THE COURT WILL NOW PROCEED TO
TAKE UP THE SECOND CASE ON
TODAY'S DOCKET, DUKE ENERGY
FLORIDA LLC V. CLARK.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, I'M
DANIEL NORDBY AND, ALONG WITH MY
COLLEAGUE ALYSSA COREY, I
REPRESENT DUKE ENERGY FLORIDA IN
THIS PROCEEDING.
I'D LIKE TO RESERVE FIVE MINUTES
FOR REBUTTAL.
IN 2009 DUKE ENERGY PLACED A
COMBINED CYCLE PLANT IN BARTOW,
FLORIDA.
THIS CASE INVOLVES DUKE'S
PETITION TO RECOVER REPLACEMENT
POWER COSTS RELATED TO AN
UNPLANNED OUTAGE THAT OCCURRED
IN FEBRUARY OF 2017, EIGHT YEARS
LATER.
UNDER THE LEGAL STANDARD
ACKNOWLEDGED BY ALL PARTIES,
DUKE ENERGY IS ENTITLED TO
RECOVER ITS COST IF IT WAS
PRUDENT IN ITS ACTIONS AND
DECISIONS LEADING UP TO AND IN
RESTORING THE UNIT TO SERVICE
AFTER THE FEBRUARY 2017 OUTAGE.
UNLESS THE COURT WOULD PREFER
OTHERWISE, I'D LIKE TO ADDRESS
TWO PRINCIPAL REASONS WHY THE
PUBLIC SERVICE COMMISSION'S
FINAL ORDER SHOULD BE REVERSED.
FIRST, THE ADMINISTRATIVE LAW
JUDGE AND THE PSC ERRED IN
CONCLUDING THAT DUKE ENERGY WAS
NOT PRUDENT IN ITS ACTIONS
REGARDING THE FEBRUARY 2017
FORCED OUTAGE.
THE LEGAL CONCEPT OF PRUDENCE IS
A TERM OF ART IN PUBLIC UTILITY
LAW THAT REQUIRES ACTIONS
CONSISTENT WITH WHAT A
REASONABLE UTILITY MANAGER WOULD
HAVE DONE IN LIGHT OF THE
CONDITIONS AND CIRCUMSTANCES
THAT WERE KNOWN OR THAT SHOULD
HAVE BEEN KNOWN AT THE TIME THE
DECISION WAS MADE.
THIS COURT HAS SAID THAT
IMPRUDENCE CANNOT BE FOUND BASED
ON THE 20/20 VISION OF

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HINDSIGHT.
HERE THE UNDISPUTED EVIDENCE WAS THAT DUKE ENERGY WAS OPERATING THE BARTOW PLANT PRUDENTLY, AND IN FACT, FOR A PERIOD OF SEVERAL YEARS PRECEDING THE 2017 OUTAGE.
>> COUNSEL, CAN WE JUST FOCUS ON TESTIMONY OF RICHARD POLLACK WHICH IS IN THE RECORD, RIGHT?
I MEAN, YOU'D AGREE THAT THAT'S THERE.
HELP ME UNDERSTAND HOW YOU GET AROUND THAT BEING A BASIS THAT THE ALJ MIGHT HAVE PRUDENTLY OR JUDICIOUSLY RELIED ON, PERMISSIBLY RELIED UPON EVEN IF YOU DON'T AGREE WITH IT.
>> I'D BE GLAD TO.
THE ONLY TESTIMONY THAT WAS OFFERED ON BEHALF OF THE INTERVENERS IN THIS CASE, REPRESENTED A FEW IMPORTANT THINGS.
FIRST, MR. POLLACK AGREED THAT DUKE ENERGY HAD ACTED PRUDENTLY NOT ONLY DURING PERIOD FIVE AT THE TIME OF THE FORCED OUTAGE, BUT IN PERIODS TWO, THREE AND FOUR LEADING UP TO THE FORCED OUTAGE.
THE ONLY DISPUTES, THE ONLY MATERIAL FACTUAL DISPUTE AT THE ADMINISTRATIVE HEARING INVOLVED DUKE'S ACTIONS 5-8 YEARS BEFORE THE OUTAGE DURING WHAT WE CALLED PERIOD ONE.
MR. POLLACK'S TESTIMONY WAS THAT DUKE ENERGY HAD ACTED IMPRUDENTLY DURING PERIOD ONE BY OPERATING THE PLANT ABOVE NAME PLATE CAPACITY.
AT THE ADMINISTRATIVE HEARING, DUKE ENERGY RAISED TWO RESPONSES; FIRST, THAT DUKE ACTUALLY HAD ACTED PRUDENTLY IN PERIOD ONE, THE NAME PLATE CAPACITY WAS NOT IN OPERATING CONDITION, BUT THEN IN THE ALTERNATIVE THAT ANY IMPRUDENCE DID NOT CAUSE THE PERIOD FIVE OUTAGE FOR WHICH DUKE--
>> JUST SO WE'RE ON THE SAME PAGE, THE HEARING OFFICER FOUND THAT DUKE DID ACT IMPRUDENTLY IN

OPERATING THE UNIT ABOVE THE
RATING CAPACITY OF 420
MEGAWATTS, CORRECT?
>> THAT'S CORRECT, JUSTICE
LAWSON.
>> AND YOU DIDN'T CONTEST THAT.
>> WE CONTESTED THAT AT THE
ADMINISTRATIVE HEARING.
WE ARE NOT ADVANCING THAT
ARGUMENT ON APPEAL.
WE FEEL IT WAS ERROR BUT NOT
REVERSIBLE ERROR.
>> SO WHAT ABOUT-- WOULD YOU
AGREE THAT IF THAT IMPRUDENT
ACTION FACTUALLY CAUSED THE
DAMAGE TO THE COMPONENTS IN 2017
AND THE SUBSEQUENT DERATING,
THAT THAT WOULD BE SUFFICIENT TO
DENY THE PETITION FOR RECOVERY
OF THE COST?
>> I WOULD.
IF THE PERIOD ONE IMPRUDENCE
CAUSED THE FORCED OUTAGE IN
PERIOD FIVE, THAT WOULD BE A
BASIS.
BUT THERE'S TO COMPETENT,
SUBSTANTIAL--
>> WHAT ABOUT THE EXPERT
TESTIMONY THAT IT WAS THE MOST
PROBABLE CULPRIT THAT THE
ACTIONS BEFORE 2012 WERE THE
MOST PROBABLE CULPRIT IN THE
PROBLEMS THAT OCCURRED AFTER
THAT AND THE REPLACEMENT IN
2012, THE REPLACEMENT IN 2014,
TWO REPLACEMENTS IN 2016, I
THINK IT WAS, AND THEN THE
PROBLEM IN 2017, THAT ALL OF
THAT IS BECAUSE OF THE VIBRATION
OF THE UNIT THAT RESULTED IN A
CONDITION THAT CAUSED THAT
COMPONENT TO CONTINUE TO WEAR
OUT FASTER THAN IT SHOULD HAVE.
>> WELL, JUSTICE LAWSON AND, IN
FACT, IN RESPONSE TO JUSTICE
COURIEL'S QUESTION AS WELL,
MR. POLLACK DISCLAIMED ANY
CAUSAL RELATIONSHIP BETWEEN
PERIOD ONE IMPRUDENCE AND THE
DAMAGE THAT OCCURRED IN PERIOD
FIVE, AND THAT'S AT PAGE 3405 OF
THE RECORD.
>> AND I ASK YOU, IT SEEMS LIKE
THE WHOLE CASE TURNS ON THE

ALJ'S VIEW THAT ONCE THE
IMPRUDENCE WAS ESTABLISHED FOR
PERIOD ONE, THAT IT BECAME YOUR
BURDEN TO DISPROVE THE
CAUSATION.
BECAUSE THE WAY I READ THE ORDER
WHICH, YOU KNOW, ISN'T A THING
OF BEAUTY BY ANY MEANS, I
MEAN--
[INAUDIBLE]
SHOULD BE IN A BOOK FOR, YOU
KNOW, HOW NOT TO WRITE A
PARAGRAPH AND THESE THINGS.
BUT, YOU KNOW, BASICALLY IT
SEEMS LIKE THE REASONING OF THE
ORDER IS WE HAVE FOUND
IMPRUDENCE IN PERIOD ONE, NO ONE
KNOWS REALLY WHAT THE CONNECTION
WAS BETWEEN PERIOD ONE AND WHAT
HAPPENED AFTERWARD, BUT BECAUSE
OF THE IMPRUDENCE IT BECAME YOUR
BURDEN TO DISPROVE THE
CAUSATION.
AND SINCE YOU DIDN'T DO THAT,
YOU LOSE.
THAT'S THE WAY I READ THE ORDER.
SO DO YOU ACCEPT THE PREMISE
THAT IT BECAME YOUR BURDEN TO
DISPROVE CAUSATION?
>> I AGREE THAT THE DUKE ENERGY
ULTIMATELY HAD THE BURDEN TO
PROVE PRUDENCE IN THE OVERALL
PROCEEDING.
I THINK WE DID THAT BASED ON THE
EVIDENCE.
>> IT SEEMS LIKE YOU PROVED THAT
YOU WERE PRUDENT.
IT SEEMS LIKE WHAT YOU PROVED
WAS THAT YOU WERE, YOUR
FOLLOW-UP ACTIONS WERE PRUDENT.
I MEAN, I THINK THAT'S KIND OF
THE BEST, A FAIR-- I MEAN,
NOBODY CHALLENGED THE PRUDENCE
IN PERIODS TWO-FIVE.
IT SEEMS LIKE THERE'S DEFINITELY
COMPETENT, SUBSTANTIAL EVIDENCE
TO SUPPORT THE FINDING OF
IMPRUDENCE FOR PERIOD ONE WHICH
YOU'RE NOT CONTESTING.
YOU DIDN'T START OFF CONCEDING
THAT, BUT NOW YOU ARE.
SO WHY, WHY ISN'T IT RIGHT THAT
IT WAS STILL YOUR BURDEN?
>> WELL--

>> [AUDIO DIFFICULTY]
>> AND THAT'S NOT A RHETORICAL
QUESTION.
>> NO.
SO I THINK THE EVIDENCE SHOWS
THAT WE, TO THE EXTENT WE HAD
THAT BURDEN, WE DID PROVE IT
BASED ON THE EVIDENCE AT THE
HEARING.
THERE'S TWO CONCEIVABLE WAYS TO
LINK THE PERIOD ONE CONCLUSIONS
TO THE PERIOD FIVE OUTAGE.
ONE OF THEM WOULD BE IF THE
BLADES DAMAGED DURING PERIOD ONE
REMAINED INSTALLED AND
ULTIMATELY MALFUNCTIONED IN
PERIOD FIVE.
ANOTHER WOULD BE IF SOMETHING
ELSE HAPPENED IN THE TURBINE
THAT WAS THE RESULT OF PERIOD
ONE IMPRUDENCE THAT MANIFESTED
IN PERIOD FIVE.
BUT THERE'S NO RECORD EVIDENCE
OF THAT EITHER.
THE UNCONTESTED TESTIMONY OF
MR. SCHWARTZ AT 3077-3079 OF THE
RECORD AND THE TESTIMONY OF
MR. POLLACK, THE INTERVENER'S
WITNESS, SAID THAT THERE WAS NO
DAMAGE TO ANY STEAM TURBINE
COMPONENT OTHER THAN THE L0
BLADES THAT WERE REPLACED AT THE
BEGINNING OF PERIOD FIVE.
SO IF THE ONLY EVIDENCE FROM
BOTH OF THE WITNESSES HERE WAS
THAT THE DAMAGE WAS SPECIFICALLY
TO THE BLADES, AND THEY WERE NEW
BLADES INSTALLED AT THE
BEGINNING OF PERIOD FIVE, THERE
WAS NOTHING ELSE IN THE EVIDENCE
OF THE RECORD WITH THE STEAM
TURBINE--
>> WHAT DID CAUSE THE PROBLEM IN
PERIOD FIVE?
>> WELL, I MEAN, WE'VE REFERRED
IN OUR BRIEF TO A COUPLE OF
EXHIBITS, EXHIBIT 82 AND 83
WHICH CONTAINS CONFIDENTIAL
INFORMATION THAT I DON'T WANT TO
GO INTO HERE, BUT THE MITSUBISHI
ROOT CAUSE ANALYSIS IDENTIFIED
SOME PROBLEMS.
BUT THEY WEREN'T THE PROBLEMS
THAT THE OFFICE OF PUBLIC

COUNSEL AND THE OTHER
INTERVENERS IDENTIFIED AS
CAUSING THE PERIOD ONE
IMPRUDENCE.
THEIR THEORY IS IT WAS OPERATED
ABOVE NAME PLATE CAPACITY.
THE RECORDS AREN'T DISPUTED THAT
IT WAS OPERATED ABOVE CAPACITY
IN PERIOD FIVE OR, INDEED, IN
PERIODS TWO, THREE OR FOUR.
>> I READ POLLACK'S TESTIMONY AS
SAYING ESSENTIALLY THE
CUMULATIVE WEAR ON THE UNIT FROM
EXCESSIVE VIBRATIONS DURING
PERIOD ONE WAS THE MOST PROBABLE
REASON FOR THE NEED TO REPLACE
THE BLADES AND THE CONTINUED
WEAR ON THE BLADES THROUGHOUT
PERIODS OR TWO-FIVE.
IF THAT IS CORRECT, IF HE SAID
THAT, WOULDN'T THAT BE
COMPETENT, SUBSTANTIAL EVIDENCE
TO SUPPORT THE HEARING OFFICER'S
FINDING TO THAT EFFECT?
>> IF HE SAID THAT, I WOULD
AGREE.
I DON'T THINK HE SAID THAT.
I THINK HIS TESTIMONY ABOUT
CUMULATIVE WEAR WAS DIRECTED
EXCLUSIVELY AT PERIOD ONE,
WHETHER THE BLADE DAMAGE
OCCURRED AT TIMES WHEN DUKE
ENERGY WAS OPERATING ABOVE NAME
PLATE CAPACITY OR BELOW.
HIS POINT WAS IT DOESN'T MATTER
BECAUSE WHEN IT WENT ABOVE AND
THEN WENT BELOW, THOSE EFFECTS
WERE CUMULATIVE DURING PERIOD
ONE.
BUT THERE'S NO BASIS--
>> RIGHT.
BUT HIS TESTIMONY WAS DURING
PERIOD ONE THE WEAR WAS NOT JUST
ON THE BLADES THAT WERE
REPLACED, BUT IT WAS ON THE UNIT
ITSELF.
>> HE MADE A REFERENCE TO
GENERAL WEAR AND TEAR ON THE
UNIT, BUT HE TESTIFIED THAT HE
WAS UNABLE TO IDENTIFY ANY
DAMAGE-- AGAIN, THIS IS AT PAGE
3401, MR. POLLACK, THE OTHER
SIDE'S WITNESS, TESTIFIED THAT
HE HAD SEEN NO DAMAGE TO ANY

STEAM TURBINE COMPONENT OTHER
THAN THE-- THAT WOULD HAVE--
>> IT'S LIKE WE EXPERIENCE WITH
OUR VEHICLES AT TIMES WHERE THEY
START MAKING A NOISE, AND YOU
TAKE IT IN AND TAKE IT IN AND
TAKE IT IN, AND THEY CAN'T FIND
THE PROBLEM.
I MEAN, THAT'S THE WAY I READ
HIS TESTIMONY, IS THAT THEY
COULDN'T IDENTIFY A SPECIFIC
PROBLEM.
BUT THE FACT THAT THAT THING WAS
SPINNING AT A RATE THAT IT
WASN'T DESIGNED TO SPIN AND
RAMPED DOWN AND RAMPED UP OVER
THAT PERIOD OF TIME IN PERIOD
ONE WORE THE MACHINE TO A POINT
THAT IT COULDN'T OPERATE AT ITS
RATE OF CAPACITY WITHOUT WEARING
OUT THOSE BLADES.
I MEAN, THAT SEEMS TO BE HIS
TESTIMONY AND WHAT THE HEARING
OFFICER FOUND.
>> I AGREE THAT'S WHAT THE
HEARING OFFICER FOUND.
I DISAGREE THERE WAS EVIDENCE OF
THAT SORT OF EFFECT, A
CONTINUING EFFECT BEYOND PERIOD
ONE OF THE STEAM THE TURBINE.
>> LET ME JUST JUMP TO YOUR
PERIOD ONE REALLY QUICKLY.
THAT REALLY IS A FACTUAL MATTER.
IS SO EVEN THOUGH THE CONCLUSION
OF LAW PARAGRAPH, THE PROPER
REVIEW OF THAT WOULD BE FOR
COMPETENT, SUBSTANTIAL EVIDENCE,
CORRECT?
>> A FACTUAL FINDING EVEN IF
CONTAINED IS REVIEWED AS A
FACTUAL FINDING.
MANY OF THE FINDINGS THAT ARE IN
THE CONCLUSIONS OF LAW INVOLVE,
I WOULD SAY, MIXED QUESTIONS,
BUT PARAGRAPH 119 IN PARTICULAR
APPEARS TO REST ENTIRELY ON THE
IDEA THAT SOMETHING IMPRUDENT
HAPPENED IN PERIOD ONE AND THEN
SOMETHING ELSE HAPPENED LATER.
AND THAT WAS REALLY
MR. POLLACK'S THEORY AND THE
INTERVENER'S THEORY THROUGHOUT
THIS CASE.
>> 119 COULD NOT BE WHAT THIS

CASE IS DECIDED ON.
I MEAN, IT SEEMS WHAT I'M
CURIOUS IS IF THE-- IT SEEMS
LIKE A LOT OF THE QUESTIONS ARE
GOING-- THEY'RE KIND OF
ASSUMING THAT THE HEARING
OFFICER MADE AN AFFIRMATIVE
FINDING OF THE CONNECTION
BETWEEN--
[AUDIO DIFFICULTY]
AND WHAT HAPPENED IN PERIOD
FIVE, AND WE'RE SORT OF LOOKING
THROUGH THE RECORD TO SEE IF
THERE'S SUPPORT FOR THAT A
FINDING.
THE WAY I READ THIS THOUGH,
THERE WASN'T THAT FINDING.
THE ALJ DID NOT
AFFIRMATIVELY DRAW THE LINK
BETWEEN PERIOD ONE AND PERIOD
FIVE.
IT BASICALLY JUST SAID WE DON'T
KNOW WHAT THE CONNECTION IS, IF
ANY, AND DEF DIDN'T--
[AUDIO DIFFICULTY]
I MEAN--
[AUDIO DIFFICULTY]
TO SEND THIS BACK AND FOR AN
ACTUAL FINDING ON THAT?
IT SEEMS LIKE THE ANSWER TO THAT
QUESTION HAS TO DEPEND ON
WHETHER YOU HAD THE BURDEN TO
ACTUALLY--
[AUDIO DIFFICULTY]
WHAT THE REAL CAUSE WAS OR
WHETHER THE WHOLE-- TO MAKE THE
ALJ COME UP WITH WHAT IS, WHAT
DOES THE EVIDENCE SHOW IS THE
MOST LIKELY EXPLANATION AND THEN
SORT OF DECIDE THE CASE BASED ON
WHATEVER THAT AFFIRMATIVE
FINDING IS.
>> SO, JUSTICE MUNIZ, I THINK
THERE'S TWO WAYS TO ADDRESS IT.
ONE WOULD BE THE WAY YOU
SUGGESTED AND THAT WE REQUESTED
IN A FORM IN OUR ALTERNATIVE
ARGUMENT, THAT THERE BE A REMAND
FOR SOME RECONSIDERATION OF THE
RECORD UNDER THE STANDARDS HERE.
THE OTHER WOULD BE LOOKING AT
THE COMPETENT, SUBSTANTIAL
EVIDENCE STANDARD BECAUSE WE
WOULD SUBMIT THERE IS SIMPLY NO

COMPETENT, SUBSTANTIAL EVIDENCE
IN THE RECORD, NOT EVEN WITH
MR. POLLACK'S TESTIMONY, THAT
PERIOD ONE CAUSED WHAT HAPPENED
IN PERIOD FIVE.
THE THEORY WAS THAT IF IT
WEREN'T FOR WHAT HAPPENED IN
PERIOD ONE, THOSE BLADES WOULD
HAVE STILL BEEN IN PLACE, AND
THERE WOULD HAVE BEEN NO NEEDS
FOR PERIODS TWO, THREE AND FOUR
AND THEN, ULTIMATELY, PERIOD
FIVE.
THAT THEORY THOUGH WAS THE VERY
THEORY THAT THE ALJ REJECTED AS
SPECULATIVE IN PARAGRAPH 119.
>> BUT IT'S AN INFERENCE FROM
THE EXPERIENCE WITH THE REST OF
THE-- I MEAN, ISN'T THAT
BASICALLY THE SUPPORT FOR THAT?
>> I DISAGREE WITH THAT BECAUSE
I THINK THAT THE RECORD SHOWED
THAT THIS PLANT WAS DIFFERENT
FROM SOME OF THE OTHER PLANTS
AND HAD SOME UNIQUE
CIRCUMSTANCES.
I THINK SOME OF THAT IS
ADDRESSED IN THE ROOT CAUSE
ANALYSIS THAT THERE WERE SOME
FACTORS SPECIFICALLY TO THE
BARTOW PLANT.
WHAT DID DUKE ENERGY DO AFTER
THE PERIOD ONE OUTAGE?
>> IT DID WHAT A PRUDENT UTILITY
MANAGER WOULD DO; TALKED TO THE
MANUFACTURER, IT TRIED TO
IDENTIFY THROUGH ROOT CAUSE
ANALYSIS, THROUGH DIFFERENT
OPERATING PARAMETERS HOW TO BEST
OPERATE THE PLANT FOR THE
BENEFIT OF ITSELFS AND ITS
CUSTOMERS.
AND I THINK THAT'S WHAT LED TO
THE PRUDENCE RECORDS IN PERIODS
TWO, THREE, FOUR AND FIVE
INCLUDING THE RESTORATION OF THE
PLATES IN PERIOD FIVE WHICH WAS
A DIRECT RESULT OF RESPONDING TO
THE FORCED OUTAGE IN AN ATTEMPT
TO GET THE PLANT OPERATING IN A
LIMITED CAPACITY.
IT'S EXACTLY WHAT A PRUDENT
COMPANY WOULD DO, AND THE PSC
PRECEDENT STATES THAT UTILITY

COMPANIES CAN BE PRUDENT IN
RELYING ON THE ADVICE OF VENDORS
WHO HAVE SUPERIOR EXPERTISE IN
THIS.
IF THE MANUFACTURER OF THE PLANT
WAS GIVING ADVICE TO PERIODS
TWO, THREE, FOUR AND FIVE ON HOW
BEST TO CONFIRM AND OPERATE THIS
PLANT TO PRODUCE AT BEST
CAPACITY, DUKE ENERGY WAS
REASONABLY ENTITLED TO RELY ON
THAT ADVICE AND DID SO.
AND, ULTIMATELY THROUGHOUT THIS
PERIOD, PAST PERIOD ONE HERE,
THE RECORD IS UNDISPUTED THAT
DUKE ENERGY ACTED PRUDENTLY.
I'D LIKE TO RESERVE THE REST OF
MY TIME FOR REBUTTAL.
>> MAY IT PLEASE THE COURT, I AM
KATHRYN COWDERY REPRESENTING THE
FLORIDA PUBLIC SERVICE
COMMISSION.
THE LEGAL LANDSCAPE OF THIS CASE
DOES NOT INCLUDE ANY DISPUTED
ISSUES OF LAW.
IT INCLUDES DEF ARGUING
APPLICATION OF FACTS THE POINTS
OF LAW THAT ARE NOT IN DISPUTE
AND ASKING THE COURT TO REWEIGH
THE EVIDENCE.
THE COMMISSION USED THE PROPER
STANDARD OF 12057 WHEN
CONSIDERING DEF'S EXCEPTIONS IN
ADOPTING THE ALJ'S RECOMMENDED
ORDER.
DEF'S EXCEPTIONS SOLELY ASKS THE
COMMISSION TO REJECT OR MODIFY
ALJ'S LEGAL CONCLUSIONS
ASSERTING THAT THE ALJ
MISAPPLIED THE LEGAL STANDARD OF
PRUDENCE BY APPLYING HINDSIGHT
AND THAT THE CONCLUSIONS WERE
CONTRARY TO COMMISSION POLICY.
THOSE WERE ITS TWO ARGUMENTS.
THE PLAIN LANGUAGE OF THE FINAL
ORDER SHOWS THAT THE COMMISSION
AGREED WITH THE ALJ'S
CONCLUSIONS OF LAW.
CONTRARY TO DEF'S ASSERTIONS,
BECAUSE THE COMMISSION REJECTED
THE DE-- THE ALJ'S LEGAL
CONCLUSIONS, THERE WAS NO 12057
REQUIREMENT FOR THE COMMISSION
TO ANALYZE WHETHER THE ALJ'S

LEGAL CONCLUSIONS SHOULD BE
MODIFIED WITH THE LEGAL
CONCLUSION THAT DEF WAS
ASSERTING WAS AS OR MORE
REASONABLE.
THE COMMISSION DID NOT NEED TO
STATE WITH PARTICULARITY ITS
REASONS FOR REJECT OR MODIFYING
THE ALJ'S CONCLUSIONS OF LAW,
NOR MAKE A FINDING THAT ITS
SUBSTANTIVE--
>> SO WOULD YOU AGREE THAT THE
ALJ'S CONCLUSIONS OF LAW EITHER
STATE OR ASSUME CAUSATION?
IF THAT THE IMPRUDENT ACTIONS
PRIOR TO 2012 CAUSED THE
PROBLEMS IN 2017?
>> I THINK THE ALJ IN HIS
RECOMMENDED ORDER SHOWS US WHAT
HE RELIED ON FOR CAUSATION.
HE HAD A VERY SPECIFIC, DETAILED
SECTION ON THE FINDING OF FACT
AND, IN FACT, OF COURSE, THE
CONCLUSIONS OF LAW CONTAIN
FINDING OF FACT AS WELL.
AND LOOKING AT THAT, WE SEE WHAT
EVIDENCE HE RELIED ON FOR
CAUSATION WHICH INCLUDED THE
MITSUBISHI AND DEF ROOT CAUSE
ANALYSES, ESPECIALLY LOOKING AT,
I THINK--
>> OKAY.
SO WHEN DUKE FILED ITS
EXCEPTIONS TO THE CONCLUSIONS OF
LAW, I READ THAT AS TAKING
EXCEPTION TO THE FINDING OF
CAUSATION.
AND I THINK THE COMMISSION DID
AS WELL WHICH IS WHY YOU USED
THE COMPETENT, SUBSTANTIAL
EVIDENCE STANDARD OF REVIEW,
CORRECT?
>> I THINK THE REASON THAT THE
COMMISSION ADDRESSED COMPETENT,
SUBSTANTIAL EVIDENCE, THERE WERE
TWO REASONS.
ONE IS, AS PART OF DEF'S
ARGUMENT THAT THERE WERE LEGAL
REASONS FOR REJECTING THE ALJ'S
CONCLUSION, IT BROUGHT IN AS
SUPPORT SOME OF ITS EVIDENCE,
OKAY?
AND SO THE COMMISSION, WHETHER
WHETHER OR NOT THERE HAD BEEN

EXCEPTIONS FILED, IT WOULD HAVE
BEEN REVIEWING THIS EXECUTIVE
ORDER, AND IT WOULD HAVE LOOKED
AT COMPETENT--
>> OKAY.
SO IN THE COMMISSION'S VIEW,
WHAT IS THE COMPETENT,
SUBSTANTIAL EVIDENCE THAT
SUPPORTS THE CAUSAL FINDING?
>> WELL, THAT WOULD BE GOING
BACK TO THE RECOMMENDED ORDER,
THE MITSUBISHI AND DEF ROOT
CAUSE ANALYSES AND THOSE
FINDINGS OF FACT IN THAT
PARTICULAR SECTION.
AND THAT IS POSSIBLY EXHIBIT 115
WERE THE WORKING DOCUMENTS.
I THINK LOOKING SPECIFICALLY AT
THAT FINDING OF FACT, 71.
ALSO THE TESTIMONY OF RICHARD
POLLACK.
>> CAN YOU TELL ME EXACTLY WHERE
IN THE ORDER THIS CAUSAL FINDING
IS?
>> I THINK THERE'S NOTHING
SPECIFIC THAT I CAN REMEMBER
WHERE THEY SPECIFICALLY TALK
ABOUT CAUSATION--
>> RIGHT.
SO, I MEAN, THE BEGINNING OF
THIS THING IS LIKE A GLORIFIED
BENCH MEMO.
PARTY A SAID THIS, PARTY B SAID
THAT, PARTY C SAID THIS.
THEN WE GET TO THE ACTUAL THING
WHERE THE ALJ'S ACTUALLY DOING
THE WORK, AND WE GET TO THIS
INSCRUTABLE PARAGRAPH 119.
I DON'T SEE ANY CAUSAL FINDING
THERE.
AND THEN WHEN HE CLOSES THE
LOOP, HE BASICALLY JUST SAYS WE
HAVE NO IDEA HOW WE EXPLAIN WHAT
HAPPENED BETWEEN PERIODS TWO AND
FIVE, BUT DEF DIDN'T-- THAT IT
WASN'T BECAUSE OF PERIOD ONE.
>> OKAY.
>> SO, I MEAN, IS THAT-- SO
WHAT IS-- I JUST WANT TO BE
CLEAR, WHAT IS YOUR BEST ANSWER
ON WHERE THE CAUSAL FINDING IS?
>> I'VE GOT, I'VE GOT TWO THINGS
I WANT TO ADDRESS BECAUSE I
ALSO WANT TO SAY YOU ARE CORRECT

ABOUT BURDEN OF PROOF IS VERY
IMPORTANT IN THIS CASE.
UTILITY ALWAYS HAS THE BURDEN OF
PROOF OF SHOWING ITS ENTITLEMENT
TO RECOVERING COSTS THAT ARE
THEN PASSED ON TO THE CONSUMER.
SO SOME OF YOUR COMMENTS BEFORE
TO THE APPELLANT, I THINK, WERE
CORRECT, THEY WERE FAIR THAT
THERE WAS A LOT OF CONFLICTING
EVIDENCE HERE, AND THE ALJ HAD
TO WEIGH IT.
AND, ULTIMATELY, THE BURDEN OF
PROOF WAS ON THE UTILITY.
THEN GOING BACK TO CAUSATION, I
THINK WE'RE LOOKING AT POLLACK'S
TESTIMONY--
>> NO, FROM THE ALJ.
I'M NOT ASKING--
>> OH.
>> WE CAN'T ASSUME THAT THERE
WAS A CAUSAL FINDING AND THEN
LOOK FOR THE-- I MEAN, SO STEP
ONE IS WHERE IS THE CAUSAL
FINDING IN THE ORDER.
AND ONLY ONCE YOU'VE ESTABLISHED
THAT DO YOU GET TO SORT OF GO
THROUGH THE RECORD AND SEE IF
THERE'S EVIDENCE TO SUPPORT THAT
FINDING.
SO WHERE IS THE FINDING?
>> I'M NOT, I'M NOT SURE--
>> SO LET ME--
>>-- IF I AGREE WITH THAT.
>> LOOKING AT PARAGRAPH 119, IT
READS IT'S SPECULATIVE TO STATE
THAT THE ORIGINAL PERIOD BLADES
WOULD STILL BE OPERATING TODAY
BUT HAD DEF, DUKE OBSERVED THE
DESIGN LIMITS OF THE 420
MEGAWATTS.
SO THAT'S NOT THE FINDING.
IT IS NOT SPECULATIVE TO STATE
THAT THE EVENTS OF PERIODS
TWO-FIVE WERE PRECIPITATED BY
DEF'S ACTIONS DURING PERIOD ONE.
>> RIGHT.
>> I MEAN, I READ THAT AS A
FINDING OF CAUSATION.
DOES THE COMMISSION VIEW IT THAT
WAY?
>> NO, I AGREE WITH THAT.
AND I BELIEVE THAT'S WHERE YOU
GO BACK AND YOU LOOK AT THE

RECOMMENDED ORDER TO FIND WHERE
DID HE GET THAT.
>> TO SAY IN THIS VAGUE WAY THAT
THE EVENTS OF PERIODS TWO-FIVE
WERE PRECIPITATED, I DON'T
EVEN-- THERE'S A LOT THAT
HAPPENED IN PERIODS TWO-FIVE.
THAT IS NOT THE SAME THING AS
SAYING-- ISN'T THE QUESTION
HERE WHETHER GOING, YOU KNOW,
THE NEED TO GET THE REPLACEMENT
GOING ONLINE AND EVERYTHING WAS
CAUSED, THAT THAT WAS CAUSED BY
THE PERIOD ONE IMPRUDENCE?
I MEAN, THAT SEEMS LIKE A MUCH
MORE--
[AUDIO DIFFICULTY]
THING THAN TO JUST SAY THE
EVENTS WERE--
[INAUDIBLE]
I MEAN, NO ONE DISPUTES THAT--
[AUDIO DIFFICULTY]
THAT ALL THESE THINGS WERE THEN
DONE TO TRY TO FIX IT.
>> RIGHT.
>> IT'S POSSIBLE THAT, YOU KNOW,
RIGHT AT THE BEGINNING ONCE
THEY, YOU KNOW, STARTED-- ONCE
THEY DID WHATEVER THEY DID AT
THE BEGINNING OF PERIOD TWO,
THAT THEY HAD--
[INAUDIBLE]
WE DON'T KNOW.
AND ALL I'M SAYING IS-- AND I
DON'T KNOW, MAYBE THE ALJ IN HIS
MIND THOUGHT THAT CAUSATION HAD
BEEN PROVEN.
HE DOES REPEATEDLY RELY ON THE
BURDEN OF-- I JUST DON'T KNOW.
>> I THINK--
>> AND IN THIS PARAGRAPH HERE IT
ENDS WITH SAYING BUT IT IS
POSSIBLE TO STATE THAT EVENTS
WOULD NOT HAVE BEEN THE SAME.
I MEAN, WHAT IS THAT?
>> RIGHT.
BUT I DO BELIEVE THAT THERE'S
COMPETENT, SUBSTANTIAL EVIDENCE
THAT HE POINTS TO IN THE
RECOMMENDED ORDER THAT SHOW THAT
WERE IT NOT FOR RUNNING THE
PLANT OVER 420 MEGAWATTS DURING
PERIOD ONE, YOU WOULD NOT HAVE
HAD THIS CASCADING SERIES OF

EVENTS THAT CAUSED THE
REPLACEMENT POWER COSTS THAT
HAVE TO BE PASSED ON.
AND I'D LIKE TO LEAVE A LITTLE
TIME FOR THE OFFICE OF PUBLIC
COUNCIL.
>> WELL, THEY'RE ACTUALLY GOING
TO HAVE TEN FINANCIALS.
>> OH, OKAY.
TIME REMAINS IS JUST MINE.
GOT IT.
>> SO LOOKING AT PARAGRAPH 119
AND THE PART THAT I READ, IT
NECESSARILY HAS TO BE GIVEN THE
CONCLUSION THAT THE HEARING
OFFICER EITHER CONCLUDED
CAUSATION WITH THAT SOMEWHAT
CRYPTIC SENTENCE OR THAT HE
CONCLUDED THAT DUKE A HAD NOT
MEANT ITS BURDEN OF PROOF WITH
RESPECT TO THE ISSUE SUCH THAT
THEY WERE NOT ENTITLED TO-- I
MEAN, IT HAS TO BE ONE OR THE
OTHER, RIGHT?
>> WELL, I THINK IT CAN BE BOTH,
YOU KNOW?
THAT THERE WAS CAUSATION AND
THEY HADN'T MET THEIR BURDEN OF
PROOF.
>> OKAY.
>> AND I THINK THAT'S WHAT WE,
THAT'S WHAT WE FIND IN THIS
CASE.
>> SO IS IT YOUR POSITION THEN
THAT THE--
[AUDIO DIFFICULTY]
REALISTICALLY AT KIND OF
EVERYTHING THAT HAPPENED BETWEEN
THE EMERGENCE OF THE PROBLEM AND
WHEN THE ULTIMATE OUTAGE
HAPPENED.
BECAUSE IF YOU, I MEAN, ONE
THING THAT'S SORT OF WEIRD ABOUT
THIS IS IT'S BEEN SORT OF SLICED
UP INTO ALL THESE DIFFERENT--
YOU KNOW, IN SOME SENSE AND I
DON'T KNOW IF THIS IS A LEGAL
QUESTION OR A FACTUAL QUESTION.
IF YOU LOOK AT THE WAY THIS
ENTIRE THING EVOLVED, NO ONE CAN
DISPUTE THAT THE--
[AUDIO DIFFICULTY]
YOU KNOW, WHEN THE PROBLEM WAS
IDENTIFIED IN 2012, SEEMS LIKE

EVERYTHING THAT THEY DID
AFTERWARD WAS THE ESSENCE OF
PRUDENCE FROM WHAT I CAN TELL.
SO ARE WE SUPPOSED TO JUST SORT
OF AWE SAY THAT EVENTUALLY
THERE'S NOTHING THAT THEY COULD
DO AFTER 2012 THAT WOULD HAVE--
I MEAN, MAYBE THEY COULD HAVE
MADE IT WORSE.
>> WELL, AND I THINK THERE WAS
SOME TESTIMONY FROM RICHARD
POLLACK THAT SOME OF THE THINGS
THAT THE MANUFACTURER HAD DONE
DURING THAT TIME PERIOD, IN HIS
OPINION, DID MAKE IT WORSE.
>> RIGHT.
BUT THAT'S NOT DEF'S-- NO ONE
IS ATTRIBUTING ANYTHING, ANY--
[INAUDIBLE]
>> CORRECT.
RIGHT.
CUTTING THE TIME PERIOD DOWN
INTO DIFFERENT PERIODS WAS
SIMPLY A CONSTRUCT THAT DEF DID
AS PART OF ITS ROOT CAUSE
ANALYSIS, THAT EVERY TIME THAT
THERE WAS A SHUTDOWN EITHER
PLANNED OR NOT PLANNED, THAT
BECAME A PERIOD.
BUT THAT IS THE ONLY
SIGNIFICANCE IT HAS.
IT DOESN'T HAVE THE SIGNIFICANCE
AS FAR AS THE PUBLIC SERVICE
COMMISSION IN ITS RESPONSIBILITY
UNDER CHAPTER 366 CAN ONLY
APPROVE AS COSTS TO BE PASSED ON
TO THE CUSTOMERS PRUDENTLY
INCURRED COSTS.
AND AS ITS RESPONSIBILITY IN
THIS CASE WHERE IT HAD AN ALJ'S
RECOMMENDED ORDER TO REVIEW, IT
HAD TO FOLLOW 12057.
AND IT FOUND THAT THERE WAS NO
LEGAL BASIS FOR OVERTURNING THE
ALJ'S DECISION AND THAT THERE
WAS COMPETENT, SUBSTANTIAL
EVIDENCE SUPPORTING THE FINDINGS
OF FACT, THE CONCLUSIONS OF LAW
WERE SUPPORTED BY COMPETENT,
SUBSTANTIAL EVIDENCE, AND IT
PROPERLY FOLLOWED 120.
>> COUNSEL, YOU'VE-- YOU'RE NOW
OVER, WELL OVER.
>> THANK YOU.

>> MAY IT PLEASE THE COURT, MY
NAME IS ANASTASIA PIRRELLO, AND
I REPRESENT THE CUSTOMERS OF
DUKE ENERGY FLORIDA AND THE
OFFICE OF PUBLIC COUNSEL.
I'D LIKE TO START BY ADDRESSING
THE COMPETENT, SUBSTANTIAL
EVIDENCE ARGUMENT THAT WE'VE
BEEN GETTING INTO, YOUR
QUESTION, JUSTICE LAWSON.
I AGREE THE FINDING IS BOTH THAT
DUKE DID NOT MEET THEIR BURDEN
OF PROOF WHICH IS BASED ON
REJECT OF THEIR EXPERT'S
TESTIMONY, JUDGE STEVENSON SAID
IT WAS UNCLEAR HOW HE REACHED
CERTAIN CONCLUSIONS, THE
TESTIMONY WAS UNPERSUASIVE, AND
HE WAS UNABLE TO EXPLAIN AWAY
CERTAIN CRITICISMS AND THAT WAS
THEIR BURDEN TO MEET.
HOWEVER, IN PARAGRAPH 114 JUDGE
STEVENSON ALSO STATED THAT, TO
THE CONTRARY, THE PREPONDERANCE
OF THE EVIDENCE POINTED TO
DUKE'S OPERATION OF THE TURBINE
DURING PERIOD ONE AS THE MOST
PLAUSIBLE CULPRIT.
AND ALL OF THIS EVIDENCE IS
OVERWHELMING.
IT'S TALK ABOUT'S ROOT CAUSE
ANALYSIS WHICH IS STATED IN
PARAGRAPH 71 IN WHICH THEIR OWN
EXPERTS STATED THAT THEIR
ACTIONS IN PERIOD ONE ARE ONE OF
THE MOST SIGNIFICANT
CONTRIBUTING FACTORS TOWARD
BLADE FAILURE OVER THE HISTORY
OF THE TURBINE.
IT'S ALSO MITSUBISHI'S ROOT
CAUSE ANALYSIS WHICH IS RESTATED
IN PARAGRAPHS 62 AND 71, WHICH
IS ALSO SUPPORTED-- ALSO
SUPPORTS THE CONCEPT THAT
DUKE--
>> IF THE EVIDENCE WAS SO
OVERWHELMING, IT SEEMS LIKE NOT
TOO HARD TO EXPECT AN AFFIDAVIT
FROM THE ENGINEER THAT SAID IN
MY PROFESSIONAL OPINION WHAT
HAPPENED IN PERIOD ONE CAUSED
THIS.
THAT'S NOT REALLY IN THE RECORD,
IS IT?

>> IN DUKE'S ROOT CAUSE
ANALYSIS, THEIR OWN ENGINEERS
DID EXPLICITLY DRAW THAT LINE
AND SAY THAT THEIR ACTIONS IN
PERIOD ONE CAUSED THE OUTAGE IN
PERIOD FIVE.
AND TO ADDRESS THE COMMENT THAT
MR. POLLACK DISCLAIMED THAT
CAUSATION IS, THERE'S A LARGER
CONTEXT TO THAT CROSS-STATEMENT
WHICH THE TRANSCRIPTS OF THAT
HEARING ARE CONFIDENTIAL.
HOWEVER, THE CONTEXT IS THAT HE
DID NOT CONDUCT HIS OWN ROOT
CAUSE ANALYSIS.
HE REVIEWED DUKE AND
MITSUBISHI'S ROOT CAUSE
ANALYSES, AND BASED ON THOSE, HE
FOUND THE DAMAGE WAS LIKELY TO
HAVE BEEN CUMULATIVE AND THAT
BUT FOR DUKE'S ACTIONS IN PERIOD
ONE, WE WOULDN'T HAVE BEEN HERE
TODAY.
THERE'S ALSO ABUNDANT
EVIDENCE--
>> SO THE SPECIFIC LANGUAGE THAT
YOU'RE TALKING ABOUT IS
SUMMARIZED IN PARAGRAPH 62 AND
71?
>> THAT'S MITSUBISHI'S ROOT
CAUSE ANALYSIS, YES.
THERE'S ALSO ABUNDANT EVIDENCE
ABOUT WHAT HAPPENED ELSEWHERE AS
WE DISCUSSED WHICH ALSO SUPPORTS
THE FINDING THAT DUKE WAS AT
FAULT FOR THIS OUTAGE.
AND JUDGE STEVENSON STATED THAT
IT WAS SIMPLE PRUDENCE TO HAVE
CONSULTED MITSUBISHI PRIOR TO
OPERATING THE TURBINE IN A
MANNER THAT MITSUBISHI DIDN'T
ANTICIPATE AND DUKE KNEW OR
SHOULD HAVE KNOWN WAS BEYOND THE
TURBINE--
[AUDIO DIFFICULTY]
ALL OF PERIOD ONE.
ALL OF THIS EVIDENCE
DEMONSTRATES THAT NOT ONLY WAS
DUKE IMPRUDENT IN PERIOD ONE,
BUT THAT THIS IMPRUDENCE FLOWED
FURTHER AND WAS THE CONSEQUENCE
OF THE PERIOD FIVE OUTAGE.
>> YOU VIEW PARAGRAPHS 114
AND--

[INAUDIBLE]
CONSISTENT?
IN THE SENSE THAT PARAGRAPH 114
IS TALKING ABOUT THE PERIOD ONE
NEGLIGENCE AS BEING THE MOST
LIKELY CULPRIT, BUT THEN IT SAYS
IN PARAGRAPH 119 IT'S
SPECULATIVE--
[AUDIO DIFFICULTY]
BLADES WOULD STILL BE OPERATING,
HAS THE THING ABOUT THE EVENTS
HAPPENING, BUT THEN IT SAYS IT'S
NOT POSSIBLE TO STATE WHAT WOULD
HAVE HAPPENED.
SOUNDS LIKE HE'S SAYING TWO
DIFFERENT THINGS IN THOSE--
>> JUDGE STEVENSON WAS STATING
THAT IT IS NOT POSSIBLE TO
PREDICT AN ALTERNATE FUTURE.
HOWEVER, BUT FOR DUKE'S ACTIONS
WHICH PRECIPITATED THE OUTAGE,
THERE WOULD NOT HAVE BEEN
PERIODS 2-5, AND THERE NEVER
WOULD HAVE BEEN THE OUTAGE IN
PERIOD FIVE.
>> WHAT IS A COURT SUPPOSED TO
DO WHEN YOU HAVE KIND OF AN
INCOHERENT--
>> SO WE AGREE THE LANGUAGE IS
IMPRECISE.
HOWEVER, DUKE DID NOT TAKE
EXCEPTION TO ANY OF THESE
FINDINGS OF FACT AT THE
COMMISSION LEVEL, AND WE WOULD
ARGUE THAT THAT ARGUMENT HAS
BEEN WAIVED.
NEVERTHELESS, THE EVIDENCE IS
OVERWHELMING EVEN IF THE
STATEMENT IS SLIGHTLY UNCLEAR.
>> WELL, I DON'T THINK THE ALJ
THOUGHT THAT THE EVIDENCE--
THEY WOULDN'T HAVE EMPHASIZED
THE--
[INAUDIBLE]
SO MUCH AT THE END.
HE WOULD HAVE AFFIRMATIVELY
TALKED ABOUT THE CAUSATION--
>> WELL, CAUSATION IS AN ELEMENT
THAT IS EMBEDDED WITHIN THE
BURDEN OF PROOF THAT THE UTILITY
MUST DEMONSTRATE THAT THEIR
ACTIONS DID NOT CAUSE OR
SIGNIFICANTLY CONTRIBUTE TO THE
OUTAGE.

AND, AGAIN, WE HAVE THEIR OWN
ENGINEERS SAYING THAT THEY
SIGNIFICANTLY CONTRIBUTED.
THE SECOND POINT I'D LIKE TO
ADDRESS BRIEFLY IS THE STANDARD
THAT THE COMMISSION USED IN
REVIEWING THE EXCEPTIONS TO THE
CONCLUSIONS OF LAW.
AS STATED, THE STATUTE STATES
THAT AN AGENCY MAY REJECT A
CONCLUSION OF LAW AND THAT IF
THEY DO SO, THEY MUST TAKE THEIR
REASON WITH PARTICULARITY AND
MAKE A FINDING THAT THE
SUBSEQUENT CONCLUSION WAS AS OR
MORE REASONABLE THAN THOSE OF
THE ADMINISTRATIVE LAW JUDGE.
THE COMMISSION DID NOT DO THIS,
HOWEVER.
THEY ADOPTED THE RECOMMENDED
ORDER WITHOUT MODIFICATION AND
RESOLUTELY-- ALL OF DUKE'S
EXCEPTIONS.
AND THEY DID THIS WITH A FULL
AND COMPLETE UNDERSTANDING OF
THEIR POWERS UNDER THE STATUTE.
NOTHING DEMONSTRATES THAT BETTER
THAN THE STATEMENTS OF
COMMISSIONER FAYE AND THE
ATTORNEY IN WHICH HE STATED THAT
HE DID NOT WANT THE REFUSAL TO
TAKE THE EXCEPTIONS OF DUKE TO
BE CONSTRUED AS A
MISUNDERSTANDING OF THEIR POWERS
UNDER THE STATUTE, STATING
EXPLICITLY I THINK IT'S VERY
CLEAR WE HAVE THE AUTHORITY TO
DO THAT.
DUKE NOW ATTEMPTS TO FLIP THIS
STANDARD ON ITS HEAD AND
SUGGESTS THAT THE COMMISSION WAS
REQUIRED TO ACCEPT ANY
CONCLUSION OF LAW THAT WAS AS OR
MORE REASONABLE.
THIS IS SIMPLY NOT THE STANDARD.
THE COMMISSION WENT BEYOND WHAT
THE STATUTE REQUIRED AND DID
MAKE A FINDING THAT EACH
EXCEPTION WAS NOT AT OR MORE
REASONABLE AND EXPLAINED THAT
REASONING, BUT THE STATUTE DID
NOT REQUIRE THEM TO DO THAT.
AND ACCORDINGLY, DUKE HAS NOT
DEMONSTRATED THAT THE AGENCY'S

DECISION IS BASE ON ANY FINING
OF FACT THAT IS NOT SUPPORTED BY
COMPETENT, SUBSTANTIAL EVIDENCE
OR THAT THE COMMISSION
ERRONEOUSLY INTERPRETED A
PROVISION OF LAW AND, THEREFORE,
HAS FAILED TO STATE A BASIS FOR
REMAND UNDER 12068, AND WE WOULD
ASK THAT THIS COURT AFFIRM THE
PUBLIC SERVICE COMMISSION'S
ORDER.
>> A FEW BRIEF POINTS IN
REBUTTAL.
FIRST, TO JUSTICE CANADY'S MORE
COMPLETE ANSWER TO YOUR QUESTION
EARLIER, THE SPECIFIC PORTIONS
OF THE RECORD THAT DEMONSTRATE
WHAT HAPPENED HERE, WE ADDRESS
THEM AT PAGES 31-32 OF OUR BRIEF
IN THE RECORD CITATIONS TO THE
CONFIDENTIAL PORTIONS INCLUDING
JOINT EXHIBIT 82, PAGE 12 OF 35.
I ACKNOWLEDGE THAT COMPETENT,
SUBSTANTIAL EVIDENCE IS A HIGH
BURDEN IN A CASE LIKE THIS.
SO I WANT TO TALK ABOUT A COUPLE
PORTIONS OF THE RECORD WHERE THE
OTHER SIDE'S WITNESS PROVES OUR
CASE IN OUR VIEW AND DIRECT YOU
TO THOSE SPECIFIC PARTS.
THE FIRST IS ONE I DISCUSSED
EARLIER.
THE INTERVENER'S EXPERT
EXPLICITLY DISCLAIMED A CAUSAL
RELATIONSHIP IN HIS TESTIMONY AT
PAGE 3405 OF THE RECORD, A
CAUSAL RELATIONSHIP BETWEEN
PERIOD ONE IMPRUDENCE AND THE
PERIOD FIVE OUTAGE.
MR. POLLACK ADMITTED THAT HE
WOULD BE SPECULATING OR ANY
OTHER FACTUAL BASIS FOR THE
PERIOD FIVE IMPRUDENCE AT PAGES
3398-3399 OF THE RECORD.
MR. POLLACK'S THEORY WAS THAT
THERE WAS IMPRUDENCE IN PERIOD
ONE, AND EVERYTHING AFTER THAT
CAME AFTER PERIOD ONE AND,
THEREFORE, WAS A RESULT OF
PERIOD ONE.
THAT'S NOT A CAUSAL
RELATIONSHIP, AND THAT'S NOT
ENOUGH.
I DISAGREE WITH MY FRIEND ON THE

OTHER SIDE'S CHARACTERIZATION OF
THE DEF WORKING PAPERS.
THEY WERE EXPLORING AFTER THE
FACT POTENTIAL CAUSES OF WHAT
HAD HAPPENED IN PERIOD ONE.
I DISAGREE THAT THEY WERE-- HAD
MADE A CAUSAL CONCLUSION OF
THEIR OWN TO DEF AND EVEN THE
PSC'S FINAL ORDER HERE SEEMED TO
AB KNOWLEDGE THAT THERE WAS A
PROBLEM WITH THE WAY THE ALJ
APPROACHED THE PRUDENCE
ANALYSIS.
THE FINAL ORDER WAS, QUOTE,
LIMITED PRECEDENTIAL VALUE AND
THAT IT WAS NOT ADOPTING ANY
POLICY THAT IT WOULD BE
IMPRUDENT TO RUN A UNIT ABOVE
NAME PLATE CAPACITY.
THAT'S COMPLETELY IRRECONCILABLE
EVEN AS TO PERIOD ONE, AND
COMMISSIONER POLMANN'S
DISSENTING OPINION IN THE FINAL
ORDER, I THINK, ACCURATELY
CHARACTERIZES THE NATURE OF WHAT
THE PSC DID WITH THE ORDER THAT
IT WAS PRESENTED FROM THE ALJ.
IN CONCLUSION, MY FRIENDS ON THE
OTHER SIDE HAVE STATED THAT
WE'RE ASKING THIS COURT TO
REWEIGH THE EVIDENCE.
WE'RE NOT DOING THAT.
IT REQUIRES NO REWEIGHING OF THE
EVIDENCE FOR THIS COURT TO
OBSERVE THAT ONE SIDE OF THE
EVIDENTIARY SCALES ON CAUSATION
IS ENTIRELY EMPTY.
THERE'S SIMPLY NOTHING THERE.
FOR THE REASONS STATED IN THE
BRIEFS AND UNLESS THE COURT HAS
FURTHER QUESTIONS, WE'D ASK THE
COURT TO REMAND TO THE PSC
EITHER FOR AN ENTRY IN FAVOR OF
DUKE ENERGY OR UNDER THE ORDER
OF THE CORRECT LEGAL STANDARDS.
>> SO DO YOU READ THIS ORDER AS
MAKING A CAUSATION FINDING?
>> ARE YOU REFERRING TO THE--
>> I'M SORRY, THE RECOMMENDED
ORDER.
>> I DON'T.
I READ THE ALJ'S ORDER AS
IMPLYING CAUSATION THROUGH
TEMPORAL SEQUENCE.

WE IDENTIFIED BELOW AND IN OUR
BRIEF THE LOGICAL FALLACY THERE,
SINCE IT CAME AFTER, IT MUST
HAVE BEEN CAUSED BY IT.
I DON'T SEE ANYTHING IN THE
ALJ'S ORDER THAT DOES MORE THAN
THAT ON CAUSATION.
THERE WAS PERIOD ONE IMPRUDENCE,
IT'S SPECULATIVE, IN PARAGRAPH
119, IT'S SPECULATIVE TO SAY IF
THE BLADES FROM PERIOD ONE
HADN'T BEEN DAMAGED, IF THEY'D
STILL BE THERE OR NOT, BUT
THINGS WOULD NOT HAVE BEEN THE
SAME.
THAT'S SIMPLY NOT AN ADEQUATE
FINDING OF CAUSATION IN ORDER TO
SUPPORT A FINDING OF IMPRUDENCE
HERE.
>> AND WE HEAR YOUR ANSWER AS TO
WHETHER PARAGRAPH 114 IS A
FINDING OF CAUSATION?
>> BE SURE I'M LOOKING AT
EXACTLY THE PARAGRAPH YOU'RE
REFERRING TO THERE.
>> YOUR COLLEAGUES ON THE OTHER
SIDE SORT OF POINTED US TO AND
WE DISCUSSED RELATIONSHIP
BETWEEN PARAGRAPHS 114 AND 119
WHICH ARE, IN SOME WAY'S,
INTENTIONED.
AND IN OTHER WAYS YOU MIGHT SAY
114 COMES CLOSER TO MAKING A
CONCLUSION ABOUT CAUSATION.
AND I GUESS MY QUESTION IS IF
119 DOESN'T SUPPLY THAT FINDING
OF CAUSATION, DOES 114 DO IT?
>> I DON'T THINK SO, JUSTICE
COURIEL.
I THINK 114 IS TALKING ABOUT
PERIOD ONE ISSUES.
PERIOD 114-- AND I HAVE THE
UNCONFIDENTIAL COPY HERE, SO I
WANT TO BE CAREFUL IN THE WAY
THAT I DISCUSS THIS-- THE
DISCUSSIONS IN THE FIRST
SENTENCE OF PARAGRAPH 114 AND
THE CONDITIONS THAT IT DESCRIBES
THERE WERE EXCLUSIVELY PRESENT
DURING PERIOD ONE AND WERE NOT
PRESENT DURING PERIOD FIVE.
SO I DON'T THINK 114 OR 119
PROVIDES THAT REQUISITE CAUSAL
LINK.

THANK YOU VERY MUCH.
>> WE THANK YOU BOTH SIDES FOR
YOUR ARGUMENTS IN THIS CASE
TODAY.
THE COURT WILL NOW STAND IN
RECESS BEFORE WE TAKE UP OUR
NEXT CASE, AND WE'LL BE OUT FOR
ABOUT TEN MINUTES.
>> ALL RISE.