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## **Florida Industrial Power Users Group v. Lila A. Jaber**

CHIEF JUSTICE: GOOD MORNING EVERYONE, AND WELCOME TO THE FLORIDA SUPREME COURT. I SEE THAT COUNSEL IS ALL READY FOR THE FIRST CASE AND, ALSO, APPARENTLY, YOU ALL HAVE AGREED ABOUT THE USE OF A DISPLAY HERE, IS THAT CORRECT?

YES, SIR.

CHIEF JUSTICE: ALL RIGHT. ALL RIGHT. WELL, WITH THAT, WE WILL GET STARTED ON THE FIRST CASE FLORIDA INDUSTRIAL POWER USERS GROUP. YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS JOHN McWHIRTER. I AM ATTORNEY FOR THE, AN INDUSTRIAL CONSUMER GROUP KNOWN AS THE FLORIDA INDUSTRIAL POWER USERS GROUP, AND I AM JOINED IN THE BRIEF AND AT COUNSEL TABLE BY THE HONORABLE ROBERT VANDIVER, NOW A MEMBER OF THE PUBLIC COUNSEL. THIS CASE IS A SIGNIFICANT ONE IN OUR OPINION. IT BEGAN.

SEPTEMBER -- IT BEGAN ON SEPTEMBER 20 LAST YEAR. TAMPA ELECTRIC CAME BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION AND SOUGHT AN INCREASE OF \$139 MILLION FOR FUEL CHARGES. 51 MILLION OF THAT WAS FOR THE FUEL CHARGES THAT THEY ANTICIPATED WOULD BE INCURRED IN THE CURRENT USE, 2002, AND \$88 MILLION OF IT WAS FOR BACK CHARGES FOR UNDER RECOVERIES DURING PRIOR YEARS. WHEN THIS CASE WAS FILED, IT BECAME READILY APPARENT THAT ONE OF THE KEY ISSUES IN THE CASE WAS NOT ONLY THE MAGNITUDE OF THE INCREASE BUT, ALSO, THE FACT THAT THIS CASE DEALT WITH THE TENUOUS INTERFACE BETWEEN WHOLESALE AND RETAIL -- WHOLESALE AND RETAIL POWER TRANSACTIONS IN THE STATE OF FLORIDA. AS YOU KNOW, FLORIDA HAS A COMPETITIVE WHOLESALE MARKET, AND THE RETAIL MARKET IS GOVERNED BY A NONCOMPETITION AGREEMENTS BETWEEN THE UTILITIES THAT ARE APPROVED BY THE PUBLIC SERVICE COMMISSION. AS A RESULT, THE CUSTOMERS OF THE INVESTOR-OWNED UTILITIES AND OTHER UTILITIES IN THE STATE PAY RATES THAT ARE ESTABLISHED BY -- YES, SIR.

WHAT I WOULD LIKE YOU TO TELL, EXPLAIN TO US, IS PRECISELY WHAT ARE YOU ASKING THE COURT TO DO.

YOUR HONOR, BELOW WE ASKED THE PUBLIC SERVICE COMMISSION TO INVESTIGATE SOME WHOLESALE TRANSACTIONS BETWEEN TAMPA ELECTRIC AND ITS AFFILIATED BUT UNREGULATED MERCHANT PLAN, AND WE CONCLUDED THAT --

AND THE COMMISSION DETERMINED THAT IT HAD THE INFORMATION THAT WAS NECESSARY FOR IT TO REACH A DECISION.

THAT'S CORRECT, YOUR HONOR.

AND THEREFORE IT DENIED THE REQUEST TO OPEN THE INVESTIGATION.

THAT'S CORRECT, YOUR HONOR.

NOW, IS WHAT YOU ARE ASKING FOR THIS COURT TO DO IS TO REQUIRE THE COMMISSION TO DO THE INVESTIGATION?

YES, SIR.

NOW, IS THE, IN THIS INSTANCE, IS THE STANDARD FOR US TO REVIEW THIS MATTER AN ABUSE OF DISCRETION?

YOUR HONOR, THAT'S CORRECT. AS YOU KNOW, CONSUMERS HAVE A DIFFICULT TIME COMING BEFORE THE COURT, BECAUSE THE COMMISSION'S INTERPRETATIONS OF ITS LAW ARE GIVEN THE PRESUMPTION OF CREDIBILITY, WITH RESPECT TO FINDINGS OF FACT THAT ARE CONCLUSORY, UNLESS THE FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIVE COMPETENT EVIDENCE, AND IN THIS CASE, ALL OF THE EVIDENCE LEADS TO --

WHAT I AM CONCERNED ABOUT HERE, AS I READ YOUR BRIEFS, IS THAT WHAT, YOU ARE NOT ASKING, YOU ARE NOT POSING THAT WHAT THE COMMISSION'S DECISION AS TO A RATE MATTER SHOULD BE SET ASIDE. WHAT YOU ARE, YOU ARE TAKING IT A STEP BACK BEFORE YOU GET THERE.

THAT'S CORRECT.

AND SAYING, YOU KNOW, IN REACHING A DECISION, THAT THE COMMISSION DIDN'T DO THE WORK OF THE INVESTIGATING IT PROPERLY. IS THAT RIGHT?

WELL, THERE ARE REASONS THAT IT SAID THAT IT DIDN'T DO THAT, AND THE REASONS WERE IT CONCLUDED, IN OUR OPINION AND WHAT THE ORDER INDICATES, IS IT WAS PREEMPTED IN DOING THAT, BY THE FACT THAT THE OTHER REGULATORY AGENCY, THE OTHER WATCHDOG, FEDERAL ENERGY REGULATORY COMMISSION, HAD APPROVED THE CONTRACTS THAT WE QUESTIONED.

WHAT OTHER INSTANCES HAS THIS COURT STEPPED INTO AND HELD THAT THE COMMISSION HAS ABUSED ITS DISCRETION IN A MATTER OF WHETHER IT SUFFICIENTLY HAD THE INFORMATION THAT IT NEEDED IN THE INVESTIGATION? IS THERE ANY INSTANCE IN WHICH THIS COURT HAS DONE THAT?

YOUR HONOR, I THINK THE CASES ARE LEGION WHERE CASES HAVE BEEN REMANDED TO THE PUBLIC SERVICE COMMISSION FOR IMPROPER INTERPRETATIONS OF THE LAW AND FOR CASES WHERE THE COMMISSION DIDN'T FOLLOW THE FACTUAL, THEY DIDN'T HAVE COMPETENT SUBSTANTIAL EVIDENCE BEFORE IT.

NOT REALLY IN A CONTEXT LIKE THIS, THOUGH, IS IT, WHERE WE HAVE ACTUALLY DIRECTED THE COMMISSION, ITSELF, TO GO FURTHER IN ITS INVESTIGATION? I AM HAVING DIFFICULTY, AS WITH JUSTICE WELLS, DON'T YOU CARRY A TREMENDOUS BURDEN IN A SITUATION LIKE THIS, ALMOST TO HAVE TO DEMONSTRATE IRREFUTABLE PROOF THAT THE COMMISSION HAS IGNORED EVIDENCE THAT WOULD LEAD TO A CONTRARY RESULT.

YOUR HONOR, THAT IS THE REASON I BROUGHT THIS CHART, AND I CAN EXPLAIN IT TO YOU WITH THAT.

YOU THINK YOU CAN DO THAT, THAT THERE IS INFORMATION OUT THERE THAT JUST REALLY DEMONSTRATES THAT THE COMMISSION HAS REALLY DROPPED THE BALL IN THIS SITUATION?

I THINK THAT EVIDENCE IS THERE, YOUR HONOR.

WHY DON'T YOU PROCEED, THEN.

ALL RIGHT. WHAT I WILL DO IS, OF COURSE, I WOULD LIKE TO SAY ONE THING BEFORE I GO TO THE CHART, IF I MAY. WE CHALLENGED THE COMMISSION'S INTERPRETATION OF THE LAW.

AND I WANTED TO JUST STOP YOU ON THAT, BECAUSE AS I UNDERSTAND IT, WHAT YOU ARE SAYING, REALLY, THAT THE REASON THAT THE PSC DIDN'T GO FURTHER IN LOOKING INTO THIS MATTER IS BECAUSE THEY FELT THEY WERE PRECLUDED BY FEDERAL LAW?

THAT IS WHAT THE ORDER SEEMED TO INDICATE.

THEY SAID THAT IS THE REASON THAT THEY DIDN'T GO FURTHER.

YES, MA'AM. THAT IS WHAT THE ORDER INDICATES. INTERESTING THING, THOUGH, AND WE THOUGHT THIS WAS VERY IMPORTANT, BECAUSE WE THINK THE PUBLIC SERVICE COMMISSION HAS A RIGHT TO PROTECT CONSUMERS. RETAIL CONSUMERS. AND IF RATES ARE PASSED DOWN, APPROVED BY THE PUBLIC SERVICE COMMISSION, WE THINK, BY THE PERC, WE THINK THE COMMISSION HAS ANOTHER SHOT AT IT. THE COMMISSION SEEMED TO THINK NOT. THE ORDER SAID THAT THEY WERE RELYING ON THE FERC APPROVAL OF THESE CONTRACTS, BUT ON THE ANSWER BRIEFS BY BOTH TAMPA ELECTRIC AND THE PUBLIC SERVICE COMMISSION, THEY AGREED WITH OUR POSITION ON THAT POINT, AND THEY SAID, NO, WE STILL HAVE THE RIGHT TO PROTECT THE PUBLIC. THE PROBLEM IS THE LANGUAGE OF THE ORDER DOESN'T CONFORM TO THE AGREEMENT NOW, WHAT I WOULD LIKE --

BEFORE YOU MOVE TO THE CHART, WOULD YOU TELL US WHETHER OR NOT THE INFORMATION ON THIS CHART IS GOING TO TELL US WHAT AREAS STILL NEED TO BE EXPLORED BY THE PSC AND WHETHER THIS INFORMATION ON THE CHART WAS ACTUALLY BEFORE THE PSC.

YES.

COUNSEL, I HAVE A QUESTION THAT IS I GUESS MORE BASIC. IF YOU ARE APPEALING ONLY THE PSC'S DECISION NOT TO INVESTIGATE, WE HAVE TO CONSIDER OUR JURISDICTION IN EVERY CASE, AND I AM HAVING TROUBLE DETERMINING HOW WE HAVE JURISDICTION OVER THIS KIND OF AN ORDER, BECAUSE WE ONLY HAVE JURISDICTION TO REVIEW ORDERS THAT DETERMINE RATES OR SERVICE FROM THE PSC.

YES, SIR.

ALL OTHER ORDERS WOULD GO TO THE DISTRICT COURT OF APPEAL. AND I DON'T KNOW HOW THIS ORDER, WHICH SIMPLY DECLINES TO INVESTIGATE AN ISSUE IS AN ORDER RELATING TO RATES OR SERVICE.

THE ORDER THAT WE ARE APPEALING IS AN ORDER THAT GRANTED \$139 MILLION RATE INCREASE TO TAMPA ELECTRIC COMPANY, AND WHAT WE ARE SAYING IS THE COMMISSIONERED IN THE METHODOLOGY THAT IT USED TO APPROVE THAT ORDER. NOW, LET ME APPROACH THE CHART, IF I MAY.

DURING THAT, WOULD YOU ANSWER THE QUESTIONS THAT I HAD CONCERNING WHETHER OR NOT THIS WILL DEMONSTRATE TO US AREAS THAT WERE NOT EXPLORED BY THE PUBLIC SERVICE COMMISSION. BECAUSE THAT WOULD SEEM TO BE THE BASIS OF YOUR ARGUMENT, THAT THERE ARE AREAS THAT THEY DID NOT GO INTO, EVEN THOUGH THEY SAY IT WAS. OKAY.

NOW, THIS CHART IS, WAS FILED BY TAMPA ELECTRIC COMPANY. A TAMPA ELECTRIC'S EVIDENCE SUPPORTS FOR ITS APPLICATION OF THE RATE INCREASE. THIS CHART DEALS WITH FUEL, AND THIS IS A DOCUMENT THAT THEY PRESENTED, AND WHAT WE SEE HERE IS THAT TAMPA ELECTRIC, WHAT WE HAVE HERE IS THE FIRST COLUMN IS MEETING A HOURS AND MEGAWATT HOURS AND KILOWATT HOUR IS 1,000 WATTS PER MILLION, SO WE HAVE TO MULTIPLY ONE COLUMN OR THE OTHER BY 1,000. WHAT I BRIEFED FOR THIS ARGUMENT, I WILL DO IT SO IT MAKES BETTER SENSE, IS USE MEGAWATT HOURS RATHER THAN KILOWATT HOURS. ONE MEGAWATT HOUR IS 1,000 KILOWATT HOURS, AND IT IS IMPORTANT, BECAUSE THIS IS A TERM USED BY THE PUBLIC SERVICE

COMMISSION IN EVALUATING THE IMPACT ON THE AFTER RAM CREST DENTION CUSS -- ON THE AVERAGE RESIDENTIAL CUSTOMER THAT USES 1,000 KILOWATT HOURS. WHEN TAMPA ELECTRIC OPERATES, THE COST OF OPERATING IS \$22 PER MEGAWATT HOUR IN FUEL COSTS. WHAT WE HAVE GOT IS THAT A WHOLESALER. OUR CONTENTION, OUR WITNESS IN THE CASE CAME IN AND SAID I HAVE EXAMINED THE TESTIMONY, AND IT APPEARS TO ME THAT TAMPA ELECTRIC WAS SELLING ITS POWER AT A LOW PRICE ON THE WHOLESALER MARKET AND IT WAS BUYING BACK POWER FROM ITS AFFILIATED COMPANY AT A HIGHER PRICE FROM THE WHOLESALER MARKET. SELLING LOW AND BUYING HIGH. NOW, IF YOU WERE DEALING IN THE STOCK MARKET, YOU WOULD THINK THAT YOUR BROKER HAD BREACHED ITS FIDUCIARY DUTY, BUT IN THIS INSTANCE, THE PUBLIC SERVICE COMMISSION HAD THE RESPONSIBILITY TO PROTECT THE CUSTOMERS FROM THAT. SO OUR WITNESS'S TESTIMONY, IT LOOKED LIKE A RETAIL CONSUMER WAS CARRYING 100 PERCENT OF THE OVERCHARGES OF THE PAST YEAR OF THE WHOLESALER TRANSACTIONS. HE DID IT ON A SPOT CHECK.

WAS THAT SOMETHING THAT THE TICO ALSO HAD AN EXPERT WHO TESTIFIED ABOUT THE SAME ISSUE? A WITNESS THAT TESTIFIED ABOUT THE SAME ISSUE?

TICO PRESENTED THIS -- TECO PRESENTED THIS EVIDENCE FROM AN EMPLOYEE AND ANOTHER EMPLOYEE, MR. BROWN, AS TO WHAT THEY SPENT.

SO THE PSC, THEN, WAS FACED WITH YOUR WITNESS READING THIS CHART IN ONE MANNER, AND THE TEAKO PRESENTING -- AND THE TECO PRESENTING ANOTHER ASPECT OF IT, SO THEY HAD TO MAKE A CREDIBILITY DETERMINATION HERE, AS TO WHICH OF THOSE?

NO. THERE WAS NO CREDIBILITY DETERMINATION, BECAUSE THE FACTS WERE UNDISPUTED, IS HOW THEY TREATED THE UNDISPUTED FACTS.

YOU ARE SAYING THEIR EXPERT NEVER CHALLENGED THAT.

NO. THEIR EXPERT PRESENTED THIS. HERE IS WHAT THE EVIDENCE SHOWS. THE EVIDENCE SHOWS THAT, ON CERTAIN WHOLESALER SALES, THE PRICE OF THE ECONOMY SALES, THEY SOLD ECONOMY SALES FOR \$20 MILLION I DON'T KNOW A MEGAWATT HOUR. THE -- FOR \$20 MILLION A MEGAWATT HOUR.

WAS THE FACT THAT IT WAS SALES TO AN AFFILIATE COMPANY, WAS THAT THE ASPECT THAT YOU, THAT YOUR CONCERN WAS NOT ADEQUATELY EXPLORED BY THE PSC AS OPPOSED TO THE GENERAL ISSUE ABOUT WHEN THESE TRANSACTIONS WERE MADE? WHO THEY WERE MADE TO?

OUR CONCERN, NOW, WHEN WE EXPRESSED THIS, THE TAMPA ELECTRIC SAID OKAY, BECAUSE THESE CONTRACTS WERE APPROVED BY THE FEDERAL AUTHORITIES AT FIRST IN THE WHOLESALER MARKET, AND YOU DON'T HAVE REGULATORY AUTHORITY OVER THAT. THAT IS WHY, ESSENTIALLY WHY WE BROUGHT THIS, BECAUSE WE THINK THE PSC DOES HAVE THAT AUTHORITY. NOW, CHARGING THE WHOLESALER CUSTOMER FOR THAT. THE RETAIL CUSTOMER, MR. VANDIVER'S CHRITS AND -- CLIENTS AND MINE, WERE \$33 PER HOUR FOR THE MEGAWATT FUEL COST, AND THERE -- \$22 PER HOUR FOR THE MEGAWATT FUEL COST, AND THERE WAS QUITE A DISPARITY FROM THIS.

AND HIS'S WAS?

HIS ANSWER WAS OKAY, IT WAS ALL APPROVED IN 1988. SO WE WENT BACK TO 1988. THEY PUT IN THE RECORD AN ORDER WHERE THE PUBLIC SERVICE COMMISSION APPROVED A TRANSACTION IN WHICH THEY SOLD POWER FROM BIG BEND POWER COMPANY, AN OPERATING POWER COMPANY, TO THE AFFILIATED COMPANY, AND THEN THE AFFILIATED COMPANY BILLED THE MERCHANT PLAN AND SOLD IT TO ANOTHER RETAILER. THE COMMISSION SAID A COMBINATION FROM THE PECO PLAN AND THE AFFILIATED PLAN IS TOO COSTLY TO CONSUMERS, AND THE RESPONSE FROM

TAMPA ELECTRIC WAS THAT HAS BEEN PASSED ON TO CONSUMERS AS WELL, BECAUSE THE FUEL COST IS NOT THE WHOLESALE COST, PLUS A COST IN THE PLAN, AND THAT PLAN SEPARATES, AND RETAIL CUSTOMERS DON'T HAVE TO PAY FOR IT.

CHIEF JUSTICE: I HAVE GOT TO REMIND YOU THAT THE WAY YOU HAVE APPORTIONED YOUR TIME, THE MARSHAL HAS PUT ON THE WARNING LIGHT FOR YOU THAT YOU HAVE USED YOUR FIRST PORTION.

YOUR HONOR, I AM GOING TO QUICKLY WIND UP. THE PUBLIC SERVICE COMMISSION DID FIND THAT THIS LINE HERE, LINE 29, WERE THE PRICES CHARGED TO RETAIL CUSTOMERS THAT WERE CHARGED 33 NOT 27. I AM GOING TO POP BACK TO THE DESK. WHAT WE HAVE, YOUR HONOR, IS A SITUATION IN WHICH THERE ARE UNDISPUTED FACTS, AND THE UNDISPUTED FACTS SHOW THAT THE, THERE WAS A DISPARITY IN THE PRICE CHARGED RETAIL CUSTOMERS AND WHOLESALE CUSTOMERS AND THE COMMISSION POLICY DOESN'T PERMIT THAT. THEY SAID YOU WILL BE CHARGED THE SAME. TICO SAID THAT WILL BE OKAY BECAUSE IT SO TO AN AFFILIATE AND APPROVED BY FERC AND BY YOU BUT THE CUSTOMERS FAILED TO HAVE ANY BENEFIT. THEY FAILED TO SHOW ANY BENEFIT, AND THAT IS WHAT WE ASK THEM TO DO.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. I AM CHRISTIANA MOORE, REPRESENTING THE FLORIDA PUBLIC SERVICE COMMISSION. THIS IS JAMES BEASLEY REPRESENTING TAMPA ELECTRIC COMPANY OR TECO.

TELL US IF YOU WOULD, WHY IT IS A BENEFIT TO THE PUBLIC WHY THE ORDER BY CSC -- BY THE PSC SUPPORTS A PLAN OF BUYING HIGH AND SELLING LOW.

THAT IS WHAT I WOULD LIKE TO ADDRESS, YOUR HONOR. THE PROBLEM IS THAT IT IS IGNORED COMPLETELY IN THE RECORD THAT SHOWS THE TRANSACTIONS WITH ITS AFFILIATE WERE REASONABLE. IN OTHER WORDS THAT IT WAS NOT IMPROPERLY SELLING POWER LOW TO AN AFFILIATE, AND TURNING AROUND AND BUYING POWER FROM THE AFFILIATE AT A HIGH PRICE, TOO HIGH A PRICE. AND THAT IS THE ISSUE THIS COURT MUST DECIDE. FIPUG, EXCUSE ME, EXPLAINED THAT THERE IS THAT BUY HIGH, SELL LOW PRICE SCHEME, BUT TO THE EXTENT THAT TECO SELLS POWER AT A RELATIVELY LOW PRICE, IT WAS POWER THAT TECO WAS OBLIGATED TO SELL UNDER A CONTRACT APPROVED IN 1989, AND THAT POWER COMES FROM, IS TIED TO THE BIG BEND UNIT FOUR GENERATING PLANT, WHICH IS COAL-FIRED, AND COAL IS A RELATIVELY INEXPENSIVE FUEL, COMPARED TO NATURAL GAS.

IS THIS THE CONTRACT THAT WAS DISCUSSED THAT IS GOING TO EXPIRE AT THE END OF THIS YEAR, I BELIEVE? IS THAT WHY YOUR ARGUMENT, THAT THEY HAVE TO SELL THIS POWER AT THAT PRICE, PURSUANT TO THAT CONTRACT?

THAT'S CORRECT. THAT CONTRACT WAS REVIEWED BY THE COMMISSION IN 1989. THERE WERE A NUMBER OF BENEFITS TO RATE PAYERS, BECAUSE IT USED, IT SOLD THE EXCESS CAPACITY THAT TECO HAD. IT WAS A NEW PLANT, RELATIVELY NEW PLANT, AND IT WAS LARGER THAN NEEDED TO SERVE TAMPA'S CUSTOMER DEMAND AT THAT TIME. AND SO IT WAS BENEFICIAL FOR THE UTILITY TO SELL THE EXCESS POWER, SO IT WAS NOT IN, PAID FOR BY THE RATES OF TECO'S CUSTOMERS, BUT THAT WAS A CONTRACT APPROVED IN 1989, DETERMINED TO BE PRUDENT AT THAT TIME AND ABSENT SOME ALLEGATION OF FRAUD OR SOME SUCH THING, THE COMMISSION DOES NOT GO BACK AND REDETERMINATION THE PRUDENCE, IN LIGHT OF TODAY'S CONDITIONS. THAT IS NOT WHAT THE LAW ALLOWS. BOUTIQUE-SELLS, IT IS ALLOWED TO SELL UNDER THE CONTRACT, UP TO 145 MEGAWATTS OF POWER TO HARDY POWER PARTNERS, WHICH IS THE AFFILIATE, AND PART OF THE ARRANGEMENT AND PART OF THE AGREEMENT IS THAT PARDY POWER SELLS IT TO TAMPA ELECTRIC. THERE IS NO EVIDENCE ON APPEAL THAT TECO IS NOT SELLING 145 MEGAWATTS, BUT THE RECORD SHOWS THAT IS NOT HAPPENING. THERE IS

TESTIMONY WITH TECO'S WITNESS THAT IT COMPLIES WITH ITS CONTRACTS, BUT THERE IS ALSO AN EXHIBIT IN THE RECORD THAT SHOWS TECO'S SALE OF THE BIG BEND UNIT FOUR POWER TO ITS AFFILIATE, IN THE SAMPLE PERIOD OF TIME, NEVER EXCEEDING THE 145 MEGAWATT HOURS, AND THAT IS AN ANSWER IN INTERROGATORIES EXHIBIT 4, INTERROGATORY 149, BUT WHAT FIPUG IS DOING HERE IS LOOKING AT THE TAIL END OF THE CONTRACT IN LIGHT OF TODAY'S CONDITIONS, AND THAT LAW DOESN'T ALLOW IT TO DO IT. AS TO TECO'S BUYING POWER FROM ITS AFFILIATE OF WHAT FIPUG CALLS THE HIGH PRICE THERE, IS EVIDENCE IN THE RECORD ABOUT THE PURCHASES, AND IT SHOWS THAT TECO DOESN'T BUY, PAY MORE TO BUY POWER FROM ITS AFFILIATE THAN FROM ANY OTHER SUPPLIER THAT IS NOT AN AFFILIATE OR THAT IT COULD BUY IT CHEAPER OR THAT IT DIDN'T NEED TO BUY THE POWER. AND THERE IS AN EXHIBIT, ANSWERS TO INTERROGATORIES, THAT SHOW TECO BOUGHT POWER FROM, AND WHO THEY BOUGHT IT FROM AND WHAT THEY PAID FOR IT, AND IT SHOWS, ALSO, THAT IT BOUGHT POWER FROM OTHER UTILITIES, POWER PRODUCERS AND MUNICIPALITIES.

LET ME ASK YOU, I AM SORT OF CURIOUS ABOUT THAT THIS. IF -- ABOUT THIS. IF, IN 1989 THEY BUILT A PLANT THAT WOULD GIVE THEM EXCESS CAPACITY, AND I KNOW WE HAVE HAD THIS IN PAST CASES, BUT THEN OVER THE YEARS THE DEMANDS OF THE MARKET COME UP TO WHERE, REALLY, THE CONSUMER, ALL THE POWER IS REALLY NEEDED IN A GIVEN YEAR, ARE THEY COMPELLED, STILL, TO SELL THE POWER, OR ARE WE TALKING ABOUT DIFFERENT MONTHS WHERE THEY DON'T NEED THE POWER IN ONE MONTH BUT THEY NEED IT IN ANOTHER MONTH, AND THAT IS WHAT IS HAPPENING? I GUESS WHAT I AM CONCERNED ABOUT, AND I ASSUME THAT THE PSC LOOKED AT THIS APPROPRIATELY, THAT IF YOU HAVE AN OLD CONTRACT BUT WHAT HAS HAPPENED NOW IS YOU NEED, YOU ARE GOING TO NEED ALL THAT POWER, AND SELLING IT LOW AND HAVING TO BUY IT HIGH DOES NOT SEEM TO BE SOMETHING THAT IS BENEFICIAL TO THE CONSUMERS IN 2002.

AND THEY HAVE NOT ENTERED INTO ANY MORE LONG-TERM CONTRACTS FOR THE SALE OF THAT PARTICULAR POWER, BUT WE ARE AT THE END OF IT. I DON'T BELIEVE THAT CONTRACT, THERE IS EVIDENCE IN THE RECORD THAT IT IS NOT RECALLABLE.

SO THEY ARE REQUIRED, THOUGH, EVEN THOUGH THEY WOULD NEED THAT POWER.

YES.

BY A PRIOR CONTRACT, TO SELL THE EXCESS POWER. IS THAT CORRECT?

LET ME MENTION, THOUGH -- YES, THEY ARE REQUIRED TO -- THERE IS TESTIMONY IN THE RECORD, ALSO, THAT 50 PERCENT, A FULL 50 PERCENT OF THE POWER THAT TECO BUYS, IT BUYS BECAUSE IT IS CHEAPER TO PURCHASE ON THE MARKET THAN IT IS TO GENERATE IT, ITSELF. YOU HAVE TO UNDERSTAND THIS BIG BEND 402 IS A COOL-FIRED PLANT -- IS A COAL-FIRED PLANT, AND MOST OF THE POWER GENERATED IN THE FUTURE WILL BE GAS-FIRED, AND WHAT IT CAN PURCHASE ON THE MARKET IS GAS-FIRED, AND THAT IS MORE EXPENSIVE, AND THERE IS EVIDENCE THAT THE PRICE TECO PAID FOR THE POWER IT BOUGHT COMPARED FAVORABLY TO THE FORWARD ENERGY MARKET AND THAT IT WASN'T PAYING OTHER NONAFFILIATES MORE FOR THIS SAME POWER UNDER THE SAME CONDITIONS.

WOULD YOU ADDRESS THE ISSUE AS TO WHETHER THE PSC FELT HAMPERED BY FEDERAL REGULATORY AUTHORITY? IS THAT, HOW DOES THAT FIGURE INTO ALL OF THIS?

THAT IS, THE FACT THAT THE CONTRACTS WERE FERC APPROVED --

AND THESE ARE 1989.

YES.

BUT THEY ALSO WERE PSC APPROVED?

YES. FERC APPROVES THE PRICING, IN TERMS THAT THE COST BASE WAS A FAIR WAY TO PRICE IT AND REMOVE THE UNCERTAINTY OR THE POTENTIAL, SOME OF THE POTENTIAL FOR ABUSE IN DEALINGS WITH AN AFFILIATE. THE COMMISSION CAN DETERMINE HOW IT IS ALLOCATED TO WHOLESALE AND RETAIL, AND EVERY YEAR IN THESE PROCEEDINGS, WHICH ARE CONTINUING INNATE, IT REVIEWS THE REASONABLENESS OF THE PURCHASES MADE UNDER THE CONTRACT. WHETHER IT CAN BUY IT CHEAPER SOMEWHERE ELSE, WHETHER SOMEONE ELSE IS SELLING IT CHEAPER. BUT, YES, THE COMMISSION DOES HAVE TO DETERMINE WHETHER THE COSTS ARE REASONABLE, BEFORE THEY ARE PASSED ON TO THE RATE PAYERS.

WHAT I AM SOMEWHAT PUZZLED ABOUT IS THAT YOUR RESPONSE HERE IS TO THE, WHAT I UNDERSTAND YOUR RESPONSE TO BE IS TO THE SUBSTANCE OF THIS ARGUMENT AS TO WHETHER THERE WAS A CORRECT TERMINATION -- DETERMINE -- A CORRECT DETERMINATION BY THE COMMISSION, AS TO WHETHER THESE, IT HANDLED THIS CONTRACT CORRECT, IS THAT WHERE YOU UNDERSTAND THEY ARE ASKING, OR ARE THEY ASKING FOR THE COMMISSION TO DO MORE OF AN INVESTIGATION INTO THIS?

THEY ARE ASKING FOR FURTHER INVESTIGATION, AND MY ANSWER WOULD BE THAT THERE IS NO NEED FOR A FURTHER INVESTIGATION, BECAUSE THERE IS COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE DECISION. THE COMMISSION CONDUCTED AN INVESTIGATION, AND THERE IS NO NEED TO CONDUCT ANOTHER INVESTIGATION ON TOP OF THAT AND HOLD A SECOND HEARING, WHEN IT HAS ALREADY HAD ONE.

WHAT DOES THE RECORD REFLECT THAT THE COMMISSION DID, IN RESPONSE TO THEIR QUESTION?

WELL, THE PROCEEDING STARTED IN JANUARY, AND DISCOVERY BEGAN NINE MONTHS BEFORE THE HEARING. IN EXHIBIT 4 AND 5 IN THE RECORD, YOU WILL SEE ALL THE STAFF INTERROGATORIES THAT WERE SERVED ON TECO, AND THERE IS TESTIMONY IN THE RECORD, AND I KNOW MR. BEASLEY MENTIONS IT IN HIS BRIEF, ABOUT THE NUMEROUS AND VOLUMINOUS DISCOVERY THAT WAS PROVIDED TO FIPUG. FIPUG FIRST GOT ANSWERS TO ITS INTERROGATORIES SEVEN MONTHS BEFORE THE HEARING, ANTIQUE-ALSO FILED AT LEAST SOME OF ITS TESTIMONY, AS EARLY AS SEVEN MONTHS BEFORE THE HEARING. SO FIPUG'S COMPLAINTS ABOUT THE TIME FRAME AND ITS INABILITY TO PREPARE A CASE OR THE INADEQUACY OF THE COMMISSION'S INVESTIGATION JUST AREN'T CORRECT. THE COMMISSION TONSLEY AND REGULARLY AUTED ITS -- AUDITS TECO AND ITS FUEL COST, AND ALL OF THIS DATE AN IS ENTERED INTO THE RECORD. IT IS SUPPLIED TO THE COMMISSION THROUGHOUT THE YEAR, AND IN ADDITION TO THAT, THERE WAS TESTIMONY AS TO THE REASONABLENESS. IT WAS NOT JUST COST DATA.

IF YOU ASK TO CAPSULIZE THE CSE THAT SUPPORTS THE PSC'S ORDER, WHAT WOULD YOUR ANSWER BE?

THE EVIDENCE THAT IT, FIRST AT SALES, THE EVIDENCE THAT SHOWED THAT IT DID NOT SELL MORE THAN 145 MEGAWATTS, THE EVIDENCE, THE ORDER WAS THAT APPROVED THE SALE, AND THE TESTIMONY THAT IT WAS COMPLYING WITH THE CONTRACT. THAT GOES TO THE SALES. THOSE ARE THE ONLY SALES THAT FIPUG IS COMPLAINING ABOUT.

CHIEF JUSTICE: YOU HAVE USED YOUR ALLOTTED TEN MINUTES THERE, SO I JUST WANTED TO CAUTION YOU.

AND THEN I MENTIONED ABOUT THE AFFILIATE TRANSACTIONS, AND I THINK MR. BEASLEY CAN TALK SOME MORE ABOUT THE EVIDENCE.

THANK YOU. MAY IT PLEASE THE COURT. JAMES BEASLEY. LET ME GO BACK TO YOUR QUESTION,

JUSTICE SHAW. I WANT TO ENCAPS LATE WHAT THE COMPETENT SUBSTANTIAL EVIDENCE WAS. THE COMMISSION LOOKED AT ALL OF THE ARGUMENTS PRESENTED. IT CONCLUDED THAT IT HAD APPROVED IN 1989, AS BEING PRUDENT, A CONTRACT, AN ARRANGEMENT THAT BROUGHT ABOUT POWER PLANT CONSTRUCTION, THAT WOULD BRING THE RATE PAYERS OF TAMPA ELECTRIC \$90 MILLION IN BENEFITS OVER THE TEN-YEAR LIFE THAT EXPIRES THIS DECEMBER. THAT IS A SIGNIFICANT AMOUNT OF MONEY. THEY DID THAT IN A VERY CAREFUL WAY. THEY CONSIDERED A LOT OF EVIDENCE, AND CONCLUDED THAT THAT, IN FACT, IS THE BEST THING FOR THE RATE PAYERS. NOW, IN THIS HEARING, THE QUESTION WAS HAS TAMPA ELECTRIC COMPANY, WERE ITS DECISION FROM 1998 THROUGH 2000 PURSUANT TO THAT CONTRACT REASONABLE? WE PRESENTED EVIDENCE THAT THEY WERE. OUR WITNESS MR. BROWN TESTIFIED AT TRANSCRIPT PAGE 268 THAT WE ARE ABIDING BY THAT CONTRACT. WE ARE FOLLOWING THE TERMS AND CONDITIONS OF T WE ARE DOING EVERYTHING WE ARE SUPPOSED TO. HE, ALSO, TESTIFIED ABOUT A COMPARISON OF THE PRICES TAMPA ELECTRIC IS PAYING ITS AFFILIATE HARDY POWER, PURSUANT TO ITS ARRANGEMENT, AND THEY COMPARED FAVORABLY TO THE FORDS MARKET. THE -- TO THE FORWARDS MARKET. THE COMMISSION WEIGHED THAT EVIDENCE AND THE KEY THING IS THE KPUS TOMERS WANTED THAT OPPORTUNITY TO ADDRESS THE COMMISSION. THEY GOT THAT OPPORTUNITY IN SPADES. THESE FUEL ADJUSTMENT PROCEEDINGS ARE A YEARLONG. IT IS WORSE THAN HAVING A BABY. THE DISCOVERY THAT MS. MOORE SPOKE ABOUT IS EXTENSIVE. THEY GOT FULL OPPORTUNITY. THE COMMISSION HAD A HEARING. IT CONSIDERED THE INDUSTRIAL CUSTOMERS' ARGUMENTS, AND AT THE CONCLUSION IT TOLD THEM, WELL, WE THINK THAT WHAT THE COMPANY DID DURING 1998-THROUGH-2000 IS REASONABLE. YOU HAVE HAD YOUR HEARING. YOU HAVE HAD YOUR INPUT. WE HAVE HEARD YOUR WITNESSES. WE HAVE HEARD YOUR ARGUMENT. WE HAVE HEARD YOUR CROSS-EXAMINATION. WE DON'T SEE A NEED FOR YET ANOTHER HEARING TO REFLOW THE SAME GROUND.

WOULD IT BE REASONABLE, ABSENT THE CONTRACT?

ABSENT THE CONTRACT?

ABSENT THE CONTRACT?

YES. IF YOU WERE NOT BOUND, YOU SAY, BY THE CONTRACT. WOULD YOU SAY IT IS REASONABLE?

YES, SIR. I THINK THE RATE PAYERS HAVE GOTTEN THE BENEFIT OF THE BARGAIN THAT THE COMMISSION APPROVED IN 1989. THEY HAVE GOTTEN MANY MILLIONS OF DOLLARS OF SAVINGS AS A RUT OF NOT HAVING TO PAY THAT TREMENDOUS -- AS A RESULT OF NOT HAVING TO PAY THAT TREMENDOUS AMOUNT OF CARRYING COSTS AND O AND M ASSOCIATED WITH THAT 145 MEGAWATTS OF POWER. THAT MAKES A LOT OF SENSE. THE RATE PAYERS DIDN'T HAVE TO PAY THAT FOR TEN YEARS. THEY GOT THE BENEFIT OF THAT BARGAIN. THE INDUSTRIAL CUSTOMERS WANT TO THE RETRY THAT IN THE ELEVENTH HOUR. WE THINK THAT IS UNFAIR. WE THINK THE DECISIONS OF IT THIS COURT SAY THAT YOU LOOK AT THE PRUDENCE OF A DECISION THAT WAS MADE AND APPROVED BY THE COMMISSION AT THE TIME THAT THAT DECISION WAS MADE AND APPROVED. I WOULD LIKE TO ADDRESS THE BUY HIGH/SELL LOW. THIS CAME ABOUT THROUGH CROSS-EXAMINATION OF OUR WITNESSES DURING THE COURSE OF THE HEARING BELOW. AND THE WITNESSES POINTED OUT THAT YOU ARE ONLY LOOKING AT ONE PIECE OF THE PICTURE HERE. YOU ARE LOOKING AT ENERGY COSTS. YOU ARE LOOKING AT, AND THERE ARE TWO DIFFERENT TYPES OF UNITS INVOLVED, THE COAL UNIT VERSUS THE NATURAL GAS-FIRED UNIT. YOU ARE NOT LOOKING AT THE WHOLE PICTURE. YOU HAVEN'T EVEN TAKEN INTO ACCOUNT THE CARRYING COSTS AND O AND M ASSOCIATED WITH 1 4R5 MEETING A WANTS -- THE 145 MEGAWATTS THAT WE HAVE NOT MADE THE RETAIL CUSTOMERS PAY OVER THAT TEN-YEAR PERIOD.

IN REGARD TO THE 145 MEGAWATTS OF POWER THAT THEY SELL TO THE AFFILIATE, CORRECT?

YES.

HOW MUCH DO THEY HAVE TO BUY, THEN, ON THE OPEN MARKET?

IT WAS EXCESS POWER, AT THE TIME THAT THE ARRANGEMENT WAS APPROVED.

I UNDERSTAND THAT, BUT IN TODAY'S MARKET, HOW MUCH DO THEY END UP HAVING TO PAY, ONCE, TO PURCHASE, ONCE THEY HAVE SOLD THE 145 MEGAWATTS?

I DON'T KNOW THAT YOU CAN ACTUALLY SAY. YOU CAN'T MARRY UP THE TWO, BECAUSE -- YOU CAN'T MARRY UP THE TWO, BECAUSE IT WAS EXCESS POWER TO START OFF WITH. IT WAS DEEMED TO BE PRUDENT BY THE COMMISSION, TO SELL IT OVER THAT PERIOD OF TIME. IT IS COMING BACK TO TAMPA ELECTRIC AT THE END OF THIS YEAR, AND IT WILL BE BACK AVAILABLE.

I UNDERSTAND THAT. I WANT TO KNOW, WHEN THEY GO OUT ON THE MARKET AND BUY POWER, HOW MUCH, IN ANY GIVEN YEAR, THAT WE ARE TALKING ABOUT, DO THEY HAVE TO GO OUT AND PURCHASE? SAY THE LAST YEAR. HOW MANY MEGAWATTS DID THEY HAVE TO PURCHASE OUT ON THE OPEN MARKET?

I DON'T KNOW THAT YOU CAN TRACE THE MEGAWATTS THAT WAY, JUSTICE QUINCE. YOU CAN'T TRACE THE DOLLARS THAT WAY.

WHAT DO YOU BUY THE POWER IN THEN? I AM LOST SOMEPLACE. IF THEY SELL IT IN MEGAWATTS, WHAT DO THEY PURCHASE IT IN?

THEY PURCHASE IT IN MEGAWATTS.

SO MY QUESTION IS, THEN, REALLY, HOW MANY MEGAWATTS DID THEY PURCHASE LAST YEAR, DID THEY HAVE TO BUY?

I DON'T KNOW THE TOTAL AMOUNT OF MEGAWATTS PURCHASED, BUT IT WOULDN'T NECESSARILY BE EARMARKED FOR THE 1 HA MEETING -- THE 145 MEGAWATTS THAT THEY SOLD, PURSUANT TO THE AGREEMENT.

I THAUNDZ THEY SOLD THE 145 MEGAWATTS BUT -- I UNDERSTAND THAT THEY SOLD THE 145 MEGAWATTS BUT IF NOW THEY NEED THE CAPACITY, I AM BACK TO JUSTICE PARIENTE'S EARLIER QUESTION OF WHEN THEY WENT INTO THIS CONTRACT THEY HAVE THE EXCESS POWER, SO NOW THAT THEY HAVE TO PURCHASE SOME, THEY DON'T HAVE THIS EXCESS POWER, SO I AM TRYING IT TO FIGURE OUT WHAT THE DIFFERENCE IS BETWEEN WHAT THEY ARE SELLING AND WHAT THEY ARE HAVING TO PURCHASE ON THE OPEN MARKET.

RIGHT. I CAN'T REALLY ADDRESS THE DOLLARS, BUT I CAN TELL YOU THAT IT WAS ALL APPROVED ON THE FRONT END, BY THE COMMISSION, BASED ON THE BEST INFORMATION AVAILABLE TO THE COMMISSION AND TO THE COMPANY AT THE TIME, AND THE COMMISSION KNEW THAT WAS EXCESS POWER AT THE TIME. THEY THOUGHT IT REASONABLE TO SELL IT FOR A TEN-YEAR PERIOD, AND NOW THAT THE TEN-YEAR PERIOD IS ABOUT TO EXPIRE, IT IS GOING TO COME BACK AND BE AVAILABLE TO SERVE RETAIL LOAD, SO THE RATE PAYERS HAVE GOTTEN THE BENEFIT OF THAT POSTPONEMENT OF HAVING TO PAY FOR THIS POWER, AND NOW, WHEN THEY NEED IT, IT IS COMING BACK TO SERVE THEM.

IT IS YOUR POSITION THAT THERE IS A DISCREET EXPLANATION FOR EVERY SEEMING INEQUITY OR IRRATIONAL APPEARANCE OF SOME OF THESE FIGURES, AND THAT IS WHAT YOU SET OUT ESSENTIALLY IN YOUR BRIEF.

YES, SIR. THAT'S CORRECT.

IS THE EXPLANATIONS. WHAT ABOUT THIS SEEMING BLANKET RELIANCE ON PERC AND YOUR OPPONENT SAYING THAT YOU HAVE TAKEN AN INCONSISTENT POSITION HERE, THAT THE COMMISSION ON ONE HAND HAS SEEMINGLY JUST COVERED THIS ALL WITH THE FERC INITIAL APPROVAL AND NOW YOU ALL ARE REALLY ADDRESSING THIS ON THE MERITS, AND THAT THAT IS SORT OF CHANGING WHAT THE COMMISSION DID INITIALLY. 4.

JUSTICE ANSTEAD, THAT IS, I WOULD JUST HAVE TO SAY IT IS THE PRODUCT OF RHETORIC, BECAUSE THE COMMISSION DID NOT DEFER TO FERC, TO THE FEDERAL REGULATORY COMMISSION. THEY SAID, IN THEIR ORDER ON NEED DETERMINATION, WE ARE NOT GOING TO NEED TO DEFER TO FERC. WE ARE SAYING WE APPROVE THIS POWER PLANT CONSTRUCTION ONLY IF FERC AGREES WITH US. WE ARE NOT GOING TO LET THEM CHANGE THE DEAL AROUND AND MAKE IT BETTER FOR THE AFFILIATED COMPANY. THEY SAID IF THEY DO THAT, THEN THE DETERMINATION OF NEED IS OFF, AND IF THEY MAKE ANY CHANGE INS THE AGREEMENT, THEY HAVE GOT TO BRING IT BACK TO US AND WE WILL TAKE WHATEVER REGULATORY ACTION IS NECESSARY.

YOU ARE SAYING BACK IN 1989.

THAT'S CORRECT.

SO ALL OF THIS RELIANCE IS BASED ON REQUIREMENTS OF A 1989 CONTRACT, WHICH YOU ARE REQUIRED TO ABIDE BY.

THAT'S CORRECT. THAT IS IMMINENTLY CORRECT, AND IT WAS DETERMINED BY THE COMMISSION TO BE SOMETHING THAT WE SHOULD RELY ON, AND IF WE GO BACK AND START CHANGING THINGS IN MIDSTREAM, THERE WON'T BE ANYMORE POWER PLANTS BUILT IN FLORIDA, BECAUSE YOU WON'T BE ABLE TO GET BANKS TO LOAN MONEY TO BUILD THEM. THEY HAVE TO RELY ON WHAT THE COMMISSION DECIDES FOR A TEN-YEAR PERIOD, AND IT WAS REASONABLE WHEN THEY DECIDED IT AND WE HAVE ADHERED TO IT. OUR WITNESSES HAVE EXPLAINED THAT THEY HAVE ABIDED BY IT AND THERE IS NO EVIDENCE TO THE CONTRARY. THERE IS NO SHIFTING OF THE BURDEN OF PROOF. WE PRESENT ADD PRIMA FACIE CASE THAT -- FROM WE PRESENTED A PRIMA FACIE CASE THAT WE WERE REASONABLE IN THE THREE-YEAR PERIOD THERE. IS NOTHING SHOWN TO THE CONTRARY.

COUNSEL, ONE OF THE ARGUMENTS THAT YOUR OPPONENT IS MAKING IS THAT YOU ARE PURCHASING THIS POWER FROM AN AFFILIATE AND THEREFORE GIVING A BENEFIT TO AN AFFILIATE. CAN YOU EXPLAIN WHETHER THE AMOUNT, THE PRICE THAT YOU CAN GET FROM A NONAFFILIATE IS ANY LESS THAN THE PRICE THAT YOU ARE GETTING FROM YOUR AFFILIATE?

WE ARE DOING THAT, YOUR HONOR, BECAUSE WE ARE OBLIGATED BY CONTRACT TO SELL TO THAT AFFILIATE, AND THAT 145 MEGAWATTS.

I AM TALKING ABOUT THE PURCHASING BACK NOT THE SELLING BUT THE PURCHASING.

PURCHASING BACK FROM THE AFFILIATE?

YES.

WE HAD A WITNESS WHO TESTIFIED THAT THE FUTURES, EXCUSE ME, THE FORWARDS MARKET COMPARISON STHOS SHOWS THAT WE ARE DOING EXACTLY THE RIGHT -- SHOWS THAT WE ARE DOING EXACTLY THE RIGHT THING. WE ARE UNDER THE FORWARDS MARKET. THE CAPACITY AND EVERYTHING COMBINED IS UNDER THE FORWARDS MARKET. THE COMMISSION ACCEPTED THAT AND THEY PUT IT IN THEIR ORDER AND WE THINK THAT ORDER SHOULD BE AFFIRMED.

CHIEF JUSTICE: THANK YOU VERY MUCH. COUNSEL. WOULD YOU ADDRESS THE VERY LAST ISSUE

THAT YOUR OPPONENT ADDRESSED, IN TERMS OF HAVING PRESENTED EVIDENCE THAT, WHILE THE PURCHASE FROM THEIR AFFILIATE IS SEEMINGLY BEEN AN IN-HOUSE DEAL OR WHATEVER KIND OF DEAL, A SWEETHEART DEAL, THAT THEY HAD TESTIMONY THAT THAT WAS WITHIN REASONABLE LIMITS.

WELL, I WOULD LIKE TO ADDRESS THAT, BECAUSE THAT WAS THEIR, WHAT THEY SAID WAS RIGHT, AND THEY SAID THE BENEFITS ARE \$90 MILLION. YOU HEARD THEM SAY IT AGAIN. WELL, THE PROBLEM IS THE CARRYING COSTS OVER THAT TEN-YEAR PERIOD ON THE 145 MEGAWATTS WAS \$235 MILLION. AND THE RETAIL CUSTOMERS PICKED UP THE BALANCE, AND THEY ONLY GOT RELIEVED FROM THE \$90 MILLION, WHEN THERE WAS A BASE RATE CASE. THERE WASN'T A BASE RATE CASE UNTIL 1993, AND AT THAT TIME, 40 PERCENT OF BIG BEND FOUR WAS TAKEN OUT OF THE RATE BASE. 40 PERCENT WAS TAKEN OUT BUT 60 PERCENT WAS IN, AND THEY SAID THIS IS BENEFICIAL, BECAUSE THE RETAIL CUSTOMERS GET THE BENEFIT OF THIS PLANT IN JANUARY, WHEN IT IS NEEDED, AND IN THE SUMMER MONTHS JUNE-THROUGH-SEPTEMBER WHEN IT IS NEEDED, AND THEY WILL GET THE LOW-COST FUEL BECAUSE THEY ARE PAYING 60 PERCENT OF THE CARRYING COSTS.

IF THE CONTRACT WAS REASONABLE IN 1989, WASN'T THAT THE TIME TO CHALLENGE THE CONTRACT? I MEAN, THAT IS WHEN THEY WERE BUILDING THIS PLANT H THIS HAPPENS, NOT THIS PARTICULAR SITUATION, BUT WHEN BUILDING ANOTHER PLANT TO, AND THERE IS EXCESS CAPACITY, THERE HAS GOT TO BE AWAY TO COMMIT TO THAT EXCESS CAPACITY AT THE TIME. I GUESS, HOW DO YOU, HOW DO WE GO BACK AND CHALLENGE A CONTRACT THAT IS OVER --

THEY ARE NOT LIVING UP TO THE DEAL. THE DEAL WAS THAT THE PLANT WAS AVAILABLE FOR THE RETAIL CUSTOMERS IN THE SUMMER MONTHS. THE INTERROGATORY THAT SHE TALKED ABOUT LOOKED AT THE MONTH OF JULY, AND IN THE MONTH OF JULY, THEY WERE SELLING EL CHEAPO POWER TO THE SISTER COMPANY AND BUYING BACK MORE EXPENSIVE POWER CONTEMPORANEOUSLY FOR ALL OF THAT MONTH.

DID THEY BREACH THEIR CONTRACT?

THEY DIDN'T BREACH THE CONTRACT. THE CONTRACT PERMITTED SEMINOLE TO CALL FOR 100 PERCENT. WHEN THEY PRESENTED THE CONTRACT TO THE PUBLIC SERVICE COMMISSION, THEY SAID THIS IS WHAT WE ARE GOING TO DO. 60 PERCENT OF THE COST IS BORNE BY THE RETAIL CUSTOMER SO THEY WILL GET THE BENEFIT OF IT 60 PERCENT OF THE TIME AND THAT WILL BE IN THE SUMMER. WE COULDN'T GET IT FROM THEM.

YOU SAID THAT THEY MANIPULATED, ALTHOUGH THEY HAD TO SELL 145 MEGAWATTS IN THE YEAR, IT DIDN'T SPECIFY WHEN THEY HAD TO SELL IT AND YOU ARE TRYING TO SAY THEY WERE SELLING IT INTENTIONALLY AT TIMES WHEN THE CUSTOMERS WOULD NEED THE POWER?

THE WAY THE CONTRACT WAS PRESENTED WAS SEMINOLE NEEDED IT FOR BACK UP POWER IN THE FALL AND IN THE SPRING, WHEN TAMPA ELECTRIC DIDN'T NEED IT, AND SEMINOLE, BECAUSE THEY MIGHT HAVE A FORCED OUTAGE AT SOME OTHER TIME, HAD THE RIGHT TO CALL ON IT 100 PERCENT OF THE TIME, WHENEVER THEY WANTED IT. WELL, WHAT HAPPENED WAS WHEN THE FUEL PRICES CHANGED DRAMATICALLY, SEMINOLE CALLED ON IT 100 PERCENT OF THE TIME IN THE SUMMERTIME, AND THE STAFF'S INTERROGATORIES SHOWS THAT, SO IT SHOWS THEY WERE BUYING HIGH AND SELLING LOW AT THE SAME TIME, AND I WILL SIT DOWN, YOUR HONOR.

CHIEF JUSTICE: ALL RIGHT. THANK YOU ALL VERY MUCH.