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THOMAS D. HALL
MAY 25 2001

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

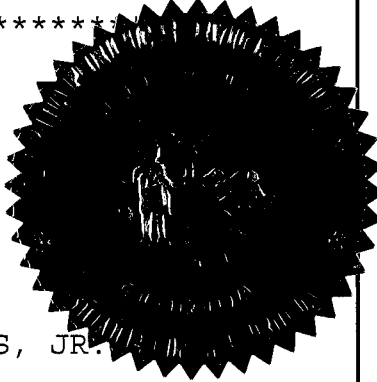
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In the Matter of : DOCKET NO. 001064-EI
:
PETITION FOR DETERMINATION :
OF NEED FOR HINES UNIT 2 :
POWER PLANT BY FLORIDA :
POWER CORPORATION. :

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VOLUME 1

Pages 1 through 95



PROCEEDINGS: HEARING
BEFORE: COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ
DATE: Thursday, October 26, 2000
TIME: Commenced at 9:30 a.m.
PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida
REPORTED BY: JANE FAUROT, RPR
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Chief, Bureau of Reporting

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1 APPEARANCES:

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3 BOWMAN, Carlton, Fields, Ward, Emmanuel, Smith & Cutler,
4 P.A., Post Office Box 2861, St. Petersburg, Florida 33731,
5 and ROBERT A. GLENN, P. O. Box 2861, St. Petersburg,
6 Florida, appearing on behalf of Florida Power Corporation.

7 DEBORAH D. HART and KATRINA D. WALKER,
8 Florida Public Service Commission, Division of Legal
9 Services, 2540 Shumard Oak Boulevard, Tallahassee,
10 Florida 32399-0870, appearing on behalf of the
11 Commission Staff.

12 SUZANNE BROWNLESS, 1311 Paul Russell Road,
13 Tallahassee, Florida, appearing on behalf of Panda Energy
14 International, Incorporated.

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P R O C E E D I N G S

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2 COMMISSIONER JACOBS: Good morning. We will go
3 on the record. Counselor, read the notice.

4 MS. HART: Pursuant to notice issued August 22,
5 2000, and notice published in the Florida Administrative
6 Weekly on September 1st, 2000, this time and place have
7 been noticed for hearing in Docket Number 001064-EI,
8 petition for determination of need of Hines Unit 2 power
9 plant by Florida Power Corporation. Also, notice was
10 published in the Lakeland Ledger on September 10th, 2000,
11 pursuant to Section 403.519, Florida Statutes.

12 The purpose of this hearing will be for the
13 Commission to take final action to determine the need
14 pursuant to Sections 403.501 through 519, Florida
15 Statutes, for the construction of an electric power plant
16 and related facilities at the Hines Energy Complex in Polk
17 County, Florida.

18 This proceeding shall allow Florida Power
19 Corporation to present evidence and testimony in support
20 of its petition for a determination of need for its
21 proposed plant and related facilities in Polk County,
22 Florida, to permit any intervenors to present testimony
23 and exhibits concerning this matter, to permit members of
24 the public who are not parties to the need determination
25 proceeding the opportunity to present testimony concerning

1 this matter, and for such other purposes as the Commission
2 may deem appropriate.

3 COMMISSIONER JACOBS: Thank you. Take
4 appearances. I'm sorry. You tripped me up.

5 MR. SASSO: We switched sides, Commissioner
6 Jacobs. Good morning. I'm Gary Sasso with Carlton,
7 Fields of St. Petersburg, Florida, representing Florida
8 Power Corporation today. And with me is Alex Glenn of the
9 Florida Power Corporation Legal Department and my
10 colleagues, Mike Walls and Jill Bowman.

11 COMMISSIONER JACOBS: Last name Glenn?

12 MR. GLENN: Glenn, G-L-E-N-N.

13 COMMISSIONER JACOBS: Very well.

14 MS. BROWNLESS: Good morning, Commissioners. My
15 name is Suzanne Brownless, I am here representing Panda
16 Energy International, Incorporated.

17 MS. HART: Deborah Hart, Commission Legal Staff.

18 COMMISSIONER JACOBS: Very well. I understand
19 we have some preliminary matters.

20 MS. WALKER: Excuse me. Katrina Walker,
21 Commission Legal staff. Sorry.

22 COMMISSIONER JACOBS: Okay. I understand we
23 have some preliminary matters.

24 MR. SASSO: That's correct.

25 MS. HART: That is correct.

1 Mr. Chairman, typically at this point we ask if
2 there are any members of the public here that wish to
3 participate.

4 COMMISSIONER JACOBS: We will issue that
5 invitation now. Let the record reflect that no one has
6 come forward, so we will assume that there is no member of
7 the public here that wishes to directly participant.

8 MS. HART: The other preliminary matters are a
9 series of motions that are pending.

10 COMMISSIONER JACOBS: Yes.

11 MR. ELIAS: Mr. Chairman, there are, by my
12 count, three pending motions and associated requests for
13 oral argument.

14 COMMISSIONER JACOBS: How do you recommend
15 proceeding, counsel?

16 MR. ELIAS: I believe it would be most
17 appropriate to first consider the question raised by
18 Florida Power Corporation's motion to reconsider the
19 prehearing officer's order granting Panda's motion to
20 intervene, and there is a request for oral argument
21 associated with that, and I think it would be appropriate
22 to take that up first. Then the motion for continuance
23 filed by Panda. And then the motion to reconsider the
24 prehearing officer's order granting its motion to strike
25 staff preliminary Issue Number 6 and denying its motion to

1 strike the direct testimony of Bill R. Dickens.

2 COMMISSIONER JACOBS: Very well. Commissioners,
3 any problems or questions with that? Very well. First,
4 we need to deal with the motion on oral argument.

5 MR. ELIAS: Yes, the request for oral argument.

6 COMMISSIONER JACOBS: Yes, the request for oral
7 argument.

8 Do I have a motion?

9 COMMISSIONER JABER: Move it.

10 COMMISSIONER JACOBS: Without objection, show
11 that that request is granted. Let's go with a time
12 limitation. Any suggestion on that?

13 MR. ELIAS: My recommendation would be a maximum
14 of ten minutes per side.

15 COMMISSIONER JACOBS: Unless you have a lot, and
16 we have a lot to do this morning, I would suggest we do
17 look at a time limitation. Ten minutes a side sounds
18 reasonable.

19 MR. SASSO: Commissioner Jacobs, I will do my
20 dead level best to it within ten minutes. I think I
21 probably can. I haven't prepared any remarks that I have
22 timed, and so I have no idea how long this will take, but
23 I assume that it will be about ten minutes.

24 COMMISSIONER JACOBS: Very well. So ten minutes
25 per side.

1 MR. SASSO: Thank you. We will proceed then,
2 since we are moving to reconsider the hearing officer's
3 decision granting Panda intervention.

4 COMMISSIONER JACOBS: Very well. Go ahead.

5 MR. SASSO: Let me begin by just speaking to the
6 procedural posture of this. We have asked in our motion
7 that the Commission panel hear this de novo. Often the
8 Commission in reviewing decisions by a prehearing officer
9 will apply a more limited standard of review asking simply
10 whether the prehearing officer overlooked something. We
11 believe in this case for a couple of reasons the panel
12 ought to regard this as a de novo matter.

13 First, we are raising an objection that
14 fundamentally goes to the scope of the Commission's
15 statutory authority, and we believe it is incumbent upon
16 the Commission at all times to consider that issue
17 de novo, consider it fully when it is raised.

18 Second, in this case the prehearing officer
19 actually, in essence, deferred the decision to the full
20 panel. As I will make clear in a moment, our fundamental
21 objection to Panda's intervention is that the proposal
22 that Panda made to Florida Power Corporation during the
23 bid process was a merchant plant proposal, which is
24 legally not viable. When we raised that objection to the
25 prehearing officer, in her order granting Panda

1 intervention she indicated on that issue, "The issue and
2 impact of TECO --" what we call the Duke decision
3 sometimes -- "on the bidding rule and the need
4 determination process has not yet been addressed by this
5 Commission." She did not purport actually to address the
6 issue we raised, but simply observed that it had not been
7 addressed by this Commission. In essence, we suggest,
8 deferring it to the full panel.

9 So with that background let me present our
10 argument about why Panda should not be granted
11 intervention in this proceeding. Panda seeks to
12 participate in this proceeding as a rejected bidder and
13 relies on the bid rule for its standing. That rule says
14 simply that the Commission shall not allow potential
15 suppliers of capacity who are not participants to contest
16 the outcome of the selection process in a power plant need
17 determination proceeding. It does not automatically
18 confer standing on somebody who did participate.

19 Somebody who did participate still has to meet
20 the tried and true test for standing in Florida; namely,
21 they have to demonstrate that their substantial interests
22 will be determined in this proceeding. Panda can't do
23 that. The Commission has admitted rejected bidders to
24 prior need proceedings, but there was a reason. They
25 admitted these rejected bidders to those prior need

1 proceedings on the basis that these bidders could
2 conceivably show in the course of the need determination
3 process that they had put forth a superior proposal, a
4 more cost-effective proposal that the utility could have
5 and should have accepted in lieu of, say, a self-build
6 alternative or another power purchase agreement.

7 Now, there is a hook with respect to
8 participation in the bidding procedure, and Panda concedes
9 this in its petitioning papers. As Panda acknowledges and
10 as this Commission has made clear, a bidder who
11 participates in the RFP process is bound by the proposal
12 it made at the time. The whole point of the bid rule is
13 to get closure on the process and not to force the utility
14 and the Commission to confront different proposals,
15 different concepts, different circumstances at the need
16 determination than those that were presented to the
17 utility at the time that it assessed the bid, in fairness
18 to the utility and in fairness to the Commission.

19 The Commission adopted this rule precisely to
20 put an end to that practice. The Florida Power and
21 Light/Cypress case was a glaring example where people were
22 coming into the need process changing the rules, changing
23 the circumstances, putting before the Commission and the
24 utility a different situation. So as Panda conceded in
25 its petitioning papers, a rejected bidder can't come into

1 the need proceeding and essentially sandbag the Commission
2 and the proposal with a different set of circumstances.

3 Well, what was Panda's proposal? Panda's
4 proposal was to sell Florida Power Corporation power from
5 a merchant plant. In fact, in its petition to intervene
6 in this case it cited its pending petitions for
7 determination of need of a merchant plant. Two merchant
8 plants, in fact. And those were straight up petitions to
9 site these plants as merchant plants.

10 What was the nature of the proposal? They
11 proposed to commit one-half of the plant, no more than
12 one-half of a 1,000 megawatt plant to meet our
13 530-megawatt need for no more than five years. They made
14 a two to five-year proposal. If you add that up they were
15 essentially offering us less than 10 percent of the
16 lifetime output of that plant. And they were making no
17 bones about the fact that they were intending to operate
18 the plant as a merchant plant apart from that small part
19 of the plant they were committing to our identified retail
20 utility need. In fact, we asked them, we said we have a
21 long-term need, can you extend that proposal. They said
22 no, we are not interested in doing that.

23 They essentially took a chance on whether the
24 Duke case would be affirmed or reversed by Supreme Court.
25 And they gambled on that and they lost. Even though they

1 knew an appeal was pending, and even though they knew that
2 the Supreme Court had previously ruled in the Nassau cases
3 that projects like this can't go forward in Florida at
4 this time.

5 As a matter of law this proposal was simply not
6 legally viable. The Supreme Court has now made abundantly
7 clear in the Duke case, quote, "A determination of need is
8 presently available only to an applicant that has
9 demonstrated that a utility or utilities serving retail
10 customers has specific committed need for all of the
11 electric power to be generated at a proposed plant."

12 Now, let me give a little bit of context for
13 this. When a utility builds a power plant, as Florida
14 Power is proposing to do here, a 530 megawatt, 25 years,
15 the entire power plant counts toward the utility's reserve
16 margins. The entire plant is committed to the utility's
17 reliability needs.

18 When a developer of an IPP makes a proposal to a
19 utility, it can have a 2,000 megawatt plant. It doesn't
20 contribute to the utility's reserve margins except to the
21 extent it is committed to the utility under a firm power
22 purchase commitment, which is why the Supreme Court said,
23 look, we understand utility built plants; they count
24 toward the reserve margin. The only way an IPP plant can
25 count toward a reserve margin is if that entire plant is

1 committed under a firm power purchase agreement to the
2 utility. And they didn't want to play games with how much
3 is enough. They have said all. They want the whole plant
4 committed, just as a utility plant would be committed,
5 because that was the analog, that was the paradigm under
6 the existing law that the Supreme Court was working --

7 COMMISSIONER JACOBS: Mr. Sasso.

8 MR. SASSO: Yes.

9 COMMISSIONER JACOBS: Given your scenario,
10 couldn't an independent power producer, in fact, engage in
11 the bidding process with a utility, get that firm power
12 commitment and then go -- and setting aside for the moment
13 your contention that they would have only granted a
14 portion of the capacity that they were proposing, couldn't
15 they bring that commitment in with their need
16 determination and cite that as support for the need?

17 MR. SASSO: Absolutely not. For one thing, they
18 are not a proper applicant. They can't come into a need
19 proceeding and file an application for determination of
20 need. The utility has to come in and support the entire
21 plant. It has to say and has to prove that it has a need
22 for that power plant. Now --

23 COMMISSIONER JACOBS: And that brings us to the
24 dilemma that Panda faces in this document. The utility
25 won't be a player. I mean, you are saying that they can't

1 ride with your petition, they can't take their bid into
2 your process and come in on their own. How do they get
3 here?

4 MR. SASSO: The come in -- if they, for example,
5 had responded directly to our need. We issued an RFP, we
6 said we need 530 megawatts for 25 years. That was our
7 next plant alternative as to which we were soliciting
8 alternatives from the market.

9 If they had come in and said we will build a
10 530-megawatt plant which we will commit to you for 25
11 years, and if it had been a more cost-effective proposal,
12 we would have said great, we will come in, we will file
13 the need petition, and we will sponsor your plant. That
14 is the way the process is intended to work.

15 The RFP process is designed to enable the
16 utility to solicit more cost-effective proposals to its
17 self-build alternatives to its next planned unit. And it
18 is incumbent upon the bidder to respond to the utility in
19 a way that allows the utility legally to be a proponent of
20 that plant.

21 There are alternatives. If Panda had said we
22 are in a position to offer you 530 megawatts for five
23 years, but we have commitments from other retail utilities
24 in Florida which together will consume our plant, and this
25 will be done within your time frame for getting a need

1 petition and getting your in-service date, yes, different
2 retail utilities could have jointly sponsored that plant.

3 But at the time Panda made its proposal it was
4 saying, we are not going to do that. We are not going to
5 do that. Now they come in with their papers and they say,
6 we are actively soliciting other retail utilities. But
7 that is sandbagging. That is changing the terms of the
8 deal. They told us at the time that what they were
9 proposing to do was essentially illegal, confirmed now to
10 be illegal.

11 Look at what they said in their motion for
12 continuance. This is extraordinary. And I'm not arguing
13 the continuance issue, but this is a statement they made
14 about their motivations in this case. They said they
15 didn't come into this docket before now -- and this puts
16 them in a position of having to move for continuance
17 because they came in just at the last minute -- they said
18 we didn't come in earlier because of the following: They
19 said, "Investing resources in this proceeding where
20 PEII's, Panda's proposed plants cannot be granted a
21 determination of need even though proven to be the most
22 cost-effective alternative available was simply
23 economically and legally insupportable until the Florida
24 Supreme Court ruled in the Tampa Electric case."

25 They are acknowledging that they could not

1 themselves and would not themselves expend resources to
2 come into this proceeding because their plants, their
3 merchant plants would be economically and legally
4 insupportable until the Florida Supreme Court ruled in the
5 Tampa Electric case.

6 Well, guess how the Supreme Court ruled in the
7 Tampa Electric case? It confirmed that the projects were
8 not economically or legally supportable. It is mind
9 boggling that in view of the outcome of that case they now
10 decide to come into our case and attempt to interfere with
11 a legitimate need proceeding.

12 The project they proposed to us was not viable.
13 They acknowledged it. In fact, in the negotiations -- and
14 this is part of the exhibits in our case -- they said we
15 have a condition. We can walk away from this plant as
16 late as sometime in the year 2001 on financial
17 contingencies or if the Supreme Court says merchants can't
18 be built. There were no bones about it, no mistake about
19 it. They were proposing to build a merchant plant. They
20 knew they were at risk. They didn't want to proceed in
21 the face of that risk, yet they suggest that we were
22 supposed to accept their proposal as the most
23 cost-effective alternative in the face of that risk.

24 That is utterly inconceivable and an untenable
25 position to take that in the face of what the Supreme

1 Court has now said is a legally stillborn proposal we were
2 supposed to accept their proposal or that they have a
3 legitimate argument that they were viable and in the
4 running. As a matter of law we would have been
5 foreclosed.

6 Now, we evaluated it at the time. Florida Power
7 Corporation put to one side the legal issues and said we
8 are going to evaluate this straight up, we are going to
9 look at all the economic issues as though the Duke case
10 were not an issue. And they evaluated it. But then the
11 Duke case came down. And whatever the outcome of that
12 evaluation is, we could not have come forward to this
13 Commission to sponsor that plant without running into the
14 very precedent that we helped create. The Duke case made
15 absolutely clear that the plant could not be sited within
16 the four corners of the proposal they made to us and given
17 the circumstances they confronted us with.

18 Now, they have raised a number of arguments
19 about why they should be able to come in. One is that
20 they are now looking for retail utilities proposals. They
21 still don't say they have got any commitments at hand.
22 They still cited when they petitioned to intervene their
23 pending merchant petitions, which they have not dismissed.
24 The fact that they are now looking has nothing to do with
25 the terms of the proposal they presented us with at the

1 time. The terms of the proposal they presented us with at
2 the time was not legally viable. They say that, well,
3 gosh, while we were only going to commit 530 megawatts, we
4 were building a 1,000-megawatt plant and we were going to
5 make the rest of that sort of available to you to help
6 increase the reliability.

7 Well, that is fine, but that does not mean that
8 extra capacity was committed to us. It was not committed
9 to us. And the reason they were saying it might be
10 available as backup is because they were not going to
11 commit it to any other utility. So they were saying,
12 well, it may be there for backup, but if when we needed
13 it, times of peak or outages, we had no contractual
14 commitment to that capacity.

15 They said, well, we want to come into the
16 proceeding just because if we manage to dump this thing
17 over, Florida Power will have to go back out to the market
18 and then we may be able to come forward with a viable bid.
19 Well, that is exactly what this Commission has said they
20 cannot do. That is exactly what the Commission was
21 concerned about, and said this, in fact, in our case where
22 we had asked for a waiver of the bid rule. The Commission
23 said, look, there are a lot of advantages for you
24 getting the -- going through the RFP process. You can
25 foreclose this type of thing from happening because

1 otherwise you are at your peril, and the Commission is at
2 its peril that somebody will come in, sandbag you with an
3 11th hour proposal and you have to scrap the whole thing.
4 And you go out to the market again and you may not be able
5 to meet your in-service date and you may not be able to
6 satisfy your need. That is the reason the Commission
7 promulgated the RFP process, to prevent exactly that type
8 of intervention just to spoil the proposal.

9 They said, well, we paid a \$10,000 fee; that
10 entitles us to come in. Well, that doesn't go anywhere
11 either. They are not seeking a refund of that fee in this
12 case. They took a chance that their project would pass
13 muster under the law. Just because, for example, a
14 merchant files a \$10,000 application with the DEP to
15 process their application, that doesn't entitle them to a
16 need proceeding. They had a legally nonviable proposal
17 and that ends the matter. The fact that they took a
18 chance on the \$10,000 or on the \$1 million they say they
19 spent on developing this proposal is neither here nor
20 there. That was a gamble they took in the face of what
21 should have given them great concern about the state of
22 the law.

23 In short, we see no legitimate basis, no
24 legitimate basis to grant Panda intervention in this
25 proceeding. This is a matter that with all respect has

1 been considered already by the Florida Supreme Court, and
2 it is incumbent upon the Commission simply to apply that
3 law to this case. It doesn't require a new determination
4 of policy or law by this Commission. The matter has been
5 fully adjudicated by the Florida Supreme Court. The
6 Florida Supreme Court has now spoken on this issue. And
7 it is incumbent upon the Commission now simply to apply
8 the law. And we submit that the application of the Duke
9 case to this situation is clear. Thank you.

10 COMMISSIONER JACOBS: Whatever the decision on
11 intervention for Panda, you would agree that we have full
12 latitude and discretion to assess the merits of the
13 bidding process that you engaged in?

14 MR. SASSO: Absolutely. In fact, we are here to
15 tell the Commission about our bidding process. We are
16 very confident about the way it was conducted, the
17 adequacy of it, and we certainly invite staff and the
18 Commission to scrutinize it fully and closely.

19 COMMISSIONER JACOBS: Thank you.

20 Commissioners. Ms. Brownless.

21 MS. BROWNLESS: Thank you. I would start off by
22 just mentioning one thing. Mr. Sasso, although I disagree
23 with his interpretation of what the Florida Supreme Court
24 definitively put to rest in the Duke Energy case, I want
25 to point out one thing. The rehearing was denied on

1 September 28th by the Supreme Court, and the 90 days that
2 Duke Energy and New Smyrna Beach Utilities Commission have
3 in which to take that matter by petition of certiorari to
4 the United States Supreme Court has not yet run. It runs
5 90 days from the September 28th date.

6 So, while I do think Mr. Sasso is correct when
7 he says that the Florida Supreme Court has completely
8 disposed of this matter, I don't think that that
9 necessarily means that the case is at rest or that the
10 case is definitively resolved. I think that is still
11 pending and there is still an opportunity and a chance for
12 the adversely effected parties there, Duke Energy and New
13 Smyrna Beach, to petition for cert at the Supreme Court.

14 I want to talk a little bit about the standard
15 to be applied. Mr. Sasso indicated that he believed that
16 the -- what I will call the appellate standard that he
17 discusses in his reconsideration motion as that associated
18 with the Southern States case, which basically says that a
19 panel such as yourself when looking at a prehearing
20 officer's procedural orders or pretrial orders should look
21 to see if there is some fact that was overlooked or some
22 legal point that was overlooked. And if that, in fact,
23 was not done, that that decision should be affirmed.

24 Mr. Sasso indicated that you had often applied
25 this standard and that really is incorrect. You have

1 always applied this standard. And you have always applied
2 to this standard to both rulings by full panels as well as
3 rulings by prehearing officers. And we would suggest to
4 you that that is the appropriate standard to be applied
5 here. And I would go on to mention that one of the
6 reasons I feel so strongly about that is that under the
7 Administrative Procedures Act you have the ability to set
8 up your own internal organizational policies. And you
9 have clearly set up a policy that says a chairman can
10 assign a panel, a chairman can assign a prehearing
11 officer, and to that prehearing officer will be finally
12 delegated decisions on pretrial motions. This is the
13 standard that you have set up. It is not Power Corp's
14 place to set that standard, it is your place. You have
15 done so and you can do so.

16 COMMISSIONER JABER: Ms. Brownless, they
17 acknowledge in their motion that the Commission has
18 applied the mistake of law and mistake of fact standard to
19 prehearing officer orders. They are saying it is
20 incorrect for us to apply that standard for a non-final
21 order. What is your response to that?

22 MS. BROWNLESS: My response is that in the
23 Southern States case you, in fact, did apply that to an
24 order of a prehearing officer, which was subsequently
25 taken to the full panel. And to my knowledge you have

1 always supplied that standard, as I said, to both
2 decisions of full panels as well as individual prehearing
3 officer decisions.

4 COMMISSIONER JABER: Well, what if we were
5 always wrong? I mean, I think that is what they were
6 saying is that the Commission has been incorrect in
7 applying that kind of a standard to a non-final order as
8 opposed to a de novo review.

9 MS. BROWNLESS: Well, I think that to the extent
10 that -- I think that is wrong. I think that you need to
11 stick with your standard, the standard that you have
12 announced. It is a legitimate standard and an appropriate
13 standard. And that you were not wrong in applying it.
14 And there is a very practical reason why I would argue
15 that. If you are going to allocate pretrial motion
16 decisions to prehearing officers and then you allow a
17 de novo review every time, what have you accomplished by
18 way of administrative efficiency? Nothing.

19 And I would suggest to you that is why you
20 adopted the standard that you did. It is very similar to
21 the standard that is applied when a case is referred to
22 DOAH, and a DOAH hearing officer makes similar type
23 motions and similar type decisions.

24 COMMISSIONER JACOBS: They base their
25 distinction on the idea that there is a different

1 decision-maker in one proceeding. And in the first
2 instance there is simply a prehearing officer, and now the
3 petition for reconsideration is being made before a
4 different decision-maker and, therefore, it is appropriate
5 to adopt the broader standard.

6 MS. BROWNLESS: I understand that. And I guess
7 what I would argue back to you is that if a case -- this
8 Commission has the ability to send any case to a Division
9 of Administrative Hearings prehearing officer. You don't
10 exercise that often, but you do have the right to. And
11 when a case under Chapter 120 is sent to a DOAH hearing
12 officer pretrial decisions that they make similar to the
13 one that the prehearing officer made in this instance
14 concerning intervention, discovery, motions to strike, all
15 of the decisions that Commissioner Jaber has made here
16 would be made by a prehearing officer. And that
17 prehearing officer would not be the final decision-maker
18 in the sense that even though that prehearing officer
19 would hear the case, it ultimately would have to go back
20 to the agency for their review.

21 And when it went back to the agency, every
22 factual determination and every prehearing motion would be
23 reviewed on the mistake of fact, mistake of law standard.
24 And that is what I think you ought to apply here.

25 I want to briefly touch on the merits. If I

1 boil down Mr. Sasso's argument it comes down to this. It
2 is a legal impossibility for Panda to site its 1,000
3 megawatt plant. And since it is a legal impossibility
4 based on the Florida Supreme Court decision, you have to
5 throw them out because they could have no substantial
6 interest which would be affected here. And I would
7 respond to that in two ways. Number one, it is not a
8 legal impossibility. Even if I take the most restrictive
9 ruling of the Duke Energy case, the most restrictive, and
10 say that for my 1,000-megawatt plant I must have a firm
11 contract for 530 megawatts with Power Corp, which is what
12 we offer, and for the balance of that 470 with somebody
13 else, okay. I can still do that. Even the Supreme Court
14 decision does not say that I have to have 1,000 megawatts
15 with one utility.

16 COMMISSIONER JACOBS: Well, I think Mr. Sasso
17 acknowledges that, but he says you have to show up with
18 your bid with either a need determination for that 1,000,
19 or in their instance 530, or a firm contract.

20 MS. BROWNLESS: And what I am suggesting to you
21 is that I will stick by my bid in the sense that I bid the
22 530, all the price parameters associated with my bid have
23 been evaluated by Florida Power Corporation, and I hope we
24 get a chance to talk later about the manner it was done,
25 and that is what I am bound by. I don't think it is a

1 legal impossibility, as Mr. Sasso argues, that I could not
2 mount a need determination in the future. And that is
3 really what he is arguing. And I don't think it is a
4 legal impossibility for several reasons.

5 First of all, I don't think the Florida Supreme
6 Court decision is final final because there is still time
7 to appeal it to the Supreme Court. That is one. Number
8 two, my guys are actively negotiating for the balance of
9 that power. So we could have contracts in place between
10 now and the time we filed our need determination. Number
11 three, in your recent decision in the Calpine case, you
12 have allowed Calpine to argue they could be issued a
13 conditional need determination. Conditional upon them
14 receiving or negotiating contracts.

15 And I am not -- I hope the staff will correct me
16 if this statement is wrong, but my understanding is as of
17 this date Calpine still does not have a firm contract for
18 the output of its facility and yet it still continues in
19 the need determination process here. So I guess the point
20 of all of this is I do not think as a legal matter we
21 would be precluded from developing this plant.

22 Now, the second point that I would make is that
23 even if you were to conclude that that was the case, we
24 still have a substantial interest as a bidder that paid
25 \$10,000 to participate in this need determination process.

1 We paid our money. Even Power Corps admits that we were a
2 bona fide bidder. We did what we were supposed to do when
3 we were supposed do it. We have a right to see and to
4 question whether the process was, in fact, fair. And I
5 would suggest to you that our perspective is different
6 than staff's perspective and can give you valuable insight
7 into whether or not that RFP process was fair.

8 Because if it wasn't fair, if the two bidders
9 that responded were not treated fairly, then the process
10 should, in fact, be set aside. And that's the truth of
11 it. The bidding rule was designed to allow participants
12 in the process to question that process. This is our only
13 opportunity to do that.

14 And as a matter of fact other independent power
15 producers cannot participate specifically by the rule.
16 And I did attend the development of the bidding rule on
17 the generating facilities. And the quid pro quo that was
18 given was that if you participated in a bid this would be
19 your point of entry to question that bid. So we are
20 suggesting that we should be allowed to do that and that
21 is a substantial interest in and of itself.

22 Finally, I want to respond to Mr. Sasso's
23 comment about in our motion for continuance where we said
24 it was not economically or legally supportable for us to
25 intervene in this case prior to the time we did, which was

1 prior until a short time after the Duke Energy decision.
2 That is not admission that our bid was not either legally
3 or economically supportable. Either at the time we made
4 it or now, we believe it is both legally and economically
5 supportable. The point there is a very simple one.
6 Unlike Florida Power Corporation, we have no guaranteed
7 revenues. If we have a set amount of money that we
8 allocate and that we budget, it is established case law,
9 and this was the Nassau 2 case, the ARK Energy and Nassau
10 Power established that you can't come into someone else's
11 need determination and get your own ticket punched, that
12 you have to file your own.

13 We have expended more than \$1 million in
14 developing these plants, \$10,000 of which was associated
15 with Power Corp's bid in an effort to secure the contracts
16 which Power Corp claims we need. Therefore -- I'm dead
17 there. The spin that Mr. Sasso gave to our statement was
18 incorrect. I know that you want to encourage a wholesale
19 competitive market, and in wholesale competitive markets
20 where there are no guaranteed returns, people allocate
21 their resources. We did make a prudent decision. We got
22 in when it was prudent to do so, so I have no apologies
23 for the timing of that.

24 Finally, Mr. Sasso has indicated that we are not
25 seeking a refund off our \$10,000 fee. I'm not seeking a

1 refund of my \$10,000 fee here because I doesn't believe
2 that you have the authority to award me damages. Perhaps
3 I can pursue that.

4 COMMISSIONER JABER: Can you say that again?
5 What about damages?

6 MS. BROWNLESS: Mr. Sasso indicated that we were
7 not seeking to get our \$10,000 fee back. And my response
8 to that is my understanding is that an administrative
9 agency does not have the statutory authority to award
10 damages.

11 COMMISSIONER JABER: Okay.

12 MS. BROWNLESS: And, finally, I want to make one
13 last point about what fully committed means under the TECO
14 decision. In this case they are building a 530-megawatt
15 plant, and I believe Mr. Crisp testified at depositions
16 that 130 megawatts of that was associated with the
17 utility's reserve margin requirements, and that leaves
18 about 400 megawatts. That would not -- that would be, and
19 this is, I believe, his terminology -- excess capacity,
20 capacity in excess of what is needed to satisfy the margin
21 of reserve. That is 24 percent of the 530 megawatts. So
22 about 75 percent of the capacity would be, quote, excess.
23 If you look at Panda's bid, 53 percent of our capacity
24 would be considered to be excess.

25 And so I don't think it is clear that the

1 Supreme Court defined or fully explicated what fully
2 committed means. And Power Corps in this case has
3 stipulated that this 24 percent means fully committed for
4 them, that is Issue Number 2. And if 24 percent is fully
5 committed, then I would suggest to you that 53 percent is
6 certainly fully admitted.

7 MR. SASSO: May I address that last point for
8 clarification?

9 COMMISSIONER JACOBS: Very briefly.

10 MR. SASSO: Because that is a complete
11 mischaracterization of Mr. Crisp's system. Ms. Hart asked
12 him a question whether any amount over the minimum 20
13 percent reserve margin was excess. I objected to the
14 form, she withdrew that question. The testimony is clear
15 that the entire plant counts toward the reserve margin and
16 we need the entire plant. The 20 percent is a minimum,
17 and that will become abundantly clear in the course of
18 this case.

19 COMMISSIONER JACOBS: That was exactly my
20 thought about it. We can resolve that through the
21 testimony.

22 Staff, did you have anything?

23 MR. ELIAS: Yes. We are prepared to make a
24 recommendation on --

25 COMMISSIONER JACOBS: First of all,

1 Commissioners, do you have any other questions?

2 COMMISSIONER BAEZ: I had a question, Mr. Sasso.
3 Can you comment on Ms. Brownless' statement that that is
4 their point of entry here. If there is a problem with the
5 bidding rule, and if that, in fact, as you have
6 acknowledged is an issue somehow that we are going to
7 review, where does a participant enter if they have a
8 problem with the bidding process?

9 MR. SASSO: If a participant makes a legally
10 viable proposal, one that is permitted under Florida law,
11 yes, this would be their point of entry. If they did not
12 make a legally viable proposal, they have no point of
13 entry.

14 COMMISSIONER BAEZ: And who makes the decision
15 as to what proposal is legally viable or not?

16 MR. SASSO: Well, first, the Supreme Court and
17 then the Commission would be called upon to apply the
18 Supreme Court's decision.

19 COMMISSIONER BAEZ: So at some point it falls
20 upon us to decide whether your assertion that the proposal
21 that Panda made originally is legally viable or not?

22 MR. SASSO: Yes, that directly falls upon the
23 Commission at this time.

24 COMMISSIONER BAEZ: How do we get to that -- how
25 do we get to that determination without having Panda at

1 the table?

2 MR. SASSO: They are at the table on this very
3 issue. On the threshold issue whether they can come into
4 the proceeding, they are at the table, they have made
5 argument, we have made argument, and now the Commission
6 can decide the issue whether their proposal was legally
7 viable. They were able to participate in this debate.

8 COMMISSIONER BAEZ: Which debate is that?

9 MR. SASSO: The question whether they are --

10 COMMISSIONER BAEZ: Just deciding on whether
11 they are intervening or not?

12 MR. SASSO: Yes, the question whether they are
13 entitled to intervene.

14 COMMISSIONER BAEZ: But is what you are saying
15 that this is the only -- I guess in the context of an
16 intervention is where we are going to decide the ultimate
17 issue of whether a proposal is legally viable or not?

18 MR. SASSO: Correct.

19 COMMISSIONER BAEZ: In essence, reviewing a
20 determination that you -- that your company made before
21 the issue is ever taken up as part of the need
22 determination.

23 MR. SASSO: No, it is actually not even
24 reviewing a determination that Florida Power made to
25 reject this bid on that ground, because the company did

1 not reject this bid on that ground. The question is as a
2 matter of law did Panda propose a legally viable bid as a
3 matter of law. And that is -- the answer to that is made
4 clear by the Supreme Court's decision in the Duke case as
5 a matter of law. The facts are frozen. Because under
6 this Commission's decision about what the bid rule is all
7 about, the facts can't change; they are frozen. They are
8 within the four corners of the bid that was submitted.
9 The circumstances they presented to us, the
10 representations they made to us about the nature of this
11 plant, that is the set of facts that cannot change through
12 a hearing or cross-examination or anything else. Whatever
13 they proposed, they proposed. They can't sandbag us by
14 changing that.

15 Now, the question is is what they proposed
16 legally viable. And we test that proposal against the
17 circumstances and ruling in the Supreme Court's decision
18 in Duke and the answer is clear. In Duke the court the
19 said we have to come forward as an applicant and say we
20 have a specific committed need for all of that plant, and
21 they did not enable us to do that by the nature of their
22 proposal.

23 COMMISSIONER JACOBS: Staff.

24 MR. ELIAS: Thank you, Mr. Chairman. And I will
25 be brief. The first thing that I want to do is bring us

1 back around to the whole purpose of this proceeding. The
2 overarching issue here is FPC's obligation to demonstrate
3 by a preponderance of the evidence that the plant sought
4 in its petition is the most cost-effective alternative
5 available, provides adequate electricity at reasonable
6 cost, and the other specific enumerated criteria in
7 Section 403.519. That is why we are here. It is their
8 affirmative burden to show that.

9 I disagree that de novo review of the prehearing
10 officer's decision is the appropriate legal standard. The
11 cases cited by Florida Power Corporation in its motion,
12 which weren't addressed specifically here today in oral
13 argument, speak to appellate review.

14 COMMISSIONER JACOBS: Ms. Brownless cited the
15 idea that we historically have not attributed that
16 standard when we have gotten cases back from DOAH. Is
17 that consistent with --

18 MR. ELIAS: That is absolutely correct. Our
19 responsibility on a recommended order is to look at -- not
20 revisit the factual determinations that were made by the
21 prehearing officer unless they were unsupported by
22 competent substantial evidence. We may have a different
23 take on the interpretation of the law, but even that in
24 recent years has been somewhat limited by revisions to the
25 Administrative Procedures Act.

1 But more importantly, we are not talking about
2 an appellate review of a lower tribunal, we are talking
3 about a decision made by the agency head, duly delegated
4 pursuant to the APA to one Commissioner. And an appellate
5 standard in that context in my mind is not appropriate.
6 It has never, to my knowledge, been applied with respect
7 to a prehearing officer's order. And Florida Power
8 Corporation did not cite to a single example where that
9 had been done.

10 The standard in the rule is very clear, or what
11 the rule contemplates is very clear. Reconsideration,
12 which has a pretty precise legal definition and a very
13 precise legal means of application. I would suggest that
14 what FPC is proposing to adopt by the suggestion that the
15 Commission employ this standard in this instance is, in
16 fact, either a waiver of that rule or a revision to that
17 rule and neither is appropriate or has been properly plead
18 in this circumstance.

19 Now, I do not agree with Florida Power
20 Corporation's characterization of the purpose of the
21 bidding rule as being to stop people from torpedoing need
22 determinations by proposals that were ever changing.

23 COMMISSIONER JABER: Bob, can I interrupt you
24 and take you back to the de novo review. Do we even have
25 authority, statute or rule, to apply a de novo standard of

1 review on reconsideration?

2 MR. ELIAS: I don't believe so.

3 COMMISSIONER JABER: Okay. And does that --

4 MR. ELIAS: Now, in all fairness, in the eight
5 hours that I had to take a look at this and the other two
6 issues, that was something that I didn't research to the
7 degree that I would really feel comfortable commenting on,
8 you know, without more time to investigate. But in any
9 case I don't think it is appropriate.

10 COMMISSIONER JABER: All right. And does that
11 kind of a review on reconsideration defeat the purpose of
12 350.01, which gives the Chairman authority to assign a
13 panel to the case and a presiding officer to every case?

14 MR. ELIAS: Absolutely. Now, as I said, I don't
15 think the bidding rule was intended to stop people from
16 torpedoing need determinations. I think it was intended
17 by the Commissioners to ensure that they have the best
18 information available to them when they were evaluating
19 proposals pursuant to Section 403.519, and to provide for
20 the orderly determination of the constructions of new
21 power plants subject to the act.

22 I think the prehearing officer in the order
23 granting intervention specifically recognized that fact.
24 And I am looking at the second full paragraph on Page 2,
25 "Consistent with Florida law, this Commission will

1 consider whether FPC's proposed plant is the most
2 cost-effective alternative available. Accordingly, the
3 Commission will consider issues regarding the RFP, the
4 company's consideration of the bids received, the outcome
5 of the bid process, and the competing alternatives
6 presented. Since Panda made a bid to supply the need
7 requested by FPC and the Commission will review the bid
8 process pursuant to Section 403.519, Florida Statutes, it
9 is appropriate that Panda, as one only two bidders, be
10 allowed to question the methodologies used by FPC in
11 evaluating the bids and making its decisions."

12 That in a nutshell is my belief as to the
13 rationale advanced in the order to permit intervention in
14 this case.

15 COMMISSIONER JACOBS: And intervention is not
16 prevented if the party can't show that they will prevail
17 in their determination.

18 MR. ELIAS: That's correct. I mean, I don't
19 think that they have to -- well, I think that is a factual
20 determination that you all have to make. I don't think
21 that that has to be made at the front end. I don't think
22 that that is a, per se, question of law given the ultimate
23 issue that we have to decide here, which is the propriety
24 of FPC's bid process.

25 Again, the standard on reconsideration is some

1 material fact or matter of law which was overlooked which
2 if it had been properly considered would yield a different
3 result. In this case, I do not believe that Florida Power
4 Corporation's motion has met that standard and for that
5 reason I would recommend that it be denied.

6 COMMISSIONER JACOBS: Very well.

7 Commissioners, do I have a motion?

8 COMMISSIONER BAEZ: Would we move to accept
9 staff's recommendation, is that --

10 COMMISSIONER JACOBS: That is appropriate.

11 COMMISSIONER BAEZ: So moved.

12 COMMISSIONER JACOBS: It has been moved.

13 COMMISSIONER JABER: Second.

14 COMMISSIONER JACOBS: It is moved and seconded.
15 Show that staff's recommendation to deny the petition for
16 reconsideration of the prehearing officer's intervention
17 order is approved without objection. That takes us to the
18 motion to reconsider -- I'm sorry, the motion for a
19 continuance.

20 MR. ELIAS: And there was also a pending request
21 for oral argument on that motion.

22 COMMISSIONER JACOBS: Okay. Is there any
23 objection to oral argument on the motion for continuance?
24 Okay. Show that that is granted. Again, I think we
25 should impose a time limitation, as well. I suspect ten

1 minutes is pushing it on this one. Commissioners, I am
2 agreeable to 15 minutes per side.

3 COMMISSIONER JABER: I am, too.

4 COMMISSIONER JACOBS: Okay. It is 15 minutes
5 per side.

6 And, Mr. Sasso, I presume you will proceed on
7 this.

8 MR. SASSO: Actually, Ms. Brownless made the
9 motion.

10 COMMISSIONER JACOBS: I'm sorry. I'm getting
11 all confused here. You're right. It is your motion. Go
12 ahead.

13 MS. BROWNLESS: Thank you, Commissioner. Where
14 to start. The first thing I want to talk about is why
15 Panda did not intervene in this case on October 7th, which
16 is the date that Power Corp filed its request for need
17 determination, and that has to do with the timing of the
18 Duke Energy case. The original Supreme Court decision was
19 made on April 20th of this year, the rehearing on that
20 decision was ruled upon by the Commission -- by the
21 Supreme Court on September 28th. Panda filed intervention
22 14 calendar days after that decision, and nine business
23 days after that decision. So we had to have an
24 opportunity to look at that decision, see what it said,
25 and review its impact.

1 COMMISSIONER JABER: How did that decision
2 change the fact that you bid while the case was pending to
3 begin with?

4 MS. BROWNLESS: It did not change the fact that
5 we bid, because obviously we couldn't change that fact.
6 But what it changed was the climate in which we could
7 develop our plant. In other words, it became obvious that
8 we could not -- an exempt wholesale generator did not have
9 independent status under the Power Plant Siting Act based
10 upon that ruling to proceed with its own need
11 determination unless there was, in fact, a contract with a
12 utility that was listed specifically in the power plant
13 siting applicant definition.

14 In other words, unless we had a contract with a
15 rural electric co-op, municipal, or investor-owned
16 utility. Obviously it had not been definitive until that
17 time. That was, in fact, the case since the Commission in
18 its ruling declared that an exempt wholesale generator
19 could, in fact, be an applicant in its own right.

20 There was existing case law out there, the
21 Nassau 2 case, which indicated that even if Panda had been
22 found to be the most cost-effective bidder in this need
23 determination proposal, even if we had proven that, which,
24 in fact, had been proven in the Cypress Energy case for
25 both Nassau Power Corporation and ARK Energy, that you

1 couldn't get -- that Panda could not get awarded a
2 positive need determination in Power Corp's docket. That
3 Panda would have to have its own docket.

4 COMMISSIONER JACOBS: That is a good point.
5 What would you assert to be the scope of your
6 participation in this docket?

7 MS. BROWNLESS: My basic thrust for being here
8 is to help the Commission evaluate the fairness and
9 appropriateness of the RFP, okay? Mr. Sasso is absolutely
10 right, we don't think the RFP was appropriately done. We
11 think, in fact, that Power Corp went through the motions
12 without sincerely evaluating the bids. In other words, we
13 think they had their mind made up before they went in.

14 COMMISSIONER JACOBS: As I understand it you
15 have been able -- well, your need for extra time is
16 essentially to ensure that you can complete discovery and
17 have adequate opportunity to prepare what I would assume
18 to be your cross?

19 MS. BROWNLESS: Yes, sir. And I want to be very
20 clear, once Power Corporation was made aware that we would
21 be granted intervention status, which was late last
22 Friday, October 20th, they have been extremely cooperative
23 in providing materials and in making the two witnesses
24 that we requested the opportunity to depose available, and
25 have, in fact, done that.

1 COMMISSIONER JABER: I am still trying to
2 understand the delay. The issue related to the fairness
3 of the bid process has always been at least identified
4 since staff filed its prehearing statement, but most
5 likely the parties knew ahead of time that that issue
6 would be part of the case because it, in fact, is part of
7 the statutory criteria, right?

8 MS. BROWNLESS: Yes, ma'am.

9 COMMISSIONER JABER: Your company, right or
10 wrong, made the decision. Your client made the decision
11 to intervene later on in the process than early on in the
12 process because you were waiting for the decision in Duke
13 to come out, right?

14 MS. BROWNLESS: Yes, ma'am.

15 COMMISSIONER JABER: Why is that our problem or
16 this company's problem with respect to processing the
17 case? If your client made an internal company management
18 decision to intervene at a certain time, why does this
19 case need to be delayed because of a decision that your
20 client made with respect to strategy?

21 MS. BROWNLESS: Because a continuance will allow
22 the Commission the fuller benefit of analysis of the
23 information that was provided. Power Corp --

24 COMMISSIONER JABER: We have got the prefiled
25 testimony, we will have the benefit of all the

1 cross-examination. What more will a continuance do that
2 we aren't able to do right now?

3 MS. BROWNLESS: Well, with all due respect, it
4 will give another set of eyes on confidential information
5 which was provided in toto as late as yesterday.

6 COMMISSIONER BAEZ: Can you use that to do
7 cross-examination today and tomorrow?

8 MS. BROWNLESS: Yes, ma'am. I'm not faulting
9 Power Corp's position. In other words, the position that
10 they took was that until they had an order in hand they
11 should not provide us with confidential information. Both
12 their own information as well as information associated
13 with the other bidder, whom I will refer to as Bidder B,
14 as well as information associated with the
15 Siemens-Westinghouse contract.

16 COMMISSIONER JABER: So you now have those
17 documents?

18 MS. BROWNLESS: The last of which I got
19 yesterday at 11:00 o'clock.

20 COMMISSIONER JABER: And you can do cross
21 examination this afternoon or tomorrow to allow you time
22 to review those documents, right?

23 MS. BROWNLESS: Yes, ma'am. And I have made
24 every diligent effort to review the documents that were
25 provided to me. There are and have been in the last 24

1 hours a series of motions, reconsiderations provided. I
2 think I counted five. Some of those motions, for example,
3 the one that has to do with Mr. Dickens' testimony, have
4 nothing to do with whether Panda has intervened in this
5 case or not intervened in case, and that is also true for
6 some protective orders, motions for protective orders that
7 were out there that I assume Power Corp would make in
8 either instance. So some of this is not associated with
9 our ability to look at complete material and confidential
10 material, but a lot of it is.

11 The point that the Commission wants to do -- I
12 want to get to whether the Commission continuing this
13 hearing to the Calpine, previous Calpine dates, which
14 would be November 29th, 30th, and December 1st, is
15 statutorily barred. I do not believe it is statutorily
16 barred because I think the time lines that are properly
17 invoked by Florida Power Corporation are keyed to 150 days
18 from the provision of the complete application to the
19 Public Service Commission.

20 And I believe, and I will accept Power Corp's
21 representation on this, they got a letter of completeness
22 August 1st from DEP, and that they did whatever they
23 needed to do so that the application they provided to the
24 Public Service Commission on August 7th with their filing
25 was, in fact, complete. So if that is true and you count

1 150 days from that, which is the keying, the triggering
2 event, the Commission actually has until January 4th of
3 2000 to put a report in the hands of DEP.

4 COMMISSIONER JACOBS: They countered that that
5 notice of insufficiency didn't toll.

6 MS. BROWNLESS: Well, there is two different
7 notices is my understanding of what happens. There is a
8 notice of completeness, which was issued on August 1st,
9 and it is the distribution, the receipt by the Commission
10 of a complete application which starts the 150-day clock
11 under 403, and then there is another separate
12 determination of sufficiency.

13 COMMISSIONER JABER: So do we have to find that
14 the application is complete or not complete?

15 MS. BROWNLESS: My understanding is that you do
16 not. Like I say, I accept on faith that what was provided
17 on August 7th was materials in compliance with DEP's
18 determination that on August 1st their application was
19 complete. So what I'm saying is that the statute, the
20 statutory limits can be complied with if you move this
21 hearing to the Calpine dates. Because you can, in fact,
22 do your process, get done, and vote and provide a report
23 to DEP by January 4th.

24 Now, I want to talk a little bit about your
25 rule. You have an existing rule. The purpose of that

1 existing rule was to implement the timeline in the
2 statute. It is the -- Statute 403.507 is what is cited as
3 the statutory basis for the rule. And in that rule you
4 have to hold the hearing within -- let me think, 45 days,
5 and you have to issue your order within 135 days. The 135
6 days, as I understand it, runs December 20th, which is the
7 day after you would be considering this item.

8 The argument I would make here is that we are
9 requesting a waiver from your procedural rule. I
10 appreciate Power Corp bringing to my attention that such a
11 waiver would be an emergency waiver under 120.542, the
12 grounds of which would be that the purpose of the
13 underlying statute has been achieved. I would suggest to
14 you that as long as you get a report to DEP in 150 days by
15 January 4th it has been achieved. And that there is a
16 substantial hardship on a legitimate party to this
17 proceeding if it is not waived, that the Commission would
18 benefit from its staff having more time to properly
19 address all the motions and for us to have more time to
20 look at this data.

21 I want to talk about Power Corp's comments that
22 indicate that a finding of insufficiency tolls or does not
23 toll the 150-day clock. They are absolutely right about
24 that. It is very clear that just because DEP issues a
25 notice of insufficiency does not mean this 150-day clock

1 has tolled. And to the extent that they read my pleading
2 to say that I believe that, I apologize. I obviously was
3 not clear. What I meant to communicate to the Commission
4 was that they have until November 6th to cure the
5 insufficiencies with their application which have been
6 identified by DEP and were identified on September 26th.

7 Until they have done that, the 150-day clock
8 cannot be vested. Because if they do not do that by
9 November 6th, then the time limits, all of the time limits
10 are automatically tolled. And I believe that Power Corp
11 has admitted that that is, in fact, the case. That if
12 they do not provide -- or do not satisfy DEP with regard
13 to sufficiency by November 6th, then everything is tolled
14 until they do so.

15 So I guess I would boil my argument down to the
16 following: I don't think you are precluded by statute
17 from granting our continuance. I believe we have
18 established grounds upon which one could rule that there
19 is an emergency waiver that should be granted. And I
20 would make as a final statement this offer: If this
21 hearing is continued until the 29th, 30th, and 1st, we are
22 willing to waive our right to file briefs. We are willing
23 instead to have oral argument at the end of the hearing
24 and to have the Commission rule immediately on same, or
25 rule subsequent to our oral arguments without the benefit

1 of brief on our part. We will be happy to pay for
2 additional court reporters to provide daily transcripts of
3 the need determination hearing so that transcripts could
4 be available the day after the hearing ends on December
5 2nd. If the Commission deems that it would like briefs
6 instead of oral argument, we will write our brief in seven
7 days.

8 COMMISSIONER JABER: Well, you only have one
9 issue to write about, right?

10 MS. BROWNLESS: Well --

11 COMMISSIONER JABER: How many issues are you
12 going to brief?

13 MS. BROWNLESS: I am going to brief several
14 issues.

15 COMMISSIONER JABER: The RFP issue and the
16 fallout issue?

17 MS. BROWNLESS: The RFP and the fallout, but
18 there is also other issues that I would be briefing.
19 Need, for example. But anyway -- and the legal issues
20 raised by Mr. Dickens.

21 So we offer all of that in an acknowledgement
22 that we do not wish to harm Power Corp. We do not think
23 Power Corp will be harmed as long as Power Corp has your
24 report and you have your report there within 150 days, it
25 can't be -- they cannot be harmed. And there is a means

1 for doing that here.

2 COMMISSIONER JACOBS: Mr. Sasso.

3 MR. SASSO: Thank you. Just by way of
4 background, we issued our RFP in January 2000. Panda
5 responded in March 2000. They were told that their
6 project would not be accepted in May 2000. We filed our
7 need petition on August 7th, which was complete with all
8 testimony and exhibits.

9 At the time that we filed the need petition, we
10 conferred with staff about scheduling. We wanted to file
11 sooner. We were looking for dates in mid-October to
12 ensure we would meet our constraints. There were dates in
13 mid-October that were occupied then by Calpine, and the
14 staff would not release them. The earliest possible dates
15 we could get were the end of October. And staff and the
16 company worked very diligently barely to fit in what we
17 need to fit in to meet the 150-day clock if we could get a
18 hearing at the end of October. It took a lot of back and
19 forth and a lot of aggressive scheduling by staff trying
20 to fit in time for briefing, time for recommended order,
21 time for this Commission to review this with due
22 deliberation and to issue a decision.

23 We were advised the latest possible date this
24 could all be accomplished would be the current hearing
25 dates and that would be close. We attempted to

1 accommodate the Commission's calendar and staff's concerns
2 by delaying our filing so that we wouldn't create a
3 problem with the 90-day clock, which we took very
4 seriously and the staff took very seriously. We filed on
5 August 7th. The prehearing officer then issued a rule
6 governing procedure on August 30th which set forth dates
7 for providing testimony, prehearing statements, a date for
8 a prehearing conference. The prehearing conference was
9 set for October 11th. That is when Panda's counsel first
10 showed up. Hadn't yet filed a petition for
11 determination -- for intervention as of that time,
12 indicated an intention to do so, and subsequently did do
13 so.

14 The Commission's own rules say that an
15 intervenor takes the case the way they find it. The staff
16 in case after case has embraced that rule and recommended
17 that the Commission adhere to it and the Commission has
18 done so. Here, however, Panda was permitted to intervene
19 late and the prehearing officer bent over backwards to
20 accommodate Panda with discovery after the discovery
21 cutoff, which was set for October 19th. This compromised
22 our hearing preparation. We spent the next several days
23 scrambling to get Panda materials, to get consent from
24 third parties to provide confidential materials, to make
25 our witnesses available for deposition, and we have done

1 so.

2 We have met Panda's every demand. We have
3 provided them all the information that the prehearing
4 officer contemplated. They were given their own
5 confidential information obviously immediately. So their
6 own direct interest, and they have that anyway, but their
7 own direct interest was immediately met with the provision
8 of materials we gave them.

9 The other bidder's materials were provided in
10 due course. So they had all of this. They had more than
11 actually they were entitled to under the prehearing
12 officer's order on procedure and this Commission's own
13 rules about the status of intervenors.

14 They now ask for a continuance of our case.
15 Why? Because they made an internal business judgment that
16 they didn't want to waste their money on our case until
17 they knew what the law was in Duke. Well, we have already
18 debated that issue. And with all respect the law in Duke
19 has made clear they shouldn't be here. But their decision
20 to wait until that event occurred and to conserve their
21 resources was no excuse to consume ours and to waste our
22 time, our resources, and the Commission's time and
23 resources with this feigned emergency.

24 What is the law? What are the principles that
25 the Commission should apply? Well, I have already

1 mentioned one, that the intervenor takes the case as they
2 find it. That is in the Commission's own rules. Another
3 rule, somebody who wants a continuance must move for a
4 continuance at least five days before the hearing. They
5 have violated that. Another rule, the Commission must
6 give us a hearing within 90 days of the time we file our
7 application, which would be November 4th. They have
8 proposed to have the Commission -- yes, ma'am.

9 COMMISSIONER JABER: You said they violated the
10 five-day rule?

11 MR. SASSO: Yes.

12 COMMISSIONER JABER: When did they file their
13 petition to intervene?

14 MR. SASSO: No, for the continuance. Requests
15 for continuance must be sought five days in advance of the
16 hearing.

17 COMMISSIONER JABER: What do you cite to for
18 that theorem?

19 MR. SASSO: If you will give me a moment, we
20 will find the citation. If I can come back to that, we
21 will look for that. It is in the Commission's procedural
22 rules on continuances.

23 MR. ELIAS: Actually, Commissioners, I have that
24 information right here. It is Rule 28-106.210 of the
25 Uniform Rules of Procedure, and it provides that requests

1 for continuance must be made at least five days prior to
2 the date noticed for hearing. I would add that Calpine --
3 I'm sorry, Panda was not a party at that point in time.

4 MR. SASSO: Another rule, the Commission, as we
5 have discussed, must give us a hearing within 90 days of
6 the date we file our materials and application petition,
7 which would run on November 4th. Although Panda has not
8 sought appropriately a waiver of that rule, they now
9 acknowledge they must.

10 Well, what must they do to get a waiver of that
11 rule? Even on an emergency basis if they want to get a
12 waiver of that rule notice has to be given to the public
13 and the Commission has to have 30 days to decide the
14 issue. So they are late on that, too.

15 The entire problem we have here, the emergency
16 they have constructed is a consequence of their own
17 strategic decision, perhaps their own economic decision,
18 but it is not a legitimate concern of this Commission. It
19 should not be imposed upon this petition. The rules
20 should be applied to merchants just as they are to
21 utilities, and they should be applied in an even-handed
22 manner.

23 As we have already discussed, we have already
24 been assured that even trying to move mountains we would
25 be barely able to meet the 150-day commitment if we have

1 the hearing today. We would certainly violate the 90-day
2 rule if we postpone the hearing. Panda has made no
3 appropriate showing for the continuance, for the waiver of
4 the 90-day rule, or for the Commission to demonstrate any
5 accommodation to its strategic decisions, and the
6 continuance should be denied.

7 COMMISSIONER JACOBS: Thank you. Any other
8 questions, Commissioners? Staff.

9 MR. ELIAS: Again, very briefly. I'm not going
10 to go through point-by-point with the arguments raised by
11 the parties, although I do disagree with some of the
12 comments that both of them made. From our perspective,
13 this issue is resolved very simply by applying the
14 standard that is in the uniform rule that relates to
15 continuances. And it says, and this is Rule 28-106.210,
16 Florida Administrative Code, "The presiding officer may
17 grant a continuance of a hearing for good cause shown."

18 Weighing the arguments of the parties, and in
19 particular the movant with respect to that obligation, we
20 don't believe that good cause has been demonstrated in
21 this case. The decision to intervene at the time, the
22 same frame for Panda's intervention was a matter strictly
23 within its control, and accordingly should not drive the
24 Commission's consideration of this case in a way that
25 could either compromise the quality of the decision or

1 cause us to miss a statutory deadline.

2 I would add that it is possible that the case
3 could be continued and the Commission could still meet its
4 obligation under Section 403.5067 to submit its report to
5 the Department of Environmental Protection within 150
6 days, but the time frame would be extremely tight. Both
7 the opportunity to file post-hearing briefs or statements
8 by the parties, time for staff to analyze and submit its
9 recommendation, time for all of you to consider that
10 recommendation, and time for us to prepare the order
11 memorializing your decision would be compromised over the
12 time frame that we typically employ in these kinds of
13 cases. But basically on a failure to demonstrate good
14 cause we would recommend that the motion for continuance
15 be denied.

16 COMMISSIONER JACOBS: Very well. Commissioners,
17 a motion?

18 COMMISSIONER JABER: I can move staff's
19 recommendation to deny the motion for continuance.

20 COMMISSIONER BAEZ: Second.

21 COMMISSIONER JACOBS: Very well. Show it moved
22 and seconded. And without objection, show that the motion
23 for a continuance is denied and we will proceed today with
24 the hearing. And that takes us to the last motion.

25 But before we do that, why don't we give the

1 court reporter a break. We will take a break for ten
2 minutes and return.

3 (Recess.)

4 COMMISSIONER JACOBS: We will go back on the
5 record, and we will move to the reconsideration of the
6 order granting a motion to strike Issue 6 and denying
7 motion to strike testimony. And that is your motion, Mr.
8 Sasso. You may proceed. Oh, I'm sorry, wait a minute.
9 We weren't sure if they wanted to participate on this
10 issue, so -- why don't we go ahead and proceed, because we
11 haven't decided whether or not they were going to
12 participate in this issue. In fact, why don't we do that,
13 but let's let Ms. Brownless get back in the room before we
14 discuss that, because that matter came up earlier, and I
15 think we probably need to clarify that before we proceed.

16 Ms. Brownless, I wanted to take up and clarify
17 the issue of -- because it came up in some discussion in
18 your arguments as to your participation in issues outside
19 of the issue on fairness of the bidding process. I heard
20 you to say that you felt that your intervention was
21 general in nature?

22 MS. BROWNLESS: Yes, sir. And I would note that
23 when I filed my petition for intervention, I raised the
24 issues, all of the issues, as issues that I believed were
25 in -- were disputed issues. All of the issues that had

1 been identified at that time by the staff. So essentially
2 the standard need determination issues are what I plead in
3 my petition for intervention. And I took -- and I would
4 also say that when I went to the prehearing conference,
5 although I had not filed the petition for intervention, I
6 did indicate that I would happily take positions at that
7 time. But because I had not filed a petition for
8 intervening, the prehearing officer told me that I should
9 be quiet, which I did.

10 COMMISSIONER JACOBS: Very well. Mr. Elias.

11 MR. ELIAS: Panda's intervention was not
12 limited. It was granted intervention to proceed -- to
13 participate in the proceeding and it wasn't limited to
14 just issues related to the bid. So I think it is
15 appropriate for them to participate in the consideration
16 of this issue.

17 COMMISSIONER JACOBS: The concern I have is the
18 context in which we find Panda in now. We are in a very,
19 very limited, time limited posture, and --

20 MR. ELIAS: Well, one thing, if it is a concern
21 about how much time we spend with respect to oral argument
22 on this --

23 COMMISSIONER JACOBS: No, it is going forward.

24 COMMISSIONER JABER: Mr. Chairman, may I ask a
25 question? When Florida Power filed the motion to strike,

1 Panda was not yet a party. And, in fact, they haven't
2 filed a response to the motion for reconsideration, have
3 they?

4 MS. BROWNLESS: No, ma'am. We have not filed a
5 written response, but that would not preclude us from
6 participating today and giving an oral response.

7 COMMISSIONER JABER: That is my question. If
8 they don't file a response, can they still make an oral
9 response today, and doesn't that also circumvent the rule
10 which says the intervenor takes the case as they find it?

11 MR. ELIAS: Well, the motion for reconsideration
12 of the order granting the motion to strike Issue 6 and
13 denying the motion on Mr. Dickens' testimony was only
14 issued on the 24th. The time hasn't run for filing
15 responses as permitted under the rules. I don't know
16 that --

17 MS. BROWNLESS: And I would add that Panda was
18 orally granted intervention on October 20th, and our order
19 came out on the 24th. So this rehearing motion was filed
20 when we were, in fact, full parties to the case.

21 COMMISSIONER JACOBS: Very well. We will
22 proceed.

23 MR. SASSO: May I begin by just briefly
24 addressing the matter on the table? Rule 25-22.0376 on
25 reconsideration of non-final orders provides, Subpart 5,

1 "Oral argument on any motion filed pursuant to this rule
2 may be granted at the discretion of the Commission. A
3 party who fails to file a written response to a point on
4 reconsideration shall be precluded from responding to that
5 point during oral argument."

6 MR. ELIAS: If I can address that. Again, this
7 motion was filed the day before yesterday, the 24th. The
8 time for filing a response under the rules is seven days.
9 And whether or not -- I don't think that that would be a
10 basis for application of a suggestion that Panda shouldn't
11 be allowed to participate in this issue given the time
12 frame in which the request was filed and its being
13 considered.

14 COMMISSIONER JACOBS: Commissioners, I raised
15 this as an issue. Is there any objection to -- we will
16 proceed and we will allow Panda to participate on this
17 issue.

18 Let me state for the record a concern. And,
19 quite frankly, it is the concern that was cited in the
20 arguments. I think the time that had been available to
21 the parties to put themselves in proper posture to
22 challenge the issue was sufficient. And I believe that
23 failure to respond even -- and I do -- taking into
24 consideration the idea that this motion was fairly short
25 in nature. But at the point in time when it was filed,

1 this case was proceeding in a very expedited fashion. And
2 it was -- we did have knowledge that the hearing was to be
3 today. The concern is to keep this case focused on what
4 it is to be focused on. Too much in need determinations
5 has occurred on threshold determinations.

6 And I would like for us to get into the guts of
7 a need determination for once if we can. And I don't want
8 to belabor these threshold preliminary issues. And that
9 is my real concern to be honest, which is not so much that
10 we restrict somebody in oral argument. I think Ms.
11 Brownless has much skill in presentation, and I would like
12 to hear her talk as much as anybody. But I would hate for
13 a party to come in and we begin to become tied down in
14 preliminary issues again and don't get into the guts of
15 what we need to be dealing with. And so having stated
16 that, we will go ahead and proceed and we will allow Panda
17 to participate.

18 MR. SASSO: Very well. Our motion is made in
19 exactly the spirit that Commissioner Jacobs mentions, that
20 we need to do in this proceeding is focus on what the case
21 is all about on the need for this plant. Staff has
22 injected an issue and has filed testimony that is quite
23 contrary to that spirit. Staff initially raised something
24 that was called Issue 6, which has now been stricken by
25 the prehearing officer that has gone through a number of

1 variations. But as it is reported in Mr. Dickens'
2 testimony, and I quote his testimony for a reason, the
3 issue is framed as is it reasonable to obligate Florida
4 Power Corporation's retail customers for the cost of the
5 Hines 2 unit for the expected life of the unit.

6 Now, the genesis of this testimony was to
7 provide a vehicle to advance staff's proposal. What was
8 the proposal? The proposal that staff is advancing
9 through Mr. Dickens' testimony is that the company be
10 allowed to build the plant, conditions for need are
11 established, put it in rate base for five years, but after
12 five years to subject the plant to a market test.

13 We are supposed to examine market alternatives
14 at that time. And if something appears five years out
15 after the plant is built that looks better than the plant,
16 then staff's proposal is that the Commission could
17 exercise authority to deny the company rate recovery based
18 on those later occurring developments.

19 Now, there are two problems with this and this
20 raises two key issues. First, the staff's proposal in Mr.
21 Dickens' testimony puts squarely at issue matters of rate
22 recovery. Second, staff's proposal in Mr. Dickens'
23 testimony proposes a change in this Commission's policy on
24 rate recovery. This is clear on the face of the testimony
25 and it is backed up by what Mr. Dickens has said in

1 deposition.

2 And our fundamental objection to this testimony
3 coming in is that this is a distraction from the issues
4 that ought to be before this Commission. The Commission
5 can and should do neither of these things in this
6 proceeding. This should not be a rate case and this
7 Commission should not use this proceeding as some type of
8 docket to change policy on rate recovery.

9 Now, the hearing officer agrees with much of
10 what I just said. She ruled that Issue 6 should be out
11 because cost recovery issues have no place in this
12 proceeding. She mentions in her order that might be
13 appropriate to raise in a different proceeding. But the
14 prehearing officer allowed the testimony to stay in
15 reasoning that the issue raised by staff, Issue 6, is
16 duplicative of other cost issues in this case, reasonable
17 costs, most cost-effective alternative.

18 Well, we respectfully disagree and suggest that
19 the prehearing officer overlooked the fact that staff
20 specifically wanted to separate out this issue because
21 they had no quarrel with our showing on these other
22 issues. They wanted to raise a different issue, a
23 discreet issue to advance a very particular proposal. Mr.
24 Dickens' testimony is constructed entirely around that
25 proposal, the rate recovery proposal. He says that in his

1 testimony. We can't make sense out of his testimony
2 without understanding that it is directed to that
3 proposal. So whether or not the issue is formally out of
4 the proceeding, it will be in the proceeding because we
5 can't discuss Mr. Dickens' testimony without knowing what
6 he was addressing, and he was addressing Issue 6, he says
7 that flat out. That is the basis for his testimony.

8 So insofar as the prehearing officer struck
9 Issue 6, the order is correct. But the basis for that
10 decision in striking Issue 6 in our view compels the
11 conclusion that the testimony must also be stricken.
12 Otherwise we will continue to be distracted in this
13 proceeding with matters that do not belong here,
14 potentially confusing the record and introducing
15 reversible error.

16 COMMISSIONER JACOBS: Ms. Brownless.

17 MS. BROWNLESS: Thank you. Well, I obviously
18 and absolutely disagree with virtually everything Mr.
19 Sasso has just said, and I have a fundamental reason for
20 doing that. We will hear testimony today from both Mr.
21 Crisp and Mr. Taylor that Florida Power Corporation used a
22 present worth revenue requirement analysis, a computer
23 program to tell exactly how much revenue would be
24 associated with all of the options being considered here
25 at Hines Unit 2, our bid as well as the other bidder.

1 Part and parcel of a present worth revenue analysis, PWR
2 analysis, is the time frame over which you would recover
3 the capital and O&M costs associated with that asset. In
4 this case it is Power Corps position it will be 25 years,
5 and that that is the appropriate recovery time. That is
6 one of the reasons that they have stated that they found
7 Panda's bid to be insufficient because we were only
8 willing to commit capacity for a five-year period.

9 So every need determination by virtue of the
10 fact that the analyses used contemplate recovery by the
11 investor-owned utility of the capital and O&M cost
12 associated with the plant being proposed contemplate cost
13 recovery. It is inherent in the entire analysis, it is
14 inherent in how you establish need, and it was done in
15 this case, as well. So the fact that this would be
16 somehow outside the realm, in other words, the issue of
17 cost recovery or revisiting cost recovery is absolutely
18 inaccurate, in my opinion.

19 Now, Mr. Sasso says, well, you struck Issue 6
20 and so you should strike Mr. Dickens' testimony because it
21 won't make any sense unless Issue 6 is there. I disagree
22 with that, as well. I absolutely concur with the
23 prehearing officer that the least-cost alternative is at
24 issue in this case and I think it elevates form over
25 substance to say that because Mr. Dickens references Issue

1 6 he could not also be referencing Issues 4 and 7, which I
2 believe are the least-cost alternative issues.

3 I would finally add that in his written comments
4 Mr. Sasso makes much of the fact that Mr. Dickens believes
5 the Hines Unit 2 to be the most cost-effective alternative
6 available. And to that I would reply Mr. Dickens I don't
7 believe on this point expresses the opinion of the staff
8 because I believe in the prehearing order they very
9 clearly stated that they have formed no opinion with
10 regard to which alternative is the most cost-effective.

11 So to the extent that those statements are in
12 his deposition, I would offer that those are his opinions
13 and not the opinion of the staff. Because I don't think
14 the staff has made that decision. And I believe it would
15 be inappropriate for them to do so prior to hearing all of
16 the evidence presented at hearing.

17 So with this in mind, I believe Mr. Dickens'
18 testimony should stay here. It is appropriate. Cost
19 recovery is inherent in all need determinations and it is
20 an issue that the Commission should hear.

21 And I would finally note that every need
22 determination of which I am aware and certainly all of the
23 need determinations that have been conducted in the last
24 five years have involved policy issues of one nature or
25 another, and the Commission is not precluded from

1 considering policy. It is incipient policymaking, as the
2 McDonald decision discusses in detail. That has been the
3 law in Florida for a long time. And one of the reasons
4 that the Commission is so reluctant to send its cases to
5 the Division of Administrative Hearings is because each
6 and every case presents mixed bags of policy and fact.
7 And I would suggest to you that in allowing Mr. Dickens'
8 testimony to stay and in considering this issue you are,
9 in fact, doing what you have always done and what it is
10 appropriate for you to do.

11 COMMISSIONER JACOBS: Mr. Sasso, that is an
12 interesting point. The point being couldn't this
13 testimony be taken to contest the idea that you raised
14 earlier that a minimum threshold for your willingness to
15 present independent power producers bid would be their
16 having committed to a 25-year firm power contract. And
17 because that testimony could be taken while it does say it
18 is specifically addressing that issue, the gist of it
19 speaks to the idea of a long-term requirement of
20 commitment, actually, to this asset.

21 MR. SASSO: Not at all, Commissioner Jacobs.
22 Mr. Dickens does not purport to offer any legal opinions.
23 Our argument was a legal argument about how the Duke case
24 applies to Panda's proposal. Mr. Dickens wasn't
25 suggesting he had anything to contribute to that and he

1 doesn't really attempt to.

2 He doesn't have any quarrel with our choice of
3 this plant or our decision to build this plant. He
4 identifies no reason whatsoever that the decision was
5 inappropriate or why we shouldn't go ahead and build this
6 plant or why we should have selected some other
7 alternative. He has no quarrel whatsoever with the
8 company's decision. He simply suggests that the
9 Commission should allow the company to build the plant,
10 put it in rate base, but then five years out impose a
11 policy that sharply departs from the longstanding
12 regulatory compact in this state.

13 As Ms. Brownless said it is inherent in every
14 need case when you are talking about a regulated utility
15 that the cost of the plants will be subject to recovery.
16 It is inherent. This Commission cannot take it upon
17 itself to change that because it is inherent in the
18 Statutes of Florida. It is part of the regulatory
19 compact. And so what Mr. Dickens is proposing is that
20 this Commission in this proceeding adopt not a policy that
21 has anything to do with the circumstances confronting this
22 company at this time on this plant, but to adopt a policy
23 that five years from now this Commission because of the
24 advent of restructuring should basically revisit the
25 regulatory compact, which it doesn't have the power to do.

1 COMMISSIONER JACOBS: But haven't we have in the
2 past, have we chosen to allow you to build excess
3 capacity, not put it in rate base for reasons similar to
4 what he is asserting, i.e., that the demand that you were
5 anticipating was not fully evident and therefore to put
6 that risk on ratepayers was not reasonable at that time?

7 MR. SASSO: Well, the Commission has on occasion
8 denied, denied need determinations on the basis that there
9 wasn't sufficient showing that the unit was needed. In
10 fact, in our Hines 1 case the Commission denied the
11 company the prerogative to go ahead and build additional
12 units because the capacity wasn't demonstrated to be
13 needed. There are other cases where the Commission has
14 permitted a utility to go ahead and build a unit that it
15 would grow into. But the rate treatment of those plants
16 is subject to discussion in rate cases. As long as the
17 utility is dedicating those resources to its customers and
18 that is a reasonable decision to make, the utility is
19 entitled under the Statutes of Florida to a reasonable
20 rate of return on its investment. That is the law.

21 Now, how the Commission actually implements that
22 law is through very well-defined procedures set out in the
23 statutes for rate setting. There are different
24 proceedings and different procedures that have to deal
25 with how the Commission addresses rate recovery. And, in

1 fact, the prehearing officer acknowledged that in her
2 order, that this would be appropriate to deal with in a
3 different type of proceeding. And, in fact, in the Hines
4 1 case, again, various parties attempted to inject issues
5 about cost recovery. And the Commission said not here, we
6 are not going to address them here. They need to be
7 addressed either in a rulemaking proceeding or in a rate
8 case, but not in a need case.

9 COMMISSIONER BAEZ: Mr. Sasso, then I guess you
10 would anticipate or were contemplating at some future date
11 rolling in, you know, addressing the cost recovery through
12 some type of rate proceeding, for this plant if it
13 eventually gets approved and built and, you know, at the
14 time it has got to be placed into rate base we address it
15 then. So what you are saying is that any cost recovery
16 discussion now is inappropriate.

17 MR. SASSO: Yes. In essence, the plant will be
18 put in rate base for surveillance purposes. Whether the
19 company will seek a rate increase is speculative and that
20 would be addressed in a rate case at some later time.

21 COMMISSIONER BAEZ: But at that point let's say
22 that that day came, the Commission would have authority to
23 set whatever -- if it came to it that it was less than 100
24 percent, the Commission does have that authority, does it
25 not?

1 MR. SASSO: Well, I don't want to predetermine
2 the outcome of any rate case. The Commission would look
3 at all the --

4 COMMISSIONER BAEZ: And I don't want you to,
5 but --

6 MR. SASSO: Yes, the Commission would look at
7 all the circumstances that it normally looks at in
8 considering whether a rate increase is appropriate. It
9 wouldn't involve just this plant.

10 COMMISSIONER BAEZ: Well, so then -- I guess so
11 then what you are saying, or would you agree that within
12 the universe of possible results is recovery less than the
13 entire -- what would have been the entire amount of this
14 plant?

15 MR. SASSO: Well, I would just agree that that
16 is a theoretical possibility.

17 COMMISSIONER BAEZ: Theoretically.

18 MR. SASSO: Provided that the Commission follows
19 the law and applies proper procedures and makes a reasoned
20 decision on the facts before it.

21 COMMISSIONER BAEZ: And at that time would it
22 not -- I guess wouldn't the company use as a buttressing
23 factor towards that 100 percent or towards that entire
24 recovery the fact that once upon a time we already
25 approved in a need determination the prudence of the

1 plant?

2 MR. SASSO: Yes. And that is the way the
3 regulatory compact operates. What the Commission
4 determines in this proceeding is is the need extant, is
5 there a need for this plant, will this meet the need to
6 provide adequate electricity at reasonable cost, is this
7 the most cost-effective alternative available. If the
8 Commission rules affirmatively on all of those issues as
9 we believe it should --

10 COMMISSIONER BAEZ: Then it should be a slam
11 dunk on the back end.

12 MR. SASSO: -- then it should be a slam dunk on
13 the other end. And we are not suggesting for one moment
14 that the Commission should not fully address those issues
15 and resolve them. What we are suggesting is that Mr.
16 Dickens' testimony does not take issue with any of those
17 matters.

18 COMMISSIONER BAEZ: Well, and wouldn't it be
19 proper for any type of circumstance to be discussed and
20 wouldn't Mr. Dickens' testimony have that character?

21 MR. SASSO: No, I disagree. What he is
22 proposing is a pure change in policy that would
23 essentially subject the utility to risk not on the basis
24 of anything that can be adduced at this hearing. I mean,
25 that is a fundamental tenet of his testimony; it is that

1 currently this is the best choice available, but there is
2 a prospect of change down the road. That is what he is
3 addressing. He is saying there are things that may happen
4 that I don't know about. In his deposition he said I
5 can't even put a 1 percent probability that it will
6 happen. But if it happens, this is the consequence. So
7 he is not addressing specific facts that will be adduced
8 in this proceeding.

9 COMMISSIONER BAEZ: Let's go back to what you
10 just said, if it happens, and I don't want to get into
11 that too much. But would it -- I guess if you can look
12 into the crystal ball for a moment and let's say it did
13 happen, wouldn't recovery of an asset like this be in
14 question anyway ultimately?

15 MR. SASSO: Oh, I don't believe so. You mean if
16 there were some later occurring change?

17 COMMISSIONER BAEZ: Right.

18 MR. SASSO: No, because it is well established
19 in the law and in regulatory policy that the development
20 of later events cannot be used. Hindsight review cannot
21 be used to disallow cost recovery based on a decision that
22 was reasonable when made. If this decision is a prudent
23 one at this time, if we are making a reasonable decision,
24 the right choice at this time given the options available
25 and the information known today, then it would be improper

1 to use hindsight five years after the plant is built to
2 look back and say, "Well, gosh, now things have changed
3 and maybe this wasn't such a great thing."

4 COMMISSIONER BAEZ: Okay. And my last question,
5 and this may be addressed to anyone of staff or Ms.
6 Brownless or yourself, can a need determination be granted
7 conditionally?

8 MR. SASSO: No. Certainly not with this type of
9 condition.

10 COMMISSIONER BAEZ: With any type of condition.

11 MR. SASSO: The point has been argued in the
12 Calpine docket, but also in this case, that the Commission
13 has, in fact, conditioned need cases before. But one has
14 to look closely at what the Commission has done before.
15 These are situations where a utility proves up at the
16 hearing certain facts about its current situation. In one
17 case, for example, TECO said this is the most
18 cost-effective alternative, the alternative we are putting
19 before the Commission because we have a DOE grant for \$120
20 million. And the decision was conditioned, it didn't even
21 have to be expressly conditioned, it was basically
22 rendered on the basis of the showing made by the utility
23 that it is the most cost-effective alternative because
24 they will get that grant.

25 And so you could say, well, it is conditioned on

1 their getting that grant, but it was simply based on the
2 set of facts proved up at that time. And because that was
3 within the control of this other party, you could say,
4 well, there was a condition on their delivering. But that
5 is the type of condition that the Commission has used
6 before. Basically, let's look at the entire set of facts
7 before us, we will make a ruling on the basis of those
8 facts, and our ruling is based on those facts.

9 COMMISSIONER BAEZ: Thank you.

10 MS. BROWNLESS: Commissioner, if I could just
11 briefly respond to that. The Big Bend 4 unit for TECO was
12 a unit that was granted a need determination and
13 subsequently Commissioner Cresse and a majority of
14 Commissioners disallowed a substantial portion of that
15 power plant from inclusion in the rate base for both
16 surveillance purposes and -- for surveillance purposes
17 they took it out of the rate base. So it is not true, as
18 Mr. Sasso indicates, although he may not have been aware
19 of that Big Bend 4 case because it has been awhile ago,
20 that if you make a determination here as to the need for a
21 particular power plant, you cannot in the future remove
22 all or part of that power plant from rate base.

23 MR. SASSO: May I respond just very briefly to
24 that?

25 COMMISSIONER BAEZ: Sure.

1 COMMISSIONER JACOBS: Very quickly.

2 COMMISSIONER BAEZ: I'm sorry.

3 MR. SASSO: If the Commission has that
4 authority, then it has that authority and nothing that Mr.
5 Dickens proposes will change that. Nothing that I say
6 will change that. As Ms. Brownless says, it may be
7 exercised in a subsequent proceeding using appropriate
8 procedures and statutory authority. But if the Commission
9 doesn't have that authority, putting a condition in our
10 need order cannot create it. So you either have it in
11 which event you don't need a condition, or you don't have
12 it in which event a condition does nothing for you.

13 COMMISSIONER BAEZ: Well, I guess that was going
14 to be my question. The instance in the Big Bend unit that
15 you just mentioned, that is always any need determination,
16 and I think Mr. Sasso would agree that everything is at
17 least implicitly subject to some cost recovery, you know,
18 whatever the Commission's discretion may be on the issue
19 later. So that is not -- you can call it a condition, you
20 can call it whatever you want, but it is not something
21 that follows every need --

22 MS. BROWNLESS: Well, I believe Mr. Sasso -- one
23 of Mr. Sasso's argument for excluding Mr. Dickens'
24 testimony is that if, in fact, a need determination is
25 granted here, he is de facto entitled to full cost

1 recovery later. He is de facto entitled to put the entire
2 cost of this plant into rate base.

3 COMMISSIONER BAEZ: And I think I would disagree
4 with that, and that is why I asked him, you know, later
5 on -- obviously anyone would expect a need determination
6 or the grant of a need determination to be used somehow to
7 support full recovery later on. And I think his
8 contemplation will be that very same thing. But we do
9 have authority that that not happen.

10 MS. BROWNLESS: Yes. And I also believe you
11 have the authority to grant conditional need
12 determinations, that you have that inherent authority.

13 COMMISSIONER JACOBS: Let me interject a point
14 here, because I think it -- more so than cost recovery, an
15 interesting point comes out of this discussion and it has
16 to do with who accepts the risk of stranded investment in
17 the event of fundamental market shifts. And if I buy the
18 argument that I hear you raising, Mr. Sasso, aren't you
19 assuming that risk?

20 MR. SASSO: Well, this is our point. If we are
21 starting to talk about stranded costs and so on, we are --

22 COMMISSIONER JACOBS: I hated for you to go
23 there, but --

24 MR. SASSO: Yes. We are out there talking about
25 restructuring legislation and the like and --

1 COMMISSIONER JACOBS: No, no. Understand what
2 I'm saying. What I'm saying is any discussion about that
3 issue will occur on the back end. And at that point in
4 time, once this decision is made, we have foregone any
5 opportunity to assess, have we not, whether or not you
6 should have incurred any risk for that if we say the full
7 scope of this project goes in and there is no opportunity
8 to question the assumptions regarding the life of this
9 asset. Because at the back end it is the regulatory
10 compact, in fact, that comes back and says, now, you did
11 what you did on good faith, and now in order to shift the
12 landscape, there is now this requirement that you -- that
13 that compact be honored, and so there is to risk any more.

14 And isn't the allegation here that we give -- do
15 we simply give some discussion to that premise, to that
16 assumption?

17 MR. SASSO: The assumption is not subject to
18 question. The legislature has set out a framework, a
19 statutory framework, and it says that with respect to the
20 decision to build a new plant the Commission has certain
21 criteria to apply. Is it needed? Is the power needed for
22 adequate power at reasonable cost? Is it the most
23 cost-effective alternative? Could it have been avoided or
24 mitigated through conservation? Inherent in that analysis
25 is a determination of the reasonableness about the

1 decision to build the plant.

2 The Commission is not called upon in the context
3 of making that decision to deal with rate recovery issues,
4 whether recovery ought to be allowed to disallowed,
5 whether rates ought to be increased or not. The statute
6 has very specific procedures for how the Commission must
7 deal with that. If the Commission has a concern, there
8 are procedures for how to initiate a proceeding to deal
9 with that concern. How to adjust rates. That is taken
10 care of in a different proceeding taking into account a
11 lot of other different considerations.

12 Today, as Commissioner Jacobs began by saying,
13 we are here to deal with the guts of the need case, that
14 is what this proceeding is all about. Now, there will be
15 ramifications, yes. Will they be completely dispositive
16 of any exposure to the company or the Commission in the
17 future? No.

18 But, again, I return to the fundamental point if
19 the Commission has authority in the future to take action
20 with respect to this plant or the rates of this utility,
21 then it has that authority, we don't have to deal with it
22 today. It can choose to exercise that authority in the
23 future based on an appropriate proceeding initiated in an
24 appropriate manner on the appropriate record. If it
25 doesn't have that authority, it makes no sense to be

1 talking about these issues devoid of that context, devoid
2 of that statutory framework and those procedures and
3 proper notice of those issues and a proper record looking
4 at all related rate issues. We have no business talking
5 about those things today if the Commission does not, in
6 fact, have that authority.

7 COMMISSIONER JABER: Mr. Sasso, if we approve
8 your need determination, it is a finding that construction
9 of this plant in the manner in which you construct it is
10 prudent. And I know that you are one of the best
11 practitioners we see before us. And I know that in two or
12 three or ten years from now if we come back and take a
13 second review of your plant and how you are recovering the
14 costs associated with that plant, you are going to say,
15 Commissioners, you can't do that because you already found
16 that the plant, the construction of the plant was prudent.
17 And absent a changed circumstance there is nothing you can
18 do, Commissioners. That is really a comment, not a
19 question.

20 MR. SASSO: I understand.

21 COMMISSIONER JABER: The question to you is
22 inherent in a need determination with respect to the
23 statute itself, it talks about adequate electricity at a
24 reasonable cost is really the effect to the retail
25 ratepayer, and whether we call it cost recovery or not, I

1 chose not to. If you think of it as the affect on the
2 retail ratepayer, if we don't do that now in the context
3 of determining the need, then when would we ever?

4 MR. SASSO: You will do that now. You will do
5 that now in looking at the present worth revenue
6 requirements for this plant. That is contemplated as part
7 of this proceeding. You will do that now in looking at
8 the cost-effectiveness of this alternative. You're right,
9 those are issues that go to impact on the ratepayer. That
10 is not what Mr. Dickens is addressing.

11 He is addressing five years out based on a
12 different record that doesn't exist today because the
13 facts don't exist today this Commission ought to take
14 certain action. That is his proposal. That is what
15 fundamentally he and the staff are trying to put before
16 this Commission.

17 And our point is it has no business here.
18 Because this Commission can act today only on the facts
19 known to this company and this Commission today. Whether
20 it should adopt a policy that if there are an entirely
21 different set of facts or technology or what have you five
22 years from now we should then be subject to second
23 guessing, that is a purely a legal issue we don't believe
24 the Commission has authority. But if you do, the time to
25 establish it is five years from now, not in this

1 proceeding.

2 COMMISSIONER JABER: And that philosophy is a
3 very narrow approach. I mean, today we know, even if we
4 just look at the creation of the Energy Commission, we
5 know that there will be changes in the next few years.
6 What those changes might be we don't know. And I think
7 that your rebuttal testimony goes to that and helps fill
8 the record in that regard.

9 MR. SASSO: That's fine. But that is not what
10 Mr. Dickens is addressing. He is not saying that under
11 the circumstances known today this plant should not be
12 built or is not the most cost-effective alternative. He
13 has said exactly the opposite in his deposition. Exactly
14 the opposite. He is not saying that.

15 He is saying five year out if circumstances
16 change and there is a whole new world, there is a
17 restructured world, there is deregulation, what have you,
18 then the Commission should take action. Should put a
19 condition in our need order that says it can go back based
20 on later occurring events that this Commission cannot
21 consider on the record in this proceeding to do something,
22 and that is inappropriate.

23 MS. BROWNLESS: If I could just add one other
24 point.

25 COMMISSIONER JACOBS: The last point.

1 MS. BROWNLESS: Yes, sir. There are facts that
2 can be established in this hearing with regard to
3 strategic matters considered by Power Corp in light of the
4 status of deregulation, in light of the likelihood that
5 the Hines Unit 2 plant would be stranded cost in a
6 deregulated market or in a market where the legislature
7 determined that generation assets should be divested.

8 I believe the testimony can be adduced that
9 there is evidence of record to show that those were
10 considerations used by Power Corp in selecting the Hines
11 Unit 2 unit. And so I think there are facts that can be
12 established here that touch on the very issues that
13 Mr. Dickens is attempting to address.

14 COMMISSIONER JACOBS: Very well. Any other
15 questions, Commissioners? Staff.

16 MR. ELIAS: Thank you, Mr. Chairman. First of
17 all, I want to clarify something that was said, because I
18 don't think, Commissioner Baez, you really got an answer
19 to your question about what would happen subsequently in
20 the inclusion of this plant in the calculation of Florida
21 Power Corporation's regulated earnings. They do not
22 need -- the company does not need further authority from
23 this Commission to report the expenses associated with the
24 Hines 2 facility in the calculation of its regulated
25 earnings. They will be included in the surveillance

1 reports that are filed pursuant to the rule.

2 Absent some Commission action to challenge the
3 inclusion of those expenses in the calculation of
4 regulated earnings, or a petition by the utility, or by
5 the Commission to change rates, there will be no
6 affirmative review of the decision to include the costs
7 associated with the operation of the plant once it becomes
8 operational. That is not to say that we are not without
9 the authority to do so, but there will not automatically
10 be a review at the time the plant comes on-line.

11 COMMISSIONER BAEZ: There has to be some
12 affirmative act --

13 MR. ELIAS: On somebody's part. We are here on
14 reconsideration, mistake of fact or law overlooked which
15 if had been considered would yield a different result. If
16 I can read briefly from the order, I think I can bring
17 this to closure pretty quickly. And I'm reading on Page
18 5. "I do not find that the subject matter of preliminary
19 Issue 6 is beyond the scope of this docket. The impact on
20 the utility's future rates of an affirmative determination
21 of need is a critical consideration. A finding of need is
22 a determination by the Commission that the utility's plan
23 to construct a proposed unit is prudent. Once that
24 prudence is established, and absent some intervening
25 changed circumstances, the Commission is obliged to allow

1 the utility the opportunity to recover these costs.
2 Therefore, consideration of issues related to the prudence
3 of this proposed plant is appropriate as part of the
4 determination of need."

5 And then there is a section that goes on to say
6 that specific cost recovery issues are not appropriate.
7 But further down, "The preliminary issues that have been
8 identified and agreed upon by staff and Florida Power
9 Corporation go ultimately to the prudence of the
10 construction of the Hines 2 unit. Specifically,
11 preliminary Issues 4 and 7 address the need for
12 electricity at reasonable cost and whether the proposed
13 plant is the most cost-effective alternative available.
14 In fact, the testimony proffered by staff Witness Dickens
15 provides his opinion on whether the construction of this
16 plant is the most cost-effective alternative on a
17 long-term basis and offers other alternatives. The
18 company's rebuttal Witness Cicchetti, purports to explain
19 in his testimony why Mr. Dickens' conclusions and
20 asymmetrical recommendations are contrary to both
21 regulatory principles and competitive market and fail to
22 achieve best cost.

23 In addition, the testimony of FPC rebuttal
24 Witness Flynn discusses why he believes the concept of
25 entering into short-term power purchase agreements to meet

1 the need for capacity resources is flawed and why a
2 long-term solution is needed. Without commenting on the
3 merits of any of the testimony, I note that without
4 question the testimony of these three witnesses addressed
5 whether the construction of the Hines 2 unit is the most
6 cost-effective alternative available."

7 I have not heard anything here this morning that
8 suggests that those determinations were somehow based on a
9 mistake of fact or law. That is the standard on
10 reconsideration, and for those reasons the motion should
11 be denied.

12 And I do want to make one other brief point. We
13 could spend days debating the esoterics of recovery and
14 prudence and the larger issues of what the Commission may
15 or may not do with respect to future plants. But I think
16 that is getting a little bit beyond what is at issue here,
17 which is specifically the application of the criterion of
18 Section 403.519 to the petition that is put before the
19 Commission.

20 And there are other sections of Chapter 366 that
21 were not discussed in the context of this discussion that
22 may bring to bear on the question. And if I had your time
23 for a week I might go into some of those, but I want to
24 get to it.

25 COMMISSIONER JACOBS: Commissioners? Well, I

1 guess we should first emphasize the standard that is to be
2 applied to this decision --

3 MR. ELIAS: Is reconsideration.

4 COMMISSIONER JACOBS: -- and that is whether the
5 prehearing officer overlooked some --

6 MR. ELIAS: Material fact or matter of law which
7 if properly considered would yield a different result.

8 COMMISSIONER JACOBS: I would offer these
9 comments. In reviewing Mr. Dickens' testimony, I think it
10 raises some very provocative and I think thought-provoking
11 issues that have -- absolutely have merit in our
12 considerations. I do get to one portion of his testimony
13 that I think begins to give me some concern, and I will
14 just toss this before you and hear your comments about it.
15 I think all of the testimony leading up to but beginning
16 at -- then beginning at Page 7, in fact, the last question
17 that is posed and the answer to that question, and
18 specifically the answer to that question really begins to
19 focus on recovery issues.

20 I am persuaded that a need determination is not
21 a proper forum for recovery issues. They have become
22 complex enough. If we were to begin to border into all
23 the subtleties of economic recovery for a plant, once need
24 is determined they will become interminable and they would
25 basically have -- given the complexity that now is

1 emerging in this market, they will become impossible to
2 resolve. I think it will be an unwise -- even if we have
3 ventured into that arena before, I think given the
4 emerging complexity of the need determination process it
5 is unwise to focus that process very deeply into many of
6 the subtle issues of recovery.

7 I think the answer to the last question really
8 begins to move fairly strongly into those issues. And I
9 would say if there is not strong legal precedent, then we
10 would want to begin to establish strong precedent as to
11 what we would anticipate need determination proceedings,
12 the scope of them to be. And I would argue that this
13 portion of the testimony would take us beyond what we
14 would really want these proceedings to encompass. And I
15 will be very active to hear your comments about that.

16 COMMISSIONER BAEZ: I think what I would most
17 have a problem with if there was an issue -- if there had
18 been an issue identified that acted as a place holder on a
19 policy issue. And I think we have done away with that.
20 And any discussion as to an eventual or a speculative
21 regulatory scheme or any change in legislation to me at
22 some point reaches the same level of challenging any
23 speculation or any projection over fuel costs or any other
24 variable that plays a part in establishing the
25 cost-effectiveness, or the reasonableness, or the prudence

1 of a certain alternative.

2 So if we know that it is out there, why do we
3 have to turn a blind eye to it? And certainly in terms of
4 relevance, it is relevant enough to be discussed. I mean,
5 I don't think that it necessarily has a place as a
6 specific or discreet issue as part of the determination,
7 but if it rises to the level of relevance as something to
8 be discussed, something that may play a part or have some
9 discussion. As a matter of fact, you know, if the company
10 itself that is proposing the plant had those same
11 considerations on some level as to whether, you know, how
12 to evaluate its own proposal, then I see no reason -- I
13 see no reason why it shouldn't be allowed.

14 So, I guess going back, my problem was that it
15 be discussed as, you know, perhaps a policy issue in the
16 context of a need determination, I don't think that is any
17 longer the case, but the testimony is still relevant.

18 COMMISSIONER JACOBS: If we impose such a broad
19 standard of relevancy in the need determination, how do we
20 avoid subsequently -- how do we avoid prejudging issues
21 that would be held for subsequent review?

22 COMMISSIONER BAEZ: Aren't we going to be
23 accused of prejudging an issue on the back end anyway? I
24 mean, I don't think you can avoid that.

25 COMMISSIONER JACOBS: Exactly my point.

1 COMMISSIONER BAEZ: Anything that you said
2 before is always going to be get held for you or against
3 you in one way or another when the time comes, I guess, is
4 what we are really talking about.

5 COMMISSIONER JACOBS: I don't think we have to
6 accept that premise. I don't think we have to accept the
7 idea that we automatically have to refute some idea that
8 we have automatically prejudged. I think we can -- and I
9 am very confident that as an agency that we can evaluate
10 and review these applications in a professional and a
11 discreet manner. I think we can look very carefully at
12 those issues in the proper context in a review proceeding.
13 And, in fact, I think we can refine the process because
14 if -- and, by the way, I would agree with the idea that a
15 policy discussion will be appropriate, and I would in
16 conjunction with -- well, let me not make a motion or move
17 toward anything relating to a motion, but I would agree
18 with the idea that a policy discussion needs to be held.

19 But in my mind if we could begin to enunciate
20 some thoughts about -- in the bidding process for
21 instance, how can a bidder come in and in this very case
22 one of the things that intrigued me about this case,
23 shouldn't Panda or some other company be able to come in
24 and argue that a 25-year threshold for them to be
25 qualified or for their bid to be assumed qualified is

1 unreasonable and here are the reasons why and, therefore,
2 why we should give further consideration to their proposal
3 as a least-cost alternative.

4 COMMISSIONER BAEZ: Isn't that a question you
5 are going to be answering? I mean, in evaluating the
6 cost-effectiveness of the proposal that is on the table
7 you are going to have to ask yourself or answer questions
8 like is a 25-year term reasonable under the circumstances.
9 And if you are not allowed to consider the circumstances
10 that are before -- you know, that are there, why should
11 you have to turn a blind eye towards the whole universe of
12 circumstances.

13 COMMISSIONER JACOBS: In the context of
14 evaluating the sufficiency of the bidding process, I think
15 it is absolutely appropriate. We can do that. We can
16 come back and make a determination that a case made by a
17 bidder that brought out all of those issues was
18 effectively made and perhaps that bid should have won out.
19 In that context I think it is absolutely great.

20 But if we then make a decision that even having
21 accepted all of those things and that that argument was
22 made but was not made persuasively, we don't want to be
23 then in a posture to have to prescribe -- having made that
24 determination on that bid proposal, have to prescribe cost
25 recovery measures for the plant going forward. That is

1 the box that we risk putting ourselves in, and the one
2 that I think we must aggressively avoid.

3 COMMISSIONER BAEZ: I disagree with you to the
4 extent that we are already in a box. You know, so if we
5 are going to be in a box, then I want as many toys in the
6 box with me as not. It's really lonely in the box.

7 COMMISSIONER JACOBS: Unfortunately, I could
8 agree with you. But we keep getting the box closed on us
9 by some authority outside of the building. I want to be
10 able to play. We can have the toys, but if we can't play
11 it doesn't make a bit of difference if we have got them
12 there.

13 COMMISSIONER JABER: Commissioner Jacobs, the
14 difference between having the box closed on us than having
15 ourselves close the box is a big difference.

16 COMMISSIONER JACOBS: Right.

17 COMMISSIONER JABER: So I think allowing
18 ourselves options is within our control. You know,
19 FPL/Okeelanta, the decision we just made at agenda, how
20 much discretion did we really have after this agency said
21 that that contract was prudent to enter into and, in fact,
22 the Commission approved it? Do you remember when it came
23 to us at agenda, we didn't have too much discretion. It
24 was all said and done because a decision had been made
25 with respect to prudence.

1 I don't know if we will accept Billy Dickens'
2 testimony at the end of the day. It wasn't my job, nor do
3 I think it is our job today to make a ruling as to whether
4 we are going to accept as feasible any options that
5 Mr. Dickens gives us or any of the rebuttal witnesses.
6 The question for me was do we preclude the testimony or do
7 we allow it to be cross-examined. And I think to the
8 degree it could go to other issues I wanted to err on the
9 side that it went to other issues and allow it to be
10 cross-examined, not to close the box on ourselves.

11 COMMISSIONER JACOBS: Okay. Well, I can't make
12 a motion.

13 COMMISSIONER BAEZ: I just realized I am the
14 only one that can.

15 COMMISSIONER JACOBS: Yes.

16 COMMISSIONER BAEZ: Well, based on what I have
17 said anyhow, and what is the correct -- can I ask counsel
18 what the correct motion is, the proper form?

19 MR. ELIAS: Either to accept to staff's
20 representation to deny --

21 COMMISSIONER BAEZ: We would move denial of
22 reconsideration?

23 MR. ELIAS: Yes.

24 COMMISSIONER BAEZ: So moved.

25 COMMISSIONER JABER: Second.

1 COMMISSIONER JACOBS: Very well. Show that it
2 is moved and seconded. I will dissent in part basically
3 following my discussion. I would strike that portion of
4 the testimony beginning in the last question on Page 7 and
5 the response to that for reasons that I have described
6 already. And so for the record show that the motion --
7 the motion for reconsideration is denied. Okay.

8 Very well. Are there any other preliminary
9 matters before us?

10 MS. BROWNLESS: Yes, sir. I would like to
11 discuss the motions for judicial notice and in particular
12 items included in Power Corp's request for official
13 recognition or judicial notice. And that was filed
14 yesterday, I guess.

15 COMMISSIONER JACOBS: Did we get those, counsel?
16 Do I have a copy of that?

17 MS. BROWNLESS: I hope it is in there.

18 COMMISSIONER JACOBS: Very well. Mr. Sasso, do
19 you have any objection?

20 MR. SASSO: Pardon me?

21 COMMISSIONER JACOBS: Do you have objections to
22 the requests for judicial notice filed by Panda?

23 MR. SASSO: No, we don't.

24 COMMISSIONER JACOBS: Very well.

25 MS. BROWNLESS: It is their motion for judicial

1 notice. Everyone, every party in this case has filed a
2 request for judicial notice, the staff, myself, and FPC.

3 COMMISSIONER JACOBS: I show that the motion for
4 judicial notice under your signature and then a motion for
5 official recognition from Power Corp.

6 MS. BROWNLESS: Yes, official recognition and
7 judicial notice --

8 MR. SASSO: We had an agreement with staff to
9 present a joint request for official recognition or
10 judicial notice. I thought we had that all worked out.

11 MR. ELIAS: Do all three Commissioners have all
12 three requests?

13 COMMISSIONER JACOBS: I didn't have either one.

14 MR. ELIAS: Perhaps we could defer --

15 COMMISSIONER JACOBS: Why don't we go ahead and
16 take a lunch break, come back, resolve this issue and then
17 we can swear witnesses and proceed.

18 MR. SASSO: Well, I'm not sure I understand what
19 the issue is. Is there some objection?

20 MS. BROWNLESS: Yes, I do object. I object to
21 Item 4, 5, and 6 on your request for official recognition
22 or judicial notice, because I don't think they fall within
23 90-202(6), which is the rationale you have presented in
24 your request for official recognition.

25 Commissioners, these are newspaper articles.

1 And, therefore, I do not think they are appropriately
2 judicial noticed for what I believe to be the reason Mr.
3 Sasso is presenting them, which is the truth of the
4 matters asserted within the articles. Now, if is he
5 offering them --

6 COMMISSIONER JACOBS: We are not going to do
7 arguments now. We are going to break for lunch so that we
8 can get copies and have a chance to review them. I
9 personally -- I don't know if the other Commissioners
10 have, but I haven't had a chance to review these. We will
11 do that. We will come back and we will resolve this after
12 lunch and then we will swear witnesses and proceed.

13 We will be back at 1:00 o'clock.

14 MS. BROWNLESS: Thank you, sir.

15 (Lunch recess.)

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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 Reporting
6 FPSC Commission Reporter, do hereby certify that the
7 Hearing in Docket No. 001064-EI was heard by the Florida
8 Public Service Commission at the time and place herein
9 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 95 pages, Volume 1, constitutes
12 a true transcription of my notes of said proceedings.

10

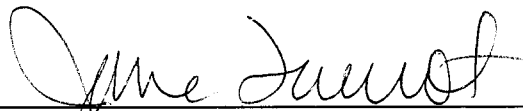
11 I FURTHER CERTIFY that I am not a relative, employee,
12 attorney or counsel of any of the parties, nor am I a
13 relative or employee of any of the parties' attorney or
14 counsel connected with the action, nor am I financially
15 interested in the action.

13

14 DATED THIS 1ST DAY OF NOVEMBER, 2000.

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

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