

STATE OF FLORIDA
DIVISION OF ADMINISTRATION HEARINGS

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

vs.

DOAH CASE NO. 99-4264-RX

990000-PU

PUBLIC SERVICE COMMISSION,
Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

Petitioner Florida Power & Light Company ("Petitioner" or "FPL"), responds to the Motion to Dismiss filed by Respondent Public Service Commission ("Respondent" or "PSC") and states:

1. The PSC's Motion to Dismiss misses the point of FPL's rule challenge petition. FPL has not challenged the PSC's statutory authority to investigate or regulate public utilities such as FPL. Rather, FPL has challenged rule 25-22.036(3), Florida Administrative Code, as an invalid

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exercise of delegated legislative authority because the PSC uses the rule to initiate adjudicatory proceedings that determine substantial interests. The rule is contrary to section 120.54(5)(a)1., Florida Statutes, which provides that "the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection." The PSC's construction of the rule ignores the Final Order of the

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Administration Commission in AC Case No. APA-98-007, which denied the PSC's request to keep the rule as an exception to the Uniform Rules of Procedure.

2. The PSC's contention that FPL's petition should be dismissed because it raises an "as applied" challenge is wrong. The application of the rule in the reserve margin docket (Docket No. 981890-EU) described in FPL's rule challenge petition is simply illustrative of why the PSC rule is invalid. Rule 25-22.036(3) on its face authorizes the PSC, on its own motion, to issue an order or notice initiating a proceeding. That authorization is prohibited by section 120.54(5)1.a., Florida Statutes, and the Uniform Rules of Procedure. The PSC could apply this rule in the future in a variety of proceedings that could affect FPL, a public utility and an electric utility as defined by section 366.02, Florida Statutes, that is regulated by the PSC. As one administrative law judge has noted, "[s]tanding is determined by whether the Petitioner has been substantially affected by suffering harm or whether the Petitioner will be harmed in the future by being subjected to the direct or collateral effect of regulatory authority on a particular issue." Security Mutual Life Ins. Co. v. Department of Insurance, 1997 WL 1053263 (DOAH Case No. 97-1132RU), aff'd in part, rev'd in part on other grounds, 707 So. 2d 929 (Fla. 1st DCA 1998) (emphasis supplied).

3. As noted in FPL's rule challenge petition, the PSC's construction of the rule is stated in the Order Denying Motions for Reconsideration, Docket No. 98190-EU, Order No. PSC-99-1716-PCO-EU, September 2, 1999 (attached to FPL's rule challenge petition as Exhibit 1); and the Order Clarifying Scope of Proceeding; Docket Procedures; and Establishing Issues, Docket No. 981890-EU, Order No. PSC-99-1274-PCO-EU, July 1, 1999 (attached to FPL's rule challenge petition as Exhibit 2). Both orders make clear that the PSC applies rule 25-22.036(3), Fla. Stat., in accordance with its express language, as providing authority independent of the Uniform Rules of Procedure for

initiation of a proceeding intended to determine substantial interests. This construction was explained at oral argument at a status conference and preliminary prehearing conference in the reserve margin docket by a PSC staff member. The following explanation was given one day before the prehearing officer issued the Order Clarifying Scope of Proceeding referenced above:

Rule 25-22.036(3) was retained by the Commission after the passage of the APA. Therefore, that rule applies to this docket with equal force and effect, or greater force and effect, than the Uniform Rules.

That rule states: "Upon its own motion, the Commission may issue an order or notice initiating a proceeding." And then it talks about where it would be served. This rule is a formal proceeding rule. That's what we have here. To state that investigations cannot also be formal proceedings in the case of the Commission is incorrect.

(Emphasis supplied). Transcript of Status Conference and Preliminary Prehearing Conference, Docket No. 981890-EU, at 60 (testimony of Leslie J. Paugh, former senior attorney, to Prehearing Officer Commissioner Julia L. Johnson) (attached as Exhibit A).

4. Ms. Paugh neglected to mention that the Administration Commission denied a requested PSC exception for rule 25-22.036(3), which would be necessary for the PSC to rely on the plain language of the rule as authority for a proceeding that determines substantial interests. Nor did she mention the Administration Commission's statement in its Final Order denying the exception that the rule "appl[ies] to applications, complaints, orders, or notices which do not involve, or which precede, proposed or final agency action determining substantial interests." (Emphasis supplied). See Final Order, AC Case No. APA-98-007, at 3 (attached to Petitioner's rule challenge petition as Exhibit 9). Finally, Ms. Paugh didn't address the PSC's own statement in a memorandum to interested persons that the rule was "outside the scope" of the Uniform Rules of Procedure. See Public Service Commission Memorandum from Noreen Davis, Director of Legal Services; Mary

Anne Helton, Associate General Counsel; and Christiana T. Moore, Associate General Counsel, to Rule Supplement Mailing List, April 26, 1999 (attached to FPL's rule challenge petition as Exhibit 10). Despite the order of the Administration Commission and the PSC's own statement that the rule is outside the scope of the Uniform Rules, the PSC is applying the rule in accordance with its plain language in a manner that determines substantial interests, which is clearly within the scope of the Uniform Rules, and thus prohibited by section 120.54(5)(a)1.

5. The PSC does not dispute that the Administration Commission denied the requested exception for rule 25-22.036(3). Nor does the PSC dispute the Administration Commission's characterization of the rule as one that "do[es] not involve, or which precede[s], proposed or final agency action determining substantial interests." See Respondent Florida Public Service Commission's Answer to Florida Power & Light Company's Petition for Administrative Determination of the Invalidity of an Existing Rule at 2 (admitting allegations of FPL rule challenge petition). The PSC even admits that it stated unequivocally to the Administration Commission, and separately to interested persons, that rule 25-22.036(3) is outside the scope of the Uniform Rules of Procedure. Id.

6. Given that section 120.54(5)(a)1., Florida Statutes, states that "the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection," the PSC cannot construe the rule as giving the PSC independent authority to conduct a proceeding that is without question governed by the Uniform Rules of Procedure. See chapter 28-106, Florida Administrative Code (decisions determining substantial interests). This is true even though the PSC has kept rule 25-22.036(3) in part IV of chapter 25-22, Florida Administrative Code, which is entitled "Decisions

Determining Substantial Interests.”¹ As the First District Court of Appeal noted in Department of Corrections v. Saulter, 24 Fla. L. Weekly D1951 (Fla. 1st DCA August 20, 1999), the Uniform Rules of Procedure replaced an agency’s prior procedural rules “by operation of law” on July 1, 1998, unless an exception had been granted by the Administration Commission. In the case of rule 25-22.036(3), the exception was specifically denied.

7. FPL does not argue in this proceeding or elsewhere that rule 25-22.036(3) does not provide authority for the PSC to initiate an investigation. The PSC without question has authority to conduct investigations that are preliminary to agency action. The problem is that the PSC maintains that rule 25-22.036(3) provides authority for the PSC to initiate a proceeding on its own motion to determine FPL’s substantial interests. It does not and cannot. Rule 25-22.036(3) was displaced by the Uniform Rules of Procedure, and the PSC’s request for an exception was denied. The PSC should construe rule 25-22.036(3) as authorizing investigations preliminary to agency action, as it told the Administration Commission it would do. At the conclusion of the investigation, the PSC then can pursue rulemaking or initiate proposed agency action, which gives substantially affected persons a point of entry under sections 120.569 and 120.57, Florida Statutes.

8. FPL has repeatedly urged the PSC to accept the interpretation of rule 25-22.036(3) described in the preceding paragraph. In pleadings filed in the reserve margin docket, FPL has argued that the docket was opened by the PSC as a generic investigation and noted that section 120.57 specifically does not apply to agency investigations preliminary to agency action. §

¹ Not only does the rule remain in the part of chapter 25-22 relating to decisions determining substantial interests, but the rule itself is still styled “Initiation of Formal Proceedings.”

120.57(5), Fla. Stat. Similarly, chapter 28-106, Florida Administrative Code, is inapplicable to agency investigations preliminary to agency action. R. 28-106.010(2), Fla. Admin. Code. See FPL's Exhibits 5 and 6 to its Petition for Administrative Determination of the Invalidity of an existing Rule. In response to those pleadings, the PSC, which had until that time relied solely on sections 120.569 and 120.57 and rule chapter 28-106 as authority to conduct its investigation, announced its intent to rely on rule 25-22.036(3) as authority to conduct the proceeding as one that will determine FPL's substantial interests. It is reasonable to assume that the PSC will rely on this rule in the future to conduct investigations in a fashion that will determine FPL's substantial interests.

9. FPL has stated a cause of action in this rule challenge proceeding. Section 120.56(1), Florida Statutes, requires that a petitioner "state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it" The facts outlined in the preceding eight paragraphs, which also were detailed in FPL's rule challenge petition, demonstrate that rule 25-22.036(3), Florida Statutes, violates sections 120.54(5)(a)1. and 120.57(5), Florida Statutes, and rule 28-106.101(2), Florida Administrative Code. Similarly, the facts outlined in the preceding eight paragraphs and in FPL's rule challenge petition demonstrate that the rule is an invalid exercise of delegated authority as defined in section 120.52(8), Florida Statutes. FPL must prove only one of the listed reasons in section 120.52(8) that a rule is an invalid exercise of delegated authority. See § 120.52(8) ("A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:") The facts detailed by FPL in its petition demonstrate that the rule is invalid based on a number of the grounds listed in section 120.52(8), including:

a. The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in chapter 120, Florida Statutes. Because the Administration Commission denied the PSC's requested exception from the Uniform Rules of Procedure for rule 25-22.036(3), the PSC should have repealed the rule or amended it to be consistent with the Final Order of the Administration Commission. Agencies are required to follow the rulemaking requirements in section 120.54(3), Florida Statutes, when they repeal or amend rules. The PSC may not simply ignore the decision of the Administration Commission and construe the rule as if the exception had been granted. The rule should have been repealed, or the PSC should have amended the rule to adopt a construction consistent with the Final Order of the Administration Commission.

b. The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1. The agency's grant of rulemaking authority does not extend to adopting rules that are inconsistent with the Uniform Rules of Procedure when no exception has been granted by the Administration Commission. § 120.54(5)(a)1., Fla. Stat. Section 350.01(7), one of two statutes cited as specific authority for the rule, provides that "[t]his section does not prohibit a commissioner, designated by the chair, from conducting a hearing as provided under s. 120.569 and 120.57(1) and the rules of the commission adopted pursuant thereto." That statute does not permit the PSC to conduct an investigation, which is outside the scope of section 120.57, as a hearing pursuant to sections 120.569 and 120.57. The other statute cited as specific authority for the rule, section 350.127(2), Florida Statutes,

is nothing more than a general grant of rulemaking authority, which is “necessary but not sufficient to allow an agency to adopt a rule . . .” § 120.52(8), Fla. Stat.

c. The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1. The rule enlarges, modifies, or contravenes section 120.57, which is one of the statutes listed as “law implemented” by the rule. The rule also enlarges, modifies, or contravenes section 120.54(5)(a)1. and other provisions of Florida law.

d. The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. The PSC’s construction of the rule allows it to use rule 25-22.036(3) to conduct an investigation on any subject as a proceeding to determine FPL’s substantial interests. Such a construction represents unbridled agency discretion.

e. The rule is arbitrary or capricious. The PSC can use rule 25-22.036(3) to conduct an investigation on any subject as a proceeding to determine FPL’s substantial interests. That construction of the rule is contrary to the PSC’s assertions to the Administration Commission about how the rule would be used, and the construction is therefore not supported by fact or logic. The rule also is capricious because the PSC’s construction is without thought or reason. Indeed, the PSC’s construction simply ignores the decision of the Administration Commission to deny an exception to the Uniform Rules for rule 25-22.036(3).

f. The rule exceeds the specific powers and duties granted by the rule’s enabling statutes. Section 120.57 is among the statutes listed as laws implemented

by the rule. Section 120.57(5) states that “[t]his section does not apply to agency investigations preliminary to agency action.” The PSC’s construction of the rule as authority for initiation of an agency investigation that can be conducted as a proceeding subject to sections 120.569 and 120.57 not only exceeds the powers and duties granted by section 120.57, but is directly contrary to section 120.57(5).

10. FPL has demonstrated that it has standing to bring this rule challenge proceeding. The PSC has admitted that FPL is a public utility and an electric utility as defined by section 366.02, Florida Statutes. See Respondent Florida Public Service Commission’s Answer to Florida Power & Light Company’s Petition for Administrative Determination of the Invalidity of an Existing Rule at 3 (admitting allegations of FPL rule challenge petition). Public and electric utilities are subject to the jurisdiction of the PSC, including its procedural rules. E.g., §§ 366.04, 366.05, 350.127(2), Fla. Stat. The PSC also has admitted that FPL has been designated unilaterally by the PSC as an appropriate party in the reserve margin docket and that FPL will be affected by any orders resulting from that docket. See Respondent Florida Public Service Commission’s Answer to Florida Power & Light Company’s Petition for Administrative Determination of the Invalidity of an Existing Rule at 3 (admitting allegations of FPL rule challenge petition). FPL has difficulty understanding how the PSC can argue that FPL has no standing to challenge rule 25-22.036(3) while nonetheless designating FPL as a “party” to a proceeding that the PSC alleges is being conducted pursuant to the authority of that rule.

11. The “substantially affected person” standing requirement for rule challenge proceedings “was intended to create an opportunity for a citizen initiated check on rule making that exceeded delegated statutory authority.” Department of Professional Regulation, Board of Dentistry

v. Florida Dental Hygienist Association, Inc., 612 So. 2d 646, 652 (Fla. 1st DCA 1993) quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U. L. Rev. 965, 1014 (1986). The court noted with approval that Professor Dore believed that the standing requirements for a rule challenge proceeding are not as stringent as those applying in a court of law.² Id. at 652. As the PSC acknowledged in its Motion to Dismiss, the standing requirements in a rule challenge proceeding are not even as stringent as in a section 120.57 proceeding. See Respondent Florida Public Service Commission's Motion to Dismiss at 5.

12. FPL easily meets the two-party standing test established in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), and subsequent cases. The test requires (1) establishment of a real and sufficiently immediate injury in fact and (2) the alleged injury must be within the zone of interest protected by the statute being implemented by the rule. Rule 22-25.036(3), by allowing the PSC to conduct any investigation on any topic as a proceeding that determines FPL's substantial interests, directly impacts FPL's business in an infinite number of ways. See Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995) (first prong of standing test met when rule impacts a challenger's occupation). The PSC has announced its construction of the rule in the reserve margin docket, a proceeding in which the PSC may determine the percentage of reserve capacity electric utilities must maintain. The PSC's decision in this docket could require FPL to increase its reserve margin.

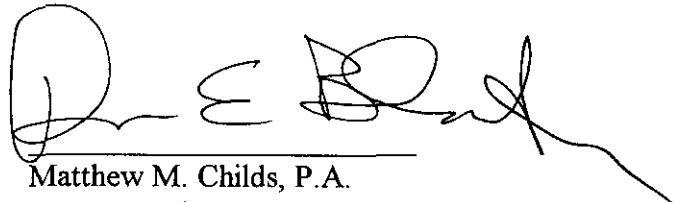
² Although the court in the Dental Hygienist case was dealing with a proposed rule challenge, the standing requirements for challenging proposed rules and existing rules are identical. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995); State Department of Health & Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979).

Clearly, FPL's injury is "real and immediate." *Id.* at 1237. The "zone of interest" element of the test is met when a party asserts that a rule encroaches upon an interest protected by a statute or by the constitution. Florida Medical Ass'n v. Department of Professional Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983). The PSC's construction of rule 25-22.036(3) denies FPL the procedural protections guaranteed by the Administrative Procedure Act.

13. The PSC asserts that FPL's remedy to the illegal use of rule 25-22.036(3) is waiting until the reserve margin docket is concluded and then filing an appeal pursuant to section 120.68, Florida Statutes. That remedy, while certainly available, is not exclusive. Additionally, it does not address the issue of the PSC's future reliance on rule 25-22.036(3) to conduct investigations as formal proceedings that determine substantial interests. FPL should not be required to appeal every agency investigation that is conducted pursuant to a rule that is an invalid exercise of delegated legislative authority.

For the reasons expressed, FPL respectfully requests that the PSC's Motion to Dismiss be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D E Blanton", written over a horizontal line.

Matthew M. Childs, P.A.
Donna E. Blanton, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Respondent's Motion to Dismiss was served by Hand Delivery* and U.S. Mail this 29th day of October, 1999 to the following:

Catherine Bedell, Esq.*
Acting General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Room 301
Tallahassee, FL 32399-0850

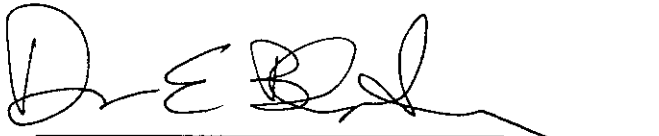
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St. Petersburg, FL 33731



Donna E. Blanton

TAL_1998/32578-1

³ Ms. Bayó is served as the PSC representative pursuant to rule 28-106.110, Florida Administrative Code.

EXHIBIT A

1 APPEARANCES:

2 RUSSELL BADDERS, Beggs & Lane, 700 Blount
3 Building, 3 West Garden Street, Post Office Box 12950,
4 Pensacola, Florida 32576-2950, appearing on behalf of
5 Gulf Power Company.

6 PAUL SEXTON, Thornton Williams and
7 Associates, 215 S. Monroe Street, Suite 600-A,
8 Tallahassee, Florida, 32302, appearing on behalf of
9 Florida Reliability Coordinating Council.

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

14 ROBERT SCHEFFEL WRIGHT, Landers & Parsons,
15 310 West College Avenue, P.O. Box 271, Tallahassee,
16 Florida 32302, appearing on behalf of Duke Energy
17 Power Services, LLC and Utilities Commission of the
18 City of New Smyrna Beach, Florida.

19 MATTHEW M. CHILDS, Steel, Hector and Davis,
20 215 South Monroe Street, Suite 810, Tallahassee,
21 Florida 32301-1859, appearing on behalf of Florida
22 Power & Light Company.

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1 APPEARANCES CONTINUED:

2 ROY YOUNG, Young, van Assenderp and
3 Varnadoe, P.A., P.O. Box 1833, Tallahassee, Florida
4 32302-1833, appearing on behalf of Kissimmee Utility
5 and City of Lakeland.

6 JOHN McWHIRTER, McWhirter, Reeves,
7 McGlothlin, Davidson, Rief and Bakas, 117 South
8 Gadsden Street, Tallahassee, Florida 32301, appearing
9 on behalf of Florida Industrial Power Users Group.

10 LEE L. WILLIS, Ausley & McMullen, P.O. Box
11 391, Tallahassee, Florida 32302, appearing on behalf
12 of Tampa Electric Company.

13 GAIL KAMARAS, Legal Environmental Assistance
14 Foundation, 1114 Thomasville Road, Suite E,
15 Tallahassee, Florida 32303, appearing on behalf of
16 Legal Environmental Assistance Foundation (LEAF).

17 GARY SASSO, Carlton, Fields, Ward, Emmanuel,
18 Smith & Cutler, P.O. Box 3239, Tampa, Florida 33601
19 appearing on behalf of Florida Power Corporation.

20 FREDERICK M. BRYANT, Moore, Williams,
21 Peebles & Gautier, 306 E. College Avenue, Tallahassee,
22 Florida 32301 appearing on behalf of the Florida
23 Municipal Power Agency.

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1 APPEARANCES CONTINUED:

2 ROBERT ELIAS, and LESLIE PAUGH, Florida
3 Public Service Commission, Division of Legal
4 Services, 2540 Shumard Oak Boulevard, Tallahassee,
5 Florida 32399-0870, appearing on behalf of the
6 Commission Staff.

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8 ALSO PRESENT:

9 ROLAND FLOYD

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

2 (Hearing convened at 9:30 a.m.)

3 COMMISSIONER JOHNSON: We're going to go on
4 the record and, counsel, if you could read the notice.

5 MS. PAUGH: Pursuant to notice issued
6 June 22nd, 1999, this time and place have been set for
7 this status conference and preliminary prehearing
8 conference.

9 COMMISSIONER JOHNSON: Thank you. We'll
10 take appearances. Mr. Wright?

11 MR. WRIGHT: Thank you, Madam Commissioner.
12 Robert Scheffel Wright, law firm of Landers & Parsons,
13 310 West College Avenue, Tallahassee, Florida, 32301,
14 appearing on behalf of Duke Energy New Smyrna Beach
15 Power Company Limited, LLP, and Duke Energy North
16 America, LLC. Duke Energy North America is the new
17 name for Duke Energy Power Services, which has been
18 granted intervention in this docket.

19 COMMISSIONER JOHNSON: Thank you.

20 MR. SNIFFEN: Robert J. Sniffen, on behalf
21 of Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan,
22 appearing on behalf of PG&E Generating Company,
23 formerly known as United States Generating Company.

24 MR. CHILDS: Matthew Childs of the firm of
25 Steel, Hector and Davis, appearing on behalf of

1 Florida Power & Light Company.

2 MR. WILLIS: I'm Lee Willis, P.O. Box --

3 COMMISSIONER JOHNSON: She can't hear you.
4 I don't think your mike is on.

5 MR. WILLIS: I'm Lee L. Willis, Post Office
6 Box 391, Tallahassee, Florida 32302, appearing on
7 behalf of Tampa Electric Company.

8 MR. SEXTON: Paul Sexton with the firm of
9 Thornton Williams and Associates, appearing on behalf
10 of the Florida Reliability Coordinating Council.

11 MR. SASSO: Gary Sasso with the firm of
12 Carlton Fields appearing for Florida Power
13 Corporation.

14 MS. KAMARAS: Gail Kamaras for the Legal
15 Environmental Assistance Foundation, 1114 Thomasville
16 Road, Tallahassee, 32303.

17 MR. BADDERS: Russell Badders on behalf of
18 Gulf Power. We're an interested party only.

19 MR. YOUNG: Roy Young appearing on behalf of
20 Kissimmee and City of Lakeland.

21 MS. PAUGH: Leslie Paugh appearing on behalf
22 of Staff. With me is Robert Elias and Roland Floyd.

23 COMMISSIONER JOHNSON: The gentleman to
24 Mr. Sasso's right, what was your name?

25 MR. SEXTON: I'm Paul Sexton with Thornton

1 Williams and Associates.

2 COMMISSIONER JOHNSON: And you represent,
3 again?

4 MR. SEXTON: The Florida Reliability
5 Coordinating Council, FRCC.

6 COMMISSIONER JOHNSON: Thank you. Okay.
7 Are there any preliminary matters that we
8 need to deal with?

9 MS. PAUGH: We have basically two items
10 before us this morning; the substantive matters raised
11 in the pleadings of Tampa Electric Company, Florida
12 Power Corporation and Florida Power & Light with
13 respect to the status conference.

14 In addition to that, we need to resolve the
15 issues that are outstanding in this docket. There are
16 four issues upon which consensus was not reached. My
17 recommendation is to take the substantive issues first
18 because they may inform the decisions on the issue
19 identification.

20 COMMISSIONER JOHNSON: Okay. Then who would
21 you suggest should go first?

22 MS. PAUGH: I would suggest that the movants
23 be given an opportunity to address it.

24 COMMISSIONER JOHNSON: Did you all have one
25 person that would speak, or had you all discussed it

1 at all?

2 MR. CHILDS: If it's your pleasure, I can
3 start first for Florida Power & Light Company.

4 COMMISSIONER JOHNSON: Okay. That'll be
5 fine.

6 MR. CHILDS: And before we do that,
7 Commissioner, I have some documents to which I'm going
8 to be referring. They are the Florida Statutes, 120,
9 the Uniform Rules of Procedure, and I have some
10 information that is from the minutes of Internal
11 Affairs and memos from the Staff opening this docket.
12 I have some extra copies of the memos related to
13 opening this docket that -- if parties want to see
14 that. And I'm going to bring them up to you. (Pause)

15 Commissioner, we filed a request for a
16 status conference because, candidly, we think we're
17 going in the wrong direction. We think there's some
18 confusion about the procedure and the scope of the
19 hearing and, as we have outlined in our request, we
20 are concerned that it seems to us that there is a
21 significant chance for a denial of due process of law
22 as well as doing so perhaps inadvertently.

23 What I'm going to address is basically what
24 I think this docket is and should be, what action the
25 Commission took to initiate this docket, and contrast

1 that with where we're going and try to point out why I
2 think that's wrong.

3 The docket -- if you look at the first
4 document that I gave you, the docket was initiated at
5 the direction of the Commission at Internal Affairs on
6 December 15 of 1998, and the Staff was directed to
7 open a docket. This is in the last sentence of
8 Item 6: "To open a docket to consider the appropriate
9 methodology for developing reserve margin."

10 Now, that related to some questions that had
11 been presented before, concerning the FRCC
12 methodology, I think, at the Agenda Conference --
13 excuse me -- Internal Affairs that there was
14 discussion about what type of an investigation you
15 should have, and it was recommended to you that you
16 pursue the question of methodology; and that's what
17 the Commissioners voted to do.

18 I also have attached as the last page in
19 that -- well, there is another page, and it's the --
20 at the very next Internal Affairs the Commissioners
21 approved the minutes of the December 15 Internal
22 Affairs meeting without change.

23 Now, what I've attached next is, there's a
24 memo from the Staff dated December 17 to the Division
25 of Records and Reporting following up on the direction

1 from two days before. But we would take exception to
2 what is done here, that instead of directing that you
3 open a docket or that a docket be opened to assess
4 reserve margin methodology, the memo says the Staff
5 was requested to open a docket to examine the planned
6 reserve margins of Peninsular Florida.

7 The form that is attached to that memo, the
8 form request to establish docket, the suggested docket
9 title has the words "generic investigation into the
10 aggregate electric utility reserve margins planned for
11 Peninsular Florida;" yet a little different variation.

12 Now, we think that it's clear that what the
13 Commission voted to do was to open an investigation,
14 and the investigation was to consider the appropriate
15 methodology for developing reserve margin. We don't
16 believe it was intended to consider other matters, nor
17 was it intended for the Staff and the participants to
18 define the scope of the proceeding.

19 In fact, we would suggest, with respect,
20 that that's an improper delegation by the Commission
21 if that was intended. But I think the information
22 shows that it was not intended anyway, that it was
23 intended that the Commission pursue this
24 investigation. And we think that that should be done.

25 Now, if you look to the order establishing

1 procedure, which -- well, back up for a minute. The
2 docket was open, but there was no notice and there was
3 no order. There was no official discussion of the
4 scope of the docket, of where the Commission intended
5 to go or what the Commission might intend to do.
6 There was not an order opening a docket.

7 Now, what there was, you entered an order on
8 procedure on April 20, 1999. That is Order No. PSC
9 990760, and I have included that in your package.

10 Now, this is one of the reasons for -- or
11 some of the reasons for our concern. If you look to
12 the second paragraph of that order it says "This order
13 is issued pursuant to the authority granted by
14 Rule 28-106.211." Now, that's in the Uniform Rules of
15 Procedure that were adopted in connection with the
16 1996 revisions of the Administrative Procedures Act,
17 which I've also included in your package, and I
18 believe the directions to do that are in Section
19 120.54(5).

20 The Uniform Rules are to displace other
21 Rules of Procedure unless there's an exception
22 granted. So I read this order as saying that reliance
23 is upon that rule for what you're doing in this
24 docket, or at least as to the procedures. And I would
25 point out that if you would turn to the information

1 that I've given you which is the Chapter 28-106 -- and
2 I think I've tabbed 28-106.101 of the Rules -- and on
3 the upper right-hand side of that page it points out
4 that the Rules of Procedure do not apply to agency
5 investigations.

6 COMMISSIONER JOHNSON: I'm not finding that.
7 Which one of these documents?

8 MR. CHILDS: (Indicating) Now, this rule
9 that reliance -- that the prehearing order places
10 reliance on is in the chapter that relates to
11 decisions determining substantial interests; and
12 that's our concern.

13 We think that this docket has been converted
14 from an investigation to a decision -- or to a docket
15 to determine someone's substantial interest. It looks
16 like we're one of those.

17 As I pointed out, I don't think that was the
18 intent, but, clearly, even the style of this docket
19 shows that it's a generic investigation. And I look
20 to this rule and it says, well, you can't use the
21 rules on -- relating to decisions determining
22 substantial interest because they don't apply. If you
23 look in -- it's 120.57(5), which is also in that
24 package of the Administrative Procedures Act, and it
25 also says that the rules having to do with -- and the

1 statute -- on decisions affecting substantial interest
2 don't apply to agency investigations.

3 The point of that is, once again, looking --
4 if you would return to the order establishing
5 procedure, it is prepared with the contemplation that
6 this Commission is going to hearing, that this
7 Commission is going to hearing on issues, that this
8 Commission is going to vote and make a decision on
9 those issues. And I submit, respectfully, that that's
10 not what an investigation is about. The -- in fact,
11 you do that, if you take that action, you will be
12 determining the substantial interests of some of us;
13 and we think that's wrong.

14 I note, Commissioner, because I think a lot
15 of the material, if most all of this material, in this
16 order on procedure, is -- it's kind of boilerplate. A
17 lot of these orders, every time we have a docket they
18 get issued. And there's some specific information
19 here that's tailored to this docket or specific to the
20 intent, but a lot of it's general.

21 But, for instance, the order says in the
22 bottom of the first paragraph, the last sentence:
23 "Given the purpose of this docket, all electric
24 utilities as defined in Section 366.022 with
25 generating assets are appropriate parties in this

1 proceeding."

2 Now, this brings me to my next point.

3 "Parties" is a term that has significance only when an
4 agency is determining substantial interests. If you
5 would look to the definition of "parties" in the
6 statute, the Administrative Procedures Act, you'll see
7 that -- that's in 120.52. I forget the subsection,
8 but I have tabbed it -- that's it's either the
9 specifically named individuals or persons and includes
10 two classes of those whose substantial interests will
11 be affected.

12 So what I'm saying is, is that "parties" is
13 not an appropriate term. We shouldn't have parties,
14 because this is an investigation. But the fact that
15 it is contemplated that we do -- in fact, it said that
16 there will be -- says to me that put it all together
17 and the Commission intends to vote on issues affecting
18 interests.

19 Similarly, in the Uniform Rules -- and it
20 speaks to intervention. It's Rule 28-106.205 that is
21 also in the package -- but there is -- that rule on
22 intervention -- and you heard one or two people
23 indicate that they've been granted leave to intervene
24 in this docket, which I'm going to come to in a
25 minute.

1 But I would point out that this, again, is
2 party status. It's supposed to be conferred on those
3 for good cause or show that they're going to have
4 their substantial interests determined in the
5 proceeding. Well, you know, if this is an
6 investigation, I submit once again that you can't be
7 doing that.

8 Now, I'm not arguing that the Commission
9 cannot have a proceeding to affect the substantial
10 interests. What I'm arguing is, is that this is not
11 that proceeding, that it was initiated as an
12 investigation, and that's what it is.

13 Now, I'm not aware -- and I've undertaken to
14 review -- I'm not aware of anything that has to do
15 with the Commission decision to change this docket
16 from an investigation into a proceeding to affect
17 substantial interests of parties.

18 COMMISSIONER JOHNSON: Let me ask you a
19 couple questions just to be clear, because there
20 appears to be two issues; not just that -- first, your
21 view that this was an -- it should be an investigative
22 docket, but it is more than that. It appears to you
23 to be more of a docket that will affect the parties'
24 substantial interest.

25 MR. CHILDS: Right.

1 COMMISSIONER JOHNSON: And then, twofold,
2 even if it was an investigation type docket, the
3 parameters have been broader than you believe the
4 Commission intended those to be. So even if I said,
5 no, this is an investigation, you would still argue
6 that the parameters have been broadened beyond that
7 which you believe the Commission intended.

8 MR. CHILDS: That's right. I believe they
9 intended that it was an investigation to consider the
10 appropriate methodology for reserve margins, for
11 developing reserve margins, and that it was not to go
12 into an investigation beyond that methodology.

13 COMMISSIONER JOHNSON: Okay. Assuming I
14 agree with you that this was simply an investigation,
15 the provisions that you're citing to in the order that
16 don't seem to reflect that in your argument -- I mean,
17 do we need to rectify those? I mean, do we need to
18 call intervenors something other than intervenors? Do
19 we need to call parties -- I mean, what terminology
20 should we use, and what difference does that make in a
21 legal sense?

22 MR. CHILDS: Well, I will -- I think it does
23 make a difference. I will comment -- I want to
24 comment independently on intervention, if I could, and
25 then try to loop back into that question.

1 Our position is on the intervention, and
2 there may be something to which we need to respond;
3 but this is an investigation. There is no
4 intervention in an investigation, number one, because
5 there are no parties because there's no substantial
6 interests being determined. Therefore, it's
7 inappropriate to call someone a party, whether they
8 intervene or not.

9 Secondly -- and we're not there yet because
10 I think it's an investigation -- but, secondly, I
11 don't think that those that have sought intervention
12 have shown, nor can they show, that their substantial
13 interest is going to be affected, separate and apart
14 from the contention that this is only an
15 investigation; and that is reserve margin is a
16 function of committed load that you have to serve.

17 One of the issues -- and, therefore, you
18 know, they don't have committed load. That's what
19 we're talking about. They are someone else. They
20 don't have to make that commitment. Now, it may be
21 that this affects their perception of their
22 marketability or their development in the state, but
23 as the Supreme Court has held in Florida Steel and
24 when this Commission concluded it, the mere economic
25 interest is not sufficient to grant status. But I

1 don't even think you need to get there, because this
2 is an investigation.

3 Now, there's some --

4 COMMISSIONER JOHNSON: Let me interject just
5 to make sure I'm following what you've all written and
6 filed, what you've all written and filed and what you
7 articulated today.

8 Because this is an investigation docket,
9 they can participate; everyone can participate.
10 You're more concerned about to the extent that we were
11 going to have final decisions that would affect one's
12 substantial interest, then we just had the wrong
13 procedure and process in place --

14 MR. CHILDS: We had the wrong --

15 COMMISSIONER JOHNSON: As long as we call
16 this an investigation, they can participate; everyone
17 can participate.

18 MR. CHILDS: Well, you know, I guess I have
19 a -- I haven't looked at it in terms of whether they
20 can or can't legally, because I guess I view it this
21 way: I view it -- and I hope this is not off the
22 point -- I view it that it's an investigation where
23 the Commission is attempting to obtain information.
24 And I guess, you know, that it's fair for the
25 Commission in its attempt to gain information to go to

1 places where it thinks there's reliable information.
2 And that's not my decision to make; I think that's the
3 Commission's.

4 I do -- would take exception -- I would take
5 exception, for instance, to attempts at discovery,
6 which I don't think is appropriate in an investigation
7 by parties like that anyway, or participants, or to
8 turn it into some sort of a more contentious type
9 proceeding which is more akin to one associated with
10 determining substantial interests.

11 Now, one other thing on the intervenor
12 status, I think that it's been suggested, well, you
13 know, maybe you should have done something sooner.
14 And I would submit that, you know, first of all, I
15 think it's an investigation, and that's not even
16 appropriate.

17 The other point, just for information as to
18 some of the confusion in this docket, is that at one
19 time when we met and talked about where we were going
20 in this docket, there was a suggestion -- and this
21 wasn't transcribed -- but there was a suggestion well,
22 we'll just tear up the CASR; we're going to try to see
23 where we're going next. So there was some stopping
24 and starting.

25 Secondly, as an investigation, Florida

1 Power & Light Company doesn't have the basis to object
2 to someone who files a pleading, I mean, because it's
3 an investigation. Those Rules of Procedure aren't
4 there. And it wasn't until your procedural order came
5 out -- I mean, that said, you're a party, on
6 April 20th said all of you utilities are parties.

7 Now, we're -- we think that that was wrong,
8 but I think that provided some basis to say, well, now
9 we need to talk about status because it seems like
10 we're going too far.

11 COMMISSIONER JOHNSON: Okay.

12 MR. CHILDS: So I come back. I urge that we
13 try to pursue this as an investigation, that that's
14 what the Commission decided to do, and that we get
15 back on that track.

16 And that -- what your question about this
17 order, it seems to me that what should be done is that
18 the order on procedure ought to be amended to reflect
19 that there is discussion concerning the procedures,
20 that this is based upon reliance upon the various
21 portions of the Uniform Rules, and that upon further
22 reflection, if you agree, Commissioner, it appears
23 that this is a proceeding for an investigation and
24 that, therefore, it will be conducted as such in the
25 future.

1 COMMISSIONER JOHNSON: And that's -- I -- on
2 its face, and I'm certain the Commission did intend
3 for this to be a generic investigation. What I need
4 to better understand from you would be -- and maybe
5 other -- I can't call them people; I can't call you
6 parties -- would say the same thing. People is good.
7 Maybe they would say the same thing, but then the
8 question becomes what would be the parameters of a
9 generic investigation.

10 What do -- because you made one point, in a
11 generic investigation people could participate, but
12 those -- you might have some questions as to what they
13 could do with respect to discovery. So, you know, as
14 we work through this, I need to better understand and
15 be clear as to what a generic investigation would
16 entail.

17 I would always have due process concerns
18 whether we were dealing with, you know, the
19 substantial interest of parties in that kind of a
20 proceeding; or even for an investigation we want a
21 full and fair record so that all of the people can
22 participate.

23 So with that, let me ask you another
24 question and, you know, take as much time as we need
25 here. A generic investigation, what would you

1 envision us doing -- and we haven't even gotten to
2 what we're investigating, because I understand that
3 you're saying that in the Internal Affairs report the
4 Commissioners said one thing and you interpret what
5 Staff drew up to actually be something different.

6 MR. CHILDS: Right.

7 COMMISSIONER JOHNSON: But just on the issue
8 of a generic investigation, what would that entail?
9 What kind of a proceeding? What could be asked? Who
10 could participate? And how would it be different?

11 MR. CHILDS: Okay. Well, let me comment,
12 try to comment first on how it would be different,
13 some observations about how it would be different.

14 First of all, I reference two portions of
15 Section 120.52. One has to do with subsection (2),
16 agency action, and subsection (7), which deals with
17 final order. Okay. Then -- the reason I'm
18 referencing that is to say that agency investigation
19 does not involve a proceeding directed towards agency
20 action or a final order. It, in fact, is to inform
21 the Commission on something. Therefore, it moves me
22 to Section 120.57 which is -- as I said, the
23 subsection (5) says this is not applicable to an
24 agency investigation.

25 Well, to me, part of the significance of

1 that is to show you that, therefore, there can be no
2 agency action or final order affecting the substantial
3 interests of anyone; so, you know, to me -- and the
4 Uniform Rules that say what the procedures are for
5 proceedings that affect substantial interests, to make
6 it quite clear that it's understood that you're not
7 getting and the agency is not getting into agency
8 action or final order.

9 As to the format --

10 COMMISSIONER JOHNSON: I'm inclined at this
11 point -- and I'm giving everybody an opportunity to
12 discuss it and for Staff to respond -- you know, I'm
13 inclined to agree with you with respect to what a
14 generic investigation is supposed to be about; and
15 then to the extent that we want to reach final
16 determination or agency action, then you take what
17 you've learned and you take -- it would probably mean
18 that we'd need another step. So --

19 MR. CHILDS: It would.

20 COMMISSIONER JOHNSON: But I haven't -- I
21 need to better understand where we've crossed the line
22 and where we're going right now.

23 MR. CHILDS: Where I think you've crossed
24 the line in this proceeding is that, first of all, as
25 to the scope -- and this is whether it's an

1 investigation or a proceeding to take final action --
2 is that I don't think -- I mean, you've characterized
3 my comment as an interpretation as to the scope of the
4 proceeding; and I would submit that that's the first
5 step.

6 But the second step beyond that is to say
7 that the scope, as is said in the third paragraph of
8 this order on procedure, the scope of this proceeding
9 shall be based on the issues raised by the parties and
10 the Commission Staff up to and during the prehearing
11 conference.

12 And I want to say, no, you know; that this
13 is the Commission's investigation. I don't think that
14 it's appropriate, particularly with the diverse group
15 that you have on this kind of an issue to say, well --
16 I mean, you look at it. We've got some 27 issues, and
17 that's when people are somewhat holding back. And I
18 don't think that we ought to get involved in that.

19 Now, Commissioner, as to how you do an
20 investigation, I'm certainly no expert in it, but I
21 would suggest that the Commission has had some
22 experience. And, you know, for instance, there --
23 it's had, over the years, extensive workshops with the
24 directions to parties that these are the things the
25 Commission would like to know, these are the things

1 that the Commission would like to have information on.

2 You remember a number of years back when the
3 Commission was looking at the conservation goals and
4 there were some tutorials about various points because
5 of some of the complexity of it. And I don't think
6 that some of complexity in that case lent itself to
7 maybe a wide-ranging workshop. It was more where you
8 needed to say, well, I have to ask this question and
9 then the next question so I'll understand you, where
10 you're going.

11 I don't think that there's any particular
12 form for an investigation. However, I think that, for
13 instance, you mentioned discovery and I mentioned
14 discovery. Discovery is identified in the rules as
15 relating to proceedings that affect the substantial
16 interests of parties. Discovery is to be initiated by
17 parties.

18 And I'm saying we don't have that here. And
19 I also think that as a practical matter, that the
20 discovery matter is one that we ought to avoid,
21 because we've clearly got questions of competition;
22 we've got questions about information, about -- that's
23 confidential. You know, we went through the last site
24 certification, there was quite obviously concern about
25 confidentiality relating to that project. And I don't

1 think anyone ought to be surprised that the utilities
2 would have similar concerns.

3 And so I think that it is much more
4 effective to have an investigation directed by the
5 Commission with -- narrow in scope and closely
6 monitored so that we avoid those kinds of problems.

7 COMMISSIONER JOHNSON: Thank you. Well, let
8 me ask you one more question. In the past when we've
9 had generic investigations, have we allowed discovery
10 to take place?

11 MR. CHILDS: I think you have, but I don't
12 think -- the law has changed. I mean, there were
13 proceedings in the past -- I think you had a
14 proceeding on nonfirm service, standby rates. I think
15 you had some investigations having to do with
16 cogeneration, small power production where it was
17 styled "Investigation", but there's a difference, I
18 think, in terms of the applicable procedures for
19 agency proceedings.

20 I mean, we had substantial revision to the
21 APA in '96, and we had, you know, just another one
22 where the most recent revision is effective on the
23 18th of June, which to me may be very well applicable
24 to any action the Commission may take of a formal
25 nature in rulemaking, and -- because, you know, if the

1 Commission wants to take action having to do with
2 reserve margins beyond what it already has in its
3 rules, then I think it's going to have to deal with
4 the revision having to address the power of agencies
5 to adopt rules.

6 And there's been a debate recently as a
7 result of the -- I think the case is a consolidated
8 Tomoka case and the revision that the governor was
9 urged to veto addressing the implementation of
10 specific powers as opposed to general powers.

11 So I think that's raised. I mean, I think
12 that will be here if the Commission decides to take
13 the next step after an investigation that it's
14 something to consider.

15 COMMISSIONER JOHNSON: So to be clear again,
16 you believe that though you've stated in the past when
17 we've had investigation dockets, we've allowed
18 discovery; you believe that the change in the law in
19 1996, or whenever it was, prohibits the Commission
20 from conducting discovery when we're dealing with
21 investigation type dockets?

22 MR. CHILDS: I do.

23 COMMISSIONER JOHNSON: Or --

24 MR. CHILDS: And I also believe there's
25 this: There's another practical problem. One of the

1 things that has happened is that the change in the law
2 says there's going to be a Uniform Rules of Procedure,
3 and among the Uniform Rules of Procedure is the one
4 having to do -- in the section on substantial
5 interests about discovery -- I just can't put my hands
6 on it right now. It's in that package that I gave
7 you -- discovery by parties, and it says discovery
8 shall be pursuant to the Rules of Procedure.

9 Now, what I'm saying about the discovery
10 should relate to if you have disputed issues of
11 material fact, for instance. That's another thing.
12 That's a practical problem. If you look to those
13 rules of the Uniform Rules, you will see there is no
14 rule on discovery, on proceedings affecting
15 substantial interests as to which there is no disputed
16 issue of material fact. Okay. That's the other
17 subsection of 120.57.

18 I also think, Commissioner, that what we
19 had, too, is more of a federal matter. This
20 Commission used to have a rule about discovery, and it
21 used to have a rule that was more clearly applicable
22 to the Commission initiating proceedings on its own
23 motion; and, you know, we just did those things then.

24 Now those rules have been changed, and this
25 Commission has gone through a revision process with

1 the Administration Commission. It has published
2 their -- that's why your order on procedure now has a
3 lot of information that used to be in your Rules of
4 Procedure, because those rules were repealed. I think
5 this is a question about that. But that's why, and
6 those rules don't permit it. They don't contemplate
7 it.

8 And I don't -- beyond it not being
9 contemplated, I guess I would question that, first of
10 all, it's the Commission's investigation. It's not
11 other parties' investigation; it's the Commission's
12 investigation and, therefore, I don't -- as a
13 practical matter, I don't even see why there'd be that
14 kind of discovery.

15 COMMISSIONER JOHNSON: Okay. And, too, the
16 point that you made in your documents that show that
17 on December 15th, 1998, as reflected at least in the
18 minutes, states that the Commission has directed Staff
19 to open a docket to consider the appropriate
20 methodologies for developing margin reserve, and the
21 December 17th Staff memo reads that the Commissioners
22 directed Staff to open a docket to examine the planned
23 margin reserves of the Peninsular grid.

24 Because this is the Commission's
25 investigation to remedy, to the extent that there was

1 some question as to the breadth of this investigation,
2 to remedy that what would we do? Just you'd have
3 to -- the Commissioners in an open forum would have to
4 say, yeah, that's what we meant; whichever one?

5 MR. CHILDS: I don't know. I don't think
6 so. I think that it -- I think it says that. It says
7 you're opening a docket to consider the appropriate
8 methodology for developing reserve margin. And my
9 reason for pointing out what I think is a distinction
10 there is that I think that "methodology" is an
11 important word.

12 To change that to say we're going to examine
13 the planned reserve margins is altogether different.
14 It doesn't have anything to do with methodology
15 necessarily. It just says we're going to look at what
16 reserves are. That's a different matter. I don't
17 think you need to do that.

18 I guess, on the other hand, if the
19 Commissioners wanted to address it, obviously they
20 can; but I think it's stated here. And as I've said,
21 I mean, this is -- when they reviewed the minutes --
22 and I realize they kind of rushed through them when
23 they reviewed the minutes and something doesn't jump
24 out at them -- but when they reviewed the minutes they
25 didn't change it. You know, they didn't say that was

1 wrong, that the scope was incorrect.

2 COMMISSIONER JOHNSON: Okay. Thank you.
3 Mr. Willis?

4 MR. WILLIS: Commissioner, first of all, we
5 very much appreciate your taking the time to meet with
6 us today to review this situation, because it is
7 important, and it was important for us to look at it
8 now rather than to wait and to aggravate the
9 situation.

10 For the reasons that Mr. Childs has just
11 outlined for you, we believe that this is a docket
12 which has gotten out of the control. It is one that
13 was opened originally to review the appropriate
14 reserve margin methodology, but has catapulted into a
15 large number of issues that have gotten well beyond
16 that scope.

17 And it has -- as Mr. Childs has pointed out,
18 is beginning to point very directly toward
19 adjudicating the specific rights of the individual
20 utilities and others and that -- but without very much
21 form of exactly where we're going to get to and before
22 testimony is due and so forth.

23 But the basic situation is that I think that
24 we ought to get back to the original purpose of this
25 docket, which was informational to determine what the

1 appropriate methodology should be; and that in order
2 to do that, to -- that you should make this an
3 education process.

4 I mean, this is -- what we thought it was
5 was a parallel educational process for you to have the
6 background to review the 10-year site plans that you
7 were receiving and that it would be very helpful to
8 have a series of educational sessions on these
9 subjects of how these -- the methodology is used and
10 what it perhaps should be. So we think that you
11 should stick to what you decided to do and to have an
12 investigation.

13 If this was intended to be a docket that
14 affected substantial interests, it should have been
15 opened in a different way. It should have been
16 defined in an order at the outset which explained
17 what -- you know, what this docket was about.

18 In any event, even in the investigation I
19 think it was important to define the scope of the
20 investigation so we don't have this process of moving
21 on to a lot of issues that we don't think are relevant
22 to the -- or pertinent in the basic thing that the
23 Commission sought to do.

24 In essence, we've got a number of procedural
25 problems which have injected what we believe is

1 unfairness in the docket, to proceed through a process
2 that adjudicates the rights of utilities in, really,
3 what is a jumbled up, mixed up manner.

4 So for that reason, we believe that you
5 should stick to the investigation, stick to the
6 purpose that you initially set out to do in this
7 docket, to more narrowly define it that way, and then
8 to move forward in an educational process, an orderly
9 educational process, and then after that process is
10 completed, take another look to determine whether you
11 want to open a specific docket that would then take
12 some specific action that would affect parties'
13 substantial interests.

14 COMMISSIONER JOHNSON: Thank you,
15 Mr. Willis. And, again, I agree with what you're
16 saying with respect to this isn't a proceeding to
17 adjudicate the rights of any particular utility, and I
18 don't want it to be set up in that way.

19 Where it will be helpful is for us to all
20 discuss, then, how we can have a process that will
21 ensure that this investigation will educate and inform
22 the Commissioners and the Staff so that when we do get
23 ready to make those kind of decisions, we will at
24 least have the background, the information that we
25 need to do so.

1 The way this has been framed and the list --
2 I have not gotten to, like, what are the issues -- but
3 the way this procedure is framed is, as you've
4 suggested, educate, inform -- but we've got to come up
5 with a process that will allow us to do that.

6 Now, Mr. Childs is saying, well, in the good
7 old days you had -- the laws were such that you could
8 have an investigation and have discovery and maybe get
9 some of the same kind of information that you could
10 when you were adjudicating someone's substantial
11 right. So I guess the Commissioners, we feel real
12 comfortable with that because we know it's going to be
13 a thorough investigation. But now, perhaps, under his
14 analysis the law has changed and we can't do that
15 anymore, so how can we make sure that this
16 investigative process is a useful one and one that is,
17 in fact, helpful at all.

18 Candidly, generally it is more useful when
19 you have discovery and you have people on both sides
20 and you're hearing a full array of thoughts, though
21 you aren't making a final agency action; you know,
22 you're just hearing these things and these thoughts.
23 And I'll have to decide what the law allows and
24 whether it allows us to have that kind of discovery in
25 the context of an investigation.

1 But your points are well taken. Reflect a
2 little bit about what -- all of the parties -- how we
3 can define this in such a way and how we can set the
4 procedures and process in such a way that we are not
5 violating anybody's due process, that we have a
6 process that is a productive investigation type
7 process.

8 I hear you saying one thing you might want
9 to do is narrowly define and limit the issues, but on
10 the other hand, we're saying the investigation is an
11 informal process where the Commissioners just learn.
12 So it seems to be kind of maybe designed to be an ebb
13 and flow process.

14 MR. WILLIS: Well, a little bit --

15 COMMISSIONER JOHNSON: How do we get around
16 that?

17 MR. WILLIS: But in order to focus the
18 information that is directed to you, it needs to have
19 some bounds to it, and that what we are suggesting is
20 that a series of tutorials, perhaps by the FRCC, which
21 would begin -- it was suggested at one of our
22 sessions -- with a good glossary of terms so we
23 understand the language that's being spoken in the
24 context of these particular issues is something that
25 would be helpful; and then to a good explanation of

1 what -- the reserve margin methodology that is being
2 presented in the aggregate to the Commission would be
3 such a thing that could be focused and would provide
4 useful information to the Commission.

5 COMMISSIONER JOHNSON: Thank you.
6 Mr. Saxton?

7 MR. SEXTON: Sexton.

8 COMMISSIONER JOHNSON: Okay. Sexton.

9 MR. SEXTON: Thank you, Commissioner. We're
10 in agreement that the approach to be taken in this
11 docket should be an informal investigatory approach.
12 We believe that the Commission has the tools that it
13 needs to use to obtain the information it wants.

14 The proposal that Tampa Electric Company has
15 made for tutorials and education for the Commission, I
16 think, is a good workable process, and there's
17 certainly a time and, I think, a willingness on the
18 part of the participants to provide the Commission
19 with what it wants and what it needs to understand the
20 reserve margin methodology and then maybe arrive at
21 some conclusions at a later date as to whether or not
22 any changes need to be made to the current approach
23 that's being employed in Florida.

24 The difficulty with the process that's been
25 established under the order establishing procedures is

1 very rigid, and that process was originally designed
2 when you had a defined type of case or you had defined
3 issues before the case even arose, like a rate case,
4 or a decision to make a specific -- take specific
5 action so that the parties could have an understanding
6 about what the nature of the Commission's ultimate
7 action was going to be. And if it was a recurring
8 type of situation like a rate case, everybody knew it
9 was coming, because they had seen it before. There
10 wasn't that much uncertainty.

11 In this particular circumstance you're
12 having the utilities file -- and I'm assuming the
13 FRCC, because we're not mentioned separately -- file
14 first in a situation where we're not even sure what
15 the action is going to be, but if we're talking about
16 changing anything, the utilities and the FRCC are not
17 the proponents, and so it would not seem appropriate
18 for them to go first in any event.

19 And then we're not even going to get the
20 issues formally established and positions formally
21 fixed in place until October, even though we could, of
22 course, do early issue identification. But in terms
23 of an official process, the testimony would be fixed
24 months in advance of the hearing, even though the
25 exchange of information and even, perhaps, the nature

1 of the inquiry might evolve over time.

2 So the process that's put in place, I think,
3 creates a certain unfairness, because people have to
4 fix their presentation well before the hearing. And,
5 of course, in the norm under the APA, the testimony is
6 live, and everything just evolves right up to the end
7 and then the testimony is presented, and there's
8 cross, and obviously there's opportunities for
9 discovery.

10 I think you don't need discovery in this
11 environment because I think you have an environment
12 where the participants are willing to bring
13 information to the Commission. We simply need to know
14 what you're interested in knowing, and then structure
15 some means of making presentation and avoid the
16 overstructure of a formal process.

17 COMMISSIONER JOHNSON: Okay. Thank you.

18 MR. SASSO: Again, Gary Sasso for Florida
19 Power Corporation. Let me begin by saying we join in
20 what Mr. Childs has said about his concerns about this
21 proceeding, and I won't belabor what has already been
22 said.

23 But let me suggest that in terms of where we
24 go from here, what makes sense is we start with the
25 Internal Affairs minutes of December 15th as the

1 polestar, as the logical starting point. We don't
2 have to reinvent the wheel. The Commission has
3 already said that what its interest is, what it would
4 like to investigate; namely, the appropriate
5 methodology for developing reserve margin. Then we
6 pick a date by which the FRCC and other parties with
7 information provide written comments and information
8 to the Commission and pick another date where we show
9 up to discuss those, provide information, answer
10 questions, and take it from there.

11 If there is a need for follow-up, we have
12 another tutorial, another informational session. But
13 this is a rational way to proceed with an
14 investigation, to enable the Commission to obtain
15 information about the issue that is already
16 identified. What we're doing now is we're heading
17 headlong into a hearing, a trial, and for all of the
18 reasons that have been given, that is inappropriate,
19 inapplicable, and dangerous.

20 COMMISSIONER JOHNSON: Thank you.

21 Mr. Wright?

22 MR. WRIGHT: Thank you, Commissioner
23 Johnson. Before I proceed I want to also note that
24 I'm also appearing on behalf of the Utilities
25 Commission of the City of New Smyrna Beach, Florida,

1 an electric utility and, hence, a party, at least as
2 the order exists as of this moment.

3 I have a few comments, and I will try to be
4 as brief as I can, I think to respond to some
5 questions that you posed, Commissioner Johnson.

6 I think the Commission either acting en banc
7 or through you as the designated prehearing officer
8 for this proceeding can do pretty much whatever you
9 want to do. I don't think there's any prohibition
10 against having determinations of substantial interests
11 and having evidentiary hearings and so on in dockets
12 that are styled "generic investigation." I don't
13 think putting the name or the caption "generic
14 investigation" on a docket limits you.

15 I don't disagree that it does go to a
16 question of what your -- meaning the Commission's --
17 intent was in establishing this docket, but I will say
18 that I thought it started as a generic investigation.
19 My sense was that it was predicated on not only
20 methodology concerns, but also on concerns relating to
21 the level of reserve margins that your Staff have been
22 articulating in public since at least August of 1997
23 that I know of. And so when I saw the Staff's issues
24 list come out on March the 1st and it included some
25 additional issues, it did not strike me that the

1 expansion beyond a very limited scope as to
2 methodology was unusual or inappropriate.

3 I'd like to just briefly digress about a
4 docket that I was involved in back in 1985 through '87
5 when I was on the Commission Staff. It was the
6 standby rates docket which was indeed styled "a
7 generic investigation into standby rates."

8 The way we handled that -- and this is not,
9 I think, inconsistent with what Mr. Sasso just said
10 regarding defining a goal, having a process whereby
11 the parties come together with written comments filed
12 in advance, having a workshop or some proceeding on
13 the record or off the record before the Commissioners,
14 or just with the parties or participants, whatever
15 they're going to be, works.

16 In the standby rates docket, over a period
17 of probably six to eight months we had four workshops
18 in which we attempted to and, in fact, did ultimately
19 define the issues that would be decided in the case.
20 There was consideration of rulemaking, which the
21 Commission decided not to do, and what we wound up
22 doing was, indeed, having a full-blown, three-day
23 hearing. I think it was in the August of 1986 or
24 thereabouts -- 1986; sorry -- in which the Commission
25 determined what the parameters and structure of

1 standby rates would be for cogenerators, and went on
2 to issue an order saying that that's what they were
3 going to be.

4 Then there was an implementation phase in
5 which the utilities, subject to the Commission's
6 order, filed their standby tariffs, and generally they
7 were administratively approved. I think we did have
8 to come back to Agenda a couple of times. I remember
9 writing a couple of 150-page recommendations in the
10 course of the docket.

11 But my points are these: You all can do
12 what you want to do, and I think if there is a concern
13 that you want to -- if you want to expand this docket
14 beyond a limited fact-finding generic investigation, I
15 think you can do that. I think that any cure for any
16 alleged due process concerns is either to re-notice it
17 or issue a revised order establishing procedure
18 saying, this is what we're going to do. I'm not
19 advocating that, and my clients are not advocating
20 that; that is your decision.

21 COMMISSIONER JOHNSON: I'm sorry. That you
22 aren't advocating -- you aren't advocating that we --

23 MR. WRIGHT: That you do jump in right now
24 and go forward with determining all the -- what I
25 would call the application issues; like what's the

1 reserve margin going to be; how is it going to play,
2 et cetera.

3 I kind of went down the issues list and
4 tagged issues, and I think they divide out into about
5 four groups, or maybe even three.

6 COMMISSIONER JOHNSON: Let me go back and --
7 just to understand you and your clients' positions as
8 to the purpose. And we won't even have to say the
9 broadest parameters and then which definition --
10 whether we're looking at the appropriate methodology
11 for developing margin reserve or planned reserve
12 margin for Peninsular grid, not that question; but
13 what did you think we were -- and if you can cite to
14 Internal Affairs or some other documentation -- what
15 do you think we intended in terms of opening this?

16 Was it an education process, information
17 process? Was it, in your mind, where we were going to
18 have some final agency action on one or some of these
19 issues?

20 MR. WRIGHT: Commissioner, I guess to ask me
21 that question is to ask me to try to read your minds,
22 and I can't really say what I really knew you
23 intended.

24 This issue, to my recollection --

25 COMMISSIONER JOHNSON: Just what you want us

1 to do, then. Not that it's relevant, but I just want
2 to know.

3 MR. WRIGHT: Well -- that's a good question.
4 The sense -- this issue, in my perception, has been on
5 the table at least since the workshop involving your
6 annual review of 10-year site plans that was conducted
7 in August 1997, nearly two years ago. There were
8 concerns expressed by your Staff at that time
9 regarding the proportion of reserves that were
10 represented by nonfirm load and concerns regarding the
11 methodology and whether the 15% planning reserve
12 margin was adequate.

13 Now, that kind of went along -- there was
14 also concerns regarding a reliance by some utilities
15 on unspecified future purchases. That process went
16 along through the review in '97, came back in '98, and
17 I think was at the Internal Affairs in December of '98
18 regarding the publication of the Commission -- or your
19 approval of the publication of the report on the
20 10-year site plans for that year that led to the
21 initiation of this docket; about six months ago.

22 If you intended it to be a generic
23 investigation for fact-finding and just educating
24 yourselves on what reserve margins are, then that's
25 what you intended.

1 I will tell you personally, just from where
2 I have sat and been involved in this process over the
3 years, in these processes over the years, I had the
4 sense that it was intended to be more than that; and
5 as I said, it just seemed to be a natural thing when
6 more application type issues got added into the issues
7 list.

8 But having said that, that's really your
9 decision. I think that -- I would say that I think
10 that the application type issues are important issues
11 that you maybe have to address at some point in time.
12 The question is, I think, how to do it; whether you
13 want to have, perhaps as we did in the standby rates
14 dockets -- and I don't want to claim Gary's agreement
15 if it's not there -- but not unlike what Gary
16 suggested.

17 You can have a workshop or a series of
18 workshops that would lead you to a point of
19 identifying action issues and then go forward from
20 there, or I think if it was your desire, the
21 Commission's desire, to go ahead and try to do it on a
22 more time compact basis, I think you could go ahead
23 and roll some of the application issues into this
24 docket.

25 I think the due process cure for any

1 problems that that might present is simply to issue an
2 appropriate notice. You might conceivably have to
3 extend the testimony dates and so on. I would say I
4 don't think my clients have a strong position on this.
5 They believe these are important issues that need to
6 be addressed, and I'm not sure there's any real
7 disagreement as to that. I think that the question,
8 the real question before you today, is procedural and
9 how you're going to do it.

10 If I could, I'd just like to --

11 COMMISSIONER JOHNSON: Let me respond to
12 that, and as you're finishing your argument you may
13 want to react. Because I would agree with you that
14 you look at the issues list and there are quite a few
15 what you've called application type issues and, of
16 such, that if we were to rule upon, they do seem to
17 impact the substantial interests of the parties, and
18 so we do need to have a real process at some point in
19 time.

20 And the question is, is this -- and there
21 are some issues, though, that are very generic,
22 open-ended type questions that we've raised before
23 that aren't as bothersome in terms of application and
24 application to a particular utility.

25 One approach may be to, you know, to

1 determine those issues that are just investigation
2 type issues and maybe deal with those and then to
3 determine the application issues and have a more
4 formalized process for that, or a second step for
5 that.

6 MR. WRIGHT: Yeah. And I think that's
7 really kind of presumed in both Issues 1 and Issue 24,
8 which are -- 1 is "What is the purpose of this
9 investigation?" and 24 is "What, if anything, should
10 the Commission do next?"

11 COMMISSIONER JOHNSON: Exactly.

12 MR. WRIGHT: And those, I think, are the
13 application type issues.

14 COMMISSIONER JOHNSON: Got you.

15 MR. WRIGHT: And, actually, you just -- I
16 won't bother going through my list. You said what I
17 was going to say about there being methodology issues
18 and application issues and, potentially some
19 rulemaking issues.

20 For example, if you were going to consider a
21 process that would determine the methodology, that
22 would decide the methodology, and perhaps either
23 through direct rulemaking or resulting in directions
24 to the Staff to promulgate a rule adopting what you
25 did, that would pose a different procedural posture of

1 the case than some other scenario.

2 And, you know, for example we would take the
3 position that we should be involved in any rule made.
4 We have a legitimate, more than legitimate, interest
5 in being involved in any rulemaking proceeding that
6 was going to determine what the reserve margin
7 methodology was going to be. If it's going to be a
8 series of workshops, we'll be a participant. If it's
9 going to be rulemaking, we'll be a party, or whatever
10 one is in a rulemaking proceeding.

11 COMMISSIONER JOHNSON: Thank you,
12 Mr. Wright.

13 MR. SNIFFEN: Without belaboring the point,
14 we echo the thoughts that Schef has just expressed,
15 although we would add that we think what the
16 Commission has done here is appropriate and that it
17 can, in fact, proceed as it has been proceeding. But
18 to the extent these types of issues need to be cleared
19 up, then I think some of the comments that Mr. Wright
20 has put forward are instructive.

21 COMMISSIONER JOHNSON: Okay. Yes, sir?

22 MR. YOUNG: I just want to add one thing. I
23 can't add anything to what anybody has said. I think
24 that we do need to get it cleared up one way or the
25 other.

1 COMMISSIONER JOHNSON: I'm sorry?

2 MR. YOUNG: That's okay. I think we need to
3 get it cleared up one way or the other, and if there
4 is any substantial doubt in your mind as to procedural
5 problems at this point, I don't think we ought to
6 waste your time or ours until we get those corrected.

7 And we at Kissimmee and Lakeland received, I
8 think as well as everybody else, an extensive amount
9 of interrogatories and requests for production that is
10 going to take a considerable amount of time and effort
11 to prepare; and I would hope that before we conclude
12 this proceeding today, that we -- whatever is decided,
13 if it's going to impact that, we can know that today,
14 because we're having to devote a substantial amount of
15 manpower and lady power to respond to that, and we
16 want to try to respond to it timely; but if we don't
17 have to do that, it can save us a lot of time and
18 effort if it's going to be delayed or if they're not
19 going to be requested at this time.

20 Thank you.

21 COMMISSIONER JOHNSON: Thank you. Points
22 are well taken.

23 MR. McWHIRTER: Madam Chairman, I didn't put
24 in an appearance in this docket because I promised
25 myself and my partner I wouldn't speak, but I'm

1 compelled to do so. (Laughter)

2 My name is John McWhirter. I'm with the
3 firm of McWhirter, Reeves, McGlothlin and others, and
4 I represent a group of customers, consumers of
5 electricity, who are vitally concerned about Florida's
6 reserve margin.

7 We're vitally concerned because last summer
8 some of the people I represent were interrupted up to
9 275 hours. They sent people home. That happened
10 again this April. The 10-year site plan that was
11 filed that's been referred to here today in 1997 and
12 again in 1998 demonstrates that the reserve margin
13 that we expected of somewhere between 15 and 20% is
14 actually declining to a point that in the year 2001
15 it's going to be around 2% and, of course, that's just
16 for meeting the demands of the firm customers, not the
17 nonfirm customers, who many of my clients are.

18 We think that this docket is a matter of
19 serious concern. When the United Nations was -- and
20 before that the League of Nations -- was founded,
21 there was concern that, well, this will be a debating
22 society and nothing will happen. As I've heard the
23 arguments here today, it appears that there are three
24 aspects that this case could take.

25 It could be a case in which some decisions

1 are made. It could be a debate in which parties who
2 have an interest in the proceedings and in their
3 future economic well-being would be allowed to find
4 out the true facts and present their opinions, or it
5 could be an education tutorial in which the utilities
6 in a private session would educate the Commissioners
7 on the issues that they were interested in.

8 I was shocked and appalled at Mr. Childs'
9 response to your question; if, under the current law,
10 does the Commission have the right to discover facts,
11 and his response was, no, you don't. If this
12 Commission can't discover what the facts are and if
13 the facts are concealed under confidentiality rules, I
14 think the state of Florida is not only in a critical
15 capacity state, but we are in a state of -- that puts
16 me in great alarm.

17 Now, what are these questions that the
18 utilities say have gone to the realm of affecting
19 their substantial interests? I think your Staff has
20 done quite an admirable job in adhering to what the
21 Commission's directives were. I recall being present
22 last year when the Staff presented a study that it had
23 conducted as to the probability of interruptions in
24 electrical service, and that was a methodology that
25 the Staff had developed, and it showed a pretty bleak

1 picture going to the future.

2 The utilities came back and said no, what we
3 would rather use is a loss of load probability study
4 which currently shows that we're only going to lose
5 one day of service in 10 years.

6 Well, as an outgrowth of those two
7 approaches, the Commission and its Staff said we ought
8 to look into at least what methodology we follow,
9 whether we do the old time loss of load probability,
10 which obviously isn't working, or a new study.

11 So it came up with some issues that it would
12 like you to make a decision on. And I'd like to know
13 how these issues affect substantial interests of the
14 utilities-in a matter that is adverse to the public
15 interest.

16 I'll address first Issue No. 3 that the
17 Staff has developed, "What is the appropriate
18 methodology for planning purposes for calculating
19 reserve margins?" They want to know what's the best
20 way to calculate reserve margins. Now, how can that
21 affect the substantial interest of a utility if you
22 just want to know how you calculated reserve margin?

23 The next is: "What is the appropriate
24 methodology for planning purposes for evaluating a
25 reserve margin?" Well, that's certainly an

1 appropriate question. It's certainly something that
2 you should come to a decision on. It's certainly
3 something that can't be resolved by waiting a couple
4 of months and then going down to the Florida
5 Reliability Council and accepting a tutorial without
6 any opportunity to discover further facts.

7 The 24 issues -- and that's a modest number
8 of issues and they're well identified, and they're
9 very specific as to methodology, which the utilities
10 say this case is not about methodology now because of
11 these questions. I would suggest to you that it is
12 about methodology; it is about the capacity reserve.

13 And I would strongly suggest to you that we
14 are in a critical situation that demands action by
15 this Commission, and you should not allow your hands
16 to be tied by an inability to discover, by keeping
17 pertinent facts confidential and under the rock, and
18 leaving the utilities to guide you.

19 You are here to protect the public interest
20 as well as the utilities' interest, and the public
21 needs to know whether or not our capacity of reserve
22 margin is satisfactory. And I would suggest to you
23 that the issues that have been refined and defined
24 over a period of six months are very clear. They
25 don't substantially affect the interests of these

1 utilities trying to find out how you determine your
2 reserve margin and what's appropriate for the state.

3 And I think you need to get on with it, and
4 I think the ideas that are raised now at the 11th
5 hour, not in February or March when this issue first
6 came to light but now just as they're about to file
7 testimony, is nothing more than an action to delay and
8 to obfuscate the issues; and I would strongly urge you
9 to proceed, and proceed with dispatch on this matter
10 of serious public concern.

11 Thank you.

12 COMMISSIONER JOHNSON: Thank you.

13 MR. MCGLOTHLIN: And I apologize to my
14 partner for having spoken. (Laughter)

15 COMMISSIONER JOHNSON: Ms. Kamaras?

16 MS. KAMARAS: Gail Kamaras for LEAF. Just a
17 couple of comments. I mean, if the Commission or you,
18 as prehearing officer, determine to proceed with this
19 as a generic investigation and not as a contested
20 proceeding, I believe that it's possible to either
21 follow the original scope, whatever that is, or to
22 expand to some of the identified issues from the Staff
23 list.

24 And in terms of an investigative proceeding,
25 I think there's several ways to proceed. You can

1 invite comments on identified issues from a broad
2 range of interested stakeholders, and in the event
3 that there are educational workshops, I would suggest
4 that beyond asking or affording an opportunity to the
5 utilities and FRRC to participate, that the Commission
6 seek to obtain information from other organizations
7 that are designed to assist regulatory commissions,
8 such as the Regulatory Assistance Project, NARUC and
9 NRRI or the Public Utility Research Council in
10 Gainesville in order to try to get some more objective
11 information than that which might be provided by the
12 utilities and the FRRC.

13 If the Commission determines to proceed with
14 this in its current mode as a contested proceeding, I
15 just wanted to say that we would take issue with
16 Mr. Childs' statement concerning the intervention
17 issue and who should be allowed to be a party. I
18 believe I heard him say that only those with load that
19 would be committed would have a substantial interest,
20 and we would certainly disagree with that point of
21 view.

22 COMMISSIONER JOHNSON: Thank you.

23 Mr. Childs?

24 MR. CHILDS: Could I make a few comments on
25 some of the points that have been presented?

1 COMMISSIONER JOHNSON: Uh-huh.

2 MR. CHILDS: First of all, I think it's -- I
3 would return just to urge you to consider what the
4 Commission did in opening this docket. Mr. Wright
5 offered to you that you could do what you wanted in
6 this proceeding, and with respect, again, I would
7 suggest that someone is going to have to reconcile, if
8 that's the case, the provisions of 120.569 and 120.57,
9 which have to do with proceedings involving --
10 affecting the substantial interests of a party, and
11 the subsection (5) which says that proceeding doesn't
12 apply to investigations.

13 I don't think you can just say, well, I'll
14 be fast and loose with the name that I give to the
15 docket and we'll call it an investigation, but do what
16 we want. I think if it's affecting the substantial
17 interests of a party or of anyone, then it's not an
18 investigation. And that's our point.

19 Now, we didn't get to the issue of can you
20 open a docket, how is a docket opened, how do you go
21 forward. We're trying to deal with, what do you have
22 before you. Mr. McWhirter, I guess for effect, wanted
23 to be shocked. Some of the things that he, I guess,
24 heard, I didn't hear, but I would suggest to you that
25 my comment on discovery, I thought, was confined to

1 the rules.

2 That's what the rules say, and the rule is
3 Rule 28-106.206, and it refers to discovery by parties
4 after commencement of a proceeding, and that is a rule
5 that's applicable to proceedings involving the
6 substantial interest of persons. So my point was, is
7 that I was trying to distinguish between that kind of
8 a proceeding and a proceeding that was an
9 investigation.

10 I don't think there's any suggestion
11 whatsoever that you ought to hide something under a
12 rock, but I think that the approach that Mr. McWhirter
13 has taken is somewhat instructive, because he has some
14 personal things he'd like you to pursue for him, and I
15 think that this instead is, it's the Commission's
16 investigation, and that's the way it ought to be
17 pursued.

18 We've heard for some time about the plight
19 of the interruptible customers who are interrupted
20 and, you know, I understand that he has a client whose
21 interests he wants to have the Commission consider.
22 My point is simply I don't think that's what this
23 docket is about nor do I think it's what the
24 Commission decided to address.

25 And thank you.

1 COMMISSIONER JOHNSON: To your question of
2 an investigation docket under the model rules not
3 allowing for the general or normal discovery process,
4 that would apply to the Commission and Staff if we
5 wanted to -- how do we seek, solicit, and gain
6 information?

7 MR. CHILDS: Well, I think you ask for it,
8 and -- you know, in terms of gaining information. The
9 Commission has had a practice, for instance, in
10 connection with other dockets that they ask detailed
11 questions at times.

12 For instance, when the 10-year site plans --
13 I mean, the idea that reserve margins is something new
14 is interesting, because they're not. The Commission
15 has addressed it with 10-year site plans. The Staff
16 provides questions to the entities that file these
17 plans for years.

18 Now, as to the reason I say discovery is --
19 and I mean that in the sense of discovery under the
20 applicable rules and the Rules of Civil Procedure, is
21 that, for instance, to illustrate, I can't conceive of
22 how you can address the relevance of a request for
23 information in discovery unless you are dealing with
24 disputed issues of material fact from which you can
25 engage the relevance.

1 I mean, clearly in proceedings where you
2 have -- are going to address the substantial interests
3 of parties, it's reasonable, and courts and
4 commissions routinely rule that fishing expeditions
5 are not permitted. Well, if you don't have the
6 issues, then it's hard to determine that.

7 But I think the Commission can decide
8 what -- you know, a way to try to get the information
9 and, in fact, I think it hasn't. I mean, the
10 Commission has addressed it on the 10-year site plans.
11 They've addressed it for years on setting prices for
12 cogeneration, small power production. They've
13 addressed it for years with the determination of need
14 where this information is filed.

15 These are not new concepts. And we have a
16 rule; we had a contested proceeding on reserve margin,
17 and we have a rule on it. So I think that the avenue
18 is there and the procedures are there and that it
19 would be helpful not to mix the procedures.

20 COMMISSIONER JOHNSON: Thank you.

21 MR. CHILDS: Thank you.

22 MR. WILLIS: Commissioner, I would just like
23 to say that this docket was opened as an
24 investigation, as a generic investigation. We're
25 merely asking you to conduct the docket as a

1 general -- generic investigation; to make that clear
2 up front that you're not adjudicating the rights of
3 the parties; to set times for an educational
4 process -- I think you'll find that that will be very
5 useful to the Commission -- and to proceed in that
6 manner.

7 COMMISSIONER JOHNSON: Thank you.

8 MS. PAUGH: Commissioner, Staff's position
9 is that there are no procedural infirmities with this
10 docket.

11 Conspicuous in its absence in the comments
12 of counsel opposing this docket and the path that it's
13 taken is any reference to the Commission's Rules of
14 Procedure. Rule 25-22.036(3) was retained by the
15 Commission after the passage of the APA. Therefore,
16 that rule applies to this docket with equal force and
17 effect, or greater force and effect, than the Uniform
18 Rules.

19 That rule states: "Upon its own motion, the
20 Commission may issue an order or notice initiating a
21 proceeding." And then it talks about where it would
22 be served. This rule is a formal proceeding rule.
23 That's what we have here. To state that
24 investigations cannot also be formal proceedings in
25 the case of the Commission is incorrect.

1 The Commission has jurisdiction to
2 investigate matters within its purview. I submit to
3 you that Section 366.0551 of Florida Statutes states:
4 "Energy reserves of all utilities in the Florida
5 energy grid shall be available at all times to ensure
6 that grid reliability and integrity are maintained.
7 The Commission is authorized to take such action as is
8 necessary to assure compliance."

9 That section gives the Commission clear
10 jurisdiction to investigate reserve margins. I don't
11 think that there is any question about that.

12 Second, I submit to you that essentially
13 what particularly Mr. Childs is alleging is an
14 improper motion for reconsideration of the order
15 establishing procedure. If he had a problem with it,
16 he should have filed within the time required. He did
17 not do that. If he had a problem with the
18 interventions, he should have opposed those within the
19 time required. He did not do that.

20 I do not believe that the discussion of the
21 order establishing procedure and its content or the
22 interventions is appropriate at this time. It's out
23 of time. He waived it.

24 With respect to the scope of the proceeding,
25 Mr. Childs quotes several times, in particular, the

1 minutes of the Internal Affairs. The minutes are just
2 that; a very brief summary. I took the time last
3 night and again this morning to listen to the tape of
4 that Internal Affairs. Let me share with you my notes
5 from the tape.

6 Commissioner Garcia, now Chairman Garcia,
7 was concerned about the adequacy of our reserve
8 margins. He stated that we need to determine a
9 Commission-established reserve margin; the FRCC has a
10 reserve margin; the utilities aren't meeting it; the
11 Commission needs to establish it.

12 Commissioner Deason stated that the
13 Commission needs to establish a set of criteria with
14 respect to reserve margins.

15 You and Commissioner Jacobs discussed
16 refining and defining methodologies to establish
17 reserve margins.

18 Finally, Commissioner Garcia discussed that
19 the process for 10-year site plans may need to be
20 looked at in order to fast track it so that it could
21 be more responsive to the fast pace of a presumably
22 competitive wholesale electric market. That issue has
23 not been taken up in the issues stated in this docket.
24 So to that extent, the scope of the docket is perhaps
25 a little more limited than it should have been, and

1 that is Staff's fault.

2 I don't think that you can separate
3 establishing criteria for reserve margin from the
4 issue of adequacy of reserves. In other words, you
5 cannot limit your analysis to methodology without also
6 discussing what is adequate. It can't be done. It's
7 a useless process.

8 The suggestion has been made by several
9 counsel that this docket is for informational purposes
10 only and should be conducted on an informal basis. I
11 submit to you that Staff and the parties and the FRCC
12 has been doing just that since 1997. That process,
13 while instructive, has not accomplished what the
14 Commissioners directed Staff to do in establishing
15 this docket.

16 There are any number of methodologies for
17 determining reserve margin. Methodology A may tell
18 you you have an adequate reserve margin.
19 Methodology B may tell you that you don't. We need to
20 determine what is right. That is the charge of this
21 Commission with respect to the Grid Bill and
22 generation in this state.

23 I submit to you that this docket is
24 appropriate substantively and procedurally.

25 COMMISSIONER JOHNSON: Thank you.

1 Mr. Elias?

2 MR. ELIAS: If I may add a few brief
3 comments.

4 December 15, 1998 Internal Affairs went
5 until approximately 11:30 p.m. The hour was late, so
6 if the minutes don't accurately reflect what really
7 happened, that's something that's curable.

8 Staff believes that the basis of this docket
9 is something broader than just in the context of the
10 Commission's review of the 10-year site plan. As
11 Ms. Paugh said, we believe it goes to a basic area of
12 the Commission's jurisdiction, which is the adequacy
13 and the reliability of the grid.

14 There has been a general and long-standing
15 concern expressed by Commissioners and Staff members
16 of the adequacy of planned reserve margins, both on an
17 individual utility and an aggregate basis. Any review
18 of the adequacy of those reserve margins necessarily
19 involves a discussion of the methodology, a discussion
20 of the planned generating resources to meet those
21 reserve margins and, in the last couple of years, the
22 question of whether the reliance on nonfirm load is
23 excessive, given today's environment.

24 As to the purpose of this docket, Staff
25 believes it is somewhat open-ended. We are not

1 prejudging the result. We may find after hearing
2 testimony that the methodology is appropriate and the
3 reserves are adequate and, therefore, no further
4 action would be required.

5 We may find that a general standard that is
6 uniformly applicable should be adopted, in which case
7 we will proceed to rulemaking. That's the only way
8 that I know in the current APA that we can do that.

9 No party, no speaker today --

10 COMMISSIONER JOHNSON: Bob, say that again.
11 To the extent that we found that they weren't, there's
12 still the -- would that, in fact, be a decision that
13 impacts the substantial interest of the parties, or is
14 it the rulemaking --

15 MR. ELIAS: Well, I think that the
16 rulemaking is required, and that's not typically
17 our -- what would affect substantial interest would be
18 our decision to enforce that rule, and that's the
19 context where the rights of the parties would be --
20 the full range of due process rights under Chapter 120
21 would necessarily be enforced.

22 But having said that, I do not believe, and
23 I know of no provision in the Administrative
24 Procedures Act that suggests that the Commission does
25 not have the jurisdiction to make specific findings

1 with respect to specific utilities in the context of a
2 generic investigation or proceeding. And we may just
3 be playing a game of semantics here, because I don't
4 know what the difference between the two is.

5 What's important is that the Commission give
6 any substantially -- person whose substantial
7 interests are affected the due process rights. And I
8 believe the procedure that we've set forth -- and
9 those rights are specifically listed in
10 Sections 120.569 and 120.57. They include the
11 opportunity to present evidence and argument, make
12 posthearing statements, to conduct discovery,
13 cross-examination; and all those rights are
14 contemplated in the process that's been established in
15 this docket.

16 COMMISSIONER JOHNSON: Let me ask you a
17 question, Mr. Elias.

18 Take an issue, Issue 3, "What is the
19 appropriate methodology for planning purposes for
20 calculating margin reserves for individual utilities
21 and for Peninsular Florida?" Say we come up with an
22 answer to that. When does that become effective?
23 Upon going through a rulemaking process or --

24 MR. ELIAS: If we're talking about a
25 statewide standard, I'm inclined to think we need a

1 rule to make a statement of that magnitude.

2 I do think that if we make a specific
3 finding based on specific facts for a specific
4 utility, after notice, as reflected in clearly
5 identified issues, an opportunity to be heard, to file
6 testimony, make argument, do discovery, conduct
7 cross-examination, file rebuttal testimony where
8 appropriate, make argument to the Commission, that the
9 Commission can say, Utility X, a negative reserve
10 margin of 2% based on your reliance on nonfirm load is
11 inappropriate and you've got to do something to bring
12 your reserves up to "X" level.

13 And if that evidence is in the record, there
14 is nothing infirm in that determination by virtue of
15 the fact that it took place in the context of a
16 generic proceeding or a generic investigation. And I
17 think that those are things that have been done by the
18 Commission for as long as I'm aware, and I know of no
19 amendment to the Administrative Procedures Act from
20 1996 or 1999 that foreclose that possibility.

21 COMMISSIONER JOHNSON: So we could do
22 that -- I guess we would then have to, though, codify
23 whatever our findings are in a rule, but at the point
24 that we make that decision it would be effective?

25 MR. ELIAS: And I'm drawing a distinction

1 between a decision with respect to one utility and one
2 with respect to all utilities collectively. We could
3 probably make the decision just based on evidence for
4 each specific utility and say yea or nay after
5 hearing --

6 COMMISSIONER JOHNSON: I got you.

7 MR. ELIAS: -- but if we decide on a
8 prospective basis that all utilities shall plan for a
9 20% reserve margin over the 10-year planning horizon
10 and that their 10-year site plans shall reflect that
11 level of planning, that's something that we need a
12 rule to do, and would review a rulemaking proceeding
13 subsequent to anything we do here with all the
14 procedural requirements of the rulemaking process met.

15 COMMISSIONER JOHNSON: Thank you.

16 MR. CHILDS: Commissioner, on a couple of --
17 one thing was injected by Ms. Paugh that's new, and I
18 need to talk about that. She referenced
19 Rule 25-22.036, and said that's applicable here. It's
20 not, and let me explain that.

21 I have a package, and I can give you that
22 information, but let me try to reference it first, and
23 then if you care to, look at it later. I have in
24 legislative format the April 15, 1999 order of the
25 Commission revising that rule. And as a rule of

1 procedure it was done without hearing.

2 Now, the significance of this document is to
3 show that what used to be subsection (6) of that
4 Rule 25-22.036 is now subsection (3). So that's why
5 this is here, to show you that for purposes of
6 discussions, that the subsections were changed when
7 the Commission revised the rule.

8 Then I want to refer to the Administrative
9 Procedures Act. This is new. 120.54(5)(a), which I
10 mentioned before, which directs that there will be
11 uniform rules established by the Administration
12 Commission, it says, these will be the rules. Now,
13 these are the rules. They displace the procedural
14 rules of agencies unless there's an exception.

15 It says: "On filing with the department,
16 the Uniform Rules shall be the rules of procedure for
17 each agency subject to this chapter, unless the
18 Administration Commission grants an exception to the
19 agency under this exception." So that's
20 120.54(5)(a)(1).

21 Then we have -- the Commission filed for
22 exception with the Administration Commission, and I've
23 referenced an order here, and I have the first page
24 and the page that applies to this particular rule of
25 the Administration Commission; and I have that copy.

1 The order reads in subparagraph (3), and I'm
2 going to read only the rule that's -- well, I'll read
3 it all. "The request for an exception by this
4 Commission for Rule 25-23.036, 1 through 7 and 9
5 through 10," which includes the one that Staff is
6 relying on.

7 Now I'll read Number 3. "Initiation of
8 proceedings is denied." Subsection (3) (5), (6),
9 (7) (b) and (7) (e) of Rule 25-22.036 apply to
10 applications, complaints, orders, or notices -- and
11 then this is important language -- which do not
12 involve or which precede proposed or final agency
13 action determining substantial interest."

14 Okay. The remaining provisions of the rule
15 are adequately covered by statute, so that's not
16 applicable. So that's -- the order said the
17 Commission's request for an exception is denied, and
18 it said that certain provisions apply to -- in effect
19 they're saying -- proceedings that do not involve the
20 determination of substantial interests. Okay.

21 The Commission then, before -- and I have a
22 memo from Noreen Davis to Theresa Tinker (phonetic) of
23 the Administration Commission dated June 10, 1998, in
24 subparagraph (2) communicates with respect to the
25 request for exception "We propose that these requested

1 exceptions are not necessary as the PSC rules are
2 outside the scope of the Uniform Rules."

3 Well, as we see, the order came out and said
4 that request for exception is denied. It did say that
5 some of them are outside the rules, of the Uniform
6 Rules because they don't apply to proceedings
7 involving substantial interests.

8 Then under the statute and under the
9 applicable rule, that all agencies have to adopt a
10 rule that shows a reconciliation between their rule
11 and the Uniform Rules. And this is shown for this
12 Commission in Rule 25-40.001, and it says: "The
13 following provisions of the Commission's rules are
14 exceptions to the Uniform Rules of Procedure. Well,
15 it doesn't include 25-22.036.

16 And then I have, to go with that, a memo
17 from Noreen Davis on the rule supplement mailing list
18 that explains -- and I'm reading in part from that
19 memo. One, two, three, four paragraphs down, last
20 sentence says "Take note, however, that because of
21 particular requirements of Section 120.54(5), the
22 rules outside the scope of the URP that are still
23 included in Chapter 25-21 and 25-22 are not included
24 in the table in Rule 25-40.001."

25 Now, I have that for you if you'd like it,

1 and the point is, is that the suggestion that there is
2 a procedure under this Commission's rules to initiate
3 a proceeding to determine substantial interests of the
4 party is totally contrary to what this Commission has
5 said in its request for exceptions, and also to note
6 that the request for exception was denied. Under the
7 APA, the Uniform Rules -- and under the Uniform Rules,
8 they displace these Rules of Procedure.

9 Now, this Commission said, "Well, we have
10 some rules that can be applied to preliminary
11 proceedings," and that's what they do. They don't
12 apply when you're determining substantial interest.

13 MS. PAUGH: I disagree with Mr. Childs'
14 analysis.

15 COMMISSIONER JOHNSON: Are you finished?

16 MR. CHILDS: No.

17 COMMISSIONER JOHNSON: I didn't think so.

18 MS. PAUGH: Well, at least he knows where I
19 stand. (Laughter)

20 MR. CHILDS: Now, on that point I want to
21 come back and say the reason I didn't raise this in my
22 first comments to the Commission or to you was because
23 the Commission decided and voted clearly to open a
24 proceeding that was an investigation.

25 Now, you're told that there's no procedural

1 infirmity with this order on procedure because you can
2 do it, and reliance is placed upon this rule, this
3 25-22.036 of the Commission's rules. I want to say to
4 you that that is wrong, that that rule does not give
5 you that authority, but, more importantly, that's not
6 what the Commission did; and the fact that someone
7 would like to have it another way is not the way the
8 Commission decided it.

9 The comment that we waived our right to
10 object to the order on procedure and we waived our
11 right to object to intervention -- first of all, one
12 of the things I've learned -- maybe it's changed and
13 the law is no longer that. I thought standing was
14 always at issue. You know, I don't think that we've
15 waived our right. I don't think that when the
16 Commission has voted to open a proceeding that's an
17 investigation, that if someone issues an order that
18 says this is what we're going to do on intervention,
19 that there's a waiver.

20 Now, I also think that in terms of how we
21 got where we are that it's interesting. You know, we
22 had -- and we tried to work through on the issues, and
23 we, you know, did have meetings to talk about issues.
24 And, you know, one time I raised in the meeting that's
25 one of our difficulties about raising problems is

1 because it's sometimes difficult for participants to
2 make their comments known to the prehearing officer.
3 It is. As a practical matter, it's very difficult,
4 but we did discuss at one of the early meetings about
5 issues -- and one of the things I was saying to the
6 Staff at that time was, you know, if you're going to
7 adopt these things as a matter of policy, that's
8 rulemaking.

9 I'm real concerned that if you're going to
10 be engaged in rulemaking and you know you're going to
11 be engaged in rulemaking that you ought to be pursuing
12 the notice. One of the things that was said -- and
13 then also said, you know, this CASR and how we're
14 proceeding is really going to be tough, and it's just
15 not fair. And the reaction was to lift the CASR up in
16 the air and say, "I'm ripping it up right now. I'm
17 ripping the CASR up." Now, this is for the
18 participants. And now to come in and say, well, you
19 know you waived your rights, I think, is not fairly
20 painting the picture of how we got where we are.

21 The listening to the tape of the proceeding,
22 or the Agenda Conference: I did, too. I listened to
23 the tape several times. I know it was a long Agenda
24 Conference, and I know that Commissioners made a lot
25 of comments about what they were interested in, and I

1 know that certain of them raised questions.

2 For instance, Deason made that comment about
3 the standards, and then at one point I think he said
4 later, "But you know if you had a standard, then you'd
5 be concerned about exceptions." I know that was said.
6 But what I'm looking to is when all was said and done,
7 they voted, and they voted not -- I don't think that
8 the scope of a proceeding, when the Commission votes
9 to open a proceeding, that the scope ought to be
10 dependent upon everything that may have been said when
11 they were discussing it. I mean, they did vote.

12 We have to give them credit for that, that
13 they voted and knew what they were doing. And the
14 other thing in terms of that argument about what the
15 broad range in discussion at Agenda may suggest is,
16 "Well, go to the procedural order." Procedural order
17 doesn't say that. The procedural order says "The
18 scope of this proceeding shall be based on the issues
19 raised by the parties and the Staff." It doesn't say
20 "raised by the Commission." It says "raised by the
21 parties and the Staff."

22 Well, the clearest direction, I think, to
23 resolve this is to go back and say we don't need -- we
24 don't need to get into this issue of is Rule 25-22.036
25 applicable. Now we don't, because the Commission said

1 they were opening investigation. Clearly, an
2 investigation is not a proceeding to determine
3 substantial interest, as I pointed out with the
4 Statute 120.57(5). Since we don't need to get in
5 there, let's try to make, then, the order on procedure
6 conform to what the Commission voted to do.

7 As to the suggestion that you're not
8 affecting anybody's rights, you know, until you choose
9 to enforce it, I said, well, now, wait a minute now.
10 I mean, I would think that the Commission, if it made
11 a statement that it thought was correct, that it would
12 expect compliance. I don't think it's inviting people
13 to say, well, you don't have to comply if you don't
14 like it. I think they are expecting compliance.

15 Beyond that I would remind you that we're
16 all familiar with the proposed agency action process.
17 Now, if the Commission decided that it wanted to make
18 that determination, then it could do it, and there
19 could be a protest to the proposed agency action and
20 we're back with a hearing again. And that's one of
21 the things that we're a little concerned about.

22 We want to be responsive in this proceeding,
23 but we don't want to waive our rights to a hearing and
24 to a fair hearing when we know what the issues are in
25 advance and know what's on the table for action.

1 So I urge you again, go back to have this
2 proceeding addressed as an investigation and address
3 what the Commission voted to address.

4 COMMISSIONER JOHNSON: Thank you.
5 Ms. Paugh?

6 MS. PAUGH: Rule 25-22.036 is titled
7 "Initiation of formal proceedings." Subsection (3),
8 it is correct the exception was denied for that. The
9 reason it was denied was because it was considered
10 outside the scope of the uniform rule. We retained
11 the rule. We didn't need an exception. It controls.

12 I disagree with Mr. Childs' analysis, and I
13 have discussed this analysis with Noreen Davis at
14 length just prior to this proceeding; and that is her
15 analysis. I can provide you with documentation if
16 you'd like to see that.

17 COMMISSIONER JOHNSON: Okay.

18 MS. PAUGH: There is no procedural infirmity
19 with this proceeding.

20 COMMISSIONER JOHNSON: Thank you.

21 MR. SASSO: May we be heard briefly? We
22 fundamentally disagree with Mr. Elias' analysis and
23 comments and with Ms. Paugh's with regard to the rule
24 and procedures and the infirmity of this proceeding.
25 And, in fact, after hearing what Mr. Elias has said,

1 we're even more concerned and frightened about what
2 evidently the Commission Staff may be proposing to do.

3 First, a comment on this rule and on
4 amendments to the Administrative Procedures Act. The
5 Administrative Procedures Act was amended in 1996
6 precisely to limit the preexisting discretion of
7 agencies to proceed in manners detrimental to
8 regulated entities in two respects; rulemaking and
9 adjudications.

10 With respect to rulemaking, agencies were
11 instructed after 1996 that they were no longer
12 permitted to develop policy on an informal basis. It
13 had to be done in rulemaking. With respect to
14 adjudications, the Legislature imposed a regime of
15 Uniform Rules. We weren't going to have any longer
16 agencies proceeding in a helter-skelter fashion with
17 respect to the procedures they pursued in various
18 administrative proceedings. And agencies were
19 instructed in 120.54 either to follow Uniform Rules or
20 to gain an exception to keep rules that they had.

21 As Mr. Childs has described, the
22 administration Commission promulgated a set of Uniform
23 Rules which were designed to prescribe precisely how
24 formal proceedings under 120.57 are to be initiated,
25 and this is a real important point, because under

1 those Uniform Rules, it's quite clear that before a
2 proceeding like that is to be initiated, parties must
3 be given precise notice of the charges against them.

4 Under Rule 28-106.201, the Administration
5 Commission provided that to commence a 120.57
6 proceeding, for example, a statement of all disputed
7 issues of material fact must be provided. A concise
8 statement of the ultimate facts alleged must be
9 provided, as well as rules and statutes which entitle
10 the petitioner to relief. A demand for relief must be
11 provided.

12 And this is critical, because these rules
13 are designed to protect the due process rights of
14 parties whose substantial interests may be impaired by
15 the proceeding. What we are talking about doing here
16 instead of following these rules is going into a trial
17 without precise notice of the charges against us, at
18 the end of which we may or may not be convicted by an
19 order the Commission may or may not enter, and if it
20 does enter an order after this trial, we may be
21 advised of the charges against us.

22 That is a flat violation of our due process
23 rights and a flat violation of the governing
24 administrative rules. Yes, this Commission used to
25 have a rule pertaining to formal proceedings that was

1 displaced by the Uniform Rules, and the Commission did
2 petition for an exception for those rules.

3 As Mr. Childs has described, in the course
4 of that exception proceeding, certain dispositive
5 statements were made, both by this agency and by the
6 Administration Commission. And I'll read again the
7 order that was issued as a final order by the
8 Administration Commission concerning this matter.

9 It said the request for an exception for
10 that rule is denied. The section at issue applies to
11 applications, complaints, orders or notices which do
12 not involve proposed or final agency action
13 determining substantial interests. That was the
14 understanding of this Commission, that was the
15 understanding of the Administration Commission, and
16 that was the final resolution of this matter.

17 And that means that this Commission cannot
18 use that preexisting rule to initiate a formal
19 proceeding that will affect and determine the
20 substantial interests of the parties. If the
21 Commission intends to bring charges against individual
22 utilities that may culminate in findings of fact that
23 are binding on the rights of those utilities and that
24 may lead to and premise action against those
25 utilities, the Commission must give very precise

1 notice that protects our due process rights in advance
2 of the proceeding about what it proposes to do, what
3 agency action it intends to take, what ultimate facts
4 it alleges and intends to prove, and then go about it
5 in a formal manner to prove them, not simply set a
6 schedule, tell the utilities to show up, put on proof
7 as though we have the burden to demonstrate something
8 we're not even sure about, and then at the end of the
9 day there may or may not be findings.

10 Now, Mr. Elias has said, well, of course, if
11 they were going to take action in the form of an
12 order, if the agency were going to take action in the
13 form of an order, then we would need the panoply of
14 due process rights; and we certainly agree. But he
15 says there's nothing that would prevent the agency
16 from making findings of fact.

17 Well, what are findings of fact? The
18 findings of fact, presumably, would be binding on our
19 rights and our interests in subsequent proceedings.
20 That's like saying, well, we're going to have a little
21 hearing and we're not going to tell you what you're
22 charged with, and we may make a finding of fact at the
23 end that you stole property, that you violated IRS
24 regulations or statutes, and later we'll have a trial
25 where you don't get to relitigate those issues because

1 they've already been found against you, and then we'll
2 convict you. That's basically what we're proposing to
3 do here.

4 We've also learned for the first time now
5 that the charges include undisclosed matters on tapes
6 that appear nowhere in the formal notices of this
7 proceeding, the formal documentation launching this
8 proceeding, or even in the issues identified at these
9 issues identification conferences.

10 And let's consider a little bit how this
11 proceeding has rolled out since its inception. There
12 was a notice indicating there was going to be an
13 investigation. Nothing wrong with that. As we've
14 discussed, the Commission can conduct an
15 investigation; and there are appropriate ways to do
16 so.

17 We then had an order establishing procedure.
18 We had an issues identification conference. The
19 issues appear to have something to do with reserve
20 margins. They were immediately displaced by a list of
21 Commission Staff issues dealing with merchant plants.

22 We then appear at an issues identification
23 conference where Staff member Jenkins in front of us
24 all tears up the CASR and says he's going to recommend
25 to the Commission to close this docket and proceed

1 with the merchant plant docket.

2 The next thing we know, we're back at an
3 issues identification conference where we promulgate
4 the full list of 27 issues that you see before you,
5 and we first have the indication that the Commission
6 may be taking action that results in a revision or an
7 establishment of obligations concerning reserve
8 margins that may well affect the utilities'
9 substantial interests. That is not due process.

10 We're very concerned about this proceeding.
11 We do believe it is fundamentally infirm. It would
12 violate our rights under the statutes, under the rules
13 and under the United States and State constitutions,
14 and we encourage the Commission very strongly that you
15 heed the various comments that have been provided by
16 parties on both sides of the table, as it were, about
17 how to proceed with an investigation in an appropriate
18 and constructive manner.

19 Thank you very much.

20 COMMISSIONER JOHNSON: Thank you. We're
21 going to take a 15-minute break.

22 (Brief recess.)

23

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24 COMMISSIONER JOHNSON: We're going to go
25 back on the record. I did that break a bit abruptly.

1 Were there any concluding remarks there? Was there
2 someone from Staff?

3 MS. PAUGH: Mr. Floyd requested to address
4 the proceeding. Do you still wish to, Roland?

5 MR. FLOYD: No, I don't think I need to.

6 MS. PAUGH: We'll take that as a "no".

7 COMMISSIONER JOHNSON: Okay. Going back to
8 the first matter that we were discussing with respect
9 to some of the arguments particularly raised by
10 Mr. Childs and what we can do in an investigative
11 docket, I've not had an opportunity to go in as much
12 detail as I'd like.

13 The information that you've provided me and
14 the information that Staff has provided me to the
15 extent that there was some change in the 1996 act that
16 impacts the way in which we do business, I need to
17 review that more thoroughly. So I will, by the end of
18 the day, though, make some decision with respect to
19 that point.

20 Now, looking at the information as it's been
21 framed and provided, I know we have -- or at least --
22 yeah, I believe all of the parties have the May 28th
23 memo that lists all of the issues that have been
24 raised and not agreed upon that would be discussed in
25 some type of proceeding.

1 Now this is going to be -- this is a very
2 difficult process to kind of navigate, but, Mr. Childs
3 and the other utilities, understanding your position
4 that the docket should be limited to considering the
5 appropriate methodology for developing margin reserve,
6 there's something I need for you to do for me.

7 I need for you to go through --
8 understanding we have the outstanding issue of how
9 probing this docket can be or not probing, I need for
10 you to go through for me these issues, if you can do
11 that now, in fact, and tell me the issues, then, that
12 would be appropriately before the Commission; and the
13 others, also.

14 I also need -- the way that the issues are
15 framed or the subject matter is framed in the
16 December 17th memorandum that you provided for me, to
17 the extent that that is the appropriate framing of the
18 issues, which of these issues would be appropriately
19 discussed under that particular interpretation? Did
20 you understand what I --

21 MR. CHILDS: Did you consciously not mention
22 the 12/15 Internal Affairs? You mentioned 12/17.

23 COMMISSIONER JOHNSON: I'm sorry. No. I
24 meant 12/15.

25 MR. CHILDS: Okay.

1 COMMISSIONER JOHNSON: Under that, which
2 issues under the 12/15 where it says "The
3 Commissioners directed Staff to open a docket to
4 consider the appropriate methodologies for developing
5 margin reserve." And I know that's what you believe
6 that's what we're limited to.

7 Which of these 24 issues would be the issues
8 that we should be addressing in the docket? And the
9 same for if it was more broadly framed in the
10 December 17th, which issues would be appropriate. And
11 I understood that you all were probably prepared to do
12 that. No?

13 MR. CHILDS: Well, maybe somebody is. I'm
14 not. I'll try to get prepared real fast, but --

15 COMMISSIONER JOHNSON: Mr. Wright?

16 MR. WRIGHT: I've gone through and flagged
17 the issues that I think are methodological in
18 application, and rulemaking and factual. If it would
19 be helpful, I'd be happy to give it a shot. If you
20 want to hear from them, that's fine, too.

21 COMMISSIONER JOHNSON: No. We can start
22 with you and allow them the opportunity to continue to
23 look through these.

24 MR. WRIGHT: This is a first cut, but my
25 view is that the following are either predominantly or

1 significantly or perhaps even totally methodology type
2 issues: Issue 3, Issue 4, Issue 5, Issue 6, Issue 7.
3 8 and 9 have some methodological implications, and I
4 would characterize them as methodological issues, but
5 others might argue with it. It has to do with the
6 inclusion of limiting nonfirm load and minimum limits
7 on supply-side resources in determining reserve
8 margins.

9 I think that really does go to calculating
10 reserve margins, but it is arguably part application
11 and part methodology, so I might put an M/A by that
12 one. Issue 12. I have Issue 13 as an applications
13 issue. 14 is a methodological issue relating to the
14 testing of reserve margin methodologies. 15, again,
15 is one that I would characterize as a sort of
16 quasi-methodology issue. I personally think it is an
17 appropriate factual issue relating to the reserve
18 criteria and reliability measures adopted by other
19 reliability coordinating councils and how they might
20 or might not be relevant to the FRCC.

21 I have 16 and 17 as application issues; 18
22 and 19 as application issues. 20 is not really a
23 methodology issue. I see 20 as a straight factual
24 issue. I would say, I think, that a -- well, that
25 the -- it's part both. The "What percent reserve

1 margin as currently planned?" is a straight fact
2 issue. The "What percent of firm load would be
3 unserved assuming temperatures on given dates?" is a
4 factual issue.

5 The question, whether the percent reserve
6 margin that is planned is sufficient to provide
7 adequate and reliable sources, is more an application
8 issue. So that's mixed to some extent.

9 21, I think, is an application issue. 22 is
10 an application issue and, in my opinion, outside the
11 scope of this docket. I think it's a tariff type
12 issue, but that's my opinion.

13 23 is part factual and part methodological.

14 The first component question is whether
15 out-of-Peninsular-Florida power sales can interfere
16 with the availability of reserves during a capacity
17 shortage; that, I think, is a factual question.

18 The second question asks "How should such
19 sales be accounted for in establishing a reserve
20 margin standard?" I think that is a methodological
21 issue. And 24 is obviously the ultimate application
22 issue; what are you all going to do next.

23 COMMISSIONER JOHNSON: Thank you. Anyone
24 else want to give it a shot? Mr. Willis?

25 MR. WILLIS: Commissioner, we thought that

1 the issues that should remain are probably Issues 3
2 and 4, 7 and 9. 17 needs to be altered to remain in.

3 COMMISSIONER JOHNSON: I'm sorry; it needs
4 to be altered? Is that what --

5 MR. WILLIS: It needs to be revised so that
6 we're not adopting a reserve margin standard and what
7 is the appropriate standard. I think you -- it has to
8 be altered to -- in that respect.

9 24, if it's understood that that is the
10 issue about what you do after you receive the
11 information, what follow-up docket that you would go
12 to.

13 COMMISSIONER JOHNSON: So it would be --
14 appropriate issues to be addressed, leaving off the
15 question of what process we use, what investigation --
16 generic investigation means, in your opinion it would
17 be 3, 4, 7, 9 and 17 if it's revised?

18 MR. WILLIS: Right.

19 COMMISSIONER JOHNSON: Any other comments?

20 MR. CHILDS: We'll have some in a minute.

21 COMMISSIONER JOHNSON: Well, while you're
22 still doing that, as I take it under advisement and
23 read the information that's been crafted, to the
24 extent that we go forward in whatever fashion we go
25 forward, I know that in our original order on

1 procedure I stated that issues could be developed up
2 until the prehearing.

3 Given the nature and the magnitude of this
4 undertaking, to the extent that we do decide to go
5 forward, I'd like for us to very -- and given the fact
6 that you all have had a hard time agreeing on the
7 issues, I'd like for us to try to identify and tee up
8 those issues early on, and then have a higher standard
9 for adding issues if individuals want to attempt to
10 add issues.

11 So that's part of, as I think through this
12 over the next several hours whether we're doing a
13 very, very informal process or whether we're doing a
14 more traditional process, I do want us to -- I'm very
15 sensitive to the concern that these are some very
16 complex issues and we can't wait to the last minute to
17 continue to raise them and mix them and interject new
18 things to be explored. I don't think that will be to
19 the benefit of the Commissioners or to any process.

20 So at some point I will, regardless of the
21 process, kind of try to set out the parameters under
22 the assumption that you all developed -- this was a
23 list that was developed by Staff, but everyone's
24 issues were in here?

25 MS. PAUGH: That's correct.

1 COMMISSIONER JOHNSON: Okay.

2 MR. WILLIS: One other --

3 COMMISSIONER JOHNSON: And let me add one
4 other thing. And to the extent that there is -- we
5 need closure on these things one way or the other, and
6 to the extent that we -- I lay these issues out there,
7 I know that there is a process by which some of you
8 may decide to reconsider. And we at least need to
9 give people some direction, something to focus on when
10 we're all -- whether it's as a group or as one
11 Commissioner making these decisions, we do need to
12 start focusing in.

13 MR. WILLIS: One other point with respect to
14 Issues 3 and 4 and throughout the proceeding, I think
15 that we ought to conform this to the title of the
16 investigation, which is an investigation plan for
17 Peninsular Florida and not the individual utilities.
18 So that would be one change that we would suggest,
19 that it would be calculating the reserve margins for
20 Peninsular Florida.

21 I think that it's important -- one of the
22 things that we're doing here is trying to focus this
23 down on something that is going to be meaningful and
24 manageable, and from that perspective, we would urge
25 that change be made.

1 COMMISSIONER JOHNSON: Staff, any reaction
2 to that on its face?

3 MS. PAUGH: To me it just seems like
4 semantics, but we can make that change.

5 MR. FLOYD: Commissioner, I need to say
6 something here, because if we're not allowed to look
7 and see what individual utilities are doing, this
8 whole thing is going to be a waste of time.

9 I mean, Peninsular Florida is made up of
10 utilities. And you may want to take some action at
11 some point, you know, in another docket or whatever to
12 a particular utility or a group of utilities, all
13 utilities. I don't know.

14 But if we're just going to look at the -
15 aggregate and not worry about how individual utilities
16 do their load forecasting, are they doing their load
17 forecasts appropriately, or are they taking weather
18 into account appropriately, and all these little
19 minutia things that only technical Staff worries
20 about, just looking at the big picture isn't going to
21 get to where we need to.

22 Now, we may wind up at the end and say we do
23 not need to set a reserve margin for every utility in
24 Florida, but don't start off saying we're not going to
25 look at what any one utility does with regard to

1 reserve margins. I think that would be a mistake.

2 Now, I don't know if legally we can look at
3 utilities, but I think we're regulating them.

4 COMMISSIONER JOHNSON: Let me understand,
5 then, Roland. Reading Issue 3, it says "What is the
6 appropriate methodology for planning purposes for
7 calculating reserve margins for individual utilities
8 and for Peninsular Florida?"

9 What do you -- I probably should ask you
10 this off line, but I'm going to ask you right now --
11 what do you expect for the -- what would you envision?
12 What would be a helpful process? Are we going to say
13 the appropriate methodology, or actually set the
14 reserve margins for -- is it a methodology or an
15 application?

16 MR. FLOYD: I envision either one -- any of
17 the above could happen. I think we could look at this
18 and say, we've got all this information now, and we
19 don't need to set individual reserve margins for each
20 utility.

21 However, I can remember -- and here's a
22 point from Internal Affairs that I listened to.
23 Commissioner Deason said he wasn't too sure if the
24 fact that we had a 15% reserve margin for Peninsular
25 was really sufficient, because one particular utility

1 might need to build a capacity. I mean, that's on the
2 Internal Affairs tape.

3 I mean, we were concerned about Florida
4 Power Corporation in that Internal Affairs. That's
5 the way the whole thing got started. They were
6 deficient, at least the way Staff looked at it, in one
7 year; in 2001, I think. And so we were concerned
8 about individual utilities as well as how the big
9 picture looks.

10 But, again, we may come around and say for
11 practical reasons or other reasons it only makes sense
12 to have an aggregate reserve margin; we'll let the
13 utilities figure out how you get there.

14 I don't know how it will end. We're asking
15 a lot of information to try to get to that point to be
16 able to give you some recommendation on it, but
17 that -- I don't know if I answered your question.

18 COMMISSIONER JOHNSON: You did. Thank you.
19 Mr. Childs?

20 MR. CHILDS: I think we're ready to comment.
21 I repeat, I think, what you know; that, first of all,
22 we believe the appropriate issue is as stated in the
23 minutes of the Internal Affairs.

24 To go beyond that, depending upon what your
25 ruling is, I will identify some issues. However, I

1 don't have the wording, but just thinking about what
2 you were talking about with Mr. Floyd looking at Issue
3 No. 3, which says "What is the appropriate
4 methodology," our position remains that this is an
5 investigation; and when you frame it as though you're
6 going to make a decision on it as opposed to
7 investigate yourself, then I think -- investigate the
8 issue, then we're going too far.

9 But having said that and -- caveat as to how
10 the issue is worded, we would say that 3 is an issue
11 you could address. 4, 5 --

12 COMMISSIONER JOHNSON: I'm sorry; you
13 said 5?

14 MR. CHILDS: 3, 4, 5, 7, 17, and 24. And at
15 the risk of being redundant, I do think that wording
16 of the issue is important.

17 Mr. Floyd is saying, well, he doesn't know
18 what we're going to do here. And I agree, none of us
19 do, but I don't want to have the issue worded so that
20 it contemplates that you're going to make a vote to --
21 you know, vote on a methodology that is appropriate
22 for all of the utilities or individual utilities.

23 You may decide to go to that next step or
24 the Commission may decide some way, but our position
25 is we're not there yet. You ought to inform yourself

1 as to matters relating to identifying the appropriate
2 methodology, not decide.

3 COMMISSIONER JOHNSON: Thank you. You
4 didn't have 9 in your list, did you, Issue 9?

5 MR. CHILDS: No. I don't think that has
6 anything to do with this. The Commission has had a
7 rule on supply-side. You've got conservation goals.
8 You've got programs. And I think that to put this in
9 here we just think is somebody's desire to pursue this
10 as a matter, because, you know, it can relate, but I
11 don't think it has anything to do with methodology.

12 COMMISSIONER JOHNSON: Thank you.
13 Mr. Sexton?

14 MR. SEXTON: I think that we're agreeable
15 with Florida Power & Light in this area.

16 One comment I would have is that
17 traditionally the Commission, in dealing with the
18 planning methodologies and the assumptions of the
19 utilities in the annual planning hearings, has
20 utilized a standard of "Are the assumptions
21 reasonable; is the methodology reasonable?"

22 And what we're looking at here, without even
23 determining whether or not they're reasonable, is
24 what's the appropriate methodology. And I would
25 suggest that perhaps the better wording would be

1 whether the methodologies employed by the utilities
2 for planning purposes to determine reserve are
3 reasonable as the threshold question.

4 Then if you reach the answer that they're
5 not, then you could address the next question as "What
6 would be a reasonable methodology?"

7 But I think that given that we're talking
8 about a utility planning function, the first question
9 is, "Is what the utility is doing reasonable?" And
10 then you go to your next step if the answer is no. If
11 you say yes, then that's as far as you need to go.

12 COMMISSIONER JOHNSON: Thank you.

13 Mr. Sasso?

14 MR. SASSO: Yes. We would agree with
15 Mr. Childs' list and also with his caveat that we have
16 to be very careful about how we phrase these issues
17 not to imply that the Commission is proposing to take
18 action on any of these items.

19 COMMISSIONER JOHNSON: Okay. Mr. Wright?

20 MR. WRIGHT: Two brief comments. First I
21 want to say that we strongly agree with your
22 suggestion, Commissioner Johnson, that however we go
23 forward, it's important to tee up the issues clearly
24 and early on. And I think your suggestion that there
25 be a higher standard, you know, you have to really

1 make a showing that there's a good reason you didn't
2 raise the issue earlier on is entirely appropriate.

3 When I made my comments earlier, I really
4 just tried to go down the list and identify the issue
5 according to what I thought its character was
6 generally, methodological versus application. Other
7 commentators have addressed it in terms of issues that
8 should be kept in the proceeding.

9 I'd submit to you, with the possible
10 exception of the issue on a pricing threshold for
11 nonfirm -- for interrupting nonfirm service, which I
12 think is really a tariff issue and could probably be
13 dealt with more easily outside the scope of this
14 docket, I think every one of the issues posed here is
15 an important issue and should be kept at some point in
16 whatever process the Commission is going to undertake
17 to address reserve margins in Florida.

18 I think the issue you have is whether you
19 try to address more issues sooner, say, over the next
20 six or eight months, or go through some other process,
21 a workshop process leading to issues, leading to
22 further proceedings that may include rulemaking and
23 may include contested proceedings relating to
24 determination of reserves, so on and so forth.

25 But I wanted to make the point that these

1 are important issues that should be kept on the
2 Commission's front burners.

3 COMMISSIONER JOHNSON: I appreciate that.

4 MR. WRIGHT: Thank you.

5 COMMISSIONER JOHNSON: Let me ask a further
6 question.

7 You don't have to address that issue?

8 MS. PAUGH: (Shaking head.)

9 COMMISSIONER JOHNSON: Let me ask a further
10 question. Just procedurally, to the extent that we're
11 going to stay on the noticed schedule, if we're
12 going -- well, if we're going forward, I'd like for us
13 to stay on the noticed schedule.

14 And with that in mind, I know that if I --
15 when I make whatever rulings that I might make by the
16 end of the day, there will be probably opportunity for
17 reconsideration before the full Commission. Is that
18 called for or allowed for?

19 MS. PAUGH: Yes.

20 COMMISSIONER JOHNSON: Now, with that in
21 mind, if there was reconsideration, what kind of
22 schedule are we looking at in terms of how soon could
23 this get before the full Commission?

24 MS. PAUGH: Just guessing, I would say a
25 month. It would take a month with the pleading filing

1 times and the response times and recommendation.
2 Perhaps we could shorten it to three weeks. It
3 depends on what our recommendation filing schedule is.
4 And perhaps we could file one out of time to speed it
5 up, as well.

6 COMMISSIONER JOHNSON: And could you then,
7 perhaps, get with the parties, just in anticipation of
8 no matter which way I go -- it'll probably be
9 reconsidered. What I'd like to do is this, at the
10 next Agenda, whenever that might be. I think it maybe
11 is like two weeks, so we'd be asking for some -- an
12 expedite, for the parties to agree to expedite any
13 responses or any comments. So just to be on notice,
14 to try to work through that if possible.

15 MS. PAUGH: Well, I think that could be part
16 of your order, to expedite the pleading periods. You
17 have that ability under the Uniform Rules, the just,
18 speedy, and inexpensive determination of every
19 proceeding. But, frankly, I haven't had an
20 opportunity to look at the Rules of Civil Procedure to
21 see if we could --

22 COMMISSIONER JOHNSON: See if we can get
23 them to agree first. (Laughter)

24 MS. PAUGH: That's what I was going to
25 recommend. I think a consensus from the parties here

1 that they would be willing to go with five-day
2 pleading periods or something would be appropriate.

3 COMMISSIONER JOHNSON: Yeah. And I'm
4 throwing that out there to see if it works. If it
5 doesn't work, then we'll just look at the calendar and
6 work accordingly.

7 MS. PAUGH: It would be cleaner if we could
8 get that consensus now while they're here, rather
9 than --

10 COMMISSIONER JOHNSON: You want to do it on
11 the record?

12 MS. PAUGH: Yes; that's what I would
13 recommend.

14 COMMISSIONER JOHNSON: Mr. Wright?

15 MR. WRIGHT: Commissioner Johnson, we are
16 okay on whatever you all say. I think that the way
17 your Agendas fall, the next one is a week from
18 yesterday --

19 COMMISSIONER JOHNSON: A week from
20 yesterday?

21 MR. WRIGHT: And the one -- yes, ma'am;
22 July 6. Am I right?

23 COMMISSIONER JOHNSON: You know what; you're
24 right. We did have back to back.

25 MR. WRIGHT: I was saying I think the very

1 next one is July 6th, and the one thereafter is, I
2 think, July 27th.

3 COMMISSIONER JOHNSON: Is that three weeks?

4 MR. WRIGHT: I think NARUC intervenes to
5 kick it to that following week. I'd be surprised --
6 if you want to get it on the 6th, you know, it would
7 be some--

8 COMMISSIONER JOHNSON: No. No.

9 MR. WRIGHT: -- interesting pleading
10 periods. But we would comply with your direction. I
11 think abbreviated pleading periods sufficient to give
12 the time -- Staff time to write and file a
13 recommendation for the July 27th Agenda Conference
14 makes sense; and if it's five or six days for us and,
15 you know, they get to file their recommendation maybe
16 a few days late, maybe a week in advance of the Agenda
17 instead of 12 days, something like that would work.
18 But we're agreeable to expedite it, pleading times,
19 and we'll do what you all say.

20 COMMISSIONER JOHNSON: With a focus on the
21 July 27th Agenda Conference.

22 MR. WRIGHT: That would seem to make the
23 most sense to me, Commissioner.

24 COMMISSIONER JOHNSON: Yeah. Any other
25 comments on this, then?

1 MR. SNIFFEN: Commissioner Johnson, PG&E
2 doesn't object to an expedited process. Is the 27th,
3 or is it the 28th that -- 27th? We'd be agreeable to
4 that.

5 COMMISSIONER JOHNSON: Okay. Mr. Childs?

6 MR. CHILDS: We can accommodate. I think
7 it's the 27th or 26th, something like that. We will
8 do that.

9 MR. WILLIS: Tampa Electric will
10 accommodate.

11 MR. SEXTON: We can agree to that.

12 MR. SASSO: We agree to it, too.

13 COMMISSIONER JOHNSON: Thank you. Thank you
14 very much.

15 Are there any other preliminaries, any other
16 matters that you'd like to bring to my attention
17 before I go back and spend the next couple hours
18 reviewing? Yes, Mr. Childs?

19 MR. CHILDS: One. Maybe it's a minor point
20 in terms of what we're talking about where we go with
21 the docket. But I would ask that if we're talking
22 about treating this as an investigation -- and even if
23 we're not -- that I don't see any reason for us to
24 have the split in terms of filing material.

25 We haven't talked about that, but if it's an

1 investigation, I think that's going to come up as to
2 what you're going to do with information; and that
3 needs to be addressed, and if it's addressed so that
4 there's going to be a filing on matters that are
5 identified in advance, then everybody knows about them
6 and everybody can file on the same date, I would
7 think.

8 MR. WILLIS: Now, that would be entirely
9 appropriate from our point of view as well.

10 COMMISSIONER JOHNSON: Mr. Wright?

11 MR. WRIGHT: Madam Chairman, Duke Energy
12 North America is an intervenor. Duke Energy New
13 Smyrna Beach Power Company is an electric utility, at
14 least under you all's order-as it exists today.

15 Our plan is to file whatever testimony we
16 file on the utility date which, as of today, is
17 August 9th. We have no objection to everybody filing
18 on that day, although, frankly, having worn the Staff
19 hat for a number of years, I'd be amenable to the
20 Staff having some time to file testimony thereafter,
21 but that's your call. We don't have a strong feeling
22 about that either way.

23 COMMISSIONER JOHNSON: Okay. Yes, sir?

24 MR. SEXTON: Yeah. It's consistent with my
25 earlier comments, because there really isn't any

1 burden placed on the utilities or the FRCC.
2 Regardless of whether it's a formal proceeding under
3 120.57 or just an investigation, I think simultaneous
4 filings would be appropriate.

5 The sequential filings imply a burden of
6 proof, and I don't think that would be appropriate.

7 MR. SASSO: We agree. Once the Commission
8 advises us of what it wishes to consider, we believe
9 it would be appropriate for all people with
10 information to provide it at the same time.

11 COMMISSIONER JOHNSON: Okay. Very good.
12 Anything else? Any other preliminaries?

13 MR. SNIFFEN: Commissioner Johnson, at
14 present we're pending intervenor status, and we would
15 prefer to keep August 23rd as the date. However, if
16 you rule that all parties need to file by August 9th,
17 then we're agreeable, but we would prefer August 23rd
18 as scheduled now.

19 COMMISSIONER JOHNSON: That's noted.
20 Anything else?

21 MR. BRYANT: Fred Bryant, general counsel
22 for the Florida Municipal Power Agency.

23 We have requests for production and
24 interrogatories that are outstanding with a due date
25 of July 23rd, I believe. In light of where the

1 proceeding is at this point in time, what is the
2 disposition, if any, of those requests for production
3 and the interrogatories and the date for response?

4 COMMISSIONER JOHNSON: I'm sorry. You said
5 that you had outstanding requests for productions and
6 interrogatories that were due -- that will be due
7 July 20?

8 MR. BRYANT: Yes; served by the Staff on all
9 parties --

10 COMMISSIONER JOHNSON: Oh.

11 MR. BRYANT: -- utilities. And we have that
12 date that we need to be aware of and, also, are we
13 going to continue to process that data.

14 COMMISSIONER JOHNSON: I understand. Staff?

15 MS. PAUGH: I think it would be appropriate
16 to see what the order says before we agree to any kind
17 of extensions. We need to have that issued, and then
18 you can file a motion as appropriate at that time.
19 Does that not make sense?

20 MR. BRYANT: That's fine with me, Leslie. I
21 just want to make sure that that's cranked into the
22 time frame so that we're not running into a problem of
23 responding timely.

24 MR. ELIAS: We'll work with the parties with
25 respect to the due dates if they pose a problem after

1 the order is issued, if there's still a pending issue.

2 COMMISSIONER JOHNSON: Yes, Mr. Childs?

3 MR. CHILDS: The order does say that you
4 have 10 days to object, and that's all -- once again,
5 one of the Rules of Procedure matters. But I think in
6 view of what we're doing, that it might be productive
7 not to force people to object within 10 days, if
8 that's helpful, until we find out where we're going in
9 the docket.

10 I think we ought to at least know where
11 we're going in the docket before we have to address
12 that matter.

13 MR. ELIAS: Staff won't seek to hold the
14 parties to that 10-day-requirement in any subsequent
15 discussion or decision on the merits of an objection
16 or a motion to compel or motion for protective order.

17 MR. BRYANT: Okay. Thank you.

18 COMMISSIONER JOHNSON: Let the record
19 reflect the agreement there.

20 Sir?

21 MR. SEXTON: So my understanding is we're
22 then on a standard 30-day objection period that would
23 go?

24 MR. ELIAS: Yes.

25 COMMISSIONER JOHNSON: Ms. Kamaras?

1 MS. KAMARAS: With regard to the filing
2 dates, LEAF is an intervenor and was scheduled to file
3 on August 23rd. Might I suggest that we split the
4 difference and have the parties file on August 16th,
5 between August 9th and the 23rd?

6 COMMISSIONER JOHNSON: Well, I was
7 interpreting the relevant point to be that you all
8 file at the same time. So if we can work through
9 something that's reasonable for everyone, that's what
10 I'll try to do.

11 MS. KAMARAS: Thank you.

12 COMMISSIONER JOHNSON: Anything else?

13 MR. McWHIRTER: Ms. Chairman, Florida
14 Industrial Power Users Group are an intervenor. We at
15 this time may or may not file testimony, because we
16 would prefer to react to the type of methodology that
17 the utilities propose rather than proposing a
18 methodology.

19 As a consequence, I would think that we
20 would still have standing to utilize the
21 September 13th rebuttal date to rebut their testimony
22 should we find it is inappropriate, but I'm sure that
23 that will create a stir at the time we seek to present
24 rebuttal testimony, so I'd like to have the issue
25 clarified at this time.

1 COMMISSIONER JOHNSON: Mr. Childs, when
2 you -- do I have a procedural order with me?

3 MS. PAUGH: I do. (Handing document to
4 Commissioner Johnson.)

5 COMMISSIONER JOHNSON: And I'm getting to
6 your question, Mr. McWhirter, but I may have to ask
7 Mr. Childs a question. (Pause)

8 I was trying to better understand your
9 question with respect to rebuttal.

10 MR. McWHIRTER: Well, previously what you
11 had was a situation in which utilities would file the
12 methodology that they're going to use, and then --
13 that's on the 6th; and then on the 23rd -- persons
14 that wanted to file something that was inconsistent
15 with that would file their testimony on the 23rd.

16 What the consensus appears to be at this
17 juncture is that everyone will have a uniform filing
18 date, and I think it ill behooves the consumers to
19 come in and suggest the type of methodology that
20 should be used. But when we see what the methodology
21 that's being used is going to be, we may find that to
22 be inappropriate.

23 So it seems to me that we may find it to be
24 perfectly satisfactory and file no testimony, but
25 since you have September 13th set aside as time for

1 rebuttal testimony, we would say to you that we would
2 like to have that date available to us to file
3 testimony should we find that the initial testimony by
4 the utilities comes up with inappropriate
5 methodologies.

6 COMMISSIONER JOHNSON: And it would be
7 rebuttal testimony, not your own methodology?

8 MR. McWHIRTER: Right.

9 COMMISSIONER JOHNSON: What Mr. Childs was
10 suggesting is that all of the parties on the first
11 instance file at the same time, and then I guess --
12 Mr. Childs, would they also file rebuttal at the same
13 time, or how would it work? Would there be rebuttal
14 under your --

15 MR. CHILDS: I don't think there necessarily
16 is. I mean, I think that that presumes that the
17 decision is that you're going to have -- you're going
18 to make a decision that affects substantial interest.

19 I think if -- I mean, it seems to me that
20 parties ought to file what they're going to file all
21 at once, and if there's -- if you're -- if it's
22 decided by the Commission to be productive to have
23 there be a separate filing for a commentary, then you
24 can do that. But I don't think I would call it
25 rebuttal, because I don't think we're in a -- I hope

1 we're not in anything other than an investigation.

2 COMMISSIONER JOHNSON: Okay. I understand
3 your point, and when I present a ruling this afternoon
4 it will address that issue, also.

5 MR. McWHIRTER: Thank you.

6 COMMISSIONER JOHNSON: Anything else?

7 MR. WRIGHT: My esteemed colleague to my
8 right just asked the question how your ruling will be
9 disseminated later today, which I think is a wonderful
10 question.

11 COMMISSIONER JOHNSON: We may have something
12 like a brief -- something briefly written just to put
13 you on notice and then follow up with something in
14 more detail, because to the extent that parties are
15 going to want to ask for reconsideration, they'll at
16 least know the basis for the ruling and what they need
17 to address. Okay?

18 MR. WRIGHT: You bet. Thank you.

19 COMMISSIONER JOHNSON: Thank you. The --
20 what was this called? A conference? (Laughter) This
21 long meeting is adjourned.

22 (Thereupon, the hearing concluded
23 at 12:40 p.m.)

24

25

1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

3 I, H. RUTHE POTAMI, CSR, RPR, FPSC
4 Commission Reporter,

5 DO HEREBY CERTIFY that the Status conference
6 in Docket No. 981890-EU was heard by the Prehearing
7 Officer at the time and place herein stated; it is
8 further

9 CERTIFIED that I stenographically reported
10 the said proceedings; that the same has been
11 transcribed by me; and that this transcript,
12 consisting of 112 pages, constitutes a true
13 transcription of my notes of said proceedings

14 DATED this 2nd day of July, 1999.

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H. RUTHE POTAMI, CSR, RPR
Official Commission Reporter
(850) 413-6734