19 And I think you have ample regulatory
20 authority to tell a purchasing utility that they
21 shouldn't have bought from us or that they paid too
22 much, and you're only going to allow what would have
23 been reasonable and prudent under the circumstances.
24 Did I make that clear?

25 **COMMISSIONER JACOBS:** I understand what

1 you're saying.

2 **MR. WRIGHT:** Why would you condition --
3 my -- rhetorically sort of, why would you condition
4 our determination of need on what is reasonable --

5 **COMMISSIONER GARCIA:** Isn't that already a
6 condition that the companies that are utilities in the
7 state have before us? In other words, if you put that
8 condition on Duke Power, it's superfluous, because any
9 of the utilities that buy from them have to buy it
10 only under those conditions.

11 **MR. WRIGHT:** Thank you.

12 **COMMISSIONER GARCIA:** Right?

13 **COMMISSIONER JACOBS:** That's the question I
14 have. Is that the case?

15 **MR. WRIGHT:** Well, we assert to you as a
16 matter of fact that that is the case and that that can
17 only be the case. We can't make them pay \$500 a
18 megawatt hour when they can turn around and generate
19 for 25. We can't make them pay \$25.50 a megawatt hour
20 when they can turn around and generate for 25 or buy
21 it from somebody else for 25 and a quarter. And I
22 think we all have to assume that they will behave in
23 an economically rational way.

24 **COMMISSIONER GARCIA:** So following something
25 that Commissioner Clark said, which sort of struck a

1 cord with me, her concept is that perhaps this
2 determination of need proceeding was based on a
3 different market that existed, say, 10 years ago and
4 where no one would in theory come in and build a power
5 plant on speculation, but now that that's happening,
6 that you're doing it, you're coming in saying, well,
7 there's a need out there and we're going to get it
8 from overall, that responsibility that we had. This
9 proceeding, you're saying, I guess, sort of it's
10 superfluous.

11 I mean, it's the law, and we have to do it,
12 but we don't even need to do this. This is
13 unnecessary, because our job is strictly that;
14 protecting the ratepayers?

15 **MR. WRIGHT:** I agree with the last part of
16 your statement that your job is to protect the rate --

17 **COMMISSIONER GARCIA:** Within the statute of
18 the siting, this is our job and our --

19 **MR. WRIGHT:** Within all of your statutes,
20 Commissioner Garcia, including Chapter 366, including
21 your Grid Bill authority to which -- that you can
22 extend to us.

23 You know, do I think need determinations are
24 superfluous --

25 **COMMISSIONER GARCIA:** Well, maybe in

1 today's --

2 MR. WRIGHT: -- not --

3 COMMISSIONER GARCIA: -- market environment,
4 just like we have --

5 MR. WRIGHT: Maybe, maybe not.

6 COMMISSIONER GARCIA: Just like we have the
7 power to say to Florida Power Corp because they don't
8 meet -- their plans are out of sync and we don't
9 feel -- we feel that they may be out of -- the margin
10 may not be adequate. We have the power to tell them
11 to build.

12 I mean, we have to have a series of hearings
13 and decide how we do that, but we also have the power
14 to do that if the companies weren't forthcoming in the
15 building of generation. I understand we haven't done
16 that often, but we also have the power to do that
17 also.

18 MR. WRIGHT: You do have that power.

19 COMMISSIONER DEASON: Mr. Wright, Mr. Guyton
20 indicated that this Commission has responsibility
21 beyond just protecting ratepayers, that we have some
22 limited environmental jurisdictional responsibility in
23 the sense that before we -- we have to determine that
24 the power plant is needed so that there is not the
25 possibility of an unneeded power plant being built

1 that would degradate Florida's environment. What is
2 your response to that position?

3 **MR. WRIGHT:** Well, my response is that your
4 job is to consider the factors in the statute, whether
5 it would -- the need for system reliability and
6 integrity, the need for adequate electricity at a
7 reasonable cost, and whether the proposed power plant
8 is the most cost-effective alternative --
9 alternative available, and the other -- and other
10 factors within your jurisdiction, including
11 conservation.

12 Basically it comes down to reliability and
13 cost-effectiveness, in my view, and that's your
14 view -- that, in my view, is your job, and it applies
15 to the ratepayers.

16 Now, certainly the Siting Act is an
17 environmental statute, and we discussed this a little
18 bit earlier. It is an environmental statute. It does
19 not say limit, limit, limit. It does not say minimize
20 the absolute number of power plants built. It says,
21 balance the need for additional capacity which you
22 consider with the environmental effects, and that's
23 the job of the DEP and the Siting Board in the overall
24 Siting Act process.

25 **COMMISSIONER DEASON:** Yes, but before it

1 ever gets to that stage, we have to say that the power
2 plant is needed.

3 **MR. WRIGHT:** Yes, sir, and you can say it's
4 needed and the Siting Board can say it cannot
5 licensed. It just --

6 **COMMISSIONER DEASON:** That has happened, but
7 that first safeguard to the environment is that it's
8 got to be determined to be needed, and that is our
9 determination.

10 **MR. WRIGHT:** It's got to be determined to be
11 needed -- I'm not sure that I agree that your part of
12 that is an environmental safeguard as much as it is a
13 ratepayer safeguard against which --

14 **COMMISSIONER DEASON:** Well, that's the
15 reason I'm asking the questions is that since there's
16 no ratepayer impact -- for the sake of my question
17 there's no ratepayer impact -- and I know there's
18 other arguments -- but for the sake of my question
19 there's no ratepayer impact; therefore, there's no
20 concern about the environment as far as we're
21 concerned. It is not our jurisdiction if there's no
22 ratepayer impact, which is our jurisdiction. We
23 shouldn't be concerned. We could say it's needed, and
24 then it's up to the environmental regulatory authority
25 to determine what the environmental impact is.

1 **MR. WRIGHT:** Yes, sir, and to determine
2 whether the plant should be licensed and, if so, under
3 what conditions, taking into account the balancing of
4 the environmental impacts that might accrue.

5 **COMMISSIONER DEASON:** As I read the statute,
6 we can't say to DEP that, well, this power plant is
7 needed because there's no adverse impacts on
8 ratepayers.

9 **MR. WRIGHT:** No, you wouldn't say that, I
10 don't think. You would say, this plant is needed
11 because it is like -- in our view and what we've
12 alleged is you would hopefully agree with us and issue
13 an order saying that this plant is needed because it
14 will improve reserve margins in Peninsular Florida, it
15 will improve system reliability and integrity. It
16 will provide adequate electricity at a reasonable
17 cost, and it will be cost-effective to Florida
18 ratepayers.

19 **COMMISSIONER DEASON:** And that goes to the
20 merits of your application, I suppose, to your
21 standing to be an applicant.

22 **MR. WRIGHT:** Yes, sir. But I was trying to
23 answer your question as to what your job is in the
24 Siting Act process.

25 **CHAIRMAN JOHNSON:** So that what you just

1 delineated would be the criteria that we need to use
2 in order to determine whether or not there is need?

3 **MR. WRIGHT:** Yes, ma'am; in order to
4 determine whether to grant the determination in need
5 for New Smyrna Beach power project.

6 **CHAIRMAN JOHNSON:** And that we can then --
7 Mr. Guyton would argue that with respect to your
8 application, you only have -- at least on its face
9 would show a need for the 30 megawatts, and the 470,
10 there is no need. So that's one of the facts alone
11 upon which we should deny this. But your argument is,
12 I guess, as it relates to the 470, that we can apply a
13 broader test of need, and that we don't have to look
14 at the need of the utility.

15 **MR. WRIGHT:** You don't have to look at the
16 need of a specific utility. Our position is -- and
17 this is an issue that's been addressed in every power
18 plant need determination case before this Commission
19 for probably the last 12 years, if not longer.

20 We submit that this power project is
21 consistent with the need for Florida, Peninsular
22 Florida, reliability system -- system reliability and
23 integrity and for -- and the need of Peninsular
24 Florida for adequate electricity at a reasonable cost.
25 And we submit to you that you can apply those criteria

1 and those considerations in making the determination
2 that you're charged to make under Florida 3.519.

3 **CHAIRMAN JOHNSON:** And are you submitting to
4 us -- is this a case of first impression, or have we
5 applied the more general Peninsular Florida analysis
6 in the past in any way?

7 **MR. WRIGHT:** It's a case of first impression
8 in some ways; not in the way that your question might
9 have suggested. You have applied the criterion, the
10 question whether the proposed power project is
11 consistent with the needs of Peninsular Florida for
12 electric system reliability and integrity and for
13 adequate electricity at a reasonable cost in numerous
14 need determination cases, some of which we have cited
15 in our papers.

16 **COMMISSIONER JACOBS:** Should this be an open
17 bid, then? Shouldn't we have everybody here?

18 **MR. WRIGHT:** I don't understand your
19 question, Commissioner Jacobs.

20 **COMMISSIONER JACOBS:** Shouldn't this be an
21 open bid? Should we have all bidders here?

22 **MR. WRIGHT:** No.

23 **COMMISSIONER JACOBS:** Why? Why not?

24 **MR. WRIGHT:** Because nobody is bidding or
25 purporting to serve the needs of a specific utility

1 other than Utilities Commission of New Smyrna Beach
2 who conducted their own evaluation of the
3 cost-effectiveness of the project and the contracts.

4 **COMMISSIONER JACOBS:** So we block out the 30
5 and we go for the 470, bid that out?

6 **MR. WRIGHT:** Well, what we want to do,
7 Commissioner Jacobs, is build a plant so that we can
8 then bid it into the market of those who want -- who
9 may want to buy it.

10 **COMMISSIONER CLARK:** But Schef, your
11 argument that we should look at Peninsular Florida and
12 determine -- use that sort of in concluding the margin
13 of reserves aren't where they should be and this will
14 help that, then that will affect any subsequent party
15 that wants to come in with a specific need for the
16 retail ratepayer.

17 I suppose we might have two that are coming
18 in and saying, we need it; and the question will be,
19 well, we can't -- we actually don't need it, because
20 those margins are now covered. And then we force them
21 in effect to buy from you, and you get to dictate the
22 price.

23 **MR. WRIGHT:** Well, I don't agree with that.
24 They would be free to apply under any future scenario
25 under the criteria in 403.519, whether the --

1 **COMMISSIONER CLARK:** But is your --

2 **MR. WRIGHT:** May I please? Whether it's
3 needed for reliability and integrity, whether it's
4 needed for adequate electricity at a reasonable cost,
5 and whether it's cost-effective.

6 Anybody can come in and prove that it's
7 cost-effective to them and their ratepayers. If they
8 can prove that their alternative is more
9 cost-effective than ours, you all aren't going to
10 force them to buy the output of our project.

11 **COMMISSIONER CLARK:** Well, I think --

12 **MR. WRIGHT:** And you're -- I don't believe
13 you're ever going to permit us to dictate a price.

14 **COMMISSIONER CLARK:** But the question is
15 that it will be a comparison of what you were doing to
16 what they propose to do, and I think that goes to
17 Commissioner Jacobs' question; shouldn't we just have
18 an open season and say it's needed, and let everybody
19 bid for it?

20 **MR. WRIGHT:** Not necessarily, and I think
21 that to have a -- when you want --

22 **COMMISSIONER JACOBS:** Well --

23 **MR. WRIGHT:** The reason for having -- reason
24 for having a bid is to protect captive ratepayers who
25 are going to be on the hook to pay for the costs of

1 any contract or utility build option that comes out of
2 that procurement process.

3 **COMMISSIONER JACOBS:** So --

4 **MR. WRIGHT:** That's not what's on the table
5 here.

6 **COMMISSIONER GARCIA:** So if Florida Power
7 Corp who has -- I think they may have the petition
8 before us -- maybe it's not here -- that they asked
9 for a waiver on the rule to put out to bid new power,
10 and they say to us, well, Commissioner, we can build
11 it cheaper if we don't have to put it out to bid.
12 That just costs more money, more administration. Let
13 us build it. We don't have to go before you. Let us
14 waive the rule, and we're going to build the cheapest
15 power available, and we just put it out there.

16 I mean, that's what you're asking us to do,
17 because to some degree, I think Commissioner Jacobs
18 and Commissioner Clark are right. You're basically
19 taking a future market away from these companies.
20 They have to put it out to bid. You're just building.

21 **MR. WRIGHT:** I don't agree --

22 **COMMISSIONER GARCIA:** What's the difference?

23 **MR. WRIGHT:** I don't agree that we're taking
24 any future market away from them.

25 **COMMISSIONER GARCIA:** Aren't --

1 **MR. WRIGHT:** No. They can apply for a need
2 determination under the statute and go through the
3 same process we're going through, and if they prove
4 this, they meet the process by the same criteria --

5 **COMMISSIONER GARCIA:** But they have a much
6 longer process by our rules. They not only have to do
7 that, they have to prove they have a need, they've got
8 to put it out to bid to make sure that it's the
9 cheapest bid. Then they've got to bid against that
10 bid if they want to try to do it themselves and beat
11 that bid, so it is an open -- and anyone can
12 participate.

13 You, however, showed up to Florida. You
14 plunk down 470 megawatts, and you start generating
15 power. You're in a much better position.

16 **MR. WRIGHT:** And they have that process to
17 protect their captive ratepayers. You all imposed
18 that process upon them to protect their captive
19 ratepayers from being saddled with uneconomic --

20 **COMMISSIONER GARCIA:** All right. Let's --

21 **MR. WRIGHT:** And it's not that --

22 **COMMISSIONER GARCIA:** Let me --

23 **MR. WRIGHT:** That's not that --

24 **COMMISSIONER GARCIA:** Let me then take your
25 argument a little bit further, then. Let's say

1 Florida Power Corp -- and I'd love for them to do this
2 on their next project -- that they are trying to speed
3 up to meet -- to make sure they meet their margins,
4 they say, Commissioners, you're not going to be on the
5 hook for this project. We're -- the ratepayers aren't
6 going to pay for it; we're just going to build it.
7 Our ratepayers aren't going to be on the hook for it.
8 We see a need in Florida, and we're going to build our
9 own plant. Yet they can't do that.

10 They still have to put it up to bid,
11 according to our rules, unless they get a waiver.
12 They still have to let you bid for that. So I could
13 almost imagine or see you, Schef, in a few months when
14 they put in their project, that you're going to take
15 your 470 megawatts, which you've already started down,
16 and say to Florida Power Corp, well, you know what; my
17 plant is going to be in service much quicker than
18 yours; and you bid and beat them at it because you're
19 already in the ground.

20 Aren't they at a disadvantage in this
21 system? Aren't they at a disadvantage then? Then the
22 point --

23 **MR. WRIGHT:** I think there are two --

24 **COMMISSIONER GARCIA:** Then the point that
25 Mr. Guyton made that this is about territory and about

1 the specific company needs is significant. And we
2 would further go back to what Commissioner Clark said;
3 well, maybe we should just have an open season. We
4 determine we have a need of 700 or 1,000 megawatts or
5 whatever, and let everyone bid so they all have a
6 crack at it so we really do get the most efficient
7 power --

8 **MR. WRIGHT:** Well, there are several issues
9 inherent there. In the first place --

10 **COMMISSIONER GARCIA:** I'm sorry. I know
11 that --

12 **MR. WRIGHT:** That's okay. I don't --
13 there's no harm. And what's the worst that can happen
14 under the scenario you posed with respect to Florida
15 Power Corporation is they wind up buying from us at a
16 cost cheaper than they can generate for. Help me out.
17 I think the ratepayers are better off, if that should
18 happen.

19 And they may buy from us for two years or
20 four years and reserve their construction for the next
21 go-around to when the H or AT technologies are
22 available and be able to take advantage of future
23 improvements in generation technology.

24 And as to open season, I think the open
25 season falls in the same category with the bid

1 process, and that is where you're determining whether
2 the -- whether captive ratepayers are going to be
3 stuck.

4 If you look at the health care industry
5 analog where they have batching cycles --

6 **COMMISSIONER GARCIA:** (Inaudible comments
7 away from microphone.)

8 **MR. WRIGHT:** Well -- they do that to protect
9 the State as payor for Medicare and Medicaid patients.

10 **COMMISSIONER GARCIA:** Well, aren't you --

11 **MR. WRIGHT:** Same thing. And if they want
12 to --

13 **COMMISSIONER GARCIA:** (Inaudible comments
14 away from microphone.)

15 **MR. WRIGHT:** I'm sorry?

16 **COMMISSIONER GARCIA:** Aren't you saying on
17 this, there is no Florida -- (away from microphone) --

18 **MR. WRIGHT:** Yes.

19 **COMMISSIONER GARCIA:** Yes, you're taking a
20 risk. And I agree; that's the advantage. Florida is
21 growing, but the financial markets are healthy and
22 they're willing to take the risk that Florida is going
23 to continue to grow, so you build your plant.

24 In that case you sort of have an advantage
25 over our incumbent utilities about new generation.

1 You can beat them to it. You can beat them -- build
2 and be there on the ground before they can.

3 **MR. WRIGHT:** Possibly by a few months to a
4 year; possibly not. If they are proposing, as Florida
5 Power is in this case, to ultimately leave their
6 ratepayers on the hook, then I'd submit to you that a
7 bid process is appropriate.

8 If they were not proposing for their
9 ratepayers to be on the hook, which is not the case
10 before you, the answer might be different. You know,
11 do I think that somebody else, for example Mr. Santa's
12 company could come in and file a need determination to
13 build a power plant for which they took the risk in
14 the same way that Duke New Smyrna is taking the risk?
15 Yes, sir. I mean, the law -- I think the law is what
16 the law is. I think the law allows us, I think the
17 law allows them; and I think it's a good thing.

18 **COMMISSIONER CLARK:** But what is the upper
19 limit of the need to merchant plants?

20 **MR. WRIGHT:** Well, Commissioner Clark, we
21 kind of had part of this conversation, and the answer
22 is I don't know.

23 But let's take a scenario. Suppose -- let
24 me just throw out some numbers. There's more than
25 20,000 megawatts of power plant capacity on the ground

1 in Florida today -- and this is a matter of public
2 record, if you look at the heat rates and all that
3 stuff -- that is significantly less efficient than the
4 power plant we propose to build. Suppose you wind up,
5 or the state winds up, with a series of merchant plant
6 need determination cases, and we get another 10,000
7 megawatts of what we call new and clean gas-fired
8 combined cycle that's running at heat rates in the
9 vicinity of the 6800. That's fully a third, probably
10 35 to 40% more efficient using 35 to 40% less fuel for
11 every megawatt hour that those plants generate.

12 You know, is that too much? You know, in my
13 opinion, no, ma'am; that's not too much. That's a
14 scenario that you all should want to see occur.

15 **COMMISSIONER CLARK:** Yes, but, Mr. Wright, I
16 would point out, that has implications for those
17 plants that don't run -- that are less efficient that
18 we have perhaps let in the rate base, and it is a
19 broader issue than just how much merchant plant is
20 enough. It has the issue of stranded investment
21 which --

22 **MR. WRIGHT:** It's not --

23 **COMMISSIONER CLARK:** And we ought to address
24 that head-on, rather than saying, all right, we'll
25 just let these merchant plants in and then deal with

1 outfall at some other time.

2 **MR. WRIGHT:** Well, I think even the
3 existence of stranded costs for Florida's utilities is
4 an open question, and it's not the issue before you in
5 this need determination proceeding.

6 This is a 500-megawatt power plant. If you
7 think that this implicates stranded cost recovery, and
8 you all think it might be time to get on with
9 addressing potential stranded cost exposure and what
10 you're going to do about it today and what you're
11 going to do about it tomorrow and what you're going to
12 do about it in some hypothetical transition period,
13 that would be the subject for a different docket.

14 **COMMISSIONER CLARK:** Well, but it's --

15 **MR. WRIGHT:** And this 500-megawatt power
16 plant --

17 **COMMISSIONER CLARK:** What you're
18 suggesting --

19 **MR. WRIGHT:** -- is not going to --

20 **COMMISSIONER CLARK:** -- has sort of the
21 notion of putting the cart before the horse.

22 **MR. WRIGHT:** Well, I don't agree. I think
23 the horse is already here.

24 **COMMISSIONER CLARK:** Okay.

25 **MR. WRIGHT:** Madam Chairman, due to the

1 questions and answers, this has taken quite a bit
2 longer than I expected for my prepared comments to
3 take. I will wrap up as quickly as I can, because we
4 do have three other members of our team to argue this
5 motion.

6 **CHAIRMAN JOHNSON:** After you finish, we're
7 going to take a lunch break and allow the others to
8 speak --

9 **MR. WRIGHT:** Thank you.

10 **CHAIRMAN JOHNSON:** -- understanding that
11 most of your presentation has been taken up with
12 questions that you've been responding to.

13 **MR. WRIGHT:** Thank you, Madam Chairman.

14 **COMMISSIONER GARCIA:** Madam Chairman,
15 because I think we've taken Schef backwards and
16 forwards a long way, and I'm sure that if we took our
17 lunch break now, Schef would probably be able to wrap
18 up in five minutes as opposed to spending five minutes
19 looking for where he's going, five to ten minutes. I
20 just don't want you to spend time and re-cover the
21 same ground. So maybe if we just take the break and
22 let him finish up and then go with the rest, it might
23 be more efficient.

24 **CHAIRMAN JOHNSON:** What works for you?

25 **MR. WRIGHT:** Your pleasure, Madam Chairman.

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1	1 1/10, 1/11, 5/2, 46/14, 91/12, 92/23 1,000 137/4 10 125/3 10,000 140/6 100 3/18 1114 3/6 117 2/9 1178 55/21, 55/25 12 130/19 13 96/13 14042 2/16 143 1/11 148 1/19 15 18/11, 85/13 17 58/16 19 5/4, 58/17 1972 96/25, 97/16, 98/22 1973 20/10, 22/6, 22/19, 23/19, 28/13, 28/14, 29/9, 29/18, 30/20, 31/14, 32/12, 33/10, 33/25, 34/1, 42/9, 46/14, 46/18, 47/8, 48/1, 95/8, 98/24 1024 33/8, 48/25 32/13, 32/19, 33/3, 33/14, 33/19 20/12, 34/6, 34/18, 34/24, 42/9, 42/12, 42/22 1980s 33/20, 33/24 1982 33/19 1989 31/13 1990 37/12, 39/1, 39/2, 39/12, 40/2, 40/10, 40/24, 42/12, 42/13, 42/23 1991 43/14 1992 75/8, 110/15 1994 110/14 1996 15/8 1998 1/17, 6/8 1st 89/23, 90/13, 90/15	4 40 9/14 40% 140/10 40232 3/22 403 57/8 403.503 23/3, 41/6, 88/19, 96/13 403.506 46/11 403.508 47/3 403.519 35/4, 35/14, 36/6, 36/23, 37/1, 37/5, 37/13, 38/20, 39/6, 39/10, 39/14, 39/19, 47/5, 51/20, 52/21, 52/23, 55/16, 56/14, 56/19, 75/16, 75/23, 78/22, 83/16, 88/13, 94/19, 94/22, 99/10, 99/15, 99/19, 107/14, 132/25 4075 1/20 45 17/17, 18/17, 18/21, 18/23, 19/2, 19/3 45th 3/18 470 51/11, 51/14, 52/3, 52/14, 79/16, 81/3, 91/22, 130/9, 130/12, 132/5, 135/14, 136/15 4804 3/18	
2	2 1/17, 31/6, 81/16, 88/3, 93/18, 99/12, 99/20, 104/22 20,000 139/25 21 58/17 210 3/15 2145 2/11 215 3/11 220 3/21 22341 51/23, 52/19, 54/24, 55/4, 56/12, 57/5, 111/4, 111/6 227 2/21 23246 111/4 23rd 15/13 24672 55/2, 55/11, 57/5 25 124/19, 124/20, 124/21 25% 119/4 25-22.0801 39/15 2540 4/4 27 58/17 28-106.106 14/4 2861 2/18 29 44/21	5 50 5/5 50% 118/18, 119/3 500 29/2, 68/1, 80/16 500-megawatt 30/14, 30/18, 51/9, 141/6, 141/15 522 15/7 590 3/3	
3	3 14/4, 41/25, 104/22 3-to-2 105/16 3.519 131/2 3/2 105/6 30 18/3, 28/23, 28/24, 51/10, 58/21, 58/22, 80/5, 106/14, 121/24, 121/25, 122/16, 123/12, 130/9, 132/4 30-megawatt 30/7, 30/9, 30/11, 30/19, 80/22, 80/23 30-year 103/17, 103/19	6 6% 80/20 601 3/11 62-110 45/1 633.86 36/7 644 75/20, 76/7 645 76/8, 76/19, 77/9 646 83/13 6800 140/9 683 15/7	
		7 700 137/4 75 30/2	
		8 8 44/12 80/20 63/15 85 5/5 8:15 8/15	
		9 9 58/8 9.370 14/20 9033 40/6, 40/9 94% 51/11, 57/13, 75/7, 80/17 981042-EM 1/4, 6/9 9:30 1/18, 6/2	
		A A.G 15/7 a.m 1/18, 6/2 ability 54/5, 87/20 abrogate 56/3	

Amicus 10/16, 12/14, 14/13, 14/18, 14/20, 14/23, 15/2, 15/10, 15/20, 16/5
amount 19/4, 32/23, 54/6, 70/16, 80/25, 99/17
ample 19/17, 120/18, 123/19
analog 138/5
 vis 40/24, 41/5, 41/14, 42/1, 68/6, 76/5, 131/5
uncement 11/13
Answer 29/25, 115/20, 117/5, 119/15, 129/23, 139/10, 139/21
answered 75/2
answers 142/1
anticipating 31/4
apologize 20/14
appeal 104/6, 111/4
appealed 55/10, 77/23, 103/2, 105/17, 110/22, 110/25, 111/3
Appeals 43/11, 44/9, 44/11
appearance 8/3
APPEARANCES 2/1, 3/1, 4/1, 6/14
Appellate 14/19
applicable 20/1, 20/8, 54/19, 82/15, 88/10
applicant 20/23, 34/16, 35/17, 37/14, 38/19, 38/23, 39/5, 75/7, 76/9, 77/17, 78/20, 79/25, 80/5, 80/21, 80/25, 81/2, 83/15, 83/25, 88/16, 88/21, 94/21, 95/1, 95/11, 97/14, 106/15, 108/4, 109/18, 110/12, 112/17, 112/21, 121/14, 121/23, 122/20, 129/21
applicants 41/4, 75/22, 78/17, 87/24, 89/6, 95/15, 99/3, 104/15, 105/19, 105/25, 106/2, 106/3, 107/4, 107/11, 107/12, 108/4, 120/13
application 35/12, 41/15, 43/15, 43/17, 68/5, 68/25, 71/6, 86/24, 87/12, 101/13, 101/19, 129/20, 130/8
applied 22/19, 95/19, 131/5, 131/9
applies 35/20, 53/9, 53/12, 69/25, 81/6, 88/22, 127/14
apply 20/3, 31/20, 32/6, 34/22, 35/1, 37/7, 37/17, 53/10, 92/19, 94/4, 100/23, 100/25, 123/17, 130/12, 130/25, 132/24, 135/1
applying 36/18
appreciate 20/7
appreciative 19/14
approach 25/18, 84/20
approached 27/17
appropriate 54/18, 87/8, 90/1, 99/23, 112/21, 114/23, 120/1, 120/19, 123/15, 139/7
approval 60/24, 61/2, 89/19, 91/10, 92/23
 ove 32/1
 oximated 68/1
April 89/23, 90/13, 90/15
area 21/16, 24/20, 24/24, 24/25, 25/4, 25/12, 34/4, 34/5, 36/3, 71/5, 94/9
areas 26/16, 37/9, 41/13
arguably 89/24, 118/18, 119/4
argue 12/11, 17/7, 29/20, 81/5, 82/12, 130/7, 142/4
argued 28/11, 28/14, 43/1, 43/23, 44/21, 45/5, 55/12
argues 28/3, 31/4
argument 5/4, 5/5, 10/18, 10/24, 15/22, 16/4, 16/5, 17/15, 19/23, 19/24, 20/22, 20/25, 25/23, 29/17, 32/7, 32/15, 33/2, 56/8, 58/4, 63/6, 65/21, 65/24, 67/3, 67/23, 69/17, 69/20, 75/18, 81/15, 84/3, 85/20, 85/21, 85/22, 94/1, 99/23, 108/14, 117/2, 118/9, 119/20, 120/23, 130/11, 132/11, 135/25
arguments 55/18, 56/1, 58/5, 86/1, 113/3, 120/21, 120/24, 128/18
arise 94/10
arises 79/20
Ark 23/6, 23/12, 75/10, 75/18, 75/20, 75/22, 76/12, 76/25, 79/14, 79/18, 79/22, 81/5, 81/12, 81/13, 81/17, 82/1, 82/6, 82/10, 82/12, 82/22, 83/5, 83/6, 83/8, 104/15, 104/22, 105/18, 108/7, 108/9, 109/1, 109/13
Ark's 108/10
Arnold 2/8
arose 43/14, 76/18
arrangement 33/5, 49/8
arrangements 33/9, 33/16, 49/1
arrive 38/2
assert 111/20, 115/4, 124/15
assessing 65/4
assets 118/18
Assistance 3/8, 6/23
assisting 15/3
associated 64/18
Association 3/5, 6/21
assumption 70/18, 84/15
 re 60/3
 red 59/15
Attachment 81/15, 81/16, 108/10
attachments 108/8
attain 21/4
attempt 18/20
attempted 17/14, 19/22, 111/4
attempting 54/17, 103/13
attempts 57/18, 81/4
attention 51/4, 54/9, 55/2, 79/4
August 6/7

Ansley 2/20, 7/3
authoritatively 21/21
authorities 29/16
authority 21/6, 21/8, 21/10, 34/20, 48/24, 73/6, 73/7, 88/4, 93/11, 93/22, 93/24, 93/25, 94/14, 94/17, 97/5, 123/20, 125/21, 128/24
authorization 30/9
authorize 115/18
authorized 13/19, 23/1, 89/3, 89/10, 89/18, 90/18, 93/6, 95/3, 96/19
authorizes 89/19, 91/12
available 26/8, 35/17, 53/2, 55/8, 66/11, 101/7, 101/8, 102/7, 127/9, 134/15, 137/22
Avenue 2/4, 7/17
avoid 57/18, 116/22
avoided 58/10

B

balance 114/19, 127/21
balancing 115/8, 129/3
base 60/10, 67/8, 67/11, 71/12, 71/22, 107/11, 119/24, 140/18
based 21/23, 25/11, 43/17, 83/23, 86/10, 125/2
BASF 15/6
basis 25/13, 25/25, 29/8, 30/18, 40/22, 56/10, 56/24, 70/2, 86/23, 97/13, 101/11, 117/7
batching 138/5
Beach 1/7, 1/8, 2/13, 6/12, 6/13, 7/19, 7/21, 29/1, 29/21, 87/24, 88/7, 89/9, 91/11, 91/21, 93/3, 93/17, 99/3, 101/19, 106/12, 122/16, 123/2, 130/5, 132/1
bear 67/4, 114/9
Beard 55/19, 57/7, 57/16, 58/8, 77/5, 77/14, 78/25, 79/15, 82/10, 84/25, 103/1, 103/17, 110/20, 110/22
bears 121/1
BEASLEY 2/20, 7/2
beat 135/10, 136/18, 139/1
behave 124/22
bench 86/15
benefit 48/24, 63/14, 64/7, 64/9, 64/13, 64/14, 64/23, 66/19, 117/22, 119/3
benefits 29/22, 29/13, 66/16, 123/2
Betty 1/19
bid 73/22, 131/17, 131/21, 132/5, 132/8, 133/19, 133/24, 134/9, 134/11, 134/20, 135/8, 135/9, 135/10, 135/11, 136/10, 136/12, 136/18, 137/5, 137/25, 139/7
bidders 131/21
bidding 118/22, 118/23, 119/1, 131/24
Bill 6/19, 30/22, 40/14, 40/19, 40/20, 73/7, 93/24, 94/14, 125/21
bind 87/18, 106/8
binds 21/22
bit 66/22, 69/15, 70/15, 96/7, 127/18, 135/25, 142/1
block 132/4
Board 83/18, 114/18, 115/6, 115/15, 127/23, 128/4
Bob 120/8
body 52/23, 54/4
bones 29/4
bottom 49/10, 52/22, 56/7, 75/20, 76/7, 77/9, 103/22
bought 123/21
Boulevard 2/11, 4/4
bound 87/2
Box 2/16, 2/18, 3/3
break 85/13, 142/7, 142/17, 142/21
breaking 143/1, 143/3, 143/6
brief 9/21, 9/23, 10/4, 10/6, 14/21, 14/23, 14/25, 16/5, 44/11, 85/14, 85/25, 98/22
briefs 10/4, 15/2
bright 115/24, 116/3
bring 54/9, 55/1, 79/3, 82/21
brings 35/4
broader 109/6, 120/24, 130/13, 140/19
brought 60/23, 68/2, 68/7, 102/21
build 30/9, 30/11, 32/22, 34/19, 46/2, 70/19, 71/4, 71/15, 72/24, 75/11, 84/11, 117/4, 125/4, 126/11, 132/7, 134/1, 134/10, 134/13, 134/14, 136/6, 136/8, 138/23, 139/1, 139/13, 140/4
Builders 12/7
building 60/2, 69/23, 71/18, 80/10, 126/15, 134/20
built 43/20, 45/25, 49/15, 49/16, 50/7, 59/24, 61/17, 70/6, 71/11, 113/24, 126/25, 127/20
burden 86/22, 87/7
burdened 113/23, 114/2
Bureau 1/22
burn 18/6
business 23/1, 89/11, 93/7, 95/14, 96/19
busy 105/6
BUTLER 3/10, 6/16
buy 48/4, 48/14, 82/14, 92/6, 92/13, 92/15, 92/17, 100/14, 101/10, 112/11, 112/9, 112/10, 117/13, 124/9, 124/20, 132/9, 132/21, 133/10, 137/19
buyer 45/14
buying 137/15

C

calculate 56/23
Calhoun 2/21
call 104/22, 140/7
came 77/20
candidate 73/11
capecky 24/4, 24/5, 24/16, 27/15, 35/23, 46/12, 51/12, 54/7, 54/23, 57/13, 66/24, 68/2, 69/2, 75/8, 81/1, 99/17, 100/6, 101/10, 101/13, 113/4, 113/5, 122/24, 127/21, 139/25
capital 105/21
captive 59/22, 114/8, 117/11, 133/24, 135/17, 135/18, 138/2
capture 95/19
care 120/8, 120/9, 138/4
Carlton 2/17, 6/24
Carolina 43/8, 43/10, 43/11, 43/16, 44/3, 44/7, 44/9, 44/10
carried 25/6
carry 116/9
cart 141/21
case 7/21, 11/19, 15/1, 15/6, 15/8, 21/24, 23/7, 24/11, 29/3, 35/3, 39/6, 43/13, 44/12, 50/20, 50/25, 51/18, 53/6, 65/12, 68/13, 75/18, 75/19, 75/20, 76/4, 76/5, 76/6, 79/22, 81/4, 81/13, 82/13, 97/1, 97/7, 97/10, 98/22, 103/17, 103/18, 103/22, 106/25, 107/2, 107/3, 107/5, 107/6, 109/4, 109/7, 109/8, 117/7, 118/16, 124/14, 124/16, 124/17, 130/18, 131/4, 131/7, 138/24, 139/5, 139/9
case-by-case 117/6
cases 15/4, 52/10, 74/9, 87/15, 87/16, 87/18, 102/24, 103/11, 103/12, 103/14, 110/4, 111/16, 111/20, 112/1, 131/14, 140/6
categories 108/2
Categorize 63/8
category 109/2, 137/25
caution 90/21
Center 1/19, 70/22
central 65/25, 66/1
centralized 29/23
certificate 43/16, 44/5, 44/16, 45/2, 46/20
certificated 44/25
certificating 45/7
certification 37/10, 46/15, 46/18, 46/21, 47/6, 88/22
certified 46/1, 50/9
certify 121/24
CG 15/6
CHAIRMAN 1/14, 6/3, 6/14, 8/2, 8/6, 8/12, 8/14, 8/22, 9/4, 9/6, 9/12, 9/16, 10/10, 10/14, 10/25, 11/8, 11/17, 11/23, 12/4, 12/10, 12/19, 12/20, 13/10, 13/13, 13/14, 13/17, 13/22, 14/1, 14/8, 14/15, 15/12, 15/16, 15/17, 15/23, 15/25, 16/14, 16/20, 16/22, 16/23, 16/24, 17/20, 17/24, 18/10, 18/15, 18/18, 19/8, 20/14, 21/1, 45/18, 49/19, 50/17, 52/2, 52/12, 69/19, 85/11, 85/16, 85/18, 86/7, 104/10, 104/13, 105/14, 107/20, 107/25, 108/6, 108/14, 129/25, 130/6, 131/3, 141/25, 142/6, 142/10, 142/13, 142/14, 142/24, 142/25, 143/1, 143/5, 143/8
Chairman's 86/11
challenge 111/5
challenged 55/15
change 39/6, 39/9, 41/7, 73/12, 74/12, 74/17
changed 33/19, 48/17, 94/20
changes 40/3, 41/16, 41/19, 42/2, 121/18
changing 74/21
Chapter 31/5, 31/20, 88/5, 94/3, 96/22, 109/22, 125/20
characterization 40/23
characterize 39/24, 40/18
characterized 78/2
chargeable 97/9
charged 131/2
CHARLES 3/10, 6/15
Chattahoochee 98/11
cheap 66/11
cheaper 134/11, 137/16
cheapest 64/22, 134/14, 135/9
Chief 1/22, 98/22
choice 95/6
choosing 95/12
cheese 80/22, 92/14, 97/12
chronologically 20/6
circumstance 104/25
circumstances 123/23
cited 131/14
cities 109/8
cities 22/22, 28/18, 88/24, 96/15
citizens 11/16
City 1/7, 2/12, 6/12, 7/20, 29/21, 89/9, 93/2, 93/3, 101/18
CLARK 1/15, 18/21, 19/1, 39/23, 40/5, 40/9, 40/11, 40/18, 45/20, 46/5, 46/8, 46/23, 47/3, 47/7, 47/15,

47/25, 48/5, 48/16, 49/2, 49/10, 49/18, 49/23, 53/20,
64/15, 67/1, 67/16, 67/21, 80/2, 80/4, 80/8, 80/13,
90/19, 90/23, 90/25, 102/16, 102/20, 104/14, 105/10,
109/15, 109/22, 109/23, 110/1, 110/6, 110/9, 110/16,
110/19, 110/24, 111/8, 111/10, 111/17, 111/19, 111/24,
113/19, 114/5, 115/17, 115/21, 116/11, 116/14,
5, 117/1, 117/5, 118/7, 118/12, 118/15, 119/18,
120/2, 120/20, 121/11, 121/22, 122/3, 122/7, 122/9,
124/25, 132/10, 133/1, 133/11, 133/14, 134/18, 137/2,
139/18, 139/20, 140/15, 140/23, 141/14, 141/17,
141/20, 141/24
Clark's 119/15
classic 29/3
classifications 31/23
clause 66/25, 86/1
clean 140/7
clear 11/8, 17/7, 21/18, 21/20, 24/21, 25/1, 30/24,
36/3, 38/18, 40/22, 41/17, 43/12, 51/18, 54/15, 74/14,
91/4, 123/24
clearer 37/5
clearly 29/12, 30/19, 31/15, 32/4, 34/20, 38/24, 42/5,
45/5, 53/2, 56/12, 58/5, 61/5, 90/18, 103/6, 103/9,
103/24, 104/8, 107/18
close 24/20, 32/4, 35/18, 36/3, 43/21, 76/1, 104/22,
119/2
Club 12/2
co-applicant 24/14, 84/1, 122/21
co-generator 24/9, 105/1
Co-generators 24/10, 24/12, 53/6, 53/9
codified 22/14, 36/8
Cogeneration 49/24, 53/16, 54/17, 111/16, 111/18
cogenerator 77/16
cogenerators 54/1, 81/6
College 2/4, 2/6, 7/11, 7/17
Columbia 13/25
column 78/19
combinations 22/25, 89/2, 96/18
combined 140/8
commence 88/17
Commenced 1/18
commended 6/2
commensurate 19/4
comment 11/2, 11/6, 11/11, 11/16
commentary 86/16
ments 11/6, 113/17, 130/6, 130/13, 142/2
merce 85/25, 97/6, 100/5
COMMISSION 1/1, 1/7, 1/23, 2/12, 4/3, 4/6, 6/11,
7/20, 8/9, 8/11, 13/8, 14/14, 15/3, 15/22, 16/25, 17/2,
17/16, 19/7, 20/3, 21/4, 21/7, 21/10, 21/12, 21/17,
21/23, 21/25, 22/1, 23/6, 24/15, 24/18, 27/17, 28/2,
28/21, 28/22, 29/1, 29/16, 30/12, 30/17, 31/21, 32/3,
32/24, 34/4, 34/10, 34/23, 35/7, 35/15, 39/16, 39/17,
43/5, 43/11, 43/17, 43/19, 44/4, 44/7, 44/13, 45/6,
47/4, 48/10, 51/4, 53/5, 53/7, 55/13, 56/6, 56/12,
56/20, 60/2, 60/24, 71/12, 72/18, 73/19, 74/22, 75/7,
77/23, 78/3, 78/14, 79/6, 79/12, 82/17, 84/6, 85/19,
87/16, 87/24, 88/16, 89/8, 91/21, 93/2, 93/16, 97/2,
98/15, 98/21, 99/2, 101/18, 103/1, 104/18, 104/19,
104/23, 105/17, 106/11, 109/5, 110/14, 114/10, 122/15,
122/19, 123/2, 126/20, 130/18, 132/1
Commission's 18/14, 25/3, 26/7, 39/15, 78/21,
79/14, 88/14, 93/21, 94/24, 97/5, 98/17, 103/5, 103/8,
104/7, 105/15
COMMISSIONER 1/14, 1/15, 1/16, 9/8, 9/13, 9/19,
9/25, 10/2, 10/8, 10/9, 16/6, 16/17, 17/23, 18/21,
18/25, 19/1, 19/14, 24/8, 24/23, 25/8, 25/22, 26/17,
27/5, 27/12, 28/17, 29/20, 30/3, 39/23, 40/5, 40/9,
40/11, 40/18, 41/22, 45/20, 46/5, 46/7, 46/8, 46/23,
47/2, 47/7, 47/15, 47/25, 48/5, 48/16, 49/2, 49/10,
49/18, 49/20, 49/23, 49/24, 50/6, 53/20, 53/21, 55/22,
59/6, 59/21, 59/25, 60/7, 60/16, 60/22, 61/1, 61/7,
61/25, 62/13, 62/24, 62/25, 63/4, 63/8, 63/19, 64/4,
64/10, 64/15, 64/20, 65/11, 65/16, 66/9, 66/21, 67/1,
67/16, 67/21, 67/22, 68/22, 69/14, 72/2, 72/20, 73/14,
73/18, 73/23, 75/1, 78/6, 78/11, 80/2, 80/4, 80/7, 80/8,
80/13, 81/19, 81/21, 86/3, 86/13, 86/18, 89/12, 89/17,
90/4, 90/11, 90/14, 90/20, 91/3, 91/16, 91/22, 92/1,
92/8, 92/13, 92/16, 92/22, 95/16, 95/25, 96/11, 96/14,
97/16, 97/19, 97/21, 98/4, 98/6, 98/8, 98/13, 98/19,
98/23, 98/25, 99/21, 100/12, 100/15, 102/15, 102/16,
102/20, 103/21, 104/1, 104/14, 105/4, 105/9, 105/11,
105/24, 106/5, 106/17, 106/24, 107/9, 108/24, 109/15,
2, 109/23, 110/1, 110/6, 110/9, 110/11, 110/16,
9, 110/24, 111/8, 111/10, 111/17, 111/19, 111/24,
112/1, 112/3, 112/12, 112/19, 113/12, 113/17, 113/19,
114/5, 115/17, 115/21, 116/11, 116/14, 116/15, 116/17,
116/21, 117/1, 117/5, 117/17, 118/7, 118/12, 118/15,
119/6, 119/15, 119/18, 120/2, 120/20, 121/11, 121/22,
121/25, 122/2, 122/3, 122/7, 122/9, 122/12, 123/5,
123/10, 123/11, 123/25, 124/5, 124/12, 124/13, 124/24,
124/25, 125/17, 125/20, 125/25, 126/3, 126/6, 126/19,
127/25, 128/6, 128/14, 129/5, 129/19, 131/16, 131/19,
131/20, 131/23, 132/4, 132/7, 132/10, 133/1, 133/11,

133/14, 133/17, 133/22, 134/3, 134/6, 134/10, 134/17,
134/18, 134/22, 134/25, 135/5, 135/20, 135/22, 135/24,
136/24, 137/2, 137/10, 138/6, 138/10, 138/13, 138/16,
138/19, 139/18, 139/20, 140/15, 140/23, 141/14,
141/17, 141/20, 141/24, 142/14, 143/6, 143/10
Commissioners 8/18, 9/7, 14/6, 14/9, 15/9, 15/18,
45/19, 50/18, 51/24, 53/4, 54/15, 57/4, 75/25, 81/11,
81/25, 84/2, 84/22, 85/9, 86/19, 96/21, 136/4
Commissioners' 119/16
commit 80/20
committed 51/10
Committee 40/14
common 23/5
communication 8/17
community 70/14
companies 22/24, 26/21, 28/9, 89/1, 95/3, 96/17,
107/4, 124/6, 126/14, 134/19
Company 1/8, 2/14, 2/22, 3/13, 3/17, 6/13, 6/18,
7/4, 7/7, 7/19, 12/21, 13/20, 20/5, 28/7, 29/8, 29/12,
31/14, 32/8, 43/15, 40/24, 58/19, 72/23, 75/12, 75/13,
81/8, 82/9, 86/20, 89/10, 91/11, 93/6, 93/21, 97/3,
101/16, 103/14, 106/9, 108/23, 137/1, 139/12
comparison 133/15
compatible 36/20
compel 82/18
compelling 85/7
competing 94/11
competition 42/4, 49/12
competitive 71/18
compilation 57/24
compiled 50/1
complete 57/11
compliance 121/20
compiled 120/17
comprehensive 25/17
concedes 34/25
concept 125/1
concepts 84/16
concern 19/15, 62/14, 84/16, 128/20
concerned 28/10, 40/14, 128/21, 128/23
concerns 43/13, 99/24, 114/20
concession 35/3
conclude 45/21, 92/4, 103/7, 104/7
concluded 42/3, 77/8
concluding 132/12
conclusion 42/15, 109/17
condition 35/19, 37/9, 47/5, 59/19, 84/8, 123/8,
123/15, 124/2, 124/3, 124/6, 124/8
conditions 68/20, 69/4, 82/25, 124/10, 129/3
conduct 39/16, 46/10, 47/6
conducted 132/2
conducting 44/8
Conference 1/19, 17/5
confirms 23/20
conflict 37/16, 37/23, 38/2, 72/15
conforming 39/3, 42/13, 42/22
conforms 41/1
confused 110/2
consent 14/21
consequence 61/12
consequences 59/14, 59/20, 61/16, 62/10, 62/19,
62/22, 65/14, 69/23, 70/8, 70/9, 84/13, 115/10
conservation 32/1, 35/1, 35/9, 35/16, 35/23, 36/2,
94/8, 127/11
consideration 20/16, 22/4, 59/22, 60/6, 82/19, 87/2
considerations 131/1
consistent 24/17, 41/8, 56/18, 57/19, 57/20, 69/16,
78/22, 79/15, 88/7, 130/21, 131/11
constitute 76/16
Constitution 33/5, 33/8, 48/22, 48/25, 88/12
constrained 21/25, 121/9
constraint 119/12, 119/14
construct 32/20, 47/24
constructed 65/14
construction 37/22, 38/5, 42/6, 42/10, 43/1, 43/2,
44/20, 46/11, 46/16, 51/6, 53/4, 53/7, 54/6, 55/15,
64/25, 70/4, 78/20, 70/21, 79/21, 82/8, 114/25, 115/12,
137/20
construed 21/22, 74/15, 83/10, 83/21, 104/24,
105/22, 109/9
construing 53/11, 62/16, 83/14
consulted 90/22
consuming 52/8, 54/13, 56/16
consumption 35/10
contained 23/16
contains 30/21
contemplate 49/8
contemplated 33/11, 49/4, 49/7
contend 28/20
contends 44/21
content 32/13, 33/25, 34/2
context 29/12, 38/3, 38/18, 50/13, 74/5, 74/20, 104/16
continue 54/2, 138/23

CONTINUED 3/1, 4/1
continuing 143/4
contract 27/13, 27/14, 44/6, 44/14, 49/25, 50/4, 50/7,
60/23, 61/2, 61/8, 61/23, 68/20, 69/3, 69/6, 69/9,
69/12, 74/7, 75/13, 78/17, 79/19, 81/17, 82/14, 82/16,
82/19, 99/14, 99/15, 99/18, 103/16, 103/17, 105/2,
106/10, 106/11, 106/13, 106/20, 107/5, 107/22, 111/12,
122/23, 134/1
contracting 77/6, 81/22, 109/2, 109/10
Contractors 12/6
contracts 27/10, 43/24, 49/14, 50/1, 60/14, 60/20,
61/15, 65/2, 65/12, 68/9, 68/11, 68/17, 68/24, 103/18,
103/19, 107/15, 132/3
contractual 69/2
contrast 60/8, 82/21
contravene 99/7
contrived 87/19
control 119/8
controlling 82/11
convenience 22/16, 44/19, 44/22
convention 57/25
conversation 139/21
conversations 120/5
cooperation 47/17
cooperations 34/2
Cooperative 6/21, 17/21, 31/9
Cooperatives 3/4, 22/24, 89/1, 96/17, 98/2
coordinate 17/15, 19/22
copied 8/17, 9/13
copies 9/14, 15/8
copy 9/15, 12/3, 14/5
cord 125/1
corporate 13/19
Corporation 2/15, 2/19, 7/1, 26/25, 27/19, 27/23,
55/10, 73/10, 77/13, 77/25, 78/25, 86/21, 101/15, 137/15
correct 9/12, 13/13, 14/15, 16/22, 25/14, 42/7, 47/1,
49/6, 49/17, 66/9, 91/19, 91/25, 103/25
corrected 36/24
cost 53/1, 62/2, 64/11, 67/4, 73/4, 102/8, 102/13,
113/8, 118/1, 118/24, 119/1, 119/2, 127/7, 129/17,
130/24, 131/13, 133/4, 137/16, 141/7, 141/9
cost-effective 51/16, 52/17, 53/2, 55/8, 57/14, 57/21,
57/22, 58/12, 58/23, 59/2, 59/17, 59/24, 60/4, 61/8,
61/10, 61/14, 63/22, 65/6, 65/12, 65/18, 67/3, 67/7,
67/9, 67/14, 68/9, 68/12, 68/21, 69/8, 84/19, 92/2,
92/4, 92/7, 92/10, 92/13, 100/2, 100/7, 100/13, 113/10,
113/11, 117/14, 123/3, 127/8, 129/17, 133/5, 133/7,
133/9
cost-effectiveness 30/13, 52/13, 56/21, 58/6, 59/8,
61/20, 62/21, 65/5, 67/17, 69/13, 71/21, 72/17, 73/10,
83/2, 84/7, 85/3, 99/22, 100/10, 127/13, 132/3
costly 66/13
costs 41/16, 101/23, 114/9, 114/11, 133/25, 134/12,
141/3
Council 3/21, 6/5, 8/15, 10/11, 10/25, 13/18, 13/20,
14/1
counties 22/23, 88/25, 96/15
country 13/2
County 1/6, 6/11, 48/15
couple 106/4
course 16/2, 17/6, 21/7, 23/18, 24/4, 26/6, 27/22,
28/13, 28/23, 35/11, 37/9, 46/19, 60/25, 115/4
court 14/22, 15/3, 20/3, 21/21, 43/11, 44/9, 44/11,
51/5, 55/11, 58/17, 56/17, 57/6, 57/16, 58/9, 58/19,
59/4, 69/10, 74/4, 74/16, 76/3, 77/2, 77/24, 78/2, 79/5,
79/13, 79/23, 82/18, 82/20, 97/2, 97/4, 97/8, 103/6,
103/7, 103/23, 105/18, 110/14, 110/17, 111/5, 111/13
Court's 57/2, 78/24, 104/5, 111/3
courts 21/14, 21/15
cover 102/11
coverage 38/12, 42/9, 42/16
covered 28/2, 31/18, 85/4, 120/7, 132/20
crack 137/6
created 41/4
creating 63/17
creature 21/7
criteria 51/19, 52/21, 53/3, 55/6, 55/7, 55/14, 55/16,
56/11, 56/13, 57/7, 58/12, 59/8, 114/17, 130/1, 130/25,
132/25, 135/4
criterion 54/3, 120/19, 131/9
critical 100/4
CSR 1/21
CSW 109/14
currently 13/1
customers 11/2, 23/9, 23/10, 23/14, 23/17, 24/2,
27/7, 35/8, 35/10, 35/21, 38/24, 37/8, 37/18, 41/13,
45/9, 45/11, 48/12, 61/11, 63/18, 63/21, 63/24, 63/25,
64/1, 64/21, 76/22, 76/23, 77/2, 77/12, 77/15, 79/8,
79/11, 79/19, 79/21, 87/21, 94/12, 97/18, 113/22, 121/3
Custer 2/17
cycle 140/8
cycles 138/5

D

DA 111/9
dam 98/11
DATE 1/17, 89/23, 90/2, 90/9, 90/12, 110/2, 110/3
ID 3/18, 7/25
ason 2/8
Davis 3/11, 6/17
day 39/9
days 8/19, 18/4, 107/17
DCA 15/8
deal 20/5, 112/11, 116/24, 121/18, 140/25
dealing 19/9, 53/15
DEASON 1/14, 25/8, 25/22, 27/5, 27/12, 59/6,
59/21, 60/7, 60/16, 60/22, 61/1, 61/7, 62/25, 63/19,
64/10, 65/11, 69/14, 73/14, 73/24, 75/1, 77/25, 79/23,
82/7, 89/12, 89/17, 90/4, 90/11, 90/14, 90/20, 91/3,
91/16, 91/22, 92/1, 92/8, 92/13, 92/22, 95/16, 95/25,
97/16, 97/19, 97/21, 98/4, 98/6, 98/8, 98/13, 100/12,
103/4, 103/18, 103/21, 103/22, 104/1, 104/14, 105/9,
105/18, 107/3, 110/6, 113/17, 119/6, 126/19, 127/25,
128/6, 128/14, 129/5, 129/19, 143/6
debate 61/1, 69/25, 116/4
December 1/17
decide 21/14, 115/5, 115/15, 116/7, 126/13
decided 74/4, 74/9, 97/1, 110/9, 110/13, 110/14
decision 18/8, 20/20, 43/12, 43/20, 48/11, 52/11,
53/9, 53/12, 53/18, 53/23, 54/16, 57/6, 57/17, 75/16,
75/25, 76/20, 77/4, 77/19, 77/23, 77/24, 78/2, 78/24,
79/2, 79/5, 79/13, 79/14, 80/19, 81/6, 82/10, 83/8,
83/10, 86/24, 87/12, 97/7, 105/21, 109/13, 111/3, 121/17
decisional 21/20
decisions 20/2, 43/10, 102/18, 102/21, 111/14
Decker 2/8
declaratory 28/11
defer 85/2
define 108/1
defined 22/22, 48/8, 76/11, 94/21
defines 88/21, 88/24
definition 23/3, 23/4, 23/8, 23/16, 28/2, 28/4, 31/6,
31/12, 31/16, 32/10, 32/11, 41/6, 41/7, 43/22, 48/7,
76/8, 76/9, 76/13, 76/21, 82/4, 88/19, 92/9, 93/5, 95/11
definitional 26/15, 88/23
definitions 34/14, 36/17, 36/20, 37/14, 37/24, 37/25,
41/1, 41/7, 41/9, 42/10, 89/8
adate 127/1
degradation 70/16
degrade 70/14
degree 62/4, 73/23, 93/19, 93/20, 100/18, 134/17
delineated 130/1
delivery 102/3
Delta 2/11
demand-side 35/9
demonstrate 28/1, 28/22, 30/13, 70/12, 87/7
demonstrated 108/8
demonstrating 45/8, 86/22
demonstration 27/17
denied 11/21, 12/8, 71/6
deny 21/25, 130/11
DEP 115/5, 127/23, 129/6
Department 83/17
depend 27/19
depends 63/24
depreciation 71/13, 71/23
Deputy 3/21, 13/18
derived 87/4
describe 30/25
described 37/17, 95/2
description 30/21
designed 23/11, 76/24, 79/7
detailed 19/12
determination 1/5, 6/10, 21/5, 23/11, 25/10, 25/18,
37/20, 39/14, 47/4, 51/9, 52/20, 55/5, 55/16, 57/9,
61/19, 61/24, 68/15, 70/23, 71/20, 72/6, 74/6, 75/9,
75/23, 76/24, 77/7, 77/13, 78/18, 79/6, 82/6, 83/2,
83/15, 84/1, 84/8, 87/12, 88/14, 113/22, 114/7, 114/10,
116/1, 122/4, 122/5, 123/16, 124/4, 125/2, 128/9,
130/4, 130/18, 131/1, 131/14, 135/2, 139/12, 140/6,
141/5
determinations 59/18, 75/15, 77/4, 83/23, 125/23
determine 24/15, 24/19, 56/9, 56/20, 61/19, 62/20,
65/3, 67/5, 69/12, 69/22, 72/12, 72/17, 80/9, 80/15,
85/2, 88/17, 92/2, 93/13, 101/6, 108/11, 115/2,
120/1, 126/23, 128/25, 129/1, 130/2, 130/4,
132/12, 137/4
determined 26/5, 57/9, 117/6, 128/8, 128/10
determines 84/7
determining 56/2, 110/25, 138/1
develop 36/1
developer 12/25, 43/14, 43/19, 43/23, 60/15, 70/11
developer's 44/4
developing 13/1, 121/8
development 19/25, 22/3, 22/20, 33/24, 50/14, 72/11

developments 72/8
dicta 87/15, 103/3, 103/10, 103/20, 110/17
dictate 65/8, 132/21, 133/13
difference 107/25, 134/22
differentiated 45/6
difficult 15/5
direct 52/10, 72/15
directive 56/19
disadvantage 136/10, 136/21
disagree 72/1, 109/4, 120/4
disagreed 105/10
dissolve 92/21
discharge 121/21
discretion 21/17
discuss 21/18, 21/20, 25/7, 25/16, 40/13, 40/21
discussed 16/2, 17/5, 17/10, 28/3, 89/18, 89/21,
127/17
discussing 22/6
discussion 115/20
disjunctive 109/24
dissolve 10/17, 10/19, 10/24, 13/7, 14/14, 16/4, 16/21,
18/10, 20/21, 44/4, 4/8, 45/16, 58/4, 70/2, 74/23,
84/3, 85/6, 86/2, 86/20, 104/21, 114/23, 121/14
dismissal 50/20, 50/22, 57/17, 77/3, 80/1, 83/14, 87/8
dismissed 12/2, 12/6, 75/5, 75/14, 75/21, 77/21,
78/3, 78/14, 83/6, 85/5
dismissing 12/3
dispatch 123/7
displace 63/16
displaced 63/14
displacing 117/23
dispositive 76/6
disprove 86/25
dispute 102/10
disputes 94/10
dissented 110/11
distinction 50/5, 82/21, 83/4, 95/6, 101/2
distinctions 63/7
distinguish 81/4, 106/5, 106/17, 107/2, 112/5, 112/6
distinguishes 106/25
distinguishing 106/24, 108/25
distributing 23/2, 96/20
distribution 31/10, 89/4, 95/4, 95/19, 96/24
distribution-only 95/21
District 13/25
districts 22/23, 88/15, 96/16
divide 16/15
Division 4/3
DOCKET 1/4, 6/9, 141/13
document 11/4
documents 15/13
Doesn't 28/17, 53/10, 64/22, 86/7, 99/8
dog 29/3
dollars 71/16
domain 34/20
DONALD 3/21, 7/14
doors 109/7
double 109/6
doubt 57/7
draw 27/1, 27/3
dropped 65/17
dual 105/3, 113/20
Duke 1/8, 2/13, 6/12, 7/8, 7/11, 7/18, 16/12, 16/13,
17/18, 17/21, 19/5, 21/4, 28/1, 28/3, 28/11, 29/4, 31/4,
31/15, 31/17, 31/19, 32/20, 32/21, 33/7, 33/23, 34/24,
37/15, 38/2, 39/17, 39/21, 42/7, 42/25, 43/24, 44/2,
44/12, 44/21, 45/5, 41/20, 53/8, 57/18, 67/6, 67/24,
73/6, 79/17, 79/24, 81/2, 81/3, 81/11, 82/23, 83/5,
84/18, 87/23, 89/9, 89/15, 91/11, 93/5, 93/9, 93/16,
93/20, 99/3, 100/23, 106/14, 108/18, 112/17, 124/8,
139/14
Duke's 21/11, 22/1, 32/7, 33/2, 35/3, 37/22, 39/6,
43/6, 43/21, 65/19, 65/20
during 10/5, 11/10
duties 41/3, 116/18
duty 23/10, 45/10, 45/12, 76/23, 79/8

28/18, 29/8, 29/11, 30/23, 31/2, 31/3, 31/6, 31/7, 31/8,
31/10, 31/14, 31/15, 31/18, 31/22, 31/25, 32/4, 32/8,
34/4, 34/5, 34/15, 36/17, 36/19, 36/21, 37/7, 37/15,
42/16, 42/21, 51/22, 52/8, 53/13, 54/13, 57/23, 58/24,
63/18, 67/10, 73/9, 76/10, 76/14, 76/16, 78/4, 78/15,
79/8, 81/8, 82/4, 82/5, 82/9, 87/21, 88/2, 88/18, 88/21,
88/24, 88/25, 89/1, 89/4, 89/6, 89/10, 89/13, 89/16,
89/24, 90/8, 90/22, 91/5, 91/9, 93/3, 93/4, 93/6, 93/17,
93/21, 93/22, 94/16, 95/3, 95/11, 96/16, 96/17, 96/20,
98/14, 99/4, 106/9, 108/22, 109/18, 109/21, 112/16,
131/12
electrical 1/6, 6/10, 23/2, 46/11, 46/13, 46/17, 53/19,
53/25
electricity 35/11, 36/14, 37/3, 44/25, 45/9, 45/13,
50/3, 52/25, 54/3, 57/1, 59/18, 89/11, 90/20, 93/8,
95/5, 95/14, 113/6, 113/8, 114/20, 115/9, 117/12,
127/6, 129/16, 130/24, 131/13, 133/4
element 68/13, 72/10
elements 72/4
emergency 93/24, 94/15, 123/9
eminent 34/20
Emmanuel 2/17
emphasis 41/9
emphasize 20/2
Empire 43/15, 44/14, 44/17, 44/18, 44/21, 45/1
Empire's 43/21
employment 42/5
empowers 21/4
enacted 20/12, 22/12, 22/17, 29/18, 31/13, 32/13,
33/4, 33/10, 33/15, 34/8, 35/5, 35/7, 36/7, 36/10,
37/12, 37/13, 38/8, 42/11, 97/1, 98/23, 107/17
enacting 29/9, 95/12
enactment 20/10, 20/13, 22/6, 34/6, 42/19
encourage 35/8, 66/10, 77/19
encumbering 116/22
end 54/11, 65/9, 71/22, 72/22
Energy 1/8, 2/13, 3/23, 6/12, 7/15, 7/19, 12/21,
13/19, 23/2, 26/8, 34/25, 36/2, 75/10, 81/12, 85/23,
88/8, 88/9, 89/4, 91/11, 96/20, 107/17
engage 59/3, 89/3, 89/10, 90/19, 93/7, 95/3, 96/19
engaged 22/25, 23/1, 89/2, 95/14, 96/18, 100/5
engaging 29/5
enjoys 64/7
ensure 26/7, 100/1
ensuring 43/7
enter 8/3, 33/5, 33/13, 33/16, 43/24, 48/19, 48/20,
60/20, 68/17, 91/13
entered 8/20, 8/23, 8/25, 9/2, 82/19
enterprise 42/4
entities 23/5, 23/8, 23/15, 33/14, 34/3, 47/17, 49/12,
49/14, 68/8, 69/1, 69/8, 75/9, 76/11, 76/13, 76/16,
76/21, 78/5, 78/15, 79/24, 82/4, 82/13, 95/10, 95/13,
96/22, 97/22, 103/12, 107/14, 107/22
entitled 101/20, 120/14, 121/16
entity 27/13, 33/6, 36/13, 37/3, 45/13, 47/23, 48/11,
48/20, 48/21, 52/7, 54/12, 56/16, 64/11, 68/16, 69/11,
71/18, 74/19, 75/12, 97/13, 100/4, 105/23, 108/20,
112/9, 118/3
entry 38/1, 38/10, 66/18
enumerated 107/14, 107/22, 108/1, 108/2
enumerating 95/9
environment 70/15, 71/3, 116/7, 126/3, 127/1,
128/7, 128/20
Environmental 3/8, 6/23, 59/13, 59/20, 61/16,
61/19, 62/2, 62/10, 62/19, 62/22, 65/14, 65/21, 65/24,
69/23, 70/5, 70/9, 83/17, 84/13, 114/3, 114/13, 114/20,
115/1, 115/5, 115/7, 115/9, 115/14, 116/9, 126/22,
127/17, 127/18, 127/22, 128/12, 128/24, 128/25, 129/4
environmentalist 116/7
environmentally 71/5
envisioned 60/19, 96/1
equal 17/18, 54/3
equally 54/19, 85/6
era 69/24, 70/1, 71/8
erroneous 103/6, 103/9, 104/8
Esplanade 1/20
establish 44/17
established 74/22, 120/18
establishing 111/11
estimates 23/23
evaluate 20/25
evaluated 77/12
evaluation 77/10, 132/2
event 27/15, 31/15, 33/1
events 20/10, 100/3
evidence 10/5, 44/14, 120/18
evidentiary 9/23, 44/8
evolution 42/18
EWG 28/12
EWGs 28/13
ex 8/16, 8/24, 8/25, 9/3
examine 23/11, 76/24, 79/7
excess 67/11

E

Easley 1/19
eat 86/7
Economic 42/1, 63/20, 70/8, 72/11, 123/7
economically 124/13
edge 18/11
edification 104/20
effect 11/5, 11/14, 115/25, 132/21
effects 127/22
Efficiency 34/25, 36/2
efficient 30/15, 66/13, 117/23, 117/24, 137/6, 140/3,
140/10, 140/17, 142/13
effort 42/5
Electric 2/22, 3/4, 6/20, 7/4, 10/14, 22/21, 22/23,
22/24, 23/22, 23/25, 36/14, 28/4, 28/5, 28/7, 28/9,

excluded 42/11
 exclusions 111/23
 Excuse 49/20, 54/24, 101/3
 executed 78/16
 exempt 46/3
 () epted 49/21
 option 30/1, 46/1
 exercise 83/18
 existed 38/13, 125/3
 existence 33/17, 33/19, 48/6, 50/15, 97/24, 98/11, 141/3
 existing 21/10, 36/17, 36/20, 46/13, 87/25
 exists 44/17, 101/11, 121/12
 expanding 17/12
 expansion 46/12
 expect 86/16
 expected 142/2
 expense 71/24
 expensive 66/12, 92/17, 116/23
 explicitly 55/15, 83/24
 explored 13/4
 exposure 141/9
 express 19/18
 extend 50/11, 125/22
 extends 93/23
 extracted 16/17

F

face 32/14, 34/13, 59/13, 84/12, 130/8
 facilities 26/4, 70/17, 76/25, 96/24, 102/2
 facility 27/9, 30/7, 30/9, 30/12, 30/14, 30/18, 45/7, 45/8, 60/9, 60/17, 70/20, 71/4, 81/24, 99/25, 100/12
 fact 29/4, 30/10, 38/6, 38/13, 38/20, 39/14, 59/22, 82/18, 87/7, 92/4, 92/16, 93/12, 98/12, 106/13, 124/16
 factor 106/25, 108/25
 factors 127/4, 127/10
 facts 76/1, 87/3, 87/15, 103/11, 130/10
 factual 63/7, 115/11
 falls 50/23
 failure 57/11
 fair 101/9, 117/7
 faith 121/19
 faith 58/5, 109/1, 111/23
 137/25
 () ioned 36/19
 fast 62/25
 fatal 35/3, 51/17
 favor 21/11
 favorable 87/3, 87/5
 Federal 28/15, 28/16, 29/10, 31/3, 81/10, 82/2, 85/22, 85/24, 88/8, 88/9, 88/11, 93/9, 93/14, 97/2, 97/4, 97/25, 98/21, 108/17, 108/19, 108/21, 108/22, 109/21, 112/15
 Federation 3/20, 8/1, 11/19
 FECCA 25/6, 25/17, 34/7, 34/24, 35/1, 35/5, 35/6, 35/7, 35/25, 36/7, 36/10, 36/12, 36/17, 37/1, 37/2, 37/6, 37/12, 38/9, 38/17, 41/12, 42/10
 fees 41/15
 FERC 82/2, 93/6, 93/11, 93/13, 102/14, 109/19
 FERC's 91/10, 92/23
 Fields 2/17, 6/25
 File 10/16, 12/14, 14/12, 14/13, 14/20, 14/23, 15/19, 89/13, 89/15, 89/22, 90/2, 90/25, 91/1, 139/12
 filed 11/20, 12/8, 14/3, 14/17, 14/25, 15/13, 34/10, 41/25, 43/15
 Filing 29/16, 40/11, 41/25, 43/9, 89/23, 90/2, 90/9, 90/12, 91/2
 filings 10/7, 19/10, 114/24
 fill 16/18
 finance 32/19, 47/24
 financed 62/5
 financial 138/21
 find 40/16, 45/13, 46/6, 73/20, 109/17
 finding 92/24, 107/9, 111/6, 111/9
 findings 52/24
 fine 86/13
 finish 142/6, 142/22
 firm 2/10, 6/16, 7/3, 7/6, 7/23, 7/24, 8/3, 27/10, 27/21, 27/22, 49/14, 101/12
 Fish 15/7
 fit 24/9, 38/5, 87/25, 108/1
 68/6
 69/7, 142/18, 142/19
 Flanigan 3/15, 7/6
 flaws 33/2
 flea 30/17
 fleet 27/4
 flip-flop 42/15
 FLORIDA 1/1, 1/7, 1/20, 2/4, 2/5, 2/6, 2/9, 2/11, 2/13, 2/15, 2/16, 2/18, 2/19, 2/21, 3/3, 3/4, 3/7, 3/12, 3/13, 3/16, 3/19, 3/20, 4/2, 4/4, 6/12, 6/17, 6/20, 6/25, 7/1, 7/10, 7/21, 8/1, 11/18, 13/4, 13/5, 14/19, 15/1,

16/10, 16/11, 16/23, 19/11, 20/1, 20/3, 21/21, 25/24, 26/4, 26/17, 26/19, 26/20, 26/24, 27/18, 27/23, 33/5, 33/8, 34/17, 34/25, 40/6, 43/8, 48/22, 49/12, 49/15, 49/16, 50/18, 51/2, 51/5, 51/11, 51/15, 51/18, 54/20, 54/23, 55/11, 55/18, 56/24, 57/2, 57/22, 57/23, 58/15, 58/18, 60/21, 63/16, 67/20, 68/14, 70/7, 78/2, 73/16, 73/17, 75/12, 75/13, 75/24, 77/24, 83/16, 86/20, 86/21, 87/21, 93/18, 95/20, 97/3, 98/7, 98/15, 101/15, 101/16, 102/5, 103/13, 113/4, 113/6, 113/7, 114/2, 114/19, 115/14, 118/4, 118/6, 122/16, 122/17, 126/7, 129/14, 129/17, 130/21, 130/22, 130/24, 131/2, 131/5, 131/11, 132/11, 134/6, 135/13, 136/1, 136/8, 136/16, 137/14, 138/17, 138/20, 138/22, 139/4, 140/1
 Florida's 127/1, 141/3
 flows 64/8
 focal 25/21, 27/2, 37/20
 focus 19/24, 20/9, 51/3
 fold 72/25
 follow 32/16, 55/13, 63/9, 111/25, 118/7, 121/20
 follows 78/3, 88/15, 100/21, 113/17
 footnote 56/5, 56/6, 56/18, 58/8
 force 56/3, 82/13, 103/13, 112/7, 112/9, 132/20, 133/10
 forced 114/9
 forces 73/20
 forecast 43/18
 forgive 66/2
 forgot 106/12
 form 29/15, 36/14, 37/3, 63/20
 forms 101/15, 101/20
 forthcoming 126/14
 found 23/3, 44/13, 50/8, 52/21, 75/20, 82/3, 82/5, 92/25, 108/20, 109/5
 Foundation 3/8, 6/23
 four 56/13, 77/20, 137/20
 Fourth 15/8
 FPC 106/9
 FPL 82/14, 98/22, 106/8, 107/5
 framed 19/11
 framework 88/1
 franchised 12/23
 free 132/24
 front 65/4, 65/9
 frustrating 61/14
 fuel 66/24, 118/5, 140/10
 function 62/17
 fundamental 21/6, 42/16, 75/4
 funds 71/10
 future 57/1, 83/24, 120/4, 123/18, 132/24, 134/19, 134/24, 137/22

G

Gadsden 2/9
 GAIL 3/6, 6/22
 gain 118/4, 118/6
 Gainesville 3/19
 GARCIA 1/15, 9/8, 16/6, 16/17, 17/23, 18/25, 19/14, 24/8, 24/23, 26/17, 28/17, 41/22, 49/24, 53/21, 55/22, 61/25, 62/13, 62/24, 63/4, 63/8, 64/4, 64/20, 65/16, 66/9, 66/21, 72/20, 73/18, 78/6, 78/11, 81/19, 81/21, 86/3, 86/13, 86/18, 91/16, 96/11, 96/14, 105/4, 105/11, 105/24, 106/5, 106/17, 106/24, 108/24, 112/3, 116/17, 116/21, 117/17, 121/25, 122/12, 124/5, 124/12, 124/24, 125/17, 125/20, 125/25, 126/3, 126/6, 134/6, 134/22, 134/25, 135/5, 135/20, 135/22, 135/24, 136/24, 137/10, 138/6, 138/10, 138/13, 138/16, 138/19, 142/14, 143/10
 Garcia's 100/15
 GARY 2/16, 6/24
 Gas 10/14, 36/15, 36/18, 37/4, 90/22
 gas-fired 140/7
 Gayfers 70/12
 gears 69/15
 generate 124/18, 134/20, 137/16, 140/11
 generated 118/2
 Generating 3/17, 7/7, 23/1, 23/23, 24/1, 24/3, 24/5, 24/15, 26/3, 27/4, 27/9, 27/21, 35/23, 44/20, 46/12, 54/7, 54/22, 89/11, 93/8, 95/14, 96/19, 135/14
 generating-only 91/17, 96/2, 97/17
 generation 13/2, 31/10, 49/25, 63/20, 63/22, 63/23, 65/18, 73/19, 73/21, 73/23, 74/1, 89/3, 90/19, 92/14, 95/4, 96/23, 97/5, 97/11, 97/12, 98/2, 116/23, 117/24, 118/18, 126/15, 137/23, 138/25
 generation-only 96/8
 generator 77/14, 104/25
 generators 23/12, 38/14, 35/2, 76/25, 79/9, 81/7, 83/22
 gentlemen 6/3, 11/24
 geographic 25/4, 25/11
 geographical 36/4
 GEY 2/5, 7/8, 85/25
 gleaned 23/4
 ge-around 137/21

goal 35/11, 113/20
 going-forward 70/2
 government 29/11
 governmental 34/3, 47/13, 47/19, 47/20, 48/15, 48/21, 48/23
 governs 94/24
 GRACE 4/2, 8/8
 grant 14/9, 130/4
 granted 13/8, 15/11, 15/20, 44/7, 45/17
 granting 83/14
 greater 85/1
 Grid 73/7, 93/24, 94/14, 125/21
 ground 136/19, 139/2, 139/25, 142/21
 grounds 50/19, 50/21, 57/17, 80/1, 87/8, 87/9
 grow 138/23
 growing 138/21
 GS 44/25
 guess 119/18, 125/9, 130/12
 guidance 31/13
 GUYTON 3/10, 6/15

H

half 16/10, 16/11, 19/6, 78/12, 86/10
 hammer 30/16
 hand 115/22
 handed 8/15, 9/10
 handout 51/25, 52/19, 55/3, 55/20, 75/18, 78/1, 81/15
 hands 21/22
 happy 91/6, 115/20
 hardly 31/13
 hardware 118/17
 harm 137/13
 harmony 88/10, 109/16
 head 73/24
 head-on 140/24
 headquartered 12/22
 health 138/4
 healthy 138/21
 hearings 126/12
 heart 18/1, 18/2, 76/19
 heat 140/2, 140/8
 Hector 3/11, 6/16
 held 23/6, 106/25, 107/10
 Help 20/24, 132/14, 137/16
 helpful 20/18
 HERSHEL 3/2, 6/19
 history 19/25, 20/22, 33/1, 36/8, 40/12
 hit 73/24
 hold 107/2
 holding 12/21, 54/25, 57/4, 57/15, 87/17, 102/25, 103/3, 103/4, 104/11, 104/12, 105/5, 105/8, 105/13, 105/15, 105/16, 109/3, 110/17, 110/21
 holdings 87/17, 102/24, 103/10, 112/6
 honest 17/23
 hook 62/6, 65/19, 65/21, 101/23, 102/6, 102/8, 117/11, 133/25, 136/5, 136/7, 139/6, 139/9
 hope 18/13, 69/18
 hopeless 37/23
 horse 141/21, 141/23
 hour 16/10, 16/11, 16/12, 16/14, 16/18, 17/6, 19/6, 86/10, 124/18, 124/19, 140/11
 House 40/14
 housekeeping 36/23, 39/2, 39/12, 39/20, 39/25, 40/19
 hundred 65/17
 hurt 117/18, 117/20
 hypothetical 141/12

I

I.e 25/25, 56/24, 115/8
 idea 22/2, 86/6
 identification 25/19, 37/21
 identified 82/24, 82/25, 101/24, 101/25
 identify 32/11, 97/21
 identifying 105/2
 ignore 39/18
 II 81/23
 III 2/3, 7/22
 imagine 136/13
 Impact 42/1, 42/4, 70/5, 71/3, 72/8, 100/8, 116/9, 128/16, 128/17, 128/19, 128/22, 128/25
 impacts 115/5, 115/7, 129/4, 129/7
 implementing 25/3
 implicates 141/7
 implications 86/1, 140/16
 implied 123/5
 import 83/4
 impose 93/14
 imposed 135/17
 impression 131/4, 131/7
 improve 115/1, 129/14, 129/15

improvement 115/13
 improvements 101/22, 137/23
 inapposite 87/15, 103/11, 112/2
 inappropriate 30/19
 inaudible 86/4, 138/6, 138/13
 inconceivable 34/17
 insistent 51/1, 57/15, 75/16
 incorporating 34/14
 incorrect 100/21
 increase 41/15
 increasing 36/1, 53/19, 53/24
 incumbent 138/25
 incur 69/22
 incurred 61/16
 incurring 59/19
 independent 44/13, 54/1, 74/10, 74/19, 77/16, 81/14, 81/24, 81/25, 97/13, 108/12, 108/16
 indicate 102/18
 indicated 17/11, 48/10, 126/20
 indicates 95/23
 indication 38/7, 42/14
 indispensable 77/7
 indulge 69/18
 industry 12/21, 121/8, 138/4
 infer 92/3
 inferences 87/4
 information 68/18, 83/3, 101/6
 informed 107/18
 inherent 137/9
 initiative 75/14
 instrumental 43/7
 integral 120/15
 integrity 52/25, 73/9, 127/6, 129/15, 130/23, 131/12, 133/3
 intent 29/12, 83/21, 84/23
 intention 90/3
 interchangeable 38/20, 38/24
 interconnected 101/17
 interest 14/24, 15/4, 79/3, 85/7
 interpret 115/23
 interpretation 25/9, 54/18, 56/18, 67/5, 77/3, 83/20, 103/5, 103/8, 103/24, 104/2, 104/8, 105/7, 119/8
 interpretations 87/19
 interpreted 74/5
 interpreting 21/15
 interrupt 59/7
 interrupting 20/15
 interstate 97/6
 intervene 7/14, 12/3, 13/9
 intervened 44/2
 intervenor 8/1
 Intervention 11/20, 12/7
 investment 18/14, 60/11, 64/16, 72/13, 119/10, 140/20
 investor-owned 31/8, 33/17
 investors 65/20, 70/19, 73/2, 119/9
 investors' 71/10
 IOU 99/5
 IOU's 112/25
 IOUs 33/18
 IPP 24/11, 45/11
 IPPs 45/7, 45/11, 103/12
 irrelevant 94/7
 isolated 83/7
 issue 13/11, 21/2, 21/9, 25/4, 25/24, 26/24, 29/7, 30/6, 40/22, 53/15, 54/16, 57/18, 60/22, 114/3, 129/12, 130/17, 140/19, 140/20, 141/4
 issued 6/7, 12/9, 107/16
 issues 15/5, 19/9, 19/10, 19/16, 20/4, 22/5, 85/21, 85/23, 88/13, 137/8
 ITEM 5/3, 100/4

142/24, 143/1, 143/5, 143/8
 joined 44/3, 49/3
 Joint 1/5, 6/9, 7/18, 7/22, 8/5, 21/11, 22/1, 22/24, 28/7, 30/10, 32/8, 32/14, 32/17, 32/18, 32/24, 33/3, 33/6, 33/12, 33/15, 33/20, 47/7, 47/9, 47/11, 48/2, 48/3, 48/5, 48/6, 48/7, 49/4, 50/20, 50/22, 51/8, 51/13, 57/11, 58/14, 58/22, 58/25, 84/4, 84/14, 87/22, 89/1, 89/5, 96/17, 99/1, 113/20
 jointly 32/19, 47/23
 joints 50/15
 JON 3/14
 JOSEPH 2/7, 7/23
 JOY 1/21
 JULIA 1/14
 jumping 34/6
 June 89/20
 jurisdiction 29/13, 54/22, 83/19, 88/1, 88/3, 113/16, 126/9, 127/10, 128/21, 128/22
 jurisdictional 126/22
 justify 50/21

K

KAMARAS 3/6, 6/22
 Katz 3/15, 7/6
 Kaufman 2/8
 KELLY 1/21
 Kentucky 3/22, 12/22
 kidding 18/11
 knowledge 15/15, 97/9
 known 22/10, 22/11
 Kolins 3/15, 7/6

L

L.L.P 1/8, 2/14, 6/13, 7/19
 L.L.P.s 91/12
 lacked 92/24
 Ladies 6/3
 laid 98/22
 land 72/9
 Landers 2/3, 7/16
 language 19/25, 21/24, 38/3, 48/1, 53/10, 53/14, 78/23, 89/7, 95/12, 95/13, 95/22, 96/7, 96/11, 96/21, 99/4, 99/6, 103/19, 106/3, 107/21, 108/5, 120/13
 large 44/23, 44/24, 45/3, 68/1
 later 22/14, 36/8, 36/22, 56/17, 62/23, 65/7, 65/10, 111/4, 111/14
 Laughter 16/19, 18/12, 18/14, 86/8, 105/12, 143/7
 Lauredo 110/11
 LAVIA 2/3, 7/22
 Law 2/6, 2/10, 6/16, 7/3, 7/11, 8/3, 14/13, 14/17, 15/1, 20/12, 21/2, 21/15, 21/20, 22/12, 22/13, 22/17, 23/19, 23/21, 25/15, 26/13, 28/16, 29/10, 29/18, 30/20, 31/1, 32/12, 32/19, 33/15, 35/25, 36/12, 36/18, 37/6, 38/7, 39/25, 40/5, 40/17, 40/24, 41/11, 42/20, 43/7, 43/8, 43/13, 44/10, 48/17, 50/7, 50/25, 51/2, 51/18, 68/13, 69/21, 69/24, 69/25, 74/11, 74/22, 74/24, 76/5, 85/21, 88/11, 88/13, 91/8, 106/21, 111/16, 111/18, 112/16, 116/10, 116/13, 116/15, 120/3, 120/10, 120/12, 120/14, 121/7, 121/10, 121/12, 121/15, 121/18, 121/21, 125/11, 139/15, 139/16, 139/17
 laws 38/20, 100/20, 121/20
 lead 31/19
 leads 43/3, 119/20
 least-cost 73/21
 leave 7/14, 13/8, 14/12, 15/19, 139/5
 led 42/12
 LEE 2/20, 7/2, 8/16, 9/10
 Lee's 10/3
 left 62/6, 85/9, 86/16, 94/13
 Legal 3/8, 4/3, 6/23, 43/2, 63/6, 69/17, 112/9
 legislation 20/1, 21/3, 21/8, 21/9, 21/10, 21/18, 22/15, 22/19, 25/6, 25/21, 27/25, 30/21, 38/4, 40/25, 41/18
 legislative 19/25, 20/5, 22/5, 25/17, 33/24, 38/8, 40/2, 40/12, 40/21, 42/17
 legislators 96/6, 97/10
 legislature 23/25, 29/9, 30/25, 34/18, 36/16, 38/8, 38/18, 39/2, 39/8, 41/18, 42/15, 59/11, 61/18, 65/7, 74/13, 95/1, 95/7, 95/8, 95/12, 96/1
 legislature's 38/25, 84/23
 legitimate 87/20, 90/7
 LEON 1/16
 LESLIE 4/2, 8/10
 letter 8/16, 8/20, 9/9, 9/10, 9/13, 10/3
 level 100/8
 LG&E 3/23, 7/15, 10/23, 12/20, 12/23, 12/25, 13/6, 13/18
 Liberty 47/14
 licensed 13/22, 13/24, 128/5, 129/2
 life 106/21

J

JACOBS 1/16, 9/19, 10/2, 10/9, 29/20, 30/3, 67/22, 68/22, 99/21, 102/15, 112/12, 112/19, 113/12, 122/2, 123/5, 123/10, 123/11, 123/25, 124/13, 131/16, 131/19, 131/20, 131/23, 132/4, 132/7, 133/22, 134/3, 134/17
 Jacobs' 133/17
 JAMES 2/15, 2/20, 6/25, 7/2
 JAYE 4/2, 8/8
 JC 70/14
 Jim 98/10
 72/18, 72/19, 72/20, 104/4, 104/5, 113/18, 115/8, 3, 125/16, 125/18, 127/4, 127/14, 127/23, 129/23
 JOE 1/15
 JOHN 2/3, 3/10, 6/16, 7/22
 JOHNSON 1/14, 6/3, 6/14, 8/6, 8/12, 8/22, 9/4, 9/6, 9/16, 10/10, 10/25, 11/8, 11/23, 12/4, 12/10, 12/19, 13/10, 13/14, 13/22, 14/1, 14/8, 15/12, 15/17, 15/23, 16/14, 16/20, 16/23, 16/25, 17/20, 18/10, 18/15, 18/18, 19/8, 20/14, 45/18, 49/19, 50/17, 52/2, 52/12, 85/11, 85/16, 104/10, 104/13, 105/14, 107/9, 107/20, 107/25, 108/6, 108/14, 129/25, 130/6, 131/3, 142/6, 142/10,

Light 3/13, 6/17, 16/11, 19/11, 44/3, 50/19, 57/4, 75/12, 75/13, 86/20, 97/3, 100/3, 101/16, 103/14, 111/12, 122/17
 limit 16/8, 16/9, 18/20, 19/5, 50/13, 87/20, 114/15, 118/13, 127/19, 139/19
 Limited 6/13, 7/19, 15/6, 16/7, 33/18, 39/19, 44/23, 81/23, 83/22, 87/17, 91/11, 105/22, 126/22
 limiting 38/9
 Line 34/7, 34/8, 34/12, 38/14, 39/3, 40/3, 40/15, 41/3, 49/11, 103/22, 115/24, 116/3, 119/5
 lines 34/19, 69/16
 list 11/1, 11/3
 listed 23/8, 76/21
 listing 95/9
 little 32/15, 66/21, 69/15, 70/15, 96/7, 105/12, 127/17, 135/25
 load 43/18, 116/2
 local 45/22, 46/24
 localities 56/25
 located 13/3, 98/6
 location 23/24
 logic 53/12, 79/1
 logical 73/10
 logically 24/3, 35/20
 long-term 101/3, 101/4, 101/12, 106/10
 loe 63/17, 64/8, 64/9
 loes 66/17
 loss 66/6
 lost 54/5
 Louisville 3/22, 10/14, 12/22
 love 136/1
 LPI 12/25, 13/4
 lunch 142/7, 142/17

M

Madam 8/2, 8/14, 9/12, 10/13, 11/17, 12/20, 13/13, 13/17, 14/15, 15/15, 15/25, 16/22, 17/24, 21/1, 85/18, 141/25, 142/13, 142/14, 142/25
 magnitude 19/8
 Main 3/22, 20/9, 99/22
 maintain 96/23, 116/2
 maintains 31/9
 mail 70/6, 70/10, 71/6, 71/18
 management 35/9, 72/9
 Manatee 12/2, 12/5
 mandate 39/18
 mandatory 35/19
 manner 26/9, 42/17, 46/15, 46/19
 margin 26/18, 116/4, 118/18, 121/2, 126/9, 132/12
 marginal 118/24, 119/2
 margins 26/1, 26/3, 129/14, 132/20, 136/3
 MARK 2/5, 7/10
 market 13/5, 44/17, 85/2, 92/5, 92/9, 92/24, 92/25, 93/13, 100/8, 119/8, 119/10, 119/14, 119/25, 120/25, 125/3, 126/3, 132/8, 134/19, 134/24
 market-based 93/12
 marketplace 72/12, 72/17, 84/6, 84/20
 markets 42/5, 138/21
 materia 94/23
 materials 41/24
 Matter 1/4, 11/1, 11/1, 18/1, 18/2, 21/14, 22/15, 36/9, 36/23, 74/11, 113/16, 124/16, 140/1
 matters 8/13, 9/17, 12/13, 20/6, 91/7, 91/8
 McGEE 2/15, 6/25
 McGLOTHLIN 2/7, 2/8, 7/23
 McMullen 2/21, 7/3
 McWhirter 2/7, 7/23
 meaning 20/7, 32/9, 32/25, 89/25, 99/7, 108/23
 meaningless 56/23, 58/13
 measure 116/2
 measures 35/10, 35/16
 Medicaid 138/9
 Medicare
 meet 14/18, 25/19, 26/18, 26/22, 26/25, 27/1, 27/20, 27/24, 44/1, 50/23, 55/14, 58/3, 80/11, 114/16, 126/8, 135/4, 136/3
 meeting 37/21, 51/17
 meets 14/3, 28/3, 45/25
 megawatt 124/18, 124/19, 140/11
 megawatts 28/23, 28/25, 29/2, 30/2, 51/10, 51/11, 51/14, 52/3, 52/15, 79/16, 80/5, 80/17, 81/3, 91/22, 106/14, 121/24, 121/25, 122/4, 122/16, 130/9, 135/14, 136/15, 137/4, 139/25, 140/7
 member 90/23, 96/10, 117/15
 members 11/9, 16/25, 35/17, 85/19, 142/4
 Memorandum 10/16, 14/13, 14/16, 14/18
 mention 16/1, 19/21
 mentioned 47/2
 merchant 12/25, 21/5, 22/2, 23/19, 24/4, 27/21, 27/24, 29/3, 32/6, 35/12, 42/6, 43/22, 49/8, 118/21, 139/19, 140/5, 140/19, 140/25
 merchants 33/11, 34/18, 39/7, 42/9, 42/11

merits 86/24, 87/2, 87/11, 121/17, 129/20
 merrier 117/15, 118/10
 MICHELLE 3/2, 6/19
 microphone 138/7, 138/14, 138/17
 middle 76/19, 78/9, 78/12
 on 65/17, 102/11, 102/13
 37/13, 75/15, 95/17
 mind-set 30/25
 minds 96/5
 minimize 71/3, 114/14, 127/19
 minimum 50/24, 114/17
 miniscule 32/23
 ministerial 116/18
 minute 85/13
 minutes 17/17, 18/3, 18/11, 18/17, 18/21, 18/23,
 19/2, 19/3, 142/18, 142/19
 MISCELLANEOUS 5/2
 missed 102/19, 105/5
 missing 68/13
 mistaken 16/6
 mitigate 35/18, 35/22, 70/15
 mix 24/9
 mockery 80/19
 moment 25/16, 40/13, 46/6, 51/24, 69/18
 money 62/4, 70/20, 70/24, 134/12
 monopolistic 71/8, 71/14, 73/13, 73/15
 Monroe 3/11, 3/16
 months 136/13, 139/3
 morning 8/15, 9/11, 10/19, 13/9, 13/21, 17/22, 18/6,
 77/22, 85/8, 89/6, 121/13
 motion 7/13, 10/15, 10/23, 11/24, 12/3, 12/11, 12/17,
 13/7, 14/11, 14/12, 14/14, 14/16, 14/18, 14/23, 15/19,
 17/3, 18/25, 20/21, 39/15, 39/16, 44/7, 58/4, 70/2,
 74/23, 84/3, 85/6, 88/16, 114/23, 121/13, 142/5
 motions 9/17, 10/11, 10/13, 10/17, 10/19, 10/20,
 10/23, 10/24, 16/4, 16/21, 17/7, 17/25, 45/16, 86/2,
 86/19, 104/21
 move 39/1, 66/6, 75/4, 80/8, 80/20
 moved 22/13, 36/8, 36/22, 73/14, 74/9
 movement 73/17, 73/18, 74/3
 moves 67/17, 67/19
 moving 19/4, 63/6, 73/12, 73/25, 84/9
 MOYLE 3/14, 7/6
 MR. BEASLEY 7/2
 GEY 7/8
 Guyton 5/5, 6/15, 17/13, 17/14, 18/24, 19/22,
 20/2, 21/19, 50/17, 50/18, 52/6, 52/14, 53/22, 55/24,
 59/6, 59/10, 59/25, 60/12, 60/19, 60/25, 61/5, 61/12,
 62/7, 62/15, 63/3, 63/5, 63/10, 63/19, 63/24, 64/6,
 64/12, 64/17, 64/24, 66/5, 66/15, 66/23, 67/15, 67/19,
 68/7, 69/1, 69/14, 72/2, 73/4, 74/2, 75/3, 78/6, 78/8,
 78/12, 80/3, 80/7, 80/12, 80/15, 81/20, 85/12, 102/21,
 104/17, 105/24, 106/25, 107/20, 108/6, 108/9, 108/10,
 108/15, 108/16, 109/1, 117/17, 126/19, 130/7, 136/25
 Mr. Guyton's 106/6, 112/6
 Mr. Jenkins 89/21
 MR. PAUGH 9/2
 MR. SANTA 7/13, 12/17, 12/19, 12/20, 13/17,
 13/24, 14/3, 14/17, 16/1, 16/15, 85/21, 100/21
 Mr. Santa's 139/11
 Mr. Sasse 5/4, 6/24, 16/24, 18/13, 18/17, 18/19,
 18/23, 19/3, 19/20, 21/1, 24/10, 25/1, 25/14, 26/6,
 26/23, 27/8, 27/16, 28/20, 29/25, 30/5, 39/23, 40/2,
 40/8, 40/10, 40/21, 41/24, 45/24, 46/6, 46/10, 47/1,
 47/9, 47/16, 48/3, 48/8, 48/19, 49/6, 49/16, 49/20,
 50/5, 94/1
 MR. SEIDENFELD 7/10
 MR. SNIFFEN 7/5
 MR. WHITE 7/25, 11/25
 Mr. Wright 5/5, 7/16, 8/2, 15/23, 15/25, 16/16,
 17/10, 85/17, 85/18, 86/9, 86/14, 86/19, 89/12, 89/17,
 90/7, 90/13, 90/17, 91/6, 91/19, 91/25, 92/3, 92/11,
 92/19, 95/16, 95/22, 96/4, 96/12, 96/15, 97/16, 97/19,
 97/23, 98/5, 98/8, 98/16, 98/21, 99/1, 99/21, 100/10,
 102/19, 102/22, 103/25, 104/3, 104/12, 105/15, 106/2,
 106/8, 106/18, 107/8, 107/13, 107/23, 108/3, 109/11,
 109/20, 109/25, 110/5, 110/8, 110/13, 110/18, 110/21,
 111/2, 111/10, 111/18, 111/24, 112/7, 112/14, 112/23,
 113/15, 113/19, 114/4, 114/6, 115/19, 116/9, 116/13,
 116/20, 116/25, 117/5, 117/21, 118/11, 118/14, 119/6,
 119/13, 120/2, 121/11, 122/3, 122/8, 122/11, 122/13,
 123/10, 123/13, 124/2, 124/11, 124/15, 125/15, 125/19,
 126/5, 126/18, 126/19, 127/3, 128/3, 128/10,
 129/9, 129/22, 130/3, 130/15, 131/7, 131/18,
 131/22, 131/24, 132/6, 132/23, 133/2, 133/12, 133/20,
 133/23, 134/4, 134/21, 134/23, 135/1, 135/16, 135/21,
 135/23, 136/23, 137/8, 137/12, 138/8, 138/11, 138/15,
 138/18, 139/3, 139/20, 140/15, 140/22, 141/2, 141/15,
 141/19, 141/22, 141/25, 142/9, 142/13, 142/25, 143/3
 MS. HERSHEL 6/19
 MS. JAYE 8/8
 MS. KAMARAS 6/22
 MS. PAUGH 6/7, 8/10, 8/14, 9/5, 9/12, 9/25, 10/6,

10/13, 11/4, 11/17, 12/4, 12/5, 12/15, 13/13, 14/2,
 14/15, 15/15, 15/21, 16/9, 16/22
 municipal 31/7, 34/3, 47/17, 93/3
 Municipalities 33/13, 33/16, 49/2, 49/3
 municipality 28/25, 33/4, 47/14, 47/23, 48/13, 48/14,
 48/17
 municipals 68/3

N

nailed 73/24
 name 81/17
 named 43/14, 81/22
 Nassau 23/7, 23/12, 48/10, 55/10, 55/19, 57/6, 57/16,
 58/8, 75/10, 75/18, 75/21, 75/22, 76/12, 76/25, 77/5,
 77/13, 77/25, 78/24, 79/9, 79/14, 79/15, 79/18, 79/22,
 79/23, 81/5, 81/13, 81/6, 82/7, 82/10, 82/12, 82/22,
 83/5, 83/6, 83/8, 84/25, 102/24, 102/25, 103/2, 103/4,
 103/16, 103/18, 103/22, 104/14, 104/15, 104/22,
 105/18, 105/19, 110/3, 110/6, 110/19, 110/21, 110/22,
 111/15, 111/16
 Nassau's 56/7
 natural 36/14, 37/4, 42/23
 necessary 61/22, 80/11, 101/22, 114/16
 necessity 44/19, 44/22
 need 1/5, 6/10, 10/11, 18/16, 20/24, 21/5, 23/9,
 23/11, 23/13, 24/15, 24/19, 24/24, 25/10, 25/11, 25/18,
 25/19, 25/20, 25/24, 26/22, 26/25, 27/2, 27/17, 29/2,
 30/19, 33/25, 34/11, 35/4, 35/14, 35/18, 35/20, 35/22,
 36/6, 36/13, 36/22, 37/1, 37/9, 37/20, 37/21, 37/25,
 38/9, 38/23, 39/11, 39/13, 39/17, 43/16, 44/1, 44/5,
 45/4, 45/8, 45/15, 46/19, 47/4, 50/12, 51/9, 51/19,
 51/20, 51/21, 51/24, 52/6, 52/7, 52/20, 52/25, 54/12,
 55/14, 55/16, 56/2, 56/9, 56/15, 56/23, 57/1, 57/8,
 57/9, 57/10, 58/6, 58/10, 58/11, 58/15, 58/16, 58/18,
 58/20, 59/14, 60/3, 61/20, 62/20, 65/4, 67/24, 68/4,
 68/15, 68/19, 68/23, 69/5, 69/11, 69/12, 69/22, 70/12,
 70/13, 70/16, 70/21, 70/23, 70/25, 71/21, 72/6, 72/17,
 73/5, 74/6, 74/8, 74/12, 75/9, 75/14, 75/23, 76/18,
 76/22, 76/24, 77/1, 77/4, 77/7, 77/11, 77/12, 77/15,
 78/17, 79/6, 79/7, 79/10, 79/20, 80/9, 80/15, 82/23,
 83/2, 83/15, 83/23, 84/1, 84/7, 84/11, 84/12, 84/17,
 84/21, 85/1, 85/3, 87/13, 88/14, 88/17, 102/11, 105/2,
 108/11, 111/1, 111/9, 112/21, 114/7, 114/19, 115/9,
 116/1, 117/2, 119/21, 119/25, 121/4, 121/5, 121/24,
 122/4, 122/5, 122/15, 123/16, 124/4, 125/2, 125/7,
 125/12, 125/23, 127/5, 127/6, 127/21, 130/1, 130/2,
 130/4, 130/9, 130/10, 130/13, 130/14, 130/16, 130/18,
 130/21, 130/23, 131/14, 132/15, 132/18, 132/19, 135/1,
 135/7, 136/8, 137/4, 139/12, 139/19, 140/6, 141/5
 needed 43/23, 50/8, 51/14, 52/4, 52/15, 57/20, 59/15,
 59/23, 65/13, 67/8, 68/8, 68/12, 71/4, 71/7, 84/19,
 113/5, 113/22, 113/24, 113/25, 114/11, 121/2, 126/24,
 128/2, 128/4, 128/8, 128/11, 128/23, 129/7, 129/10,
 129/13, 133/3, 133/4, 133/18
 needs 23/23, 24/1, 24/3, 24/5, 24/6, 26/16, 27/20,
 27/24, 28/23, 51/17, 53/19, 53/25, 57/12, 57/25, 74/21,
 80/11, 87/20, 113/4, 113/6, 113/7, 113/9, 114/3,
 131/11, 131/25, 137/1
 negotiated 50/1, 91/13, 91/18
 Neither 75/6, 75/12, 76/12, 104/15, 105/18, 109/14
 net 115/13, 118/4, 118/6
 New 1/7, 1/8, 2/12, 2/13, 6/12, 7/8, 7/11, 7/19, 7/20,
 28/21, 29/1, 29/21, 31/21, 32/24, 41/8, 46/11, 46/16,
 50/14, 53/8, 59/14, 69/24, 70/1, 70/6, 70/17, 70/22,
 71/6, 74/18, 75/6, 79/17, 79/24, 80/6, 81/2, 81/3,
 81/11, 82/23, 83/5, 84/18, 87/23, 87/24, 88/7, 89/9,
 91/11, 91/21, 93/3, 93/5, 93/9, 93/16, 93/17, 93/20,
 99/2, 99/3, 100/23, 101/17, 101/19, 106/11, 106/14,
 108/18, 112/17, 122/15, 123/2, 130/5, 132/1, 134/9,
 138/25, 139/14, 140/7
 non-utility 77/14, 79/9
 nonetheless 17/16, 61/15, 109/18, 121/9
 nonfirm 27/19, 27/24
 nonsense 43/3
 nonutility 12/24, 13/2, 23/12, 76/25, 81/7, 83/22,
 104/25
 normally 92/20
 North 43/7, 43/10, 43/11, 43/16, 44/7, 44/9, 44/10
 note 56/5
 notice 6/6, 6/7, 11/15, 12/1, 29/15, 41/25, 43/9
 notion 141/21
 number 12/24, 13/1, 29/16, 33/2, 44/23, 55/1, 57/25,
 72/5, 74/16, 114/14, 114/15, 114/16, 127/20
 numbers 139/24

O

Oak 4/4
 OASIS 101/5
 objection 17/12, 17/21, 19/13
 obligated 23/9, 23/16, 48/11, 76/22

obligation 24/2, 27/13, 35/21, 76/17, 79/20, 111/21
 obligations 22/13, 27/25, 37/17, 41/10, 42/21
 observed 54/9
 obtain 64/22, 86/23
 obtaining 44/15, 46/15, 46/18
 obtains 21/8
 occasion 54/25
 occasioned 114/20
 occasions 74/16
 October 46/14, 46/17, 110/15
 odds 84/5
 Off-system 63/12, 66/24
 offer 54/4, 87/14, 87/19, 111/11
 offered 10/5
 offering 117/10
 Office 2/18
 Officer 11/22
 Official 1/23
 omission 51/17
 open 42/6, 101/5, 131/16, 131/21, 133/18, 135/11,
 137/3, 137/24, 141/4
 opening 18/20, 19/5
 operate 31/15, 32/20, 32/22, 47/23, 96/23
 operates 13/1, 31/9, 119/14
 operating 22/24, 28/8, 32/9, 32/17, 32/18, 32/25,
 33/12, 47/11, 48/3, 48/6, 48/7, 49/5, 89/1, 96/17
 operation 29/6, 114/25, 115/12
 operations 93/24, 94/15
 opinion 18/9, 20/23, 21/16, 120/24, 140/13
 opponents 86/21, 87/17, 99/5, 120/22
 opportunities 13/4
 opportunity 10/8, 13/9, 19/18, 46/24, 67/12, 121/23
 opposed 24/25, 56/2, 142/18
 opposing 112/25
 opposite 73/1, 107/1
 opposition 15/14, 15/17
 opted 80/22
 option 30/11, 30/13, 30/15, 134/1
 options 163/19
 Oral 5/4, 5/5, 10/18, 10/24, 15/22, 16/4, 75/17, 81/15
 Order 10/20, 10/22, 11/21, 12/3, 14/22, 16/7, 16/10,
 51/23, 52/19, 53/14, 54/24, 55/2, 55/4, 55/11, 56/12,
 57/5, 75/17, 83/21, 103/2, 104/23, 104/24, 105/16,
 105/17, 105/20, 105/21, 107/16, 110/3, 110/23, 110/24,
 111/2, 111/3, 111/4, 111/9, 111/11, 129/13, 130/2, 130/3
 orders 55/1, 109/12, 111/13
 organization 11/21
 organizing 93/7
 originally 22/12, 36/7
 outcome 70/1
 outfall 141/1
 output 32/23, 102/3, 102/4, 103/15, 106/15, 106/20,
 112/8, 112/10, 122/23, 133/10
 outstanding 12/13
 overflow 26/20
 overturn 104/6
 owned 101/17
 owns 12/24, 13/1, 31/9

P

P.A. 2/18, 3/15
 Pages 1/11
 Pahokee 81/22, 82/1
 paid 123/21
 panoply 93/14
 papers 43/1, 93/7, 131/15
 paragraph 53/17, 54/8, 58/16, 58/17, 58/22, 59/1,
 78/9, 78/13, 83/9, 83/11, 104/17
 paragraphs 58/16, 58/21
 paraphrase 15/6
 parcel 20/12
 pari 94/23
 parse 120/22
 parses 38/2
 Parsons 2/3, 7/17
 part 16/3, 20/12, 22/12, 22/17, 25/17, 35/5, 35/19,
 36/11, 37/2, 40/25, 62/7, 65/25, 72/25, 107/18, 111/21,
 116/23, 120/15, 125/15, 128/11, 139/21
 parte 8/16, 8/24, 8/25, 9/3
 participate 13/9, 135/12
 participated 17/4
 participation 16/2
 parties 8/19, 9/15, 9/20, 9/22, 10/3, 14/22, 15/18,
 17/3, 17/8, 18/2, 18/5, 19/17, 51/25
 Partners 81/23
 Partnership
 party 14/24, 19/4, 77/7, 81/22, 109/10, 132/14
 pass 51/24
 passage 54/8, 55/3, 77/8, 79/3
 passages 79/4
 passed 34/24, 63/15
 passing 52/2

patients 138/9
PATRICK 2/10, 8/3
patterned 34/10, 38/16
PAUGH 4/2, 8/10
pause 51/24
71/23, 100/16, 101/23, 102/6, 102/8, 106/10,
1, 124/17, 124/19, 133/25, 136/6
payer 138/9
Peddler 15/7
pending 7/13, 9/17, 10/11, 10/13
Peninsular 25/24, 26/4, 26/20, 56/24, 57/2, 57/22,
57/23, 58/15, 58/18, 68/23, 102/5, 113/7, 129/14,
130/21, 130/23, 131/5, 131/11, 132/11
Peninsular-specific 67/18
Penney 70/14
perceive 65/22
period 141/12
periods 103/15
permissible 22/4
permit 21/4, 33/9, 48/25, 102/3, 133/13
permitted 31/17, 33/4, 33/13, 33/15, 33/21, 39/8,
47/12
permitting 29/24, 45/22, 46/24, 120/15
perspective 73/4, 73/5, 92/12, 119/16
Petersburg 2/16, 2/18
petition 1/5, 6/10, 11/20, 12/1, 12/14, 21/11, 22/1,
30/10, 44/4, 50/20, 50/23, 51/8, 51/13, 57/15, 58/14,
58/22, 75/5, 78/4, 78/14, 81/13, 81/14, 84/4, 84/14,
85/5, 108/11, 134/7
petitioner's 57/11
petitioned 75/9
Petitioners 7/18, 7/22, 8/5, 58/13, 87/23, 88/2, 88/4,
89/5, 99/2
petitions 12/7, 13/8, 75/21, 77/21
philosophy 69/17, 74/11, 115/19
phrase 44/22, 99/11
physical 118/17
PLACE 1/19, 6/8, 33/9, 33/24, 50/13, 61/17, 102/17,
107/19, 137/9
placed 42/21, 60/11, 60/13, 63/1, 71/10
places 60/17
Plan 20/11, 22/7, 22/10, 22/13, 23/22, 25/9, 25/15,
25/23, 26/4, 35/25, 36/1, 37/6, 41/11, 42/20, 71/4,
80/4, 89/15, 89/22, 90/24, 91/2, 94/11
ling 22/14, 25/19, 41/9, 41/10, 42/20, 57/24,
93/23, 94/15, 111/11
Plans 22/21, 24/19, 26/12, 90/10, 126/8
plant 1/6, 6/11, 12/25, 20/10, 21/5, 22/2, 22/7, 22/9,
24/4, 24/13, 25/16, 28/24, 29/5, 29/19, 31/17, 32/9,
32/22, 33/10, 33/12, 34/11, 34/15, 34/22, 35/18, 36/9,
37/5, 37/11, 37/13, 37/24, 38/1, 38/10, 38/13, 38/16,
39/4, 40/4, 40/16, 41/2, 41/11, 42/6, 42/19, 43/14,
43/20, 43/22, 43/23, 45/22, 45/24, 45/25, 46/2, 46/3,
46/14, 46/17, 46/21, 47/2, 49/9, 50/9, 50/12, 51/12,
53/1, 55/6, 55/7, 56/21, 59/14, 59/15, 59/20, 61/8,
61/17, 62/12, 64/18, 65/15, 66/18, 67/6, 68/12, 69/23,
71/11, 71/15, 71/16, 71/20, 72/19, 75/8, 79/17, 80/16,
80/17, 80/20, 80/21, 80/22, 80/24, 83/19, 84/13, 84/21,
84/24, 85/3, 88/18, 88/19, 88/20, 94/22, 99/18, 106/10,
113/5, 113/21, 113/24, 114/12, 114/25, 115/13, 117/20,
119/21, 122/6, 122/10, 122/25, 123/1, 125/5, 126/24,
126/25, 127/7, 128/2, 129/2, 129/6, 129/10, 129/13,
130/18, 132/7, 136/9, 136/17, 138/23, 139/13, 139/25,
140/4, 140/5, 140/19, 141/6, 141/16
plant's 106/15
plants 22/20, 23/19, 23/24, 27/22, 30/1, 32/6, 35/12,
49/15, 49/16, 49/21, 50/7, 50/14, 59/12, 59/23, 60/2,
60/3, 75/11, 114/2, 114/9, 114/15, 114/16, 115/18,
117/4, 117/24, 118/21, 127/20, 139/19, 140/11, 140/17,
140/25
played 43/6
pleading 14/3, 50/24, 113/3
pleadings 114/24
pleasure 142/25
plunk 135/14
Plus 86/15, 93/24
pockets 67/23
point 22/8, 25/21, 27/2, 37/20, 38/1, 38/10, 52/5,
61/3, 62/2, 67/9, 67/16, 92/22, 97/15, 99/1, 105/25,
106/6, 111/12, 115/22, 117/2, 119/9, 120/3, 121/17,
122/13, 136/22, 136/24, 140/16
pointed 65/11, 94/1
s 51/18, 52/3
y 70/18, 85/23, 88/9, 107/17, 114/19
portion 11/6, 11/11
posed 86/1, 137/14
position 42/25, 43/2, 54/11, 56/13, 79/18, 81/12,
82/22, 107/23, 110/16, 115/11, 127/2, 130/16, 135/15
positions 19/18
possibility 126/25
possible 62/4, 64/22, 119/2, 121/12
Post 2/18
posthearing 10/6

POTAMI 1/22
potential 66/6, 141/9
power 1/6, 1/8, 2/13, 2/15, 2/19, 3/13, 6/10, 6/13,
6/17, 6/25, 7/1, 7/19, 12/25, 16/11, 16/23, 19/11,
19/12, 20/10, 22/7, 21/9, 23/23, 23/24, 24/1, 24/13,
25/15, 26/19, 26/22, 26/24, 27/9, 27/10, 27/14, 27/19,
27/23, 27/24, 28/15, 28/24, 29/18, 31/21, 31/25, 32/9,
32/14, 32/17, 32/18, 32/20, 32/25, 33/3, 33/6, 33/10,
33/12, 33/15, 33/20, 33/21, 34/11, 34/15, 34/22, 36/8,
37/5, 37/10, 37/13, 37/24, 38/1, 38/10, 38/13, 38/16,
39/4, 40/3, 40/16, 41/2, 41/11, 42/19, 43/14, 43/15,
44/3, 44/13, 44/15, 44/18, 45/4, 45/21, 45/24, 46/1,
46/3, 46/13, 46/17, 46/21, 47/7, 47/9, 47/24, 48/2,
50/4, 50/9, 50/11, 50/18, 51/22, 52/8, 52/9, 53/13,
54/1, 54/13, 54/14, 54/20, 55/6, 55/10, 55/19, 56/16,
56/21, 57/6, 57/16, 58/8, 58/23, 59/2, 59/12, 59/14,
59/20, 60/2, 60/3, 61/11, 62/11, 64/18, 64/22, 65/3,
65/15, 66/11, 66/13, 66/14, 67/6, 67/11, 68/8, 68/12,
69/23, 71/11, 71/15, 71/19, 72/19, 74/10, 74/20, 75/10,
75/11, 75/12, 75/13, 77/5, 77/11, 77/13, 77/17, 77/25,
78/16, 78/24, 79/15, 79/17, 79/23, 80/16, 80/17, 80/20,
80/21, 81/10, 81/14, 81/23, 81/24, 81/25, 82/3, 82/7,
82/10, 82/14, 83/19, 84/21, 84/23, 84/25, 85/3, 86/20,
86/21, 88/7, 88/18, 88/20, 91/11, 91/13, 91/15, 91/20,
92/21, 92/25, 93/10, 93/13, 94/22, 97/2, 97/3, 97/4,
97/18, 97/25, 98/9, 98/21, 99/17, 100/17, 101/15,
101/16, 102/3, 103/13, 107/6, 108/13, 108/16, 108/18,
108/19, 108/21, 108/22, 109/21, 110/22, 111/15,
111/16, 111/22, 112/15, 113/5, 113/10, 113/11, 113/21,
114/9, 114/12, 114/14, 114/15, 114/16, 114/25, 115/13,
117/4, 117/11, 117/24, 117/25, 118/21, 118/25, 119/1,
119/21, 122/5, 122/17, 122/25, 123/1, 123/3, 123/9,
124/8, 125/4, 126/7, 126/10, 126/13, 126/16, 126/18,
126/24, 126/25, 127/1, 127/20, 128/1, 129/6, 130/5,
130/17, 130/20, 131/10, 134/6, 134/9, 134/15, 135/15,
136/1, 136/16, 137/7, 137/15, 139/5, 139/13, 139/25,
140/4, 141/6, 141/15
powers 32/3, 94/13
PPSA 41/8
practice 13/23, 13/24, 55/13, 56/1, 72/15
precedent 37/10, 47/6, 59/19, 84/9
preclude 65/1, 80/10
precludes 80/13
precondition 46/20, 61/21
predicated 92/24
preempted 30/24
preemption 85/24
preexisting 45/10
Prehearing 10/20, 11/21, 16/7, 16/10, 17/5
preliminary 8/12, 17/1
premiered 84/14
premises 99/22
prepared 142/2
preparing 17/6
prerogative 21/15
prescribe 31/23, 31/24, 94/5
prescribes 94/23
presentation 15/5, 17/19, 22/15, 36/9, 142/11
presenting 85/20, 85/22
preserve 54/21, 85/8
president 13/18
presuming 55/14, 56/2, 58/20
presumption 58/25, 59/3
pretty 19/12, 116/3
prevent 114/8
price 54/3, 62/4, 83/1, 101/7, 101/8, 132/22, 133/13
prices 118/23
pricing 111/12
prior 114/10
private 33/6, 33/14, 42/4, 47/23, 48/20, 48/24
privates 68/4
pro 101/15, 101/20
problem 118/19, 121/6
procedural 11/1, 41/1
Procedure 14/19, 74/21
Procedurally 8/22
proceed 10/12, 80/23, 86/23, 87/11, 88/10
proceeding 64, 6/5, 8/21, 11/7, 11/14, 14/21, 22/4,
23/11, 28/11, 35/20, 39/17, 43/22, 44/2, 46/21, 57/9,
75/23, 76/24, 77/8, 77/13, 78/18, 79/7, 88/17, 102/14,
125/2, 125/9, 141/5
PROCEEDINGS 1/12, 83/22
process 8/24, 20/24, 74/17, 74/18, 77/11, 84/10,
120/16, 127/24, 129/14, 134/2, 135/3, 135/4, 135/6,
135/16, 135/18, 138/1, 139/7
procurement 134/2
produce 107/6
producer 44/13, 74/20, 77/17, 108/13, 108/17
producers 54/1, 74/10
producing 50/3, 66/12
product 100/1, 100/2
Professor 85/23, 85/25
profit 119/11

progress 42/17
progression 42/23
prohibited 29/21
prohibition 48/23, 50/10
project 32/18, 32/20, 32/25, 33/6, 33/20, 33/22, 47/8,
47/24, 48/2, 58/22, 59/1, 72/23, 72/24, 73/3, 81/14,
81/17, 81/24, 82/1, 86/22, 87/1, 87/13, 88/7, 99/5,
102/4, 106/21, 112/8, 112/10, 112/25, 117/9, 122/25,
123/1, 130/5, 130/20, 131/10, 132/3, 133/10, 136/2,
136/5, 136/14
projects 13/2, 13/3, 47/10, 54/2, 103/15
promise 16/18
promote 35/9
promoting 35/23
propose 20/5, 27/22, 133/16, 140/4
proposed 8/1, 35/18, 53/1, 56/21, 60/17, 81/3, 88/6,
88/18, 99/17, 105/23, 122/5, 127/7, 131/10
proposing 32/21, 139/4, 139/8
proposition 107/1, 109/8
protect 62/1, 62/3, 72/21, 73/1, 125/16, 133/24,
135/17, 135/18, 138/8
protected 59/23, 117/16
protecting 125/14, 126/21
Protection 83/18
prove 58/3, 133/6, 133/8, 135/3, 135/7
provide 11/2, 11/16, 23/21, 26/21, 27/14, 27/22,
30/22, 49/13, 58/23, 58/24, 61/11, 73/22, 80/6, 89/19,
89/20, 113/5, 113/9, 113/10, 117/10, 129/16
provider 53/12
providers 49/15, 54/20
provides 31/13, 35/14, 36/14, 37/3, 123/1
provision 26/24, 36/4, 36/6, 36/13, 36/22, 37/1, 37/9,
37/25, 38/10, 39/11, 59/17, 112/20, 112/23
provisions 20/8, 21/19, 25/2, 25/10, 41/2, 50/12,
78/23
prudence 92/20, 100/17, 123/18
prudent 123/23
PSC 56/3, 56/9, 56/23
PSC's 56/1, 56/18
PSC-92-1210-FOF-EQ 75/17
PUBLIC 1/1, 4/3, 11/2, 11/6, 11/10, 11/16, 12/23,
15/4, 22/23, 23/18, 24/18, 29/18, 30/20, 36/15, 37/4,
43/10, 43/16, 44/6, 44/19, 44/22, 44/23, 44/24, 45/2,
45/4, 45/15, 47/4, 48/23, 72/18, 81/9, 82/1, 88/25,
93/9, 95/20, 96/16, 108/17, 108/19, 108/21, 109/20,
112/15, 140/1
purchase 27/9, 27/10, 66/13, 78/17, 100/11, 101/1,
103/14, 111/22
purchases 100/12, 123/6, 123/18
purchasing 30/15, 51/22, 52/8, 54/13, 57/10, 64/1,
64/13, 68/18, 74/7, 77/6, 82/24, 92/11, 100/13, 112/13,
112/22, 123/7, 123/20
pure 21/2, 53/4, 53/6
purpose 15/2, 30/22, 35/6, 114/1, 114/7, 119/24
purposes 31/22, 36/11, 36/25, 39/10, 51/21, 52/6,
54/11, 56/15, 88/8, 115/2, 119/23
put 61/3, 68/5, 70/20, 70/24, 73/21, 99/22, 123/8,
123/15, 124/7, 134/9, 134/11, 134/15, 134/20, 135/8,
136/10, 136/14
putting 23/17, 119/23, 141/21

Q

QF 54/2
QFs 74/10, 103/12, 112/9
Qualified 10/15, 12/17, 13/11, 13/15, 14/4
quality 13/16
quality 115/1, 115/14
quarter 124/21
question 9/18, 10/1, 15/24, 15/25, 21/6, 21/13, 25/8,
30/1, 49/11, 62/11, 62/12, 66/1, 70/3, 71/2, 71/7, 71/9,
71/13, 75/2, 80/2, 83/12, 83/24, 90/7, 90/15, 90/17,
105/12, 115/20, 119/15, 119/19, 120/24, 124/13,
128/16, 128/18, 129/23, 131/8, 131/10, 131/19, 132/18,
133/14, 133/17, 141/4
questions 9/6, 14/8, 15/19, 20/16, 45/18, 49/19,
85/12, 86/14, 100/15, 128/15, 142/1, 142/12, 143/5
quicker 136/17
quote 22/22, 24/19, 24/20, 30/23, 31/7, 31/21, 32/4,
35/15, 35/19, 36/3, 36/11, 40/25, 43/20, 43/21, 52/10,
53/18, 54/11, 55/3, 57/19, 75/21, 81/7, 117/14
quoting 23/7, 75/19

R

railing 9/14
raised 50/19, 84/3
rate 31/24, 60/10, 67/8, 67/11, 71/12, 71/22, 73/6,
91/12, 92/23, 93/1, 93/14, 94/5, 100/7, 102/7, 119/23,
125/16, 140/18
ratepayer 41/17, 65/23, 72/22, 117/11, 128/13,
128/16, 128/17, 128/19, 128/22, 132/16

ratepayers 41/21, 59/22, 59/23, 60/5, 60/10, 60/15, 60/17, 60/21, 61/3, 62/1, 62/3, 62/5, 63/1, 63/14, 63/16, 64/9, 65/19, 65/20, 66/4, 66/17, 66/19, 67/4, 67/13, 71/22, 73/2, 114/8, 115/4, 116/22, 117/16, 117/18, 117/19, 119/3, 125/14, 126/21, 127/15, 129/8, 133/7, 133/24, 135/17, 138/19, 136/5, 136/7, 138/2, 139/6, 139/9

rates 72/25, 91/13, 91/17, 91/20, 93/12, 140/2, 140/8

rational 82/17, 124/23

rationale 77/18

Raymond 3/15, 7/6

re 6/9

re-cover 142/20

reached 119/9

read 6/6, 17/25, 77/19, 83/9, 94/23, 99/19, 104/17, 113/1, 129/5

reading 41/22, 78/7

reads 36/24, 38/3, 53/18, 88/15

reason 14/24, 29/8, 61/25, 62/8, 62/20, 75/5, 84/12, 100/16, 128/15, 133/23

reasonable 42/14, 53/1, 101/8, 113/8, 114/11, 117/9, 123/23, 124/4, 127/7, 129/16, 130/24, 131/13, 133/4

reasoned 55/5, 76/5, 79/6

reasoning 78/4, 78/15, 82/20

reasons 71/19, 77/20, 85/4

rebuttal 19/7, 85/9, 86/16

receive 12/2, 87/11

received 11/1, 11/3, 11/4, 11/25, 12/1, 45/1, 89/18

receives 44/24

recess 85/14

recommend 8/18, 12/15, 12/16

recommendation 14/2, 14/17, 15/10

record 8/21, 8/23, 9/1, 9/2, 11/12, 11/15, 19/19, 85/17, 140/2

Records 12/8

recovery 60/11, 71/24, 141/7

reduce 35/10

reducing 38/12

redundant 17/15, 19/23

Reeves 2/7, 7/23

reference 24/21, 34/14, 36/3, 57/1

reflect 11/12, 11/15

reflected 16/5, 41/9

reflects 29/12

refusal 72/8

late 54/5, 54/22

regulated 22/23, 27/6, 28/5, 28/7, 28/9, 28/12, 28/15, 28/16, 29/7, 29/11, 31/5, 31/14, 32/8, 34/23, 41/20, 71/9, 71/14, 73/13, 73/15, 81/8, 82/5, 82/9, 88/25, 89/10, 89/13, 93/6, 95/2, 96/16, 99/13, 108/22

regulates 26/14, 29/14

regulation 26/10, 29/10, 30/23, 31/2, 31/3, 31/18, 37/7, 42/23, 50/11, 82/2, 88/8, 93/1, 93/15, 94/24, 98/14, 98/17

regulations 25/3

regulatory 87/25, 88/4, 93/11, 93/22, 94/17, 97/5, 123/19, 128/24

reject 56/7

relate 41/12

related 119/19

relates 139/12

reliability 52/24, 59/16, 73/9, 114/17, 116/3, 120/7, 127/5, 127/12, 129/15, 130/22, 131/12, 133/3

reliable 118/24, 123/3

relied 27/15

relies 37/15

rely 26/2, 26/20, 27/20, 27/23, 31/5, 69/2, 69/3

relying 29/17, 33/23

remainder 77/19

remand 104/6

remarks 18/20, 19/6

remember 38/14, 58/8, 58/19, 62/15, 100/7

render 58/12

rendered 56/22

renewal 103/19

replaced 63/22

report 34/9

REPORTED 1/21

Reporter 1/23

Reporting 1/22

represent 13/20

Representative 10/15, 11/18, 12/18, 13/12, 13/16,

resented 81/13, 109/13

representing 3/16, 6/20, 6/22, 7/1, 7/4, 7/7, 7/8, 7/11

request 14/22, 14/24, 17/2, 17/17, 38/22, 48/16, 88/15

require 17/8, 31/25, 45/9, 52/23, 56/9, 116/16

required 23/13, 27/18, 56/23, 77/1, 77/15, 79/10, 102/9, 102/10, 121/5

requirement 44/16, 56/22, 69/22, 99/14, 113/13, 122/21

requirements 14/4, 14/19, 20/11, 22/8, 22/11, 50/24, 59/9, 93/15, 94/3, 94/8, 113/3, 120/17

requires 26/15, 31/16, 36/1, 44/19, 56/20, 73/22, 116/13, 120/15

requiring 119/21

resale 100/14, 117/14

reserve 19/6, 24/19, 26/1, 26/2, 26/19, 83/12, 83/24, 100/5, 116/4, 118/18, 121/2, 129/14, 137/20

reserves 132/13

resolve 74/24

resources 27/1, 27/3, 27/19, 27/21, 27/23, 59/13

respect 80/5, 94/14, 115/3, 130/7, 137/14

respects 28/4, 81/5

respond 8/20, 9/21, 9/22, 10/4, 16/12, 19/5

responded 55/18

responding 8/25, 142/12

response 11/11, 100/11, 100/15, 113/3, 127/2, 127/3

responsibilities 56/4, 59/5

responsibility 26/7, 58/21, 72/21, 73/6, 84/25, 125/8, 126/20, 126/22

rest 84/9, 103/3, 103/10, 142/22

restate 54/25, 79/1

restated 112/4

restrict 83/17

restricted 38/17

rests 39/6

result 43/4, 115/13

results 31/19

retail 23/18, 24/6, 24/14, 24/21, 25/13, 25/20, 26/10, 27/7, 27/8, 29/14, 32/5, 34/5, 34/22, 35/8, 35/21, 35/22, 36/4, 36/6, 37/4, 37/8, 37/18, 37/19, 38/11, 38/17, 39/10, 39/19, 41/12, 42/21, 42/24, 43/6, 43/18, 44/6, 48/12, 49/13, 49/14, 58/24, 61/10, 94/4, 94/6, 94/9, 97/18, 98/17, 98/18, 99/11, 111/21, 116/1, 117/13, 119/23, 132/16

return 71/12, 71/23

reveals 33/2

revenue 64/7, 64/8, 64/10, 66/20

review 20/19, 77/22, 92/20, 100/18, 104/4

reviewed 14/16, 89/14, 89/16

reviewing 76/2

revisers 40/19

rhetorically 124/3

risk 43/21, 60/11, 60/13, 60/14, 60/18, 61/4, 61/6, 63/1, 63/10, 63/17, 64/17, 65/23, 66/4, 70/20, 71/10, 71/17, 82/15, 84/18, 138/20, 138/22, 139/13, 139/14

Road 3/6

ROBERT 2/2, 3/14, 7/5, 7/16

role 43/7, 94/24

Room 1/19

round 90/9

RPR 1/21, 1/22

rubber-stamp 54/2

Rule 14/4, 14/5, 14/20, 21/11, 39/15, 73/20, 84/10, 134/9, 134/14

ruled 11/24, 12/12, 38/10

Rules 14/19, 50/24, 106/22, 112/24, 121/20, 135/6, 136/11

ruling 16/3, 21/23, 86/11, 106/16

rulings 106/19

run 58/7, 63/21, 66/16, 92/14, 117/21, 117/23, 118/24, 119/2, 140/17

running 100/5, 140/8

rural 31/8

RUTHE 1/22

S

saddled 135/19

safeguard 128/7, 128/12, 128/13

sale 44/15, 90/19, 91/14, 91/20

sales 63/11, 63/12, 63/15, 66/6, 66/8, 66/10, 66/24, 75/11, 91/13, 94/6, 100/24, 101/3

sand 76/25

SANTA 3/21, 7/14

SASSO 2/17, 6/24

satisfactory 102/2

satisfy 24/6, 120/18

saturated 119/11

Save 12/1, 12/5

savings 122/18, 123/3

scenario 105/22, 132/24, 137/14, 139/23, 140/14

Schedule 91/12, 92/23

Schef 16/18, 86/3, 92/17, 108/25, 120/6, 132/10, 136/13, 142/15, 142/17

SCHEFFEL 2/2, 7/16

scheme 38/6, 74/15, 77/9

scope 38/12, 62/8, 95/10

Sears 70/13

season 133/18, 137/3, 137/24, 137/25

second 28/6, 32/7, 52/5, 53/18, 53/24, 59/7, 78/12, 81/20, 82/12, 108/11, 114/1, 143/7

secretary 13/20

Section 23/3, 35/4, 36/6, 36/7, 36/10, 38/21, 39/18, 41/6, 41/7, 45/1, 47/2, 47/5, 51/19, 52/21, 52/23,

56/13, 56/19, 57/7, 68/2, 75/16, 75/23, 78/22, 83/16, 88/2, 88/13, 88/19, 88/20, 88/23, 93/18, 96/12, 99/10, 99/12

section-by-section 41/5

Sections 36/25, 88/5, 94/17

secure 61/15, 68/15

seek 58/14, 83/23

seeking 30/8, 30/17, 54/21

seeks 24/5, 30/13, 51/8, 100/24

SEIDENFELD 2/6, 7/10

Seindenfeld 85/23

seize 83/7

self-generation 83/12

self-generator 83/25

sell 32/22, 33/21, 45/10, 45/12, 67/12, 92/5, 92/8, 98/18, 100/1, 117/25

selling 50/4, 64/2, 64/6, 64/14, 66/7, 66/8, 66/15, 93/8

seller 66/16, 98/10

Senator 8/16, 9/10, 10/3

senior 13/17

sense 21/22, 26/15, 32/12, 32/15, 47/10, 121/4, 126/23

sensitive 71/5

sentence 56/5, 83/8, 83/9, 104/16

separate 50/19

sequence 98/19

series 67/25, 68/7, 68/11, 126/12, 140/5

serve 14/20, 23/9, 23/10, 23/13, 23/17, 23/18, 24/2, 24/25, 26/16, 35/21, 37/7, 37/18, 41/13, 45/2, 48/12, 76/17, 76/22, 76/23, 77/1, 77/11, 77/15, 79/8, 79/10, 79/19, 79/21, 94/6, 94/11, 94/12, 105/1, 105/23, 116/1, 121/2, 131/25

served 18/7, 25/11, 35/8

served' 24/20

serves 25/12, 27/6, 99/11

SERVICE 1/1, 4/3, 24/18, 24/21, 25/5, 26/11, 34/4, 34/5, 36/2, 36/4, 37/8, 47/4, 49/13, 58/24, 60/4, 72/18, 89/20, 94/9, 100/25, 101/4, 136/17

Services 4/3

servicing 94/4, 117/13

set 6/8, 10/18, 16/9, 55/6

setting 58/2, 72/9, 73/6

settles 105/12

share 53/19, 53/24

Shoehan 3/15, 7/7

shift 69/15

shifting 61/6

shifts 60/14

shopping 70/6, 70/10, 70/22, 71/6, 71/18

short 15/10, 58/5, 101/5, 118/24, 119/2

short-term 101/3, 101/4, 101/10, 102/7

shortfall 27/15

Show 15/19, 45/3, 45/4, 45/8, 50/22, 82/23, 96/11, 130/9

shows 83/11

Shumard 4/4

side 17/6, 18/17, 18/22, 19/2, 19/13, 87/14

sides 17/9

sighted 87/18

signature 93/20

signed 68/8, 69/6

significance 20/8

simple 84/11, 102/25

Site 20/11, 22/7, 22/10, 22/13, 22/20, 23/22, 24/13, 24/19, 25/9, 25/15, 25/23, 35/25, 37/6, 37/10, 41/11, 42/20, 59/12, 89/14, 89/15, 89/22, 90/10, 90/24, 91/2

Siting 20/10, 22/7, 22/9, 22/20, 25/16, 28/24, 29/19, 32/10, 33/10, 33/12, 34/7, 34/8, 34/11, 34/12, 34/15, 34/22, 36/9, 37/5, 37/11, 37/14, 37/24, 38/1, 38/10, 38/13, 38/15, 38/16, 39/4, 40/3, 40/4, 40/6, 40/15, 40/16, 41/2, 41/3, 41/11, 42/19, 45/22, 45/24, 46/2, 46/3, 46/21, 50/9, 50/12, 51/6, 51/21, 52/7, 52/23, 53/5, 53/7, 53/11, 54/12, 54/18, 55/6, 56/4, 56/8, 56/15, 59/10, 61/13, 62/8, 62/10, 62/16, 65/8, 66/1, 67/6, 69/21, 71/20, 72/19, 74/4, 76/9, 76/11, 76/17, 77/3, 78/18, 79/22, 79/25, 80/21, 80/23, 81/8, 83/18, 83/19, 84/5, 84/6, 84/9, 84/10, 84/24, 88/19, 88/20, 88/23, 94/22, 94/25, 98/15, 96/25, 98/23, 108/23, 113/21, 114/12, 114/18, 115/6, 115/8, 115/15, 119/21, 125/18, 127/16, 127/23, 127/24, 128/4, 129/24

situated 24/11

situation 42/8, 43/13, 60/8, 61/13

six 50/19, 76/10

size 46/4, 49/22

sledge 30/16

Smith 2/17

Smyrna 17, 1/8, 2/12, 2/13, 6/12, 6/13, 7/9, 7/12, 7/19, 7/20, 28/21, 29/1, 29/21, 32/21, 32/24, 53/8, 75/6, 79/17, 79/24, 80/6, 81/2, 81/4, 81/11, 82/23, 83/5, 84/18, 87/23, 87/24, 88/7, 89/9, 91/11, 91/21, 93/3, 93/5, 93/9, 93/16, 93/17, 93/20, 99/3, 100/24, 101/17, 101/19, 106/12, 106/14, 108/18, 112/17, 122/16, 123/2, 130/5, 132/1, 139/14

SNIPPEN 3/14, 7/5

So.2d 15/7
sold 69/5, 91/23, 97/17, 98/3, 98/4
sort 26/12, 113/20, 124/3, 124/25, 125/9, 132/12,
138/24, 141/20
sought 105/1
76/20
da 68/5
source 27/5
sources 27/11
South 2/9, 2/21, 3/11, 3/15
Southeast 90/9
speculation 125/5
specifically 66/22
speed 136/2
spend 76/2, 142/20
spending 142/18
split 66/23
Staff 4/5, 8/7, 8/9, 8/11, 9/11, 14/16, 34/9, 40/24,
41/14, 42/1, 42/3, 96/10, 117/15, 120/6
Staff's 14/2, 14/17, 15/10, 111/14
stage 128/1
standard 20/19, 20/24, 54/4, 104/3, 111/11
standing 24/12, 129/21
standpoint 59/16
start 11/14, 12/14, 20/19, 135/14
started 72/5, 76/7, 136/15
State 2/5, 2/6, 7/11, 13/3, 13/15, 14/23, 15/1, 20/1,
22/3, 24/22, 25/20, 26/8, 26/22, 29/9, 30/24, 31/2,
31/11, 31/18, 32/5, 34/19, 39/8, 42/6, 42/24, 50/2,
50/25, 51/2, 51/11, 53/13, 54/7, 54/20, 54/23, 58/25,
59/12, 59/13, 60/21, 63/16, 64/3, 65/17, 67/20, 68/14,
70/7, 70/10, 73/15, 73/16, 80/18, 85/21, 85/22, 88/8,
88/9, 88/13, 91/8, 96/24, 99/13, 113/9, 113/18, 114/14,
114/19, 116/2, 118/4, 118/6, 121/3, 124/7, 138/9, 140/5
state's 29/13, 53/19, 53/24, 87/21
statement 28/11, 42/1, 125/16
states 14/20, 88/11, 97/1, 97/4, 97/8, 118/25
statewide 44/1, 56/24, 58/10, 58/18
Status 14/5, 14/10, 34/1
Statute 8/19, 21/22, 21/24, 24/17, 28/6, 28/8, 28/17,
29/22, 32/25, 33/1, 36/5, 47/10, 47/11, 48/9, 72/14,
72/16, 88/14, 94/19, 95/23, 96/10, 97/7, 99/8, 99/12,
99/16, 103/6, 103/8, 104/8, 106/4, 108/5, 114/7,
114/13, 114/17, 115/23, 120/13, 122/22, 125/17, 127/4,
7, 127/18, 129/5, 135/2
ten 33/18, 37/17, 40/17, 50/25, 72/9, 75/24,
83/16, 93/5, 93/18, 94/18, 99/5, 99/6, 112/24, 120/19,
125/19
statutory 19/24, 21/6, 21/19, 23/8, 23/16, 25/2, 56/4,
58/20, 74/14, 76/21, 88/11
stay 74/11
steam 46/12
Steel 3/10, 6/16
Steen 2/8
step 104/10, 104/11
Steve 7/8
STEVEN 2/5
stood 43/24, 44/1
straighten 100/22
strained 38/5
stranded 64/16, 140/20, 141/3, 141/7, 141/9
stream 64/7, 64/8, 66/20
Street 2/9, 2/21, 3/11, 3/16, 3/18, 3/22
strike 10/20, 10/24
strikes 121/6
struck 124/25
structure 31/24, 94/5
stuck 138/3
study 101/21
stuff 140/3
sub 82/2
Subject 7/13, 16/2, 82/2, 88/18, 93/1, 93/10, 93/21,
94/3, 94/7, 94/9, 94/16, 98/14, 98/16, 99/18, 100/17,
103/16, 103/18, 111/15, 120/5, 141/13
submit 23/22, 35/2, 115/2, 115/14, 117/8, 120/12,
121/15, 130/20, 130/25, 139/6
submitting 131/3
subsidiaries 12/23, 12/24
substantive 14/11, 40/20
substation 101/17
substitute 40/14
substituted 39/5
red 65/13
client 26/1, 50/21
suitable 26/5
Suite 3/7, 3/11, 3/18
summer 90/25
superfluous 124/8, 125/10, 125/24
supplied 53/25
supplier 92/15
supply 59/2, 118/25, 119/1
support 29/1, 30/18, 120/23
Supreme 20/3, 21/21, 51/5, 55/11, 55/17, 57/6,

57/16, 59/4, 69/10, 74/4, 74/16, 76/3, 77/2, 77/24,
79/23, 97/2, 97/4, 97/8, 111/13
SUSAN 1/15
swat 30/17
sync 126/8
system 29/2, 31/11, 31/16, 44/20, 52/24, 73/9, 93/4,
101/6, 101/13, 118/25, 127/5, 129/15, 130/22, 131/12,
136/21
systems 31/23

T

Tab 41/25, 52/18, 52/22, 53/23, 55/19, 55/23, 55/24,
75/17, 77/24, 77/25, 83/13
table 134/4
tail 29/3
talk 69/17, 96/6
talked 38/22, 38/23
talking 9/9, 63/25, 64/19, 120/3
talks 47/11
Tallahassee 1/20, 1/4, 2/9, 2/11, 2/21, 3/3, 3/7, 3/12,
3/16, 4/4, 7/17
Tampa 2/22, 7/4, 67/10, 106/9
tariff 89/18, 89/19, 90/1, 90/6, 90/18, 91/4, 91/10,
91/14, 93/12, 101/15
tariffs 101/20
tank 114/18
team 142/4
technologies 137/21
technology 137/23
TECO's 117/19
ten 8/19, 20/11, 22/7, 22/10, 22/13, 22/20, 23/22,
24/19, 25/9, 25/15, 25/23, 35/25, 37/6, 41/11, 42/19,
51/23, 89/13, 89/15, 89/22, 90/9, 90/24, 91/1, 142/19
term 22/21, 28/8, 29/11, 32/11, 32/13, 33/25, 34/2,
38/19, 48/8, 73/13, 78/20, 78/21, 82/8, 94/21, 95/19,
96/3, 101/4, 101/5, 102/9
terms 34/15, 34/21, 37/16, 38/3, 38/21, 38/24, 62/8,
68/20, 69/4, 72/10, 73/8, 73/24, 73/25, 82/25, 99/25,
109/11, 109/12, 121/1
territorial 32/1, 94/10
territories 24/21, 26/11, 36/4
territory 24/25, 136/25
TERRY 1/14
test 130/13
testify 11/10
testimony 17/25, 102/1
text 23/19
Thank 8/6, 8/22, 9/4, 16/24, 19/20, 75/1, 75/3, 85/9,
85/11, 85/18, 86/18, 102/15, 124/11, 142/9, 142/13
theme 25/6
theory 84/4, 125/4
they've 43/1, 135/7, 135/9
third 10/24, 54/8, 84/3, 140/9
thirds 81/18
Thomasville 3/6
three 12/7, 18/4, 20/9, 66/5, 68/19, 77/20, 81/4, 85/4,
85/5, 95/24, 104/20, 107/19, 142/4
threshold 21/9, 44/16, 122/1
throw 139/24
tied 36/5
TIME 1/18, 6/8, 16/3, 16/8, 16/9, 17/3, 17/8, 17/12,
17/18, 18/3, 18/14, 18/15, 19/4, 19/6, 19/15, 20/17,
28/10, 34/13, 38/21, 39/7, 47/12, 48/22, 51/3, 60/23,
69/19, 74/3, 76/2, 77/22, 79/3, 85/7, 85/9, 86/5, 86/15,
86/17, 89/21, 89/25, 97/24, 98/1, 98/12, 101/6, 103/15,
104/19, 111/6, 141/1, 141/8, 142/20
timing 41/1
TLSA 41/8
tone 10/3
Top 53/22, 76/7, 71/1, 78/8, 78/9
towns 22/22, 28/19, 88/24, 96/15
traditional 84/16
transaction 101/9
transactions 123/18
transcended 53/15, 54/17
transferred 41/17
transition 141/12
transmission 31/10, 34/7, 34/8, 34/12, 34/19, 38/14,
39/3, 40/3, 40/15, 41/3, 89/3, 95/4, 96/23, 97/6, 98/2,
100/6, 100/19, 100/20, 100/23, 100/25, 101/2, 101/4,
101/7, 101/10, 101/12, 101/14, 101/21, 102/1, 102/7,
102/12, 120/7
transmitting 23/2, 96/20
trooped 67/24, 67/15
true 50/10, 72/7, 96/25
trust 100/21, 143/10
turn 66/11, 76/10, 81/16, 124/18, 124/20
turned 76/9
two 12/23, 28/4, 40/17, 51/18, 51/20, 52/3, 55/12,
55/15, 68/19, 69/6, 73/8, 79/4, 81/18, 94/11, 104/18,
107/16, 117/25, 132/17, 136/23, 137/19
type 49/8

types 76/11, 95/9

U

U.S. 3/16, 7/7
unclear 99/25
uncommitted 51/12, 75/8, 79/16, 80/17
unconstitutional 43/4
undertaken 46/14, 46/17
uneconomic 135/19
uniform 31/23
Union 12/6
unit 47/20, 48/15, 48/23, 51/9, 51/10, 57/13, 57/19,
58/10, 65/18, 67/4, 81/3
unit-specific 51/20, 53/3, 56/14
unitary 36/12
United 88/11, 97/1, 97/3, 97/8, 118/25
units 27/21, 47/19, 49/24, 49/25, 66/12
University 2/5, 2/6, 7/11
unnecessary 72/24, 125/13
unneded 126/25
upgrades 101/22, 102/9, 102/11
upheld 56/10, 77/2, 78/20, 82/6, 97/4
uphold 103/7
upper 139/18
uptake 62/25
Utilities 1/7, 2/12, 6/11, 7/20, 22/21, 24/6, 24/22,
25/20, 26/3, 26/10, 26/13, 26/14, 27/18, 28/21, 28/25,
29/14, 30/12, 30/17, 30/23, 31/2, 31/3, 31/22, 31/25,
32/4, 32/5, 32/23, 33/17, 34/23, 35/8, 36/4, 36/6,
36/21, 37/7, 37/18, 37/19, 38/11, 38/17, 39/10, 39/11,
39/19, 41/12, 41/16, 41/20, 42/16, 42/21, 42/24, 43/10,
43/17, 43/18, 43/25, 44/6, 44/24, 44/25, 45/6, 45/7,
49/13, 57/25, 58/24, 60/1, 63/11, 63/12, 63/13, 63/18,
64/3, 64/21, 66/7, 67/10, 67/20, 71/9, 73/14, 73/15,
75/6, 78/4, 78/5, 78/15, 78/16, 84/17, 87/23, 88/2,
89/7, 89/8, 91/14, 91/21, 92/5, 93/2, 93/16, 93/17,
93/22, 94/4, 94/11, 95/19, 96/2, 96/8, 97/17, 99/2,
99/4, 101/1, 101/18, 102/4, 102/12, 106/11, 111/21,
117/13, 122/15, 122/18, 123/2, 124/6, 124/9, 132/1,
138/25, 141/3
utilities' 23/25
utility 12/23, 22/23, 23/22, 24/1, 24/14, 25/12, 25/25,
26/1, 27/3, 27/6, 27/8, 28/4, 28/18, 31/6, 31/7, 31/8,
31/18, 34/16, 35/21, 35/22, 36/1, 36/13, 36/17, 37/2,
37/15, 38/19, 38/22, 39/5, 39/13, 39/16, 43/6, 44/6,
45/2, 45/3, 45/10, 45/13, 51/10, 51/13, 51/15, 51/19,
51/20, 51/22, 52/8, 52/16, 52/17, 53/3, 53/13, 54/13,
55/17, 56/14, 57/10, 57/12, 57/14, 57/24, 58/1, 58/16,
61/10, 64/1, 64/2, 64/6, 64/13, 64/14, 66/16, 66/17,
68/19, 71/14, 74/7, 76/10, 76/14, 76/16, 77/6, 77/16,
80/18, 81/9, 82/1, 82/4, 82/5, 82/24, 84/1, 84/17,
88/21, 88/24, 88/25, 89/13, 89/16, 89/24, 90/8, 91/5,
91/9, 93/4, 93/9, 94/16, 94/20, 95/11, 95/18, 95/21,
96/16, 98/14, 99/9, 100/13, 100/25, 105/23, 106/9,
108/17, 108/19, 108/21, 109/2, 109/19, 109/20, 109/21,
112/8, 112/15, 112/16, 112/22, 113/23, 114/8, 123/7,
123/20, 130/14, 130/16, 131/25, 134/1
utility's 13/7, 51/16, 60/10, 77/10, 77/11, 79/8,
83/23, 92/12, 95/20, 101/14, 105/1
utility-specific 55/9, 56/10, 56/11, 57/8, 58/11,
67/17, 68/14, 74/8, 99/8, 103/20, 113/13

V

vacillation 42/18
version 105/4
vice 13/18
vicinity 140/9
view 49/4, 49/11, 56/1, 127/13, 127/14, 129/11
Villacorta 2/10, 8/4
virtue 46/3, 49/21
VOLUME 1/10, 5/2
Volusia 1/6, 6/11
vote 104/21, 105/16, 107/18

W

wa-la 39/7
wagging 29/3
waiting 65/9
waive 134/14
waiver 134/9, 136/11
walk 109/6
Ward 2/17
Wednesday 1/17
weeks 107/19
welcome 9/5
West 2/3, 3/22, 7/17
WHITE 3/18, 7/25
wholesale 28/14, 35/1, 49/12, 53/12, 54/19, 63/11,
75/11, 90/20, 91/15, 92/5, 93/8, 94/6, 97/6, 97/12,

97/18, 98/1, 98/3, 98/5, 98/10, 98/18, 100/24
WIGGINS 2/10, 8/3, 8/4
Wildlife 3/20, 8/1, 11/18
WILLIAM 3/2
willing 45/4, 70/19, 119/9, 138/22
WILKINSON 3/2, 6/20
WIS 2/20, 7/3
wisdom 137/15, 140/4, 143/7
winds 140/5
wisdom 59/11, 69/10
wish 10/12, 11/6
Woodruff 90/11
word 39/5, 95/1, 95/9, 99/9, 99/11, 99/14, 99/19,
102/19
words 30/25, 95/7, 97/12, 109/3, 124/7
work 100/20
working 47/17, 48/14
works 116/10, 142/24
workshop 117/15, 120/6
worth 18/13, 62/12
wrap 142/3, 142/17
WRIGHT 2/2, 7/16
writings 111/14
written 14/21, 85/6
wrong 66/10, 71/25, 103/2, 103/24, 104/5, 109/4,
110/22
wrote 96/10, 105/20

X

X 5/1

Y

Year 20/11, 22/7, 22/10, 22/13, 22/20, 23/22, 24/19,
25/9, 25/15, 25/23, 26/2, 34/9, 35/25, 37/6, 38/14,
38/17, 41/11, 42/20, 69/6, 89/14, 89/15, 89/20, 89/22,
90/9, 90/24, 91/1, 96/25, 120/6, 139/4
year's 90/9, 91/1
years 51/23, 69/7, 125/3, 130/19, 137/19, 137/20