

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 080001-EI

In the Matter of

FUEL AND PURCHASED POWER  
COST RECOVERY CLAUSE WITH  
GENERATING PERFORMANCE INCENTIVE  
FACTOR.



VOLUME 9  
Pages 1121 through 1276

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PROCEEDINGS: HEARING

BEFORE: CHAIRMAN MATTHEW M. CARTER, II  
COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER KATRINA J. McMURRIAN  
COMMISSIONER NANCY ARGENZIANO  
COMMISSIONER NATHAN A. SKOP

DATE: Wednesday, November 12, 2008

TIME: Commenced at 9:39 a.m.

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

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APPEARANCES: (As heretofore noted.)

DOCUMENT NUMBER-DATE

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(Transcript follows in sequence from Volume 8.)

CHAIRMAN CARTER: Good morning. I'd like to reconvene our hearing. With that, staff, are there any preliminary matters before we begin?

MS. BENNETT: No, Mr. Chairman, there are no preliminary matters.

CHAIRMAN CARTER: Okay. When we left we were, we were getting ready to go into rebuttal, were we not?

MS. BENNETT: Yes.

CHAIRMAN CARTER: Okay. Mr. Butler.

MR. BUTLER: We're going to go with the evidence on rebuttal on Issue 13C first; correct?

CHAIRMAN CARTER: Absolutely.

MR. BUTLER: Thank you. Then I would call our witness Mr. or Dr. Avera to the stand.

CHAIRMAN CARTER: Say again.

MR. BUTLER: I would call our rebuttal witness Dr. William Avera to the stand.

Commissioner, while -- Mr. Chairman, while he is getting ready for his testimony, I'd just remind you that, you know, pursuant to the agreement we had with Office of Public Counsel and the other parties when Mr. Larkin testified last week, we're going to have the two witnesses who prefiled rebuttal testimony, Dr. Avera and Ms. Dubin, briefly comment on

1 aspects of Mr. Larkin's additional oral testimony that went to  
2 the, to Exhibit 54, to the FBI FOIA document, and then we also  
3 have some brief comments by our witness Terry Jones who did not  
4 prefile rebuttal testimony, but he is a, sort of our technical  
5 expert and he has a couple of brief comments on points that  
6 Mr. Larkin had made about that exhibit. So that's the order we  
7 intend to pursue with our rebuttal case.

8 CHAIRMAN CARTER: Mr. Burgess, is that your  
9 understanding?

10 MR. BURGESS: Not quite.

11 CHAIRMAN CARTER: Okay. Let's hear it.

12 MR. BURGESS: My understanding was that what we were  
13 trying to do was assimilate this very serious information that  
14 came in at the last moment, the, the FBI field agent's notes.  
15 And Mr. Jones had filed direct testimony and Mr. Larkin had  
16 responded and we had rebuttal testimony of two witnesses. It  
17 strikes me that to put this in the posture of where we would  
18 have been had we had the information at an earlier point in the  
19 case, that Mr. Jones would be entitled to address the FBI field  
20 notes, which he's had a lot of opportunity and has done, but  
21 not provide rebuttal testimony to a witness who came after him  
22 in the order of events.

23 So I don't have a problem, you know, with incremental  
24 testimony from Mr. Jones specifically on the, the information  
25 that we received the Friday before the hearing, but it seems

1 out of order to then allow him to become a subsequent rebuttal  
2 witness.

3 MR. BUTLER: Mr. Chairman, I would point you to  
4 Page 443 in the transcript of the hearing where we were  
5 discussing the ground rules that would apply to the oral  
6 testimony on Exhibit 54. And I said the following, to which  
7 there was no objection: "Mr. Jones, who will be testifying on  
8 direct here shortly, hopefully shortly, is also, he's our  
9 technical expert. I don't know whether anything Mr. Larkin  
10 would comment on about the report would require sort of a  
11 technical response. But to whatever extent it did, then  
12 Mr. Jones would make a brief statement to that effect and be  
13 subject to cross-examination." So what I just described is  
14 exactly what I had laid out at the time that we reached our  
15 understanding on how the oral testimony would proceed.

16 MS. HELTON: Mr. Chairman, Mr. Butler and I share the  
17 same understanding. I thought that poor Mr. Jones was going to  
18 have to come back if Mr. Larkin made statements in his summary  
19 that he felt like he had to rebut. I thought that was part of  
20 the agreement.

21 CHAIRMAN CARTER: Okey-dokey. We shall proceed  
22 likewise.

23 Mr. Butler.

24 MR. BUTLER: Thank you.

25 WILLIAM E. AVERA

1 was called as a witness on behalf of Florida Power & Light  
2 Company and, having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. BUTLER:

5 Q Dr. Avera, have you previously been sworn in this  
6 docket?

7 A I have.

8 Q Thank you. Would you please state your name and  
9 business address for the record?

10 A William E. Avera, 3907 Red River, Austin, Texas  
11 78751.

12 Q And by whom are you employed and in what capacity?

13 A I am the President of FINCAP, Incorporated, a  
14 financial and economic consulting firm.

15 Q Thank you. Do you have before you a document  
16 entitled "Rebuttal Testimony of William E. Avera" dated May 27,  
17 2008?

18 A I do.

19 Q Okay. And this consists of 12 pages and there are no  
20 attached exhibits; correct?

21 A Correct.

22 Q Do you have any changes or corrections to make to  
23 your prefiled rebuttal testimony?

24 A I do not, Mr. Butler.

25 Q Okay. If I asked you the questions in that testimony

1 today, would your answers be the same?

2 A They would be.

3 MR. BUTLER: Mr. Chairman, I ask that Dr. Avera's  
4 prefiled rebuttal testimony be inserted into the record as  
5 though read.

6 CHAIRMAN CARTER: The prefiled testimony will be  
7 entered into the testimony as though read.

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1                   **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                               **FLORIDA POWER & LIGHT COMPANY**

3                                   **REBUTTAL TESTIMONY OF WILLIAM E. AVERA**

4   **DOCKET NO. 080001-EI**

5   **May 27, 2008**

6   **Q.    Please state your name and business address.**

7    A.    William E. Avera, 3907 Red River, Austin, Texas, 78751.

8   **Q.    By whom are you employed and in what capacity?**

9    A.    I am a principal in Financial Concepts and Applications, Inc. ("FINCAP"), a  
10   firm engaged in financial, economic, and policy consulting to business and  
11   government.

12   **Q.    Please describe your educational background and professional  
13   experience.**

14   A.    I received a B.A. degree with a major in economics from Emory University  
15   and a Ph.D in economics and finance from the University of North Carolina at  
16   Chapel Hill. I have held the Chartered Financial Analyst (CFA<sup>®</sup>) designation  
17   for 30 years. Upon receiving my Ph.D., I joined the faculty at the University of  
18   North Carolina and taught finance in the Graduate School of Business. I  
19   subsequently accepted a position at the University of Texas at Austin where I  
20   taught courses in financial management and investment analysis.

21  
22   In 1977, I joined the staff of the Public Utility Commission of Texas ("PUCT")  
23   as Director of the Economic Research Division. During my tenure at the  
24   PUCT, I managed a division responsible for financial analysis, cost allocation  
25   and rate design, economic and financial research, and data processing

1 systems, and I testified in cases on a variety of financial and economic  
2 issues. Since leaving the PUCT I have been engaged as a consultant. I  
3 have participated in a wide range of assignments involving utility-related  
4 matters on behalf of utilities, industrial customers, municipalities, and  
5 regulatory commissions. I have previously testified before the Federal  
6 Energy Regulatory Commission ("FERC"), as well as the Federal  
7 Communications Commission ("FCC"), the Surface Transportation Board  
8 (and its predecessor, the Interstate Commerce Commission), the Canadian  
9 Radio-Television and Telecommunications Commission, and regulatory  
10 agencies, courts, and legislative committees in 39 states. I have testified in  
11 over 260 regulatory cases, including several before the Florida Public Service  
12 Commission ("FPSC" or "the Commission").

13  
14 In 1995, I was appointed by the PUCT, with the approval of the Governor, to  
15 the Synchronous Interconnection Committee to advise the Texas legislature  
16 on the costs and benefits of connecting Texas to the national electric  
17 transmission grid. In addition, I served as an outside director of Georgia  
18 System Operations Corporation, the system operator for electric cooperatives  
19 in Georgia.

20  
21 I have served as Lecturer in the Finance Department at the University of  
22 Texas at Austin and taught in the evening graduate program at St. Edward's  
23 University for twenty years. In addition, I have lectured on economic and  
24 regulatory topics in programs sponsored by universities and industry groups.

1 I have taught in hundreds of educational programs for financial analysts in  
2 programs sponsored by the Association for Investment Management and  
3 Research (now the CFA Institute), the Financial Analysts Review, and local  
4 financial analysts societies. These programs have been presented in Asia,  
5 Europe, and North America, including the Financial Analysts Seminar at  
6 Northwestern University. I was elected Vice Chairman of the National  
7 Association of Regulatory Commissioners ("NARUC") Subcommittee on  
8 Economics and appointed to NARUC's Technical Subcommittee on the  
9 National Energy Act. I have also served as an officer of various other  
10 professional organizations and societies.

11

12 I have extensive experience with issues of fuel and purchased power  
13 recovery, having led the PUCT staff review of the fuel adjustment clauses in  
14 Texas. Since leaving PUCT I have been involved in a variety of issues  
15 relating to fuel and purchased power recovery as a consultant and expert  
16 witness for regulatory agencies, consumer groups, and utilities.

17 **Q. What is the purpose of your rebuttal testimony?**

18 A. The purpose of my testimony is to respond to the direct testimony of Mr. Hugh  
19 Larkin, Jr., on behalf of the Office of Public Counsel ("OPC"). Mr. Larkin  
20 recommends that Florida Power & Light Company ("FPL" or "the Company")  
21 not be authorized to recover from customers \$6,163,000 of replacement  
22 power costs due to an outage at Turkey Point Unit 3. He asserts that those  
23 costs are not "fair, just and reasonable," as that term is used in Section  
24 366.06(1) of the Florida Statutes and claims that FPL and its investors are  
25 compensated for the risk of not recovering those costs by the return on equity

1 (“ROE”) that this Commission authorizes FPL to earn. Mr. Larkin also asserts  
2 that disallowing recovery of those costs would not be a disincentive for FPL  
3 and other utilities to invest in low fuel-cost generating resources.

4 **Q. Please summarize the conclusions of your rebuttal testimony.**

5 A. My rebuttal testimony demonstrates that Mr. Larkin’s recommendation would  
6 represent a dramatic change in regulatory policy in Florida; one that would be  
7 inconsistent with both established regulatory principles and investor  
8 expectations. Mr. Larkin’s recommendation would result in significantly  
9 increased regulatory risk and create perverse incentives against investment  
10 in generating resources with low energy costs, such as nuclear, wind and  
11 solar. This would ultimately harm customers and the economy of the state. I  
12 also show that Mr. Larkin’s recommendation would have an adverse impact  
13 on FPL’s ability to earn a fair rate of return on equity (“ROE”) and would  
14 impair FPL’s ability to attract capital.

15 **Q. Are there established regulatory policies related to FPL’s ability to**  
16 **recover replacement power costs?**

17 A. Yes. A fundamental tenet of the regulatory compact is that the utility is  
18 entitled to an opportunity to recover from customers all reasonable and  
19 necessary costs prudently incurred in providing service. In addition, it is  
20 common to make a distinction between the regulatory policies for the  
21 recovery of costs associated with fuel and purchased power from the other  
22 costs of a utility. Regulatory policy in Florida recognizes this distinction, as an  
23 OPC witness recently stated:

24           There is typically a distinction between base rates and fuel  
25           rates. Base rates are set to recover a utility’s non-fuel

1 operating costs plus a reasonable return on used and useful  
2 utility investment....Fuel rates are established so that the utility  
3 recovers its *actual prudently incurred costs no more and no*  
4 *less.* (Rebuttal Testimony of Dan Lawton, Docket No. 060658-  
5 EL, March 6, 2007, p. 3, emphasis added)

6 Under regulatory policy in Florida (as in most state and federal jurisdictions) a  
7 utility is allowed to recover prudently incurred fuel and purchased power costs  
8 without profit or loss.

9 **Q. Mr. Larkin proposes that FPL not recover its Turkey Point replacement**  
10 **power costs because they are not “fair, just and reasonable,” even if**  
11 **there has been no determination that those costs resulted from any**  
12 **imprudence on FPL’s part. In your experience, where utilities recover**  
13 **their fuel and purchased power costs through an actual-cost recovery**  
14 **fuel adjustment clause like the one that is used in Florida, are costs**  
15 **disallowed for recovery in the absence of a finding of imprudence?**

16 A. No. I believe it would be both unfair and very poor regulatory policy to do so.

17 **Q. Please explain why Mr. Larkin’s proposal would be unfair.**

18 A. Under Florida’s fuel adjustment clause, a utility never has an opportunity to  
19 recover more than its actual fuel costs. In other words, there are never  
20 “winnings” from a “good hand” in the recovery of fuel and purchased power  
21 costs. The best outcome for the utility is that the dollars it has paid are fully  
22 recovered from customers. If some of the utility’s expenditures are deemed  
23 to have been imprudent, then those costs are not recovered from customers.  
24 However, Mr. Larkin would have the Commission change the rules of the

1 game unfairly and retroactively, preventing FPL from recovering the actual  
2 money paid for replacement power costs due the Turkey Point outage even if  
3 FPL's actions were prudent. This would change the "game" of fuel and  
4 purchased power recovery to one with no possibility of winning and an ever-  
5 present potential for losing, even when the underlying causes of costs are not  
6 due to imprudent actions of the utility. Under Mr. Larkin's proposed regulatory  
7 policy, if forces beyond the reasonable control of the utility caused extra  
8 costs, the utility would have to pay out money with no hope of recovering it  
9 from customers. He points to nothing that would compensate utility investors  
10 for participating in such a one-sided wager. This would be a fundamental and  
11 ill-advised shift in regulatory policy.

12 **Q. What are the economic implications of a policy that prevents utilities**  
13 **from recovering prudently incurred replacement power costs?**

14 A. The rational economic response by utilities would be to avoid situations  
15 where high replacement power costs are possible. In other words, utilities  
16 would have a major disincentive to employ any generation technology where  
17 the energy component of costs is very low relative to the generation  
18 resources that would provide replacement power (typically fossil fuel plants).  
19 Therefore, Mr. Larkin's proposed new regulatory policy would create a  
20 disincentive for nuclear power because nuclear fuel costs are low compared  
21 to fossil fuel plants. It would likewise create economic biases against wind,  
22 solar, or any other generating resource with low energy costs. This  
23 disincentive would thwart the development and utilization of low fuel cost  
24 generating sources and undermine the environmental imperative of seeking  
25 low-emission alternatives to fossil fuels. If utilities respond to the perverse

1 signal implied by Mr. Larkin's recommendation by taking the rational response  
2 of avoiding low fuel cost generating sources, utility customers in Florida will  
3 pay more than necessary for utility service. The Florida economy would not  
4 only suffer from electric costs that are higher than necessary, but the  
5 environmental impact could harm the quality of life and limit the potential for  
6 economic growth in the state as well.

7 **Q. Has the FPSC recognized the importance of the economic incentives  
8 inherent in fuel and purchased power recovery?**

9 A. Yes. This Commission has been a national leader in recognizing that the  
10 rules for fuel and purchased power recovery create economic incentives for  
11 utility behavior. In 1979 when I was leading an effort at the PUCT to  
12 introduce incentives into the fuel and purchased power mechanism, I visited  
13 with senior staff and commissioners in Florida to learn from the policies  
14 implemented here. The FPSC has continued to be a leader in mobilizing  
15 incentives. Mr. Larkin would have this Commission adopt a policy on  
16 replacement power that runs counter to Florida regulatory policy, creates a  
17 perverse incentive that would encourage utilities to avoid generating sources  
18 that have lower fuel costs, and distorts the economic and environmental  
19 imperatives that would otherwise support alternatives to fossil fuels.

20 **Q. Do you agree with Mr. Larkin's contention that the disincentive resulting  
21 from the risk of not recovering prudently incurred fuel costs will not  
22 influence utility decisions on low fuel-cost generating alternatives?**

23 A. No. First of all, his contention directly contradicts the longstanding Florida  
24 regulatory policy on incentives that I just described. Furthermore, he is  
25 focusing narrowly on one factor that influences utility decision-making, while

1 ignoring another important factor. I would agree in principle with Mr. Larkin  
2 that, all things being equal, a utility would want to choose generating  
3 alternatives that minimize its cost of electricity. If Mr. Larkin's proposal were  
4 adopted, however, all things most assuredly would not be equal. The lower  
5 the fuel cost for a proposed generating unit relative to the fuel cost of a  
6 utility's other generating resources, the more the utility would have at risk for  
7 disallowance of replacement power costs whenever the proposed unit is  
8 unexpectedly out of service. Under Mr. Larkin's proposal, the utility could not  
9 protect itself against this risk by operating the unit prudently, because  
10 replacement power costs might be disallowed even in the absence of  
11 imprudence. While well-managed utilities such as FPL are always interested  
12 in taking actions that help control the cost of electricity, their management  
13 also must consider the financial risk that the investment community perceives  
14 in those actions. If investing in low fuel-cost generating alternatives will be  
15 perceived as increasing a utility's perceived financial risk because of the risk  
16 of replacement power costs being disallowed, management cannot ignore  
17 that perception. By significantly increasing that perceived risk, Mr. Larkin's  
18 proposal will tip the balance away from investment in low fuel-cost generating  
19 alternatives.

20 **Q. Mr. Larkin argues that his proposal is not really a change in the**  
21 **Commission's policy on disallowance of replacement power costs,**  
22 **because "[t]he Commission's history has been to examine each case**  
23 **individually for reasonableness. That history would not suddenly**  
24 **vanish simply because the Commission decides to disallow**  
25 **unreasonable costs under one specific set of facts." Do you agree?**



1 A. No. As I discussed earlier, the Commission's consistent policy has been to  
2 disallow replacement power costs only where they are the result of the utility's  
3 imprudent actions. Mr. Larkin does not suggest, much less provide any  
4 evidence, that the Turkey Point outage was the result of imprudence on FPL's  
5 part. For the Commission to disallow replacement power costs without a  
6 finding of imprudence would be a major change in policy, whether it was  
7 implemented on a case-by-case basis or across the board.

8 **Q. Are FPL's investors currently being compensated for bearing the risks**  
9 **associated with disallowance of prudently incurred fuel and purchased**  
10 **power expenses?**

11 A. No. Regulators routinely shield utilities and their investors from exposure to  
12 cost increases resulting from unforeseen events, including factors over which  
13 they have no control, with respect to costs such as fuel and purchased power  
14 that are recovered through pass-through adjustment clauses. Investors'  
15 required rates of return for utilities are premised on this regulatory compact  
16 that allows the utility an opportunity to recover reasonable and necessary  
17 costs. And by sheltering utilities from exposure to extraordinary or  
18 catastrophic events that are beyond the control of management, customers  
19 benefit from lower capital costs than they would otherwise bear. Of course,  
20 the corollary is also true – shifting the burden of extraordinary risks to  
21 shareholders would have the effect of considerably increasing investors'  
22 required rate of return on FPL securities.

23

24 There is no indication that shareholders included exposure to the costs of  
25 replacement power from events beyond the reasonable control of the utility in

1 their assessment of FPL's investment risks or their required rate of return.  
2 Rather, investors expect that FPL will be able to recover its fuel and  
3 purchased power costs unless they are shown to be imprudent. Investors  
4 rely on established regulatory policies in deciding whether or not to commit  
5 capital to utilities, and in Florida the policy supporting recovery of all prudently  
6 incurred fuel and purchased power expenses is well-established. For  
7 example, OPC witness Todd F. Bohrmann testified in Docket No. 060658-EI:

8 Accordingly, the Commission structured a program in which  
9 early collections could occur, but in which the Commission  
10 would retain the ability to review prudence and reasonableness  
11 until all facts had been presented and fully adjudicated. The  
12 Commission initially established the principles of the  
13 contemporary fuel clause in Order No. 12645, in Docket No.  
14 830001, issued November 3, 1983 (Order No. 12645).  
15 (Rebuttal Testimony of Todd F. Bohrmann, Docket No. 060658-  
16 EI, March 6, 2007, page 3).

17 **Q. How would investors likely react to the change in FPSC policy proposed**  
18 **by Mr. Larkin?**

19 A. Mr. Larkin's policy would add an open-ended risk to stock and bond  
20 investments in FPL. For example, while FPL's nuclear program is universally  
21 regarded as exemplary, mandated shutdowns in response to security threats  
22 or a catastrophic event elsewhere in the U.S. would impose significant  
23 reliance on wholesale power markets to meet energy shortfalls. FPL's  
24 reliance on purchased power for a significant portion of its power  
25 requirements also imposes increased vulnerability to supply disruptions,

1 especially in light of its relative geographic isolation on the Florida peninsula.  
2 At present, investors understand that if FPL management acts imprudently,  
3 the resulting replacement power costs cannot be recovered. But Mr. Larkin  
4 would introduce a new risk – the inability to recover costs even if they were  
5 prudently incurred. Given the size of FPL’s nuclear program and purchased  
6 power commitments, the magnitude of the new risk could be huge—having  
7 implications for the cost and availability of capital urgently needed to meet  
8 growth and environmental challenges facing FPL. Moreover, the effect of this  
9 new policy would likely spill over to other utilities operating under the  
10 jurisdiction of the FPSC since Mr. Larkin does not limit the applicability of his  
11 new regulatory policy to FPL.

12 **Q. Mr. Larkin seems to suggest that, since the recommended disallowance**  
13 **is relatively small, it would be “self defeating” for utilities not to seek**  
14 **“cost-effective” generating alternatives (pp. 5-6). Is his argument**  
15 **consistent with economic logic?**

16 **A.** Not at all. Mr. Larkin’s argument ignores the forward-looking nature of  
17 economic decisions. Utilities (and investors) would recognize this  
18 disallowance as a signal that the Commission had changed its long-standing  
19 policy of allowing recovery of replacement power costs unless there has been  
20 a finding of imprudent acts. The relative size of the disallowance in this case  
21 would not change the perception that there had been a fundamental shift in  
22 regulatory policy in Florida. It would be economically rational and reasonable  
23 for utilities and their investors to regard this change in policy as applying (or  
24 potentially applying) to any and all future outages where there is no finding of  
25 imprudent behavior. As a result, a utility making a significant commitment to

1 generating resources with low fuel costs would become exposed to  
2 disallowances that could become huge, even if the utility did nothing  
3 improper. Such unlimited exposure would represent a significant new risk to  
4 investors in utilities under the jurisdiction of the Commission. Moreover, this  
5 new policy would be a disincentive for FPL and other utilities under the  
6 jurisdiction of the Commission to pursue generation alternatives that are  
7 clearly in the long-term interest of customers, Florida, and the global  
8 environment.

9 **Q. Should regulators and customers be concerned about investors'**  
10 **perceptions?**

11 A. Absolutely. Investors' assessment of regulatory support and risk has a direct  
12 impact on FPL's financial strength and ability to attract capital. FPL faces a  
13 number of potential challenges that might require the relatively swift  
14 commitment of considerable capital resources in order to maintain the high  
15 level of service to which its customers have become accustomed. Ultimately,  
16 it is customers and the service area economy that enjoy the rewards that  
17 come from ensuring that the utility has the financial wherewithal to take  
18 whatever actions are required to ensure a reliable energy supply.

19 **Q. Does this conclude your rebuttal testimony?**

20 A. Yes.

1 BY MR. BUTLER:

2 Q Dr. Avera, would you please summarize your prefiled  
3 rebuttal testimony. And to the extent there are remarks that  
4 Mr. Larkin made regarding Exhibit 54, I would ask you to  
5 briefly address those orally at the end of your summary.

6 A Yes. Good morning, Commissioners. I'm Bill Avera.  
7 My rebuttal testimony responds to the prefiled testimony of  
8 Mr. Larkin of OPC. Mr. Larkin recommends that FPL not be  
9 authorized to recover from customers \$6,163,000 of replacement  
10 power costs due to an outage at Turkey Point Unit 3. He  
11 asserts that FPL and its investors are compensated for the risk  
12 of not recovering these costs by the return on equity.  
13 Mr. Larkin also asserts that disallowing the recovery of these  
14 costs would not be a disincentive for FPL and other utilities  
15 to invest in low fuel cost generating resources. My testimony  
16 shows that Mr. Larkin is wrong on both counts.

17 My testimony demonstrates that Mr. Larkin's  
18 recommendation would represent a dramatic change in regulatory  
19 policy in Florida, one that would be inconsistent both with  
20 established regulatory principles and investor expectations.  
21 Mr. Larkin's recommendation would result in significantly  
22 increased regulatory risk for FPL and other utilities in  
23 Florida. This increased regulatory risk would ultimately harm  
24 customers in the form of higher costs in the electric bills  
25 they pay. Mr. Larkin's recommendation would also create

1 perverse incentives against investment and generating resources  
2 with low energy cost such as nuclear, wind and solar. This too  
3 would ultimately harm customers, the environment and the  
4 economy of the state.

5           Mr. Larkin's proposed disallowance would send a  
6 signal to utilities and investors that this Commission has  
7 changed its long-standing policy of allowing recovery of  
8 replacement power costs unless there's been a finding of  
9 imprudent acts. The relatively small size of this disallowance  
10 would not change the perception that there has been a  
11 fundamental shift in regulatory policy in Florida. It would be  
12 economically rational and reasonable for utilities and their  
13 investors to regard this change in policy as applying or  
14 potentially applying to any and all future outages where there  
15 is no finding of imprudent behavior. As a result, a utility  
16 making a significant commitment to generating resources with  
17 low fuel costs would become exposed to disallowances that could  
18 become huge, even if the utility did nothing improper.

19           Now the lower the fuel cost of the resource and the  
20 higher the fossil fuel that replaces it, the greater the risk  
21 to the utility and its investors. So this would clearly  
22 militate against investing in low fuel cost options because it  
23 would increase the risk of exposure. Such unlimited exposure  
24 would represent a significant risk to investors in utilities  
25 under the jurisdiction of this Commission, one for which

1 investors would have to be compensated in the form of a higher  
2 cost of capital both for their equity and debt. This completes  
3 my summary of the prefiled testimony.

4 I'll now turn to Mr. Larkin's oral testimony. In his  
5 oral testimony last week Mr. Larkin explained that the  
6 company's allowed ROE includes a premium over the return for  
7 U.S. government bonds to cover the risk investors bear for  
8 unknowns like weather and he suggested that the risk of the  
9 disallowance is covered by that premium. Mr. Larkin is correct  
10 that FPL's ROE includes an allowance for risk. Investors  
11 assess the risk they're signing up for on the basis of the  
12 regulatory policy in the state. In Florida, utilities earn no  
13 profit on fuel and purchased power. The best that can happen  
14 is that they recover those costs.

15 And investors understand if those costs are found by  
16 the Commission to have been imprudent, then those imprudent  
17 costs will not be recovered, but investors also understand that  
18 prudence does not require perfection. As Ms. Dubin documents  
19 in her testimony, the Commission has evaluated prudence in the  
20 context of what utility management could reasonably know at the  
21 time it was making a decision. The Florida policy of full  
22 recovery of purchased power and fuel costs in the absence of  
23 prudence has resulted in Florida regulation being regarded by  
24 investors as supportive and this rating has saved customers  
25 money.

1           If the Commission changes this policy, then investors  
2 will realize that they're exposed to risks that they did not  
3 sign up for and the reaction will be significant and harmful to  
4 utility customers in Florida.

5           Mr. Larkin was right that FPL, not customers,  
6 controls access to nuclear plants, but this is true of all fuel  
7 and purchased power costs. The utility is responsible for the  
8 decisions. The utility, not customers, decides what fuels to  
9 buy, how to dispatch the plants and where and when to purchase  
10 power. Under established regulatory policy the utility is  
11 responsible and accountable for those costs and will be able to  
12 recover those costs unless the decisions are found imprudent.  
13 Investors know that they're exposed to the risk that management  
14 can be found imprudent, but only then will fuel and purchased  
15 power costs not be recovered.

16           I listened very carefully to Mr. Larkin's testimony  
17 last week and have read the transcript several times. He does  
18 not say that based on the new FBI information that the  
19 Commission should find FPL was imprudent. Indeed, he  
20 reaffirmed on Page 988 at Line 15 the Commission doesn't need  
21 to find imprudence. In my opinion as a financial analyst who  
22 has followed utility investors for over 36 years, if this  
23 Commission were to disallow the replacement power expenses in  
24 the face of findings by the NRC and ignoring the Florida policy  
25 on prudence, the response in the investment community would be



1 swift and significant. Investors' required risk premium for  
2 FPL and other Florida utilities would increase. The end result  
3 would be to impose a new cost on FPL's customers that would far  
4 exceed the \$6.2 million reduction due to this disallowance.  
5 This completes my response to Mr. Larkin's testimony.

6 MR. BUTLER: I would, excuse me, I would tender Dr.  
7 Avera for cross-examination.

8 CHAIRMAN CARTER: Thank you.

9 Mr. Burgess, you're recognized.

10 MR. BURGESS: Thank you, Mr. Chairman.

11 CROSS EXAMINATION

12 BY MR. BURGESS:

13 Q Dr. Avera, would I be fair in characterizing your  
14 testimony at the heart of it is saying that if the Commission  
15 makes a disallowance, it would represent a shift in regulatory  
16 principles and that would be perceived as an additional risk by  
17 investors?

18 A That is correct. Investors have predicated their  
19 evaluation of FPL and other Florida utilities based on their  
20 understanding of Florida policy, which is only prudence would  
21 result in a disallowance.

22 Q And to offer that opinion in this forum, you, you are  
23 necessarily holding yourself out as someone with special  
24 expertise in Florida regulatory principles and the investors'  
25 perception of those principles; is that correct?

1           A     Yes.  In my testimony I make clear I'm relying in  
2 part on Ms. Dubin's accounting of past Commission decisions,  
3 but I looked at those as well.

4           Q     Well, do you have an expertise in, in Florida  
5 regulatory principles?

6           A     I have the expertise of an economist.  I'm not an  
7 attorney like you, Mr. Burgess.  But as I explained in my  
8 testimony, since 1979 I have been in communication with  
9 regulators in Florida as part of my duties on the staff of the  
10 Public Utility Commission of Texas.  I've appeared before this  
11 Commission numerous times over the years, including being the  
12 rate of return witness in the last two FPL rate cases.

13          Q     Sir, well, let me ask you this with regard to  
14 regulatory principles.  Are you familiar with the concept of  
15 burden of proof?

16          A     Yes.

17          Q     And would I be correct in characterizing burden of  
18 proof as being something that places on the moving party the  
19 responsibility to bring forth all the evidence necessary to  
20 prove its case?

21          A     Well, that's my understanding as a layperson.  I'm  
22 again not an attorney.  But I understand in regulatory matters  
23 there is a burden of making a prima facie showing.

24          Q     And ultimately the burden is on the company, even in  
25 response to presentation by the other side, the burden is on

1 the other, on the moving party to prove the case. Would you  
2 agree that that is a fair characterization of the burden of  
3 proof?

4 A Again, my understanding as a layperson, as an  
5 economist and a financial analyst is that the company must  
6 convince the Commission and the, or whoever the finder of fact  
7 is that they have proved up the required fact or circumstance.

8 Q And in your understanding of, of regulatory history  
9 in the State of Florida, would you agree that there are a  
10 number of cases in which the Public Service Commission has  
11 disallowed costs because the Commission believed the utility  
12 did not bring forward evidence to carry its burden of proof?

13 A I --

14 MR. BUTLER: I would object to the form of the  
15 question. Mr., excuse me, Mr. Burgess has specific cases that  
16 he would like to address with Dr. Avera. I would ask that he,  
17 you know, identify and then provide Mr. or Dr. Avera a copy of  
18 those cases.

19 MR. BURGESS: Commissioner, the reasons -- this is --  
20 that is not a valid objection and that's the reason I started  
21 off my questions by asking him what his opinions were and what  
22 they were based on and what his expertise was in. He is  
23 offering to you opinions as to your departure from past  
24 regulatory principles. That's what his testimony is based on.  
25 And so I am probing his understanding of the regulatory

1 principles that he speaks about in his testimony.

2 MR. BUTLER: But the question didn't go to regulatory  
3 principles. It was asking specifically about a fact of there  
4 being specific cases that have specific holdings, and I think  
5 it's fair enough for me to ask that Mr. Burgess identify what  
6 cases he is referring to.

7 CHAIRMAN CARTER: Ms. Helton.

8 MS. HELTON: I heard the witness say that he has 36  
9 years of regulatory experience. It seems to me that  
10 Mr. Burgess's question is a fair question, and if he knows the  
11 answer, he can say whether he does or not.

12 CHAIRMAN CARTER: Overruled. You may proceed.

13 MR. BURGESS: Thank you, Mr. Chairman.

14 BY MR. BURGESS:

15 Q Shall I repeat the question or do you recall it?

16 A Please. Please.

17 Q Would you agree that there are cases in which the  
18 Public Service Commission has disallowed costs because the  
19 Commission believed that the utility did not bring forward  
20 evidence necessary to carry its burden of proof?

21 A Yes, I believe that's occurred.

22 Q Would you agree then that the risk associated with  
23 the disallowance, with these disallowances is embedded in the  
24 current expectations of the investors?

25 A These -- I don't quite understand what you're

1 referring to, Mr. Burgess, when you say these disallowances.

2 Could you please clarify?

3 Q Yes. You agree that there have been cases, in your  
4 understanding there have been cases in which the Commission has  
5 disallowed costs based on its finding that a company has not  
6 carried its burden of proof?

7 A Yes.

8 Q Would you agree then that since there are such cases,  
9 that the risk associated with that type of disallowance is  
10 embedded in the current investors' expectations?

11 A Yes. The investors expect that unless there is a  
12 finding that the company has not shown it is prudent, only then  
13 will there be a disallowance.

14 Q And were you here for the testimony of Mr. Jones?

15 A Yes.

16 Q Do you recall Mr. Jones' testimony agreeing that the  
17 personal history questionnaire of the individual who caused  
18 the, who drilled the hole in the pressurizer piping, that  
19 individual, that that individual's personal history  
20 questionnaire, criminal offense adjudication table,  
21 psychological screening, FBI criminal history, drug and alcohol  
22 screening, that that has not been presented in this case?

23 A I'm trying to remember the exact testimony to which  
24 you're referring. I remember that he said the data that was in  
25 Exhibit 54 is, is not data that he had accessed because he

1 didn't feel he had a need to know. I remember that.

2 Q Yes. And would you then agree -- let me back up.

3 Excuse me. Strike that.

4 So the question I need to ask you is if the  
5 Commission then finds that first it needed that documentation  
6 to make a final decision in this case and, second, that FP&L by  
7 choosing not to bring that information forward failed to carry  
8 its burden of proof on the issue of prudence, if the Commission  
9 finds that and based on that disallows cost, is that something  
10 that the investors would perceive as a departure from current  
11 Commission principles?

12 A I think so. I think such a finding where the NRC,  
13 which is the agency responsible for safety, has sent down a  
14 team to study this episode, this individual, all of the  
15 circumstances, and as a result of their examination, including  
16 the benefit of the FBI and everything else, they concluded  
17 there was no problem. I think investors would be troubled if  
18 this Commission in the face of that were to find that the  
19 company had not met its burden of prudence.

20 Q And that's because you think the Commission should  
21 accept that evidence as requiring a finding of prudence.

22 A No. I do not purport to tell the Commission what  
23 they should do. I think my message to the Commission as an  
24 expert financial analyst and economist is that they should be  
25 mindful of the implications of their decision because I believe

1 the investment community would interpret a finding of  
2 imprudence in the face of the NRC's action on this specific  
3 episode, the investment community would find that troublesome.  
4 So that is a consequence of what the Commission may do, but I  
5 would not purport to tell the Commission what they should do.  
6 I'm just trying to be helpful in making sure they understand  
7 the possible financial implications of their actions.

8 Q Yes, and I appreciate that. But you used the term a  
9 finding of imprudence, and I'm distinguishing that from a  
10 finding that the company failed to carry its burden of  
11 affirmatively proving prudence. And you have, I think, agreed  
12 with me that there are cases in which the Commission has said  
13 we find that a company has failed to carry its burden of  
14 demonstrating prudence. And so my question is if that's what  
15 they found in this case, would that be a departure from your  
16 understanding of past historical principles?

17 MR. BUTLER: I'm sorry. Mr. Burgess, if they found  
18 what? If that was what they found, what are you referring to  
19 that they would find?

20 BY MR. BURGESS:

21 Q If the Commission makes a finding that the company  
22 has not affirmatively carried its burden of demonstrating that  
23 it was prudent because it did not bring forward all of the  
24 evidence that the Commission deems necessary to make that  
25 finding, would that be a departure from --

1           A     Yes, I think it would because I think -- well, I  
2 can't -- I think it would have a chilling effect on the  
3 investment community's view of regulation in Florida. I think  
4 they would find that a departure from policy whether it be  
5 because the Commission found the burden of proof was not met,  
6 but the end result is there's been a disallowance of  
7 \$6.2 million of replacement cost where the NRC in that episode  
8 has found no fault to FPL.

9           Q     Where is the information that the NRC made a finding  
10 of no fault, the source document?

11          A     Well, one source document is a March 18th, 2008,  
12 letter from the NRC.

13          Q     Okay.

14          A     Which finds in response to the circumstances which  
15 led to the AIT, that's the augmented investment or  
16 investigation team that Mr. Jones talked about extensively, the  
17 Federal Bureau of Investigation, FBI, initiated an  
18 investigation and Region 2 Special Agent with the Office of  
19 Investigations acted as liaison between the AIT technical staff  
20 and the FBI. Based on the results of the NRC inspection during  
21 the AIT, the results of the FBI investigation and the actions  
22 that the Florida Power & Light Company took in response to this  
23 issue, the NRC does not plan to conduct any further inspection.

24          Q     And is that not, that finding not part of a, a total  
25 finding that is a very thick volume of information that is a



1 confidential document in this case?

2 A Well, I understand this letter to be an open  
3 document. It's not confidential. So I believe this is in the  
4 public record. I think there is a confidential exhibit which I  
5 have not seen because I don't have a need to know, which is the  
6 detail of the entire NRC investigation.

7 Q Were you here for the Commissioners' questions about  
8 all the factors and facts surrounding this individual's hiring  
9 and the process for screening and what was found on that  
10 individual's specific background?

11 A Yes. I was present and I also reviewed Exhibit  
12 54 myself.

13 Q And Exhibit 54 though did not answer some of the  
14 Commissioners' questions about it.

15 A Yes. As I recall, there were questions about the  
16 individual and other individuals which were not resolved by  
17 Exhibit 54 and there were questions to Mr. Jones about those  
18 items.

19 Q And you're saying that if the Commission finds that  
20 the lack of that information is such that the Commission must  
21 find that the company did not carry its burden to bring forward  
22 all the evidence, that investors would see that as a departure  
23 from Commission principles.

24 A In my -- yes. In my opinion, based on the facts and  
25 circumstances here, I think that would be seen as a departure

1 because it would be seen as holding to a higher level of a  
2 standard of prudence than the ones that have traditionally been  
3 held in Florida that are discussed in Ms. Dubin's testimony.

4 Q So when these Commissioners were asking questions  
5 about that, you're saying those were irrelevant, that  
6 information was not relevant to a finding that the company has  
7 carried its burden of proof?

8 MR. BUTLER: I'm going to object to this question as  
9 asked and answered. I think that Mr. or Dr. Avera has  
10 responded to variants on that question two or three times now  
11 and Mr. Burgess just doesn't like the answers he's getting.

12 MR. BURGESS: Oh, I am liking the answers I'm  
13 getting. I don't, I don't need to ask that. I'll withdraw.  
14 Thank you.

15 COMMISSIONER EDGAR: Okay. Let's move along. Was  
16 that your last question?

17 MR. BURGESS: That completes the questions. Thank  
18 you, Madam Chair.

19 COMMISSIONER EDGAR: Okay. Thank you, Mr. Burgess.  
20 Mr. Wright.

21 MR. WRIGHT: Thank you, Commissioner Edgar.

22 CROSS EXAMINATION

23 BY MR. WRIGHT:

24 Q Good morning, Mr. Avera.

25 A Good morning.

1           Q     My name is Schef Wright. I represent the Florida  
2 Retail Federation, and I think that I like you have been here  
3 for the whole proceeding so far. Is that true?

4           A     I think you have. I can't account for every moment  
5 of your time, but my time has been spent here.

6           Q     All right. I just have a few questions for you.  
7                   Is it your understanding that, that, and this is  
8 based on testimony of Mr. Jones and Exhibit 54, that FPL was  
9 aware of this fellow whom I will call the hole driller, that  
10 FPL was aware of his criminal record, including apparently  
11 three arrests, five dismissed charges and one guilty plea  
12 before it hired him?

13          A     Yes, I believe so. Again, I'm not an expert on  
14 criminal investigation. I read this as a layperson. But the  
15 information that was revealed about this individual I think was  
16 revealed to FPL in the course of their using the procedures  
17 they use to grant access.

18          Q     Thank you. And you kind of answered my next  
19 question. It's your understanding that they, they were aware  
20 of this information both when they approved the individual to  
21 be hired and when they approved him for unescorted access to  
22 the sensitive areas of the plant, to certain sensitive areas of  
23 the plant.

24          A     Yes, I believe so. Again, this is not my area of  
25 expertise. But based on listening to all the testimony and all

1 that I've read, this type of information was elicited by the  
2 company before, in the process of making its decision. Now I  
3 can't guarantee they knew all the details because, as I recall,  
4 there were many questions from the Commission that Mr. Jones  
5 was unaware of and I'm not sure FPL was aware of at the time.

6 Q Thank you. Is it also your understanding that FPL  
7 claims to have trained all of its employees to report safety  
8 violations at the plant?

9 A That's my understanding again listening to Mr. Jones'  
10 testimony and the other documents and discussions that I've had  
11 around this case as a layperson.

12 Q And is it also your understanding that there was a  
13 second employee who was aware of the drilling of the hole after  
14 it was drilled but before it was discovered and that that  
15 second employee did not report it?

16 A Well, again, that's my understanding based on what  
17 was reported by the FBI interview notes of that individual.  
18 That's the limit of my understanding.

19 Q Thank you. And it was in exactly that context that I  
20 was asking the question, Madam Chairman.

21 So here's, here's, I've got basically two more  
22 questions, I think. We all know what the consequences were of  
23 drilling the hole. Here's the question. How does making  
24 Florida Power & Light Company take responsibility for the  
25 consequences of its actions, approving this employee to be

1 hired, approving him for unescorted access and following a  
2 training program that failed to result in disclosure of a  
3 serious violation, how does making FPL take responsibility for  
4 the consequences of these actions increase regulatory risk?

5       A       It does because the standard is not perfection, it is  
6 prudence, reasonable actions in the context of what was known  
7 at the time. And as I understand it, the FBI did its  
8 investigation, the NRC had technical people that had the  
9 benefit of all of this and, based on the totality of the  
10 information it had before it, it reached the conclusion that  
11 FPL had taken all reasonable actions and no change was  
12 necessary.

13               Now Mr. Jones can talk about this further. But I  
14 think from a financial standpoint, because financial people are  
15 people that have a background like me, not the technical  
16 background that Mr. Jones would have, but I think the financial  
17 analysts would say that you have a circumstance where an  
18 individual got through. Let's look at the system, let's look  
19 at how the system was exercised and let's see if there's a  
20 problem with the system or a problem with the way it was  
21 exercised. And I think the financial community would say if  
22 the NRC looked at all of those things, including the FBI notes  
23 about the other individual who may have known about the drilled  
24 hole before it became known by FPL, the NRC considered all of  
25 that and said we find no violation and no further action

1 necessary.

2 I think financial analysts in assessing the risk  
3 would say that that is the kind of thing that would allow a  
4 company to continue to collect the money that it, that it spent  
5 with no profit. I think the kinds of cases that Ms. Dubin  
6 cites where there were episodes that caused nuclear shutdowns  
7 or caused other kinds of replacement power and there was no  
8 finding of imprudence and they were allowed to recover, I think  
9 this would fit into that paradigm.

10 Q Do you have an opinion as to whether the Florida  
11 Public Service Commission could find that FPL's execution of  
12 its plans and its programs, its hiring practices and training  
13 was imprudent or prudent in this case? My question is do you  
14 have an opinion personally?

15 A As a layperson -- if the opinion is whether this  
16 Commission can make such a finding, as a layperson I think they  
17 can. I think this Commission can find that these, that FPL was  
18 imprudent. I think they could. I don't think myself that I've  
19 seen such evidence, but I think this Commission can do that.  
20 My contribution to the decision is not on the technical details  
21 of this episode, but to help the Commission to understand the  
22 financial implications and the financial costs that may go with  
23 such a finding. But the Commission can do what, what they  
24 choose to do and that's not my job to tell them what to do.

25 Q So to summarize, is it, is it your testimony that in

1 this case where we know a bad guy slipped through the system  
2 and we know that somebody who was trained to report safety  
3 violations failed to do so having thus been trained by FPL, on  
4 these facts it's your testimony that investors expect customers  
5 to take the risk of the consequences?

6 A Yes. Given that there's been a full and complete  
7 investigation by the federal agency that's responsible for the  
8 safety of all power plants and has plenary authority over  
9 safety issues at power plants, I think given those facts and  
10 circumstances the investment community would be very surprised  
11 and I think shocked if the Florida Public Service Commission  
12 were to reach a different result. This is not to say they  
13 can't, it's certainly within their power to do so, but I'm  
14 telling you what I think in my opinion as a financial analyst.

15 Q Would it change your opinion if the Commission were  
16 to determine as a finding of fact that FPL's behavior had been  
17 imprudent, would that change the opinion and reaction of  
18 investors?

19 A I don't think so, given the facts and circumstances  
20 that I talked about in my earlier answer.

21 MR. WRIGHT: Thank you. Thank you, Madam Chairman.

22 COMMISSIONER EDGAR: Thank you.

23 Mr. McWhirter, I'm going to jump in for a moment with  
24 a few questions before I come to you. Okay?

25 MR. McWHIRTER: All right.

1 COMMISSIONER EDGAR: Thank you.

2 And, Mr. Avera, you may have covered this, so I'll  
3 say, Mr. Butler, it may be asked and answered but I want to ask  
4 him anyway. Thank you.

5 MR. BUTLER: I won't object.

6 COMMISSIONER EDGAR: Thank you.

7 I think I heard you say in your summary, in your  
8 opening summary comments that there was a finding by the NRC  
9 that FPL was prudent in this instance. And I'll go back and  
10 look at the transcript when that becomes available.

11 THE WITNESS: If I said that, I misspoke.

12 COMMISSIONER EDGAR: Okay.

13 THE WITNESS: I don't think that's the role of the  
14 NRC to determine prudence. I think the role of the NRC is to  
15 assure the public of the safety of nuclear facilities.

16 COMMISSIONER EDGAR: Okay. And that helps, and I  
17 will look at the transcript and I do appreciate that  
18 clarification because I understand that sometimes it's kind of  
19 semantics or splitting hairs, but yet in my mind a finding of  
20 prudence is a legal standard that we utilize.

21 And then I think as you have answered questions from  
22 others you've used the terms that there was, that the NRC  
23 found, quote, no trouble, they found, quote, no fault. At one  
24 point you cited a document that said the NRC was going to do,  
25 quote, no further investigation, and at another point I think



1 you said that they found that FPL had taken all reasonable  
2 actions. And if I've -- but I was taking pretty careful notes.  
3 So I guess let me ask you this, from, from your perspective  
4 what is it that you believe the NRC has made a finding of on  
5 this particular factual situation?

6 THE WITNESS: I will tell you my opinion. I think  
7 Mr. Jones, who will be up here, can give you a lot more  
8 background for how the NRC regulation worked. I've heard him  
9 discuss it and it's fascinating and he certainly knows more  
10 about it than I do.

11 But from my understanding as a financial analyst,  
12 whenever you have an episode in my experience that involves  
13 safety in a nuclear plant, the NRC swings into action and does  
14 an investigation. And if they find that there was a problem  
15 with the company, the plant, the way the company is operating  
16 the plant, then in extreme cases they can shut down the plant,  
17 they can find the operator, they can cause them to make  
18 changes, they can do all sorts of things, and in various plants  
19 around the country they have done that.

20 In this circumstance they did a thorough  
21 investigation, they brought in the augmented inspection team,  
22 they employed other federal agencies to look at the facts, and  
23 when all was said and done they said no changes. I think  
24 Mr. Jones testified that they even took away some of the things  
25 that FPL does in terms of screening individuals as a model to

1 be used elsewhere. But the bottom line was they didn't make  
2 any changes, they didn't do any further inspections. That's  
3 what this March 18th, 2008, letter says, that given all that  
4 they've learned from the FBI, their own investigations and  
5 everything that they went into, the case is closed. And as a  
6 financial analyst, I interpret that to mean that there's  
7 nothing that FPL had to change about its procedures to prevent  
8 this sort of thing happening. No set of procedures is perfect,  
9 things, people slip by, and, and the NRC stopped their  
10 investigation and commented to FPL that they thought their  
11 procedure for screening was a good one and should be emulated  
12 to some extent by other nuclear utilities.

13 So based on all of those facts, I think the lay  
14 understanding would be that the NRC didn't find a problem, and  
15 I hope I've characterized that correctly. I don't mean to  
16 suggest they made a finding of imprudence because that's the  
17 province of this Commission.

18 COMMISSIONER EDGAR: Okay. Thank you. Because in my  
19 mind a statement by the expert agency of no further  
20 investigation is not necessarily the same thing as a finding of  
21 prudence, but that's one of the things that I'm still trying to  
22 think through as we continue with that testimony.

23 On a slightly different tact, I believe you also  
24 testified in your summary that a disallowance in this instance  
25 would be a fundamental shift, and that's also a quote, a

1 fundamental shift in policy and would also be considered  
2 significant, I think you said, increased risk to shareholders.  
3 I may not have gotten those words exactly right. So my  
4 question is are you aware of any entity other than the case  
5 here put on by FPL that has labeled a potential finding of  
6 disallowance as a fundamental shift in policy?

7 THE WITNESS: Commissioner, I want to make clear that  
8 my reference to the fundamental change in policy was in  
9 reference to Mr. Larkin's suggestion that there be a  
10 disallowance in the absence of a finding of imprudence. And he  
11 kept that position in his prefiled testimony and also in his  
12 oral comments last week.

13 I think that a disallowance of fuel and purchased  
14 power costs where there has not been a finding of prudence, I  
15 think that would be the departure and that would be a  
16 fundamental shift and would be very alarming to investors.

17 Now there's this other issue that has come up in  
18 our conversations, in my conversations with Mr. Burgess and  
19 Mr. Wright, which is if the Commission were to find imprudence  
20 and base the disallowance on imprudence. And I'm not saying  
21 that would be a fundamental shift, although I think the  
22 investment community would, would look very carefully at what  
23 the basis of that finding was and that the Commission had not  
24 shifted its understanding of imprudence based on the kinds of  
25 cases that Ms. Dubin talks about in her testimony.

1 COMMISSIONER EDGAR: Thank you.

2 Commissioners, I will come back to the bench after --  
3 but any other questions at this point or you want to hold for  
4 now? Okay. Thank you.

5 Mr. McWhirter, thank you for your patience.

6 MR. McWHIRTER: Thank you.

7 CROSS EXAMINATION

8 BY MR. McWHIRTER:

9 Q Dr. Avera, my name is John McWhirter and I represent  
10 a consumers group as well.

11 Are you familiar with the term "public utility  
12 holding company"?

13 A Yes.

14 Q Would you describe what a public utility holding  
15 company is?

16 A A public utility holding company is a corporation  
17 which owns the stock of public utilities. So it is an upstream  
18 entity that holds one or more public utilities as an  
19 investment.

20 Q May it also own other types of businesses?

21 A Yes. There have been over the years various  
22 restrictions on what other types of businesses a public utility  
23 holding company can hold, beginning in the 1935 act when the  
24 Public Utility Holding Company Act was passed. But as it is  
25 now, public utility holding companies can have other

1 enterprises involved in things other than being public  
2 utilities.

3 Q Are you familiar with the corporate structure of FPL?

4 A Yes.

5 Q And as I understand it, there's an FPL Group and then  
6 there's an FPL subsidiary corporation; is that correct?

7 A Yes.

8 Q When you speak in terms of investors, are these  
9 people that invest in the electric company FPL or are they  
10 people that invest in the public utility holding company FPL  
11 Group?

12 A Both. FPL the utility issues bonds in its own name  
13 and it has a bond rating by three major rating agencies, and  
14 they evaluate the risk, including the regulatory risk of FPL  
15 the utility. FPL the utility gets its equity from FPL Group,  
16 which is a publicly held entity. So the -- where the market  
17 and investors meet equity is at FPL Group and then it comes  
18 down to FPL the utility.

19 In looking at, for example, the three latest or the  
20 latest credit rating reports by the three agencies that rate  
21 FPL the utility all mention the timely recovery of fuel and  
22 purchased power as being a significant risk factor favorable to  
23 their investment in FPL.

24 Q Do the rating -- how do the rating agencies, do they  
25 give the same rating both to FPL Group and to FPL the electric

1 company?

2 A Some have different ratings. As I sit here today,  
3 I'm trying to remember what the group ratings are. I didn't  
4 review the group rating reports in preparation for my  
5 testimony. I just reviewed FPL the utility because it's the  
6 one that issues bonds in its own name to support its utility  
7 operations.

8 Q Would it be fair to say that when you prepared your  
9 testimony for this case you did not look at the ratings that  
10 rating agencies used for FPL Group?

11 A Well, I did look at FPL Group. But what I'm not  
12 prepared to do, Mr. McWhirter, is to rattle off the ratings of  
13 groups. I know for S&P they're generally the same. I'm not  
14 sure about Fitch and Moody's. I looked at the reports but I  
15 didn't commit the rating to memory.

16 Q Did you look at the 10K that was filed by FP&L Group  
17 with the Securities and Exchange Commission in preparation for  
18 this testimony?

19 A No, I didn't look at it in preparation for this  
20 testimony. I've looked at it in the past and I'm sure I will  
21 look at it in the future. I did look at various equity analyst  
22 reports on FPL Group from Merrill Lynch, from ValueLine, from  
23 Citibank, from UBS Securities. So I did look at some equity  
24 analyst reports on FPL Group. I did not look at the 10K as  
25 filed with the SEC.

1           Q     Are you aware that the 10K and the FPL Group annual  
2 report to its stockholders contains the risk factors that are  
3 faced by both of these corporations?

4           A     Yes. It is a requirement of SEC reporting that there  
5 be a discussion to disclose to investors what the risk factors  
6 at least in the view of management are, and that's generally on  
7 the first couple of pages of the 10K report.

8           Q     If you were advising in your expert hat, if you were  
9 advising FPL Group what it should report as a risk factor and  
10 you knew that this Commission had determined that FPL the power  
11 company, subsidiary corporation, had been found imprudent in  
12 the way that it handled the management of the employees working  
13 on its nuclear plant and it resulted in a \$6 million refund to  
14 customers, would you advise FPL Group that it must report that  
15 as a significant change in regulatory policy that augured ill  
16 for the corporation?

17          A     Well, I think in the general discussion that we talk  
18 of risk, as I recall in the 10K they say one of the risks is  
19 whether they'll be able to recover their fuel and purchased  
20 power expenses, which I believe are on the order of  
21 \$7.5 billion at this point. So, so that general risk is there.  
22 I think investors look more precisely at what, how that is  
23 implemented in the regulatory regime. So I think you also see  
24 in the 10K there is a summary of regulation and then there is a  
25 summary of major cases. In the reviews that I've seen of

1 equity analysts they talk about this case, you know, the fuel  
2 recovery case is ongoing and that it represents a lot of money.  
3 Since the Commission hasn't acted yet there's been no action.

4 But I think the fact that investors focus on  
5 disallowances is very clear. Last Friday Standard & Poor's  
6 issued a report called "Assessing U.S. Utility Regulatory  
7 Environments," and in that report one of the things they say is  
8 they look specifically at disallowances to see what they say  
9 about regulatory policy.

10 So I think if this Commission were to order a  
11 \$6.2 million disallowance, I think that would be picked up by  
12 the investment community. I assume it would probably appear in  
13 the 10K next year when there is a summary of regulatory  
14 actions. But I think investors would probably be aware of it  
15 on a much more timely manner because they pretty much follow  
16 things in real time.

17 When I worked for the Public Utility Commission of  
18 Texas, one of my jobs was to deal with rating agencies. And  
19 after every major decision I would get a call from the rating  
20 agencies and they would ask me what happened and why, and then  
21 I would, back then, fax them the, the order and then they would  
22 call back in a couple of days with specific questions, you  
23 know, "What does this mean about the future of policy in  
24 Texas?" So I know that investors rely on the SEC reports, but  
25 they also look directly at what the Commission is doing on



1 forming their assessment of regulatory risk. And I think the  
2 actions in this case would be noticed for whatever effect that  
3 may have.

4 Q Pretend for the moment that I'm an analyst calling  
5 you about FP&L Group and this Commission rules that in its  
6 management of two employees or three employees or group of  
7 employees they determine those employees should have been  
8 managed better, would you, and they disallow the \$6 million,  
9 would you tell the analyst that this entails a major change in  
10 the regulatory policy that allows utilities to collect their  
11 fuel costs?

12 A I think it would. Because you have a utility like  
13 FPL that has significant nuclear facilities where the  
14 difference between the nuclear cost and the replacement cost is  
15 very high. This was, what was it, a five- or six-day outage  
16 and it's \$6.2 million of a 700-megawatt plant? If you had a  
17 longer outage of more or a bigger plant, the numbers could be  
18 very large.

19 Mr. Larkin in his deposition testified his policy  
20 would be the same whether it's \$6 million, \$60 million or  
21 \$600 million, he would still recommend the disallowance in the  
22 absence of prudence.

23 So I think in that circumstance, it's \$6.2 million  
24 today, but what investors are buying is the future. When you  
25 buy FPL's bonds or you buy FPL Group stock, you don't get the

1 past, you get the future. And when they think about risk, they  
2 think about what bad things could happen over the horizon. And  
3 one of the bad things that could happen is because of employees  
4 or whatever reason nuclear plants go down or other low fuel  
5 cost generation goes down and the replacement power can amount  
6 to huge numbers, and they would see that as risk if the  
7 standard has changed from what it has been of prudence.

8 Q A number of years ago Progress Energy had a major  
9 increase in fuel costs as a result of a failed hook in their  
10 plant and the Commission investigated that and considered  
11 whether or not it should disallow those fuel costs. Were you  
12 aware of that?

13 A Yes. I think that's one of the cases that's  
14 discussed in Ms. Dubin's testimony I think both at the  
15 Commission level and perhaps at the supreme court level, as I  
16 recall.

17 Q Did you find that that had a serious adverse impact  
18 on the people that invested in the holding company?

19 A Well, I didn't go back to look at what it did to, you  
20 know, any effect on Florida Progress. My understanding is that  
21 that decision was consistent with what I understand and I think  
22 investors understand to be the Florida policy that companies  
23 will recover fuel and purchased power costs unless there's a  
24 finding of imprudence. And the standard of imprudence is not  
25 perfection. It's whether without the benefit of hindsight

1 management made reasonable decisions based on what they knew at  
2 the time.

3 Q And in your opinion then this drilled hole affair  
4 would, if they determined that the company didn't exercise  
5 sufficient management over that employee, it would be your  
6 opinion that that would be more significant than what happened  
7 with respect to the Florida Power case.

8 A And let me again, Mr. McWhirter, answer at, kind of  
9 at two levels. Level one is if this Commission adopted the  
10 policy that Mr. Larkin advocates, which is if it's unusual, if  
11 it's out of line, it doesn't matter if it's imprudent, it  
12 should be disallowed. If it departs from the past policy in  
13 that regard, I think it would be regarded by investors as a  
14 significant shift in policy.

15 Q Do you think that a ruling that they had exercised  
16 inappropriate management of this employee would in your opinion  
17 be a change in regulatory policy?

18 MR. BUTLER: I'm going to object to that as asked and  
19 answered several times.

20 COMMISSIONER EDGAR: Mr. McWhirter, I do think we've  
21 covered this.

22 MR. MCWHIRTER: I will cease and desist,  
23 Ms. Chairman, and yield the witness.

24 COMMISSIONER EDGAR: Thank you, Mr. McWhirter.

25 Commissioner Argenziano.

1           COMMISSIONER ARGENZIANO: Yes. Thank you. Because  
2 before I lose train my of thought there's several things that I  
3 just wanted to either express or clarify.

4           And one was that, one right off the bat, and I don't  
5 want to make it a real issue, but I like to fill in the gaps  
6 sometimes when there's something either left unsaid or maybe  
7 I'm not sure of the full picture.

8           So you had mentioned that the utilities earn no  
9 profit on fuel. And for the most part I guess that's true on  
10 fuel itself, but aren't there other things that are put into  
11 the fuel clause that they can recover that they do make profit  
12 on, even though I know it's relatively small?

13           THE WITNESS: Well, they're -- it is relatively  
14 small. My understanding is things like railcars, there's a  
15 carrying cost. But unlike the profit in base rates, this  
16 profit is, is fixed, and it is an amount that's recovered  
17 that's part of the carrying cost and it's reconciled and trued  
18 up. So I think that degree of profit is not profit in the same  
19 sense we think about profit in the base rate part of the  
20 equation. It is a carrying cost which since equity is used to  
21 finance the railcars and other assets, there is a carrying  
22 cost. And from an economic perspective if all you earn is your  
23 cost of equity, there's no economic profit. You're breaking  
24 even. And I think --

25           COMMISSIONER ARGENZIANO: Right. And I understand

1 that and I know it's relatively small. Because people have  
2 asked me, well, they do make profits on certain components that  
3 are put in the fuel clause. And I wanted to clarify that, that  
4 there are other things besides fuel in the fuel clause that you  
5 do make profit on. Small --

6 THE WITNESS: Yes, they are. And the profit is  
7 constrained and trued up.

8 COMMISSIONER ARGENZIANO: Okay. And then I guess I'm  
9 looking at what you say as far as -- and I'm going back and  
10 forth on this issue and I haven't actually determined yet the  
11 answer that I'm going to come about, but when you say that  
12 there will be other costs, if the, if the Commission finds the  
13 company was imprudent in either hiring this gentleman or  
14 putting him in a place where he could be left unattended,  
15 unsupervised would have other costs imposed upon the ratepayers  
16 because of the, I guess the financial arena's uncertainty. And  
17 I kind of turned that around in thinking that are you then  
18 saying, looking at it a different way, that if the company was  
19 imprudent, and I'm not saying they have been, but if they were  
20 imprudent, that if the Commission ever finds that they are,  
21 then the customer is going to pay no matter what? That's  
22 another way of looking at it and I'm wondering if that's what  
23 you're really saying.

24 THE WITNESS: No, it isn't, Commissioner. I think if  
25 this Commission follows a policy that the investment community

1 is familiar with and understands, they understand that when  
2 management is imprudent they will lose money. And for that  
3 reason one of the big parts of analyzing a company is the  
4 quality of management and understanding how management does  
5 things and investors must do diligence to assure that they're  
6 comfortable with management.

7           So I think if the Commission follows its policy, even  
8 if that means a disallowance, that is a nonevent from the  
9 investor's perspective. Now what I'm responding to is  
10 Mr. Larkin's proposal that you depart from the policy and  
11 disallow this \$6.2 million not based on a finding of  
12 imprudence. He said that in his prefiled testimony and he said  
13 it before you last week. I think that would be a departure.

14           Now there's another issue that we've talked about a  
15 little bit with Mr. Burgess and that is, well, what if the  
16 Commission finds imprudence and bases the disallowance on  
17 imprudence? Well, I think that is a slightly different  
18 question. And I think the reaction of the financial community  
19 depends on its being comfortable that this is not a changing of  
20 the rules in the middle of the game, that the standard for  
21 imprudence is the same as has traditionally been held to in  
22 Florida as discussed in Ms. Dubin's testimony.

23           So, so my testimony, my prefiled testimony goes to  
24 the circumstance where you adopt Mr. Larkin's proposal and  
25 change the policy and disallow even without a finding of

1 imprudence. If you find imprudence and disallow, I think  
2 there's another set of issues. And the main issue from an  
3 investor perspective, is this a change in the rules of the  
4 game? And I think one of the factors that investors would  
5 consider is the NRC's assessment of the episode. But, but I  
6 think whether investors add a cost with that finding of  
7 imprudence depends on if they see it as a change in policy that  
8 increases their risk or not. If they see it as a change in  
9 policy or not a change in policy, then that's built into the  
10 risk that they've already assessed and the risk premium and the  
11 bond ratings and everything else. So the key is does your  
12 decision represent a change in policy or not?

13 COMMISSIONER ARGENZIANO: Okay. Change in policy on  
14 whether we believe they acted imprudently or, or as to whether  
15 the charges to the consumer would be fair, just and reasonable?

16 THE WITNESS: Well, I think if the Commission adopts  
17 a policy, I believe as a financial analyst if the Commission  
18 were to adopt a policy that prudence is not the factor that  
19 determines whether the company collects the money or not, that  
20 it's whether it's unusual or fair or, you know, some of these  
21 other terms that I believe apply to rates, not costs that  
22 Mr. Larkin talks about in his testimony, I think that would be  
23 perceived as a change in policy.

24 The policy has been and investors understand it to be  
25 if the Commission finds imprudence based on a reasonable

1 standard, which it's done through the years as, as identified  
2 by Ms. Dubin, I don't think that would be alarming to  
3 investors. It's not the disallowance, it's the basis of the  
4 disallowance. Because, remember, investors are looking forward  
5 and they're saying what does this imply about the next time  
6 something happens that may involve a whole lot more money?

7 COMMISSIONER ARGENZIANO: Okay. But in the grand  
8 scheme of the investors being comfortable with continuing their  
9 investments, shouldn't they also take into account that the  
10 companies in Florida have really relatively very low risk at  
11 all in looking into the future? I think that they would be  
12 great companies to invest in because of the statutory language  
13 that basically removes the risk from the companies. Wouldn't  
14 that play a part in investing in the, you know, financial  
15 arena? And I'm serious about that.

16 THE WITNESS: Right. No. Commissioner, the  
17 reputation that this Commission has earned as a supportive,  
18 constructive jurisdiction really pays off. I think companies  
19 pay less for debt, they pay less to borrow, they pay less for  
20 equity, and I think that benefit goes to the bottom line of  
21 customers in the bills they pay. But I can't agree that just  
22 the constructive regulatory environment makes investing in  
23 Florida low risk because Florida has many other risks: Its  
24 location as a peninsula, its remoteness from the national  
25 electric grid, its exposure to extreme weather such as



1 hurricanes, its economic fragility. So, so, you know, the  
2 investor takes a holistic view of risk. And the fact that you  
3 have a very strong regulatory reputation is very helpful in  
4 keeping those rates low.

5 COMMISSIONER ARGENZIANO: And I appreciate that. But  
6 I have to go back to, because this is a big part of when I look  
7 at the -- I don't want to, I don't want to hamper any  
8 investments that would be made into our Florida companies that  
9 would be, you know, devastating to the company as well as  
10 Florida, but I can't help but just as a common sense approach,  
11 and I know there's a lot of things that go into it, but any  
12 time the statute reads to me or, you know, basically says that  
13 you have a company that can recover all costs incurred, that  
14 shall recover all costs incurred, even, even allowing for the  
15 recovery of rates prudently incurred, and understand prudent,  
16 prudent is the word, and allow for even at the existing  
17 plants -- if you have a plant -- this is going a little bit  
18 beyond, but just to show you what the statutes have done for  
19 our companies as far as risk, if you have an existing plant  
20 that's being replaced, I mean, they can still recover. If they  
21 shut down those plants, they're still going to recover. I  
22 mean, that's a guarantee. And then if they invest in a plant  
23 that is not built or precluded from being built or they decide  
24 not to build it, they still get to recover.

25 So to me, I mean, as an investor I would rather

1 invest in a company that has the statutory language that pretty  
2 much protects it from everything, that I know I'm going to  
3 recover, even with the understanding that sometimes, you know,  
4 things happen. You know, a \$6 million hit is relatively small  
5 compared to the larger investments, the billions that are being  
6 invested, and have that backup language that pretty much says  
7 you shall recover all of this. So I'm trying to get a good  
8 feel for what I think, my common sense tells me that a  
9 financial, the financial stability of our companies is great  
10 because of the statutory language that backs it.

11 THE WITNESS: Well, I think the language, the way  
12 this Commission has implemented the law has been very positive  
13 and I think that has saved the customers money. Of course, the  
14 Florida companies are competing with other states that have  
15 similar languages, and this S&P report that came out Friday  
16 ranked Florida along with Alabama, California, Georgia,  
17 Indiana, Iowa, South Carolina and Wisconsin as having  
18 constructive regulatory environments. So Florida does have a  
19 good environment because it has a set of policies that  
20 investors understand and are comfortable with and that has  
21 saved the customers money. And I think if you give investors  
22 reason to believe that that may be changing, I think there will  
23 be implications on the cost side.

24 COMMISSIONER ARGENZIANO: Well, you do know this  
25 Commission can't change the statutes.

1 THE WITNESS: I certainly understand that.

2 COMMISSIONER ARGENZIANO: Okay.

3 THE WITNESS: But I think in terms of implementing  
4 prudence, I think that's clearly a policy that the Commission  
5 implements on a case-by-case basis, and investors look at how  
6 it's being implemented for implications of how it will be  
7 implemented as events occur in the future.

8 COMMISSIONER EDGAR: Commissioner Skop.

9 COMMISSIONER SKOP: Thank you, Madam Chairman. I  
10 could reserve my question or I could do it now at your  
11 preference.

12 COMMISSIONER EDGAR: Ms. Bradley, do you have  
13 questions?

14 MS. BRADLEY: Just a few. Thank you.

15 COMMISSIONER EDGAR: Commissioner Skop, okay if we  
16 finish and then we'll come back to you?

17 COMMISSIONER SKOP: That's fine.

18 COMMISSIONER EDGAR: Okay.

19 CROSS EXAMINATION

20 BY MS. BRADLEY:

21 Q You mentioned a March, I believe it was 18, 2008,  
22 letter that you were referring to.

23 A Yes.

24 Q When did you first review that?

25 A This morning.

1 Q This morning? You hadn't seen it before this  
2 morning?

3 A No. I had discussed with Mr. Jones and I heard  
4 Mr. Jones' testimony as to the outcome of the NRC  
5 investigation, but this was the first time that I had seen the  
6 letter itself.

7 Q So you got it from Mr. Jones this morning?

8 A Yes.

9 Q Do you know what exhibit that's part of because I'm  
10 having trouble finding it?

11 MR. BUTLER: Chairman or Commissioner Edgar --

12 COMMISSIONER EDGAR: Mr. Butler, can you help with  
13 that?

14 MR. BUTLER: It is not. It's not something that's in  
15 the record and one of the things I was expecting to do at the  
16 outset of Mr. Jones' testimony, but --

17 COMMISSIONER EDGAR: I'm sorry. Did you say it is  
18 outside the record at this time, is that what you said?

19 MR. BUTLER: The exhibit is not, it is not, the  
20 letter is not an exhibit in the record. It's something I was  
21 going to offer at the beginning of Mr. Jones' testimony, but  
22 Dr. Avera referred to it first. I have copies for the  
23 Commissioners and the parties. I'm happy to distribute it,  
24 identify it as an exhibit, if you would like to do so, so that  
25 people have the benefit of, you know, seeing the letter

1 firsthand.

2 COMMISSIONER EDGAR: Ms. Bradley.

3 MS. BRADLEY: It's way too late. This letter was  
4 dated March the 18th of this year. They've had it for eight  
5 months. They didn't feel free to share it with the other  
6 parties until the hearing should have been over but for some  
7 complications was extended. I would object and move to strike  
8 any reference to this letter. I mean, it's inappropriate at  
9 this point. They've known this, they've known this was an  
10 issue. You know, we're getting all this late-filed stuff and  
11 it's too late for us to do anything to review or to consult  
12 with anybody else or do any discovery or anything else.

13 COMMISSIONER EDGAR: Mr. Burgess.

14 MR. BURGESS: Madam Chair, I would support the  
15 Attorney General's position in that. We have due process and  
16 the whole thing is to allow everybody to see it. To bring  
17 something in now and to bring it in and have it sitting waiting  
18 to be read for cross-examination because they have chosen not  
19 to present it to the Commission as an exhibit beforehand so  
20 that all the parties can have an opportunity to look at it and  
21 address it and in our testimony make any reference to it we  
22 might need to, I think it's such that it would violate due  
23 process rights for us.

24 COMMISSIONER EDGAR: Mr. Wright.

25 MR. WRIGHT: Join the objection, Madam Chairman.

1 Thank you.

2 COMMISSIONER EDGAR: Mr. Butler.

3 MR. BUTLER: Commissioner Edgar, the letter is  
4 addressing something specifically that got brought up and kind  
5 of called into question by the testimony last week, both the  
6 testimony of Mr. Larkin and the cross-examination of our  
7 witnesses. The AIT report which we, you know, had submitted as  
8 part of discovery, I think it stands on its own, but there were  
9 substantial questions brought up as to the implications of the  
10 information and what was identified as Exhibit 54, the FBI FOIA  
11 response, regarding the sort of continued viability or validity  
12 of the NRC's investigation in 2006 that constituted the AIT  
13 report. And so, you know, in view of that questioning we went  
14 back to find out, you know, what, what has been said that  
15 indicates the NRC's sort of following up on these issues that  
16 were raised. And we, you know, learned of this letter,  
17 intended to bring it up with Mr., excuse me, Mr. Jones last  
18 week, but, of course, the testimony got deferred to this week  
19 and here we are.

20 COMMISSIONER EDGAR: Okay. Then this is what -- yes,  
21 Ms. Bradley.

22 MS. BRADLEY: Can I respond to that? I mean, staff  
23 asked for all reports related to this and they never once  
24 brought it up then. It's like this is a gotcha. You know,  
25 we're not going to give it to you until the trial is almost

1 over. And they said it was in something else and I've looked  
2 and it wasn't in that. And, you know, to spring it now --

3 COMMISSIONER EDGAR: This is, this is the, thank you,  
4 the way I think I'd like to proceed. Ms. Bradley, did you make  
5 a motion to strike the testimony of this witness earlier  
6 regarding this letter or memo or whatever it is?

7 MS. BRADLEY: I would move to strike all testimony,  
8 including Mr. Jones with this, anything, any testimony related  
9 to this, and it may have been Ms. Dubin as well. But, you  
10 know, they make these allegations and then when we ask for  
11 where do you get that from, is there any corroboration, they  
12 point to, you know, so I would move to strike all of it.

13 COMMISSIONER EDGAR: Okay. Okay. Then this is, this  
14 is my ruling at this point in time. I will grant partial the  
15 request to strike, but only of this witness and only the  
16 testimony presented this morning specifically referencing that  
17 memo. I realize we may need to go back to the transcript. We  
18 will be taking a short stretch break at the conclusion of this  
19 witness's testimony. At the end of that very short break we  
20 will move on to the next witness. During that break I would  
21 like counsel on both sides to confer with staff, and we will  
22 consider the possibility of whether that document can be  
23 presented with Witness Jones or not. Okay? Is that clear?  
24 Okay. Thank you.

25 Ms. Bradley, you had questions.

1 MS. BRADLEY: I just have a couple of more.

2 BY MS. BRADLEY:

3 Q Since we've dealt with that, you as a financial  
4 analyst did not, you were not involved in the NRC  
5 investigations and all of that, were you?

6 A No, I was not.

7 MS. BRADLEY: Okay. Thank you. I have nothing  
8 further.

9 COMMISSIONER EDGAR: Thank you.

10 Mr. Twomey.

11 MR. TWOMEY: Probably just one, Madam Chair, beyond  
12 what was already covered by the other Intervenors.

13 CROSS EXAMINATION

14 BY MR. TWOMEY:

15 Q Doctor, good morning.

16 A Good morning, Mr. Twomey.

17 Q You mentioned a moment ago a report that I think you  
18 said came out last Friday ranking the regulatory utility  
19 commissions in the United States.

20 A Well, rating the regulatory environments. It's both  
21 the Commission and the statutes under which they operate.

22 Q And I didn't hear, what report is that?

23 A It's Standard & Poor's, they have a publication  
24 called "Rating Direct," and the title of the report is  
25 "Assessing U.S. Utility Regulatory Environments," and it's by



1 Todd A. Shipman, CFA, who is a senior staff member of Standard  
2 & Poor's.

3 Q Is that, is that a publicly available document?

4 A It is. It's available on the Internet.

5 Q You don't have to subscribe to it?

6 A I don't -- I think you can get Ratings Direct from  
7 the Internet. I'm not absolutely -- we are subscribers to S&P,  
8 but I think it's available to the public.

9 MR. TWOMEY: Okay. Thank you. That's all.

10 COMMISSIONER EDGAR: Thank you. Federal agencies, no  
11 questions at this time. Thank you.

12 Commissioner Skop.

13 COMMISSIONER SKOP: Thank you, Madam Chairman, I have  
14 a few questions.

15 Good morning, Dr. Avera.

16 THE WITNESS: Good morning, Commissioner.

17 COMMISSIONER SKOP: Just to follow up on some of the  
18 line of questioning that we've heard this morning, I guess you  
19 would agree that the NRC is not vested with jurisdiction to  
20 determine the prudence of cost recovery issues; correct?

21 THE WITNESS: Yes, sir, I agree.

22 COMMISSIONER SKOP: Okay. And that the Florida  
23 Legislature saw fit to grant that authority to the Florida PSC?

24 THE WITNESS: Yes, sir, that's my understanding as a  
25 layperson.

1           COMMISSIONER SKOP: Okay. So NRC findings, and I'm  
2 going to steer away from the letter based on the ruling that  
3 the Chairman just made, so any findings by the NRC would be  
4 relevant but not dispositive of whether FPL's actions were  
5 prudent; correct?

6           THE WITNESS: That would be my understanding.

7           COMMISSIONER SKOP: Okay.

8           THE WITNESS: And, and I was, I hope it was clear I  
9 was not presenting it with that in mind.

10          COMMISSIONER SKOP: Okay. And I believe you stated  
11 in Mr. Jones' testimony -- were you here or did you review the  
12 transcripts where Mr. Jones stated in response to my line of  
13 questions that the need to purchase power could have been  
14 avoided altogether if the second person had reported what the  
15 person of interest had told him about drilling the hole?

16          THE WITNESS: I remember that line of questioning,  
17 Commissioner.

18          COMMISSIONER SKOP: Okay. And you would also agree  
19 that based upon testimony you've either heard or reviewed that  
20 FPL was responsible for training not only its own workers but  
21 all contract employees in terms of --

22          THE WITNESS: That's my general understanding. I  
23 don't know the details of the training programs. I think  
24 Mr. Jones is prepared to talk about that. But my understanding  
25 is that's a responsibility of the owner of the nuclear

1 facility.

2 COMMISSIONER SKOP: Okay. Because the way I'm  
3 looking at it, and again trying to be fair to the parties, to  
4 the Intervenors and as well as FPL, there seems to be two  
5 persons, not just one, it's two people here. One is the person  
6 of interest, and I think the genuine question of material fact  
7 for the person of interest stems around whether FPL was prudent  
8 in following the NRC approval process and allowing access to  
9 the facility or whether they could have done more over and  
10 beyond that or some red flags have gone up with respect to that  
11 person. But certainly on the second person, why, if that  
12 second person was trained by FPL, did he not report a critical  
13 nuclear safety issue?

14 But beyond that, I just want to go back to again you  
15 made some references to the NRC, and, again, I'm not going to  
16 speak to the letter but just generally, to your knowledge did  
17 the NRC review the circumstances surrounding a second person  
18 not reporting knowledge of a critical nuclear safety concern?

19 THE WITNESS: I don't know exact, exactly. I know  
20 that the documents that are in Exhibit 54 I believe were  
21 obtained through the NRC, so the NRC had those documents. But  
22 I don't have personal knowledge of what they did with them.

23 COMMISSIONER SKOP: Okay. And do you know if failing  
24 to report an act of intentional vandalism to a nuclear facility  
25 violates any NRC regulations or is a crime?

1           THE WITNESS: I would expect so. Again, Mr. Jones  
2 would be the expert on exactly what the requirements are. But  
3 that would certainly be my belief as a layperson.

4           COMMISSIONER SKOP: Okay. And to your knowledge did  
5 the NRC make any specific findings that the actions of the  
6 second person who failed to report a critical nuclear safety  
7 concern were in accordance with NRC regulations?

8           THE WITNESS: I don't have knowledge of that. I  
9 think Mr. Jones may be able to speak to it when he comes up  
10 here.

11           COMMISSIONER SKOP: Okay. And, again, this goes to  
12 what I said last Wednesday, I believe. You know, you had a  
13 second person that knew about a hole in a nuclear pipe and he  
14 didn't tell anyone, and apparently the NRC doesn't seem to be  
15 concerned about that. And, again, I have some concerns,  
16 frankly, that they may not be doing their job because I see  
17 that as a big critical safety concern, somebody not reporting a  
18 drilled hole.

19           But moving back to some other questions that I had,  
20 you mentioned that the FPL fuel bill I think was approximately  
21 \$16 billion last year or the current year.

22           THE WITNESS: The number that sticks in my mind is  
23 \$7.5 billion, but I may be wrong.

24           COMMISSIONER SKOP: Okay. \$7.5 billion. All right.  
25 Subject to check. But, again, I've been listening to a lot of

1 testimony this morning.

2           So in relation to the amount in question, which I  
3 believe is \$6.2 million, that amount would not be even material  
4 to the total fuel expenditures incurred in a given year by FPL;  
5 is that correct?

6           THE WITNESS: That's correct, Commissioner. But it's  
7 not the amount of this disallowance, it's what it says about a  
8 possible change in policy and the exposure that it would  
9 introduce for future disallowances where you have a  
10 circumstance of a plant with a big difference between  
11 replacement power and its fuel cost that goes offline.

12           COMMISSIONER SKOP: Okay. And let's explore that for  
13 a moment. And I'll make this brief, Chairman.

14           You mentioned the rankings of the other states in  
15 terms of regulatory policy and decision-making and you also  
16 stated the flight of capital to other states based upon  
17 regulatory action. You would agree that Florida has a greater  
18 than average ROE for its investor-owned utilities; is that  
19 correct?

20           THE WITNESS: I think that's generally true. I  
21 haven't done a side-by-side comparison. But I do believe  
22 Florida has high ROEs and I think that's reflective of some of  
23 the inherent risks that go with Florida that are not completely  
24 offset by the constructive regulatory environment.

25           COMMISSIONER SKOP: Okay. Now let's speak briefly to

1 the chilling effect that you allude to resulting from  
2 regulatory accountability.

3           Would you agree that the capital markets are  
4 sophisticated enough to distinguish between this instance and  
5 any resulting disallowance by this Commission from other cost  
6 recovery matters?

7           THE WITNESS: I think they're sophisticated enough to  
8 look at each case, but I think they would take this case and  
9 look into the implications it would have for future cases.  
10 That's exactly what S&P said in this report, that we would  
11 analyze any particular disallowance and assess what it means  
12 for any change in policy. So it, it, they would look at the  
13 specific circumstances and then they would draw inferences as  
14 to whether things have changed or not as to regulatory policy.

15           COMMISSIONER SKOP: Okay. I guess with respect to  
16 the chilling effect, you stated that that would theoretically  
17 transcend to nuclear construction, wind and solar projects, and  
18 I think Commissioner Edgar made a line of questioning to  
19 Mr. Jones about this last week. But how can that be? I mean,  
20 that just does not seem plausible. I think Commissioner Edgar  
21 had the same concerns, so I'd like to --

22           THE WITNESS: My understanding of the way it would  
23 work is when you have nuclear, wind or solar, you have  
24 relatively high capital costs and in return you get very low  
25 energy costs. If those generating sources go offline, then you

1 have to replace the power usually with fossil fuel based  
2 purchased power which is significantly higher in price. So  
3 there's a big differential between the energy cost of the  
4 resource and the replacement power. And every hour that  
5 resource is offline that amount accumulates, and it could  
6 accumulate to a very large, hundreds of millions, even billions  
7 of dollars.

8           Now investors understand that risk and that's why  
9 they are very focused on what disallowances are made for  
10 replacement power. And if they -- the policy, as I think they  
11 understand it now and as illustrated by Ms. Dubin, is the  
12 utility will be able to recover the replacement power unless  
13 there is a finding of imprudency. So the exposure as you move  
14 your fleet more and more into these low energy cost options,  
15 which is a good thing, it's good for the economy of the state  
16 and it's good for the environment, you are exposing utilities  
17 to larger and larger replacement power disallowances. And if  
18 the policy is in place and it's one that investors are  
19 comfortable with, that doesn't affect the cost of capital or  
20 the ability to finance these facilities. But if the investment  
21 community becomes uncomfortable or there's uncertainty about  
22 what the rules are, then there is a financial cost penalty.

23           COMMISSIONER SKOP: Okay. And just two quick  
24 follow-up questions.

25           To that point, why would the investment community or

1 investors be concerned about an immaterial disallowance?

2 THE WITNESS: Because what they imply about future  
3 possibly material and huge disallowances, and Mr. Larkin said  
4 that his policy would apply to \$6 million, \$60 million or  
5 \$600 million, and I assume \$6 billion. So the investors are  
6 saying, not this disallowance, that's not the -- it's history.  
7 What they're worried about is the exposure to future  
8 disallowances, which could be much larger in size than  
9 \$6.2 million.

10 COMMISSIONER SKOP: So if I understand you correctly,  
11 are you suggesting that any notion of a regulatory disallowance  
12 would result in a quantum shift in the regulatory landscape as  
13 viewed by --

14 THE WITNESS: No, Commissioner, I'm not. Investors  
15 understand there will be disallowances and there is a record of  
16 disallowances in this state and in other states. But what  
17 investors want to know is what are the rules? Are they stable,  
18 understandable, fair rules for disallowance? And I believe  
19 that one of the reasons Florida is up there with these other  
20 states and can compete for capital is investors are comfortable  
21 that the rules are clear and fair and they understand them. If  
22 we change that circumstance and investors become uncomfortable  
23 or unclear about the rules, then I think there's a penalty to  
24 be paid in terms of the cost and availability of capital. So  
25 that's why it's not the amount of disallowance, it's the nature



1 of the change in policy that's important.

2           **COMMISSIONER SKOP:** And just one comment in passing,  
3 I guess, on this point of the \$6.2 million. We spent nearly  
4 three days making sure the rules, as we go forward, will be  
5 clear and fair. So I think the issues have been fully vetted,  
6 and I would respectfully disagree that the financial community  
7 would be taken aback by any disallowance in this instance.

8           **COMMISSIONER EDGAR:** Commissioner McMurrin, did you  
9 want to go, or do you want --

10           **COMMISSIONER McMURRIAN:** I can go.

11           **COMMISSIONER EDGAR:** Commissioner Argenziano.

12           **COMMISSIONER ARGENZIANO:** Just a question to that, in  
13 thinking of your responses to me and to Commissioner Skop, how  
14 would we be changing policy? I'm not understanding that. I  
15 think the Commission has always used the determination of  
16 prudence, so I'm not sure how we would be changing. Are you  
17 saying that the Commission has never found a company to be  
18 imprudent?

19           **THE WITNESS:** No, Commissioner. I think you are  
20 absolutely correct, the policy has been imprudence, and there  
21 have been disallowances and investors know that and expect it.  
22 But the proposal on the table by Mr. Larkin rearticulated in  
23 oral testimony from this stand last with week is the prudence  
24 standard goes by the board. And now the standard becomes  
25 unusual, abnormal, not fair, just, or reasonable. I think that

1 is the change in policy. If the Commission finds imprudence  
2 and uses the same standards, I don't think we have a change in  
3 policy.

4 **COMMISSIONER ARGENZIANO:** But let me just -- and I  
5 understand that, because I've been trying to really get to --  
6 and you're talking about his proposal. That's not necessarily  
7 what the outcome of the Commission will be. But within that,  
8 even with that, if he's talking about fair, just, and  
9 reasonable under 366.05 under powers, the first -- under (1),  
10 in the exercise of such a jurisdiction, the Commission shall  
11 have power to prescribe fair and reasonable rates and charges.  
12 So I would include that and charges to be part of a continued  
13 policy. So that could be a way of looking at -- and I'm not  
14 sure exactly what he had suggested, but a charge -- because you  
15 had indicated before that fair, just, and reasonable applies  
16 to, I believe you said to rates, to rate fixing.

17 And I'm not so sure now reading, especially at 366.05  
18 where it says rates and charges. So that would be continued  
19 policy also. And I just want to make sure I'm on the same page  
20 of you indicating that we could be shifting from a policy  
21 change, and maybe it's past decisions, and maybe -- I don't  
22 know, you know, maybe there hasn't been a time when someone has  
23 been imprudent in a similar type instance. But I would, I  
24 guess, have some problem with disregarding what I just read out  
25 of the statute and charges being part of that policy that the

1 Commission has used.

2           **THE WITNESS:** Well, I can only answer as a layperson.  
3 You know, I interpret that to apply to the charges that are on  
4 customers bills. The Commission here is looking at the cost  
5 that the utility pays, and the utility did pay these  
6 replacement power costs. I don't think there is any dispute  
7 about that. The dispute is whether they were prudently  
8 incurred or not. And the standard that this Commission has  
9 applied -- and I think Ms. Dubin's testimony documents it, is  
10 whether those costs were prudently incurred. And when they  
11 weren't prudently -- when the Commission found that, they go  
12 out.

13           When it doesn't find it, even though the utility  
14 might -- in the case of one example didn't realize that fuel  
15 markets were changing and didn't switch to natural gas quickly  
16 enough. In hindsight that was a mistake. They could have  
17 saved the customers money if they had moved to natural gas, but  
18 the Commission and the courts agreed you can't use hindsight.

19           So I think the standard that this Commission has  
20 applied is one of prudence, and if the Commission departs from  
21 that, I think that is clearly an alarming change for investors  
22 because of the future exposure. I think if you change the  
23 standard of prudence, if you call it imprudent, but you have  
24 moved the goalposts, I think that too would be disturbing. It  
25 might be less disturbing, but it still would be disturbing.

1           So if the Commission continues with its policy then  
2 there is no news from an investor standpoint and, therefore, no  
3 capital cost implications.

4           **COMMISSIONER EDGAR:** Commissioner McMurrian.

5           **COMMISSIONER McMURRIAN:** Thank you, Chairman. And  
6 thank you, Doctor Avera.

7           I think I finally understand the company's position  
8 on perverse incentives against low fuel cost sources, but I  
9 want to make sure I understand it correctly. And Commissioner  
10 Skop asked you some questions related to this, too, and you  
11 explained again that it is the difference in the lower fuel  
12 cost sources with respect to maybe nuclear and even wind and  
13 some others in what the replacement costs would be. That that  
14 risk is larger because of the larger difference between those  
15 two resources.

16           But to make sure I understand that, are you saying  
17 that perhaps a company may be more likely to invest in natural  
18 gas, for instance, as a resource because they would get the  
19 recovery of any prudent fuel cost recovered regardless of the  
20 fuel cost source, but that it would be less likely to have as  
21 large of a difference between what the -- let's say something  
22 happened with respect to a natural gas plant and it was taken  
23 off-line and you had to replace that with something else. I  
24 guess it's fairly likely it might be replaced with more natural  
25 gas.

1           **THE WITNESS:** That's correct. So the difference  
2 between the fuel costs if the plant were running and the  
3 replacement fuel cost is relatively small. So no matter how  
4 long the plant is off-line, you are not accumulating a lot of  
5 dollars of exposure.

6           **COMMISSIONER McMURRIAN:** And so you are saying  
7 because the risk of the difference there is smaller, if that  
8 were the case, that it may send an incentive to a company to  
9 avoid some of the lower cost resources like nuclear and wind  
10 because they would have less risk exposure by using the natural  
11 gas, for instance.

12           **THE WITNESS:** That is correct.

13           And the investors would agree with the company's  
14 actions because they would see the exposure increasing, and if  
15 a company does invest in those low fuel cost alternatives,  
16 there would be a financial penalty. So it does create a  
17 perverse incentive that would lead utilities and investors to  
18 prefer relatively high fuel cost incentives, which is exactly  
19 the wrong thing at this point in the state's history.

20           **COMMISSIONER McMURRIAN:** Thank you for that.

21           As Commissioner Skop mentioned when we had some  
22 questions on that the other day, I still didn't quite  
23 understand, so I think I follow it now.

24           But moving on to another point you made. I think you  
25 said that the importance -- what investors look at would be the

1 basis of the disallowance. And I'm trying to think this  
2 through, and it's probably not worded absolutely correctly, but  
3 if the record were to show that FPL met all of the NRC's rules,  
4 regulations, and guidelines, and we've talked a lot about what  
5 the guidelines are, and it sounds like they're a little bit  
6 more like rules or regulations in a sense. And if it showed  
7 that FPL met its own guidelines for coming up with the  
8 unrestricted access, and the Commission found because of some  
9 of the other evidence that has been in the record, particularly  
10 with respect to that Exhibit 54, that the company acted  
11 imprudently regardless of if the record shows that they met all  
12 the guidelines by NRC and their own, what is your opinion on  
13 how investors would view that decision?

14 **THE WITNESS:** Well, I think it depends on how it all  
15 plays out. What I do know is that if the investors perceive  
16 that the standard of prudence has shifted that would be  
17 worrisome. Perhaps not as worrisome as the proposal to ignore  
18 prudence, but I think it's not just that the prudence is the  
19 standard for disallowance, I think there is a perception out  
20 there in the investment community that this Commission has  
21 applied that standard consistently and fairly through time in  
22 the various episodes that Ms. Dubin talks about in her  
23 testimony.

24 So I think if the Commission didn't change the policy  
25 and instead had a disallowance based on prudence, then I think

1 the focus would shift. Well, is it the same prudent standard  
2 that we have come to be comfortable with, or is there some  
3 shift? And I don't think I can answer whether that would be  
4 the case without knowing how it all plays out, and that's above  
5 my paygrade anyway.

6 **COMMISSIONER McMURRIAN:** Okay. I think that helps.  
7 I guess one other question. If the evidence were to show that  
8 FPL hadn't followed the NRC's rules, regulations, guidelines,  
9 or its own guidelines with respect to granting unrestricted  
10 access, do you believe it is consistent regulatory policy that  
11 the Commission would find imprudence, and imprudence of those  
12 higher fuel replacement costs?

13 **THE WITNESS:** I think speaking in very general terms  
14 the financial community would probably interpret an imprudence  
15 disallowance in the face of findings that there was a violation  
16 of NRC guidelines and its own policies and procedures, I think  
17 they would find that probably consistent with past policy and  
18 not disturbing and not resulting in any change in the  
19 regulatory risk.

20 **COMMISSIONER McMURRIAN:** And I guess one final  
21 thought. And you talked to about the standard of prudence and  
22 whether that shifts or not. How important do you think it is  
23 on whether -- in that standard of prudence, how important do  
24 you think that the NRC's determination, or maybe the fact that  
25 they are not doing more, I can't remember the exact terminology

1 that Commissioner Edgar used from something you had said  
2 earlier, but they weren't going to do further investigation.  
3 How important is that, in your opinion, in determining the  
4 standard of prudence.

5           **THE WITNESS:** Well, I think it's very important for  
6 two reasons. First, I think investors recognize that the NRC  
7 is the federal agency that has the special expertise and the  
8 special charge to deal with matters of nuclear safety and to  
9 protect the public. So I think investors give a lot of  
10 credence to the NRC because they have confidence that the NRC  
11 has the expertise and the knowledge and can use federal  
12 agencies like the FBI to investigate circumstances and  
13 episodes.

14           I think the second reason why it's important to  
15 investors is the NRC cuts across all states. And, as mentioned  
16 earlier, Florida has to compete for capital with utilities in  
17 other states. And I think if investors were to feel that the  
18 standards of performance were different in Florida than they  
19 are in Indiana, Iowa, the other states that have nuclear  
20 exposure, Maryland, then I think that might create some  
21 problems for their preference to invest in Florida versus other  
22 states.

23           I want to be clear that I don't think there is a  
24 capital flight out of Florida. I think Florida has investor  
25 confidence, and that's a good thing, because the companies are



1 able to raise capital even in these very difficult markets and  
2 a lot of companies can't. But I think if there were to be a  
3 decision that was perceived as saying the rules in Florida are  
4 different than they are for nuclear plants in other states, I  
5 think that that might be troublesome to the financial  
6 community.

7 **COMMISSIONER McMURRIAN:** Thank you. That's all the  
8 questions I have.

9 **CHAIRMAN CARTER:** Commissioner Argenziano.

10 **COMMISSIONER ARGENZIANO:** One other question, and  
11 then I have a question for staff. Take it back one step again.  
12 Are you basically indicating that the Commission should only  
13 use prudence in the determination of the purchase of the  
14 additional fuel or the higher cost fuel that it needed since it  
15 was off-line, and not in using prudence in regards to the  
16 gentleman and maybe the oversight of the gentleman and how the  
17 incidents occurred, if there was imprudence?

18 **THE WITNESS:** No, Commissioner, I'm not. I  
19 understand there's no dispute about the amount of replacement  
20 power in this case. So the dispute at issue was was there  
21 imprudence that caused the company to have to buy that power.  
22 And I think the question in Florida policy is was there  
23 imprudence or not. And I think Mr. Larkin is suggesting  
24 another standard, and I think that's the one that would be  
25 troublesome.

1           But as I understand, the issue is the Commission can  
2 find that FPL was imprudent and disallow it. And I think if  
3 the Commission were to do that, I think the focus then in the  
4 financial community would be was the standard of prudence  
5 applied here the same as has been applied, or are we seeing  
6 some migration or change in the prudent standard.

7           **COMMISSIONER ARGENZIANO:** Okay. Thank you. I just  
8 wanted to make sure it wasn't being applied just to the one  
9 area of the fuel and you have clarified that. Thank you.

10          **COMMISSIONER EDGAR:** Commissioner Skop.

11          **COMMISSIONER SKOP:** Thank you, Madam Chairman. And I  
12 just wanted to thank Commissioner Argenziano for her prior  
13 question. I thought that was a very good pointed one.

14           With respect to the NRC, I think in our line of  
15 questioning that we have previously discussed -- and I wish,  
16 frankly, the NRC was here so we could ask them some questions,  
17 because I think it would resolve a lot of my concerns. And  
18 we're in a situation here where we are having to make a  
19 judgment call based upon incomplete late information. And,  
20 again, I'm trying to read between the lines and make the right  
21 decision so that it's fair to everyone.

22           But with respect to the NRC, again, going back to  
23 that central question, because not much is known. The NRC has  
24 just -- I'll try and make this a question. I will get to my  
25 question at some point, but the NRC really just -- all it

1 stated, if anything, was that it declined to pursue any  
2 additional investigation. But it never passed judgment as to a  
3 specific finding on whether something broke down in terms of  
4 somebody failing to report a critical safety issue, or whether  
5 best practices over and above its existing policies could have  
6 been put into place to avoid somebody getting unfettered access  
7 to sensitive areas. So they never passed judgment on -- I'm  
8 trying to think of the right words -- lessons learned, so to  
9 speak, to your knowledge.

10 **THE WITNESS:** Mr. Jones obviously knows a lot more  
11 than I do, but let me give you the answer from a financial  
12 standpoint. Investors know when the NRC is unhappy. They  
13 close plants, they levy fines, they issue rulings that things  
14 have to change, or in some cases new folks have to take over  
15 management. So investors know that when the NRC is unhappy  
16 they have ample powers to express that unhappiness. And I  
17 don't think there has been any of that expression in this  
18 episode.

19 **COMMISSIONER SKOP:** And just one quick follow-up to  
20 that point. Could it equally be possible that maybe the NRC in  
21 its wisdom may have overlooked something in this instance?

22 **THE WITNESS:** It's certainly possible, Commissioner,  
23 I just don't know.

24 **COMMISSIONER SKOP:** Thank you.

25 **COMMISSIONER EDGAR:** Are there questions from staff?

1           **MR. YOUNG:** Yes.

2           **COMMISSIONER EDGAR:** Okay. Mr. Butler, did you have  
3 something before we --

4           **MR. BUTLER:** Yes. Before we went to staff, I think  
5 we need to revisit a subject that you had ruled on a few  
6 moments ago. And I wanted to do it now so that if this becomes  
7 part of the record everybody has an opportunity to use it.

8           I had, quite frankly, not done my homework adequately  
9 on the source of the March 18, 2008, letter that Doctor Avera  
10 had referred to. It is part of the record. It is a document  
11 that was part of the FPL's response to staff's second  
12 production of documents, Bates number FCR088928 and 8929. And  
13 that POD response is Item 24 in Exhibit 2, which was the  
14 stipulated staff composite exhibit.

15           And I think with that information that it certainly  
16 changes our position, and I would hope changes the Commission's  
17 position on the admissibility of Doctor Avera's testimony  
18 concerning the letter.

19           **COMMISSIONER EDGAR:** Well, absolutely the  
20 representation that that document, letter, whatever it is was  
21 not in the record was certainly a factor in my ruling. So let  
22 me look to our objectors for further comment.

23           **MS. BRADLEY:** Can we discuss this at a break with  
24 staff and look at that, because if it is part of the record  
25 then that changes things.

1           **COMMISSIONER EDGAR:** Mr. Butler, I had asked that --  
2 and I appreciate you bringing that to our attention earlier  
3 rather than later. Is there a reason that we need to deal with  
4 this now while this witness is still on that stand?

5           **MR. BUTLER:** I don't think so. I mean, our principal  
6 intent was to have Mr. Jones address it anyway, so we can  
7 certainly address it with him at that time.

8           **COMMISSIONER EDGAR:** Okay. And that was my  
9 expectation, but I do appreciate you bringing that to our  
10 attention as a correction. Okay. We will address it at what I  
11 hope will be a break soon.

12                   Questions from staff.

13           **MR. YOUNG:** Very quickly.

14                                   CROSS EXAMINATION

15           BY MR. YOUNG:

16           **Q**     Doctor, do you have the S&P report with you?

17           **A**     I do.

18           **Q**     Do you have copies of that report for everyone?

19           **A**     No, I do not. I just got it this morning.

20           **MR. YOUNG:** Madam Chairman, if it's possible, we can  
21 ask for a late-filed exhibit of that S&P report?

22           **COMMISSIONER EDGAR:** When you say late-filed, can  
23 we --

24           **MR. BUTLER:** We can do it after the break, I'm sure.

25           **COMMISSIONER EDGAR:** Okay. What should we label it?

1 Mr. Butler, I will look to you, since this is your  
2 witness.

3 **MR. BUTLER:** And I will look to Doctor Avera. Is  
4 there a descriptor on there that would be appropriate to refer  
5 to it as an exhibit, Doctor Avera?

6 **THE WITNESS:** Well, it's Standard and Poor's,  
7 November 7th, 2008, ratings direct report.

8 **MR. BUTLER:** I would adopt that as the title of the  
9 exhibit.

10 **COMMISSIONER EDGAR:** S&P November '08 -- what did you  
11 say the report was?

12 **THE WITNESS:** Ratings direct.

13 **COMMISSIONER EDGAR:** S&P November 8th (sic) ratings  
14 direct report. Does that work? Okay. Thank you.

15 **MR. YOUNG:** No further questions.

16 **COMMISSIONER EDGAR:** That's it?

17 **MR. BUTLER:** And I think that would be Late-filed --  
18 is it 57?

19 **COMMISSIONER EDGAR:** I will mark it as 57, yes, sir.  
20 (Late-filed Exhibit Number 57 marked for  
21 identification.)

22 **COMMISSIONER EDGAR:** Commissioner Argenziano.

23 **COMMISSIONER ARGENZIANO:** Before we take a break, may  
24 I ask staff -- and I think the company, too, there were two  
25 things I asked for the other day that are really pertinent to

1 me in making a decision on this matter. And one was about I  
2 had mentioned a confidential document and gave you the number  
3 of that confidential document and was concerned with wanting to  
4 know if the company had implemented anything since the action  
5 that was described in that document, because it may have  
6 bearing on the second witness in this case and this timely or  
7 untimely report to the company.

8           And then the second part was was there anything in  
9 the individual's personal file that indicated to the company  
10 that he might have been a problem. Anything outstanding that  
11 we might have been able to take a look at. Whether he was --  
12 you know, outbursts or chronic complaining? We know he was  
13 chronically complaining because we read that in the transcript,  
14 but anything in a file. I'm sure the company has some personal  
15 files on people that they could indicate one way or another  
16 there was some type of -- or is the staff allowed to see that  
17 file?

18           **MR. BUTLER:** Well, as to the first point, Mr. Jones  
19 is prepared to address his February or January 2008 letter that  
20 you are referring to, and we actually have a report, and it  
21 probably will end up needing to provide this as a confidential  
22 exhibit, if that is the Commission's pleasure. But, yes, he  
23 can address that.

24           He can also address your second point, but I think  
25 just to manage expectations, keep in mind that this was a

1 contractor employee, and I do not believe there is a  
2 substantial personnel file on that individual that FPL has.  
3 But Mr. Jones can address that point when he testifies.

4 **COMMISSIONER ARGENZIANO:** Okay. I appreciate that.  
5 Thank you.

6 **COMMISSIONER EDGAR:** Mr. Butler, did you or did you  
7 not say whether you had redirect?

8 **MR. BUTLER:** I do not have any redirect.

9 **COMMISSIONER EDGAR:** Okay. And other than the S&P  
10 report that we have just marked, I see no other exhibits. Is  
11 that correct?

12 **MR. BUTLER:** No other exhibits.

13 **COMMISSIONER EDGAR:** Okay. Then in an abundance of  
14 caution, let me ask this. We will excuse the witness from the  
15 witness stand. Is it possible for him to be available for  
16 hopefully the remainder of this proceeding today, just in an  
17 abundance of caution? Do you have an early flight?

18 **MR. BUTLER:** Yes.

19 **THE WITNESS:** I have a flight at 6:25.

20 **COMMISSIONER EDGAR:** Okay. Then I would ask that you  
21 hang around for a while longer and not be formally excused yet.  
22 But you may go ahead and gather your things and move on for the  
23 time being.

24 **THE WITNESS:** Thank you, Madam Chair.

25 **COMMISSIONER EDGAR:** Thank you very much.



1 Mr. Butler, my memory is that last week we marked a  
2 document 56 for Witness Dubin. Has that been submitted?

3 **MR. BUTLER:** Yes. We filed it with the Clerk's  
4 Office on Monday, I believe.

5 **COMMISSIONER EDGAR:** Has that been distributed to  
6 Commissioners?

7 **MS. BENNETT:** On break we will go up and get it and  
8 distribute it.

9 **COMMISSIONER EDGAR:** Okay. And it may be that  
10 everybody has that. I don't know that I have retrieved it, so  
11 if we could maybe get copies of that before this witness comes,  
12 it just -- it may come up.

13 And, Ms. Helton, do you have anything now before we  
14 go on brief break?

15 **MS. HELTON:** No, ma'am.

16 **COMMISSIONER EDGAR:** Okay. Commissioner Skop.

17 **COMMISSIONER SKOP:** Thank you, Madam Chair.

18 I was just going to ask with respect to the S&P  
19 report that is going to be admitted as a late-filed exhibit, if  
20 staff has the opportunity to get that and could provide a copy  
21 to the bench, I would appreciate that, if that is a  
22 possibility.

23 **COMMISSIONER EDGAR:** Thank you. And I think that Mr.  
24 Butler has said that he can get us a copy, and we can certainly  
25 ask staff to make more copies and distribute.

1           **MR. BUTLER:** Yes.

2           **COMMISSIONER EDGAR:** Okay.

3           Anything else before we go on break? Okay.

4           Commissioners, we will take a ten-minute recess, so we can all  
5           stretch. When we come back, we will begin with Witness Dubin.  
6           We are moving a little slower than I had expected, so let me  
7           just put this out there. We will at some point take a lunch  
8           break, and my expectation is at the conclusion of testimony  
9           that we will take a break before we come back and hear from  
10          staff, and we'll just kind of see how the time frames go a  
11          little further as we move along. And we are in recess.

12                        (Recess.)

13          **COMMISSIONER EDGAR:** We are back on the record.

14          Mr. Butler, your witness.

15          **MR. BUTLER:** Is it time to return to or revisit the  
16          decision on the motion to strike the testimony and to address  
17          the March 18, 2008, letter, or do you want to wait until Mr.  
18          Jones comes up for that purpose?

19          **COMMISSIONER EDGAR:** I know what my preference is,  
20          but, Ms. Bradley, do you have a comment?

21          **MS. BRADLEY:** How about if I withdraw my objection,  
22          since staff has assured me that it is part of that document  
23          that is part of the record.

24          **COMMISSIONER EDGAR:** Okay.

25          **MR. BURGESS:** Same reaction, Madam Chair.

1           **COMMISSIONER EDGAR:** Okay. So, Mr. Butler, am I  
2 hearing you correctly that you are asking that I revisit my  
3 ruling to strike the testimony of the previous witness as to  
4 the specific document?

5           **MR. BUTLER:** I'm asking that.

6           **COMMISSIONER EDGAR:** Okay. I will withdraw that  
7 ruling under the heading of changed circumstances.

8           **MR. BUTLER:** Thank you.

9           **COMMISSIONER EDGAR:** And we will have that duly noted  
10 in the transcript.

11          **MR. BUTLER:** Thank you.

12          **COMMISSIONER EDGAR:** Okay.

13          **MR. BUTLER:** And would it be appropriate to move  
14 Exhibit 57, Late-filed Exhibit 57? I think it has been  
15 distributed to everyone and move that into the record?

16          **COMMISSIONER EDGAR:** Any objection? This is the  
17 Standard and Poor's report that came up in the earlier  
18 discussion and has now been passed out, I believe, to all  
19 parties and Commissioners. I am seeing no objection. Okay.  
20 No objection, we will enter 57 into the record.

21          **MR. BUTLER:** Thank you.

22                   (Late-filed Exhibit Number 57 admitted into the  
23 record.)

24          **MR. BUTLER:** And I would call our next witness, Ms.  
25 Dubin.

1 KOREL DUBIN

2 was called as a witness, and having first been duly sworn, was  
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. BUTLER:

6 Q Ms. Dubin, have you been previously sworn?

7 A Yes, I have.

8 Q Would you please state your name and business address  
9 for the record?

10 A Yes. My name is Korel Dubin. My business address is  
11 9250 West Flagler Street, Miami, Florida 33174.

12 Q By whom are you employed and in what capacity?

13 A I'm employed by Florida Power and Light Company as  
14 Senior Manager of Purchased Power.

15 Q Do you have before you a document entitled rebuttal  
16 testimony of Korel M. Dubin dated May 27, 2008?

17 A Yes, I do.

18 Q And this consists of 11 pages, correct?

19 A Yes.

20 Q Do you have any changes or corrections to make to  
21 your rebuttal testimony?

22 A No, I do not.

23 Q If I asked you the questions set forth in that  
24 testimony today, would your answers be the same?

25 A Yes, they would.

1           **MR. BUTLER:** Commissioner Edgar, I would ask that Ms.  
2 Dubin's prefiled testimony, rebuttal testimony be inserted into  
3 the record as though read.

4           **COMMISSIONER EDGAR:** The prefiled rebuttal testimony  
5 of this witness will be entered into the record as though read.

6           **MR. BUTLER:** Thank you.

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1           **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2                           **FLORIDA POWER & LIGHT COMPANY**

3                           **REBUTTAL TESTIMONY OF KOREL M. DUBIN**

4                           **DOCKET NO. 080001-EI**

5                           **May 27, 2008**

6

7    **Q.     Please state your name and business address.**

8    A.     My name is Korel M. Dubin and my business address is 9250 West  
9           Flagler Street, Miami, Florida 33174.

10 **Q.     By whom are you employed and what is your position?**

11 A.     I am employed by Florida Power & Light Company ("FPL" or "the  
12           Company") as Senior Manager of Purchased Power in the Resource  
13           Assessment and Planning Department.

14 **Q.     Have you previously testified in this docket?**

15 A.     Yes, I have.

16 **Q.     What is the purpose of your rebuttal testimony?**

17 A.     The purpose of my testimony is to rebut the testimony of the Office of  
18           Public Counsel (OPC) witness Hugh Larkin, which opposes FPL's  
19           recovery through the Fuel Cost Recovery (FCR) Clause of  
20           replacement power costs associated with the Turkey Point Unit 3  
21           Outage Extension due to the Pressurizer Piping incident. My rebuttal  
22           testimony, together with that of FPL witness Avera, shows that Mr.  
23           Larkin's rationale for opposing recovery of these replacement power  
24           costs is completely inconsistent with the Commission's established

1 practice for applying the FCR and would provide no mechanism for  
2 recovery of prudently incurred fuel costs. As discussed in my  
3 testimony and that of FPL witness Avera, such a change in PSC  
4 practice would be harmful to customers and the Company because it  
5 would be a disincentive to investment in low energy cost generation  
6 and would send inappropriate signals to the financial community that  
7 could ultimately increase FPL's cost of capital and costs to  
8 customers.

9 **Q. Mr. Larkin's testimony argues that FPL should not be allowed to**  
10 **recover the \$6,163,000 in replacement power costs due to the**  
11 **outage at Turkey Point Unit 3 because "[i]t is the position of the**  
12 **Public Counsel and myself that the purchase power costs**  
13 **resulting from the vandalism is not a normal fuel and purchase**  
14 **power cost which should be recovered through the Fuel**  
15 **Adjustment Clause." Is his argument consistent with**  
16 **Commission practice concerning application of the FCR?**

17 **A.** No. The Commission has consistently based replacement power  
18 cost recovery determinations on whether a utility's actions were  
19 prudent in whatever circumstances led to the need for replacement  
20 power. These prudence determinations essentially look to whether a  
21 utility acted reasonably based on the information available to it at the  
22 time, without the benefit of hindsight. So long as a utility's actions are  
23 prudent by this measure, utilities have been permitted to recover the  
24 replacement power costs. In my direct testimony, I presented two

1 examples (the 1984 St. Lucie Thermal Shield case and the 1996  
2 review of an act of vandalism when a vehicle was lodged in one of  
3 the discharge pipes) in which the Commission has evaluated actions  
4 that led to outages and allowed recovery of the resulting replacement  
5 power costs where the utility was found to have acted prudently.  
6 There have been many other instances where the Commission has  
7 evaluated the recovery of fuel and purchased power costs and the  
8 standard for recovery has always been the same – prudence, where  
9 a utility acted reasonably based on the information available to it at  
10 the time, without the benefit of hindsight.

11

12 For example, in Docket No. 880001-EI, an intervenor, Occidental  
13 Chemical Corporation (OCC) took the position that Florida Power  
14 Corporation's (FPC's) final true-up amount should be reduced  
15 because FPC allegedly had followed imprudent fuel procurement  
16 practices, in that the utility did not act as quickly as it should have to  
17 obtain necessary contracts to switch from oil to gas at its Suwannee  
18 plant. In response the Commission rejected OCC's hindsight-based  
19 assertion stating:

20 "Having reviewed the testimony on the gas contract issue, we  
21 are unable to conclude, as OCC's witness urged, that FPC  
22 was imprudent in negotiating its direct supply and  
23 transportation contracts with South Georgia and its affiliates.

24 While the clear vision of hindsight suggests that it is possible



1           that FPC could have acted more expeditiously in concluding  
2           the contract and that some benefit might have derived from it,  
3           we are unable to find that the delays were so unreasonable,  
4           or the potential benefit so clear, that the utility's actions rise to  
5           the level of imprudence. In short, we will not here substitute  
6           our judgment for that of FPC's management in conducting  
7           negotiations with the utility's gas supplier nor in evaluating the  
8           risks inherent in choosing the fuel supply for the Suwannee  
9           plant. We, therefore, find that the \$2,340,058 adjustment to  
10          FPC's final true-up amounts for the period April through  
11          September 1987, should not be made, and we approve the  
12          \$14,587,854 underrecovery proposed by FPC and agreed to  
13          by Staff with the approval of Public Counsel."

14          Order No. 19042.

15  
16          This case again demonstrates that the standard consistently used by  
17          the Commission in determining cost recovery is prudence. Absent a  
18          finding of imprudence, the Commission refused to disallow recovery  
19          of fuel costs the utility had actually incurred to serve its customers.  
20          Additionally, it is interesting to note that OPC approved of the actions  
21          taken in this case supporting the Commission's practice.

22  
23          Another example of the prudence standard is illustrated in Order No.  
24          23232 in Docket No. 900001-EI where an outage at FPL's Turkey

1 Point Plant was being evaluated. In that case, OPC requested that  
2 the Commission rule on OPC's proposed Findings of Facts, one of  
3 which asserted: "there is no evidence in the record from which the  
4 Commission can discern that FPL was prudent in failing to have  
5 functional containment pressure switches in inventory." In response,  
6 the Commission stated:

7 "We reject this finding. It is misleading as stated, in that the  
8 Commission must focus on whether the utility was imprudent.

9 Further, we believe that the record supports a finding that the  
10 failure to have containment pressure switches was not  
11 imprudent under the circumstances."

12 This case again demonstrates the Commission's unwillingness to  
13 disallow recovery of fuel costs absent a finding that the utility acted  
14 imprudently.

15  
16 Finally, the Commission affirmed its commitment to the prudence  
17 standard in Order No. PSC -01-1665-PAA-EI in Docket No. 010001-  
18 EI, which memorialized the process for midcourse corrections:

19 "The history of mid-course corrections made subsequent to  
20 Order No. 13694 shows that this Commission has not chosen  
21 to conduct evidentiary hearings on petitions for mid-course  
22 corrections. Instead, we have granted or denied such  
23 petitions through informal proceedings after testing the  
24 reasonableness of actual and revised projected data

1 supporting a utility's petition for a midcourse correction. *In*  
2 *each instance, we have recognized that a more thorough*  
3 *prudence review can occur at the next regularly scheduled*  
4 *hearing in the fuel clause docket.* Thus, we retain jurisdiction  
5 over the incremental (decremental) amounts collected  
6 (refunded) as a result of the mid-course correction. *If any*  
7 *collected amounts are found after an evidentiary hearing to*  
8 *have been incurred imprudently, we may require a utility to*  
9 *refund such amounts, with interest, to the utility's ratepayers."*

10 (Emphasis added.)

11 **Q. Has the Florida Supreme Court opined regarding the issue of the**  
12 **prudence standard and hindsight review?**

13 A. Yes. In *Florida Power Corp. v. PSC*, 424 So.2d 745 (Fla. 1982)  
14 (commonly referred to as the dropped test weight case), the Supreme  
15 Court stated:

16 "We are mindful of the NRC's notice of violation which  
17 criticized plant procedures for the labeling and testing of  
18 hooks, and of the report of FPC's nuclear general review  
19 committee, (NRGC), which concluded that the repair work at  
20 CR3 was safety-related. However, the NRC's notice and the  
21 NGRC's report were both issued after the accident had  
22 occurred. Hindsight should not serve as the basis for liability  
23 in this instance...The purpose of the NGRC is to suggest  
24 improvements in procedures after an accident occurs. Its

1           purpose is not to find fault. After careful review of the record  
2           and of PSC's order no. 9775, we believe that the PSC relied  
3           excessively on the NGRC report and the NRC notice of  
4           violation. While these documents are undoubtedly useful for  
5           numerous purposes, they should not serve as the primary  
6           source of evidence in a fault-finding determination."

7           Furthermore, in *Florida Power Corp. v. PSC*, 456 So.2d 451 (Fla  
8           1984), the Supreme Court stated:

9           "The lack of procedures which might have prevented the  
10          accident, suggested by the PSC, amounts to an application of  
11          the 20-20 vision of hindsight. The PSC has not shown that  
12          FPC management acted unreasonably at the time. In short,  
13          the PSC's findings are unsupported by competent substantial  
14          evidence."

15   **Q.    In addition to conflicting with PSC and Florida Supreme Court**  
16   **precedent, does Mr. Larkin's testimony also conflict with other**  
17   **OPC testimony in fuel related dockets?**

18   **A.**    Yes. In my direct testimony, I have already described OPC's support  
19          for the prudence standard in the 1984 review of FPL's St. Lucie  
20          thermal shield outage. And, earlier in my rebuttal testimony, I  
21          referenced OPC's support for the prudence standard in the 1988  
22          OCC case against FPC. More recently, in 2007, OPC's witness Dan  
23          Lawton filed testimony in the coal cost recovery case involving  
24          Progress Energy (Docket No. 060658-EI), which argued that:

1                    “No utility or investor can reasonably expect that imprudent  
2                    expenditures be reimbursed by customers. All parties in this  
3                    case agree that imprudent expenditures should not be passed  
4                    on to customers. Moreover, the investment community does  
5                    not expect imprudent expenditures to be passed on to the  
6                    customers...*First, the appropriate standard in this case is*  
7                    *prudence.*”

8                    (Emphasis added).

9                    **Q. Does OPC’s witness Larkin assert that FPL’s outage regarding**  
10                    **the Pressurizer Piping incident was imprudent?**

11                    A. No. When asked if FPL was imprudent, he states that “[i]t is difficult to  
12                    assess specific responsibility or fault”. Moreover, he does not even  
13                    try to refute the detailed testimony of FPL witness Jones concerning  
14                    the actions that FPL took to protect against an event such as the  
15                    Pressurizer Piping incident or the prompt actions FPL took once that  
16                    incident was discovered. FPL witness Jones explains that FPL’s  
17                    actions at each step in this outage process were unquestionably  
18                    reasonable and prudent. FPL complied fully with NRC requirements  
19                    and industry standards in order to prevent improper access and  
20                    deliberate criminal acts, and took extensive actions to swiftly and  
21                    effectively investigate and inspect both Turkey Unit 3 and Unit 4 after  
22                    the drilled hole in the pressurizer piping was discovered, enabling  
23                    FPL to expeditiously return the plant to service with minimal  
24                    disruption in production.

1

2 In view of the strong evidence from FPL that it performed prudently  
3 and the absence of evidence from OPC or any other party that FPL  
4 did not, what Mr. Larkin is asking the Commission to do is as  
5 troublesome as it is extraordinary: disallow recovery of actual,  
6 legitimately incurred replacement power costs to a utility that  
7 demonstrably has done nothing wrong.

8 **Q. Mr. Larkin states that “FPL, to my knowledge, has chosen not to**  
9 **sue either the responsible person or the contractor who engaged**  
10 **the person responsible for the vandalism. In my mind, this raises**  
11 **serious questions as to why not?” Please comment on this**  
12 **statement.**

13 **A. Mr. Larkin ignores the direct testimony of FPL witness Jones that**  
14 **states:**

15 “The FBI’s and NRC’s decisions not to pursue actions against  
16 the individual, coupled with the FBI’s unwillingness to release  
17 its final investigative report to FPL, has hindered our ability to  
18 evaluate potential claims arising out of the incident. FPL  
19 understands that the FBI has provided the NRC a copy of its  
20 report. FPL has requested the NRC, under the Freedom of  
21 Information Act, to disclose the report to FPL. If FPL is able to  
22 obtain the FBI’s investigative report, an evaluation will be  
23 performed to determine whether the information it contains  
24 gives FPL a basis for recourse in connection with this

1 incident.”

2 In the event that FPL is able to recover any of the replacement power  
3 costs, it will credit that recovery to customers through the FCR. This  
4 is the same approach FPL took in the two cases referenced in my  
5 direct testimony (the 1984 thermal shield outage and the 1996 outage  
6 involving the submerged vehicle).

7 **Q. In Mr. Larkin’s testimony, he is asked “Are you, or the Public  
8 Counsel, recommending a change in Commission Policy?” His  
9 answer is “No....We are recommending that costs associated  
10 with damage to the Company’s property which resulted from an  
11 act of vandalism is a risk to be borne by stockholders.  
12 Therefore, these costs should be disallowed.” Do you agree that  
13 Mr. Larkin’s testimony is not requesting a change to  
14 Commission policy?**

15 **A.** No. His position would be a clear, substantial and troublesome  
16 change to Commission policy. Regardless of the cause of the outage  
17 -- whether due to an act of vandalism such as a vehicle in the  
18 discharge canal or a thermal shield repair -- the Commission policy  
19 has always been to evaluate actions that led to outages, without the  
20 benefit of hindsight, and allow recovery of the resulting replacement  
21 power costs if the utility were found to have acted prudently. Mr.  
22 Larkin’s testimony misses the point – the standard for recovery is  
23 prudence. To deny recovery of actual replacement power costs even  
24 where a utility has acted prudently would be completely inconsistent

1 with Commission policy, the purpose of the FCR Clause, and with  
2 fundamental principles of ratemaking.

3 **Q. Do you agree with Mr. Larkin's contention that his proposed**  
4 **change of Commission policy would not discourage utilities**  
5 **from pursuing low fuel-cost generating alternatives such as**  
6 **nuclear and renewable energy?**

7 A. No. He is simply ignoring reality. Such a change in Commission  
8 policy would create a major disincentive to investments in any  
9 technology that has very low energy costs, including solar and wind  
10 as well as nuclear generation because companies investing in low  
11 energy cost generation risk disallowance of replacement power costs  
12 irrespective of whether such costs were the product of actions within  
13 the utility's control. Investments in low energy cost generation are  
14 important to helping achieve Florida's energy security, fuel diversity  
15 and environmental (including climate change) goals.

16 **Q. Does this conclude your testimony?**

17 A. Yes, it does.



1 BY MR. BUTLER:

2 Q Ms. Dubin, would you please summarize your rebuttal  
3 testimony?

4 A Yes. Good morning, Commissioners. The purpose of my  
5 rebuttal testimony is to address the testimony of Office of  
6 Public Counsel Witness Hugh Larkin that opposes FPL's recovery  
7 of replacement power costs associated with Turkey Point Unit 3.  
8 OPC argues that these replacement power costs should be  
9 disallowed for recovery because they are not a normal fuel and  
10 purchased power cost. Mr. Larkin ignores the fact that the  
11 Commission has consistently based replacement power  
12 cost-recovery determinations on whether a utility's actions  
13 were prudent in whatever circumstances led to the need for  
14 replacement power.

15 In my direct and rebuttal testimonies, I present a  
16 number of cases where the Commission has evaluated the recovery  
17 of replacement power costs. Time and time again these cases  
18 demonstrate that the standard consistently used by the  
19 Commission in determining cost recovery is prudence, and OPC  
20 and reviewing courts have also agreed. Absent a finding of  
21 prudence, the Commission has declined to disallow recovery of  
22 fuel costs the utility had actually incurred to serve its  
23 customers.

24 As FPL Witness Jones has explained, FPL's actions at  
25 each step in this outage process were reasonable and prudent.

1 FPL complied fully with NRC requirements and industry standards  
2 in order to prevent improper access and deliberate criminal  
3 acts and took extensive action to swiftly and effectively  
4 investigate and inspect both Turkey Point Units 3 and 4 after  
5 the drilled hole in the pressurized piping was discovered,  
6 enabling FPL to expeditiously return the plant to service with  
7 minimal disruption in production. To deny recovery of actual  
8 replacement power costs even where a utility has acted  
9 prudently would be completely inconsistent with Commission  
10 policy, Florida Supreme Court precedent, and the purpose of the  
11 fuel clause.

12 This concludes my summary.

13 **MR. BUTLER:** Thank you, Ms. Dubin. I tender the  
14 witness for cross-examination.

15 **COMMISSIONER EDGAR:** Mr. Burgess.

16 **MR. BURGESS:** Thank you, Madam Chair.

17 CROSS EXAMINATION

18 BY MR. BURGESS:

19 **Q** Ms. Dubin, your testimony is that in every case in  
20 which there has been a disallowance the Commission has made a  
21 finding of imprudence. Am I correct on that?

22 **A** Yes.

23 **Q** From our discussion whatever day it was on your  
24 direct testimony, I think you agreed, though, that as well if  
25 the Commission finds that a utility has not carried its burden

1 of proving prudence that that would also justify a  
2 disallowance.

3 **A** It could. It could.

4 **Q** And in your testimony you have listed a number of  
5 cases that support your point of the Commission's use of the  
6 standard of prudence, is that correct?

7 **A** That is correct.

8 **Q** And, in fact, one of them is on the bottom of Page  
9 4 of your testimony starting with Line 23, where you discuss  
10 Order Number 23232, which was in the 1990 fuel adjustment  
11 proceedings. Is that correct?

12 **A** Yes, that is correct.

13 **Q** And if you look over on Page 5 from the top down  
14 through the middle of the page, you describe that case and the  
15 Commission's usage of the prudence standard. Is that correct?

16 **A** Yes.

17 **Q** Now, would you agree with me that the particular  
18 finding that you address here was not the only issue in that  
19 case?

20 **A** The Commission was looking at outages over an  
21 extended period of time, yes.

22 **Q** And if we look at Line 10 of Page 5, we see that the  
23 issue that the Commission was dealing with in the portion that  
24 you cited is a question of the company's inventory of pressure  
25 switches, is that correct?

1           **A**     That is correct.

2           **Q**     Would you agree with me that there were issues in  
3 that case that involve both Turkey Point 3 and Turkey Point 4?

4           **A**     Yes, that is correct.

5           **Q**     Okay. For the balance of my questions, I want to  
6 restrict it to Turkey Point 3 so that we don't bleed over into  
7 some areas that are not part of my concern.

8           **A**     Okay.

9           **Q**     Turkey Point 3, and that's, of course, what we are  
10 dealing with in today's fuel adjustment issue.

11          **A**     Yes, it is.

12          **Q**     Now, one of the issues that was addressed by the  
13 Commission in Order Number 23232 was the failure of Florida  
14 Power and Light's nuclear plant operators to pass the  
15 examination necessary for recertification, is that correct?

16          **A**     That is correct.

17          **Q**     And am I correct that the Commission in that case  
18 disallowed three days worth of replacement fuel because of the  
19 failure of Florida Power and Light's nuclear plant operators to  
20 pass their recertification exams?

21          **A**     That is correct. They disallowed recovery of  
22 replacement costs from March 29 through the 31st. However,  
23 April 1st on they said the replacement power costs were prudent  
24 and those costs were recovered.

25               **MR. BURGESS:** Commissioners, on that, I am going to

1 distribute a copy of that case. And so that you will be aware  
2 when I distribute it, I have taken the liberty to tab and  
3 highlight the section in which the disallowance that Ms. Dubin  
4 spoke of took place at least in my representation of it, and so  
5 I have provided the entire case for context, and I have  
6 highlighted for the purpose of --

7           **CHAIRMAN CARTER:** Mr. Burgess, would you yield for a  
8 moment, please.

9           **MR. BURGESS:** Absolutely.

10           **CHAIRMAN CARTER:** Thank you.

11           Commissioner Skop.

12           **COMMISSIONER SKOP:** Thank you, Mr. Chair.

13           And, Mr. Burgess, after you pass that out, if you  
14 could just elaborate with respect to the training for the  
15 recertification and kind of blend that into the context of what  
16 may be within the document you have provided.

17           **MR. BURGESS:** Absolutely, Commissioner.

18           **COMMISSIONER SKOP:** Thank you.

19           **CHAIRMAN CARTER:** Thank you. You may proceed.

20           **MR. BURGESS:** Now, as I have stated, Commissioners,  
21 what I have done with this is tried to provide full context so  
22 that if there is anything further that needs to be dealt with  
23 it is here in the document. But I have tabbed that which  
24 addresses the specific issue which I think I discussed with Ms.  
25 Dubin.

1 BY MR. BURGESS:

2 Q Ms. Dubin, would you turn to Page 4 of the order that  
3 I distributed?

4 A I'm there.

5 Q Would you agree that the last paragraph on that page  
6 is where the Commission determined that the outage -- excuse  
7 me, let me back up.

8 Would you agree that that paragraph is where the  
9 Commission gave its reason for disallowing a certain amount of  
10 replacement fuel costs because of the failure of certain  
11 nuclear plant operators to pass their requalification  
12 examinations?

13 A I would agree.

14 Q Would you agree that the Commission's stated reason  
15 is contained in the second sentence that it is because operator  
16 training is directly a management function and, therefore, they  
17 found that the outage was a responsibility of Florida Power and  
18 Light's management?

19 A I would agree. And I would also point out that the  
20 last sentence of that paragraph says, "Thus, even though  
21 management was responsible for the outage, replacement fuel  
22 costs were prudently incurred commencing April 1." Therefore,  
23 the prudence standard was used here. Prudence to allow the  
24 cost-recovery of replacement power costs that commenced  
25 April 1st. And conversely the costs incurred March 29th, 30th,

1 and 31st were, therefore, imprudent.

2 **Q** So that is just by inference of the standard of  
3 why -- when they started allowing beginning April 1, they said  
4 that's prudent, so by inference you're saying that must mean  
5 that the period of time before that for which it was disallowed  
6 was imprudent.

7 **A** That's correct. My understanding in working in the  
8 fuel clause for 25 years is it is a double-edged sword, what  
9 works one way also works the other.

10 **Q** Would you agree that in making its finding that  
11 operator training is directly a management function, that the  
12 Commission did not go into an examination of whether the  
13 training was consistent with NRC requirements?

14 **A** I'm trying to think back, Mr. Burgess. I believe  
15 they did look at what the NRC requirements were.

16 **Q** And did they make a finding that it was inconsistent  
17 with NRC training requirements?

18 **A** They made the finding here; and, again, that starting  
19 April 12st prudence was the determination.

20 **Q** I have miscommunicated my question.

21 Did the Commission, in this order, rely on a finding  
22 that Florida Power and Light's training was inconsistent with  
23 NRC requirements?

24 **A** It failed to pass an NRC requalification exam.

25 **Q** Did the Commission make a finding with regard to

1 Florida Power and Light's training program as to whether it met  
2 the NRC requirements?

3 **A** It does say that because operator training is  
4 involved here, but it is an NRC requirement that they failed,  
5 and on the reverse side, or on the contrasting side, April 1st  
6 the determination is prudence, so conversely the opposite would  
7 be true.

8 **Q** Okay. With regard to the issue of it being -- the  
9 operator training being directly a management function, which  
10 is the reason for disallowance, would you agree that screening  
11 of personnel to determine who is allowed unescorted access into  
12 a nuclear power plant is also a management function?

13 **A** It's a management function. It is also something  
14 that -- Mr. Burgess, I'm sorry, I lost my train of thought.  
15 Could you restate that?

16 **Q** Yes.

17 Would you agree that the screening of personnel to  
18 determine who is allowed to have unescorted access into Florida  
19 Power and Light's Turkey Point 3 nuclear plant is also a direct  
20 management function?

21 **A** It's a direct management function in compliance with  
22 the NRC requirements, just as this was an NRC requirement for  
23 taking this exam.

24 **MR. BURGESS:** Thank you, Ms. Dubin.

25 That's all I have.



1           **CHAIRMAN CARTER:** Commissioner Skop.

2           **COMMISSIONER SKOP:** Thank you, Mr. Chairman.

3           Just to follow up on Mr. Burgess's line of  
4 questioning with respect to Page 4 of Order Number 23232. In  
5 the last paragraph it speaks to the outage commenced on  
6 March 29th, 1989, and that was earlier than the scheduled  
7 outage as a result of not passing the requalification exam, is  
8 that correct?

9           **A**     That's correct.

10          **Q**     Okay. But also at the bottom of that page it seems  
11 that the outage as originally scheduled was for April 1st,  
12 1989, is that correct?

13          **A**     That's correct.

14          **Q**     So if I am to understand what is before me, it would  
15 seem reasonable that for a normally scheduled outage, would it  
16 not, that purchased power would be prudently incurred to  
17 replace the unit being down. Is that correct?

18          **A**     Purchased power or whatever replacement power.

19          **Q**     Okay. So drawing an analogy to the instant case  
20 before us, which, again, this seems to be a problem on the  
21 front end caused an earlier than scheduled outage, and in the  
22 instant case a problem on the back end, i.e., the leak, caused  
23 a return to service that was later than scheduled. So if you  
24 follow that analogy, I guess it would seem to me that if  
25 someone -- or let me ask this question to you. If someone knew

1 of a leak and failed to report that, and that leak could have  
2 been discovered in time to put the unit back in service on its  
3 scheduled date to the extent that purchased power could have  
4 been avoided altogether, wouldn't that be relevant in  
5 distinguishing this case, or would that parallel exactly what  
6 was done by the Commission in this case?

7       **A**       They are similar in that an outage was occurring  
8 anyway. I just would point out, again, that -- and as my  
9 testimony says, and I believe it says here is that the prudence  
10 standard again was used. But I do agree that it's similar in  
11 that there was an outage occurring.

12               **COMMISSIONER SKOP:** Okay. And would you also agree  
13 that training to report a nuclear safety issue is also an FPL  
14 management function?

15               **THE WITNESS:** I'm sorry, Commissioner.

16               **COMMISSIONER SKOP:** Would you also agree that  
17 training of employees, whether they be FPL employees or  
18 contract employees, to report nuclear safety issues is also an  
19 FPL management function?

20               **THE WITNESS:** Yes, I believe it is, but Mr. Jones may  
21 be more appropriate to answer that.

22               **COMMISSIONER SKOP:** Thank you.

23               **CHAIRMAN CARTER:** Mr. Wright.

24               **MR. WRIGHT:** Thank you, Mr. Chairman.

25                               CROSS EXAMINATION

1 BY MR. WRIGHT:

2 Q Good afternoon, Ms. Dubin.

3 A Good afternoon.

4 Q I have what may be a very few or a few questions. We  
5 will see. At Page 8 of your testimony you make the statement  
6 that FPL's Witness Jones explains that FPL's actions at each  
7 step in this outage process were unquestionably reasonable and  
8 prudent.

9 My question for you, my first question for you is do  
10 you have an independent opinion regarding the prudence of FPL's  
11 actions in the outage process?

12 A Do I have an independent --

13 Q Opinion.

14 A I believe FPL's actions were reasonable and in  
15 compliance with NRC requirements.

16 Q Do you have an independent opinion as to FPL's  
17 actions in the hiring process of the hole driller?

18 A Again, I think FPL's actions were reasonable and  
19 within the guidelines set by the NRC.

20 Q Do you have an independent opinion regarding FPL's  
21 actions with respect to personnel management as it relates to  
22 the incidents in this case?

23 A By personnel management, I'm sorry, I'm not sure what  
24 you mean.

25 Q Well, earlier Mr. Butler told the Commission that he

1 doubts that there is much in the way of a personnel record for  
2 this employee. Does that ring true to you?

3 **A** I'm not the witness to ask that. I'm not involved  
4 with anybody's personnel file.

5 **Q** Do you know how FPL handles personnel matters with  
6 regard to contract employees at its nuclear power plants?

7 **A** I do in regard to what Mr. Jones has explained to me  
8 and how they have been in compliance with the NRC requirements.

9 **Q** So, basically, if I want to ask more about what FPL  
10 does or does not do with regard to personnel management, I  
11 should ask Mr. Jones?

12 **A** For the nuclear units, yes.

13 **Q** Do you know about FPL's personnel management with  
14 respect to contract employees at other power plants?

15 **A** No, I do not.

16 **MR. WRIGHT:** Thank you. That's all I have, Mr.  
17 Chairman.

18 **CHAIRMAN CARTER:** Thank you.

19 Mr. McWhirter.

20 **MR. McWHIRTER:** I have no questions, Mr. Chairman, if  
21 that pleases you.

22 **CHAIRMAN CARTER:** It does indeed.

23 Ms. Bradley, you're recognized.

24 **MS. BRADLEY:** No questions. Thank you.

25 **CHAIRMAN CARTER:** Mr. Twomey.

1           **MR. TWOMEY:** No questions.

2           **CHAIRMAN CARTER:** Ms. White.

3           **MS. WHITE:** No questions.

4           **CHAIRMAN CARTER:** Captain McNeil.

5           **CAPT. MCNEIL:** No questions.

6           **CHAIRMAN CARTER:** Captain -- I almost promoted you.

7 Commissioner Skop.

8           **COMMISSIONER SKOP:** Thank you, Mr. Chairman.

9           Just one more question, Ms. Dubin. On Page 5 of that  
10 order, if you have it before you, on the second paragraph under  
11 the Turkey Point Unit 4.

12           **THE WITNESS:** Yes.

13           **COMMISSIONER SKOP:** It states, I quote, "Operator  
14 training is a management function, therefore, the portion of  
15 the outage attributable to this failure is a management  
16 responsibility." Do you see that?

17           **THE WITNESS:** Yes, I do.

18           **COMMISSIONER SKOP:** Would you agree that if the  
19 training of employees or contract employees was a management  
20 responsibility, and part of an outage was attributable to a  
21 training failure or failure of employees to perform as they  
22 have been trained, that that would also equate to a management  
23 responsibility?

24           **THE WITNESS:** I believe so. What they failed here,  
25 though, again, was an NRC requirement. It is a training for

1 that test.

2           **COMMISSIONER SKOP:** I understand. I'm trying to draw  
3 a parallel analogy to the case before us now. Whereas, as we  
4 discussed previously, the failure of the qualification exam at  
5 least for Turkey Point 3, as I briefly understood this,  
6 resulted in an earlier than expected outage to a planned  
7 outage.

8           In the instant case, you had a later than expected  
9 return to service, where the ratepayers incurred five  
10 additional days of purchased power as a result of not being  
11 able to readily identify a leak that was known to a second  
12 person two weeks before it was found. And I guess that gets  
13 back to the central crux that if that person would have  
14 reported that leak appropriately, which was, in my view, a  
15 critical nuclear safety concern, then not only could the person  
16 of interest have been found, but the hole likely could have  
17 been found and repaired such that the unit could have gone back  
18 into service at the date.

19           I'm not saying that would happen or not, but it's  
20 more likely than not since it took five days to find it and fix  
21 it, and you had 14 days in that window where it could have been  
22 accurately reported. So, again, I'm trying to draw parallels  
23 to what the Commission previously did in its past orders, and  
24 I'm seeing some strong precedent there that directly  
25 corresponds. So I guess to my question, if an employer

1 contractor was trained by the -- which is a management  
2 function, as I think we've heard in the testimony, and that  
3 they did not adhere to that training, would that still be a  
4 management responsibility if it caused the ratepayers to incur  
5 additional cost?

6 **THE WITNESS:** I think it could be. I am not an  
7 expert in what training they get, and I think perhaps that is  
8 better to ask Mr. Jones.

9 **COMMISSIONER SKOP:** Yes, ma'am. Thank you.

10 **CHAIRMAN CARTER:** Thank you.

11 Commissioners, anything further from the bench? I'm  
12 going to go ahead to staff, but I will always come back to the  
13 bench.

14 Staff, you're recognized.

15 **MR. YOUNG:** No questions.

16 **CHAIRMAN CARTER:** We're back to the bench.

17 Okay. Mr. Butler.

18 **MR. BUTLER:** I have no redirect.

19 **CHAIRMAN CARTER:** Okay. Exhibits.

20 **MR. BUTLER:** There are no questions for this witness  
21 on redirect.

22 **COMMISSIONER EDGAR:** Mr. Butler, have we admitted 56?

23 **MR. BUTLER:** I have it listed on my copy of the  
24 exhibit list that we have, but in an abundance of caution I  
25 will move its admission.

1           **CHAIRMAN CARTER:** Any objections? Without objection,  
2 show it done.

3           (Exhibit Number 56 admitted into the record.)

4           **CHAIRMAN CARTER:** And we did move 57, right?

5           **COMMISSIONER EDGAR:** Yes, sir.

6           **MR. BUTLER:** I did move 57.

7           **CHAIRMAN CARTER:** Anything further for this witness?

8           **MR. BUTLER:** No.

9           **CHAIRMAN CARTER:** You may be excused. Have a great  
10 day.

11          **THE WITNESS:** Thank you.

12          **CHAIRMAN CARTER:** Mr. Butler, call your next witness.

13          **MR. BUTLER:** I'll call our next and last witness, Mr.  
14 Jones.

15          **MR. BURGESS:** Mr. Chairman, may I address an issue?

16          **CHAIRMAN CARTER:** Mr. Burgess.

17          **MR. BURGESS:** Thank you very much, Mr. Chairman.

18           I in no way am seeking to readdress your ruling  
19 earlier on this witness testifying. I do want to fully  
20 understand the parameters of it, if I may. As I understand it,  
21 any testimony now is going to be strictly limited to the  
22 incremental testimony that Mr. Larkin presented orally in  
23 response to the exhibit that was brought in late. In other  
24 words, this will not be a rebuttal to any prefiled testimony  
25 that Mr. Larkin had filed in May of this year.





1 prefiled rebuttal testimony. I'm just going to ask him a  
2 couple of questions to -- or refer him to a couple of sections  
3 in Mr. Larkin's oral testimony, ask him to comment on those.  
4 That will be the extent of his rebuttal testimony.

5 **CHAIRMAN CARTER:** You may proceed.

6 **MR. BUTLER:** Thank you.

7 BY MR. BUTLER:

8 **Q** Mr. Jones, Mr. Larkin testified with respect to the  
9 access authorization guidelines of the NRC that, quote, I would  
10 assume since every nuclear plant operator does not have the  
11 exact same protocols, then they are pretty much on their own to  
12 set their own protocols. And there isn't any direct one step,  
13 two step, three step, but just that the NRC requires that they  
14 have some vetting procedure.

15 Would you comment on Mr. Larson's testimony regarding  
16 the nature of the NRC's regulation of access authorization?

17 **A** Yes, I will.

18 Chairman and Commissioners, the notion that the  
19 plants are on their own to develop and to meet generic  
20 regulatory requirement is just not true. The overarching  
21 requirements are set forth in the Code of Federal Regulations.  
22 Beyond that there are specifics that are specified in NRC  
23 security orders. There are details that are specified in new  
24 regs and also in the NRC inspection procedures that inspectors  
25 use in the course of verifying compliance with the procedures.

1           In this particular case germane to criminal  
2 adjudication, or criminal history adjudication, the specifics  
3 and the details associated with that are contained in NEI-0301,  
4 which was -- NEI stands for Nuclear Energy Institute, and that  
5 was a document jointly developed by the industry and the NRC,  
6 reviewed and approved by the NRC, and within that NEI-0301 is  
7 the details on how criminal history adjudication is to occur  
8 going back to how to disposition a misdemeanor, what is the  
9 history that the offense occurred, how was the charge  
10 dispositioned, including the specifics of reinvestigation and  
11 arrest reporting requirements.

12           The NEI-0301, as I said, that is not a Code of  
13 Federal Regulation. That is codified in the plant's physical  
14 security plan. Once that was approved by the NRC, then all  
15 plants were required to commit to that NEI-0301 in their  
16 physical security plan. The physical security plan is then  
17 reviewed and approved by the United States Nuclear Regulatory  
18 Commission, and so that is how those programs and processes are  
19 laid out and governed by the Nuclear Regulatory Commission.

20           **Q**     Thank you, Mr. Jones.

21           Mr. Larkin also was asked about the impact of Exhibit  
22 54, the FBI FOIA response on his conclusions that the company  
23 should be liable and not the customer. And he said, quote,  
24 while I think it's cemented or at least draws into question Mr.  
25 Jones' representation of the company's vetting system that the

1 vetting system is not the pristine no fault,  
2 nothing-ever-happens system that he represented it to be, and  
3 that the company is responsible for that system and not the  
4 ratepayer.

5 I would ask you, please, to comment on Mr. Larkin's  
6 suggestion that the information in Exhibit 54 would change  
7 conclusions about the validity and effectiveness of FPL's  
8 access authorization program.

9 **A** Yes. The inference would be that that was new  
10 information, or new to the NRC, and if you look carefully at  
11 the time line, the NRC dispatched the augmented inspection  
12 team. Along with that augmented inspection team, the NRC  
13 Office of Investigation obviously was involved as well as the  
14 Federal Bureau of Investigation. We won't go back through  
15 that.

16 The augmented inspection team -- and you have that  
17 report, if you read the details, there were no adverse findings  
18 or violations, and also any findings or observations by the  
19 augmented inspection team is turned over to the region  
20 headquarters or NRC headquarters in Washington for follow-up.  
21 And as I previously testified, there was an NRC access fitness  
22 for duty inspection that was conducted shortly after the  
23 augmented inspection team. But having said that, you have  
24 before you the March 18th, 2008, letter to which the NRC closes  
25 out the inspection from the augmented inspection team, the NRC

1 Office of Investigations, as well as having reviewed the  
2 investigation at the Federal Bureau of Investigation with no  
3 adverse findings and no violations.

4           The way the regulatory framework is that if there is  
5 a deviation from a performance standard, it could be  
6 self-identified by the licensee, or we could identify that we  
7 have had a performance deficiency and enter that in our  
8 corrective action program. It could be a self-revealing type  
9 event. It could be identified by one of the NRC inspectors.  
10 Once a performance deficiency is identified, then they have,  
11 depending on the nature of the violation, the severity of the  
12 violation they have several options to them in that they could  
13 cite it as a finding of minor safety significance, they could  
14 cite us with what is called a noncited violation of low safety  
15 significance, or it could be a cited violation for escalated  
16 enforcement to which there could be sanctions or fines. And in  
17 this case there were none of those and not even a finding, a  
18 minor finding.

19           **Q** Mr. Jones, in the March 18 letter that you were just  
20 referring to --

21           **CHAIRMAN CARTER:** Mr. Butler, would you yield for a  
22 moment?

23           **MR. BUTLER:** Certainly.

24           **CHAIRMAN CARTER:** Commissioner Skop.

25           **COMMISSIONER SKOP:** Thank you, Mr. Chairman.

1           Mr. Jones, just briefly. I asked some questions of  
2 Doctor Avera, and I guess he deferred to you. So I think at  
3 the time, based on your responses, would be a good one. To  
4 your knowledge, did the NRC specifically review the  
5 circumstances surrounding the second person not reporting  
6 knowledge of a critical nuclear safety concern?

7           **THE WITNESS:** I'm sorry, Commissioner, can you  
8 restate that question?

9           **COMMISSIONER SKOP:** Yes, sir. To your knowledge, did  
10 the NRC review the circumstances surrounding a second person  
11 not reporting knowledge of a critical nuclear safety concern?

12           **THE WITNESS:** The only knowledge I have of what the  
13 FBI did or did not do is what is contained in those notes that  
14 they made public. I don't know -- in regards to that witness,  
15 I don't know what the protected status of that witness is or  
16 why that witness came forward. I don't know what the  
17 motivation of that particular witness was. We did have a  
18 \$100,000 reward out at the time.

19           **COMMISSIONER SKOP:** Okay. Do you know if failing to  
20 report an act of intentional vandalism to a nuclear facility  
21 violates any NRC regulations or is considered a crime?

22           **THE WITNESS:** I don't know if it's a crime. The  
23 program requirement is you are continued to have a continuous  
24 behavior observation program, so all employees and contractors  
25 receive training that if they notice aberrant behavior that we

1 ask them to report that to their supervisor or security. And,  
2 again, no system is 100 percent -- I don't want to say  
3 bulletproof -- it is not 100 percent perfect.

4 **COMMISSIONER SKOP:** And just, I think, two final  
5 questions. To your knowledge, did the NRC make a specific  
6 finding that the actions of the second person who failed to  
7 report a critical nuclear safety concern were in accordance  
8 with NRC regulations?

9 **THE WITNESS:** No, I do not know.

10 **COMMISSIONER SKOP:** And I think that you mentioned  
11 the AIT findings are forwarded to the NRC for follow-up, and  
12 lessons learned and comparison to performance standards and  
13 corrective actions and findings of safety significance. Do you  
14 know if any lessons learned or corrective action has been taken  
15 or adopted? And this goes more towards preventing recurrence  
16 under the existing policies and procedures, to the extent the  
17 first person, which was the person of interest, obviously he  
18 had some sort of an arrest record, but was not convicted on all  
19 charges, but he was allowed access. So, again, there might be  
20 room for improvement there in terms of the screening process.

21 But, secondly, to the second person who had actual  
22 knowledge as told to him by the interested person that he had  
23 drilled the hole in the nuclear power plant, as to training or  
24 additional things that might be learned from that? Because if  
25 a second person with actual knowledge of a hole in the pipe in

1 the nuclear generating facility doesn't disclose that, to me  
2 that is a critical safety concern. I'm concerned about how  
3 that is going to be -- I'm equally concerned about how that is  
4 going to be addressed on a forward-going basis as I am with  
5 respect to what we are going to do in terms of my colleagues  
6 and I dispositioning the request before us. But I would like  
7 to see if there has been any follow-up or some lessons learned  
8 or corrective action taken.

9           **THE WITNESS:** In regards to people bringing forward  
10 deficiencies or having what we call a critical questioning  
11 attitude, that occurs basically on a daily basis. A strong  
12 evidence that there's a healthy safety conscious work  
13 environment. It is very -- what we have is we have our  
14 integrity and we have our trustworthiness, and that's what  
15 makes this work. And that is paramount to protect the health  
16 and safety of the public.

17           That's why I mentioned that it is not unusual to see  
18 an NRC inspection report licensee, which would be us, identify  
19 violations, because we report our mistakes when we make them.  
20 It requires constant vigilance to reinforce with employees, and  
21 particularly contractors that are here and gone, the importance  
22 of raising anything that doesn't look right or looks out of  
23 place. And so that goes on constantly.

24           In fact, with our contracted workforce -- and I  
25 talked personally to the site vice president down at Turkey



1 Point last week in response to a question raised by a  
2 Commissioner, what did we do and how do we identify issues, is  
3 on a daily basis we have an FPL supervisor meet with the  
4 contracted workforce to encourage them to bring forth issues or  
5 frustrations. Because while they get it in pre-access  
6 training, we don't stop there. We are constantly reinforcing  
7 that very important attribute of reporting things that are out  
8 of norm or improper. And is it going to happen 100 percent of  
9 the time? No. There is no such thing that exists anywhere in  
10 the world. But does it happen at an extreme high percentage of  
11 the time? Yes, it does.

12 **COMMISSIONER SKOP:** Thank you. And just one  
13 follow-up. If a contractor -- and I agree that nothing is  
14 perfect. But, again, I'm looking for improvements, because  
15 obviously the training -- and, again, there's an individual  
16 component there also. But if the person had been properly  
17 trained and trained repeatedly, can you offer an explanation as  
18 to why that person would not have reported what he was told by  
19 the person of interest?

20 **THE WITNESS:** No, Commissioner, I cannot. I would  
21 like to -- you did ask me about lessons learned. And if you  
22 examine the NRC augmented inspection team report, they did have  
23 two recommendations for lessons learned.

24 And it would be Page 10 of that report, and it was in  
25 the area of considering malevolent intent during corrective

1 action program reviews, and that is that there are items  
2 identified every day in a nuclear power plant,  
3 equipment-related issues. You may find that a valve doesn't  
4 look properly positioned. And so one of the things the  
5 augmented inspection seem raised is how do you know that -- how  
6 do you really know that that component was just bumped by a  
7 careless worker and that there was not an intent at vandalism,  
8 and shouldn't that be a part of the normal routine investigated  
9 for a corrective action program? So that was one  
10 recommendation that was being forwarded to the Commission for  
11 review.

12           And then the other was on industry notification when  
13 perpetrators of potentially malevolent acts cannot be uniquely  
14 identified. In other words, something has occurred and you are  
15 not able to immediately determine who that is, how should the  
16 industry respond. And those were the two areas identified as a  
17 result of the augmented inspection team.

18           **COMMISSIONER SKOP:** And I appreciate that, and I  
19 think that that is certainly appropriate. I guess the point  
20 I'm trying to make is that the discussion, at least through the  
21 NRC -- and, again, we are seeing this late, the AIT findings  
22 and such. But the focus seems to be on the person of interest  
23 with malicious intent, you know, to drill the hole or vandalize  
24 a nuclear plant. But more so I would expect to see some  
25 concern by the NRC that a second person knew of that intent or

1 that action and didn't take any appropriate action to inform  
2 anyone. And to me that would seem to be a piece that perhaps  
3 the NRC has maybe overlooked, because I don't have all the  
4 information before me and I don't want to armchair quarterback  
5 what was done.

6 **THE WITNESS:** Yes. And, I obviously am not a federal  
7 investigator, and I don't know about the protections that were  
8 afforded the witness when they came forward, and so I can't  
9 speak to whether or not the FBI even identified that witness by  
10 name to the NRC.

11 **COMMISSIONER SKOP:** Thank you.

12 **CHAIRMAN CARTER:** Mr. Butler.

13 **MR. BUTLER:** Thank you.

14 BY MR. BUTLER:

15 **Q** Mr. Jones, returning to the March 18, 2008, letter.

16 **A** Yes.

17 **Q** The middle paragraph ends with the statement that the  
18 NRC does not plan to conduct any further inspection. Do you  
19 see that?

20 **A** Yes, I do.

21 **Q** Would you just briefly explain to the Commission the  
22 significance in the NRC regulatory practice of a conclusion  
23 that they do not plan to conduct any further inspection?

24 **MR. BURGESS:** Commissioner, Mr. Chairman, I'm going  
25 to have to object. As I understood it, we were going to limit

1 this to comments with response to Mr. Larkin addressing a  
2 specific exhibit that came into play two days before the  
3 hearing. And now I'm hearing him a somewhat open-ended  
4 question about an exhibit that has been here since March. And  
5 so, you know, I think this is beyond the scope of what at least  
6 I understood this additional rebuttal testimony of this witness  
7 who was not initially offered for rebuttal to be about.

8 **CHAIRMAN CARTER:** Thank you.

9 Ms. Helton.

10 **MR. BUTLER:** May I respond?

11 **CHAIRMAN CARTER:** Sure. Mr. Butler, you're  
12 recognized.

13 **MR. BUTLER:** Thank you, Mr. Chairman.

14 First of all, just to set the stage. This is the  
15 last question I have for the witness before I tender him for  
16 cross-examination. The purpose of the question, and there has  
17 been an interlude where Commissioner Skop was asking the  
18 witness some questions, but basically prior to that interlude,  
19 Mr. Jones was responding to a comment that Mr. Larkin had made  
20 on Page 994 of the transcript where a suggestion was that the  
21 NRC should have done more once it knew about the FBI  
22 investigative results. And one of the things Mr. Jones was  
23 referring to in describing what the NRC did following up on  
24 that was this letter that I just referenced.

25 For the benefit of the Commission, I was trying to

1 have him elucidate a little bit further on the significance  
2 having reviewed the FBI's investigative report of concluding  
3 that they weren't going to conduct any further inspection. So,  
4 I think it is directly connected to what he was testifying to  
5 earlier and probably the connection would have been clearer if  
6 it had just come immediately after that testimony.

7 **MR. BURGESS:** Mr. Chairman, based on the  
8 representation that this is the last question, I will withdraw  
9 the objection.

10 **MR. BUTLER:** I knew that would carry the greater  
11 weight.

12 **MR. BURGESS:** It's not that you weren't persuasive.

13 **MR. BUTLER:** Yes.

14 **CHAIRMAN CARTER:** Thank you, Mr. Burgess.

15 BY MR. BUTLER:

16 **Q** Do you recall the question, Mr. Jones?

17 **A** Yes, I recall the question. I'll answer the  
18 question.

19 Referring back to, I believe it is Exhibit 54, if you  
20 look at those documents, obviously the NRC Office of  
21 Investigations was involved throughout this entire FBI process.  
22 You see the notes being exchanged back and forth between the  
23 FBI and the Office of Investigation.

24 When an augmented inspection team has done their  
25 inspection, it does not stop there. There are other

1 inspections that occur. There are follow-ups. And, basically,  
2 this -- let me back up.

3 A normal inspection, the NRC comes in with their  
4 inspection procedures. They do their detailed inspection to  
5 their program guidelines. They will exit with the management  
6 staff, and in that exit they will communicate to management if  
7 they have observations and findings. Then that will go back to  
8 the NRC headquarters and will go through that review to  
9 determine do those things warrant violations and what level of  
10 violations.

11 The augmented inspection team, which is the technical  
12 staff expert that was doing this investigation, had a liaison  
13 between the FBI investigative report and the NRCOI. And then  
14 based on that information, the NRC closed out their inspections  
15 and their findings with this letter to document that there were  
16 no findings, there were no violations, and, therefore, there  
17 were no additional follow-ups necessary. I hope I made that  
18 clear.

19 **MR. BUTLER:** Thank you, Mr. Jones.

20 I would tender the witness for cross-examination.

21 **CHAIRMAN CARTER:** Mr. Burgess.

22 **MR. BURGESS:** Thank you, Mr. Chairman.

23 CROSS EXAMINATION

24 BY MR. BURGESS:

25 **Q** With regard, Mr. Jones, to your reading of a report

1 of the augmented inspection team regarding malevolent acts on  
2 Page 10, what exhibit is that?

3 **A** I don't know the exhibit number.

4 **Q** There are so many exhibits, and I'm just trying to  
5 find out is this in the exhibit that was confidential? Because  
6 I read that, and I read that -- what you read I read, and I  
7 read it out of the exhibit that I thought was confidential.

8 **A** I'm looking for John to help me on this.

9 **MR. BUTLER:** Yes. Mr. Burgess, this is in response  
10 to Staff's Third Request for Production of Documents. It is a  
11 portion of the confidential document that we had distributed,  
12 made available to the parties at the end of Mr. Jones'  
13 testimony last week.

14 **MR. BURGESS:** Yes. And here's my problem with it.  
15 Unless we go into in camera proceedings, my understanding is I  
16 can't cross-examine from anything from that exhibit. And so I  
17 am troubled now that the witness can bring forward selected  
18 excerpts from it, and then -- I don't want to use an  
19 intentionally derogatory term -- but then hide behind the fact  
20 that it is confidential and, therefore, I can't -- in this open  
21 public hearing I can't ask him questions out of the same  
22 document. So based on that, I'm going to move to strike the  
23 testimony that read from and that addressed the report of the  
24 augmented inspection team. That's why I asked was it in any  
25 other exhibit. Because it is only in the exhibit, that I'm

1 aware of, that has been designated as confidential and,  
2 therefore, off limits for me to ask about unless we move in  
3 camera.

4 **CHAIRMAN CARTER:** Mr. Butler.

5 **MR. BUTLER:** Mr. Chairman, I'm sensitive to Mr.  
6 Burgess' concern. I mean, the context here was that Mr. Jones  
7 was responding to a request from Commissioner Skop or a  
8 question from Commissioner Skop asking about whether there had  
9 been any follow-up, any, you know, lessons learned that were  
10 being pursued. And Mr. Jones referred sort of generically and  
11 briefly to points made in the AIT report, which is  
12 confidential. I don't think that the generic reference was  
13 itself revealing anything of significant confidential nature,  
14 but I basically defer to your pleasure on how to handle this.

15 It really was an attempt to provide the Commissioners  
16 with guidance to where the information that the Commissioner  
17 was seeking was located, and whatever your pleasure on how to  
18 handle it is acceptable to FPL.

19 **MR. BURGESS:** I'm not particularly troubled by the  
20 information. It is just a direct quote. It was a reading from  
21 a document that we are not allowed to cross-examine on. You  
22 know, it's not that there wasn't that much to it, I'm not that  
23 much worried about it other than a matter of form and a matter  
24 of procedure.

25 **MR. BUTLER:** And I would note that the reading from



1 was just reading a couple of section headings. I mean, I would  
2 have been troubled had he gotten into reading the specific  
3 findings and what the NRC Commission recommended doing about  
4 it, but I think that Mr. Jones was simply trying to provide  
5 reference to Commissioner Skop where the information he was  
6 seeking is located.

7 I think that is consistent with the Commission's  
8 practice regarding the use of confidential documents. We try  
9 to avoid disclosing enough about a confidential document where  
10 the confidential essence of it will have been compromised,  
11 while being responsive to Commissioner questions that may arise  
12 with respect to the information in the confidential document.  
13 That is what Mr. Jones was attempting to do here.

14 **CHAIRMAN CARTER:** Ms. Helton.

15 And I appreciate your timely objection, Mr. Burgess,  
16 because we really -- I try to kind of head things off before we  
17 go down that path dealing with any confidential documents.

18 Ms. Helton.

19 **MS. HELTON:** I think Mr. Burgess makes a very good  
20 point. That being said, it doesn't seem to me that Mr. Burgess  
21 was troubled, per se, about the answer that the witness gave to  
22 Commissioner Skop. So it seems to me we don't need to go down  
23 that road with respect to striking any testimony, but perhaps  
24 the witness could be cautioned that in giving answers he needs  
25 to be mindful that there is confidential information, part of

1 this record, and our ability to deal with that information in  
2 the public is limited by our process, and so to think about  
3 that when responding.

4 **CHAIRMAN CARTER:** Mr. Butler, do you need a minute  
5 with your client? Your witness, I'm sorry.

6 **MR. BUTLER:** It's both. But, no, I think that --

7 **CHAIRMAN CARTER:** Because I really don't want us to  
8 go down that road. I really don't want us to go down that  
9 road. I want -- I mean, we want to be fair in the process  
10 above and beyond all else.

11 **MR. BUTLER:** I agree.

12 I think that so far as I am aware the primary place  
13 where this will arise as an issue is with respect to the AIT  
14 report and its confidential nature. I think probably the thing  
15 that would be useful is for Mr. Burgess or any other witnesses  
16 that intend to ask questions specifically about the AIT report  
17 to make reference to it by name so that we can all be alert  
18 that this is something that might be answered from it. And I  
19 would actually -- or, in addition, ask Mr. Jones that if he  
20 feels the need to refer to the AIT report in responding to  
21 something, it is probably best to identify that he feels the  
22 need to do so and then we will decide. Possibly take a brief  
23 break at that point and decide if it is something that would be  
24 requiring disclosure of confidential information.

25 **MR. BURGESS:** Mr. Chairman, I don't intend to ask any

1 questions about the AIT report, and I have no more questions.

2 **CHAIRMAN CARTER:** Thank you. Mr. Wright.

3 **MR. WRIGHT:** Thank you, Mr. Chairman. I have just a  
4 few questions.

5 CROSS EXAMINATION

6 BY MR. WRIGHT:

7 **Q** Good afternoon, Mr. Jones.

8 **A** Good afternoon.

9 **Q** In response to some questioning by Commissioner Skop,  
10 you mentioned that Florida Power and Light has what I think you  
11 described as a continual observation program intended to detect  
12 aberrant behavior. Is that an accurate characterization of  
13 your testimony?

14 **A** Yes, it is.

15 **Q** Thank you. Is chronic complaining something that  
16 should be caught or identified by this observation program as  
17 aberrant behavior?

18 **A** Relatively speaking, yes. You said chronic  
19 complaining?

20 **Q** That was my term, yes, sir.

21 **A** Yes, chronic complaining would be -- I would expect a  
22 supervisor to address that issue.

23 **Q** Now, we do have some evidence that a co-worker of the  
24 hole driller testified that the hole driller complained about  
25 how much time it was taking to get to work in the plant, that

1 he complained that the equipment wasn't functional, and that he  
2 complained several times that he wasn't making enough money,  
3 and that he was promised a certain amount, and that FPL wanted  
4 to lay him off earlier than he was previously promised. I  
5 gathered it would be your testimony you didn't know about that.

6 **A** No, I didn't know about that.

7 **Q** Did FPL know about that?

8 **A** I do not know if FPL knew about that. Those are in  
9 the notes of what he said to a co-worker. I don't know who, or  
10 when, or if he disclosed that to anyone else other than his  
11 co-worker.

12 **Q** Well, my question then is do you have an explanation  
13 as to how this guy could apparently have been complaining about  
14 these things on multiple occasions and not gotten identified as  
15 a complainer?

16 **A** No, I can't explain it because I don't have any  
17 information on it.

18 **Q** In your testimony, did I understand you to say that  
19 FPL management meets on a daily basis with the contractor  
20 workforce to identify safety violations, frustrations, and the  
21 like?

22 **A** During the refueling outage they have a daily meeting  
23 and an FPL supervisor goes to that daily meeting to seek out  
24 issues and concerns of the contractor workforce.

25 **Q** Does that meeting involve the entire contractor

1 workforce working during the refueling outage?

2           **A**     I don't know. I had asked specifically about the  
3 workforce that we bring in for the boilermakers, pipe fitters,  
4 carpenters, that particular work force. We bring in a number  
5 of vendors. So my direct question, back to Turkey Point, was  
6 in regards to what I referred to as the variable workforce.

7                   They also reported to me that they had -- two times  
8 in 2008 had met with the contractor workforce in smaller  
9 groups, groups limited to around 15 employees. And I was  
10 asking those questions in response to a question a Commissioner  
11 had asked last week.

12           **Q**     I apologize, but I am not quite clear on what  
13 actually happens with regard to these meetings with the  
14 workforce. Does an FPL supervisor meet with the whole  
15 workforce every workday, or sometimes, or do you not know  
16 exactly?

17           **A**     I was told that during the refueling outage that an  
18 FPL supervisor meets with that work force on a daily basis.  
19 And does it happen 100 percent of the time, did it happen, you  
20 know, 35 days out of 35 days? I don't know.

21           **Q**     Thank you. Now, FPL approved this person, the person  
22 of interest, the hole driller to be hired, correct?

23           **A**     That's correct.

24           **Q**     And FPL approved the person of interest for  
25 unescorted access to certain sensitive areas of the plant, also

1 correct?

2           **A**     That is correct.

3           **Q**     Does FPL maintain personnel files on these  
4 individuals that it approves for hiring and that it approves  
5 for unescorted access to sensitive areas?

6           **A**     Personnel files is a pretty broad category.  If you  
7 are asking do we maintain the records associated with the  
8 screening, the character verification, the psychological  
9 evaluation, yes, those are all records that are retained.  As  
10 far as personnel files, I don't have any knowledge that we  
11 would maintain a personnel file for a temporary contractor.

12          **Q**     Do you know whether the contractor who was actually  
13 the technical employer of these employees maintains personnel  
14 files and records on these folks during their employment at the  
15 plants?

16          **A**     In this case, the Day Zimmerman (phonetic) vendor,  
17 which provides the variable workforce for us, again, being the  
18 carpenters, the pipe fitters, the welders, and sheet  
19 metalworkers, and those, they could obtain that workforce from  
20 anywhere in the United States.  And I do not know what type of  
21 records did they maintain.  I do know that employment  
22 verification, there has to be some type of record; but to the  
23 extent that they maintain a personnel file, I'm not familiar  
24 with Day Zimmerman's policies and programs.

25          **Q**     So when you say you don't know whether they maintain

1 records, would it be fair for me to conclude that FPL does not  
2 make any attempt to review any personnel records that might be  
3 maintained by the contractor?

4 **A** FPL makes every attempt to review employment  
5 verification, character references, of course the criminal  
6 history background check, and those things. And then we grant  
7 access based on that holistic review. So whatever is available  
8 to us to verify people are who they say they are and that their  
9 employment history and their past work history is as they say  
10 it is, those are the things that we seek after.

11 **Q** Well, I think that in your previous response you told  
12 me that you don't know what, if any, personnel records the  
13 contractor keeps after the person is hired. Is that accurate?

14 **A** That is accurate.

15 **Q** So wouldn't it be fair for us to conclude that FPL's  
16 continual observation program does not include any review of  
17 any such personnel records as might be kept by the contractor?

18 **A** Continuous behavior observation program, that's not  
19 that program. That is once someone has gained unescorted  
20 access to the plant. We are all subject to review by our peers  
21 and our supervisors and our management on whether or not our  
22 behaviors are changing at any given time. That's the  
23 continuous behavior observation program.

24 As far as people who are granted unescorted access to  
25 the power plant, there is a reinvestigation process should

1 someone bring forward a concern about an individual, or given  
2 the nature of their work and a certain time period, we will go  
3 back and reinvestigate whether they be FPL employees or  
4 long-term contracted personnel.

5 **Q** You are not aware of any such reinvestigation in this  
6 instance, are you, or until after the hole was discovered?

7 **A** No. For the shorter period of time that this person  
8 was contracted for, that would not have -- it wouldn't have met  
9 the time standard. There's other standards that would trigger  
10 a reinvestigation, but --

11 **MR. WRIGHT:** Thank you. That's all I have,  
12 Mr. Chairman.

13 **CHAIRMAN CARTER:** Ms. Bradley.

14 CROSS EXAMINATION

15 BY MS. BRADLEY:

16 **Q** Sir, if I understood you, you kind of went through it  
17 very quickly, but you referred to an NEI-0301?

18 **A** Yes, I did.

19 **Q** And did I understand you to say that that is not  
20 found in the federal code?

21 **A** That is not a Code of Federal Regulation.

22 **Q** Where would I find that?

23 **A** I don't know exactly where you would find that.

24 **Q** Is it public?

25 **A** You can obtain NEI-0301 with the exception of the



1 safeguarded part, and the safeguarded portion of that deals  
2 with criminal background adjudication.

3 **Q** And we couldn't look at that, that's secret?

4 **A** If you have a need to know, and you meet the -- and  
5 you're clear to have access to safeguard information, you could  
6 review that safeguard information. There is a process and a  
7 procedure to go through to do that.

8 **Q** If a Commissioner or if a party here wanted to look  
9 at that, they would have to go through some need-to-know test?

10 **A** Yes. There is a process to go through to get cleared  
11 to review safeguards information.

12 **Q** To the best of your knowledge does a public hearing  
13 and the public's interest meet the need to know?

14 **A** You mean disclose safeguard information publicly?  
15 No. If there is an individual -- if there is an individual  
16 with an official purpose that has a need to know that  
17 information, that may meet the rules.

18 **Q** To the best of your knowledge, does the Commission's  
19 need to know for purposes of this hearing meet the need-to-know  
20 test?

21 **A** I don't know.

22 **Q** You have given your opinion about several of these  
23 documents and what they say and everything. Would you agree  
24 that the documents speak for themselves?

25 **A** No, I would not. Not to a layperson that is not

1 familiar with the NRC processes.

2 **Q** So you can interpret beyond what the document  
3 actually says?

4 **MR. BUTLER:** I object to the form of the question. I  
5 don't think that's what he said at all.

6 **CHAIRMAN CARTER:** Rephrase, Ms. Bradley.

7 BY MS. BRADLEY:

8 **Q** You gave testimony last time, and I think maybe again  
9 today about the glowing praise that they gave and all this type  
10 thing. Wouldn't that be your interpretation and would not the  
11 documents speak for themselves as to how they classified that?

12 **A** The documents do speak for themselves as far as their  
13 findings and observations and whether or not Florida Power and  
14 Light was in compliance with the program requirements and the  
15 industry standards. My response was around, if you don't, if  
16 you are not familiar with the workings of the Nuclear  
17 Regulatory Commission it is not readily obvious what an  
18 augmented inspection team is, what they do, and then what  
19 occurs after an augmented inspection team.

20 **Q** Would you agree if the augmented inspection team says  
21 what they do and what they don't do in these documents that  
22 that would be an accurate statement?

23 **A** Yes.

24 **Q** Now, you mentioned that the NRC closed out their  
25 inspection based upon the AIT inspection and FBI reports. Is

1 that correct?

2 **A** Yes.

3 **MS. BRADLEY:** No further questions.

4 **CHAIRMAN CARTER:** Thank you.

5 Mr. Twomey.

6 **MR. TWOMEY:** No questions.

7 **CHAIRMAN CARTER:** Mr. Young.

8 **MR. YOUNG:** Yes.

9 **CHAIRMAN CARTER:** Staff, you're recognized.

10 **MR. YOUNG:** Thank you.

11 CROSS EXAMINATION

12 BY MR. YOUNG:

13 **Q** Mr. Jones, you testified that the NRC found no fault  
14 with FPL's screening process for selecting employees that are  
15 fit for duty to work in an FPL nuclear plant, correct?

16 **A** That's correct.

17 **Q** Exactly how did the NRC communicate to FPL its  
18 satisfaction with FPL's screening process for selecting  
19 employees fit for duty to work in a FPL nuclear plant?

20 **A** They communicated that through the findings and  
21 observations in the NRC augmented inspection report. They also  
22 communicated that in the security access program inspection  
23 that followed the AIT, and then also they communicated it in  
24 the March 18th, 2008 follow up to the NRC augmented inspection  
25 team report.

1           **Q**     And all that is in the record, correct?

2           **A**     I can't attest to everything that's in the record.

3     You have the March 18th, 2008, do you not; and you have the NRC  
4     augmented inspection team report?

5           **MR. YOUNG:**   Is all of that in the record?

6           **MR. BUTLER:**   Yes.

7           **MR. YOUNG:**   Okay.

8           BY MR. YOUNG:

9           **Q**     Now, in Request Number 16 of Staff's Third Request  
10     for Production of Documents, staff asked for copies of all NRC  
11     reports related to the investigation of the Turkey Point Unit 3  
12     pressurized piping drilling incident, any written comments by  
13     the NRC related to this incident would have been included in  
14     the record, and I think you just said that any related to this  
15     incident would have been included in FPL's response to Number  
16     16, correct?

17           **MR. BUTLER:**   I'm going to object to the question or  
18     ask for a clarification. I think he said it would be in the  
19     record. I'm not sure it is necessarily in that particular POD  
20     response. For example, this March 18 letter we were just  
21     talking about is actually in response to POD Number 24, and it  
22     is POD 12 and 14.

23           BY MR. YOUNG:

24           **Q**     Are there any additional NRC reports, or letters, or  
25     written communication regarding the drilled hole incident that

1 FPL has not included in the previous documents or previous  
2 requests for production?

3 **A** Specific to the drilled hole in the pressurizer  
4 piping?

5 **Q** Yes.

6 **A** To the best of my knowledge, no.

7 **Q** Last week you testified that no corrective actions  
8 were necessary as a result of the NRC review of the Turkey  
9 Point Unit 3 pressurized piping drilling incident, correct?

10 **A** That is a little too broad. Obviously, there were  
11 corrective actions that were taken, such as repairing the hole.  
12 We had to remove insulation. We had to do extensive  
13 inspections and testing. Those were all correction actions in  
14 response.

15 If I have stated it exactly as that, then it was in  
16 the context of there were no changes that we made to our  
17 criminal adjudication table, our psychological evaluations, our  
18 character background checks, reference checks. We did not make  
19 any changes to those processes.

20 **Q** And that would be the matrix and the security  
21 screening process, correct?

22 **A** That is correct.

23 **MR. YOUNG:** Can I have one minute, sir? Could I have  
24 one minute?

25 **CHAIRMAN CARTER:** Yes.

1           Commissioners, while staff is reviewing, any  
2 questions from the bench for this witness at this point?

3           Commissioner McMurrin, you're recognized.

4           **COMMISSIONER McMURRIAN:** Thank you.

5           Mr. Jones, earlier -- and I think it was in your  
6 summary, or when Mr. Butler was asking you some questions at  
7 the beginning, and you talked about how -- I guess the NRC  
8 didn't find any, or there were no adverse findings. And you  
9 spoke -- well, you went into a little more detail about how  
10 they could cite it as a finding, and I think there were three  
11 different findings that you said that they could cite, and some  
12 of them included sanctions and fines and I guess some of them  
13 did not. I can't remember what the whole list included. But I  
14 think you said that there was not even a minor finding.

15           Where would the NRC's finding show up if there were a  
16 finding? Would it be in a letter like the March 18th letter or  
17 would it be in the AIT report? I'm trying to --

18           **THE WITNESS:** Yes. In the AIT report is where they  
19 would -- first off, in the AIT report is where they would list  
20 the observation or the deviation, and then they would put you  
21 on notice in that AIT that they are turning it over to either  
22 the NRC region headquarters for a follow-up inspection and for  
23 disposition, or they would -- depending on the nature of the  
24 deviation, there may be a matter of wrongdoing that would  
25 require the NRC Office of Investigation to get involved. And

1 so the document that -- and, again, since this was an open  
2 investigation that took quite sometime, the augmented  
3 inspection team process stayed open until we were notified here  
4 on March 18th, 2008 -- March 18th, 2008, that it is closed.

5 **COMMISSIONER McMURRIAN:** Mr. Chairman.

6 **CHAIRMAN CARTER:** You're recognized.

7 **COMMISSIONER McMURRIAN:** So there is always a  
8 follow-up letter of some sort after there is an AIT inspection  
9 conducted. The question, I guess, would be what that follow-up  
10 contained. Would this be the place where if the NRC was going  
11 to do further investigation, would they also tell you in a  
12 letter like this, and they would say whether or not they had  
13 basis to look for more information, or -- in any event would  
14 there be a letter?

15 **THE WITNESS:** Yes. In this March 18th, 2008, letter,  
16 if there were any findings or violations, they would be  
17 stipulated in this letter.

18 **COMMISSIONER McMURRIAN:** I think that is all for now,  
19 Mr. Chairman. Thank you.

20 **CHAIRMAN CARTER:** Thank you. Commissioners, anything  
21 further? Commissioner Argenziano, you're recognized.

22 **COMMISSIONER ARGENZIANO:** Yes, thank you. In regards  
23 to the comments you made about the deviation from a performance  
24 standard that the NRC hadn't found even a minor one, is that  
25 just pertaining to the screening of the applicant before

1 employment, or is it the performance also of the applicant  
2 throughout employment, and/or also of the management of the  
3 employee throughout his time? Do they screen for those things,  
4 or is it just -- I mean, I'm sorry, do they look for a  
5 deviation of those items, or are you just talking about the  
6 screening of the employee before the employee was actually  
7 employed?

8 **MR. BUTLER:** Mr. Jones, let me caution you that if  
9 you are going to be reading out of the AIG report --

10 **THE WITNESS:** I'm not going to read it. If you will  
11 just give me a moment to think about how to answer this and  
12 maintain the confidentiality.

13 The NRC looked at our access authorization program,  
14 which included our screening, our fitness for duty. They  
15 looked at the programs and procedures. They interviewed the  
16 people that performed those. They performed a number of  
17 reviews of screenings that we had performed and determined that  
18 those were all in accordance with the required program elements  
19 and processes. They also looked at our physical security in  
20 regards to our security officers and how we controlled access  
21 to the area and found those to be in compliance.

22 **COMMISSIONER ARGENZIANO:** Thank you.

23 **CHAIRMAN CARTER:** Thank you. Anything further from  
24 the bench?

25 Staff, you're recognized.



## CROSS EXAMINATION

1  
2 BY MR. YOUNG:

3 Q Mr. Jones, I would like to ask you to turn to Bates  
4 stamped Page Number 9777. It's in the confidential document.

5 A Which document?

6 MR. BUTLER: I'm sorry, is this in the AIT report?

7 MR. YOUNG: It's a letter.

8 CHAIRMAN CARTER: All right, everybody, be careful  
9 now.

10 MR. YOUNG: Yes. It's the confidential document that  
11 was handed in the red folder. It is the last two pages in the  
12 rubber-band bundle.

13 MR. BUTLER: This is the February 11, 2008 letter?

14 MR. YOUNG: Yes.

15 MR. BUTLER: Mr. Jones, do you have a copy of that  
16 with you on the stand? If you don't, I can provide you one.

17 MR. YOUNG: He has it right there. The last two  
18 pages in the bind bundle.

19 CHAIRMAN CARTER: Commissioner Argenziano.

20 COMMISSIONER ARGENZIANO: You are referring to the  
21 pages that I asked about the other day?

22 MR. YOUNG: Yes, ma'am.

23 COMMISSIONER ARGENZIANO: Thank you.

24 MR. BUTLER: Before these questions proceed, one  
25 thing that I was just discussing with Mr. Jones, to be sure

1 that I alert the Commissioners to this, FPL responded to the  
2 NRC's comments in the letter that Mr. Young is about to ask  
3 about by having an investigation conducted by an outside  
4 consulting firm, and they reported back to FPL with some  
5 conclusions about the extent to which workers felt comfortable  
6 to bring safety concerns forward.

7 That report is something that is confidential. We  
8 have not -- the report itself is not in the record. It is not  
9 in the folder that you just got handed. Mr. Jones may be  
10 making some general references to its conclusions, but if we  
11 get to a point where we need to have that document in the  
12 record, we are going to have to address it as a new  
13 confidential document, because it is not something that had  
14 been previously provided or included as part of the record.

15 **CHAIRMAN CARTER:** Mr. Burgess.

16 **MR. BURGESS:** I don't think I -- I guess that gives  
17 me problems of not being able to see it in advance. But I have  
18 got kind of a broader issue on this whole thing, and I'm sort  
19 of in the same situation that Mr. Young is in. I was trying to  
20 tiptoe around things and ask questions based on this document  
21 that is confidential, but that a lot of representations have  
22 been made about it. There is no findings.

23 I just want it said that I take issue with that. And  
24 I intend to brief it in the proper mechanism, but I do feel  
25 that we have been stymied a little bit by not being able to --

1 again, without trying to ask you to take it into in camera  
2 proceedings, but by our not being able to ask specific  
3 questions about this that would perhaps cast some, what we  
4 would consider to be doubt on some of the broad statements that  
5 are being made that the NRC has made no findings of fault, or  
6 no findings of any improprieties.

7           So I guess that is just to say that I intend to brief  
8 the issue about the improprieties, but I guess publicly I would  
9 like to say that I disagree. I dispute the statements that are  
10 being made that this does not provide -- that this report has  
11 no findings or no statements of anything of any finding of any  
12 wrongs.

13           (Transcript continues in sequence with Volume 10.)

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1 STATE OF FLORIDA )  
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CERTIFICATE OF REPORTERS

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WE, LINDA BOLES, RPR, CRR, and JANE FAUROT, RPR, Official Commission Reporters, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that we stenographically reported the said proceedings; that the same has been transcribed under our direct supervision; and that this transcript constitutes a true transcription of our notes of said proceedings.

WE FURTHER CERTIFY that we are not a relative, employee, attorney or counsel of any of the parties, nor are we a relative or employee of any of the parties' attorneys or counsel connected with the action, nor are we financially interested in the action.

DATED THIS 17<sup>th</sup> day of November, 2008.

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