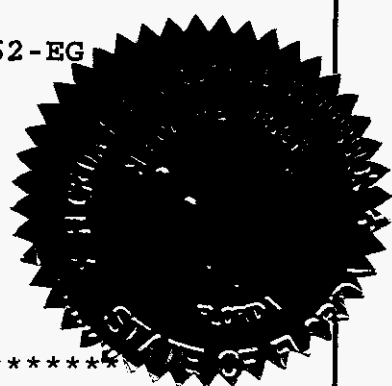


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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of :
PETITION FOR DETERMINATION :
OF NEED FOR AN ELECTRICAL :
POWER PLANT IN OKEECHOBEE :
COUNTY BY OKEECHOBEE :
GENERATING COMPANY, L.L.C. :

DOCKET NO. 991462-EG



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PROCEEDINGS: ORAL ARGUMENT
BEFORE: CHAIRMAN JOE GARCIA
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER
DATE: Monday, March 20, 2000
TIME: Commenced at 9:30 a.m.
Concluded at 11:10 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

DOCUMENT NUMBER-DATE

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5 appearing on behalf of Florida Power Corporation.

6 MATTHEW M. CHILDS and CHARLES A. GUYTON, Steel,
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8 Tallahassee, Florida 32301, appearing on behalf of Florida
9 Power & Light Company.

10 ROBERT SCHEFFEL WRIGHT and DIANE KIESLING,
11 Landers & Parsons, 310 West College Avenue, Tallahassee,
12 Florida 32301, and JON MOYLE, Moyle, Flanigan, Katz,
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14 Tallahassee, Florida 32301, appearing on behalf of
15 Okeechobee Generating Company, L.L.C.

16 JAMES D. BEASLEY, Ausley and McMullen, 227 South
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19 WILLIAM COCHRAN KEATING, FPSC Division of Legal
20 Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida
21 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 CHAIRMAN GARCIA: All right. Good morning. We
3 are going to open this hearing. Mr. Cochran.

4 MR. KEATING: Pursuant to notice issued
5 January 27th, 2000, this time and place have been set for
6 a hearing in Docket Number 991462-EU, petition for
7 determination of need for an electrical power plant in
8 Okeechobee County by Okeechobee Generating Company, L.L.C.

9 CHAIRMAN GARCIA: Why don't you tell us where we
10 are.

11 MR. KEATING: As you are probably aware, last
12 Monday Okeechobee filed a motion for a continuance of this
13 hearing. Wednesday morning the prehearing officer heard
14 oral argument from the parties concerning that motion.
15 The prehearing officer deferred ruling on that motion to
16 the rule Commission, in effect granting the motion as far
17 as until 1:00 o'clock tomorrow afternoon. If the motion
18 for continuance is denied, we would begin the hearing at
19 1:00 o'clock tomorrow afternoon.

20 CHAIRMAN GARCIA: Okay. And, like always, I
21 inverted the process. Let's take appearances.

22 MR. WRIGHT: Robert Scheffel Wright and Diane K.
23 Kiesling, law firm of Landers and Parsons, P.A., 310 West
24 College Avenue, Tallahassee 32301, appearing on behalf of
25 the Petitioner, Okeechobee Generating Company.

1 CHAIRMAN GARCIA: Okay.

2 MR. SASSO: Gary Sasso and Jim McGee, St.
3 Petersburg, Florida, appearing for Florida Power
4 Corporation.

5 MR. GUYTON: Charles A Guyton and Matthew M.
6 Childs with the law firm of Steel, Hector, and Davis,
7 L.L.P., 215 South Monroe Street, Suite 601, Tallahassee,
8 Florida 32301, appearing on behalf of Florida Power &
9 Light Company.

10 MR. BEASLEY: James D. Beasley with the law firm
11 of Ausley & McMullen, P.O. Box 391, Tallahassee, Florida
12 32302, representing Tampa Electric Company.

13 MR. KEATING: And Cochran Keating, appearing on
14 behalf of Commission staff.

15 CHAIRMAN GARCIA: Okay. So basically -- I was
16 going to call you Keating now.

17 MR. KEATING: I respond to either.

18 CHAIRMAN GARCIA: That is the advantage.
19 Basically, right now we are going to listen to arguments
20 on whether to grant the continuance filed by PG&E, is that
21 the name of the -- PG&E, right?

22 MR. WRIGHT: Okeechobee Generating Company, Your
23 Honor.

24 CHAIRMAN GARCIA: Okeechobee Generating, I'm
25 sorry. I knew I had it wrong. Okeechobee Generating.

1 All right. How much time are we talking about? I was
2 thinking of allowing each side -- I know that the
3 prehearing officer had quite a long -- I was trying to
4 listen in. Is ten minutes a side all right for --

5 MR. GUYTON: Commissioner, I need about 20
6 minutes for the remarks I have prepared. This is not an
7 insignificant motion. It is of very significant import.

8 CHAIRMAN GARCIA: I know it is. 20 minutes,
9 okay.

10 MR. WRIGHT: I've timed mine out at eight, Mr.
11 Chairman.

12 CHAIRMAN GARCIA: Mr. Sasso.

13 MR. SASSO: I had a few things to say, although
14 Mr. Guyton may cover them all. But perhaps --

15 CHAIRMAN GARCIA: And then some.

16 MR. SASSO: Maybe so. But Perhaps 30 minutes a
17 side, and we would try not to use it, if that would be
18 acceptable.

19 CHAIRMAN GARCIA: Okay. Staff, are you going to
20 make a recommendation at all or are you going to wait to
21 listen to the arguments and then maybe make a comment.

22 MR. KEATING: Staff is prepared with a
23 recommendation. I guess that we would make that
24 recommendation after the arguments have been made.

25 CHAIRMAN GARCIA: Okay. All right. Does the

1 prehearing officer want to add anything, or do you just
2 want to go at it?

3 COMMISSIONER JACOBS: No, I think it's best just
4 for the parties to make their respective positions.

5 CHAIRMAN GARCIA: Mr. Guyton, if you can -- I
6 guess it is your motion, so we will start with you. But
7 if you can edit down yourself a little bit so that we can
8 get through this. I'm sorry, but he has got 20 minutes.
9 I know it is going to go first, but --

10 COMMISSIONER JACOBS: It's their motion, though.
11 It's OGC's motion.

12 MR. WRIGHT: It's our motion.

13 CHAIRMAN GARCIA: I know. But he has got some
14 20-plus minutes to go. So I would just say while Shef
15 speaks, maybe he can edit down the volume so that we can
16 get through this.

17 Mr. Wright, go right ahead.

18 MR. WRIGHT: Mr. Chairman, with your permission,
19 all I would ask is that we have equal time. I will make
20 my direct comments, and then if I have any time left over
21 I would like to be able to rebut the other side.

22 CHAIRMAN GARCIA: Okay.

23 MR. WRIGHT: Commissioners, we are here on
24 Okeechobee Generating Company's motion for a continuance
25 of the hearing in this proceeding. In summary, as

1 reflected in our motion that was timely filed last Monday,
2 our modeling experts discovered and FPL's modeling experts
3 discovered some errors and discrepancies in the input data
4 to the model runs that underlie the cost-effectiveness
5 analyses presented by Doctor Nesbitt. At least one of the
6 these, the inadvertent omission of the Okeechobee Project
7 from one of the Excel input data files, is at least
8 apparently serious, and in their totality these input
9 errors and discrepancies are serious enough to have caused
10 us to move for the requested continuance last Monday.

11 As set forth in our motion, we believe that
12 Okeechobee Generating Company will be prejudiced if this
13 continuance is not granted because we will not be able to
14 put forth the best available evidence on our case. More
15 significantly, we believe that you, the Commission, will
16 not have the best available information before you in
17 making your decision on the requested determination of
18 need for the project on the merits. Accordingly, we
19 believe that solely on the grounds set forth in our motion
20 last Monday, the continuance should be granted.

21 Moreover, intervening events have given rise to
22 additional reasons why the Commission should grant the
23 requested continuance. Specifically, on Friday afternoon,
24 we received Commission Order Number PSC-00-0562-PCO-EU,
25 which grants Okeechobee's motions to compel responses to

1 more than 120 discovery requests that OGC has propounded
2 to the three investor-owned utilities that have intervened
3 in this case to oppose the project.

4 The order, Order 00-0562, expressly recognizes
5 that with respect to the discovery propounded to each of
6 the IOUs, quote, "In preparing for hearing, OGC must be
7 allowed the opportunity to conduct discovery concerning,"
8 unquote, the matters addressed in our discovery requests.

9 Even if the IOUs were prepared to respond in
10 full to all of these discovery request here and now, there
11 is no meaningful way that we could evaluate their
12 responses and make any meaningful use of the information
13 provided during a hearing to be held this week.

14 Accordingly, we would be prejudiced by denial of
15 the discovery opportunities that the prehearing officer
16 has ordered we are entitled to if our motion for a
17 continuance is denied.

18 The standard for whether to grant a motion for a
19 continuance is simply sound discretion. It is in your
20 sound discretion as the Commission to grant the requested
21 continuance, it is in your sound discretion to deny it.
22 We believe that it is in the best interest of the
23 Commission to grant the continuance because it will
24 provide the best opportunity to reach a decision on the
25 merits of the proposed Okeechobee Generating Project. It

1 will give Okeechobee Generating Company the opportunity to
2 present the most accurate factual information to the
3 Commission to try our case on the merits without the
4 distraction of errors in the input data and potential
5 arguments as to whether they would or would not have a
6 significant impact on either the magnitude or nature of
7 the results of the analyses. We don't believe they will,
8 but we certainly assume that that issue will be litigated.

9 The continuance, as requested, will give the
10 intervenors an additional and better opportunity to
11 conduct discovery, particularly with respect to the
12 models, and to prepare their responsive testimony and
13 exhibits on those subjects. It will give the Commission
14 the most accurate factual record possible on which to base
15 its decision. And it will enable Okeechobee to obtain and
16 finish discovery as ordered by the prehearing officer in
17 the order issued on Friday.

18 With respect to the discovery issues that I
19 mentioned at the outset, I would like to make the
20 following specific points. The prehearing officer's order
21 recognizes that we need the requested discovery responses
22 to prepare for hearing. At a minimum, we should have the
23 opportunity to carefully review the ordered responses in
24 preparation for our witnesses' cross-examination. We have
25 reviewed the discovery requests and identified that the

1 answers are relevant to the testimony of at least five of
2 our witnesses, including Mr. Sean Finnerty, Doctor Dale
3 Nesbitt, Mr. Bevin Hong, Mr. Roger Clayton, and Mr. Jerry
4 Kordecki.

5 Another point, one of the IOUs, Tampa Electric
6 Company, flat out stone-walled us on discovery. They
7 refused to respond to a single discovery request. And on
8 Friday they were ordered to respond to at least 96 of the
9 requests that we propounded to them. Two more if we
10 appropriately circumscribe the time period with respect to
11 which we have asked our questions.

12 On a related note, relating to mistakes made in
13 testimony that were uncovered in discovery, on Friday the
14 17th, three days ago, FPL submitted responses to the
15 staff's interrogatories in which it acknowledged that
16 Mr. Waters' testimony contained a computational error,
17 apparently identified after his deposition two weeks ago
18 in the calculation of gains claimed by FPL from off-system
19 sales. This relates directly to one of OGC's production
20 requests to which FPL has been ordered to submit
21 supplemental response by identifying documents that are
22 publicly available and responsive to the request, and by
23 identifying the public entity that is in custody of those
24 documents.

25 At his deposition on March 6th, I asked

1 Mr. Waters whether he then knew of any changes to his
2 testimony, and he responded no. I'm completely sure that
3 was a truthful response, but we are now in a situation
4 where FPL has acknowledged a computational error in its
5 witness' testimony, and announced that they are going to
6 file a correction to Mr. Waters' testimony. And we
7 haven't received the responses to our discovery requests
8 addressing exactly the subject matter involved.

9 In sum, the Commission should grant the
10 requested continuance because it will provide the
11 Commission with the best opportunity to decide this case
12 on the merits of the proposed power plant on the basis of
13 the best information available. We have discovered flaws
14 in the input data to the analyses that related to our
15 affirmative case on cost-effectiveness, and we have
16 proposed a solution that will enable the case to go
17 forward with the law of the case, everything that has gone
18 forward to this time intact.

19 Yes, we have indicated that we would, to the
20 extent necessitated by changes in the output values from
21 the corrected analyses, amend or seek leave to amend our
22 petition and initial exhibits. We have put forth a prima
23 facie case on the project, on the need for the project in
24 light of system reliability and integrity, on the need for
25 the project in light of the need for adequate electricity

1 at a reasonable cost.

2 We have also put forth additional evidence in
3 addition to the analyses prepared by Doctor Nesbitt on the
4 cost-effectiveness issues, specifically through the
5 testimony of Mr. Kordecki, explaining why and how
6 purchases from the Okeechobee Project would be
7 cost-effective to purchasing utilities and their
8 ratepayers. It is thus only part of our prima facie case
9 on the cost-effectiveness issue that is flawed, and those
10 flaws extend only to inadvertent errors in the input data,
11 not to the models themselves. And, accordingly, it is
12 only that part of the case that we are seeking to correct.

13 The requested continuance will provide OGC with
14 the opportunity to put forth the best information
15 regarding the merits of the project. It will provide the
16 intervenors with an additional and better opportunity to
17 conduct discovery with respect to the models. Even FPL's
18 own witness, Doctor David Sosa, stated in his testimony
19 that he didn't have sufficient time to reproduce and test
20 the estimates of the models. And in this regard, in good
21 faith, we have proposed to expedite the discovery process
22 with respect to the new versions of the models identified
23 in our motion.

24 Finally, the requested continuance will provide
25 the Commission with the best factual information upon

1 which to render your decision. Okeechobee Generating
2 Company will be prejudiced if the continuance is not
3 granted not only because we will be prevented from putting
4 forth the best factual case on the merits of the project,
5 but also because we will have been denied the opportunity
6 to have the extensive discovery of the intervenors that
7 the prehearing officer has expressly recognized and ruled
8 we need to prepare for hearing.

9 We respectfully request that you grant our
10 motion for continuance.

11 COMMISSIONER CLARK: Mr. Wright, I have a
12 question. Are you denied the opportunity to withdraw the
13 case and file again? Is that an option available?

14 MR. WRIGHT: Commissioner Clark, that is
15 certainly an option. It is noted in numerous Commission
16 orders. The ability to take a voluntary dismissal is
17 pretty much a matter of absolute right. We don't think
18 that is a good idea at all.

19 COMMISSIONER CLARK: And why is that?

20 MR. WRIGHT: Because it would essentially vacate
21 everything that has gone forward in this case. We would
22 have to relitigate intervention, we would have to probably
23 relitigate motions to dismiss. We have filed the
24 testimony of nine witnesses, eight of those, including
25 Doctor Nesbitt, have been deposed. We certainly agree

1 that Doctor Nesbitt will have to be redeposed if our
2 motion for continuance is granted and the case goes
3 forward with revised analyses and testimony as we have
4 suggested it would be, but you wouldn't have to redo the
5 depositions of the other seven witnesses.

6 If we dismiss the case, those depositions would
7 still be usable to impeach as prior inconsistent
8 statements, to the extent there were any such, but they
9 wouldn't be viable depositions in the same case. There
10 would be a lot more litigation. We would basically have
11 to recreate the wheel. There have been numerous discovery
12 disputes litigated in this case to date, and those would
13 all be subject to being relitigated. That's why we think
14 it's a bad idea.

15 COMMISSIONER JABER: Mr. Wright, just to follow
16 up on a couple of things you said. You said our standard,
17 the standard we should follow is sound discretion?

18 MR. WRIGHT: Yes, ma'am.

19 COMMISSIONER JABER: What rule, case law, what
20 is it you are using for that?

21 MR. WRIGHT: We cited in our motion
22 Edwards v. Pratt, a Supreme Court case. That was a case
23 in which the motion for continuance was denied. Let me
24 give you the citation. We cited it because it was a
25 Supreme Court case. There are a raft of cases from the

1 District Courts of Appeal in which motions for continuance
2 were granted and the standard is sound discretion. It's
3 at Page 5, Edwards v. Pratt, 335 So.2d 597, Florida
4 Supreme Court, 1976.

5 COMMISSIONER JABER: Okay. So you are using
6 that to supplement the rule that says you can -- we can
7 grant a continuance for good cause shown. You agree that
8 is the standard, don't you?

9 MR. WRIGHT: Yes, ma'am.

10 COMMISSIONER JABER: Okay. One of the things
11 that the IOUs have said in their response to your motion
12 is that it is not clear how you would remedy this problem.
13 And I think that is a good point. What is it you intend
14 to do if we granted the continuance? Would you be
15 withdrawing Mr. Nesbitt's testimony? How is it you intend
16 to correct this problem?

17 MR. WRIGHT: I just have been advised that my
18 citation was erroneous. It was a Third District Court of
19 Appeal decision, Edwards v. Pratt. I had been advised by
20 a colleague that it was a Supreme Court case, and I
21 apologize for that.

22 To answer your question, Commissioner Jaber,
23 what we have proposed is the following, and if I could
24 take about a minute to explain the background. The
25 analyses that Altos Management Partners prepared in

1 support of our case and that support Doctor Nesbitt's
2 testimony were based on the Altos North American Regional
3 Electric Model. That model now runs in a software
4 platform known as MarketPoint. It is a trademarked
5 software package owned by a company called MarketPoint,
6 Incorporated.

7 As of last August and early September when the
8 runs that underlie Doctor Nesbitt's testimony as filed
9 were prepared, the Altos Electric Model was in a much
10 earlier stage than it is now, and MarketPoint was in what
11 was then identified as Version 3.0. The Altos Electric
12 Model has advanced in its own internal programming, and
13 the MarketPoint product has now advanced to where the
14 current commercial release is Version 7.0. I would liken
15 this to an improvement in Word Perfect going from, like,
16 maybe 5.0 to 6.0, or 6.0 to 7.0.

17 With respect to the electric model and platform
18 in which it runs, MarketPoint -- the improvement in that
19 has been kind of like going from Windows 3.1 to Windows
20 2000. It's a pretty dramatic improvement in the
21 underlying platform. So what we have proposed to do is to
22 withdraw -- and I think we laid this out in our motion, is
23 to withdraw Doctor Nesbitt's testimony, flyspeck the data
24 base, free it of all errors, and rerun it using the now
25 current version of the Altos Electric Model in the now

1 current Version 7.0 of MarketPoint, and to submit that.

2 The big benefit of MarketPoint 7.0 is that it
3 runs geometrically like a couple of orders of magnitude
4 faster than the version that was in use last summer. One
5 of the problems that the intervenors encountered in
6 discovery and why in part at least I think Doctor Sosa
7 testified that he didn't have sufficient time is that the
8 runs using Version 3.0 of MarketPoint took somewhere
9 between 8 and 24 hours each, depending on the degree of
10 convergence you wanted to achieve with the model. It's a
11 large, multi-sector iterative model that basically solves
12 for supply and demand equilibria by trial and error until
13 it converges to real close tolerances. Version 7.0 will
14 do the same thing in 10 to 20 minutes per run.

15 And as I indicated, we have -- both partially in
16 argument and clearly in the motion, we have indicated that
17 we would supply all the data supporting the new analyses
18 within one week following the submission of Doctor
19 Nesbitt's revised testimony. And that we thought we were
20 acting in good faith in making this offer, that we would
21 treat all discovery requests propounded by the intervenors
22 with respect to Doctor Nesbitt's work and the models as
23 having been propounded with respect to the new models and
24 the new runs, and that we would answer those within one
25 week following the submission of Doctor Nesbitt's models.

1 Further, we have indicated that we would make
2 the new version, or the current -- I should say the
3 current version of the electric model and the current
4 version of MarketPoint 7.0 available on the same terms and
5 conditions as set forth in the protective order granted
6 with respect to that subject matter by Prehearing Officer
7 Jacobs.

8 COMMISSIONER JABER: When was the 7.0 software
9 available?

10 MR. WRIGHT: I'm not 100 percent sure,
11 Commissioner Jaber. I think that it became available in
12 January. It could have been December or February, but it
13 was fairly recently. My best understanding is that 6.0
14 was the version that was available in January; and 7.0, I
15 think, became available in late January or early February.

16 CHAIRMAN GARCIA: Commissioners? Okay. Mr.
17 Guyton.

18 MR. GUYTON: Thank you, Mr. Chairman.

19 Commissioners, you have a case before you that
20 has been filed for six months. And the applicant's direct
21 case, which is supposed to contain its prima facie case,
22 has been before you for five months. The intervenor and
23 rebuttal testimony is filed, and the witnesses are either
24 here or they are poised to get on an airplane to come
25 here.

1 This case, as presented in the prefiled
2 testimony, is ready for trial. Why aren't we in trial?
3 We are not in trial because the applicant has realized on
4 the eve of trial that it has not presented and cannot
5 present on the case they filed with you a prima facie
6 case.

7 The applicant has made the most fundamental
8 error that an applicant for a determination of need could
9 possibly make. They have failed to analyze their own
10 unit. They have completely omitted the OGC unit from any
11 of the computer simulation models that they used to
12 analyze and submit their testimony. They have completely
13 omitted it from all the model runs.

14 Now, the fact that they have omitted the OGC
15 unit from their computer simulation analysis is not a fact
16 that is in dispute. We filed testimony on March the 9th
17 documenting that very fact. The next day, and over the
18 course of the next day and a half, one of OGC's
19 consultants in deposition, Mr. Blaha, admitted that the
20 OGC unit had not been included in the model simulations.
21 That is in his deposition, and it is succinctly stated at
22 Page 448 through 452 of his deposition. Then on Monday of
23 last week, OGC filed a motion in which they admitted that
24 the OGC unit had been omitted from all of their model
25 runs.

1 Now, the significance of this fundamental
2 failure of proof has not been lost on OGC. In argument
3 last week before Commissioner Jacobs here is what OGC's
4 counsel voluntarily admitted, and this is Page 6 of the
5 transcript of last week's oral argument. And I quote, "It
6 is our prima facie case on cost-effectiveness that is
7 flawed. And those flaws extend only to inadvertent errors
8 in the input data, not to errors in the models themselves.
9 And, accordingly, it is only that part of our case that we
10 are seeking to revise."

11 Commissioners, there you have it. Their counsel
12 has admitted that their prima facie case on
13 cost-effectiveness is flawed, and therefore they are
14 seeking to revise it. I think that admission goes far
15 beyond a prima facie case on cost-effectiveness. The
16 omission of the OGC unit also shows that they haven't made
17 a prima facie case as to economic need. But we can set
18 that aside.

19 Because while Mr. Wright and I may disagree
20 about the import, we agree on one thing, and that is they
21 have a flaw in their fundamental case, their prima facie
22 case on cost-effectiveness. And given that they have the
23 option that they choose not to exercise to voluntarily
24 dismiss, what you should do on your own initiative, given
25 their admission, you should summarily deny the petition.

1 But what OGC wants is a redo. They want to do
2 over. For the golfers up there, they want a mulligan.
3 They teed it up, they took a swing and they shanked it out
4 of bounds. But they don't want just another swing, they
5 want free months. They want to be able to go practice
6 with the golf pro, and then they want to bring a new set
7 of clubs.

8 Commissioners, what they have asked from you is
9 extraordinary, but it is consistent with their behavior
10 throughout this case. OGC seeks a remedy that works to
11 their advantage and works to the disadvantage of the
12 intervenors. They know that at this late date that if
13 they attempted to change Doctor Nesbitt's testimony on the
14 stand and substitute entirely new analyses that they
15 ginned up over the weekend, that such a course would be
16 patently offensive. It would be a clear violation of due
17 process. It would be trial by ambush and surprise.

18 In last weeks oral argument before Commissioner
19 Jacobs, they have admitted that such a course of conduct
20 would be inappropriate. So not daring that inappropriate
21 course, they seek another course that means the least
22 amount of time and expense for them, but the most amount
23 of work for the intervenors in a ridiculously short period
24 of time.

25 Let's going over what they have asked. They

1 asked to withdraw Doctor Nesbitt's testimony. Now, that
2 testimony has been the focus of numerous discovery
3 requests. It has been the focus of four days of
4 deposition. It has been the focus of hundreds of pages of
5 intervenor testimony, and it has been the focus of
6 hundreds of thousands of dollars of intervenor trial
7 preparation. By withdrawing it, they seek to avoid
8 embarrassing cross-examination not only about the error
9 that we all agree here on, but other numerous errors that
10 have been documented in both our testimony and in Doctor
11 Nesbitt's deposition.

12 Then they ask for leave to substitute new
13 testimony. New testimony that would be supported by
14 entirely new analyses using new versions of models that
15 the intervenors have not been trained on, and indeed we
16 haven't yet seen. This new testimony, though, would have
17 the benefit not only of them changing the model versions,
18 but they would also have the benefit of every criticism
19 that has been offered by all of our witnesses to date, as
20 well as the errors that have been pointed out by
21 deposition.

22 Now, instead of suggesting new discovery and a
23 reasonable time for new discovery, they propose an
24 alternative. They propose that they reanswer the old
25 questions asked about the old analysis, but treat them as

1 if they had been asked about the new analysis. Well, that
2 way they control not only the testimony they file, but the
3 questions that we ask. And, quite frankly, they could
4 even draft the testimony so as to avoid some of the
5 difficult questions.

6 They seek the advantage of avoiding additional
7 discovery. Why? It is not apparent on the face of the
8 motion, but it became apparent in oral argument last week.
9 We found out that what they propose is a schedule where we
10 would have all of three weeks to review their new
11 testimony and new analyses based on new versions of the
12 model. And we would only have two of those three weeks to
13 look at the revised discovery responses.

14 Commissioners, it was just such a demanding
15 schedule with too little time for trial preparation that
16 caused you to grant our request for a continuance last
17 December, because it would have been a denial of due
18 process. They want to put us back in the same situation
19 that you appropriately kept us out of four months ago.

20 They also seek to have access to the new
21 version of the models to be under the same terms and
22 conditions as we have agreed to under the old -- for the
23 old versions of the model. But what they fail to point
24 out to you is that they insisted upon terms that went
25 beyond the protective order that Commissioner Jacobs

1 issued. And we agreed to it simply because we were
2 desperate in this case to get access to the model. And it
3 would be unreasonable for us to have to agree to those
4 terms again if this continuance were to be considered.

5 They even sought in their motion to have the
6 unilateral opportunity to meet with staff and to meet with
7 Commissioner Jacobs to reschedule. Now, they did retreat
8 from that last week at oral argument. But I think it is
9 of some significance that they even asked for it.

10 Commissioners, none of this one-sided relief
11 that OGC requests is necessary. If they want a mulligan,
12 if they want a do over, they have it within their power to
13 request it. They can request a voluntary dismissal; they
14 can refile their case; they can take as much time as they
15 need to cobble together a prima facie case. And that
16 would be, in my estimation, a far more honorable course of
17 conduct than the one that they have put you in the
18 situation of having to pass over. There is no need for
19 you to be in the position of having to address this
20 continuance. If they want a do over, they can get it on
21 their own initiative.

22 Now, Commissioners, I and my client have reacted
23 very strongly to what we consider to be an extraordinary
24 request for relief in the motion that was filed last week.
25 We have suggested that under the circumstances fees and

1 costs against OGC should be levied. Not only because they
2 caused us to waste hundreds of thousand of dollars because
3 of their negligence, but because they have also
4 systematically thwarted legitimate attempts to get at the
5 data and the underlying model runs. Commissioners, we
6 make no apology for that suggestion. We want you to
7 understand why we feel so strongly that this motion should
8 be denied.

9 OGC initiated this case with a petition that did
10 not follow your rule regarding need determination
11 petitions. If they had followed that rule, we wouldn't be
12 here today. Your Rule 25-22.080, Subsection 3, states in
13 pertinent part, "If a determination of need is sought on
14 some basis in addition to or in lieu of capacity needs,
15 such as oil backout, then detailed analyses and supporting
16 documentation of costs and benefits is required." OGC's
17 petition didn't include those detailed analyses. It
18 didn't include those supporting documentations which would
19 have included the model inputs and outputs which were used
20 to discern that they had left the OGC unit out.

21 Now, because they didn't file that, we were
22 forced to request it through discovery, even though it was
23 supposed to be part of their filing. And in that effort,
24 we have been frustrated repeatedly by tactics of providing
25 impartial or incomplete responses, or simply refusing to

1 answer questions. I have fully developed this in the
2 motion or in the response to the motion that we filed last
3 week, but I'm just going to give you a taste of it, three
4 or four examples.

5 FPL's second set of interrogatories to OGC were
6 presented on November 2nd, 1999. They clearly posed
7 questions to OGC about the allegations in their petition.
8 Questions were posed to OGC, and we asked about the
9 allegations in the petition. OGC objected saying that was
10 improper discovery because it required their experts to
11 answer the questions. Well, we moved to compel. And the
12 prehearing officer agreed with us. And he said, "OGC, you
13 are going to have to answer the questions." That is in
14 one of the orders that Commissioner Jacobs issued in
15 February. We received answers to those interrogatories
16 originally posed on November 2nd, we received those
17 answers last Friday.

18 FPL also asked in November a series of document
19 production requests designed to secure all the model runs
20 and all the model inputs and outputs. We received a
21 response, I believe it was in last November, and they
22 forwarded a zip disk where they represented it contained
23 all the model inputs and outputs. Well, we turned it
24 loose to our consultants. They took a look at it, and
25 some of the inputs were missing. Some of the crucially

1 important inputs were missing. Indeed the inputs that
2 were missing were the ones that allowed us ultimately to
3 discover that they had omitted the OGC unit from their
4 analysis.

5 We brought the fact that there were inputs
6 missing to their attention and they did supplement the
7 response in February. But even then they didn't provide
8 all the files that we pointed out were missing, and we
9 only got access to some of those files when we got access
10 to the model on February 28.

11 Now, access to the model, it's another good
12 example. They insisted upon wholly and totally
13 unreasonable terms and conditions for us to get access to
14 the model. They gave us two choices; one, you can pay the
15 full annual licensing fee for the Altos model, even though
16 you are not going to need it for more than two or three
17 months, or you can agree to a set of unreasonable terms
18 and conditions. I will give you one example. They said
19 if you are going to use consultants, we insist that our
20 consultants supervise your consultants and have immediate
21 access to all the trial preparation materials they prepare
22 for you.

23 Well, we didn't think either of those
24 alternatives were reasonable. And we went to Commissioner
25 Jacobs, and he agreed. And he gave reasonable terms and

1 conditions for access to the model. Once again in the
2 same order. Now, he said also that we were to get access
3 to the model on February 15th. But we didn't. Due to
4 OGC's conduct, we finally got access to the model on
5 February 28th.

6 In short, at every step in this proceeding we
7 have been denied reasonable access to the underlying model
8 runs. If we had had that access, we wouldn't be here
9 today because we would have discovered this error months
10 ago. There has been a systematic attempt to frustrate the
11 intervenors' access to the models and the model underlying
12 data. And as I say, it is much more detailed than what I
13 have pointed out here today, but most of it is in the
14 response that we filed to the motion or in Doctor Sosa's
15 testimony.

16 What is clear, Commissioners, is there has been
17 an extensive pea and shell game here, frustrating our
18 reasonable access to the model. But we persevered. We
19 finally got access. And in seven working days we showed
20 that they had failed to analyze their own unit.

21 So, what was the OGC response? Well, first they
22 tried to deny it. In deposition Mr. Blaha suggested that
23 it wasn't the OGC unit that was left out, it was Martin
24 Unit Number 4. But after a day and a half of questions,
25 even he acknowledged that it was the OGC unit that was

1 left out.

2 What did they do when denial didn't work? Well,
3 then they tried to understate the import of the problem.
4 Here is what they said in the motion that you are
5 deliberating on today. In the course of reviewing the
6 model runs and underlying data, and in connection with
7 discovery and in preparation for hearing, Altos personnel
8 discovered several discrepancies in the input data in
9 which their analyses were based.

10 Commissioners, we filed testimony documenting
11 the error on March the 9th. Their witness suggested the
12 next day it wasn't the OGC unit, but the Martin unit. It
13 took another day and a half of detailed deposition to get
14 them to acknowledge that the OGC unit was the unit that
15 had been omitted. They didn't discover it, we discovered
16 it.

17 Moreover, consider how they have represented the
18 omission to you in the motion. They have described it as
19 one of several discrepancies. Well, in that same
20 deposition, Mr. Blaha acknowledged, quite candidly, and to
21 his credit that it wasn't a mere discrepancy. He said, "I
22 think if I missed a power plant, that is an error." So
23 their witness said it was an error, but their lawyer said
24 to you it is just a mere discrepancy. Now, they tell you
25 today it is a serious flaw. And last week they told

1 Commissioner Jacobs that it was a flaw in their prima
2 facie case on cost-effectiveness.

3 Now, that they have admitted that fundamental
4 admission, do they seek a course to dismiss on their own?
5 No, they ask you to give them a mulligan that would
6 severely prejudice the intervenors. Commissioners, if
7 they need a second chance, they have it at their disposal.
8 They can request that they voluntarily -- or they could
9 request that their petition be voluntarily dismissed.

10 But instead they ask you for this extraordinary
11 relief that would burden us. And if you were to grant the
12 continuance, and I don't want to suggest this, it is not
13 just a continuance, it is a lot of other relief, as well.
14 We submit that under the circumstance that would be a
15 miscarriage of justice. They have admitted a flaw in
16 their prima facie case, and the only proper response to
17 that is for you to summarily deny the petition. And under
18 the circumstances we feel we should be awarded fees and
19 costs. But you certainly shouldn't grant the relief that
20 has been requested.

21 Now, those were my prepared remarks. But as
22 you heard today, we had additional grounds for continuance
23 that weren't in the motion but had been argued by Mr.
24 Wright even more extensively than the grounds that were in
25 the motion. I will just respond very briefly to those.

1 First, they say, well, you ought to grant a continuance
2 because last Friday we were granted a motion to compel
3 discovery responses. Two or three points. None of those
4 responses are essential to any of their direct case.
5 Their direct case is filed. It is their witness'
6 testimony. It is before you.

7 What we have to say in discovery responses can't
8 be supplemented into their direct case. If we proceed to
9 trial tomorrow it is going to take more than a day and a
10 half to try their direct case. We are going to proceed
11 beyond Wednesday. If they need additional time to prepare
12 for our witnesses due to those discovery responses, they
13 will have it. But more importantly, they don't need it
14 for their direct case.

15 We will tell you that we can respond to that
16 discovery request, and I believe there are only three that
17 we are required to respond to. We could respond either
18 late today or by tomorrow. But more importantly, they
19 don't need it to present their direct case.

20 The second thing they said, "Well, Mr. Waters
21 made a computational error and so consequently we ought to
22 get a continuance." Commissioners, we are not talking
23 about leaving a unit out of an analysis. We are talking
24 about a computational error where we quantified off-system
25 sales at 135 million when it was 133 million. They

1 already have the discovery response that gives the detail,
2 and we are in a position to file supplemental testimony.
3 There is no mystery. They already know what has happened.
4 But the significance of it, it is kind of offensive to
5 suggest that it is even comparable to the type of error
6 that we are facing on their part.

7 And, finally, they say, "Well, even Doctor Sosa
8 admitted that FPL needed more time." Commissioners, don't
9 make the mistake of thinking that they are asking for a
10 continuance so that my consultant can have more time to
11 perform his analysis. They were just fine with the
12 schedule that forced us into too little time until they
13 discovered there was an error in their prima facie case.

14 Commissioners, we think it is clear that this
15 motion should be denied. But more importantly, given the
16 admission that is in front of you, given that they have
17 stated that they don't have a prima facie case with the
18 case they have submitted, you ought to summarily dismiss
19 the petition and award us fees.

20 Thank you.

21 CHAIRMAN GARCIA: Thank you, Mr. Guyton.

22 Commissioners, do you want to hear from Mr.
23 Sasso and then you can ask some questions? Of course, you
24 can always ask questions.

25 Go ahead, Mr. Sasso.

1 MR. SASSO: I have very few remarks.

2 Mr. Guyton's presentation was very thorough.

3 I would say only this: Okeechobee has asked for
4 this continuance in the interest of presenting better
5 information to the Commission to enable the Commission to
6 make its decision on the basis of better, more accurate
7 information. Well, the Commission's interest in any case
8 is getting at the truth of the case. And that is what has
9 happened here. The adversary process is designed to
10 expose the truth in a case, the true merits of a case.
11 And that is exactly what has happened here.

12 As Mr. Guyton has said, what we have experienced
13 is a pea and shell game. Doctor Nesbitt initially used
14 something he called the GEMS model. You may recall that
15 from the Duke case. We have been advised he has retired
16 that model. He has now used what he called MarketPoint
17 3.0 for his direct testimony in this case, and we hear
18 today that he intends to retire that model. In fact, he
19 testified in deposition that MarketPoint 7.0 is completely
20 different software. So he now intends to use MarketPoint
21 7.0 to do his new run and set us all back to ground zero
22 in trying to discover the pea.

23 We were fortunate in this case to identify the
24 errors, given severe time constraints. Under the schedule
25 and with the relief that Okeechobee now proposes we may

1 not discover the pea next time around. We may not have,
2 in fact, better more accurate information on which the
3 Commission can base its ruling. We have exposed the truth
4 now. Okeechobee has filed rebuttal testimony addressing
5 that. Doctor Nesbitt says it doesn't matter. Mr. Wright
6 says it doesn't really matter.

7 Well, if Okeechobee believes that and Doctor
8 Nesbitt believes that, so be it; let's have a hearing and
9 see if it matters. But the case is ready to go to trial
10 now on the basis of the extensive preparation by all
11 parties up to this point in time, and that will best serve
12 the interests of this Commission in getting to the true
13 merits of this case.

14 CHAIRMAN GARCIA: Thank you.

15 COMMISSIONER CLARK: I do have a question, Mr.
16 Wright.

17 You indicated that it is apparently a serious
18 flaw; but then you say, you said later that it is not of
19 the magnitude that makes a difference. So why do we have
20 to continue the case?

21 MR. WRIGHT: I'm not sure -- I don't remember
22 saying that it is not of a magnitude that makes a
23 difference. What I think I said is I don't believe it is
24 going to make a difference. Mr. Blaha testified he didn't
25 think it would make a difference, but there are several

1 errors. The ones that I know about are all laid out in
2 our motion.

3 There is the omission of the Okeechobee plant
4 from the input file; there is two regional misassignments
5 that I know of, the Reedy Creek unit is inadvertently
6 assigned to the FPL east region, and a large coal unit is
7 inadvertently assigned to the FPL south region where there
8 is none; and at least two small plants that I know of are
9 misclassified as to their generating technology. We
10 think -- we believe that we should fix these --

11 COMMISSIONER CLARK: Why should you be --

12 MR. WRIGHT: -- these errors and rerun the model
13 and see what the new answers are.

14 COMMISSIONER CLARK: Why should you be allowed
15 to use a different model? I mean, shouldn't you be
16 confined to the model that you ran it on changing the
17 inputs to see what that produces?

18 MR. WRIGHT: Commissioner Clark, I don't think
19 so. The models, I believe, and I am advised by Doctor
20 Nesbitt and Mr. Blaha are not substantially different.
21 There are some upgrades in the separation of Florida into
22 additional zones that they believe more accurately reflect
23 the way -- more accurately reflect the way transactions
24 occur in light of the transmission constraints in Florida.
25 The basic guts of the model and the basic guts of the

1 platform, MarketPoint, are basically not changed. I don't
2 know what changes have been --

3 COMMISSIONER CLARK: So would you be comfortable
4 using the other model, the older model? It just strikes
5 me that the discovery and a lot of work has gone around
6 that model. Why not use that model, correct the errors
7 and move forward?

8 MR. WRIGHT: I can't answer for them as to
9 whether they would be comfortable using that model. I
10 think I have to say, I guess, reflecting on it, I think
11 they would say that they are professionals and they
12 believe it is their responsibility as professionals to use
13 the best tools available, which they believe are the
14 current version of the electric model and the current --

15 COMMISSIONER CLARK: I would agree with that if
16 we were more toward the beginning of the process.

17 MR. WRIGHT: I would, too, Commissioner Clark.
18 Could I respond to Mr. Guyton's remarks?

19 CHAIRMAN GARCIA: You have a couple of minutes.

20 MR. WRIGHT: Thank you.

21 First off, as I indicated in my direct remarks,
22 we have not acknowledged that there is a total failure of
23 our prima facie case. We have acknowledged there is a
24 flaw in one part of the proof with respect to the
25 cost-effectiveness demonstration of that case. As I

1 indicated in my direct remarks, there are additional --
2 there is additional support specifically through the
3 testimony of Mr. Kordecki that would support a finding
4 that the project would be cost-effective and that it would
5 be the most cost-effective alternative available.

6 As regards Mr. Guyton's suggestion that the
7 Commission consider summarily denying the petition, that
8 is equivalent to a motion for a summary judgment. There
9 is enough evidence left here for you all to make a
10 decision to grant the requested determination of need.

11 Now, we don't think that's in the Commission's
12 best interest. We think it is in the Commission's best
13 interest and in our best interest, and frankly, though
14 they say otherwise, in the intervenors' best interest to,
15 as Mr. Sasso put it, get at the truth of the case. Let's
16 get the input data right. Let's do the analyses using the
17 best tools available and give them time to look at it.

18 You know, I think Mr. Guyton suggested that what
19 we have suggested here would make for the most amount of
20 work for the intervenors. I hardly think so. I think
21 what would make for the most amount of work for the
22 intervenors is the alternative that Mr. Guyton suggests we
23 should pursue, and that is withdrawing the case and taking
24 a voluntary dismissal and filing a new case. That will
25 make for a lot of work. We will have witnesses, we will

1 have new depositions, we will have fights over
2 intervention, we will probably have new motions to dismiss
3 and so on. That will make a lot more work than the
4 continuance route that we have proposed.

5 We did not -- certainly did not mean to suggest,
6 and I don't think it is a fair interpretation that we did
7 suggest that they would be prohibited from seeking new
8 discovery on the models. All we said was that in an
9 effort to expedite and try to move this forward, we would
10 treat their discovery requests from the previous go rounds
11 as though they had been asked. We weren't trying to cut
12 them out of any new discovery opportunity.

13 And on last Wednesday we agreed we would work
14 with the parties. Frankly, it just didn't occur to me to
15 write that into the motion. It was not a unilateral
16 effort to cut the intervenors out. And besides, at the
17 end of the day it is Commissioner Jacobs or the full
18 Commission's decision as to what the schedule is going to
19 be, and I'm sure you all would make an appropriately
20 equitable decision.

21 With regard to the suggestion that --

22 CHAIRMAN GARCIA: Let me stop you. Tell me
23 why -- Mr. Guyton makes a good point. I mean, why not
24 just start this thing over. They have relied on certain
25 information, a certain program vehicle to elaborate --

1 that you used to elaborate the case and they have prepared
2 themselves to fight that vehicle. Why not just refile the
3 case? Why not pull out and start this whole thing over?
4 Tell me the efficiencies gained by staying the course.
5 What do we gain by a continuance? Because you're right,
6 if Mr. Guyton says that two weeks is not enough, then
7 obviously it will be three months, or four months, or five
8 months. I mean, we can obviously set it whenever. But
9 what do we gain by continuing this, by granting your
10 continuance?

11 MR. WRIGHT: You do not have to litigate new
12 interventions which we will contest. If we have to take a
13 dismissal here and they file to intervene, we will contest
14 their intervention. You don't have to relitigate the
15 motions to dismiss which have been litigated and decided
16 unanimously in Okeechobee's favor. You don't have to
17 relitigate all the discovery disputes, and there have been
18 quite a few. There have been motions to compel and
19 motions for protective orders filed by both sides. You
20 don't have to redo all the discovery depositions,
21 interrogatories, production requests, et cetera.

22 CHAIRMAN GARCIA: Weren't those discovery --
23 weren't those based on some of the model we are talking
24 about here?

25 MR. WRIGHT: I do agree that we are going to

1 have to redo the discovery with respect to Doctor
2 Nesbitt's analyses. There is no question in my mind about
3 that. And we, I thought, in good faith proposed an
4 entirely reasonable means of addressing that. Now, they
5 asked -- it depends on how you count. FPL asked 199
6 interrogatories. If you count subparts, they asked
7 somewhere between 247 and 312, depending on how you count
8 subparts. They asked a whole lot of interrogatories, a
9 whole lot of which were addressed to Nesbitt and Blaha, to
10 our experts. They subsequently -- on the day we had the
11 oral argument on the motions --

12 CHAIRMAN GARCIA: Just answer the question,
13 though. You are getting too specific.

14 MR. WRIGHT: Yes, thanks. With respect to the
15 other witnesses, though, you would not have to redo those
16 interrogatories, you would not have to redo those
17 production requests. You would not have to retake the
18 other seven witnesses' depositions of ours who have been
19 taken. We had nine witnesses, eight of them have been
20 deposed. One they elected not to depose, Mr. Clayton, our
21 transmission witness. You wouldn't have to redo the other
22 seven depositions.

23 CHAIRMAN GARCIA: All right. Stop there for a
24 second.

25 Mr. Guyton, that makes sense to me. Tell me why

1 I'm wrong. Leaving out all the background, I just want to
2 know why. It seems to me, yes, you have got two witnesses
3 whose testimony has changed and who erred in the
4 presentation of that testimony initially, or there is a
5 flaw in the testimony. Why not simply take up where we
6 left off and correct that and go forward?

7 MR. GUYTON: Commissioners, this isn't -- Mr.
8 Chairman, this is not a matter simply of efficiency. If
9 you grant their continuance, if you let them refile their
10 testimony --

11 CHAIRMAN GARCIA: Do me a favor, Mr. Guyton.
12 Don't argue the whole case. I'm speaking specifically
13 about efficiency here. And I understand your argument and
14 you presented it well. Now I'm speaking about efficiency
15 for this Commission. This is a large case taking up a lot
16 of time. Apparently you are bothered by how much time and
17 money your company has spent getting us to here.

18 And so now we are going from here forward, and
19 they are asking for a three-month continuance. He tells
20 me that all we need is -- it saves us time because all we
21 need is two witnesses to be redone and another program to
22 be redone. You need some additional time to look at that
23 program. Where is that wrong?

24 MR. GUYTON: Well, I think where it's wrong is
25 that they had their chance to put their prima facie case

1 together and they failed to do it. And they didn't do it
2 because they were negligent, because they weren't
3 diligent. We ought to proceed. Rather than giving them a
4 do over, we ought to give them an opportunity to try the
5 case on the infirm basis that they have here.

6 Why should they get the benefit of having all
7 the discovery responses that exposed the flaws, all of our
8 testimony filed and refiled their testimony redoing the
9 analysis? It's just not fair. They floated a trial
10 balloon, we shot it down. And now that they have the
11 benefit of our fully-developed trial strategy, they want
12 to do it over again, resubmit the analysis. That is not
13 fundamentally fair.

14 Would it be more efficient? It may be more
15 efficient. But then, again, we don't know if they refile
16 if they are going to use the same witnesses, we don't know
17 if they do the same witnesses if they are going -- if they
18 would say the same thing over again. If they refile the
19 case, they may choose to use a whole host of different
20 witnesses. We don't know. Might it be more efficient?
21 Yes. Might there also be problems and inconsistencies
22 between the two? Yes.

23 The question here, though, I don't think, if we
24 have an impartial trier of fact, is whether or not can you
25 give me a better case. The question is whether the case

1 in front of us is sufficient to satisfy the burden of
2 proof. I think it's pretty clear that it's not.

3 CHAIRMAN GARCIA: Shouldn't the interest,
4 though, be for us, at least, can we get the most complete
5 information that is available so that we can make this
6 determination of need? In other words, a company comes
7 before us, puts together its case. Regardless of the
8 program it is, if there is a program that is more
9 advanced, I would obviously like that, and I think that
10 Floridians benefit from it. How are we hurt by postponing
11 it?

12 And I think you have made a good argument. But
13 I don't know if it is about the show or the trial whether
14 it is a gotcha or not. Isn't it more about what
15 information comes before us and what information we have
16 before us to make that decision?

17 MR. GUYTON: Commissioner, I think it is a
18 matter of perspective. As an abstract proposition, yes,
19 cases ought to be tried on the best information available.
20 But it is not your role when they say we haven't presented
21 the best information available for you to give them a
22 redo.

23 They have a burden of proof. They didn't
24 discharge it. There is a flaw in their prima facie case.
25 They have admitted that. They are backtracking now, but

1 they have admitted that at least as to cost-effectiveness
2 there is a flaw in their prima facie case. Confronted
3 with that, an impartial trier of fact is not going to say,
4 well, you get a do over. Confronted with that, an
5 impartial trier of fact should summarily deny the
6 petition.

7 MR. SASSO: May I respond briefly to your
8 question, Mr. Chairman?

9 CHAIRMAN GARCIA: Sure.

10 MR. SASSO: Really what the Petitioner is
11 suggesting is quite extraordinary. They filed this
12 petition on the basis of Doctor Nesbitt's analysis. The
13 centerpiece of that analysis are these extraordinary
14 statements he has made about cost savings. Savings that
15 he proposes this plant would provide to the people of
16 Florida. That is the foundation of their petition.

17 Now they say, without the benefit of knowing
18 what a new run and a new model will produce, we are simply
19 going to substitute one run for the other and keep on
20 going. It is really quite extraordinary.

21 One would think that they would want to
22 reevaluate their case. They would want to see what
23 analysis Doctor Nesbitt's new work would produce when OGC
24 was included and decide whether, in fact, it is a
25 meritorious project before already concluding,

1 presupposing the outcome of this analysis. What does that
2 lead us to believe this is all about? Is this really
3 something that is respectful of the processes and the
4 integrity of this fact-finding process? We already know
5 the outcome. They are prepared simply to substitute a new
6 run, support the petition they have already filed, and
7 keep on going.

8 The witnesses who have supplied prefiled
9 testimony in this case all rely on Doctor Nesbitt. Are we
10 to presume that even without knowing the outcome of a
11 completely different analysis that analyzes the OGC plant
12 they will be prepared to stand firm in their original
13 testimony, that they are prepared to continue to rely on
14 Doctor Nesbitt? That is quite extraordinary statement.
15 The fact is their petition is tainted, their whole direct
16 case is tainted. Not just with respect to
17 cost-effectiveness, but economic need. It is quite
18 extraordinary that they think they can simply substitute a
19 computer run by one witness and keep on going.

20 We would submit that if they were forced to take
21 a voluntary dismissal, they ought to be forced to
22 reevaluate the merit of this project. At the time they
23 filed this petition we were in a different posture in this
24 state. We were in the middle of the reserve margin
25 docket. They made representations in their petition about

1 that docket, about things that were happening.

2 Since the time they filed the petition, that
3 docket has been resolved. There was an agreement. There
4 was a change in reserve margins in Florida. There may
5 have been other supply side changes since September when
6 they filed this petition. They really need to take a hard
7 look at the merit of the case they originally sought to
8 put before this Commission and not presume that everything
9 they once said on the basis of a defective model run is
10 still valid.

11 CHAIRMAN GARCIA: Okay.

12 COMMISSIONER CLARK: I have one question.

13 Mr. Guyton, you mentioned fees and costs. What
14 is our authority to award fees and costs?

15 MR. GUYTON: Excuse me. The Administrative
16 Procedures Act authorizes -- I think it is Section
17 125.95 -- an award of fees and costs under certain
18 circumstances. And, unfortunately, I did not bring the
19 citation here to read it.

20 COMMISSIONER CLARK: What are those
21 circumstances? Do these fit those circumstances?

22 MR. GUYTON: I think they do. I will travel
23 from my general recollection, and I'm sure I will be
24 corrected if I go astray. But, essentially, if something
25 is filed for an improper purpose, or if it's filed for

1 harassment, or delay, or if it is frivolous. And those
2 cases have been construed to be consistent with the
3 federal rule in that regard.

4 COMMISSIONER CLARK: Rule 11.

5 MR. GUYTON: Yes. So that if one is not
6 appropriately diligent, if one is dilatory, then there is
7 an opportunity to recover fees and costs under that
8 provision of the APA. That is my understanding of how the
9 cases have been construed. And, indeed, I think that is
10 exactly the situation you have here.

11 You have a fundamental lack of diligence on the
12 part of OGC, OGC's consultants to make sure that they had
13 included the very unit that was subject to the dispute.
14 And because of that we have spent hundreds of thousands of
15 dollars to expose that flaw. That's why we think fees and
16 costs are appropriate.

17 CHAIRMAN GARCIA: Okay. Did you have something,
18 Commissioner?

19 Shef, I interrupted you. I know you were
20 finishing up your rebuttal and I interrupted you. Go
21 right ahead.

22 MR. WRIGHT: Thank you. Just a couple more
23 things, Commissioners. Mr. Guyton asserted that
24 Okeechobee Generating Company systematically thwarted the
25 intervenors access to the models. We disagree with that

1 pretty strongly. In fact, about as strongly as possible.
2 I want to tell you the story from my end. On December the
3 7th, I handed Mr. Nieto and Ms. Bowman -- Mr. Nieto is a
4 colleague in Steel, Hector, and Davis of Mr. Guyton's -- a
5 proposed term sheet under which we would -- we, Okeechobee
6 and Altos and MarketPoint, would provide the models to
7 them at no licensing fee. They were subject to terms and
8 conditions, which Mr. Guyton believes are onerous. We
9 didn't think they were that onerous and Commissioner
10 Jacobs ultimately resolved that.

11 Let me tell you the backdrop of that. Every
12 case that I have been involved in here at this Commission
13 where PROMOD, or PROSCREEN, or PROSYM, TIGER, or WEST
14 COUGAR (phonetic), or any generation type modeling program
15 has been available, and my client, usually a QF, has
16 sought discovery based on that model, we have been met
17 with a standard response. We will be happy to give it to
18 you as soon as you demonstrate that you have a license to
19 that model.

20 The same thing happened in litigation on behalf
21 of a couple of QF clients of mine against Florida Power
22 Corporation over the last four years. We will not provide
23 this, we object to this discovery request until and unless
24 you demonstrate that you have a satisfactory license to
25 this project -- to this product, the software product in

1 question.

2 We told them that they were welcome to license
3 the products at the standard commercial rates, which are
4 the same deal that EMA, or now it is New Energy Associates
5 offers for PROMOD, or ABB offers for WEST COUGAR or UNIT
6 COMMIT. Or we told them, if you will agree to these
7 conditions, we will give it to you for free, no license
8 fee. That was not acceptable to them. They moved to
9 compel. We filed the counter motion for protective order.
10 And finally on February the 11th, the order was issued
11 following oral argument, I think -- yes, following oral
12 argument on the motions to compel and the motions for
13 protective order, which was held on February 7th. The
14 order came out essentially granting our motion for
15 protective order with respect to the models, allowing them
16 to have access to it with no license fee with three
17 modifications to the terms and conditions we had proposed.

18 We had asked that the consultants who used it be
19 prohibited from bad-mouthing or disparaging the model.
20 Commissioner Jacobs ruled quite reasonably that that would
21 not extend to disparagement on the record in future
22 proceedings in which the model was at issue. He also
23 ruled that we were not entitled to supervise because that
24 could interfere with the trial preparation by the
25 intervenors and their consultants.

1 He also ruled, and we were basically agreeable
2 to this, that -- we had proposed to have one computer here
3 at the Public Service Commission's offices where the
4 computer would be available on request. We said we
5 thought it would be okay for there to be one in
6 California, and his order indicated that there should be
7 one in California, and the reason for that is that is
8 where their consultants are.

9 There were some slight delays. We did have --
10 we did believe that a training session was appropriate.
11 We scheduled the training session as soon as we
12 practicably could, which was on February 21 and 22. My
13 understanding is that the model was available on Thursday,
14 February 24th, in California. But we did, frankly, have
15 further negotiations as between myself and Doctor Nesbitt
16 on this side of the equation, and as between Mr. Guyton
17 and his consultants on that side of the equation that led
18 to the guarantees contemplated by the protective order not
19 being executed until sometime very, very late in the day.
20 I think it was something like 5:00 or 6:00 o'clock Pacific
21 time those guarantees came in over Doctor Nesbitt's fax
22 machine out in California, whereupon they got access on
23 February 28th.

24 In response to what Mr. Sasso said, it is my
25 understanding that the electric model is updated, but it

1 is substantially the same. The techniques and the
2 technology of the modeling are the same, and that the
3 MarketPoint techniques are the same. It does work a lot
4 faster.

5 COMMISSIONER CLARK: If that representation is
6 correct, then would your consultant have any objection to
7 running it on the models that were presented in the case?

8 MR. WRIGHT: Well, I think --

9 COMMISSIONER CLARK: I mean, if we are seeking
10 to minimize the costs and disruption to this case, it
11 seems to me he should adhere to that model. That is the
12 one the intervenors have looked at, that is the one they
13 are prepared to go to trial on.

14 MR. WRIGHT: Well, two points, Commissioner
15 Clark. First, I don't think that is the best information
16 available to you, and I don't think it is the best tool
17 available to analyze the issue at hand.

18 COMMISSIONER CLARK: Well, as I say, I would
19 agree with you if we were back in the process, but it was
20 that tool you decided to file on, and it is that tool that
21 seems to me that you should be able to correct, not
22 introduce a new model.

23 MR. WRIGHT: Well, the second point I would make
24 is that I don't believe it is a new model. Maybe we
25 should --

1 COMMISSIONER CLARK: If it is not, what
2 difficulty should you have in using the old one?

3 MR. WRIGHT: This one is much faster, it is
4 updated, it is more accurate. When I say it's not a new
5 model -- like I said, it is like a new version. The
6 electric model I think is fairly likened to a new version
7 of Word Perfect. There are some changes, overall it's
8 better.

9 CHAIRMAN GARCIA: Susan wants us to use the
10 manual model of the typewriter, and you want us to use the
11 electric one. But she makes a good a point. If the same
12 result, if your argument is that they haven't disproved
13 your model, that the model remains strong, it is simply
14 the program that runs it is a little bit off, why not run
15 the older model? I mean, I agree we are not using the
16 best information available, and clearly from where I sit I
17 would like the best information available.

18 But let's take Susan's argument, and that's what
19 I want you to respond to. If we use this model, if they
20 haven't disproved the model, in other words, if Mr. -- I'm
21 trying to remember who did it. But if Mr. Childs when he
22 cross-examined your witness and we realized that there was
23 some error, if I recall correctly, that said, now what do
24 we have? I mean, why not go with the old model and stay
25 where we are, and just stay the course, and just run the

1 old model once you get the right inputs in as opposed to
2 changing it? Why go to Word Perfect 7, or 10, or whatever
3 it is? Why no just stay with what they have -- because if
4 I take their arguments, they are willing to stay with the
5 old model. What is the problem with that?

6 MR. WRIGHT: Well, again, I think the
7 fundamental problem with that is that it is not the best
8 information available. Let me just kind of explain what
9 goes on here. The model estimates supply curves and
10 demand curves. My understanding and, you know, it has
11 been a long time since I was really a practicing
12 economist, but my understanding is that there are some
13 slight modifications to the supply curve equations in the
14 new version of the model and to the demand curve
15 equations.

16 I think in the old model, I think the demand
17 curve was assumed to be vertical hour by hour. I think in
18 the new model the demand curve is assumed to have a slight
19 slope. At least that is my understanding of what
20 transpired in the deposition.

21 It doesn't change the substance of what is going
22 on here. You've got a supply curve that is kind of like
23 this, and then you have got a demand curve that moves
24 around on it. The MarketPoint technology is so far
25 advanced as to really provide a tremendous additional

1 benefit. My understanding is that the fundamental
2 workings are not that different, but that the programing
3 enables it to run like a couple of orders of magnitude
4 faster, which would not only facilitate our repreparing
5 our case, but would also facilitate any discovery that the
6 intervenors would want to do on it. Instead of taking
7 literally 8 to 24 hours per run, it takes 10 to 20 minutes
8 per run.

9 COMMISSIONER JACOBS: That is the point that I
10 wanted to kind of touch on. I agree that the essence of
11 the upgrade was to achieve some efficiency gains, but
12 isn't it also true that there will be a fundamental
13 revision in the inputs to the new updated version?

14 MR. WRIGHT: Commissioners Jacobs --

15 COMMISSIONER JACOBS: Essentially to overcome
16 the discrepancy that occurred.

17 MR. WRIGHT: That is the main point. That's why
18 we are here is to ask you all for a continuance for the
19 opportunity to correct the input data. And I have laid
20 out in our motion those that I know of, and I will tell
21 you that the process has already begun on the Altos and
22 Okeechobee end to check, recheck, cross check, verify, and
23 reverify the database. We are going to make sure that all
24 the plants are in the right regions, that they got the
25 right ratings, and that they are classified as the right

1 type of technology, and that the Okeechobee plant is
2 included appropriately in the input file. That is a
3 process that requires some checking. Sorry.

4 COMMISSIONER JACOBS: The concern -- and this is
5 where I would like to get your response from. How
6 significant should we be concerned as to the ability of
7 the parties to respond to that change? Is it such a
8 fundamental revision in the model, first, and then in the
9 model's results, second, that intervenors will now have to
10 go and reassess and maybe fundamentally realign their
11 response to the model?

12 MR. WRIGHT: My understanding is that the right
13 answer to your question, Commissioner Jacobs, is no. That
14 the fundamental economic workings of the electric model
15 are not substantially different such that the training on
16 the version that was done that was used back in August and
17 September that underlay the case as filed is pretty much
18 directly applicable. There may be some changes in the
19 coefficients to some of the variables of the equations in
20 there, but the fundamental structure of the model, it is
21 my understanding, is not going to change.

22 I do understand that the version that they are
23 working with now has a few more what are called nodes,
24 subregions within Florida designed to reflect -- in the
25 opinion of our experts, more accurately the way

1 transactions occur. Now as to -- and then as to the
2 modeling software, again, I think it is -- they have been
3 trained on one version, they did get some exposure to
4 Version 6.0 at the training session in February, I
5 believe. There was a version running during the course of
6 this -- I had to be doing some other stuff and I wasn't
7 able to pay full attention -- there was a version running
8 during the training session that was running extremely
9 fast, faster than I thought 3.0 was capable of running.

10 But the bottom line is all I can tell you is my
11 best understanding, Commissioner Jacobs, is that the
12 fundamental workings of MarketPoint are not significantly
13 different from -- of 7.0 are not significantly different
14 from the fundamental workings of the 3.0. The fundamental
15 workings of the current version of the electric model are
16 not significantly different from the fundamental workings
17 of the version that was used last fall.

18 And what we don't know -- frankly, we found
19 mistakes in the input data that we are not comfortable
20 with. We found little gas steam plants that were
21 classified as combined cycle, they shouldn't have been.
22 We found Reedy Creek assigned to FPL east, it shouldn't
23 have been. We found a coal unit assigned to FPL south, it
24 shouldn't have been. And the base case that our experts
25 apparently thought included Okeechobee as the base for

1 combined cycle capacity in the FPL east region didn't. It
2 started with a number that was too low by the amount of
3 the Okeechobee power plant.

4 So, Commissioner Jacobs, to answer your
5 question, what we are trying to do here with respect to
6 the data piece of this, what we are trying to do here is
7 get the data right. I don't think anybody can be
8 prejudiced by going in with a flyspecked cross-checked
9 database that puts the plants in the right regions and
10 classifies them according to their technology in a proper
11 way.

12 COMMISSIONER JABER: That is input data. That
13 is someone putting in the data regardless of the model.

14 MR. WRIGHT: Yes, ma'am.

15 COMMISSIONER JABER: Okay. In plain English,
16 there is no difference between the models. One is faster,
17 that is 7.0. That will benefit you.

18 MR. WRIGHT: Well, I think it will benefit
19 everybody, Commissioner Jaber.

20 COMMISSIONER JABER: The benefit is that it is
21 quicker.

22 MR. WRIGHT: A lot.

23 COMMISSIONER JABER: So that if the parties ask
24 you discovery, you are able to run that program quicker.
25 But that is not their problem, that is your problem.

1 MR. WRIGHT: And they are able to run it quicker
2 given access to the model.

3 COMMISSIONER JABER: Right. But why should they
4 care about that?

5 MR. WRIGHT: Because they want to run
6 sensitivities and test the model.

7 COMMISSIONER JABER: They don't care how long it
8 takes.

9 MR. WRIGHT: What?

10 COMMISSIONER JABER: They don't care how long
11 that takes. This is your application, your plant. In
12 plain English, there is no difference between the two
13 models other than the speed of the model. And the input
14 data you will put in, that is what a human will put in
15 regardless of the model.

16 MR. WRIGHT: Again, I don't think that is a
17 quite 100 percent accurate statement. I think they are
18 very, very similar. As I tried to explain, I think the
19 fundamental techniques are the same. I do think that
20 there are some differences in the equations. If you
21 will, the slopes of the --

22 COMMISSIONER CLARK: What you are saying, Mr.
23 Wright, it is not the same model, it is a different model
24 and it will give you -- he has tweaked it more than just
25 being faster.

1 MR. WRIGHT: What is faster, Commissioner Clark,
2 is the platform, MarketPoint. The electric model, I
3 think, has been tweaked -- it is my understanding has been
4 tweaked to the extent that there are slight differences in
5 the formulas for the supply and demand equations. There
6 is no change in the structure. You have still got
7 quantity demanded as a function of price. You have still
8 got quantity supplied as a function of price or in the
9 model itself as a function of O&M cost, and the change in
10 O&M across the range of output for the given technology
11 type in the given region.

12 But the structure of the equations is the same,
13 and it is not a completely different model. It is not
14 changing from this large iterative simulation model that
15 calculates equilibrium supplies and demands and prices and
16 quantities using the iterative method that it uses to
17 something that uses a macroeconomic econometrics model.

18 CHAIRMAN GARCIA: That's enough. We have heard
19 from -- staff, do you want to give us your rec?

20 MR. GUYTON: Mr. Chairman, I apologize for this,
21 but I have misrepresented a fact to one of the
22 Commissioners, and I would like the opportunity to correct
23 that.

24 CHAIRMAN GARCIA: Okay. Go right ahead.

25 MR. GUYTON: I suggested in a response to

1 Commissioner Clark that the case law in Florida construing
2 the provision that allows attorneys fees in the APA has
3 been construed consistent with Federal Rule 11. I am
4 mistaken in that remark. I understand that it has, the
5 case law has been allowed under the construction of being
6 filed for a frivolous purpose, that has been allowed to
7 award attorneys fees for a case where counsel has been
8 negligent or dilatory. So I was right in that regard,
9 but it is not a Federal Rule 11 standard.

10 COMMISSIONER CLARK: So it is a more liberal
11 standard.

12 MR. GUYTON: Well, I'm reluctant to draw that
13 conclusion one way or the other, Commissioner, but I would
14 be more than happy to present a motion for fees and costs
15 that would fully develop that argument.

16 CHAIRMAN GARCIA: Staff.

17 MR. KEATING: If you would like, I can read you
18 the cite to the APA provision regarding fees and costs.

19 COMMISSIONER CLARK: I think if that is
20 appropriate it should be done by a separate motion and
21 fully briefed.

22 MR. KEATING: I would agree.

23 Let me preface my comments by reminding everyone
24 what the standard is here. We are here on a motion for a
25 continuance. And the standard is whether Okeechobee has

1 shown good cause, and that is in the Uniform Rules of
2 Procedure 28-106.210. We are not here on a motion for
3 summary judgment. There has not been such a motion filed.
4 We are not here to determine, therefore, whether
5 Okeechobee has met its burden of proof in this case.

6 Now, the intervenors have offered three options
7 rather than granting the continuance. First, summary
8 denial of the petition; second, taking this case to
9 hearing as scheduled; or, third, requiring OGC to withdraw
10 its petition and refile an amend petition. In essence,
11 dismissing the petition with leave to amend.

12 The first, summary denial, amounts to denying
13 the petition on the merits. This would effectively mean
14 denying Okeechobee's petition without leave to amend to
15 correct the errors in its analysis. Now, Okeechobee
16 suggests that there is support for its prima facie case in
17 the record. However, a decision to summarily deny the
18 petition would be unduly harsh, and the intervenors have
19 really offered no legal authority for what amounts to the
20 ultimate punishment in this case for OGC's errors. I
21 think it is telling that at this point none of the
22 intervenors have actually filed a motion for summary
23 judgment.

24 The second option, hearing this case as
25 scheduled, that would mean going to hearing tomorrow,

1 would force the Commission to make a decision in this case
2 without the benefit of the most complete record. Such a
3 hearing would not aid the Commission in meeting its
4 statutory duty to determine the need for this plant.

5 Now, the intervenors have attempted to attach
6 some significance to the fact that they found the errors
7 through discovery. I think that regardless of who
8 discovered these errors first, going to hearing on
9 evidence we know to contain significant errors harms this
10 Commission's ability to determine the need for the plant.
11 And I sort of asked the question, if the Petitioner was
12 the City of Tallahassee and staff had discovered these
13 errors through discovery, would we grant a continuance. I
14 don't know that we would.

15 The third option is that Okeechobee withdraws
16 and refiles its petition. I would agree with Okeechobee
17 that puts everyone in the position of having to relitigate
18 this whole case again when we could simply continue and
19 focus on one part of the case that contained errors.

20 Now, you can look at the rack behind me. This
21 is all the paper at least that I have that we have
22 produced in this case in the last six months. There is a
23 stack of depositions about two feet tall. There is a
24 stack of testimony about foot-and-a-half tall. We can
25 avoid probably about two feet of that if we continue this

1 rather than require them to withdraw and refile.

2 I would also point out that if Okeechobee
3 withdraws and refiles its petition, we are in the position
4 where we are faced with a 90-day time clock again to do
5 all of this work. Now, the 90-day deadline has been
6 waived in this case. And I would agree with Florida Power
7 & Light's attorneys that perhaps a schedule slightly
8 different from what Okeechobee has proposed would be
9 appropriate, if the continuance is granted, that would
10 allow the parties the time to do adequate discovery and to
11 prepare their responsive testimony to whatever testimony
12 Okeechobee's witnesses would refile.

13 That being said, staff recommends that you grant
14 the continuance to permit Okeechobee to rerun its analyses
15 using the corrected inputs and to revise its testimony
16 accordingly. Okeechobee has shown good cause for the
17 requested continuance. It has become aware of errors in
18 its expert witnesses' analyses that require correction in
19 order to present the Commission with a correct and
20 complete record.

21 Okeechobee's revisions should be limited to
22 those necessary to demonstrate its corrected analyses.
23 And the intervenors should be permitted to conduct
24 discovery concerning those analyses and file responsive
25 testimony.

1 Okeechobee should be required to honor the
2 commitments it made in its motion for continuance that it
3 stated here today; that is, to file all input and output
4 data supporting the revised analyses within one week of
5 filing the revised testimony, to make the computer model,
6 and I guess whichever model we decide that they will be
7 required to use for these analyses, available on the terms
8 previously set by the Commission, and to treat all
9 interrogatories and requests for production as having been
10 asked with respect to the revised testimony and exhibits
11 and submit responses to those discovery requests within
12 one week of filing the revised testimony.

13 As to the question of which model to use, I
14 haven't prepared any comments on that. And I think --

15 CHAIRMAN GARCIA: If we go that route we will
16 leave it to the Prehearing Officer.

17 COMMISSIONER CLARK: Well, no, I think that is
18 an important point to make, because it seems to me I hear
19 discrepancies, and yet the only assurance we have that it
20 is the same is it is your understanding that they are not
21 materially different. It seems to me to avoid that battle
22 you use the same model. If it was appropriate to develop
23 your case on and you were comfortable that it was a good
24 model, and I assume you are comfortable that it is a still
25 a good model, if not then it strikes me that discovery has

1 to go -- would be more extensive to determine if, in fact,
2 the model is the same and there have been no substantive
3 changes to the model.

4 CHAIRMAN GARCIA: Let's do that if we grant the
5 continuance, then we can take up that issue.

6 Is there a motion?

7 COMMISSIONER DEASON: Mr. Chairman, I apologize
8 for my voice. I'm recovering from a bout of something,
9 I'm not really sure what. To try to expedite this, I'm
10 willing to make a motion. I would deny staff's
11 recommendation. I would move that we would deny the
12 applicant's motion for a continuance.

13 I believe that we are here to make a
14 determination, and it is the applicant's burden to come
15 forward and demonstrate their case. I find it slightly
16 ironic that the remedy that they are requesting is within
17 their own control.

18 Either their case is fatally flawed and they
19 need to refile entirely, or else their case is not fatally
20 flawed and the testimony that they have filed and the
21 evidence which will be produced at hearing will
22 substantiate their case.

23 It is not our job at this point, and I don't
24 think it's fair to the Commission to be placed in the
25 position of trying to make a determination as to the

1 character of the flaw in the testimony. I think the best
2 person to make that judgment is the applicant itself. And
3 they can choose to withdraw, or they can choose to go to
4 hearing. I'm prepared to go to hearing.

5 That is my motion.

6 CHAIRMAN GARCIA: Is there a second?

7 COMMISSIONER JACOBS: I second it.

8 CHAIRMAN GARCIA: Okay.

9 Is there any discussion?

10 COMMISSIONER JABER: Let me just state on the
11 report my rationale for not going along with the motion.
12 Although, let me tell you, Commissioner Deason, I'm not
13 far from where you are. I think that what I can't get
14 past is working on the uniform rules last year and asking
15 the Administration Commission on the continuance part,
16 which is why I was asking you what standard, Mr. Wright,
17 you thought we had which is for good cause shown. And I
18 remember that that standard was put there for the reason
19 of allowing every agency to be liberal in determining what
20 good cause is shown.

21 Now, don't misunderstand, I think you dropped
22 five balls. I think the five reasons you have got on Page
23 3 of your motion are really inexcusable in the sense of
24 that you did waste a lot of time and you have wasted a lot
25 of money. So this was a hard decision for me to make.

1 But from a pure procedural standpoint, I think that it is
2 within our purview to grant the continuance.

3 I would have granted -- I would have moved
4 staff's recommendation to grant the continuance only
5 because I want to hear the merits of this case before
6 ruling. And it is only for that reason, Commissioner
7 Deason, that I don't support the motion. Because I do
8 think it has been handled not as well as it should have
9 been.

10 CHAIRMAN GARCIA: Very good.

11 COMMISSIONER CLARK: Let me just -- I am
12 concerned about efficiency in this case. And I think
13 there is merit to the notion of saying we are going to go
14 forward, you can decide if it is a fatal flaw or not. I
15 would have trouble granting a continuance that doesn't
16 confine the petitioner to correcting what is wrong and
17 running it on the same model. I don't see any reason to
18 allow you to improve your case. It is a matter of
19 correcting discrepancies. If you choose to improve your
20 case, take a dismissal and start again.

21 CHAIRMAN GARCIA: Ms. Jaber, would you agree
22 with Commissioner Clark about that, about granting a
23 continuance, running under the same model and going
24 forward from this point?

25 COMMISSIONER JABER: Yes. The only thing that

1 troubles me about that is I don't know, and it's just a
2 question, I don't know if we can dictate how they put on
3 their testimony.

4 COMMISSIONER CLARK: I think we can.

5 COMMISSIONER JABER: Perhaps. And maybe our
6 legal staff can help us out in that. That's just a
7 question.

8 COMMISSIONER CLARK: I would say they have a
9 choice; if they don't think that is appropriate, they can
10 take a dismissal and start again.

11 COMMISSIONER JABER: That's true. There is one
12 more thought along those lines. I don't think that a
13 hearing, if we do end up continuing the case, I don't
14 think a hearing in June gives the parties enough time to
15 do the discovery and all --

16 CHAIRMAN GARCIA: I don't think that that is
17 what we are going to be voting on, because at least for
18 the next nine months I've got to say and where we find a
19 place in the schedule. And if we need more time, I'm sure
20 that the Prehearing Officer has been very agreeable to
21 working with this.

22 COMMISSIONER JABER: But that would be important
23 to me. It's not a continuance just to allow them to fix
24 their case, it is a continuance that allows all parties
25 enough time to put on the best available information.

1 COMMISSIONER CLARK: See, I would have trouble
2 voting for that. It seems to me they have asked for a
3 continuance for the specific purpose of correcting
4 discrepancies that they maintain is not material to their
5 case. It is material to cost-effectiveness, they admit it
6 is apparently serious.

7 CHAIRMAN GARCIA: I don't think Lila is talking
8 about that. I think what Lila is talking about is
9 Mr. Guyton stated very clearly, he said, and correct me if
10 I'm wrong, Mr. Guyton. Mr. Guyton said under the
11 three-month time clock, we get it with three weeks. Then
12 I quote, Shef Wright quoting one of his own witnesses
13 saying we didn't even go through these programs, because
14 according to FPL's witness it took more than 24 hours to
15 run, or six hours to run, or whatever.

16 So I assume that Mr. Guyton is giving me a time
17 frame that is unacceptable there. And I'm sure that the
18 Prehearing Officer will look at that and try to get them
19 the allotted time if we do grant the continuance.

20 COMMISSIONER JACOBS: If the continuance is
21 granted, I had indicated previously that I think it is
22 extremely important --

23 CHAIRMAN GARCIA: What Lila is simply adjusting
24 is the time frame for Mr. Guyton to be able to respond,
25 because Mr. Guyton said he didn't have enough time to do

1 that.

2 COMMISSIONER DEASON: Mr. Chairman, with all due
3 respect, I think we are debating a motion that has not
4 been made.

5 We have a motion that has been made and been
6 duly seconded, and I think we need to vote it up or down.
7 And If it is voted down, then we can discuss whether there
8 is going to be a continuance and under what grounds it
9 will be granted.

10 COMMISSIONER CLARK: Okay.

11 CHAIRMAN GARCIA: There is a motion to grant a
12 continuance. All those in favor --

13 COMMISSIONER DEASON: No, no.

14 CHAIRMAN GARCIA: I'm sorry, to deny staff and
15 go to hearing by Commission Deason, seconded by
16 Commissioner Jacobs.

17 All those in favor signify by saying aye.

18 COMMISSIONER DEASON: Aye.

19 COMMISSIONER JACOBS: Aye.

20 CHAIRMAN GARCIA: We then have a motion, I
21 assume that Lila or Susan can make it. I think you were
22 both more or less on the same point. I'm sorry, hang on
23 one second. Mr. Wright, you wanted to make a comment
24 since we are discussing the --

25 MR. WRIGHT: I know it is irregular at this

1 point in the proceedings, but I just wanted to make a
2 suggestion that may work out. I would suggest that we
3 rerun 3.0 with corrected data, and run 7.0; explain the
4 differences, and let the parties have discovery on all of
5 that. I'm trying to offer something efficient,
6 Commissioners, sorry.

7 COMMISSIONER CLARK: Well, my view is if you
8 want to base your case on the newer data, that is up to
9 you. You take a voluntary dismissal and start again. If
10 you want to continue this case to correct discrepancies,
11 that's what you do.

12 CHAIRMAN GARCIA: That was almost a motion. If
13 you want to go ahead and state it again.

14 COMMISSIONER CLARK: Well, Mr. Chairman, I would
15 move we allow them -- we grant the continuance based on
16 the fact -- grant the continuance, allow them to correct
17 the discrepancies. And that appropriate time -- I think
18 the time frames given for requiring them to correct the
19 discrepancies, and make the runs, and file the testimony
20 may be appropriate, but it would be with the understanding
21 that the intervenors will have the time they need to make
22 appropriate discovery.

23 Also, I would urge that the clarification be
24 given as to the terms and conditions of running the model.
25 We have heard today some allegations that the terms and

1 conditions they had to agree to were not those that were
2 required by your order.

3 If there are fees and costs that are
4 appropriate, I would indicate to the parties that they
5 should file that motion.

6 CHAIRMAN GARCIA: That is the motion. Is there
7 a second?

8 COMMISSIONER JABER: Second.

9 COMMISSIONER JACOBS: Would that entail -- I
10 don't know if we have done this before, but it sounds like
11 it may be useful here to have some kind of a conference on
12 the scheduling.

13 COMMISSIONER CLARK: I think you can call a
14 pretrial conference and work on the schedule.

15 COMMISSIONER JACOBS: I think we want to do
16 that.

17 CHAIRMAN GARCIA: Okay. Very good. We have got
18 a motion and a second. All those in favor signify by
19 saying aye.

20 COMMISSIONER JABER: Aye.

21 CHAIRMAN GARCIA: Aye.

22 COMMISSIONER CLARK: Aye.

23 CHAIRMAN GARCIA: Opposed?

24 COMMISSIONER DEASON: Nay.

25 COMMISSIONER JACOBS: Nay.

1 CHAIRMAN GARCIA: Very good. Thank you very
2 much. Yes.

3 MR. MOYLE: Mr. Chairman, if I could just take a
4 brief second. John Moyle on behalf of OGC. I want to
5 issue an apology to the Commission and the staff and the
6 other parties for this. This has not been one of the best
7 days for either me or Mr. Wright. And I apologize that we
8 are in this position. It has put us in a very difficult
9 choice and whatnot, and I'm sorry to take this moment to
10 do that, but I did want to do that for the record.

11 CHAIRMAN GARCIA: Very good. The hearing is
12 adjourned.

13 (The hearing adjourned at 11:10 a.m.)

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

4

5 I, JANE FAUROT, RPR, Chief, FPSC Bureau of
6 Reporting, Official Commission Reporter, do hereby certify
7 that the Oral Argument in Docket No. 991462-EG was heard
8 by the Florida Public Service Commission at the time and
9 place herein stated.

7

8 It is further certified that I stenographically
9 reported the said proceedings; that the same has been
10 transcribed under my direct supervision; and that this
11 transcript, consisting of 73 pages, constitutes a true
12 transcription of my notes of said proceedings.

10

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

13

DATED this 22nd DAY OF MARCH, 2000.

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