

>> OUR FINAL CASE, STATE OF FLORIDA VERSUS CLARK, CASE NUMBER 2294.

>> MAY IT PLEASE THE COURT, MY NAME IS MARY WESSLING AND I REPRESENT CITIZENS OF THE STATE OF FLORIDA, SPECIFICALLY CUSTOMERS OF DUKE ENERGY, FLORIDA.

I WOULD LIKE TO RESERVE 5 MINUTES OF TIME FOR REBUTTAL. WE ARE HERE TODAY BECAUSE OF THE PUBLIC SERVICE COMMISSION AT IMPROPER DECISION TO GO WITH THEIR GUT RATHER THAN FOLLOW THE LAW.

DESPITE EXPRESSLY FINDING DO CAPS ACTIONS DIRECTLY LED TO THE OUTAGE AT CRYSTAL RIVER UNIT 4 THE COMMISSION NEVERTHELESS ORDERED CUSTOMERS TO PAY HALF OF THE 14.

\$4 MILLION IN REPLACEMENT POWER COSTS INCURRED AS A RESULT OF THAT OUTAGE.

>> BEFORE YOU GET INTO THE MERITS, CAN YOU ADDRESS DUKE'S ASSERTION ON THE PRESERVATION ISSUE?

>> CERTAINLY.

WITH REGARD TO THE PRESERVATION ISSUE.

OPC MAINTAINS WE APPROPRIATELY PRESERVED OUR ARGUMENTS, WE FEEL THERE ARE CONSTITUTIONAL STATUTORY PROTECTIONS THAT GIVE THIS COURT MANDATORY JURISDICTION OVER THIS MATTER BUT AT THE END OF THE DAY, WORST-CASE SCENARIO FOR OPC THE COURT FINDS OPC'S WITHDRAWAL OF THE MOTION FOR RECONSIDERATION LED TO THE ABANDONMENT OF THE ISSUES, THERE ARE SERIOUS DUE PROCESS VIOLATIONS THAT OCCURRED IN THIS CASE THAT RESULTED IN FUNDAMENTAL ERROR AND THOSE DUE PROCESS VIOLATIONS CONSIST OF VIOLATION OF SECTION 120-57 ONE-B AND ONE-J.

>> THE FIRST TIME THOSE WERE RAISED WAS IN YOUR REPLY BRIEF, RIGHT?

>> YES, YOUR HONOR.

THAT MEANS FUNDAMENTAL ERROR
ALLOWS FOR RAISING ISSUES FOR
THE FIRST TIME IN THE APPEAL.
THAT'S THE SITUATION HERE.

>> TYPICALLY, IN AN APPEAL, THE
APPELLATE HAS TO RAISE ISSUES IN
THE INITIAL BRIEF.

IT'S NOT SOMETHING YOU COME UP
WITH AN ARGUMENT FOR RELIEF FOR
YOURSELF IN THE REPLY BRIEF.

>> ONE UNIQUE CIRCUMSTANCE HERE
IS WE COME STRAIGHT FROM THE
COMMISSION'S ORDER TO THE
SUPREME COURT, THERE WAS NO
INTERMEDIATE ORDER, JUST A COURT
OF APPEAL WHERE THE ISSUE WAS
BROUGHT TO ATTENTION.

WE MAINTAIN WE PRESERVED OUR
ARGUMENTS UNTIL THE ANSWER BRIEF
WAS FILED THAT CONTENDED
OTHERWISE.

WE BELIEVED OUR ARGUMENTS AND
CONTINUE TO BELIEVE OUR
ARGUMENTS ARE PRESERVED.

>> YOU FIRST FILED THE MOTION
BELOW.

WHY DID YOU DO THAT?

WHY DIDN'T YOU JUST GET A
RULING?

>> THERE ARE SEVERAL REASONS FOR
THE WITHDRAWAL, NONE OF THOSE
REASONS ARE OR COULD HAVE BEEN
CAPTURED BY THE RECORD SO I
CAN'T GO INTO THOSE.

WHAT I CAN SAY IS THE DUE
PROCESS VIOLATIONS --

>> DUE PROCESS, WE HEARD THAT
ARGUMENT BUT WE ARE STUMBLING A
LITTLE EARLIER IN THE DISCUSSION
WHICH IS ASSUMING WE DON'T GO TO
THE LAST REFUGE OF A SCOUNDREL,
YOU ARE CONCEDING THAT IF YOU
HAD TO DO IT OVER AGAIN, YOU
WISH YOU HAD RAISED THESE ISSUES
IN THE FIRST INSTANCE IN YOUR
FIELD BRIEF OR WE WOULDN'T BE IN
THIS PICKLE AT ALL IF YOU HAD
JUST GOTTEN A RULING, SO IT
SEEMS TO ME AT LEAST LIKE A
PRETTY TEXTBOOK CASE OF WAIVER
BECAUSE TO RAISE IT PROPERLY IN
APPEAL WITHOUT GOING TO THE DUE
PROCESS THING, FRONTLINE

QUESTION WHETHER IT IS
APPROPRIATE TO RAISE GUILT, IT
ISN'T?

>> I DON'T CONCEDE THAT.

THE CURRENT READING OF RULE 9.
020 ON THE MOTION UNDER
CONSIDERATION, 9.020, IT IS UP
TO 2G IF I'M NOT MISTAKEN, SAYS
THE IT CURRENTLY SAYS WHEN A
NOTICE OF APPEAL IS FILED AND
THERE ARE PENDING MOTIONS FOR
RECONSIDERATION, THE WITHDRAWAL
OF A MOTION FOR RECONSIDERATION,
NOTICE OF APPEAL IS HELD IN
ADVANCE UNTIL EITHER A RULING ON
THE MOTION ITSELF OR WITHDRAWAL
OF THE MOTION.

THE RULE USED TO SAY THERE USED
TO BE A SENTENCE IN THERE THAT
SAID WITHDRAWAL OF A MOTION FOR
RECONSIDERATION IS TANTAMOUNT TO
ABANDONMENT OF THE ARGUMENT, THE
RULE DOES NOT SAY THAN WE
WITHDREW THE MOTION FOR
RECONSIDERATION, THAT WAS NOT
CONTEMPLATED.

WE FELT THAT SINCE WE HAD A
MOTION FOR RECONSIDERATION.

>> THE WHOLE IDEA BEHIND THE
REQUIREMENT WITH PRESERVATION OF
AN ARGUMENT IS TO GIVE THE
TRIBUNAL BELOW THE OPPORTUNITY
TO ADDRESS THE ISSUE AND THE
SEQUENCE OF EVENTS HERE WITH
THAT WITHDRAWAL, JUMPED BEYOND
THAT AND YOU HAD AN ARGUMENT
THAT COULD HAVE BEEN PRESENTED
BY WAY OF A MOTION FOR
RECONSIDERATION AND DIDN'T
PURSUE IT.

SO WE ARE HERE TALKING ABOUT IT
WHEN THIS COULD HAVE BEEN
RESOLVED BY THE LOWER TRIBUNAL
AND THE COMMISSION SO IF YOU ARE
LOOKING AT PRESERVATION IT SEEMS
LIKE A CLASSIC CASE BASED ON THE
LAW OUT THERE IN THIS
ADMINISTERED CONTEXT, TOGETHER
THESE ISSUES AND THE MOTION FOR
REHEARING, IF WE'VE NOT HAD AN
OPPORTUNITY TO DO IT BEFORE, I'M
JUST STRUGGLING TO SEE HOW YOU
GET AROUND THAT IN THIS CONTEXT.

>> TWO POINTS TO HELP WITH THAT,

FIRST OF ALL, NOTHING ABOUT OUR WITHDRAWAL OF THE MOTION FOR RECONSIDERATION PROHIBITED THE COMMISSION OF THEIR OWN VOLITION ISSUING AN AMENDED ORDER OR TAKING THEIR ORDER BACK AND FIXING IT.

>> YOU SAID NEVERMIND.

EFFECTIVELY, WHY DO SOMETHING WHEN YOU SAID NEVERMIND?

>> YOU FILE THE NOTICE OF APPEAL THE SAME DAY.

>> THE SEQUENCE OF EVENTS WAS ON DECEMBER 21ST, JANUARY 5TH, DC FILED THE MOTION TO RECONSIDER ON JANUARY 20TH, THE NOTICE OF APPEAL.

5 DAYS AFTER WE FILED THE APPEAL WE WITHDREW THE MOTION FOR CONSIDERATION.

THE OTHER THING, AS FAR AS THE COMMISSION IS NOT HELD BY THIS IS THEY DIDN'T RAISE THIS ISSUE. THEY ACKNOWLEDGED MANDATORY JURISDICTION OVER THIS MATTER.

>> A SEPARATE ISSUE FOR PRESERVATION, AND IT IS WAIVED.

THAT IS CATEGORY CONFUSION.

>> AS FAR AS WE STAND HERE THE COMMISSION STANDS BY THIS ORDER AND COULD HAVE FILED A MOTION FOR WILL ENCOURAGEMENT FROM THIS COURT IF THEY FOUND THEY HAD AIRED AND HAD NOT DONE SO, THEY DOUBLED DOWN ON THEIR POSITION

--

>> I UNDERSTAND THAT.

THE ISSUE --

>> THERE IS NO PRESERVATION ISSUE AND YOU WILL WIN OR LOSE ON IT WHICH IS THEY HAD THE BURDEN OF PROOF, THAT IS IN DISPUTE.

AND THAT'S THE WHOLE SUBJECT MATTER.

CAN YOU FOCUS ON THAT.

THE ISSUE OF PRESERVATION OF ARGUMENTS.

AND AS RELATED IN THE SUPPLY BRIEF.

IF YOU RAISED ON APPEAL IF YOU LOOK AT IT THAT WAY.

ONCE WE WERE MADE AWARE OF THIS

ARGUMENT IN THEIR ANSWER BRIEF, THE FIRST OPPORTUNITY TO REPLY WAS IN THE REPLY BRIEF AND LAID UP ON ISSUES THERE AND ON TOP OF ALL THOSE ISSUES, DUE PROCESS VIOLATIONS ARE FUNDAMENTAL ERROR EVEN IF IT IS UNPRESERVED AND A NUMBER OF CASES CITED IN THE REPLY BRIEF THAT STAND FOR THAT POSITION.

SO ULTIMATELY THE PRESERVATION ISSUE IS NOT DISPOSITIVE OF THE PRUDENCE ISSUE WHICH IS WHAT WE SHOULD BE DISCUSSING AND I HOPE WE CAN DISCUSS MORE.

5 FLAWS IN THIS ORDER ARE LAID OUT IN THE INITIAL BRIEF BUT ESSENTIALLY THE FIRST ARGUMENT IS THE COMMISSION ERRED BY THE PROVISION OF LAW, THE SUPREME COURT CASE WHICH HAS BEEN WELL ESTABLISHED THAT UTILITIES BEAR THE BURDEN OF PROOF WHEN THEY SEEK TO RECOVER COSTS AND WITH THE COMMISSION'S FINDING THAT THEIR DECISION-MAKING DIRECTLY LED TO THE OUTAGE IN CRYSTAL RIVER UNIT 4, ORDERING CUSTOMERS TO PAY HALF OF THOSE COSTS IS AN INAPPROPRIATE INTERPRETATION OF THE STANDARD.

ADDITIONALLY, THE COMMISSION ACTED OUTSIDE THEIR RANGE OF DISCRETION, ALTHOUGH THE STATUTE SAYS THEIR POWERS ARE TO BE LIBERALLY CONSTRUED, THAT DOESN'T MEAN THEY CAN ILLUMINATE THE BURDEN OF PROOF, THIS COURT MUST NOT ALLOW THEM TO DO SO. THE COMMISSION ALSO ACTED INCONSISTENT WITH PRIOR AGENCY PRACTICE, THEY NEVER BEFORE OUR LOCATED COSTS FOR SINGLE OUTAGE EVENT AND NEVER BEFORE CITED MITIGATING FACTORS EITHER BUT 2009 FUEL CASE WHICH EYESIGHT IN THE INITIAL BRIEF STANDS FOR TYPICAL CASE WHERE THE COMMISSION TAKES EVIDENCE, LOOK, THEY WEIGH THE FACTORS AND DETERMINE WHETHER OR NOT TO LEAN ON THE BURDEN OF PROOF. THEY ARE VERY EXPLICIT ABOUT THAT.

OBVIOUSLY THIS ORDER IS MISSING ALL OF THAT ANALYSIS.

THERE IS A LONG CHAIN OF CASES THAT PRECEDE THAT AND FOLLOW THAT CASE WHICH SHOW THE COMMISSION'S COMMON PRACTICE.

THE COMMISSION ALSO BY INTRODUCING THIS FOR THE FIRST TIME EVER AND AFTER ANY PARTY COULD PRESENT EVIDENCE OR ARGUMENT ON IT THIS CONCEPT ABOUT LOCATION CAUSING MITIGATING FACTORS, THOSE META-GATING FACTORS DON'T SUPPORT SUBSTANTIAL EVIDENCE.

120-SOME 571J SAYS FINALISTS CAN ONLY BE MADE ON EVIDENCE IN THE RECORD AND THE COMMISSION VERBALLY SAID THEY ARE GOING WITH THEIR GOT, DON'T KNOW WHAT FACTS TO BASE THIS ON BUT WILL GO WITH THEIR GUT AND SPLIT THE BABY HERE.

>> GOING WITH THE GOT WAS ABOUT 50/50 SPLIT, THE DECISION TO MAKE IT EVEN.

YOU WOULD SAY THERE IS EVIDENCE IN THE RECORD TO SUPPORT THE MITIGATING FACTORS, THE MACHINE DID NOT OPERATE AS IT WAS SUPPOSED TO WHEN THE OPERATOR ATTEMPTED TO FIX THIS PROBLEM MANUALLY.

>> THERE IS EVIDENCE OF A FAULTY RELAY BUT THAT ON EVIDENCE IS A RED HERRING IN THIS CASE AND THERE IS 0 EVIDENCE IN THE RECORD OF WHAT PERCENTAGE OF THE \$14 MILLION THE FAILED RELAY BECAUSE THE.

THERE IS 0 EVIDENCE IN THE RECORD OF HOW MUCH OF THE REPLACEMENT POWER COST CONTINUING TO DO SOMETHING WRONG CAUSES.

THERE IS 0 SUPPORT IN THE RECORD OF ANY DOLLAR NUMBER TO SUPPORT EITHER OF THE MITIGATING FACTORS.

WHEN YOU CONSIDER THAT ON TOP THE COMMISSION HAS NEVER CONSIDERED MITIGATING FACTORS OR ALLOCATING COSTS, THIS IS IMPROPER.

ADDITIONALLY, THE DUE PROCESS --
>> HELP ME UNDERSTAND THE FACTS
HERE.

IS THERE EVIDENCE HERE TO
SUPPORT THE CONCLUSION THAT THIS
ADVERSE EVENT WOULD NOT HAVE
HAPPENED BUT FOR THE OCCURRENCE
OF BOTH THE OPERATOR ERROR AND
THE RELAY?

>> ON RECORDS 1869, DUKE'S OWN
WITNESS SAID HAD THE OPERATOR
FLIPPED THE BREAKER AT THE
APPROPRIATE TIME, NO DAMAGE
WOULD HAVE OCCURRED.

>> TALKING ABOUT OPERATOR ERROR,
WE KNOW THAT OPERATOR ERROR
HAPPENED, THAT'S NOT DISPUTED.
I'M ASKING ABOUT THE RELAY
FAILURE.

IF THE RELAY HAD NOT FAILED IS
THERE EVIDENCE THAT WOULD SHOW
THAT OPERATOR ERROR WOULD NOT
HAVE CAUSED IT?

>> THERE ARE SITES ON THE
RECORD.

WHEN YOU THINK ABOUT IT
CHRONOLOGICALLY, WHETHER THE
OPERATOR FLIP THE BREAKER AT THE
RIGHT TIME PRECEDES WHETHER OR
NOT THE RELAY WAS WORKING.
IT IS THE OPERATOR'S ERROR
THAT'S KEY TO THIS ANALYSIS.

>> THAT YOUR POSITION BUT THERE
IS FACTUAL PATTERN HERE IS THAT
THESE TWO DIFFERENT THINGS THAT
WENT AWRY, BOTH OF THEM HAD TO
AT LEAST THERE'S EVIDENCE TO
SUPPORT THAT CONCLUSION.

AND YOU ADMIT THAT, CORRECT?

>> I BELIEVE THAT THERE IS
EVIDENCE THAT POTENTIALLY COULD.
HOWEVER, WHEN YOU LOOK AT THE
COMMISSION'S OWN ORDER, THEY DO
DID NOT HAVE TO PICK A DIRECT
CAUSE.

THEY COULD HAVE SAID THESE TWO
THINGS TOGETHER CAUSED THIS
OUTAGE.

THEY DID NOT DO THAT.

THEY SAID, IN SUM, FAILURE OF
THE PLANT OPERATOR TO FOLLOW
WRITTEN PROCEDURES WITHOUT
SUPERVISORY APPROVAL DIRECTLY
LED TO THE OUTAGE AT CRYSTAL

RIVER UNIT 4.
THEY WEIGHED ALL OF THOSE
FACTORS.
THEIR ORDER SHOWS THEM WEIGHING
THOSE FACTORS.
AND THEN THEY CONCLUDE THAT THE
ONE AND ONLY DIRECT CAUSE OF
THIS OUTAGE WAS DUKE'S ERROR.
>> WELL, THEY TALK ABOUT TWO
CAUSES, BUT I THINK FROM YOUR
PREMIER PERSPECTIVE, THE BURDEN
OF PROOF WAS ON THE COMPANY TO
SHOW THEY ACTED PRUDENTLY.
ONE OF THE THINGS THAT THEY
COULD HAVE PROVED AND THAT COULD
HAVE BEEN FOUND POTENTIALLY BY
THE PSC WAS THAT THAT IT WAS
PRUDENT TO RELY ON THIS RELAY.
IT SEEMS LIKE THIS WAS A
MECHANISM THAT WAS SUPPOSED TO
MAKE IT IDIOT-PROOF.
IF PEOPLE JUST SIT THERE HITTING
THE BUTTON REPEATEDLY, IT'S
GOING TO ESSENTIALLY MAKE IT SO
THAT THAT DOESN'T CAUSE A
PROBLEM.
AND THE PSC COULD HAVE FOUND
THAT BETWEEN THE RELAY WORKING
THE WAY IT NORMALLY DOES AND THE
FACT THAT THIS GUY HAD DONE THIS
BEFORE, THAT IT WAS REASONABLE
AND THAT IT WAS PRUDENT FOR THEM
TO GO AHEAD AND TO DO WHAT THEY
DID.
BUT THEY DIDN'T FIND THAT.
INSTEAD, AS IT -- WHEN IT COMES
TO THE ACTIONS OF THE COMPANY
WHICH IS THE ONLY THING AT ISSUE
THAT THEY WERE IMPRUDENT BY NOT
FOLLOWING THE PROCEDURES, AND
YET THEY STILL GAVE THEM \$7
MILLION.
ISN'T THAT THE BOTTOM LINE?
>> YES, YOUR HONOR.
AND NOT ONLY DOES THE ORDER SAY
THAT THAT'S THE COMMISSION'S
ULTIMATE FINDING OF FACT ON THIS
MATTER, THEIR OWN VOTE SHEET AT
RECORD PAGE 91, THEY'RE, THEY
HAVE -- THE COMMISSION, EVERY
SINGLE COMMISSIONER SIGNED THAT
ON THE DAY THEY MADE THEIR
RULING.
AND THERE ARE THE HANDWRITTEN

STRIKE-THROUGHS OF THE PORTIONS
THEY DISAGREE WITH.

BUT THE ONLY THING THAT'S NOT
STRICKEN THROUGH, THE PART THAT
THEY UNANIMOUSLY AGREED ON IS
THAT FAILURE OF THE PLANT
OPERATOR TO FOLLOW WRITTEN
PROCEDURES WITHOUT SUPERVISORY
APPROVAL DIRECTLY LED TO THE
OUTAGE AT CRYSTAL RIVER 4.

THEY COULD HAVE WRITTEN IN AND
SAID AND THE RELAY.

THEY DID NOT DO THAT.

THE COMMISSION MADE A FINDING OF
FACT, AND THE ONLY NATURAL
CONCLUSIONS CAN BE DRAWN ARE
THAT DUKE WAS IMPRUDENT AND,
THEREFORE, FAILED TO MEET THEIR
BURDEN OF PROOF.

AND I'D LIKE TO RESERVE THE REST
OF MY TIME.

>> GOOD MORNING AND MAY IT
PLEASE THE COURT, MY NAME IS
JOHN RUEBOTTOM, ATTORNEY FOR THE
PUBLIC SERVICE COMMISSION.

TO BEGIN WITH, I'D LIKE TO SAY,
JUSTICE CANADY, I THINK YOU'VE
IDENTIFIED THE ISSUE AT THE
HEART OF THIS CASE WHICH IS THAT
THE COMMISSION DID FIND THAT
THERE WERE TWO CAUSES OF THIS
OUTAGE.

NOW, I THINK IT'S IMPORTANT TO
POINT OUT WHILE THE FINAL ORDER
DID AND DOES SAY THAT THE
DEVIATION FROM STANDARD
PROCEDURE DIRECTLY LED TO THE
OUTAGE, IT DOES NOT SAY NOR DOES
THE DISCUSSION IN THE FINAL
ORDER INDICATE THAT IT WAS AN
INDEPENDENT CAUSE AND, IN FACT,
THE RECOMMENDATION WITH WHICH
THE COMMISSION DISAGREED AT THE
AGENDA CONFERENCE INCLUDED
LANGUAGE THAT SAID DIRECTLY AND
INDEPENDENTLY LED.

THAT LANGUAGE DOES NOT APPEAR IN
THE FINAL ORDER.

AND THE DISCUSSION AT THE AGENDA
CONFERENCE IS ENTIRELY ABOUT THE
RESPONSIBILITY FOR THE OUTAGE,
THE CAUSATION OF THE OUTAGE.

AND ONE OF THE COMMISSIONERS,
INDEED, STATING THAT --

>> I THINK, THOUGH, THAT YOU'RE KIND OF MIXING THINGS. THE CAUSATION THING SEEMS LIKE THAT'S NOT REALLY, YOU KNOW, THE -- WHAT THE ISSUE BEFORE THE, YOU GUYS CAME IN -- NOT YOU, I'M SORRY, THE COMPANY CAME IN AND SAID WE, YOU KNOW, WE HAD TO BUY THESE, YOU KNOW, THIS REPLACEMENT TOWER. WE ACTED PRUDENTLY. WE WANT TO RECOVER THOSE COSTS, RIGHT? AND SO THE ISSUE BEFORE THE COMMISSION IS GIVEN, GIVEN WHAT WAS FACING THE COMPANY, YOU KNOW, DID THEY ACT PRUDENTLY. AND IT SEEMS LIKE AS TO PRUDENCE, THE ONLY FINDING IN TERMS OF WHAT THE COMPANY ITSELF DID WAS THAT THEY DID NOT ACT PRUDENTLY. AND IN YOUR BRIEF YOU SAY THE ORDER ALLOWED RECOVERY OF DEF'S PRUDENTLY-INCURRED COSTS. I DON'T, I DON'T SEE THAT IN THE ORDER. AND IT HAD SAID THAT, I DON'T EVEN KNOW HOW YOU WOULD SUPPORT THAT BECAUSE HOW DOES THE FACT THAT THE RELAY BROKE MAKE THAT A PRUDENTLY-INCURRED COST? UNLESS, AGAIN, IT WOULD HAVE BEEN PRUDENT TO RELY ON THE RELAY ESSENTIALLY TO PROTECT YOU FROM YOUR OWN ERRORS. BUT THE PSC DIDN'T FIND THAT. >> OUR POSITION ON THAT IS THERE WAS NO EXPLICIT STATEMENT, BUT THE STANDARD COSTS ARE RECOVERABLE IF PRUDENTLY INCURRED. SO CERTAINLY THE GRANTING OF RECOVERY IS AN INDICATION THAT THE COMMISSION FOUND 50% OF THOSE COSTS WERE PRUDENTLY INCURRED. >> BUT CAN YOU EXPLAIN, EXPLAIN THE -- EXPLAIN THE CHAIN OF LOGIC THAT WOULD GET YOU TO THAT CONCLUSION. >> CERTAINLY, WE'RE HAPPY TO. THE CHAIN OF LOGIC IS THAT IMPRUDENT ACTIONS UNLESS THEY

ARE, UNLESS THEY GIVE RISE TO AND CAUSE THE OUTAGE AND THE COSTS TO BE INCURRED IS NOT A BASIS TO DENY A RECOVERY. SO CAUSATION IS IMPLICIT IN THIS ANALYSIS.

AND IN THIS CASE, THE COMMISSION FOUND TWO INDEPENDENT CAUSES OF THE OUTAGE THAT APART FROM EITHER ONE THEY ARE BOTH CAUSES MANY FACT.

THEY BOTH OCCUR IN THE CHAIN OF EVENTS LEADING TO THE OUTAGE. AND HAD EITHER ONE OF THEM NOT OCCURRED IN THIS CASE, THE OUTAGE WOULD NOT HAVE TAKEN PLACE.

>> CAN YOU POINT TO THE PART OF THE REPORT THAT SAYS THAT THE FAILURE OF THE RELAY TO PROPERLY WORK WAS A CAUSE?

I MEAN, I UNDERSTAND THEY CONSIDER IT MITIGATION, A FACTOR TO BE CONSIDERED.

BUT, I MEAN, IT SAYS THAT THE OPERATOR FAILURE THAT LED TO THE OUTAGE.

AND THEN IT SAYS THIS OTHER THING HAPPENED THAT, YOU KNOW, WAS A FACTOR.

WHERE DOES IT SAY THAT THAT WAS A CAUSE?

>> THE FAILURE OF THE DEVICE ITSELF WAS A CAUSE?

>> UH-HUH.

>> IN THE SENSE THAT IT'S A CAUSE IN FACT THAT BECAUSE IT FAILED, BECAUSE IT WAS NOT OPERATING, IT WAS, IT WAS A CAUSE.

IT WAS NOT, IT DID NOT FUNCTION AS DESIGNED.

>> YOU CAN'T SAY IT WAS A SUFFICIENT CAUSE.

YOU MIGHT BE ABLE TO SAY IT WAS A NECESSARY CAUSE BECAUSE ABSENT THAT FAILURE IT MIGHT HAVE, HAD THERE BEEN NO OPERATOR ERROR, WE WOULDN'T HAVE KNOWN.

BUT CAN YOU CONCEDE, APTLY CONCEDE THAT WHILE NOT A SUFFICIENT CAUSE, IT IS A NECESSARY CAUSE OF WHAT HAPPENED?

>> YES, YOUR HONOR, WE DO AGREE THAT.

AT THE MOMENT THE RELAY FAILED OR WENT INTO A FAILED CONDITION, THAT DID NOT CAUSE THE OUTAGE. BUT IN THE CHAIN OF EVENTS, THIS OPERATOR MAKING THESE DECISIONS AND ACTIONS, THE RELIANCE ON THE RELAY THAT HE -- TAKING ACTIONS HE HAD DONE IN THE PAST WITH NO ADVERSE CONSEQUENCES, IN THIS CASE THERE WAS A CONDITION HE DID, HE WAS UNAWARE OF THAT LED TO AND CONTRIBUTED TO CAUSING THE EVENT.

SO, AGAIN, WE, OUR POSITION IS THAT THE CAUSATION, THE FACT THAT TWO CAUSES WERE FOUND, THOSE WERE FACTORS LEADING TO THE OUTAGE.

THAT WAS THE ISSUE THE FINAL ORDER WAS DEALING WITH, AND THE COMMISSION WAS EXAMINING THE UTILITY'S PRUDENCE WITH RESPECT TO THOSE CAUSAL FACTORS.

>> WELL, OKAY.

GO ON.

>> NO, GO AHEAD.

>> I WAS JUST GOING TO SAY I THINK THIS TAKES US BACK TO WHERE --

[INAUDIBLE]

WHICH IS THAT THIS IS A VERY INTERESTING DISCUSSION OF CAUSATION.

LET'S REALIZE THAT THAT'S ONLY ONE COMPONENT OF CAUSATION, AND THAT YOU -- NOT YOU, THEY BEAR THE BURDEN.

AND YOU FIND, I THINK YOU'D HAVE TO SAY THAT ON SORT OF A MIXED, YOU'VE GOT A MIXED BAG HERE.

HELP ME UNDERSTAND, IS IT THE COMMISSION'S POSITION THAT DUKE MET THE PRUDENT STANDARD IN THIS CASE?

AND IF SO, HELP ME GET OVER THAT HUMP, BECAUSE I STRUGGLE WITH IT.

>> CERTAINLY.

IT IS OUR POSITION THAT DUKE MET ITS BURDEN OF PROOF TO PROVE THAT COSTS WERE PRUDENTLY INCURRED AND THAT THE

COMMISSION'S ROLE IN THAT INSTANCE WAS TO ALLOW RECOVERY OF PRUDENTLY-INCURRED COSTS. AND AGAIN, THOSE FACTS THAT ARE DISCUSSED AND SUMMARIZED IN THE FINAL ORDER --

>> THEN I GUESS THE QUESTION THEN BECOMES LET'S SAY THAT THERE IS BASIS FOR RECOVERING PRUDENTLY-INCURRED COSTS. WHY IS EXACTLY 50% OF WHAT THIS COSTS THE AMOUNT OF COST THAT IS PRUDENTLY INCURRED AS OPPOSED TO THE WHOLE AMOUNT?

WHY?

WHAT'S THAT ABOUT?

IS THAT REALLY ULTIMATELY ABOUT GUT?

>> WE BELIEVE THAT THE OPC IS MISCHARACTERIZING THAT DISCUSSION.

IT IS ABOUT A JUDGMENT CALL.

IT'S ABOUT THE COMMISSION'S DISCRETION.

THIS ULTIMATELY IS A CASE INVOLVING RATE MAKING.

THE ALLOWANCE OF PRUDENTLY-INCURRED COSTS TO BE RECOVERED THROUGH RATES, THAT'S WHAT THIS CASE IS ENTIRELY ABOUT.

AND SO WHEN THE COMMISSION IS FACED WITH EVIDENCE INDICATING THAT TWO, TWO COMBINED FACTORS LED TO CAUSING THE OUTAGE AND THE COSTS TO BE INCURRED AND HAS NO, NO INDICATION THAT EITHER ONE OF THEM COULD HAVE CAUSED IT ON ITS OWN, THE COMMISSION'S POSITION IS THAT IT'S WITHIN THE COMMISSION'S DISCRETION UNDER THE BROAD RATE MAKING AUTHORITY TO GRANT RECOVERY OF HALF OF THOSE COSTS.

IT'S A FAIR, JUST AND REASONABLE OUTCOME UNDER THE COMMISSION'S AUTHORITY TO SET FAIR, JUST AND REASONABLE RATES.

SO THAT'S THE BASIS FOR THE 50% FOR THE ALLOCATION --

>> CAN YOU DIRECT US TO WHERE WE FIND THIS ELABORATION IN YOUR ORDER?

AS TO THE BASIS?

BECAUSE IT SEEMS LIKE -- AND THIS IS A RECURRING ISSUE. IT SEEMS TO ME LIKE PERHAPS YOU CAN.

LIKE WE'RE LEFT WITH VERY LITTLE IN THE WAY OF A RECORD DEMONSTRATING THE CONSIDERED JUDGMENT THAT YOU JUST ARTICULATED.

I'M HEARING IT HERE IN ORAL ARGUMENT.

IS IT PRESENT ON THE FACE OF ANY ORDER OR ANY CONCLUSION?

>> WE BELIEVE THAT THE COMMISSION'S, THE AGENDA CONFERENCE, THE DISCUSSION IS VERY MUCH ABOUT HOW DO THEY DETERMINE CAUSAL RESPONSIBILITY. IT'S AN ENTIRE DISCUSSION ABOUT THE RESPONSIBILITY AND HOW TO MEASURE IT.

IT DISAGREED WITH STAFF'S RECOMMENDATION THAT THERE WAS, THAT THE UTILITY'S DEVIATION FROM STANDARD PROCEDURE WAS THE SINGLE CAUSE.

SO AGAIN, IT'S AN EXERCISE OF THEIR DISCRETION.

IT'S NOT SUMMARIZED EXPLICITLY IN THE ORDER, BUT WE DON'T BELIEVE THAT THAT'S A BASIS TO OVERRULE OR TO REMAND ON THAT BASIS.

AND I SEE I'M NEARING THE END OF MY ALLOTTED TIME, AND WITH RESPECT, WE'D REQUEST THAT THE COURT AFFIRM THE FINAL ORDER.

>> MAY IT PLEASE THE COURT, DANIEL NORDBY AND ALYSSA -- ON BEHALF OF DUKE ENERGY FLORIDA. UNLESS THE COURT WOULD PREFER OTHERWISE, I'D LIKE TO START BY ADDRESSING TWO QUESTIONS THAT WE THINK ARE DISPOSITIVE OF THIS APPEAL.

FIRST, DID THE COMMISSION FIND THAT DUKE ENERGY CARRIED ITS BURDEN TO DEMONSTRATE PRUDENCE WITH RESPECT TO THE CR4 OUTAGE AND, WHO TWO, IF SO, BECAUSE COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORT THAT FINDING.

IF THOSE TWO QUESTIONS ARE

ANSWERED IN THE AFFIRMATIVE, WE WOULD SUBMIT THIS COURT NEED NOT REACH ANY OF THE OTHER ESOTERIC ISSUES THAT HAVE BEEN RAISED BY THE OFFICE OF PUBLIC COUNSEL IN ORDER TO AFFIRM THE COMMISSION'S ORDER.

SO THE FIRST OF THOSE QUESTIONS, DID THE COMMISSION FIND THAT DUKE ENERGY CARRIED --

[INAUDIBLE]

YOU'VE HEARD FROM COMMISSION'S COUNSEL THAT THAT WAS THEIR FINDING.

WE THINK THAT IS NECESSARILY TRUE EVEN IF NOT EXPLICITLY STATED IN THE ORDER.

AND THAT'S BECAUSE THE COMMISSION OUTLINED THE BURDEN OF PROOF AT PAGE 28 OF THE RECORD, CLEARLY ESTABLISHED THAT DUKE ENERGY BORE THE BURDEN OF PROOF TO DEMONSTRATE PRUDENCE IN THIS APPEAL.

AND AT THE END OF THE ORDER, THE COMMISSION AWARDED REPLACEMENT POWER COSTS DUKE ENERGY.

IT COULD NOT HAVE DONE THAT WITHOUT FINDING THAT DUKE HAD CARRIED ITS BURDEN TO DEMONSTRATE --

>> BUT WOULDN'T, I MEAN, IN TERMS OF THE ISSUES THAT WERE THIS FRONT OF THEM, IT SEEMS LIKE IN TERMS OF THEIR AFFIRMATIVE PRUDENCE THE ONLY WAY YOU WOULD GET TO THAT IS IF THEY HAD SAID IT WAS REASONABLE TO RELY ON THE GUY'S PAST EXPERIENCE WITH NOT HAVING HAD A PROBLEM DOING IT THIS WAY AND JUST GENERAL, YOU KNOW, FAITH IN THE RELIABILITY OF THE MACHINE. DID THAT, DID THAT SATISFY THEIR BURDEN?

IN THIS CASE, IT SEEMS LIKE THE RIGHT ANSWER IS ZERO.

BUT INSTEAD THEY BASICALLY SAID IT SEEMS LIKE THEY CONCLUDED THAT IT WASN'T REASONABLE, THAT THEY STILL, YOU KNOW, THAT THE REASONABLE MANAGER WOULD HAVE GONE THROUGH THE STEPS AND DONE ALL THAT IN WHICH CASE, YOU

KNOW, THE ANSWER SHOULD BE THAT THEY -- I'M SORRY, THAT THEY SHOULD GET ALL OF IT VERSUS NONE OF IT.

IT JUST SEEMS LIKE THOSE ARE TO TWO OPTIONS.

>> CERTAINLY ON THAT ISSUE, THE AMOUNT OF COST IS A SEPARATE ISSUE, I THINK, FROM THE PRUDENCE DETERMINATION.

SO WHAT WE'RE SUGGESTING IS THAT IF THE COMMISSION FOUND THAT DUKE ENERGY SATISFIED ITS BURDEN TO DEMONSTRATE PRUDENCE HERE, THEN IS THERE COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD THAT WOULD SUPPORT THAT THE FINDING.

WE SUBMIT THERE IS.

THE TESTIMONY OF OUR WITNESS, JOSEPH SIMPSON, AND THE ROOT CAUSE ANALYSIS HAVE ABUNDANT EVIDENCE THAT THIS WAS A TRAINED OPERATOR, THAT HE PULLED THIS LEVER ONE SECOND -- IF HE'D PULLED IT ONE SECOND LATER, THIS WOULD NOT HAVE OCCURRED.

IF THIS HIGHLY RELIABLE RELAY HAD NOT FAILED, THEN THIS OUTAGE WOULD NOT HAVE OCCURRED.

THERE ARE A LOT OF THINGS IN THIS RECORD, THE EVIDENCE BEFORE THE COMMISSION, THAT WOULD SUPPORT A FINDING OF PRUDENCE HERE.

COMPETENT, SUBSTANTIAL EVIDENCE IS A LOW BURDEN HERE.

THE COURT'S TASK IS NOT TO WEIGH THE EVIDENCE ON BOTH SIDES TO SEE IF THERE'S EVIDENCE SUPPORTING THAT FINDING OF PRUDENCE HERE.

AND WE THINK THAT IS A NECESSARY FINDING HERE BECAUSE THERE WASN'T A WAR OF COSTS, AND AS YOU'VE HEARD FROM COUNSEL, THE COMMISSION FOUND THAT DUKE HAD CARRIED ITS BURDEN OF PROOF HERE.

ON THE SECOND QUESTION, THOUGH, CHIEF JUSTICE ON THE AMOUNT OF THE COSTS HERE, WE DON'T THINK THERE'S A NEED FOR THE COURT TO REACH THAT ISSUE AND THE

COMMISSION'S DECISION TO --
>> CAN WE BACK UP FOR A SECOND?
I DON'T UNDERSTAND WHY WE SHOULD
BE TRYING TO DO ALL THESE MENTAL
GYMNASTICS THAT WE'RE DOING WHEN
THE STUFF THAT'S ON THE PAGE
ADDRESSES THE QUESTION.

AND IF THEY CAN'T FIND THAT IT
WAS PRUDENT TO RELY ON THAT
STUFF.

>> I DISAGREE WITH THE
CHARACTERIZATION THAT OPC'S
COUNSEL MADE ON THAT THE
CAUSATION QUESTION.

SO I THINK THAT'S A CATEGORY
CONFUSION.

CAUSATION DOES NOT DEMONSTRATE
IMPRUDENCE HERE.

PROXIMATE CAUSATION IS NECESSARY
BUT NOT A SUFFICIENT FINDING TO
DEMONSTRATE PRUDENCE.

THERE ARE CASES WE'VE CITED IN
THE BRIEFS WHERE THERE'S NO
QUESTION THAT WHERE A UTILITY
RELIES REASONABLY ON ADVICE
THAT'S GIVEN TO THEM BY A
CONSULTANT CAUSES AN OUTAGE, BUT
THEIR REASONABLE RELIANCE ON AN
EXPERT CAN STILL BE PRUDENT
ACTION NOTWITHSTANDING THE
CAUSATION.

>> THE PSC IS CONFLATING
CAUSATION AND PRUDENCE.

I MEAN, THEY'RE BASICALLY,
THAT'S THEIR WHOLE ARGUMENT IS
THAT THERE'S TWO CAUSES AND,
THEREFORE, IT'S, YOU KNOW, YOU
SHOULD ONLY BEAR, I GUESS,
RATIONALLY THIS ARBITRARY 50-50
SPLIT.

>> WELL, ON -- THERE WERE TWO
CAUSES THAT INDEPENDENTLY WOULD
HAVE HAD TO COME TOGETHER HERE.
THE FAILURE OF A HIGHLY RELIABLE
DEVICE AND HUMAN PERFORMANCE
ERROR BY CLOSING THE CIRCUIT ONE
SECOND EARLY.

THE QUESTION THEN IS ARE THE
ACTIONS OF A HIGHLY TRAINED
OPERATOR HERE AND THE FAILURE OF
EQUIPMENT, DOES THAT COME
TOGETHER TO DEMONSTRATE THAT
DUKE WAS PRUDENT IN ITS ACTIONS
HERE?

WE THINK THAT EVIDENCE WOULD SUPPORT A FINDING OF PRUDENCE HERE.

A HUMAN PERFORMANCE ERROR BY A HIGHLY TRAINED OPERATOR DOES NOT DEMONSTRATE IMPRUDENCE --

>> YOU'RE FIGHTING AGAINST, I MEAN, THAT'S FIGHTING AGAINST WHAT THE PSC ITSELF FOUND.

IF THERE'S ONE THING, HOW THEY'RE FACTORING IN THE MACHINE FAILURE IS THE LOGIC ON THAT IS MURKY.

THE LOGIC ON THEIR FINDING OF IMPRUDENCE BY THE OPERATOR IS NOT MURKY AT ALL.

THEY BASICALLY SAY AT THE END OF THE DAY, YOU'RE NOT A BAD GUY, IT WASN'T INTENTIONAL, YOU GUYS WEREN'T, YOU KNOW, RECKLESSLY INDIFFERENT OR WHATEVER.

BUT THE BOTTOM LINE IS YOU CAN'T HAVE WRITTEN PROCEDURES, YOU DIDN'T HAVE TRAINING, YOU DIDN'T TO DO WHAT YOU WERE SUPPOSED TO DO.

AND AS A RESULT OF THAT, THE OUTAGE OCCURRED.

THAT'S CRYSTAL CLEAR IN THE ORDER.

>> I DISAGREE WITH THAT AS TO THE TRAINING ASPECT.

THE EVIDENCE WAS THAT HE WAS A HIGHLY TRAINED OPERATOR WHO MADE A HUGE PERFORMANCE ERROR HERE.

WHAT THEY SAY AT PAGE 30 OF THE RECORD, THE COMMISSION'S ORDER SAYS FAILURE TO FOLLOW WRITTEN PROCEDURES WITHOUT SUPERVISORY APPROVAL DIRECTLY LED TO THE OUTAGE OF CRYSTAL RIVER UNIT 4.

IT DOESN'T SAY AND, THEREFORE, THE CONDUCT OF THE UTILITY WAS IMPRUDENT.

IT'S A CAUSATION FINDING.

IT'S NOT AN IMPRUDENCE FINDING, IN OUR VIEW.

THE SECOND QUESTION THAT I WANTED TO GET TO THOUGH IS THE ISSUE OF COSTS AND WHY THIS COURT DOESN'T NEED TO REACH THAT ISSUE.

BECAUSE IF THE COMMISSION FOUND THAT DUKE HAD CARRIED ITS BURDEN

AS TO PRUDENCE AND IF COMPETENT, SUBSTANTIAL EVIDENCE SUPPORTS THAT FINDING, THEN THE AGGRIEVED PARTY, IF THERE IS ONE, AS TO THE REDUCTION OF THE COSTS IS MY CLIENT.

MY CLIENT HAS NOT CHALLENGED THE COST REDUCTION IN THIS APPEAL.

OPC I DON'T UNDERSTAND TO BE SAYING THAT THE ONLY OPTION IS 14.4 MILLION.

WE'VE CHOSEN IN THIS APPEAL TO ACCEPT THE COMMISSION'S REDUCTION IN THE COSTS.

AND THIS COURT, THEREFORE, DOES NOT NEED TO REACH THE ISSUE OF WHETHER IT REDUCED THOSE COSTS APPROPRIATELY, WHETHER IT DEPARTED FROM PRECEDENT IN DOING SO.

MY CLIENT WOULD BE THE AGGRIEVED PARTY.

WE'VE NOT CHALLENGED IT IN THIS SPECIFIC FIELD.

WE DON'T THINK THEY NEED TO REACH THAT QUESTION FOR TWO REASONS.

ONE IS THE ISSUE OF PRESERVATION THAT THE COURT ADDRESSED WITH MY FRIEND ON THE OTHER SIDE HERE.

ANY ISSUES ABOUT MITIGATION OR ALOE ALLOCATION OF COSTS WERE FIRST RAISED IN A POSTHEARING MOTION FOR CONSIDERATION THAT WAS DRAWN INEXPLICABLY WITHOUT ANY DECISION ON IT.

SO I THINK THERE'S A PRESERVATION ISSUE THAT SHOULD PREVENT THIS COURT FROM REACHING THE REDUCTION IN COST.

THE SECOND ISSUE IS AKIN TO AN ISSUE OF STANDING HERE.

IF THE COSTS WERE REDUCED FROM 14.4 TO 7.2, OPC IS NOT ADVERSELY AFFECT BY THAT DECISION WITHIN THE MEANING OF 120.68 BECAUSE THEY HAVE THE ABILITY TO ASSERT THAT IT SHOULDN'T HAVE BEEN TAKEN FROM 7.2 DOWN TO 0.

AGAIN, THE ISSUE THERE IS THE REDUCTION FROM A 14.4 TO A 7.2 IF YOU ACCEPT MY PREMISE AT THE BEGINNING THAT THE COMMISSION

FOUND WE SATISFIED OUR BURDEN AS TO PRUDENCE AND THAT THERE IS EVIDENCE IN THIS RECORD -- NOTWITHSTANDING THAT THERE MIGHT BE EVIDENCE GOING BOTH WAYS -- IF THERE IS COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTING A PRUDENCE DETERMINATION, THEN THOSE ARE THE ONLY ISSUES --

>> SO YOU DON'T, WHERE IT SAYS THE WAY THIS WENT DOWN IS VERY TROUBLING AND DOES NOT CONSTITUTE ACCEPTABLE OPERATIONAL PRACTICES? YOU WANT US TO READ THIS AS SAYING THAT YOU WERE PRUDENT?

>> IF THE COMMISSION THAT NOT FOUND THAT WE SATISFY OUR BURDEN, IT WOULD NOT HAVE MADE AN AWARD OF COST RECOVERY HERE. WHAT THE COMMISSION SAID, AND THIS IS THE CASE IN --

>> SO BASICALLY, SO WE SHOULD JUST ASSUME THAT REGARDLESS OF THE WORDS ON THE PAGE, WE JUST SHOULD ASSUME THAT, I MEAN, THAT'S GOING TO BE A BIZARRE STANDARD OF REVIEW, THAT WE CAN IGNORE WHAT YOU ACTUALLY SAY AND JUST KIND OF ASSUME THAT YOU MUST HAVE SOMEHOW, MAGICALLY PROPERLY INTERPRETED THE LAW TO MAKE WHAT YOU DID ACCEPTABLE?

>> WELL, THE COMMISSION DOES NOT FIND, MAKE ANY EXPLICIT FINDING OF IMPRUDENCE IN THIS DETERMINATION.

THEY SUMMARIZED THE EVIDENCE, AND IT IS SOMETHING THAT WE'VE SEEN IN SEVERAL COMMISSION ORDERS, IT'S SORT OF A SUMMARY OF THE EVIDENCE ON BOTH SIDES, AND THEN A DECISION AT THE END. BUT WE THINK NECESSARILY THE COMMISSION FOUND THAT DUKE HAD SATISFIED ITS BURDEN OF PROOF OR IT COULD NOT HAVE MADE AN AWARD OF A COST RECOVERY HERE. IT WOULD NOT HAVE BEEN PROPER TO HAVE DONE SO IN THIS CASE. WE THINK THEY KID FIND BASED ON THE EVIDENCE BEFORE THEM THE EVIDENCE OF THE WITNESS THAT THE

COMMISSIONER SAID AT THE AGENDA CONFERENCE WAS CREDIBLE, THAT HE GAVE A LOT OF INFORMATION ABOUT THE SPECIFIC PROCEDURES THAT HAPPENED HERE.

THIS IS A PROCEDURE THAT HAD BEEN SUCCESSFUL IN THE PAST. IT WOULD HAVE BEEN SUCCESSFUL HERE EXCEPT FOR THE FAILURE OF A DEVICE A MILE AND A HALF AWAY THAT NO ONE COULD HAVE KNOWN ABOUT.

ALL OF THOSE FACTORS TOGETHER WOULD SUPPORT A FINDING THAT EVEN IF SOMETHING HAPPENED HERE, A BIZARRE CONFLUENCE OF CIRCUMSTANCES THAT LED TO THIS OUTAGE, THAT DOESN'T MEAN IF THAT THAT A REASONABLE UTILITY MANAGER WOULD HAVE DONE SOMETHING DIFFERENT IN THESE CIRCUMSTANCES.

HUMAN ERROR IS NOT EVIDENCE OF IMPRUDENCE IN THIS SETTING.

SO THERE MAY HAVE BEEN EVIDENCE, AND OPC HAS CITED SOME EVIDENCE SUGGESTING THAT CERTAIN THINGS COULD HAVE BEEN DONE DIFFERENTLY.

OUR ROOT CAUSE ANALYSIS THAT'S IN THE RECORD HERE SUGGESTS THAT SOME THINGS COULD BE DONE DIFFERENTLY.

BUT AT THE END OF THE DAY, THE FACT THAT THESE CIRCUMSTANCES CAUSED THE OUTAGE IS NOT IN DISPUTE HERE.

THE QUESTION IS WHETHER IT WAS IMPRUDENT.

DUKE ENERGY WAS IMPRUDENT IN THE WAY IT ACTED HERE.

WE THINK THE FINDINGS AND THE COMMISSION'S AWARD OF COST RECOVERY AMOUNTS TO A FINDING THAT DUKE CARRIED ITS BURDEN, AND THE EVIDENCE SUPPORTS THAT.

UNLESS THE COURT HAS FURTHER QUESTIONS, WE'D STAND ON OUR BRIEFS FOR THE REMAINDER.

THANK YOU.

>> THANKS.

>> THANK YOU AGAIN AND MAY IT PLEASE THE COURT, SPEAKING OF RAISING ISSUES FOR THE FIRST

TIME ON APPEAL, THIS IS THE FIRST TIME I'M HEARING ABOUT THE STANDING ISSUE.

IF I WAS UNDERSTANDING DUKE'S ARGUMENT CORRECTLY, THEY WERE SUGGESTING THAT ONLY DUKE HAS A RIGHT TO HAVE A PROBLEM WITH THIS CASE.

BUT BECAUSE OF THE COMMISSION'S ORDER, CUSTOMERS OWE JUST AS MUCH MONEY BECAUSE OF DUKE'S IMPRUDENCE AS DUKE DOES. CUSTOMERS ARE BEING FORCED TO PAY \$7.2 MILLION WHICH IS THE SAME AMOUNT DUKE IS BEING FORCED TO PAY.

SO RAISING THAT ISSUE IS COMPLETELY INAPPROPRIATE -- >> WELL, HE'S JUST SAYING THAT THE LOGIC -- AND, OBVIOUSLY, IF THEY WERE PRUDENT, WHY AREN'T THEY GETTING, HE'S JUST SAYING THAT THE LOGIC OF A PRUDENCE FINDING, IF PROOF THERE WAS ONE HERE, THAT IT WOULD HAVE LED TO THE, YOU KNOW, THE WHOLE AMOUNT BEING RECOVERED.

SO THAT'S NOT A NEW ARGUMENT.

>> ALL I WAS TRYING TO SAY IS THAT IT SOUNDED LIKE A STANDING ARGUMENT, AND THAT WOULD BE THE FIRST TIME THEY'RE RAISING IT.

>> I THINK JUST WHAT HE WAS SAYING IS THAT YOU'RE NOT ASKING FOR A DIFFERENT SPLIT.

YOU'RE NOT ASKING FOR 70-30 OR 80-20.

YOU WANT ALL OF IT.

>> WE'RE --

>> TO DUKE.

AND SO SENDING IT BACK, SHOULD IT HAVE BEEN 50-50 IS NOT REALLY SOMETHING THAT YOU'RE ASKING FOR.

>> RIGHT, CORRECT.

WHAT WE'RE ASKING FOR IS THAT THE COMMISSION BE REQUIRED TO FOLLOW THEIR AGENCY PRACTICE. AND IT'S IMPORTANT TO REMEMBER NO PARTY DURING ANY PORTION OF THIS CASE CONTESTED THE AMOUNT OF MONEY AT STAKE.

IT WAS ALWAYS \$14.4 MILLION.

THAT WAS IN THE BRIEFS, THAT WAS

IN THE TESTIMONY, THAT WAS IN THE, THE ORDER ITSELF ACKNOWLEDGES THAT NO PARTY CONTESTED THAT \$14.4 MILLION IS THE AMOUNT IN QUESTION. ON THE ISSUE OF DISCRETION, I WOULD POINT OUT THAT THE COMMISSION IS STATING THAT THEY'RE ENTITLED TO YOUR DISCRETION, BUT THEY'RE ALSO SAYING THAT THEIR AUTHORITY TO ACT COMES FROM STATUTE FROM THIS COMBINATION OF STATUTES. AND THE FLORIDA CONSTITUTION SAYS WHEN AN AGENCY ACTS, THIS COURT CAN REVIEW THAT DE NOVO. YOU DON'T OWE THEM DISCRETION ON THEIR INTERPRETATION OF STATUTORY AUTHORITY. ADDITIONALLY, BOTH THE COMMISSION AND DUKE HAVE ESSENTIALLY ASKED YOU TO REWEIGH THE EVIDENCE IN THIS CASE. OPC IS NOTING ASKING YOU TO REWEIGH THE EVIDENCE. OPC AGREES WITH THAT IN SUM FINDING THAT DUKE'S ACTIONS DIRECTLY LED TO THIS OUTAGE. AND AS FAR AS THE CONFLATION OF CAUSATION --

>> IT, LET ME ASK YOU THIS, IS IT YOUR POSITION THAT ANYTIME AN EMPLOYEE MAKES A MISTAKE, THAT THAT THAT DEMONSTRATES A -- IN WHICH I THINK THE EMPLOYEE IF MADE A MISTAKE, THAT THAT DEMONSTRATES A LACK OF PRUDENCE BY THE UTILITY?

>> NO, YOUR HONOR. THE PRUDENCE STANDARD ACCOMMODATES THIS CONCEPT OF MITIGATION AND THIS CONCEPT OF GOOD ACTIONS ON BEHALF OF THE UTILITY. THE PRUDENT STANDARD SAYS WHAT A REASONABLE UTILITY MANAGER WOULD DO --

>> SO IT'S CONCEIVABLE THAT IF YOU'VE GOT A REDO UNDER THIS, THE PERSON WHO'S GOING TO BE SMILING IS THE UTILITY RATHER THAN THE CONSUMERS.

>> IT WOULD BE INTERESTING TO SEE THE COMMISSION --

>> IT WOULD BE INTERESTING.
>> -- CHANGE THEIR FINDING OF
FACT, BUT THAT IS CONCEIVABLE.
>> WELL, I DON'T KNOW THERE
WOULD BE A CHANGE.
I THINK IT WOULD BE MORE LIKE A
REFINEMENT.
>> MAYBE IF THEY'RE WATCHING,
THEY COULD JUST REWRITE IT ALONG
THE LINES OF WHAT WE HEARD.
[LAUGHTER]
>> AND THAT IS, THAT -- WE'LL
JUST HAVE TO WAIT AND SEE.
STAY TUNED, I GUESS.
BUT AS FAR AS THE PRUDENCE
STANDARD, IF YOU'RE, TO YOUR
POINT THOUGH, AS LONG AS THE
UTILITY ESTABLISHES THE BURDEN
OF PROOF THAT THEY ACTED
PRUDENTLY WHETHER THERE WAS AN
OUTAGE, WHETHER THERE WERE
REPLACEMENT COSTS, AS LONG AS
THEY MEET THEIR BURDEN OF PROOF,
THEY WILL RECOVER THEIR MONEY.
SO THE PRUDENCE STANDARD DOESN'T
REQUIRE THE UTILITY-APPROVED
CAUSATION.
IT REQUIRES THE UTILITY TO PROVE
THEIR ACTIONS WERE REASONABLE OR
PRUDENT REGARDLESS OF WHETHER
COSTS ARE INCURRED.
THAT'S HOW THIS CONCEPT OF
FAIRNESS IS ALREADY INCORPORATED
IN THE BURDEN OF PROOF, AND
THAT'S WHY THE COMMISSION SHOULD
HAVE MADE THAT FINDING.
AND ULTIMATELY, JUST LIKE WHEN
WE PUT THE SWITCH IN OUR HOUSES
AND THE POWER IS EITHER ON OR
OFF, A UTILITY EITHER MEETS
THEIR BURDEN OF PROOF OR THEY DO
NOT.
HERE THE COMMISSION CORRECTLY
FOUND THAT DUKE'S ACTIONS
DIRECTLY LED TO THIS OUTAGE.
HOWEVER, INSTEAD OF STATING,
THEREFORE, DUKE'S ACTIONS WERE
IMPRUDENT AND THEY FAILED TO
MEET THEIR BURDEN OF PROOF, THEY
INTRODUCED THESE FOREIGN
CONCEPTS IN VIOLATION OF ALL THE
PARTIES' DUE THE PROCESS RIGHTS,
DUKE INCLUDED, BECAUSE THEY
DIDN'T KNOW THIS WAS GOING TO

HAPPEN.
AND THIS IS FUNDAMENTAL ERROR.
THE COURT SHOULD DIRECT THE
COMMISSION TO ENTER AN ORDER
FINDING THAT DUKE'S ACTIONS WERE
IMPRUDENT AND THAT DUKE FAILED
TO MEET THEIR BURDEN OF PROOF.
THEREFORE, THEY ARE RESPONSIBLE
FOR THE ENTIRETY OF THE
STIPULATED \$14.4 MILLION.
>> THANK YOU VERY MUCH.
>> THANK YOU.
>> WE'RE ADJOURNED.