

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 981042-EM



PROCEEDINGS: **PREHEARING CONFERENCE**

BEFORE: **COMMISSIONER JOE GARCIA**
 Prehearing Officer

DATE: **Thursday, November 5, 1998**

TIME: Commenced at 9:35 a.m.
 Concluded at 10:30 a.m.

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

REPORTED BY: **JOY KELLY, CSR, RPR**
 Florida Public Service Commission
 Chief, Bureau of Reporting

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

1 **APPEARANCES:**

2 **ROBERT SCHEFFEL WRIGHT and**
3 **JOHN T. LAVIA, III, Landers & Parsons, 310 West**
4 **College Avenue, Tallahassee, Florida 32302, appearing**
5 **on behalf of Duke Energy New Smyrna Beach Power**
6 **Company Ltd., L.L.P.**

7 **JAMES A. MCGEE, Florida Power Corporation,**
8 **P. O. Box 14042, St. Petersburg, Florida 33733-4042, and**
9 **GARY L. SASSO, Carlton, Fields, Ward, Emmanuel, Smith &**
10 **Cutler, P.A., Post Office Box 2861, St. Petersburg, Florida**
11 **33731, appearing on behalf of Florida Power Corporation.**

12 **JAMES D. BEASLEY, Ausley & McMullen, 227 South**
13 **Calhoun Street, Tallahassee, Florida 32302, appearing on**
14 **behalf of Tampa Electric Company.**

15 **MICHELLE HERSHEL, P. O. Box 590,**
16 **Tallahassee, Florida 32302, appearing on behalf of**
17 **Florida Electric Cooperatives Association, Inc.**

18 **GAIL KAMARAS, 1114 Thomasville Road, Suite**
19 **E, Tallahassee, Florida 32303, appearing on behalf of**
20 **Legal Environmental Assistance Foundation, Inc.**

21 **(LEAF).**

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1 **APPEARANCES CONTINUED:**

2 **MATTHEW M. CHILDS, and CHARLES GUYTON, Steel**
3 **Hector & Davis, 215 South Monroe Street, Suite 601,**
4 **Tallahassee, Florida 32301, appearing on behalf of**
5 **Florida Power & Light Company.**

6 **TERRY L. KAMMER, PAC Director, 3944 Florida**
7 **Boulevard, Palm Beach Gardens, Florida 33410, appearing on**
8 **behalf of System Council U-4 IBEW.**

9 **ROBERT J. SNIFFEN, Moyle, Flanigan, Katz, Kolins,**
10 **Raymond & Sheehan, 210 South Monroe Street, Tallahassee,**
11 **Florida 32301, appearing on behalf of U. S. Generating**
12 **Company.**

13 **LESLIE J. PAUGH and BOB ELIAS, Florida**
14 **Public Service Commission, Division of Legal Services,**
15 **2540 Shumard Oak Boulevard, Tallahassee, Florida**
16 **32399-0870, appearing on behalf of the Commission**
17 **Staff.**

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

2 (Hearing convened at 9:35 a.m.)

3 **COMMISSIONER GARCIA:** Let it be said that
4 this Cuban started one proceeding on time, so I --
5 (laughter)

6 This is a lengthy document so I'm going to
7 try to go point by point in the prehearing and
8 hopefully we can work it out. Staff did have some
9 problems with some of the issues. I want to work with
10 you to try to consolidate some of these things. It
11 will make it easier for you all and make it easier for
12 how we address this later on, and hopefully we will
13 break another record and get out of here before
14 Staff's estimated three hours. I'm hoping we'll do
15 much better than that. With that said, call the
16 hearing to order.

17 Counsel, will you please read the notice.

18 **MS. PAUGH:** Pursuant to notice issued on
19 August 31st, 1998, this time and place have been set
20 for the prehearing in Docket No. 981042, joint
21 petition for determination of need for an electrical
22 power plant in Volusia County by Utilities Commission,
23 City of New Smyrna Beach, Florida and Duke Energy New
24 Smyrna Beach Power Company Limited, L.L.P.

25 **COMMISSIONER GARCIA:** We'll take

1 appearances.

2 **MR. WRIGHT:** Commissioner Garcia, Robert
3 Scheffel Wright of law firm Landers & Parsons, 310
4 West College Avenue, Tallahassee, Florida 32301,
5 appearing on the Utilities Commission, City of
6 New Smyrna Beach, Florida and Duke Energy New Smyrna
7 Beach Power Company Limited, L.L.P. I would also
8 like to enter an appearance for my partner, John T.
9 LaVia, III, who will be joining us shortly.

10 **MS. HERSHEL:** Michelle Hershel representing
11 the Florida Electric Cooperatives Association, 4916
12 Apalachee Parkway, Tallahassee 32301.

13 **MS. KAMARAS:** Gail Kamaras, Legal
14 Environmental Assistance Foundation, 1114 Thomasville
15 Road, Suite E, Tallahassee 32303.

16 **MR. SNIFFEN:** Robert J. Sniffen, of the firm
17 of Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan on
18 behalf of U. S. Generating Company. We're a proposed
19 intervenor at this point, and we ask that we be
20 allowed to make an appearance notwithstanding that our
21 intervenor status has not been granted at this point.
22 And we be allowed to file positions in writing subject
23 to the granted intervenor status as soon as possible.

24 **COMMISSIONER GARCIA:** We'll deal with that
25 in a second.

1 **MR. GUYTON:** Charles A. Guyton and Matthew
2 M. Childs of the law firm Steel, Hector and Davis, 215
3 South Monroe Street, Tallahassee, Florida 32301,
4 appearing on behalf of Florida Power and Light
5 Company.

6 **MR. BEASLEY:** James D. Beasley and Lee L.
7 Willis of the law firm of Ausley & McMullen, P. O. Box
8 391, Tallahassee, Florida 32302, appearing on behalf
9 of the intervenor, Tampa Electric Company.

10 **MR. SASSO:** Gary Sasso, law firm of Carlton
11 Fields, One Progress Plaza, St. Petersburg, Florida
12 33731, appearing on behalf of Florida Power
13 Corporation.

14 **MR. MCGEE:** James McGee, P. O. Box 14042,
15 St. Petersburg, Florida, also appearing on behalf of
16 Florida Power Corporation.

17 **MR. KAMMER:** Terry Kammer, representing
18 System Council U-4 IBEW, 3944 Florida Boulevard, Palm
19 Beach Gardens, Florida 33410.

20 **MS. PAUGH:** Leslie Paugh on behalf of Staff.
21 With me are Robert Elias and Grace Jaye on behalf of
22 Staff.

23 **COMMISSIONER GARCIA:** Counsel, are there any
24 preliminary matters?

25 **MS. PAUGH:** Yes, Commissioner. Under

1 Section 6 of the draft Prehearing Order we would like
2 to bring to your attention, and counsels', that prior
3 to the issuance of the Prehearing Order, the parties
4 will need to reflect which issues their witnesses are
5 addressing. We only have those statements from
6 Florida Power Corporation at this time.

7 **COMMISSIONER GARCIA:** So we're looking for
8 FP&L and Duke to tell us which issues they are going
9 to address.

10 **MS. PAUGH:** That's correct, Commissioner.

11 **MR. GUYTON:** FP&L will get that to Staff.

12 **COMMISSIONER GARCIA:** Okay. You have only
13 one witness here, pretty much spread him out.

14 **MR. GUYTON:** Yes, Commissioner.

15 **MR. WRIGHT:** We will too.

16 **COMMISSIONER GARCIA:** Okay. Do you want to
17 just proceed and go through the issues, that way we
18 can take -- we don't have to post the nonissues that
19 we may not be considering.

20 We're going to go through the -- let me try
21 to do this real quick on the front side. There is an
22 outstanding motion by Mr. Kammer --

23 **MR. KAMMER:** Kammer.

24 **COMMISSIONER GARCIA:** Forgive me. Kammer.
25 About intervention. I'm going to go ahead and grant

1 it so he can participate on this.

2 And then the other issue is we haven't
3 finished because Mr. Wright has yet to respond, if I'm
4 not mistaken, correct?

5 **MR. WRIGHT:** Commissioner Garcia, it's my
6 understanding that this petition was filed either
7 yesterday or the day before, we haven't responded.

8 Based --

9 **COMMISSIONER GARCIA:** Making any decision --

10 **MR. WRIGHT:** -- based on what I know at this
11 time I don't think we will respond, but I will advise
12 Staff as soon as that decision is final.

13 **COMMISSIONER GARCIA:** We're not going to
14 take any new issues from you today. If you want to
15 make some comment -- I don't have a problem with you
16 participating in a limited way, but I'm not going to
17 take any new issues. Any new issues you can address
18 to Staff. When we handle your motion and we can look
19 at that and check with the parties that are already
20 here.

21 Okay. Let's go through the case background.
22 We don't have anything yet -- at least I don't have
23 it.

24 **MS. PAUGH:** The case background has been
25 written and it's available in the draft Prehearing

1 Order that was issued yesterday. It was after our
2 meeting yesterday.

3 **COMMISSIONER GARCIA:** Okay. Does anyone
4 have a problem with it? I know I don't because I
5 obviously haven't seen it. So we'll move one then.

6 Corrections or changes to the order of the
7 witness list. We will, before we finish today, get
8 positions from each of -- which each of these
9 witnesses we'll be dealing with. Basic position, any
10 changes or corrections? All right.

11 **MR. GUYTON:** On Page 9 of the Prehearing
12 Order, the last line on the first paragraph should
13 read "Commission's minimum pleading" rather than
14 "plant requirements." And then the two paragraphs
15 down the last line should read "Court's Nassau
16 decisions," plural.

17 **COMMISSIONER GARCIA:** All right. Issues and
18 positions. Let's go through them issue by issue. If
19 you have any questions, problems, we'll deal with them
20 as we get to them.

21 Issue No. 1. Issue No. 2. Issue No. 3.

22 **MS. PAUGH:** Commissioner -- I'm sorry, go
23 ahead.

24 **MR. GUYTON:** Go ahead.

25 **MS. PAUGH:** Staff's position on Issue No. 3

1 is that it is subsumed by Issue No. 1.

2 **COMMISSIONER GARCIA:** Whose issue is this?

3 **MR. GUYTON:** I believe that it's a Florida
4 Power and Light Company issue.

5 **COMMISSIONER GARCIA:** Okay.

6 **MR. GUYTON:** Commissioner, this issue is
7 preparatory not only to Issue 1 but also to the other
8 statutory criteria issues. It's not limited to a
9 question of reliability. It's a question as to
10 whether or not you have enough information to pass on
11 reliability, the reasonable cost that are --
12 reasonable electricity -- adequate electricity at a
13 reasonable cost, cost-effectiveness or conservation
14 measures.

15 **COMMISSIONER GARCIA:** Schef, do you have a
16 problem with this?

17 **MR. WRIGHT:** Commissioner Garcia, we do not
18 have a problem with this issue being included.

19 **COMMISSIONER GARCIA:** We're going to go
20 ahead -- unless someone else has a problem with it,
21 we're going to go forward and leave it in for now.

22 No. 4.

23 **MS. PAUGH:** Staff's position is that this
24 issue is also subsumed by Issue No. 1.

25 **COMMISSIONER GARCIA:** Whose issue is this?

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1 **MR. GUYTON:** Florida Power and Light. We're
2 trying very hard to pin down Duke's theory of the case
3 here.

4 Duke has offered testimony on this issue
5 that it, itself, has a need for this power plant. Yet
6 they also take the position that it's the need of the
7 Peninsular Florida that they are trying -- we're
8 trying to make sure that we understand what the theory
9 of the case is. And to the extent that they are
10 trying to prove that they have a need, that that is an
11 appropriate issue.

12 Now, if they're going to take the position
13 that no, it's not their need, and they don't have a
14 need -- their own need for the power plant, and
15 they'll stipulate to that, then we have no difficulty
16 with dropping the issue. But because of the
17 uncertainty about the theory of the case, at least in
18 its present position, we think this is an appropriate
19 issue.

20 **COMMISSIONER GARCIA:** Schef?

21 **MR. WRIGHT:** I'm not sure what question I'm
22 supposed to address. We don't --

23 **COMMISSIONER GARCIA:** Mr. Guyton, we'll
24 leave it in.

25 **MR. WRIGHT:** If I may, we do question the

1 relevance of this issue. We don't disagree with
2 Staff. Mr. Guyton and I and our clients have agreed
3 that rather than fight over the inclusion of issues as
4 between ourselves, we would take a position statement
5 reflecting our concern regarding the issues, and then
6 provide a position in the statement.

7 **COMMISSIONER GARCIA:** We'll leave it in
8 then.

9 Issue No. 5. It was my own analysis that
10 this was also subsumed by Issue No. 1. Is this yours
11 again, Mr. Guyton?

12 **MR. GUYTON:** No, Commissioner. I believe
13 Florida Power Corporation raised this issue.

14 **COMMISSIONER GARCIA:** Okay.

15 **MS. PAUGH:** Staff has some suggested wording
16 changes to Issue No. 5 that would make the issue more
17 acceptable to Staff. Otherwise their position is it
18 is subsumed under Issue No. 1. That change would be
19 after the word "the, "calculating the," adds the words
20 "short-term operating and long-term planning reserve"
21 -- "margins" is then plural. We believe that this
22 more fully addresses what the issue is attempting to
23 explore.

24 **MR. SASSO:** We would agree to that change.

25 **COMMISSIONER GARCIA:** No. 5.

1 **MR. GUYTON:** If I may go back and make a
2 correction to a position -- is that appropriate as to
3 5?

4 **COMMISSIONER GARCIA:** Sure.

5 **MR. GUYTON:** On Page 6, 16, the next to the
6 last line.

7 **COMMISSIONER GARCIA:** Page 16 --

8 **MR. GUYTON:** Am I jumping ahead?

9 **COMMISSIONER GARCIA:** 16.

10 **MR. GUYTON:** Next to the last line should
11 read --

12 **COMMISSIONER GARCIA:** I'm sorry, next to the
13 last line.

14 **MR. GUYTON:** Of FP&L's position.

15 **COMMISSIONER GARCIA:** Issue 6.

16 **MR. GUYTON:** On Issue 5, Page 16.

17 **COMMISSIONER GARCIA:** Okay. FP&L. Go
18 ahead.

19 **MR. GUYTON:** "Reliability benefits and with
20 possible," insert "with" before "possible." My
21 apologizes.

22 **COMMISSIONER GARCIA:** And "with."

23 **MR. GUYTON:** Correct.

24 **COMMISSIONER GARCIA:** Okay. All right.
25 Issue No. 6.

1 **MS. PAUGH:** Staff believes this is subsumed
2 by Issue No. 1.

3 **COMMISSIONER GARCIA:** I'd like to ask you
4 about that. Whose is this one?

5 **MR. GUYTON:** I believe it's Florida Power
6 Corporation's issue originally.

7 **MR. WRIGHT:** Commissioner Garcia, if you're
8 interested we agree with Staff that it's duplicative
9 of Issue 1 but --

10 **COMMISSIONER GARCIA:** Thank you.

11 **MR. SASSO:** We'd be happy to recede on this
12 one.

13 **COMMISSIONER GARCIA:** We're dropping Issue
14 No. 6. Issue No. 7. Okay. We're going to leave 7
15 in. Issue 8. That's fine also. Issue 9. Issue 10.
16 Issue 11.

17 **MR. BEASLEY:** Tampa Electric has a revised
18 position on No. 1. I'll hand it out.

19 **MS. PAUGH:** Staff's position on Issue 11 is
20 it is subsumed by Issue 9 Commissioner.

21 **COMMISSIONER GARCIA:** Okay.

22 **COMMISSIONER GARCIA:** Let's do this,
23 Mr. Beasley. We're going to TP this one so that
24 everyone can see it and see if they have an objection,
25 as well as Staff. Staff has not had an opportunity to

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1 read it. It's not going to fly on that one. So we'll
2 pass on Issue 11. Staff, remind me to get back to
3 that before we leave here, okay? And that way
4 everyone can look at Mr. Beasley and TECO's position.
5 Issue 11.

6 Issue 12.

7 **MS. PAUGH:** Staff's position is that this
8 issue is subsumed by Issue 9.

9 **MR. GUYTON:** Commissioner Garcia, that was a
10 Florida Power and Light Company issue. If you'll note
11 that Issue 9 goes to the question of
12 cost-effectiveness. One of the specific criteria
13 under 403.519. This issue goes to the Commission's
14 authority under Chapter 366, the Grid Bill and other
15 provisions, as to whether or not the proposed project
16 will result in an uneconomic duplication of
17 facilities. They are different issues, different
18 factual issues, and certainly this is not subsumed
19 within the cost-effectiveness issue.

20 And if you'll note under 403.519 it's not
21 limited to the consideration of just the four criteria
22 but other matters within the Commission's
23 jurisdiction.

24 **MR. WRIGHT:** Commissioner Garcia, I'm
25 honoring my agreement with Mr. Guyton. If it's your

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1 pleasure to leave the issue in, we're not going to
2 fight with it.

3 **COMMISSIONER GARCIA:** All right. We're
4 going to leave this one in. 13.

5 **MS. PAUGH:** Staff believes this issue is
6 also subsumed by Issue 9.

7 **COMMISSIONER GARCIA:** It almost seems
8 broader than Issue 9, too, the scope of this question.

9 **MR. WRIGHT:** Commissioner Garcia, this is
10 actually an issue that we initially proposed. It is
11 specifically an issue that has been included in just
12 about every need determination case that I know of for
13 the last ten years plus. If the Staff believes that
14 it is subsumed in Issue 9, we would not have any
15 objections to it.

16 **COMMISSIONER GARCIA:** We'll drop 13 also.
17 14.

18 **MS. PAUGH:** Staff believes this issue is
19 subsumed by Issue 9.

20 **COMMISSIONER GARCIA:** Do you want to try to
21 defend your issue or --

22 **MR. GUYTON:** It was a Staff issue so --

23 **COMMISSIONER GARCIA:** Even better. 14.
24 Thank you, Mr. Guyton. 15.

25 **MS. PAUGH:** Staff believes this issue is

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1 speculative and should be dropped.

2 **MR. GUYTON:** Commissioner, I'm torn. I have
3 agreed with Mr. Wright that I won't argue with him
4 about the propriety of the issues, but I'm finding
5 that I have somebody else that I disagree with and I'm
6 torn as to whether or not I should respond.

7 **MR. WRIGHT:** Commissioner Garcia, for what
8 it's worth, our agreement is between ourselves. I
9 don't think it binds you in any way. I don't think it
10 binds Mr. Guyton in any way with respect to arguing
11 other parties' issues.

12 **MR. GUYTON:** In that regard, this was an
13 issue that Florida Power and Light Company raised.
14 The point of this issue is that it's speculative. The
15 point of this issue is to raise the matter that
16 clearly this information is not available to you.
17 It's critical information which should be available to
18 you. The point is to get that in front of the
19 Commission to have you pass on it.

20 **COMMISSIONER GARCIA:** This issue struck me,
21 like Staff, as an issue that would be good for an
22 engineering philosophy course rather than what we're
23 going to be conducting here. I think it is
24 speculative. I don't think it adds anything to us
25 moving forward, so we're going to go ahead and drop

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1 15. Issue 16.

2 **MS. PAUGH:** Staff believes this issue is
3 addressed by Issue 9.

4 **MR. GUYTON:** Once again, it's a Florida
5 Power and Light Company issue. Issue 9 is a
6 cost-effectiveness issue. This issue goes to need.

7 **COMMISSIONER GARCIA:** Mr. Guyton, isn't this
8 subsumed by 9 and the ones we have allowed after that?
9 How do you distinguish this issue from 9? 9 is a
10 little bit more specific. This is perhaps a little
11 bit more broader.

12 **MR. GUYTON:** 9 goes to cost-effectiveness.
13 This goes to the -- you may want to open the matter as
14 to whether it goes to some of the other issues
15 identified as a need, but it's clearly not a
16 cost-effectiveness issue.

17 **COMMISSIONER GARCIA:** I mean it struck me as
18 I read it that we had touched upon it somewhat earlier
19 in this. We'll leave it in for now. Issue 17.

20 **MR. BEASLEY:** We had taken no position for
21 Tampa Electric at this time. And I have a position
22 I'll distribute.

23 **COMMISSIONER GARCIA:** Okay. That seems
24 simple enough. I'm not going to drop 17, so we'll
25 move on.

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1 **MR. SASSO:** May I just point out a
2 typographical error in the statement of FPC's position
3 there, "engages" should be "engaged."

4 **COMMISSIONER GARCIA:** Thank you, sir. 18.
5 19. 20.

6 **MS. PAUGH:** The parties may be able to
7 stipulate to Issue 20.

8 **COMMISSIONER GARCIA:** I don't see anyone
9 stepping up. We'll go on and leave it in for now.
10 Issue 20 is in.

11 **MR. GUYTON:** We might revisit that. As we
12 read it, it looks like we're all in agreement --

13 **COMMISSIONER GARCIA:** That would be fine.
14 I'll give you an opportunity to think about it.
15 Issue -- let's be reminded to return to Issue 20.

16 **MS. PAUGH:** 21.

17 **COMMISSIONER GARCIA:** 21. It strikes me
18 this is very similar to Issue 18.

19 **MR. GUYTON:** This is Florida Power and Light
20 Company issue, Commissioner. This goes not to the
21 Commission's authority but to the Petitioner's status
22 as to whether there is appropriate need as envisioned
23 within the statute.

24 FP&L would agree that within the context of
25 a broad, essentially ultimate legal issue can raise a

1 host of legal issues, we think the Commission is much
2 better served if it focuses on some of the subordinate
3 legal issues that it needs to address. This, we
4 think, is a pretty critical issue in terms of the
5 legal issues this Commission need to address
6 specifically, rather than running the risk of getting
7 lost in the broad issue and in the text of the Staff
8 recommendation when it comes back to the Commission.

9 **COMMISSIONER GARCIA:** It strikes me in terms
10 of efficiency we're going to have to deal with it any
11 way, so I'm going to drop 21. 22.

12 **MS. PAUGH:** Staff's position is that this
13 issue is subsumed by Issue 18. It is also the subject
14 of a motion to dismiss.

15 **MR. GUYTON:** Commissioner, I'm in a position
16 I don't have a ruling on the motion to dismiss. I
17 have to raise this issue to make sure it's not waived
18 under your rules. Once again, this goes to the
19 Petitioner's statute, not to the broad brush
20 Commission authority. This isn't even the most narrow
21 issue that can be drafted. There are issues subsumed
22 at this point. Issues we're concerned that if we
23 don't break the issues down they won't get addressed.

24 This issue goes to whether an entity is an
25 electric utility. Subordinate to that, are the issues

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1 of whether Duke New Smyrna is a regulated electric
2 company or a joint operating agency within the meaning
3 of the Siting Act. We haven't identified those
4 subordinate issues but we have to identify them here
5 to make sure that this is an issue that everybody --

6 **COMMISSIONER GARCIA:** I got scared. I
7 thought you were going to pull some more issues. So
8 when you're saying this is in a broader context, you
9 feel that this subsumes some of the smaller issues
10 that have to be dealt with anyway.

11 **MR. GUYTON:** That should be, but we're
12 concerned --

13 **COMMISSIONER GARCIA:** I guess the other
14 issues, touching on the -- I mean it's a progression;
15 you end up at the same place. You've got to build
16 your case to get there anyway, but we'll go ahead and
17 leave it. Issue 23.

18 **MS. PAUGH:** Staff's position is that this
19 issue is also subject to the motion to dismiss and
20 that it is argumentative and should be dropped.

21 **MR. GUYTON:** I don't disagree that it's an
22 issue that's been raised by the motion to dismiss. I
23 don't know -- I mean, I'm at a little bit of a loss as
24 how to respond to an issue being argumentative. They
25 are the source of argument and contention within a

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1 case. I think it's objectively worded, if you will,
2 and it is an issue on which the Commission has
3 previously passed.

4 **MR. WRIGHT:** As noted, we think it's vague.

5 **COMMISSIONER GARCIA:** I think that it's an
6 obvious issue. It an obvious part of what is the rest
7 of what we're doing, Mr. Guyton, so I just don't see
8 it being necessary. We'll drop that. 24.

9 **MS. PAUGH:** Staff's position is that this
10 issue is subsumed by Issue 18.

11 **MR. GUYTON:** Commissioner, I think the
12 Commission would be well served to visit whether or
13 not it's in compliance with specific language from the
14 specific Supreme Court decision as opposed to running
15 the risk that it get lost in the legal issues.

16 **COMMISSIONER GARCIA:** It's certainly been
17 pointed out that we may be abrogating our
18 responsibilities, and I hope this agency can keep that
19 part of our responsibility during this case. I don't
20 see a point to this, Mr. Guyton. I'm going to drop
21 Issue 24. 25.

22 **MS. PAUGH:** Staff's position is that
23 Issue 25 is subsumed by Issues 18, 19 and 9.

24 **COMMISSIONER GARCIA:** Who's defending this
25 one?

1 **MR. GUYTON:** I am. I need to go back and
2 take a look at the three issues.

3 **COMMISSIONER GARCIA:** That's all right.

4 Commissioner, this really goes to an issue
5 that is not within the four criteria within the need
6 determination's statute, but in the other matters
7 within the Commission's jurisdiction, as we understand
8 18 and 19 they go to the need criteria. This goes to
9 the authority under Section -- Chapter 366, to
10 avoiding uneconomic duplication of facilities --

11 **COMMISSIONER GARCIA:** Didn't we retouch on
12 that --

13 **MR. GUYTON:** On a factual issue. This is a
14 legal issue.

15 **COMMISSIONER GARCIA:** All right, Mr. Guyton,
16 we'll allow it. 26.

17 **MS. PAUGH:** Staff has no objection to this
18 issue.

19 **COMMISSIONER GARCIA:** We'll move on then.
20 27.

21 **MS. PAUGH:** Staff's position is that
22 Issue 27 is subsumed by Issue 18.

23 **MR. GUYTON:** Commissioner, I have to raise
24 it. I don't have a ruling on my motion to dismiss. I
25 had to raise it to keep from waiving.

1 **COMMISSIONER GARCIA:** You agree, Mr. Guyton,
2 this is also subsumed in what we're basically looking
3 at. Do you really think we need to break this out as
4 an issue, or do you think this is a bit repetitive?

5 **MR. GUYTON:** I think the Commission needs to
6 rule on this issue given it's been raised in the
7 motion to dismiss.

8 **COMMISSIONER GARCIA:** We can only refrain
9 from answering it as we move through this, if we deal
10 with it in the motion to dismiss, so I'll leave it in.
11 I think you could all come to an agreement on this
12 one, I would hope.

13 **MS. PAUGH:** Are you referring to Issue 28?

14 **COMMISSIONER GARCIA:** 28, yeah.

15 **MS. PAUGH:** Yes. It appears the parties may
16 be in a position to stipulate to Issue 28.

17 **MR. GUYTON:** The stipulation being "no"?

18 **MS. PAUGH:** That's correct.

19 **MR. GUYTON:** FP&L can stipulate to that.

20 **MR. WRIGHT:** We've got a problem because we
21 think this is irrelevant and prejudicial to include a
22 stipulation as to "no".

23 **COMMISSIONER GARCIA:** I'm comfortable
24 dropping the issue all together. Does that make you
25 more comfortable?

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

2 **COMMISSIONER GARCIA:** We're going to drop
3 this issue all together. I don't think it gets us
4 anywhere.

5 29. Staff is fine with 29?

6 **MS. PAUGH:** That's correct.

7 **COMMISSIONER GARCIA:** Get to policy issues.
8 30 is all right.

9 **MS. PAUGH:** That's correct, Commissioner.

10 **CHAIRMAN JOHNSON:** 31 is all right.

11 **MR. GUYTON:** We may have a stipulation on
12 this.

13 **COMMISSIONER GARCIA:** On 31?

14 **COMMISSIONER GARCIA:** Well, do we have a
15 stipulation? Seems like we do.

16 **MR. WRIGHT:** According to the stated
17 position, not necessarily. But if the stipulation is
18 no, we're okay on that. If the stipulation is "no,
19 but" extra discussion, maybe not.

20 **COMMISSIONER GARCIA:** Whose issue is this?
21 Is this yours, Mr. Guyton?

22 **MR. GUYTON:** Yes, Commissioner.

23 **COMMISSIONER GARCIA:** Would that be fine
24 with you?

25 **MR. GUYTON:** As to "no"?

1 **COMMISSIONER GARCIA:** Yes.

2 **MR. GUYTON:** As long as we're not by
3 stipulating that removing the opportunity to present
4 testimony as to the other matter that's covered in our
5 position here.

6 **COMMISSIONER GARCIA:** I agree on that. 31
7 is stipulated. "No" is the answer.

8 32. I'm fine with this. 33.

9 **MS. PAUGH:** Staff's position is that
10 Issue 33 is subsumed by Issues 30, 29 and 1.

11 **COMMISSIONER GARCIA:** Okay. Mr. Guyton,
12 this is yours.

13 **MR. GUYTON:** Yes.

14 **COMMISSIONER GARCIA:** Let me save you time.
15 I feel comfortable with this one.

16 **MR. GUYTON:** Okay.

17 **COMMISSIONER GARCIA:** I think we can leave
18 it in. 34.

19 **MS. PAUGH:** Staff's position is that this
20 issue is subsumed by Issues 25, 29, 30 and 1. This
21 issue is also the subject of the motions to dismiss
22 and it is argumentative. Staff suggests that it be
23 dropped.

24 **COMMISSIONER GARCIA:** 25, 29, 30.

25 **MS. PAUGH:** And 1.

1 **COMMISSIONER GARCIA:** And 1. Okay.

2 **MR. GUYTON:** This is a FP&L issue. 25 and
3 29 are legal issues, not policy issues. 1 is a
4 factual issue, not a policy issue. Issue 30 is a
5 policy issue. Let me go back and take a look at it
6 briefly.

7 **COMMISSIONER GARCIA:** Sure.

8 **MR. GUYTON:** Issue 30 goes to how the
9 Commission would discharge its responsibilities under
10 the Siting Act as to the need criteria, it affects
11 those. Issue 34 goes not go to the four specific need
12 criteria but to the Commission's Grid Bill
13 jurisdiction, all of which are appropriately
14 considered but this matter is not reached under 30 but
15 instead is a separate matter. We think it's
16 appropriately in.

17 **COMMISSIONER GARCIA:** We'll leave it in
18 then. 34 is in.

19 Ms. Paugh, you had some issue with -- you
20 wanted to offer something?

21 **MS. PAUGH:** Yes, Commissioner. The
22 following rewording of Issue 35, Staff would find it
23 acceptable. It would be reworded in its entirety to
24 say as follows: Can Florida's investor-owned electric
25 utilities, or their affiliates, build merchant plants

1 in their service areas?

2 The reason we have suggested this rewording
3 is because we believe that it more closely addresses
4 the matters that are attempted to be addressed in the
5 issue as it is presently worded. In other words, we
6 believe it's more on point and reflective.

7 **COMMISSIONER GARCIA:** Whose issue is this?
8 Staff's?

9 **MR. GUYTON:** It was a Florida Power and
10 Light Company issue.

11 **COMMISSIONER GARCIA:** Okay.

12 **MS. HERSHEL:** We would have to include the
13 municipals and cooperatives in Staff's rewording also.

14 **MS. PAUGH:** That would be acceptable.

15 **COMMISSIONER GARCIA:** Do you want to see
16 this in writing and we'll come back to it? All right,
17 Staff, if you could have someone just type that up so
18 we could pass it out.

19 **MR. WRIGHT:** If I could just make one
20 suggestion to the wording while we're here.

21 **COMMISSIONER GARCIA:** Shef, I'm not even
22 looking at it, so I don't even have it before me.
23 Let's wait until Staff prints it out. We've got to
24 return to a few other issues.

25 Issue 36.

1 **MS. PAUGH:** Staff's position on Issue 36 is
2 it is argumentative and should be dropped.

3 **COMMISSIONER GARCIA:** Don't get sympathetic
4 on me. Whose is this? (Laughter)

5 **MR. GUYTON:** Florida Power and Light.

6 Commissioner, I must express some surprise,
7 through three issue ID meetings Staff has said they
8 agree to this issue and, indeed, here having said
9 that, if the Commission -- if you, from the
10 Commission, is not concerned about these types of
11 issues, we can proceed from there.

12 **COMMISSIONER GARCIA:** Mr. Guyton, I think
13 these are issues I would be concerned with, I'm
14 certain that the Chairman is concerned, I'm certain
15 the executive director is concerned. However, I don't
16 think the issues in this docket don't bring the
17 concern necessary, so we're going to drop 36. 37.

18 **MS. PAUGH:** Staff's position on Issue 37 is
19 that it is subsumed by Issues 9 and 14.

20 **COMMISSIONER GARCIA:** Whose issue is this?

21 **MR. GUYTON:** Florida Power and Light
22 Company. Issue 14 has been dropped.

23 **COMMISSIONER GARCIA:** Referring back to
24 that, you score. We'll leave 37.

25 **MS. KAMARAS:** The other conservation

1 measures, No. 7, Staff, the one you meant to refer to.

2 **COMMISSIONER GARCIA:** I think this is fine
3 as a policy issue. I feel comfortable with it.

4 38. I was all right with this one.

5 **MS. PAUGH:** Staff has no objection to
6 Issue 38 through Issue 40.

7 **COMMISSIONER GARCIA:** Good. If no one else
8 has any objection, Issue 41. So we leave in Issue 38,
9 39, 40 -- does anyone have any issue with 41,
10 objection to Issue 41? All right. If no one does,
11 then we're finished -- well, 42 I guess no one can
12 have an objection.

13 **MS. PAUGH:** Actually, Commissioner, Staff
14 does; has not an objection but a question. Tampa
15 Electric Company has taken a position of "no"
16 regarding the docket closing, and we wonder if that's
17 correct.

18 **MR. BEASLEY:** It should be "yes". Thank
19 you.

20 **COMMISSIONER GARCIA:** That was surprising.
21 We're through with that.

22 We'll go through the exhibit list. Any
23 corrections? Is there anything else to be taken up?

24 **MS. PAUGH:** Yes, Commissioner. LEAF has not
25 taken --

1 **COMMISSIONER GARCIA:** With the exception of
2 the two issues we're going to go back to in a moment.

3 **MS. PAUGH:** Yes. LEAF has not taken a
4 position with respect to any of the issues in this
5 docket, and they will need to do that. I was
6 wondering when LEAF proposes to take a position?

7 **MS. KAMARAS:** I think we're authorized going
8 into the hearing to be neutral on the issues.

9 **COMMISSIONER GARCIA:** You're not giving us a
10 witness or anything.

11 **MS. KAMARAS:** No, we have no witnesses, and
12 we're reserving our right to cross examine, but we
13 hope to take a position after hearing the evidence at
14 the hearing.

15 **MS. PAUGH:** Commissioner, the Order
16 Establishing Procedure states that all parties must
17 take positions by the time of the prehearing. I'm
18 looking for that language for you. I would refer LEAF
19 to Page 5 of the first Order Establishing Procedure,
20 under "Prehearing Procedure and Waiver of Issues." It
21 states that "Any issue not raised by a party prior to
22 the issuance of the Prehearing Order shall be waived
23 by that party except for good cause shown." In
24 addition, this page states that "Unless a matter is
25 not at issue for that party, each party shall

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1 diligently endeavor in good faith to take a position
2 on each issue prior to issuance of the Prehearing
3 Order."

4 **COMMISSIONER GARCIA:** Mr. Kamaras, it will
5 make it easier for the parties to participate if they
6 know where you stand on this.

7 **MS. KAMARAS:** Because LEAF has extremely
8 limited resources, we have really been unable to do
9 much on this case. And we would like the opportunity
10 to hear the evidence at the hearing in order to better
11 form our positions. If we must take a position on
12 issues, I will endeavor to do that this afternoon and
13 get that to Staff and all of the parties. I would
14 suspect we will only take a position on one or two
15 issues in any case.

16 **COMMISSIONER GARCIA:** Ms. Paugh, we will be
17 asking this of Mr. Kammer, we'll be asking him to take
18 a position also.

19 **MS. PAUGH:** That's correct, Commissioner. I
20 bring to the parties' attention that the Prehearing
21 Order is due on November 18th. That gives the
22 parties, Mr. Kammer and LEAF plenty of time to provide
23 Staff with positions on issues. We do request the
24 positions be provided to us two days in advance of the
25 issuance date so that we have an opportunity to

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1 include them in the order.

2 **COMMISSIONER GARCIA:** Let's not give that
3 that much time. Let's give them four days before
4 you -- just so if there's any problems by the other
5 parties that they can take a look at it.

6 **MS. PAUGH:** I'm sorry, did you say a date,
7 Commissioner?

8 **COMMISSIONER GARCIA:** I just said four days
9 before that so we can have enough time and they will
10 have enough time, and I think Mr. Kammer -- what is
11 the date again? You said the 18th.

12 **MS. PAUGH:** Four days before that is Sunday.
13 I would recommend that we have it be due on the 13th,
14 which is a Friday.

15 **COMMISSIONER GARCIA:** Okay.

16 **MS. PAUGH:** I would also request that the
17 positions be submitted on diskette pursuant to our
18 filing requirements.

19 **COMMISSIONER GARCIA:** It's with the light
20 off. We work different here. (Referring to
21 microphone)

22 **MR. SNIFFEN:** Would that same opportunity be
23 provided to U. S. Generating?

24 **COMMISSIONER GARCIA:** Once we decide and
25 once we get -- we decide, then we'll think about that.

1 But I would imagine you take this as you find it. If
2 we do let you in at that stage I think we're pretty
3 much set on the issues that are going to be before us.

4 **MR. SNIFFEN:** With respect to positions.

5 **CHAIRMAN JOHNSON:** With respect to
6 positions, if we do allow you to intervene, I expect
7 you to take positions. You've got enough time to look
8 at it, if I'm not mistaken. That's what, a week and
9 something, so we'll be fine.

10 **MR. SNIFFEN:** All right. Thank you.

11 **COMMISSIONER GARCIA:** We've got to go back
12 to the two issues that we were hoping for -- if I'm
13 not mistaken, we're going to go back to Issue 11.

14 **MS. PAUGH:** That's correct, Commissioner.

15 **COMMISSIONER GARCIA:** Remind me why we're
16 going back to Issue 11.

17 **MS. PAUGH:** Tampa Electric Company provided
18 us with positions. Staff has no objection to the
19 position.

20 **COMMISSIONER GARCIA:** Okay. Good. Does
21 anyone else? So we move on. Issue 11, then, we add
22 TECO's position. Then we had to go back to --

23 **MS. PAUGH:** Issue 17.

24 **COMMISSIONER GARCIA:** And this is also --
25 we're not changing the issue, we're putting TECO's

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1 response in also.

2 **MS. PAUGH:** That's correct.

3 **COMMISSIONER GARCIA:** We're putting in
4 TECO's response in on Issue 17. We had another one
5 that Staff was rewriting, if I'm not mistaken, we were
6 going to pass out.

7 **MS. PAUGH:** Before we get to that,
8 Commissioner, we had questions whether we could
9 stipulate to Issue 20.

10 **COMMISSIONER GARCIA:** Correct. Let's give
11 the parties a chance to look at it. Relatively
12 quickly, and --

13 **MR. WRIGHT:** Commissioner Garcia, I
14 apologize, I turned to co-counsel -- are we on
15 Issue 20.

16 **COMMISSIONER GARCIA:** Issue 20.

17 **MR. WRIGHT:** Okay. We believe that the
18 issue raises not only the simple fact question that it
19 purports to raise but it implicates timing issues as
20 to when contracts may be required and when they may be
21 entered into. If we stipulate to this issue we're not
22 going to have a chance to address that. And we think
23 it's entirely appropriate for us to address that. So
24 we're not going to stipulate this, unless the
25 stipulation is our statement.

1 **COMMISSIONER GARCIA:** So much for that. All
2 right. Issue 35 then is the last one.

3 **MS. PAUGH:** Yes, Commissioner, everyone has
4 been handed Staff's.

5 **COMMISSIONER GARCIA:** Obviously, by the
6 change of the wording of this, some of the positions
7 may change a little bit. So let's see how comfortable
8 we are with Staff's change and then we'll go from
9 there.

10 **MR. WRIGHT:** Commissioner Garcia, is it your
11 pleasure to entertain discussion on this issue now or
12 do you want us to get together afterwards?

13 **COMMISSIONER GARCIA:** I'm hoping to have
14 discussion now, unless you need some more time, and
15 we'd get your positions later; you can send them to
16 Staff later.

17 **MR. WRIGHT:** With your permission then, I'd
18 like to offer the suggested wording change --

19 **COMMISSIONER GARCIA:** Correct.

20 **MR. WRIGHT:** -- and the rationale that I
21 started to do a little while ago.

22 Given the interconnected nature --

23 **COMMISSIONER GARCIA:** Ms. Paugh, read this
24 into the record.

25 **MS. PAUGH:** "Can Florida's investor-owned

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1 electric utilities, electric cooperatives and
2 municipal electric utilities, or the affiliates of any
3 of these, build merchant plants in their service
4 areas?"

5 **COMMISSIONER GARCIA:** Now, remind me, was
6 this an issue -- a Staff issue, an FP&L issue?

7 **MS. PAUGH:** This is a revision of an FP&L
8 issue revised for the purpose of more closely
9 focussing on the intent of the issue.

10 **COMMISSIONER GARCIA:** Maybe one of those
11 cases where I agreed with Mr. Guyton, but nonetheless
12 this is the issue that is there.

13 **MR. WRIGHT:** My only comment --

14 **COMMISSIONER GARCIA:** Hold on a second. I
15 have to ask Mr. Guyton. It's his issue and clearly
16 there's been substantial changes.

17 **MR. GUYTON:** I don't mean to be contentious.
18 As you might guess, I prefer the issue that we raised.
19 As long as we can get the issue before the Commission
20 I guess I'm largely indifferent to the wording of it.

21 I think we would do well to keep this in the
22 context of this case to have kind of a preparatory
23 sentence or phrase, would granting the determination
24 being sought authorize the remainder of Staff's issue
25 would be fine. The Commission may want to be somewhat

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1 concerned about how broad a policy issue have been
2 identified for this motion.

3 **COMMISSIONER GARCIA:** Schef, how are you
4 going to change this? Just real quick.

5 **MR. WRIGHT:** I was going to say considering
6 the interconnected nature of the transmission system
7 in Peninsular Florida, and limiting the connections to
8 the Panhandle and Georgia, I think the relevance of
9 building a merchant plant in a specific utility's
10 service area, i.e., its traditional service area, is
11 not as relevant as whether they could build a plant in
12 Florida. For example, FP&L owns a plant 17 miles
13 north of Macon, Georgia --

14 **COMMISSIONER GARCIA:** This is why we're not
15 going to change it. Thank you. We're going to stay
16 with Mr. Guyton's position. And I think that does it.

17 **MR. WRIGHT:** I apologize for prolonging
18 this.

19 **COMMISSIONER GARCIA:** We're still under
20 record time.

21 **MR. WRIGHT:** But with respect to Item 11 on
22 Page 59 of the Prehearing Order, I just.

23 **COMMISSIONER GARCIA:** Roman XI on Page 59.

24 **MR. WRIGHT:** Roman Numeral XI on Page 59 of
25 the order, "Pending Motions."

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1 **COMMISSIONER GARCIA:** Go ahead.

2 **MR. WRIGHT:** You dealt with IBEW's motion to
3 intervene and our motion opposition. I wanted to call
4 to your attention that yesterday the joint
5 petitioners, the Utilities Commission and Duke New
6 Smyrna filed motions to strike portions of the
7 prefiled direct testimonies of Florida Power's
8 witnesses Rib and Dolan and Florida Power and Light's
9 witness Steinmeier.

10 **COMMISSIONER GARCIA:** I haven't seen those.

11 **MR. WRIGHT:** Just for purposes of letting
12 everybody know.

13 **COMMISSIONER GARCIA:** Thank you for bringing
14 me back. It just reminded me that FP&L's Motion to
15 Expedite, I think I had to officially deny it here,
16 and so it's denied.

17 **MR. WRIGHT:** We had an alternate Motion to
18 Expedite 20 days, and that's how we have been
19 governing ourselves to the extent possible with our
20 resources. We've agreed with Staff to respond in 20
21 days to their request. I appreciate the affirmative
22 ruling on our motion for alternative expedited
23 discovery schedule, which was 20 days response time,
24 sir.

25 **COMMISSIONER GARCIA:** I don't remember

1 seeing that.

2 **MS. PAUGH:** It would be appropriate to rule
3 on that, Commissioner. It was within their objection.

4 **MR. WRIGHT:** We objected to the 14 days and
5 proposed an alternative by a motion for --

6 **COMMISSIONER GARCIA:** Does Staff have any
7 problem with that?

8 **MS. PAUGH:** Staff does not.

9 **COMMISSIONER GARCIA:** Then that is granted.
10 Anything else?

11 **MS. PAUGH:** Yes, Commissioner.

12 First, so the parties know, Staff will issue
13 by the end of business on Monday, the 9th, the
14 renumbered issues to reflect those issues which have
15 been dropped. That will be the basis of the
16 additional positions that may be filed by LEAF and/or
17 IBEW. We also need to discuss the pending motions to
18 dismiss.

19 **COMMISSIONER GARCIA:** Correct. It's my
20 belief that this issue would probably clog up agenda
21 unnecessarily. So what we're going to do is take it
22 up at the beginning of the hearing, so you should all
23 be prepared to argue it then. What we're going to do
24 is limit it to -- I think we had discussed,
25 Ms. Paugh -- is it half an hour per side?

1 **MS. PAUGH:** I would recommend each of the
2 two parties that have filed Motions to Dismiss be
3 allowed a half hour for oral argument each, and that
4 Duke New Smyrna be allowed half an hour in response to
5 each of them for a total of a hour for Duke, a total
6 of two hours oral argument.

7 **COMMISSIONER GARCIA:** Correct. That's not
8 to encourage you, Mr. Wright, to take that full hour
9 because I think that's -- a lot of these issues will
10 be overlapping so we can deal with it all at once.

11 **MS. PAUGH:** I believe there are no further
12 matters, Commissioner.

13 **COMMISSIONER GARCIA:** Thank you all for
14 being so cooperative. I just caution you that we're
15 working on a tight time clock so try to be early on
16 everything with Staff and let's get this done. Thank
17 you.

18 (Thereupon, the hearing concluded at 10:30
19 a.m.)

20 - - - - -

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23 Over 1030 a.m.

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

: CERTIFICATE OF REPORTER

3 I, JOY KELLY, CSR, RPR, Chief, Bureau of
4 Reporting, Official Commission Reporter,

5 DO HEREBY CERTIFY that the Prehearing
6 Conference in Docket No. 981042-EM was heard by the
7 Prehearing Officer at the time and place herein
8 stated; it is further

9 CERTIFIED that I stenographically reported
10 the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 41 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 DATED this 6th day of November, 1998.

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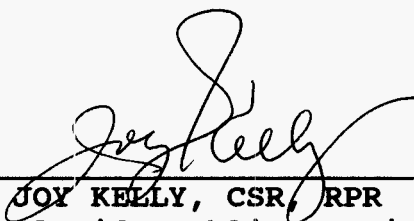
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