

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Application for rate increase in Brevard,  
Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake,  
Marion, Martin, Nassau, Orange, Osceola, Pasco,  
Putnam, Seminole, Volusia, and Washington Counties  
by Southern States Utilities, Inc.; Collier County  
by Marco Shores Utilities (Deltona); Hernando County  
by Spring Hill Utilities (Deltona); and Volusia  
County by Deltona Lakes Utilities (Deltona).

DOCKET NO. 921099-WS

920199

BEFORE: CHAIRMAN SUSAN F. CLARK  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER JULIA L. JOHNSON  
COMMISSIONER DIANE K. KIESLING  
COMMISSIONER JOE GARCIA

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 26(\*\*)

DATE: Tuesday, September 12, 1995

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

REPORTED BY: JANE FAUROT  
Notary Public in and for the  
State of Florida at Large



ACCURATE STENOGRAPHY REPORTERS, INC.  
100 SALEM COURT  
TALLAHASSEE, FLORIDA 32301  
(904) 878-2221

DOCUMENT NUMBER-DATE

0294 MAR-68

FPSC-RECORDS/REPORTING

## 1 PARTICIPATING:

2 MS. SUSAN FOX, representing Sugarmill Woods Civic  
3 Association.4 MICHAEL B. TWOMEY, representing Sugarmill Woods  
5 Civic Association, Spring Hill Civic Association and Marco  
6 Island Civic Association.7 KENNETH HOFFMAN and BRIAN ARMSTRONG, representing  
8 Southern States Utilities.

9 MARY ALICE PURITT, representing Hernando County

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11 STAFF RECOMMENDATIONS12 (\*\*) Participation will be permitted if the recommendation  
13 in Issue 1 is approved.14 Issue 1: Recommendation that parties be allowed to  
15 participate in this proceeding, with participation limited  
16 to fifteen minutes for each side.17 Issue 2: Recommendation that, in the absence of directions  
18 from the appellate court for the Commission to make an  
19 additional finding or to reconsider its decision in light of  
20 the court's decision, the Commission should not reopen  
21 proceedings to take additional evidence.22 Alternative Recommendation: The Commission may reopen the  
23 record for the sole purpose of taking evidence on whether or  
24 not SSUs' facilities and land were functionally related  
25 during the test year in Docket No. 920199-WS.26 Issue 3: Recommendation that, if the Commission approves  
27 the alternative recommendation in Issue 2, the Commission  
28 should reopen the record. A hearing should be scheduled  
29 immediately. SSU should have 20 days from the conference to  
30 file testimony on only the issues identified in the analysis  
31 portion of Staff's memorandum dated August 31, 1995.32 Parties should be allowed 14 days from the date the utility  
33 files its testimony to file their testimony on these issues.  
34 All other dates should be established later by the  
35 prehearing officer in a future order on procedure governing  
36 this proceeding. If the record is reopened, the rate  
37 currently being charged should remain in effect pending the  
38 conclusion of the administrative hearing.39 Issue 4: Recommendation that, if the Commission approves  
40 the primary recommendation in Issue 2, SSU's final rates  
41 should be calculated based on a modified individual system  
42 basis, with the exception of Welaka and Sarasota Harbor,

1 Silver Lake Estates and Western Shores, Park Manor and  
2 Interlachen Lakes, and Rosemont and Rolling Green, which are  
3 combined for water ratemaking purposes. All other existing  
4 uniform rates should be unbundled. The rates should be  
5 developed based on a water benchmark of \$30.00 and a  
6 wastewater benchmark of \$46.75 for a total bill of \$76.75.  
7 These benchmarks should be calculated at 10,000 gallons of  
8 water usage. Revenue deficiencies caused by the staff-  
9 recommended benchmark should be recovered from each  
10 industry's customers. The recommended rates, before any  
11 adjustments for subsequent indexes and pass-throughs, are  
12 shown on Attachment A of Staff's memorandum dated August 31,  
13 1995, which contains Schedules 1 and 2. Since this decision  
14 was rendered, SSU has had two indexes and one pass-through  
15 approved by the Commission for the 127 service areas.  
16 Therefore, SSU should make any necessary adjustments for  
17 indexes and pass-throughs and be required to recalculate and  
18 submit the recommended rates within 7 calendar days of the  
19 Agenda Conference. SSU should also be required to file the  
20 supporting documentation, as well as a computer disk in a  
21 format which may be converted to Lotus 1-2-3 by Staff. The  
22 utility should be required to file revised tariff sheets and  
23 a proposed customer notice to reflect the appropriate rates.  
24 The approved rates should be effective for service rendered  
25 on or after the stamped approval date on the tariff sheets  
pursuant to Rule 25-30.475(1), F.A.C., provided the  
customers have received notice. The rates may not be  
implemented until proper notice has been received by the  
customers. The utility should provide proof of the date  
notice was given within 10 days after the date of the  
notice.

Issue 5: Recommendation that no refunds are appropriate to  
customers who receive a rate reduction because revenue  
requirement was not an issue on appeal. The rate changes  
should be made prospectively and no refunds should be  
required. Further, no refund of interim revenues is  
appropriate.

Alternate Recommendation: There should be a refund to  
customers who receive a rate reduction, in the event the  
Commission changes the uniform rates of SSU to another  
alternative.

Issue 6: Recommendation that, if the Commission requires  
that refunds be made, SSU should submit, within 7 days of  
the date of the Agenda Conference, the information detailed  
in Staff's memorandum for purposes of refunds. The refunds  
should cover the period between the initial effective date  
of the uniform rate up to and including the date at which  
new rates are implemented. Any such refunds should be made  
with interest pursuant to Rule 25-30.360, F.A.C., by  
crediting customers' bills over the same time period the

1 revenues were collected. SSU should be required to file  
2 refund reports pursuant to Rule 25-30.360(7), F.A.C. SSU  
3 should apply any unclaimed refunds as contributions-in-aid-  
of-construction (CIAC) for the respective plants, pursuant  
to Rule 25-30.360(8), F.A.C.

4 Issue 7: Recommendation that the issue of whether or not  
the joint petition for implementation of stand-alone water  
5 and wastewater rates for SSU and the immediate repayment of  
illegal overcharges with interest (filed by Springhill,  
6 Sugarmill Woods, and Citrus County) will be granted or to  
what degree will be determined by the Commission's decisions  
on the previous issues.

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P R O C E E D I N G S

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2 CHAIRMAN CLARK: We're going to call the agenda  
3 conference to order. We're on Item 26.

4 MS. JABER: Commissioners, Item Number 26 is  
5 Staff's recommendation addressing the remand by the  
6 First District Court of Appeal of Order Number 930423.  
7 In the recommendation, Staff has identified seven  
8 issues, the last five really revolve around your  
9 decision in Issue 2. For that reason, we recommend  
10 that you go issue-by-issue. Just for purposes of  
11 information and clarification, the joint petition that  
12 was filed by Mr. Twomey last week was filed on behalf  
13 of Sugarmill Woods, Spring Hill and Citrus County.  
14 It's important to bring out to your attention that  
15 Spring Hill is not a party to this docket, the response  
16 that was filed by the utility we received last night  
17 very late; and, of course, that's not incorporated into  
18 this recommendation. There are parties here that would  
19 wish to address the Commission.

20 CHAIRMAN CLARK: So, is it your recommendation we  
21 vote on Issue 1?

22 MS. JABER: Yes. Issue 1 is just allowing parties  
23 15 minutes per side to participate.

24 CHAIRMAN CLARK: Okay. Commissioners?

25 COMMISSIONER DEASON: I move Staff.

1 COMMISSIONER JOHNSON: Second.

2 CHAIRMAN CLARK: Without objection, Staff's  
3 recommendation is approved. We will allow 15 minutes  
4 per side on the issue on the remand. Which party goes  
5 first, and what are they supposed to be addressing?

6 MS. JABER: We didn't specify what they would be  
7 addressing. What we left open would be, specifically,  
8 just the issues regarding the remand. It's my  
9 recommendation that you allow Mr. Twomey to proceed  
10 first and the utility last.

11 CHAIRMAN CLARK: Mr. Twomey did file a petition,  
12 is that correct?

13 MS. JABER: That's correct.

14 CHAIRMAN CLARK: Mr. Twomey. Let me ask you,  
15 initially, are you going to be presenting -- as I  
16 understand the Staff, you have recommended per side?

17 MS. JABER: Right.

18 CHAIRMAN CLARK: Is there anyone beyond yourself  
19 who will be presenting viewpoints on the remand?

20 MR. TWOMEY: Yes, ma'am. In fact, Ms. Fox is  
21 going to go first. Okay?

22 CHAIRMAN CLARK: Okay. How are you going to split  
23 your time?

24 MR. TWOMEY: Oh, eight minutes for her, seven for  
25 me.

1 CHAIRMAN CLARK: Okay. Anyone else?

2 MS. PURITTS: I'm Mary Alice Puritts, and I'm here  
3 on behalf of Hernando County. And I'm not sure if this  
4 is the appropriate time, or, you know, when I should  
5 say what I have to say, but I just wish to address  
6 Issue Number 5.

7 CHAIRMAN CLARK: How much time do you need?

8 MS. PURITTS: One minute.

9 CHAIRMAN CLARK: Commissioners, I would suggest we  
10 perhaps provide an extra five minutes for Hernando  
11 County, with the understanding that Ms. Fox will take  
12 eight minutes and Mr. Twomey seven, and then we will  
13 allow -- I'm sorry, your name again?

14 MS. PURITTS: Mary Alice Puritts.

15 CHAIRMAN CLARK: Puritts. Ms. Puritts to also  
16 address the Commission.

17 MS. MOORE: Madam Chairman, I don't believe  
18 Hernando County is a party to 920199.

19 CHAIRMAN CLARK: Ms. Puritts?

20 MR. TWOMEY: Madam Chairman, may I address  
21 something in that regard, and I will do it with respect  
22 to the Staff counsel's comment that Spring Hill was not  
23 a party to 920199. And the point I'd like to make to  
24 you is that the reason I filed the petition on behalf  
25 of Spring Hill, Commissioners, in addition to Sugarmill

1 Woods, is that if you determine that you're obliged by  
2 the mandate of the First District Court of Appeals to  
3 return stand-alone rates, as we submit you must in  
4 compliance with the mandate, you have to do so, not  
5 just for the parties to that case, but for everybody  
6 that was paying subsidies over and above the  
7 stand-alone rates. That includes the people at Spring  
8 Hill Civic Association, all customers served by the  
9 Spring Hill Civic Association -- or the Spring Hill  
10 plant of SSU. The same is true for Hernando County.  
11 Hernando County is the largest single bulk customer of  
12 the Utility. So, the point is, is you're going to make  
13 the return of the stand-alone rates and order refunds,  
14 you have to do it for everybody, notwithstanding what  
15 the Utility might --

16 CHAIRMAN CLARK: Mr. Twomey, what about -- I don't  
17 know if there is anyone here, but I have had indication  
18 there are people who, under the stand-alone rates, will  
19 pay more, and they've asked to speak. And it's been  
20 the advice I've gotten from counsel that it should be  
21 limited to the parties.

22 MR. TWOMEY: Well, I personally wouldn't object to  
23 the people that are opposed to our position to speak,  
24 speaking as one attorney for one party here. I think  
25 there might be some people out here that may have

1 traveled from the Jacksonville area today. Are there  
2 any Jacksonville people?

3 MS. JABER: Madam Chairman, may I very briefly  
4 respond to Mr. Twomey? We have to go back to the  
5 intent of allowing the parties to participate in this  
6 recommendation. Traditionally, you don't allow parties  
7 to participate in a post-hearing decision, even on  
8 remand. The only reason that Staff has recommended  
9 here that you go away from that tradition is because in  
10 lieu of allowing them oral argument on a case of this  
11 nature and allowing them to file briefs, we thought  
12 this would be a shorter way of letting the parties  
13 address the Commission. And Hernando County is not a  
14 party to this docket. We shouldn't forget that their  
15 opportunity to present evidence was at the hearing, and  
16 they had plenty of opportunities to intervene. We are  
17 here for a very limited purpose, and that purpose is  
18 just to allow the parties to address the Commission.

19 CHAIRMAN CLARK: Thank you, Ms. Jaber. Thank you,  
20 Mr. Twomey. I understand your point with respect to  
21 the rate design. Commissioners?

22 COMMISSIONER DEASON: Well, I have a question of  
23 Ms. Puritts. Are you here representing Hernando County  
24 as Hernando County being a customer or Hernando County  
25 being a legal governmental institution that has a

1           desire to represent viewpoints of its citizens?

2           MS. PURITTS: Well, I suppose it's both. I don't  
3           have arguments to make. I just have like a very brief  
4           comment about a Staff recommendation on Issue Number 5.  
5           And I was just under the impression that I would have  
6           the opportunity to speak. If that's not the case --

7           CHAIRMAN CLARK: This is more in the nature of  
8           oral argument limited to the parties in this  
9           proceeding, as I understand the recommendation of  
10          Staff.

11          COMMISSIONER DEASON: Well, let me just say that I  
12          would be hesitant to not allow Hernando County an  
13          opportunity to, at least, address that one issue that  
14          they have a concern with. First of all, they are a  
15          customer of the utility, and even if their position  
16          goes beyond that, just being a customer, I think this  
17          Commission has always been very liberal in allowing  
18          persons to make comments before the Commission. And I  
19          don't know exactly where you would draw that line, but  
20          I think that Hernando County, being another  
21          governmental institution, we ought to allow them some  
22          latitude in addressing the Commission.

23          CHAIRMAN CLARK: The only concern I have about  
24          that, Commissioner, is there are other people who are  
25          customers that have come here, who would likewise might

1 want the opportunity to speak. And I feel that if we  
2 do allow it to other than -- if we expand it beyond  
3 just the parties, we would, likewise, need to provide  
4 them that opportunity. Would you be amenable to  
5 allowing them to speak, also?

6 COMMISSIONER DEASON: I can stay here as long as  
7 everybody else can. And if we want to open it up to  
8 the general public, I'm not opposed to that.

9 CHAIRMAN CLARK: Commissioners?

10 COMMISSIONER GARCIA: I just don't want to set any  
11 precedent that's going bring us down the road where we  
12 have chaos when things of this nature come back. Like  
13 Terry, I'm amenable to stay here forever if that is  
14 what it takes. I just want to make sure that our vote  
15 here today doesn't bring all sorts of consequences on a  
16 whole series of other things that have a lot of public  
17 interest.

18 COMMISSIONER DEASON: I mean, this is a very  
19 special circumstance. This is a remand and something  
20 that doesn't happen every day. But in a case that  
21 does, we've gone to the time and expense to have 14  
22 customer hearings to hear from customers in a rate  
23 case. I think it's good we hear from customers. Why  
24 is it we can't hear from customers on a remand case?  
25 Is there something that prevents that?

1 MS. JABER: I think that the rationale is you've  
2 heard from the customers at those 14 service hearings,  
3 and that was their opportunity. The other thing is,  
4 you have to remember that those customers are  
5 represented by counsel. OPC is a party in this case.  
6 Mr. Twomey has intervened on behalf of some of those  
7 customers, and they are represented. The only thing  
8 other than that I can add to you is there are some  
9 customers who are not here today and some people that  
10 are not here today because we told them that this was  
11 an agenda item that would be heard for a very limited  
12 purpose and would be limited to the parties.

13 COMMISSIONER DEASON: Well, I would still think  
14 that it would not violate anything to at least give  
15 Hernando County the opportunity to address the one  
16 issue in which they wish to address the Commission. I  
17 understand it's not going to take more than a minute.

18 COMMISSIONER GARCIA: Again, I don't disagree with  
19 you that Hernando County wouldn't take that much time.  
20 And if we want to open it up, and that's all right with  
21 the rest of the Commission, that's fine. But I just  
22 don't want to get ourselves in a position where I find  
23 Staff -- because I don't want to have to come back here  
24 for someone who says, "Listen, I didn't go because  
25 Staff told me that I couldn't speak," and so then we

1 will be back here in two weeks to --

2 CHAIRMAN CLARK: And I think that will happen,  
3 because I know that we have gotten calls and the  
4 indication we have provided to them is that  
5 participation is limited to parties in this proceeding.  
6 And it's my feeling if we do want to hear from the  
7 public we should renote it as something that we will  
8 hear from the public on. And with all due respect to  
9 you, Commissioner Deason, it seems to me the line is,  
10 "Are you a party to this docket? If you're a party we  
11 will hear from you as being on one side of the issue or  
12 another. If you are not a party, then since we are not  
13 going to hear from the public, because it has not been  
14 adequately noticed, that's all the public can hear."  
15 We will not hear from Hernando County.

16 With that, Ms. Fox.

17 MS. FOX: Thank you. I'm Susan Fox from the  
18 Macfarlane, Ausley law firm in Tampa. I represent  
19 Sugarmill Woods Civic Association, formerly known as  
20 COVA in this docket. There are a number of them that  
21 have traveled four or five hours to be here today, and  
22 I believe you could recognize them in the audience, if  
23 they would stand. These are some of the people from  
24 Sugarmill Woods.

25 I would like to say also that I was not near a

1 microphone when the time limits were discussed, and I'm  
2 going to find it difficult to respond to a 40-page  
3 Staff recommendation in eight minutes. I don't  
4 represent the same parties as Mr. Twomey. He and I  
5 don't have any formal agreement to divide anything up,  
6 and I'm going to get through my remarks as quickly as I  
7 can. And when you feel I've used up my time, I would  
8 ask you to cut me off.

9 CHAIRMAN CLARK: I'll let you know. Go ahead.

10 MS. FOX: Okay. All right. I would like to begin  
11 today by way of telling you about a quotation that  
12 hangs on a wall plaque in virtually every courtroom in  
13 Hillsborough County, which is where I come from. It  
14 says, "We receive our statutory law from the  
15 Legislature and our decisional law from the courts,  
16 agreeing with some, disagreeing with some, but  
17 following all, for our bondage to the law is the price  
18 of our freedom."

19 CHAIRMAN CLARK: Ms. Fox, get real close to that  
20 microphone. We have been having trouble with that.

21 MS. FOX: All right. Did you hear the quotation  
22 that I read you? All right. This quotation was  
23 written by then chief judge of the Second District  
24 Court of Appeal in Lakeland. And the courts in my home  
25 district look at that as a reminder of their duty to

1 follow the law that is set by that court. The chief  
2 judge that wrote that popular quotation was Bob Mann,  
3 who went on to become a chairman of this body, and  
4 under whom I had the pleasure of serving as his  
5 executive assistant. However, the popularity of this  
6 particular saying is attributable, I think, to the  
7 sincerity of judges who wish to be faithful to their  
8 responsibilities. Many is the time in the courtroom  
9 when counsel makes an impassioned argument, perhaps  
10 even a compelling argument, and then the judge in  
11 Hillsborough County will turn to that saying on the  
12 wall and say, "I'm sorry, Counselor, but do you see  
13 this plague, and this is what I'm going to follow."  
14 Then you know that he is about to tell the lawyer that  
15 his duty is to follow the law, no matter how difficult  
16 that sometimes seems.

17 And today this is what you're going to have to  
18 tell your Staff. In this case, you function, more or  
19 less, identically to a lower court that has entered a  
20 judgment, an erroneous judgment, that has been  
21 overturned on appeal. This Commission is bound to  
22 follow the decision of the First District. The First  
23 District has said you don't have statutory authority to  
24 do what you did. And reversed (blank spot on tape)  
25 compliance with that order is quite simple. First, you

1           modify the terms of the final order that was entered in  
2           March of 1993, to do what the court said you could do,  
3           which was, essentially, not combine those systems for  
4           ratemaking purposes. Then, since money changed hands  
5           under the terms of an erroneous judgment, you order  
6           restitution to the parties who paid in error. Here  
7           that means you pay refunds to the parties who overpaid.

8           So, on Issue Number 2, getting straight to the  
9           point here, on Issue Number 2, we would agree with the  
10          primary recommendation of Staff that was written by, I  
11          believe, it was Chris Moore and seconded or approved by  
12          Mr. Pruitt in a memorandum that he sent around late  
13          last week.

14          The alternate recommendation raises a number of  
15          obvious problems. As I'm sure your own lawyers will  
16          tell you, when a court disposes of what it considers a  
17          dispositive issue, then it doesn't have to go and  
18          resolve all the other issues. On appeal there were  
19          about six issues, as I recall, most of which would  
20          still be relevant and still have to be resolved if the  
21          case were going to be decided on grounds that weren't  
22          dispositive in an overall blanket sense. But the Court  
23          said it didn't have to consider all of those other  
24          issues, because it was disposing of the case on grounds  
25          of statutory authority. There were, for example,

1 issues of notice and, of course, the customers having  
2 been notified that the rate request was a stand-alone  
3 rate request, questions of whether or not they were  
4 given an appropriate point of entry in the proceeding  
5 to challenge the uniform rate issue when it did arise.  
6 And, of course, those things the Court would have dealt  
7 with if it was sending it back for merely a further  
8 hearing on the same subject.

9 The Court also said that the evidence didn't  
10 support and wouldn't support a finding that the systems  
11 were functionally related. And in this regard, let me  
12 just cite you to a couple of statements in the Court's  
13 opinion. And I'm using the slip opinions, if there is  
14 a question about the pagination. Towards the bottom  
15 paragraph on the third page, they say, "We decline to  
16 address each issue separately because we reverse on the  
17 ground that the PSC exceeded its statutory authority  
18 when it approved uniform statewide rates for the 127  
19 systems involved in this proceeding based on the  
20 evidence produced."

21 And on Page 5, the first full paragraph, "We find  
22 no competent, substantial evidence that the facilities  
23 and land comprising the 127 SSU systems are  
24 functionally related in a way permitting the PSC to  
25 require that the customers of all systems pay identical

1 rates."

2 The first full paragraph on Page 6, "In reviewing  
3 an order of the PSC, this court must determine from the  
4 record whether it's supported by competent, substantial  
5 evidence."

6 The top of Page 7, and here we are getting to some  
7 of the critical statements made by the Court. "After  
8 reviewing the testimony, it is clear that this  
9 testimony does not constitute competent, substantial  
10 evidence to support the PSC's decision." And now,  
11 still quoting, "The systems are not functionally  
12 related as required by Section 367.021(11), their  
13 relationship being apparently confined to physical  
14 functions resulting from common ownerships." And they  
15 went onto describe some of the differences.

16 The next full paragraph, "The Commission's order  
17 must be reversed, based on our finding that Chapter  
18 367, Florida Statutes, did not give the Commission  
19 authority to approve uniform statewide rates for these  
20 utility systems which are operationally unrelated in  
21 their delivery of utility service."

22 Now, the Court didn't have any question about  
23 those items, as you can see from reading their opinion.

24 I believe Chris Moore's recommendation does a  
25 pretty good job of pointing out the case law on this

1 particular issue. And I would just cite you to one  
2 additional case, which is a more recent First District  
3 Court of Appeal case, Vestico versus Prestige  
4 Properties. It's at 597 So.2d 356. It's a 1992  
5 Florida First District case, which says that where  
6 there is evidence that's available to the parties and  
7 could have been presented in the first proceeding, then  
8 on remand they do not get a chance to present that  
9 evidence; their opportunity was at the time of the  
10 hearing that was held.

11 Also, as the primary Staff recommendation points  
12 out, there is an argument, I believe, in the alternate  
13 recommendation that this was a new issue that the  
14 Commission couldn't have anticipated. And as Chris  
15 Moore points out, the First District didn't treat this  
16 as a new issue. They treated it as something they had  
17 disposed of in Board versus Beard.

18 I'm going to move on here to one point on the  
19 alternate Staff recommendation. They say that even if  
20 you have the authority to conduct another hearing, that  
21 it would be discretionary. And that, clearly, you have  
22 discretion not to conduct that hearing, but to dispose  
23 of the case on the existing record. Now, I would cite  
24 you back to another statement in the First District's  
25 opinion, which is that when there is any reasonable

1           doubt about your authority to exercise a particular  
2           power, you should always resolve that doubt against  
3           yourself. Here there is plenty of doubt as to whether  
4           or not you have the right to hold such a hearing. And  
5           I would urge you not to go out on a limb again on this  
6           subject and exercise your discretion. In the event you  
7           think you have any, not to conduct such a hearing. If  
8           you do -- I don't know if I should go on and address  
9           some of the points about what would -- you know,  
10          projecting, what would happen if you do. But we would  
11          have some suggestions to make along those lines,  
12          obviously.

13                 CHAIRMAN CLARK: Ms. Fox, go ahead and do that.  
14                 You're just about out of time, but I think you had  
15                 better address those.

16                 MS. FOX: All right. Well, if there were to be a  
17                 further hearing, we would object to it being before  
18                 this Commission and suggest that it be referred to a  
19                 DOAH independent hearing officer, so that there would  
20                 be basically an independent determination, and the  
21                 result wouldn't necessarily be colored by the prior  
22                 proceedings of which there have been many in front of  
23                 this Commission. It will basically allow the parties  
24                 to start in front of an independent hearing officer.

25                 Let's see. Moving on to Issue Number 3, which I

1 believe I've already covered. That would be whether or  
2 not to exercise your discretion. So, I'm passing over  
3 that to Number 4, which is what rates you should  
4 implement under the Court's decision. It's our  
5 position that you should implement stand-alone rates.  
6 The systems can't be combined for ratemaking purposes  
7 under the Court's decision. So, really, you don't have  
8 the option of going to the capped rate structure unless  
9 and until they are combined for ratemaking purposes.  
10 So, essentially, you're left with stand-alone rates.  
11 That would be adjusted by any automatic pass-through  
12 type adjustments that have been approved in the  
13 meantime that would apply to all of those systems.

14 And, finally, on Issue Number 5, which is on the  
15 refund, we categorically disagree with the primary  
16 Staff recommendation, which, I believe, was written by  
17 someone who is not a lawyer. And with all due respect,  
18 this person doesn't know what they are talking about.  
19 The effect of the reversal of that order means that  
20 that order was invalid on the day it was adopted. It  
21 has no force and effect in the interim, and what you  
22 have to do now is go back and try to restore the  
23 parties to where they should have been all along.

24 Mr. Smith, the Director of your Appeals Division,  
25 I believe, authored the alternate Staff recommendation

1 on the refund issue, and we feel that he has correctly  
2 presented the law to you in that regard. Likewise,  
3 Mr. Pruitt, in his memorandum to the Commissioners, I  
4 believe as Commission Counsel, states that there is  
5 absolutely no issue about it; there is no valid  
6 argument against making refunds. That this argument  
7 was anticipated by the Commission, or this action was  
8 anticipated in requiring a bond, and it's really just  
9 as simple as that.

10 Just a little bit of case law. There is a Supreme  
11 Court case, Silverman versus Lichtman, L-I-C-H-T-M-A-N,  
12 269 So.2d 495. It's a 1974 Supreme Court case. It  
13 says that, "Following the reversal and remand of a  
14 judgment in which a party is paid sums pursuant to the  
15 judgment, he is entitled to restitution." And in that  
16 case, the trial court wanted to allow that party 180  
17 days to make restitution. And the court ordered that  
18 restitution be made within ten days. A few other  
19 cases, I will just touch on them very briefly, Sheriff  
20 of Alachua County versus Hardy, 433 So.2d, Page 5.  
21 It's a Florida First District case, 1983. It discusses  
22 the party's right to restitution basically to be  
23 restored to the position that they held before the  
24 erroneous judgment was entered.

25 CHAIRMAN CLARK: Ms. Fox, you need to wrap it up.

1 MS. FOX: Okay. Let's see. There is likely to be  
2 litigation against the surety, since there was a bond  
3 in effect in the event that this Commission doesn't  
4 order refunds. And also further proceedings in the  
5 First District in which there would have to be a  
6 discussion about the representations that were made by  
7 the Commission in the proceedings that were had there  
8 for review of your order lifting your automatic stay.  
9 There are representations that the customers were  
10 protected by the existence of the bond and the right to  
11 refund in the event that the decision was overturned.

12 And on Issue Number 6, I believe the appropriate  
13 period for making the refunds would be the same period  
14 over which customers have to pay their utility bill,  
15 which, I believe, is around 25 days.

16 Thank you.

17 CHAIRMAN CLARK: Thank you.

18 Mr. Twomey.

19 MR. TWOMEY: First, that while we don't expect any  
20 ruling on this because of the late timeliness of it,  
21 the Citrus County, Sugarmill Woods and Spring Hill  
22 Civic Association are going to this afternoon move  
23 Commissioner Kiesling to recuse herself in this case  
24 and the other cases involving SSU and the uniform rate  
25 situation for the reasons stated therein. We'll file

1 that. We don't expect any response now or any  
2 suggestion that she should not vote on this case today.

3 Let me read you a quick quote here, Commissioners.  
4 It says, "And if the courts say you cannot do what you  
5 have done, then you've got to go back to a system  
6 specific rate and revenue requirement." That's where  
7 you have to go. There is no other place to go. It  
8 says, "If they have collected money they should not  
9 have collected, then it will have to be refunded."  
10 That's Chuck Hill. That's your Director of the  
11 Division of Water and Wastewater speaking -- I don't  
12 know where he is now -- speaking two years ago when he  
13 was trying to convince those of you that were here on  
14 voting on the lifting of the stay requested by Southern  
15 States. He stood up, came to the table and he said,  
16 "Don't worry about it, Commissioners, let's go ahead  
17 and put these uniform rates in. The customers will be  
18 protected by it. Don't worry about this silly argument  
19 the utility has that they won't have to make refunds."  
20 They will have to make refunds if you were reversed on  
21 the uniform rate issue. And the only place you can go  
22 back to is stand-alone rates." Chuck Hill, circa 1993.  
23 He was saying all of that kind of loud stuff when he  
24 was trying to convince you that everybody is protected,  
25 and it would be okay to put uniform rates into effect.

1           Notwithstanding the fact that we begged you, virtually,  
2           not to put the rates into effect by lifting the stay,  
3           because it would not only subject these people to  
4           immediate loss of their money, the time value of it,  
5           and maybe permanently, but because it would put the  
6           utility at risk, as well. Mr. Hoffman and Mr.  
7           Armstrong moved, nonetheless, said don't worry about  
8           it. They don't have much of a chance of winning on  
9           appeal. Go ahead and lift the stay, we are good for  
10          it. We've got \$70 million. That is the way I read the  
11          transcript. He says, "We've got \$70 million equity.  
12          We are good for it." Whether they say they are good  
13          for it or not is immaterial. If you go back and read  
14          the transcript of that hearing, it is clear --  
15          Commissioner Deason was Chairman -- it is clear that  
16          you all intended that they file a bond. They ended up  
17          not filing a sufficient bond compared to what you  
18          intended, I think. But you intended that they file a  
19          bond for purposes of refund, and that if you all were  
20          reversed, the transcript reveals, in my opinion, that  
21          you intended that there would be refunds made with  
22          interest and that you go back to stand-alone rates. I  
23          think your order says exactly the same thing. Now, not  
24          withstanding the statements of Mr. Hill, I see that his  
25          name and his initials are on the front of this

1 recommendation your Staff has put to you which is  
2 entirely inconsistent with what he said two years ago.  
3 I don't understand it. I don't understand why he is  
4 not in here supporting what he said two years ago and  
5 why his subordinates with leave to disagree aren't  
6 saying the same thing.

7 Now, the Attorney General, through the person of  
8 Michael Gross, gave me the authority this morning to  
9 say on the Attorney General's behalf that the Attorney  
10 General would like to see for purposes of complying  
11 with the mandate of the First District Court of Appeals  
12 in this case, that you return to the stand-alone rates  
13 and that you issue the refunds to these customers that  
14 are deserving of them forthwith.

15 Now, I said before, they had the money. We had  
16 the stay. They could have gotten all of their money;  
17 that is, SSU, they could have gotten all of their  
18 money, all of their revenue risk-free under the  
19 stand-alone rates. That's where they would have been,  
20 no risk at all. They chose to go with uniform rates.  
21 They subjected themselves to risk.

22 Now, with respect to where we are now, we have  
23 got, as Ms. Fox said, we have got the notice issue; we  
24 have got the undue discriminatory issue. Before the  
25 First District Court of Appeal, we argued six different

1 issues that the Court didn't address because it  
2 reversed for the reasons that are stated. You've got  
3 to deal with those things if you try to go back and  
4 reopen the record. We agree with Ms. Moore, who was at  
5 the First District Court of Appeals. She is a fine  
6 lawyer. She's a fine appellate lawyer. She was given  
7 a rough time by the Court over there, not because she  
8 is a bad lawyer, but because she had to deal with the  
9 decision that was put over there in the form of a final  
10 order. We agree with her. We agree with Mr. Pruitt  
11 that you cannot reopen the record. I'm not going to go  
12 into all the additional reasons that Ms. Fox stated.

13 The rates, we disagree entirely with the Staff  
14 recommendation. The only rate that you can go back to  
15 is stand-alone. If you will recall in Schedules 5  
16 and 6 of the Staff recommendation, February 3rd, 1993,  
17 there were essentially two types of rates you had  
18 there. Stand-alone rates, which are the traditional  
19 rates, which have never been departed from previously  
20 in a major case like this. Then you had the uniform  
21 rates and something in between. Mr. Hill told you two  
22 years ago you have to go back to stand-alone rates.  
23 Now, can you go back to this business that the Staff  
24 has cobbled together, going back picking and choosing  
25 through the record of the proceeding, which I assume,

1           Commissioners, that none of you except Commissioner  
2           Clark, who voted on that case, are familiar with. And  
3           I would suggest to you that unless you went back and  
4           read everything, you couldn't reopen that record anyway  
5           and vote on it, notwithstanding the objections Ms. Fox  
6           had about wanting to go to DOAH. They have cobbled  
7           together rates that they call modified stand-alone.  
8           And I want to put the emphasis on modified, not  
9           stand-alone, but modified, because they put a cap, and  
10          it is a low cap. And, Commissioners, if you're not  
11          familiar with the cap system, if you have a low cap,  
12          you cut people's rates off, everybody's rates off at a  
13          relatively low level and force subsidies to flow again.  
14          If you have a high cap, you make them pay a little bit  
15          more, everybody, and you have a lower level of  
16          subsidies. We have calculated that under the proposal  
17          of your Staff asking that 50 percent of all the water  
18          customers of the 127 systems would have identical or  
19          uniform rates, 50 percent. Under the sewer, the cap  
20          rate they have announced and proposed and cobbled  
21          together from the record would have 94 to 97 percent of  
22          all the sewer systems paying the identical rates.  
23          Uniform rates, you can't do it. You cannot do it. You  
24          would have people from Sugarmill Woods still paying  
25          under the Staff proposal subsidies well in excess of

1           \$300,000 a year. You cannot do it. It would be, on  
2           its face I would submit to you, a violation of the  
3           court order that you're supposed to be complying with.

4           Now, refunds, David Smith is the head of your  
5           Appellate Section. He knows what he is talking about.  
6           Mr. Pruitt, obviously, knows what he is talking about.  
7           Mr. Pruitt says there is no doubt. Mr. Smith says  
8           there is no doubt. As pointed out by Ms. Fox, while  
9           Ms. Chase may be a fine rate analyst, she is not a  
10          lawyer. It is a legal issue. She had no business, in  
11          my opinion, making a recommendation on that, no  
12          disrespect to her. But you have to make the refunds,  
13          and we would submit to you that you can't stretch this  
14          business out over two years. You have taken this money  
15          from these people in cash. A lot of these folks are  
16          elderly. Some of them are young working families, and  
17          so forth. They have got the money. They have got a  
18          bond. You need to give the money back immediately, as  
19          soon as you can calculate the refunds and the interest,  
20          and they need to do it in one cash payment, period. It  
21          might teach them a lesson next time about being so bold  
22          to go forward and taking a risk where none was  
23          required.

24          Now, one last thing. The ostensible purpose for  
25          this Commission in adopting uniform rates has changed

1 from case to case. The most recent pronouncement, as I  
2 recall, the emphasis was on affordability, okay?  
3 Affordability. We want to have affordable rates for  
4 everybody. And one of the things we have shown --  
5 Staff showed that the utility took advantage of it.  
6 The Commissioners, on occasion, because they were given  
7 this information by the Staff and the utility, played  
8 up the horror stories like das blein (phonetic). If  
9 these people use 10,000 gallons of water per month,  
10 they are going to have rates of \$153 a month, okay.  
11 Nobody ever explained how Gospel Island people went  
12 from having a \$15 a month rate before these people took  
13 them over, to be in the position of having a \$153 rate.  
14 But notwithstanding that, there are a certain number of  
15 little horror story, red flag systems out there that  
16 your Staff will point to, that SSU will point to, and  
17 say, "You've got to take care of these people. You  
18 can't afford to have stand-alone rates. Now, one of  
19 the things that Sugarmill Woods offered in the 930880  
20 -- I'm almost finished -- case and that the Association  
21 of Spring Hill is willing to consider, as well, or is  
22 willing to go for is that you take a 5 percent -- they  
23 will stipulate to you all taking a 5 percent amount  
24 over and above the cost of service rates, that is the  
25 stand-alone rates, for Sugarmill Woods, Spring Hill

1 Civic Association, which is a huge system. I would try  
2 and convince the other customers or other clients I  
3 might have before too much longer, that that's a wise  
4 thing to do. You could get hundreds of thousands of  
5 dollars -- I don't have the calculation, but you could  
6 get hundreds of thousands of dollars which you could  
7 use to supplement in some manner, like using the high  
8 cap rates that were proposed in the last rate case,  
9 supplement the rates of Gospel Island, Jungle Den and  
10 some of these little hard-pressed systems, and you  
11 could do it without uniform rates, you could make  
12 uniform rates affordable for those hard-pressed people,  
13 and you could do it without forcing our clients to pay  
14 subsidies to truck parks, industrial parks, country  
15 club communities, which they are doing right now, and  
16 yacht club and marina communities, which they are doing  
17 right now. Under the current system you're forcing  
18 them to pay subsidies to people that clearly have  
19 greater incomes. We would renew that offer on the  
20 5 percent and would ask you to consider that.

21 So, I appreciate the time, and I would hope that  
22 you would follow the mandate of the Court by reducing  
23 the rates to stand-alone, making the refunds with  
24 interest and doing so immediately. Thank you.

25 CHAIRMAN CLARK: Thank you, Mr. Twomey.

1 (Applause.)

2 CHAIRMAN CLARK: I did allow Mr. Twomey and  
3 Ms. Fox a little more time. I will likewise allow  
4 Southern States a little bit more time. Go ahead,  
5 Mr. Hoffman.

6 MR. HOFFMAN: Thank you, Madam Chairman,  
7 Commissioners. My name is Ken Hoffman, with me is  
8 Brian Armstrong, here this afternoon on behalf of  
9 Southern States Utilities.

10 I would first want to address Issues 2, 3 and 4 of  
11 the Staff recommendation, which essentially deal with  
12 the issue of reopening the record and the issue of the  
13 approach rate structure for this company. And I will  
14 be brief on these issues.

15 We support a reopening of the record for the  
16 limited purpose of taking official recognition of this  
17 Commission's final order in the jurisdictional docket,  
18 Docket 930945, and the final order is PSC-95-0894, a  
19 final order that was issued on July 21, 1995. In that  
20 final order, the Commission held that all of Southern  
21 States' land and facilities constitute one system.  
22 That order has been appealed by the counties who were  
23 parties to the case. And because of that appeal, there  
24 is an automatic stay of the implementation of the  
25 order. However, the Commission's findings remain

1 intact and could be officially recognized in this  
2 docket, thereby satisfying the First DCA's test, legal  
3 test, for uniform rates.

4 Ms. Fox in her presentation cited to a case which  
5 discussed the issue of whether or not certain evidence  
6 was available at the time of the hearing. And I would  
7 submit to you that as a matter of fact the final order  
8 in the jurisdictional docket certainly was not  
9 available to the parties at the time that this docket  
10 went to hearing nor throughout the appeal. This is new  
11 evidence.

12 This Company continues to support uniform rates  
13 and believes that uniform rates should be applied in  
14 this docket through official recognition of the  
15 jurisdictional order.

16 Commissioners, now I want to move to the refund  
17 issue. First of all, Commissioners, what I want to do  
18 first is address the points that the joint petitioners  
19 have raised in their joint petition in here today. And  
20 there are essentially four points. And I think the  
21 first point maybe gives the best illustration of the  
22 weakness of their arguments and their legal position.

23 You have the joint petitioners filing a joint  
24 petition and emphasizing to you today, that was  
25 Mr. Twomey, some comments made by Mr. Hill at the oral

1 argument in November of 1993 concerning Southern  
2 States' motion to vacate the automatic stay. And he  
3 notes in his joint petition and he emphasizes to you  
4 that it was Mr. Hill's opinion that the customers are  
5 going to be protected and that there needs to be a  
6 refund. Ms. Fox, on the other hand, comes before you  
7 today and says respectfully, that if you're not a  
8 lawyer, you don't know what you're talking about. I  
9 think they have shot themselves in the foot, and I  
10 think their position lacks credibility.

11 They also argue in their joint petition that  
12 counsel for SSU, at this same oral argument,  
13 acknowledged that the Company had an obligation to make  
14 refunds if the appeal of the uniform rates was  
15 reversed. That's a pure misstatement of the facts.

16 In their joint petition they, I think,  
17 inadvertently include some comments made by then  
18 Chairman Deason. Where Chairman Deason at that oral  
19 argument stated, and I quote, "And what Mr. Hoffman is  
20 saying, it's his opinion that the Company is not  
21 putting itself at risk. It does not have the liability  
22 to make the customers specific whole." There are other  
23 statements that I made during that oral argument which  
24 confirm that it was the Company's position that the  
25 appeal of the rate structure issue was a revenue

1 neutral issue, and that we had no obligation to make  
2 refunds.

3 The joint petitioners also appear to rely on the  
4 order that you entered vacating the automatic stay,  
5 which contains two passages which essentially say that  
6 the utility may be required to bear a risk of loss in  
7 the event the rate structure was issued. I think the  
8 important word is "may," and I think that word speaks  
9 for itself.

10 But perhaps the best evidence of the fact that the  
11 bond that Southern States was required to post in order  
12 to secure the lifting of the stay was not a bond that  
13 was supposed to make individual customers whole, it was  
14 a bond that was designed to secure the lifting of the  
15 stay to protect ratepayers as a whole on a total  
16 revenue requirements basis. And I read to you the  
17 statements made by then Chairman Deason, who was the  
18 lone dissenter on that issue, from the transcript. And  
19 I'm on Page 8 of 15 of Attachment B to your Staff  
20 recommendation, where after Commissioner Clark moved to  
21 grant Southern States' motion to vacate the automatic  
22 stay, and Commissioner Johnson seconded it, Chairman  
23 Deason stated, quote, "Let me state right now that I am  
24 going to vote against the motion," close quote. He  
25 goes on to say, quote, "Even though there is going to

1 be a bond posted, it's not going to be for the purposes  
2 of making individual specific customers whole. It's  
3 going to be for the purpose of making customers as a  
4 total ratepaying body whole." So, we think that that  
5 is very strong and persuasive evidence that the intent  
6 of the bond was a revenue requirements bond to make the  
7 customers whole in the event that there was a  
8 modification of revenue requirements on appeal, not to  
9 provide refunds for individual customers.

10 The last point that is made in the joint petition  
11 in support of the refunds contains several references  
12 to the opinion of the First District Court of Appeal  
13 that reversed the Commission on the uniform rates that  
14 was issued in April of 1995. I would say to you,  
15 Commissioners, if you go back and look at that opinion,  
16 there is nothing in there which even remotely addresses  
17 the issue of refunds. Presumably, that is why Citrus  
18 County, after that opinion was issued, and in response  
19 to motions for rehearing filed by the PSC and by  
20 Southern States, made an affirmative expressed request  
21 to the Court in their response that the Court order  
22 refunds. The Court declined to do so.

23 Commissioners, I want to now move to the legal  
24 grounds which we believe support our position that a  
25 request for refunds must be denied. First of all, we

1 point you to a principle known as the law of the case.  
2 That is a legal doctrine that is similar to the  
3 doctrine of res adjudicata and binds a lower tribunal,  
4 in this case the PSC, to decisions made by an appellate  
5 court in a former appeal on issues that were actually  
6 presented or could have been presented to the court.  
7 The decisions of the appellate court on those issues  
8 govern the lower court throughout all subsequent stages  
9 of the proceeding. The facts of this case demonstrate  
10 that Citrus County has come to this Commission and  
11 asked for refunds. They did that back in November,  
12 December, of 1993. They asked for a refund of the  
13 difference between the interim rates and the  
14 stand-alone -- excuse me, the interim stand-alone rates  
15 and the final uniform rates. That motion was denied by  
16 this Commission. Citrus County appealed that order.  
17 The First DCA affirmed the Commission. In the  
18 meantime, Citrus County filed a third direct request  
19 with the First DCA for the same type of refunds. That  
20 third request was denied. As I have previously stated  
21 to you, Citrus County made a fourth request for  
22 refunds; this time asking for refunds of interim rates  
23 and final rates. That request was not granted. Our  
24 position is that the First DCA's three refusals to  
25 order the refunds that Citrus County has requested is

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1 the law of the case and is binding on the Commission  
2 throughout the remainder of this proceeding.

3 Moving to the merits, the first ground that we put  
4 before you in support of our position is that the  
5 Commission lacks the authority to treat the remand of  
6 this appeal as anything other than a total revenue  
7 requirements issue. Now, there is no dispute that the  
8 Company's total revenue requirements that the  
9 Commission ordered in March of 1993 was affirmed by the  
10 First DCA, notwithstanding an appeal of a revenue  
11 requirements issue by the Office of Public Counsel.  
12 Public Counsel did not prevail on that issue. Citrus  
13 County and Sugarmill Woods have acknowledged throughout  
14 this proceeding that their appeal is a revenue neutral  
15 issue. We think that acknowledgment is inconsistent  
16 with now coming back to you and asking you to order  
17 Southern States to make refunds which would modify the  
18 revenue requirements. We believe that any action by  
19 the Commission to modify the court-affirmed total  
20 revenue requirements would be inconsistent with the  
21 First DCA's decision and their mandate. Simply put, we  
22 believe the Commission lacks the authority to modify  
23 the total revenue requirements that were affirmed by  
24 the Court.

25 Secondly, our position is that the granting of

1           refunds would constitute an unconstitutional taking of  
2           Southern State's property. You all know there are  
3           numerous decisions at the Florida Supreme Court and the  
4           United States Supreme Court level which essentially say  
5           that the failure to allow a utility the opportunity to  
6           earn a fair rate of return violates the utility's right  
7           to due process, just compensation for taking of  
8           property, and the right to possess and protect  
9           property. In this case, the Commission lacks the  
10          statutory authority to place this Company in the  
11          position of where the Company's compliance with  
12          Chapter 367, with Commission rules, and with your  
13          orders, would effect an unconstitutional taking of the  
14          Company's property and deprive it of the opportunity to  
15          earn the revenue requirements that you ordered and were  
16          affirmed by the First DCA.

17                 Third, we believe that a refund requirement would  
18          violate the prohibition against retroactive ratemaking.  
19          On Page 9 of the Staff's recommendation, the Staff  
20          states, and I quote, "To apply new rates back to the  
21          beginning of the case would be an impermissible attempt  
22          to set rates to be effective in the past," close quote.  
23          We agree with the Staff, retroactive ratemaking results  
24          when new rates are applied to prior consumption. That  
25          is the Gulf Power Company versus Cresse case, 410 So.2d

1           492. In this case, a refund of final rates would  
2           entail the application of new stand-alone rates that  
3           the joint petitioners have requested, to customer  
4           consumption dating back to September of 1993, when  
5           Southern States' uniform rates were tariffed and  
6           effective. That application would violate the test of  
7           Gulf Power Corp versus Cresse. I must also emphasize  
8           to you that it is our position that any type of  
9           backbilling would violate the prohibition against  
10          retroactive ratemaking. Nonetheless, if you do it, it  
11          must be done across-the-board. Because in the  
12          decisions that we've analyzed that address retroactive  
13          ratemaking, there is no distinction made between  
14          backbilling for purposes of rate increases or rate  
15          decreases. Simply put, if you are going to go back and  
16          backbill, which we think is illegal, but if you do it,  
17          we think it has to be done on an even-handed basis  
18          across-the-board.

19                 CHAIRMAN CLARK: I guess I don't understand that.  
20                 If you can't do it, how were there any cases that said,  
21                 if you do it, you've got to do it either way?

22                 MR. HOFFMAN: The cases that I'm talking about,  
23                 Chairman Clark, that dealt with retroactive ratemaking  
24                 did not elucidate or articulate that you could only --  
25                 that the prohibition against retroactive ratemaking

1           only applied to a rate increase or rate decrease. That  
2           issue is simply not addressed in the cases.

3           Fourth, Commissioners, we believe that the refunds  
4           would impose a penalty on this Company not authorized  
5           by statute. In the order vacating the automatic stay,  
6           the Commission took time to make it very clear that  
7           this Company complied with all applicable statutes,  
8           rules, and orders in implementing the final uniform  
9           rates. The Company properly filed the rates, promptly  
10          moved to vacate the stay, properly filed a bond. The  
11          effect of a refund would be to penalize the Company for  
12          complying with all applicable law, and we think that  
13          would be unconstitutional.

14          I also need to point out to you and make sure that  
15          you understand that the Company implemented the only  
16          legally available rates at the time. I've mentioned it  
17          to you before when I have been before you on this case  
18          that Citrus County and Sugarmill Woods chose not to  
19          request a stay of the uniform rates when they moved for  
20          reconsideration. They could have done that, and in all  
21          likelihood it would have been granted, because Citrus  
22          County has that automatic stay when they file an  
23          appeal, but they didn't do it. On July 20th, when you  
24          denied their motions for reconsideration on the rate  
25          structure issue, this Company had the right to then

1 immediately file its uniform rate tariffs. The Company  
2 was in a deteriorating financial situation, it  
3 responded by filing its tariffs. The tariffs became  
4 effective in September of 1993. What I'm trying to  
5 emphasize to you is that when Citrus County filed their  
6 appeal, and got their automatic stay, it was too late  
7 because those final uniform rates had been tariffed  
8 already in September of 1993. There were no legally  
9 authorized interim rates on file. The interim rate  
10 statute says, "The Commission may authorize the  
11 collection of interim rates only until the effective  
12 date of the final order." That final order in this  
13 case was effectuated when the Company filed its  
14 tariffs, and those were the only rates we could  
15 implement while the appeal was pending. We also  
16 believe that ordering the Company to make refunds would  
17 violate the filed rate doctrine. That doctrine bars  
18 recovery by those who claim injury by virtue of having  
19 paid a filed rate. Here the filed rates have been the  
20 uniform rates. They have been in effect since  
21 September of '93, and we believe the filed rate  
22 doctrine applies to bar any request for refunds based  
23 on payment of the filed rates.

24 Commissioners, I want to conclude by asking you to  
25 just stop and consider the precedent, the bad

1 precedent, in our judgment, which would come about by  
2 ordering refunds. If you assume for the purposes of  
3 this discussion that in this case, despite the  
4 Company's deteriorating earnings situation, that the  
5 Company had agreed to allow the interim stand-alone  
6 rates at lower revenue levels to stay in effect during  
7 the appeal, and that the uniform rates were affirmed,  
8 just assume that. Under this scenario, the economic  
9 risk would be placed on the customers who have lower  
10 rates under uniform rates, since there would be no  
11 means for them to recoup the difference between their  
12 higher stand-alone rates and the lower uniform rates  
13 while the appeal was pending. The customers who  
14 challenge the uniform rates would do so with no risk of  
15 economic loss. The joint petitioners essentially say  
16 to this Company, that you need to have a stand-alone  
17 rate structure in effect to avoid refunds. That  
18 precedent, I submit to you, would encourage appeals of  
19 Commission-approved rate structures by customers who  
20 are dissatisfied with the Commission-approved rate  
21 structure with no risk to the appealing party. The  
22 risk -- in fact, the loss would be suffered by  
23 customers who would have lower rates under the  
24 Commission-approved rate structure, but who would pay  
25 higher rates while the appeal was pending with no

1 recourse for refunds.

2 Thank you for your time, Commissioners. We  
3 respectfully request that you deny the joint petition  
4 for refunds and approve the primary recommendation on  
5 the refund issue.

6 Thank you.

7 CHAIRMAN CLARK: Thank you, Mr. Hoffman.

8 Commissioners, are there any questions that you  
9 want to ask the parties? I know you were circumspect  
10 in not interrupting their arguments. You're free to  
11 ask them questions or ask Staff questions.

12 COMMISSIONER KIESLING: Could I ask a question in  
13 clarification? Before we do that, are we going to hear  
14 anything from Staff in support of their primary?

15 CHAIRMAN CLARK: Absolutely. We should hear from  
16 Staff. We can go through the -- why don't you give us  
17 an overview, starting with Issue 1.

18 MS. JABER: Commissioners, Issue 2, I guess, is  
19 where you really want to start.

20 CHAIRMAN CLARK: Yes.

21 MS. JABER: Yes. Ms. Moore's recommendation is  
22 the primary recommendation, and she would tell you and,  
23 really, she should be the one that tells you, that we  
24 should not reopen the record. I think her analysis of  
25 the cases suggests that we should not reopen the

1 record. I support the alternative recommendation, I  
2 think that the cases are clear, that there is enough  
3 discretion for the Commission to reopen the record.  
4 And if I can skip ahead to Issue 3 -- and not only do I  
5 think you're legally entitled to reopen the record, I  
6 think you should reopen the record. And I would be  
7 glad to give you my standpoint if you would like to  
8 hear that first before going to Ms. Moore.

9 CHAIRMAN CLARK: Let me ask Ms. Moore one thing.  
10 Mr. Hoffman mentioned that one of the appellants had  
11 requested that the Court specifically tell us to refund  
12 monies in excess of stand-alone rates. Do you recall  
13 that?

14 MS. MOORE: I recall it in a prayer for relief in  
15 the wherefore at the conclusion, but it was not an  
16 issue -- made an issue. The Court didn't rule on any  
17 of the merits, and I don't think the Court would have,  
18 absent it being made an issue, absent the Commission  
19 having dealt with it first.

20 CHAIRMAN CLARK: Then it's your feeling that under  
21 no circumstances would a court have done that. They  
22 would have simply made their decision and remanded it  
23 back, expecting the lower court to carry out the  
24 directions of the court? They wouldn't have -- I guess  
25 it's your view they wouldn't have put it in there.

1 MS. MOORE: Not in this case.

2 MR. SMITH: If I may address that, I don't think  
3 the court would have assumed that function unless it  
4 was a very unusual case, that they would actually  
5 direct an agency to grant a specific form of relief.  
6 Especially -- I mean, obviously, it involves a  
7 technical issue determining how much the refund should  
8 be, and that sort of thing. So, they wouldn't have  
9 addressed it, anyway, in my opinion.

10 COMMISSIONER KIESLING: Could I get a  
11 clarification from, I guess, you, Mr. Hoffman? Was the  
12 request that you alluded to a separate and independent  
13 motion or was it just a sentence that was in a pleading  
14 that was otherwise not related?

15 MR. HOFFMAN: Commissioner Kiesling, there were  
16 three. And I will give you a quickie description of  
17 each. The first was filed directly with the  
18 Commission, and it was a motion, part of a motion,  
19 titled, "Citrus County's Motion for Reduced Interim  
20 Rates Pending Judicial Review for Recalculated Customer  
21 Bills, Refunds, and Imposition of Penalties for  
22 Violating Automatic Stay." That was the first one.  
23 The second one was a document filed directly with the  
24 First DCA, titled, "Emergency Motion of Appellant,  
25 Citrus County, to Enforce Automatic Stay and Suggestion

1           for Contempt," which contains a sentence in the prayer  
2           for relief asking for refunds. The third is in Citrus  
3           County's response to motions for rehearing, et cetera,  
4           and suggestion for motion to show cause why monetary  
5           and other sanctions should not be imposed.

6           COMMISSIONER KIESLING: What court?

7           MR. HOFFMAN: Excuse me. Directly with the First  
8           DCA, and that pleading contains about three sentences  
9           toward the end where Citrus County respectfully  
10          requests, I'm quoting now, quote, "That the court make  
11          abundantly clear that it has reversed the uniform rates  
12          as being unlawful, that the stand-alone rates  
13          calculated by the PSC in its final order, are the  
14          correct and only lawful rates, and that the next action  
15          for the PSC to undertake is to order customer refunds  
16          to those individuals who have been unlawfully  
17          overcharged for 32 months now," period, close quote.

18          COMMISSIONER KIESLING: And just to get one other  
19          thing clear. It appears to me, having not seen some of  
20          those pleadings, that the prayers for relief that you  
21          have identified were not, I guess, material to the  
22          court ruling on the styled motion. They were just --  
23          I mean, there was no motion to the court on which the  
24          court would have had to rule yes or no to that request.

25          MR. HOFFMAN: Commissioner, I guess, I would

1 respectfully say in response to that, while I certainly  
2 can't put myself in the shoes of the judges, and so  
3 forth, it could depend on whether you view the title of  
4 a motion to be a primary indication of the relief  
5 sought or what is actually set forth in the body of the  
6 motion.

7 COMMISSIONER JOHNSON: I have a question of  
8 Ms. Moore. In Issue 2, on your primary recommendation,  
9 Page 7, you cite to the GTE case as supporting your  
10 analysis that we cannot look at this issue again. And  
11 in that, about the second paragraph, you state here  
12 that, "In its order on remand, the Commission stated  
13 that its general practice is to not conduct further  
14 evidentiary hearings on remand unless the record is  
15 insufficient or incomplete." And in that particular  
16 proceeding, we declined to conduct such a proceeding.  
17 But in this instance, do you see this as a complete  
18 record? Because, I guess, as I read the alternative  
19 recommendation, and as I sit and look at the issue, it  
20 appears as if the functional-relatedness issue is  
21 something that we didn't address. And to the extent  
22 that we didn't address it, and it wasn't before us,  
23 that the record is incomplete with respect to that  
24 issue. Could you respond to that and just help me  
25 better understand your analysis?

1 MS. MOORE: It could be viewed as incomplete to  
2 set uniform rates, but the record is not insufficient,  
3 I don't believe, to determine some other --

4 COMMISSIONER JOHNSON: I didn't hear the first  
5 part.

6 MS. MOORE: I don't think the record is  
7 insufficient to choose a rate structure. That's a  
8 decision the Commission has to make. But the record  
9 evidence to choose a rate structure is there; there is  
10 a record basis. I don't think that the record is --  
11 the record could be viewed as insufficient to set  
12 uniform rates, yes, but not to make a decision.

13 COMMISSIONER KIESLING: Let me ask another  
14 question, then. And I guess this would go to both of  
15 our various Staff positions. On Page 2, the last  
16 sentence of the third full paragraph, it says, "The  
17 purpose of this recommendation is to bring to the  
18 Commission's attention all possible options in  
19 addressing the First District Court of Appeal's  
20 mandate." And I guess I'm a little concerned, because  
21 it seems to me that there are more options than just  
22 the two that we have. And, to me, one of the obvious  
23 options that I would like to consider would be we have  
24 lots of legal minds here, and they clearly are  
25 differing on how to interpret the Court's opinion. Why

1 don't we, or why have we not considered filing a motion  
2 for clarification with the Court and simply pointing  
3 out that in our attempt to implement the Court's  
4 opinion that, you know, there are divergent schools of  
5 thought on whether the defect which the Court  
6 identified is one which can be cured by reopening the  
7 record, or one for which we are precluded from taking  
8 any further evidence? I mean, was that manner of  
9 getting the Court to clarify what they want us to do  
10 considered?

11 MS. JABER: Commissioner, we did talk about that,  
12 but to tell you the truth, it really is an appellate  
13 function and an appellate decision, and I would defer  
14 to Mr. Smith.

15 COMMISSIONER KIESLING: Okay.

16 MR. SMITH: It has been discussed in the course of  
17 considering, you know, what we should do in this case.  
18 The time to have done that, I believe, would have  
19 properly been on rehearing or when we got the mandate  
20 from the Court. I'm not saying it's impossible at this  
21 point. We could certainly try it. I don't know that  
22 -- I don't know if we were aware of the ultimate  
23 dilemma we would be facing. So, you know, that's just  
24 hindsight, I guess. We should have maybe jumped on  
25 that issue, or could have, and maybe gotten some

1 clarification from the Court. On the other hand, I  
2 don't think, you know, anybody was particularly aware  
3 that we were going to find ourselves in this  
4 complicated position. So, basically, I think that is  
5 the reason we did not do that. Whether we can do it  
6 now, frankly, without looking at the rules and how the  
7 Court might respond to such a motion, I don't know.

8 COMMISSIONER KIESLING: You know, I, at least,  
9 would like to consider that, because I have no problem  
10 with going to the Court, you know, hat in hand, so to  
11 speak, and saying, you know, "We took it up, and we  
12 discovered that there are such divergent opinions that  
13 we aren't comfortable with either answer. So, Court,  
14 you know, what did you mean?" I mean, I don't think  
15 that the Court want us to do something that's contrary  
16 to their orders simply because we are having divergent  
17 legal opinions on --

18 MR. SMITH: I'm certain the Court doesn't want  
19 such a thing.

20 COMMISSIONER KIESLING: And I can tell you, I  
21 don't want such a thing. I want to do what the Court  
22 ordered.

23 MR. SMITH: Obviously, we are faced with a dilemma  
24 because of the way the Court's opinion came down, and  
25 the way it's written. And we are really struggling

1 with it. And everybody wants, you know, a fair  
2 resolution in the light of that opinion and consistent  
3 with the Commission's law.

4 CHAIRMAN CLARK: Commissioners, it seems to me  
5 that one of the things that hasn't been factored in  
6 here is the fact that we have requested that the second  
7 proceeding come back to the Commission so that we can  
8 make that finding. And in my own mind, I sort of draw  
9 a line between what has gone on in the past and what we  
10 need to do now to make sure the rates going forward are  
11 correct. And as I understand what the Staff has done,  
12 we have asked for that to be remanded back to us, so  
13 that we can make the appropriate finding and on a  
14 going-forward basis we have the appropriate rates.

15 COMMISSIONER KIESLING: Which case was that in?

16 CHAIRMAN CLARK: It's not in this one. It's in  
17 the second case.

18 COMMISSIONER DEASON: The generic investigation.

19 COMMISSIONER KIESLING: The investigation?

20 CHAIRMAN CLARK: Right.

21 MS. JABER: It's in the 880 docket.

22 COMMISSIONER KIESLING: Okay. I guess I wasn't  
23 aware of that. And how does that play into what we are  
24 doing here, then?

25 CHAIRMAN CLARK: Well, it plays in this sense: As

1 I understand it, we have requested them to send it  
2 back, because in advance of that proceeding, we didn't  
3 know we had to make that finding. And if I'm not in  
4 error, I don't recall that anyone made the argument on  
5 the point the Court finally decided the case. I guess  
6 the basis on which they made their decision was a  
7 surprise to everyone. It was not a point argued even  
8 by appellants. Their primary points were noticed, as I  
9 recall.

10 MS. MOORE: That's correct, noticed, and several  
11 other things.

12 CHAIRMAN CLARK: So, what we have said to the  
13 Court is you have now told us that we needed to do  
14 something else, and we have asked for that subsequent  
15 case back. Is that the vehicle to correct the rates on  
16 a going-forward basis?

17 MS. MOORE: As opposed to attempting to do it in  
18 this docket before you, I think, yes.

19 CHAIRMAN CLARK: And then we can say -- I guess  
20 what I'm saying is do we reopen this record or do we  
21 deal with it in the other case? And then with respect  
22 to this one, we ask the Court, "What are we supposed to  
23 do in terms of refunds?"

24 MS. MOORE: Commissioners, the reason we moved for  
25 rehearing, the appellate rules provide for 15 days to

1           move for clarification or a rehearing, or permit you to  
2           do that. And we moved for rehearing on the basis that  
3           it was not an issue, and that the issue of functional  
4           relationship should not play a part in the setting of  
5           rates. That motion was denied, but that was the course  
6           of action we took then, rather than a motion for  
7           clarification, because we didn't initially agree.

8           CHAIRMAN CLARK: Well, I think Ms. Fox was  
9           concerned about something. I asked for her response,  
10          and I would like to let you respond.

11          MS. FOX: The point I wanted to address was the  
12          idea that this wasn't something argued by the parties  
13          or was a surprise. I don't think that's accurate at  
14          all, and that has been presented to the First District.  
15          Now, that is an issue that has been directly presented  
16          to them. SSU took the tack, after the decision, of  
17          filing a motion to file brief upon which case was  
18          decided.

19          CHAIRMAN CLARK: Well, let me ask you this. And  
20          clarify it for me, because you all would have been on  
21          the side arguing it. I didn't recall seeing an  
22          argument that the Commission had to make a finding that  
23          they were functionally and operationally related in  
24          order to implement uniform rates. Was that one of your  
25          arguments?

1 MS. FOX: Well, we argued that the Commission  
2 didn't have statutory authority under the ratemaking  
3 statute to adopt uniform rates. And encompassed within  
4 that is an argument that they should be made on a  
5 stand-alone basis.

6 CHAIRMAN CLARK: I'm just trying to -- it came,  
7 frankly, as a surprise to me, because I thought that  
8 the purpose of making a determination of functionally  
9 and operationally related -- and I think I have those  
10 words correct -- is for jurisdictional purposes, not  
11 ratemaking. (TAPE CHANGE) -- not an argument made in  
12 the lower court.

13 MS. FOX: I believe SSU has, in fact, made that  
14 argument, and we have filed our brief where we  
15 vigorously opposed that, and I think we could give you  
16 pages of the briefs that discuss the definition of  
17 system, the definition of utility. These are the  
18 definitions that are incorporated into the ratemaking  
19 statute.

20 CHAIRMAN CLARK: So, you did make some distinction  
21 with respect to utility and with respect to system in  
22 the First DCA.

23 MS. FOX: Yes, that argument was made, and is  
24 encompassed within. And this is something on the law  
25 of the case that has been presented to the First

1 District. And, you know, they have rejected their  
2 position on this point.

3 CHAIRMAN CLARK: On the rehearing?

4 MS. FOX: Right, and issued their decision. They  
5 feel that this was distinctly a matter on appeal.

6 CHAIRMAN CLARK: Okay.

7 MS. MOORE: Commissioner Clark, I want to mention  
8 that in the briefs, the only issue raised was in the  
9 ratemaking statute, and whether the statute gives the  
10 Commission authority to set rates for utilities. Never  
11 once did any of the parties raise the issue of the  
12 definition of system within which are the terms  
13 functionally related. And never once did any of the  
14 parties raise the case or discuss the case Board v.  
15 Beard.

16 CHAIRMAN CLARK: I can look that up and just see  
17 how it goes. But I guess for my own purposes what I'm  
18 trying to do, is it seems to me that at this point it  
19 has been remanded to us. We have got to get the rates  
20 right on a going forward basis, and we have got to  
21 decide whether or not we have to do refunds. And I had  
22 understood that we have a case that has been decided.  
23 We had yet another case that was on appeal. And we  
24 have acknowledged to the Court we did not make that  
25 finding in that subsequent case. We would like that

1 case back to allow us to make or not make that finding,  
2 and set the rates on a going-forward basis. Is that  
3 what we should be doing here?

4 MS. JABER: Commissioner, the only thing I would  
5 suggest to you is from my understanding of talking to  
6 Ms. Moore and Mr. Smith is that there is no guarantee  
7 you're going to get that case back. That parties  
8 will --

9 CHAIRMAN CLARK: Well, it may address what  
10 Commissioner Kiesling is suggesting is that we file a  
11 supplement that says, "We are in a dilemma here."

12 MS. JABER: That is the recourse that I would  
13 suggest to you, is that you do both. But to you say  
14 that you don't want to reopen the record here and to  
15 fix it, quote, unquote, "in the 880 docket," you may be  
16 remiss in doing that, because the Court may not  
17 relinquish jurisdiction back to you in the 880 docket.  
18 And then you haven't afforded the parties the  
19 opportunity to present evidence.

20 COMMISSIONER DEASON: Well, let me ask another  
21 question, perhaps a little more practical. And that  
22 question is, as we all know, sitting here today, we are  
23 right now in the midst of another rate proceeding on  
24 top of all of this other that we are having to deal  
25 with, which I think is an unfortunate situation. But

1 we are not the agency that determines when these cases  
2 are filed. Nevertheless, we are going to have to make  
3 a decision on interim rates.

4 MS. JABER: That's right.

5 COMMISSIONER DEASON: I believe that is scheduled  
6 for some time the first week of October.

7 MS. JABER: That's correct.

8 COMMISSIONER DEASON: And then sometime in the  
9 first part of 1996, we are going to have to make a  
10 decision on permanent rates on a going-forward basis.

11 MS. JABER: That's correct.

12 COMMISSIONER DEASON: And we are going to need to  
13 know what basis we can set rates upon, whether we need  
14 to do it on a stand-alone, on strictly stand-alone,  
15 some type of a uniform, some type of a capped rate. I  
16 don't know. And maybe there are some other  
17 alternatives out there that would be pursued during the  
18 hearing. But we do not have the luxury of saying,  
19 "We're going to put the rate case on hold until all of  
20 this can be resolved." And while we may want to  
21 petition the courts to give some clarification, or we  
22 may want to wait and see what the Court does as far as  
23 relinquishing jurisdiction for us to make some further  
24 findings, the fact of the matter is, there is an  
25 eight-month clock ticking right now as we speak on the

1 rate proceeding, and we are going to have to make a  
2 determination on rate structure for that case. How are  
3 we going to do that?

4 MS. JABER: That is precisely the concern that  
5 this Staff had in writing this recommendation,  
6 Commissioner. It is why we brought this to you when we  
7 did. It's not an easy situation. The new rate case  
8 complicates this tremendously. And one of the things  
9 that we have to consider in interim is even if we can  
10 bring you a recommendation on what the appropriate  
11 interim rate is, we don't know what to do yet.

12 COMMISSIONER DEASON: I think you're looking for  
13 some guidance from the decision that we made today,  
14 were you not?

15 MS. JABER: Yes, we were.

16 COMMISSIONER DEASON: And I assume that whatever  
17 decision we make today, given the track record of this  
18 case, it's probably going to be appealed.

19 MS. JABER: That's correct.

20 MR. HOFFMAN: Madam Chair, if I may?

21 CHAIRMAN CLARK: Mr. Hoffman, I'll let you speak,  
22 but I will also give Ms. Fox or Mr. Twomey an  
23 opportunity to respond.

24 MR. HOFFMAN: Okay. The thing that I wanted to  
25 reiterate was in terms of the proposal to send it back

1 to the Court. I just wanted to reiterate again that  
2 Citrus County has raised that issue with the Court.  
3 They have said to the Court in response to the motions  
4 for rehearing, "Clarify that what you meant is  
5 stand-alone rates and refunds." Southern States filed  
6 a motion for leave to file a reply in a proposed reply.  
7 The Court did nothing. The Court did not grant that  
8 request of Citrus County.

9 MR. SMITH: Madam Chairman, could I make a comment  
10 here?

11 CHAIRMAN CLARK: Yes.

12 MR. SMITH: As far as I know, those motions were  
13 simply denied without opinion. The fact is we don't  
14 know why the Court decided what it did. And I don't  
15 think you can say that that establishes the law of the  
16 case. The law of the case is normally established by a  
17 court making a ruling, a finding, an opinion, which  
18 says, "We find that this issue is decided this way, and  
19 any further proceedings below will be carried out in  
20 accordance with that." And I think simply, "We deny  
21 your motion," just establishes that whatever was in  
22 that motion is the law of the case or not the law of  
23 the case.

24 MS. JABER: For practical purposes, can I throw --

25 CHAIRMAN CLARK: I promised Ms. Fox I would give

1 her an opportunity to --

2 MS. FOX: No, Mr. Smith is correct.

3 CHAIRMAN CLARK: Okay.

4 MR. HOFFMAN: Madam chair, if I may briefly?

5 CHAIRMAN CLARK: No, Mr. Hoffman.

6 MR. HOFFMAN: Okay.

7 CHAIRMAN CLARK: Go ahead.

8 MS. JABER: For just practical purposes, to try  
9 and give you an idea of the dates that we've thought  
10 about for all of this, in the event that you do move  
11 the alternative and decide to reopen the record, we  
12 have reserved a date in November and a date in December  
13 to have a hearing. It would be in the nature of an  
14 emergency hearing. If you decide not to reopen the  
15 record, and you move Staff's proposal, which is the  
16 modified stand-alone version, that would be, I suppose,  
17 what we would have to use in the interim calculation,  
18 if that helps.

19 CHAIRMAN CLARK: You surely haven't run out of  
20 questions to ask. Why don't we take a break until  
21 2:30, and we'll come back at 2:30.

22 \* \* \* \* \*

23 CHAIRMAN CLARK: I call the agenda conference back  
24 to order. I do have one other question. Mr. Twomey, I  
25 have a question I wanted to ask you or Ms. Fox with

1           respect to stand-alone rates. As I understand the  
2           Staff recommendation, there were some rates that were  
3           not stand-alone rates to begin with, that they were, in  
4           fact, countywide rates. When you say stand-alone  
5           rates, are you suggesting that we go back to what the  
6           rates were prior to this case and just add an increment  
7           onto those rates?

8           MS. FOX: The systems that had already been  
9           combined for ratemaking purposes, that's water over the  
10          dam, I believe. And there must have some prior  
11          proceedings, I would assume, in which either that  
12          finding was made or there was --

13          CHAIRMAN CLARK: Now, Ms. Fox, do you think that  
14          finding was made?

15          MS. FOX: Well --

16          CHAIRMAN CLARK: But, nonetheless, they were  
17          treated as one system, weren't they, for ratemaking?  
18          My question is fairly simple. Do we disaggregate them,  
19          too, or do we treat them as a unit?

20          MS. FOX: I think there were instances in which  
21          that was never an issue. And maybe that is because  
22          they were close enough that it wasn't worth arguing  
23          about. But, you know, we are not interjecting  
24          ourselves to change them to a different rate structure  
25          than what they had coming into the '92 rate case.

1           CHAIRMAN CLARK: All right. Then let me be clear.  
2           Is it your position we should go back to, I guess, the  
3           breakout of how rates were figured prior to the case  
4           and add the increases onto that?

5           MR. TWOMEY: Let me respond to your first  
6           question, Commissioner. In an attempt to be  
7           consistent, I think, with the position we argued to you  
8           from the beginning, and the position we argued to the  
9           Court, and that is that we believe -- and unless the  
10          systems are interconnected and there is a basis for  
11          finding that service can flow from one to the other,  
12          and we are talking about water pipes and sewer  
13          collection pipes and not this other stuff -- that you  
14          have to base the rates for each system, unless they are  
15          interconnected, on the legitimate cost of service for  
16          that plant plus the reasonable allocation of common  
17          costs, okay? So, my answer to you is I don't know  
18          exactly how some of those previous systems got thrown  
19          together. I think one of the arguments we made in one  
20          of the cases, and it was probably the generic rate  
21          investigation, was that maybe, maybe those systems, if  
22          they were put together for purposes of uniform rates  
23          within a county, for example, maybe their costs were  
24          similar enough that it would be okay and wouldn't  
25          violate the undue discrimination. My answer to you is

1 I think that you ought to base the rates on costs with  
2 an allocation of common and general costs based upon  
3 whatever your reasonable methodology is, and do it for  
4 each and every system.

5 CHAIRMAN CLARK: Your exception to that would be  
6 if they were treated as one entity in terms of getting  
7 uniform rates, that we could continue to treat them as  
8 one entity.

9 MR. TWOMEY: Well, the only caveat there is I  
10 think if it is Rosemont and Green--something --

11 UNIDENTIFIED SPEAKER: Rolling Green.

12 MR. TWOMEY: -- Rolling Green, that were  
13 physically interconnected, sure, they would have common  
14 rates. But I'm suggesting to you that within a county  
15 if you have five systems, that for whatever reason, and  
16 in a proceeding say four years ago the Commission  
17 decided to set uniform rates, or maybe they took -- SSU  
18 bought these systems from a company that had uniform  
19 rates for whatever reason -- all these systems that we  
20 said all along are required to keep, I think still  
21 required to keep, individual system costs per the NARUC  
22 System of Accounts. You can ascertain what the costs  
23 of service are for each one of them. And I think you  
24 should go back and set them specifically --

25 CHAIRMAN CLARK: Okay. So, unless they are

1 interconnected, physically interconnected, you ought to  
2 go back. And even if they were treated as one entity  
3 prior to this rate case, you should disaggregate them  
4 and have stand-alone rates for even those.

5 MR. TWOMEY: Yes.

6 CHAIRMAN CLARK: Okay.

7 COMMISSIONER GARCIA: Madam Chairman, I would like  
8 to make a motion and then make a comment with it, and  
9 then see where that takes us. And then perhaps we can  
10 move along, although I doubt it.

11 CHAIRMAN CLARK: Oh, I should mention, I'm going  
12 to go ahead and cancel Internal Affairs. I have been  
13 informed that we can take up the one matter on it at a  
14 later date. And with respect to federal matters that  
15 are pending, we can take that up at a later date, too.  
16 I think it's pretty clear that we are going to need to  
17 spend time at this agenda.

18 MS. JABER: Madam Chairman, at the sake of  
19 interrupting Commissioner Garcia, I just wanted to tell  
20 you that Commissioner Kiesling asked us questions about  
21 interim, and Deason. And since Commissioner Garcia was  
22 going to make a motion, would you prefer that we wait  
23 to answer her after you make your motion?

24 COMMISSIONER GARCIA: That's up to the  
25 Commissioners. If you want to answer them now, then

1           that's fine, too. Maybe we can touch on that because  
2           what I'm going to move for will probably move us in  
3           that direction, anyway, if it's all right with the  
4           Commissioners.

5           My first motion is to move with primary on Issue  
6           Number 2. And I want to say that, first of all, all  
7           the arguments that have been made here have been  
8           wonderful reading. And although I think we are trying  
9           to get to a correct answer, I think what has happened  
10          is that we are out of sequence. And we are trying to  
11          fix something at the tail end, as opposed to looking at  
12          it in sequence. And the reason we find ourselves in  
13          that position is I think that this is the first shot we  
14          took at this, an exceedingly complex issue with very  
15          many different components to it, and I think tenacious  
16          opposition from those who this system was being imposed  
17          upon. And many of the legal arguments that were needed  
18          to get to where we got have been clarified, I think, by  
19          the Court, but I think have been clarified on the tail  
20          end. In other words, out of sequence. And I find  
21          myself pretty convinced by Prentice's memo on the issue  
22          that I could not vote for the alternative. I think the  
23          logic holds there. And I think it puts us in a  
24          difficult position in the future if we do do this.  
25          Because we then have to look at things after we've

1 finished. And in this particular case there are parts  
2 of it where I wasn't even here as a Commissioner when  
3 they were decided. It is for that reason that I am  
4 going to move primary on 1, and then make a suggestion.  
5 And I guess it's for discussion, because some of you  
6 are clearly more water experts than I. I think that  
7 then that forces us to go back to the rates we had  
8 before this whole process began, stand-alone rates.  
9 That doesn't, however, foreclose the possibility of  
10 uniform rates in some future time when we have these  
11 things as we have now completely clarified by the  
12 courts, and by the reasoning of this Commission, and  
13 then we begin from there this process, however complex  
14 it may be. I think the logic dictates from the  
15 decisions that we've made here reaching that  
16 conclusion, that whether SSU decides to do that or not,  
17 that's something completely different. I'm certainly  
18 not inviting them to come before us again. But, at  
19 least, I want the Commissioners to understand what my  
20 thinking is because I think in the last case we had on  
21 this, I found myself very torn because there were some  
22 basic tenets that I just didn't agree with or didn't  
23 completely appreciate the position that we had already  
24 been taken to, and so I had to come up with, I think, a  
25 compromise in my own decision.

1           If we do this, I don't think it forecloses what we  
2           have done in the past, and I think much of what we have  
3           done here will still be usable in terms of  
4           understanding and clearly has more refined the thought  
5           on what we are doing. But, I leave that to the  
6           Commissioners and maybe we can discuss it for a little  
7           while.

8           But with that, I move primary on 1 and nothing  
9           else for right now.

10          COMMISSIONER KIESLING: I think you mean 2.

11          COMMISSIONER GARCIA: I'm sorry, on 2.

12          CHAIRMAN CLARK: There has been a motion. Is  
13          there a second?

14          COMMISSIONER DEASON: I will second the motion.

15          CHAIRMAN CLARK: Is there any further discussion?

16          COMMISSIONER JOHNSON: One of the things I just  
17          wanted to throw out for discussion purposes, I think in  
18          the alternative recommendation one of the issues that  
19          the alternative raised was that we could conclude that  
20          we have the discretion, but decide not to open the  
21          record. That was something that I wanted to discuss or  
22          get some feedback from the other Commissioners with  
23          respect to that issue and whether or not we were  
24          setting a precedent that we may not want to set with  
25          respect to that. Because, indeed, you know, as I read

1 the alternative analysis, I'm somewhat persuaded that  
2 perhaps we do have the discretion to do this, but I'm  
3 not so sure I want to reopen it.

4 MS. JABER: Can I explain the importance of why I  
5 really wanted to bring that to your attention? The  
6 primary cites to the GTE case. And I don't think  
7 that's what you meant to say, or at least I don't think  
8 that is the precedent that you really wanted to set  
9 forth. And I would hate for you to find that legally  
10 you cannot reopen the record on a case where the Court  
11 has said for further disposition consistent herewith.  
12 I think that you have to leave that up to a  
13 case-by-case basis. I think you should find that  
14 legally you can reopen the record. And in Issue 3, if  
15 you don't want to reopen the record, that is, of  
16 course, up to you. But what you risk by saying you  
17 legally can't reopen the record is, just like the GTE  
18 case, this will be used again and again. And I don't  
19 know that that's really what you intend to do. In my  
20 mind the cases are clear. You can reopen the record  
21 when the Court has specifically said, as they do in the  
22 SSU opinion, you have not made a finding on functional  
23 relatedness.

24 And I wanted to address one of the questions that  
25 you asked Ms. Moore, "Did the Court find that there was

1           insufficient evidence or a lack of evidence?" And I  
2           would disagree with Ms. Moore. They said, "absent a  
3           finding." There is no evidence on that issue. And  
4           there has to be a distinction between what the parties  
5           say in their brief and the record that was made here at  
6           the Commission. That issue was never identified, never  
7           litigated. No one ever had the opportunity to present  
8           evidence on it, nor could we have known. We had  
9           jurisdiction over the 127 systems. So, 367.171 never  
10          came into my mind, as it never came into the  
11          Commissioners' minds.

12                 COMMISSIONER DEASON: Well, let me ask a question  
13          along those lines. I know a motion has been made, and  
14          I think I'm the one that seconded it, and I think it's  
15          the appropriate action we need to take. But just for  
16          the sake of argument, if the Commission were to decide  
17          that we can reopen the record and have further  
18          proceedings, and we do that, and for the sake of  
19          argument, let's assume that we make a finding that  
20          there is functional relatedness. Do we have any  
21          assurance whatsoever that the Court is going to agree  
22          that uniform rates was the appropriate decision? It  
23          seems to me that the order from this Court leaves much  
24          in doubt. In fact, there was references in the opinion  
25          as to the type of evidence that was taken, the lack of

1 evidence, but the evidence that was taken, that no one  
2 recommended in the hearing that there be a uniform rate  
3 structure. It did recognize that there were some  
4 benefits, but the order said that there was no evidence  
5 to support it. And then on top of that, the Court said  
6 statutorily you can't do it, anyway.

7 MS. JABER: Right.

8 COMMISSIONER DEASON: So, I have a lot of doubt in  
9 my mind, given what the Court is saying in this order,  
10 if we were to take that route, we would have any  
11 assurance that we are going to rectify a problem  
12 anyway. The ultimate decision by the Court may still  
13 be the same.

14 COMMISSIONER JOHNSON: I may agree with you on  
15 that point, but the issue that I was looking at was  
16 maybe we find that, yes, we do have the authority to do  
17 this. But in this case, maybe you're right, maybe the  
18 Court already gave us a big hint not to bring it back  
19 to them in that instance. And, you know, I may  
20 hesitate in saying that we don't have the authority to  
21 open this, but I may not hesitate on us deciding that  
22 we have the authority, it's within our discretion, but  
23 we decide not to review this issue.

24 COMMISSIONER KIESLING: Well, let me -- I'm sorry.  
25 Go ahead.

1           COMMISSIONER DEASON: Well, I was just going to  
2 say that I think that any time a decision of this  
3 magnitude, it's got to be based upon the situation that  
4 is before us at the time. We've got to look at the  
5 order from the Court. We have got to try to understand  
6 what the Court is trying to tell us. And we have to  
7 make a decision, do we think it is appropriate to  
8 reopen the record and take additional evidence. I  
9 don't think that -- and maybe the clear wording of the  
10 issue in Issue 2, maybe is not really what I want to  
11 second. I can't really divorce Issue 3 from Issue 2.  
12 I am firmly convinced that we should not reopen the  
13 record in this case to take additional evidence to try  
14 to make a finding of functional relatedness to try to  
15 cure a defect in a prior decision. We should not do  
16 that. If we want to say we can't do that, I'm not so  
17 sure, but I think that it is wrong for this Commission  
18 to do it. And maybe we want to even avoid the question  
19 of whether legally we can or we cannot, but, just say,  
20 "Given this case, the order from the Court, the record  
21 that is before us, do we want to reopen the record?"  
22 I'd say emphatically no.

23           CHAIRMAN CLARK: I guess I would just say that I'm  
24 not sure that we want to make a policy decision as  
25 opposed to a legal decision. Because it seemed to me

1 in the GTE case we did say that it was a general -- I  
2 can't remember the distinction. They both fell into  
3 the same category of being a general remand, right? Or  
4 a specific remand.

5 MS. JABER: It's my recommendation that GTE was a  
6 specific mandate, and this, I believe, is a general.

7 CHAIRMAN CLARK: I was on both of them, and I'm  
8 not sure I see the distinction between the two.

9 MS. JABER: Can I explain the distinction that I  
10 see?

11 CHAIRMAN CLARK: Let me hear from Ms. Moore,  
12 first.

13 MS. MOORE: In GTE, it was a general remand for  
14 further actions consistent with this opinion.

15 CHAIRMAN CLARK: Right. And what is it in this  
16 one?

17 MS. MOORE: A remand for disposition consistent  
18 herewith.

19 CHAIRMAN CLARK: Okay. Now, you say both of those  
20 do not give authority to reopen the record.

21 MR. SMITH: May I respond to that? I don't think  
22 that was the issue in the GTE case. I think there was  
23 a general remand, and you decided essentially, given  
24 the Court's pronouncement, (a), that you misconceived  
25 the test for approval of the affiliated expenses; and

1 (b), if you apply the test of this evidence, there is  
2 no way that you could support that finding. And in  
3 light of that conclusion by the Court, you said it  
4 would not be appropriate, or would not be worthwhile to  
5 reopen the record and take further evidence.

6 In this case, we're not saying in the primary  
7 recommendation that for all time, whenever a court  
8 opinion comes down with this direction, that you shall  
9 not open the record. Obviously, it's a case-by-case  
10 decision, and it should be based on the wording of the  
11 Court's opinion. That's all that we are saying. In  
12 this case, we believe that the Court's opinion does not  
13 support reopening the record.

14 CHAIRMAN CLARK: Well, let me be clear. In the  
15 GTE, you said the Court indicated we misperceived the  
16 test.

17 MR. SMITH: That's right.

18 CHAIRMAN CLARK: That's a little -- that's similar  
19 to what we did here. We sort of misperceived the test.

20 MR. SMITH: That's correct.

21 CHAIRMAN CLARK: And the evidence in the docket,  
22 we concluded, would not support -- or they said the  
23 evidence in the docket would not meet the new test.

24 MR. SMITH: That's correct.

25 CHAIRMAN CLARK: And the Court said the same thing

1 in this case.

2 MR. SMITH: That's correct. That's where the  
3 analogy is.

4 CHAIRMAN CLARK: All right. Now, Ms. Jaber, what  
5 did you want to say?

6 MS. JABER: The distinction that I see with the  
7 GTE case, when I went back and read the order, the  
8 recommendation and some of the transcripts, what the  
9 Court, in my mind, said was that the record that was  
10 there was insufficient. And, I think, in my reading of  
11 the transcript, it was apparent that the utility did  
12 put on some evidence. I even went back and I read  
13 OPC's brief. OPC made the contention that you should  
14 reopen the record in GTE, because OPC and Staff never  
15 had the opportunity to present the evidence. Now, I  
16 think the Commission was correct in GTE in not  
17 reopening the record, because there was an opportunity  
18 to present evidence in GTE as evidenced by the fact  
19 that the utility did. The distinction in SSU is no one  
20 ever presented evidence on functional relatedness; not  
21 the utility, not the parties, not Staff. It's not that  
22 the evidence was insufficient, there was no evidence.

23 COMMISSIONER KIESLING: May I make a comment? And  
24 that is, that I don't know why we have to take a final  
25 vote on Issue 2, up front.

1           COMMISSIONER GARCIA: I agree with you.

2           COMMISSIONER KIESLING: Because I may agree with  
3 the alternate recommendation that it is within our  
4 discretion to do it, but still on Issue 4, may be quite  
5 willing to vote and say, "But I don't want to do it  
6 here." And, to me, that is the issue that relates to  
7 this case, not, you know, some issue of a legal issue  
8 of statutory or interpretation of opinions, because I  
9 don't want us to lock ourselves into a position that  
10 would be that if a remand says this, then our official  
11 position is we can't reopen.

12           CHAIRMAN CLARK: Okay. Commissioner Garcia, I  
13 think there may be some indication for support of an  
14 amended motion.

15           COMMISSIONER GARCIA: Correct. Commissioner  
16 Deason, I think, stated it quite well a few moments  
17 ago. I think maybe we should just not get there. I  
18 mean, we may agree that we have the authority, but we  
19 simply do not want to reopen the record in this  
20 instance. And I don't know if I have to restate that  
21 in some more arcane way, but --

22           CHAIRMAN CLARK: Articulate way.

23           COMMISSIONER GARCIA: Sometimes it gets arcane,  
24 but --

25           CHAIRMAN CLARK: Not arcane. For me, articulate.

1           COMMISSIONER KIESLING: May I make a suggestion  
2 that you withdraw your first motion and move Issue 3,  
3 and thereby make Issue 2 no vote necessary, rather than  
4 deciding an issue that we don't have to decide.

5           CHAIRMAN CLARK: Well, I guess in a way it does  
6 decide the issue. It indicates we think on these --  
7 that we can reopen it.

8           COMMISSIONER KIESLING: Yes, I guess that's true.

9           CHAIRMAN CLARK: The suggestion is, there seems to  
10 be sentiment for the notion that whether it's  
11 authorized in law or not, some of us may agree that it  
12 is, some of us may believe that it is not, but we all  
13 agree that we shouldn't reopen the record.

14          COMMISSIONER KIESLING: I think we all agree.

15          CHAIRMAN CLARK: Well, I'm saying that would be  
16 the motion. That the motion would be under the law we  
17 may -- it appears unclear as to whether or not we could  
18 reopen the record as a matter of law. But as a matter  
19 of policy in this case, we would vote not to reopen the  
20 record. Is that your motion?

21          COMMISSIONER GARCIA: Thank you for stating it  
22 more articulately.

23          CHAIRMAN CLARK: Is there a second, if I stated it  
24 well?

25          COMMISSIONER DEASON: Well, let me ask Mr. Smith a

1 question. As I understood your explanation of the  
2 recommendation, the primary recommendation for Issue 2,  
3 you're basically saying that given the specifics of  
4 this case, the facts of the case, the order on remand,  
5 that it is your recommendation that we should not,  
6 legally we should not?

7 MR. SMITH: That's correct.

8 COMMISSIONER DEASON: And that was the basis for  
9 my second.

10 COMMISSIONER KIESLING: Is it "should not," or  
11 "cannot"?

12 COMMISSIONER DEASON: Well, the recommendation is  
13 "should not."

14 MR. SMITH: Should not.

15 COMMISSIONER DEASON: And I think that -- I mean,  
16 I'm willing to support that. If this is going to move  
17 us along, and we are going to get to the same end point  
18 anyway; that is, that we are not going to reopen the  
19 record, I'm agreeable to doing that, also. But I just  
20 wanted to clarify the basis for my second was that it  
21 was my understanding that your primary recommendation  
22 was "should not," given the specifics of this case. It  
23 was not a blanket statement that if language XYZ  
24 appears in a remand order, you do X, and if other  
25 language, you do Y. It just that the sum total of this

1 case, it's your recommendation that we should not?

2 MR. SMITH: Yes. Let me just say one more thing.  
3 I think ultimately you're correct in the approach  
4 you're taking, because it's what you do that counts,  
5 not how you decide this legal issue, per se. But the  
6 reason it's there is because if a lower tribunal or the  
7 Commission makes a decision to take further evidence  
8 that is inconsistent with the Court's remand, then that  
9 is a basis for being overturned again on appeal. So,  
10 we wanted to go in the right direction to begin with.  
11 And if you now decide that you will not reopen the  
12 record, then that is consistent with what we are  
13 recommending, whether or not you decide the first issue  
14 the way we formulated it. But the reason it's there is  
15 we didn't want to go in a direction that would lead us  
16 into another confrontation with the Court on the next  
17 appeal that derives out of this. Because it is the  
18 basis for remand again, a reversal again, if you do not  
19 act consistently with the Court's remand.

20 CHAIRMAN CLARK: Let me clarify something. With  
21 the respect to the way the recommendation is issued, it  
22 says, "In the absence of directions from the appellate  
23 court for the Commission to make an additional finding  
24 or to reconsider its decision in light of the Court's  
25 decision," is your recommendation that in absence of

1 directions by the appellate court in this case, not the  
2 general statement --

3 MR. SMITH: That's correct. No, you could never  
4 say -- unless the court says, "You shall not conduct  
5 further proceedings." I mean, normally if the court  
6 wants you to do something, they will tell you. And you  
7 can look down the list of cases, some of them decided  
8 on Commission cases, if the court says, you know, "Go  
9 forth and take evidence on this issue," then that is  
10 what they want you to do. And so, you know --

11 CHAIRMAN CLARK: I guess I'm concerned that we  
12 still have the latitude that where the facts are  
13 different and yet they use the same sort of ordering  
14 language --

15 MR. SMITH: Absolutely. We're not suggesting  
16 otherwise.

17 CHAIRMAN CLARK: Okay.

18 COMMISSIONER JOHNSON: You made the motion, right?

19 COMMISSIONER GARCIA: Yes, I made the motion.

20 COMMISSIONER DEASON: Okay. Your motion is,  
21 basically, we're just going to combine Issues 2 and 3  
22 and just make a statement that we're not going to  
23 reopen the record. That's your motion.

24 COMMISSIONER GARCIA: That's the motion.

25 COMMISSIONER DEASON: Now, Mr. Smith, is that

1 sufficient for your basis? You mentioned the fact that  
2 this order is going to be subject to potentially  
3 another order from the Court. Does that meet your  
4 needs as far as addressing Issues 2 and 3?

5 MR. SMITH: I think so. I don't think, you know,  
6 the bare fact that you didn't specifically decide  
7 Issue 1 in legal terms is going to be a basis for the  
8 Court to, you know, reverse the Commission. It's what  
9 you do on remand that's important.

10 COMMISSIONER DEASON: I will second the motion.

11 CHAIRMAN CLARK: All right. I just need to be  
12 clear. And I'm sorry for belaboring the point. Is the  
13 motion more simply stated, then, the Staff's  
14 recommendation is modified on Number 2 to be,  
15 "Recommendation that the Commission not reopen  
16 proceedings to take additional evidence in this case?"

17 COMMISSION GARCIA: Correct.

18 CHAIRMAN CLARK: Is that sufficient?

19 COMMISSIONER DEASON: That's sufficient with me.  
20 I'll second.

21 CHAIRMAN CLARK: There is a motion and second.  
22 All those in favor, say aye.

23 COMMISSIONER DEASON: Aye.

24 COMMISSIONER KIESLING: Aye.

25 CHAIRMAN CLARK: Aye.

1 COMMISSIONER GARCIA: Aye.

2 COMMISSIONER JOHNSON: Aye.

3 CHAIRMAN CLARK: Opposed, nay. The motion passes.

4 MS. JABER: And you want the order to reflect that  
5 you did not make a decision on the legal authority, is  
6 that correct?

7 CHAIRMAN CLARK: That would be correct.

8 That disposes of Issue 3.

9 COMMISSION STAFF: Commissioners, Issue 4 is  
10 Staff's recommendation in light of your vote on  
11 Issues 2 and 3 on the appropriate rates on an ongoing  
12 basis. Staff makes this recommendation based on its  
13 review of the record and the evidence presented  
14 therein. Staff is recommending to modify the  
15 stand-alone rate schedule based on a cap, which is  
16 based on the water and wastewater. This was a previous  
17 recommendation that was made before the Commission in  
18 the last rec.

19 COMMISSIONER DEASON: Let me ask a question.  
20 There was a discussion about some matters that were  
21 stipulated in this rate case, which is a '92 case. And  
22 one of the stipulations, as I recall, was an agreement  
23 that a gallonage rate would not be less than a dollar.

24 COMMISSION STAFF: That is correct. That was one  
25 of the stipulations that was approved prior to making

1 the recommendation.

2 COMMISSIONER DEASON: All parties agreed to that?

3 COMMISSION STAFF: When we looked back at the  
4 record, the way that those rates -- I mean, those  
5 issues were not on appeal. So, those were voted on by  
6 the Commission, and those were never appealed, so that  
7 was one of the issues that we felt that was not at  
8 issue based on the appeal.

9 COMMISSIONER DEASON: My question is very simple.  
10 Did all parties in the docket stipulate to that?

11 MS. CHASE: No, Commissioner, they did not  
12 stipulate. That was just simply an aspect of the  
13 decision that was not on appeal. It was not the  
14 stipulation.

15 COMMISSIONER DEASON: Okay. Well, I misunderstood  
16 the recommendation. I read the recommendation to mean  
17 that all parties stipulated to the rate structure that  
18 no one would have to pay less than -- no one would pay  
19 less than a dollar, and that is not the case at all.  
20 You're just saying that that's not an issue that was  
21 appealed.

22 COMMISSION STAFF: And I apologize. When we  
23 looked back at the order, we picked out the issues that  
24 were not on appeal, and we made our recommendation  
25 based on that. And I apologize for inferencing that it

1 was a stipulation.

2 COMMISSIONER JOHNSON: Could you respond to -- one  
3 of the arguments or statements made by Mr. Twomey was  
4 that he gave that 50 percent of the water customers  
5 will have uniform rates. And of the sewer customers,  
6 94 to 97 percent would have uniform rates. And that,  
7 in fact, this modified stand-alone was really just  
8 uniform rates in drag.

9 COMMISSION STAFF: After reviewing the schedules,  
10 I did concede to those numbers. We are not referring  
11 to them as uniform rate, in the essence, in that we  
12 calculate the revenue requirement per system and then  
13 there is a subsidy based on a cap that was presented at  
14 the record. So, although it appears to be a uniform  
15 rate, those systems have the same rate. So, we do  
16 concede to those numbers, although we don't clarify  
17 them as uniform rates.

18 COMMISSIONER JOHNSON: I'm sorry, I didn't catch  
19 the last part.

20 COMMISSION STAFF: We don't clarify them as  
21 uniform rates in that we don't throw all the revenue  
22 requirements together and then spread them amongst the  
23 systems. We do them on a system-specific basis.

24 COMMISSIONER JOHNSON: Okay.

25 COMMISSIONER DEASON: Well, part of the difficulty

1 I'm having is that while the remand order states that  
2 uniform rates are unlawful, it does not state that  
3 strict stand-alone rates are required. There is a  
4 distinction there. And what we are trying to do, is we  
5 have this remand order, and we are sitting here today  
6 trying to do what we think the Court wants us to do and  
7 what we think is fair, just, and reasonable, given our  
8 statutory requirements and authority from the  
9 Legislature. So, I do not read this order to say that  
10 we have to go to strict stand-alone. Perhaps that's an  
11 option, and perhaps that would be affirmed by the  
12 Court.

13 But my concern is that it's apparent to me from  
14 the remand order that the Court wants us to do  
15 something based upon evidence in the record, which is  
16 something we should be doing anyway. And they've made  
17 the finding that we could not utilize uniform rates,  
18 given the record that we have. But that same concern  
19 that I have expressed with strict stand-alone kind of  
20 goes to your capped rates, as well. You know, we are  
21 sitting here today trying to do what we think is just,  
22 fair, and reasonable, but your proposal certainly  
23 wasn't in the record, either. A variation was in the  
24 record, was it not? Okay. Not exactly what you're  
25 proposing.

1           My question is can we structure rates based upon a  
2           proposal that was in the record? I understand that the  
3           Company made a proposal for some capped rates. Their  
4           caps were much higher than what you're proposing here.  
5           Perhaps that would alleviate some of Mr. Twomey's  
6           concerns because he believes that what you're  
7           recommending here with your capped rates is just  
8           another form of uniform rates, because so many  
9           customers would be paying the same rate. I'm not  
10          necessarily buying into that argument, but,  
11          nevertheless, it's hard to argue against so many  
12          customers paying the same rate and then saying it's not  
13          basically a uniform rate. And, obviously, that  
14          argument has probably been made at the Court at some  
15          time.

16                 Do we have the -- are our prospects of satisfying  
17                 the Court better met by adopting a rate structure that  
18                 was testified to by a competent witness at the hearing  
19                 in this case? And can we structure rates based upon,  
20                 for example, the company's proposed capped rate  
21                 structure at caps which, I believe, were in excess of  
22                 what you're recommending here, and they are in this  
23                 recommendation, but we don't have them right at our  
24                 fingertips. Is that something that we can do? And if  
25                 we could, does it make sense that this is something we

1           should do?

2           MS. JABER: Commissioner, if I may address your  
3 concern by also addressing what Mr. Twomey suggested.  
4 What is not in the record clearly is the notion of  
5 unbundling the systems that had county-wide rates and  
6 maybe even regional rates. There is nothing in the  
7 record that would support that. And I would suggest to  
8 you that you don't even consider that. The evidence in  
9 the record on the modified version of the stand-alone  
10 rates, we have cited to in the record. There is  
11 evidence in the record to support the Cresse proposal.  
12 And I think Mr. Pruitt can help me out, but there is  
13 case law -- there is a case, and I believe it's Bevis,  
14 that suggests that when there are extremes in testimony  
15 on rate structure, the Commission can make adjustments  
16 to that testimony and accept something in between.  
17 That is within your discretion. The only thing that  
18 Staff has done is change the cap, I believe, or what we  
19 have called the target benchmark. What the utility  
20 proposed was a higher benchmark. So, the very proposal  
21 of the Cresse rate is abundant in the record. I went  
22 back and I checked that myself.

23           COMMISSIONER DEASON: But mathematically it would  
24 be true that if you adopted the caps as proposed by the  
25 Company -- and I have found them now. It's a cap of 52

1 for water and 65 for wastewater -- that mathematically  
2 you would have fewer customers paying identical rates  
3 as is contained in your lower cap modified structure?

4 MR. WILLIS: Mathematically, that's correct. I'd  
5 also like to point out that there is testimony in the  
6 record from Staff Witness Williams that points out that  
7 the actual caps presented by the Company are too high.  
8 So, there is evidence to support where Staff came from.  
9 And our recommendation itself, on the caps of \$30 for  
10 water and 43.75 for wastewater, actually was a  
11 recommendation presented to the Commissioners at the  
12 point in time in the 920199 docket when we came before  
13 the Commissioners at that time with that  
14 recommendation. It's nothing new that we dreamed up.  
15 We have gone back and resurrected the second choice at  
16 that point. And we basically have ranked our  
17 recommendations in that order. Since uniform rates,  
18 apparently, are something that the Court says we can't  
19 do in this case, then we have gone back and said,  
20 "Based on the evidence," which is the next best. And  
21 the next best at this point we believe would be Staff's  
22 modified version of the utility's cap. And if you  
23 don't wish to accept that, then we believe it would  
24 have to be the company's version of their capped rate  
25 structure. Other than that, I don't believe there is

1 any evidence in the record that says you ought to go to  
2 stand-alone. There is some evidence from Mr. Jones.  
3 There is about three pages of testimony, I believe,  
4 that I read, went back and reread. There isn't much  
5 there that supports it. He even says that he is not a  
6 rate structure specialist.

7 CHAIRMAN CLARK: Clarify for me. In the record,  
8 who supported the modified version? Did Mr. Williams?  
9 What was his testimony?

10 MR. WILLIS: No, Mr. Williams did not sponsor the  
11 modified version. In cross examination, he was crossed  
12 on the utility's capped rate method, and asked whether  
13 or not he agreed with the method, and his answer to  
14 that was that the method apparently got the utility  
15 closer to a uniform rate in the future. It was a good  
16 step toward that. He agreed with it, but he did not  
17 agree with the size of the cap. The cap was definitely  
18 too high for both water and wastewater.

19 MS. JABER: It was not that a particular witness  
20 sponsored that testimony, at all. It was brought out  
21 through cross examination questions.

22 COMMISSIONER JOHNSON: Let me make sure I clearly  
23 understand something. You're saying that this modified  
24 -- what we are calling modified stand-alone proposal  
25 was, indeed, presented. And at what stages -- you said

1 it was Mr. Cresse, or which one of our witnesses?

2 MR. WILSON: Mr. Cresse was the witness for the  
3 utility that presented the capped rate structure for  
4 the company, which Mr. Deason just pointed out was the  
5 \$52 for water and \$65 cap for wastewater.

6 COMMISSIONER JOHNSON: Okay. I'm still confused,  
7 and I apologize for cutting you off. He was a witness  
8 for the company's proposal?

9 MR. WILLIS: That is correct.

10 COMMISSIONER JOHNSON: Who presented the proposal  
11 that you all are presenting today? How did that --

12 MR. WILLIS: That proposal that we're presenting  
13 today was our version of looking at the testimony in  
14 the record and coming up with our best recommendation  
15 on what you should do with the company's proposal. As  
16 you are aware, in many cases, whether it be rate  
17 structure or other issues, accounting-wise,  
18 engineering-wise, we looked at the actual testimony in  
19 the record and come forward with our best  
20 recommendation on what to do with that. It may be a  
21 blend of witnesses' testimony.

22 COMMISSIONER JOHNSON: Okay, I think I understand.  
23 So, it wasn't something that was affirmatively put  
24 forward, but it was something that could be gleaned  
25 from the testimony that was provided.

1 MR. WILLIS: That's correct.

2 COMMISSIONER JOHNSON: Because I have the same  
3 concern that -- I always want to call him Chairman  
4 Deason -- that Commissioner Deason stated with respect  
5 to was this just another way for us get around and  
6 institute uniform rates when, you know, the Court has  
7 determined that there wasn't, you know, whatever you  
8 want to call it, whether it was sufficient evidence, or  
9 whatever, in the record to do that. But to the extent  
10 that there was record evidence that you all could go  
11 back to and support the analysis and reach this  
12 conclusion of a modified stand-alone rate, then I feel  
13 more comfortable with that.

14 MR. WILLIS: That's correct. The major variance  
15 between what the company proposed and what Staff is  
16 proposing here deals directly with the cap itself.  
17 That is the major difference. And, of course, the  
18 Commission is free, naturally, to make any  
19 determination. You might think the caps ought to be  
20 lower or higher or somewhere in between.

21 COMMISSIONER JOHNSON: One last question. With  
22 respect to stand-alone rates, not modified, but some  
23 form of stand-alone, you're saying that there wouldn't  
24 be enough information for you all to go back to do an  
25 analysis and actually come up with stand-alone, kind of

1 as we know it.

2 MR. WILLIS: Well, Commissioners, the company in  
3 reaching their conclusion for the cap rates actually  
4 unbundled all the uniform rates that were presently in  
5 place. That's how they came up with their capped rate  
6 methodology. Every system was set on a stand-alone  
7 rate, and then each system was individually looked at  
8 to see whether or not they should be capped. So, you  
9 might say the information is there in 199 to make  
10 stand-alone calculations, just because of the  
11 unbundling. Now, stand-alone itself is not looked  
12 at --

13 COMMISSIONER DEASON: Let me interrupt you a  
14 second. I think it's extremely important. But,  
15 likewise, there was no one that testified in that  
16 hearing that the rate should be strictly stand-alone,  
17 totally on a separate system basis. Maybe the  
18 information was there --

19 MR. WILLIS: That's correct. I'm just saying --

20 COMMISSIONER DEASON: -- but it was not testified  
21 to. And there would be a deficiency in doing that,  
22 just like the Court says there's a deficiency in doing  
23 uniform, because they said that you didn't have  
24 sufficient evidence to do the uniform.

25 MR. WILLIS: That's correct, except Mr. Jones did

1 have three pages of testimony which I alluded to before  
2 on a stand-alone. Now, it's true that what I'm  
3 referring to is only that the calculations were made in  
4 the MFRs. There was no testimony except for Mr. Jones'  
5 three pages of testimony that basically said you should  
6 go to stand-alone. The Company -- I imagine that the  
7 very last option you would have would be to leave the  
8 rate structure completely as it was. I don't agree  
9 with that idea or that option. But I think that is  
10 your very last option would be to just go ahead and  
11 leave everything --

12 COMMISSIONER GARCIA: Leaving it would be the  
13 safest, though, wouldn't it? I mean, we wouldn't run  
14 into problems of going back to court on this thing.

15 CHAIRMAN CLARK: I don't think it --

16 MR. WILLIS: Commissioners, I don't think anything  
17 you do here is safe in this. In my opinion, I really  
18 don't. I think if you set strict stand-alone rates,  
19 you're not safe because somebody is not going to like  
20 that decision. If you go ahead and keep things as they  
21 were, the rate structure as they were prior to coming  
22 into that 199 case, they're not going to like that,  
23 either. The utility would probably take that one back  
24 to court.

25 CHAIRMAN CLARK: There was no testimony to support

1 that, just as there was no testimony on --

2 MR. WILLIS: Exactly. I think the safest bet you  
3 have is to go with a version of the capped rates,  
4 either the Staff's method or the utility method,  
5 because I believe those are the best supported in the  
6 record at this point, when you consider that the Court  
7 says uniform rates can't be done. I really think  
8 that's the best leg you have to stand on.

9 MS. JABER: Commissioners, safe is relative. You  
10 have to remember that there are some customers that  
11 regardless of what you do here, will have even a higher  
12 rate than the uniform rate.

13 COMMISSIONER GARCIA: I agree. And there are  
14 some, though, that have been receiving a subsidy.

15 MS. JABER: That's right.

16 COMMISSIONER GARCIA: My question is of safe as if  
17 we're -- maybe I'm jumping ahead, but I think we are  
18 going to look at all of this again very soon.

19 But that said, what I want to try to do is avoid  
20 us being caught with ongoing litigation and move from  
21 here, where I think everything has already been defined  
22 much more clearly and start this process. And from  
23 that point, I think we run into less problems. I think  
24 part of the problem we have been running into with this  
25 case is that there is stuff going on defining what we

1 had already done. And in this case we have that before  
2 us. We have a road laid out for us, which we built,  
3 again, in an order that didn't work. We're out of  
4 sequence.

5 And all I want to try to do is avoid the  
6 perception that we are still going through uniform  
7 rates, because to some degree -- again, I don't have  
8 the benefit of having participated in this docket. I  
9 have read the transcripts and, clearly, I have a good  
10 understanding of what occurred. But it isn't as  
11 specific as some of the Commissioners who were there.  
12 And I think you get a little bit more by participating.  
13 My thinking is that if we were to go back -- and humor  
14 me here -- if we were to go back and go to the rates  
15 that existed before, and then begin this anew.  
16 Clearly, the company would have some very nasty revenue  
17 shortfalls, I would assume. So then we would have to  
18 probably approve some type of interim rates until we  
19 solved either stand-alone rates for each one of these  
20 companies, or went through the uniform process again.  
21 And all I want to get from you is, is that wrong? Is  
22 that calculation wrong?

23 COMMISSIONER DEASON: Well, now, there would be no  
24 revenue deficiency on a going-forward basis. We would  
25 set the revenues at the same revenue requirement. And,

1 of course, the company would then be allowed to include  
2 their indexes and pass-throughs that they've gotten  
3 since this decision. So, they would be getting the  
4 same dollar revenue. It would just be the structure of  
5 the rates that would be different on a going-forward  
6 basis.

7 MR. WILLIS: Going forward. The problem here is  
8 the period in between.

9 COMMISSIONER GARCIA: Right.

10 MS. CHASE: Commissioners, since you have been  
11 discussing Mr. Cresse's proposal, I wanted to point out  
12 one other difference between the Staff proposal and  
13 Mr. Cresse's; and that is, that there was some sharing  
14 of wastewater deficiency over to the water side. So,  
15 you just need to be aware of that, also.

16 CHAIRMAN CLARK: Which is not what you  
17 recommended?

18 MS. CHASE: Right. That was eliminated in the  
19 Staff proposal.

20 CHAIRMAN CLARK: Any other questions,  
21 Commissioners?

22 COMMISSIONER JOHNSON: You know what I need to  
23 have clarified, I'm not clear after all of the  
24 discussion that we have had and some of the questions,  
25 Madam Chair, that you had asked Mr. Twomey as to

1 exactly what they are suggesting that we do with this  
2 issue. What are they recommending, what kind of rate  
3 structure?

4 MS. FOX: I think the basic problem is that in  
5 order to go to the type of caps that the Staff is  
6 talking about, you have to combine the systems for  
7 ratemaking purposes. And that's what the First  
8 District said you shouldn't do. You can't combine the  
9 systems for ratemaking purposes until you find that  
10 they are functionally related. And that was the  
11 deficiency in the prior order. So, you could go back  
12 to the prior rate structure. And I think I can  
13 represent to you that none of the parties to this case  
14 would challenge you if you went to the capped rate  
15 structure that was presented as the Staff alternative  
16 in the prior rate case. And that, essentially, is a  
17 5 percent difference to, I think, the Sugarmill Woods  
18 customers that would alleviate some of the severe  
19 problems and some of the other ones. Now,  
20 intellectually, that still -- you know, maybe it raises  
21 a question on the combining issue, but I can tell you  
22 that I don't think anyone here would appeal that  
23 further if that was what you did.

24 COMMISSIONER KIESLING: I think I'd like to hear  
25 that from Mr. Twomey, also.

1 MS. FOX: Okay.

2 MR. TWOMEY: Yes, ma'am. If I understood what  
3 Mr. Willis said, he said he thought -- I'm not sure  
4 that Ms. Fox has it right, that it's a Staff  
5 alternative necessarily, or the cap, the high cap  
6 testified to by Mr. Ludsen and the Company, the much  
7 higher cap. But there was a high cap testified to in  
8 that case, the first case before you now -- that, as I  
9 understand it and recall, it would not have resulted in  
10 any system's customers as a group paying more than  
11 about 5 percent. Okay. There may have been one that  
12 had about 9 percent, but on average, they were much  
13 less than 5 percent, and they maxed out at about 5.

14 I thought I heard Mr. Willis say that the way that  
15 the Company arrived at that was basically by taking the  
16 stand-alone rates for each system and figuring out  
17 which ones needed to be capped, so that they weren't  
18 viewed as excessive. Okay. Now, if you were to go to  
19 that and go to a system, as I suggested earlier, that  
20 didn't exceed a 5 percent above stand-alone subsidy,  
21 altruism, tax, or whatever you want to call it, above  
22 5 percent, no one that I represent, I think I can say  
23 to you, would appeal that. I think that you have the  
24 authority, by and large, to do something within that  
25 range and have it not constitute undue discrimination.

1           COMMISSIONER DEASON: What would the maximum  
2           subsidy be with the caps as proposed by the Company,  
3           that being \$52 for water and 65 for wastewater? Do we  
4           know what that would be?

5           MS. CHASE: Commissioners, we don't have that  
6           information today.

7           MR. TWOMEY: I think we do, Commissioner.

8           MS. FOX: Yes, we have an analysis of what it  
9           would be under Mr. Cresse's proposed capped rate  
10          structure.

11          COMMISSIONER DEASON: Now, is this with sharing  
12          subsidies between water and wastewater, or is it  
13          nonsubsidies between water and wastewater. As I  
14          understand that's one of the deficiencies Staff has  
15          identified with the Cresse approach.

16          MS. FOX: Could you give us a minute to check on  
17          that?

18          COMMISSIONER DEASON: And let me reiterate. If we  
19          are asking for information here, I'm only asking for  
20          information that is the record in this case. I don't  
21          want to see anything else.

22          COMMISSIONER KIESLING: And I completely agree  
23          with that. I mean, I want to know when we get  
24          information that it does tie back to the record.

25          MS. FOX: This isn't a document that was in

1 920199, but it was a response to a request as to how  
2 you would make that calculation, based on the evidence  
3 in that docket, as I understand it. So --

4 COMMISSIONER KIESLING: Whose response?

5 MS. FOX: The Staff's response to an interrogatory  
6 request in one of the others proceedings as to how you  
7 would make that calculation, based on the MFRs in that  
8 docket number. So that you could see what the effect  
9 would be under that capped rate proposal. And, you  
10 know, without getting -- that's all I can tell you  
11 about the origin of what we have. And we'll have it  
12 copied and passed out, if you want.

13 COMMISSIONER DEASON: Well, let me ask you, you  
14 say it's an interrogatory response, was that  
15 interrogatory response entered into the record in this  
16 proceeding?

17 MS. FOX: I think so. Not in this proceeding, no.  
18 No, it was subsequent, obviously. And it's simply --

19 COMMISSIONER DEASON: I'm sorry, I mean --

20 MS. FOX: -- a compilation of the evidence that --

21 COMMISSIONER DEASON: Well, I'm sorry I can't take  
22 a look at it because I don't want -- we've got to make  
23 the decision based upon the evidence in this case. And  
24 if we have the evidence to make the calculation based  
25 upon the Cresse proposal at his caps, I guess then it

1 would just be a mathematical calculation to determine  
2 what the percentage subsidy is. And I understand the  
3 Staff doesn't have that now, but it's something that, I  
4 guess, could be done over a period of time. And what  
5 period of time, I don't know if it's hours or days or  
6 weeks, but --

7 MR. WILLIS: We may certainly have it, and it may  
8 be back over in the Gunter Building. I'm not quite  
9 sure, but we don't have that information here at this  
10 point.

11 COMMISSIONER KIESLING: Could I just clarify, did  
12 that interrogatory identify the Staff person who was  
13 responsible for it?

14 MS. CHASE: Commissioners, I think I might be of  
15 some help here. I believe that was something that was  
16 done in 930880, not in this docket, but in the rate  
17 structure investigation docket.

18 MS. FOX: It was accomplished and based on  
19 evidence from --

20 COMMISSIONER KIESLING: Well, see I want to hear  
21 that from the person that did it. That's where my  
22 trouble comes in.

23 MS. JABER: Commissioner, without having to look  
24 at the document, and without looking at what we've got  
25 in the other building, I really can't answer your

1 question right now. Maybe this is a good time for a  
2 break or maybe you'd want us to come back.

3 MR. TWOMEY: Madam Chairman, Commissioner  
4 Kiesling, we think, and we are not positive about this,  
5 and perhaps your Staff can make an examination to  
6 determine this -- but we think that the billing  
7 determinants, that this information was made in the  
8 second docket, the investigation docket, that the  
9 billing determinants and all the data was taken from  
10 the first case, we believe, which would mean that, in  
11 fact, it was then taken from the record of the case now  
12 before you.

13 COMMISSIONER DEASON: Commissioners, let me ask  
14 you, what is -- we're on Issue 4, do you want to take a  
15 break or do you want to take a motion on Issue 4?

16 COMMISSIONER DEASON: Well, I'll be glad to share  
17 my thoughts. And I'm inclined to support a capped rate  
18 structure at the caps that were suggested by the  
19 Company through Witness Cresse. Mathematically, there  
20 would be -- that structure would less resemble a  
21 uniform structure than what Staff is recommending with  
22 their lower caps. It's just a mathematical function.  
23 And since those specific caps were testified to in the  
24 record, I think that we would have justification for  
25 using those caps. I understand that Staff thinks those

1 caps are too high, and that there is evidence in the  
2 record from Mr. Williams to justify a lower cap, but he  
3 did not specify a specific lower cap, did he? I don't  
4 think that he did.

5 MR. WILLIS: He did not specify a specific cap.  
6 What he did say was that those rates proposed by the  
7 company, in his opinion, were not fair and reasonable.  
8 And if you were looking for fair and reasonable rates,  
9 they would have to be lower.

10 COMMISSIONER DEASON: Okay. But that's his  
11 opinion.

12 MR. WILLIS: That's correct.

13 COMMISSIONER DEASON: And I regard his opinion  
14 very highly. There is also an opinion from another  
15 witness who I regard very highly, as well, saying that  
16 these are appropriate caps. And at this point, I think  
17 we need to make a decision, get on with this, do  
18 something we do think is just and fair and reasonable,  
19 and, also, is supported in the record. And, obviously,  
20 I think these caps are supported in the record.  
21 Reasonable people can disagree, but I think every  
22 reasonable person would agree that they are supported  
23 in the record.

24 MR. WILLIS: I agree.

25 COMMISSIONER DEASON: And we can go on with this,

1 and using these higher caps, it would less resemble a  
2 uniform structure than that was recommended by Staff  
3 with the lower caps.

4 CHAIRMAN CLARK: Let me ask two questions. Is it  
5 also your motion that we not have any sharing of  
6 revenues between water and wastewater?

7 COMMISSIONER DEASON: Oh, I agree with that. I  
8 think that's a policy, and I think there is evidence in  
9 the record that that should not be done. Mr. Williams  
10 testified to that, is that correct, that there not be  
11 sharing between water and wastewater?

12 MR. WILLIS: That's correct.

13 CHAIRMAN CLARK: Now, one other thing. As I  
14 recall, those caps were based on what the utility had  
15 asked for in terms of the rates and the revenue  
16 requirement, is that right? It wasn't based on what  
17 was ultimately --

18 MR. WILLIS: That's correct. Their caps are based  
19 on having that \$1 million come over from water to  
20 wastewater. And it was the same Mr. Williams, I  
21 believe, who testified that --

22 CHAIRMAN CLARK: You misunderstood my question. I  
23 presume his testimony was based on what they asked for  
24 in revenue requirements. Did we give them everything  
25 they asked for in revenue requirements?

1 MR. WILLIS: No, we did not.

2 CHAIRMAN CLARK: Okay. Have you adjusted the --  
3 is it appropriate to adjust those caps downward to  
4 reflect the fact that they were based on a different  
5 revenue requirement?

6 MR. WILLIS: I don't believe so, Commissioner.

7 CHAIRMAN CLARK: Okay.

8 MR. WILLIS: If you choose -- those caps were set  
9 up to basically reflect what the Commission felt was  
10 the highest reasonable rate to give a customer at  
11 10,000 gallons. That's what Mr. Cresse testified to.  
12 And if you follow through with his testimony and his  
13 idea that that would be the highest reasonable rate,  
14 then even if you lowered the revenue requirement, you  
15 wouldn't lower the cap. It should not have an effect  
16 on the cap.

17 CHAIRMAN CLARK: Okay.

18 COMMISSIONER DEASON: And that's what I would  
19 support, and that's what I'm leaning towards. But, I'm  
20 still open if there are other suggestions from other  
21 Commissioners. And I just simply asked the question if  
22 the calculation had already been done, what was the  
23 maximum subsidy percentage, just more out of curiosity  
24 to see if it satisfied Mr. Twomey's threshold. I would  
25 be ecstatic if it did. If it didn't, I'm not so sure

1           that there is anything more that we can do, given that  
2           this remand does not say, "Go to strict stand-alone  
3           rates." It does not say that. And I think that that  
4           would be a deficiency, as well, because there is no  
5           evidence in the record saying -- with the exception of  
6           three pages from a witness who describes himself as not  
7           a rate structure expert, there is no evidence  
8           indicating that we should utilize a strict stand-alone  
9           rate structure.

10           MR. WILLIS: I agree.

11           CHAIRMAN CLARK: Commissioner Deason, I take it  
12           from your comments that you don't feel that it's  
13           necessary to take a break to get that information.

14           COMMISSIONER DEASON: No. If it was readily  
15           available, I would like to hear it, and it could,  
16           perhaps, stimulate some discussion about maybe doing  
17           something different with these caps. I'm amenable, but  
18           I do have some comfort in setting it at these caps,  
19           because these were specific numbers that were testified  
20           to by an expert witness and there is ample evidence in  
21           the record using these caps.

22           MS. JABER: Commissioners, if you could just give  
23           us two minutes. We're trying to discuss how much time  
24           we need to get you that information. And if --

25           COMMISSIONER DEASON: Well, I'm saying, you know,

1 it would be nice to have it, but it's not essential,  
2 not unless other Commissioners would like to see it.

3 MR. WILLIS: Commissioners, I'm not sure that we  
4 have the information available at this point to  
5 calculate the exact rates using the Cresse cap. At  
6 that point, you not allowing the one million subsidy  
7 from water to wastewater with the new revenue  
8 requirement, that was not an actual proposal that we  
9 came forward with in the 920199. Maybe it would be a  
10 good idea to give us five minutes to group here and see  
11 if we believe we have the information available to do  
12 that, or if we are going to have to ask you to propose  
13 the company, or to order the company to come forward  
14 with those rate calculations for us.

15 COMMISSIONER DEASON: We are not going to reopen  
16 the record. If we have the information to do it based  
17 upon the record, fine. If we don't --

18 MS. JABER: That's not what he is suggesting.

19 MR. WILLIS: You misunderstand me. I'm not  
20 talking about going out of the record. What I'm  
21 talking about is we may not have all the billing  
22 determinants and everything we need to make that  
23 calculation. They are probably there, but the company  
24 is best equipped computer-wise to make those  
25 calculations quicker than we are.



1 differences between Staff's methodology that we  
2 proposed and the Cresse methodology. And I'd like to  
3 just quickly run over what those differences are.

4 I pointed out that the major difference was the  
5 cap itself, the \$52 for the Company versus our cap of  
6 47.50 or 43.75, I believe, and wastewater, also.

7 The other differences that were reflected in our  
8 rate structure were the fact that for both water and  
9 wastewater we had a base-facility charge that was  
10 actually capped on the low end. We looked at the water  
11 system and said that on the base facility charge there  
12 should be no base facility charge less than \$4, which  
13 the Cresse proposal doesn't do. And for wastewater,  
14 the base facility low end was \$8. That there should  
15 not be a base facility charge less than \$8 for the  
16 wastewater systems. And the Cresse proposal did not do  
17 that, either. As was also pointed out in another  
18 discussion, the Staff also eliminated the \$1 million  
19 subsidy, which I believe was also brought up, too.

20 CHAIRMAN CLARK: Between water and wastewater?

21 MR. WILLIS: Right, from water to wastewater.

22 Now, we have gone back and looked to see if we  
23 could find any information available to us to quickly  
24 tell you what that subsidy would be as a term of  
25 percentage or a quick calculation of those rates, and I

1 am here to tell you we cannot do that. We do not have  
2 the information available to quickly do that. It  
3 wasn't calculated back in 1920, basically because  
4 there were several things that it did not take into  
5 account. One, it didn't take into account that the  
6 Commission voted to have a conservation minimum for the  
7 water system for the gallonage charge of one dollar.  
8 That's something we mentioned earlier. It wasn't a  
9 stipulation, but it was a separate vote of the  
10 Commission that didn't deal strictly with the rate  
11 structure itself. The Commission decided for  
12 conservation effects there should not be a gallonage  
13 charge of less than one dollar for any system.  
14 The Cresse proposal --

15 COMMISSIONER DEASON: You're saying that that was  
16 not appealed by any party?

17 MR. WILLIS: That was not appealed. The rate  
18 structure itself was appealed on uniform rates, but not  
19 the idea of having a one dollar minimum gallonage  
20 charge for conservation purposes. That was one thing  
21 the Commission looked at. We had several issues on  
22 conservation. There was testimony taken on  
23 conservation and the need for it and what Commission  
24 should do in this case. And Staff at the time of  
25 bringing that to the Commission, recommended in this

1 case that for conservation purposes there should not be  
2 a gallonage charge in water of less than one dollar.  
3 The Commission agreed with that recommendation. That's  
4 one we do not believe is in -- or actually was not  
5 appealed to the Court as far as rate structure, because  
6 it's not actually in a design for a rate structure. It  
7 actually goes to whether or not you should have a  
8 conservation rate or not. And with that being there,  
9 we actually don't have the ability right now to quickly  
10 turn around a rate structure for you. That would take  
11 reprogramming and a program to actually run the billing  
12 determinants and everything. And to have that checked  
13 out, we are talking a good period of time for 127  
14 systems.

15 COMMISSIONER DEASON: What period of time?

16 MR. WILLIS: We are talking probably about seven  
17 days to run all of this. The original rates were done  
18 by Mr. Berg, and they were actually done by hand.  
19 Believe it or not, they were done by hand. There were  
20 many hours spent by him. If you remember Mr. Berg,  
21 Mr. Berg was not really fond of computers and --

22 COMMISSIONER DEASON: But we do have it on  
23 computer now, do we?

24 MR. WILLIS: We have the ability to put it on  
25 computer right now. At this point it's going to take a

1 while to run the program to do that, plug all the  
2 different factors in, test check the numbers going into  
3 it to make sure it's all right.

4 COMMISSION STAFF: There was one additional, the  
5 utility's proposal had that cap of the wastewater of  
6 10,000, and the Commission voted on the 6,000 cap,  
7 also.

8 MR. WILLIS: That's true.

9 COMMISSION STAFF: One small difference.

10 MR. WILLIS: But the cap isn't an issue in this  
11 proceeding, either.

12 Now, the Company -- as in our position before,  
13 we've recommended that the Company actually make the  
14 calculations at this point and turn those around to us  
15 within seven days, which we think is ultimately fair.

16 COMMISSIONER DEASON: But those calculations would  
17 be based upon evidence that's --

18 MR. WILLIS: That's exactly right.

19 COMMISSIONER DEASON: -- provided in this docket.

20 MR. WILLIS: That's correct. And those  
21 calculations would be determined on factors that you  
22 give the utility today at this agenda.

23 COMMISSIONER KIESLING: Would it also be based on  
24 the two items, or maybe three, that you identified that  
25 were not appealed? One of which was the minimum of a

1 dollar per thousand for water, the minimum of a \$4 base  
2 facility charge and \$8 base facility charge for  
3 wastewater, and the elimination of the cross-subsidy  
4 between water and wastewater? Was there one I missed?

5 MR. WILLIS: At this point, it would only include  
6 the \$1 million subsidy removal, because I believe  
7 somebody indicated that you wouldn't want that to be  
8 done. And you would have to tell the Company you  
9 didn't want that. That's not something that has been  
10 voted on. That is part of the rate structure itself.  
11 As far as the minimums on the base facility charge,  
12 that's something that you would also have to decide if  
13 you wanted them to do that. That is not part of the  
14 Cresse proposal. The only thing it would include would  
15 be the 10,000 gallon cap for wastewater. And it would  
16 also --

17 COMMISSIONER KIESLING: You mean 6,000.

18 MR. WILLIS: 6,000 gallon cap for wastewater,  
19 excuse me. And it would include the one dollar  
20 conservation minimum for water. Those are the only two  
21 factors at this point that the Cresse proposal would  
22 include. You would have to basically tell the Company  
23 -- if you don't desire to have that \$1 million subsidy  
24 from water to wastewater, you would have to tell them  
25 that. If you desire to have minimum caps for base

1 facility charges, you would have to tell them that,  
2 also. Any modification other than including the 6,000  
3 gallon wastewater cap, usage cap, and the one dollar  
4 low end on the gallonage charge for water, you would  
5 have to tell the Company and vote on those changes to  
6 the Cresse proposal.

7 COMMISSIONER KIESLING: Commissioners, I'm in a  
8 quandary. I mean, I don't feel like, even from reading  
9 the record, that I have the information that I need to  
10 make this decision. I don't know how we can do this.

11 COMMISSIONER DEASON: Well, let me ask the  
12 question. Could we decide these issues and have this  
13 calculation made and then brought back to us to look at  
14 those rates, and then make a decision if we think that  
15 is a fair and reasonable rate structure?

16 MS. JABER: What we're talking about,  
17 Commissioner, is when the next agenda is, and whether  
18 or not we can do everything in time to prepare a  
19 recommendation and bring it back to you. And I don't  
20 see why not.

21 COMMISSIONER KIESLING: Okay. I think maybe I  
22 misunderstood what Commissioner Deason said, but I  
23 didn't think that it was to come back with a complete  
24 recommendation. It was we were going to decide today  
25 the parameters that we thought we wanted.

1 MS. JABER: I see.

2 COMMISSIONER KIESLING: And then have you come  
3 back and show us what those rates would be.

4 MS. JABER: I see.

5 COMMISSIONER KIESLING: Because I don't feel like  
6 we can go solely with the Cresse one in that it is  
7 contrary to at least two issues that were decided and  
8 were never appealed for one reason, and the  
9 million-dollar subsidy for another.

10 COMMISSIONER DEASON: Well, I think I've already  
11 indicated at this point, what I'm inclined to endorse,  
12 realizing that the calculation has not been done, and  
13 we don't know what the rates would be, and I think  
14 there should be some type of a final review of those  
15 specific rates to make sure there is not some  
16 abnormality or something that we didn't foresee. But I  
17 would be inclined to go to a capped rate structure, as  
18 endorsed by Witness Cresse, with some changes. That we  
19 would use his proposed caps, which are in excess of the  
20 Staff recommended caps, and that you have that. I  
21 believe it's 52 for water and 65 for wastewater?

22 MR. WILLIS: That's correct.

23 COMMISSIONER DEASON: Okay. That there would not  
24 be a subsidy between water and wastewater, that there  
25 would be a one dollar per 1,000-gallon minimum for

1 water, because that was voted in the previous case, and  
2 that was not appealed. Likewise, the use of a  
3 6,000-gallon cap for wastewater was an issue that was  
4 voted by the -- in the previous decision and that,  
5 likewise, was not appealed. So, with those three  
6 modifications, I'd like to see a rate using the Cresse  
7 approach with those three modifications.

8 CHAIRMAN CLARK: I would like further  
9 clarification. You mentioned something about a base  
10 facilities charge.

11 MR. WILLIS: That's correct. I was talking about  
12 the differences between Staff proposal in this case  
13 versus Cresse's proposal. And in those proposals, we  
14 had recommended a minimum base facility charge in water  
15 of \$4 and a minimum in wastewater of \$8.

16 COMMISSIONER DEASON: That was recommended -- I  
17 know you're recommending that --

18 MR. WILLIS: That was a modification of the  
19 Staff's.

20 COMMISSIONER DEASON: Right. But that was not  
21 voted out before.

22 MR. WILLIS: That's correct.

23 CHAIRMAN CLARK: Okay.

24 COMMISSIONER DEASON: Now, I'm not including that  
25 in my suggestion.

1           CHAIRMAN CLARK:  What you're suggesting, then, is  
2           that rather than vote on Issue 4 at this time, that  
3           Staff get the calculations given with the capped rate  
4           with those parameters?  That's what you're suggesting.

5           COMMISSIONER DEASON:  Well, yes, because I had an  
6           indication, at least from one Commissioner, and perhaps  
7           from two Commissioners, and I would like to see the  
8           rates, too.  But I am at the point to where if to get  
9           this case going and to meet other statutory deadlines,  
10          i.e., interim rates in October, and all of these other  
11          things that are upon us, we have got to make a decision  
12          today.  To me, this is the best approach to take, but  
13          it would be doing it halfway in the blind because we  
14          don't have the final rates calculated.  I would prefer  
15          to see the final rates calculated, and if we have the  
16          luxury of getting that calculation and bringing it back  
17          and not violating some other time requirement in some  
18          other case, so be it.  But if we are going to violate  
19          something somewhere else, I need for Staff to let us  
20          know, and then we'll have to make a decision what we  
21          are going to do.

22          COMMISSIONER KIESLING:  I would like to also,  
23          while you're cogitating on that, let you know that I am  
24          interested in seeing perhaps more than one calculation.  
25          And that would be what it would be under the Cresse

1 caps with what has occurred in the prior case that  
2 wasn't appealed, including the elimination of the  
3 million-dollar cross-subsidy. But I also would like to  
4 know what it would be under, for example, the Cresse --  
5 well, let me ask you this. Is there record evidence to  
6 support the cap that you mentioned on the base facility  
7 charge, or is that just one of those where, you know,  
8 there was evidence on this end and there was evidence  
9 on this end, and it is just somewhere in between?

10 MR. WILLIS: Are you talking about the low end  
11 caps?

12 COMMISSIONER KIESLING: Four and eight, yes.

13 MR. WILLIS: Yes, I believe so. We believe there  
14 was evidence in the record to support that.

15 COMMISSIONER KIESLING: Okay. Then I would like  
16 to also see what that would do to the calculation.

17 MS. JABER: And what I'll also do, Commissioners,  
18 is go back and make sure that there was evidence to  
19 support that, because my memory doesn't serve.

20 COMMISSIONER KIESLING: Yes, I want to know that  
21 there was specific evidence, not just that it falls  
22 somewhere in this nebulous range of where we think we  
23 can do it. I want evidence.

24 MS. JABER: Right. Commissioner, what we were  
25 just talking about was if you don't vote on Issue 4

1 now, and we bring it back to you at the next agenda,  
2 what my concern was the recommendation for interim  
3 would be filed before the next agenda. So, we still  
4 would be in the same problem with knowing what to use  
5 for --

6 COMMISSIONER DEASON: See, I thought that was the  
7 problem.

8 CHAIRMAN CLARK: When is the recommendation on the  
9 interims due?

10 MS. JABER: The agenda is October 6th, so it would  
11 be 12 days before that. I don't have my calendar. The  
12 26th, maybe, yes.

13 UNIDENTIFIED SPEAKER: The 28th, I believe.

14 MS. JABER: I think the agenda is like the 29th.  
15 It could be that the dates are reversed. It could be  
16 that the agenda is the --

17 CHAIRMAN CLARK: No, it's two days in between.

18 MR. WILLIS: The agenda is October 6th.

19 CHAIRMAN CLARK: The agenda is what, the 26th, and  
20 so it's probably due the 28th. Isn't it the Thursday  
21 before?

22 MS. JABER: Right, but we have a special --

23 CHAIRMAN CLARK: We have two days after it's done.

24 MS. JABER: But it's a special agenda, so I don't  
25 know if that rec day falls on a Thursday or not.

1 MR. WILLIS: The interim agenda is on a special  
2 agenda on October 6th, so we have to back up ten days.  
3 And I think the due date is on a Friday. I don't have  
4 a calendar before me.

5 CHAIRMAN CLARK: So, would it be Friday the 29th?  
6 No.

7 MR. WILLIS: I think it's the 29th. To me it  
8 rings a bell that September 29th is the due date.

9 COMMISSIONER KIESLING: Let me tell you one of my  
10 concerns. I mean, I understand that the Company made  
11 their filing in the current rate case when they did.  
12 But I am not going to feel comfortable making a  
13 decision in this case that we have before us right now  
14 on rates just so that we can meet a deadline on  
15 interim. I mean, that, to me, means the Company is  
16 driving our decisions and not us. And I have to feel  
17 sure that there is evidence to support a decision, and  
18 that, you know, the possibilities have been explored.  
19 So, you know, in some ways I'm mindful that there is  
20 this interim decision out there somewhere, but I'm not  
21 willing to have that force me into a decision  
22 prematurely without all the information here.

23 MS. JABER: Right. This is a good opportunity to  
24 address your concerns earlier about interim. What we  
25 were going to say to you is we do have options in

1 deciding what to do with the interim. We could give  
2 them something with the understanding that whatever  
3 happens may warrant a refund, or we could deny interim  
4 on the basis that what the utility has filed doesn't  
5 allow the Commission to make a decision on interim.

6 CHAIRMAN CLARK: Well, I think Commissioner  
7 Kiesling is right. I think we need to get this  
8 satisfied and be sure that the rates that we think are  
9 appropriate on a going-forward basis are rates that we  
10 think are supported in this case. And I think if I  
11 understand correctly what Commissioner Deason and  
12 Commissioner Kiesling are indicating, they would like  
13 to defer Item 4 until the next agenda, and they would  
14 like to have calculation of rates based on the  
15 parameters given. And as I understand it, the  
16 difference between what Commission Deason would like to  
17 see and what Commission Kiesling would like to see has  
18 to do with another variation to the rate calculation.  
19 What she would like to see done is that there would be  
20 a minute of a \$4 base facility charge for water and an  
21 \$8 base facility charge for wastewater. And that is  
22 the two things that we would like to see presented at  
23 the next agenda.

24 COMMISSIONER KIESLING: And that is because the  
25 calculations that we have in here based on Staff's

1 proposal at this time includes that, and I would like  
2 to see what that number is compared to the Cresse caps.

3 CHAIRMAN CLARK: But as I understand it, the caps  
4 will be those recommended by Witness Cresse.

5 MR. WILLIS: That's correct.

6 CHAIRMAN CLARK: Okay.

7 MR. WILLIS: We can have those calculations in  
8 probably a week. The reason why I said that we would  
9 like to have the Company prepare those calculations is  
10 they are going to have to after this case is decided in  
11 199, turn it around and make those calculations again,  
12 including the indexes that have occurred since, the  
13 change that took place in the 880 docket, because of  
14 the Hernando County bulk rate, and, also, they are  
15 going to have to supply the end calculations as of the  
16 present day with all that taking effect, so they can be  
17 used for interim. And that was my ulterior motive for  
18 having the Company supply those calculations, as well.

19 CHAIRMAN CLARK: Do you want clarification from us  
20 directing the Company to make those calculations with  
21 those parameters and that you would review them?

22 MR. WILLIS: I think it would be easier for them  
23 to make those calculations at this point, because they  
24 are going to have to make them anyway. And we can  
25 review those things, review the calculations

1 themselves.

2 CHAIRMAN CLARK: Can you can make those  
3 calculations?

4 MR. WILLIS: Yes, we can.

5 CHAIRMAN CLARK: Okay.

6 MR. WILLIS: We can make the calculations probably  
7 about the same time the Company can.

8 CHAIRMAN CLARK: I think I would be more  
9 comfortable you having made them with the request that  
10 they sort of do it themselves, and then it's a sanity  
11 check. But I would like to know that our Staff has  
12 done it.

13 COMMISSIONER KIESLING: I mean, that's my view,  
14 too, because at least we know if we input the  
15 information into our computer system, we will be  
16 inputting information that is based on the record from  
17 199.

18 MR. WILLIS: Correct.

19 COMMISSIONER KIESLING: And I'm not suggesting the  
20 Company would do otherwise, but it would avoid there  
21 having to be another whole check behind the Company to  
22 make sure that we verify every one of their variables.

23 MR. WILLIS: That's fine. We can do that.

24 CHAIRMAN CLARK: Is there a motion?

25 COMMISSIONER DEASON: Well, let me just -- I'm not

1           opposed to getting the information Commission Kiesling  
2           is also seeking, just so we are sure what we are  
3           getting. Is that if you'll look, if you have the \$4  
4           minimum base facility on water and a dollar minimum on  
5           gallonage, you've already got most of -- that's already  
6           the top rate for most of the subsidy that's already  
7           being created under Staff's recommended cap of \$30 for  
8           water. If you'll look at certain systems like Silver  
9           Lake Estates, that has a subsidy of \$133,000, they are  
10          already at four and one dollar. Spring Hill Utilities,  
11          a subsidy of \$330,000, they are already at four and  
12          one. Sugarmill Woods, a subsidy of \$128,000, they are  
13          already at four and one. So, I'm not so sure we are  
14          going to see a big difference, maybe not, I don't know.  
15          But I'm not opposed to getting the information. It's  
16          just going to be a lot of calculations.

17                 MR. WILLIS: There may not be a big difference.

18                 CHAIRMAN CLARK: Okay. Is there a motion?

19                 COMMISSIONER DEASON: I would move that we  
20                 basically defer a decision on Issue 4, and that we get  
21                 additional specific rate structure calculation based  
22                 upon two different scenarios. And I'm basically  
23                 incorporating what Commissioner Kiesling is seeking.  
24                 One rate scenario would be capped rates at \$52 for  
25                 water and 65 for wastewater with no subsidy between

1 water and wastewater, with a one dollar per 1,000  
2 gallon minimum for water as the gallonage rate, and a  
3 6,000-gallon cap for the wastewater calculation. That  
4 would be one scenario. The second scenario would be  
5 like the first, but it would also include a base  
6 facility charge low end cap of \$4 for water and \$8 for  
7 wastewater. Is that clear?

8 CHAIRMAN CLARK: Is that a motion?

9 COMMISSIONER KIESLING: I think that was one.

10 COMMISSIONER DEASON: And does the Staff -- I  
11 mean, does the Company understand that? Because, as I  
12 understand it, our Staff is going to make that  
13 calculation, but there is also going to be -- there is  
14 not going to be a request to have the Company provide  
15 that?

16 MS. JABER: No, I think what we were talking about  
17 is they are going to have to do it eventually, anyway.

18 COMMISSIONER DEASON: All right. As long as our  
19 Staff understands, that's the motion.

20 CHAIRMAN CLARK: There is no prohibition that they  
21 make it themselves, but you're --

22 MR. WILLIS: No, there is no prohibition.

23 CHAIRMAN CLARK: There's a motion.

24 MS. FOX: I have an objection I need to place on  
25 the record, if you'd give me leave to do that.

1           CHAIRMAN CLARK: Well, I guess I'm confused. I've  
2 given you the opportunity to address these items. We  
3 are in the posture of taking a vote. I mean, I don't  
4 know what procedurally --

5           MS. FOX: It just concerns the one dollar  
6 gallonage charge, which has just come up in this  
7 discussion, and I've been sitting here for quite  
8 sometime waiting to have the opportunity to do this.

9           COMMISSIONER DEASON: Well, Chairman Clark, let me  
10 say this. It's a question that I had. That's why when  
11 this whole initial discussion started, I raised the  
12 question about whether it was a stipulation that all  
13 parties signed off to or exactly the nature of it. And  
14 we are so deep into this already, if a party has  
15 something to add, I would like to have it clarified now  
16 instead of it being subject to some future litigation.

17           CHAIRMAN CLARK: Go ahead and clarify, Ms. Fox.

18           MS. FOX: It will only take a few seconds.

19           There shouldn't be an inference here that the  
20 parties either agreed to or didn't object to the caps.  
21 They simply weren't relevant to your decision, because  
22 the rates that were adopted were in excess of those.  
23 And, you know, I think you can go back and look at  
24 that, but it would be erroneous to proceed on the  
25 assumption that those are a given and that those

1 wouldn't be the subject of further -- in other words,  
2 Sugarmill Woods did not agree to those caps. None of  
3 the parties that appealed, the one dollar gallonage --

4 CHAIRMAN CLARK: I think that was clarified, that  
5 they said that there was no stipulation on that, that  
6 it simply was not appealed.

7 MS. FOX: And I think the inference that it wasn't  
8 appealed is erroneous in the sense that we did appeal  
9 the rates that were adopted. These weren't adopted,  
10 and the gallonage charges that were adopted were in  
11 excess of these. So, it was a moot point. I mean, we  
12 couldn't have appealed it.

13 MR. TWOMEY: And the shame of it is, Madam  
14 Chairman, is I think we were very close to an agreement  
15 whereby that Commission Deason's motion without the  
16 dollar cap would have been something that everybody  
17 could have lived with. Whereas, with the inclusion of  
18 it, notwithstanding the fact that we didn't agree to it  
19 and didn't even think of appealing it could throw  
20 things out.

21 COMMISSIONER DEASON: Are you saying that you  
22 think it was subsumed within the appeal on uniform  
23 rates, and it wasn't specifically addressed because by  
24 uniform rates all of the uniform rate was in excess of  
25 one dollar per 1,000 gallons?

1 MR. TWOMEY: Yes, sir. Yes, sir, they are so much  
2 higher that it wasn't a material issue.

3 COMMISSIONER DEASON: But, see, what I'm having my  
4 Staff telling me is that the nature of that decision at  
5 that time was it was a dollar per 1,000 gallons that  
6 was established not for any type of uniform versus  
7 stand-alone rate structure debate, but for conservation  
8 purposes. And that was a finding by that panel. That  
9 decision was not -- that specific decision was not  
10 appealed based upon conservation purposes. And now  
11 you're asking me to second-guess a decision that was  
12 made by that panel based upon the record that was taken  
13 at that time. And I think I assumed there was evidence  
14 in the record that it was good to do that for  
15 conservation purposes, and I just can't second-guess  
16 that.

17 MR. TWOMEY: Well, I'm not asking you to  
18 second-guess. What I'm suggesting to you is that I  
19 don't recall how much evidence there was in the record  
20 to support the dollar. My recollection, although it's  
21 limited, is there was about as much evidence, competent  
22 substantial evidence to support the dollar notion as  
23 there was to support the uniform rates. But that's not  
24 my point. My point is that unless the Company is  
25 locked into this dollar business for some reason, which

1 they shouldn't be because they can -- we are willing to  
2 see them get their revenue, every penny of it that you  
3 authorized them two years ago through a modified cap  
4 type arrangement. Not the Staff's, but Mr. Cresse's,  
5 as modified by most of what your motion was. I'm  
6 saying I think we are ready to say we don't care about  
7 the dollar stuff; we want it out. If the Company is  
8 opposed to it and is agreeable to doing that, and  
9 nobody else cares, I'm suggesting to you let's examine  
10 trying to cut a deal somehow and not have it trip up on  
11 some dollar thing that is not of really any  
12 significance.

13 COMMISSIONER DEASON: Well, let me ask, I know we  
14 are on a short time frame, but there is nothing that  
15 prevents the parties, the two principal litigants here  
16 to get together and present a stipulation to resolve  
17 this issue, is there? And we could take that up.

18 CHAIRMAN CLARK: I was thinking the same thing. I  
19 mean, I think that's still available.

20 MR. TWOMEY: Well, we are always for that,  
21 certainly.

22 COMMISSIONER DEASON: Right now, I feel like a  
23 decision was made. I assume it was based upon  
24 competent evidence. And that decision for a dollar was  
25 made for conservation purposes, as I understand, and

1 didn't have anything to do with uniform versus  
2 stand-alone. And the nature of the appeal was uniform  
3 rates.

4 MS. JABER: Commissioner, can I offer this? Why  
5 don't you in the process of giving us the time to  
6 calculate the rates, let me go back and check what that  
7 dollar was for exactly, and even offer the calculation  
8 without the dollar included. So, that would make three  
9 calculations.

10 COMMISSIONER KIESLING: That sounds good to me.

11 COMMISSIONER DEASON: What are you going to be  
12 doing on your Saturdays and Sundays?

13 MS. JABER: What I do now.

14 COMMISSIONER DEASON: Okay. I'm certainly  
15 agreeable to getting that third calculation, because as  
16 I indicated earlier, most of the entities or systems  
17 that are contributing the most subsidy are already at  
18 the \$4 and the \$1 anyway.

19 CHAIRMAN CLARK: Okay.

20 MR. TWOMEY: Thank you.

21 CHAIRMAN CLARK: Now, there has been a motion and  
22 a second. All those in favor say aye.

23 COMMISSIONER KIESLING: Aye.

24 CHAIRMAN CLARK: Aye.

25 COMMISSIONER DEASON: Aye.

1 COMMISSIONER JOHNSON: Aye.

2 COMMISSIONER GARCIA: Aye.

3 CHAIRMAN CLARK: Opposed, nay.

4 Issue Number 5.

5 MS. CHASE: Commissioners, Issue Number 5 has to  
6 do with whether or not there should be a refund now  
7 that the rate structure is going to be changed. Their  
8 primary recommendation is that no refunds are  
9 appropriate because the revenue requirements was not at  
10 issue. There is an alternative recommendation  
11 supported by Mr. Smith, who is here to defend that,  
12 that a refund is appropriate from the inception of the  
13 uniform rate up to the date of the order in Docket  
14 930880. I think it probably would be good just to  
15 simply give you the options that you have here. And  
16 they are, number one, that you could refund to those  
17 customer that paid too much and back bill those that  
18 have underpaid under the uniform rate structure. Now,  
19 again, we don't know the amount of the refund until we  
20 know the final rates. But in all of these there will  
21 be some that are going to have paid too much and some  
22 that would have paid too little.

23 COMMISSIONER KIESLING: How can we back bill?

24 MS. CHASE: We have always heard that that was not  
25 a feasible way to go, where it was retroactive

1           ratemaking. However, in Mr. Pruitt's memo, he does say  
2           that it is his opinion that SSU should be allowed to  
3           recover from customers who paid less under the uniform  
4           rate structure than they would have paid under the old  
5           stand-alone. We are not recommending that, but -- we  
6           don't think it's really a feasible option, but that is  
7           an option that you have out there.

8           COMMISSIONER JOHNSON: It's a legally -- it's a  
9           viable option. Legally, we can do that. Is that what  
10          you're saying?

11          MS. JABER: Well, there is a difference of  
12          opinion. My recommendation initially was that you  
13          should not order the Company to back bill. You  
14          shouldn't allow them to back bill. I think Mr. Hoffman  
15          even acknowledged that in his presentation. But Mr.  
16          Pruitt's memo does suggest than you can back bill.  
17          There is no authority cited for it.

18          COMMISSIONER JOHNSON: Is there any authority  
19          cited for the proposition that we can't?

20          MS. JABER: Well, retroactive ratemaking is the  
21          theory that you can't go back and apply a new rate to  
22          prior consumption. And to allow the utility to bill  
23          customers a new rate for consumption that they had fits  
24          within the definition. And I think that Mr. Hoffman is  
25          absolutely correct, the cases don't make a distinction

1           between decreases or increases.

2           COMMISSIONER JOHNSON: So, you're saying we  
3           couldn't do it either way.

4           MS. JABER: I don't think so.

5           COMMISSIONER DEASON: Well, we declined to do it  
6           in the GTE case, did we not?

7           MS. JABER: I think you did. Yes, you made that  
8           decision on a going-forward basis.

9           COMMISSIONER GARCIA: How does the Company recover  
10          its expenses?

11          MS. JABER: It doesn't. That's the problem we  
12          have, and that's why we're recommending that a refund  
13          isn't appropriate, either. If you're going to keep a  
14          balance, you shouldn't let them refund and you  
15          shouldn't allow them to back bill. What Ms. Chase, I  
16          think, is suggesting is if you make them refund, you  
17          should let them back bill.

18          MS. CHASE: Actually, all I was trying to do was  
19          list your options. And that has been mentioned as an  
20          option, refund those and back bill others.

21          The other option, of course, is to refund those  
22          that have overpaid. And you have heard arguments  
23          today, that that would be taking away revenue that was  
24          not at issue and that the Commission did grant the  
25          utility. There are arguments there that that would be

1           confiscatory to the utility.

2           The other option that we are recommending as a  
3           primary is that there be no refund, that you're  
4           changing the rate structure on a going-forward basis  
5           and you leave the Company whole that way.

6           We heard some discussion this morning, I think  
7           from the bench, that perhaps there is another option  
8           which is to ask the Court for clarification on what  
9           they really wanted or meant on this issue.

10           COMMISSIONER KIESLING: I didn't raise that in  
11           connection with this. I raised it in connection with  
12           whether we could reopen the record.

13           MS. CHASE: Okay. I'm sorry. I think, anyway,  
14           those are your options, at least the three. And the  
15           primary recommendation is that there be no refund.

16           I think Mr. Smith would probably like to comment  
17           on the alternative recommendation.

18           MR. SMITH: Yes. The alternative recommendation is  
19           simply that the Court determined that that rate order  
20           establishing uniform rates was invalid from the  
21           beginning; therefore, you didn't have a valid rate in  
22           effect. The normal process or the normal way of  
23           viewing that situation is that the rates revert back,  
24           during that interim period, to the rates that were  
25           lawfully approved prior to the issuance of the invalid

1 order. And based on the --

2 CHAIRMAN CLARK: What about the revenue  
3 requirement? The rates prior to that order --

4 MR. SMITH: The revenue requirement would stay the  
5 same. And that raises a difficult question. If you  
6 have a revenue requirement which is unchallenged and  
7 remains the same, does the fact that you have a change  
8 in the rate structure amount to retroactive ratemaking?  
9 In my opinion, changing the rate structure would also  
10 amount to retroactive ratemaking for the simple reason  
11 that if you're charging customers a certain rate based  
12 on a certain rate structure, then after a decision by  
13 the Court declaring that invalid, you say, "Well, we've  
14 decided that another rate structure should have been in  
15 effect during that interim period; therefore, we are  
16 going to charge you different rates based on that."  
17 Now, the revenue requirement might be the same, but  
18 you're asking people to pay, effectively, different  
19 rates during that interim period. And I think that is  
20 retroactive ratemaking.

21 MR. PRUITT: Madam Chairman.

22 CHAIRMAN CLARK: Yes, Mr. Pruitt.

23 MR. PRUITT: I have to defend my little  
24 recommendation a little bit. Somebody said that I  
25 didn't have any authority to say that the --

1           CHAIRMAN CLARK: We would like to hear the  
2 authority.

3           MR. PRUITT: All right. It is universally held  
4 that a public utility or common carrier is not only  
5 permitted, but is required to collect undercharges from  
6 established rates whether they result from its own  
7 negligence or even from a specific contractual  
8 undertaking to charge a lower rate. That's a Florida  
9 case, Third District Court of Appeal, Corporation  
10 Degestiance, STE, whatever that means, Foy versus  
11 Florida Power and Light Company, 385 So.2d 124, 1980.

12           CHAIRMAN CLARK: Mr. Pruitt, let me ask you the  
13 question. Did that have to do with when the filed  
14 rates were say \$100 per thousand kilowatt hours, and  
15 for some reason they were mistakenly charging 95, but  
16 the rate said 100, they could go back and get that?  
17 Does that apply when the filed rate said 100, they were  
18 collecting 100, but later on the courts have said that  
19 that's the wrong rate?

20           MR. PRUITT: You gave me two examples. I don't  
21 think I followed one of them.

22           CHAIRMAN CLARK: Give me more background on that  
23 FP&L case.

24           MR. PRUITT: Well, I don't have the case with me.  
25 I can get it right quick, but I don't have it with me,

1 and I don't recall the factual circumstances.

2 CHAIRMAN CLARK: All right. Maybe you can give it  
3 to me later.

4 COMMISSIONER JOHNSON: Commissioners, I have a  
5 problem on this one. Reading the Staff recommendation,  
6 I know that they, at least the primary, summarized the  
7 discussion that occurred between, then Chairman Deason  
8 and now Chairman Clark and myself with respect to how  
9 we would handle this issue. And my recollection is  
10 similar to Mr. Twomey's recollection. And that  
11 certainly I thought that we did discuss the refund  
12 issue. And in my mind, I interpreted Staff to state  
13 that we did have the ability to require these refunds.  
14 And I read back over the transcript, and it was just  
15 refreshing my recollection, and I distinctly recall  
16 that the Company at that point in time, after Chairman  
17 Deason stated, "Well, this risk is going to be on the  
18 Company," the Company kind of emphatically said, "No,  
19 no, no, we don't want to bear that risk." And we asked  
20 Staff again, "Well, you know, can we require this type  
21 of refund to occur?" And I thought that the answer was  
22 yes, and that is where I found some comfort, so that if  
23 we did get to this point, that we would, indeed, be in  
24 a position and that we had the legal authority to then  
25 go back and say, "Well, we were wrong, now let's go

1 back and refund that money." And the problem that I  
2 have now is that now I'm hearing that we don't have the  
3 legal authority to do that. And I don't know what we  
4 can do, because at this point in time when we made this  
5 decision, I was under the impression that we had the  
6 authority to go back and require these refunds. And,  
7 in fact, when we stated -- I remember saying, "Oh, no.  
8 I know what the Company thinks, but I've been assured  
9 by Staff that we do have this authority." And perhaps  
10 we should see that in the order. And by doing that, I  
11 thought, well, if the Company disagrees, maybe they can  
12 appeal that order or maybe they can bring that up, ask  
13 for reconsideration or something, and that never  
14 happened. So, I felt that there was some degree of  
15 comfort. And now I feel very uncomfortable with where  
16 we are going and the position that we are in. And I  
17 simply -- I just don't have the answer. And I wanted  
18 to see if perhaps -- that's why I went to the issue of  
19 what can we legally do? And I know Mr. Pruitt is  
20 saying that we can. Indeed, we have the authority to  
21 require refunds on both sides, those that get refunds  
22 and those that actually will have to be back billed.  
23 And I wanted to pursue that, and for us to reach some  
24 conclusion as to what our legal authority was.

25 MS. JABER: Let me try and -- I understand the

1           confusion. A first reading of transcript, especially  
2           when you have different people giving you the excerpts  
3           of the transcripts that is appropriate for their  
4           position, you understand why there is confusion. The  
5           transcript that we've attached to the recommendation is  
6           the entire transcript related to that very issue.

7           When I went back and I read that entire  
8           transcript, it is clear that Mr. Hill did say a refund  
9           would be required. It is clear that the utility said a  
10          refund would not be required. And let me tell you  
11          where they were each coming from. The utility has  
12          always maintained a refund wasn't going to be necessary  
13          because they were under the impression that revenue  
14          requirement was not going to be appealed. What I think  
15          Mr. Hill was saying, not that it matters, because Staff  
16          isn't the one that makes the decision, it's the  
17          Commission. What he was trying to say was if revenue  
18          requirement does get appealed, and revenue requirement  
19          does get overturned, there will be a refund that's  
20          generated. It's the difference in the revenue  
21          requirement that is going to create a refund.

22          Now, what Commissioner Clark and then Chairman  
23          Deason recognized was that it would be the difference  
24          of the revenues, and I think that's clear in the  
25          transcript.

1           What the utility is also saying to you today is  
2           that to make them refund would be a taking of their  
3           property, and I understand that view, as well. They  
4           are afforded an opportunity to earn a fair rate of  
5           return. If you make them refund, then they really  
6           haven't earned their fair rate of return anymore.

7           COMMISSIONER JOHNSON: Unless you also allow them  
8           to back bill.

9           MS. JABER: Unless you allow them to back bill.  
10          Now, I will say here today and tell you that I don't  
11          think you should let them back bill. But by the same  
12          time, to keep an equal balance, you shouldn't let them  
13          refund.

14          CHAIRMAN CLARK: Let me ask a question. Was there  
15          any thought given to creating a regulatory asset for  
16          the monies that were not collected? And that over time  
17          it would be collected from the appropriate people? Is  
18          that an option? I mean, I'm concerned about going back  
19          and rebilling for that consumption. I don't think we  
20          should do that. I think we should refund, but I also  
21          think we should seek a way to recognize that they are  
22          entitled to earn that amount, and haven't we created  
23          regulatory assets for other purposes?

24          MR. WILLIS: We have created regulatory assets for  
25          other purposes. This would be very unique as a

1 regulatory asset. It would be basically creating an  
2 asset for revenue that we were -- actually, earnings  
3 that we were removing from the Company and requiring to  
4 be refunded. I would have to go back and research that  
5 one. You know, there is a point in time where the FASB  
6 opinions state that certain regulatory -- you know, you  
7 can only go so far in making regulatory assets, that  
8 the Commission isn't free just to make regulatory  
9 assets at free will.

10 CHAIRMAN CLARK: Well, here is my concern. I  
11 think the reason you don't allow retroactive ratemaking  
12 is so people can make the choice. They know how much  
13 it's going to cost them, and they can regulate their  
14 consumption based on that. And that is my concern with  
15 going back and billing them for it. There is no  
16 opportunity for them to regulate their consumption.  
17 But if you create a regulatory asset and recover it  
18 over time, they can regulate their consumption. And I  
19 agree with the notion that it's sort of an  
20 out-of-period expense, but don't we do that when we  
21 have an underrecovery with respect to depreciation? We  
22 have allowed recovery.

23 MR. WILLIS: That's true.

24 CHAIRMAN CLARK: And there are some inequities in  
25 the system as it is.

1           MR. WILLIS: The other thing in creating a  
2 regulatory asset is if you do that, and you properly  
3 apply it, you're going to be having everyone in the  
4 system paying for recovery of that regulatory asset,  
5 uniformly. I mean, everyone is going to get a piece of  
6 it through an allocation. So, you're back to giving it  
7 back to those customers that you took it away from or  
8 you're taking it away from the customers you're getting  
9 it back from, partially.

10           COMMISSIONER GARCIA: Well, that's what happened  
11 with this whole case, isn't it? I mean, the cost of  
12 litigating this to this point and everything that has  
13 gone on is clearly going to be passed on to all the  
14 customers at one point or another, correct?

15           MR. WILLIS: At one point, but if you actually  
16 make refunds on one side and don't collect on the other  
17 side, and allow for no recovery, they will not get that  
18 money. You have actually put the Company into an  
19 underearnings posture at that point and have not  
20 allowed them a fair rate of return.

21           COMMISSIONER DEASON: I think we need to go back,  
22 and we were having this discussion at the time that  
23 there was a motion to vacate the stay. And my  
24 recollection is more akin to that of Commissioner  
25 Johnson, and that's why I asked the questions that I

1 did. I wanted to understand specifically what the  
2 Company's position was, because they were the ones that  
3 were seeking the vacation of the stay. And it took  
4 several attempts, but I think it finally became clear  
5 that they were saying that they were not -- it's their  
6 opinion that they would not be subject to make specific  
7 customers whole, i.e., those customers who paid more  
8 under the uniform rate, if uniform rates were found to  
9 be inappropriate. That they didn't feel like they  
10 would have go to back and refund to those specific  
11 customers, that their only liability was on a company  
12 whole basis and a customer base basis; that is, only if  
13 revenue requirements were to change. And that being  
14 the case, that's why I voted in the minority to not  
15 grant their motion to vacate the stay. I said that we  
16 needed to keep the status quo, because they were on the  
17 record saying they were not willing to accept that  
18 risk. And I was not willing to put that risk upon  
19 them, but that was not the decision. The decision was  
20 to vacate the stay. With that decision being made, I  
21 agreed with Commissioner Johnson that there was a  
22 representation that the Company would be at risk. And  
23 I think the Company realized fully, even though they  
24 didn't think -- they were saying they are not at risk,  
25 they realized that this Commission had question and

1 concern about that and felt like there would be  
2 potentially -- one day, that they may have to address a  
3 court decision which would find uniform rates to be  
4 inappropriate. And that they made the decision by  
5 implementing uniform rates, in my opinion, to accept  
6 that risk. And they may have felt that the day would  
7 never come that they would have to face it. Maybe they  
8 were confident that uniform rates were going to be  
9 upheld. But they were wrong. They took that risk,  
10 they implemented the rates, the Court made its  
11 decision, the Court said it was wrong. They are at  
12 risk. And I, for one, am not going to vote to  
13 retroactively bill customers who have base consumption  
14 upon -- their consumption based upon rates that were  
15 adequately noticed to them. And I am not going to vote  
16 to not refund money to customers who appealed this  
17 case, and I thought -- and it was represented to them  
18 that they were being protected. And that may be unfair  
19 to the Company, but I think that the Company is not  
20 blameless in this, that they fully understood what the  
21 potential consequences were. And I tried to fully  
22 explore that with them. And I think that they are  
23 partly to blame for the situation that they find  
24 themselves in at this time.

25 CHAIRMAN CLARK: I was just going to say,

1 Commissioner, that that's consistent with what was put  
2 in the order. I mean, if you look at Page 31, what  
3 Commission Deason has said is what is in the order.

4 COMMISSIONER JOHNSON: And even during that agenda  
5 conference and that discussion, one of the things that  
6 we stated after Staff made their presentation, we  
7 stated that that language needed to be in the order, so  
8 that the Company -- so that if they needed to appeal,  
9 then they could appeal that, if they needed a  
10 reconsideration of that. But it was clear in my mind  
11 that they would be in position where they would be  
12 required to refund those customers. And I thought it  
13 was clear in the transcript and maybe not as clear it  
14 should have been in the order, but I thought it was --  
15 it put the Company on notice in the order.

16 COMMISSIONER KIESLING: Well, let me throw in my  
17 two cents here. Since I wasn't a part of that  
18 decision, and Commissioner Garcia was not, all I had to  
19 go back to was to read the transcripts and then the  
20 order that came out of it. And having read those, I  
21 came to the conclusion that what I thought was the most  
22 logical reading of them is consistent with what  
23 Commissioner Deason just said. I did not have the  
24 understanding that -- well, I don't understand the  
25 transcript and the order the way the others are reading

1           it. I just don't understand it that way. I mean, my  
2           reading of it was that there would be a refund, and  
3           that there would not be back billing. And the purpose  
4           of the bond was to hold the general body of ratepayers  
5           harmless for that. And I think it says it right here.

6           CHAIRMAN CLARK: And the order makes it clear,  
7           that, "Since the utility has implemented a final rates  
8           and asked to have the stay lifted, we find the utility  
9           has made the choice to bear the risk of loss that may  
10          be associated with implementing the final rates pending  
11          the resolution of appeal." I mean, that's consistent  
12          with what I thought came out of that agenda conference,  
13          notwithstanding the fact that Commissioner Deason  
14          disagreed. My feeling was we needed the bond to  
15          address the fact that some people may be due refunds.

16          COMMISSIONER DEASON: Well, let me make it clear.  
17          I dissented not because of the wording in that order.  
18          I think the Company did put themselves at risk. I was  
19          not willing to grant them -- they were the petitioning  
20          party wanting the stay, but they were not willing to  
21          step forward and say, "We are going to make everybody  
22          whole, customer specific." And if they weren't willing  
23          to say that, I was not going to vote to grant them the  
24          stay that they were seeking.

25          CHAIRMAN CLARK: And I voted that way because I

1 felt that by asking for the stay, they put themselves  
2 at risk. That was what Staff put in the order, which  
3 was consistent with what was said. We may find out if  
4 we were wrong. But my recollection is consistent with  
5 what Commissioner Johnson has just stated, is that the  
6 reason for having the bond was that there was some risk  
7 that refunds needed to be made to some customers.

8 COMMISSIONER DEASON: Well, if there is no further --

9 CHAIRMAN CLARK: And they started the paragraph,  
10 "We are concerned the utility may not be afforded the  
11 statutory opportunity to earn the fair rate of return."  
12 By that phrase we were specifically addressing the  
13 notion that having to refund part of the rates will  
14 affect the rate of return.

15 COMMISSIONER JOHNSON: Absolutely.

16 COMMISSIONER DEASON: Let me ask this question  
17 before we dispose of this issue. If there is to be a  
18 refund; that is, if the Commission votes to support the  
19 alternative recommendation on Issue 5, on what basis is  
20 a refund to be calculated?

21 MS. CHASE: The refund would be under the rates as  
22 you're going to approve them at the next agenda and the  
23 uniform rate.

24 COMMISSIONER DEASON: That difference --

25 MS. CHASE: That difference.

1           COMMISSIONER DEASON:  -- for those customers that  
2           paid more would be entitled to a refund based upon that  
3           calculation.

4           COMMISSIONER KIESLING:  With the appropriate  
5           adjustments during the interim period.

6           MS. CHASE:  Yes.  I think we're probably getting  
7           into Issue 6 a little bit, but, yes, with the  
8           appropriate indexes, and so forth.

9           COMMISSIONER DEASON:  But the reason -- that was  
10          my understanding.  But I thought somewhere along  
11          today's discussion, and we've discussed a lot of things  
12          today, I thought somebody said there was going to be a  
13          difference between the original rates before this rate  
14          case and the rates the customers were charged.

15          MS. CHASE:  There is kind of two issues here.  
16          That does bring up the point of there was a petition  
17          for a further refund of interim.  I thought we would  
18          probably just finish the discussion on the final, and  
19          then talk about whether more interim needs to be made.

20          COMMISSIONER DEASON:  You confirmed what my belief  
21          was, and that it is going to be difference between  
22          whatever rates that we determined in Issue 4, which we  
23          deferred, and the rates that were in effect, the  
24          uniform rates that were in effect during this period of  
25          time.

1 MS. CHASE: That's correct.

2 COMMISSIONER DEASON: With the necessary  
3 adjustments for pass-throughs, et cetera.

4 MS. CHASE: Right.

5 CHAIRMAN CLARK: Is there a motion?

6 COMMISSIONER KIESLING: I move alternate  
7 recommendation on Issue 5, subject to the discussion we  
8 just had about how that amount will be calculated.

9 COMMISSIONER DEASON: Second.

10 CHAIRMAN CLARK: All those in favor, say aye.

11 COMMISSIONER KIESLING: Aye.

12 COMMISSIONER DEASON: Aye.

13 CHAIRMAN CLARK: Aye.

14 COMMISSIONER JOHNSON: Aye.

15 COMMISSIONER GARCIA: Aye.

16 CHAIRMAN CLARK: Opposed, nay.

17 Issue Number 6.

18 MS. CHASE: Commissioners, excuse me. Before we  
19 go on to Issue Number 6, there is the matter of refund  
20 of interim that you need to decide. And that  
21 discussion is on Page 34 of the recommendation, but  
22 there was a petition of Sugarmill Woods, et cetera,  
23 that are requesting a refund of the interim rates to  
24 the extent that the uniform rate would be greater than  
25 -- excuse me, to the degree that the rate that's

1 approved in Issue 4 would be less than the interim rate  
2 that was in effect. Now, our recommendation here is  
3 that there be no refund of the interim. There was one  
4 refund of the interim that had to do with the revenue  
5 requirement. This is another request by them that they  
6 probably would like to address today. But my  
7 understanding of their request is that the way the  
8 interim rate was done in this case is that the interim  
9 revenue requirements for all the systems were added  
10 together, and there was a uniform dollar amount given  
11 to each system. So, there was an interim increase  
12 given to each system, but the rates for all the systems  
13 stayed different, however they came into the case. It  
14 was just the interim part of it that was a uniform  
15 dollar amount added to gallons and added to the base  
16 charge.

17 COMMISSIONER DEASON: And it's your recommendation  
18 that there be no additional refund.

19 MS. CHASE: No additional refund of interim.

20 COMMISSIONER GARCIA: As a general rule, though,  
21 if we go to interim rates, aren't they usually  
22 refundable?

23 MS. CASE: Yes, they are, and there was a refund  
24 here on interim rates based on the calculation of the  
25 revenue requirement. And that is how an interim is

1 usually -- they are held subject to refund based on the  
2 final revenue requirement. And there was a refund in  
3 this case based on that. What they are asking for is a  
4 refund of the interim based on the ultimate rate  
5 structure decision that was made.

6 COMMISSIONER DEASON: A customer specific refund,  
7 not a revenue requirement refund.

8 MS. CHASE: Customer specific, that's correct,  
9 very similar to the other refund that we have been  
10 talking about.

11 CHAIRMAN CLARK: So, the rates for interim were on  
12 a completely different basis?

13 MS. CHASE: Yes, they were. The rates for  
14 interim, like I was explaining, they were --

15 CHAIRMAN CLARK: And there was no appeal that that  
16 was the wrong rate structure for interim?

17 MS. CHASE: That's true. The interim rate  
18 increase was not an issue on appeal.

19 CHAIRMAN CLARK: Is there a motion on -- well,  
20 wait a minute. Is that something we have to take up  
21 in --

22 COMMISSIONER GARCIA: I think the Company should  
23 at least --

24 MS. CHASE: It was discussed in Issue 5, and  
25 mentioned in my primary recommendation. It's not

1 really mentioned in the alternative at all. So, I  
2 think you need to address it, since you voted for the  
3 alternative.

4 MR. TWOMEY: Commissioner.

5 CHAIRMAN CLARK: And there should be a specific --  
6 we should vote specifically on whether a refund of the  
7 interim is due.

8 MS. JABER: Right. You need to make a finding on  
9 that. It was included in the primary analysis, but not  
10 included in the alternative. So, if you move the  
11 alternative, you have to make a separate finding on  
12 whether or not a refund of interim is appropriate.

13 CHAIRMAN CLARK: Okay.

14 Mr. Twomey.

15 MR. TWOMEY: Yes, ma'am, just briefly, so you --  
16 I'm not sure everybody understands what happened. When  
17 you approved the interim rate increases for the 127  
18 systems that were involved in this case, as I'm sure  
19 you will recall, Commissioner Clark, because you voted  
20 against it. I don't know if you recall this. You  
21 voted against this. And I recall now, you wrote a  
22 dissent. I wish I had it here to read it to you, but  
23 you said something to the effect that you voted --

24 CHAIRMAN CLARK: That it hadn't been proven.

25 MR. TWOMEY: Not only did you say it hadn't been

1 proven, but you said it wasn't being -- it was because  
2 it wasn't on a system specific bases. I recall that  
3 distinctly.

4 CHAIRMAN CLARK: That's right. I said we needed  
5 to look at whether or not statewide rates were  
6 appropriate. And until we did -- and I felt we did in  
7 the case, the Court said we didn't.

8 MR. TWOMEY: Yes, ma'am. I'm not -- I started to  
9 say I'm not criticizing that final vote, but --

10 CHAIRMAN CLARK: Well, I'd like to point out to  
11 you that I thought there was consistency in what I  
12 voted for, even though you're trying to illustrate that  
13 there wasn't.

14 MR. TWOMEY: My point is this: You recognized  
15 when you voted against the interim rate increase, that  
16 it wasn't on a system specific basis, and you voted  
17 against the increase for that reason. And you were  
18 right, because as you all know -- I assume you all  
19 know, if you have had any of these cases, these small  
20 cases -- now, your typical practice, and you're only  
21 practice that I'm aware of, until the interim rates in  
22 this case, was that you took a -- when there was more  
23 than one system, you took the percentage and applied it  
24 to each, okay. And what I've maintained, what you did  
25 here and why you voted against it, Commissioner Clark,

1 is because they took a uniform dollar amount and  
2 applied it to each system. We would suggest to you  
3 what they did on the interim rates is they gave  
4 increases to some systems that didn't even require a  
5 revenue increase on a stand-alone basis, okay, by  
6 putting this uniform rate dollar amount on it. And  
7 what I've maintained all along is that the Staff was  
8 telegraphing their intention to recommend uniform rates  
9 later in the case. Whether you accept that or not, the  
10 uniform rate increase, because it was not system  
11 specific, as you noted, was therefore, uniform in  
12 nature. And, therefore, under the First District Court  
13 of Appeal's decision, was wrong. And we are suggesting  
14 to you that what you should do is you should approve  
15 refunds for interim between the basis -- whatever you  
16 come out with on Commissioner Deason's motion on what  
17 the stand-alone -- I mean, the new rates would be and  
18 whatever the interim rates were during that period.  
19 That's our argument.

20 CHAIRMAN CLARK: Mr. Hoffman.

21 MR. HOFFMAN: Madam Chairman, Commissioners, with  
22 respect to the interim rate refund issue, they never  
23 appealed that rate structure. That never came up until  
24 they requested this Commission to make the very type of  
25 refund that they are now asking you to make again, and

1           you said no. So, I mean, they have made that request  
2           before. They have made it, actually, three or four  
3           times. And it has been denied every time.

4                       Secondly, the way that interim rates are set up by  
5           statute, the statute assures the ratepayers that there  
6           will be a refund from the standpoint of revenue  
7           requirements, if the final rates that the Commission  
8           determines to be appropriate are less than the interim  
9           rates. So, I think you're talking about a separate  
10          animal.

11                      And, third, I just don't logically and factually  
12          -- I'm not able to put together, you know, how or why  
13          you could make a refund on interim rates that were  
14          instituted in September of 1992 as against a final  
15          uniform rate structure that was instituted in September  
16          of 1993. So, for those reasons, you know, we believe  
17          that the request for refunds on interim should be  
18          denied.

19                      COMMISSIONER DEASON: The interim rate structure  
20          was not appealed and the Court did not address it.

21                      MS. JABER: No, not at all.

22                      CHAIRMAN CLARK: Is there a motion on interim  
23          rates, the refund of interim rates?

24                      COMMISSIONER DEASON: I move there be no  
25          additional -- there already was a refund on interim.

1 MS. JABER: That's right.

2 COMMISSIONER DEASON: I would move that there be  
3 no additional refund of interim based upon a different  
4 rate structure.

5 CHAIRMAN CLARK: There has been a motion. Is  
6 there a second?

7 COMMISSIONER GARCIA: Second.

8 CHAIRMAN CLARK: All those in favor say aye.

9 COMMISSIONER KIESLING: Aye.

10 CHAIRMAN CLARK: Aye.

11 COMMISSIONER GARCIA: Aye.

12 COMMISSIONER DEASON: Aye.

13 COMMISSIONER JOHNSON: Aye.

14 CHAIRMAN CLARK: Opposed, no.

15 COMMISSIONER DEASON: We still need address the  
16 question of the timing of the refund, or is that a  
17 different issue?

18 CHAIRMAN CLARK: I think we're on issue -- now we  
19 are on Issue 6. That was something we had to add to  
20 Issue 5.

21 COMMISSION STAFF: Issue 6 addresses Staff's  
22 recommendation of the methodology and the time period  
23 and the interest for the refunds. Staff is  
24 recommending that the refunds be applied consistent  
25 with Rule 25-30.360, Florida Administrative Code, with

1 the exception of the time period. The rule has a time  
2 period of 90 days, unless otherwise specified by the  
3 Commission. The Staff is recommending that the refunds  
4 be made over the same period that the revenues were  
5 collected.

6 The recommendation also addresses the fact that  
7 the information is not available to Staff as much as  
8 it's calculated on the actual consumption during that  
9 two-year period. So, we also recommend that this  
10 information be provided to Staff within seven days.  
11 However, it's going to have to be seven days after we  
12 vote on Issue 4, which is the appropriate rates. The  
13 methodology is also explained.

14 It should be pointed out that the plants in  
15 Staff's analysis may or may not change, depending on  
16 the new rates, also.

17 There are some other inferences to interest that  
18 were also brought out in the joint petition that will  
19 need to be voted on and the length of time for the  
20 refund.

21 COMMISSIONER DEASON: Commissioners, I agree with  
22 Staff's recommendation, with the exception for the  
23 period of time in which to conclude the refund. I  
24 understand that if it were to be extended over a period  
25 of time, it would be with interest, which would,

1 perhaps, make customers whole. But I think that for  
2 those customers who have paid in excess of what they  
3 should have, according to the Court's remand, that they  
4 should get that money back as quickly as possible, and  
5 whatever is reasonable to do that. But I don't think  
6 it needs to be protracted over the period of time that  
7 the funds were collected.

8 CHAIRMAN CLARK: When you say that, are you saying  
9 two years?

10 COMMISSION STAFF: We were saying two years. It's  
11 actually whenever the new rates will be implemented, so  
12 it would be up to that point. That was something that  
13 we --

14 CHAIRMAN CLARK: I think you did mention a concern  
15 about financial viability, right?

16 COMMISSION STAFF: Yes, ma'am.

17 CHAIRMAN CLARK: Are you saying two years is  
18 needed for that purpose?

19 COMMISSION STAFF: That was based on an analysis  
20 by the Division of Auditing and Financial Analysis.  
21 So, we picked a two-year as a arbitrary period. It  
22 could be anywhere between the 90 days and up to the  
23 two-year period. Mr. Lester could address the  
24 Commissioners on that fact.

25 MR. LESTER: I'm not saying that it needs to be --

1           CHAIRMAN CLARK: You need to get close to your  
2 microphone.

3           MR. LESTER: I'm not saying that it needed to be  
4 over a two-year period, I tried to report that the  
5 company's current financial ratios are -- they are  
6 somewhat weak, and that if it was stretched out over a  
7 period of time, that would smooth out the situation for  
8 them. But I'm not making a specific recommendation  
9 regarding the time.

10          MR. WILLIS: Commissioners, Staff has a concern --  
11 not that the customers shouldn't get their money back  
12 immediately. I mean, in any refund a customer ought to  
13 get their money back immediately. I don't want to see  
14 the customers be harmed in the future because the  
15 Company's ability to attract debt capital, that the  
16 cost of attracting that goes up because of this refund.  
17 That's what I'm worried about. I'm worried about the  
18 overall financial posture of the Company. I know they  
19 can make the refunds. They are financially able to  
20 make the refunds. But there are other aspects you have  
21 to consider.

22           If you make a company go back and make a refund of  
23 some magnitude -- and I'm not sure what this is going  
24 to turn out to be. It may be as much as 5 million, who  
25 knows? That can have an impact upon the loan

1 institutions and the rate in which those loan  
2 institutions are willing loan money to Southern States.  
3 That in itself will reflect in the future rates that  
4 these customers are going to have to pay. And Staff's  
5 recommendation, basically, saying let the Company give  
6 it back to the customers over the same period of time  
7 they collected it, was to basically reduce that effect.  
8 Give the customers back their refund with interest over  
9 the whole period of time, and that would reduce the  
10 effect that the Company may have with the financial  
11 loan institutions in the future. Whether it will or  
12 not, we're not sure, but it certainly would reduce the  
13 effect of it. That's the basis of the Staff's  
14 recommendation. And the two years is basically not  
15 really pulled out of the air; the two years was  
16 basically set there because that was the time period in  
17 which they collected it.

18 COMMISSIONER KIESLING: Well, let me ask you this.  
19 Do we in these kinds of circumstances have any  
20 expectation that if Southern States' ability to borrow  
21 at favorable rates is damaged, that their parent  
22 company can't come in and prop them up or co-sign in  
23 order to continue to get those kinds of favorable  
24 rates?

25 MR. WILLIS: I couldn't tell you that. I don't

1 know the -- at this point in time I don't know what  
2 kind of relationship Southern States has with Topeka's  
3 parent, Minnesota Power, as far as their willingness to  
4 co-sign or infuse additional capital into this company.

5 COMMISSIONER KIESLING: Well, I have trouble with  
6 two years. I mean, if there was something in between,  
7 something beyond 90 days. But, certainly, two years  
8 just seems too long to me.

9 MR. WILLIS: Well, certainly the Commission can  
10 come up with anything in between; six months, one year,  
11 nine months.

12 COMMISSIONER KIESLING: Well, I'd prefer that it  
13 be based on something besides just a number in between  
14 two numbers.

15 MR. WILLIS: I understand.

16 MS. JABER: That's why we came up with the two  
17 years. It was the period of time in which it took them  
18 to collect the rates. It was not a magic number. The  
19 rule says 90 days. We thought that was not enough  
20 time. If we want to split the baby, so to speak, you  
21 could do a year.

22 COMMISSIONER DEASON: Well, doesn't the Company --  
23 if it is truly going to severely handicap their ability  
24 and impact their financial standing in the investment  
25 community, can't they always petition the Commission to

1 change that, and then they would have the burden to  
2 demonstrate how their financial ratios are in such weak  
3 condition that they cannot come forward with a refund  
4 under a short time period?

5 MR. WILLIS: Yes, they could.

6 MS. JABER: Yes.

7 COMMISSIONER DEASON: Sometimes a financial  
8 committee looks at things like it's better to take your  
9 medicine, swallow it and get on with business and get  
10 this behind you and get on. And if you do it over a  
11 period of time, it's like a constant reminder of  
12 something that went awry. I don't know. All I know is  
13 that customers have overpaid, the Company has the money  
14 now and it should be refunded as quickly as possible.  
15 Our standard refund rule requires it to be completed  
16 within 90 days?

17 MS. JABER: 90 days. You have to remember that is  
18 usually for a shorter period of refund, and it's not  
19 usually this great.

20 CHAIRMAN CLARK: Is there a motion on Issue 6?  
21 Any further discussion?

22 COMMISSIONER DEASON: I move Staff on Issue 6,  
23 with the exception that the standard refund policy  
24 apply, which is 90 days, and give the option to the  
25 Company if they want to come forward with a petition

1 demonstrating that 90 days would severely impact their  
2 financial position to the detriment of both the Company  
3 and it's ratepayers, that they would have the leave to  
4 make such a filing, and that we would consider it.

5 CHAIRMAN CLARK: There has been a motion. Is  
6 there a second?

7 MS. JABER: Could I just clarify it for the order  
8 and for the motion? You're talking about a credit to  
9 the bill, 90 days of the date of the order?

10 COMMISSIONER DEASON: Well, let me say this. Yes,  
11 it needs to be completed within 90 days. It may be  
12 that three months worth of credits is not going to be  
13 enough for some customers. They may even have to  
14 actually cut a check to some customers. And if that is  
15 the case, so be it.

16 MR. SMITH: Madam Chairman, Commissioners, I have  
17 another question. This issue actually has some  
18 subissues. And you are voting on one issue, namely,  
19 how long a period is going to be utilized to make the  
20 refund. There are other issues, namely, the length of  
21 time for the refund. And if you recall, in Issue 5 in  
22 the alternate, I suggested you might want to make a  
23 refund only up to the time you issued the order in the  
24 investigation docket, because they have asked for it  
25 back from the Court, and have said that it is possible

1           that the Court would allow us to make a finding and  
2           institute uniform rates for that period.

3           CHAIRMAN CLARK: You mean the refund would be up  
4           to that period of time?

5           MR. SMITH: Right. And the recommendation in  
6           Issue 6 on that point, on Page 38, the length of time  
7           for the refunds -- I'm sorry. Maybe I'm getting the  
8           wrong one. On Page 37, the refund period, the  
9           recommendation is that the refund period or the  
10          revenues calculation should be up to the time the  
11          Commission now sets rates on a going-forward basis. In  
12          other words, all the way from back at the beginning of  
13          the case until now, all the revenues that were  
14          collected in excess back to that point when the  
15          Commission made the decision that it should be  
16          refunded. Am I making myself clear?

17          CHAIRMAN CLARK: Well, here is the concern I have,  
18          it seems to me what you're suggesting is a variation on  
19          this issue which should have been in an alternative  
20          recommendation. Because as I understand this, this  
21          requires refunds from the date of the agenda  
22          conference. And what you're suggesting is because we  
23          have asked for the other proceeding back, that there is  
24          a different date other than the agenda conference  
25          today.

1           MR. SMITH: That's right. And that's what is in  
2 the alternative in 5. And, you know, I'm sorry if it  
3 is confusing. I didn't address it in this issue, but  
4 I'm just telling you it is out there and was part of  
5 the consideration. And, frankly, I believe that the  
6 more viable alternative is what is in Issue 6 now, that  
7 you just consider the whole period up to now. Because,  
8 A-number one, I don't know what the Court is actually  
9 going to do. I don't know if they would approve  
10 implementation of those uniform rates back to the  
11 beginning of the 880 proceeding, or whether they would  
12 say only from this point in the future, which will be  
13 sometime after this decision will those rates be valid  
14 or based on that determination, which leads to another  
15 complication that you're already into the next rate  
16 case.

17           CHAIRMAN CLARK: Well, I understand the motion of  
18 Commission Deason to be that he is moving Staff on  
19 Issue 6 with the exception that the period of time for  
20 refund will be according to our rules, and that is 90  
21 days, and that there may be a situation where instead  
22 of a credit, there will be a check. But it's with the  
23 understanding that the Company can come in and suggest  
24 a different period of time for refund based on  
25 financial need. That's what I understand the motion to

1 be.

2 COMMISSIONER KIESLING: If I understood what  
3 Mr. Smith was saying, though, he was talking about in  
4 calculating the amount of the refund, between what  
5 dates are we deeming that they are entitled to the  
6 refund. And I thought that was settled in Issue 5.

7 CHAIRMAN CLARK: And it's also settled in 6. It  
8 says from -- it's the cutoff date, it's the ending date  
9 that we are worried about. And it says the date of the  
10 agenda conference.

11 MR. SMITH: That's right, but that is contrary  
12 to --

13 CHAIRMAN CLARK: Have I read this wrong? When are  
14 you suggesting the cutoff be in terms of determining  
15 when the refund is due? I presume it's when the new  
16 rates go into effect, and anything back from there is  
17 refunded.

18 COMMISSION STAFF: That's what Staff is suggesting  
19 or recommending in Issue 6. And we base this on the  
20 fact that -- and I may be corrected by Legal Staff --  
21 that if we bring 880 back, then the final decision was  
22 not made. So, therefore, the new rates that are going  
23 to be implemented here, the refund should go back to  
24 the uniform rates up to these new rates, which will be  
25 voted on presumably at the next agenda conference.

1           COMMISSIONER KIESLING: Well, then, I'm confused,  
2 because the alternate rec on 5 that I thought was what  
3 we moved and essentially voted on, had that the refund  
4 would cover the period from the final order in 199  
5 through the entry of the final order in 880.

6           MS. JABER: Right. I understand the confusion  
7 now. Mr. Smith did include what he just suggested to  
8 you in Issue 5. In moving the alternative Staff  
9 analysis, you, in effect, moved that. But I don't  
10 think that all of the Commissioners realized that they  
11 were also voting to the period of the refund. When we  
12 worded --

13           CHAIRMAN CLARK: That's not what is in the  
14 recommendation. The recommendation speaks only to a  
15 refund.

16           MS. JABER: Exactly. That's right. And when --

17           CHAIRMAN CLARK: Issue 6 speaks to the period of  
18 time.

19           MS. JABER: Our intent -- our intent was that the  
20 refund period would be voted on in Issue 6. And in  
21 retrospect, we should have taken out what was in  
22 Issue 5. And Mr. Smith's opinion with respect to the  
23 refund period should have been put into Issue 6. What  
24 I would suggest to you is that you move 5, the  
25 alternative, with the understanding that you haven't

1 done anything with the refund period. And in Issue 6  
2 right now we can go ahead and discuss everything we  
3 need to discuss on the refund period.

4 COMMISSIONER KIESLING: I'd be happy to modify it.  
5 I think I made the motion. I'd be happy to modify my  
6 motion. I mean, when I made the motion, I made it  
7 having read the Staff recommendation that included that  
8 the time period we were discussing was from the final  
9 order in 199 to the final order in 880.

10 MS. JABER: Right.

11 COMMISSIONER KIESLING: And if the other  
12 Commissioners didn't know that, I'd be happy to modify  
13 my motion and let us discuss that in Issue 6.

14 MS. JABER: The alternative recommendation in  
15 Issue 5 just answers the question in Issue 5 in the  
16 affirmative. It's not until you get to the analysis  
17 that you realize --

18 CHAIRMAN CLARK: Yes, and that is all we voted on  
19 is that we'll have a refund. And I don't think there  
20 is any reason to go back and deal with Issue 5. We  
21 will deal with it in Issue 6. What is the appropriate  
22 period for the refund to apply, not the period over  
23 which the refund will be given.

24 COMMISSIONER DEASON: Well, I asked the question  
25 about the period, and you all said, "Well, that's going

1 to be addressed in Issue 6."

2 MS. JABER: That's exactly right. It is our  
3 recommendation that it should have been addressed in  
4 Issue 6. I didn't realize it was part of the analysis.  
5 I apologize.

6 CHAIRMAN CLARK: We are going to make the vote in  
7 Issue 6.

8 MS. JABER: That's correct. It is our  
9 recommendation in Issue 6 that the refund period should  
10 go up to the time that the new rates are implemented,  
11 and I guess that Mr. Smith's recommendation is that it  
12 should only go up to the point of the final order in  
13 the 880 docket.

14 MS. CHASE: That date, by the way, is February  
15 7th, '94, just so you have a feel for the time period.

16 COMMISSIONER KIESLING: No. 880 wasn't February  
17 7th, '94.

18 MS. CHASE: That's what is in this recommendation.  
19 I'm just reading the --

20 COMMISSIONER KIESLING: That's not so. That's  
21 before we even held all of those customer hearings in  
22 the investigative docket.

23 MR. HOFFMAN: Commissioner Kiesling, September of  
24 '94.

25 MS. CHASE: September. It was September of '94.

1 COMMISSIONER KIESLING: Yes.

2 CHAIRMAN CLARK: A year ago.

3 MR. HOFFMAN: Madam Chairman, may I be heard  
4 briefly on this issue?

5 CHAIRMAN CLARK: Mr. Hoffman, go ahead.

6 MR. HOFFMAN: Very briefly. I would say with  
7 respect to the starting point, that it would appear  
8 that the only place that one could start with respect  
9 to a refund would be when the final rates were  
10 implemented. That would not be when the final order  
11 was issued. The final order was issued in March of  
12 1993, but the rates themselves, pursuant to the final  
13 order were implemented in September of 1993. So, I  
14 would say that in terms of a beginning point, the  
15 beginning point could not occur before September of  
16 '93, particularly because you have already ruled that  
17 there should be no refund for interim. Interim was in  
18 effect between March of '93 and September of '93.

19 With respect to the cutoff point, if you accept  
20 the rationale that the cutoff point is when new rates  
21 went into effect, new rates went into effect in  
22 December of 1993 when the Commission approved a price  
23 index for this company. So, with respect to looking at  
24 this from the viewpoint of only the record in this  
25 docket and making a refund based on the rates in this

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1 docket, and not with respect to new rates, then the  
2 cutoff point would be December of 1993.

3 COMMISSIONER DEASON: Hold on just a second.  
4 You're saying because you got some type of a  
5 pass-through or index that was added to these rates,  
6 then the deficiency in these rates disappear and the  
7 refund is only going to be for three months?

8 MR. HOFFMAN: Commissioner, I'm saying two things.  
9 That if you limit your decision to the record in this  
10 docket, and the record in this docket contains rates  
11 that remained in effect from September of 1993 through  
12 December of 1993. That's all I'm saying. And if you  
13 accept the Staff's rationale that the refund point  
14 ought to terminate when new rates went into effect --  
15 and I'm not saying whether you will or if you won't.  
16 I'm telling you as a matter of fact that new rates went  
17 into effect in December of '93.

18 COMMISSIONER KIESLING: But those rates were  
19 calculated based on the rate structure that has been  
20 overturned. I mean, we are talking about rate  
21 structure here and not when there was an index.

22 MR. HOFFMAN: No question about it, the rates were  
23 indexed to the uniform rate structure on the one hand.  
24 On the other hand, there was no challenge taken to the  
25 indexing of those uniform rates.

1           CHAIRMAN CLARK: Ms. Fox, did you want to say  
2 something?

3           MS. FOX: No, I think the point is obvious, and  
4 Commissioner Kiesling is making it.

5           CHAIRMAN CLARK: Now, we did have a motion, but we  
6 had no second on that motion.

7           COMMISSIONER DEASON: That's true. I made a  
8 motion and it was not seconded.

9           CHAIRMAN CLARK: Would you care to restate that  
10 motion, because we have a --

11           COMMISSIONER KIESLING: May I just ask for a point  
12 of inquiry? It would make a difference to me on  
13 Commission Deason's motion whether we determine the  
14 period of time to be covered by the refund, because  
15 that impacts on the magnitude of the refund and then,  
16 therefore, impacts on what a reasonable amount of time  
17 is.

18           COMMISSIONER DEASON: We can vote on it  
19 separately.

20           COMMISSIONER KIESLING: I mean, that's where my  
21 problem is.

22           COMMISSIONER DEASON: Well, I would move, as far  
23 as the refund period, that it would begin when the  
24 rates went into effect.

25           COMMISSIONER KIESLING: September of '93?

1           COMMISSIONER DEASON: September of '93, according  
2 to Mr. Hoffman. And that it would terminate when new  
3 rates went into effect as a result of what we're doing  
4 here today. Granted, it's going to be delayed a little  
5 while, because Issue 4 has not yet been determined.  
6 But when that issue is determined and those rates  
7 become effective, that would constitute the refund  
8 period. That's what I would move as the first part of  
9 Issue 6.

10           CHAIRMAN CLARK: Okay. With that clarification,  
11 is there a second? Is there another motion?

12           COMMISSIONER GARCIA: Terry, let me ask you  
13 something. Is it essential for your motion that they  
14 be -- I guess you have given the Company a way out by  
15 coming before us if it causes --

16           COMMISSIONER DEASON: No, I'm not setting the time  
17 period. I mean, a time period to actually accomplish  
18 the refund. It's just the period of time upon which  
19 the difference in rates will be calculated to determine  
20 the amount to be refunded. And that would be from the  
21 implementation of the uniform rates, which is being  
22 represented as September of '93, up until the point  
23 that a new rate structure is implemented as a result of  
24 this recommendation and what we are considering. And  
25 that is going to be delayed just a little while because

1 we need some rate structure calculations as a result of  
2 some discussions on Issue 4. But whenever those new  
3 rates are implemented, that would be the refund period.

4 CHAIRMAN CLARK: And if I understand --

5 COMMISSIONER GARCIA: I can second that, yes.

6 COMMISSIONER KIESLING: Could I just hear from  
7 Mr. Smith, since his recommendation was different than  
8 that, and I still am not clear on the basis for your  
9 recommendation.

10 MR. SMITH: Okay. We have asked for the  
11 investigation now to be remanded or relinquished back  
12 to the Commission. We've asked for that relinquishment  
13 based on the idea that we now know that we should have  
14 made a finding. Let us make a finding, hold a  
15 proceeding, and determine whether or not uniform rates  
16 should be implemented during that period and whether  
17 the utility was functionally related during that time.  
18 If we did that, there would be a possibility that the  
19 Court would say, "Well, this is just like a  
20 continuation of the original proceeding, so whatever  
21 decision you made originally in that docket stands, and  
22 the uniform rates are in effect for that period." Now,  
23 if that were the result, then the Court would be -- or  
24 the Commission would determine and the Court presumably  
25 would sanction that the uniform rates were only invalid

1 for that period of time up until you made a finding in  
2 the investigation docket. So, therefore, you wouldn't  
3 want to refund money past the time when you might  
4 possibly determine that uniform rates were, in fact,  
5 valid. But now that is a problematical situation. It  
6 may be that the Court would say, "No, you can't make a  
7 finding now in that docket and have it apply all the  
8 way back to the beginning of that proceeding," namely,  
9 back into September of '94.

10 CHAIRMAN CLARK: Mr. Smith --

11 MR. SMITH: I mean, I give you that option with,  
12 you know, not a great deal of enthusiasm because I  
13 think it's problematical.

14 MR. WILLIS: Commissioners, I would like to point  
15 out that --

16 CHAIRMAN CLARK: And it seems to me that if we  
17 filed that, what we will do is then make a decision  
18 that the rates we're deciding on today are not the ones  
19 that should be in effect, because we have made a  
20 finding -- if we make a finding that they are  
21 functionally related, then we'll change the rates  
22 again, as I understood it. So, it seems to me that to  
23 advocate that position, we should be saying we should  
24 not change the rates until we have the opportunity to  
25 open the record in the later case and either make or

1 not make the finding with respect to functional  
2 relatedness.

3 COMMISSIONER KIESLING: And let me just say, as a  
4 preface to voting on the motion, that that just doesn't  
5 make any sense to me. I mean, everything that -- all  
6 of the conditions precedent that you're setting out for  
7 us are all speculative, because the Court hasn't made a  
8 decision on the request to relinquish jurisdiction.  
9 And if, in fact, at some point in the future the Court  
10 does relinquish jurisdiction to allow us to correct the  
11 880 order by making a functionally related  
12 determination, then that would be enough changed  
13 circumstances for someone to come back in and say,  
14 "Now, the amount that you ordered us to refund is not  
15 the correct amount." But until something has happened,  
16 I'm not willing to, you know, hope or second-guess that  
17 the Court is going to do that. And for that reason,  
18 I'm going to support the motion that was made and  
19 seconded.

20 CHAIRMAN CLARK: All those in favor say aye.

21 COMMISSIONER KIESLING: Aye.

22 COMMISSIONER DEASON: Aye.

23 CHAIRMAN CLARK: Aye.

24 COMMISSIONER GARCIA: Aye.

25 COMMISSIONER JOHNSON: Aye.

1 CHAIRMAN CLARK: Opposed, nay.

2 Issue 7. Is there a motion?

3 COMMISSIONER KIESLING: Wait, wait. There's  
4 something still missing. We just voted on the period  
5 of time --

6 CHAIRMAN CLARK: That's right. Now, what is the  
7 period of time over which the refund is to be made?

8 Commissioner Deason, do you have a motion?

9 COMMISSIONER DEASON: Yes, my motion is that it  
10 would be according to our rule, which is 90 days. and  
11 that is with the understanding that if that creates an  
12 inordinate burden on the Company as far as their  
13 financial position that they would be free to file a  
14 motion seeking an extension of that time.

15 CHAIRMAN CLARK: Is there a second?

16 COMMISSIONER JOHNSON: I'm going to second it.

17 CHAIRMAN CLARK: There's a motion and a second.  
18 All those in favor say aye.

19 COMMISSIONER DEASON: Aye.

20 CHAIRMAN CLARK: Aye.

21 COMMISSIONER JOHNSON: Aye.

22 COMMISSIONER GARCIA: Aye.

23 CHAIRMAN CLARK: Opposed, nay.

24 COMMISSIONER KIESLING: Nay.

25 CHAIRMAN CLARK: Commissioner Garcia, did you vote

1 in --

2 COMMISSIONER GARCIA: No, I voted in favor.

3 CHAIRMAN CLARK: Okay. That passes on a 4-to-1  
4 vote.

5 COMMISSIONER KIESLING: I just want to make it  
6 clear. My vote is not that, you know, that they ought  
7 to have two years. I mean, that's not my vote. It's  
8 just that I think that 90 days, considering that it is  
9 such a long period, just is not sufficient. And I  
10 think that putting the requirement on the Company to  
11 come in and affirmatively prove that it is going to  
12 affect their position is just too high of a burden for  
13 this amount of money. And I would have preferred  
14 something longer than 90 days, but certainly way less  
15 than two years.

16 CHAIRMAN CLARK: All right. Issue 7. Is there a  
17 motion?

18 MS. JABER: Commissioners, I think to some degree  
19 you probably don't even need to vote on this issue. I  
20 will leave that up to you.

21 CHAIRMAN CLARK: I think we should move to deny  
22 the motion. Don't we have to dispose of a motion or a  
23 petition?

24 MS. JABER: Or you could find it moot.

25 CHAIRMAN CLARK: I don't know that we can argue

1 with respect in the legal sense to say it's moot.

2 MS. JABER: My point was in the sense of you have  
3 really disposed of most of the issues that are  
4 surrounding it in this petition.

5 COMMISSIONER DEASON: It seems to me like we have  
6 granted it in part and denied it in part.

7 MS. JABER: Right.

8 COMMISSIONER KIESLING: Yes.

9 CHAIRMAN CLARK: Is there a motion on Issue 7?

10 COMMISSIONER DEASON: I move that we find that we  
11 have granted the motion in part and denied it in part,  
12 consistent with the votes on Issues 2 through 6,  
13 realizing that we still have to vote on Issue 4.

14 CHAIRMAN CLARK: Is there a second?

15 COMMISSIONER KIESLING: Second.

16 CHAIRMAN CLARK: All those in favor, say aye.

17 COMMISSIONER JOHNSON: Aye.

18 COMMISSIONER KIESLING: Aye.

19 CHAIRMAN CLARK: Aye.

20 COMMISSIONER DEASON: Aye.

21 COMMISSIONER GARCIA: Aye.

22 CHAIRMAN CLARK: Opposed, nay.

23 That disposes of Item 26.

24 MR. WILLIS: Commissioners, there may be one more  
25 matter. I'm not sure if there is or not, but there is

1 a bond requirement on the Company that expires next  
2 month, and I think they are obligated to extend that  
3 until this matter is completed. And maybe the Company  
4 can clarify that. But if not, they need to be ordered  
5 to extend that bond.

6 CHAIRMAN CLARK: Mr. Armstrong, it's Staff's  
7 understanding that the bond expires next month. Do we  
8 need to have that bond extended?

9 MR. ARMSTRONG: I think the Commission would  
10 probably order us to have that bond extended at this  
11 point in time. I mean, we would assume that we have to  
12 extend it until final disposition of this matter.

13 CHAIRMAN CLARK: Mr. Willis, do we need to order  
14 them to extend the bond until final disposition of this  
15 matter?

16 MR. WILLIS: We might as well, because I thought  
17 they were already under those conditions, but we might  
18 as well to be safe.

19 COMMISSIONER KIESLING: If we need to clarify it,  
20 I so move that the bond be extended until the final  
21 resolution.

22 CHAIRMAN CLARK: Without objection.

23 MR. TWOMEY: Madam Chairman, I want to say thank  
24 you. But could I make one comment on the bond, and  
25 that is you originally ordered a \$5.8 million bond for

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA )  
COUNTY OF LEON )

I, JANE FAUROT, Court Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages numbered 1 through 183 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 26th day of September, 1995.

Jane Faurot  
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