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BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for rate )  
increase and increase in service )  
availability charges by )  
Southern States Utilities, Inc., )  
for Orange-Osceola Utilities, Inc., )  
in Osceola County, and in Bradford, )  
Brevard, Charlotte, Citrus, Clay, )  
Collier, Duval, Highlands, Lake, )  
Lee, Marion, Martin, Nassau, )  
Orange, Osceola, Pasco, Putnam, )  
Seminole, St. Johns, St. Lucie, )  
Volusia and Washington Counties. )

DOCKET NO. 950495-WS

VOLUME I  
MORNING SESSION

PROCEEDINGS: SPECIAL AGENDA  
BEFORE: JULIA L. JOHNSON, Chairman  
J. TERRY DEASON, Commissioner  
SUSAN F. CLARK, Commissioner  
JOE GARCIA, Commissioner  
E. LEON JACOBS, JR.,  
Commissioner  
DATE: Friday, November 13, 1998  
TIME: Commenced at 9:30 a.m.  
PLACE: Betty Easley Conference Center  
4075 Esplanade Way  
Room 148  
Tallahassee, Florida  
REPORTED BY: RAY D. CONVERY, Court Reporter

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

## P R E S E N T

## PARTICIPATING:

1  
2  
3 RALPH R. JAEGER, PSC, Legal  
4 LILA JABER, PSC, Legal  
5 ROSANNE GERVASI, PSC, Legal  
6 BOBBIE REYES, PSC, Legal  
7 CHARLES HILL, PSC, Division of Water and Wastewater  
8 MARSHALL WILLIS, PSC, Division of Water and Wastewater  
9 TROY RENDELL, PSC, Division of Water and Wastewater  
10 KENNETH HOFFMAN, Florida Water Services  
11 JOSEPH CRESSE, Florida Water Services  
12 BRIAN P. ARMSTRONG, Florida Water Services  
13 FORREST LUDSEN, Florida Water Services  
14 TONY ISAACS, Florida Water Services  
15 JACK SHREVE, Office of Public Counsel  
16 HAROLD McLAIN, Office of Public Counsel  
17 JOHN JENKINS, Marco Island Fair Water Rate Defense  
18 Committee  
19 MICHAEL TWOMEY, Sugarmill Woods Civic Association  
20 RON BROADBENT, Sugarmill Woods Civic Association  
21 JOHN MAYLES, Sugarmill Woods Civic Association  
22 RALPH NEELEY, Sugarmill Woods Civic Association  
23 CHARLES STEPHENS, The Moorings and  
24 The Moorings Homeowners Association  
25

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

1  
2 CHAIRMAN JOHNSON: Let me make a couple of  
3 preliminary announcements for staff to provide the  
4 notice information. This is being broadcasted over  
5 the Florida Channel, we want everyone to know that.  
6 We may need to take our time and talk a little slowly  
7 just for the administrative aspects of this. And  
8 also, Commissioner Garcia is participating from  
9 Miami, so although we can't see him here, he can see  
10 us on the screens, and although we don't see the  
11 cameras for Florida Channel, they are indeed recording  
12 and it is live, it is not a delayed transmittal.

13 With that, could you read the notice?

14 MR. JAEGER: Pursuant to notice issued November 2,  
15 1998, and by verbal announcement at the November 2,  
16 1998, special agenda, this time and place has been set  
17 for a special agenda to consider the remand of the  
18 rate case application of Southern States Utilities,  
19 now known as Florida Water Services Corporation,  
20 Docket No. 950495-WS.

21 CHAIRMAN JOHNSON: Are we coming through okay on  
22 the mike system, and can everyone in the audience hear  
23 me?

24 Okay. We'll take appearances.

25 MR. HOFFMAN: Good morning, Madam Chairman and

1 Commissioners. My name is Kenneth Hoffman. My  
2 address is 215 South Monroe Street, Suite 420,  
3 Tallahassee, Florida 32301. With me this morning is  
4 Joseph Cresse, as well as Brian P. Armstrong and  
5 Forrest Ludsen. Mr. Armstrong is vice-president and  
6 general counsel for Florida Water Services  
7 Corporation. Mr. Ludsen is vice-president of business  
8 development for Florida Water. We're all here this  
9 morning along with Mr. Tony Isaacs of Florida Water on  
10 behalf of Florida Water Services.

11 CHAIRMAN JOHNSON: Thank you.

12 MR. SHREVE: Jack Shreve, Public Counsel, Harry  
13 McLain, here on behalf of the citizens of the State of  
14 Florida, Claude Pepper Building, Tallahassee,  
15 Florida.

16 CHAIRMAN JOHNSON: Thank you, Mr. Shreve.

17 MR. TWOMEY: I'm Mike Twomey, appearing on behalf  
18 of Sugarmill Woods Civic Association. My address is  
19 Post Office Box 5256, Tallahassee, Florida,  
20 32314-5256. In the audience, Mr. Ron Broadbent,  
21 president of the Sugarmill Woods Civic Association,  
22 and three other gentlemen in the association who would  
23 wish to speak at the appropriate time. Thank you.

24 MR. JAEGER: Ralph Jaeger on behalf of the  
25 Commission staff, also Bobbie Reyes and Rosanne

1 Gervasi. Address, 2540 Shumard Oak Boulevard,  
2 Tallahassee, Florida 32399.

3 And, Commissioners, I haven't done my intro to  
4 what is going on here today, I just did the notice, so  
5 I just want to make sure you knew that. I think John  
6 Jenkins is --

7 COMMISSIONER GARCIA: Ralph, could you do me a  
8 favor, Ralph, and speak clearly and into the mike, as  
9 I cannot hear what you're saying.

10 MR. JAEGER: Okay. I'll get as close as I can to  
11 the mike, Commissioner.

12 CHAIRMAN JOHNSON: We can hear you, Joe, loud and  
13 clear, and I didn't hear the last part of your comment  
14 either.

15 MR. JAEGER: I'm saying I haven't done my intro to  
16 start this. I just did the notice. I wanted the  
17 normal intro to the staff recommendations, but I think  
18 John Jenkins has not done his appearance.

19 COMMISSIONER GARCIA: Ralph?

20 MR. JAEGER: Yes.

21 COMMISSIONER GARCIA: Just to ask the chairman for  
22 a moment, because I was not aware of this, you are not  
23 seeing me?

24 MR. JAEGER: No.

25 COMMISSIONER GARCIA: Okay.

1           MR. JAEGER: That's Joe Garcia, Commissioner Joe  
2 Garcia.

3           MR. JENKINS: I'm John Jenkins, with the firm of  
4 Rose, Sundstrom & Bentley, Tallahassee, Florida. I'm  
5 here today on behalf of Fred Kraemer, who represents  
6 the Marco Island Fair Water Rate Defense Committee.  
7 I'm also here on behalf of the City of Marco Island  
8 regarding our petition to intervene in proceedings  
9 after that.

10           CHAIRMAN JOHNSON: Are there any other lawyers  
11 that need to make appearances? I do see that we have  
12 Senator Cowan in the audience, I wanted to acknowledge  
13 her, she's been following this process for years, and  
14 I wanted to take this time to acknowledge Senator  
15 Cowan. Welcome.

16           And I do understand, Mr. Twomey, that there are  
17 several customers that are here. I'd like to  
18 acknowledge them, too. And there has been a request,  
19 particularly since this is being transmitted over the  
20 Florida Channel, that staff go through in detail the  
21 recommendation for the benefit of those listeners and  
22 so that they can understand what the Commission will  
23 be voting on today, so I'm assuming that's what you  
24 mean when you say you're getting ready to key up the  
25 issues?

1 MR. JAEGER: I was going to give a brief overview,  
2 but I wasn't going to go over all the issues. I can,  
3 I can list the issues if that's what you wish.

4 CHAIRMAN JOHNSON: Would staff be prepared then to  
5 go through the issues?

6 MR. JAEGER: We were going to go issue by issue  
7 after I give my overview.

8 CHAIRMAN JOHNSON: Okay. We'll do the overview,  
9 but when we get to the issues, we may need to go in a  
10 little more detail than we generally would.

11 MR. JAEGER: Commissioners, this special agenda  
12 item is to consider the remand of the First District  
13 Court of Appeal of the Commission's Final Order in  
14 Docket No. 950495-WS, the application of Southern  
15 States Utilities, now known as Florida Water Services  
16 Corporation, for increased rates.

17 Since that remand and partial reversal of the  
18 final order, the City of Marco Island has filed its  
19 petition to intervene. Staff believes that the  
20 Commission should rule on that petition before it  
21 proceeds with other issues.

22 Commissioners, also we need to bring to your  
23 attention that staff has recommended that only parties  
24 be allowed to participate; however, as you noted,  
25 Senator Cowan is in the audience and also there may be

1 other Representatives, and while the Representative is  
2 not a party, it has been past Commission policy to  
3 hear from sitting members of the Legislature in any  
4 Commission proceeding.

5 Before proceeding with the issues, Mr. Hill would  
6 like to address the Commission about a meeting in  
7 Citrus County that took place on November 9, 1998.  
8 Also the Commission should be aware that Florida  
9 Water, on the afternoon of November 12th, that's  
10 yesterday, submitted a revised offer of settlement and  
11 that will affect staff's recommendation on Issue 3.

12 Chuck? Mr. Hill?

13 MR. HILL: Commissioners, on Monday we had the  
14 opportunity to travel down to Lecanto, Florida, and  
15 meet with approximately 250 of the customers from five  
16 different subdivisions --

17 CHAIRMAN JOHNSON: Mr. Hill, I apologize for  
18 interrupting, but could you start over and, again, for  
19 the benefit of the audience, state who you are and --

20 MR. HILL: Sure. I'm Charles Hill with the  
21 Commission --

22 COMMISSIONER GARCIA: And Chuck, a little bit  
23 louder, because I'm having a problem hearing you.

24 MR. HILL: Sure. I can't get any closer.

25 I'm Charles Hill with the Commission. We had the



1 opportunity on Monday to travel to Lecanto, Florida,  
2 and meet with some of the customers in this docket.  
3 We met with approximately 250 of the customers from  
4 five subdivisions. We explained our recommendation  
5 and answered questions as best we could. I believe  
6 that by the time the meeting ended, the customers  
7 understood our recommendation, though they disagreed  
8 with it. I certainly did tell them that I would bring  
9 their concerns and their point of view back to the  
10 Commission, and that's what I'm doing.

11 Our recommendation, as you have read, has two  
12 parts to it. There is a part that has been remanded  
13 back to us from the court that you have no discretion  
14 in. There is a second part that the court has said  
15 we've lost, but we have an opportunity to win back or  
16 we are allowed to reopen the record if that's what the  
17 Commission decides. Our recommendation basically said  
18 to go ahead and implement increased rates and  
19 surcharges and collect that money subject to refund,  
20 but send those items to hearing that we had an  
21 opportunity to readdress. The customers and Senator  
22 Cowan unanimously said that they don't want to give up  
23 their money held subject to refund, that they would  
24 rather hold it, and should we not be able to win those  
25 issues back, that they would just be liable for that

1 in the future, but it was their preference unanimously  
2 that they not go ahead and pay the increase now, even  
3 though it would be subject to refund. And I did tell  
4 them that I would bring that message back to you.

5 So with that, I'll turn it back over to the  
6 issues.

7 COMMISSIONER JACOBS: Chuck, as I understand it,  
8 that meeting was actually called and sponsored by the  
9 County Commission, is that correct?

10 MR. HILL: I'm not sure if that's correct or not.  
11 Somebody did ask us to come down and the County did  
12 facilitate that, I'm not exactly sure who made the  
13 request. I really don't know, Commissioner.

14 COMMISSIONER JACOBS: The point I want to be clear  
15 on, however, is that that was not an official  
16 proceeding in this docket. That was simply an issue  
17 with staff coming in to provide --

18 MR. HILL: That was not a public -- that's  
19 correct. That is not a public meeting that we  
20 noticed, that we took care of. We were invited down  
21 there and we came down to meet with the customers.

22 COMMISSIONER JACOBS: Thank you.

23 CHAIRMAN JOHNSON: Mr. Hill, the customers that  
24 participated, you said there was about 250 people?

25 MR. HILL: Yes, ma'am.

1           CHAIRMAN JOHNSON: Were they from different  
2 systems, were they from --

3           MR. HILL: They were from five different systems,  
4 yes, ma'am. I don't recall them off the top of my  
5 head, certainly Sugarmill Woods, Pine Ridge, Gospel  
6 Island, Citrus Springs, and Point Woods, and there was  
7 one other one I thought -- The Moorings. And that  
8 might have been just a second name for one of the  
9 others, but those were basically the subdivisions.

10          CHAIRMAN JOHNSON: And you said as it relates to  
11 -- I guess you all took some kind of a hand vote on  
12 one of the issues of whether or not -- what was the  
13 issue? Could you explain that again where you said  
14 they were unanimous?

15          MR. HILL: Yes. Our recommendation -- the court  
16 has remanded back some issues to you to act upon.  
17 Some of those, you have no choice, we've lost that in  
18 court and we must now take action to fix that. There  
19 are two issues, and that is lot count, and the other  
20 issue is annual average versus max month flow for used  
21 and useful, those two issues we lost in court, it's  
22 been remanded back us, but the court said that we have  
23 an opportunity to reopen the record and take testimony  
24 to try to prove that if we can.

25          Our recommendation says that, based on that court

1 decision, the utility is entitled to some money.  
2 There is also some money that they're entitled to  
3 unless we win it back. So there are increases on a  
4 prospective basis and there are surcharges pending.

5 Our recommendation says increase the rates  
6 prospectively and go ahead and start collecting the  
7 surcharges, but go to hearing and allow us an  
8 opportunity to try to win those issues back for the  
9 customers.

10 Now, under our recommendation, the utility would  
11 increase their rates and begin collecting a surcharge,  
12 and should the Commission or the customers or whomever  
13 prevail, ultimately in the courts, then the utility  
14 would have to refund money with interest. If we were  
15 not successful in the courts, then there would be no  
16 refund, the customers have paid the money that they  
17 were supposed to pay. The people in attendance said  
18 that they would prefer not to pay the money subject to  
19 refund. They would just rather go ahead and let that  
20 bill keep accruing.

21 CHAIRMAN JOHNSON: And so that was explained, that  
22 the bill would keep --

23 MR. HILL: Oh, yes, ma'am, I tried to explain  
24 that, and in our perspective, there is a tab running,  
25 somebody's putting stuff on your bill.

1 CHAIRMAN JOHNSON: Sure.

2 MR. HILL: And it will continue to run until this  
3 is over with. And I believe they understand that and  
4 they unanimously said they'd rather just keep that  
5 money, and they did recognize that they could face  
6 nearly four years of consumption and back-billing  
7 should we not prevail. But it was my understanding --  
8 I mean, my belief was that they understood that.

9 CHAIRMAN JOHNSON: Okay. Thank you.

10 MR. HILL: Yes, ma'am.

11 CHAIRMAN JOHNSON: Any other questions about the  
12 meeting? Mr. Hill, you wanted to add something else?

13 MR. HILL: No, I just wanted to say that with that  
14 I'll give to Mr. Jaeger, I believe Issue 1 is a legal  
15 issue with respect to intervention and participation.

16 CHAIRMAN JOHNSON: Let me go back to the  
17 recommended issue that you discussed with the  
18 customers that they said they'd rather take their  
19 chances.

20 MR. HILL: Yes, ma'am.

21 CHAIRMAN JOHNSON: That recommendation is  
22 consistent with the proposal that we're sending over  
23 to the Legislature this year as to how to deal with  
24 this issue, that we've now been faced with surcharges  
25 and retroactive ratemaking and those kinds of things.

1           MR. HILL: Yes, ma'am, it is consistent with our  
2 legislative package and it is consistent with our  
3 practice of what we would do right now. Again, we  
4 found ourselves in '97 with a decision and then  
5 subsequent decisions from the First DCA and Southern  
6 States that lead to us believe that should the  
7 Commission's decision be taken up on appeal and  
8 ultimately the Commission be overturned on a revenue  
9 requirement issue, that that time between the  
10 Commission's final order and when it's remanded back  
11 to us, a utility would have the right to surcharge  
12 customers to gain that revenue they were entitled to.

13           While we don't like that, we recognize that was a  
14 decision made by the Supreme Court of the state of  
15 Florida and subsequent decisions by the DCA.

16           What we then have come up with -- and we do not  
17 want customers to ever pay surcharges. And so what we  
18 have come up with and what we do in our practice now  
19 with new cases that come in and what we've submitted  
20 for legislation is that when the Commission makes its  
21 final decision in a case, you will also make a  
22 decision on what rates will go into effect if your  
23 decision is appealed to the courts. And basically it  
24 will put in the higher rates subject to refund while  
25 that appeal is pending so that if it comes back and

1 the Commission loses, then there will be no  
2 surcharges. If it comes back and the Commission wins  
3 and is upheld, then there would be refunds with  
4 interest.

5 And yes, our recommendation is consistent with the  
6 legislative package, yes, ma'am.

7 CHAIRMAN JOHNSON: Thank you, Mr. Hill.

8 Any other questions regarding the meeting or the  
9 issues discussed? Seeing none.

10 MR. JAEGER: The first issue, Chairman, is should  
11 the petition to intervene filed by the City of Marco  
12 Island be granted. That petition was filed by John  
13 Jenkins, and also Ken Hoffman filed a response in  
14 opposition to intervention being granted. I think Mr.  
15 Jenkins would like to address you on that, and then  
16 Mr. Hoffman probably would like to respond.

17 MR. JENKINS: Madam Chairman and members of the  
18 Commission, the City was incorporated in August of  
19 '97. These are the first proceedings back at the  
20 Commission from the District Court of Appeal that the  
21 City would have had a chance to participate in. The  
22 City has -- is a customer of the utility. The other  
23 customers on Marco Island are now looking to the City  
24 Council to participate in this matter. Previously  
25 that was done through the Marco Island Fair Water Rate

1 Defense Committee. The committee has deferred to the  
2 City Council on these matters.

3 There are -- as a customer, the City is a  
4 substantially affected party by what happens at the  
5 Commission. There are a number of issues, including  
6 interim rate refund, the surcharge issue and possibly  
7 the reopening of the hearing on the used and useful  
8 issues, which still need to occur and in which the  
9 City could have its input. On that basis, we would  
10 ask to be allowed to intervene and to take the case as  
11 we find it at this point in time. Thank you.

12 MR. HOFFMAN: Madam Chairman?

13 CHAIRMAN JOHNSON: Yes.

14 MR. HOFFMAN: Kenneth Hoffman on behalf of Florida  
15 Water. We did file a response in opposition to Mr.  
16 Jenkins' petition. We certainly believe that there  
17 would be no legal authority to -- at this point, to  
18 allow the City to intervene on behalf of the Marco  
19 Island customers, but apart from that, we're willing  
20 to withdraw our objection to their participation.  
21 They have participated in the settlement process and  
22 we would agree, or we would at least stipulate to the  
23 staff's recommendation that the City be allowed to  
24 participate on behalf of itself as a customer of the  
25 utility.



1 CHAIRMAN JOHNSON: Any questions, Commissioners?

2 Any other -- let me interject. I see Mr.  
3 Stephens, I believe you want to make an appearance?

4 MR. STEPHENS: Yes, please.

5 CHAIRMAN JOHNSON: We'll allow you to do that  
6 right now. I know you're feeling a need to make an  
7 appearance on the record.

8 MR. STEPHENS: Yes. I apologize for being late.  
9 My name is Charles Stephens. I'm here on behalf of  
10 The Moorings and The Moorings Homeowners Association.

11 In connection with the comments about the meeting,  
12 I have to tell you that my clients have retained me  
13 just to help them understand what's going on --

14 COMMISSIONER GARCIA: Mr. Stephens, you need to  
15 speak into the microphone.

16 CHAIRMAN JOHNSON: Let me explain, Mr. Stephens, I  
17 know you came in late, and for those of you who tuned  
18 in late on the Florida Channel, Commissioner Garcia is  
19 participating from our Miami office. We cannot see  
20 him, but we can hear him.

21 MR. STEPHENS: He is out there.

22 CHAIRMAN JOHNSON: Yes, he's out there. And the  
23 connection and the sound system, because it's not  
24 working that well, you need to speak directly into the  
25 microphone to be sure that everyone can hear you, not

1 only Commissioner Garcia, but those that are listening  
2 on TV.

3 MR. STEPHENS: Very well. I'm here on behalf of  
4 The Moorings and The Moorings Homeowners Association  
5 to seek an opportunity to intervene in this  
6 proceeding. I just want to report that there is  
7 considerable confusion on their part as to what their  
8 options are, what's happening. The Moorings is a  
9 development that has taken over from a previous  
10 development and did not do the initial utility  
11 negotiations. They're feeling that they're on the --  
12 they have liability and exposure and they don't know  
13 why and they don't know from whence it comes, and so  
14 they want an opportunity to understand the record in  
15 the proceeding and to determine whether they have an  
16 opportunity or a need to participate in any further  
17 hearings or fact-finding.

18 CHAIRMAN JOHNSON: Okay. Mr. Stephens, I wanted  
19 to allow you the opportunity to make an appearance.  
20 We are in the middle of trying to deal with the Issue  
21 1 specifically. I don't -- I think, for purposes of  
22 being in the middle of that process, I saw you  
23 anxiously wanting to make that appearance for purposes  
24 of the record and I think we've achieved that. To the  
25 extent that there's another motion that you would like

1 for us to hear, we'll take that in time.

2 MR. STEPHENS: Thank you very much.

3 COMMISSIONER GARCIA: Madam Chairman, may I then  
4 go ahead and move staff?

5 COMMISSIONER CLARK: I just have a question.

6 Joe, can you hear me?

7 COMMISSIONER GARCIA: Yes.

8 COMMISSIONER CLARK: Okay. My question is, as I  
9 understood the staff's recommendation is that the City  
10 would be allowed to represent -- to intervene  
11 representing themselves. Is that your  
12 understanding, Mr. Jenkins, and the recommendation is  
13 that you be denied the opportunity to represent the  
14 citizens?

15 MR. JENKINS: That's right.

16 COMMISSIONER CLARK: Okay. One thing I think we  
17 need to do on the issue of intervention, I think we  
18 need to readdress our rules, because the staff seems  
19 to base its initial recommendation, at least as I  
20 understand it, that your initial recommendation was a  
21 strict reading of the rule indicates the City's  
22 petition is untimely.

23 Are you saying that because they could not have  
24 known that a surcharge would be likely they are now  
25 entitled to --

1           MR. JAEGER: I think the decision in what we refer  
2 to as the Southern States case, that's the -- cited at  
3 704 So.2d 555, in Southern States Utilities versus  
4 Florida Public Service Commission, the court said, "We  
5 find that the PSC erred in denying these petitions for  
6 intervention as untimely in the circumstances of this  
7 case where the issue of a potential surcharge and the  
8 applicability of the Clark case did not arise until  
9 the remand proceeding."

10           I think Mr. Hoffman has one reading of that, but  
11 the way staff reads that language is not until you get  
12 the remand that they realize they are subject to --  
13 that they are now indeed subject to a surcharge and  
14 therefore they have now standing to intervene.

15           COMMISSIONER CLARK: What that says to me is every  
16 time we are reversed on a revenue issue, that there is  
17 a new opportunity for standing.

18           MR. JAEGER: Yes, I believe there is,  
19 Commissioner.

20           COMMISSIONER CLARK: I think that's something we  
21 should consider and either address in our rules or ask  
22 them to address in the model rules, and I think the  
23 court needs to be aware of the substantial change they  
24 have made in that, and so that on a going-forward  
25 basis, everybody knows at what point they need to

1 intervene or at what point they may have additional  
2 parties who are intervening. And I just wanted to  
3 indicate that I don't think we can just treat this as  
4 something that's going to come up only in this  
5 context, that it requires us to address it on a  
6 generic basis.

7 I think Joe was ready to make a motion.

8 CHAIRMAN JOHNSON: Commissioner Garcia?

9 COMMISSIONER GARCIA: Yeah, I'll move staff.

10 CHAIRMAN JOHNSON: Is there a second?

11 COMMISSIONER CLARK: Second.

12 COMMISSIONER JACOBS: Second.

13 CHAIRMAN JOHNSON: Any discussion?

14 All those in favor signify by saying aye.

15 (Chorus of ayes.)

16 CHAIRMAN JOHNSON: Opposed?

17 Show it then approved unanimously.

18 COMMISSIONER CLARK: I move staff on Issue 2.

19 COMMISSIONER JACOBS: Chairman Johnson, I believe  
20 we do need to rule on Mr. Stephens' petition to  
21 intervene if he wants to address the Commission today,  
22 because it is noticed as parties, and so I think to  
23 allow him to address the Commission, you need to rule  
24 on his oral motion to intervene.

25 CHAIRMAN JOHNSON: Certainly. Is there a

1 recommendation?

2 MR. JAEGER: I believe he has shown that he  
3 represents a customer class and he has shown that  
4 intervention is authorized and should be allowed.

5 COMMISSIONER JACOBS: Move it.

6 CHAIRMAN JOHNSON: There's a motion. Is there a  
7 second?

8 COMMISSIONER GARCIA: Second.

9 CHAIRMAN JOHNSON: Any comments from the parties?

10 MR. HOFFMAN: The only comment I have, Madam  
11 Chairman, is that, you know, on the one hand, I think  
12 that Mr. Stephens and his client stand in the same  
13 shoes as Mr. Jenkins and the City of Marco Island as a  
14 customer of the utility. On the other hand, Mr.  
15 Joseph Jenkins has been involved from the get-go in  
16 extensive, extensive efforts to try to settle this  
17 rate case. Mr. Stephens has not. And so the only  
18 caution I have is that I would oppose any efforts on  
19 the part of Mr. Stephens coming this late in the  
20 process to disrupt the potential approval of the  
21 company's modified settlement offer.

22 MR. TWOMEY: May I comment, please? I'm Mike  
23 Twomey for Sugarmill Woods Civic Association.

24 That -- Mr. Hoffman's objection and limitation, or  
25 his attempt to limit Mr. Stephens' participation, I

1 find shocking. First of all, say on behalf of my  
2 client, we have no objection to the other customers  
3 participating at any point in the proceeding in an  
4 attempt to defend their interests here, which are  
5 substantial. The fact that Mr. Jenkins on behalf of  
6 the City of Marco Island participated in some  
7 settlement negotiation is irrelevant to the extent  
8 that Mr. Stephens and his client should be allowed to  
9 participate, and you shouldn't entertain any such  
10 thought. So I would urge to you grant the  
11 intervention and ignore any attempts by any party to  
12 limit their participation. Thank you.

13 CHAIRMAN JOHNSON: Commissioners, is there a  
14 motion?

15 COMMISSIONER JACOBS: Yes.

16 CHAIRMAN JOHNSON: There's a motion to approve?

17 COMMISSIONER DEASON: I have a question for staff.  
18 Your recommendation is intervention with no  
19 limitation, is that correct? Your recommendation is  
20 to allow intervention with no limitation?

21 MR. JAEGER: That's correct. In customer groups,  
22 we have allowed customer groups and our attorneys that  
23 represent -- I'm not -- the difference in the City is  
24 that they -- it's a more nebulous connection, it's  
25 just voters and citizens, so I think that's the

1 distinction staff is seeing.

2 COMMISSIONER CLARK: The City is only intervening  
3 on behalf of itself?

4 MR. JAEGER: That's what we -- that's what the  
5 recommendation was, yes.

6 COMMISSIONER JACOBS: And Mr. Stephens was  
7 representing the association, didn't he say that?

8 MR. JAEGER: Yes, I believe that's what he said.

9 CHAIRMAN JOHNSON: There's a motion by  
10 Commissioner Jacobs. Is there a second?

11 COMMISSIONER DEASON: Second.

12 CHAIRMAN JOHNSON: Motion and second. Further  
13 discussion?

14 All those in favor signify by saying aye.

15 (Chorus of ayes.)

16 CHAIRMAN JOHNSON: Opposed?

17 Show it approved unanimously.

18 Thank you, Mr. Stephens. I think we're on Issue

19 2.

20 COMMISSIONER CLARK: I move staff.

21 CHAIRMAN JOHNSON: Is there a second?

22 COMMISSIONER DEASON: I have a question about the  
23 ten-minute limitation. Is ten minutes going to be  
24 enough per party to delve into the very difficult  
25 issues involved and technicalities involved?



1           COMMISSIONER JACOBS: I believe that they will  
2 definitely go over ten minutes and I think you've  
3 always let them. I originally had 20. But we said  
4 we'd give them 20, then they'll shoot for an hour, so  
5 it's sort of ten minutes and we know they'll go over  
6 some with your questions, but it's up to you all --

7           COMMISSIONER CLARK: I think it's adequate  
8 initially, but I didn't interpret that as limiting our  
9 ability to ask them questions.

10          MR. TWOMEY: Can I comment, Madam Chair?

11          CHAIRMAN JOHNSON: Hold on one second, Mr.  
12 Twomey. Any other questions of --

13          COMMISSIONER DEASON: No, I'm just -- my concern  
14 is that I want this fully discussed here today, and  
15 hopefully a decision can be made and we can get on  
16 with whatever the decision is and I don't want it to  
17 be arbitrarily limited, and I understand that  
18 obviously Commissioners can ask questions and we have  
19 the ability to do that as long as we wish. I just  
20 didn't want the parties to feel like that they were  
21 being unduly constrained to -- as I understand it,  
22 there are some very difficult matters here in front of  
23 us, and that's what my concern was.

24          MR. HOFFMAN: Madam Chairman, may I make a brief  
25 comment?

1           CHAIRMAN JOHNSON: Well, Mr. Twomey asked to make  
2 a brief comment first, but I want to better understand  
3 -- I know that Commissioner Clark has a motion to  
4 approve staff as written. Any other discussions on  
5 that?

6           COMMISSIONER JACOBS: I have no questions.

7           COMMISSIONER DEASON: I would like to hear from  
8 Mr. Twomey and Mr. Hoffman. Has there been a second  
9 to the motion?

10          CHAIRMAN JOHNSON: No, there hasn't.

11          COMMISSIONER GARCIA: I'll second.

12          CHAIRMAN JOHNSON: There's a motion and a second.

13          MR. TWOMEY: Madam Chairman, Commissioners, I was  
14 just going to say, I appreciate the fact that the  
15 Commission is usually generous with the time, but  
16 having said that, I don't see any necessity for  
17 hamstringing this going in and making us obliged to  
18 the good will of the Commission of asking the  
19 questions. I have four gentlemen that have driven up  
20 here about three and a half hours. It's a trip  
21 they've made many times now in these series of cases  
22 and they want to express their views to you. I think  
23 they have views that are important that you hear.

24                 There are other consumers, other systems that have  
25 views. I want to speak to the legal issues, and we

1 shouldn't be constrained to ten minutes going in. You  
2 have very important weighty issues before you that are  
3 somewhat controversial, and to the extent they haven't  
4 been enacted before, and likewise, the -- these issues  
5 are important for the utility as well, and they should  
6 be given adequate time to make their case before you.  
7 So I would urge you not to just start out by taking --  
8 giving us ten minutes and being more generous at the  
9 beginning. Thank you.

10 CHAIRMAN JOHNSON: Mr. Hoffman?

11 MR. HOFFMAN: Madam Chairman, the way that the  
12 staff has articulated the issue, it's ten minutes for  
13 each party, rather than ten minutes a side. And so if  
14 you look at sides, so to speak, on this matter, we  
15 could have four, five, six speakers who may use as  
16 much as ten minutes speaking in opposition to the  
17 utility and/or in opposition to the utility's modified  
18 settlement offer. I think I'll need a little more  
19 than ten minutes, maybe 15 minutes or so, to sort of  
20 take you through the appeal, through the settlement  
21 negotiations and through our proposal, and I would ask  
22 that I be granted that.

23 COMMISSIONER GARCIA: Madam Chairman, I think in  
24 this case this Commission has demonstrated its  
25 willingness to hear from everyone all of the time and

1 even more than necessary sometimes. So maybe -- I  
2 would remove my second and I think we can trust your  
3 leadership to get us through this, but I'd like to ask  
4 the parties to see if we can move through this  
5 quickly.

6 CHAIRMAN JOHNSON: Is there a modified motion?  
7 There was a motion and a second, but the second has  
8 been withdrawn.

9 COMMISSIONER CLARK: Are you asking -- he's  
10 withdrawn his second?

11 CHAIRMAN JOHNSON: I think he said he withdrew his  
12 second.

13 COMMISSIONER CLARK: No, I thought he said he was  
14 making a second.

15 COMMISSIONER GARCIA: No, I'm withdrawing my  
16 second.

17 COMMISSIONER CLARK: All right. Madam Chairman,  
18 I'm willing to move staff with the modification that  
19 it's within your discretion to determine how much time  
20 each party will get, and I think it's incumbent on the  
21 parties to remember to stick to the issues we need to  
22 decide, and I trust they won't repeat what other  
23 parties may have said. And with that, I would move  
24 that we allow parties to participate the length of  
25 time given to each party to be within your discretion.

1           CHAIRMAN JOHNSON: There's a motion. Is there a  
2 second?

3           COMMISSIONER GARCIA: Second.

4           CHAIRMAN JOHNSON: There's a motion and a second.  
5 Any further discussion?

6           COMMISSIONER JACOBS: Question. I assume the  
7 parties then are willing to -- there's no need for  
8 each party to match the time of another party, that so  
9 long as they stick to issues and they feel it's  
10 adequate, there's no need to reserve any time in that  
11 regard? Okay. With that understanding, then --

12           CHAIRMAN JOHNSON: There's a motion and second.  
13 Any further discussion?

14           Seeing none, all those in favor, signify by saying  
15 aye.

16           (Chorus of ayes.)

17           CHAIRMAN JOHNSON: Show it approved unanimously.

18           There's one issue that Mr. Twomey raised and I  
19 just need to understand what we can and cannot do, so  
20 with respect to -- I know you said he had some  
21 customers that are here that want to speak to the  
22 issue. I see you're getting ready -- go ahead, Mr.  
23 Jaeger.

24           MR. JAEGER: Chairman, I think in most cases when  
25 the customers are represented by counsel, I think I've

1 seen where you've let the customers talk, but I'm not  
2 sure if that's been adhered to in every case and how  
3 you've handled it, but I know I have seen at least one  
4 time where you have let the customers talk.

5 CHAIRMAN JOHNSON: Mr. Twomey?

6 MR. TWOMEY: Yes, ma'am, their comments are  
7 relatively brief.

8 CHAIRMAN JOHNSON: Okay. Well, then, at the  
9 appropriate time, we'll allow the customers to come  
10 forward. Okay.

11 I think that disposes of Issue 2.

12 MR. JAEGER: Issue 3 was originally written, "What  
13 is the appropriate action for the Commission to take  
14 on Florida Water Service Corporation's joint offer of  
15 settlement and Sugarmill Woods Civic Association's  
16 counteroffer to propose settlement?" We originally  
17 said the Commission should not unilaterally accept the  
18 utility's offer since it was specifically rejected by  
19 one of the parties, and the counteroffer of Sugarmill  
20 Woods was presented to the parties, and so the  
21 Commission -- therefore it requires no action by the  
22 Commission.

23 Now the utility has revised its offer for Issue 3  
24 and has taken care of two of the main concerns,  
25 although they have thrown in a little twist on how

1           they -- this revised offer. I think Mr. Hoffman would  
2           like to address you on this revised offer, and I think  
3           we need to -- I'm not sure -- we went in with a  
4           settlement offer and it -- we now have a revised offer  
5           that we need to consider, I believe. I think he's  
6           taken the additional offer off the table.

7           COMMISSIONER CLARK: You're saying the revised  
8           offer addresses the notion of collecting from  
9           customers who did not receive service?

10          MR. JAEGER: Both the collecting and in going-  
11          forward rates from the correct customers and  
12          collecting the surcharge from the right customers  
13          also, because they had originally proposed to create a  
14          regulatory asset which would increase rates for all  
15          customers on a going-forward basis, and now in this  
16          revised recommendation they want to collect the  
17          surcharge from the customers that enjoyed the improper  
18          rates.

19          CHAIRMAN JOHNSON: Let's start over. And again,  
20          I'm very cognizant of the fact that we have  
21          individuals that are participating or listening on the  
22          Florida Channel, and if we're going to make this  
23          vehicle available to them, they need to be able to  
24          follow the process.

25          So for Issue 3, could you start off again, stating

1 the issue and then laying out what the settlement is  
2 that we're proposing before we allow the company to  
3 say how -- what they are now proposing so that people  
4 can at least follow through?

5 MR. JAEGER: In the original settlement offer that  
6 was offered by Florida Water Service Corporation and  
7 signed on by the Marco Island Fair Water Defense  
8 Committee, the City of Marco Island, I believe, they  
9 offered to settle this case and they proposed, I  
10 believe -- let me just read the offer.

11 Here's the offer: "An across-the-board increase  
12 in the rates on a prospective basis to increase annual  
13 revenues by 2.2 million plus an additional 600,000 for  
14 the regulatory asset, for a total of 2.8 million  
15 annual revenue increase will be approved. A  
16 regulatory asset in the amount of 4.4 million will be  
17 created. The utility will begin amortization of the  
18 regulatory asset the earlier of its next rate case or  
19 three years, and on such date, the regulatory asset  
20 shall be included in the rate base, and water and  
21 wastewater rates automatically and correspondingly  
22 increased. There will be no surcharges, there will be  
23 no additional rate case expense related to rate case  
24 expense incurred following the mandate issued by the  
25 First District in Case No. 96-4227," this case.



1 "Florida Water will not file a motion for  
2 attorneys' fees. The Commission will close the gain  
3 on sale docket, Docket No. 980744" -- and that was  
4 subsequently removed -- and then "there will be a  
5 subsequent meeting held as soon as possible to discuss  
6 the refund requirement in Docket No. 920199-WS,  
7 related to the Spring Hill facility, and a docket will  
8 be opened on rulemaking" and that was also, I believe,  
9 subsequently removed.

10 That was the essence of their offer. And then  
11 they -- when we delayed the -- we had this originally  
12 scheduled for the 13th of October, and then that was  
13 delayed until November 2nd, and the utility advised us  
14 that surcharges were increasing at the rate of about,  
15 I think, 240,000 per month, and so their offer, for  
16 every month of delay that changed, the surcharge was  
17 increasing by 240,000 per month.

18 COMMISSIONER JACOBS: I'd like to, for a minute,  
19 because I think it will be important for us here and  
20 for those who may be listening, to go back and address  
21 how that offer corresponds to the remand directions we  
22 were given from the court.

23 MR. JAEGER: Okay. The court, as we said, we had  
24 issues we had no choice on, and --

25 COMMISSIONER JACOBS: Help me understand, just as

1 a matter of digression, just go back to what those  
2 directions were from the court.

3 MR. JAEGER: They're taking -- they're offering to  
4 take less than what the court remanded, but they were  
5 taking it from the wrong customers, in staff's  
6 opinion. In the remand we -- we're trying to keep --  
7 the capband rate structure was approved.

8 COMMISSIONER JACOBS: Okay. The court approved  
9 the capband rate structure, but it indicated that  
10 there were certain areas that were --

11 MR. JAEGER: We made an adjustment to reuse  
12 facilities for used and useful. They said that was  
13 wrong, we'd have no choice in that. We made an equity  
14 adjustment of 4 point some million, and with the  
15 overturn of the order in 920199, that equity  
16 adjustment was known -- it was based on a refund  
17 being required in 920199. That changed, and so we had  
18 to fix that.

19 COMMISSIONER CLARK: You know, Ralph, what I think  
20 might be useful in answer to the question is to start  
21 on page 26 and you do an analysis of the First  
22 District Court, and I don't know if it's appropriate  
23 for you to do it or somebody on the -- technical staff  
24 could do it and they could say what the issue was and  
25 what the monetary impact is, plus or minus.

1 COMMISSIONER JACOBS: Yeah, that would be good.

2 MR. TWOMEY: Madam Chairman, before you do that,  
3 may I make an objection, please?

4 CHAIRMAN JOHNSON: To what?

5 MR. TWOMEY: To the -- before you get into this  
6 discussion, maybe give you something to think about.

7 I object on behalf of my clients to any discussion  
8 about the settlement negotiations. This is highly  
9 unusual. We had negotiations amongst the parties, and  
10 fairly intensive, three or four meetings, as I recall;  
11 and my client rejected the settlement. We have had as  
12 recently as the Public Counsel did -- I don't presume  
13 to speak for him, but nobody that I'm aware of  
14 accepted the utility's offer of settlement except for  
15 either the Marco Island people in some form of party,  
16 and then to the best of my understanding, that  
17 agreement they accepted has been changed at least two  
18 times, I think as recently as late yesterday  
19 afternoon. I spoke to Mr. Jenkins late yesterday  
20 afternoon, and to my knowledge, the utility hasn't  
21 given him the courtesy of telling them that they were  
22 changing their offer, so it's not a joint offer of  
23 settlement as is listed in the staff recommendation.

24 But my larger point is this: We tried to engage  
25 in -- we did engage in settlement discussions pursuant

1 to your comments at the last agenda conference, at  
2 which time you said you would encourage settlement  
3 discussions and you'd probably -- four of you  
4 indicated you'd probably vote for a hearing if  
5 settlements failed. We in good faith attempted  
6 settlement. It failed.

7 It is my belief that this Commission does not have  
8 the legal statutory authority to impose a settlement  
9 upon the other parties, especially in cases in which  
10 virtually all of the consumers have rejected the  
11 utility's offer, so therefore I really object to this  
12 discussion of going through and discussing what they  
13 offered versus what the court said you had to do, and  
14 would -- because I don't think you have the authority  
15 to impose a settlement on us. I think your time would  
16 be better served if you asked your staff to tell you  
17 what the court said you had to do, tell you what the  
18 court said you could do that you had discretion in,  
19 and go from there.

20 It's clear that this company is owed certain  
21 amounts of money that the court said were beyond your  
22 discretion, and other matters are within your  
23 discretion, but again, I don't think you have the  
24 legal authority to impose a settlement upon us, and it  
25 seems to me that to the extent that you want to work

1 with alacrity here, you're wasting your time  
2 discussing something that most of us customers think  
3 you can't do legally.

4 Thank you.

5 CHAIRMAN JOHNSON: Thank you, Mr. Twomey.

6 We have an Issue 3 that's framed, what is the  
7 appropriate action for the Commission to take on  
8 Florida Water Service Corporation's joint offer of  
9 settlement and Sugarmill Woods Civic Association's  
10 counteroffer of proposed settlement. I'm going to  
11 allow staff the opportunity to explain the process and  
12 what has occurred with respect to the district court's  
13 decision, what they laid out on the table, and what  
14 has been considered. But at the appropriate time, I  
15 understand that you're going to have some legal  
16 arguments to make and I will allow you to make those  
17 legal arguments, too, but there are probably a lot of  
18 people that are listening to this process.

19 We do have a pretty comprehensive and complex  
20 recommendation here. I think it will be helpful for  
21 the Commissioners to hear what is on the table and to  
22 hear your legal arguments. We may hear what's on the  
23 table and think, gosh, this is a good idea if we have  
24 the legal authority, but you may convince us we don't  
25 have the legal authority. But if you don't you

1 convince us of that, we still need the benefit of  
2 hearing this discussion to rule upon Issue 3. So for  
3 that reason, I'm going to overrule your objection, but  
4 I will allow you to make those legal arguments at the  
5 appropriate time.

6 MR. TWOMEY: Okay. Thank you.

7 COMMISSIONER JACOBS: Madam Chairman, I'm somewhat  
8 leery that we -- I guess I'm somewhat dissuaded about  
9 the argument, we can go too far afield into the  
10 vagaries of these negotiations before we actually get  
11 to homing in on the real reason we're here, and my  
12 understanding is to address the remand from the  
13 court. And with that ruling, though, let me offer  
14 this.

15 Would it be useful, and I ask this really as a  
16 question and -- and see what you think, would it be  
17 useful for us to look at Issue 4 before we resolve  
18 Issue 3?

19 CHAIRMAN JOHNSON: And Issue 4 reads, "In light of  
20 the decision in the remand of the First District Court  
21 of Appeal, what is the appropriate action the  
22 Commission should take?" That's the issue that you  
23 would like to see us address before --

24 COMMISSIONER JACOBS: Well, I -- and let me give  
25 you the logic of that. In my opinion, the settlement

1 negotiations were entered into as a way -- as a way of  
2 proffering a potential decision on that ultimate  
3 issue, on that ultimate decision by the  
4 Commission, and so one part of that resolution of  
5 Issue 4 in my mind has to do with whether or not we're  
6 willing to accept whatever offer is presently before  
7 the Commission, whatever offer in what form, status or  
8 presentation is before the Commission. Ultimately,  
9 however we make a decision about any stipulation  
10 still, I agree, leaves us with the ultimate resolution  
11 of Issue 4, and so it is kind of -- it's not quite as  
12 clear as it might be, but my concern is that we can go  
13 very far into the vagaries of the negotiations on this  
14 issue and not really be focused and homed in on why  
15 we're really here, and that is to address the remand  
16 from the court.

17 CHAIRMAN JOHNSON: And I was assuming that staff  
18 would start with some explanation and historical  
19 analysis, and I think that's why the technical staff  
20 was probably going to walk us through what was  
21 remanded, why, where we have the discretion, where we  
22 do not, and at the appropriate time if we feel,  
23 understanding Mr. Twomey's concerns, too, we'll try to  
24 keep this manageable, and if we feel that we're going  
25 too far afield or we're talking about something that's

1 irrelevant, we'll try to rectify that. But I'm trying  
2 to accomplish two things, trying to make sure that  
3 individuals can -- this can be a useful process not  
4 only for us, but for those that we've allowed to  
5 listen in and for the parties that are sitting at the  
6 tables here today to be able to respond to any  
7 questions or issues that may be presented.

8 COMMISSIONER DEASON: Madam Chairman, let me make  
9 a suggestion. I wholeheartedly agree that there is a  
10 need for a historical explanation to put things into  
11 perspective to explain where we've been and where we  
12 find ourselves now, and I think that staff should  
13 explain the various decisions by the court: Those  
14 that we have some discretion, concerning those that we  
15 don't, the annual revenue impact of all of those  
16 decisions, the impact on surcharges, how those would  
17 be calculated that we know the dollar impacts of the  
18 decisions that have been made that are on us -- before  
19 us now, and I think that would help explain to all the  
20 parties and to those folks that are listening in, and  
21 in all honesty, refresh it once again for the  
22 Commissioners, because I've read this several times,  
23 but it always helps to have it refreshed in your mind.

24 Then at that point I think that we need to  
25 entertain the threshold legal question as to whether



1 we have the authority to entertain a settlement. It  
2 seems to me it makes more sense to address that  
3 question first before we get into all the specifics of  
4 what was offered in the form of a settlement, because  
5 it's going to be fruitless to go through all of that  
6 exercise and then to find out, well, we don't even  
7 have the legal authority to even address the  
8 settlement.

9 There is two questions concerning the settlement,  
10 first, do we have the legal authority, and then second  
11 of all, is it a good settlement, is it good public  
12 policy to accept it if we do have the legal authority,  
13 and all that is dependent, obviously, upon the dollars  
14 associated with what issues. And so I would propose  
15 that we do that first and then let's assess where we  
16 are and what the next step would be.

17 CHAIRMAN JOHNSON: I would agree.

18 MR. HILL: With that, Madam Chairman, I'll give it  
19 a shot.

20 MR. HOFFMAN: Madam Chairman, if I may, before Mr.  
21 Hill starts, we filed a joint offer of settlement and  
22 proposal for disposition of mandate on remand on  
23 October 2nd, and then we filed a modification to that  
24 offer yesterday, and I'm just asking the Commissioners  
25 if they have copies of those documents.

1 CHAIRMAN JOHNSON: I think all of the  
2 Commissioners -- the November 12th document is the  
3 modification and I certainly have the original October  
4 2nd document, I believe.

5 MR. HOFFMAN: Thank you.

6 MR. HILL: Okay, I'm going to do the best I can on  
7 this and I'm going to --

8 CHAIRMAN JOHNSON: I think we're getting to where  
9 you want us to be. Were you getting ready to -- I was  
10 looking at you, I thought you were getting ready to  
11 say something.

12 MR. TWOMEY: I'm sorry, I was thinking. Probably  
13 a rare view of me.

14 CHAIRMAN JOHNSON: I was trying to read your mind  
15 or something.

16 MR. HILL: I'm going to at least start on page 27,  
17 actually, of the recommendation, and I'm going to use  
18 Schedule 1, which is on page 47. So may I suggest you  
19 just go to page 47 and rip that sucker out and set it  
20 next to page 27? Or I twisted mine up like that so I  
21 could kind of look at it.

22 As briefly as I can, this docket started a couple  
23 of years ago. It was a file and suspend rate case.  
24 Revenue requirement as well as rate structure were at  
25 issue. The Commission made a final decision back in

1 '96, I think, sometime, maybe late '95. The  
2 Commission's decision was appealed by various parties  
3 to the First DCA. Recently, a little over 90 days  
4 ago, we got the decision from the court and matters  
5 were remanded back to us. The parties that appealed  
6 the Commission decision were upheld on some issues,  
7 and the Commission was upheld on some issues.

8 Rate structure that was at issue in the docket was  
9 upheld -- the Commission's decision was upheld, so  
10 that's not back to us for reconsideration. What the  
11 Commission did with respect to reuse facilities -- I'm  
12 sorry, if we look here on Category 1 on page 27, there  
13 are items that the court decided, and that's reuse  
14 facilities we apply to used and useful and reuse  
15 facility, and the court said that we were incorrect on  
16 that. We had some errors that we admitted to and  
17 there was an equity adjustment that we needed to fix.  
18 Those were remanded back to us by the court and we  
19 were told we were wrong and we just plain have to  
20 change it and fix it and do it right with no  
21 opportunity to go to hearings, to reopen the records,  
22 to take any further evidence, those issues are over  
23 with. That's what we called Category 1 at the bottom  
24 of page 27.

25 If you look at page 47, the dollar amount of those

1 is on line --

2 COMMISSIONER DEASON: Line 8, isn't it?

3 MR. HILL: Yes, sir. My schedule doesn't have the  
4 total, I had to write it in, so I wasn't sure what  
5 line number it was, which should be \$1,331,973. That  
6 is the dollar amount of those items remanded back to  
7 the Commission for which you have absolutely no  
8 discretion in what you do.

9 There were some other issues that the court  
10 overturned us on and remanded back to us. In Category  
11 2 down on page 27, we have listed them there. There  
12 is what we call in sub (a) AADF, which is annual  
13 average daily flow, and then (b) would be the lot  
14 count methodology. Those were remanded back to us  
15 from the court. They said, you did wrong, Commission,  
16 you lose; however, you have an opportunity to reopen  
17 the record and take further evidence and prove you did  
18 right, if you can. But the bottom line is you lose,  
19 but you have a chance on these. Those two items, the  
20 AADF and the lot count, were shown on page 47.

21 If you look at line -- and I have to add a line  
22 number, I think, for all of line 10. The increase for  
23 the annual average daily flow, the dollars that we  
24 would be fighting over there are \$529,000. On line  
25 13, the dollars we would fight over on lot count are

1 1,435,984, which then brings you a total on line 15 of  
2 3,297,363. That is the amount on a going-forward  
3 basis, that's the annual revenue on a going-forward  
4 basis of the total remand of the court. One million  
5 three of it is decided. There is no further action on  
6 that. One million nine of it, you have been given an  
7 opportunity to reopen the record if you so desire to  
8 try to take evidence on it to prove to the court that  
9 you did right, the total of three million two.

10 In addition to all of this, while this case was  
11 pending, in 1997 there was a decision that came out of  
12 the Supreme Court, and again, I'm just going to give a  
13 little overview of this, I'm sure I won't do it  
14 justice and we'll need other technical staff and  
15 attorneys to fill in all the blanks, but we got a  
16 decision from the Florida Supreme Court, and it was  
17 GTE versus the Commission, and I know there's always a  
18 Commissioner they verse, but I don't remember who it  
19 was at this point.

20 In 1997, the Supreme Court of the State of Florida  
21 came out with this GTE decision that basically said  
22 that if a Commission's final order decision is taken  
23 up on appeal and ultimately overturned such that the  
24 utility would have been entitled to higher revenue,  
25 that that pendency between the final order and when a

1 decision comes back to the Commission, the utility  
2 would have the right to back-bill customers. Again,  
3 we're not talking about the test period. Often when  
4 I've spoken with customers, it's been this thinking,  
5 well, you had a test period and you have that data,  
6 you have that information. The time period the court  
7 is talking about is not interim, it's not the test  
8 period, it's the time between the final order of the  
9 decision and the remand back from the court, and that  
10 makes sense, because you begin to think, well, the  
11 court said you made a wrong decision and therefore  
12 your final order was erroneous, and the time frame in  
13 between there, then the utility purportedly was  
14 entitled to more revenue.

15 In addition, we had some subsequent decisions on  
16 Southern States, and those I don't remember. I just  
17 know it just makes it worse every time we get a  
18 decision. And that didn't sound right and I didn't  
19 mean it that way.

20 Where we ended up then is we got this back -- this  
21 was pending when the '97 Supreme Court decision came  
22 out. There were other cases pending. You all know we  
23 have Florida Cities we're going to hearing on. That  
24 case was pending at the time, a little different  
25 circumstances. This was one case that was pending

1 when that GTE decision came out. Therefore, when this  
2 was remanded back to us, we, looking at GTE and the  
3 subsequent Southern States decision, were of course  
4 horrified to look at this and say, not only on page 47  
5 are we looking at a \$3.2 million increase on a  
6 prospective basis, but pursuant to these court  
7 decisions, the utility is allowed to back-bill, to  
8 surcharge these customers. And we have a pretty good  
9 idea what that total dollar amount is. And if you  
10 look at line 27 on page 47, that shows up as  
11 \$5,765,000, and that's in back bills. These numbers  
12 are what we call --

13 COMMISSIONER DEASON: That was as of what date?

14 MR. HILL: That was as of September. It is -- the  
15 company is correct, these things do grow on a daily  
16 basis as long as rates don't change. This was a  
17 September -- September of this year. So there's a --  
18 some more monies that would need to be added.

19 COMMISSIONER DEASON: And what is the approximate  
20 monthly increase?

21 MR. HILL: It is approximately \$240,000 a month.

22 So we're faced -- when we looked at the numbers,  
23 we said all right -- oh, and on page 27 we have a  
24 Category 3, and those are items that are fallout, we  
25 can't do anything about that until it's all over

1 with. So really what we're concerned about are Items  
2 1 and 2 and surcharges and customer impact and that  
3 sort of thing.

4 COMMISSIONER DEASON: But likewise, the surcharge  
5 question as you've shown on your schedule on page 47,  
6 it can be broken down between Category 1 issues and  
7 Category 2 issues as well?

8 MR. HILL: Yes, sir. Yes, sir.

9 COMMISSIONER DEASON: So that's another part of  
10 the risk factor involved in the whole scenario.

11 MR. HILL: Yes, sir. Yes, sir. One of the  
12 things, and I want to make this clear, because this is  
13 often a point of frustration, we do not, nor have we  
14 ever had, the widgets to calculate surcharges on a  
15 per-customer basis. If it were during the test year,  
16 we would have all of that, but again, this time period  
17 is after your final decision and runs yet to today,  
18 and surcharges are based on consumption. So this  
19 surcharge, an individual is impacted by what they're  
20 using even today, on Friday the 13th, and so it's not  
21 -- we can tell you a dollar amount and we can tell you  
22 it's growing and we can break it down into categories  
23 and we can disaggregate about like we have here, but  
24 we can't go to an individual customer and say, this is  
25 what your surcharge potential is. We do not have that



1 data.

2 And it -- and those widgets grow every day.  
3 Yesterday, today and tomorrow, those gallons will  
4 continue to be used and therefore the potential  
5 surcharge increases.

6 Now, why do we want to point out here is --

7 COMMISSIONER DEASON: Now, the surcharge as a  
8 total is dependent upon present consumption because  
9 it's a difference in rate; on a total company basis,  
10 you don't have the billing determinants, though, to  
11 actually calculate a customer-specific surcharge?

12 MR. HILL: That's correct, we do not.

13 And now what I want to point out is that these are  
14 what we call worst-case scenario numbers. These say,  
15 we go, we give it our best effort and we don't win  
16 these issues that have been remanded back. This is  
17 the worst-case scenario.

18 While we were doing our analysis, and I forget  
19 when it was, we came here at one point and we brought  
20 you a piece of this, and you said, staff, don't bring  
21 us a piece, this isn't right, we need to see the whole  
22 picture. And you were correct, you needed to. And  
23 you said, go back, bring us everything when you come  
24 back, and at the same time, try to weigh whether we  
25 should go to hearing or not, try to see what benefits

1 we're gaining and what this might cost, and parties,  
2 please try to get together and see if you can't  
3 settle.

4 So there was that time period when we were looking  
5 at these numbers, what could possibly be done on  
6 remand, and then we begin to say, all right, we need  
7 to look at some what-ifs, what, you know, what are the  
8 possibilities? At the same time, we entered into  
9 discussions with the parties in an effort to see if  
10 there couldn't be some negotiated settlement.

11 I don't recall, there were four meetings, I  
12 believe, and there were various discussions. Along  
13 about the second meeting the utility did offer a  
14 proposal of settlement, and I believe Mr. Jaeger  
15 pretty much outlined it. I can give it another shot.

16 COMMISSIONER CLARK: Madam Chairman, before he  
17 does that, I have a question with respect to the  
18 monthly maximum flow and the annual average flow  
19 point, and it's just an attempt to gauge the  
20 likelihood that we would succeed on that issue.

21 I note that staff on page 35 says that we had a  
22 Florida Cities case where the Commission voted to  
23 reopen the record on the annual average daily flow  
24 issue, and the decision -- the Commission's decision  
25 to reopen the record in that case was affirmed. Now,

1 haven't we also had a decision on whether or not we  
2 could use the different methodology?

3 MR. HILL: No, ma'am.

4 COMMISSIONER CLARK: All right. What is -- give  
5 me the status of that case, then.

6 MR. HILL: We go to hearing in December. We just  
7 filed testimony on Friday.

8 COMMISSIONER CLARK: So we did have someone appeal  
9 the issue of opening the record, is that it?

10 MR. HILL: Oh, I don't believe so, I think we're  
11 reopening the record in December.

12 MR. JAEGER: We did vote to reopen the record,  
13 they took an interlocutory appeal, Florida Cities did,  
14 and that appeal was summarily disposed of, per curiam  
15 denied.

16 COMMISSIONER CLARK: Okay. That's good  
17 information. Thank you.

18 MR. HILL: Sorry I gave you erroneous information.

19 COMMISSIONER DEASON: The point is that on the  
20 merits, we have not yet even gone to hearing on the  
21 merits.

22 MR. HILL: Well, we have a couple of times,  
23 Commissioner, and we've lost it in the court. We're  
24 doing it again.

25 COMMISSIONER DEASON: No, I'm talking about after

1 the court's decision on remand, the decision is that  
2 we can reopen the record, the court affirmed that we  
3 can reopen the record, but we have not yet gone to  
4 hearing.

5 MR. HILL: Yes, sir, yes, sir, that's correct.

6 COMMISSIONER CLARK: Let me be clear about another  
7 point on this. When the Florida Cities case was  
8 argued, was there a reargument in that case?

9 MR. HILL: I don't recall.

10 MR. JAEGER: No, ma'am, we issued that order on  
11 like the end of October, and they appealed on November  
12 1st. It was like they immediately took it straight to  
13 the court, and so they did not ask for  
14 reconsideration, if that's what the question was.

15 COMMISSIONER CLARK: Okay. Let me ask it another  
16 way. Was there another case dealing with this issue?

17 MR. HILL: Yes, Palm Coast, and we don't -- there  
18 have been three separate cases dealing with this  
19 issue: Florida Cities, Florida Water -- I apologize, I  
20 keep calling them Southern States -- Florida Cities,  
21 Florida Water and Palm Coast. The court has decided  
22 on two of the three, Florida Cities and Florida Water.  
23 We are still waiting on Palm Coast. And --

24 CHAIRMAN JOHNSON: Just a minute, Chuck. Let me  
25 ask Mr. Jaeger, this was -- I'm just trying to

1 reorient myself. This was the case where it was  
2 suggested that we confess error by the staff on --  
3 that we had gotten a decision on this from the court,  
4 and in a subsequent case, there was a suggestion that  
5 we confess error, and we took it to Internal Affairs  
6 and we said no, we didn't want to --

7 MS. JABER: Commissioner, this was the case where  
8 it was suggested by a member of our appellate division  
9 that we confess error, this is it.

10 CHAIRMAN JOHNSON: Florida Cities Water?

11 COMMISSIONER CLARK: Florida Water.

12 MR. JAEGER: Florida Water, Ms. Helton was just  
13 before oral argument and we took it to Internal  
14 Affairs and we said no, we thought we should use, if  
15 it was in the permit annual average daily flow, then  
16 we should use annual average daily flow to begin with.

17 COMMISSIONER CLARK: And is this also the issue  
18 that the court tells us to get further evidence if we  
19 can?

20 MR. HILL: Yes. So if you look at these --

21 CHAIRMAN JOHNSON: I think you're getting ready to  
22 proceed into the settlement discussions?

23 MR. HILL: Well, I wasn't quite there yet.

24 CHAIRMAN JOHNSON: Good, go ahead, because at that  
25 point I want to ask the Commissioners what they'd like

1 to do next. They may want to hear from the parties,  
2 but go ahead and continue to tee up the issues.

3 MR. HILL: Sure.

4 So we generated numbers and looked at what we  
5 considered to be worst-case scenario. These are the  
6 numbers that we have used all along to try to evaluate  
7 what our recommendation would be with respect, A, to  
8 even going to hearing and trying to fight these.  
9 Again, we, like all of you, tried to lay out the  
10 possibilities, and then without actually writing  
11 anything down in paper, tried to estimate the  
12 probabilities of those outcomes, and then based on  
13 that, it is sort of what do we need to do and what  
14 should we do. These are worst-case scenarios, and the  
15 possibility -- we laid them out somewhere in the  
16 recommendation because we did use those during the  
17 discussions that happened on settlement. But these  
18 that you have on pages 27 and 47 are the basic  
19 elements and the associated dollar values.

20 COMMISSIONER DEASON: The worst-case scenario  
21 would be a 3.3 million annual increase on a going-  
22 forward basis with a surcharge amount of 5.8 million,  
23 which is growing at \$240,000 a month until it's  
24 implemented?

25 MR. HILL: Yes, sir, that's correct.

1 MR. CRESSE: Mr. Deason, I think those figures  
2 lack two things. The figures are for 24 months; we're  
3 now at 27 months, so you can add 2.25 times the annual  
4 figure and you'll be about \$6.3 million. Plus, those  
5 figures I don't believe include any interest which  
6 would be applicable. I'd roughly estimate that to be  
7 in the neighborhood of about \$400,000. So you're  
8 talking substantially more than \$5.7 million, and I  
9 believe and I think you can check with the staff on  
10 that to be sure I'm correct.

11 COMMISSIONER CLARK: Mr. Cresse, do you disagree  
12 it grows by 240,000 a month?

13 MR. CRESSE: Yes, ma'am, we agree with that  
14 figure, it grows by \$240,000 a month plus interest.

15 COMMISSIONER DEASON: And you would have then with  
16 the increase per month to where we are now plus  
17 interest would put us at a total potential surcharge  
18 of 6.7 million, roughly?

19 MR. CRESSE: Yes, sir, that's a pretty good rough  
20 figure.

21 CHAIRMAN JOHNSON: Any other questions,  
22 Commissioners?

23 MR. CRESSE: I might mention one other thing,  
24 too. That figure will change somewhat prospectively  
25 because of the .50 on equity that was adjusted earlier

1 in this month.

2 CHAIRMAN JOHNSON: Thank you, Mr. Cresse.

3 COMMISSIONER DEASON: I'm sorry, you lost me on  
4 that one. I know that the equity adjustment was  
5 overturned by the court, or actually it was,  
6 consistent with the court decision, it was determined  
7 to be an inappropriate adjustment. Is that correct?

8 MR. CRESSE: Would you repeat that, sir? I was  
9 looking to see --

10 COMMISSIONER DEASON: I guess, where are we with  
11 the -- you mentioned the equity adjustment?

12 MR. CRESSE: Yes, I believe that has already been  
13 implemented. Of course, that expired at a certain  
14 period of time.

15 MR. JAEGER: I think you're talking cross  
16 purposes, Commissioner. He's talking about the 50  
17 basis points equity adjustment and how that affects  
18 this, and you're talking about the refund equity  
19 adjustment, so I think y'all are sort of talking past  
20 each other.

21 COMMISSIONER CLARK: The 50 percent adjustment was  
22 made in September by the utility and we would have to  
23 make it here, but the equity adjustment has to do with  
24 the fact that we took into account the necessity of  
25 making a refund. That would bring their equity ratio



1 down, and the court said, since there may not be a  
2 refund, you have to make that adjustment in equity,  
3 which we'll make later.

4 MR. HILL: Exactly, Commissioner. In Docket  
5 920199 where we were faced with a refund decision, we  
6 took that into account as a brand new docket, which is  
7 this docket, and in this docket we reduced equity for  
8 about 8.2 million, which was the amount we were  
9 looking at for the refund to come from the company  
10 based on your decision. That's the equity adjustment  
11 we're talking here and that's what we're putting back  
12 into equity.

13 MR. TWOMEY: Madam Chairman, can I just comment  
14 briefly and say that just for maybe -- I've used a  
15 necessary dose of reality here, is that those Category  
16 2 numbers that your staff is talking about and to  
17 which Mr. Cresse probably correctly wants to add  
18 little bits of additional monies, are totally  
19 theoretical. If your staff does its job correctly, if  
20 the customer parties, including the Public Counsel, do  
21 their jobs properly and you do your job properly of  
22 refunding for your decisions on these two  
23 discretionary points that you found in your final  
24 order, that number will be zero, zero.

25 COMMISSIONER CLARK: Mr. Twomey, I would just say

1 that I'm not as optimistic as you are, because with  
2 respect to the maximum monthly annual -- that  
3 adjustment, that we tried at least twice to explain to  
4 the court the notion of the matching principle on  
5 which it is based, and they haven't gotten it.

6 MR. TWOMEY: Yes, Commissioner. Let me say this:  
7 Mr. Hill, in his depression of pessimism, likes to  
8 keep saying to the customers down in Lecanto Monday,  
9 and he's saying it to you, that you've lost twice, and  
10 that's not correct. You've lost the same issue before  
11 the court. You haven't lost it twice. The court in  
12 Palm Coast, if it has any sense, will come out and  
13 say, if you haven't explained it any better, they're  
14 giving you a chance to re-explain these things. And  
15 what the customers are going to say to you, I'm going  
16 to say to you, and the other customers are going to  
17 say to you presumably on this issue, is that you did  
18 the right consumer, correct, legal thing in your final  
19 order on both those issues. The court said you didn't  
20 explain it properly and/or you didn't have enough  
21 evidence to support it.

22 The court's giving you a chance to go back and re-  
23 explain it and take additional evidence. I prefer to  
24 be a glass-is-half-full guy on this and assume that  
25 you're going to win both those issues and that the

1 additional charges to the customers are going to be  
2 zero. There's no need for any of this worst-case  
3 stuff, which we say you don't have the authority to do  
4 anyway, but --

5 COMMISSIONER DEASON: But, Mr. Twomey, you would  
6 agree that a decision-maker needs to know the  
7 parameters in which they are working, and then one  
8 side of that parameter is the worst-case scenario and  
9 you at least need to be aware of that possibility, and  
10 that there is risk associated with that?

11 MR. TWOMEY: No, sir, you're entirely right. You  
12 need that, you should have it at all times. I'm just  
13 trying to make an observation that as you start  
14 talking about these numbers and Mr. Cresse piles on  
15 with additional interest and so forth, they start  
16 getting some momentum as if they're actual, as if  
17 they're real, and I'm just trying to throw some cold  
18 water on that and say, if everybody does their job  
19 right here, except for the utility falling down, those  
20 dollars are zip, that's the way it should come out, no  
21 additional liability.

22 CHAIRMAN JOHNSON: The Category 2 dollars?

23 MR. TWOMEY: Yes, ma'am, Category -- Category 1  
24 are owing to the utility, no doubt about it. You've  
25 got to do that, the sooner do you it the better, in my

1 estimation. Collect it from the right people.

2 Category 2 is entirely theoretical, it's  
3 entirely potential, and if we on the consumer side do  
4 our jobs correctly, it will stay at zero.

5 CHAIRMAN JOHNSON: And as we are calculating and  
6 discussing the numbers, Mr. Hill, we are combining --  
7 even to get to that \$6.7 million number we're  
8 combining Category 1 and Category 2? And when we talk  
9 about the 240,000 --

10 MR. HILL: Oh, yes, ma'am, absolutely.

11 CHAIRMAN JOHNSON: -- and the \$240,000 a day  
12 accrual is based on Category 1 and Category 2?

13 MR. HILL: Yes, ma'am.

14 MR. SHREVE: Madam Chairman, I think Commissioner  
15 Deason is right, we need to talk in terms of knowing  
16 what --

17 COMMISSIONER GARCIA: Jack, Jack, could you speak  
18 up? I cannot hear you. And my voice is particularly  
19 loud since you can't see me, I have to have --

20 MR. SHREVE: I'm sorry, Commissioner, I couldn't  
21 understand you. It was muffled.

22 COMMISSIONER GARCIA: My voice is particularly  
23 loud because I can't see you and you can't see me.

24 MR SHREVE: One thing that I think we need to  
25 think about here is the worst-case scenario for the

1 customers would be to not have a hearing and go ahead  
2 and let the company have the money at this time. If  
3 you go to hearing and win and make the same decision  
4 you made in the past, staff is successful and the  
5 customer is successful, then that surcharge or  
6 back-pay would never be made.

7 Everyone seems to be talking in terms of the  
8 surcharge going up so much. I guess that's not good,  
9 to have a large surcharge, and there are some down  
10 sides, primarily because of who you have to collect  
11 the money from, but the money does not change. The  
12 money is either in the surcharge to be collected, and  
13 if it is, it's because it's still in the customer's  
14 pocket and has not been given to the company. The  
15 interest is really about the only thing that's going  
16 to affect the total amount on that, and I would assume  
17 the interest that's going to be paid by the company or  
18 by the customers is in the neighborhood of five or six  
19 percent. The customers have that money in their  
20 pocket and they're able to do what they want to with  
21 it at whatever interest rate they can handle. Maybe  
22 they pay their Sears, Roebuck bill off at 18 percent.

23 The only point I'm trying to make, the big  
24 discussion here is stop that surcharge from going up.  
25 Okay, I understand that. However, you are not talking

1 about a change in the amount of money that is going to  
2 change hands, you're talking about where the money  
3 is. The surcharge increases, it increases only  
4 because the customers still have the money.

5 So the worst-case scenario is for you to not go to  
6 hearing, not to try to make the same decision you made  
7 in the past, not to give your staff an opportunity to  
8 go ahead and carry out the advice that they gave you  
9 in the first recommendation where they said they feel  
10 they can prevail, and all of us are ready to put on  
11 cases, but that would be the worst-case scenario is to  
12 go ahead and give the company money on the two issues  
13 without a hearing.

14 CHAIRMAN JOHNSON: Thank you, Mr. Shreve.

15 Any other comment, Commissioners?

16 COMMISSIONER DEASON: Let me ask another question,  
17 and I'll address anybody that wants to respond to it,  
18 but another factor involved in the various scenarios  
19 is whether there's going to be additional rate case  
20 expense, is it not? Isn't that a legitimate issue  
21 that's going to have to be resolved and there's a risk  
22 factor associated with that as well? Mr. Twomey?

23 MR. TWOMEY: I think -- do you mean if you have a  
24 hearing?

25 COMMISSIONER DEASON: Yes.

1           MR. TWOMEY: Yes, sir. I mean, undoubtedly, if  
2 you have a hearing, there will be rate case expense  
3 from all parties concerned.

4           Now, the -- you have to say to yourself, you know,  
5 I mean, we could avoid rate case expense if every time  
6 a utility comes in on initial filing and we roll over  
7 and don't fight, let's just give them everything that  
8 they ask for in their initial filing and we'll avoid  
9 all kinds of rate case expense. Mr. Shreve can close  
10 up his shop, people like me will be out of business  
11 and the utilities will get everything they ask for.

12           So I'm not trying to be smart in my response to  
13 you, I'm just saying, we've looked at this, we're not  
14 afraid of additional rate case expense. My clients  
15 have been, throughout this process, been faced with  
16 the potential of paying more money in the settlement  
17 process than they otherwise legitimately owed on the  
18 Category 1 non-discretionary monies and don't want to  
19 pay it, and would just as soon fight on that, and  
20 they're confident on the Category 2 issues and agree  
21 with the written statements made to you by your staff  
22 that they can prevail on the lot count issue as well  
23 as the maximum flow issue. So if we do prevail on  
24 that, whatever rate case expense we have to have  
25 apportioned amongst all the customers will be

1 substantially less than if we just roll over and let  
2 these people take all or part of the money that the  
3 court suggested they might win eventually in a worst-  
4 case scenario.

5 COMMISSIONER DEASON: Well, we may be getting a  
6 little bit ahead of ourselves in here, I think we're  
7 starting to touch upon the question of settlement on  
8 the periphery, at least, and obviously in a settlement  
9 negotiation that's one of the things parties realize,  
10 and that's one of the advantages of a settlement, is  
11 if there is a settlement reached, that is one  
12 potential expense that everyone knows will not  
13 materialize, and that is rate case expense. That's  
14 one of the potential advantages.

15 I know Mr. Shreve has engaged in negotiations with  
16 parties and that that is one of the benefits when it  
17 can be accomplished is that that rate case expense is  
18 eliminated. And for small systems, that can be a very  
19 big impact on customers. And obviously, I wasn't  
20 suggesting that you never have a rate case just to  
21 avoid rate case expense, but we're in a very novel  
22 situation here in that we have a remand, we have some  
23 very specific issues that have already been to hearing  
24 once, and that if there is the potential for  
25 settlement, that's one of the benefits, in that there



1 is rate case expense avoided.

2 MR. TWOMEY: Yes, sir, and to answer your question  
3 more directly, we considered their issue of rate case  
4 expense and we rejected the settlement.

5 MR. SHREVE: Commissioner, you're exactly right on  
6 the rate case expense, and we have to consider every  
7 case that we do settle, but we're talking primarily in  
8 smaller cases, and in this situation, we don't have a  
9 full rate case, we're going to hearing on two issues,  
10 so I would think the company wouldn't have any reason  
11 to have a tremendously large rate case expense on two  
12 issues that they have already prepared on during the  
13 case at one time.

14 MR. HOFFMAN: Madam Chairman, I do think we are  
15 jumping ahead a little bit, but I think what we're  
16 really talking about here is, you know, the  
17 Commissioners and the Commission is going to have to  
18 make its own judgment as to its prospects of success  
19 on appeal, because if we go to hearing, that's where  
20 this case will end up. And I can tell you, as Mr.  
21 Twomey says, if the Commission rolls the dice and the  
22 Commission wins, that number's going to be zero on the  
23 two issues. If the Commission rolls the dice and the  
24 Commission loses, by the time we finish the appellate  
25 process, which could take us, conservatively, to

1 January of 2001, with rate case expense, you're going  
2 to be over \$12 million, \$12 million. And I'm going to  
3 get into all this when I make my presentation, but I  
4 wanted to give some perspective.

5 MR. HILL: Madam Chairman, we may well be at the  
6 spot that Commissioner Deason was saying that maybe  
7 you need to discuss whether you could even accept the  
8 settlement offer, you know, legally. I don't know.  
9 Perhaps we're at that point.

10 CHAIRMAN JOHNSON: Have you finished your  
11 presentation?

12 MR. HILL: I believe I don't have a whole lot left  
13 to say anymore. That's basically, you know -- those  
14 are our numbers that bring us up to this point. There  
15 were discussions of settlement offers, there is our  
16 recommendation and then the filing of the company  
17 yesterday, but I think probably that all should happen  
18 after the discussion on whether or not you could even  
19 accept the settlement.

20 CHAIRMAN JOHNSON: Thank you.

21 COMMISSIONER DEASON: Well, Madam Chairman, I  
22 would tend to agree that we're at that point now, and  
23 I would suggest that we need to address the threshold  
24 question as to whether -- what options the Commission  
25 had, what can we -- do we have the legal authority to

1 even consider a stipulation or a settlement. I know  
2 we don't have a stipulation because all parties are  
3 not -- we do have an offer of settlement, and I guess  
4 the question is, do we have the legal authority to  
5 consider that. And depending upon the answer to that  
6 question would then dictate whether we even want to  
7 explore the intricacies of that offer and the pros and  
8 cons and the risk factors involved in the worst-case  
9 scenario versus what's being offered.

10 CHAIRMAN JOHNSON: Staff?

11 MR. JAEGER: Commissioners, excuse me.

12 CHAIRMAN JOHNSON: Ralph, I'm sorry. We're going  
13 to take a break. The Commissioners need a short  
14 break. We'll take a 15-minute break and then we'll  
15 begin with your presentation on the legal issues and  
16 allow the parties to respond.

17 (Whereupon, a recess was had in the proceedings.)

18 CHAIRMAN JOHNSON: We're going to go back on the  
19 record. I think staff was prepared to present the  
20 legal arguments on the Commission's ability to accept  
21 settlement.

22 MR. JAEGER: Yes, Chairman Johnson. What I want  
23 to do is focus on what they call the Category B, the  
24 lot count, and the AADF issue.

25 The court has given the Commission discretion to

1 reopen the record. What they have said, though, is  
2 you are wrong on using lot count in mixed use areas.  
3 You've used ERCs to lots prior to this, and that's  
4 what you needed to do here, unless you can show  
5 otherwise. You've used max month average daily flow  
6 in the numerator of the used and useful question prior  
7 to this. Now you're trying to use annual average  
8 daily flow. You do not have the evidence. So what  
9 they've said is, you can either go back to the max  
10 month average daily flow in the numerator, that would  
11 be fine, and you can go back to the ERCs, the lots  
12 methodology that you've used before in mixed use  
13 areas, and that would be fine.

14 So if you decline to reopen the record, they have  
15 basically said what you go back to. You have the  
16 opportunity, the discretion to reopen the record; it  
17 doesn't say you have to. So that's the -- I think the  
18 crux of the deal is that you have this discretion, and  
19 I think you are bound to follow the public interest  
20 and do what you think is in the public interest and  
21 whether the public -- you know, that's where you get  
22 into the criterion of whether you should accept this  
23 settlement offer.

24 What the utility has done and what the staff has  
25 done, they've quantified what is that risk here, the

1           worst-case scenario, and then they've done the best  
2           case, of course, and what they have said is that 1.3  
3           million is what -- no matter what, the rates are going  
4           to go up 1.3 million plus about 2.6 surcharge, that's  
5           on a 24-month basis. It's now been 27 months.

6           So clearly, you can decline to reopen the record,  
7           and the court has basically said, if you decline to  
8           reopen the record, then you've got to go back to what  
9           you did before, the policies that you had before. So  
10          I think -- you know, my analysis is on page 23, 24,  
11          25, in that area, that was the additional stuff that  
12          we did put in the recommendation, and what we said was  
13          in the utility's original -- they asked us to consider  
14          a unilateral offer, the first one, and they said they  
15          were going to just bump everybody up 4.7, 4.8 percent,  
16          and we said no, that would violate the capband rate  
17          structure which has been approved by the court, and we  
18          said, what we have to do is take all this money and go  
19          back and do what we did before and keep it consistent  
20          with the capband rate structure.

21          So the utility has fixed that in their revised  
22          recommendation, the revised offer. They said, okay,  
23          we'll go back and use the rate structure that you used  
24          and we've -- that's where we go up 3.2 million and  
25          then they come off that 3.2 million, 400,000 in annual

1 revenues, 2.8 million, so that's what they're giving  
2 up in annual revenues. I think the utility clearly,  
3 if you determine not to reopen the record and they are  
4 authorized to collect 3.2 million, they can give up  
5 that right to collect the full 3.2 million and collect  
6 only 2.8 million. The stickier wicket was the  
7 surcharge issue and the GTE decision.

8 CHAIRMAN JOHNSON: Could you go back to the first  
9 one and let me make sure I understand what you're  
10 saying? You're saying that the court gave us the  
11 option to reopen the record, or if we did not reopen  
12 the record, they kind of delineated what we needed to  
13 do?

14 MR. JAEGER: They said what we've been doing  
15 before in mixed use areas was okay, and we either do  
16 what we did before or reopen the record and put on  
17 additional evidence that supports the lot count and  
18 mixed use, so I think the evidence is in the record to  
19 say, okay, we will go back and do what we did before,  
20 and in fact, that's what I think Mr. Rendell did when  
21 he calculated the amounts that were in the Category B,  
22 the 1.4 million that he associated with the lot count.

23 CHAIRMAN JOHNSON: I'm trying to follow the  
24 numbers. If we went -- if we did not reopen the  
25 record, what would be the liability, or what would be

1 the amount of money --

2 MR. JAEGER: Okay. I think what we've said is the  
3 529,000 is associated with annual average daily  
4 flows --

5 CHAIRMAN JOHNSON: Where is that?

6 MR. JAEGER: That's Schedule 1 on page 47, I  
7 believe.

8 CHAIRMAN JOHNSON: And which line?

9 MR. JAEGER: Line 9.

10 CHAIRMAN JOHNSON: Line -- okay, line 10.

11 MR. JAEGER: Line 9 on the total on the Schedule  
12 1.

13 CHAIRMAN JOHNSON: And say the amount again?

14 MR. JAEGER: \$529,406. That's the amount  
15 associated as -- if we use average annual daily flow  
16 or if we use max month. That's the difference.

17 CHAIRMAN JOHNSON: Okay. And then the lot  
18 count --

19 MR. JAEGER: Lot count is the line 12, and that's  
20 if we use ERCs to lots, or lots to lots difference,  
21 \$1,435,984. Those are the differences calculated on  
22 that schedule.

23 CHAIRMAN JOHNSON: So if we don't reopen the  
24 record, this is the amount that we have to --

25 MR. JAEGER: That we would have to give the

1 utility in their records. Those are annual figures,  
2 is that not correct?

3 MR. HILL: That is correct.

4 COMMISSIONER DEASON: 3.3 million total annually.

5 MR. JAEGER: The 1.9 discretionary plus the 1.3  
6 nondiscretionary, which is 3.297 I think is what we  
7 came up with. Plus then you multiply that to get the  
8 surcharges, that's just annual rates.

9 CHAIRMAN JOHNSON: But then you're saying that we  
10 do have the discretion to open the record, and I guess  
11 this is where Mr. Twomey's saying so that we could  
12 conceivably end up not owing the 3 point --  
13 \$3,297,363?

14 MR. JAEGER: Yes, we could conceivably win on both  
15 issues, lot count and AADF.

16 MR. WILLIS: Commissioners, let me correct that.  
17 It's not 3.2. The total remand come out to 3.2  
18 million. The part that's what we call the category 2  
19 that we actually could win back that we're talking  
20 about amounts to 1.9 million, 1.9 of the 3.2 million.

21 CHAIRMAN JOHNSON: You're right.

22 MR. WILLIS: The other part with the 1.3 million  
23 is the part we have no discretion over. The court  
24 already said, you did wrong, fix it.

25 CHAIRMAN JOHNSON: That was a bit -- I was seeing



1 that, but I was saying the wrong thing, you're right.

2 COMMISSIONER CLARK: Now, are we going over the  
3 particulars of the offer or whether or not we can  
4 accept it?

5 MR. HILL: I think we're getting to whether or not  
6 it would be legal for you to accept it.

7 MR. JAEGER: What I'm trying to say is, you've got  
8 to know what the utility would be entitled to if -- I  
9 think what goes hand in hand is you have this  
10 discretion not to reopen the record and you have to  
11 figure out, if you decided not to reopen the record,  
12 what would the utility be entitled to. And then you  
13 have to look and see what they're asking for, and if  
14 they're asking for either what they're entitled to or  
15 less than what they're entitled to, then it's --  
16 clearly you can let them have that if you decide it's  
17 in the public interest.

18 COMMISSIONER CLARK: While I've interrupted you,  
19 let me just ask one thing. Is part of every  
20 settlement that we close the gain on sale docket?

21 MR. JAEGER: No.

22 COMMISSIONER DEASON: What you're saying is that  
23 we have the discretion to not reopen the record,  
24 there's a certain result from that. If we have that  
25 discretion, and if there's an offer that's something

1 less than that, that's also within our discretion to  
2 accept that?

3 MR. JAEGER: Yes, Commissioner.

4 COMMISSIONER DEASON: Is that the bottom line of  
5 your argument?

6 MR. JAEGER: Exactly.

7 MR. HOFFMAN: Commissioner Clark, just a  
8 clarification and a correction.

9 Our offer as modified is an all-encompassing, all  
10 or nothing offer, which includes closing the gain on  
11 sale docket.

12 MR. HILL: Yes, I would like to clarify there was  
13 an offer made through Mr. Twomey that did not include  
14 that. I thought your question was, did all settlement  
15 offers include the gain on sale. The two offers made  
16 by the utility do. The one offer presented through  
17 Mr. Twomey did not, and that's why our answer was no.  
18 I'm sorry for any confusion.

19 MR. HOFFMAN: Madam Chairman, may I address the  
20 same issue of the legal authority of the Commission?

21 CHAIRMAN JOHNSON: Were you finished?

22 MR. JAEGER: I think the only part that surcharge,  
23 the way they plan -- intend on handling the surcharge,  
24 they're talking about they are only going to collect  
25 it from the people who were on the system at the time,

1 but they -- their current offer as revised is saying  
2 they want to try to collect 4.7 million in total  
3 surcharges and we think that they're entitled to over  
4 five million or six million in surcharges. So what  
5 they're saying is, if they don't collect the 4.7  
6 million, if there's been what we call loss of  
7 customers where they can't find them, they've either  
8 died or moved on, the utility, if it's -- say they  
9 only collect 4.5 million in surcharges, they're  
10 requesting that the 200,000 deficit, and Mr. Hoffman  
11 can correct me if I'm wrong, be debited to CAIC. So  
12 CAIC would be reduced and their rate base would be  
13 increased by the amount that they collect. That's too  
14 little, from what's in this offer.

15 In reading the GTE decision, the court says, it  
16 says, "While no procedure can perfectly account for  
17 the transient nature of the utility customers, we  
18 envision that the surcharge in this case can be  
19 administered with the same standard of care afforded  
20 to refunds, and we conclude that no new customers  
21 should be required to pay a surcharge."

22 So staff believes that no new customers should be  
23 required to pay a surcharge, which --

24 MR. HILL: In short, what we're saying is that  
25 yes, you could legally accept an offer from the

1 utility, and that to the extent it was an offer where  
2 they were accepting less revenues than they would  
3 otherwise be entitled to, then our staff would feel  
4 comfortable that you could do that legally. We did  
5 have some other concerns with respect to the specific  
6 offer of settlement made by the company that we  
7 discussed in our recommendation, but in short, the  
8 answer is that to the extent it is merely a matter of  
9 the utility taking less than they're entitled to, then  
10 you could. If that helped any.

11 CHAIRMAN JOHNSON: Thank you.

12 Anything else?

13 MR. HOFFMAN: Thank you, Madam Chairman.

14 First, let me address the Commission's general  
15 authority to approve the company's settlement proposal  
16 and offer for disposition of the mandate on remand  
17 from the appellate court decision. I agree with what  
18 Mr. Jaeger has said, and let me try to distill it  
19 down.

20 If you look at page 32 of the staff  
21 recommendation, you will see some discussion in the  
22 second full paragraph which was outlined in the  
23 initial recommendation on remand that you heard, I  
24 believe, on September 1st. In there the staff has  
25 said to you that it is within your authority to either

1 decline to reopen the record and accept the utility's  
2 positions and the utility's numbers in connection with  
3 the water distribution and collection lines and the --  
4 the water distribution and the wastewater collection  
5 lines and the wastewater treatment used and useful  
6 issues. You have that choice, that would be within  
7 your authority.

8 Alternatively, you can reopen the record and you  
9 can go to hearing. Nobody has questioned that. No  
10 party has questioned the fact that it is within your  
11 authority to not reopen the record and accept the  
12 utility's numbers on these two issues as filed. If  
13 you were to do that, it would certainly be within your  
14 authority to enter a final order to take final agency  
15 action disposing of this case by increasing the  
16 company's revenue requirement consistent with the  
17 amounts in the company's MFRs, consistent with the  
18 amounts in the record on these two issues.

19 Now, if you had that authority, certainly you have  
20 the authority to bring a rate case which was filed  
21 over three years ago to a fair and equitable  
22 resolution by not opening the record, which I think  
23 everyone agrees is within your authority, by not  
24 reopening the record, and accepting the utility's  
25 revenue concessions which would still remain supported

1 by the record to take less than what the utility  
2 requested, and this also would be final agency  
3 action. This is not a settlement agreement. It is  
4 the company's proposal for disposition of the mandate  
5 on remand, and you must, to approve it, make it your  
6 own solution, your own decision. If the company never  
7 raised it, you would still be within your authority on  
8 remand to not reopen the record and accept the  
9 utility's concessions to take less revenue than it  
10 requested on the lot count and wastewater treatment  
11 plant issues.

12 In some ways it's no different than matters that  
13 we've brought to the Commission before on motion and  
14 you've rejected and then you have just come back and  
15 raised that same issue on your own motion. Here you  
16 would be within your legal authority to not reopen the  
17 record and enter a final order accepting less than  
18 what the utility requested on remand.

19 COMMISSIONER CLARK: Madam Chairman, I have a  
20 question.

21 Is part of your proposal that we close the docket  
22 on gain on sale?

23 MR. HOFFMAN: Yes.

24 COMMISSIONER CLARK: I'm confused on that, because  
25 it seems to me if we don't get agreement on that, that

1 any other party could then petition us to open a  
2 docket to require us to look at the gain on sale and  
3 how it is appropriate to dispose of any gain. Is it  
4 part of this docket? I understand that it's not.

5 MR. HOFFMAN: It's a different docket number,  
6 Commissioner Clark, but if the closure of that docket  
7 was a part of the Commission's final order on remand  
8 in this docket, that would be the binding precedent of  
9 the Commission in connection with that issue.

10 COMMISSIONER CLARK: Well, I guess, then, haven't  
11 we precluded due process rights for the other parties  
12 to address that issue?

13 MR. HOFFMAN: No, you've got -- no, because,  
14 Commissioner, it's, you know, not every potential  
15 party participates in the Commission's disposition of  
16 issues. The closure of the docket was part of the  
17 negotiated process in a trade-off for the company  
18 accepting less than what the company believes it will  
19 prevail on in connection with the annual revenue  
20 increase and the surcharges.

21 COMMISSIONER DEASON: Mr. Hoffman, you just said  
22 it's not a negotiated process. You come up  
23 unilaterally with your offer to accept something less  
24 and you're saying the Commission has the discretion to  
25 accept something less than the result of not reopening

1 the record.

2 MR. HOFFMAN: That is the -- the accepting  
3 something less, Commissioner Deason, was the result of  
4 the negotiations. That was our proposal, our proposal  
5 as a --

6 COMMISSIONER DEASON: You say result of the  
7 negotiations. Everyone's not agreeing to that, Mr.  
8 Hoffman.

9 MR. HOFFMAN: That's why I'm saying to you,  
10 Commissioner Deason, what we don't have is a  
11 settlement agreement. What you have in front you, and  
12 I think Mr. Jacobs will speak for himself, because I  
13 think that he has dropped off now that we have  
14 modified our proposal to meet staff's concerns, what  
15 you have is the company's proposal to resolve this  
16 case on remand, something you could have done on your  
17 own motion, and you have the authority to do that and  
18 make it final agency action.

19 COMMISSIONER DEASON: But how do we include within  
20 that your requirement of your proposal to close the  
21 gain on sale docket?

22 MR. HOFFMAN: There's nothing that would prohibit  
23 from you doing that.

24 COMMISSIONER DEASON: We could close the docket  
25 any time we want, so are you making it part of your



1 offer of settlement?

2 MR. HOFFMAN: That's right.

3 COMMISSIONER CLARK: Does that carry with it that  
4 no other party or no other concerned member of the  
5 public who takes service from this utility couldn't  
6 petition that we open a docket and allow them the  
7 benefit of the gain on sale?

8 MR. HOFFMAN: In our judgment, Commissioner, if  
9 you include that piece in your final order, then no  
10 one could then come back and challenge that decision.

11 COMMISSIONER CLARK: And that gives me cause to be  
12 concerned about due process issues.

13 MR. ARMSTRONG: Commissioner --

14 CHAIRMAN JOHNSON: Hold on, Mr. Armstrong.

15 Terry, would you complete? I'm going to allow you  
16 to follow up, but then I'm going to have Mr. Twomey  
17 and Mr. Shreve make their points because you all may  
18 want to rebut what he says.

19 MR. ARMSTRONG: If I may just add, it was totally  
20 discretionary to the Commission and it would remain  
21 discretionary to the Commission whether or not that  
22 docket should remain open. It was certainly  
23 discretionary whether to open it in the first place,  
24 because it was -- it was simply discretionary. For  
25 the Commission here to suggest that they were closing

1 that docket is something that was integral to the  
2 company's position regarding any reduction in the  
3 annual revenue we would recover in this docket, and we  
4 can't forget the surcharges. The surcharge that  
5 customers would face if we litigate these dockets,  
6 this docket, and we go through the appeal process,  
7 which would be very likely, would be in the order of  
8 \$12 million in surcharges.

9 Now, the company has agreed to modify and reduce  
10 that surcharge amount. The staff's own numbers show  
11 somewhere in the neighborhood of \$7 million, not even  
12 including interest. We have suggested that we would  
13 surcharge only \$4.7 million. We have also suggested  
14 mechanisms for the recovery of that surcharge which  
15 would mitigate the recovery and the impact on  
16 customers.

17 COMMISSIONER CLARK: I interpret your argument to  
18 go to the merits of a settlement, not really to the  
19 issue as to whether or not we can accept a unilateral  
20 concession, because it is not just a concession on  
21 your point. It involves affecting the rights of  
22 parties to be heard on a separate issue.

23 MR. ARMSTRONG: Commissioner, which is an issue  
24 which is at the discretion of the Commission whether  
25 or not to hear that issue. That is the integral thing

1           that we should not forget. It's not a mandate,  
2           there's no statutory mandate that the Commission hears  
3           and opens that docket on the gain on sale. As a  
4           matter of fact, as we're all aware, there have been  
5           many, many, many, many, many, many sales where there's  
6           been no opening of any docket in investigation of a  
7           gain on sale. The Commission has not in the past ever  
8           opened a docket to investigate gain on sale. That in  
9           and of itself tells y'all it is discretionary to open  
10          that docket. So it is also discretionary to close  
11          that docket.

12                 COMMISSIONER DEASON: May I ask Mr. Armstrong a  
13                 question? Would it also be within the Commission's  
14                 discretion to identify a revenue impact of the gain on  
15                 sale and put that much money subject to refund on a  
16                 going-forward basis?

17                 MR. ARMSTRONG: In this docket?

18                 COMMISSIONER DEASON: No, I'm talking about in the  
19                 gain on sale docket. Do we have that authority?

20                 MR. ARMSTRONG: You know, I don't like to speak  
21                 off the cuff. I don't know that you would have that  
22                 authority, and I would suggest that you wouldn't have  
23                 that authority at this point in time. Absent anything  
24                 else, I would suggest you do not have that authority.

25                 CHAIRMAN JOHNSON: Public Counsel Jack Shreve?

1           MR. SHREVE: For the first time, I think I  
2 followed Mr. Hoffman's arguments on this. He's saying  
3 we do not have a settlement. That's how we're coming  
4 in on this, but it's within the discretion of the  
5 Commission to accept the terms and set your own terms,  
6 and whatever you come out with a final order, no one  
7 else will have a right to challenge. If that's the  
8 case then, you certainly have the right, if you're  
9 going to close that docket, to decide who is going to  
10 win, so I think we could accept Southern States'  
11 arguments, and maybe this is what you're getting at,  
12 is that if you can make a decision to let Southern  
13 States win on the gain on sale docket in the same  
14 scenario that Mr. Hoffman and Mr. Armstrong and  
15 Southern States is maintaining, then you can certainly  
16 say this is a situation where we have a gain on sale  
17 that's within the jurisdiction of the Commission that  
18 doesn't go along with the decisions we made in the  
19 past where we had no jurisdiction on gain on sale,  
20 decide with the customers, say there is a \$4 million  
21 gain on sale, they win, we close the docket, and as  
22 Mr. Hoffman said, you have the right to make that  
23 decision.

24           You're going to accept their -- the numbers on  
25 this, you're going to make your own decision, as Mr.

1 Hoffman says. It's yours, you put out a final order,  
2 then you certainly have the right to make that  
3 decision and go the customers' way. It's the same as  
4 Mr. Hoffman argues you can go the company's way.

5 I originally was going to say, you know, this is  
6 one situation where you have absolutely no hearing,  
7 you have no evidence, and if you're going to do this,  
8 there may be some situations I'd like to come in and  
9 eradicate and have you just go ahead and make a  
10 decision without having any evidence. But if you  
11 accept Mr. Hoffman's argument on this, then go ahead,  
12 I would urge you to decide with the customers and  
13 close the docket, and then as Mr. Hoffman says, no one  
14 can challenge it.

15 CHAIRMAN JOHNSON: Thank you, Mr. Shreve.

16 Mr. Twomey, did you want to add?

17 MR. TWOMEY: Yes, Madam Chairman, Commissioners.  
18 I'm feeling fairly magnanimous here, which I think is  
19 the right word, and I'd like to assume for a moment  
20 that SSU is going to be entitled to zero dollars if  
21 the Commission reopens the record, and the customers  
22 and the Commission and the Commission staff prevail on  
23 the Category 2 issues, and assuming that the  
24 Commission and the customers and the staff are going  
25 to prevail on those two issues, and assuming that SSU

1 will therefore be entitled to zero dollars on Category  
2 -- let's not get Category 1 confused, they're  
3 entitled to that, let's not mix them -- assuming that  
4 if we win they're entitled to zero dollars, I would  
5 like to now, I know it's late in the game, but of  
6 course they've taken the opportunity of changing their  
7 offer as recently as closing time yesterday, so  
8 although it's late in the game, I would like to  
9 unilaterally on behalf of my clients offer to give the  
10 utility without any reopened record \$200,000, without  
11 them having to go to any proofs or engage in incurring  
12 any more additional rate case expense. Okay. And as  
13 long as we're at it, I would like to throw in Mr.  
14 Shreve's part and say let's just assume that the  
15 customers are going to win on the gain on sale, and  
16 let's go with that too, okay, and we can stop all this  
17 and they'll get \$200,000 in additional revenues, both  
18 prospectively and retroactively on the surcharges,  
19 okay?

20 You see, the problem is, Commissioners, while it's  
21 clear that the court in this case said on the Category  
22 2 issues that you can reopen the record and attempt to  
23 fight out and defend your decision -- we're not  
24 talking about my order or my client's order, we're  
25 talking about the Commission's order on those two

1 Category 2 issues, you made the findings, we think you  
2 were correct. This ERC business, not to go too much  
3 into the substance, this ERC business as demonstrated  
4 by Marco Island, where you can have a hundred percent  
5 used and useful when it's only 40 percent built out,  
6 any system where you have a preponderance of one-inch  
7 meters, that's wrong on its face.

8 Now, if you not want to not reopen the record and  
9 as your staff suggests you can and go and adopt that  
10 where you give them a -- you people were down there,  
11 you saw that the place isn't half built out and that  
12 giving them a hundred percent used and useful on lines  
13 was incorrect, it was logically flawed, you can see it  
14 with your own eyes. And so you gave them, using the  
15 methodology you adopted on the lot count, you gave  
16 them 42 percent or thereabouts.

17 So what I'm saying to you is, you can go ahead and  
18 refight this thing, that's one thing the staff and the  
19 company recognize you can do. You can reopen the  
20 record, take advantage of what the court told you you  
21 can do in terms of finding new evidence to support  
22 your theory and/or doing a better job of explaining  
23 why you adopted that methodology. You can do that,  
24 and if we're successful in that, the company will get  
25 zero dollars in new rates, both prospective and

1 surcharges, and they'll get nothing from the effort  
2 except maybe a chance to recover their rate case  
3 expense, which shouldn't be that great.

4 It is probably true, as your staff suggested and  
5 Mr. Hoffman indicates, that the court gave you the  
6 option of just not reopening the record and giving the  
7 utility everything it wants, okay? I think legally  
8 you can do that, okay. I think you would totally  
9 abandon your obligation to the customers. It would be  
10 politically insane to roll over and give these people,  
11 without a fight, throw away the decision you made  
12 before on your rate case completely without a fight  
13 and give them every penny they say they're entitled  
14 to, whether it's 10 million, 12 million, whatever,  
15 going backwards and forwards. You've got to give them  
16 that if you choose not to fight.

17 Now, you folks are, as a body, accountable, you  
18 have to be held accountable. Now, I don't think you  
19 can defend that, that's not a legal issue. That's a  
20 political/social issue. I don't think that you would  
21 even consider giving up all this money to this utility  
22 without abandoning your previous position and giving  
23 up without a fight when the court has clearly said  
24 that you can reopen the record and attempt to readopt  
25 what you did before.



1           So what I'm saying, only tongue in cheek, of  
2           course, is that if you can assume for purposes of your  
3           staff's analysis that they're going to win everything  
4           if there's a hearing and you can back off from that  
5           and they can tell you how much they're willing to  
6           take, then I've got the same right on behalf of my  
7           party, my client, to say hey, I'm assuming they're  
8           going to win zip on the Category 2 items and I'm going  
9           to make a unilateral offer that no one's joined me on,  
10          just like them, and say, let's give them \$100,000,  
11          \$200,000 for their time here, and assume they're going  
12          to win zero, and I'm giving them more, I'm  
13          magnanimous, let's go with that.

14           I don't expect you to do that. I don't expect you  
15          to go with this business, but what I'm trying to show  
16          you is if you think they're going to win, you're  
17          pessimistic, you're wrong, you're abandoning the  
18          customers. If you don't reopen the record to take  
19          additional evidence and give additional explanations  
20          for whatever decision you come out with, which I would  
21          hope would be a readoption of what you said before,  
22          because it makes sense, what you did before makes  
23          sense, if you reopen the record, I would suggest to  
24          you, and maybe Mr. Stephens can add something to this,  
25          because he used to be the -- I think he was the chair

1 for some time of the Bar's administrative law  
2 committee, I would submit to you that you have to have  
3 evidence of record and make a reasonable explanation  
4 of why you're giving them anything on this remand,  
5 that you just can't say on the worst-case day for the  
6 customers they would have wanted 10, 12, 13 million  
7 dollars, and since they've come in and offered to take  
8 four or whatever it is, we're going to go ahead and  
9 give it to them. In my view, that isn't adequate  
10 legally. It's not consistent with the Chapter 120  
11 administrative law of this state.

12 You can't do it. I mean, you shouldn't do it for  
13 lots of social, practical, political reasons, but I'm  
14 suggesting to you that whatever you come up with here,  
15 if you do you something that's -- you can do all or  
16 nothing, but if you do something in between, I think  
17 you have to have evidence of record to support it.  
18 And merely suggesting and saying to the people of this  
19 state and the customers of this utility that they're  
20 willing to take more than they're entitled to on their  
21 best day doesn't get it, in my opinion, under the law.

22 COMMISSIONER JACOBS: Would that be responsive to  
23 the court on that issue, though?

24 MR. TWOMEY: Sir?

25 COMMISSIONER JACOBS: Do you feel that that would

1 be responsive to the court on that issue?

2 MR. TWOMEY: What, if you did that?

3 COMMISSIONER JACOBS: Yes.

4 MR. TWOMEY: No, sir. What I'm saying is that  
5 while I agree that you can do nothing and give them  
6 everything and the court would probably uphold it and  
7 you could clearly reopen the record and fight and  
8 hopefully fight them down to zero, I'm suggesting to  
9 you that the law requires that if you do anything in  
10 the middle, that you have to be able to explain it.

11 COMMISSIONER DEASON: Madam Chair, let me ask Mr.  
12 Twomey a question and then -- what if the Commission  
13 issues something in the middle as a PAA, do we have  
14 that authority?

15 MR. TWOMEY: I don't think so, but I think you  
16 just -- I mean, you recognize it's probably insane,  
17 that you'd just be wasting your time. I'm here to  
18 tell you on behalf of my clients that we want a  
19 hearing. We're not afraid of a hearing, we're not  
20 afraid of additional rate case expense. If you do a  
21 PAA, we will come back in and protest it. I can't  
22 speak for Mr. Shreve, but there may be -- and Mr.  
23 Jenkins has to speak for his people, but these people  
24 changed this offer within the last eight, twelve  
25 hours, whatever it comes to, last 24 hours certainly,

1 and I'm saying to you that you can't accept it, and my  
2 suggestion to you in a practical sense --

3 COMMISSIONER DEASON: Let me clarify my question.  
4 I'm not saying issuing as PAA the company's offer.  
5 I'm just saying anywhere in between, just for the sake  
6 of theory, because right now we're still on theory of  
7 the legal argument, we're not really talking the  
8 dollars. You're saying that it would be fruitless to  
9 issue any PAA because somebody's going to protest it  
10 because there's no settlement, so anywhere that we  
11 reach in between, somebody's going to protest, so that  
12 is a closed door?

13 MR. TWOMEY: Yes, sir, and I don't -- I haven't  
14 thought about this enough or researched it to say flat  
15 out that you couldn't technically do -- legally do a  
16 PAA right now, but my gut reaction is that you can't.  
17 The court has given this back to you. It's not free-  
18 form. I don't mean to suggest you think it's this  
19 way. I'm just saying that this isn't just here on a  
20 petition of the company or a motion or an offer, it's  
21 back on remand from the court. The court's given you  
22 specific things, Category 1 that you're bound by, you  
23 have no discretion, has given you discretion that you  
24 can elect to exercise or not with the Category 2  
25 items, and I don't think -- again, I don't think you

1 can do anything in the middle dollar-wise, including a  
2 PAA, without supporting it by evidence to say -- and  
3 you're put in a difficult position, of course, because  
4 the -- until you hear more evidence, the lot count  
5 thing, for example, is kind of an all or nothing, it's  
6 either you go with what you had before or you give the  
7 utility everything, which on its face is wrong.

8 If you go to hearing on this and take additional  
9 evidence, you might find, for example, that what you  
10 did in SSU's case for Sugarmill Woods in 1992 is just  
11 the answer that you need, it's something in between,  
12 straight lot count, straight ERCs. It makes more  
13 sense, it takes into account the fact of a system that  
14 has a large number of one-inch meters, for example,  
15 and still gives the utility credit for larger meters,  
16 commercial customers and that kind of thing. I don't  
17 know if you've -- that was in our offer. I don't know  
18 if that was presented to you. But staff's made a big  
19 deal about the fact that the company's offer was given  
20 -- I gave staff copies of my offer. I didn't file it  
21 with the Commission.

22 My point is, you go to hearing on this,  
23 Commissioner, you can take additional evidence, you  
24 can massage this thing, it's not all or nothing. To  
25 answer your question, I think legally by the court,

1           you give them everything or you have a hearing as  
2           they've given you the chance to, as most of us want,  
3           and make a new decision. Thank you.

4           CHAIRMAN JOHNSON: Ms. Jaber?

5           MS. JABER: Commissioners, I just wanted to bring  
6           you back -- because Mr. Twomey, probably  
7           unintentionally, made some representations about what  
8           staff's recommendation was, I would like to bring you  
9           back to what staff's recommendation is, which is right  
10          now that there are two viable options, one being that  
11          you can go to hearing on those two issues we say we  
12          have discretion, the court has given us discretion;  
13          two, if the utility adjusted its offer of settlement  
14          in the two ways that was discussed in the  
15          recommendation, that's probably a viable option.

16          Now, honestly, we probably missed the gain on sale  
17          docket. I think in looking at the original offer of  
18          settlement, we took the view that the Commission  
19          opened that docket and the Commission could close that  
20          docket. But I have to tell you today that I'm  
21          convinced that that would affect customers and I think  
22          that Mr. Shreve has made a good point. Based on that,  
23          perhaps the utility would be willing to withdraw that  
24          term in their settlement. That's the first thing I'd  
25          like to throw out at you.

1           Secondly, we would not recommend anything that  
2 would result in a PAA order. We think that would be  
3 fruitless and it would get us nowhere.

4           Thirdly, you do have the evidence and the record  
5 you need to comply with this mandate. You've got two  
6 options in complying with this mandate. This was your  
7 order that was reversed. The utility has made you an  
8 offer of settlement. You have to decide whether that  
9 offer of settlement will work within the purview of  
10 the mandate. We have tried very hard to look at that  
11 closely and we've identified some problems and we  
12 recognize we missed the gain on sale. I think you  
13 have the evidence you need. We are not attempting to  
14 give the utility more than what it's entitled to.  
15 What this recommendation says is the utility's  
16 entitled to X. This settlement probably will result  
17 in less than X.

18           MR. ARMSTRONG: Madam Chairman, if I may now,  
19 first for clarification, I think it needs, based on  
20 what's been said so far, it needs to be totally clear  
21 in the record that there's been an apparent  
22 misconception of the role of this Commission in this  
23 docket and in any docket.

24           As recently as the GTE decision, it was confirmed  
25 by the Florida Supreme Court that it's the role of

1           this Commission to be objective, to be fair and  
2           equitable to both the utility and its customers. To  
3           hear it posited that the Commissioners are here to  
4           fight the utility, fight for the customers and fight,  
5           fight, fight, fight, fight is a misconception of the  
6           role of this Commission, first of all.

7           Second of all, it's another misconception that's  
8           been made, and that is the fact that this company  
9           appealed seven or eight items before that DCA, and won  
10          on every one of those issues except for one. As has  
11          been hinted at today, this average annual daily flow  
12          issue is one that the Commission has twice been  
13          reversed on, twice, and probably likely will be  
14          reversed a third time in the Palm Coast decision.

15          The gain on -- I mean, the lot, the lot count  
16          method, this Commission repeatedly over a number of  
17          years for more than a decade rejected every attempt to  
18          impose a lot count method in mixed use areas like  
19          Marco Island and other areas that the company serves,  
20          rejected it over and over again with rational reasons  
21          therefor. The Commission acknowledged that -- I mean,  
22          the court acknowledged that at the DCA, and you can't  
23          forget, and so everybody's clear, the court's order  
24          repeatedly says you have the discretion to open the  
25          record and you have an ability to attempt, if you can,



1 to produce evidence. You have an ability to present  
2 evidence if it exists. Those qualifications there  
3 have to be read with all -- every degree of  
4 seriousness which that court intended those words to  
5 be placed in that order for.

6 So the Commission being objective, understanding  
7 that you have discretion whether or not to open the  
8 record, understanding that the evidence is in the  
9 record in support of the company's positions, the  
10 evidence is there, understanding that the company at  
11 the direction of this Commission willingly entered  
12 settlement negotiations, that the company has now  
13 addressed the situation where we would say we would go  
14 forward and collect the revenue increase now that is  
15 less than we would otherwise be entitled to, to go  
16 forward and delay for a period of time and mitigate  
17 the impact on customers of surcharges, taking far less  
18 money, millions of dollars less in the way of  
19 surcharges from customers -- and let's remember, those  
20 surcharges are there because the court found the  
21 Commission's prior activities were unlawful. The  
22 company should have been collecting those dollars over  
23 time.

24 We have to remember all those facts when we  
25 consider what the company has posited here, and to be

1 very clear on the record, though, the company has  
2 often made motions. The Commission has denied those  
3 motions on the merits only to, on your own motion, do  
4 exactly the same thing the company has requested.  
5 That gain on sale docket is a discretionary docket  
6 never before opened any of its type in the past, and  
7 the company has sold facilities in the past as well as  
8 others have sold.

9 The Commission has the discretion now and always  
10 has had to close that docket. It is the company's  
11 position that we are conceding these dollars, and part  
12 of the quid pro quo is the gain on sale docket being  
13 closed. If that's not part of the decision-making  
14 here, then obviously, and I want to be very clear on  
15 this, if there's a reduction in the recovery of the  
16 company as a result of an order from today's  
17 proceeding that doesn't include the gain on sale, then  
18 the company would have an opportunity and the right to  
19 appeal that kind of decision.

20 CHAIRMAN JOHNSON: Thank you.

21 Any other comments?

22 Questions, Commissioners?

23 Oh, Public Counsel Jack Shreve.

24 MR. SHREVE: Very briefly on Commissioner Deason's  
25 question about PAA, I'm not sure exactly how you're

1 structured or what issues you would take up on the  
2 PAA, but if you were to decide to put something out  
3 like that, I think you'd have to also put in the  
4 effect on the individual customer groups, because even  
5 with the calculations that are in the staff  
6 recommendation, you have some going up, some going  
7 down, and so I think you'd need to do that and make it  
8 very specific as to what -- so the customers were  
9 aware of what the effects were on them.

10 MR. JENKINS: Madam Chairman, if what we're  
11 talking about right now is can the PSC legally accept  
12 a settlement offer or make that your own, I don't have  
13 any comment on that. We at Marco Island were in favor  
14 of the original settlement and are on the record as  
15 having done that. We don't support the revised  
16 settlement, and I'll speak to that later, but given  
17 those two situations, I don't think I'm in the best  
18 position to speak to your right to accept or not the  
19 settlement, but I'm concerned if we're beyond that  
20 point and if we're discussing the merits of the issue  
21 as to why you should or should not reopen the record,  
22 I'd like to speak to that, whether at this time or if  
23 we're going to deal with that at a later point.

24 CHAIRMAN JOHNSON: Let me ask a question of Mr.  
25 Twomey so that I can better understand your position.

1           As it relates to the gain on sale issue, I think  
2           you're saying we clearly don't, or you don't believe  
3           we have the authority, and I know Public Counsel said  
4           we don't have the authority to even accept a  
5           settlement that would have --

6           MR. TWOMEY: I agree with Mr. Shreve.

7           CHAIRMAN JOHNSON: Now, on the second issue,  
8           though, assuming that was out, off the table, I  
9           thought I heard you say that we did have the authority  
10          to accept the other components, but that we shouldn't,  
11          basically. Because I thought you said that we have  
12          the authority to accept less, kind of like what Lila  
13          stated, and even the company, but that it would not be  
14          wise to do, or do you think we don't even have the  
15          authority if we took gain on sale out?

16          MR. TWOMEY: I don't -- gain on sale out, I don't  
17          think you have the authority, and again, this is why.

18          As you may recall, in -- to look at this somewhat  
19          analogous but still different type area, typically the  
20          courts of the United States and Florida have given the  
21          Commission broad latitude to decide what a company's  
22          return on equity award would be if, within bounds, the  
23          decision the Commission made was within the zone of  
24          whatever the experts testified for, top and bottom  
25          range. The Commission generally could pick any number

1 they wanted to and the courts won't disturb that  
2 because they found it was within the range that was  
3 testified to by the expert witnesses. And you didn't  
4 have to -- and you could make up whatever explanation  
5 you wanted to on why you justified the number and it  
6 would sail through, usually.

7 What I'm suggesting to you here is different, in  
8 that you've got two somewhat diametrically opposed  
9 methodologies. You've got the lot count method which  
10 Mr. Armstrong wants to suggest has always been right,  
11 which is to say that in his argument, if you've been  
12 doing something for a long time, you couldn't have  
13 seen the wisdom of its flaws and made a change, which  
14 is what you did, which is clearly what you did if you  
15 read your order. You rejected that methodology as  
16 being appropriate under these circumstances and you  
17 made a change and you tried to justify why you did it.

18 But you've got the lot count -- and I'm just  
19 talking about the used and useful lines -- you've got  
20 the lot count methodology on one end, which if you go  
21 do the numbers, results for any given system of X  
22 percentage, you do the ERC, which is what the utility  
23 is suggesting they should have and what the court is  
24 apparently saying they must have, unless you resupport  
25 or readopt the lot count or something different, and

1 that gives you a totally different percentage number  
2 based upon the same facts. And in many cases, it  
3 gives you, not to go too much into substance, if you  
4 got a lot of large meters for residential, it gives  
5 you a huge percentage of used and useful, even if  
6 there is a relatively low level of buildout in  
7 residences.

8 But based upon the same facts, the lot count gives  
9 you one percentage number, the ERC methodology gives  
10 you another, and they are -- they're carved in stone,  
11 essentially, based upon given facts. And what I'm  
12 suggesting to you is I think that -- and one would be  
13 a zero increase if you reaffirm successfully your lot  
14 count methodology in your final order, and one would  
15 be this huge additional amount of money if the utility  
16 were to prevail. And what I'm suggesting to you is  
17 that, in your order, I think the administrative law  
18 and the law of this state requires you to say, if  
19 we're going to give them an additional three million  
20 or four million or whatever it is that they end up  
21 getting, prospectively and surcharge-wise, these  
22 monies that we're doing it because in the record we  
23 find that there is an amalgamation of these two  
24 methodologies and it comes up with this percentage,  
25 okay.

1           Now, you can't do that. You can't do that from  
2 your record, and I don't think your staff is  
3 suggesting that. What they're saying to you is that  
4 the record, according to the utility, and maybe the  
5 court, supports giving them everything, so you can  
6 just arbitrarily decide any number below that is  
7 appropriate, and you can do it, and what I'm  
8 suggesting to you is that I don't think you can. I  
9 think you have to have evidence you can support to in  
10 the record that comes up with a theory that supports  
11 the number that they're willing to accept.

12           CHAIRMAN JOHNSON: I think I'm following you, and  
13 I appreciate that additional explanation. So I guess  
14 what you're saying, though, too, is that we could,  
15 based on the record, pick one of those methodologies  
16 and say but -- but we would have to pick based upon  
17 what was in the record, and then say, but the utility  
18 has decided to accept less than that, right? We have  
19 to speak to the substantive issue of methodology and  
20 what we used and how we got to what the numbers should  
21 have been and then conclude that the utility accepted  
22 less?

23           MR. TWOMEY: I don't know. I mean, I'm not sure  
24 that I understand your question. But you can't, you  
25 can't just arbitrarily pick the lot count because the

1 court said you can't use that unless you take  
2 additional evidence and reaffirm it with more concise  
3 explanations, so you can't just pick it and give them  
4 more.

5 CHAIRMAN JOHNSON: We'd have to --

6 MR. TWOMEY: And I don't think you have any -- you  
7 don't have any -- you wouldn't be doing yourself and  
8 your staff justice, because your staff has said fairly  
9 aggressively in these agenda conferences verbally, and  
10 in their written recommendations, they think they can  
11 defend those two issues successfully, defend your  
12 order. So to go ahead and arbitrarily pick the big  
13 100 percent victory for them and cut it back I think  
14 is wrong, too.

15 So what I'm suggesting is that you wouldn't be  
16 able to support it in your order. Unless you just  
17 came out in and order and said, we're going to accept  
18 that, they were maybe entitled to 100 percent of it  
19 and they would take less. So we're fine with that.

20 CHAIRMAN JOHNSON: And you're saying that's  
21 almost the only way you could accept this, it would  
22 be --

23 MR. TWOMEY: Yes, ma'am, but what I'm saying is I  
24 don't think that meets the requirements of the law  
25 that you, on this remand specifically and in



1 administrative law in general, that you support an  
2 awarding of customers' money to those people without  
3 specific findings of fact that they were legally  
4 entitled to it.

5 CHAIRMAN JOHNSON: I'm following you.

6 Did you have a question?

7 COMMISSIONER CLARK: No, I'm ready to make a  
8 motion.

9 CHAIRMAN JOHNSON: Any other questions?  
10 Is there a motion?

11 COMMISSIONER CLARK: I'm ready to move staff on  
12 Issue 3. I agree with what they say there, that we  
13 could not -- they say we should now, I don't think we  
14 can unilaterally accept the offer, nor can we accept  
15 the counteroffer. If it were a, totally a situation  
16 where all the concessions were being made on the part  
17 of the utility, I think we could, but the gain on sale  
18 involves a concession by perhaps parties who are not  
19 even represented, and I don't think we have the  
20 authority to do that.

21 MS. JABER: I should tell you who the parties are  
22 in the gain on sale docket.

23 COMMISSIONER CLARK: Well, at this point, at this  
24 point, and we're not to the final hearing on that, I  
25 presume, so that there are people, not just the

1 parties there, but potential parties' due process  
2 right may be cut off. I'm not -- I understand the  
3 notion that it's discretionary, but also understand  
4 the notion that even though it's discretionary, the  
5 parties would want to raise an issue in another docket  
6 and require that we hear it. I'm not sure that just  
7 saying, well, we've settled it in another docket you  
8 never had an opportunity to participate in is  
9 defensible.

10 CHAIRMAN JOHNSON: There's a motion on Issue 3.

11 COMMISSIONER DEASON: I need some clarification on  
12 the motion. Is the motion that the Commission does  
13 not have the authority because of the gain on sale  
14 provision within the proposed settlement, or that the  
15 Commission should not accept it because of the gain on  
16 sale proposal? Because I'm trying to understand, are  
17 we setting some precedent here, and I want to  
18 understand clearly, if we are, what that precedent  
19 would be.

20 COMMISSIONER CLARK: I guess, and maybe I can get  
21 some help in crafting a motion, because I don't think  
22 you can unilaterally accept any settlement which  
23 affects the rights of a party who has not agreed to  
24 that settlement.

25 COMMISSIONER DEASON: So you're saying then,

1           regardless -- it's just the fact that we don't have --  
2           because we don't have a settlement that is agreed to  
3           by all parties, we don't have the legal authority to  
4           accept it?

5           COMMISSIONER CLARK: No, because if one of those  
6           parties who has rejected it really has -- its rights  
7           are not being affected by it, that wouldn't trouble  
8           me, and I suppose if the gain on sale came out of it,  
9           I would have a hard time understanding where some  
10          rights might be affected.

11          COMMISSIONER GARCIA: Is that the only issue, that  
12          rights are affected on the gain on sale?

13          COMMISSIONER CLARK: Pardon me?

14          COMMISSIONER GARCIA: Is the gain on sale the only  
15          issue that affects someone else's rights?

16          COMMISSIONER CLARK: That's my understanding. I  
17          mean, it seems if you sort of take out of that, the  
18          concessions have all been made on the part of the  
19          utility and in effect they've agreed to take less than  
20          they might be entitled to on the issues.

21          Let me -- but let me ask this: But that's less,  
22          assuming they win on those other issues, right? So I  
23          may be wrong. Let me -- I don't think we can  
24          unilaterally accept their offer. And I think that  
25          should be the gist of the motion, that we cannot

1 unilaterally accept the offer of settlement. Is it an  
2 offer of settlement?

3 MS. JABER: This is an offer of settlement made to  
4 you. For whatever it's worth, you need to be careful  
5 about that kind of precedent. We are in the era of  
6 mediation and that kind of flies against what we've  
7 been telling the conflict resolution consortium, which  
8 is if we have a mediated settlement agreement which  
9 might have an impact on others, but if they're not  
10 involved, it's going to come before the Commission,  
11 who will act on that mediated offer of settlement.

12 COMMISSIONER CLARK: Well, we don't have where the  
13 parties -- if you want to add to it -- where the  
14 parties to the docket don't agree to the settlement.

15 MS. JABER: With respect to the gain on sale, I  
16 would agree with you. Public Counsel has intervened  
17 on that docket --

18 COMMISSIONER GARCIA: Hang on one second, Lila.  
19 What I was trying to --

20 COMMISSIONER CLARK: What the parties have not  
21 agreed, even if you take out the gain on sales,  
22 they've not agreed and in effect it is -- I see what  
23 you're saying, because it's within our discretion to  
24 hold a hearing or not, that --

25 COMMISSIONER GARCIA: Yeah, I would contend that

1 the question is a settlement between us and the  
2 company.

3 MS. JABER: Right, and what I would suggest --

4 COMMISSIONER GARCIA: We're the ones that lost.

5 MS. JABER: Yeah, that's my recommendation to you,  
6 that if the utility agreed to withdraw the term  
7 related to the gain on sale, that you have the legal  
8 authority with the modified settlement to accept it  
9 unilaterally, and that could be a final agency action.

10 COMMISSIONER CLARK: I would agree with that.

11 MR. HOFFMAN: Commissioner, Madam Chairman, may I  
12 make one suggestion? You know, while we disagree  
13 about the impact of our inclusion of the gain on sale  
14 issue in our proposal, we disagree with you on that,  
15 we're still trying to reach the finish line on this  
16 thing, and so what we would suggest is take a step  
17 back for a second and recall when this gain on sale  
18 issue first came before you some six, nine months ago,  
19 whenever it was. I argued to you, you don't need to  
20 open this docket. How do you handle every other gain  
21 on sale? You handle it in the rate case. And what's  
22 going to happen, we're going to go through, the  
23 company's going to incur costs to litigate this gain  
24 on sale in this so-called special docket, and if the  
25 company prevails, which we believe under the facts and

1 your precedent we would, then we're going to have to  
2 take it up again in the next rate case. And you said,  
3 we're going to open that docket anyway.

4 And what we would suggest to you now to try and  
5 react to where we are this morning would be we would  
6 agree to modify our proposal even further to postpone  
7 the disposition of the gain on sale of the Orange  
8 County facilities to our next rate case and to still  
9 close that docket, to close the docket that has been  
10 opened and to postpone the deferral -- to postpone the  
11 disposition of that issue to our next rate case. In  
12 that manner, you would be handling the gain on sale  
13 issue in the same manner that you handled it in our  
14 last four or five rate cases, and probably uniformly  
15 throughout the industry.

16 COMMISSIONER GARCIA: Well, I want to try to  
17 understand whose rights we affect by accepting this  
18 settlement offer, because it's my belief that this is  
19 a settlement between us and the company.

20 MR. TWOMEY: Madam Chairman, may I respond to  
21 that? That is on the surface --

22 COMMISSIONER GARCIA: Mr. Twomey, could you let  
23 Lila answer it, and then I definitely want to hear  
24 from you.

25 MR. TWOMEY: Yes, sir.

1 MS. JABER: Commissioner Garcia, are you saying  
2 with the modification that the gain on sale docket be  
3 disposed of later on --

4 COMMISSIONER GARCIA: Yes.

5 MS. JABER: -- who it would be affecting?

6 COMMISSIONER GARCIA: Yes.

7 MS. JABER: Let me answer it this way: The  
8 customers are affected in that they will have that  
9 rate increase and the surcharge, but that's because of  
10 the remand, that's not because of your settlement,  
11 that's not because you accepted the settlement offer.  
12 It's the nature of the beast. The remand -- you have  
13 to act because of the mandate by the First District  
14 Court of Appeal. That will by definition affect all  
15 customers.

16 COMMISSIONER GARCIA: Right, but that is a  
17 settlement between this Commission and the company --

18 MS. JABER: That is our --

19 COMMISSIONER GARCIA: -- based on a remand from  
20 the court.

21 MS. JABER: Yes, sir.

22 COMMISSIONER GARCIA: We are taking everyone's  
23 discussion here, but the truth is that the only two  
24 parties involved are the company and the Florida  
25 Public Service Commission because our order was

1 remanded.

2 MS. JABER: That is our recommendation.

3 MR. TWOMEY: My turn?

4 COMMISSIONER GARCIA: Yes, Mr. Twomey, please.

5 MR. TWOMEY: Okay, Commissioner.

6 Ms. Jaber missed one important point, I believe.  
7 It's your order and I've suggested to you repeatedly  
8 this morning that you have an obligation to defend  
9 it. The court has said you can defend it, and the  
10 court has said that you don't have to defend it if you  
11 don't want to.

12 But let's not be confused or mistaken for one  
13 second here. If you accept the company's settlement  
14 to make my clients and every other customer of this  
15 utility pay increased prospective rates and  
16 retroactive surcharges, you're affecting their Chapter  
17 120.57 substantial interests, pure and simple. You  
18 can't get around it. It's not just this Commission's  
19 rights that are affected and it's not just this  
20 Commission and this utility that are the parties to  
21 this decision.

22 COMMISSIONER CLARK: Let me be clear, then. You  
23 are saying that if we do not exercise discretion to  
24 open the record, you have a right to require us to?

25 MR. TWOMEY: No, I'm not, and I want to be clear



1 on that. I'm not --

2 COMMISSIONER GARCIA: You're saying exactly that,  
3 Mr. Twomey.

4 MR. TWOMEY: No, here's what I'm saying. Let me  
5 say it again. I might try to find some way of  
6 suggesting on appeal that y'all should have reopened  
7 the record if you just roll over and give them  
8 everything by assuming that everything you did before  
9 was wrong on the Category 2 items, okay? What I've  
10 been saying is that our preference is that you fight.  
11 I've also been saying I don't think you can just  
12 arbitrarily accept what they're offering -- I don't  
13 care about the gain on sale issue, take it out -- that  
14 you can just arbitrarily accept what they've offered  
15 you because it falls within the middle of what they  
16 might win on their best day and what they might get if  
17 they get nothing. And I'm saying to you that if you  
18 do this, if you accept their deal, we're going to  
19 appeal it.

20 COMMISSIONER GARCIA: That's fine. That's your  
21 right, Mr. Twomey, because you can exercise that  
22 right, but the question before us is more direct. The  
23 court has asked us whether we want to take this up or  
24 not, and that is a decision wholly and totally up to  
25 this Commission.

1 MR. TWOMEY: Well, sir, I don't mean to be -- I  
2 don't want to be too abrupt on this. You're sitting  
3 in the driver's seat and have to make the decision.  
4 But let's not be mistaken on whether it's just your  
5 rights that are affected by the course of your  
6 decision. It is your decision to make because of the  
7 positions you hold in trust for this state. The court  
8 says you can reopen the record or you can not reopen  
9 it, and what I'm saying to you is, if you don't reopen  
10 it, you've adversely affected the customers of this  
11 utility horribly. If you accept this settlement, this  
12 unilateral, one-sided deal from this company, and you  
13 accept it because you accept the notion that it's less  
14 than they might win on their best day but still more  
15 than they're entitled to if they lose to the  
16 customers, then you are affecting the economic and  
17 120.57 substantial rights of my clients. It may be  
18 your decision, but it's the money that's going to come  
19 out of my clients, not your own.

20 COMMISSIONER CLARK: Mr. Twomey, just cutting to  
21 the meat of it, you're saying that you have a right to  
22 appeal our decision not to open the record?

23 MR. TWOMEY: I'm saying that we'll look for one.  
24 The bigger point --

25 COMMISSIONER CLARK: Let me just lay it out for

1 you the way I perceive your argument.

2 You're saying, apparently, that we have the right  
3 to say we are not going to reopen the record and  
4 therefore we are going to allow them to collect on --  
5 we're going to assume a reversal on the Category 2 so  
6 they would be allowed to collect that. Would you  
7 argue that you have the right to appeal a decision not  
8 to open the record and just accept it?

9 MR. TWOMEY: I think I'll try and find a way, yes,  
10 if you do that.

11 COMMISSIONER CLARK: But doesn't your argument  
12 that we cannot accept something less -- that we cannot  
13 accept something less assumes that you have the right  
14 to contest it in the first place?

15 MR. TWOMEY: No. I mean, it might, what I told  
16 you a minute ago was that I think you have to -- any  
17 order that you come up with that accepts this deal has  
18 to explain the facts upon which you did it that  
19 justify the additional dollars. This is not a  
20 theoretical deal. You're talking about raising my  
21 clients' rates by X number of dollars per month, real  
22 dollars out of the pocketbooks of real people, and  
23 you've got to explain it, that's why I'm saying you've  
24 got to explain it.

25 COMMISSIONER GARCIA: But Mr. Twomey, the court

1 has already determined that issue. The court has said  
2 to us that on these particular issues we can hold  
3 hearings or not. If we don't hold hearings, we know  
4 exactly the way those numbers will end up. It doesn't  
5 -- just because the court sent it back to remand  
6 doesn't give you the right to a hearing. We can give  
7 you that right, but we don't have to give that you  
8 right, correct?

9 MR. TWOMEY: I don't agree with that.

10 COMMISSIONER GARCIA: Well, then, the court didn't  
11 give us a decision, you're telling us that the court  
12 remanded us to have hearings, period.

13 MR. TWOMEY: No, sir. What I am saying is that  
14 you owe us a hearing. I mean, I can't make it any  
15 clearer than that. The court has given you the option  
16 of rolling over and not fighting. They've given you  
17 the option of reopening the record and taking new  
18 evidence and making a decision, and what I'm saying to  
19 you is --

20 COMMISSIONER CLARK: Your argument is not legal,  
21 it's your policy. It's not a legal argument, it's  
22 your policy.

23 MR. TWOMEY: Yes, and my legal argument is that I  
24 don't think you can come in the middle without giving  
25 factual evidence to support the dollar amount.

1           COMMISSIONER GARCIA: Madam Chairman, may I ask  
2 Mr. Shreve's position on this, taking out the gain of  
3 sale and just discussing this without the gain of sale  
4 issue?

5           CHAIRMAN JOHNSON: Okay. I don't know if he  
6 necessarily heard you.

7           I think Commissioner Garcia wanted the Public  
8 Counsel to explain his position on our legal authority  
9 if you took out the gain on sale.

10          MR. SHREVE: I'll tell you, one -- I'll be very  
11 brief. One, we'd like to have a hearing, but you've  
12 had a lot of discussion on that already. Mr. Garcia,  
13 you mentioned that it was a decision to be made  
14 between the company and the Public Service Commission  
15 because the remand was not in the order. The court  
16 had -- did not remand anything about the gain on sale  
17 docket. And I think there has been some accidental  
18 misstatement as far as what the precedent was.

19          The last precedent on the gain on sale docket  
20 where there was a loss on sale granted was in Lake  
21 County several years ago to Southern States, so that's  
22 the last one. There were two cases, St. Augustine  
23 Shores, about \$6 million that the Commission went with  
24 the company primarily because you had no jurisdiction  
25 in that county; Sarasota County, that was primarily

1 because there was no jurisdiction in that county. So  
2 this is the first case on point, and we don't want it  
3 buried in some other rate case, and I don't think you  
4 have the right to close this docket on the gain on  
5 sale.

6 I don't know if I've answered your question on  
7 that, but the court did not include anything on the  
8 gain on sale docket. It's a totally different thing.  
9 It was --

10 COMMISSIONER GARCIA: Mr. Shreve, I agree with you  
11 thus far, and you're right, you're not answering my  
12 question. The question is, more specifically, let's  
13 drop the gain on sale issue, I want you to just follow  
14 the line that, I guess the position that Commissioner  
15 Clark has been saying and that I've been expressing as  
16 opposed to Mr. Twomey.

17 Do you think that we can accept a settlement, if  
18 we take out the gain on sale issue, of somewhere in  
19 between where we could be in worst-case scenario and  
20 not going to hearing?

21 MR. SHREVE: If you take an action on your own, I  
22 think it's been laid out already the different  
23 parameters that the court sent back giving you the  
24 option to have a hearing or not have a hearing, and  
25 there are certain issues in here that are already

1 gone. That decision, it appears to me, is what's left  
2 and what you're considering of the settlement offer if  
3 you exclude the gain on sale.

4 Now, that's -- I'm having a little trouble putting  
5 all that together, but I think that's where you are.  
6 If that's the case, I don't know that you'd even be  
7 accepting their settlement offer on this, you'd be  
8 talking about whether or not you're going to have the  
9 hearing. And then if you decide to have the hearing,  
10 the question is whether or not you're going to give  
11 the money to them.

12 I think the Commission has a decision to make, and  
13 when they make that decision, I'm not sure -- you are  
14 not accepting a settlement offer because there is no  
15 settlement that has been accepted by all of the  
16 parties. The company has made --

17 COMMISSIONER GARCIA: I agree.

18 MR. SHREVE: Yes, sir?

19 COMMISSIONER GARCIA: No, I agree. There's no  
20 settlement that we're considering. We're considering  
21 whether we go to hearing or not. And again, I'm  
22 having this discussion, dropping the gain on sale  
23 discussion.

24 MR. SHREVE: Then I think the discussion has  
25 really almost got away now from -- the company has

1 proposed a certain scenario to you. I don't know  
2 where the company stands on that, if they still have  
3 that proposal before you, but I think you have a  
4 decision in front you that you do have the authority  
5 to make, so I'm not looking at it at this point if  
6 you're talking about it being out of the gain --  
7 taking the gain on sale out, whether or not you're  
8 actually accepting the company proposal or settlement.

9 I am saying, and I think you'd agree with this,  
10 you don't have the authority to close that docket.  
11 That wasn't even involved in this case at all.

12 COMMISSIONER JACOBS: Can I segue from that --

13 CHAIRMAN JOHNSON: I wanted to stay on that point  
14 and maybe have Lila address it and --

15 COMMISSIONER JACOBS: Yeah, because I was going to  
16 ask her something on that point.

17 To my understanding, when we get a remand from a  
18 court, it's a final order in which they have cited  
19 errors in our decision and the directions are for us  
20 to correct those errors and send them something back.  
21 Is that correct?

22 MS. JABER: Well, hopefully, not to have it go  
23 back, but yes --

24 COMMISSIONER JACOBS: Don't we have to respond to  
25 the remand?



1 MS. JABER: You have to issue a final order  
2 complying with the mandate by the court.

3 COMMISSIONER JACOBS: And then when it goes back  
4 before that court, don't they have to sign off to the  
5 idea that it is in compliance with their remand  
6 instructions?

7 MS. JABER: No, sir. You issue a final order  
8 complying with the mandate. Some party could appeal  
9 it again, appeal that final order again.

10 COMMISSIONER JACOBS: Then, Julia, maybe your  
11 question -- I think what you were going to ask was  
12 about the same as what I was going to ask.

13 CHAIRMAN JOHNSON: Maybe not, but the reason --  
14 well, let's go back to Mr. Twomey's proposal, because  
15 I thought it was kind of a -- it was a legal issue,  
16 and that's why I asked him to explain taking out the  
17 gain on sale. And, Lila, I need your response to this  
18 question.

19 Mr. Twomey admits that we have the discretion as  
20 to whether to open the record or not. If we decide  
21 not to open the record and to accept something less,  
22 his position is legally we have to have some rationale  
23 and explanation or basis for that, or that he has an  
24 appealable right because we are required to say how we  
25 reached that decision, and I think I hear him saying,

1 and we can't just say, well, the utility -- or it  
2 could have gotten more money, but we're going to give  
3 them less and that's our reason for accepting this. I  
4 hear him saying that's not legally sufficient.

5 MS. JABER: But he's actually saying what staff is  
6 saying. And plus, in our decision that you can  
7 unilaterally accept a settlement offer that's within  
8 the parameters of the mandate is you recognizing that  
9 all of those issues were reversed, but saying that the  
10 utility has volunteered to take less. In other words,  
11 you would be recognizing that you're not going to go  
12 to hearing on lot count and annual average daily flow,  
13 but that the utility has volunteered to take less. He  
14 and I are saying the same thing.

15 CHAIRMAN JOHNSON: Do we have to also say -- do we  
16 have to say we lost on those issues, the utilities are  
17 entitled to the 1.9, but we're giving them less, and I  
18 think he's saying how can we say that with a straight  
19 face kind of a thing. But would we have to say that?  
20 Would we have to say that we lost on both of these,  
21 they're entitled to 1.9, but we're going to give them  
22 less?

23 MR. JAEGER: Chairman Johnson, what's inherent in  
24 staff's recommendations is that we keep the integrity  
25 of the capband rate structure, which means we have

1 that 2.8 over 3.2, that -- you know, they're entitled  
2 to the 3.2 million in increased rates and they're only  
3 going to take 2.8. We would adjust in the lot  
4 count --

5 CHAIRMAN JOHNSON: Wait, stop. So we would have  
6 to say they're entitled to 3.2?

7 MR. JAEGER: 3.2.

8 CHAIRMAN JOHNSON: Which means we are saying -- so  
9 we would have to say that?

10 COMMISSIONER CLARK: They're entitled to that if  
11 we choose not to go to hearing.

12 MR. JAEGER: If we decline to reopen the records.  
13 And so they're entitled to that 3.2, and what we're  
14 going to do is we're going to keep the exact same rate  
15 structure, make all the adjustments for each  
16 individual system based on the lot count, losing the  
17 lot count, losing the AADF, losing the reuse, and then  
18 equity applies to everybody, and then there's three  
19 systems that we use -- we misidentified them as having  
20 annual average when they actually had max month, we  
21 made an error and we'd correct those. So we'd correct  
22 all those systems, and then we would keep the -- and  
23 so every system if we were -- if we'd have gone back  
24 and said, okay, everybody, you'd have had to pay this  
25 much under that 3.2, but now you're only going to pay

1 2.8 over 3.2, the percentage, you're going to pay 85  
2 percent of what you would have paid if we had just  
3 gone ahead and lost, if we'd just declined to reopen  
4 the record. So every system stays in the same  
5 position that they were in and they pay 85 percent  
6 less than what they would have had on all those  
7 issues.

8 MS. JABER: One final thing to add to that, which  
9 is that you can't lose sight of the court's opinion.  
10 The court's opinion says that the evidence put on by  
11 the utility is the evidence that exists. The argument  
12 that was made in the Commission's order is the  
13 evidence that was lacking. So I think before we get  
14 into, you know, do we need to make an affirmative  
15 statement that they're entitled to that money, I think  
16 the court has told us that they're entitled to that  
17 money. They've given us the discretion on two issues  
18 to try again.

19 In your order, if you choose to unilaterally  
20 accept any offer of settlement by the utility, you  
21 would say, we have exercised the discretion not to  
22 reopen the record. That would result in X amount of  
23 money for the utility. They have voluntarily taken --

24 CHAIRMAN JOHNSON: So you would provide the  
25 rationale that was necessary?

1 MS. JABER: Of course.

2 CHAIRMAN JOHNSON: If I'm following what you just  
3 said.

4 MR. ARMSTRONG: Madam Chairman, if I might provide  
5 some legal case precedent as well, there is precedent  
6 for the PSC to make a determination of the utility's  
7 revenue requirement at, say, a level X, and for the  
8 company on the record to concede on the record that  
9 they would accept a revenue requirement of something  
10 less than X, and there is an appellate decision out  
11 there, at least one, that affirms the ability of the  
12 Commission and the utility to do that.

13 Now, that is the case here, except what we have  
14 suggested is we will take less than we otherwise would  
15 be entitled to, given success under the terms of our  
16 offer, which now include having the gain on sale issue  
17 reserved and handled as it has always been handled in  
18 the past, in a rate case, in a subsequent rate case.

19 COMMISSIONER DEASON: I have a question for staff.  
20 Under your explanation of accepting the offer of  
21 settlement in that we calculate everything as if the  
22 company had won those issues, then does that stand as  
23 precedent that from then on that the lot count  
24 methodology is no longer appropriate, and that the max  
25 month is required? Does it have precedent authority?

1 MS. JABER: No, sir, and we can make that clear in  
2 the order, because each case will be governed by the  
3 language of the opinion itself. You wouldn't be  
4 making a statement on precedent as to which flow  
5 should be used and which methodology should be used in  
6 calculating used and useful.

7 COMMISSIONER DEASON: So you're saying that for  
8 calculation of revenue requirements purposes, this is  
9 the methodology we're using, and the company has  
10 agreed to a reduction off the result of that  
11 methodology and here's the rates that result?

12 MS. JABER: That's the way we should craft the  
13 order. That would be my recommendation.

14 CHAIRMAN JOHNSON: Following up on that, what  
15 would be our rationale again for saying this is the  
16 methodology we're using? I think we said earlier,  
17 Lila, because the court -- tell me the rationale we  
18 have to put in the order, because I think Mr. Twomey  
19 is right and maybe y'all are agreeing that you do  
20 have to have rationale and a basis for reaching some  
21 of the conclusions that we might reach.

22 MS. JABER: Which is that the court reversed the  
23 Commission on those two issues, on those two  
24 methodologies, and in the nature of settlement and  
25 mitigating expenses, future expenses, you find it

1 appropriate to not exercise your discretion to reopen  
2 the record on those two issues and to move forward.

3 COMMISSIONER GARCIA: But Lila, in that case what  
4 we're basically saying is that the court already made  
5 a decision on this.

6 MS. JABER: Yes, sir.

7 COMMISSIONER GARCIA: That the precedent is not  
8 being established by this Commission. The precedent  
9 has been established by the court, but it gives us the  
10 opportunity that at some future date we want to change  
11 that, as long as we explain it, we can establish  
12 another methodology.

13 MS. JABER: That would be our recommendation, and  
14 then just to remind you, each fact scenario will  
15 govern the case, and really it just depends on the  
16 testimony that the utility will put on, the customers  
17 and staff in future rate cases.

18 CHAIRMAN JOHNSON: Commissioner Clark had a  
19 question.

20 COMMISSIONER JACOBS: I'm prepared to go that  
21 far. I think this -- any -- and I differ also on  
22 calling this a settlement. I think this is a  
23 stipulation of most issues with some issues still  
24 outstanding, but this -- the acceptance of this  
25 stipulation is guided by the extended history and the

1 litigated history of this case, and the substance of  
2 these particular issues are still up for debate. And  
3 I think the issue here is whether or not, given the  
4 history of this case and the exposure to ratepayers of  
5 continued surcharges, whether or not it is in the --  
6 or considering all the factors, it is in the best  
7 interests of those ratepayers to consider this  
8 stipulation, that's it, the company's interests are  
9 balanced in that, part and parcel as a result of doing  
10 that.

11 But in my mind we have to be concerned with  
12 whether or not, given the history of this case,  
13 whether or not it is in the best interests of these  
14 consumers to go with this -- these terms at this time.

15 COMMISSIONER GARCIA: I would agree with almost  
16 every part of that, but what worries me is the gain on  
17 sale issue.

18 COMMISSIONER CLARK: I have a question of the  
19 utility. If we choose not to exercise our discretion  
20 to reopen the record with respect to the daily flows  
21 and which is appropriate, the annual average or the  
22 maximum monthly or the lot count, is it your position  
23 that we can't relitigate those issues in future cases?

24 MR. ARMSTRONG: No.

25 COMMISSIONER CLARK: That we can, and specifically



1 with respect to these systems?

2 MR. ARMSTRONG: Yes.

3 COMMISSIONER CLARK: Okay.

4 MR. HOFFMAN: Commissioner Clark, part of our  
5 proposal was that what we're doing here is the  
6 customers are paying more than they, you know, would  
7 otherwise pay and the company is agreeing to recover  
8 less than the company believes it would recover. And  
9 along with that, when we filed our proposal, and this  
10 still remains true, there would be no precedent  
11 arising out of this settlement or proposal. But on  
12 top of that, and what we believe to be part of the  
13 public interest positive aspects of what we've put  
14 before you, is that the Commission should open a  
15 rulemaking and address these issues on a prospective  
16 basis.

17 CHAIRMAN JOHNSON: Mr. Stephens?

18 MR. STEVENS: Yes, if I could address that for a  
19 moment, please?

20 I've done a terrible thing, and that is, I've  
21 actually just read the order on remand from the court,  
22 and I think you have been slightly misled about the  
23 thrust of the court's comments here or the effect of  
24 this order. I'm reading to you just briefly from page  
25 22 and 23, discussing the annual average and the used

1 and useful concept. And the court there says, "While  
2 we do not rule out the possibility that evidence can  
3 be adduced on remand to show that calculating a used  
4 and useful fraction by comparing average annual daily  
5 flows to plant capacity and so on is preferable to the  
6 PSC's prior practice, we nevertheless conclude that  
7 remand for the taking of such evidence, if it exists,  
8 is necessary."

9 And just further on page 24 and 25, "Evidence of  
10 record in the present case does not support or explain  
11 the PSC's switch to the lot count method for  
12 evaluating systems serving mixed use areas. For this  
13 policy shift, too, the PSC must give a reasonable  
14 explanation on remand and adduce supporting evidence,  
15 if it can, to justify a change in policy required by  
16 no rule or statute. That failing, the PSC should  
17 adhere to its prior practices in calculating used and  
18 useful and for percentages serving mixed use areas."

19 So I think the effect of that is that the original  
20 order from the Commission has been reversed and  
21 remanded, and the order in its entirety is sitting  
22 before you. If you want to enter an order that relies  
23 on these new methods of calculation, I believe you  
24 can't do that without a hearing and adducing evidence  
25 to support their reasonableness and their

1           appropriateness. I also think that the clear thrust  
2           of this order is to urge the Commission to conduct  
3           hearings to develop that evidence to determine if it's  
4           appropriate.

5           I certainly think from my client's standpoint we  
6           don't know what our position would be, but we would  
7           like to help you try to understand those concepts as  
8           they apply to different utility settings that would  
9           affect us.

10          So in conclusion, I think it's -- the notion that  
11          you have a lot of discretion I think is greatly  
12          overstated. The options for you to pursue -- I think  
13          you can't use the concepts that were in that original  
14          order without taking some additional evidence and  
15          determining in a quasi-rulemaking proceeding, you  
16          don't have to do rulemaking, but I think you have to  
17          hear evidence that justifies their application in  
18          these cases.

19          CHAIRMAN JOHNSON: Thank you, Mr. Stephens.

20          Any response to that?

21          MS. JABER: Only that nothing he's stated changes  
22          staff's opinion. You should never take something out  
23          of context. The sentence in front of what Mr.  
24          Stephens read is, "We reverse the order under review  
25          because the PSC relied on a new methodology," et

1 cetera, et cetera. Nothing he's said changes staff's  
2 recommendation to you.

3 CHAIRMAN JOHNSON: Mr. Cresse?

4 MR. CRESSE: Are we still discussing your legal  
5 authority, or are we to the merits of the issue as to  
6 what you should do?

7 COMMISSIONER CLARK: Madam Chairman, with respect  
8 to that, I would now recommend we do what Commissioner  
9 Jacobs suggested. I think we should go to the other  
10 issues, decide what we want to do. If it looks like  
11 we think we want to do the settlement, then let's  
12 reach that issue; but if we decide we don't, then we  
13 don't even have to take a position on whether we could  
14 or we couldn't.

15 So I guess it's my view that we hear on what the  
16 staff's recommendation is and also on the virtues of  
17 accepting the settlement.

18 CHAIRMAN JOHNSON: Any other comments?

19 Do you want to take a break?

20 COMMISSIONER CLARK: Yeah.

21 CHAIRMAN JOHNSON: We're going take a break before  
22 we begin that process. Do you want lunch?

23 We're going to break until 1:30.

24 (Transcript continued in Volume No. II.)

25

## C E R T I F I C A T E

STATE OF FLORIDA )

COUNTY OF LEON )

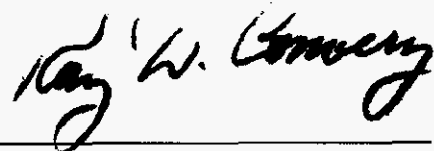
I, RAY D. CONVERY, Court Reporter at Tallahassee, Florida, do hereby certify as follows:

THAT I correctly reported in shorthand the foregoing proceedings at the time and place stated in the caption hereof;

THAT I later reduced the shorthand notes to typewriting, or under my supervision, and that the foregoing pages 3 through 132 represent a true, correct, and complete transcript of said proceedings;

And I further certify that I am not of kin or counsel to the parties in the case; am not in the regular employ of counsel for any of said parties; nor am I in anywise interested in the result of said case.

Dated this 18th day of November, 1998.



RAY D. CONVERY

Court Reporter