

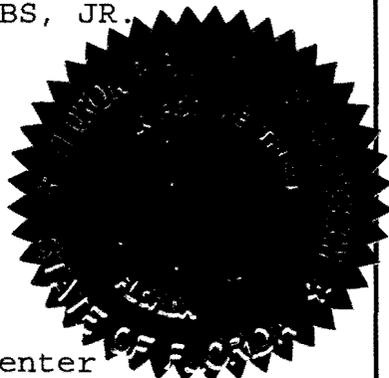
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BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 991462-EG  
:  
PETITION FOR DETERMINATION :  
OF NEED FOR AN ELECTRICAL :  
POWER PLANT IN OKEECHOBEE :  
COUNTY BY OKEECHOBEE :  
GENERATING COMPANY, L.L.C. :  
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\* AND DO NOT INCLUDE PREFILED TESTIMONY. \*  
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PROCEEDINGS: ORAL ARGUMENT  
BEFORE: COMMISSIONER E. LEON JACOBS, JR.  
Prehearing Officer  
DATE: Wednesday, March 15, 2000  
TIME: Commenced at 9:30 a.m.  
Concluded at 10:20 a.m.  
PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida  
REPORTED BY: JANE FAUROT, RPR  
FPSC Division of Records & Reporting  
Chief, Bureau of Reporting



## 1 APPEARANCES:

2 GARY SASSO, Carlton and Fields, One Progress Plaza,  
3 St. Petersburg, Florida 33701, and JAMES A. MCGEE, Post  
4 Office Box 14042, St. Petersburg, Florida 33733-4042,  
5 appearing on behalf of Florida Power Corporation.

6 MATTHEW M. CHILDS and CHARLES A. GUYTON, Steel,  
7 Hector & Davis, 215 South Monroe Street, Suite 601,  
8 Tallahassee, Florida 32301, appearing on behalf of Florida  
9 Power & Light Company.

10 ROBERT SCHEFFEL WRIGHT, Landers & Parsons, 310  
11 West College Avenue, Tallahassee, Florida 32301, and JON  
12 MOYLE, Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan,  
13 P.A., 210 South Monroe Street, Tallahassee, Florida 32301,  
14 appearing on behalf of Okeechobee Generating Company,  
15 L.L.C.

16 WILLIAM COCHRAN KEATING, FPSC Division of Legal  
17 Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida  
18 32399-0850, appearing on behalf of the Commission Staff.

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

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2 COMMISSIONER JACOBS: Okay. Let's go on the  
3 record.

4 Counsel, read the notice.

5 MR. KEATING: Pursuant to notice issued  
6 March 14th, 2000, this time and place have been set for an  
7 oral argument in Docket Number 991462-EU, petition for  
8 determination of need for an electrical power plant in  
9 Okeechobee County by Okeechobee Generating Company, L.L.C.

10 COMMISSIONER JACOBS: Take appearances.

11 MR. WRIGHT: Robert Scheffel Wright, law firm of  
12 Landers and Parsons, 310 West College Avenue, Tallahassee,  
13 Florida, 32301, appearing on behalf of the Petitioner,  
14 Okeechobee Generating Company.

15 MR. MOYLE: John Moyle, Jr., Moyle, Flanigan law  
16 firm, also on behalf of the Petitioner, OGC.

17 MR. SASSO: Gary Sasso and James McGee, St.  
18 Petersburg, Florida, appearing for Florida Power  
19 Corporation.

20 MR. LONG: Harry W. Long, appearing on behalf of  
21 Tampa Electric Company, P.O. Box 111, Tampa, Florida,  
22 33601.

23 MR. GUYTON: Charles A. Guyton and Matthew M.  
24 Childs, the law firm of Steel, Hector and Davis, Suite  
25 601, 215 South Monroe Street, Tallahassee, Florida, 32301,

1 appearing on behalf of Florida Power & Light Company.

2 MR. KEATING: Cochran Keating appearing on  
3 behalf of Commission staff.

4 COMMISSIONER JACOBS: Okay. This is what I  
5 would like to do. I would like to keep it fairly brief.  
6 I don't want to go all day. Actually all morning, even.  
7 I will ask the parties, is 15 minutes per side sufficient?

8 MR. WRIGHT: I believe it is sufficient for me,  
9 Commissioner Jacobs.

10 COMMISSIONER JACOBS: Okay. We will go with  
11 that. However you guys want to parcel it out will be  
12 fine.

13 Mr. Wright.

14 MR. WRIGHT: Commissioner Jacobs, with your  
15 permission and approval, I would propose that we would  
16 proceed with our direct argument on our motion for  
17 continuance. And I don't think that is going to take  
18 anything like 15 minutes. Then let the other side have  
19 their say. And then if I might have some time for  
20 rebuttal, assuming it is within my 15 minutes.

21 COMMISSIONER JACOBS: Okay.

22 MR. WRIGHT: Commissioner Jacobs, we are here on  
23 Okeechobee Generating Company's motion for continuance of  
24 the hearing in this case. In summary, our modeling  
25 experts discovered and FPL's experts discovered some

1 errors and discrepancies in the inputs to the model runs  
2 that underlie the cost-effectiveness evaluations presented  
3 by Doctor Nesbitt. At least one of these errors, the  
4 inadvertent omission of the Okeechobee Project from the  
5 analyses, is serious. And in their totality these errors  
6 have caused us to move for the requested continuance so  
7 that we may prepare a better factual case for the  
8 Commission to consider in rendering its decision on the  
9 requested determination for need.

10           The standard for granting a continuance is that  
11 it is within the sound discretion of the presiding  
12 officer. We have alleged prejudice resulting if we are  
13 not granted the continuance at Page 6 of our petition, and  
14 we have explained why we believe that the requested  
15 continuance is in the Commission's best interest. And,  
16 frankly, we believe in the best interest of the parties in  
17 endeavoring to try this case on the merits of the proposed  
18 power plant. The Commission should make its decision on  
19 whether to grant the requested determination of need on  
20 the basis of the best data available.

21           We have acknowledged flaws in the input data to  
22 the cost-effectiveness analyses of our case as filed, and  
23 these errors would at least cause changes in the actual  
24 output values of the modeling analyses that were done.  
25 Accordingly, we have proposed a solution that will enable

1 the case to go forward without recreating and relitigating  
2 everything that has already been litigated.

3           We have indicated that we would seek -- that we  
4 would amend our petition as required and indicated by  
5 changes in the input numbers, but no more than that. We  
6 have put forth an extensive case on the project. We have  
7 provided engineering descriptions of the project, an  
8 overview of the project management and structure,  
9 transmission impacts of the project, fuel supply for the  
10 project, and evidence in addition to the  
11 cost-effectiveness analysis showing how the project, we  
12 believe, is needed, taking into account the need for  
13 system reliability and integrity and how we believe the  
14 project is needed taking into account the need for  
15 adequate electricity at a reasonable cost.

16           It is our prima facie case on cost-effectiveness  
17 that is flawed, and those flaws extend only to inadvertent  
18 errors in the input data, not to errors in the models  
19 themselves. And accordingly it is only that part of our  
20 case that we are seeking to revise. Otherwise, the rest  
21 of the case would go forward.

22           The requested continuance, if granted, will  
23 provide the Commission with a better basis upon which to  
24 determine whether the Okeechobee Generating Project is  
25 needed, while keeping the rest of the case upon which the

1 parties have expended substantial effort intact. The  
2 requested continuance will provide the intervenors with  
3 further and better opportunities to evaluate the models  
4 and the cost-effectiveness analyses.

5           Indeed, FPC's own witness, Doctor Sosa, says in  
6 his testimony that they have not had sufficient time to  
7 study the models. We think this will benefit all parties.  
8 It would give the Commission the best opportunity possible  
9 to evaluate and make a determination on the merits of the  
10 project itself. And we respectfully believe you should  
11 grant our motion. Thank you.

12           COMMISSIONER JACOBS: Aren't we anticipating  
13 more than just a continuance? Aren't there going to be  
14 some further amendments to the schedule in terms of  
15 refiling of testimonies and so forth?

16           MR. WRIGHT: Yes, sir. I suggested -- well, I  
17 tried to lay out without going into detail as to proposed  
18 dates because I thought that would be somewhat  
19 presumptuous without having a chance to consult the  
20 calendar.

21           We would propose, as indicated in our motion, to  
22 withdraw and file -- Doctor Nesbitt's testimony and file  
23 revised testimony and analyses. To expedite the process  
24 of discovery, following on that we would propose that  
25 within one week following the submission of the revised

1 testimony we would submit all supporting data and analyses  
2 to that testimony. And also that we would treat all  
3 interrogatories and production requests propounded by the  
4 intervenors and the staff with respect to the subject  
5 matter of the revised testimony as having been duly  
6 already asked so that we wouldn't have to go through  
7 another round of them propounding discovery,  
8 interrogatories and production requests and going through  
9 responding to those.

10           We will take as given that they have -- or we  
11 are offering to take as given that they have been asked  
12 with respect to the revised testimony in the same way that  
13 they were asked with respect to the initial testimony, and  
14 to submit those within one week following the submission  
15 of the testimony. There would have to be new dates -- I  
16 certainly think there would have to be new dates for  
17 responsive testimony by the intervenors to the revised  
18 testimony. And we think we should have some reasonable  
19 opportunity, like a couple of weeks thereafter, to file  
20 rebuttal testimony to that responsive testimony.

21           Just for talking purposes, we think we can be  
22 refiled within approximately a month. Giving the  
23 intervenors three weeks for their responsive testimony and  
24 us two weeks for rebuttal testimony thereafter, we think  
25 we should be ready to tee this up for hearing sometime

1 around the middle of June. But, again, that is subject to  
2 being worked out.

3 And I will mention now that since FPL raised it  
4 in their response we certainly have no objection to  
5 including the intervenors in the negotiations of the  
6 rescheduling for this case.

7 COMMISSIONER JACOBS: Very well.

8 Mr. Moyle.

9 MR. MOYLE: I will save on rebuttal.

10 COMMISSIONER JACOBS: Who should go first? Mr.  
11 Sasso.

12 MR. GUYTON: I believe I will, Commissioner.

13 COMMISSIONER JACOBS: Okay.

14 MR. GUYTON: Commissioner, before we get into  
15 the particulars of the motion, I want to take a minute to  
16 thank you. I want to thank you for the opportunity to be  
17 heard this morning. It is a critically important issue to  
18 us. And we know it was not a matter of convenience for  
19 you to schedule this hearing. We appreciate the  
20 opportunity to be heard and we appreciate the opportunity  
21 to be heard so promptly.

22 Before I address the specifics of the request  
23 for the continuance and the other significant relief that  
24 is being characterized within the umbrella of a  
25 continuance, I would like to push back for a minute and

1 talk about why we are here today. And I won't take you  
2 through the full development of the facts, but I do want  
3 to take you through what I think are the crucial  
4 developments of the facts.

5           We are here today because OGC failed to analyze  
6 its own unit in its submission to the Commission. The  
7 heart, the core of the petition and the testimony are  
8 Doctor Nesbitt's modeling runs of OGC. They are used by  
9 the Petitioner to show not just that the unit is  
10 cost-effective, but also that the unit -- supposedly that  
11 there is an economic need for the unit. It goes to the  
12 heart and core of their case. The only quantification of  
13 benefits proffered by OGC is that associated with Doctor  
14 Nesbitt's purported analysis of the OGC units. And I want  
15 to briefly review what they have proffered.

16           Ostensibly, Doctor Nesbitt performed two runs.  
17 One with the OGC unit and one without the OGC unit. And  
18 he quantified the difference of cost/price and he  
19 calculated a wholesale price suppression effect associated  
20 with the OGC unit based on those two runs. And he said  
21 that that was \$111 million a year and \$745 million over  
22 ten years. That is the core of their case. It is the  
23 core of the petition, it is the core of Doctor Nesbitt's  
24 testimony.

25           Now, what we have here today is that FPL's

1 witnesses in their prefiled testimony have exposed the  
2 fact that that analysis wasn't right. That those numbers  
3 simply are a sham. We have a deposition that was  
4 concluded last weekend in which Mr. Blaha, Doctor  
5 Nesbitt's partner, has admitted that the OGC unit was not  
6 included in any of the modeling runs that were performed  
7 that underlie this case and Doctor Nesbitt's testimony.  
8 And now you have before you an admission in OGC's motion  
9 that they have failed to analyze their own unit.

10           What you have is you have a fundamental failure  
11 of proof. They have failed to present to the Commission a  
12 prima facie case as counsel for OGC has acknowledged this  
13 morning. But it is more extensive than just  
14 cost-effectiveness. They also fail to make a prima facie  
15 case as to economic need, as well.

16           Consequently, what we think we ought to be  
17 discussing here is really not whether you ought to  
18 continue this case and give them the myriad other relief  
19 that they have asked. What really ought to be the subject  
20 of the focus here is whether you, on your own initiative  
21 on behalf of the Commission, should summarily deny this  
22 petition for failure to establish a prima facie case.  
23 That is what the focus ought to be as a result of the  
24 admission that has been made by OGC. They have failed to  
25 prove a critical element of their case as they now admit

1 before you here this morning.

2           Now, they have asked for, as I pointed out  
3 earlier, far more than a continuance. And I would like to  
4 take you through the individual requests for relief that  
5 they have made and address each of those, or at least the  
6 significant ones. First they ask, they would like to  
7 withdraw their testimony, or Doctor Nesbitt's testimony.  
8 And by doing that what happens? They deny the intervenors  
9 an opportunity to cross-examine that testimony and point  
10 out the myriad faults both with the underlying analysis  
11 and the testimony itself.

12           They want to have the benefit of all the  
13 criticisms that all the intervenor testimonies have made,  
14 and they are considerable, of Doctor Nesbitt's testimony.  
15 And then they want to go back and they want to revise  
16 Doctor Nesbitt's testimony having had the benefit of all  
17 of those criticisms and errors that have been pointed out.  
18 They want to correct all the numerous errors and have the  
19 benefit of that by withdrawing the testimony and  
20 resubstituting new testimony.

21           Now they have had six months to put their case  
22 together. Well, they had countless months. We have had  
23 six months to take a look at their case. Quite frankly,  
24 we have had about two weeks given that we had access to  
25 the models beginning on the 28th of February. Why should

1 they have the benefit of all the errors that have been  
2 pointed out? Why should they have the benefit of learning  
3 from their deposition? Why should they have the benefit  
4 of correcting and changing the fundamental basis of the  
5 case and create a moving target that the intervenors are  
6 going to have to hit? Why? Because they weren't  
7 diligent? Because they didn't address a fundamental due  
8 diligence in filing their case? They didn't discover  
9 facts that they should have discovered if they had been  
10 reasonably diligent in reviewing the model runs in the  
11 first place? We don't think so. We think the idea of  
12 withdrawing the testimony and substituting new testimony  
13 is fundamentally unfair.

14 But it is worse than that. They want to use  
15 entirely new models. Now, we have labored mightily for  
16 the better part of six months to get access to the models  
17 that Doctor Nesbitt used. We finally got access on the  
18 28th of February. We had to sign onerous agreements with  
19 them that were, quite frankly, not consistent with the  
20 order of access that you ordered earlier, but we simply  
21 had to do it to get access to the model.

22 They want to change that model. They are not  
23 going to use any of the models that they used in this  
24 case, they are going to use entirely new models. So all  
25 of that effort is going to be wasted.

1           COMMISSIONER JACOBS: Is it that they are going  
2 to use a totally new model or a different underlying  
3 platform, I wasn't clear on that.

4           MR. GUYTON: I want to make sure that I don't  
5 misstate this. They are going to use totally new versions  
6 of the same models. They are going to use version -- not  
7 3.0 of Market Point, they are going to use Version 7.0.  
8 Something that didn't exist apparently three weeks ago,  
9 but exists now today. They are going to use a new version  
10 of the Altos North American Reliability Model.

11           We haven't been trained on those. We haven't  
12 had access to them. But we spent tens of hundreds of  
13 thousands of dollars trying to get to the point where we  
14 could understand and critique them, and they are going to  
15 change the basis of the analysis overnight.

16           Finally, they asked for the unilateral  
17 opportunity to work with you and staff. And I am pleased  
18 to here today that they are not looking for the unilateral  
19 opportunity to reschedule, that they will actually include  
20 us in that exercise.

21           These requests should be denied, Commissioner.  
22 We are on the eve of trial. We have spent tens of  
23 thousands of dollars, if not hundreds of thousands of  
24 dollars to get to where we are to expose the case for the  
25 sham that it is. The problems are extensive. The

1 problems are fundamental. And the problems were  
2 discoverable by OGC if they had exercised reasonable  
3 diligence.

4 Now we have pointed out the problems, and they  
5 want to do it over. They just want to redo and correct  
6 all of their mistakes. They want this exercise to be one  
7 big trial balloon. We shot the first one down, so they  
8 want to launch another one now.

9 They want to change the facts. They want to  
10 change the means of analysis. And they want to make all  
11 of our effort or most of our effort up-to-date wasted  
12 because they want to change not only the facts in the  
13 analysis, but also the means by which they are doing it.  
14 So we are going to have to reinvest, understand a new  
15 model, understand a new analysis, and they want to put us  
16 back on a time schedule that allows us a whole three weeks  
17 from the time they file their testimony to actually  
18 understand, supposedly train on the model, and come to  
19 some new understanding of whatever new analysis it is that  
20 they are proposing.

21 Commissioner, I can state it simply. It is  
22 simply not fair. They propose a moving target. They  
23 shouldn't be allowed to do so. This motion should be  
24 denied. The Commission should be considering whether they  
25 should summarily deny the existing petition for failure of

1 a prima facie case that they have acknowledged this  
2 morning. And at a minimum the continuance request should  
3 be denied. And if you are not going to summarily deny the  
4 petition, we ought to go to trial next week on the case  
5 that all of us have been working at least six months to  
6 prepare.

7 Thank you.

8 MR. SASSO: Good morning, Commissioner Jacobs.  
9 We would join in Mr. Guyton's remarks and add only this.  
10 Mr. Wright has indicated that you have the discretion to  
11 grant a continuance. This is committed to your sound  
12 discretion. It is equally committed to your sound  
13 discretion to deny a request for a continuance. In fact,  
14 the case they rely on, the Edwards case, is a case where  
15 the court did just that.

16 On the eve of the hearing, the trial judge,  
17 whose name ironically enough was Judge Nesbitt, denied a  
18 request for a continuance. And as a result the parties  
19 went to trial and the moving party lost.

20 This is not a case where the petitioner has  
21 submitted a well-supported petition, where the petitioner  
22 has established a prima facie case on all the elements of  
23 the case, and where the parties simply need more time to  
24 complete discovery to deal with depositions or document  
25 review or the like. This is a case where discovery has

1 disclosed that the petitioner's case is fatally defective.

2 Mr. Wright expresses an interest in trying this  
3 case on the merits. This case will be tried on its  
4 merits. And what will be seen by the Commission, if the  
5 case is tried as scheduled next week, is that the  
6 petitioner's case has no merit.

7 We respectfully submit that the petitioner has  
8 not made a case for a continuance. To the contrary, the  
9 discovery record to date demonstrates that a case has been  
10 made for summary disposition, denial of the petition on  
11 the merits.

12 Thank you.

13 COMMISSIONER JACOBS: Mr. Wright.

14 MR. WRIGHT: Mr. Long, didn't want to say  
15 anything?

16 COMMISSIONER JACOBS: I'm sorry. Mr. Long,  
17 forgive me.

18 MR. LONG: We filed a short objection to the  
19 motion yesterday, and generally agree with the comments  
20 made by Light and Corp.

21 COMMISSIONER JACOBS: Okay.

22 Mr. Wright.

23 MR. WRIGHT: Thank you, Commissioner Jacobs.

24 Just briefly. To be clear, and I think Mr.  
25 Guyton got it about right after you asked him about the

1 platform, we are not talking about entirely new models,  
2 although FPL's response in opposition to our motion says  
3 that in four or five places, if not more than that. We  
4 are talking about an updated version of the Altos North  
5 American Regional Electric Model that will now run in a  
6 much faster platform, MarketPoint, which is now up to  
7 Version 7.0 where it was running in Version 3.0 last  
8 summer.

9           As pointed out in our motion, the new software  
10 platform will run the model in ten to twenty minutes per  
11 run where the old version took 8 to 16 hours and sometimes  
12 more depending on the degree of convergence wanted by the  
13 analysis to get there.

14           The analogy would be something like upgrading  
15 Word Perfect 6.0 to Word Perfect 7.0 as being the  
16 improvement in the North American Regional Electric Model  
17 running in Windows 3.1 or something that came before that  
18 as a platform and then upgrading to Windows '98 or Windows  
19 2000 as an operating platform.

20           FPL and FPC have received training with respect  
21 to these models. They did receive at least some training  
22 with respect to MarketPoint 6.0 in the training session.  
23 And, frankly, we are not talking about doing this  
24 overnight. We are talking about doing this over a  
25 reasonable period of time which we suggest to you is

1 something like three months plus or minus from today  
2 depending on availability and what we can all work out.

3           We don't agree with the opponents' contentions  
4 that we have not put on a prima facie case. There are  
5 flaws in the cost-effectiveness demonstration of our case.  
6 We believe we have put on substantial evidence, competent  
7 substantial evidence that would support the Commission's  
8 determination of need taking into account the need for  
9 system reliability and integrity. We have shown what the  
10 improvements in reserve margins would be. And we have put  
11 on competent substantial testimonial evidence as to how  
12 and why the project is needed and will be cost-effective  
13 to the ratepayers of Florida through the testimony of  
14 other witnesses in addition to the testimony of Doctor  
15 Nesbitt.

16           One brief point. The Edwards case, and I thank  
17 Mr. Sasso for pointing out the irony of the judge's name  
18 in that case. We cited the Edwards case. And he is  
19 absolutely right, in the Edwards case a motion for  
20 continuance was denied. We cited it for the proposition  
21 that it is in your sound discretion to grant a motion for  
22 continuance. We could have cited a raft of district court  
23 of appeals cases for the proposition that it was within  
24 the judge's or the presiding officer's sound discretion to  
25 grant a motion for continuance. But we thought that since

1 we had a Supreme Court case that stands for the basic  
2 proposition of law that it is within your sound  
3 discretion, that we should cite that.

4           Mr. Sasso, before -- I want to say one thing  
5 about the diligence with which OGC and the experts and  
6 perhaps myself pursued this case. We made some mistakes  
7 here, and there is no question about it. The  
8 misclassification of some of these units and the omission  
9 of the Okeechobee project from the runs was a serious  
10 error, and we are not attempting to paint it as anything  
11 else.

12           We relied on our experts. I spoke with them. I  
13 confirmed with them that they had verified it to the  
14 federal data base sources that they were using. I  
15 furnished them a copy of the FRCC's Regional Supply Plan,  
16 and I thought that they had got it right.

17           Frankly, I probably bear some responsibility for  
18 not going in and fly-specking the data bases myself. But  
19 I relied on my experts. And I don't think that my  
20 omission and even the experts' omission should be visited  
21 as penance for sin on my client.

22           Mr. Sasso said this case is ready to be tried on  
23 its merits. That is partly true and significantly not  
24 true. The case could be tried on its merits based on all  
25 the paper that has been generated to date in this docket.

1 The case, unfortunately, because of our errors is not  
2 ready to be tried on the merits of the Okeechobee  
3 generating project itself.

4 We have asked for a continuance to enable us to  
5 give you the record with full opportunity for discovery,  
6 responsive testimony, and so on by the other side upon  
7 which to make that decision on the merits of the  
8 Okeechobee Generating Project.

9 Thank you.

10 COMMISSIONER JACOBS: Very well. At first blush  
11 it is pretty clear that the relief requested is a bit  
12 broader than just a deferral of the present dates. They  
13 are a more substantial modifications to the schedule than  
14 that would anticipate. In light of that, and in light of  
15 some of the issues that were brought up -- first of all,  
16 let me go to the issue that you raised, Mr. Guyton, as to  
17 whether or not I would, on my own motion, consider  
18 summarily denying. I think that would be probably unwise.  
19 And I'm not sure if we are at the proper stage of this  
20 proceeding. Normally that would amount to sort of a  
21 summary judgment. And normally at least the parties would  
22 have an opportunity to put on their case in that event.  
23 So I'm not going to grant that. I don't think that was a  
24 formal motion. If it was, I will just say that on the  
25 record. And I say that, that does not preclude -- and I

1 think if the procedures allow that, I'm not saying that  
2 you are prohibited from at the proper time. If you want  
3 to raise that, then that is up to you.

4 On the other hand, my belief is that today is of  
5 particularly short notice to the hearing. What I would  
6 like to do is to defer ruling -- is to defer a final  
7 ruling on this and have this be argued, i.e., the  
8 continuance, and the withdrawal of the testimony, and  
9 refiling and whatever remedies that the intervenors might  
10 need to respond to this revised schedule. I think that  
11 ought to be heard before the full panel before the hearing  
12 and a decision made there.

13 So I'm going to defer that final ruling until  
14 the first day of the hearing and then take that up as a  
15 preliminary matter. Is that proper, Counsel?

16 MR. KEATING: I would just point out that that  
17 puts -- I guess puts us all in a position where we --  
18 particularly the parties in preparation for hearing, where  
19 they are going to have all of their witnesses here and do  
20 a lot in preparation for hearing in the next few days and  
21 may not -- it would seem to be all for nought.

22 COMMISSIONER JACOBS: I'm prepared to then -- I  
23 can do -- we can do this. Do we have any other dates in  
24 mind?

25 MR. KEATING: We are still looking at the

1 calendar. We don't have any lined up at this time.

2 COMMISSIONER JACOBS: Let's go off the record  
3 for a moment.

4 (Off the record.)

5 COMMISSIONER JACOBS: Here is what we will do. We  
6 will grant a continuance for one day, and have oral  
7 argument on this before the Commission on Monday. And  
8 then if the decision is made to grant the continuance,  
9 then we will continue with trial on Tuesday. Okay.

10 MR. GUYTON: Commissioner, I'm sorry, I didn't  
11 understand that. If the decision is made to grant the  
12 continuance we will continue the trial?

13 COMMISSIONER JACOBS: We would hear -- the panel  
14 or is it the full Commission? The Commission would hear  
15 the arguments as to continuance on Monday morning and then  
16 whatever -- if the decision is made then to grant -- I'm  
17 sorry, you're right, I was wrong.

18 If the decision is made to deny the continuance  
19 then we will proceed on Tuesday. Is that clear?

20 MR. MOYLE: So I'm clear, we would not be  
21 bringing our witnesses in for testimony on Monday?

22 COMMISSIONER JACOBS: That is the intent is they  
23 should be prepared -- we would hope to get you a decision  
24 as early as possible on Monday morning so that you can --  
25 and let me say this. If that presents a particular

1 problem then we could -- I'm sure there will be some  
2 flexibility in terms of time for your witnesses to fly in  
3 on Tuesday morning. And we can agree with staff on that  
4 right now.

5 But what I would like to do is grant you the  
6 flexibility of not having to have your witnesses here on  
7 Monday, and that is what we are attempting to do. And  
8 then if the decision is made to deny the motion for  
9 continuance, then you would have the flexibility on Monday  
10 to make arrangements to have your witnesses here.

11 If that is not workable, then let's be clear on  
12 that now and we will figure out where we go from there.

13 MR. MOYLE: I think it would be probably hard to  
14 get -- if you decide to force us to trial on that, it  
15 would be hard to do it in two days. I think it is  
16 probably a three-day case.

17 COMMISSIONER JACOBS: We can work with the third  
18 day as we get there. That's not a real concern. My  
19 concern is is it workable for you to give your parties  
20 notice enough on Monday in order to get them here on  
21 Tuesday?

22 MR. GUYTON: Commissioner, I don't know -- from  
23 Florida Power & Light Company's perspective, I have to  
24 check with my consultants. What this does create is kind  
25 of a dual track. We have to prepare for argument and we

1 have to prepare for trial at the same time. We are kind  
2 of running out of time. And with all due respect, we  
3 really need a ruling.

4 COMMISSIONER JACOBS: I understand.

5 MR. SASSO: We have a witness coming in from  
6 California. He would probably have to be on the plane  
7 Monday.

8 COMMISSIONER JACOBS: Can we put him in the  
9 schedule for Tuesday?

10 MR. SASSO: It would take all day to travel out  
11 here.

12 COMMISSIONER JACOBS: I'm sorry for --

13 MR. SASSO: We are going to have a hardship in  
14 terms of having witnesses present and we will also have to  
15 prepare as though we are going to trial. So we won't be  
16 relieved of that obligation.

17 COMMISSIONER JACOBS: Okay.

18 MR. MOYLE: We also have witnesses from  
19 California.

20 COMMISSIONER JACOBS: Okay. Off the record for  
21 a moment.

22 (Off the record.)

23 COMMISSIONER JACOBS: Well, I don't want to  
24 belabor this too long. First of all, as I thought through  
25 this it occurs to me that there are some obvious remedies

1 that are self-evident. First of all, any party can get on  
2 the stand and revise their testimony. Not beyond the  
3 scope of the existing testimony, but they can revise that.  
4 So either party has the opportunity to do that.

5           What I'm hearing here, however, is that the  
6 issues that need to be revised are so fundamental that it  
7 may necessitate a fundamental realignment of the whole  
8 testimony.

9           That being the case, it would appear to me that  
10 we would not -- it is such an important issue as to  
11 whether or not we continue that I don't want to dilly over  
12 that one way or the other. I want to have parties clear  
13 about exactly what we are proceeding on and exactly what  
14 the status of their testimony is. So that is why I view  
15 it to be an important issue that the full Commission  
16 should address.

17           That being the case, I'm prepared to at this  
18 point, since what I'm hearing the parties say is that a  
19 one-day notice is not sufficient, I'm prepared to -- I  
20 want to have the oral argument on Monday morning. If it  
21 is not adequate notice to have parties here on Tuesday,  
22 then we need to begin to look at alternative dates for the  
23 hearing in the event that the motion for continuance is  
24 denied.

25           Of course, if it is granted -- I'm sorry, if it

1 is granted. But if it is denied, in my opinion we ought  
2 to go ahead and begin trial on the afternoon of Tuesday,  
3 the 21st. For the witnesses coming from California, it  
4 would be my recommendation that we seek to modify the  
5 testimony schedule to have them testify on Wednesday, the  
6 22nd. So that would give them adequate travel time.

7 We would have to look for probably another day,  
8 day and a half somewhere later in the schedule. That is  
9 probably a better prospect than trying to find three whole  
10 days at the moment. And as prehearing officer, I would  
11 like to proceed under that scenario for the moment.

12 MR. MOYLE: And I guess just so we are all on  
13 the same page with respect to that, I mean, if this were  
14 as simple as correcting our project manager's testimony,  
15 if he had said the project is located on State Road 24,  
16 and he transposed those numbers and it is really State  
17 Road 42, he could take the stand and do that in a matter  
18 of seconds. I think you made that point.

19 I guess based on your comments where witnesses  
20 are free to correct testimony, we will direct Mr. Nesbitt  
21 to go back and do his runs over the weekend in  
22 anticipation of him possibly going on the stand Wednesday  
23 afternoon.

24 COMMISSIONER JACOBS: You could. But I think we  
25 have to be practical. Obviously that is going to raise

1 concerns by the intervenors, that we are going to have to  
2 entertain those concerns and probably their objections.  
3 What -- my goal here is to proceed in as orderly a fashion  
4 as possible. That is exactly what I'm looking to avoid.  
5 I don't want to get here and we have testimony that is  
6 going to be objected to, and we have to have a wholesale  
7 deliberation on what parts of testimony need to be and  
8 can't be responded to. What I want to do is come away  
9 after Monday with some clear idea of what schedule we are  
10 proceeding on and how we are going to do that.

11           You know, there is all the remedies that the  
12 parties have outside of what we do. But that is my  
13 objective here is that we proceed in as clear and as  
14 orderly a fashion as possible, given the circumstances.

15           Mr. Wright.

16           MR. WRIGHT: Commissioner, it is exactly the  
17 point that you just made, that if we were to have Doctor  
18 Nesbitt run new runs, assuming that that can be  
19 accomplished in the time from -- we discovered these  
20 errors between last Thursday and last Saturday, over that  
21 period. If we had thought it was possible to revise  
22 everything and make sure that it was correct and the best  
23 basis for you all to make your decision, we would have  
24 forged ahead with that plan.

25           Even if that were possible, what you said is

1 exactly right, that would create significant problems for  
2 the other side. And that is, frankly, why we moved for  
3 this continuance.

4 COMMISSIONER JACOBS: Okay. So that is about as  
5 clear as it gets.

6 Mr. Guyton, you had a question?

7 MR. GUYTON: Well, I --

8 COMMISSIONER JACOBS: I understand it doesn't  
9 get to where you want to go.

10 MR. GUYTON: I guess I wanted to ask if we could  
11 explore another option, and that is whether we may be able  
12 to convene the Commission before Monday morning to address  
13 this issue.

14 COMMISSIONER JACOBS: I'm not aware of the  
15 Commission's schedule, and that is probably going to be  
16 too -- I know for sure that Friday is out of the question  
17 for me. Well, we could modify it, but not having any idea  
18 what the other Commissioners --

19 MR. ELIAS: Commissioner, I think that is  
20 ill-advised. We have got a collegial body subject to  
21 meeting in the sunshine being asked to make a decision  
22 that could be -- the outcome, you know, could effectively  
23 conclude the case in a proceeding that would not be  
24 properly noticed.

25 I realize that waiting until Monday does create

1 some problems, but proceeding with a public meeting that  
2 hasn't been noticed on an issue that addresses, you know,  
3 the outcome of the case is treading on extremely tenuous  
4 ground.

5 We have noticed the hearing for Monday, and it  
6 is appropriate to take up this issue at that time. But  
7 doing so by the full Commission before then could  
8 jeopardize the finality of that decision.

9 COMMISSIONER JACOBS: I'm persuaded that is  
10 probably a more reasonable request, to go along with that  
11 procedure. So that is my ruling. We will grant a  
12 continuance for one day, and that would be for March 20th.  
13 But the parties, we will hold -- the continuance of the  
14 hearing, we will hold arguments as to the motion for  
15 continuance on the 20th, and with the pending dates of the  
16 Tuesday -- I'm thinking 1:00 o'clock, the trial can begin  
17 at 1:00 o'clock.

18 MR. ELIAS: There may be some witnesses who will  
19 be available Tuesday morning.

20 COMMISSIONER JACOBS: I don't want to do that.  
21 I think we might as well just go ahead. We are going to  
22 probably need that time anyway just for folks to figure  
23 out where they want to go. So at 1:00 o'clock Tuesday.  
24 And then we will begin the search for dates now so that we  
25 will have those dates in mind Monday or Tuesday so parties

1 can be on notice of that.

2 Just looking down this calendar, I see a couple  
3 of dates. The 27th and 28th of April and the 8th and 9th  
4 of May appear to be two dates that we may be able to look  
5 at. Okay.

6 No other matters to come before us today? This  
7 hearing is adjourned.

8 (The oral argument concluded at 10:20 a.m.)

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STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

COUNTY OF LEON )

I, JANE FAUROT, RPR, Chief, FPSC Bureau of Reporting Official Commission Reporter, do hereby certify that the Oral Argument in Docket No. 991462-EU was heard by the Prehearing Officer at the time and place herein stated.

It is further certified that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript, consisting of 31 pages, constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED this 16th DAY OF MARCH, 2000.



JANE FAUROT, RPR  
FPSC Division of Records & Reporting  
Chief, Bureau of Reporting  
(850) 413-6732