

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR.

PAY ATTENTION, YOU SHALL BE
HEARD.

GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.

PLEASE BE SEATED.

>> OKAY.

WELCOME TO THE FLORIDA SUPREME
COURT.

THE FIRST CASE ON THE DOCKET
THIS MORNING IS CITIZENS OF THE
STATE OF FLORIDA V. GRAHAM.
COUNSEL?

>> GOOD MORNING.

MAY IT PLEASE THE COURT, I AM
JOHN TRUITT REPRESENTING THE
CITIZENS OF THE STATE OF
FLORIDA.

ALSO ARGUING ON BEHALF OF THE
APPELLANTS IS MR. JON MOYLE.
WE'VE AGREED TO DIVIDE OUR TIME
EIGHT MINUTES EACH, RESERVING
FOUR FOR REBUTTAL.

I'D LIKE TO SPEND MY TIME ON THE
SUBJECT MATTER JURISDICTION AND
THE ABILITY TO GRANT THE RELIEF
REQUESTED BY AN ADMINISTRATIVE
AGENCY.

THE THRESHOLD QUESTION ON THIS
MATTER IS DO FLORIDA STATUTES
ALLOW THE PUBLIC SERVICE
COMMISSION TO GRANT MINING
INVESTMENT RECOVERY TO REGULATED
ELECTRIC UTILITIES.

QUITE SIMPLY, THE ANSWER IS NO.
WE'RE RESPECTFULLY ASKING THIS
COURT DRAW A LINE BECAUSE
FLORIDA LAW DOES NOT GIVE THE
COMMISSION THAT POWER TO--

>> LET ME ASK YOU THIS.

IT DOESN'T EXPRESSLY PRECLUDE
IT, DOES IT?

>> YOUR HONOR, NO.

>> OKAY.

SO YOUR ARGUMENT THAT IT'S
PRECLUDED BY IMPLICATION?

>> THE ARGUMENT IS THAT AS A
CREATURE OF STATUTE, YOUR HONOR,
THEY MUST BE EXPRESSLY GRANTED
POWERS, AND THERE'S NO--

>> WELL, BUT I DON'T UNDERSTAND
HOW THIS DOES NOT JUST FLOW FROM
THEIR POWER TO REGULATE RATES,
BECAUSE THIS IS ABOUT OBTAINING
A NECESSARY COMPONENT FOR THE
PRODUCTION OF POWER, THE FUEL,
IS THAT CORRECT?

>> FUEL IS NECESSARY, YES, YOUR
HONOR.

>> AND THIS IS ABOUT OBTAINING
THAT.

AND IN OBTAINING THE WAY OF
BEING COMPENSATED FOR THAT IN
THE RATE-MAKING PROCESS.

I'M JUST REALLY PUZZLED BY HOW
THIS IS NOT A MATTER THAT IS
DIRECTLY RELATED AND INHERENT IN
THE RATE-MAKING AUTHORITY THAT
THE COMMISSION HAS.

NOW, I UNDERSTAND THAT YOU MIGHT
ARGUE THAT THIS IS A BAD IDEA,
YOU MIGHT ARGUE THAT IT'S NOT
PRUDENT, ALTHOUGH I DON'T THINK
YOU'VE ARGUED THAT.

BUT THOSE ARE DIFFERENT
QUESTIONS THAN WHETHER THIS IS
RELATED TO THE, AND INTEGRAL TO
THEIR DETERMINATION OF RATES.

WHY AM I WRONG?

>> WELL--

[INAUDIBLE]

YOUR HONOR.

FIRST OF ALL, WHEN YOU LOOK AT
THE STATUTES WHERE IT REGARDS
RATES AND THE RATE-SETTING
POWER, IT DISCUSSES THE SERVICE.
NOW, THE STATUTE DOES NOT
SPECIFICALLY DEFINE SERVICE, BUT
IF YOU LOOK AT THE BUSINESS
SCOPE OF A REGULATED UTILITY, IT
SAYS REGULATION, TRANSMISSION
AND DISTRIBUTION.

THERE'S A CONTINUUM WHEN YOU LOOK AT THIS PROCESS. YOU HAVE THE MINING, YOU HAVE THE PRODUCTION OF THE INPUTS FOR THE MINING, THEN YOU HAVE THE SALE OF THE INPUTS FROM THE UTILITY.

THAT'S WHERE THE LINE IS. AND WE'RE NOT ASKING THIS COURT TO DRAW A LINE THAT HASN'T BEEN RECOGNIZED BY THE COMMISSION BEFORE.

IN 1989 IN 21847, IN EXAMINATION OF A WHOLLY-OWNED SUBSIDIARY THAT HAD COAL MINING INVESTMENTS, THE COMMISSION LOOKED AT THAT CASE AND SAID THAT IS NOT JURISDICTIONAL, AND THEN WENT THE NEXT STEP TO SAY, WELL, WHEN WE EXAMINE THE COST OF FUEL, WE MUST EXAMINE IT AS THOUGH IT WERE AN UNAFFILIATED TRANSACTION.

>> SO LET ME ASK YOU THIS, IF FLORIDA POWER & LIGHT ACTUALLY OWNED THIS PROPERTY AND WAS NOT ENTERING INTO SOME KIND OF AGREEMENT WITH A THIRD PARTY, WOULD YOUR ARGUMENT STILL BE THE SAME?

>> YES, YOUR HONOR. AND THERE'S A FUNDAMENTAL ISSUE WITH NATURAL GAS IN AND OF ITSELF.

IN ALL OF THE THINGS WHERE CAPITAL INVESTMENTS WHERE THE PROFIT HAD BEEN RECOVERED BY THE COMMISSION, THEY'VE BEEN ACTUAL, TANGIBLE ITEMS.

HERE THE LAW GOVERNING THE ACTUAL PROPERTY RIGHTS IS OKLAHOMA LAW WHICH THE COMMISSION OFFICIALLY RECOGNIZED AND FPL AGREED TO IN THE LOWER CASE THAT THEY DON'T ACTUALLY OWN ANY NATURAL GAS WHATSOEVER IN THIS PROJECT.

THE CAPITAL INVESTMENTS ARE MERELY A RIGHT TO EXCLUSIVELY ENTER LAND AND ATTEMPT TO

CAPTURE IT.

>> BUT IF THEY DO, IN FACT,
CAPTURE THE NATURAL GAS, THEN
FPLE MUST HAVE SOME KIND OF
AGREEMENT THAT THEY GET A
CERTAIN PERCENTAGE OF IT?

>> CORRECT, YOUR HONOR.
THEY GET A CERTAIN PERCENTAGE,
HOWEVER, THERE ARE OTHER UNNAMED
INVESTORS IN THIS DEAL IN EVERY
SINGLE WELL.

IT'S UNKNOWN THE EXACT
PERCENTAGE, BECAUSE IF AN
INVESTOR COMMITS--

>> THAT REALLY IS NOT A LOT
DIFFERENT THAN IN THE OLD DAYS
WHERE YOU'D GET A COAL BROKER,
AND THE COAL BROKER WOULD OBTAIN
THE PRODUCTION, ENTIRE
PRODUCTION OR PARTIAL PRODUCTION
FROM COAL MINING AREAS, AND THAT
WAS USED, WASN'T IT?

>> THE FUEL IS PURCHASED ON THE
MARKET ITSELF, YOUR HONOR, AND
THE ISSUE IS, IS--

>> WELL, AS YOU'RE TALKING
ABOUT, YOU CHANGED THE QUESTION
ON ME RIGHT THERE WHEN YOU SAID
THAT.

>> OKAY, I'M SORRY.

>> THE QUESTION THAT JUSTICE
QUINCE, YOU KNOW, PRESENTED IS
THAT IT'S IN THE GROUND, AND
IT'S ALWAYS-- I MEAN, THE COAL
SOURCE WAS IN THE GROUND, AND
THE ONLY DIFFERENCE IN THAT, IT
SEEMS TO ME AND TELL ME WHERE
I'M WRONG, IS THAT THEY'D USE A
COAL BROKER, AND THE COAL BROKER
WOULD GO FIND THE PRODUCER WHO
WOULD GIVE THEM PRODUCTION, AND
THEY WOULD, THEY WOULD BUY THE
ENTIRE PRODUCTION OF A CERTAIN
OPERATOR.

AND HOW IS THAT DIFFERENT THAN
SAYING I'LL BUY, WE GET A
CERTAIN PERCENTAGE OF THE GAS
THAT COMES OUT OF THE GROUND IN
THIS DEAL?

>> I BELIEVE, YOUR HONOR,

HISTORICALLY IT'S ALWAYS BEEN THE SAME IN TERMS OF-- THAT WAS, THEY WERE PURCHASING THE ENTIRE PERCENTAGE.

HOWEVER, THEY ALSO, FIRST, FOLLOWED THE LONGSTANDING TRADITIONS, THERE WAS NO PROFIT ON THE FUEL COMMODITY ITSELF WHICH, AGAIN, THEY'RE NOT PURCHASING A FUEL COMMODITY HERE AT ALL.

THEY'RE PURCHASING A LICENSE TO ATTEMPT TO GET FUEL.

SO THAT'S ONE FUNDAMENTAL DIFFERENCE.

AND THE OTHER FUNDAMENTAL DIFFERENCE IS AGAIN THIS THAT INSTANCE THEY'RE MERELY PURCHASING A KNOWN QUANTITY FOR A KNOWN PRICE ON THE OPEN MARKET.

THEY'RE PURCHASING THOSE INPUTS THAT COME IN, AND THAT'S WHY WE SAY THAT LINE THAT WAS IN 21847 NEEDS TO EXIST, BECAUSE THIS IS NO INDICATION IN STATUTE THAT THE LEGISLATURE GAVE THE COMMISSION A COMPLETE CRADLE-TO-GRAVE OVER ELECTRICITY GENERATION.

MINING--

>> SO IS THE PROBLEM HERE THAT THERE MAY NOT BE THE GENERATION OF THIS NATURAL GAS?

IS THAT--

>> NO, YOUR HONOR.

THE PROBLEM IS THAT THEY'RE ALLOWING AN ELECTRIC UTILITY TO GO FAR BEYOND THE SCOPE OF ITS STATUTORY DEFINITION, FAR BEYOND THE SCOPE OF WHAT THE COMMISSION HAS EVER RECOGNIZED BEFORE.

THAT IS THE CONCERN, BECAUSE AGAIN, IT'S VERY LIMITED.

OBVIOUSLY, THE LEGISLATURE WAS INTELLIGENT AND WEIGHED THE RISKS OF THE MONOPOLY AND WHAT THE UTILITY SHOULD BE COMPENSATED FOR.

BUT THIS RISK SHIFTING, I THINK

AS EVERYONE WOULD ACKNOWLEDGE--
DRILLING FOR NATURAL GAS AND
THOSE TYPES OF THINGS-- IS A
RISKY PROPOSITION.

THERE'S NOWHERE IN THE STATUTE
THE LEGISLATURE SAYS, YES, YOU
CAN SHIFT ALL THAT RISK TO THE
CUSTOMERS REGARDLESS OF WHAT YOU
GET, AND THEIR EXPERT
ESTIMATED--

>> AGAIN, DOESN'T THAT COME BACK
TO JUSTICE CANADY'S QUESTION?
THAT YOU'RE OBJECTING, OR THE
OBJECTIONS ARE TO THE RISKINESS
OF THE OPERATION AS OPPOSED TO
ITS RELATIONSHIP TO THE STREAM
OF ENERGY TO CONVERT THE POWER.

>> NO, YOUR HONOR.

WE'RE SAYING--

>> THAT'S A BAD IDEA.

THAT'S WHAT YOU SEEM TO BE
MAKING THE ARGUMENT ON.

>> THAT IS AN ARGUMENT, BUT THE
MAIN ARGUMENT IS THAT THE
STATUTE SAYS, THE STATUTE
DOESN'T ANYWHERE EXPRESS THAT AN
ELECTRIC UTILITY CAN GO FAR
OUTSIDE THE SCOPE OF ITS
BUSINESS AND INTO THE PRODUCTION
OF THE--

>> I DON'T UNDERSTAND--

>> HOW DOES THIS DIFFER FROM, IT
SEEMS TO ME A YEAR OR SO AGO WE
WERE HERE ON A DUKE ENERGY ISSUE
INVOLVING A NUCLEAR PLANT.

AND SUBSEQUENTLY, THEY DIDN'T
CARRY THROUGH WITH IT.

SO HOW DOES THIS DIFFER FROM
ALLOWING THAT, THAT NUCLEAR
PLANT PASS THROUGH VERSUS THIS
ONE?

HOW DOES IT DIFFER?

>> THAT, THE CRITICAL DIFFERENCE
IS THAT ONE ACTUALLY HAS A
STATUTE FOR EARLY COST RECOVERY
FOR NUCLEAR PLANTS THAT THE
LEGISLATURE DRAFTED HERE.

MINING, INVESTMENTS IN FUEL
PRODUCTION AND ANY OF THAT IS
NOWHERE IN ANY OF THE PSC'S

ENABLING STATUTE.
IT'S A COMPLETELY DIFFERENT
CHAPTER REGULATED BY A
COMPLETELY DIFFERENT AGENCY.
THE COMMISSION 26 YEARS AGO
RECOGNIZED THE LAND THAT YOU
PURCHASE FOR GENERATION AND
DISTRIBUTION, THERE'S NOTHING TO
INDICATE THAT HAS CHANGED NOW.
IT'S EXACTLY THE SAME.
SO I SEE I'M GETTING NEAR
MR. MOYLE'S TIME.

WE WOULD LIKE TO SAY THAT WE
RESPECTFULLY REQUEST THIS COURT
VACATE THE ORDER AND REMAIN WITH
THE INSTRUCTION THAT THEY DO NOT
HAVE THE AUTHORITY TO PRESERVE
GAS RESERVE INVESTMENTS.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, I'M JON
MOYLE, AND I'M REPRESENTING THE
FLORIDA INDUSTRIAL POWER USERS
GROUP, LARGE USERS.

WE REFER TO THEM AS FIPUG.
WE'VE BROUGHT THREE ISSUES
BEFORE THE COURT.

ONE IS THE JURISDICTIONAL ISSUE
THAT YOU'VE HEARD ABOUT.
A SECOND IS A DUE PROCESS ISSUE
THAT I'D LIKE TO SPEND SOME TIME
SPEAKING ABOUT, AND THE THIRD IS
HAVING TO DO WITH EXPERT
TESTIMONY ON QUESTIONS OF LAW.

>> CAN I ASK YOU ON THE FIRST
ONE, BECAUSE I AM HAVING THAT
SAME PROBLEM WHICH IS WHETHER
THERE WAS JURISDICTION VERSUS
WHETHER THEY PROPERLY EXERCISED
THAT AUTHORITY BY APPROVING THE
RECOVERY.

I MEAN, WHAT IF YOU HAD A
SITUATION WHERE IT WAS CLEAR
THAT BY ENTERING INTO THIS
CONTRACT IN OKLAHOMA THAT COST
OF THE FUEL WAS GOING TO BE
ONE-HALF OF WHAT IT WOULD BE IN
THE OPEN MARKET SO THAT THERE
WOULD BE NO QUESTION THAT
CONSUMERS WOULD BENEFIT.
AND HOW-- I GUESS WHAT I'M

HAVING TROUBLE WITH IS MAYBE
THAT THIS CONFLATION OF THE
JURISDICTION AND THE POLICY.
COULD YOU HELP ME WITH THAT?

>> SURE.

>> AS FAR AS-- AND WHAT, THAT
THIS LINE HAS TO BE, NO, YOU
CANNOT DO ANYTHING THAT COULD
HELP THE CONSUMERS, BECAUSE THAT
WOULD EXCEED, I GUESS, THE
JURISDICTION OF THE PSC AND,
THEREFORE, THE ABILITY OF FP&L
TO ACTUALLY ENTER INTO THIS TYPE
OF AN AGREEMENT.

>> LET ME TRY TO ADDRESS THAT.
AS WE KNOW, THE PSC IS A
CREATURE OF STATUTE, AND THERE'S
A STATUTE, 366.04, THAT SAYS
HERE'S THE JURISDICTION.

THE DISCUSSION ABOUT A HALF OFF
NATURAL GAS, THAT VERY WELL MAY
BENEFIT THE CONSUMERS, BUT IT'S
A LITTLE BIT OF, YOU KNOW, A
POLICY ARGUMENT WHICH OUGHT TO
BE MADE TO THE LEGISLATURE, WE
WOULD CONTEND, BECAUSE CLEARLY
NOW THE STATUTE DOESN'T SAY YOU
CAN GO FORTH--

>> BUT THEY'RE NOT, IT'S NOT
LIKE THEY'RE GOING AND SAYING
WE'RE GOING TO INVEST IN
SOMETHING THAT'S GOING TO GIVE
US MONEY, AND THEN WE'LL BE ABLE
TO HAVE MORE MONEY TO BUY FUEL.
THEY'RE DOING SOMETHING THAT'S
INTEGRALLY RELATED, EXTRICABLY
RELATED TO WHAT WE EXPECT A
UTILITY TO DO, WHICH IS TO FIND
FUEL AT THE LOWEST COST FOR THE
BENEFIT OF THE CONSUMERS.

NOW AGAIN, I GUESS IT'S JUST--
THAT'S WHAT I'M STILL HAVING
TROUBLE WITH.

YOU, YOU KNOW, IT LOOKS LIKE
EVERYBODY ON THE OTHER SIDE IS
SAYING WE KNOW, LISTEN, THIS IS
WIN/WIN FOR FP&L BECAUSE THEY
GET THE COST RECOVERY, AND THEN
THEY GET THE PROFIT.

AND IF IT GOES SOUTH, THE

CONSUMERS LOSE.

ISN'T--

>> THAT'S RIGHT.

>> NO ONE IS SAYING THAT.

>> RIGHT.

>> OKAY?

BECAUSE THAT'S REALLY WHAT THIS LOOKS LIKE, OTHERWISE IT LOOKED TO ME AS I'M-- THIS IS A GREAT DEAL.

WHY WOULD YOU ALL BE AGAINST THIS?

>> RIGHT.

WELL, WE DON'T THINK IT IS, BUT THAT'S REALLY NOT WHY WE'RE HERE.

WE'RE HERE BECAUSE WE THINK THAT 366 WAS SET UP BY THE LEGISLATURE TO REGULATE MONOPOLIES.

FPL'S A MONOPOLY.

IT'S TO PROTECT CONSUMERS.

WE DON'T THINK THE LEGISLATURE INTENDED THESE MONOPOLY POWERS TO BE USED TO GO GET INTO A BUSINESS WHERE THERE'S A LOT OF COMPETITION.

THE NATURAL GAS BUSINESS, THERE'S PEOPLE BUYING AND SELLING THAT EVERY DAY.

IT'S A VERY COMPETITIVE BUSINESS.

AND WE THINK 366 DOESN'T SAY TO FLORIDA POWER & LIGHT GO AND USE YOUR MONOPOLY POWERS TO GET INTO OTHER COMMERCIAL VENTURES.

WE ASKED THEM UNDER YOUR VIEW OF THE JURISDICTION, YOU COULD GET INTO URANIUM MINING, YOU COULD GET INTO SOLAR FACILITIES, YOU COULD GET INTO THE CAR BUSINESS IF YOU COULD SAY I'M GOING TO INVEST IN FORD, AND THAT'S GOING TO RESULT IN US ONLY PAYING HALF THE AMOUNT--

>> WELL, THAT WOULD BE-- OKAY.

>> THEN--

>> WELL, THAT'S WHY THIS IS, THIS IS FUEL.

IT'S NOT A, IT'S NOT LIKE, YOU

KNOW, THE CAMELS AND THE NOSES
IN THE TENT.

>> RIGHT.

>> THIS IS THE ACTUAL COMMODITY
THAT IS THE BASIS FOR THEIR
GENERATION OF ELECTRICITY.

>> RIGHT.

AND I THINK IT'S A QUESTION OF
WHERE YOU DRAW THE LINE.
AND THIS COURT WAS VERY CLEAR IN
THE LEE COUNTY COOPERATIVE CASE
VERSUS JACOBS.

THEY LOOKED AT THE
JURISDICTIONAL STATUTE, AND
THERE WAS A QUESTION ABOUT
JURISDICTION.

AND THE COURT LOOKED AT IT AND
SAID IF THERE'S A REASONABLE
DOUBT ABOUT JURISDICTION, THAT
IS RESOLVED AGAINST EXERCISING
JURISDICTION.

AND I THINK, CLEARLY, THIS IS A
REASONABLE DOUBT ON JURISDICTION
HERE.

I MEAN, THE QUESTION'S ABOUT
IMPLICATION, ISN'T THIS BY
IMPLICATION?

THAT'S NOT A SLIPPERY SLOPE THAT
I THINK THIS COMMISSION SHOULD
GO DOWN.

BECAUSE THEN WHAT'S THE TEST?
AS LONG AS SOMEONE CAN SAY THIS
IS IN THE PUBLIC INTEREST AND WE
THINK IT MAY SAVE MONEY IN THE
FUTURE AND YOU GET THREE VOTES
ON THE COMMISSION, THAT BECOMES
THE JURISDICTIONAL TEST.

AND WE DON'T THINK THAT'S
APPROPRIATE.

CAN I SHIFT GEARS JUST FOR A
MINUTE ON THE DUE PROCESS
ARGUMENT?

FIPUG ARGUES THAT ITS DUE
PROCESS RIGHTS WERE VIOLATED.
THE ROLE THAT STAFF PLAYED IN
THIS HEARING WAS THEY
CROSS-EXAMINED WITNESSES, THEY
INTRODUCED DOCUMENTS.

THEY WERE VERY ACTIVE IN THE
PROCEEDING, JUST LIKE FIPUG

INTRODUCED DOCUMENTS AND
CROSS-EXAMINED WITNESSES.
AFTERWARDS, STAFF MET PRIVATELY
WITH THE COMMISSIONERS AND
TALKED ABOUT THE EVIDENCE THAT
THEY HELPED SHAPE.

AND THE--

>> DID STAFF TESTIFY?

>> STAFF, STAFF DID NOT, NOT
TESTIFY.

>> WELL, DOESN'T THE AUTHORITY
THAT RELATES TO WHETHER THERE
CAN BE COMMUNICATION BETWEEN
STAFF AND THE COMMISSION FOCUS
ON WHETHER THERE'S STAFF
TESTIMONY AS OPPOSED TO STAFF
INVOLVEMENT AND QUESTIONING?

>> YEAH.

THERE'S THREE CASES ON THAT, AND
WE THINK THAT THE FACTS OF THIS
ONE ARE MORE LIKE THE CHERRY
CASE WHERE YOU LOOK AT IT, IT'S
A QUASI-JUDICIAL PROCEEDING, AND
THE QUESTION IS, YOU KNOW, WAS
IT FAIR.

STAFF DID NOT TESTIFY, BUT WE
DON'T THINK THAT IS, YOU KNOW,
THE END ALL, BE ALL.

BECAUSE AS YOU KNOW, YOU CAN PUT
ON EVIDENCE THROUGH DOCUMENTS.

THEY PUT IN DEPOSITIONS.

THEY PUT IN A WHOLE BUNCH OF
DEPOSITION TESTIMONY OF FLORIDA
POWER & LIGHT WITNESSES, BUT THE
PARTICULARLY DISTURBING THING IS
WHEN THEY MET WITH THEM, THEY
SHARED INFORMATION THAT WAS
EXTRAJUDICIAL.

IT WAS NOT PART OF THE RECORD.
THEY GAVE THEM SOME INFORMATION
ABOUT HERE'S WHAT LOS ANGELES
HAS DONE ABOUT NATURAL GAS.

WE DIDN'T KNOW THAT.

WE ONLY FOUND OUT ABOUT IT AFTER
THE FACT WHEN WE MADE A PUBLIC
RECORDS REQUEST.

WE THINK-- WE HAD NO NOTICE OF
THAT--

>> HOW CAN YOU, HOW CAN YOU SHOW
THAT THAT HAD ANY MATERIAL

IMPACT ON WHAT HAPPENED HERE?
IT'S HARD-- I MEAN, I KNOW WHAT
YOU'RE TALKING ABOUT.

IT'S MORE LIKE A LITTLE NEWS
BLURB ABOUT SOMETHING THAT'S
GONE ON SOMEWHERE ELSE THAT A
COMMISSIONER MIGHT VERY WELL
HAVE READ IN A NEWSPAPER
ABOUT-- OR A TRADE PAPER ABOUT
WHAT'S GOING ON IN THE POWER
BUSINESS.

>> WELL, THIS IS UNPRECEDENTED
FOR FPL TO BE THE FIRST UTILITY,
ELECTRIC UTILITY IN THE COUNTRY
TO BE SEEKING THIS APPROVAL AND
GETTING IT.

SO THE ISSUE ABOUT HAVE OTHER
JURISDICTIONS LOOKED AT THIS WAS
IMPORTANT.

WE WOULD HAVE LIKED TO HAVE HAD
THE OPPORTUNITY TO EXPLORE THAT,
TO KNOW THAT IT WAS COMING IN.
WE NEVER GOT THAT.

AND TO YOUR QUESTION ABOUT,
WELL, THEY PROBABLY COULD HAVE
GOTTEN TO THE SAME RESULT, YOU
ALL RECENTLY IN THE SPECIAL V.
WEST BOCA CASE ARTICULATED A
CASE FOR HARMLESS ERROR.

AND THAT TEST IS THE
BENEFICIARIES OF THE ERROR HAVE
TO SHOW THAT THERE WAS NO
REASONABLE POSSIBILITY THAT THAT
COULD HAVE AFFECTED THE RESULT.
WE WOULD ARGUE-- AND THAT'S
AFTER REVIEWING THE ENTIRE
RECORD.

WE WOULD ARGUE THAT THE VERY
FACT THAT STAFF INCLUDED IT IN
THEIR BRIEFING PAPERS SUGGESTS
THAT IT POTENTIALLY DID AFFECT
THE RESULT, AND THERE'S NO WAY
FOR YOU TO REVIEW IT, BECAUSE
THERE'S NO RECORD OF THESE
PRIVATE MEETINGS.

SO YOU CAN'T REVIEW WHAT WAS
IN FRONT OF THE COMMISSION.
WE THINK THEY ARGUE HARMLESS
ERROR.

WE THINK WHEN YOU APPLY THE

HARMLESS ERROR RULE TO THAT,
THAT THE PROPER RESULT IS TO
SEND IT BACK.

I HAVE JUST A COUPLE OF
ADDITIONAL MINUTES, 32-- I'M
SORRY?

>> YOU'RE INTO YOUR REBUTTAL
TIME.

>> YEAH.

36 SECONDS LEFT.

>> I'LL STOP.

LET ME JUST DO THIS.

THE LAST ISSUE, THE LAST ISSUE
RELATES TO EXPERT TESTIMONY ON
QUESTIONS OF LAW.

THE COMMISSIONER, DEASON,
PROVIDED A WHOLE HOST OF
TESTIMONY.

IT'S IMPROPER AS A MATTER OF
LAW, AND WE WOULD ASK THAT YOU
CLEARLY SEND THAT SIGNAL IT'S
NOT GOOD PRACTICE TO HAVE THE
COMMISSIONER COME UP AND SAY
THEY SHOULD DO THIS, THAT THEY
SHOULD NOT DO THAT.

THANK YOU.

>> OKAY.

>> GOOD MORNING, YOUR HONORS.
MAY IT PLEASE THE COURT, I'M
ADRIA HARPER, COUNSEL FOR THE
PUBLIC SERVICE COMMISSION.

THIS CASE INVOLVES FPL'S REQUEST
FOR APPROVAL FOR THE WOODFORD
PROJECT.

BECAUSE THE PROJECT INVOLVED
FUEL AND RATES, IT DIRECTLY
FALLS UNDER PETITION'S BROAD--
EXCUSE ME, THE COMMISSION'S
BROAD RATE-MAKING AUTHORITY
UNDER CHAPTER 366.

>> THE COSTS THAT ARE SEEKING TO
BE APPROVED HERE ARE THE COSTS
THAT WOULD BE INCURRED IN
DRILLING THE WELLS, CORRECT?

>> THE COSTS ARE THE PROJECT
COSTS WHICH INCLUDES, YES,
PROJECTS-- INCLUDES COSTS SUCH
AS DRILLING THE WELLS--

>> A SIGNIFICANT COST OF
DRILLING THE WELLS FALLS TO

FP&L, RIGHT?

>> CORRECT.

THERE ARE COSTS INVOLVED WITH SETTING UP THE INFRASTRUCTURE TO DRILL THE WELLS, YES, YOUR HONOR.

>> AND THAT IS BEING SOUGHT TO BE RECOVERED THROUGH THE FUEL ADJUSTMENT CLAUSE.

>> YES, YOUR HONOR.

>> WELL, ISN'T-- HAD THAT EVER BEEN DONE BEFORE?

>> WE-- YES, YOUR HONOR.

THE COMMISSION HAS APPROVED CAPITAL PROJECTS THROUGH THE FUEL CLAUSE NUMEROUS TIMES AS CITED IN OUR BRIEF.

WHEN WE HAVE A PROJECT THAT'S PRESENTED TO THE COMMISSION THAT INVOLVES FUEL AND THERE IS POTENTIAL FOR EITHER REDUCTION VOLATILITY IN THE COST OF FUEL OR THERE'S A POTENTIAL TO BENEFIT THE CUSTOMERS AND SAVING RATES--

>> HAS THE COST INCURRED FOR DRILLING EXPLORATORY OIL OR GAS WELLS BEEN APPROVED AS A FUEL ADJUSTMENT COST?

>> NOT YET, YOUR HONOR.

HOWEVER, THERE HAVE BEEN NUMEROUS CAPITAL PROJECTS THAT HAVE BEEN RELATED TO FUEL INCLUDING NATURAL GAS AND THE ABILITY TO ACCESS THAT GAS AND GET IT TO THE CUSTOMERS THAT HAVE BEEN APPROVED.

>> WHAT IF, WHAT IF THERE WAS A NUCLEAR PLANT THAT JUSTICE QUINCE INQUIRED ABOUT?

IF THERE WERE NO SEPARATE STATUTORY PROVISION FOR THAT, WOULD THE COSTS INCURRED FOR BUILDING A NUCLEAR PLANT BE RECOVERABLE THROUGH THE FUEL ADJUSTMENT CLAUSE?

>> WELL, THE FUEL CLAUSE, WE WOULD HAVE TO LOOK AT THE PETITION THAT CAME BEFORE US LIKE WE DID IN THIS CASE.

THERE WAS A LOT OF EVIDENCE WHY IT WAS APPROPRIATE TO GO THROUGH THE FUEL CLAUSE.

BUT THE FUEL CLAUSE IS DESIGNED TO HANDLE PROJECTS THAT INVOLVE FUEL, AND IT CAN REDUCE RATES OR REDUCE VOLATILITY IN FUEL.

SO IF IT MET THAT CRITERIA, THEN IT'S POSSIBLE THAT, YES.

AND THERE HAVE BEEN PLANT MODIFICATIONS THAT HAVE GONE THROUGH THE FUEL CLAUSE BEFORE.

>> LOOKING AT THE LANGUAGE OF THE FUEL ADJUSTMENT COSTS, IT APPEARS TO BE INTENDED TOWARD, BY ITS LANGUAGE, A VERY SHORT-TERM HEDGING ACTIVITY TO COVER THE ACTUAL HEDGING ACTIVITY WHICH BY ITS NATURE WOULD BE MORE SHORT TERM, NOT A VERY LONG-TERM CAPITAL PROJECT. IS THAT NOT RIGHT?

>> WELL, I THINK IT'S, IT SHOULD BE CLEAR THAT THE FUEL CLAUSE-- THERE'S PETITIONS THAT ARE FILED ANNUALLY IN THE FUEL CLAUSE.

THERE ARE HEDGING PROJECTS THAT ARE SOMETIMES PART OF THESE PETITIONS THAT WE LOOK AT ANNUALLY FOR ALL OF THE UTILITIES, AND ALSO WE ENCOURAGE UTILITIES TO FILE PROJECTS, CAPITAL PROJECTS IN THAT CLAUSE THAT HAVE TO DEAL WITH FUEL THAT RESULT IN SAVINGS.

SO THERE'S SORT OF TWO CRITERIA WE LOOK AT IN THE FUEL CLAUSE.

THERE'S HEDGING, AND THEN THERE'S ALSO PROJECTS THAT PROJECT CUSTOMER SAVINGS THAT RELATE TO FUEL.

>> YOUR OPPOSING COUNSEL JUST THIS MORNING HAS SUGGESTED THAT THIS IS A MATTER OF LINE DRAWING WHERE, HOW FAR OUT CAN YOU GET INVOLVED IN UTILIZING THIS ADJUSTMENT PROCESS IN THIS OBTAINING OF FUEL.

AND HE SAYS THAT THE LINE HAS ALREADY BEEN DRAWN IN CONNECTION

WITH USING COAL AS AN ENERGY SOURCE.

WHAT'S YOUR RESPONSE TO THAT COMMISSION RULING?

>> WELL, THE ORDER THAT HE CITES, THE 21487--

>> WE'RE TALKING ABOUT THE SAME ONE.

>> THAT ONE ACTUALLY WAS A ANALYSIS OF A COAL PROJECT, A DEAL BETWEEN A UTILITY THAT WE REGULATE AND THEIR AFFILIATE. AND IN THAT THE ORDER STOOD FOR THE PROPOSITION THAT WE CAN REGULATE A UTILITY AS WE'VE ALWAYS DONE WITHOUT REGULATING AN AFFILIATED AFFILIATE. WHAT WE DID IS LOOKED AT THE BOOKS.

AND BECAUSE WE HAD ACCESS TO THE RECORDS, WE WERE ABLE TO MAKE A JUDGMENT CALL ON THE CONTRACT. THIS CASE IS SIMILAR.

WE'RE NOT TRYING TO ASSERT JURISDICTION JUST IN THE PREVIOUS ORDER CITED.

WE'RE NOT TRYING TO ASSERT JURISDICTION OVER AN UNREGULATED AFFILIATE.

WE WILL HAVE ACCESS TO ANY OF THE ACCOUNTING TRANSACTIONS THAT OCCUR, SO WE DON'T NEED TO GO AND TAKE THAT STEP OVER A SUBSIDIARY.

>> OKAY.

>> WHAT BOTHERS ME ABOUT THESE KINDS OF PROJECTS IS THAT, YOU KNOW, THE CONSUMER GETS TO PAY FOR IT WHETHER IT TURNS OUT TO BE TRUE OR NOT, THE CONSUMER GETS ANY BENEFIT FOR SUCH AS IF YOU ABANDON THE PROJECT OR THE NUCLEAR FUEL.

SO WHY ISN'T IT MORE PRUDENT THAT FP&L GOES ON WITH WHATEVER THEY WANT TO DO, AND IF IT PANS OUT, THEN YOU GO TO THE REGULATOR AND GET AN INCREASE IN YOUR RATES?

>> WELL, YOUR HONOR, THE

COMMISSION LOOKED AT THOSE ISSUES, AND THERE WAS A LOT OF EVIDENCE ON THE RECORD THAT THERE WOULD BE CUSTOMER SAVINGS.

>> ASSUMING THAT THIS DRILLING PANS OUT.

>> WELL, ACTUALLY, IN THE MAJORITY OF THE SCENARIOS THAT THEY PRESENTED, THERE DID SHOW TO BE CUSTOMER SAVINGS.

SO THERE WAS A HIGH LIKELIHOOD OF THAT.

AND WHAT THE APPELLANTS ARE TRYING TO GET YOU TO DO IS REWEIGH THE FACTS AND THE EVIDENCE THAT WAS PRESENTED ON THAT.

AND THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE THAT THERE WOULD BE SAVINGS, AND THAT IS SOMETHING THE COMMISSIONERS LOOKED AT.

>> THERE WOULD BE CUSTOMER SAVINGS ASSUMING THAT THIS NATURAL GAS REALLY COMES TO FRUITION, THAT'S--

>> YES.

AND THERE WAS TESTIMONY AS WELL ABOUT THE LIKELIHOOD OF THE GAS COMING TO FRUITION.

THEY WERE NOT GOING TO BE WILDCATting, IS WHAT THEY CALL IT--

>> AND WAS THERE EVIDENCE PRESENTED THAT WOULD SHOW WHAT PERCENTAGE OF THIS NATURAL GAS WOULD ACTUALLY FLOW TO FP&L?

>> YES, THERE WAS EVIDENCE THAT SAID THE GAS EXTRACTED FROM THE WOODFORD PROJECT WOULD GO DIRECTLY TO FPL CUSTOMERS. IT'S NOT GOING TO BE USED FOR ANYBODY ELSE OR SOLD TO ANYBODY ELSE AS INTIMATED WITH THE PROFIT AND MARK-UP LANGUAGE THAT THE APPELLANTS ASSERTED.

THIS WOULD BE DIRECTLY USED TO PRODUCE ELECTRICITY IN FPL PLANTS HERE IN FLORIDA.

>> IF, IF-- SO GOING BACK TO

THE TWO BASIC ISSUES, SUBJECT MATTER AND THEN WHETHER IT WAS PROPERLY ALLOWED, IF WE DECIDED THAT THIS, THAT THE LEGISLATURE DID NOT CONTEMPLATE GOING THIS DIRECTION BECAUSE IT WAS WHETHER IT'S-- THAT THEY ARE THE ONES THAT HAVE TO GIVE THE PSC, WHICH IS A CREATURE OF STATUTE, THE AUTHORITY, NOT THIS COURT BY IMPLICATION.

IF WE DECIDE THAT, THEN DOES FP&L GET TO DO IT ANYWAY, OR DOES THAT STOP FP&L FROM BEING ABLE TO GO OUT AND ENTER INTO THIS CONTRACT?

>> WELL, FPL WOULD BE ABLE TO-- I ASSUME THEIR SUBSIDIARIES MIGHT BE ABLE TO ENTER IN A CONTRACT TO CONTINUE THIS.

BUT IF THIS ORDER WAS INVALIDATED, THEN WE WOULD, OF COURSE, HAVE TO LOOK AT HOW THAT WOULD AFFECT THE CONTINUANCE OF THE PROJECT.

>> I MEAN, WHY-- SO, IN OTHER WORDS, SO YOU'RE SAYING THERE IS A WAY FOR FP&L TO DO THIS--

>> BUT THE CUSTOMERS WOULD NOT RECEIVE THE BENEFIT ACCORDING TO THE RECORD AND THE EVIDENCE.

THIS IS WHY THIS PROJECT WAS PRESENTED TO US THE WAY IT WAS. THERE WAS MORE CUSTOMER BENEFIT BY DOING IT THIS WAY, BY ALLOWING FPL TO DECOUPLE THE COSTS FROM THE MARKET AND THIS--

>> I UNDERSTAND.

BUT I'M ASKING YOU, IT DOESN'T STOP IN SOME WAY IF THE PSC SAYS WE DO NOT HAVE JURISDICTION OVER THIS.

LIKE, FOR EXAMPLE--

>> YEAH.

>>-- FP&L WANTS TO ACQUIRE ELECTRIC CARS, AND, YOU KNOW, GET IN THE BUSINESS OF ELECTRIC CARS.

THE PSC WOULDN'T BE ABLE TO

REGULATE THAT, RIGHT?
THAT'S A TOTALLY DIFFERENT
BUSINESS.

>> WELL, THE PSC WOULD BE ABLE
TO REGULATE ANYTHING THAT HAD TO
DO WITH THE GENERATION OF
ELECTRICITY.

>> ALL RIGHT.
BUT SOMETHING THAT WOULD
GENERATE MONEY FOR FP&L.

>> CORRECT.

>> OKAY.

>> IT'S JUST SOLELY--

>> AND THAT'S WHAT THEY'RE
SAYING.

ISN'T THAT WHAT THE PUBLIC
COUNSEL IS SAYING, THAT THIS IS
A WAY TO GENERATE MONEY, BUT
IT'S OUTSIDE OF THE PSC'S
AUTHORITY?

NOW, THE SECOND ISSUE OF
PRUDENCE, YOU'RE SAYING ON THAT
ONE THAT THE MEASURE OF WHETHER
WE AGREE OR DISAGREE IS
COMPETENT, SUBSTANTIAL EVIDENCE
AS TO WHETHER IT'S A PRUDENT
INVESTMENT.

>> CORRECT.

BUT I WOULD ALSO SAY THAT THERE
IS A MISCHARACTERIZATION OF THE
PROFIT ISSUE.

THERE'S RECORD EVIDENCE THAT
SAID THIS PROJECT, LIKE PREVIOUS
CAPITAL PROJECTS, FPL WOULD BE
RECEIVING THEIR MIDPOINT RATE OF
RETURN.

THERE'S A LIMIT ON HOW MUCH THEY
WOULD RECEIVE.

AND THERE'S NO ISSUE-- IT'S NOT
COMPARING APPLES TO APPLES.

THEY'RE NOT ACQUIRING THIS GAS
AND MARKING IT UP AND FILLING IT
TO SOMEBODY ELSE.

SO THERE'S NO PROFIT TO BE HAD
IN THAT SENSE.

FPL'S ACQUIRING THE GAS AND
USING IT TO POWER ITS PLANTS.

>> THEY CAN'T USE IT FOR SOME
OTHER PURPOSE.

>> THEY'RE NOT GOING TO USE

IT--

>> WELL, I MEAN, THAT'S--

>> YES, MA'AM.

>> THAT'S CLEAR IN WHAT WAS APPROVED?

>> YES, YOUR HONOR.

>> THAT IT IS SOLELY FOR THE BENEFIT OF THE CONSUMERS?

>> YES, YOUR HONOR.

THAT'S ON THE RECORD.

>> YOUR TIME IS UP.

>> THANK YOU.

>> YOU CAN WRAP IT UP.

>> I WOULD JUST ASK THAT THE COURT PLEASE AFFIRM THE WOODFORD ORDERS.

THANK YOU.

>> MAY IT PLEASE THE COURT, RAOUL CANTERO FOR FLORIDA POWER & LIGHT.

I'D FIRST LIKE TO ADDRESS THE JURISDICTIONAL ISSUE.

SECTION 366.041, PAREN ONE, PROVIDES THAT THE COMMISSION HAS JURISDICTION IN DETERMINING FAIR, JUST AND REASONABLE RATES TO TAKE INTO ACCOUNT THE COST OF PROVIDING THE SERVICE.

THERE'S NO DISPUTE IN THIS CASE THAT FPL CAN GO OUT AND BUY FUEL, NATURAL GAS, ON THE MARKET AND THAT IT DOES, BECAUSE IT NEEDS THAT FUEL TO GENERATE ELECTRICITY.

>> BUT THERE'S A DIFFERENCE, MR. CANTERO, ISN'T THERE, BETWEEN BUYING FUEL ON THE OPEN MARKET OR EVEN PERHAPS BUYING AN INTEREST IN AN EXISTING, PUMPING WELL AS OPPOSED TO CONVERTING COST INTO AN OIL AND GAS EXPLORATORY COMPANY IN SOME WAYS?

ISN'T THAT A BIG DIFFERENCE?

>> WELL, IT IS A DIFFERENCE.

IT IS NOT A DIFFERENCE THAT CONVERTS THIS INTO A LACK OF JURISDICTION.

>> WELL, OVER THE JURISDICTIONAL HURDLE.

>> OKAY.

>> ASSUME THAT THERE'S JURISDICTION.

WHY ISN'T THAT A PROBLEM WITH THE INTERPRETATION OF WHAT IS AN APPROPRIATE FUEL ADJUSTMENT CLAUSE?

FROM A LEGAL STANDPOINT?

>> BECAUSE THIS IS THE, THE COMMISSION DETERMINED THIS IS ANOTHER FORM OF HEDGING, AND THAT'S A CONCEPT THAT WE HAVEN'T TALKED ABOUT YET.

WE'VE TALKED ABOUT ONE ASPECT OF THE ORDER APPROVING WHICH IS THIS IS GOING TO SAVE THE CUSTOMERS MONEY, AND THAT IS TRUE, AND THERE'S EVIDENCE IN THE RECORD FOR THAT.

BUT THE OTHER PART OF IT--

>> WELL, I HAVE A TOUGH TIME WITH THE CONCEPT THAT, FOR EXAMPLE, IF THERE WERE NO STATUTORY PROVISION FOR A NUCLEAR PLANT, THAT THE CONCEPT OF BUILDING A NUKE PLANT IS SOMEHOW A HEDGING ACTIVITY.

>> HERE IT'S A HEDGING ACTIVITY BECAUSE IT'S ONLY 2.7% OF THE FUEL THAT FPL IS GOING TO USE.

SO IT'S JUST A VERY SMALL PORTION OF WHAT IT'S DOING.

IT'S NOT THE ENTIRE CASE.

IT'S STILL BUYING FUEL ON THE MARKET, IT STILL HAS OTHER HEDGING PROGRAMS.

THIS IS JUST A VERY SMALL PROGRAM THAT HAS BEEN DETERMINED WILL BE A HEDGE AND ALSO WILL SAVE THE CUSTOMERS MONEY IN THE LONG RUN.

AND THERE'S PLENTY OF EVIDENCE IN THE RECORD ON THAT.

ON PAGE 334 OF THE TRIAL, THERE WAS TESTIMONY BASED ON MATHEMATICAL ANALYSIS THAT THERE'S AN 85% CHANCE THAT THIS IS GOING TO RESULT IN A BENEFIT TO THE CUSTOMERS.

BUT THE ORDER ALSO SAID

REGARDLESS OF THAT, IT'S A HEDGING PROGRAM OF THE TYPE THAT WE HAVE TRADITIONALLY APPROVED IN THE SENSE THAT IT HEDGES AGAINST THE VOLATILITY OF THE MARKETPLACE.

>> RIGHT.

BUT THE HEDGE IS VERY LONG-TERM CAPITAL EXPENDITURE OF ACTUALLY DRILLING WELLS THAT IS FAR BEYOND WHAT A TYPICAL FINANCIAL HEDGING INSTRUMENT MAY LOOK LIKE, RIGHT?

>> YOU'RE RIGHT, YOUR HONOR.

>> SO WHY WOULDN'T THIS BE APPROPRIATE NOT SOMETHING AS RECOGNIZED AS A TYPICAL FUEL ADJUSTMENT CLAUSE, BUT JUST LIKE IN A NUCLEAR CAPITAL EXPENDITURE CASE, SOMETHING APPROPRIATE FOR THE LEGISLATURE TO CONSIDER AND APPROVE A STATUTORY PROVISION IF IT WANTS THE FLORIDA POWER & LIGHT AND OTHER POWER COMPANIES TO BE ABLE TO DO SOMETHING LIKE THIS WHICH MAY OR MAY NOT BE A GOOD IDEA?

ISN'T THAT UP TO THEM TO DECIDE?

>> WELL, I THINK YOU'RE GETTING BACK TO THE JURISDICTIONAL POINT, AND NOBODY DISPUTES THAT THE, THAT FPL HAS THE POWER TO BUY GAS FOR TO PRODUCE.

AND TO ANSWER JUSTICE PARIENTE'S QUESTION, ALL OF THIS THAT THEY'RE GOING TO GET IS GOING TO BE USED FOR FPL FACILITIES TO GENERATE THE GAS.

I ANALOGIZE IT TO, LET'S SAY, A RESTAURANT CHAIN THAT HAS BEEN GOING OUT AND GOING TO FARMERS' MARKETS TO BUY ITS VEGETABLES AND NOW SUDDENLY SAYS WE CAN SAVE A LOT OF MONEY IF WE JUST BUY THE VEGETABLES AS THEY COME OUT FROM THE GROWER RATHER THAN GO TO THE FARMERS' MARKET.

WE CAN GET IT AT THE WHOLESALE COST RATHER THAN BEING IT AT RETAIL.

>> ISN'T THIS WHOLE DISCUSSION CENTERED ON NOT THE ACT OF BEING ABLE TO DO THAT, BUT TO PASS ON THE COST OF WHAT'S GOING TO BE INVOLVED UP FRONT?

ISN'T THAT REALLY WHAT THIS IS ABOUT?

>> RIGHT.

I THINK IT'S BOTH.

I THINK IT'S BOTH.

AND ON THAT ISSUE, THE COSTS ARE ALREADY PASSED ON TO ANY HEDGING PROGRAM.

THOSE COSTS ARE PASSED ON ALREADY TO THE CUSTOMERS.

THOSE HEDGING PROGRAMS ARE APPROVED, AND FPL ENGAGES THEM, AND THEY ARE DESIGNED TO STABILIZE THE PRICES.

THEY'RE FOR THE CUSTOMERS' BENEFIT.

>> BUT, AGAIN, ISN'T THAT REALLY THE ONLY THING WE'RE REALLY TALKING ABOUT?

AT WHAT POINT, AT WHAT POINT CAN FLORIDA-- OR FLORIDA POWER & LIGHT OR ANY POWER COMPANY THAT WANTS TO ENGAGE IN THIS-- WHEN, AT WHAT POINT CAN THEY PASS THAT COST ON TO THE CUSTOMERS?

>> WELL, WITHOUT BEING ABLE TO DO IT, THEY WOULDN'T HAVE INVESTMENT ABILITY--

>> OKAY.

WELL, THAT'S ANOTHER STORY.

>> RIGHT.

>> I MEAN, THAT'S WHAT WE'RE TALKING ABOUT, IS THAT IF A POWER UTILITY HAS THE ECONOMIC POWER TO DO IT, THIS IS NOT A QUESTION OF WHETHER THEY CAN OR CANNOT DO IT, IT'S MERELY A QUESTION CAN-- IS THIS SOMETHING THAT CAN BE PASSED ON UP FRONT TO THE CUSTOMERS.

>> WELL, IT'S ALSO A QUESTION WHETHER THEY'RE ABLE TO DO IT. AND PRACTICALLY SPEAKING--

>> WELL, BECAUSE OF THAT FACT.

>> YES.

>> OKAY.
>> BUT IT IS-- CAN YOU-- IF THE PSC DOESN'T DECIDE THEY DIDN'T HAVE JURISDICTION, CAN YOU THEN RESPOND TO THE QUESTION THAT I ASKED COUNSEL FOR--
>> THEN THEY WOULD HAVE TO BUY THE FUEL AT MARKET PRICE--
>> NO, NO.
I'M ASKING CAN THEY, A SUBSIDIARY--
>> WELL, THAT'S MY POINT. EVEN FROM THE SUBSIDIARY, THEY'D HAVE TO BUY AT A MARKET PRICE BECAUSE THE SUBSIDIARY THAT OWNS IT NOW IS NOT A SUBSIDIARY THAT--
>> NO.
WHY CAN'T THEY STILL INVEST THROUGH A SUBSIDIARY AND DO THE EXACT SAME THING BUT-- AGAIN, TO FOLLOW UP ON JUSTICE LEWIS-- BUT NOT GET THE RECOVERY OF THE INVESTMENT COST UP FRONT?
>> BECAUSE THEN THEY WOULD, THEY WOULD BE BUYING IT AT MARKET PRICE AT THAT TIME, AT THAT POINT.
JUST LIKE ANY OTHER--
>> SO THEY COULD, IS THERE A WAY FOR THEM TO DO THIS DEAL ABSENT THE PSC APPROVING IT?
>> I DON'T BELIEVE THAT THERE WAS ANY EVIDENCE OF THAT.
>> BUT NOT EVIDENCE CAN THEY, I MEAN, NOTHING STOPS FP&L FROM DOING IT.
>> WELL, THE INVESTMENT WAS ESTIMATED TO BE \$191 MILLION, SO THEY DON'T HAVE \$191 MILLION--
>> THEY NEED THE MONEY FOR THIS APPROVAL.
>> YES.
>> THAT'S WHAT THIS IS ALL ABOUT.
>> SO LET'S JUST ASSUME, AND I GUESS WHAT I'M THINKING ABOUT IS THAT YOU SAID A RESTAURANT CHAIN.
BUT IF A RESTAURANT CHAIN IS NOT

A MONOPOLY, OKAY?

SO WHAT WE'RE DEALING WITH HERE IS A MONOPOLY WHERE I GUESS, WHAT, HOW MANY CONSUMERS IN FLORIDA HAVE FP&L AS THEIR--

>> I'M NOT SURE.

>> IT'S A BIG PERCENTAGE.

>> YES.

>> RIGHT.

SO WE'RE REALLY DEALING WITH HOW FAR THE LEGISLATURE INTENDED THIS, THE MONOPOLY TO GO IN THE KINDS OF INVESTMENTS THAT WOULD, THEREFORE, BE SEEN AS PRUDENT OR NOT PRUDENT.

AND SO WHY ISN'T IT BETTER TO LET THE LEGISLATURE, SINCE IT'S OUTSIDE OF THE SCOPE OF ANYTHING THAT'S HAPPENED BEFORE, MAKE THAT POLICY DETERMINATION LIKE THEY DID FOR THE NUCLEAR PLANTS? AND, AGAIN, I DON'T KNOW-- I'M NOT-- I'M JUST QUESTIONING THAT.

>> YEAH.

AND THIS COURT HAS SAID THAT THE LEGISLATURE'S ALREADY GIVEN THE PSC A BROAD GRANT OF AUTHORITY. AND AS IT SAID IN THE CITIZENS CASE FROM 1982, CONSIDERABLE LICENSE.

>> BUT IS THERE, IF THERE'S A REASONABLE-- WHAT IS THE TEST? I MEAN, FIRST OF ALL, THERE'S A QUESTION OF LAW.

SO IF THERE'S A REASONABLE DOUBT AS TO THEIR JURISDICTION, WE CAN'T FIND THAT THIS WAS JURISDICTION, RIGHT?

>> WELL, WITH THE CAVEAT THAT THE COURT HAS ALREADY SAID THE JURISDICTION IS VERY BROAD--

>> I MEAN, WE'VE ALSO SAID IF THERE'S ANY REASON LIKE THAT.

>> YES.

>> HAVE WE SAID THAT TOO? SOMEONE SAID IT?

>> YES.

>> I'M HAVING DIFFICULTY UNDERSTANDING WHY THIS IS BEING

PHRASED IN THE CONCEPT OR
CONTEXT OF JURISDICTION BECAUSE
WE KNOW THAT THE PUBLIC SERVICE
COMMISSION'S GOING TO HAVE
JURISDICTION ON WHETHER YOU CAN
RECOUP FROM THE CITIZENS IN
ADVANCE FOR SOME KIND OF
EXPENDITURE, RIGHT?

>> YES.

AND SO, I MEAN, AND ABSENT THAT
YOU'RE SAYING THE DEAL'S NOT
WORKABLE.

BUT THERE'S NOTHING THAT STANDS
IN THE WAY OF FPL IF THEY HAD
ENOUGH MONEY TO DO IT, THAT THEY
COULD GO AHEAD AND DO THIS, IT'S
JUST THE ISSUE OF GETTING THE
MONEY UP FRONT.

SO, I MEAN, IT'S REALLY JUST AN
ISSUE OF THE ADVANCED COST,
ISN'T IT?

>> I THINK ALSO AS A REGULATED
ENTITY, IT WANTS TO MAKE SURE
THAT FOR SUCH A LARGE
EXPENDITURE THAT THE PSC
DEMONSTRATES OR IS COMFORTABLE
THAT IT'S PRUDENT TO MAKE THIS
KIND OF INVESTMENT BEFORE IT
GOES AHEAD AND DOES IT.

>> BUT, I MEAN, DOES THE PSC
EVALUATE ANY TYPE OF INVESTMENT
THAT THE FPL OR ANY OTHER POWER
COMPANY MAY MAKE?

>> NOT-- WELL, IT DOES.
IT HAS, SURE.

THERE ARE A LOT OF ORDERS WHERE
THEY HAVE APPROVED CAPITAL
EXPENDITURES, AND THOSE ARE
INVESTMENTS.

JUST LIKE WHEN THE FPL, OR I
DON'T KNOW IF IT WAS FPL, BUT A
UTILITY, BOUGHT RAIL CARS--

>> RIGHT.

TO TRANSPORT THE PRODUCT.

>> CORRECT.

I THINK 240 RAIL CARS IT BOUGHT
AT MILLIONS OF DOLLARS, AND THE
PSC APPROVED THAT.

>> WELL, APPROVED THE PURCHASE
OR ADVANCED COST FOR THAT?

>> FIRST APPROVED THE PURCHASE
IN '95 AND THEN APPROVED THE
COST IN '97.

>> OKAY.

>> SO IT APPROVED, YOU KNOW, IT
APPROVED BOTH.

>> BUT ISN'T THIS ALSO A CASE
THAT IF FLORIDA POWER'S
SUBSIDIARY PUT THEIR OWN MONEY
IN, THAT THEY WOULD HAVE TO HAVE
THEIR PROFITS FOR THE
SHAREHOLDERS?

>> YES.

SO THAT'S THE THING.

FPL SUBSIDIARY'S RESPONSIBLE TO
ITS SHAREHOLDERS, AND THEY WOULD
HAVE TO--

>> BUT IF WE, IF THE PUBLIC
SERVICE COMMISSION PUT THE MONEY
IN, THEN THAT WOULD PICK THAT
PROFIT MARGIN UP?

>> YES.

FPL IS A REGULATED ENTITY, AND
ITS PROFITS, ACCORDING TO THE
LAST SETTLEMENT AGREEMENT FOR
2013, HAVE TO BE FROM 9.5 TO
11.5%.

AND WHAT IT ASKED FOR HERE WAS
THE 10.5%.

IF IT'S A SUBSIDIARY THAT'S NOT
REGULATED BY THE PSC BECAUSE IT
DOESN'T GENERATE ELECTRICITY,
THEN THAT'S NOT REGULATED.

IT COULD HAVE WHATEVER
REASONABLE RATE OF RETURN IS
AVAILABLE ON THE MARKET.

>> OKAY.

>> WE ASK YOU ALSO TO AFFIRM THE
PSC'S ORDER.

THANK YOU.

>> THANK YOU.

REBUTTAL?

>> THANK YOU, YOUR HONORS.

FIRST, I WANTED TO RETURN TO THE
ISSUE OF WHAT WOULD HAPPEN IF
THIS COURT SAID, NO, YOU CANNOT
DO THIS.

AND, AGAIN, IT'S ORDER 21847
THAT ANSWERS THAT QUESTION WITH
THE SUBSIDIARY AND THE COAL

MINING INVESTMENTS.
IT'S NOT GOING TO BE AT MARKET
PRICE.
THE COMMISSION'S ALREADY
DETERMINED THIS.
IT'S THE LOWER OF MARKET OR
COST.
SO IF THE SUBSIDIARY WAS ABLE TO
INVEST AND GET IT AT CHEAPER
THAN MARKET, DECOUPLE IT FROM
THE MARKET PRICES, THE CUSTOMERS
STILL GAIN THE BENEFIT.
BUT AGAIN, AND IT WAS RAISED IN
21847 IT WAS ONLY LOOKING--
>> I DON'T UNDERSTAND.
WHAT'S THE CUSTOMER GETTING THE
BENEFIT OF?
>> IF IT'S AT THE LOWER OF
MARKET OR COST, IT INSURES THAT
THE CUSTOMER IS NEVER GOING TO
PAY MORE THAN MARKET.
BUT IN THE RECORD--
>> WELL, BUT I MEAN-- OKAY.
>> THEY'RE ARGUING THEY CAN DO
IT LESS, YOUR HONOR.
SO IT'S GOING TO BE COST OF
PRODUCTION, AND THE CUSTOMERS
COULD GAIN THAT BENEFIT WHICH IS
THEIR PRIMARY ARGUMENT WHEN THIS
PETITION CAME IN.
>> I WANT TO MAKE IT CLEAR THAT
FPL COULD, IN FACT, DO THIS DEAL
WITHOUT THE COMMISSION'S
APPROVAL IF THEY HAVE THE MONEY?
>> FPL CAN GO INVEST MONEY IN
WHATEVER IT WANTS TO.
AND THEN WHEN IT COMES IN IN A
RATE CASE, ASK FOR APPROVAL OF
THOSE COSTS.
IF THEY COME BACK AT, YOU KNOW,
THEY INVEST A CERTAIN AMOUNT,
NOW, THE ISSUE'S GOING TO BE,
YOUR HONOR, THE LONGSTANDING
PRACTICE OF YOU DON'T GET A
RETURN OR PROFIT, WHICH IS THE
SAME THING, ON FUEL.
SO IF THEY COME IN AND SAY WE
INVESTED THIS MONEY TO BUY FUEL,
WELL, YOU DON'T GET A PROFIT.
IF YOU SAY WE INVESTED THIS

MONEY IN THE LIMITED SCOPE OF ATTEMPTING TO HUNT FOR FUEL-- WHICH IS WHAT INVESTING IN THESE DRILLING LEASES ARE-- THEN I THINK WE COME BACK TO THE SAME ISSUE THAT CAN A UTILITY RECOVER INVESTMENTS FOR SOMETHING THAT'S SO FAR BEYOND THE SCOPE OF ITS BUSINESS.

>> THE ISSUE OF WHETHER IT'S A FUEL RECOVERY COST, WHICH I THINK JUSTICE POLSTON WAS FOCUSED ON, IS THAT REALLY THE SECONDARY ARGUMENT THAT WHETHER THERE'S MAYBE SUBJECT MATTER JURISDICTION, BUT THAT IT'S NOT A PROPER FUEL RECOVERY COST?

IS THAT AN ALTERNATIVE ARGUMENT?

>> THAT COULD BE AN ALTERNATIVE ARGUMENT--

>> WELL, I MEAN, ARE YOU MAKING THAT ALTERNATIVE ARGUMENT?

>> WE ARGUE THAT PRIMARILY, NO, THEY'RE NOT ALLOWED TO RECOVER IT AT ALL.

AND WE DON'T SAY THAT INVESTMENT IN THE PRODUCTION IN MINING IS A FUEL COST.

AS IT'S ALWAYS BEEN PRACTICED-- SO ISN'T THAT A-- I MEAN, AGAIN, WHETHER THAT'S A MORE DIRECT WAY, IT SEEMS TO ME, TO APPROACH THIS ON A STATUTORY CONSTRUCTION ARGUMENT THAN THE SUBJECT MATTER JURISDICTION.

>> YES, YOUR HONOR.

IT CAN BE.

AND THAT WOULD BE AN EASILY WORKABLE RESOLUTION TO THIS CASE.

I DO ALSO WANT TO RETURN, THOUGH, TO THE QUESTION OF THE AMOUNT OF GAS COMING OUT OF THE GROUND.

THERE WAS A QUESTION ABOUT IS FPL GETTING ALL THIS GAS TO RUN ITS PLANTS, AND THE RECORD IS CLEAR THEY INTEND TO.

BUT THEY ALSO RESERVE OR THE RIGHT TO SELL IT WHEREVER THEY

WANT TO IF THEY FIGURE THEY CAN GET A BETTER DEAL SOMEWHERE ELSE.

WITNESSES FOR FPL STATED THAT SEVERAL TIMES.

THEY RESERVE THE RIGHT TO SELL IT IN CASE THEY SHOULD.

>> THEY'RE GOING TO HAVE TO GET THE APPROVAL OF THE COMMISSION IF THEY WERE TO DO THAT?

BECAUSE IT SOUNDED TO ME LIKE THE COMMISSION SAID, NOPE, THEY'RE GOING TO USE IT ALL FOR THE CUSTOMERS.

>> NO.

THAT WAS NOT IN THE ORDER, AND IT WAS STATED DURING THE HEARING THAT SINCE ALL OF THIS IS BEING RECOVERED UP FRONT, IT WOULDN'T BE A COMEBACK AND YOU WOULD TAKE FUNDS AWAY.

NOW, THEY DO REVIEW THESE COSTS OVER TIME, SO IF SOME TIME IN THE FUTURE THE COMMISSION DETERMINED THAT WASN'T PRUDENT, MAYBE THEY COULD PREVENT THE COLLECTION OF SOME OF THE FUNDS.

>> WHAT IS THE PUBLIC COUNSEL'S BIGGEST CONCERN?

YOU KNOW, AGAIN, WE'RE TALKING IN A LOT OF LEGALESE AND PROBABLY THINGS THAT MIGHT BE BEYOND MY EXPERTISE, SO IF YOU COULD GET-- I ASKED MR. MOYLE'S ABOUT THIS.

WHAT IS IT, SINCE YOU'RE REPRESENTING THE PUBLIC, WHAT IS YOUR BIGGEST CONCERN ABOUT THIS?

>> OUR BIGGEST CONCERN, YOUR HONOR, IS LIKE WE SAID, DRAWING THE LINE.

THE LINE, THE SCOPE OF BUSINESS OF AN ELECTRIC UTILITY IS CLEARLY DEFINED.

WE'VE LOOKED AT MINING INVESTMENTS BEFORE, AND THEY SAID THEY WEREN'T JURISDICTIONAL, SO WE JUST DO IT AT COST.

THAT'S OUR BIG CONCERN, THERE

NEEDS TO BE A LINE.
IT'S ALWAYS BEEN YOU PURCHASE
THE INPUTS FOR GENERATION ON THE
MARKET.

THAT'S WHERE THE LINE'S BEEN,
IT'S BEEN WELL RECOGNIZED, AND
NO ONE'S EVER CHALLENGED IT--
>> BUT IF IT WAS A SUREFIRE
INVESTMENT, I MEAN, THERE AGAIN
YOU'RE NOT REALLY CHALLENGING
THE PRUDENCE ISSUE.

SO IF THERE'S NOT, THERE'S
COMPETENT, SUBSTANTIAL EVIDENCE
THAT THIS IS A GOOD IDEA.
>> EVEN WERE IT THE PRINCIPLE IS
VERY IMPORTANT, YOUR HONOR.
BECAUSE, ONE, EVEN IF IT'S A
SUREFIRE INVESTMENT,
TECHNICALLY-- LET ME GIVE YOU
AN EXAMPLE JUST BRIEFLY.

HEDGING AS WE'VE SEEN BEFORE IS
FIXED PRICE FOR FIXED QUANTITY.
SAY YOU AGREED WITH YOUR LOCAL
GAS STATION IT'D BE \$2 A GALLON
FOR GAS.

THE ONLY TESTIMONY ON THE RECORD
IS THEY CAN VARY BY UP TO PLUS
OR MINUS 20%.

YOU GO INTO YOUR GAS STATION AND
HAND HIM \$10, HE MIGHT GIVE YOU
BETWEEN 4-6 GALLONS OF GAS OR
NOTHING IF IT WAS A DRY HOLE.

>> BUT THAT ARGUMENT REALLY IS
ABOUT WHETHER IT'S PRUDENT OR
NOT, AND YOU HAVEN'T MADE THAT
UNDERLYING ARGUMENT THAT IT'S
NOT PRUDENT, HAVE YOU?

>> NO, BUT OUR POINT IS, YOUR
HONOR--

>> YOU'RE TALKING AROUND IT, BUT
YOU'RE NOT MAKING THAT ARGUMENT.

>> I USE THAT AS AN EXAMPLE IN
RESPONSE TO THE SUREFIRE.

NOTHING IS SUREFIRE--

>> WELL, NOTHING IN LIFE IS
SUREFIRE.

>> IT'S DRAWING THE LINE, YOUR
HONOR.

IT'S WHAT'S CLEARLY BEEN
INDICATED PREVIOUSLY AND THE

COMMISSION'S RECOGNIZED.
SO WE BELIEVE THE BEST COURSE OF
ACTION IS TO HAVE THAT LINE AND
CLEARLY DELINEATE THE
GENERATION, TRANSMISSION,
DISTRIBUTION FROM THE PRODUCTION
AND MINING OF INPUTS.
I DID NOT HAVE ANY OTHER
SPECIFIC ISSUES I WOULD RAISE ON
REBUTTAL, SO I'LL GIVE THE LAST
MINUTE TO MR. MOYLE'S.
>> YOU HAVE NO TIME.
EXCUSE ME.
YOU USED UP THE FOUR MINUTES.
[LAUGHTER]
YOU HAVE NO TIME LEFT.
THANK YOU FOR YOUR ARGUMENTS.