Panda Energy International, Inc. v. E. Leon Jacobs, Jr.

MR. CHIEF JUSTICE

GOOD MORNING, AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THE FLORIDA SUPREME COURT, AND THE FIRST CASE ON OUR CALENDAR THIS MORNING IS PANDA ENERGY INTERNATIONAL VERSUS JACOBS. MS. BROWNLESS.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS SUZANNE BROWNLESS, AND I AM HERE, TODAY, TO REPRESENT THE APPELLANT, PANDA ENERGY INTERNATIONAL, TO WHOM I WILL REFER AS PEII THROUGHOUT THIS ARGUMENT. I WOULD LIKE TO SET ASIDE 8 MINCE FOR REBUTTAL, PLEASE. IT IS FACT LETTER LAW IN FLORIDA THAT, WHEN THE TERMS AND PROVISIONS OF A STATUTE ARE CLEAR AND UNAMBIGUOUS ON THEIR FACE, THERE IS NO ROOM FOR EITHER JUDICIAL OR AGENCY INTERPRETATION.

WHICH ISSUE ON APPEAL ARE YOU GOING TO ADDRESS INITIALLY?

I AM GOING TO ADDRESS ISSUE TWO FIRST, YOUR HONOR. THE LEGISLATURE HAS INTENDED WHAT IS CLEARLY EXPRESSED. THE SAME RATIONALE IS APPLICABLE TO THE DECISIONS OF THIS COURT, WHERE THE COURT USES PLAIN LANGUAGE, CLEAR IN ITS INTENT. AGENCIES ARE BOUND TO FOLLOW IT. THIS COURT IS THE FINAL AUTHORITY ON STATUTORY INTERPRETATION, AND THIS COURT'S RULINGS ARE TO BE FOLLOWED, UNLESS SET ASIDE BY THIS COURT OR BY AN ACT OF THE LEGISLATURE. IN THE CASE AT HAND, BOTH FLORIDA PUBLIC SERVICE COMMISSION AND FLORIDA POWER CORPORATION, HAVE IGNORED THE UNAMBIGUOUS AND PLAIN LANGUAGE OF THIS COURT'S HOLDING, IN THE TAMPA ELECTRIC CASE V GARCYEAH. IN TEKO, AS I HAVE NOTED ON PAGE 19 OF MY BRIEF, THIS COURT STATED FOLLOWS, QUOTE, THE STATUTORY SCHEME EMBODIED IN THE STATUTORY ACT IN FICA, IS NOT INTENDED TO AUTHORIZE THE DETERMINATION OF NEED FOR A PROPOSED POWER PLANT OUTPUT THAT IS NOT FULLY COMMITTED TO BE USED BY FLORIDA CUSTOMERS TO PURCHASE ELECTRICAL POWER AT RETAIL RATES. WHAT IS THE PLAIN MEANING OF FULLY COMMITTED? WEBSTER DEFINES "FULLY", AS CONTAINING AS MUCH AS OR AS MANY AS POSSIBLE, AND IT DEFINES "COMMITTED", AS BOUND, OBLIGATED OR PLEDGED.

WAS THE FACTUAL SITUATION IN TAMPA ELECTRIC DIFFERENT FROM THIS ONE? WEREN'T WE TALKING ABOUT IN THAT CASE, NOW, THE STATE ELECTRICAL PROVIDER?

YOUR DECISION DOES NOT TURN ON WHO OWNS THE POWER. YOUR DECISION TURNS ON YOUR DETERMINATION THAT THE FLORIDA PUBLIC SERVICE COMMISSION DID NOT HAVE JURISDICTION OVER HOLE SALE POWER, AND THEREFORE THE DECIDING ACT DID NOT INTEND TO BE USED TO CITE WHOLESALE POWER. THIS RECORD IS CLEAR, THAT JUST AS IN THE DUKE ENERGY CASE, THE PECO CASE, THE 130 MEGAWATTS OF THE 530 MEETING A WETS WATTS THAT IS PROPOSED -- MEGAWATTS THAT IS PROPOSED TO BE CITED, WILL NOT BE USED TO MEET RETAIL NEEDS. 130 MEGAWATTS WILL BE USED FOR THE RESERVE MARGIN, I AM SORRY, AND 400 MEGAWATTS WILL BE SOLD AS WHOLESALE. THE FACT OF THE 400 MEGAWATTS WILL BE SOLD AS WHOLESALE AND IS WHOLESALE POWER IS CLEARLY ESTABLISHED IN THE RECORD, IN THE TRANSCRIPT, AT 382 AND 384 AND IN CONFIDENTIAL EXHIBIT NO. 6, AND THE REASON IT IS ESTABLISHED IS BECAUSE ALL THE BIDDERS WERE GIVEN CAPACITY CREDITS FOR THAT AMOUNT OF CAPACITY IN THE BID EVALUATION PROCESS.

YOU ARE INTERPRETING OUR DECISION IN TAMPA ELECTRIC AS SAYING THAT, UNLESS A PLANT THAT IS PROPOSED TO BE BUILT IS GOING TO BE FULLY COMMITTED TO 100 PERCENT COMMITTED, TO SELL RETAIL AT THE TIME THAT IT IS ONLINE --

IT CAN'T BE BUILT.

AND YOU AGREE THAT WASN'T THE ISSUE IN TAMPA ELECTRIC, AND THAT THERE --

NO, I DO NOT AGREE WITH THAT, YOUR HONOR. I BELIEVE THAT WAS EXACTLY THE ISSUE IN TAMPA ELECTRIC, BECAUSE I BELIEVE THE COURT'S RATIONALE WAS BASED UPON THEIR DETERMINATION THAT THE PSC COULD NOT CITE WHOLESALE POWER.

DO YOU AGREE THAT, IF WE GO WITH THE STATUTE AND THE WAY THAT THE COMMISSION HAS INTERPRETED THE STATUTE OVER "X" NUMBER OF YEARS, THAT, COULD YOU ADDRESS, REGARDLESS OF THIS LANGUAGE IN TAMPA ELECTRIC, HOW THE PSC'S DETERMINATION OF NEED IN THIS CASE MEETS OR DOES NOT MEET THE STATUTORY CRITERIA?

I WOULD AGREE THAT THE PUBLIC SERVICE COMMISSION HAS TRADITIONALLY USED WHAT THEY DETERMINE TO BE ECONOMIC FACTORS IN ADDITION TO WHAT I WOULD CALL RELIABILITY FACTORS, MEANING THE AMOUNT OF CAPACITY NECESSARY TO MIX RETAIL MODE. YES, THEY HAVE TRADITIONALLY DONE THAT, AND IT IS MY POSITION THAT YOUR DECISION INTIC-HAS SPECIFICALLY -- IN TICO HAS SPECIFICALLY AND CLEARLY DENIED THEM, OR THEY CAN NO LONGER DO THAT.

LET'S JUST ASSUME THAT THAT IS NOT WHAT THE DECISION WAS MEANT TO HOLD. COULD YOU ADDRESS WHETHER THERE IS COMPETENT, SUBSTANTIAL EVIDENCE IN THIS RECORD, TO SUPPORT THE DETERMINATION OF NEED THAT THE PSC MADE?

NOTWITHSTANDING THIS ISSUE AND WHETHER THE PSC CAN DEVIATE FROM YOUR LANGUAGE IN THE TICO DECISION AND WHAT THE TICO DECISION MEANS, I BELIEVE THAT, FOR THE POINTS ARGUED ON APPEAL, OUR FIRST POINT, WHICH IS A DUE PROCESS ARGUMENT,, REGARDING OUR INABILITY TO GET A FULL AND FAIR HEARING, AND OUR THIRD ARGUMENT, WHICH HAD TO DO WITH THE COMPETENT SUBSTANTIAL EVIDENCE FOR THE BID PROCESS ARE THE BASIS, ALSO, FOR REVERSING THE PSC'S DETERMINATION IN THIS CASE CASE. WITH REGARD TO THE FIRST POINT, I WOULD POINT OUT THAT THE OGC DECISION, WHICH WE CITE ON PAGE 19 OF OUR BRIEF, IS ABSOLUTELY ON POINT THAT, IN THAT CASE, THERE WAS SUBSTANTIAL AMOUNTS OF TESTIMONY THAT INVOLVED CONFIDENTIAL TESTIMONY AND CONFIDENTIAL EXHIBITS, AND THAT THERE WAS, ALSO, NO REQUEST FOR AN EXTENSION OF TIME THAT, WOULD IMPAIR THE PUBLIC SERVICE COMMISSION'S ABILITY TO MEET THE STATUTORY DEADLINES IMPOSEED BY 403.507, SO IT IS OUR POSITION THAT THE OGC CASE SHOULD CONTROL AND DOES CONTROL AND THAT THE PSC DOES ABUSE ITS DISCRETION IN NOT GRANTING THE CONTINUANCE THAT WE MADE, AND THAT THE ONLY DIFFERENCE IN THIS CASE IS THAT, INSTEAD OF THE POWER CORPS BEING THE ONLY CONTESTANT IN THE OGC CASE, POWER CORPS IS THE ONLY APPLICANT, AND THAT IS THE FACTUAL STANDPOINT, FROM OUR POINT OF VIEW. WITH REGARD TO OUR ARGUMENT ON THE THIRD POINT, WITH REGARD TO HOW THE BIDDING PROCESS WAS UNFAIR, WE WILL STAND ON THE ARGUMENTS RAISED IN OUR BRIEF. THANK YOU. WE WILL RESERVE THE REST OF OUR TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT. I AM RICHARD BELLAK REPRESENTING THE FLORIDA PUBLIC SERVICE COMMISSION AND WITH ME IS GARY SASSO, REPRESENTING THE FLORIDA PUBLIC SERVICE COMMISSION, AND WE ARE GOING TO SPLIT OUR TIME, TEN AND TEN, AND I WOULD LIKE TO BEGIN BY ADDRESSING THE SECOND POINT ON APPEAL OF PANDA'S APPEAL. IT IS WORTH NOTING THAT WHAT WAS VISIONSLY CONTESTED BELOW, WAS THE NEED FOR THE PLANT. THAT IS NOT REALLY AN APPEAL ISSUE. SO THERE ISN'T AN APPELLATE CONTEST ABOUT WHETHER THE PLANT IS NEEDED. THERE IS NO CLAIM THAT THE RECORD LACKS COMPETENT AND SUBSTANTIAL

EVIDENCE SUPPORTING THE NEED FOR THE PLANT AND THE COMMISSION'S FOCUS IS TO MAKE SURE THIS PLANT WILL BE BUILT IN FLORIDA, BECAUSE IT IS A CRITICAL NEED, AND IT MUST BE MET. WHAT WAS NOT VISIONSLY ARGUED BELOW IS IF THE PLANT MEETS THE TEST OF FULLY COMMITTED. HOWEVER, IT WAS PRESERVED. THERE WAS A STIPULATION TO THAT EFFECT BETWEEN THE STAFF AND FPC BUT PANDA DULY NOTICED THAT IT WAS NOT JOINING THE STIPULATION, AND NOW THEY MADE THAT THE CENTERPIECE OF THEIR APPELLATE ISSUES,, AND THE WAY WE ADDRESS THAT IS WITH THREE POINTS. FIRST, WE MADE A REASONABLE ACCOMMODATION OF THE FULLY-COMMITTED REQUIREMENT AND THE ORIGINAL NEED DETERMINATION. WHAT WE DID WAS WE LOOKED AT THOSE ASPECTS OF THE HINES II PROPOSAL, WHICH COULD BE SEEN AS BEING WITHIN THE FULLY-COMMITTED RATIONALE. FIRST THERE IS THE FACT THAT IT IS A RETAIL UTILITY, THAT IT HAS RETAIL CUSTOMERS THAT IT IS OBLIGATED TO SERVE, THAT WE ASKED THEM TO INCREASE THEIR RESERVE MARGINS AND THEY AGREED TO DO THAT, THROUGH CONSTRUCTING THIS PLANT, SO THEY WILL HAVE A 20 PERCENT RESERVE MARGIN. WE, ALSO, WANTED THEM TO REPLACE NONFIRM ASSETS, SUCH AS DEMAND SIDE MANAGEMENT, WITH FIRM ASSETS, AND THEY WERE AGREEABLE TO THAT, WHICH MEANS THEY NEED MORE MEGAWATTS THAN ONLY THE 130 MEGAWATTS REQUIRED TO BRING THEIR RESERVE MARGIN UP TO 20 PERCENT. SO THAT IS THEIR RATIONALE FOR WHY THEY NEED THE WOLE PLANT, AND THAT IS WHY WE AGREE WITH IT. IN OTHER WORDS, IF THERE IS AN EMERGENCY OUTAGE, IF THERE IS PEEK DEMAND, THEY NOW HAVE CUSTOMERS WHO ARE GOING TO DEMAND ELECTRIC POWER, INSTEAD OF BEING WILLING TO BE INTERRUPTED. THAT IS WHAT THE TRANSITION FROM DEMAND-SIDE MANAGEMENT TO FIRM ASSETS MEANS. THEY ARE WILLING TO BUILD THE PLANT TO DO THAT. THAT IS IN ACCORD WITH THE COMMISSION'S POLICIES GENERALLY, SO WE THINK ALL OF THAT IS IN ACCORD WITH THE FULLY-COMMITTED RATIONALE, AND WE NOTE THAT, GIVEN THE STATUS OF THE UTILITY, ALL OF THE CAPACITY OF THE PLANT CONTRIBUTES TO THEIR RESERVE MARGIN, AND SO ALL OF THAT IS WITHIN THE FULLY-COMMITTED RATIONALE. HOWEVER, WE HAVE TO SEED THE PALM FOR LITERAL NECESSARY TO PANNED APARTMENT. NOT EVERY MEGAWATT IS GOING TO BE RETAIL MEGAWATT, AND WE CAN HAVE NO WAY OF KNOWING WHAT THE INTENT OF THE TAMPA ELECTRIC LANGUAGE IS. SO IN ACCORD WITH THAT, WE HAVE PROVIDED TWO ADDITIONAL RAGS ANALYSIS. -- RATIONALES. ONE OF THEM IS THAT POWER CORPS'S ARGUMENT THAT THEY ARE NOT BOUND BY THE FULLY-COMMITTED REQUIREMENT, AND WE ARE GOING TO DEFER TO THEM TO MAKE THAT CASE TO YOU. OUR THIRD RATIONALE, IN THE EVENTS THAT OUR ACCOMMODATION ON THE GROUNDS OF REASONABLENESS IS NOT FOUND TO MEET THE TEST OF TAMPA ELECTRIC, OUR THIRD RATIONALE IS THAT, IF YOU FIND THAT THIS RATHER STRINGENT REQUIREMENT AND, PERHAPS, UNDO UNDOABLE REQUIREMENT, IN PRACTICAL TERMS, IS COUNTERPRODUCTIVE, THEN YOU CAN CONSIDER OUR BRIEFING OF THE THRESHOLD LEGAL ISSUE,, WHICH BY THE WAY, WAS NEVER BRIEFED TO HUH IN THE TAMPA ELECTRIC CASE, ITSELF. WE NEVER ANTICIPATED THE THRESHOLD LEGAL ARGUMENT. WE MISSED IT COMPLETELY. WE WERE ABOUT THE TASK OF DEMONSTRATING THAT OUR ORDER WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND NOT ERRONEOUS, SO THE ACTUAL THRESHOLD LEGAL ISSUE SURPRISED US, AND IN FACT, WE NEVER BRIEFED IT. YOU WERE NEVER GIVEN THE PRECEDENTS THAT -- PRECEDENCE THAT, FOR EXAMPLE, THE COURT HAD DECIDED EXACTLY THE SAME THRESHOLD ISSUE IN THE ENERGY PRODUCTIVITY SYSTEMS CASE IT HAD AND THEY CAME TO THE EXACT OPPOSITE CONCLUSION THAT THIS COURT DID. THAT COURT FOUND THAT, THE CLAIM BY THE DEFENDANTS THAT THE MERE FACT OF BEING REGULATED MONOPOLY UTILITIES AUTOMATICALLY IMMUNIZED THEM FROM ALL WHOLESALE COMPETENT TITION -- COMPETITION, WAS ACTUALLY AN IMPLIED PREEMPTION OF COMPETITION AND DISFAVORED AS A MATTER OF LAW, AND THEREFORE THE COURT REJECTED IT. GIVEN THE SAME ARGUMENTS THAT WERE MADE TO YOU, AND WITH THE AID OF THOSE FEDERAL PRECEDENCE DENTS -- PRECEDENTS, THEY CAME TO EXACTLY THE OPPOSITE CONCLUSION. THEY SAID THAT THE COURT SAW NOTHING IN THE NEW MEXICO STATUTES THAT OUSTED WHOLESALE COMPETITION, AND THAT WAS DESPITE THE FACT THAT THIS WAS A NATURAL MONOPOLY RETAIL, REGULATED VERTICAL INTEGRATED UTILITY, EXACTLY AS-IS THE CASE WITH THE INCUMBENTS IN THE STATE OF FLORIDA. SO THEY DID, THEY CAME TO THE OPPOSITE CONCLUSION, AND SO WE ARE MERELY POINTING OUT THAT THE

COMPETITION LAW OF FLORIDA REQUIRES THAT THIS COURT GIVE DUE CONSIDERATION AND PLACE GREAT WEIGHT ON THAT BODY OF FEDERAL COMPETITION LAW THAT THE ENERGY PRODUCTIVITY SYSTEMS COURT RELIED ON, WHEN THEY CAME TO EXACTLY THE OPPOSITE CONCLUSION ON THE SAME EXACT THRESH OLD LEGAL ISSUE. AND WE WOULD, ALSO, POINT OUT THAT THERE IS ANOTHER FLAW IN THE TAMPA ELECTRIC DECISION, AND THAT IS IT CITES, WITH FAVOR, THE IDEA THAT WHOLESALE SALES ARE WITHIN THE REGULATED SPHERE OF REGULATION. UNFORTUNATELY THAT IS MISLEADING IN A PLANT CITING CASE. PLANT CITING IS A REGULATED MATTER. THERE IS A WHOLE CHAPTER 43 DEVOTED TO IT, AND AS YOU KNOW, FROM THE AUTHORITY THAT WE CITED SUPPLEMENTALLY, THE FEDERAL POWER ACT DISCLAIMS ANY JURISDICTION OVER MATTERS REGULATED BY THE STATES.

YOU ARE ASKING US TO READ THIS AS THE TAMPA ELECTRIC CASE, ON TWO SEPARATE POINTS.

RIGHT.

ONE BEING THE WHOLESALE ISSUE AND THE OTHER BEING?

THE IMPLIED REPEAL, WHICH IS DISFAVORED AS A MATTER OF LAW, AND WHAT IT DOES TO THE REGULATORY SCHEME, IF YOU LOOK AT 403.502-3, IT MAKES THE COMMISSION RESPONSIBLE FOR ELECTRIC ENERGY IN FLORIDA, WHOLESALE AND RETAIL. OTHERWISE IT IS NOT ADEQUATE. PURSUANT TO THE NEED DETERMINATION STATUTE, WHICH IS HAS BEEN ADJUDICATED LIMITED TO RETAIL, SO THERE IS A DISCONNECT THERE, AND WE WOULD SAY THAT WE DON'T KNOW IF OUR ACCOMMODATION IS APPROPRIATE. WE DON'T KNOW IF WE HAVE MET THE STRINGENT TERMS OF TAMPA ELECTRIC. IF WE HAVE, FINE. THAT MEAN THE PLANT WILL BE BUILT. IF WE HAVEN'T, THE COURT SHOULD CONSIDER THOSE FACTORS, IN WHETHER IT WANTS TO PROCEED TO APPLY THE TAMPA ELECTRIC RATIONALE TO ANY NEED DETERMINATIONS, INCLUDING THIS ONE. IF IT GOES BACK TO THE STATUS "ANTE, THE ONLY CHANGE IS WE WOULD GET TO LOOK AT EVERYBODY'S APPLICATIONS. IT DOESN'T MEAN THAT WE HAVE TO GRANT THEM, AND IT DOESN'T MEAN THAT, IF THEY WERE UNSUPPORTED OR HAD AN ERROR IN THEM, THAT YOU COULDN'T REVERSE THEM OR REMAND THEM. NOW, I ASSUME THAT MY TIME IS RUNNING, AND ON THE LAST POINT THREE --

BEFORE YOU LEAVE TAMPA ELECTRIC, I TAKE IT THAT YOUR CONTENTION IS THAT TAMPA ELECTRIC WAS NOT BASICALLY A STATUTORY CONSTRUCTION MATTER.

WELL, NOT AT THE BOTTOM LINE, IF IT DOES WHAT IS DISFAVORED, WHICH IS TO HAVE THE RESULT OF OUSTING IT AN ENTIRE CLASS OF COMPETITION. IN OTHER WORDS, THAT THE STATUTORY INTERPRETATION WOULD BE TRUMPED BY THE REQUIRED STANDARD OF ACTUAL AND CLEAR STATUTORY REPUING NANCE, AND PEOPLE LOOK TO THE ACTUAL AND STATUTORY REPUGNANCE TO APPLY TO THE STATUTE, BUT UNFORTUNATELY THAT DOESN'T DO IT.

IT SEEMS TO ME, THOUGH, THAT IN MATTERS, THOUGH, OF STATUTORY INTERPRETATION, THAT IF THE, THE POSITION OF THE COMMISSION IS THAT THE COURT GOT IT WRONG AS TO STATUTORY INTERPRETATION, THAT THE REMEDY IS TO GET THE LEGISLATURE TO DEAL WITH THE STATUTE. I MEAN, WASN'T THAT THE THRUST OF WHAT TAMPA ELECTRIC SAYS, IS THAT --

RIGHT.

WE ARE DEALING WITH A STATUTE.

THAT IS FINE, IF IT IS NOT DISFAVORED AS A MATTER OF LAW, UNFORTUNATELY, THOUGH, IT IS DISFAVORED AS A MATTER OF LAW. THE STATUTORY CONSTRUCTION IS THE IMPLICATION. UNLESS YOU HAVE AN ACTUAL AND CLEAR, SPECIFIC STATUTORY PROVISION, THAT OUSTS COMPETITION, YOU CAN'T USE STATUTORY INTERPRETATION TO IMPLY THE REVEAL PEEL OF -- IMPLY THE REPEAL OF STATUTORY INTERPRETATION. THAT IS CLEAR IN NEW YORK STOCK

EXCHANGE, AND, YOUR HONOR, EVERY COMPANY WOULD BE IN THE COURTS, TRYING TO IMPLY THEIR WAY OUT OF HAVING TO COMPETE, IF STATUTORY INTERPRETATION WOULD DO THE TRICK, AND THAT IS WHY THE U.S. SUPREME COURT HAS INCORPORATED, IN THE COMPETITION LAW OF FLORIDA, HELD THAT IMPLIED REPEAL IS DISFAVORED, UNLESS SUPPORTED BY ACTUAL AND CLEAR STATUTORY REPUGNANCE, AND THERE IS PLENTY ANY THE RETAIL AREA. HAVE NO FEAR ABOUT THAT. NO ONE COULD DO OTHER THAN IMPLY THE REPEAL OF COMPETITION AS TO RETAIL. MR. CHIEF JUSTICE

IF YOU ARE DIVIDING YOUR TIME WITH MR. SASO, I THINK YOU --

THANK YOU.

MY NAME IS GARY SASSO, AND I REPRESENT THE FLORIDA POWER CORPORATION. MAY IT PLEASE THE COURT. THIS STATUTE HAS AN APPLICATION IN THE POWER PLANT CITING ACT IN 419.

YOU LIKE OUR INTERPRETATION.

YES, WE DO, AND WE THINK IT HAS NOT BEEN DEPARTED FROM IN THIS CASE. WHAT WE HAVE HERE IS A STATE-REGULATED RETAIL UTILITY THAT WILL OWN AND OPERATE THIS PLANT, TO WHICH THE PLANT IS COMMITTED. IT HAS DEMONSTRATED A RETAIL NEED FOR THIS PLANT, AND THE PLANT WILL BE THE MOST COST COST-EFFECTIVE DETERMINATION TO THAT NEED, BEATING OUT PANDA BY $60,000. THAT IS THE BACKGROUND TO WHICH PANDA RAISES ISSUES ON APPEAL. I, ALSO, WILL FOCUS ON NUMBER TWO, BECAUSE WE BELIEVE THAT BOTH PANDA AND THE PUBLIC SERVICE COMMISSION MAKES THIS MORE CONFUSING THAN IT REALLY S IT IS ACTUALLY VERY STRAIGHTFORWARD. PANDA COMMITTED THAT THIS COURT DEPARTED FROM TICO, BY APPROVING A PLANT NOT FULLY DEVOTED TO RETAIL NEED. THAT IS WRONG WITH THE LAW. WHAT DID THIS COURT HOLD IN TICO? THAT THIS DOES NOT HAVE STATUTORY APPROVAL TO BUILD AN EMERGEENT PLANT. IT IS BUILD ON SPECULATION THAT, AFTER THE PLANT IS UP AND RUNNING, SOMEONE SOMEWHERE WILL BUY OUTPUT FROM THE PLANT. THOSE ARE THE TYPE OF COMPANIES THAT WE HAVE BEEN READING ABOUT IN CALIFORNIA THAT HAVE NEITHER THE STATUTORY NOR THE CONTRACTUAL COMMITMENT OF MEETING RETAIL NEEDS TO SERVE CUSTOMERS IN THE STATE. THERE IS A DISCONNECT BETWEEN THE SOURCE OF SUPPLY AND THE NEED FOR THAT SUPPLY. AS THIS COURT RECOGNIZED IN TICO RETAIL UTILITIES LIKE FLORIDA POWER CORPORATION, HAVE A STATUTORY OBLIGATION TO SERVE THE PEOPLE IN THIS STATE, AND THEY CAN DO SO IN ONE OF TWO-WAY TWO-WAYS. THEY CAN BUILD POWER PLANTS THAT THEY WILL OWN AND OPERATE. THAT IS THE PARADIGM. THAT IS THE REFERENCE POINT THAT THIS COURT USED IN TICO, OR THEY CAN USE A THIRD PARTY CONTRACT, WHICH RAISED THE ISSUES THAT THE COURT HELD IN TICO, AND THE COURT HELD THAT ESSENTIALLY FOR A CONTRACT TO BE HELD TO BE FUNCTIONALLY EQUIVALENT TO THE UTILITY PLANT, IT HAD TO MEET THE NEEDS OF THE UTILITY FOR REACHING THE CAPACITY, JUST AS IF OWNED AND OPERATED BY A RETAIL UTILITY. THIS CASE INVOLVES A PLANT THAT WILL BE OWNED AND OPERATED BY A RETAIL UTILITY, AND THERE WAS NEVER ANY SUGGESTION IN TICO THAT SUCH A PLANT WOULDN'T BE FULLY COMMITTED TO THE RETAIL NEEDS. IT IS FULLY COMMITTED BECAUSE THE COMPANY OWNS IT. ON THE RECORD, THIS CASE SIMPLY DOES NOT ADDRESS THE ISSUES THAT EITHER PANDA OR THE APPELLANT AT -- APPELLATE COUNSEL FOR FLORIDA PUBLIC SERVICE HAS MET. IT IS STIPULATED THAT THIS WILL BE COMMITTED. FLORIDA POWER OPERATED WITH A COMMITMENT, INCLUDING PUTTING ON PUTTING ON WITNESSES AND CROSS-EXAMINING WITNESSES, ET CETERA. WE COMMITTED TO THE STIPULATION THAT IT WOULD BE DEVOTED TO RETAIL OPERATIONS. WE ALSO STIPULATED THAT THE OUTPUT WOULD BE TOWARD THE COMPANY'S RESERVE MARGINS THIS. IS IMPORTANT, BECAUSE IN ORDER TO FULFILL OUR RESPONSIBILITY TO MAINTAIN CUSTOMERS, WE HAVE TO MEET ADEQUATE RESERVES, AND THE PUBLIC SERVICE COMMISSION HAS LONG HELD THAT WE CAN ONLY DO THAT THROUGH FIRM RESOURCES, EITHER PLANTS THAT ARE OWNED OR PLANTS THAT ARE FULLY COMMITTED, BY CONTRACT, TO THE UTILITY, AND WE STIPULATED THAT THE OUTPUT OF THIS PLANT WOULD

FULLY SUPPORT THOSE STIPULATIOS BECAUSE WE OWNED IT. PANDA ACKNOWLEDGED BEFORE THE COMMISSION THAT THAT STIPULATION IS BINDING IN THIS DOCKET. THAT IS WHAT PANDA SAID IN ITS POST-HEARING. IT IS INCLUSIVELYLY DETERMINED IN THE DOCKET. THE PUBLIC SERVICE COMMISSION, ON THE FACE OF ITS FINAL ORDER, EXPRESSLY FOUND THAT THE PLANT WILL BE FULLY COMMITTED TO THE COMPANY MEETING ITS RETAIL SERVICE OBLIGATIONS. IT IS NOT A QUESTION IN THIS CASE, WHETHER THE PLANT WAS FULLY COMMITTED. IT WAS CONCLUSIVELY ESTABLISHED BELOW. NOW, PANDA HAS CONCEDED UPON A STATEMENT IN THE COMMISSION'S FINAL ORDER, AS THE BASIS FOR ITS ARGUMENT, WHERE THE COMMISSION SAID THAT THE COMPANY WOULD NOT NEED PRECISELY ALL OF MEGAWATTS OF THE PLANT, WHEN IT IS FIRST PUT INTO SERVICE, PRECISELY TO HIT THE 20 PERCENT RESERVE MARGIN PLANNING CRITERIA THAT THE COMPANY USES. THAT DOES NOT MEAN THAT THE ENTIRE PLANT IS NOT NEEDED. OF COURSE A UTILITY IS RARELY GOING TO HIT THAT MINIMUM MARGIN PLANNING RESERVE MARGIN ON THE HEAD, BECAUSE IT IS CALCULATING SYSTEM-WIDE DEMANNED WITH SYSTEM ---DEMAND WITH SYSTEM-WIDE RESOURCES, BUT THAT IS A MINIMUM. THE COMPANY HAS A COMMITMENT, PURSUANT TO ITS STATUTORY OBLIGATIONS TO SERE, TO MAINTAIN AT LEAST THOSE AMOUNT OF RESOURCES, AND MORE, IF NECESSARY, TO APPROPRIATE THE RELIABILITY OF THE SYSTEM, AND THE UNDISPUTED EVIDENCE IN THIS CASE WAS THAT THE COMPANY NEEDED A BIT MORE THAN 20 PERCENT IN THIS TIME FRAME, FROM THE MOMENT THIS PLANT GOES INTO SERVICE, TO ENSURE THE RELIABILITY OF THE SYSTEM. AS MY COLLEAGUE MENTIONED, IT WAS UNCONTROVERTED THAT THIS COMPANY HAD RELIED VERY HEAVILY ON DEMAND-SIDE MANAGEMENT. THERE IS TWO WAYS YOU CAN SERVE YOUR CUSTOMERS. ONE IS BY REDUCING DEMAND AND THE OTHER IS BY HAVING POWER PLANTS TO SERVE THAT DEMAND. UTILITIES IN FLORIDA PURSUE WHAT IS CALLED DEMAND-SIDE MANAGEMENT WHICH ARE PROGRAMS BY WHICH WE CAN TURN TO CERTAIN CUSTOMERS AND ASK THEM TO CUT BACK THEIR DEMAND, DURING TIMES OF PEEK LOAD. IT IS A VALUABLE RESOURCE, UNLESS YOU USE IT TOO OFTEN. IF YOU GO TO THAT WELL TOO OFTEN PEOPLE BAIL OUT OF THE PROGRAM, AND THE RECORD EVIDENCE WAS THAT DURING THE PAST SUMMERS WHERE WE HAVE HAD RECORD TEMPERATURES, WE HAVE HAD TO LEAN ON THAT RESOURCE TOO OFTEN, AND WE HAVE HAD A LOT OF CUSTOMERS BAILING OUT OF THE PROGRAM, AS THEY HAVE THE RIGHT TO DO, WHICH PUTS ADD STRAIN ON THE ACTUAL POWER PLANTS THAT WE HAVE AVAILABLE TO SERVE THE SYSTEM.

I TAKE IT THAT IT IS PART OF YOUR POSITION OF YOUR COMPANY THAT IT WOULD BE TOTALLY UNREALISTIC NOT TO HAVE THAT RESERVE CAPACITY.

ABSOLUTELY, YOUR HONOR.

AND THAT IS WHY THE COMMISSION IS ONE OF THE INITIATING FORCES IN REQUIRING THAT.

THAT'S CORRECT. AND IN FACT, THE COMMISSION HAD LEANED VERY HEAVILY ON THE COMPANY TO BUILD A POWER PLANT, POINTNG OUT THAT WE WERE RELYING MORE HEAVILY ON DEMAND DEMAND-SIDE MANAGEMENT THAN ANY OTHER UTILITY IN THE NATION. FURTHER, DURING THE TIME FRAME IN WHICH THIS PLANT IS GOING INTO EFFECT, WE WERE TRANSITIONED TO A NEW DEMAND SIDE PROGRAM, WHICH CREATED FURTHER UNCERTAINTY, AND SO THE COMPANY CONCLUDED AND THE COMMISSION AGREED THAT IT NEEDED TO ADD THIS CAPACITY TO ITS SYSTEM IN THIS TIME FRAME, IN ORDER TO ENSURE THE RELIABILITY OF THE SYSTEM. WITHOUT THIS PLANT, ONLY 25 PERCENT OF OUR RESERVES ARE HARD-GENERATING ASSETS, POWER PLANT EQUIPMENT. THE OTHER 75 PERCENT IS THE ABILITY TO ASK CUSTOMERS TO CURTAIL THEIR USAGE. WITH THIS PLANT, THE NUMBER GOES UP TO 45 PERCENT REPRESENTED BY ACTUAL GENERATING CAPACITIES, NECESSARY TO ENSURE RELIABILITY. THERE ARE NO MEGAWATTS IN THIS PLANT. FROM THE MOMENT IT IS PUT INTO SERVICE, IT WILL BE USED. IN FACT THE COMPANY WILL GROW OUT OF THAT PLANT, FROM THE MOMENT IT IS PUT INTO USE AND HAVE TO BUILD ANOTHER LIKE-SIZED PLANT AND IN ANOTHER TWO YEARS ANOTHER LIKE-SIZED PLANT.

YOU SAY THERE ARE NO MEGAWATTS. IF IT GOES ON-LINE, IF THERE ISN'T A PEEK TIME, WHAT HAPPENS TO THE POWER?

WHAT THE RECORD SHOWS, JUSTICE PARIENTE, IS THE COMPANY MAY HAVE THE OPPORTUNITY TO MAKE SHORT-TERM WHOLESALE SALES, BUT THOSE DOLLARS ARE RETURNED TO THE RATE PAYER. THAT IS WHAT THE RECORD SHOWS, A AND IN FACT PART OF THE STIPULATION WAS THAT, WHILE THE PLANT IS FULLY COMMITTED, THAT IS NOT WITHOUT REGARD TO COMPANY'S ABILITY TO MAKE WHOLESALE SALES, WHEN IT WILL BENEFIT THE RETAIL RATE PAIR. IN FACT, THIS IS NECESSARY IN ORDER TO ALLOW THE COMPANY TO OPTIMIZE THE VALUE OF THE PLANT FOR THE RATE PAIR. IT MITIGATES THE COST OF HAVING THE -- THE RATE PAYER. IT MITIGATES THE COST OF HAVING THE PLANT, WHEN THE OFF PEEK TYPES IT CAN MAKE CRITICAL SALES. BUT WHEN THERE IS AN OUTAGE, THE COMPANY CAN CALL THAT COMPANY BACK INTO POWER AND, BEING COMMITTED TO THE RETAIL PAYER, THE COMPANY IS COMMITTED TO PROVIDE THE NEED. WE DON'T KNOW WHEN THESE WILL OCCUR.

WHEN YOU SAY IT WILL OUTGROW THE PLANT IN TWO YEARS, WHAT DO YOU MEAN, WHAT DO YOU SHOW BY THAT?

JUSTICE PARIENTE, THE COMPANY WILL NEED AN ADDITIONAL PLANT OF LIKE SIZE IN TWO YEARS. THIS S OT A SITUATION WHERE THIS PLANT IS GOING TO SERVE THE COMPANY'S, FULFILL ALL OF THE COMPANY'S NEEDS FOR GENRATING CAPACITY IN THE FUTURE.

FOR RESERVE CAPACITY OR FOR ACTUALLY MEETING ONGOING NEEDS OF RETAIL CUSTOMERS?

BOTH. BOTH. THE RESERVE MARGIN REQUIREMENT IS A MEASURE OF WHAT WE NEED, TO MEET THE ONGOING NEEDS OF RETAIL CUSTOMERS.

AND THIS IS PROBABLY WASN'T ARGUED TODAY, BUT A POINT WAS MADE BY PANDA THAT ONE OF THE REASONS THAT FLORIDA POWER SAID THAT THEY NEEDED TO BUILD THE PLANT RIGHT NOW WAS BECAUSE OF THE COMMITMENT OF THE DISCOUNT ON THE GENERATION EQUIPMENT, AND THERE WAS SOME ARGUMENT ABOUT WHETHER THAT EQUIPMENT, WHETHER YOU REALLY COULD GET THAT DISCOUNT. IS THE RECORD CLEAR ABOUT THAT?

THE RECORD IS CLEAR THAT, BY BUILDING THE PLANT WHEN IT BUILT IT, THE COMPANY HAD BUILT THE RELIABILITY ADVANTAGE AND AN ECONOMIC ADVANTAGE, AND BOTH OF THOSE CRITERIA ARE IN 403.519. WE HAVE AN OBLIGATION TO ENSURE THAT WE PROVIDE ADEQUATE ELECTRICITY AT REASONABLE COST. TO FULFILL THAT OBLIGATION, THE COMPANY IS ALWAYS TRYING TO NEGOTIATE FAVORABLE OPTIONS AND CONTRACT ALTERNATIVES, WHICH IT WOULD ABANDON, IF IT WAS PRESENTED WITH A BETTER ALTERNATIVE, BUT HERE THE NEXT ALTERNATIVE WAS $66 MILLION CHEAPER, SO THE COMPANY CAPITALIZED ON THAT OPTION AND WAS ABLE TO BRING A PLANT INTO THE SYSTEM AT GREAT SAVINGS TO ITS RATE PAYERS, PLUS THE COMPANY WILL BRING IN ECONOMIC STABILITY FOR ITS RATE PAYERS, SO THERE IS AN ECONOMIC NEED FOR ALL OF THE PLANT. MR. CHIEF JUSTICE

THANK YOU VERY MUCH, MR. SASSO. MS. BROWNLESS.

IN RESPONSE TO MR. SASSO'S POINT ABOUT ALL OF THIS CAPACITY BEING IMMEDIATELY USED AND IMMEDIATELY COMMITTED ON THE IN IN-SERVICE STATE OF THE PLANT, BASICALLY WHAT MR. SASSO IS ARGUING IS THAT, IF AN INVESTOR INVESTOR-OWNED UTILITY BUILDS A POWER PLANT AND EVEN ONE MEGAWATT OF THAT POWER LANT IS USED AT RETAIL ON THE IN-SERVICE DATE OF THAT PLANT, THAT IT IS ALL FULLY COMMITTED, BECAUSE IT IS OWNED BY THE UTILITY, AND THE UTILITY CAN ACCESS IT, SHOULD IT NEED IT. I WOULD SUGGEST --

ISN'T THAT, REALLY, AN EXAGGERATION? HOW CLOSE DOES THAT COME TO THE FACTS THAT WE

ARE ACTUALLY PESETED?

THE FACTS IN THIS CASE ARE THAT USING POWER CORPS'S OWN CALCULATIONS OF A 20 PERCENT RESERVE MARGIN, IN NOVEMBER OF 20023, THIS IS THEIR OWN -- OF NOVEMBER OF 2003, THIS IS THEIR OWN NUMBER, BASED ON THEIR OWN ASSESSMENT OF HOW MANY FOLKS WILL ABANDON THEIR LOAD MANAGEMENT PROGRAM. THEIR QUANTITY FIX, 130 -- QUANTIFICATION IS THAT 140 MEGAWATTS IS AND 130 MEGAWATTS IS NOT. THEY CAN ARGUE THAT THEY WILL GROW INTO AN OUT-SIZED POWER PLANT AND THAT THEY SHOULD HAVE THE ABILITY TO ACCESS POWER. IF YOU WAIT LONG ENOUGH, EVERY UTILITY WILL GROW INTO ANY-SIZED PLANT.

DOES PANDA ADD HAVE INDICATE A -- ADVOCATE AN EXTREME POSITION THAT EVERY MEGAWATT HAS TO BE ACCOUNTED FOR IN A RETAIL MANNER, WHEN THE PLANT IS BUILT? THAT IS REALLY THE STRAIGHT JACKET THAT YOU ARE ADVOCATING THAT WE INTERPRET FROM OUR PREVIOUS DECISION, IS IT NOT?

WELL, SIR --

THAT THE PSC --

-- THAT IS THE PLAIN LANGUAGE OF YOUR PREVIOUS DECISION, AND I THINK THAT THAT --

HOW COULD THAT POSSIBLY BE REALISTIC ON THE GROUND, WITH REFERENCE TO THE DEVELOPMENT OF ENERGY? IN OTHER WORDS, HOW COULD THAT POSSIBLY BE GOOD POLICY FOR THE STATE OF FLORIDA TO SAY, NOW, YOU CANNOT BUILD ANYTHING, UNLESS YOU ABSOLUTELY HAVE LINED UP RETAIL CUSTOMERS, AND THEY ARE OUT THERE NOW, WAITING, NOT BEING SERVED, AND AS SOON AS YOU GET THE PLANT ON, IT WILL ALL BE FILLED UP. ISN'T THAT REALLY WHAT YOU ARE ADVOCATING?

THAT IS WHAT THE TICO DECISION STATES. I DO NOT THINK THAT WAS GOOD POLICY, IN THE TICO DECISION, EITHER. THE FLORIDA PUBLIC SERVICE COMMISSION HAS ALWAYS TAKEN THE POSITION THESE POWER PLANTS ARE BUILT, BASED UPON UNIFORM POWER BLOCKS. IF THE POWER BLOCK AT ISSUE HERE IS THE 250-MEGAWATT POWER BLOCK, I THINK THAT IS WHAT HAS TO BE AVAILABLE, BUT THE POWER BLOCK HERE --.

ISN'T THAT EXTREME POSITION. WE HAD AN OUT-OF-STATE MERCHANT PLANT ATTEMPTING TO COME IN, WHERE IT WAS MORE OR LESS CONCEDED THAT THIS WAS FOR THE WHOLESALE PRODUCTION, THAT THAT WAS THE ENTIRE FOCUS HERE, AS OPPOSED TO THE EXISTING UTILITY COMMUNITY, WITHIN THE STATE OF FLORIDA NOW, IN THE ORDINARY COURSE, ASKING FOR CITING FOR A NEW POWER PLANT, TO SERVE THE NEEDS OF THE PEOPLE IN THE STATE. AREN'T THERE JUST SHARP DISTINCTIONS BETWEEN THAT PREVIOUS CASE? AS YOU KNOW, I DISSENTED IN THAT CASE, INSOFAR AS THE AUTHORITY OF THE COMMISSION, BUT STILL YOU HAVE TO CONCEDE, DO YOU NOT, THAT THERE ARE DRAMATIC DISTINCTIONS BETWEEN THE ISSUE THAT WE WERE FACED WITH THERE AND THE SITUATION THAT WE HAVE HERE?

I BELIEVE THAT THE OWNERSHIP OF THE PLANT IS IMMATERIAL TO ANALYSIS OF WHAT IS REQUIRED UNDER THE CITING ACT. THE CITING ACT REQUIRES A BALANCE OF A SPECIFIED AMOUNT OF NEED AT A SPECIFIED TIME, AGAINST THE ENVIRONMENTAL HARM, AND I DON'T THINK THAT MR. SASSO SASSO'S INTERPRETATION OR HIS ALLEGATION THAT THE COMMISSION CAN SIMPLY, FOR, QUOTE, ECONOMIC REASONS, ALLOW A PUBLIC UTILITY TO GROW INTO ANY SIZED PLANT, EFFECTUATES THE PROCEDURE THAT IS CLEARLY SET FORTH IN THE CITING ACT. YOU HAVE TO HAVE SOME SPECIFIED MEGAWATTS AT SOME SPECIFIED TIME, TO BALANCE AGAINST ENVIRONMENTAL NEED.

I AM LOOKING AT THE DECISION IN THE TAMPA ELECTRIC CASE, AND WHAT THIS COURT SAID WAS THAT THE -- THAT THE CITING ACT IN TICO WAS NOT INTENDED TO AUTHORIZE THE

DETERMINATION OF NEED FOR A PROPOSED POWER PLANT OUTPUT THAT IS NOT FULLY COMMITTED TO USE BY FLORIDA CUSTOMERS. NOW, IS THAT THE PART THAT YOU ARE RELYING UPON?

YES, SIR.

AND THE WAY THAT YOU ARE SAYING THAT THAT SHOULD BE READ IS THAT IT IS RATHER THAN A COMMITTED TO USE GENERICLY, BY ONLY FLORIDA CUSTOMERS, AS OPPOSED TO THOSE CUSTOMERS IN NORTH CAROLINA, WHICH COULD BE THE POWER COULD BE SOLD TO A WHOLESALE MARKET OUT OF THAT NEW SMYRNA BEACH PLANT, THAT THAT LANGUAGE IS READ RESTRICTIVELY TO MEAN THAT IT IS COMMITTED USE THAT ALREADY EXIST THES FOR RETAIL CUSTOMERS -- EXISTS FOR RETAIL CUSTOMERS IN FLORIDA.

IT IS COMMITTED USE THAT IS IDENTIFIED, AND IN THIS CASE THE IDENTIFY NEED WAS RESERVE MARGIN NEED -- THE IDENTIFIED NEED WAS RESERVE MARGIN NEED, SO WHAT IS RESERVE MARGIN? IT IS ACTUAL CAPACITY THAT SITS THERE IN RESERVE.

WOULDN'T YOU AGREE THAT THAT IS A PRETTY STRAINED READING OF TAMPA ELECTRIC, IN THAT THE ISSUE IN TAMPA ELECTRIC WAS WHETHER YOU ARE GOING TO ALLOW THESE OUT-OF-STATE FEDERALLY, THE WHOLESALE MARKET WAS DEALT WITH IN A DIFFERENT WAY, NOT BY THE PUBLIC SERVICE COMMISSION, AND THE ISSUE PRESENTED WAS WHETHER THE I AND P'S COULD COME WITHIN THE FLORIDA REGULATORY PROCESS AND BUILD THIS PLANT, WHERE ONLY 30 MEGAWATTS WAS GOING TO BE USED, COMMITTED TO BE USED, IN FLORIDA. ISN'T THAT A FAIR READING OF THAT?

THAT IS A FAIR READING OF THE FACTS OF THAT CASE, BUT I WOULD GO BACK TO THE RATIONALE FOR WHY THIS COURT MADE THAT HOLDING, AND THE RATIONALE WAS THE DETERMINATION, I BELIEVE, INAPPROPRIATELY, THAT THE FLORIDA PUBLIC SERVICE COMMISSION HAD ABSOLUTELY NO JURISDICTION OVER WHOLESALE SALES. THE VERY TYPE OF SALES, WHETHER WHOLESALE SALES ARE MADE BY INVESTOR-OWNED UTILITIES OR WHOLESALE GENERATORS, THAT WAS THE BASIS FOR THE RATIONALE. THAT WAS THE RATIONALE SET FORTH BY SUSAN CLARK. THAT WAS THE RATIONALE ARGUED BY FLORIDA POWER CORPORATION AND THE OTHER INVESTOR-OWNED UTILITIES, AND THAT WAS FOLLOWED THROUGH. HENCE THE LANGUAGE THAT I CITED IN MY BRIEF AND HIM RELYING ON, THAT IT IS THE PROPOSED POWER PLANT OUTPUT THAT MUST BE USED AT RETAIL. I THINK THAT WHOLESALE/RETAIL DISTINCTION IS AN INAPPROPRIATE ONE, BUT THAT IS WHAT YOU BASED YOUR DECISION, IN TICO, UPON, AND WHAT WE ARE ARGUING IS THAT THAT DISTINCTION SHOULD BE APPLIED HERE.

HOW DOES THAT HELP PANDA ENERGY, IN THIS CASE? I MEAN, YOU ARE PROPOSING TO BUILD IT FOR FLORIDA POWER, UNDER, WHAT YOU ARE ARGUING FOR WOULD BE THAT, EVEN IF YOU COULD HAVE BEEN A SUCCESSFUL BIDDER, THE PLANT WOULDN'T GET BUILT. IN OTHER WORDS, I AM -- HOW DOES THIS ARGUMENT BENEFIT PANDA ENERGY? THAT IS THAT WE DECIDE THAT THIS PLANT CAN'T BE BUILT, BECAUSE IT IS NOT GOING TO BE FULLY COMMITTED TO --

AT A MINIMUM, THERE IS 103 MEGAWATTS OF CAPACITY, WHICH IS THE AMOUNT OF CAPACITY WE THINK IS REALLY AT ISSUE HERE, IN NOVEMBER 2003, THAT FLORIDA POWER CORPORATION WILL PUT OUT TO BID ON THE OPEN MARKET AGAIN.

PANDA WOULD SUPPLY THAT --

PANNED AND OTHERS WOULD HAVE AN OPPORTUNITY TO SUPPLY THAT. AND PERHAPS TO PROVIDE THE STATE OF FLORIDA WITH THE BENEFIT OF OTHER OPPORTUNITIES. TO GET CHEAPER POWER THAN THAT. STATED HERE. I GUESS IN SUMMATION, MY POINT IS QUITE SIMPLE. THE WHOLE POINT OF THE POWER PLANT CITING ACT IS TO, AT A SPECIFIC POINT IN TIME, IDENTIFY A SPECIFIC AMOUNT OF NEED, AND ONE CANNOT SIMPLY ALLOW THE FLORIDA PUBLIC SERVICE

COMMISSION OR FLORIDA POWER CORPORATION TO COME UP WITH ANY AMOUNT OF MEGAWATTS, SIMPLY BECAUSE THEY COULD USE THOSE MEGAWATTS IN FLORIDA, IF NECESSARY, WHEN THE RECORD IS CLEAR HERE THAT 400 OF THOSE MEGAWATTS ON THE IN-SERVICE DATE ARE GOING TO BE SOLD AT WHOLESALE, AND R. SASSO HAS INDICATED THAT THAT IS, IN FACT, HIS RESPONSIBILITY TO DO SO. UNDER THOSE CIRCUMSTANCES, I DON'T SEE THE DIFFERENCE BETWEEN A PROPOSED POWER PLANT, WHICH WILL BE SOLD AT WHOLESALE, BY AN AWG, AND A PROPOSED POWER PLANT WHICH WILL BE SOLD AT WHOLESALE BY AN INVESTOR-OWNED UTILITY. I DON'T THINK THE OBLIGATION TO SERVE --.

THE NEED INCREASES FOR THE RETAIL CUSTOMER. THEY ARE OBLIGATED UNDER THIS FLORIDA, THE REGULATORY SCHEME, TO TAKE THAT POWER FOR THE FLORIDA CUSTOMERS, WHICH WOULD NOT BE THE CASE FOR A PLANT THAT IS A NONREGULATED UTILITY. ISN'T THAT THE DIFFERENCE THAT WE HAVE BEEN TALKING ABOUT THIS MORNING?

YES, MA'AM. IT IS TRUE THAT THEY HAVE AN OBLIGATION TO SERVE, BUT THAT OBLIGATION IS NOT UNLIMITED. AND IT CANNOT BE USED AS A MEANS FOR ALLOWING THEM TO BUILD POWER PLANTS OF ANY SIZE WHATSOEVER. AND IN MY OPINION, THAT IS WHAT HAS HAPPENED HERE. WHAT IS DRIVING THIS TRAIN IS THE ECONOMICS. WHAT IS DRIVING THE SIZE OF THIS PLANT IS THE $20 MILLION TO $40 MILLION DISCOUNT THAT FLORIDA POWER CORPORATION COULD NOT SECURE, UNLESS THE PLANT CAME ON LINE, UNLESS A 500 MEGAWATT POWER BLOCK, WHICH IS A 530 EGWTT PLANT, CAME ON LINE IN NVEMBR 2003. THEY DDN'T HAVE ANY OTHER DISCOUNTS. AND IF YOU LOOK AT EXHIBIT NO. 6 WHICH I HOPE YOU WILL, YOU WILL SEE THAT THEY HAD SERIOUS PLANS FOR THAT CAPACITY, WHICH DID NOT INCLUDE RETAIL CUSTOMERS, WHICH HAD TO DO WITH DEREGULAR RATED -- DELEG LATED ENVIRONMENTS -- DEREGULATED ENVIRONMENTS AND WHOLESALE SALES.

WITH REGARD TO YOUR STATEMENT THAT FLORIDA POWER WOULD REGULATE CUSTOMERS FROM THE WHOLESALE OR FROM THE ENERGY THAT WOULD BE PART OF THAT WHOLESALE GROUP OF ENERGY, IS THERE A, WHAT DO YOU MEAN BY THAT, THAT IT IS NOT UNLIMITED? IN RESPONSE TO JUSTICE PARIENTE'S QUESTION.

I DON'T THINK THAT IT IS THE INTENTION OF THE CITING ACT TO ALLOW AN INVESTOR-OWNED UTILITY WITH AN OBLIGATION TO SERVE, TO BUILD ANY SIZE PLANT, BECAUSE IF THAT WERE THE CASE, THEY WOULD BUILD VERY LARGE PLANTS, BECAUSE VERY LARGE PLANTS HAVE THE BEST ECONOMY OF SCALE, THE BEST ECONOMICS AND THE CHEAPER KILOWATT HOUR RATES, AND I THINK, IN ORDER TO EFFECT THIS BALANCE, THERE HAS TO BESOME QUANTITY FIX. THE QUANTITY FIX IN THIS -- THE QUANTITYFICATION IN THIS CASE, DONE BY FLORIDA POWER CAN CORPORATION, SHOWS THAT ONLY 130 MEGAWATTS WILL BE USED FOR RETAIL SALES ON THE SERVICE DATE. MR. CHIEF JUSTICE

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE. THE COURT, AT THIS TIME, WILL TAKE A FIVE-MINUTE RECESS.