

CITIZENS OF THE STATE OF FLORIDA, ETC.  
V. ANDREW GILES FAY, ETC., ET AL

>> Marshal: ALL RISE.

LADIES AND GENTLEMEN THE FLORIDA SUPREME COURT IS NOW IN SESSION PLEASE  
BE SEATED.

>> Chief Justice Carlos Muniz: WILL NOW TAKE UP

CITIZENS OF THE STATE OF FLORIDA, ETC. V. ANDREW GILES FAY, ETC., ET AL. CASE  
NO. SC2022-1733.

>> Appellant Wessling: THANK YOU AND GOOD MORNING. I REPRESENT THE FLORIDA  
OFFICE OF PUBLIC COUNSEL AS WELL AS FLORIDA POWER AND LIGHT, DUKE ENERGY  
FLORIDA, TAMPA ELECTRIC COMPANY AND THE FLORIDA PUBLIC UTILITIES COMPANY  
I WILL START BY ACKNOWLEDGING THAT THERE WERE A LOT OF BRIEFS AND LARGE  
RECORDS IN THIS MATTER.

WHAT I WANT TO BE VERY CLEAR ABOUT IS THAT OBC'S ARGUMENT THROUGHOUT  
THE LITIGATION AND THROUGHOUT THIS ENTIRE APPELLATE PROCESS IS THE SAME.  
THE COMMISSION HAS FAILED TO FULFILL ITS LEGISLATIVE MANDATE OF ENSURING  
UTILITY INVESTMENTS ARE PRUDENT AND COST-EFFECTIVE.

>> I THINK FIRST WE HAVE TO ESTABLISH WHETHER THAT MANDATE NEEDS TO BE  
EFFECTUATED NOW AT THIS POINT OR JUNCTURE WHETHER THE PREFERRED  
STANDARD IS PUBLIC INTEREST AND THOSE TWO THINGS ARE DIFFERENT HOW THEY  
ARE DIFFERENT. PERHAPS YOU CAN SAY A LITTLE BIT ABOUT THE DIFFERENCE  
BETWEEN THE PUBLIC INTEREST REVIEW AND THE PRUDENCE REVIEW TO THE  
EXTENT YOU THINK THERE IS A DIFFERENCE.

>> CERTAINLY THERE HAS BEEN A LOT OF CASE LAW ON ONE OF THESE ISSUES  
SEPARATELY AND TOGETHER.

OVERALL CHAPTER 366 AS THE COURT HAS RECENTLY STATED IS GOVERNED BY  
PUBLIC INTEREST STANDARDS THE WHOLE CHAPTER IS IN EXISTENCE FOR THE  
PUBLIC INTEREST. WITHIN THAT CHAPTER 366 366.06 SPECIFICALLY REQUIRES A  
PRUDENCE REVIEW TO THE EXTENT A PRUDENCE REVIEW IS REQUIRED TO FILL.

>> Chief Justice Carlos Muniz: ARE THEY DIFFERENT HOW ARE THEY DIFFERENT.

>> THEY ARE DIFFERENT YOUR HONOR BUT YOU CAN'T HAVE ONE WITHOUT THE  
OTHER THE COURT HAS PREVIOUSLY STATED IN THE SIERRA CLUB CASE THAT IN  
PRUDENT INVESTMENTS OF MILLIONS OF DOLLARS WOULD LIKELY CONFLICT WITH  
THE PUBLIC INTEREST FINDING.

>> Chief Justice Carlos Muniz: THAT IS TRUE BUT IN SIERRA CLUB VERSUS BROWN WE  
STILL EMBRACE THE PUBLIC INTEREST TEST AND MAKE NOTES ABOUT WHAT WOULD  
LIKELY BE TRUE. HERE'S THE STATUTE STORM PROTECTION PLAN STATUTE IS  
DIFFERENT IN WE HAVE A CHRONOLOGICALLY STAGED REVIEW. EVERY THREE  
YEARS WE'VE GOT SORT OF A DIFFERENT TEST THEN WE DO HAVE AN ISSUE. THAT  
SEEMS TO ME TO REFLECT THE STRUCTURE OF THE LEGISLATION CHOICE ABOUT

WHAT TO DO.

THERE IS NO MENTION OF PRUDENCE IT SHOWS UP IN THE THREE YEAR SORT OF REFRESHER IF YOU WILL. DON'T WE ASCRIBE TO THAT LEGISLATIVE CHOICE SOME MEANING OR IS IT FROM YOUR PERSPECTIVE, INDIFFERENT.

>> WOULD RESPECTFULLY DISAGREE THAT.. THE ISSUE EVERY THREE YEARS STRICTLY PUBLIC INTEREST BECAUSE PRUDENCE OF INVESTMENTS IN EVERY SINGLE DOCKET IN FRONT OF THE COMMISSION IS A STATUTORY REQUIREMENT IN THE ABSENCE OF THE SETTLEMENT AGREEMENT AS THE COURT HAS STATED IN SIERRA CLUB. PRUDENCE OF INVESTMENTS IN RATEMAKING DOCUMENTS WITH INCLUDES THE.

[LISTING NAMES] PRUDENCE HAS ALWAYS BEEN REQUIRED AS THE COURT IS AWARE THESE CASES WERE HEAVILY LITIGATED THIS IS NOT A SETTLEMENT AGREEMENT SITUATION. THE PRUDENCE OF THESE INVESTMENTS AS REQUIRED BY THREE 366.06(1) AS ALWAYS APPLIES. AND SPECIFICALLY CHAPTER 366.96 THE SPP STATUTE DOES NOT CONTAIN NOTWITHSTANDING 366.06 A STATEMENT.

>> WHY ISN'T TO THE EXTENT THAT THE STATUTE TELLS THE COMMISSION THAT IN ITS REVIEW THESE PLANS IT HAS TO FACTOR IN THE ESTIMATED COST AND BENEFIT TO THE UTILITY AND CUSTOMERS OF MAKING THE IMPROVEMENTS IN THE PLAN, WHITE DOES NOT BAKE WHAT YOU ARE WORRIED ABOUT AND CALLING THE PRUDENCE THING WHITE IS THAT SORT OF BAKED INTO THIS AND TO THE EXTENT THAT THE COMMISSION ABUSED ITS DISCRETION BECAUSE IT ARBITRARILY IGNORED THAT IF THEY WERE NOT COMPETENT AND SUBSTANTIAL EVIDENCE. IT SEEMS LIKE WE HAVE A VERY SPECIFIC STATUTE THAT DOES EMBODY THIS PRINCIPLE THAT YOU ARE WORRIED ABOUT AND BECAUSE IT TELLS BECAUSE THE STATUTE SAYS ONCE THE PLAN IS APPROVED THE WAY I UNDERSTAND THEN WHEN YOU GET TO THE COST RECOVERY PART, PEOPLE CAN ARGUE ABOUT WHETHER THE PLAN WAS IMPLEMENTED IN A PRUDENT WAY BUT YOU CANNOT SORT OF AT THAT STAGE QUESTION WHY ARE YOU DOING THIS IN THE FIRST PLACE?

YOU DID IT PERFECTLY BUT IT WAS IN PRUDENCE. IT SEEMS LIKE THAT MAKE IT'S TAKEN OFF THE TABLE WHY ISN'T WHAT YOUR CONCERNS WHICH ARE UNDERSTANDABLE AND VALID WHY IS IT NOT JUST HANDLED THROUGH FOLLOWING THE STATUTE AND MAKING SURE THAT THE COMMISSION CONSIDERS THIS CRITERIA IN THE WAY IT IS EXPLICITLY TOLD TO.

>> THAT IS EXACTLY OUR ISSUE YOUR HONOR WE AGREED THAT THE STATUTE IS CLEAR THAT THE STATUTE WHEN READ HARMONIOUSLY WITH THE ALWAYS REQUIRED THAT PRUDENCE BE CONSIDERED THAT THE STATUTE IS CLEAR IT IS THE COMMISSION'S INTERPRETATION WHICH MUST BE SUBJECT TO A DE NOVO REVIEW THAT IS THE PROBLEM HERE. THE COMMISSION DID NOT PROPERLY CONDUCT THE COST-EFFECTIVENESS EVALUATION THAT IS REQUIRED BY THE TEXT OF 366.96 AND THE RULED THAT THE COMMISSION WROTE WE HAVE NO PROBLEM WITH THE STATUTE WE HAVE NO PROBLEM WITH THE RULE WE HAVE A PROBLEM WITH THE WAVE THE COMMISSION HAS INTERPRETED BOTH.

>> Chief Justice Carlos Muniz: INSTEAD OF SORT OF HAVING THE SORT OF

METAPHYSICAL ARGUMENT ABOUT PRUDENCE AND STATUTORY INTERPRETATION IT SEEMS LIKE YOU NEED TO BE MAKING A SPECIFIC ARGUMENT ABOUT HOW WHETHER YOU CHARACTERIZE ABUSE OF DISCRETION OR LACK OF COMPETENT SUBSTANTIAL EVIDENCE?

WHAT IS YOUR SPECIFIC ARGUMENT NOT ALL OF THE UTILITIES ARE IN THE SAME BOAT ACCORDING TO YOUR VIEW OF THE CASE.

WHAT SPECIFICALLY ARE WE SUPPOSED TO BE IF WE ACCEPT THAT THIS COST BENEFIT REVIEW WHATEVER YOU WANT TO CALL IT IS EMBEDDED IN THE SORT OF THE STATUTORY FRAMEWORK THEN WHAT DID THE COMMISSION GET WRONG? WHAT IS YOUR ARGUMENT ABOUT WHAT THEY GOT WRONG SPECIFICALLY?

>> Appellant Wessling: THERE ARE A COUPLE OF THINGS THEY GOT WRONG AS YOU IDENTIFIED THE FOUND ALL THE COMPANIES COMPLIED WITH THE SDP RULES REQUIREMENT WHEN THERE IS NOT COMPETENT SUBSTANTIAL EVIDENCE OF THAT. TWO COMPANIES DID DIVIDE THE REQUIRED INFORMATION TWO OF THEM DID NOT. THAT IS ONE ISSUE.

>> Chief Justice Carlos Muniz: CAN WE TAKE THE OTHER TWO THEN OFF THE TABLE?

>> Appellant Wessling: NO YOUR HONOR THE COMMISSION FOUND EXPLICITLY THAT PRUDENCE WAS OUTSIDE THE SCOPE OF THE SPP PROCEEDING THEY FOUND AS IT APPLIES TO ALL FOUR CASES EVEN THOUGH THESE UTILITIES WHO DID COMPLY WITH THE RULE AND THE STATUTE PROVIDED THE INFORMATION WHEN THE COMMISSION FOUND THAT PRUDENCE WAS OUTSIDE OF THE SCOPE OF THE SPP PROCEEDING THAT AFFECTS ALL FOUR DOCUMENTS.

>> Chief Justice Carlos Muniz: DEBATE SAVE COST BENEFIT COMPARISON IS OUTSIDE OF THE SCOPE THAT IS THE QUESTION RIGHT.

>> Appellant Wessling: YES YOUR HONOR WHAT THEY DID SAVE IN EACH ORDER IS NEITHER SECTION 366.96 N. THE SPP RULE EXPLICITLY REQUIRED A COST-EFFECTIVENESS EVALUATION OR QUANTITATIVE COST-BENEFIT ANALYSIS. THAT IS WHAT THE COMMISSION FOUNDED. THAT IS OUR ULTIMATE ARGUMENT THAT THE PRUDENCE AND COST-EFFECTIVENESS THAT IS MANDATED BY THE LEGISLATURE TO BE CONDUCTED WAS IGNORED. AND THE COMMISSION ABDICATED ITS RESPONSE ABILITY TO CONDUCT THAT ANALYSIS.

>> JUST MAKING SURE I UNDERSTAND YOU ARE SAYING EVEN WHEN YOU HAVE A STATUTE WHEN THERE IS A CLEAR BIFURCATED PROCESS IT USES VERY SPECIFIC WORDS FOR THIS FIRST SECTION PUBLIC INTEREST FOR THIS SECOND PART, THAT PART HAS TO HAVE VERY SPECIFIC COST-BENEFIT ANALYSIS VERY SPECIFIC. THEN THE SECOND PART WHICH REQUIRES THE THREE YEAR AND THE PRUDENCE AND ALL THAT THAT SOMEHOW WE ASSUME THAT THERE IS SOMETHING ELSE THAT THE LEGISLATURE INTENDED THAT OVERLAYS THAT THAT THEY JUST DID NOT REALLY INCLUDE IN THEIR DETAILED PROCEDURES.

>> Appellant Wessling: I DON'T KNOW IF ASSUMING MAYBE IS THE RIGHT WORD BUT IF YOU LOOK AT SUBSECTION 7 OF THE SPP STATUTE IT SAYS PROCEEDING WITH ACTIONS TO IMPLEMENT AN APPROVED STORM PROTECTION PLAN SHALL NOT BE EVIDENCE OF IMPRUDENCE THAT SHOWS THE LEGISLATURE'S INTENT ESPECIALLY

KNOWING THAT THEY ALREADY HAD 366 IN PLACE NOTWITHSTANDING.

>> EXCEPT THE FIRST WORD IN SEVEN IS AFTER UTILITIES FOR PROTECTION PLAN HAS BEEN APPROVED PROCEEDING WITH ACTIONS TO IMPLEMENT THE PLAN SHALL NOT CONSTITUTE OR BE EVIDENCE OF IMPRUDENCE I GUESS WHAT I'M GETTING GET YOUR ARGUMENT THAT THERE IS A STATUTORY ARGUMENT OVERLY OF IMPRUDENCE PRINTS DON'T ARGUE THAT I SEE FINALLY BROUGHT STATUTORY SCHEME THAT ASSUMES THAT WE NOTE THAT THERE IS THAT OVERLAY. BUT HERE IN 366.96 IT SPEAKS MORE SPECIFICALLY TO A NEW PROCESS THESE SBP PROCESS AND IT BALANCES THE STATUTE'S OVERARCHING INTEREST IN PRUDENCE AND PUBLIC INTEREST IN A SPECIFIC WAY BY DOING A PUBLIC INTEREST DETERMINATION. AGAIN THE QUOTE THE STATUTE AFTER UTILITY TRANSMISSION AND DISTRIBUTION STORM PROTECTION PLAN HAS BEEN APPROVED EVALUATE FOR PRUDENCE AM I MISSING SOMETHING.

>> Appellant Wessling: MY UNDERSTANDING I THINK TO ANSWER YOUR QUESTION YOUR HONOR IS THAT SPECIFIC STATUTES ONLY OVERRIDE WOULD TAKE PRECEDENCE OVER MORE GENERAL STATUTES WHEN THERE IS A CONFLICT. WE DO NOT ALLEGE THAT THERE IS A CONFLICT BETWEEN THE OVERARCHING EVER-PRESENT REQUIREMENT FOR PRUDENCE AND THE REQUIREMENTS THAT THESE PLANS BE IN THE PUBLIC INTEREST. AS I SAID PUBLIC INTEREST IS THE POINT OF THE STATUTE. THERE IS STILL A REQUIREMENT THAT PRUDENCE BE CONDUCTED.

>> I GUESS I DON'T UNDERSTAND FIRST OF ALL THE 366.06(1) THIS IS NOT A RATEMAKING THING WHEN YOU TALK ABOUT APPROVING THE PLAN I DON'T UNDERSTAND WHY YOU ARE INTRODUCING THIS KIND OF OVERLAY OF THAT WHEN THIS DOESN'T JUST SAY PUBLIC INTEREST AND IT IS UP TO THE YOU COULD IMAGINE STATUTE THAT SAYS PUBLIC INTEREST WOULD BE MUCH LESS BOUNDED SORT OF ACTIVE DISCUSSION HERE WE HAVE A PUBLIC INTEREST STANDARD THAT REQUIRES THE CONSIDERATION OF THESE SPECIFIC THINGS ONE OF THE THINGS IS THIS COST-BENEFIT THING IT SEEMS LIKE REALLY THE WHOLE ARGUMENT SHOULD BE KIND OF FOCUSED ON JUST THIS STATUTE RATHER THAN HAVING WHAT I THINK IS KIND OF A DISTRACTION ABOUT WHETHER THE OTHER STATUTES YOU NEED TO HARMONIZE THEM THIS IS A VERY SPECIFIC THING.

>> Appellant Wessling: THERE ARE TWO POINTS WILL HOPEFULLY ADDRESS YOUR CONCERN THE FIRST IS THAT WE DO BELIEVE THAT THE STORM PROTECTION PLAN PROCESS IS RATEMAKING.

OUR REPLY BRIEF GOES INTO THIS IN GREATER DETAIL UNDERSTAND THE COURT'S PREFERENCE FOR BREVITY OF NOT REPEAT THAT WITH CLEAR STRONG PREFERENCE ABOUT WHY THE SPP PROCESS DOES CONSTITUTE RATEMAKING BUT THE COMMISSION IS SETTING BUDGETS IN THE SPP PROCESS THEY ARE SENDING BILLIONS OF DOLLARS WORTH OF BUDGETS THEY ARE PRE-APPROVING THE EXPENDITURE OF BILLIONS OF DOLLARS THAT CUSTOMERS WILL HAVE TO PAY FOR IN THE FIVE PROCESS AND THE SPP PROCESS AND THE SPP CRC PROCESS ARE INEXTRICABLY INTERTWINED UTILITIES CANNOT RECOVER A SINGLE PENNY FROM CUSTOMERS WITHOUT BOTH OF THOSE PROCESSES HAVING TAKEN PLACE THEY

BOTH RESULT IN THE CHARGE THAT SHOWS UP ON CUSTOMERS BILL EVERY MONTH. THE SPP PROCESS IS RATEMAKING AGAIN I WILL RELY ON OUR ARGUMENTS IN THE REPLY BRIEF THAT ALSO FURTHER SUPPORT THAT POINT.

>> Justice Charles Canady: THE RATEMAKING ASPECT OF IT ONLY HAPPENS IN THE SECOND PHASE THE EXPLICIT RATEMAKING PHASE OF IT RIGHT.

>> Appellant Wessling: I WOULD DISAGREE YOUR HONOR.

>> Justice Charles Canady: YOU THINK THE TABLE IS SET BY THE FIRST PHASE AND THEREBY BOXED IN.

>> Appellant Wessling: CORRECT YOUR HONOR LIKE I SAID UTILITIES CANNOT COLLECT A SINGLE PENNY WITHOUT BOTH OF THOSE PROCESSES TAKING PLACE.

>> Justice Charles Canady: HELP ME UNDERSTAND SOMETHING HOW DO YOU QUANTIFY THE BENEFIT OF A REDUCTION IN OUTAGE TIMES?

>> Appellant Wessling: YOUR HONOR TWO OF THE UTILITIES DID SO I CAN GIVE YOU SOME RECORD SITES IF YOU LIKE THEY ARE REFLECTED ON THE INITIAL BRIEF PAGE 37 THAT IS WHERE WE IDENTIFY THE TAMPA ELECTRIC COMPANY AND DUKE ENERGY OF FLORIDA THEY HIRED OUTSIDE CONSULTANTS AND THOSE CONSULTANTS WENT THROUGH A RIGOROUS PROCESS I HATE TO GIVE THEM CREDIT THEY WENT THROUGH A RIGOROUS PROCESS OF IDENTIFYING HOW TO PUT A DOLLAR NUMBER ON THOSE ELEMENTS AND THEY DID SO THEY PROVIDED THAT INFORMATION CONSISTENT WITH THE REQUIREMENTS OF THE SPP STATUTE AND THE SPP RULE UNFORTUNATELY TWO OF THE COMPANIES DO NOT COMPLY.

>> Justice Charles Canady: I UNDERSTAND YOU CAN DO SOME MAGIC AND COME UP WITH DOLLARS.

BUT YOU ARE COMPARING THINGS THAT ARE DIFFERENT SORTS OF THINGS. ONCE YOU PUT A DOLLAR NUMBER YOU COMPARED DOLLARS. THERE DOES SEEM SOME KIND OF SOMETHING KIND OF MYSTERIOUS OR ARBITRARY ABOUT THAT.

>> Appellant Wessling: ONE THING I THINK IS IMPORTANT TO RECOGNIZE IS THAT THE BENEFITS OF THE STORM PROTECTION AND OF STORM HARDENING ARE LAID OUT IN THE STATUTE. WE FULLY AGREE THE STORM HARDENING IS A GOOD THING REDUCING OUTAGE TIME REDUCING RESTORATION COSTS. THAT'S A GOOD THING WHETHER WE AGREE OR NOT THAT IS WHAT THE STATUTE SAYS. THE QUALITATIVE BENEFITS OF THE STORM PROTECTION PLANS ARE ALREADY ENCOMPASSED IN THE STATUTE. WHAT THE STATUTE REQUIRES IS QUANTITATIVE INFORMATION. ABOUT HOW THESE SPP WILL ACTUALLY BENEFIT CUSTOMERS AND HELP THOSE BENEFITS RELATE TO THE COSTS.

THE QUANTITATIVE NATURE OF THE WORD ESTIMATE WHICH AGAIN IS ABOUT THE STATUTE AND THE COMMISSION'S OWN RULE THAT SHOWS HOW THE DEGREE OF SPECIFICITY THAT IS REQUIRED IN ORDER TO HAVE AN ACCURATE COMPARISON OF THE COST AND BENEFIT.

>> Justice Charles Canady: YOU KNOW WHAT IT SAYS IN THE RULE IT TALKS ABOUT A DESCRIPTION THAT INCLUDES AN ESTIMATE OF RESULTING REDUCTION IN OUTAGE TIMES?

AND RESTORATION COST DUE TO EXTREME OTHER CONDITIONS. I AM TRYING TO

SEE HERE IN THE TEXT OF THE RULE WHICH YOU ARE NOT CHALLENGING THROUGH.

>> Appellant Wessling: CORRECT.

>> Justice Charles Canady: YOU'RE GOING TO OPERATE WITHIN THE RULES. I AM TRYING TO SEE WHERE YOU GET TO THE REQUIREMENT FOR A QUANTIFICATION OF THAT ELEMENT.

>> Appellant Wessling: OUR VIEW IS THAT IT IS EMBEDDED IN WORD ESTIMATE AGAIN THE QUALITATIVENESS OF THE BENEFIT IS LAID OUT BY STATUTE.

>> Justice Charles Canady: I UNDERSTAND ESTIMATE DOES IMPLY SOMETHING QUANTITATIVE.

WHAT CAN BE QUANTITATIVELY ESTIMATED IS WE WILL REDUCE OUTAGE TIMES BY 20%. THAT DOESN'T SAY ANYTHING ABOUT A DOLLAR VALUE . OR WE WILL REDUCE BY X NUMBER OF DAYS.

THAT IS WHAT COMES TO MY MIND WHEN I READ THIS IN CONTEXT. OTHER PLACES THEY ARE TALKING ABOUT COST I'M JUST STRUGGLING TO REALLY SEE THE REQUIREMENT FOR SOMETHING QUANTITATIVE A DOLLAR QUANTITY ASSOCIATED WITH THAT WHICH IS WHAT YOU SAY IS REQUIRED.

>> Appellant Wessling: YES YOUR HONOR THE DOLLAR COST IS REQUIRED IN THE SAME RULE. WHEN YOU TALK ABOUT THE ESTIMATES OF THE REDUCTION IN OUTAGE TIMES AND THE REDUCTION IN RESTORATION COST OBVIOUSLY THE RESTORATION COST WOULD BE IN DOLLARS AND THE OTHER WOULD BE IN THE NUMBER OF MINUTES.

2 OF THE UTILITIES PROVIDED THEY DID THAT QUANTIFICATION THEY ANALYZED THEIR PLANS WHAT THOSE PLANS WERE MEANT TO ACHIEVE AND THEY CAME UP WITH MINUTES THEY CAME UP WITH A NUMBER OF MINUTES THAT WOULD BE REDUCED AND THE RESTORATION COST THAT WOULD BE REDUCED. IT IS POSSIBLE HALF OF THE COMPANIES DID IT BUT HALF OF THEM DID NOT.

>> Justice Charles Canady: THERE IS NOT A MONETARY LIMIT TO THAT? IT IS PURELY A QUANTITATIVE ASSESSMENT OF TIME?

>> Appellant Wessling: YES YOUR HONOR.

>> Justice Charles Canady: AS OPPOSED TO A MORE QUALITATIVE.

>> Appellant Wessling: I WOULD SAY IT IS SUBJECTIVE RATHER THAN QUALITATIVE MAYBE THAT'S BETTER WORD TO USE FOR HAVING OBJECTIVE NUMBERS THEY CAN BE COMPARED TO OBJECTIVE COST AND UNLESS THE COST BENEFIT.

>> Justice Charles Canady: COMPARING MINUTES TO THESE THE COST DOLLARS DON'T KNOW HOW YOU COMPARE THAT THOSE ARE COMPARABLE THINGS REALLY.

>> Justice John Couriel: THIS GOES TO THE SAME POINT I WAS TRYING TO ARTICULATE EARLY I THINK JUSTICE CANADY HAS DONE A BETTER JOB THAN I HAVE. WHAT DOES THE ORDER IF YOU PREVAIL WHAT DOES THE ORDER ON REMAND SAY?

>> Appellant Wessling: WE ASK THE ORDER ON REMAND REQUIRE THE COMMISSION TO FULFILL THE LEGISLATIVE MANDATE UPHOLDING THE UTILITIES TO THE REQUIREMENTS OF A TEXT OF THE STATUTE AND THE RULE. AND TO CONDUCT THIS PRUDENCE AND COST EFFECTIVENESS EVALUATION TO ENSURE CUSTOMERS ARE NOT PAYING FOR THESE BILLION-DOLLAR INVESTMENTS WHICH ARE IMPRUDENT.

THAT IS WHAT WE ARE ASKING FOR.

>> Justice John Couriel: ARE THEY PRESUMPTIVELY IMPRUDENT? WHY ARE WE ASSUMING THERE ARE IMPRUDENT.

>> Appellant Wessling: AS IT STANDS RIGHT NOW WE DON'T KNOW. THEY ARE NOT PRESUMPTIVELY IMPRUDENT. IT IS IMPRUDENT BECAUSE THE COMMISSION FAILED TO CONDUCT THE REMOVE VIEW THE HARM TO CUSTOMERS IS NOT THAT THEY ARE PAYING FOR IMPRUDENT INVESTMENTS IS THAT THEY COULD BE PAYING FOR IMPRUDENT INVESTMENTS IS BECAUSE THE COMMISSION DID NOT DO ITS JOB I'M NOT SURE WHERE I AM ON TIME.

>> Chief Justice Carlos Muniz: YOU HAVE TWO MINUTES.

>> Appellant Wessling: I WOULD LIKE TO RESERVE THE REST FOR REBUTTAL PLEASE.

>> GOOD MORNING SUSAN SAPOZNIKOFF

APPEARANCE FOR APPELLEE, FLORIDA PUBLIC SERVICE COMMISSION THE BOARD OF PUBLIC SERVICE COMMISSION ASKED TO TAKE 10 MINUTES OF TODAY'S TIME WITH MY ESTEEMED COLLEAGUE [LISTING NAMES]RESERVING THE REMAINING TIME ON BEHALF OF THE UTILITIES. THIS COURT SHOULD AFFIRM THE FIVE FINAL ORDERS IN THIS CONSOLIDATED MATTER FOR TWO REASONS.

FIRST THE COMMISSION DIRECTLY AND INTERPRETED AND APPLIED THE PLAIN LANGUAGE OF SECTION 366.96 AND SECONDLY COMMISSION CORRECTLY INTERPRETED AND APPLIED THE PLAIN LANGUAGE OF RULES 25 -6.030 AND 25-6.031. 366.96 IS A VERY SPECIFIC AND A VERY UNIQUE STATUTE. AND IF THE STATUTE THE LEGISLATURE REQUIRES LOGIC UTILITIES TO DEVELOP PLANS TO ENGAGE IN SPECIFIC STORM HARDENING ACTIVITIES DESIGNED TO MAKE THE ELECTRIC GRID MORE RESILIENT DURING EXTREME WEATHER EVENTS AND IT ALSO SETS FORTH SPECIFIC CRITERIA THE COMMISSION MUST USE TO DETERMINE IF THE UTILITIES PLANS TO PUBLISH THOSE ACTIVITIES SATISFIED THE STATUTORY MANDATE AND WHETHER THEY ARE IN THE PUBLIC INTEREST. MOREOVER THE STATUTE HOLDS THE ONCE A PLAN HAS BEEN DETERMINED TO BE IN THE PUBLIC INTEREST, THE COMMISSION MUST CONDUCT AN ANNUAL STORM PROTECTION COST RECOVERY CAUSE PROCEEDING TO DETERMINE THE UTILITIES PRUDENTLY INCURRED COST AND ALLOW THE UTILITY TO RECOVER SUCH COSTS THROUGH A SEPARATE CHARGE SEPARATE FROM BASE RATES.

>> Chief Justice Carlos Muniz: CAN I STOP YOU RIGHT THERE THE POINT OF THE SECOND PROCEEDING IS TO SEE WHETHER THE PLAN THAT WAS APPROVED HAS BEEN PRUDENTLY IMPLEMENTED?

SO YOU CAN HAVE A PLAN BY DESIGN MAKES SENSE AND WOULD BE COST BENEFIT RATIONAL BUT YOU THEN GO AND ACTUALLY IMPLEMENT IT IN A WAY WHERE YOU WASTE MONEY DOING IT OR YOU HIRE BAD CONTRACTOR WE MISMANAGED THE PROJECT OR WHATEVER THAT COULD LEAD TO SORT OF VARIABLES AND WHAT KIND OF COST RECOVERY YOU HAVE RIGHT.

>> Susan Sapoznikoff: EXACTLY.

>> Chief Justice Carlos Muniz: YOU AGREE THAT THE STATUTE ITSELF REQUIRES THE COMMISSION TO TAKE INTO ACCOUNT IN SOME WAY WHETHER YOU HAVE A

RATIONAL FIT BETWEEN THE COST OF WHATEVER THIS PROPOSED PLAN IS AND WHAT THE BENEFITS ARE GOING TO BE. SOME OF WHICH CAN PROBABLY QUANTIFY DOLLAR AMOUNTS LIKE REDUCED COST OF WHATEVER THE REPLACEMENT POWER THAN THE DOWNTIME WHICH PROBABLY PEOPLE PROBABLY TRY TO PUT DOLLAR VALUE., YOU AGREED THE RATIONALITY OF THE FIT BETWEEN WHATEVER THE PLAN IS AND WHAT THAT IS GOING TO COST AND WHAT'S ON THE OTHER SIDE FOR BENEFITS YOU AGREED THAT IS PART OF THE FIRST PHASE REVIEW? THE REVIEW OF THE PLAN ITSELF?

>> Susan Sapoznikoff: CORRECT THE LEGISLATURE PUT FORTH VERY SPECIFIC FACTORS THE COMMISSION HAD TO CONSIDER.

THAT WAS UNTIL LOOKING AT COST LOOKING AT BENEFITS LOOKING AT PROJECTED RATE IMPACT WHEN WE ARE AT THE PLANNING STAGE THESE ARE 10 YEAR PLANS. THE STATUTE ONLY ESTIMATE KIND OF SET FORTH A GENERAL ROADMAP. THE RULE CAME IN WITH MORE SPECIFICS. WHEN WE ARE LOOKING AT PUBLIC INTEREST THE LEGISLATURE SET FORTH WHAT THE COMMISSION HAD TO CONSIDER THAT GIVES THE INFORMATION TO MOVE INTO THAT SECOND PHASE WHEN YOU'RE LOOKING AT WHETHER OR NOT THEY ACTUALLY PRUDENTLY DID WHAT HE TOLD THE COMMISSION THEY TENDED TO DO.

>> Chief Justice Carlos Muniz: EXPLAIN TO US WHAT IS THE DIFFERENCE BETWEEN YOUR UNDERSTANDING WHAT THE COMMISSION IS SUPPOSED TO BE LOOKING AT WHAT THE UTILITIES ARE SUPPOSED TO BE KIND OF LAYING THE FOUNDATION FOR? VERSUS THIS PRUDENCE REVIEW THAT COUNSEL ON THE OTHER SIDE IS ASKING FOR?

>> Susan Sapoznikoff: CERTAINLY THE COMMISSION HAS A LONG-STANDING DECADE I THINK BACK 1982 IT'S BEEN SUPPORTED BY THIS COURT A WELL-ESTABLISHED DEFINITION OF WHAT PRUDENCE IS. IT LOOKS AT WHAT A REASONABLE UTILITY MANAGER WOULD HAVE DONE GIVEN THE INFORMATION IT KNEW OR SHOULD HAVE KNOWN AT THE TIME WHEN IT MADE ITS DECISION AND GOES TO INCURRED COSTS. EVEN OUR STATUTE TALKS ABOUT INCURRED COST WHICH IS A BACKWARD LOOKING AT THE COST AT . IF WE WANT TO USE PRUDENCE MORE IN THE COLLOQUIAL SENSE IS THIS REGIONAL IS THIS APPROPRIATE IS THIS A GOOD THING TO DO IS MEETING THE STATES INTEREST UNDER THE STATUTE?

THAT CAN BE CALLED PRUDENCE BUT IT IS NOT A PRUDENCE REVIEW. THE LEGISLATURE CLEARLY SAYS THE COMMISSION HAD TO PERFORM A PUBLIC INTEREST DETERMINATION IN THE FIRST HEARING THEN WE SWITCH TO LOOKING AT THE ACTUAL COST THERE IS CONSISTENT REVIEW AS TO WHETHER OR NOT THE MANAGERIAL DECISIONS THAT THE UTILITIES ARE MAKING ARE BEING DONE PRUDENTLY.

>> Justice Charles Canady: IF I UNDERSTAND WHAT YOU ARE SAYING THE PRUDENCE DETERMINATION REALLY IS A DETERMINATION THAT IS MORE APPROPRIATE TO LOOK AT AT THE IMPLEMENTATION PHASE AS OPPOSED TO THE LONG RANGE PLAN PHASE CORRECT.

>> Susan Sapoznikoff: YES SIR.

>> Chief Justice Carlos Muniz: YOU WOULD ALSO AGREE THAT ONCE THE PLAN IS APPROVED WHEN YOU GET TO THE COST RECOVERY PHASE THE PUBLIC COUNSEL WOULD NOT BE PERMITTED TO COME IN AND SAY WHY DID YOU IT DOESN'T SEEM LIKE THIS THE BANG FOR THE BUCK THAT YOU GET FOR HAVING DONE THIS OR THAT THING PRETTY EVEN IF YOU MANAGED IT PERFECTLY AND DIDN'T WASTE A PENNY IN IMPLEMENTING THAT THE AGREEMENT UNDER THE STATUTORY FRAMEWORK THAT TYPE OF ARGUMENT THAT GOES TO IS IT RATIONAL TO DO THIS IN THE FIRST PLACE, BY THE TERMS OF THE STATUTE, THAT IS TAKEN OFF THE TABLE DO YOU AGREE WITH THAT.

>> Susan Sapoznikoff: RIGHT THEY SHOULD'VE MADE THOSE ARGUMENTS DURING THE PLAN HEARING AND COMING WITH EVIDENCE.

>> Chief Justice Carlos Muniz: SO BASICALLY YOU AGREE OBVIOUSLY THE QUESTION IS GOING TO BE DID THE COMMISSIONER AND HERE. YOU AGREE THE RATIONALE THE REASONABLENESS OF PLANNING TO DO THESE PROJECTS AND SPEND THESE ESTIMATED AMOUNTS OF MONEY IN EXCHANGE FOR WHAT THE BENEFIT IS THAT IS ALL PART OF THE FIRST STEP REVIEW OF THE PLAN?

>> Susan Sapoznikoff: RIGHT IN TERMS OF WE HAVE THE PLANS AND THEN WE HAVE PROGRAMS AND THE PROGRAMS HAVE INDIVIDUAL PRODUCTS. WHEN WE LOOK AT THE PLANNING STAGES IT IS 10 YEARS OUT SO STATUTE AND THE RULES SET FORTH SPECIFIC THINGS THAT NEED TO BE LOOKED UP AT THE FIRST YEAR, GOING THREE YEARS OUT THEN THE REST OF THE PLAN. AS THOSE COME BACK AND GET REVISITED EVERY THREE YEARS THOSE PLANS WILL COME BACK BEFORE THE COMMISSION THINGS GET UPDATED THINGS GET REASSESSED THAT IS THE OPPORTUNITY TO COME IN AND TALK ABOUT WHETHER THE CONCEPT OF WHAT YOU'RE DOING IS APPROPRIATE.

EVEN IF THAT CONCEPT IS APPROPRIATE YOU CAN STILL COME BACK AND CHALLENGE HOW THOSE ARE IMPLEMENTED IN THE COST RECOVERY CLAUSE PHASE.

THERE IS MULTIPLE PORTIONS WHERE THIS IS AN ONGOING ASSESSMENT OF REASONABLENESS AND WHETHER THE ACTIONS WERE PRUDENTLY TAKEN TO GET THOSE OBJECTIVES.

>> Chief Justice Carlos Muniz: THE COMMISSION UNDER THE STATUTORY DESIGN THE COMMISSION HAS BE SMART ABOUT THE EXTENT OF ITS APPROVAL BECAUSE ONCE IT CAN SAY THIS SOUNDS PRETTY GOOD, BUT WE WILL ONLY APPROVE IN TERMS OF LOCKING IN THE WISDOM OF DOING CERTAIN ASPECTS OF THIS PLAN, WE ARE ONLY GOING TO IMPROVE THIS PART OF IT TO THE EXTENT YOU ARE PROJECTING 10 YEARS OUT WE WILL GET TO YEAR THREE AND BEYOND WHEN YOU COME BACK FOR YOUR UPDATE?

ESSENTIALLY, ONCE YOU'VE BLESSED THE WISDOM OF A PARTICULAR PROJECT AT THAT LEVEL THEN ESSENTIALLY, THAT THEN IS KIND OF SET IN STONE AND REALLY THE ONLY THING THAT IS LEFT TO FIGHT ABOUT IN THE COST RECOVERY PHASE IS THE ACTUAL MANAGERIAL SORT OF EFFICIENCY AND EFFECTIVENESS OF HEALTH THAT WAS IMPLEMENTED?

IS THAT FAIR?

>> Susan Sapoznikoff: ESSENTIALLY I GUESS THE PROGRAMS ARE AND THE PROJECTS ARE IN SOME EXTENT LESS OR MORE DEPENDING ON HOW FAR THAT WHAT THEY ARE GIVEN SOME APPROVAL THAT PLAN STAGE.

BUT WHEN THEY COME IN THE FIRST YEAR COST RECOVERY THAT WILL BE REASSESSED. MAYBE THE UTILITY STARTED A PROJECT DECIDED NOT TO GO FORWARD WITH IT BECAUSE OF COST CONCERNS THE CAME UP.

IF THEY DID GO FORWARD WITH IT AGAIN WHETHER OR NOT THEY ARE MAKING PRUDENT DECISIONS AND IMPLEMENT THING THAT ARE STILL CONSTANTLY GOING TO BE ASSESSED. THE LANGUAGE OF THIS STATUTE DOES NOT MAKE THE SCRUTINY WITH WHICH THE MANAGEMENT DECISIONS TO IMPLEMENT THESE PROJECTS IT DOESN'T MAKE IT ANY LESS. AS A MATTER FACT IF THE OBESITY GOT WHAT IT IS ASKING FOR ESSENTIALLY THAT PRUDENCE WAS DONE THE FIRST STAGE AND WE JUST SORT OF HAD THIS VERY FAR LOOKING INFORMATION AHEAD OF US THAT WOULD THEN PRECLUDE ANY SORT OF FURTHER REVIEW THE COST RECOVERY STAGE. PRUDENCE IS A FINALITY IF YOU LOOK AT THE STATUTE TALKS ABOUT LET ME MAKE SURE I GET THE LANGUAGE CORRECT.

THAT IF THE COMMISSION CAN DETERMINE THE COST WERE PRUDENTLY INCURRED THOSE COSTS WILL NOT BE SUBJECT TO DISALLOWANCE OR FURTHER PRUDENCE REVIEW ABSENCE CERTAIN CIRCUMSTANCES. IF WE WERE TO MAKE A PRUDENCE DETERMINATION AT THE PLANNING STAGE WITH THIS FAR LOOKING NOT NAILED DOWN INCURRED COST THAT WOULD THEN PRECLUDE OBC FROM COMMUNION IN THE SECOND STAGE AND CHALLENGING THESE MANAGEMENT DECISIONS WHICH I'M SURE IS NOT WHAT THEY WANT.

ANY FURTHER QUESTIONS?

FOR THE REASONS STATED IN OUR BRIEF AND ARGUED TODAY WE RESPECTFULLY REQUEST THIS COURT TO AFFIRM ALL FIVE ORDERS.

>> Chief Justice Carlos Muniz: THANK YOU.

>> Daniel E. Nordby:

DANIEL E. NORDBY

APPEARANCEFOR APPELLEE, DUKE ENERGY FLORIDA IN THE INTEREST OF EFFICIENCY I WILL PRESENT ARGUMENT ON THE LEGAL ISSUES THAT ARE COMMON. TO ALL OTHER QUESTIONS ON UTILITIES IF THE COURT HAS SPECIFIC QUESTIONS ABOUT THE RECORD OF ANY UTILITY OTHER THAN DUKE ENERGY I WILL DEFER TO COUNSEL FOR THE COMPANY FOR THOSE SPECIFIC QUESTIONS. BASED ON THE QUESTIONING SO FAR IT APPEARS THE COURT UNDERSTANDS OUR ARGUMENTS BASED ON THE STATUTORY TEXT AND STRUCTURE. THAT FLORIDA STORM PROTECTION PLANS STATUTE ESTABLISHES TWO DISTINCT PROCEEDINGS AT THE PUBLIC SERVICE COMMISSION EACH OF WHICH IS GOVERNED BY DIFFERENT STANDARDS. THE OFFICE OF PUBLIC COUNSEL INTERPRETATION IS CONTRARY TO THE TEXT AND STRUCTURE OF 366.96 AND IT SHOULD BE REJECTED ON THAT BASIS. I WOULD LIKE TO START BY ACTUALLY ADDRESSING THE COST RECOVERY ORDER THAT IS HERE AS PART OF THE CONSOLIDATED APPEAL. THE OFFICE OF PUBLIC

COUNSEL IN THEIR BRIEF HAS NOT RAISED ANY INDEPENDENT CHALLENGES TO THE ELEMENTS OF COST RECOVERY THAT THE COMMISSION AWARDED TO THE UTILITIES HERE. THE ONLY ISSUE IS THIS OVERARCHING ARGUMENT ABOUT THE COMMISSION NOT CONDUCTING A PRUDENCE REVIEW AND THAT THE PLAN IN THE SEPARATE PLAN APPROVAL PROCEEDING. BUT THERE IS NOTHING IN PUBLIC COUNSEL'S BRIEFING FOR EXAMPLE CHALLENGING ANY ITEM OF COST RECOVERY AND ARGUE THAT THERE IS NO COMPETENT SUBSTANTIAL EVIDENCE SUPPORTING RECOVERY OF THAT ELEMENT IN FACT DID NOT RAISE THOSE ARGUMENTS BELOW. WE'VE OUTLINED IN OUR BRIEF THOSE ARGUMENTS ARE NOT PROPERLY BEFORE THE COURT THEY HAVE NOT BEEN PRESERVED THEY HAVE BEEN WAIVED ON APPEAL AND THEY SHOULD BE APPROVED ON THAT BASIS TO THE EXTENT THE COURT WANTED TO LOOK IN THE RECORD FOR COMPETENT SUBSTANTIAL EVIDENCE THERE IS AMPLE EVIDENCE IN THE RECORD WE'VE OUTLINED IN OUR BRIEF SUPPORTING EACH ELEMENT OF THE COST RECOVERY ORDER.

ON THE STORM PROTECTION PLAN APPROVAL ORDER THE COMMISSION'S FINAL ORDER HERE OUTLINES EACH OF THE FOUR FACTORS IN SUBSECTION 4 A THROUGH D THAT THE COMMISSION IS REQUIRED TO CONSIDER BEFORE DETERMINING WHETHER TO APPROVE THE PLAN IN THE PUBLIC INTEREST AND THE COMMISSION HERE DID THAT THE COMMISSION'S ORDER EXPLAINS EACH OF THOSE ELEMENTS STANDARD THAT APPLIES. THE EVIDENCE THAT WAS PRESENTED. AND THOSE ARE THE FACTORS THAT THE COMMISSION MUST CONSIDER IN DETERMINING WHETHER THE PLAN SHOULD BE APPROVED IN THE PUBLIC INTEREST. THE PRUDENCE DETERMINATION STATUTORILY BY TEXT AND STRUCTURE COMES INTO PLAY AS CHIEF JUSTICE MUNIZ SAYS IN THE IMPLEMENTATION STAGE. HOW THE UTILITY IMPLEMENTED AND APPROVED STORM PROTECTION PLANS IF IT DID IT AND AWAIT THE WEST IN PRUDENCE. WE GIVE EXAMPLES IN HER BRIEFS OF WAYS A PARTICULAR IMPLEMENTATION MAY BE IMPRUDENT BUT THE DECISION TO ENGAGE IN TRANSMISSION VEGETATION MANAGEMENT AS OUTLINED IN A PLAN IS NOT SUBJECT TO AND AFTER THE FACT REVIEW OF THE COST RECOVERY STAGE.

>> Chief Justice Carlos Muniz: PRUDENCE IN THIS AREA IS A TERM OF ART YOU AGREE THAT THE COST BENEFIT SORT OF DOES THIS MAKE SENSE IS IT A RATIONAL THING TO UNDERTAKE THIS PLAN?

THAT IS PART OF THE INITIAL REVIEW OF THE PLAN RIGHT.

>> Daniel E. Nordby: ABSOLUTELY PARAGRAPH 4C OF THE STATUTE REQUIRES THE COMMISSION TO CONSIDER THE ESTIMATE OF COST AND BENEFITS TO THE UTILITY AND ITS CUSTOMERS OF MAKING THE INVESTMENTS PROPOSED IN THE PLAN. THAT GOES INTO THE MIX OF PUBLIC INTEREST DETERMINATION SEPARATELY FROM A DECISION OF PRUDENCE BECAUSE AS THE COMMISSION COUNSEL HAS EXPLAINED THE PRUDENCE REVIEW THAT THE COMMISSION DETERMINES IS A REVIEW OF COST THAT HAVE BEEN INCURRED DETERMINE WHETHER THE ADDITION THAT HAS BEEN MADE THE COST THAT HAVE BEEN INCURRED CONSISTENT WITH WHAT REASONABLY UTILITY MANAGER WOULD HAVE DONE IN THOSE CIRCUMSTANCES. BACKWARD LOOKING A PRUDENCE REVIEW DOES NOT IN THE TRADITIONAL PRUDENCE REVIEW

THE COMMISSION DOES NOT ALLOW FOR A DETERMINATION OF WHAT WILL HAPPEN EIGHT YEARS IN THE FUTURE UNDER A PLAN THAT IS DESCRIBED IN GENERAL TERMS AND WILL BE BACK FOR A RENEWAL.

>> Chief Justice Carlos Muniz: TO GET TO THEIR OTHER POINT OBVIOUSLY IF YOU HAVE THINGS THAT CAN BE COMPARED APPLES TO APPLES YOU CAN DO THE DOLLAR THING.

WHAT INPUT DOES THE COMMISSION NEED TO BE ABLE TO RATIONALLY DO A COST BENEFIT ANALYSIS I DON'T USE THAT IN ANY HYPER TECHNICAL SENSE BUT WHAT REASONABLE PERSON WOULD CONSIDER TO BE KIND OF A SENSE IS IT WORTH WHAT I'M GETTING OUT OF IT IS IT WORTH IT CONNECT WITH DATA DO THEY NEED FOR INFORMATION OR INFORMATION TO THE NEED.

>> Daniel E. Nordby: THIS WAS THE FIRST FULLY ADJUDICATED STORM PROTECTION PLAN PROCEEDING. EACH UTILITY CHOSE TO PRESENT ITS EVIDENCE IN A SLIGHTLY DIFFERENT FORMAT WE DON'T QUIBBLE WITH THE METHODOLOGY APPLIED BY ANY PARTICULAR UTILITY. WHAT THE RULE REQUIRES SOME OF THE STATUTE REQUIRES IS THE RULE SPECIFICALLY REQUIRES A DESCRIPTION OF THE COSTS A DESCRIPTION OF THE BENEFITS AND A COMPARISON. NEITHER THE RULE NOR THE STATUTE REQUIRES IS WHAT YOU MIGHT CONSIDER AN ECONOMIC COST BENEFIT ANALYSIS WHERE THE BENEFITS HAVE TO OUTWEIGH THE COST IN ORDER FOR THE PLAN TO BE APPROVED. THANK MAKES GOOD SENSE GIVEN WHAT WE ARE CONSIDERING HERE. IT MAY BE COSTLY TO EMPLOY STORM HARDENING IN THE TAMPA BAY REGION BUT YOU WOULD NOT SAY JUST BECAUSE WE HAVE NOT HAD A DIRECT CATEGORY FIVE HURRICANE IMPACT IN TAMPA BAY IF THERE ARE NO BENEFITS SIMPLY BECAUSE THERE WAS NO NEED FOR THOSE HARDENING MEASURES TO TAKE EFFECT WE DIDN'T HAVE CUSTOMER INTERRUPTED MINUTES. NEITHER THE STATUTE NOR THE RULE IS PARTICULARLY PRESCRIPTIVE AND WHAT SORT OF EVIDENCE THE COMMISSION CAN EVALUATE IN MAKING THOSE DECISIONS. THE COMMISSION HERE EVALUATE THE EVIDENCE BY EACH UTILITY DETERMINED THAT THAT IS ONE OF THE FOUR FACTORS THAT WAS SUFFICIENT FOR THE PUBLIC INTEREST.

>> Chief Justice Carlos Muniz: CAN YOU HELP US UNDERSTAND OBVIOUSLY WE WILL SET ASIDE FOR HOW WE REVIEWED THESE THINGS. ONE OF MY THINGS THAT IS A PROBLEM WITH ALL OF THESE PSC CASES IS TRYING TO MAKE SENSE OF THEIR CASE LAW AND THE CONNECTION BETWEEN THESE DECISIONS THAT THE PSC MAKES AND THE STANDARD OF REVIEW.

IF I WERE WRITING ON A BLANK SLATE AND HAVE AN AGENCY THAT IS BEEN TOLD TO MAKE THE PUBLIC INTEREST DETERMINATION, I WOULD LOOK FOR SORT OF A RECENT EXPLANATION AS TO WHY THE AGENCY THOUGHT TO WHATEVER THEY WERE APPROVING IS IN THE PUBLIC INTEREST AND TO THE EXTENT THAT EXPLANATION RELIES ON SORT OF FACTUAL FINDINGS I WOULD LOOK FOR COMPETENT SUBSTANTIAL EVIDENCE TO BACK UP THE UNDERLYING FINDINGS . I DON'T THINK IT MAKES SENSE TO JUST SORT OF HAVE AN AGENCY ASSERT THAT SOMETHING IS IN THE PUBLIC INTEREST WITHOUT EXPLANATION. I'M NOT SAYING

THAT THAT IS WHAT HAPPENED HERE BUT WITHOUT EXPLANATION WE ARE SUPPOSED TO KIND OF COMB THROUGH THE RECORD TO SEE ARE THERE FACTS IN HERE THAT A RATIONAL PERSON MIGHT THINK BECAUSE WE ARE REPLACING THE AGENCY AS THE ONE SORT OF DOING FOR THINKING. WHEN WE ARE REVIEWING THIS WHAT IS YOUR UNDERSTANDING AS TO WHAT IT IS THAT THE AGENCY IS SUPPOSED TO DO AND THEN WHAT ARE WE SUPPOSED TO BE LOOKING FOR IN TERMS OF REVIEWING IT. DO THEY HAVE TO GIVE AN EXPLANATION FOR EXAMPLE LIKE IN THE HYPOTHETICAL YOU GIVE GUESS IT IS ALL OF THESE BECAUSE YES THERE IS NOT BEEN A STORM IN 10 YEARS. IF THERE WERE A STORM HE WOULD HAVE THIS CATASTROPHIC EFFECT AND THEREFORE IT IS REASONABLE BLAH BLAH BLAH. DO THEY HAVE TO GIVE THAT KIND OF EXPLANATION AND DO WE LOOK FOR THE UNDERLYING FACTS TO BE SUPPORTED OR IS THERE SOMETHING ELSE WE ARE DOING.

>> Daniel E. Nordby: I CERTAINLY AGREE THE COMMISSION IS MAKING OR ANY AGENCY IS MAKING FACTUAL DETERMINATIONS THAT THIS COURT WILL REVIEW THAT AND DETERMINE WHETHER IT HAS ANY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THOSE FACTUAL FINDINGS.

NOTWITHSTANDING THAT THERE BE EVIDENCE TO SUPPORT THE OPPOSITE VIEW.

>> Chief Justice Carlos Muniz: IS THE PUBLIC INTEREST DETERMINATION A FACTUAL FINDING.

>> Daniel E. Nordby: THE PUBLIC INTEREST DETERMINATION AS A MIX OF TWO DIFFERENT THINGS THERE IS AN ASPECT THAT IS A FACTUAL FINDING AND WOULD HAVE BE BASED ON THE OTHER ASPECTS THAT ARE OUTLINED IN THE PARTICULAR ORDER HERE WHETHER THE FACTS ARE SUPPORTED IN THE RECORD OF PUBLIC INTEREST DETERMINATION ALSO HAS IS INFUSED WITH SOME POLICY CONSIDERATIONS THE COMMISSION IS ESTABLISHED AS THE EXPERT AGENCY ON THIS AREA AND THEY APPLY POLICY REASONING AND IN ADDITION TO THOSE FACTS TO ARRIVE AT THAT DETERMINATION. THE ADMINISTRATIVE PROCEDURE ACT DOES NOT EXPLICITLY REQUIRE WHAT YOU SUGGESTED IS A RECENT EXPLANATION FOR WHY THEY APPLY FOR POLICY IN THAT PARTICULAR WAY.

>> Chief Justice Carlos Muniz: WHY IS IT NOT IMPLICIT OTHERWISE WHAT IS THE POINT OF HAVING THESE EXPERTS WHO CAN INTELLIGENTLY SORT OF CONSUME ALL OF THIS DATA THEN MAKE A REASONED DETERMINATION OF WHAT IS IN THE BEST PUBLIC INTEREST OF THE STATE?

EITHER YOU GUYS ARE NOT DOING, NOT YOU BUT HER, OR WE ARE WASTING OUR TIME HERE BECAUSE IF ALL IT IS OBVIOUSLY ANYBODY CAN PUT ANYTHING THAT THEY WANT ON THE RECORD AND IF THE AGENCY CAN JUST ASSERT THIS IS IN THE PUBLIC INTEREST AND WE ARE SUPPOSED TO GO AND SAY WELL IF THEY BELIEVED SUCH AND SUCH WITNESS IT IS OVER IT SEEMS LIKE THIS WHOLE THING IS A WASTE OF TIME.

>> Daniel E. Nordby: I WOULD AGREE TO WHAT EXTENT WOULD AGREED THAT THE PUBLIC INTEREST AND EVALUATION OF THE PUBLIC INTEREST DETERMINATION IS VERY DEFERENTIAL STANDARD OF REVIEW. MUST BE BASED ON THE RECORD IF AN

AGENCY IS ESTABLISHING SOMETHING IS IN THE PUBLIC INTEREST FOR REASONS NOT SUPPORTED BY THE RECORD THAT WOULD BE A BASIS FOR THIS COURT TO DECLINE IT OR THE TERMS THAT SOMETHING IS IN THE PUBLIC INTEREST BASED ON A CONSIDERATION OF FACTORS THAT THE STATUTE PROHIBITS THE AGENCY FROM CONSIDERING THAT WOULD BE A BASIS FOR THIS COURT TO REVIEW IN THIS PARTICULAR CASE THOUGH WHAT WE HAVE IS A PUBLIC INTEREST DETERMINATION AND WE HAVE EACH OF THE FACTORS CONSIDERED IN THIS ORDER THE ONE HERE TODAY ISN'T FOR EXAMPLE AN ORDER OF THE COMMISSION ESTABLISHING SOMETHING WITH NO DISCUSSION OF A MAJOR ISSUE THAT WAS DISPUTED BETWEEN THE PARTIES BELOW. THIS ORDER OUTLINES EACH. THIS COURT MAY HAVE SEEN SOME OF THOSE.

>> Chief Justice Carlos Muniz: WE HAVE SEE THEM A LOT THAT IS THE THING I'M TRYING TO UNDERSTAND WHAT WE SHOULD BE SETTING AS A PRECEDENT . IF WE HAVE ANOTHER AREA OF THE LAW MAY HAVE A DISCRETIONARY DECISION THAT WE ARE REVIEWING THEN WE ARE JUST SORT OF LIKE MINDLESSLY SAYING WE WILL APPLY COMPETENT SUBSTANTIAL EVIDENCE IT SEEMS LIKE WE ARE SETTING UP YET ANOTHER AREA OF THE LOT THAT MAKES NO SENSE.

>> Daniel E. Nordby: I WOULD SAY TWO BRIEF RESPONSES IF I MAY ON TIME. IF YOU'RE WRITING ON THIS WOULD ASK YOU TO WRITE IT'S A DEFERENTIAL STANDARD IT'S NOT A STANDARD THAT IS WITHOUT ANY LIMITATIONS BUT IT IS A DEFERENTIAL STANDARD BECAUSE IT'S A MIX OF FACT DETERMINATION AND A POLICY DETERMINATION AND ALSO AN EMPHASIS ON THE FACT THAT THE BURDEN OF AN APPELLANT TO IDENTIFY ISSUES OF SUFFICIENCY WITHIN AN ORDER ON APPEAL. THAT IS NOT AN ASPECT OF THE CHALLENGE THAT OBESITY HAS A GREAT YEAR. THEY'VE NOT CHALLENGE THE SUFFICIENCY OF THE ORDER IN ITS EXPLANATION FOR THAT REASON WOULD ASK THAT THAT WOULD BE AFFIRMED BOTH THE STORM PROTECTION ORDER AND THE COST RECOVERY ORDER.  
THANK YOU.

>> Appellant Wessling: THANK YOU. I WANT TO POINT SOMETHING OUT THAT IS A CLEAR ISSUE HERE. IF I UNDERSTOOD WHAT THE COMMISSION AND COUNSEL FOR DUKE REPRESENTED THEY AGREE A COST-BENEFIT ANALYSIS OF SOME SORT SHOULD BE DONE IN THIS MATTER. HOWEVER, THAT IS NOT WHAT HAPPENED IN THESE CASES. THE COMMISSION STATED IN ALL FIVE ORDERS THAT NO COST-BENEFIT ANALYSIS WAS REQUIRED.  
THEY DID NOT CONDUCT.

>> LET'S GO TO THE RULE 25- 603.03 SETS OUT WHAT GIVES SOME MEAT TO WHAT WE ARE TALKING ABOUT. WE HAVE BEEN HAVING A FAIRLY ABSTRACT DISCUSSION. BUT THERE IS A LIST OF A DESCRIPTION OF EACH PROPOSED STORM PREDICTION PROGRAM THAT INCLUDES AN IT ENUMERATES FIVE FACTORS BUT ONE I WILL FOCUS ON IS NUMBER FOUR. A COMPARISON OF THE COST IDENTIFIED IN SUBPARAGRAPH ONE ABOVE AND THE BENEFITS IDENTIFIED IN SUB-PARAGRAPH THE ONE ABOVE. SO COMPARISON. THE RULE REQUIRES A COMPARISON. INSTEAD OF SAME COST-BENEFIT ANALYSIS LET'S TAKE THE RULE IS IT YOUR POSITION THAT NO

PERSON IN THE 40,000 PAGES OF THIS RECORD THERE IS NO COMPARISON OF THAT NATURE?

>> Appellant Wessling: NO YOUR HONOR THERE IS NOT. THE COMMISSION DID NOT CONDUCT AN EVALUATION OF ESPECIALLY WITH FLORIDA POWER AND LIGHT NFP YOU SEE THOSE UTILITIES DID NOT PROVIDE ESTIMATES REQUIRED BY THIS RULE. WHEN YOU LOOK AT THE ORDERS THEMSELVES EVEN HEADERS FOR THE SECTION IN EACH ORDER IT SAYS WHAT ARE THE ESTIMATE COST AND BENEFIT.

>> IS COUNSEL FOR DUKE WRONG DO YOU CHALLENGE THE SUFFICIENCY OF THE EXPLANATION GIVEN BY THE COMMISSION IN THIS CASE.

>> Appellant Wessling: YES YOUR HONOR THEY DID NOT CONSIDER THE PRUDENCE OR COST-EFFECTIVENESS OF ANY OF THESE PLANS. WHAT I WAS SAYING THE COMMISSION ASKS WHAT OF THE ESTIMATE OF COST AND ESTIMATE OF BENEFITS AND THE CONCLUSION PARAGRAPH IN EACH OF THOSE SECTION OF EACH ORDER IS THAT THE COST ARE X AND THE BENEFITS ARE X IF THEY WERE PROVIDED. THAT ORDER DID NOT LIST THE BENEFITS BECAUSE THOSE WERE NOT PROVIDED. IT DID NOT CONSIDER ANYTHING THEY JUST SAID WHAT ARE THE COST WHAT ARE THE BENEFITS AND MOVED ALONG WITH THE ORDER. THEY DID NOT CONSIDER PRUDENCE DID NOT CONDUCT AN EVALUATION THE EVALUATION COMPARISON ANALYSIS WHATEVER YOU WANT TO CALL IT ALL THEY DID WAS ESSENTIALLY TREAT THE STATUTE LIKE A CHECKLIST AND SAY THESE OF THE COSTS THESE ARE THE BENEFITS WE STAMP THIS AS BEING IN THE PUBLIC INTEREST. NO ANALYSIS WAS DONE THAT IS CLEAR FROM THE RECORD. I UNDERSTAND CERTAIN PARTIES ARE AGREEING THAT THE ANALYSIS IS REQUIRED THAT IS NOT WHAT HAPPENED HERE. IN THE RECORD IS CLEAR ABOUT THAT.

>> Chief Justice Carlos Muniz: I DON'T REALLY READ IN YOUR BRIEF ABOUT RAISING THE SUFFICIENCY OF THE EXPLANATION I KNOW WE'VE GOT THE JURISPRUDENCE HERE IS A LITTLE BIT OF A MOVING TARGET I DON'T REALLY VIEW YOU AS MAKING THE KIND OF ARGUMENT THAT YOU ARE BEING ASKED ABOUT.

>> Appellant Wessling: WE ARGUED THAT THE SUFFICIENCY OF THESE ORDERS THAT THESE ORDERS ARE INSUFFICIENT BECAUSE THEY DID NOT CONDUCT A PRUDENCE AND COST EFFECTIVENESS EVALUATION AS REQUIRED BY THE TEXT OF THE STATUTE AND THE RULE. THESE ORDERS ARE DEFICIENT OR INSUFFICIENT BECAUSE THEY DO NOT CARRY OUT THE LEGISLATIVE MANDATE THAT THE COMMISSION IS REQUIRED TO CARRY OUT BY ENSURING THAT THE PRUDENCE UTILITY INVESTMENTS PASSED ALONG TO CUSTOMERS ARE PRUDENT THAT IS THE ROOT ISSUE OF THE INSUFFICIENCY OF THESE ORDERS.

>> IS THERE ANY OTHER SITUATIONS WHERE THAT PRUDENCE DETERMINATION THAT YOU'RE ASKING ABOUT IS DONE PROSPECTIVELY.

>> Appellant Wessling: YES YOUR HONOR WITHIN THE INITIAL BRIEF I THINK IT'S THE SECOND ARGUMENT THERE ARE SITUATIONS WHERE PRUDENCE IS DONE PROSPECTIVELY. FOR EXAMPLE IN THAT SITUATION IT WAS THERE IS A STATUTE FOR NUCLEAR AND INTEGRATIVE GAS COMBINED CYCLE PLANS.

THE COMMISSION IS REQUIRED AND WE INCLUDED A QUOTE WITH THE COMMISSION

STATED THAT WHEN YOU'RE LOOKING AT PROSPECTIVE INVESTMENTS PRUDENCE IS WHAT IS AT STAKE PRUDENCE IS WHAT NEEDS TO BE DETERMINED THE COMMISSION SAID THAT WHEN THEY CONSIDERED THIS PROSPECTIVE WHETHER OR NOT THEY SHOULD APPROVE THIS PLAN. THIS IS A STORM PROTECTION PLAN. THIS IS A PROSPECTIVE REVIEW THAT THE COMMISSION MUST CONDUCT. AND THE PRUDENCE OF THIS PLAN IS REQUIRED BY ALL PARTS OF SECTION OF CHAPTER 366. AGAIN I KNOW I'VE HOPPED ON THIS BEFORE BUT THE FACT THAT THE LEGISLATURE DID NOT INCLUDE A STATEMENT AT THE BEGINNING OF THE STORM PROTECTION STATUTE TO SAY NOTWITHSTANDING 366.0 6.1 AND THE PRUDENCE REQUIREMENTS THERE HERE IS WHAT THE COMMISSION MUST CONSIDER THE LEGISLATURE USED THE WORD NOTWITHSTANDING 16 DIFFERENT TIMES IN CHAPTER 366 AND NOT ONCE DID THEY SAVE THAT WORD IN THE STORM PROTECTION STATUTE. THE PRUDENCE REQUIREMENT OF 366.0 6.01 IS ESSENTIAL TO THE COMMISSIONS.

>> Justice Charles Canady: AND IF THE STATUTE WE ARE LOOKING AT TALKS ABOUT PRUDENCE JUST TALKS ABOUT IT FROM THE SECOND PHASE.

>> Appellant Wessling: THAT DOESN'T MEAN THE FIRST PHASE IS NOT SUBJECT TO.

>> Justice Charles Canady: WHEN THEY TALK ABOUT PUBLIC INTEREST IN A TALK ABOUT PRUDENCE IS NOT LIKE THE LEGISLATURE FORGOT PRUDENCE OR SOMEHOW THEY ARE ACKNOWLEDGING THE OVERLAY THEY ARE MAKING DISTINCTIONS ABOUT THE WAY THIS PARTICULAR PROCESS WILL ROLL. IT SEEMS TO ME JUST FROM LOOKING AT IT LOOKING AT THAT TEXT IN CONTEXT.

>> Appellant Wessling: IN ORDER TO FIND SOMETHING IS IN THE PUBLIC INTEREST IT HAS TO BE PRUDENT.

>> Chief Justice Carlos Muniz: I THINK YOU ARE GETTING YOURSELF OFF TRACK BY USING A TERM THAT HAS THIS KIND OF SPECIALIZED MEETING.

YOUR POINT IS THAT IT CANNOT BE IN THE PUBLIC INTEREST IF THERE IS NOT A RATIONAL CONNECTION BETWEEN THE COST AND THE BENEFIT.  
RIGHT.

>> Appellant Wessling: YES YOUR HONOR.

>> Chief Justice Carlos Muniz: THAT IS TOTALLY WITHIN THE FOUR CORNERS OF THE STATUTE YOU DON'T NEED TO GET INTO 366.06(1) WHATEVER YOU HAVE 30 SECONDS.

>> Appellant Wessling: I WOULD CLOSE BY SAYING THAT THE SPP STATUTE AUTHORIZED AN ADDITIONAL FORMER COST RECOVERY FOR UTILITIES BUT IT DID NOT ABSOLVE THE COMMISSION OF ITS RESPONSABILITIES OTHERWISE RESPONSABILITIES.

THE FLORIDA PUBLIC SERVICE COMMISSION HAS ABDICATED ITS RESPONSABILITY TO CONDUCT THIS COST EFFECTIVENESS REQUIRED IN THIS BY THE TEXT OF THE STATUTE AND RULE OBC ASK'S THIS COURT TO REVERSE AND REMAND ALL FIVE ORDERS BACK TO THE COMMISSION SO THE COMMISSION CAN DO THEIR JOB CONDUCT THIS COST EFFECTIVENESS EVALUATION AND DETERMINE THE PRUDENCE AND COST-EFFECTIVENESS OF THESE INVESTMENTS BEFORE THESE BILLIONS OF DOLLARS ARE INVESTED.

THANK YOU VERY MUCH.

>> Chief Justice Carlos Muniz: THANK YOU VERY MUCH