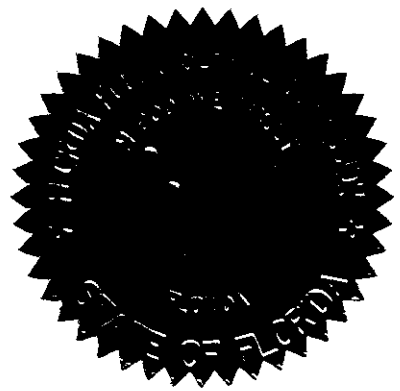


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 971065-SU
: Application for rate :
: increase in Pinellas :
: County by Mid-County :
: Services, Inc. :



VOLUME 1
Pages 1 through 110

PROCEEDINGS: HEARING

BEFORE: COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JULIA L. JOHNSON

DATE: Monday, June 21, 1999

TIME: Commenced at 10:00 a.m.

PLACE: Dunedin City Hall
City Commission Chambers
542 Main Street
Dunedin, Florida

REPORTED BY: H. RUTHE POTAMI, CSR, RPR
KIMBERLY K. BERENS, CSR, RPR
FPSC Commission Reporters

DOCUMENT NUMBER-DATE
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1 **APPEARANCES:**

2 **RICHARD D. MELSON**, Hopping Green Sams and
3 Smith, Post Office Box 6526, Tallahassee, Florida
4 32314, appearing on behalf of **Mid-County Services,**
5 **Inc.**

6 **STEPHEN C. BURGESS**, Office of Public
7 Counsel, 111 West Madison Street, Room 812,
8 Tallahassee, Florida 32399-1400, appearing on behalf
9 of the **Citizens of the State of Florida.**

10 **JENNIFER BRUBAKER**, Florida Public Service
11 Commission, Division of Legal Services, 2540 Shumard
12 Oak Boulevard, Tallahassee, Florida 32399-0870,
13 appearing on behalf of the **Commission Staff.**

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I N D E X

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13	1 Staff's Official	40	40
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1 P R O C E E D I N G S

2 (Hearing convened at 10:05 a.m.)

3 **COMMISSIONER DEASON:** Call the hearing --
4 this microphone on? Okay. Very well. Call the
5 hearing to order. We will begin by having the Notice
6 read.

7 **MS. BRUBAKER:** Pursuant to Notice, this time
8 and place has been designated for hearing in
9 Docket No. 971065-SU, Application for Rate Increase in
10 Pinellas County by Mid-County Services Incorporated.

11 **COMMISSIONER DEASON:** Thank you. Take
12 appearances.

13 **MR. MELSON:** Richard Melson of the law firm
14 of Hopping Green Sams & Smith, P.A., P.O. Box 6526,
15 Tallahassee, Florida, appearing on behalf of the
16 utility, Mid-County Services Inc.

17 **MR. BURGESS:** Steve Burgess for the Office
18 of Public Counsel, 111 West Madison Street,
19 Tallahassee, appearing for the Citizens of the State
20 of Florida.

21 **MS. BRUBAKER:** Jennifer Brubaker, 2540
22 Shumard Oak Boulevard, Tallahassee, Florida, appearing
23 on behalf of the Commission Staff.

24 **COMMISSIONER DEASON:** Thank you. Let me
25 take this opportunity first to introduce myself. My

1 name is Terry Deason. I'm a member of the Public
2 Service Commission. I will be chairing the hearing
3 today and tomorrow. Seated to my immediate left is
4 Commissioner Susan Clark, and seated to my immediate
5 right is Commissioner Julia Johnson. We constitute a
6 panel of Commissioners that will be hearing and
7 deciding this matter.

8 Let me welcome everyone out to the hearing.
9 First of all, let me -- in case there are members of
10 the public who didn't realize who was speaking
11 earlier, let me take just a moment to identify those
12 persons.

13 Mr. Melson is the attorney. He made an
14 appearance. He's representing the utility company in
15 this proceeding. Mr. Burgess is representing the
16 public. He is employed by the Office of the Public
17 Counsel and is the attorney designated by the
18 Legislature to represent consumer interest in matters
19 before the Public Service Commission.

20 Seated here at the -- in front to my far
21 left are members of the Staff of Public Service
22 Commission. Ms. Brubaker introduced herself. She is
23 the Staff attorney. She works for the Public Service
24 Commission. She will be participating in the hearing,
25 conducting cross examination and assisting the

1 Commission in this matter.

2 Mr. Willis is seated to Ms. Brubaker's
3 right. He also is a member of the Staff of Public
4 Service Commission.

5 We have other members of the Staff of the
6 Commission that are in the audience and you also were
7 greeted by members of the Staff of the Public Service
8 Commission as you entered the hearing room today.

9 As you entered the hearing room you should
10 have been presented a special report that was printed
11 on blue paper. It has all of the background
12 information concerning the history and status of this
13 proceedings and why we are here today. I would
14 encourage you to review this information.

15 Also, the last page of this report is
16 designed to be detached. It is for those members of
17 the public who did not wish to make a formal statement
18 here today, but who do wish to make comments to the
19 Commission. You may detach this page, write your
20 comments to the Commission and fold it and mail it to
21 the Public Service Commission.

22 You also may reach the Commission via
23 telephone as well as through Internet and things of
24 that nature and that information is on the front page
25 of the blue special report.

1 We are here today to hear from members of
2 the public, which is going to be the first order of
3 business. After we do that, we're going to proceed
4 into what we refer to as the technical phase of the
5 hearing where there will be expert witnesses presented
6 by the utility company, by Public Counsel's Office and
7 by the Staff of the Public Service Commission. There
8 will be cross examination of those witnesses. Members
9 of the public are welcome and invited to stay and
10 participate and view that part of the proceeding as
11 well.

12 There also will be a customer hearing this
13 evening. I believe it begins at 6:00 p.m. And we do
14 that to afford an opportunity for members of the
15 public who may have conflicts during business hours so
16 that they can come in the evening time and also
17 participate in our proceedings.

18 I know there are some preliminary matters
19 that we need to attend to, but most likely it would be
20 better to do those after the conclusion of the
21 customer testimony unless there are some preliminary
22 matters which need to be addressed at this particular
23 time. Are there any such matters? (No response.)

24 Okay. Are there any introductory matters
25 which I failed to address? (No response.) Very well.

1 Mr. Melson.

2 **MR. MELSON:** Commissioner Deason, I believe
3 the customer meeting for this evening was scheduled
4 for 6:30 rather than 6:00.

5 **COMMISSIONER DEASON:** Okay. Let me correct
6 that and I appreciate you bringing that to my
7 attention. It's 6:30 this evening, not 6:00. I
8 appreciate that correction. I think I was given some
9 wrong information somewhere.

10 Okay. Members of the public who wish to
11 testify, it's going to be necessary for us to swear
12 you in. This is part of the normal procedure of the
13 Public Service Commission. This is so that your
14 testimony can become part of the official record of
15 this proceeding. We have a court reporter with us
16 today who is recording this proceeding. Your
17 testimony, as I indicated, will become part of the
18 official record.

19 After all witnesses are sworn in,
20 Mr. Burgess will call members of the public to come
21 forward. We ask that you come forward to the
22 microphone directly in front of the Commissioners and
23 begin by giving us your name and your address. If you
24 think it would be helpful to the court reporter you
25 may wish to spell your name so that it will be

1 recorded accurately in the record.

2 We ask then that you proceed with your
3 statement, and to tell the Commission your thoughts on
4 this pending rate increase, as well as your experience
5 with the quality of service that is being provided by
6 this utility company and any other relevant matters
7 which you think could be useful to the Commission as
8 we deliberate on this matter.

9 After you conclude your remarks we ask that
10 you stay for just a moment because there may be some
11 clarifying questions, either from the Commissioners,
12 our Staff, or the Public Counsel's Office, or from the
13 utility company.

14 And with that, I'm going to ask all members
15 of the public -- let me ask this. Are all the expert
16 witnesses in attendance here at this time as well? We
17 can go ahead and swear in everybody at one time.

18 **MR. MELSON:** Ours are.

19 **COMMISSIONER DEASON:** I'm going to ask,
20 members of the public that wish to testify, as well as
21 all of the expert witnesses who will be testifying
22 today and tomorrow, please stand and raise your right
23 hands.

24 (Witnesses collectively sworn.)

25 **COMMISSIONER DEASON:** Thank you. Please be

1 seated. Mr. Burgess.

2 **MR. BURGESS:** Commissioners, first on my
3 list is John Lomaka.

4 **WITNESS LOMAKA:** My name is John Lomaka,
5 L-O-M-A-K-A. I live at 2555 Northfield. That's in
6 Clearwater, 33761.

7 **COMMISSIONER DEASON:** Sir, were you sworn in
8 with the other witnesses? Let me go ahead and do that
9 now.

10 - - - - -

11 **JOHN LOMAKA**

12 appeared as a witness and testified as follows:

13 **DIRECT STATEMENT**

14 **COMMISSIONER DEASON:** Thank you. Please
15 proceed.

16 **WITNESS LOMAKA:** I appeared here before this
17 group a year ago when there was a meeting like this
18 and I had asked at that particular time for one of
19 these Staff PAA recommendations. I filled it out and
20 turned it in, but unfortunately I guess somewhere my
21 request fell in the cracks. I never received an
22 answer to it. But when I received this letter a
23 couple days ago about this meeting I thought I would
24 appear again.

25 I have gone through trouble and I went

1 through this trouble a year ago, and I stated at that
2 time, I live in a building, six units in one building.
3 There are 12 people that live in this building.
4 That's adults and children in six units.

5 In those six units we pay over \$300 every
6 two months for service. And it's ironic that over
7 four years we have paid \$200 for water, which is, I
8 guess, a cheap commodity. But to get rid of that
9 water it costs us almost \$900.

10 I have copies of my bills where the bills
11 have increased from \$30 a month every two months to
12 now \$50 every two months.

13 I don't really feel that the public is
14 getting a fair shake out of this whole deal. Number
15 1, the federal government has told me anything over
16 1.8% in my pension is inflationary. I don't want to
17 disturb the economy of the country so I live along
18 with my 1.8% which is recommended by the federal
19 government, and my railroad pension because anything
20 over -- beyond that would be inflationary and would
21 destroy the economy of the country. So we don't want
22 that.

23 I came here a year ago asking what justified
24 a 28% increase in a sewer bill. I really never got an
25 honest answer and I get this letter today, this

1 special report, that tells me that their last increase
2 was granted November of '93. And in the meantime, my
3 sewer bill has gone from 30-some dollars to 50-some
4 dollars every two months, so I gather I must not be
5 reading very well or somewhere I'm missing the point.

6 Now, the young lady explained to me earlier
7 that it was interim, but then I see on the same thing
8 in this report that's given to us that the Commission
9 recommended \$1.60 for 1,000 gallons and then our
10 so-called PSC has recommended approved \$1.93. So,
11 obviously, they feel -- maybe they don't agree with
12 the 1.8% being inflationary, so it appears that
13 anybody appearing here is wasting his time because it
14 appears that our Public Service Commission is not
15 really there to represent the people. They're to
16 represent these people out of Illinois.

17 Now, I asked at that time, and I'd like to
18 ask again, how do we buy into this company? If they
19 can make that kind of money, I want to be a part of
20 the action. Now, all I'd like to know is who are
21 they; are they -- can people like me and little people
22 like me to live in Northfield buy into this outfit?
23 And I never got an answer then. I still -- and I
24 would like to hear from somebody because to make that
25 kind of money is better than my pension. I would love

1 to buy into that company because it's obviously making
2 more money than Hillary can make. And I don't think
3 it's an unreasonable request.

4 **COMMISSIONER DEASON:** Sir, before you leave,
5 let me take just a moment and explain the -- what
6 happened is, you're correct. We granted an interim
7 increase, which is provided by Florida statute. Part
8 of the normal course of processing these cases.
9 Interim increases, as you are aware, are subject to
10 refund. And there may or may not be a refund later
11 on. It depends on how this case is processed.

12 We issued a Proposed Agency Action Order
13 which was what we as a Commission felt was a fair
14 increase. The company disagreed with that and
15 protested that saying that that was not enough. That
16 was the \$1.60 which you referred to earlier. So we
17 are here now to hear from the company as well as
18 Public Counsel's Office.

19 The final amount could be greater or could
20 be less than what the \$1.60 which we determined
21 earlier to be a fair rate. That was without the
22 benefit of a hearing. It was a proposed action. And
23 there was a protest to that.

24 As far as whether this company is publicly
25 traded, I'm not sure. Mr. Melson, is this company

1 publicly traded?

2 **MR. MELSON:** No, it is not.

3 **WITNESS LOMAKA:** I wouldn't think so. To
4 make that kind of money, no way.

5 **COMMISSIONER DEASON:** So that answers your
6 question then. It's not a publicly traded company.

7 **WITNESS LOMAKA:** Well, the only question I
8 have, Commissioner Deason, is it says here these
9 revenues exceeded the test year by 28 -- 29%. And
10 they have the nerve to come and ask for more.

11 I mean, Hillary turned 1,000 into 100,000 in
12 24 hours. These people are trying to exceed that.
13 And I would like to be a part of that. And I think
14 it's a reasonable request. And I think we should be
15 allowed to buy into that outfit. If we want to
16 support it, fine. And maybe the Commission can
17 furnish us with the information as to how we can do
18 it. Because there's too much money being made there
19 and it should be shared by more than one little group.

20 **COMMISSIONER DEASON:** Let me ask you. You
21 mentioned earlier that you participated in this
22 process earlier and that you requested some
23 information. I assume that was the -- you requested a
24 copy of the PAA order and you never received that; is
25 that correct?

1 **WITNESS LOMAKA:** That's correct.

2 **COMMISSIONER DEASON:** We can provide that to
3 you. If we cannot provide that to you today, I'm sure
4 that we can send it to you when we get back to
5 Tallahassee. That provides information as to the
6 rationale and the calculations which came up with the
7 \$1.60 which you referred to earlier. But understand
8 that was a preliminary decision and it was protested.

9 So it really -- it will be just a
10 coincidence if the same result came out of this
11 proceeding because basically we are here to take all
12 of the evidence to determine if the amount should be
13 less or greater than the \$1.60.

14 But we'll be happy to provide that to you
15 and I'm sure that we probably can then provide you
16 with the final order, which would be the result after
17 this hearing and after we get back to Tallahassee and
18 clear this matter up, which is scheduled for the end
19 of August.

20 **WITNESS LOMAKA:** I would appreciate that
21 because where I live it appears that we are one-third
22 of the residential customers that they serve. And
23 maybe I can wake up our so-called board that we have
24 there because I've been talking to them, but I have
25 nothing in writing to back me up when I talk to them.

1 And it appears that they need a little bit in writing
2 to wake them people up and give them numbers that they
3 can see and visualize because it appears that that is
4 why the board itself is --

5 **COMMISSIONER DEASON:** The PAA order would
6 have information concerning the company's investment;
7 changes in that investment since the last rate
8 proceeding; the level of their operating and
9 maintenance expenses; their allowed return on their
10 investment; things of that nature which probably would
11 be useful to you. But realizing, again, that was a
12 proposed action and we're going to be -- I'm sure
13 there will be changes to that as we go through this
14 process this time.

15 **WITNESS LOMAKA:** Okay. Thank you very much.

16 **MS. BRUBAKER:** Commissioner, I happen to
17 have an additional copy. Mr. Lomaka, if you'd like to
18 go ahead and take that.

19 **WITNESS LOMAKA:** Okay. Thank you.

20 **COMMISSIONER DEASON:** Mr. Burgess.

21 **MR. BURGESS:** Norman Phillips.

22 **MR. PHILLIPS:** Here.

23 **COMMISSIONER DEASON:** Sir, do you wish to
24 come forward and make a statement to the Commission?

25 **MR. PHILLIPS:** No. I checked that in case I

1 had any questions. Seeing how the proceedings go, I
2 might have questions later. I have no formal
3 statement.

4 **COMMISSIONER DEASON:** Thank you, sir.

5 **MR. BURGESS:** James Crumley.

6 - - - - -

7 **JAMES CRUMLEY**

8 appeared as a witness and testified as follows:

9 **DIRECT STATEMENT**

10 **WITNESS CRUMLEY:** Good morning. Good
11 morning ladies and gentlemen. How are you all this
12 morning?

13 **COMMISSIONER DEASON:** Sir, were you sworn
14 earlier?

15 **WITNESS CRUMLEY:** Yes, I did stand and take
16 the oath.

17 **COMMISSIONER DEASON:** Very good. Thank you.

18 **WITNESS CRUMLEY:** Okay. I have some
19 statements and some questions, both. And time goes by
20 so quickly, I just wanted to confirm some things on
21 the front of the sheet.

22 We started in September of '94 with the
23 first or the last request for a rate increase with
24 Mid-County Services; is that correct? And at that
25 time they were granted an interim increase from

1 roughly -- from -- I'm looking at numbers here;
2 roughly \$9 million -- \$900,000 to \$1.2 million. Is
3 that an interim increase that we're talking about?
4 And that increase has been in place since September of
5 '97; is that correct?

6 **COMMISSIONER DEASON:** If you don't mind, can
7 we turn to Page 3 of that report? It may be a little
8 more useful. This is not --

9 **WITNESS CRUMLEY:** I have it.

10 **COMMISSIONER DEASON:** These are not total
11 revenue dollars. These are the rates that are being
12 charged to customers.

13 **WITNESS CRUMLEY:** Right. Okay. I have them
14 right in front of me. Let's take residential rate has
15 been or was \$1.51 per 1,000 gallons; is that correct?

16 **COMMISSIONER DEASON:** That's correct. And
17 it's my understanding that was the final rates -- that
18 was the rate before this filing and that --

19 **WITNESS CRUMLEY:** Okay. What was -- the
20 interim they've been receiving \$1.93 per 1,000; is
21 that correct?

22 **COMMISSIONER DEASON:** That's correct.

23 **WITNESS CRUMLEY:** They've been receiving
24 that for what period of time?

25 **COMMISSIONER DEASON:** It would have been

1 after the September filing. I'm not exactly sure when
2 it was implemented. Staff --

3 **WITNESS CRUMLEY:** So we're going on
4 something like 16 months. Does that sound about
5 right?

6 **MS. BRUBAKER:** Yes. December of '97.

7 **COMMISSIONER DEASON:** So, yes, it's been
8 well over a year.

9 **WITNESS CRUMLEY:** Well over a year. Okay.
10 All right. And it normally takes this long? And, of
11 course, now we have a recommendation to go to a final,
12 which is less than the interim. If that passes then
13 they're going to have to rebate their customers what
14 they've received then in excess funds during that
15 interim period; is that correct?

16 **COMMISSIONER DEASON:** Yes. If the final
17 decision is less than the interim, then there will be
18 a refund.

19 **WITNESS CRUMLEY:** Okay. All right. The
20 first thing I have is a service issue. And I brought
21 this up at the last hearing in 1997. I own 22 rental
22 properties all on Park Lane which constitute eight
23 buildings. We have had a continuing odor problem with
24 our sewer, particularly on the corner of Park Lane.
25 It was addressed at the last meeting. I was promised

1 by the utility that some things would be done and I
2 haven't heard from anybody. Okay.

3 **COMMISSIONER DEASON:** The utility company
4 did not contact you?

5 **WITNESS CRUMLEY:** Not a thing. And I've had
6 the engineer here. I've had engineer drawings of what
7 they were going to do with the manhole problem and
8 it's basically, not a step was taken. So if you
9 consider that reasonable service, maybe that's
10 something that you can deal with.

11 The other problem that I have -- and I think
12 the gentleman here will admit to the fact that we've
13 been discussing this problem for a long, long period
14 of time.

15 I do have some general questions even on the
16 rate changes. In my particular case I'm effected by
17 the general services/multiple family category. So, in
18 my category my rate increase -- first of all, I'm 30
19 cents per 1,000 gallons above residential use. I'd
20 like to know why.

21 I would like to know why I pay more per
22 treatment of water than a residential customer. And
23 if the reason is because of sprinkling systems, I have
24 an underground sprinkling system. I have a deep well.
25 All of my units are done, so we don't use a dime of

1 that. I do not allow my tenants to wash their cars
2 using this water. If you go through per family, we
3 use less gallonage than the average residential
4 customers.

5 I'd like to know why I'm being penalized to
6 the amount of 30 cents -- I'm not being penalized in
7 the base rate, but I'm being penalized in the
8 gallonage. If it's being done for political reasons,
9 let's address that. If it's because you want less
10 stress from less people, let's address that. But is
11 it legal, fair and just? I don't think so.

12 The other issue I have is, I noticed the
13 mobile home parks were at \$1,595.45 flat rate. Every
14 other group in here is recommended by the Commission
15 to have an increase and yet mobile parks are looking
16 at almost a 40% decrease. I'd like to know the logic
17 of that one. I'm just using your numbers. I just
18 looked at this five minutes ago.

19 And, of course, the other problem I have is
20 the return on investment figure. I've never really
21 found out what the initial investment was by this
22 firm. This utility was bought from Dyna Flow
23 Services, I believe. I've never been able to find out
24 what the purchase price was.

25 I also know they did make some improvements

1 to the utility. But I always questioned the
2 profitability of those improvements. I'd like to know
3 who made the improvements; are they subcompanies of
4 this utility that made the improvements; and are those
5 subcompanies making a profit on the improvements,
6 inflating the dollar value of the improvements, and
7 then looking a return investment on that inflated
8 amount?

9 Basically it is not unfair for any company
10 to ask for an increase in operating expenditure, as
11 long as it's justified. The problem is with this
12 process, it's almost impossible to find that out. It
13 is so difficult and so cumbersome and so complex
14 sometimes.

15 The other problem we have as general
16 citizens we don't normally have the time to invest in
17 this that the professionals do. Obviously, the
18 utilities have attorneys and specialists who are there
19 to continually ask for rate increases. That seems to
20 be the modus operandi.

21 You know, we just continually ask for a rate
22 increase and the minute that we don't get that, we ask
23 for another one and the minute we get another one we
24 put another one in and I don't quite understand the
25 system.

1 But could anyone -- I'll stop at this
2 moment. And the questions just -- that I just asked,
3 can anyone address some of those for me and help me a
4 little bit with those?

5 **COMMISSIONER DEASON:** I will start with the
6 last question, and that being; the level of
7 investment, changes in that, and who made the
8 improvements associated with that.

9 Those are issues which the Commission will
10 be addressing during this proceeding. Any time the
11 Commission changes rates it has to make a
12 determination of the amount of rate base, which is the
13 prudently invested capital of the company and its
14 employees providing services to customers.

15 We look to see if there are any affiliated
16 transactions involved in that investment. If there
17 are affiliated transactions, it is -- we apply a test
18 to that and the standard is that it should be no more
19 than what would be required from the arms-length
20 transaction. That requires audit and sometimes
21 assessment by our engineers. But those are issues
22 which we normally look at during the course of these
23 types of proceedings.

24 **WITNESS CRUMLEY:** May I stop you for a
25 second, Mr. Deason? At the preliminary hearings -- I

1 guess we call them those -- in 1997, we did have --
2 actually I went to the utility's office and got a copy
3 of their operating expense sheet, their P&L. We went
4 through that. All of those items were addressed by
5 myself and other members. I think there was people
6 from Spanish Oaks subdivision that did a very, very
7 fine job of going through the P&L.

8 Is that part of what you're going to be --
9 part of the problem I have is the time lapse. This
10 was a hot fresh item a year and a half ago. Now,
11 it's, you know -- apparently we're starting over again
12 and we're doing so because the utility's unwilling to
13 take the rate increase that you're recommending. Is
14 that the information that you're going to be
15 re-reviewing today? Is that part of this procedure
16 or --

17 **COMMISSIONER DEASON:** I wish I could give
18 you a definitive statement. Part of the problem that
19 we're dealing with, and one of the preliminary matters
20 that we're going to get to after the conclusion of
21 customer testimony, is actually the type and number of
22 issues which we're going to address in this
23 proceeding.

24 It's been presented by the utility company
25 that only those issues which were protested are

1 legitimate to be taken up at this point. I don't
2 think they're trying to limit the Commissioners from
3 delving into these areas, but I think they're trying
4 to limit Public Counsel from raising additional
5 issues.

6 Public Counsel's position is that any issue
7 that they want to raise should be addressed by the
8 Commission. So we're at the stage where we've already
9 had the PAA. And so I don't want to be accused of
10 prejudging exactly what all of the issues are going to
11 be.

12 I would encourage you to stay and
13 participate. We're going to get into that oral
14 argument stage in this proceeding shortly and that may
15 give some enlightenment on how we're going to proceed
16 further.

17 **WITNESS CRUMLEY:** Is Public Counsel here
18 today, by the way?

19 **COMMISSIONER DEASON:** That's Mr. Burgess.

20 **WITNESS CRUMLEY:** Okay. From Jack Shreve's
21 office?

22 **MR. BURGESS:** That's correct.

23 **WITNESS CRUMLEY:** Okay. Thank you very much
24 on that.

25 **COMMISSIONER DEASON:** Now, as far as the

1 rate structure issue --

2 **WITNESS CRUMLEY:** Yes, sir.

3 **COMMISSIONER DEASON:** -- those are certainly
4 very legitimate questions. I don't have an immediate
5 response to you on those. If our Staff has some
6 information they want to share, I will allow them to
7 do that at this time.

8 But those are certainly legitimate questions
9 and if it was not going to be gone into before, it
10 certainly will now. Either I will ask the questions
11 or my fellow Commissioners or our Staff will ask these
12 questions to make sure that the rate structure is fair
13 and reasonable.

14 **WITNESS CRUMLEY:** And there's one other
15 thing, too, while I'm thinking about it that I could
16 use your help on. When I built these buildings, as a
17 contractor back in the early 70's, then the logical
18 thing to do was to build a unit with a single water
19 meter. So we have some units where we have three
20 residences with one water meter.

21 In an effort to save money, conserve water
22 and all the other right things, I've already contacted
23 Pinellas County about putting three water meters on
24 the building.

25 My problem is, that Pinellas County supplies

1 my water. Mid-County provides the water treatment.
2 We have vacancy situations so we've already -- we've
3 run into some problems at the county level with paying
4 charges for water conservation, not because we're not
5 conserving, but because we have a vacancy which throws
6 or average gallonage all over the place. If you have
7 a unit that has two vacancies for two months, the
8 gallonage drops. When you put people back in it goes
9 way up and it goes off the specter so I get paid --
10 I'm penalized even though -- it's the system. Trust
11 me.

12 So in an effort to do that, we are
13 considering individually metering each unit, which
14 would be the great way to get people to conserve. I
15 don't mind paying the expense to do that.

16 But the other problem I have is how to
17 handle vacancies. If someone moves out right now, I
18 pay the water. But there is a situation where you
19 continue to pay sewer charges even if the unit's
20 vacant.

21 So what I need to do is to see how that
22 would be effected by Mid-County's policies. I don't
23 know where that is. In other words, I would like to
24 conserve water for the state of Florida. I have some
25 policies that are keeping me from doing that

1 financially. And that's something I need to have
2 addressed.

3 Also, one final statement, then I'll let you
4 go. I understand that any company has a right to make
5 a return on its investment. I'm not here saying that
6 our services should be free. I'm not here saying that
7 this company should not receive a fair return on its
8 investment. I think they should. We need private
9 companies like this to operate in the public sector.
10 Not opposed to that at all.

11 I just want to be absolutely sure that this
12 company is being run as efficiently as possible; that
13 I'm not subsidizing mismanagement and that I'm paying
14 basically for the best service that I can get. And
15 that's where I need your help. Thank you very much.

16 **COMMISSIONER DEASON:** Before you leave --
17 I'm sorry.

18 **MS. BRUBAKER:** I was going to ask,
19 Mr. Crumley, you said earlier at the customer meeting
20 in '97 you spoke with an engineer. Was that a utility
21 engineer or a Staff engineer? Can you recall his
22 name?

23 **WITNESS CRUMLEY:** That was an engineer from
24 the utility company. I met with some of the people
25 from the utility company after the meeting and I'm --

1 excuse me for not knowing. I don't remember who
2 exactly -- I think you chaired that meeting.

3 **MR. WILLIS:** Yes, I did.

4 **WITNESS CRUMLEY:** And I think we had
5 conversation on this. The problem I have is we have
6 an unusual design.

7 When this system was originally designed it
8 started in the subdivision that I own property. It
9 was added to. We took a mobile home park and added a
10 mobile home park to it, and of course, it uses a lift
11 station to do that. So the problem is, from various
12 times of the day, the lift station pumps a huge amount
13 of effluent -- if that's the right word -- into the
14 system. It comes down to a rather shallow manhole, on
15 which I own a number of properties on that corner and
16 has to make a 90 degree turn.

17 The problem is, the liquids make the turn;
18 the odors do not. So I have continuing problems with
19 complaints on odor. The utility has looked at the
20 problem. The utility has tried to make some efforts
21 to take care of it. I'm afraid it's a major design
22 flaw that needs to be corrected. We talked about
23 bypassing the manhole, doing this kind of stuff. I
24 even offered to contribute to repairing the concrete
25 that had to be torn up, and basically it's a dead

1 issue with them. They've done nothing about it.

2 To be honest with you, I should have
3 probably pushed more, but I didn't. But this has
4 been -- I mean, if I had a dime for every time this
5 has been gone over with this company I'd be a wealthy
6 man. Does that answer your question?

7 **MS. BRUBAKER:** Yes. Thank you.

8 **COMMISSIONER DEASON:** Further questions?
9 You raised a question about the possibility of having
10 the City install individual metering, but you're
11 unsure how would that affect your wastewater billing?
12 Do you want some information on that so you can make
13 an informed decision?

14 **WITNESS CRUMLEY:** What I've got -- and we
15 went through this. I'll try to give you the logic.
16 We went through an impact fee in Pinellas County and
17 that made it financially impractical to add individual
18 meters, if you pay the impact fees.

19 The bottom line was that my point of view
20 with Pinellas County was that by me adding metering,
21 I'm going to use less of a utility. I'm going to use
22 less water. Why should I pay an impact fee? I'm
23 going to use less.

24 They said, "Well, that's the rules." So I
25 said, "Fine, I'll give you a bond. I'll put up a bond

1 for all the impact fees. You study it for a year. If
2 I use less water in that year, period, you give me my
3 bond back."

4 Finally, they came around to realizing that
5 they were having a policy that was detrimental to what
6 they wanted to accomplish. So they've agreed to
7 install the meters at basic meter charges, which is
8 fine. I've agreed to pay the plumbing costs to
9 re-plumb the buildings.

10 My problem is, if I have a vacancy, which
11 occurs in our business quite frequently, now I'm
12 receiving no revenue, I'm not using any water nor
13 sewer, is there going to be a minimum monthly rate
14 that I'll be paying just to have the availability of
15 the service and that could make it financially
16 impractical for me to make this move?

17 So I've guess the point I'm making is,
18 everybody in the state of Florida keeps talking about
19 conserving water. But nobody seems to be looking at
20 the policies in different local governments and state
21 governments that make that a financial
22 impracticability.

23 **COMMISSIONER DEASON:** Let me provide you
24 some initial information and you may want to meet with
25 our staff and maybe they can provide you some

1 additional information.

2 But if you'll, once again, refer to Page 3
3 of our report and the rate structure there, you will
4 see that there is an amount identified as a base
5 facility charge.

6 **WITNESS CRUMLEY:** Yes.

7 **COMMISSIONER DEASON:** It's my understanding
8 that that charge is assessed every month --

9 **WITNESS CRUMLEY:** That's correct.

10 **COMMISSIONER DEASON:** -- regardless of
11 usage. So that if you do have a vacancy and that --
12 that charge would continue. There would be no
13 gallonage charge. There would be no gallonage --

14 **WITNESS CRUMLEY:** Right.

15 **COMMISSIONER DEASON:** -- incentive, but it
16 would be the basis --

17 **WITNESS CRUMLEY:** Right. Well see, and the
18 problem is at this point I supply the service. So I
19 pay the base fee in my operating expense. And
20 there -- whether there is a vacancy or not doesn't
21 really matter because I'm supplying it to two other
22 units or one other of the three units.

23 If I go ahead and put individual metering
24 in, now we're going to take the base charge for the
25 same triplex, from 30 -- well, let's take your

1 recommended final rate, \$29.31. That's going to go to
2 roughly almost \$90.

3 The problem is, if the tenant -- even though
4 the tenant is going to be the end user, if the tenant,
5 who has now gone to Michigan, doesn't pay the bill, it
6 gets billed back to the homeowner or property owner.
7 That's me. So I see the potential of being billed
8 back for base charges. Okay. That's not a practical
9 reason for me to make this change.

10 So that's -- these are the little things. I
11 understand that you have basic systems. But if water
12 conservation is what we're all about, we need to look
13 at some of these things and come up with some ways
14 that -- because I'm one of a million small property
15 owners in this state who are in this same situation.

16 We can't live with our tenants. We can't
17 tell them, don't take a long shower, turn the water
18 off when you're shaving. We try to instruct them, we
19 try to limit them. But the best way to get people to
20 conserve is to make them pay for the resource, bottom
21 line. There are some policies like this that are
22 keeping us from being able to do that. I think
23 everybody losses from that.

24 **COMMISSIONER DEASON:** Let me ask you one
25 further question. Do you have a 5/8ths by 3/4ths inch

1 meter now --

2 WITNESS CRUMLEY: Yes.

3 COMMISSIONER DEASON: -- for all three
4 units?

5 WITNESS CRUMLEY: That's correct.

6 COMMISSIONER DEASON: Just one?

7 WITNESS CRUMLEY: Uh-huh. Which works fine.
8 Services them.

9 COMMISSIONER DEASON: Okay. All right.
10 Thank you.

11 WITNESS CRUMLEY: Thank you so much.

12 COMMISSIONER DEASON: Mr. Burgess.

13 MR. BURGESS: Commissioner, Mr. Crumley was
14 the last customer listed on -- for those who signed
15 up.

16 COMMISSIONER DEASON: Yes, sir. Please come
17 forward. Come to the microphone and identify yourself
18 for the record.

19 MR. RUTHERTON: Bob Rutherton. I'm a
20 customer of the system and I have not been sworn. Do
21 you need to do that?

22 COMMISSIONER DEASON: Yes, sir, I do. If
23 you would please raise your right hand.

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BOB RUTHERTON

appeared as a witness and testified as follows:

DIRECT STATEMENT

COMMISSIONER DEASON: Please proceed.

WITNESS RUTHERTON: My address is 2192 Marketa Drive in Spanish Acres subdivision. I am a customer of the system. I'm also the Director of Public Works and Utilities for the City of Dunedin, where you are today, and which is somewhat unique.

I'm familiar with the City of Dunedin's wastewater rates that we charge here and I've looked at the rates that are being proposed for this area immediately adjacent to our city.

I would like to say that looking at the calculations, they charge slightly differently; that they charge a big base charge and a small rate charge. We charge a small base charge and a high rate charge. However, when you look at the average consumption, the rates between the two utilities are very similar based on what they're proposing for their rates. So I, as a customer, would support their proposed rate increase. I think it is fair.

Also understand that when you operate a smaller utility, it's difficult to operate with the --

1 it cost you a little bit more to operate a smaller
2 utility as it does a large utility. So I think
3 they're doing a very good job based on the rates that
4 I see.

5 I would also like to say that although they
6 are transferring about 9.5% to their profit, if you
7 will, the City of Dunedin transfers about 15% to their
8 general fund for administrative expense. So while we
9 don't call it profit, we do transfer it to offset the
10 cost of our taxes. So I think it's a pretty fair rate
11 increase that's been proposed and I would support it
12 as a customer.

13 My office is right around the corner here if
14 you need any input about what we do in Dunedin. I'm
15 here all day. My office is right around the corner.
16 Thank you.

17 **COMMISSIONER DEASON:** We need to ask you a
18 question. You indicated that the city -- that the
19 City of Dunedin rates are comparable, but they're
20 weighted more towards gallonage and less on based
21 facility.

22 **WITNESS RUTHERTON:** Yes. That's correct.

23 **COMMISSIONER DEASON:** Could you just explain
24 why that is your policy.

25 **WITNESS RUTHERTON:** I think that the reason

1 we've done our rates that way over the years I think
2 is towards water conservation and trying to get people
3 to conserve, not only because we control your drinking
4 water and your sewage, as your consumption goes up, so
5 does your bill.

6 In fact, our water rates are a true block
7 water conservation rate system where the more you use
8 the more you pay per 1,000 gallons.

9 Pinellas County's water rate system is not
10 really truly a block water conservation rate
11 structure. But we're very concerned about water
12 conservation in Dunedin. In fact, we restrict either
13 one day a week watering in our city, where the county
14 allows you two days a week watering.

15 So we have -- like to encourage water
16 conservation so we have kept the heavy cost, if you
17 will, in the gallonage charge to get those that
18 conserve the ability to conserve through the rate
19 structure. And I think that's a good way to do it.

20 However, I understand on a small utility you
21 have to probably heavily weigh it. To make sure you
22 have a good base income for your utility, you have to
23 really probably weigh it more towards the block charge
24 to make sure you're revenues are pretty constant.

25 **COMMISSIONER DEASON:** Questions? Thank you,

1 sir. Let me ask, are there any more members of the
2 public who wish to testify? (No hands)

3 Let the record reflect that there are no
4 other members of the public present who wish to
5 testify at this point.

6 Let me state again that there will be a
7 customer hearing this evening at 6:30 and we will hear
8 additional comments from the public at that time.

9 Let me just, at this point, request of the
10 utility that if there is any information available
11 concerning the odor problem which was mentioned
12 earlier, whichever witness would be appropriate to do
13 that, to address that, assuming there is no objection
14 from Public Counsel, we'll entertain any information
15 you may have on that situation and bring us up-to-date
16 on that.

17 **MR. MELSON:** Yes, sir. That may be a person
18 who is not scheduled to testify, but who is here today
19 and we will put him on the stand to answer that
20 question when we get to the appropriate time.

21 **COMMISSIONER DEASON:** Please remind me when
22 would be a good time for that. That concludes the
23 customer testimony phase of this proceeding. We will
24 proceed now to the technical phase of the hearing.

25 (Whereupon, the service hearing ended at

1 10:40 a.m. and the technical hearing commenced at
2 10:41 a.m.)

3 **COMMISSIONER DEASON:** We will go ahead to
4 the technical phase of the hearing. There are some
5 preliminary matters which I mentioned earlier which we
6 need to attend to at the beginning of this phase of
7 the hearing. And so, I propose that we go ahead and
8 at least do the preliminary matters, and after we
9 conclude the preliminary matters we will probably have
10 a break before we actually begin with expert
11 testimony. So we're at the stage now to address the
12 preliminary matters.

13 **MS. BRUBAKER:** Commissioner, there are
14 several preliminary matters. If either of the parties
15 have any preference as to the order, Staff doesn't
16 particularly. Otherwise, I will just go ahead and
17 proceed.

18 The first matter that I had was with regard
19 to official recognition. The Staff would like to
20 request that the Commission take official recognition
21 of several documents and we've distributed to the
22 Commissioners a memorandum which lists those documents
23 and also to the parties.

24 Normally copies of documents would be
25 provided along with a memorandum. Unfortunately,

1 those documents are in Tallahassee at the moment, and
2 with the Commission's discretion and the parties'
3 allowance, they will be provided upon the return to
4 Tallahassee.

5 **COMMISSIONER DEASON:** Is there any
6 objection?

7 **MR. MELSON:** There appears no objection, and
8 in fact, they are all Commissioner orders so we don't
9 need to receive copies of them. We will save a tree
10 or two.

11 **MR. BURGESS:** We have copies and we have no
12 objection.

13 **COMMISSIONER DEASON:** Very well.

14 **MS. BRUBAKER:** But I'd like to ask then that
15 the special Staff memorandum as to those items be
16 entered into the record at this time.

17 **COMMISSIONER DEASON:** We will identify this
18 list as Exhibit No. 1 and without objection it will be
19 admitted into the record.

20 (Exhibit 1 marked for identification and
21 received in evidence.)

22 **COMMISSIONER DEASON:** Okay. Other
23 preliminary matters?

24 **MS. BRUBAKER:** There are several proposed
25 stipulations, four of which are addressed in the

1 Prehearing Order. I can read them into the record if
2 you like or we can refer to them by reference.

3 There is also an additional stipulation
4 which was raised pursuant to a deposition at Staff's
5 request of Mr. Carl Wenz, utility witness, on
6 June 7th.

7 That stipulation is, the parties stipulate
8 to the 1996 insurance expense amounts, allocation rate
9 and debit and credit amounts shown at the bottom of
10 Page 2 of 6 of Exhibit HYS-1. That is an exhibit to
11 Staff witness Hillary Sweeney's testimony. With the
12 understanding, however, that the parties are
13 stipulating as to the correct dollar amounts, and not
14 as to their appropriate ratemaking treatment.

15 **COMMISSIONER DEASON:** And that's the only
16 other additional stipulation, other than the ones that
17 are already listed in the Prehearing Order; is that
18 correct?

19 **MS. BRUBAKER:** That's correct.

20 **COMMISSIONER DEASON:** Okay. Commissioners,
21 what is your preference as far as addressing the
22 stipulation? Are you prepared to move forward then at
23 this time?

24 **COMMISSIONER CLARK:** I would move approval
25 of the stipulation.

1 **COMMISSIONER JOHNSON:** Second.

2 **COMMISSIONER DEASON:** It's been moved and
3 seconded. Show then that without objection the
4 stipulations listed in the Prehearing Order, as well
5 as the stipulation which Staff counsel just addressed,
6 are approved.

7 **MS. BRUBAKER:** Commissioner, just as a
8 matter of clarification, the stipulations addressed in
9 the Prehearing Order have to do with stipulating to
10 two witnesses, Charles Winston for Staff and Don
11 Rasmussen for the utility. Just as a matter of
12 clarification, that cross examination is waived and
13 that we'll insert their testimony into the record at
14 the appropriate times.

15 **COMMISSIONER DEASON:** Right, and we will
16 address that at that time, and insert that testimony
17 with the understanding that cross examination is
18 waived.

19 **MR. MELSON:** Commissioner Deason, just for
20 the record, at the prehearing conference, there was
21 some verbal discussion of the stipulations and of the
22 limited nature of a couple of them is that we were not
23 stipulating to some collateral implications that they
24 might have. That's reflected in the transcript of the
25 prehearing conference. I just wanted to make sure

1 that those stipulations are accepted with the
2 clarification that was made at the prehearing
3 conference.

4 **MS. BRUBAKER:** Those clarifications are
5 included in the Prehearing Order itself. If
6 Mr. Melson doesn't have a copy, I would be happy to
7 read them directly into the record.

8 **COMMISSIONER DEASON:** Yes. As I recall --

9 **MR. MELSON:** Actually, I withdraw that. I
10 had not sat here and read the stipulations as they
11 were written. I'm sorry.

12 **COMMISSIONER DEASON:** I think they were
13 really addressed in a factual situation and it was
14 understood that it didn't address particular policy or
15 ratemaking treatment, that those acts would or would
16 not provide.

17 **MS. BRUBAKER:** As an additional preliminary
18 matter, at the prehearing, the prehearing officer
19 requested that the parties prepare and file briefs
20 discussing Issues A, B and C in the Prehearing Order.
21 Ten minutes were allocated to each party to present
22 their arguments before this panel as a preliminary
23 matter. If you'd like to proceed with that.

24 **COMMISSIONER DEASON:** Okay. We will proceed
25 with that. Which party is to proceed first?

1 **MR. MELSON:** I suspect I am.

2 **MR. BURGESS:** Actually, it would probably
3 depend on the issue. With regard to Issue A, it's --
4 Mr. Melson has come forward. With regard to Issue B,
5 we came forward. So it would seem like it would
6 depend on the issue.

7 **COMMISSIONER DEASON:** Let me ask this
8 question. Mr. Melson, is your oral argument broken up
9 between the various issues or is it just one complete
10 package?

11 **MR. MELSON:** It can be broken up if that's
12 the easiest way to handle it.

13 **COMMISSIONER DEASON:** Very well. We will
14 address then -- we will begin with Issue A, and
15 Mr. Melson, you may proceed.

16 **MR. MELSON:** Commissioner, if the basic --

17 **COMMISSIONER DEASON:** Before -- could you --
18 I will ask Staff counsel. For members of the public,
19 could you state what Issue A is so they'll know what
20 is being argued here. I alluded to it here, but Ms.
21 Brubaker can explain.

22 **MS. BRUBAKER:** Issue A reads as follows:
23 "What issues are considered to be 'in dispute' for the
24 purpose of Section 120.80(13)(b), Florida Statutes."

25 **COMMISSIONER JOHNSON:** You should probably

1 read the statute.

2 **MS. BRUBAKER:** Okay. That Section
3 120.80(13)(b), Florida Statutes provides that
4 "notwithstanding Sections 120.569 and 120.57, a
5 hearing on an objection to proposed action of the
6 Florida Public Service Commission may only address the
7 issues in dispute. Issues in the proposed action
8 which are not in dispute are deemed stipulated."

9 **COMMISSIONER DEASON:** And just let me offer
10 this. In layman's terms what we're trying to
11 determine here are what issues are going to be
12 addressed by the Commission.

13 There was a Proposed Agency Action issued by
14 the Commission. The company timely protested some of
15 those issues within that determination. Clearly those
16 issues are before the Commission. There is a dispute
17 at this point as to whether additional issues which
18 have been raised by Public Counsel's Office are fair
19 to be considered by the Commission, and that's what
20 we're here on argument today. Mr. Melson.

21 **MR. MELSON:** Thank you, Commissioner Deason.
22 Members of the Commission, the issue really is what is
23 the meaning of an issue in dispute for purposes of
24 120.80(13)(b).

25 We believe that the fairest reading of that

1 statute is to read it that it relates to issues that
2 are raised in a timely protest, proposed agency action
3 order. That's the way, in a PAA process, that a party
4 puts issues in dispute. If no protest is made to an
5 order, than by operation of that, the law of that
6 order becomes final at the expiration of the protest
7 period.

8 We believe that the -- one of the purposes
9 of that statute was to, I guess, address a concern as
10 to whether when there is a protest, does the entire
11 order become a nullity and you have to go back and
12 relitigate every issue in the order, or are you
13 limited to hearing -- the matters actually are put
14 into dispute.

15 We believe when you read that in conjunction
16 with your existing rules on protest, which require
17 that issues be identified -- issues and material facts
18 that are in dispute be identified, that you read that
19 all together and it sets out a scheme where you don't
20 spend your time and effort, and the parties don't
21 spend their time and effort, unless somebody has cared
22 enough about what is in a PAA order to make a protest
23 and put it in dispute.

24 Public Counsel has the right, as you know,
25 under the statute to appear in any utility case.

1 Public Counsel had the right to protest the order and
2 had they protested it, they would have defined issues
3 in dispute. And the utility, had it also filed a
4 protest, would have added some issues to that. If
5 Public Counsel had filed the only protest, those would
6 be the only issues that we'd be here on today.

7 I don't believe this is an issue that you
8 would ever squarely address in the context of limiting
9 issues in a manner that got as far as this one has got
10 and got to the hearing stage.

11 There are several decisions though, that
12 you've entered that have, I believe, make it clear to
13 me that my -- the utility's interpretation of the
14 statute is the interpretation that various panels of
15 this Commission, and the full Commission, has given to
16 it in a number of cases since the statute was adopted.
17 We cite four of them in our memorandum.

18 One was another case involving a sister
19 company of this utility, the Lucy case. That case had
20 a very complex procedural background that I don't
21 intend to try to relate here. The bottom line is that
22 when that case was proceeding to hearing on Public
23 Counsel's protest of a second PAA order, this
24 Commission issued an order that essentially laid out
25 what issues were in dispute and what were not, and

1 said, in effect, that some of the issues that Public
2 Counsel even had raised in it's protest were not fair
3 game because they had not been protested in an earlier
4 PAA order; and therefore, the resolution of those
5 issues had been deemed stipulated throughout the
6 course of that proceeding and Public Counsel's filing
7 of a second protest to a second PAA order could not
8 even open them up and revive them.

9 The next case --

10 **COMMISSIONER DEASON:** Mr. Melson, you would
11 agree that was a pretty unique factual situation with
12 the way that course -- that particular proceeding
13 occurred with the various protests and withdrawals and
14 PAAs that were issued.

15 **MR. MELSON:** I would agree it was unique. I
16 would also agree that your legal staff probably
17 devoted more attention to the analysis of the issue in
18 that order than they have in any other because they
19 were trying to decide what to recommend to you about
20 the issues in dispute. They made a recommendation.
21 That recommendation was adopted and we believe it's --
22 it not only set out the ground rules, but set out
23 appropriate ground rules.

24 The second case we cite is a Florida Power
25 Corporation case, which was on a motion to dismiss.

1 The statement in that case I think is dicta, because
2 it did arise in a different context.

3 But in that case the Commission said we
4 believe that Section 120.80(13)(b) Florida Statutes
5 can be interpreted to effectively preclude a party
6 from addressing at hearing any disputed issue in the
7 PAA order that was not raised in that party's petition
8 on proposed agency actions.

9 The utility in this case carefully crafted
10 its protest to limit the amount of effort it was going
11 to have to put into this case and to identify only
12 issues that were in dispute.

13 Third order cited in my memorandum, a
14 payphone deregulation order. Commissioner Clark, I
15 believe you were the prehearing officer in that case
16 and you ruled -- that case was a little unique, too.

17 MCI had protested an order and had filed a
18 limited protest. The PAA order that was protested had
19 a provision in it that left the docket open to
20 consider some implementation matters, and what
21 Commissioner Clark's ruling was, in essence, we can
22 hold our hearing on those unresolved implementation
23 matters at the same time we hold the hearing on MCI's
24 protest. We don't have to say that the hearing is
25 going to be limited to just what MCI raised because

1 there were other issues that had affirmatively been
2 left open.

3 That's not the case here today. The only
4 issues that are open are ones that the utility opened
5 by its protest.

6 The final case we cite is a Florida Power --

7 **COMMISSIONER DEASON:** Mr. Melson, before you
8 leave that one, and I believe I'm referring -- I have
9 a copy of your filing.

10 **MR. MELSON:** Yes, sir.

11 **COMMISSIONER DEASON:** And I'm looking at
12 Page 9 of that.

13 **MR. MELSON:** Yes.

14 **COMMISSIONER DEASON:** The bottom paragraph
15 there, it indicates that the -- it says first Section
16 120.80(13)(b) limits parties to litigating the issues
17 that were raised by a timely protest.

18 And I guess my question is, do you interpret
19 that to mean that if there is a specific issue raised
20 and addressed by the PAA order, that if that
21 particular issue is protested, that only that issue
22 can be litigated even though there may be some
23 peripheral issues associated with that, that were not
24 protested?

25 **MR. MELSON:** I think in content -- I think

1 it depends, frankly, exactly on the context. And the
2 reason I say that, in a ratemaking proceeding we
3 recognize that when you change, for example, the
4 amount of plan and service you may change
5 depreciation, you may change accumulated depreciation.
6 And I believe to the extent that there are truly, what
7 I would say fall-out issues, that where every -- you
8 know, every bit of information you need to decide and
9 flows from the issue that's protested, that those are
10 appropriate.

11 In fact, our protest in this case listed
12 half a dozen issues and then listed as a seventh issue
13 any fall-out issues. We gave those as a couple of
14 examples, to the extent they are effected by the
15 matters that were affirmatively protested. In a
16 nonrate case, Commissioner, I have difficulty thinking
17 as I sit here of what would be a collateral issue
18 within the meaning of that approach.

19 **COMMISSIONER DEASON:** Let me raise this
20 question. We all know that the bottom line result of
21 a rate proceeding is to set rates. It seems to me
22 that, in essence -- and there are certainly nuances in
23 every rate proceeding and some unique character in
24 just about every rate proceeding. But, in essence,
25 there are two fundamental issues in any rate

1 proceeding.

2 One, what is the revenue requirement of the
3 company. Two, what rates do we establish to generate
4 that revenue requirement. And there can be many, many
5 subissues under those two general ones, but you're
6 going to have those two issues in every rate
7 proceeding.

8 In this particular case, you protested some
9 issues which dealt with the revenue requirement. That
10 is, how much revenue should this company be allowed to
11 collect from its customers to afford the company an
12 opportunity to earn a reasonable rate of return. You
13 protested some of those specific issues.

14 I guess my question is, since you protested
15 some of those issues which go into the overall formula
16 of calculating a revenue requirement, does that make
17 then every issue which affects a revenue requirement
18 fair game?

19 **MR. MELSON:** No, sir, it doesn't. To take
20 that approach would read 120.80(13) out of the
21 statute. It would say, even though you have limited
22 your protest, for example, to a rate base adjustment
23 and the revenue requirement consequence of that
24 adjustment, that operating expense items, which the
25 utility did not believe were in dispute, which no

1 other party raised and put in dispute, would be open
2 and fair game, and I think you'd be undercutting the
3 whole purpose of that statute, which was to enable the
4 Commission and the parties to narrow the proceedings.

5 **COMMISSIONER JOHNSON:** Mr. Melson, does your
6 analysis -- does your analysis apply to the Commission
7 itself? I know you've been saying when you referred
8 back to the dicta and some of the opinions of the
9 Commission, we talked about the parties. Would your
10 analysis and your interpretation of this issue relate
11 to the Commission? That is to say, you raised seven
12 issues, and during the course, the Staff discovers
13 something else they wanted to be addressed and Staff
14 tried to add another issue.

15 **MR. MELSON:** Commissioners, let me give you
16 two answers. First answer is, I think the rule
17 applies to prevent the Commission or the Staff from
18 introducing issues that were not protested.

19 **COMMISSIONER JOHNSON:** The law? You think
20 the law?

21 **MR. MELSON:** Yes. You took your position,
22 you made your preliminary decision at that PAA stage.

23 The second thing I have to say, though, is
24 that's -- I think that is a tougher question and it's
25 one you don't have to decide to make your ruling today

1 because the issues that are on the table that we
2 contend are subject to that rule, are issues that were
3 raised by Public Counsel. They're not issues that
4 were raised by the Commission or by the Staff.

5 And as a matter of judicial restraint, I am
6 not looking for you to give a broad ruling. I'm
7 looking for you to give a ruling as to issues raised
8 by parties.

9 **COMMISSIONER DEASON:** Mr. Melson, while
10 we're interrupting -- and we're going to give you
11 ample time because there is several questions on this
12 issue. So I know we -- originally you were given ten
13 minutes, but you're getting a lot of questions so I'm
14 not going to hold that against you.

15 Now, I don't mean to be going ahead, but
16 perhaps now is a good time for you to address this.
17 In Public Counsel's filing they raise kind of a
18 fundamental fairness issue and concerning the process
19 which you were proposing today is the only issues that
20 are specifically identified and protested are
21 legitimate to be litigated at this phase of the
22 hearing.

23 That, in essence, their argument is that if
24 we follow that, we're going to have a proliferation of
25 protests because everyone is going to protest to

1 preserve their position. In other words, the argument
2 is, is that while we issue a PAA and the bottom line
3 revenue increase may be fair and reasonable, there may
4 by some issues concerning rate base that perhaps they
5 disagree with, but they really agree with a lot of the
6 issues concerning expenses. But on the whole, they
7 kind of counterbalance each other and they can live
8 with the bottom line numbering so they don't file a
9 protest. And then perhaps to preserve the ability to
10 litigate those issues they're going to file a protest
11 even though they consider the bottom line revenue
12 increase to be fair and reasonable. How do you
13 respond to that?

14 **MR. MELSON:** I think any interpretation you
15 give to this statute is going to have consequences for
16 how your procedure is run. I think Mr. Burgess has
17 raised a fair point there. I think that if you agree
18 with me as to how the statute should be interpreted,
19 parties are going to think very carefully about the
20 necessity of filing protests in order to sort of
21 protect themselves from what the other side might do.

22 I also suggest to you, though, that if I was
23 advising a private client I might very well advise
24 them to prepare to file a protest. And if one is --
25 you know, if a protest is not filed by the other

1 party, don't file. Or if one is not filed by the
2 party, turn around the next day and withdraw it. I'm
3 not sure you can do anything that minimizes the
4 burden, that short of -- I mean, there are procedures
5 on petitions for reconsideration, for petitions and
6 cross petitions. There are procedures on appeal for
7 appeals and cross appeals. It is possible that
8 through rulemaking you could adopt those kinds of
9 procedures under this statute, but given -- I think
10 without a rulemaking, that to do that on an ad hoc
11 case-by-case basis stretches the statutory language
12 pretty far.

13 **COMMISSIONER DEASON:** That, I guess, leads
14 me to my next question, and you raised the point about
15 the procedural process and appeals and reconsideration
16 that basically a party has the ability to cross appeal
17 or to file a cross motion for reconsideration and
18 that's not part of the process here. And you
19 suggested that perhaps we could, through rulemaking,
20 allow for a cross protest, if that is the correct
21 terminology. Do you think that we have the -- under
22 current statutory language, the ability to adopt a
23 rule which allows that?

24 **MR. MELSON:** Commissioner, I can't give you
25 a top of the head answer to that. I haven't really

1 focused on that aspect of the issue. In a way, it's
2 an approach that has some intuitive appeal, I think,
3 and would have some intuitive appeal to many of the
4 folks who practice before you and it might be
5 something that nobody would ever question whether they
6 would point to a precise place that gave you that
7 authority.

8 **COMMISSIONER CLARK:** Mr. Melson, that is
9 going to be a procedural rule and how are we going to
10 be able to do a procedural rule when we're required,
11 as I understand it, from the model rules, and I don't
12 think we have much of an ability to vary from those.

13 **MR. MELSON:** Commissioner Clark, because
14 120.80(13)(b) applies only to the Commission, and to
15 the extent that rule is imposing different
16 requirements on this agency than are applied on other
17 agencies, it would seem to me it would be an
18 appropriate case for an exception from the uniform
19 rules. I know you've got some of them.

20 **COMMISSIONER CLARK:** Don't we have to go to
21 the -- it won't be our call finally as to whether we
22 can have that rule or not; is that correct?

23 **MR. MELSON:** That's correct.

24 **COMMISSIONER CLARK:** We have to go to -- I
25 forget what it was.

1 **MR. MELSON:** I think you go to the Governor
2 and Cabinet, but I'm not sure.

3 **COMMISSIONER CLARK:** I think we do, too. So
4 in order to implement that we have to go to them?

5 **MR. MELSON:** I believe that's correct.

6 **COMMISSIONER JOHNSON:** Mr. Melson, in your
7 opening statements you kind of went to the purpose of
8 the statute, and I guess it's a relatively new
9 statute, and you talked about administrative finality
10 and efficiencies as being one of the purposes of the
11 change in the language here.

12 Given the point that Chairman Deason made
13 with respect to what is this really, if we go down the
14 road that you'd like, it's going to cause even your
15 client to maybe file something that they may later
16 have to withdraw or for Public Counsel to always file
17 a protest. How does that lead to efficiency and
18 finality, and how has that, in fact, then meet the
19 purposes of the statute?

20 **MR. MELSON:** I guess I can't tell you that
21 makes it a very efficient process. I think there are
22 inefficiencies, in essence, no matter which way you
23 interpret it. And it just seems to me, the more
24 logical reading of the statute and the reading that
25 this Commission or panel have given every time you

1 looked at it, is a reading that gives effect to what I
2 think is pretty much the plain meaning.

3 **COMMISSIONER CLARK:** Mr. Melson, let me ask
4 you one other thing. Was the Lucy case a panel?

5 **MR. MELSON:** Yes.

6 **COMMISSIONER CLARK:** What about the Power
7 Corp. case?

8 **MR. MELSON:** Yes. Lucy was a panel, I
9 believe with you and Commissioner Deason and I forget
10 who the third one was. Here it is. It's in -- I
11 think I've indicated the panels in the footnotes.

12 The Lucy case was Commissioner Deason,
13 Commissioner Clark and Commissioner Jacobs. The Power
14 Corp. case was you, Commissioner Clark; and
15 Commissioners Kiesling and Garcia. The payphone order
16 case that I referred to was you as prehearing officer,
17 and then the Florida Power & Light case, which I
18 haven't talked about, was the entire Commission, but
19 it was while Commissioner Kiesling was still on the
20 Commission before Commissioner Jacobs had joined.

21 **COMMISSIONER DEASON:** You want to direct
22 back to your case now since we interrupted you?

23 **MR. MELSON:** Yes. And I will address it
24 very briefly. Again, a strange procedural context so
25 I don't think it's directly controlling. But what

1 you've cited in that case is when an order is cited,
2 one and only one issue, that a protest went to the
3 entire order. I think, as I suggested to you earlier,
4 that's distinguishable from a rate case where you
5 decide many issues and they are, in large part,
6 several. Thank you.

7 **COMMISSIONER DEASON:** Okay. With that, you
8 anticipated my next question. And that is, that
9 the -- you stated at the bottom of Page 10, and I will
10 quote that. It says, "because there was only one
11 substantive action in the PAA order and that action
12 was protested, the Commission ruled that the entire
13 PAA order was put in dispute."

14 And that was a fairly unique case. It was
15 basically a question of whether we were going to
16 continue with an earnings protection plan basically
17 for the benefit of the customers and for the company.
18 And we came out with a plan. We issued that as a PAA
19 and there was a protest of that.

20 Now, that plan had various parts or segments
21 of the various procedures that were going to be
22 following if certain earnings levels were achieved and
23 there were certain actions that were prescribed
24 concerning depreciation and other matters, if my
25 memory serves me correctly.

1 So they were many things that entered into
2 the determination and that's what we were going to
3 proceed with if there were no protests. But we did
4 have a protest and we determined that, in essence,
5 there was only one key issue, and that is, were we
6 going to continue with this earnings plan for
7 protection of the company and its customers.

8 And we determined that everything is in
9 dispute because that was the one substantive
10 determination. I guess I asked the question before
11 about really in a rate case you only have two
12 substantive determinations. One is level of revenue,
13 and the second one being, what are the rates which
14 would generate that revenue.

15 And it's your position that even though
16 those are the ultimate decisions, since the order
17 addresses and enumerates specific issues, that is what
18 the key question is and if only one of those specific
19 enumerated issues is specifically protested, only then
20 does it become in dispute for purposes of Florida
21 Statutes?

22 **MR. MELSON:** Yes, sir. And I was not
23 involved in the Florida Power & Light case. It
24 sounded to me, from reading the Commission's order, as
25 though you essentially had voted on one issue; do we

1 continue the plan or don't we continue the plan.

2 The PAA stated in this docket, I mentioned
3 it, said you voted on 20-some odd issues. And the
4 Commission essentially, in the way it approaches these
5 cases, recognizes those as several.

6 **COMMISSIONER CLARK:** Is there any
7 legislative history to this provision?

8 **MR. MELSON:** I don't know. My legislative
9 person was on vacation all of last week and I was,
10 therefore, unable to complete my research.

11 **COMMISSIONER CLARK:** My recollection is we
12 asked for this. That we asked for this provision
13 because we were struggling with the idea that a
14 protest puts the entire case in dispute and there was
15 no reason to do this and that it was intended to say,
16 you know, here's the PAA. Now, if you got any
17 problems you better say something, and those are the
18 only things that we're going to look at.

19 **MR. MELSON:** I'm glad you had that
20 legislative history because I think it supports my
21 position.

22 **COMMISSIONER CLARK:** Well, you know, that is
23 sort of my recollection. I've been wrong before.

24 **MR. MELSON:** And I was not involved in that.
25 And, as I say, I have been unable to find anything.

1 **COMMISSIONER JOHNSON:** Do you remember what
2 year it was? Susan, is that the --

3 **COMMISSIONER CLARK:** I can say, it was -- I
4 think since you have been on the Commission. When was
5 it was enacted, Rick? Can you tell me?

6 **MR. MELSON:** 1996.

7 **COMMISSIONER DEASON:** Does that conclude --

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

9 **COMMISSIONER DEASON:** Thanks, Mr. Melson.
10 Mr. Burgess.

11 **MR. BURGESS:** Thank you, Commissioners. I
12 think we need to start with the statutory language and
13 I have -- as I have put it in my prehearing brief.

14 The beginning point is, the statute doesn't
15 say what Mr. Melson would like the interpretation to
16 be. It says that an objection to a hearing on an
17 objection to a proposed agency action shall address
18 only those issues that are in dispute.

19 You've got two different orders there, two
20 different terms. You've got "an objection" and you've
21 got "in dispute". You have to make those two equal in
22 order to arrive at the interpretation that Mr. Melson
23 would have. And I don't think it linguistically makes
24 sense because if the Legislature had intended or if
25 the Commission had intended with its request of

1 language saying -- sending over to the Legislature to
2 restrict it to those which are in the objection, it
3 would simply say, shall be -- the Commission may hear,
4 may address only the issues raised in the initial
5 objection.

6 In other words, if it had wanted that to be
7 the interpretation, it simply would have said so. And
8 the fact that it doesn't, I don't think -- I'm not up
9 here to tell that you that it raises without any
10 possibility to the contrary that the two are
11 different, but it certainly raises the inference. So
12 then we look at some of the procedural results of
13 interpretation.

14 **COMMISSIONER JOHNSON:** May I ask you a
15 question before you get to the procedural results?
16 Then what does this provision add or change? What
17 does it -- under your interpretation, would we be
18 doing it any differently than we do before this
19 Commission's act?

20 **MR. BURGESS:** Absolutely. I think it does
21 two things and gets back to the question that
22 Commissioner Clark addressed. I think the reason for
23 it is two points; very interrelated but neither one
24 having to do with the issue that we're talking about
25 here.

1 The first being that you start off with the
2 administrative process that says anything involving
3 substantial interest shall be governed by 120.569 and
4 57. Those require certain things before a Commission
5 decision can be reached. An appellate court will look
6 for certain things to underpin a Commission decision;
7 evidence in the record; application of a rule; nonrule
8 policy, although that is in a little bit of flux right
9 now; but all of these things of which a proposed
10 agency action is not one of them.

11 A proposed agency action cannot underpin a
12 Commission determination on an issue involving
13 substantial interests of a party. So this says,
14 notwithstanding 120.569 and 120.57, a proposed agency
15 action will support a Commission decision. So it
16 takes it out of the framework, the restrictive
17 framework of 569 and 57.

18 The other point is --

19 **COMMISSIONER DEASON:** Mr. Burgess, before
20 you look at that, can you explain that again? I'm not
21 really following the point you're trying to make in
22 all honesty.

23 **MR. BURGESS:** 120.569 and 120.57 are what
24 determine what the administrative process is for
25 dealing with an issue that affects a substantial

1 interest of a party. There are certain things -- if
2 you do have not certain things in the record in
3 arriving at your decision then that decision cannot be
4 upheld.

5 One of the things, of course, is the easiest
6 thing is evidence of record. The other is whether you
7 have simply taken oral argument and it's not and it's
8 not an issue that involves a disputed issue of
9 material fact.

10 The other is, as I say, you've got the means
11 of -- right now that we're dealing with in a little
12 bit of flux of the nonrule policy; applying policy.
13 The other is applying a direct rule.

14 All of these things can support a Commission
15 decision. All of these things are applicable under
16 120.57, 120.569.

17 **COMMISSIONER DEASON:** That doesn't apply for
18 a PAA.

19 **MR. BURGESS:** A PAA is not one of those
20 things. So if you are relying simply on a PAA, if a
21 PAA is all you've got, it does not meet the model of
22 120.569 and 120.57. So this is saying,
23 notwithstanding those two requirements, if it's a PAA,
24 that does meet the requirement. Now, a record that
25 includes only a PAA, that's all there is, that now

1 does meet the requirement.

2 And the second point is similar. It's
3 exempting it from 569 and 57. But, it is filtered
4 through a decision by the Supreme Court and this
5 involves the South Florida natural gas case. And I'm
6 not sure, Commissioner Clark, whether you were counsel
7 on it or not. I see that Mr. Balinky argued it for
8 the Commission, but you perhaps worked on it
9 nevertheless.

10 This is the case wherein, if you'll recall,
11 the utility said basically we filed something, nobody
12 objected to it, therefore, there is no hearing to be
13 had on the issues, and therefore, the Commission
14 cannot put us to the requirement of meeting a burden
15 of proof when nobody objected to it. And a court
16 rejected that approach saying basically this. And
17 again, I'll read some of the language.

18 This is -- 534 Southern 2nd and I'm reading
19 at 695. This is the Supreme Court reading the
20 position or reciting the position of the company at
21 this point. "Further, because no evidence was
22 presented by the Commission, no material issues exist,
23 thus, precluding the Commission from a formal
24 proceeding."

25 Their statement responds to that. "We

1 reject this contention. The act of filing creates
2 issues of material fact for all factors comprising the
3 justification for the increase."

4 Okay. With that being the filter through
5 which 57 has to be interpreted, that means that the
6 entirety of the filing is then subject to putting the
7 company on proof. This is, again -- this particular
8 statute is, again, exempting this from that strict
9 process.

10 It's saying, under a PAA, notwithstanding
11 that interpretation of 120.57, a company does not have
12 to be put -- have to put on proof on all of those. If
13 it's an issue that is not put in dispute, then even
14 without the company putting on a case on that, the
15 record nevertheless will stand to underpin the
16 decisions in a PAA. Once again, the point being,
17 simply to remove this from the process of 120.57 and
18 is 120.569.

19 But, none of those points, none of those
20 reasons have anything to do with changing the process
21 under which issues are brought into dispute. Issues
22 are brought in dispute through the Commission's
23 deliberate process of the prehearing access.

24 And that, just like Mr. Melson said, yes,
25 the model rules require that somebody filing a

1 petition can include all issues of material fact. But
2 in that, the case is not limited to the issues of
3 material -- to the issues brought up in the initial
4 pleading. The case goes on, on all the issues that
5 are defined, as the parties bring them through the
6 deliberate prehearing process. And there's no reason
7 to make that distinction here.

8 So I think that's the basic legislative
9 history. That's why we're here where we are with this
10 particular language and none of it calls for this
11 restriction that it be tied to the original protest.

12 **COMMISSIONER CLARK:** Mr. Burgess, I need you
13 to -- if we made a decision today agreeing with you,
14 how could we reconcile it with our decision in the
15 Lucy case?

16 **MR. BURGESS:** That's a difficult question,
17 Commissioner. It is a difficult situation because I
18 will agree with this.

19 Even though I don't think there's anything
20 absolutely definitive or binding at this point, it
21 does appear, as I look at the case, that the
22 Commission's direction on this has been as Mr. Melson
23 asserts. And so this will be contrary to that. You
24 have a legitimate record upon which to base it and I
25 think you clearly can, and simply say, this is the

1 proper interpretation. But it is -- yes, it does
2 appear to be contrary to the direction the Commission
3 is going and that's part of what is vexing me
4 through -- excuse me.

5 **COMMISSIONER CLARK:** It is vexing to me too,
6 because I would like to have a process that, you know,
7 the parties kind of weigh what they want to do. That
8 if nobody else protests they're going to be happy and
9 it goes away. But if somebody else protests, well, it
10 ought to be the same thing as a cross thing. If
11 they're going to take it up you want to make sure that
12 those things that you didn't agree with are taken up
13 too, and I think the answer to it is to do what
14 Mr. Melson said, is to establish the ability to cross
15 protest in a very limited period of time.

16 **MR. BURGESS:** If I may address that. The
17 only problem with that is if you adopt a rule within
18 the statute that says, yes, you may cross protest, and
19 you establish some procedure for it, I agree that that
20 is a reasonable basis to do it. The problem is, if
21 you do that, assuming the rule is not contrary to the
22 statute, then that rule would be adopting an
23 interpretation that "in dispute" does not mean
24 relating back to the original objection. And if
25 that's the case, if that's the interpretation, then

1 there is no reason to go through that at all because
2 that's all we're saying at this point is to go through
3 the Commission's normal prehearing process for
4 identifying issues.

5 **COMMISSIONER CLARK:** Yeah, but I think what
6 we're saying is to put it in dispute, you've got to
7 protest it and -- but we're going to put up -- we're
8 going to establish a two-step protest.

9 **MR. BURGESS:** I think that's fine. I just
10 say that that is contrary to what Mr. Melson is saying
11 that "in dispute" means in the original protest.

12 **COMMISSIONER CLARK:** Well, I don't think
13 it's contrary if you don't say original protest, you
14 say protest.

15 **MR. BURGESS:** Yes. You're right. You're
16 right. If you say protest. I'm just not sure, if
17 that's your interpretation, that it's then necessary
18 to apply this as a shackle that it appears is driving
19 this whole thing right now. Because to me, quite
20 frankly, it appears that this very inadequate process
21 from the standpoint of efficiency is being forced by
22 this interpretation that is not necessary. I mean,
23 even as we discuss this, what we're saying is, well,
24 let's make some distinctions here. And so that's what
25 troubles me.

1 And I guess, the only other issue on the --
2 Mr. Deason -- Commissioner Deason' covered the issues
3 that we would have with regard to the inefficiency of
4 the process.

5 The only other one that I would add to it is
6 that it's not only offensive strategy, it's also
7 defensive strategy. In other words, not only do I
8 think in terms of, "well, I can raise these and I
9 don't have to worry about the other side," also I have
10 to worry about, "am I going to be --" there are two
11 sides to this. One is, am I going to be able to raise
12 the issues that I want to raise. The other is, right
13 now, as I sit and try to decide whether to protest
14 something or whether to take an appeal or whether to
15 take a reconsideration, even if I've got a valid
16 basis, one of the things that goes through my mind is,
17 all right, I've got validity on Issues A, B and C, but
18 as I read the overall result, the other side can raise
19 D, E and F, and I'm worried about those.

20 So, I may be circumspect about raising the
21 issues that concern me because I'm afraid of what the
22 other side can bring forward.

23 Well, under this circumstance, not only do I
24 not worry about the other side, if I come forward and
25 have a protest, if the other side has already

1 protested, then I've got to protest these to get them
2 in, and if they haven't protested, there is no reason
3 not to. There is not that negative side. There's not
4 that concern that the other side can hurt me more than
5 I can hurt them.

6 **COMMISSIONER CLARK:** That's the beauty of
7 the cross -- allowing the cross appeal.

8 **MR. BURGESS:** Exactly. That's exactly
9 right. I agree 100%. And if it were set up to where
10 there were some duration for which identification of
11 issues is required, that's not something that I would
12 necessarily object to. But I think once again, that
13 does demonstrate that this statute does not strictly
14 say that in dispute means only those which have been
15 raised in the initial protest.

16 **COMMISSIONER CLARK:** Let me ask you this.
17 What is the language that allows for a PAA to begin
18 with? Is there a statute that allows for that? Is it
19 in 367 perhaps?

20 **MR. BURGESS:** I better not -- I don't know.
21 I will say this. That the term PAA is that -- my
22 recollection of the general term of art is not
23 proposed agency action, but intended agency action or
24 something along those lines, but I can't answer you
25 specifically.

1 **COMMISSIONER CLARK:** I agree with you.
2 That's in 120. Notice of intended action is something
3 an agency can give. But I think in our statutes we
4 have -- we use proposed agency action. And my
5 question is, is the language describing a proposed
6 agency action require that all disputed issues be --
7 do they use that terminology "disputed issues" in the
8 statute?

9 **MR. BURGESS:** Commissioner, it would be
10 improper for me to try to answer that. I don't know.
11 As I looked through the statutes to try to determine
12 the other usages of "in dispute", I did not see it in
13 there. I saw it in other areas where "in dispute"
14 clearly meant -- as it's being practiced -- clearly
15 meant those issues that are brought up in the course
16 of the -- of normal prehearing process, just like in
17 120.57(1); it says "issues in dispute". And, of
18 course, the Commission's interpreted that to be issues
19 that come up in the course of the prehearing process.

20 I'd like to, if I could, just address a
21 couple of other issues that you've already dealt with
22 in discussion with Mr. Melson.

23 This is what I would say with regard to how
24 it would bind the Commission or if it would bind the
25 Commission Staff with regard to issues. We need

1 something definitive on this to know where it's going
2 to be. This is by no means a threat. I'm just using
3 this as an example.

4 If you rule against us, if you rule with the
5 interpretation that Mr. Melson has, and as a result of
6 our needing to know definitively what the answer is,
7 we take this up with the District Court, and the
8 District Court sides with the Commission and with
9 Mr. Melson and says, "yes, issues in dispute do mean
10 issues that are raised in the objection," well, then I
11 would argue that if that is the interpretation, then
12 there is no room to say it applies to the parties, it
13 restricts the parties, but it does not restrict the
14 Commission. Because what it says is, "a hearing may
15 only address the issues in dispute." That's all of
16 us. That's not restricted to the issues that I
17 wanted -- restricting the issues I want to raise or
18 restricting the issues a utility wants to raise. That
19 is a hearing.

20 And if that is the grounds for which --
21 under which it restricts us in this case, that is,
22 that an issue in dispute is that which objected to,
23 what the language says is a hearing may only address
24 that. And I would suggest at that point that it would
25 bind the Commission, the Commission Staff, as well as

1 any of the parties.

2 Again, a result that -- I mean, sometimes we
3 as parties are concerned when the Commission raises
4 something that is outside of us, but we recognize that
5 it's the Commission attempting to fulfill its
6 responsibility to come up with overall reasonable
7 rates and addressing everything, even if a party is
8 not -- we recognize that. But I would say this. If
9 this is read that way, the way it's instructed, it
10 applies to all authorities in this and not just the
11 parties.

12 **COMMISSIONER JOHNSON:** Could you address for
13 me -- I was sort of like Chairman Deason with respect
14 to when I first read your brief; really trying to
15 understand your interpretation of this language and I
16 think I get it now.

17 But the operative words here would be the,
18 "notwithstanding 120.569 and 120.57," because you're
19 saying, under those two statutes you could have an
20 objection and raise other issues. But under --
21 because of this new statute, you can only -- no, you
22 got to --

23 **MR. BURGESS:** There are two points. This is
24 doing two things as I understand it. First, it is
25 adding legitimacy to a proposed order just of itself

1 as supportive of a Commission decision without
2 anything else. Whereas, before you get this, if
3 you're dealing with just straight 120.57 and 569,
4 there was the concern of, well, the PAA is really
5 nothing. It's really nothing that otherwise exists in
6 the Administrative Procedure Act that otherwise
7 legitimizes decisions by the agency.

8 So the first thing is to create something
9 that says a proposed agency action is itself the
10 record evidence necessary to support it. And the
11 second is to -- I assume, to prevent the application
12 of 120.57(1) as it has been interpreted by the Supreme
13 Court in South Florida Natural Gas, which basically
14 said, every item that is the underpinning of a rate
15 increase is the subject of a hearing. And this is
16 saying, "No, not so. Only those items that are in
17 dispute." And so it exempts it from that requirement.
18 And that's what I understand the point of it being,
19 the administrative point of this being, to make
20 certain that exists.

21 Now, the argument could have been made that
22 the process -- and the arguments were made -- that the
23 process, as it existed before, could work. That is,
24 the parties get together and they -- everything that
25 they don't want to put on they stipulate, just like

1 you do in a conventional final suspend rate case. But
2 I think there was a concern that what exactly it meant
3 when you had a proposed action, which is defined
4 elsewhere, and you had an objection to it that created
5 a de novo hearing, what happens to the balance of the
6 proposed action that parties don't want to dispute.

7 **COMMISSIONER CLARK:** But, you know, I don't
8 think in you're first argument that it's so -- the PAA
9 order itself can support a decision is accurate as one
10 of the reasons it was done because 120 is already a
11 provider for agencies to put out a notice of what they
12 intended to do, and unless anyone protested it, it
13 would be binding. So that has been legitimate since
14 120 was enacted.

15 **MR. BURGESS:** Except my understanding was,
16 what was always complicating that situation -- that
17 factual situation is, you put out a proposed agency
18 action and somebody protests. Does that then -- and
19 that causes a de novo hearing. Does it put you back
20 to a de novo hearing on every aspect of that which is
21 included in the proposed agency action, or only those
22 parts of the proposed agency action that were not
23 protested?

24 In other words, what happens to the balance
25 of it? Is the status quo -- on those issues in which

1 nobody addressed, is the status quo what it was, what
2 was last approved in the previous Commission order?
3 Or is it 120 -- or is it the proposed agency action?

4 **COMMISSIONER CLARK:** Well, what was
5 previously done was, was it in their petition or was
6 it what the Commission did in the PAA?

7 **MR. BURGESS:** Yes. And this defines that.
8 This says --

9 **COMMISSIONER CLARK:** Okay.

10 **MR. BURGESS:** -- a reasonable record is that
11 portion of the PAA which has not been brought in
12 dispute.

13 In conclusion, I again, will recognize that
14 it appears that the Commission has been going in this
15 direction. And I simply say, I think this is a very,
16 very problematic procedural result and the Commission
17 clearly has it in its discretion to reevaluate this.
18 The Commission is not bound by the statutory language
19 to consider "in dispute" to be those items brought in
20 the original protest. And so I recommend that the
21 Commission allow issues that are raised in the normal
22 prehearing process for which we already have a model
23 to proceed. Thank you.

24 **COMMISSIONER CLARK:** Okay. Let me ask you
25 one other question. If we decide that you're wrong,

1 that because you didn't protest it you have no ability
2 to take them up, are you asking us to, nonetheless,
3 take that evidence so you can preserve that on appeal?

4 **MR. BURGESS:** I had intended -- basically if
5 you rule that way, I intended to make proffer of the
6 evidence at the time Mr. Melson moves to strike that
7 which we prefiled and to preserve it in that fashion.

8 **COMMISSIONER CLARK:** Okay.

9 **MR. BURGESS:** That doesn't do that much for
10 me because for us to get something definitive it
11 really seems like the Commission has to --

12 **COMMISSIONER CLARK:** In order to go up and
13 get it decided -- and if it's decided one way, here's
14 what it is, and if it's decided another way, here's
15 what it is. It doesn't appear that we can avoid it.
16 If they decide contrary to what we did, it would come
17 back down to us for us to take some action.

18 **MR. BURGESS:** That's correct, but what I
19 would suggest is that if a party decides that they
20 need to take it up because it's contrary to their
21 interests in a particular case, and they think they
22 got a good case, that it be sent up with the most
23 logical interpretation which I think is the
24 interpretation that parties can bring something into
25 dispute during the course of the process that has been

1 used for every other case. There's no reason that
2 that process has to be scrapped in light of the
3 statutory language.

4 **MR. MELSON:** Commissioner Deason, if I might
5 respond for about 30 seconds on one point.

6 Mr. Burgess said in his memo and he said a couple
7 times this morning, that in deciding what is in
8 dispute you can look to 120.57(1) and see what the
9 Commission's normal procedures are for defining issues
10 in dispute.

11 I think Commissioner Johnson was starting
12 down the right track when she pointed out that the
13 statute starts with, notwithstanding 120.57, this is
14 the rule. So I submit that the normal procedures
15 under 120.57 are simply not a consideration.

16 **MR. BURGESS:** May I address that?

17 **COMMISSIONER DEASON:** Yes, you may.

18 **MR. BURGESS:** I agree with what he's saying
19 that this says "notwithstanding", and it
20 differentiates from that. And my only point is, it
21 differentiates from that for the purposes for which I
22 have spoken, not for the purposes of redefining the
23 term "in dispute".

24 **COMMISSIONER DEASON:** Further questions?
25 Does Staff wish to add anything at this point?

1 **MS. BRUBAKER:** I suppose it would be simply,
2 Commissioner, to say that the PAA process is itself a
3 unique animal. It's meant to streamline the
4 administrative process, which is sometimes cumbersome,
5 even at best.

6 It seems to me that it is distinguishable in
7 the statute from a typical 120.57 hearing. Although I
8 haven't done any exhaustive legislative history, my
9 understanding has been that the statute was passed
10 essentially to help further promote that efficient
11 process and to keep away from re-litigating issues
12 which were approved through the PAA process and were
13 not protested.

14 **COMMISSIONER JOHNSON:** On the procedural
15 point, I guess that's where this is a bit confusing
16 because I can look at the statute and on it's face I'm
17 more convinced by the arguments put forth by the
18 utility. But when you say the purpose of the statute
19 is to promote the efficiency and finality, policy
20 arguments raised by Public Counsel make more sense.

21 It's like, if this is what we intended if we
22 were the ones that brought forth this language, the
23 Legislature intended for us to have a process that's
24 more efficient and provide a finality, it strikes me
25 that this language doesn't necessarily get us there,

1 unless we do maybe the next step of some cross appeal.
2 It's like we need to take one more step to get us
3 there because this isn't getting us there.

4 **COMMISSIONER CLARK:** Well, there haven't
5 always been cross appeals. It used to be, I'm sorry
6 to say, by the time I was practicing when it was --
7 you didn't have cross appeals and you went and stood
8 to see if the other party was going to file. And you
9 didn't file if they didn't file, but if they did, you
10 put yours in right in behind them. And that was the
11 strategy you had to watch, and that was clearly
12 available to the Public Counsel in this instance.

13 **COMMISSIONER JOHNSON:** Now, will we have the
14 authority to do that in this instance? It's kind of
15 to the issue that you raised, Susan, do we have -- are
16 we bound by some model rule? And I know you addressed
17 that somewhat, Mr. Melson. But if we interpret this
18 the way that you did, you could then later argue that
19 the law didn't give us the authority to do the cross
20 appeal rule.

21 **MR. MELSON:** I think Commissioner Clark
22 suggested the right analysis a little earlier, which
23 is, statute talks about an objection to a proposed
24 action. Today the only objection provided for in your
25 rules is a protest. If you amended your rules to

1 provide that an objection can be a protest or a cross
2 protest, I think that would resolve some of the, you
3 know, concerns that you're expressing and would appear
4 to me that it would be consistent with the statutory
5 language.

6 At this point, though, since you don't have
7 that rule, the only objection in this case is the
8 original protest, so we're a little different factual
9 situation.

10 **COMMISSIONER JOHNSON:** So just to be clear,
11 the rule that we would adopt would go to kind of
12 define the objection as the initial --

13 **MR. MELSON:** A timely protest or a cross
14 protest filed within ten days, for example, like your
15 reconsideration rules.

16 **COMMISSIONER JOHNSON:** I see. Okay.

17 **MS. BRUBAKER:** Just as a point of
18 clarification, Section 120.5475 Florida Statutes
19 provides that an agency may petition for variance from
20 the Uniform Rules. It would go before the
21 Administrative Commission, the Legislature for
22 approval.

23 Another point I'd like to raise is simply to
24 make -- I think there is a distinguishing factor
25 between a party who protests at the outset of the

1 case, as in this case the utility did, and an
2 intervenor, which OPC is in this case. Intervenor's
3 legal precedent simply provides that they are,
4 essentially, parties with a limited status in that
5 they take the case as they find it. Our rules
6 specifically provide for that. It may not be a
7 perfect process, given the interpretation of the rule,
8 but I think it is what was intended under the statute.

9 **COMMISSIONER CLARK:** So you're saying that
10 because they're simply an intervenor and at the time
11 they intervened the only thing in dispute was what is
12 in the protest, they cannot now put anything at issue?

13 **MS. BRUBAKER:** For this type of case, yes,
14 that is my interpretation.

15 **COMMISSIONER DEASON:** And explain that
16 further. You're saying regardless of whether or how
17 we define the term "in dispute" in the statute, Public
18 Counsel, by the fact that they intervened at the time
19 that they did, that they're precluded from raising any
20 additional issues?

21 **MS. BRUBAKER:** Well, it's really part and
22 parcel with this particular statute, Commissioner.
23 With the 120.57 hearing, I believe initially
24 intervenors are allowed to raise certain issues in the
25 prehearing process even though, once again, a rule was

1 provided that they take the case as they find it. I
2 believe that in the context of this kind of situation,
3 that means subject to 120.80, which means the issues
4 are those that are raised in the timely protest.

5 **COMMISSIONER DEASON:** Okay.

6 **COMMISSIONER JOHNSON:** But if we did the
7 rule and they were -- did a cross appeal or cross
8 petition, whatever we end up calling that, then they
9 wouldn't be intervenors, it would be --

10 **MS. BRUBAKER:** Yes, that's correct. They
11 would be, in essence, a party in the way that somebody
12 who files a cross appeal or a cross -- well, you
13 wouldn't get party transfer, but party cross petition
14 for reconsideration -- but it would put them on a
15 party footing.

16 **COMMISSIONER JOHNSON:** Uh-huh, got you.

17 **COMMISSIONER DEASON:** Commissioners, we've
18 addressed Issues A. We still have two other
19 preliminary issues that need to be addressed. Would
20 your preference be to hear argument on those or make a
21 determination on Issue A?

22 **COMMISSIONER JOHNSON:** To make a decision on
23 A. I think they can be bifurcated.

24 **COMMISSIONER CLARK:** Yes. We ought to make
25 a decision. Staff has a recommendation on this,

1 right?

2 **MS. BRUBAKER:** Staff provided the
3 Commissioners with an informal memorandum of
4 recommendation, yes. Our recommendation is to adopt
5 the utility's position that the issues of speed are
6 those raised in the timely protest.

7 **COMMISSIONER JOHNSON:** I can move that, that
8 issues in dispute for purposes of 80(1) -- 120.80(1)
9 and 31(b) are those raised by they utility's protest
10 and that means that Issues 5, 6, 9 and 10 shouldn't be
11 addressed at the hearing. But, I would like to limit
12 it and I think it was written in such a way that, just
13 to ensure that we were ruling as it relates to the
14 parties and that we weren't addressing the global
15 issue.

16 And also that we look into setting up a rule
17 to determine that cross appeal process, because though
18 I read the statute on its face to be consistent with
19 what Mr. Melson has argued, I don't believe it
20 ultimately gets us where we need to be so that we
21 would need to have a secondary process to allow
22 parties to react in such a way that we will have the
23 finality hopefully and the efficiency that I believe
24 the Legislature intended.

25 **COMMISSIONER CLARK:** I will second that

1 motion. I would point out that at the time this came
2 up I believe parties who might have protested this
3 were well aware of the decision and the implications
4 of not protesting an issue.

5 **COMMISSIONER DEASON:** Okay. We have a
6 motion to decide. Before we take a vote, let me just
7 indicate my position on this, so that it doesn't catch
8 anyone by surprise.

9 I'm going to disagree with the motion and
10 going to vote against it. I'm persuaded by Public
11 Counsel's argument that the terminology "in dispute"
12 does not equate to a protest.

13 Now, I also understand that this is an area
14 where there is some ambiguity and it certainly is an
15 area where we need clarification, and I think the
16 parties have indicated that this is probably going to
17 be -- there's probably going to be clarification
18 sought from the court regardless of what we do, and
19 that's fine.

20 I'm also -- my vote against the motion,
21 though, should not be interpreted as a vote against
22 that portion of the motion which encourages or directs
23 Staff to pursue a rulemaking remedy to allow for a
24 procedure that would incorporate some type of a cross
25 protest. I think that that would achieve the

1 efficiencies which we are trying to achieve by this
2 particular statute.

3 Let me also say that I'm somewhat disturbed
4 by the action that by issuing a PAA, that that and the
5 motion's interpretation of "in dispute", somehow is
6 limiting a party's ability to raise issues and perhaps
7 infringes upon, in this case, Public Counsel's ability
8 to properly represent customers before this agency.

9 I do realize and agree that there were other
10 remedies available. Public Counsel could have filed
11 protests within the period of time. But I think that
12 is the inefficient way of conducting this.

13 So, with that clarification, the motion has
14 been made. It's been properly seconded. All in favor
15 say "Aye".

16 **COMMISSIONER CLARK:** Aye.

17 **COMMISSIONER JOHNSON:** Aye.

18 **COMMISSIONER DEASON:** All opposed say,
19 "Nay." Nay.

20 The motion is adopted. And that Issue A has
21 been decided. And as was part of that motion, the
22 issues identified will not be part of this proceeding,
23 and at some time I assume that Public Counsel will
24 attempt to make a proffer on that and we will do that
25 at the appropriate time.

1 We can now proceed to Issue B. Mr. Burgess,
2 is this your issue to proceed or is this --

3 **MR. BURGESS:** No, sir. This is not our
4 issue. We did not raise this issue.

5 **COMMISSIONER DEASON:** Mr. Melson.

6 **MR. MELSON:** He didn't raise Issue B. He
7 raised Issue C, and I believe they should travel
8 together. It might be most appropriate to hear our --
9 I would prefer to argue Issues B and C together.

10 **COMMISSIONER DEASON:** Is there any objection
11 to arguing Issues B and C together?

12 **MR. BURGESS:** I don't have any objection. I
13 just want it clear that I don't have anything to say
14 about Issue B. It's something that Mr. Melson raised
15 and if he's got a concern with the Commission's
16 authority then --

17 **COMMISSIONER DEASON:** We will allow
18 Mr. Melson -- there doesn't seem to be a lot of
19 dispute on Issue B if you interpret it -- never mind.
20 I will let Mr. Melson explain Issue B and you can also
21 address Issue C, and then we'll allow Mr. Burgess to
22 address Issue C.

23 **MR. MELSON:** Commissioners, the issue
24 Mr. Burgess raised is whether the Commission should
25 take evidence on a protested issue when the PAA

1 granted the utility all the remedy that was sought on
2 that issue.

3 I wanted to make sure that the Commission
4 regarded that as a policy decision and not as a
5 decision on their legal authority. But I think
6 clearly you have the legal authority and, in fact,
7 under 120.80(13) we just talked about the obligation
8 to hear matters that are in dispute that had been
9 raised by a timely objection.

10 Essentially, the utility in this case is
11 suggesting a pro forma adjustment for some
12 construction projects that were completed in 1997,
13 shortly after the close of the test year, and the
14 issue is how much of a pro forma adjustment. In the
15 MFRs, the utility included a pro forma adjustment at
16 an average balance. That was a mistake on the
17 utility's part. The utility should have included a
18 pro forma adjustment for the full balance.

19 In the PAA Order the way the Commission
20 Staff went through the mathematics of making the
21 adjustment pointed out to us the oversight in the
22 MFRs, because they said, we're going to give you the
23 entire amount of the project and then ended up with an
24 order which showed a negative balance in a
25 construction work in progress account, and therefore,

1 an offset, if you will, to what they had given us.

2 We raised that in our protest. And Public
3 Counsel frames the issue as when a utility gets every
4 dollar it wants -- every dollar that was identified in
5 the MFRs as related to a specific issue, can it then
6 protest.

7 I believe the Commission's precedent, and
8 the correct policy, is that a utility's rate request
9 is limited by the dollar amount of revenues that are
10 requested. If there is a change in cost of capita,
11 for example, up or down, prior to the time a final
12 decision is made, that can affect the revenues awarded
13 with the only restriction being you can't give the
14 utility more dollars than it asked for.

15 The Commission has a long history of
16 correcting oversights in MRFs; some up, some down, and
17 so long as the case we put on, including the correct
18 inclusion of that full amount of CWIP, does not cause
19 us to exceed revenues that we originally requested, I
20 think you got -- I think you got probably a legal
21 obligation here. You clearly have the authority to
22 hear it and hearing it would be consistent with your
23 past practice. Thank you.

24 **COMMISSIONER DEASON:** Mr. Burgess.

25 **MR. BURGESS:** Yes. Commissioners, I start

1 off by citing to a previous decision where we've
2 decided that only issues in dispute can be heard and I
3 just want you to realize that what we're dealing with
4 here is a situation where the issue is the utility's
5 disputing the utility. Mr. Melson cites precedent as
6 the Commission --

7 **COMMISSIONER DEASON:** Excuse me, Mr.
8 Burgess. I hate to interrupt, but there is a noise
9 and it is distracting. It seems to be some type of a
10 beeper. (Brief pause. Beeping stopped.)

11 Okay. You may want to start over because it
12 was distracting.

13 **MR. BURGESS:** I have nothing to say about
14 the Commission's authority to address this. I'm not
15 questioning the Commission's legal authority. It's
16 just a question of propriety in this case. We've got
17 a situation where the Commission -- (telephone
18 ringing) -- he's doing this, isn't he? Where the
19 Commission -- where the company came in and they asked
20 for a post test year, CWIP. CWIP a lot of times isn't
21 even allowed a test year. Now, a post test year, CWIP
22 and the depreciation expense on it. And the
23 Commission gave it to them. And the company came back
24 in and said, "No, we dispute that. That's what we
25 want to put in dispute, that which we asked for and

1 you gave us."

2 It strikes me that this is something that as
3 a matter of policy the Commission should not allow
4 something to be in dispute when it's merely a matter
5 of the company disputing itself.

6 Mr. Melson cites two things. He cites
7 precedent to conventional rate cases. Well, we have
8 earlier decided the conventional rate cases, the
9 precedent for those don't have application here.

10 So, I don't think that's a valuable
11 precedent to rely on and I simply ask you to consider,
12 in light of the fact of two ancillary issues, that
13 that is -- that rate case expense is being sought on
14 the initial filing on the deliberation as to whether
15 to protest this where the Commission gave it all it
16 asked for, and now, on the protest itself of the issue
17 for which the Commission made a determination, I think
18 it's altogether improper for that to be allowed.

19 And the second point is, on its effect on
20 the interim rates. The company sought interim rates
21 on its initial filing. The PAA determined the amount
22 of interim rates that were excessive based on the
23 initial filing and now the company comes back in and
24 protests the PAA, changing not a mistake; not an
25 addition error; not something that everybody knows

1 would have been asked a certain way, but changing the
2 regulatory philosophy under which they're seeking
3 rates.

4 There's nothing unusual about the seeking of
5 average balance CWIP, especially when it's based on
6 post test year CWIP. And now to come in and say, "no
7 no, we didn't want average balance and that was a
8 mistake, and therefore, give us all of the mistaken
9 amount and the new amount and the cost it takes us to
10 correct the mistake," I think it is improper public
11 policy.

12 **COMMISSIONER CLARK:** Let me ask you a
13 question. We might correct it, but could we -- even
14 if we corrected it, could we say, "well, you know,
15 because you had to bring it to hearing and take a
16 crack at it, the responsibility is yours and we're not
17 going to allow rates case expense pursuant to that,
18 and furthermore, we're not going to -- it's going to
19 remain as part uncorrected in the interim because you
20 should have brought it, but from this point forward we
21 want to correct it"? Could we bifurcate it in that
22 way?

23 **MR. BURGESS:** You could do both of those,
24 and yes, you are correct. That would satisfy the
25 peripheral objections that I raise. I think still, as

1 a matter of public policy, it's improper to allow in a
2 protest of a proposed agency action, a complete shift
3 in regulatory philosophy. It's like changing the test
4 year.

5 **COMMISSIONER CLARK:** Just so I'm clear, are
6 they asking for year end?

7 **MR. BURGESS:** It's not clear to me precisely
8 what they're asking for. I will say this, and not
9 intending to use denigrating terms, but it's sort of a
10 hodgepodge of various projects; some of which took
11 place; some of which were going on in the test year;
12 some of which were going on in the post test year and
13 the year following the test year. And there was an
14 aggregate balance for all of these projects, I assume,
15 when they were completed some point in the year after
16 the test year. And they're asking for that ending
17 balance to be in there and I don't think it's exactly
18 a year end. And I don't think they exactly ask for
19 average balance. They used a conventional short cut
20 method for coming up with an average balance to
21 expenditure items.

22 **COMMISSIONER DEASON:** You're not protesting
23 the Commission's authority to address the issue? It's
24 a question of whether it should be -- the adjustment
25 should be allowed as a matter of policy?

1 **MR. BURGESS:** Yes.

2 **COMMISSIONER CLARK:** So we can take evidence
3 on it.

4 **MR. BURGESS:** I'm arguing against it. I
5 think -- I think the regulatory treatment of its own,
6 forgetting the procedural means through which the
7 company is seeking it, setting that aside, I think it
8 is wrong regulatory philosophy. And I also say,
9 though, that the procedural means by which it's
10 seeking this, that is, changing its test year in a
11 protest of a PAA wherein the PAA gave it what it asked
12 for in the initial pleading, is simply something that
13 the Commission should say, "no, we're not going to
14 allow you to come in, ask for something and get that,
15 and say, well, that was easy. Let me ask for more.
16 Now that I've got this and have no jeopardy there, let
17 me ask for more." I think that is improper.

18 **COMMISSIONER DEASON:** Mr. Melson, I have a
19 question for you.

20 **MR. MELSON:** Yes, sir.

21 **COMMISSIONER DEASON:** And this relates to
22 Page 13 of your filing, at the very bottom of the
23 page, and again, for purposes of my question, I'll
24 just quote what you say there. Beginning on the third
25 line of that last paragraph at the bottom, you

1 indicate, "a utility's obligation for a rate increase
2 requests that the overall amount of revenues based on
3 test year conditions with any of the appropriate pro
4 forma adjustments. It does not request a specific
5 amount of revenues associated with each component or
6 subcomponent of rate base and expenses."

7 Mr. Melson, I find that totally inconsistent
8 with your argument on Issue 1. I'm sorry. On Issue
9 A. When I asked you about, isn't the -- in essence,
10 the issue before the Commission the appropriate amount
11 of revenue requirements. And if there is a protest to
12 that, all of the subcomponents of that become fair
13 game. You indicated no. That each issue stands on
14 its own, each issue is -- can be litigated and decided
15 in and of itself with no impact, except for fall-out
16 issues, which I understand that.

17 But here for purposes of this argument, you
18 seem to be taking the opposite position in that you
19 indicate an application for a rate increase is an
20 overall amount of revenue. And it's not the specific
21 issues or the specific revenues of each component
22 which is relevant. Can you clarify that?

23 **MR. MELSON:** I will try. The amount of
24 revenues associated with this post test year
25 adjustment is a severable issue. You can decide that

1 in isolation from all of the other issues in the case.

2 The question was, as a matter of policy
3 should you allow the utility to change its position
4 on that issue in the context of a protest. And my
5 only point here was that your precedent is that the
6 cap on what a utility can recover is the total amount
7 of revenues requested. There may be puts and takes
8 within the subissues but you apply as an absolute
9 limit the original request, and we're not seeking to
10 change that approach or that policy. We're willing to
11 live that as a cap. We believe below that cap you can
12 deal separate with individual issues. I hope that was
13 responsive.

14 **COMMISSIONER DEASON:** So for purposes of
15 your request, it is a dollar amount that you're
16 requesting and you substantiated that request by
17 various positions on the various subcomponents that go
18 into that calculation. And that you're free to change
19 your positions or your argument on any of those
20 subcomponents just so long as those changed positions
21 or arguments do not cause you to exceed the total
22 dollar amount that you originally requested?

23 **MR. MELSON:** Yes. And let me give an overly
24 simplistic example. Assume a situation in which the
25 company came in and justified everything in the MFRs

1 with two exceptions. One exception was a cost of
2 capital because the Commission in the interim had
3 adopted a new leverage graph that reduced the cost of
4 capital.

5 The other change was, that the rate case
6 expense prudently and actually incurred, exceeded what
7 the utility estimated at the outset. And assume those
8 two exactly balanced each other. The utility could
9 still get the full revenue requirement that it
10 requested in its application, despite the fact that
11 the components of that revenue requirement have
12 changed and that was my only point.

13 **COMMISSIONER DEASON:** Any further questions?
14 Staff.

15 **MS. BRUBAKER:** I don't have anything to add.

16 **COMMISSIONER DEASON:** Commissioners, any
17 final questions or a motion?

18 **COMMISSIONER JOHNSON:** I'm having a problem
19 with -- based upon something Commission Clark said a
20 little earlier. Perhaps because you raised some
21 alternatives that we might have, I think that we do
22 have the authority to hear this, and perhaps we should
23 hear it. But in terms of what we do, maybe we should
24 defer that until a final vote.

25 **COMMISSIONER CLARK:** Absolutely. I think

1 the fact that we have the legal authority to take
2 evidence on protested issues, if there is agreement
3 on that, then it seems we may have to take the
4 evidence if there's -- if we don't have the legal
5 authority to say no. But what we do with that
6 evidence is another matter and the implications of
7 that and this --

8 **MR. BURGESS:** Commissioner, may I say this?
9 This has nothing to do with readdressing the issue,
10 but what Commissioner Clark said, I need to clarify
11 for the record. We are not stipulating affirmatively
12 that the Commission does have legal authority for
13 this. I want to preserve the opportunity in some
14 future case perhaps as the factual circumstances
15 perhaps change from this one, to argue that. I'm
16 simply saying, it's not an issue for us in this
17 particular case.

18 I just want to make sure that the record
19 reflects that. That we are not affirmatively agreeing
20 to the Commission's authority. We are simply not
21 taking issue with the issue that Mr. Melson raised in
22 this case.

23 **COMMISSIONER CLARK:** Okay. With that
24 clarification --

25 **COMMISSIONER DEASON:** We need a little bit

1 of clarification. Because as I read Issue B in
2 conjunction with Issue C, there is a slight difference
3 there. Issue B, of course, is legal authority, and I
4 understand Public Counsel's position that they're not
5 questioning that at this point, but they're preserving
6 that at some point if they wish to pursue it then.

7 Issue C, though, it goes to more -- Issue C
8 is more like Issue A in that it's, should the
9 Commission take evidence. I mean, on Issue A the
10 utility was arguing that, no, you shouldn't allow
11 Public Counsel to present evidence, and we've made
12 that decision that we're not going to have that
13 evidence.

14 Issue C says, should we even take evidence
15 on this particular issue because of the factual
16 situation that the company has granted all that they
17 requested for that issue initially.

18 **COMMISSIONER CLARK:** Well, I just want to be
19 clear that I think Issue A was not whether or not we
20 could allow it. It's, what does the statute allow.
21 It was a legal question as well as -- and as I
22 understand it you're not taking issue at this point in
23 this case, and if you don't take it now you won't be
24 able to take it in this case with respect to that
25 issue.

1 **MR. BURGESS:** For the record, I have no
2 intention through the processing of this case at all
3 to raise that issue.

4 **COMMISSIONER CLARK:** So it strikes me that
5 it appears that we don't have the legal authority to
6 say no to Mr. Melson; that you can't present this
7 evidence because he protested. But what we do with
8 that, we are not bound in any way to not take the
9 action he's requested in protest.

10 **COMMISSIONER DEASON:** Well, I guess Issue C
11 to me can be read, is -- since we've taken a very
12 narrow definition of what constitutes a protest to an
13 issue within a PAA order, does the fact that you
14 protest -- you say, "well, Commission we agree with
15 what you did but we made the mistake, and therefore,
16 we are protesting what you did because even though you
17 did what we asked you to do, we didn't ask you the
18 right thing." Is that a proper protest and does that
19 meet the definition of "in dispute" for purposes of
20 the statute?

21 **COMMISSIONER CLARK:** There is no party that
22 is saying it doesn't. But that is what Mr. Burgess
23 wants to preserve for another day.

24 **COMMISSIONER DEASON:** And let me ask
25 Mr. Melson then. You believe that the terminology "in

1 dispute" in the statute means that "in dispute" means
2 not finding fault or error in the Commission's
3 decision, but finding fault or error in the filing?

4 **MR. MELSON:** If it means finding error in
5 the Commission's decision, even if in this case it's
6 an error that was, in part, the result of what the
7 utility did, yes, sir.

8 **MS. BRUBAKER:** Commissioners, if I may.
9 Issue C speaks to Issues 1 and 1-A and with special
10 specificity to Issue 1, which is, how should CWIP be
11 treated in this case. Just as kind of a general
12 statement, the Commission has in past cases looked to
13 errors and oversights and made adjustments where
14 appropriate, provided, however, that the total
15 requested revenue does not go up. So there is some, I
16 think, precedent for our ability to do that. It is --

17 **COMMISSIONER JOHNSON:** Specifically as the
18 facts were presented to us today? By that I mean,
19 where the utility got what they requested and then
20 they determined that they made a mistake? Have we
21 addressed that issue on its face?

22 **MS. BRUBAKER:** If I remember correctly the
23 case I'm thinking of had an error in one of the
24 schedules, but I'm afraid I can't tell you off the top
25 of my head. That is right on point. But I know

1 corrections to filing MFRs have been made.

2 **COMMISSIONER JOHNSON:** It strikes me that
3 Public Counsel, they aren't really objecting to those
4 kind of errors. They're making this a special case
5 and that these facts kind of stand alone because it
6 was the utility's request. They got what they
7 requested and Mr. Melson said that it was a mistake
8 and now they're raising that as --

9 **MS. BRUBAKER:** I suppose, in part, it is a
10 distinction. A utility is saying that an error was
11 made. Public Counsel, I believe, is -- please correct
12 me if I'm misinterpreting anyone's comments -- is
13 saying that this is really just a shift of policy
14 being made after the fact.

15 **MR. BURGESS:** If I may take that invitation,
16 that the distinction is that in all the circumstances
17 that I'm familiar with, that you're speaking of, that
18 the company is speaking of correcting errors, it is
19 within the case as it was filed and the distinction
20 I'm saying is we've got a proposed -- we've got the
21 Commission acting. This is after the Commission has
22 acted on what the company filed and I don't know of
23 any circumstance where a company has been granted
24 something in full in a proposed agency action, come
25 back and changed its philosophy from what it was

1 seeking and the Commission's entertaining evidence as
2 to why that should be changed.

3 I understand. I've dealt any number of
4 times with differences in numbers that come in in MRFs
5 and that type of thing within the case, within a
6 120.57 proceeding. But I never encountered it and
7 this particular type of thing that we have said is
8 exempted from 120.57 type of process and has its own
9 circumstances and its own proceedings where a company
10 has come in and changed basically what it's seeking in
11 test year.

12 **COMMISSIONER CLARK:** Mr. Chairman, for
13 purposes of moving this along, I'm going to move that
14 we go ahead and take the evidence. I don't think -- I
15 think we may have to do that. But with respect to
16 whether we allow it or not, I think we have a clear
17 policy decision we may want to make on this because
18 there have been -- there are cases in -- where we went
19 to a full rate proceeding and the utility was -- I
20 think it was United Telephone, was continually
21 updating their information. And the court said to us,
22 at some point, you can tell them no more. We're not
23 going to take it.

24 And as a matter of policy we may want to
25 say, "once that PAA is issued, that's it. You're not

1 going to get -- you can have no further opportunity to
2 correct it." We may want to say that. We may want to
3 do it in this case, but we need to do it now.

4 **COMMISSIONER DEASON:** That's fine. I have
5 no problem taking the evidence and we can proceed on
6 with just one question, and perhaps the parties can
7 think about it anyway.

8 What would have happened if Public Counsel
9 had filed a protest in this case and the company had
10 not filed a protest whatsoever and we now find
11 ourselves in this phase of the hearing and you find a
12 mistake and since you didn't file a protest, and
13 consistent with your argument on Issue A, then are you
14 free to come in and say, "this is not a protest. We
15 made a mistake. Now we want to change our filing"?

16 **MR. MELSON:** No, sir, I cannot. And, in
17 fact, the situation in the Lucy case in the second
18 protest, Public Counsel had not protested rate case
19 expense. We were faced with going to a hearing where
20 we could not claim any rate case expense beyond that
21 in the PAA. That was a result we weren't happy with,
22 but that's what the statute required and we lived with
23 it.

24 **COMMISSIONER DEASON:** All right.

25 **COMMISSIONER JOHNSON:** Second.

1 **COMMISSIONER DEASON:** It's been moved and
2 seconded. Without objection show the motion is
3 adopted.

4 Okay. That addresses the preliminary
5 issues.

6 **MR. BURGESS:** Commissioner, may I raise
7 another preliminary issue that I was not anticipating?

8 **COMMISSIONER DEASON:** Sure.

9 **MR. BURGESS:** It is a motion that the
10 Commission take notice of the Public Service
11 Commission order. That I apologize. I do not have
12 the order number and will provide it before this
13 hearing ends. But take official notice of the Public
14 Service Commission order establishing the current
15 leverage formula for the purpose of establishing water
16 and wastewater return on equity.

17 **MR. MELSON:** We got no objection to that.

18 **COMMISSIONER DEASON:** No objection.

19 Commission will take notice of that order.

20 Okay. Other preliminary matters.

21 **MS. BRUBAKER:** One more from Staff,
22 Commissioner. Staff would like to make an oral
23 request that the Commission strike certain portions of
24 the prefiled rebuttal testimony of the utility of Mr.
25 Frank Seidman. I provided a page to the parties and

1 Commissioners outlining those particular pages and
2 lines which we are requesting be stricken, and we're
3 requesting that they be stricken essentially for
4 hearsay purposes. And I can walk you through the
5 particular examples if you like.

6 **MR. MELSON:** Commissioner Deason, I would
7 suggest that we perhaps deal with this when we get to
8 Mr. Seidman's rebuttal testimony. That will give us
9 an opportunity to look at it and respond to it in real
10 time.

11 **MS. BRUBAKER:** I think that would be
12 appropriate.

13 **COMMISSIONER DEASON:** All right. We will
14 take that up at that point.

15 **MR. MELSON:** Commissioner, I got some other
16 preliminary matters, but it's essentially in the form
17 of identifying the MFRs as an exhibit and official
18 recognition list. It might be more convenient to do
19 that after a short break because I could pass some of
20 those things out.

21 **COMMISSIONER DEASON:** Okay. Mr. Burgess, do
22 you have anything else for this matter?

23 **MR. BURGESS:** Did we take more than our 10
24 minutes?

25 **COMMISSIONER DEASON:** I think that the

1 questions prolonged the ten minutes considerably.
2 Given that it's almost 20 after 12:00, let me say
3 something.

4 Let me ask a question. Are there places to
5 eat close by? How long do we need for lunch, I guess,
6 is my basic question.

7 **COMMISSIONER CLARK:** That are places within
8 walking distance.

9 **COMMISSIONER DEASON:** Would 45 minutes be
10 sufficient? I tell you what, let's go ahead and we'll
11 reconvene at 1:15.

12 (Thereupon, lunch recess was taken at
13 12:15 p.m.)

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15 (Transcript continues in sequence in
16 Volume 2.)

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