

BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo
Ivan W. Smith, Alternate



FLORIDA POWER & LIGHT COMPANY
(St. Lucie Plant, Unit No. 2)

Docket No. 50-389A

August 7, 1981

FLORIDA CITIES' RESPONSE TO
BOARD QUESTIONS



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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii - vi
Question 1.....	1
Estoppel As To Facts.....	2
Estoppel As To Situation Inconsistent.....	6
Decisions Giving Rise To Estoppel.....	11
A. Having Found An Actual Law Violation, <u>Gainesville</u> Mandates a Finding That A "Situation Inconsistent" With the Antitrust Laws Exists.....	11
B. Opinion No. 57 Separately Establishes The Existence Of A "Situation Inconsistent" With The Antitrust Laws.....	18
C. <u>Gainesville</u> and Opinion No. 57 Can Be Relied Upon In Support Of Summary Disposition.....	25
Question 2.....	27
<u>Gainesville</u> On Markets.....	27
Florida Power & Light Company FERC Decision On Markets.....	28
Summary Of Findings Concerning Market.....	30
Legal Implications Of Market Findings.....	31
Question 3.....	36
Question 8.....	39
Question 9.....	52
Question 10.....	52
A. Status of document discovery.....	53
B. Interrogatories.....	54
C. Future discovery.....	54
Question 11.....	57
Miscellaneous.....	60

TABLE OF AUTHORITIES

	<u>Page</u>
<u>AGENCY CASES:</u>	
<u>Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646 (1981).....</u>	6-9, 11, 13-14, 15, 16, 23, 24, 31, 37
<u>City of Homestead, Florida v. Florida Power & Light Co., Docket No. EL78-28 (November 8, 1979).....</u>	19
<u>Consumers Power Company (Midland Units 1 and 2), ALAB-452, 6 NRC 892 (1977).....</u>	8, 9, 11, 13, 15, 24, 37-38, 47
<u>Florida Cities v. Florida Power & Light Co., FERC Docket No. EL78-4 (June 12, 1978).....</u>	19
<u>Florida Power & Light Co., Opinion No. 517, 37 FPC 544 (1967), reversed, 430 F.2d 1377 (5th Cir. 1970), reversed, Florida Power & Light Co. v. FPC, 404 U.S. 453 (1972)</u>	6, 10, 14
<u>Florida Power & Light Company, Opinion Nos. 57 and 57-A, 32 PUR 4th 313, 340 (1979).....</u>	<u>passim</u>
<u>Florida Power & Light Company, Docket No. ER78-19, et al., "Order Directing the Submission of a Transmission Tariff and Substitution for Individual Rate Schedules" (December 21, 1979).....</u>	10, 21
<u>Florida Power & Light Company, Docket No. ER78-19, et al., "Order Denying Rehearing, Accepting for Filing and Suspending Rate Schedules and Denying Motion for Extension of Time (February 6, 1980).....</u>	10, 21

AGENCY CASES (CONT'D)

Gulf States Utilities Co., Docket No. ER76-816 "Order Approving Settlement Subject to Condition" (October 20, 1978).....	47
Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563 (1979), affirmed, ALAB-574, 11 NRC 7 (1980).....	23
Mississippi Power Co., 45 FPC 269 (1971).....	47
Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, (1977).....	23
Toledo Edison Company (Davis Besse Plant, Units 1, 2, and 3), ALAB-560, 10 NRC 265 (1979).....	8, 14, 15, 24, 37

COURT CASES

Associated Press v. United States, 326 U.S. 1 (1945).....	14
Battle v. Liberty National Life Insurance Co., 483 F.2d 39, (5th Cir. 1974).....	36
Chandler v. Roudebush, 425 U.S. 840 (1976).....	10
City of Anaheim v. Southern California Edison Co., C.D.Cal. No. CV-78-810-MML (May 19, 1981).....	23
City of Mishawaka v. American Electric Power Co., 465 F.Supp. 1320 (D.C. Ind. 1979), modified and remanded, 616 F.2d 976 (7th Cir. 1980).....	22
FPC v. Idaho Power Company, 344 U.S. 17 (1952).....	11

COURT CASES (CONT'D)

<u>Gainesville Utilities Dept. v. Florida</u> <u>Power Corp., 402 U.S. 515 (1972).....</u>	28
<u>Gainesville Utilities Department v.</u> <u>Florida Power & Light Company,</u> <u>573 F.2d 292 (5th Cir.), cert.</u> <u>denied, 439 U.S. 966 (1978).....</u>	<u>passim</u>
<u>Gamco v. Providence Fruit Produce</u> <u>Building, Inc., 194 F.2d 484</u> <u>(1st Cir.), cert. denied, --</u> <u>344 U.S. 817.....</u>	14
<u>Georgia Power Co. v. FPC, 373 F.2d</u> <u>485 (5th Cir. 1967).....</u>	47
<u>Gulf States Utilities v. FPC,</u> <u>411 U.S. 747 (1973).....</u>	22
<u>Jeffrey v. Southwestern Bell,</u> <u>518 F.2d 1129 (5th Cir.</u> <u>1975).....</u>	36
<u>Miller v. New York Produce Exchange,</u> <u>550 F.2d 762 (2d Cir. 1977).....</u>	10
<u>Montana-Dakota Utilities Co. v.</u> <u>Williams Electric Cooperative,</u> <u>263 F.2d 431 (8th Cir. 1959).....</u>	33
<u>Niagara Mohawk Power Corp. v. FPC,</u> <u>379 F.2d 153 (D.C.Cir. 1967).....</u>	11
<u>Northern Pacific R. Co. v. United States,</u> <u>356 U.S. 1 (1958).....</u>	32
<u>Otter Tail Power Co. v. United States,</u> <u>410 U.S. 366 (1973).....</u>	24, 26, 37
<u>Peelers Co. v. Wendt, 260 F.Supp 193</u> <u>(W.D.Wash. 1966).....</u>	36
<u>Penn. Water & Power Co. v. Consolidated</u> <u>Gas Elec. & Power Co., 184 F.2d 431</u> <u>(4th Cir. 1950), cert. denied, 340</u> <u>U.S. 906.....</u>	33-34

COURT CASES (CONT'D)

	Page
<u>Perington Wholesale, Inc. v. Burger</u> <u>King Corp.</u> , 631 F.2d 1369 (10th Cir. 1979).....	32
<u>Radiant Burners v. Peoples Gas Co.</u> , 364 U.S. 656 (1961).....	32
<u>South Carolina Counsel of Milk</u> <u>Producers, Inc. v. Newton</u> , 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966).....	35-36
<u>TV Signal of Aberdeen v. Am. Tel.</u> <u>& Tel.</u> , 617 F.2d 1302 (8th Cir. 1980).....	32-33
<u>United States v. AT&T, 1980-2 Trade Cases</u> ¶63,480 (D.D.C. 1980).....	10
<u>United States v. Consolidated Laundry</u> <u>Corp.</u> , 291 F.2d 563, (2d Cir. 1961).....	32
<u>United States v. Crescent Amusement Co.</u> , 323 U.S. 173 (1944).....	35
<u>United States v. Florida Power</u> <u>Corporation and Tampa Electric</u> <u>Company</u> , CIV No. 68-297-T.....	16
<u>United States v. Griffith</u> , 334 U.S. 100 (1948).....	34-35
<u>United States v. Socony-Vacuum</u> <u>Oil Co.</u> , 310 U.S. 150 (1940).....	32
<u>United States v. Topco Associates</u> , <u>Inc.</u> , 405 U.S. 596 (1972).....	12-13, 32, 47
<u>United States v. Utah Mining and</u> <u>Construction Co.</u> , 384 U.S. 394 (1966).....	23
<u>United States v. Yellow Cab Co.</u> , 332 U.S. 218 (1947).....	35
<u>White Motor Co. v. United States</u> , 332 U.S. 253, 263 (1963).....	12-13

STATUTES

Atomic Energy Act, Section 105(a), 42 U.S.C. §2135(a).....	11-17
Rule 803(8)(c) of the Federal Rules of Evidence.....	10

MISCELLANEOUS

FPC <u>National Power Survey</u> (1970).....	6-7
1 <u>Moore's Federal Practice</u> , 0.60 (Manual for Complex Litigation).....	57
1 <u>Moore's Federal Practice</u> ¶2.80.....	58

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FLORIDA CITIES' RESPONSE TO
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Pursuant to the Board's July 8, 1981 order, Florida
Cities respond to questions 1-3 and 8-11 in Table I.

Question:

- (1) How are these proceedings affected by Gainesville Utilities Department v. Florida Power & Light Company, 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978) and Florida Power & Light Company, Opinion Nos. 57 and 57-A, 32 PUR 4th 313, 340 (Federal Energy Regulatory Commission, 1979)?

Answer:

For reasons explained below, Gainesville and Opinion Nos. 57 and 57-A require a Board finding that Florida Power & Light Company's ("FPL's") proposed ownership and operation of St. Lucie Unit 2 will create or maintain a situation inconsistent with the antitrust laws.

If the Board concludes that it cannot make such a finding of inconsistency with the antitrust laws based upon these decisions alone, it should make such finding based upon these decisions plus additional uncontroverted evidence, which is set forth in Florida Cities' "Motion to Establish Procedures, for a Declaration that a Situation Inconsistent with the Antitrust Laws Presently Exists and for Related Relief" (May 27, 1981, referred to as "Motion to Establish Procedures").

If the Board determines not to make that finding of inconsistency, then the Board should rule that the decisions are determinative as to the following facts and that FPL should be estopped from contending otherwise.

Estoppel As To Facts:

1. FPL controls three out of the four operating nuclear units in Peninsular Florida and is constructing its fourth. Opinion No. 57 (32 PUR 4th at 324,335; Sl. Op. pp. 15, 32). 1/ These units provide FPL with an important source of low-cost power for base load requirements. Opinion No. 57, Id. Municipal generating units characteristically have high operating costs and are ill-suited to provide base load requirements. Id., 32 PUR 4th at 324-5, 330; Sl. Op. pp. 15-16, 24. Except as provided under settlement license conditions in this case, FPL refuses to grant Florida Cities access to its nuclear facilities.

1/ For convenience, Opinion 57 is cited to both PUR and the FERC Slip Opinion. Opinion 57 Slip Opinion page references follow those of PUR.

Id., 32 PUR 4th at 324-325, 335; Sl. Op. pp. 15-16, 32. FPL has otherwise sought to deny municipals economically priced, base load power. Id., pp. 324-325, 334, 339; Sl. Op. pp. 15-16, 32, 38; and passim. Such refusals are substantially detrimental to the municipals and advantage FPL in competition for acquiring and retaining retail service area, Id., pp. 330-331, 335, 339; Sl. Op. pp. 25-26, 32, 38-39; and passim, and in increasing its wholesale monopoly power. Id., p. 330; Sl. Op. p. 24.

2. FPL has (a) dominance over the bulk power market in Peninsular Florida and (b) a monopoly within its retail service area over economic base load generation (including nuclear generation), transmission and coordination, as well as retail and wholesale sales. See Opinion Nos. 57 and 57-A, generally, especially at pp. 314, 324-331, 335; Sl. Op. pp. 2, 15-16, 32. Regardless whether FPL has dominance in Peninsular Florida, it has acted to restrain competition in the bulk power market in Peninsular Florida. Gainesville, supra. It has monopolized the "wholesale bulk geographic" submarket within its retail service area and constrained competition for wholesale transactions across its boundaries. Opinion No. 57, pp. 323, 326-327, 331, 335; Sl. Op. pp. 13, 19, 26-27, 32-33.

3. FPL is the largest electric utility in Florida. It has a retail service monopoly in eastern and southern Florida. Gainesville, 573 F.2d at 294. Opinion No. 57, pp. 323-325; Sl. Op. pp. 13-15. FPL's refusals to deal in nuclear and base load

power, wholesale power, transmission and coordination have advantaged it in competition with other electric systems, helping FPL to preserve and extend its retail and wholesale monopoly. See generally Gainesville and Opinion No. 57, especially Opinion No. 57 at pp. 330-331; Sl. Op. pp. 24, 25-26.

4. FPL has acted to restrict or deny Cities access to base load generation (including nuclear), transmission, wholesale power and coordination. See Gainesville, Opinion No. 57 and positions taken by FPL in this case.

5. FPL owns 81% of the transmission lines in or near its retail service area at 69 KV or above. Jacksonville Electric Authority owns 5%. These are facilities over which bulk power is or may be transported between cities in FPL's retail service area, including cities and other utilities outside such retail service area. FPL's monopoly over transmission within its retail service area gives it strategic dominance over transmission within, to and from Peninsular Florida. Opinion No. 57, p. 325; Sl. Op. p. 16. See Gainesville, 573 F.2d at 294. FPL has used its monopoly power to restrict Cities' access to transmission, Opinion No. 57, pp. 335-336; Sl. Op. pp. 32-33. See p. 333; Sl. Op. pp. 29.

6. FPL was part of a conspiracy with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida. Gainesville, 573 F.2d at 294.

7. FPL and the municipal utilities located within its retail service territory engage in vigorous franchise competition. Gainesville, 573 F.2d at 297-299; Opinion No. 57,

pp. 327-335; Sl. Op. pp. 20-32 and findings at 330-331; Sl. Op. pp. 24-26. At various times FPL has promoted acquisition or willingly received municipal proposals to sell their systems to FPL. Most, if not all, of those incidents occurred when the municipal systems were arranging new bulk power supplies from the options of self-generation, wholesale purchase from FPL and retail purchases from FPL after franchise disposition. Opinion No. 57, p. 330; Sl. Op. p. 24. The Cities were denied the option of sharing in FPL's nuclear or other base load units. Opinion No. 57, pp. 335, 330, n. 37; Sl. Op. pp. 32, 24, n. 37; and passim.

8. FPL has advertised the economic benefits from its base load generation (including nuclear) and its access to economies of scale in all facets of its operation. Such statements were of a nature to induce franchise renewals for FPL or sales of municipal systems to FPL. Opinion No. 57, pp. 331, 339; Sl. Op. pp. 25-26, 38. FPL was aware of municipal needs for economic base load power and access to economies of scale. Opinion No. 57, pp. 329, 330, 333-334, 339; Sl. Op. pp. 22-23, 24, 29-31, 38.

9. FPL's proposed restricted tariff at issue in Docket No. ER78-19 was not economically justified and was anticompetitive. Opinion No. 57-A, p. 1; Opinion No. 57, pp. 314, 336-340; Sl. Op. pp. 2, 34-40.

Estoppel As To Situation Inconsistent:

The ultimate questions before the Board are whether a situation inconsistent with the antitrust laws exists and, if so, the appropriate relief to be ordered.

Florida Cities contend that the following situations inconsistent exist and, absent a remedial order, are likely to continue:

1. Florida Power & Light Company is directly interconnected with the other two, large investor-owned utilities in Peninsular Florida, Florida Power Corporation ("Florida Power") and Tampa Electric Company ("Tampa"). It constructs and operates its generation in the context of coordination and business dealings with these companies. Thus, it benefits economically from the existence of a market in Peninsular Florida in which it can buy and sell firm power and "coordination". 1/ However,

1/ These facts are established conclusively by Florida Power & Light Co., Opinion No. 517, 37 FPC 544 (1967), reversed, 430 F.2d 1377 (5th Cir. 1970), reversed, Florida Power & Light Co. v. FPC, 404 U.S. 453 (1972) and the materials set forth at Motion to Establish Procedures, pp. 24-43, and related appendices. These materials include sworn deposition testimony, legal filings, financial reports, and other public documents. Compare Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646 (p. 38 of Slip Opinion, June 30, 1981), in which the Appeal Board recently reaffirmed the importance of coordination:

"The principles of electric power supply production and coordination are generally applicable throughout the electric utility industry (Mayben, Direct, pp. 3-9). These principles do not vary significantly among electric utilities regardless of differences in locations, although they may change to a certain extent depending on corporate policy and financial requirements (Mayben, Direct pp. 8-9; Tr. 5, 576-5, 586; FPC National Power Survey, Part I, Chapter 17 "Coordination for Reliability and Economy," December 1971)."

Quoting the Farley Licensing Board Decision, LBP-77-24, 5 NRC 804, 834 (1977).

(footnote continued on next page)

by conspiring with Florida Power Corporation to divide the wholesale power market in Peninsular Florida and by its other anticompetitive actions described above, FPL has limited the access of systems such as Cities to competitive power supply.

Further, FPL's current refusals to deal with systems within Florida Power's "territory" perpetuate the artificial barrier established by the territorial division. Smaller systems are impeded in buying and selling power supply, since they are substantially restricted to dealing with systems to which they are directly interconnected. A smaller system directly connected with only Florida Power Corporation is restricted in its dealings with Florida Power & Light and smaller systems surrounded by it; conversely, a smaller system in FPL's retail service area is restricted in transactions with Florida Power and systems surrounded by it. The result is to enhance the economic power of

(footnote continued from previous page):

1/ The 1970 National Power Survey by the Federal Power Commission relied upon in Farley, supra, found that such coordination in Peninsular Florida exists between Florida Power, FPL, Tampa, Jacksonville and Orlando:

"These suppliers, surrounded on three sides by water, subjected to hurricanes and the highest incidence of lightning in the nation, undertake to stand on their own feet and provide their own reserves. They are strongly interconnected and comprise what has come to be known as the Florida Group. In emergencies each supplier aids the Florida system in trouble to the maximum extent of its resources. Notwithstanding the fact that each Florida supplier operates his own system in the most economical manner consistent with its individual requirements and policies, there is a strong recognition of the need to coordinate operating matters."

the larger systems in wholesale and retail markets and to limit the smaller systems to dealing with one principal supplier for many power supply products or services.

2. As Florida's largest electric utility, FPL has a retail and wholesale service monopoly throughout its retail service area, covering a large portion of the state and dominant power over nuclear and base load generation and over transmission in Peninsular Florida. FPL has refused to deal with smaller systems in significant aspects of power supply and services both inside and outside the boundaries of its retail service area with the purpose and result of advantaging itself in wholesale and retail competition. Further, although it benefits from flexible dealings with larger investor-owned utilities to meet the power supply needs of each system, where FPL has dealt with smaller systems, it has done so on a restrictive basis.

In Midland 1/, Davis Besse 2/, and most recently in Farley 3/, the Appeal Board has found that to demonstrate a "situation inconsistent" a licensing board need not find an actual violation of law, although such violation has been found here. Gainesville Utilities Dept. v. Florida Power & Light Co., 573 F.2d 292. The standard for finding liability is set forth at pp. 26-29 of the Farley Opinion.

1/ Consumers Power Company (Midland Units 1 and 2), ALAB-452, 6 NRC 892 (1977).

2/ Toledo Edison Company (Davis Besse Plant, Units 1,2, and 3), ALAB-560, 10 NRC 265 (1979).

3/ Alabama Power Company, supra.

A situation inconsistent results from the existence or likely existence of conditions which are contrary to the policies that underly the antitrust laws. Midland, supra, 6 NRC at 907-914, quoted in Farley, at 27-28. The Gainesville and Federal Energy Regulatory Commission decisions concerning Florida Power & Light compel the conclusion that FPL's conduct has been contrary to the policies underlying those laws. The proposed license conditions that FPL has propounded in this proceeding exclude relief to systems in Florida Power's "territory". They deny such systems rights of access to St. Lucie Unit 2 and wholesale power, perpetuate transmission barriers and contain wholesale power resale restrictions, thereby mandating a conclusion that the market strictures complained of will continue. While FPL will undoubtedly seek to argue that its conduct does not conflict with the antitrust laws based upon narrow distinctions with regard to market definitions or justifications for exclusionary conduct, these are precisely the kinds of arguments that Congress intended to foreclose by requiring that the Commission find whether a situation inconsistent with the antitrust laws exists (as distinguished from an actual law violation). Furthermore, such rationalizations were rejected by the Court in Gainesville and by the Federal Energy Regulatory Commission in Opinion No. 57 and also in Federal Power Commission Opinion No. 517, supra, 37 FPC 544.

The text of both the Gainesville and Federal Energy Regulatory Commission decisions prove the existence of the

situation inconsistent claimed by the Cities. This agency has determined that agency decisions have the force of res judicata and collateral estoppel. See references in "Motion to Establish Procedures", pp. 11-15. 1/ Moreover, Gainesville and the FERC decisions -- and others 2/ -- provide conclusive evidence that FPL is likely to act inconsistently with the antitrust laws.

Moreover, here an actual violation has been found by a Court. This Board must defer to that judicial determination, especially considering that the agency has been held to have the authority and responsibility to treat less than actual violations as justifying license conditions. The agency is even empowered to reopen existing licenses where an actual violation is found.

1/ If estoppel is not applied, the prior findings of administrative agencies are admissible into evidence. See Rule 803(8)(c) of the Federal Rules of Evidence. Miller v. New York Produce Exchange, 550 F.2d 762, 769 (2d Cir. 1977) (Commodity Exchange Authority findings to commodity squeeze admissible); United States v. AT&T, 1980-2 Trade Cases ¶63,480 (D.D.C. 1980) (FCC findings admissible in antitrust suit); see also Chandler v. Roudebush, 425 U.S. 840, 863, n. 39 (1976) (administrative findings as to employment discrimination admissible in statutory trial de novo in federal court).

2/ E.g., Florida Power & Light Company, Opinion No. 517, 37 FPC 544 (1967), reversed 430 F.2d 1377 (5th Cir. 1977), reversed, Florida Power & Light Company v. FPC, 404 U.S. 453 (1972); Florida Power & Light Company, Docket No. ER78-19, et al., "Order Directing the Submission of a Transmission Tariff and Substitution for Individual Rate Schedules" (December 21, 1979); "Order Denying Rehearing, Accepting for Filing and Suspending Rate Schedules and Denying Motion for Extension of Time" (February 6, 1980). FPL has appealed these orders on jurisdictional grounds. Florida Power & Light Co. v. FERC, CA5 Docket No. 80-5259. However, even if FPL is correct that FERC cannot order it to file a transmission tariff, FPL has declined to file a tariff covering non-interchange firm service and resists the directive that it file any transmission tariff. The FERC orders are effective during FPL's appeal.

See Atomic Energy Act, Section 105(a), 42 U.S.C. §2135(a). For the Commission to give less than conclusive determination to the Gainesville case would be an abnegation of agency responsibility.

In Farley, the Appeal Board reiterated that the basis for the Commission's antitrust responsibilities was

" . . . 'a basic Congressional concern over access to power produced by nuclear facilities' and . . . legislative recognition 'that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds [which] should not be permitted to develop into a private monopoly via the [NRC] licensing process'"

Pp. 6-7, quoting Midland, 6 NRC at 897. When FPL receives NRC licenses, it receives valuable grants of the "public domain".

FPC v. Idaho Power Company, 344 U.S. 17 (1952). Where an agency has been granted remedial power to protect against wrongdoing by recipients of certificates or licenses, the justification for use of such power is compelling. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C.Cir. 1967). To paraphrase Judge Leventhal, the breadth of agency power is "at zenith" when a petitioner seeks a license or privilege, but fails to discharge the "duty he should by rights have assumed without nudging." 379 F.2d at 159.

Decisions Giving Rise To Estoppel:

- A. Having Found An Actual Law Violation, Gainesville Mandates a Finding That A "Situation Inconsistent" With the Antitrust Laws Exists.

Gainesville held "that the evidence compels a finding that P&L was part of a conspiracy with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida."

573 F.2d at 294. It also found that such agreement was illegal under the antitrust laws, e.g., 573 F.2d at 299-300, and that the Company's purported justifications, either that no agreement existed or that its refusals to deal were justified could not stand factual scrutiny. 573 F.2d 300-303. Finally, based upon evidence set forth at 573 F.2d 294-299, and elsewhere, the Court found:

" . . . In view of the correspondence on other cities, we believe the treatment Gainesville received compels the inference that a continuing conspiracy existed to divide the market."

There can be no doubt that FPL's actions were inconsistent with the antitrust laws. The Fifth Circuit held:

"A horizontal market division in most industries is clearly a per se violation of the Sherman Act."

573 F.2d at 299.

While the Court implies that a retail agreement could be justified, it applies a per se standard to Florida Power Corp. and FPL's wholesale territorial division. The reasons for such per se application are well established. A seller of goods or services cannot justify price-fixing as pro-competitive. Such actions are naked market restraints. Territorial divisions are also. Indeed, they constitute an extreme form of price-fixing, since there would be no price under which a system in one company's service area could obtain service from the other. 1/

1/ "One of the classic examples of a per se violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal'

As the Fifth Circuit pointed out, 573 F.2d at 302, "the concentration of the electric power industry in Florida" reduced Gainesville's alternatives. Because of the territorial division, the Court finds that these alternatives were limited to one. Id.

While Florida Cities believe that the above is determinative, the Alabama Power decision lends additional support for the conclusion that Gainesville should be decisive here. At pp. 30-31 of the Slip Opinion the Appeal Board sets forth:

"In the electric utility business, there is common practice among the companies of interchanging power and energy and sharing responsibility for building new generation facilities to achieve economic benefits unattainable by an individual utility acting alone. Generally known as "coordination", the practice includes various arrangements among utilities for reserve sharing, emergency exchange of power and energy, economy exchange of power and energy, maintenance scheduling, seasonal capacity exchange, and staggered construction. The simple purpose of these arrangements is to allow producers of firm power to lower their costs of production."
(footnotes deleted).

Referring to the Midland decision "as precedent" (see Slip Opinion at 43), where "it traced in painstaking detail the operations of the electric utility industry", the Board reaffirms its conclusions that:

(footnote continued from previous page):

restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed 'vertical' restraints. This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' White Motor Co. v. United States, 372 U.S. 253, 263 (1963). Such limitations are per se violations of the Sherman Act." United States v. Topco Associates, 405 U.S. 596, 608 (1972).

". . . because of the peculiar characteristics of electricity, utilities buy, sell and exchange surplus bulk power and associated services to improve the efficiency and reliability of their operations. For reasons there discussed, we concluded that there existed a separate coordination services market consisting of these types of transactions."

Slip Opinion, pp. 38-39 at 39.

"Territoriality" prevents or limits access by smaller systems to coordination. Cases such as Associated Press v. United States, 326 U.S. 1 (1945) and Gamco v. Providence Fruit Produce Building, Inc., 194 F.2d 484 (1st Cir.), cert. denied, U.S. 344 817 (1952), as well as the Commission's decision in Toledo Edison Company (Davis Besse Units 1 and 2), ALAB-560, 10 NRC 265 (1979), establish that when companies in the same business act in concert to obtain benefits, while denying such benefits to smaller actual or potential competitors, they act inconsistently with the antitrust laws. E.g., Toledo Edison Co., supra, 10 NRC at 277-278. 1/

1/ For a more detailed discussion of the principle and additional case support, see "Motion to Establish Procedures", pp. 93-99. FPL simply cannot deny that it has acted in a coordinated manner with Florida Power Corporation. The Gainesville case itself establishes cooperative activity, which goes far beyond simple coordination.

Moreover, in 1967, in a case that was ultimately affirmed by the United States Supreme Court, the Federal Power Commission specifically found that FPL, Florida Power Corporation, Tampa Electric Company and others formed the Florida Operating Committee, which it referred to as the "Florida Pool" and that:

"The record in this proceeding makes it plain that FPL received substantial benefits from its participation in the Florida Pool in the coordination of spinning reserves, the arrangement of plant maintenance schedules and the assurance of reliability of frequency control and from both the Florida Pool and ISG in the form of automatic assistance in the case of emergencies."

Florida Power & Light Company, supra, 37 FPC 544, 551-552.

(footnote continued on next page)

In short, the Gainesville decision establishes the fact of a territorial division of "the wholesale power market in Florida". Florida Cities submit this alone is sufficient to constitute a situation inconsistent with the antitrust laws. Moreover, the Farley, Davis-Besse and Midland decisions establish that denial of access to smaller systems to the benefits of coordination is inconsistent with antitrust policy. By its nature, the territorial division found in Gainesville blocked access by smaller systems to coordination.

FPL may perhaps argue that the passage of time, intervening causes or the like should vitiate the Gainesville Court's finding. Antitrust violators have often argued the possibility of their reform, coupled with their having taken calculated steps in that direction. Such arguments should be rejected. See Midland, supra, 6 NRC at 1044-1046. The law violation found in Gainesville during the pendency of this case compels a finding by the Nuclear Regulatory Commission that a situation inconsistent exists and FPL ought not to be able to avoid the impact of such

(footnote continued from previous page):

The above finding is confirmed by FPL's present membership in the Florida Electric Coordinating Group ("FCG"), bilateral coordination contracts on file with the Federal Energy Regulatory Commission, deposition and affidavit testimony and repeated public statements of the Company. These are set forth in the "Motion to Establish Procedures" pp. 24-43.

finding any more than it could argue that a Board finding that a situation inconsistent exists ought to be given no effect. 1/ See Farley, supra, pp. 135-140 of Slip Opinion, discussing the remedial purpose of Section 105.

Moreover, whatever possibilities may be open for companies to argue their reform in other contexts, we have shown the Board testimony by FPL's Chief Executive Officer that the Company has no program to assure compliance with the antitrust laws and, indeed, that it rejects the correctness of the Fifth Circuit's decision. 2/ Where a company brazenly takes the position that judicial findings against it were incorrect, it is hardly in the position to plead repentance.

While FPL may argue that the antitrust "conspiracy" found in the Gainesville case has terminated because of the withdrawal of Florida Power Corporation or otherwise, as the Gainesville decision itself demonstrates, and as we discuss more fully above, the evil of the territorial division was that it restricted municipalities in FPL or Florida Power's service area to one potential source of supply. 3/ Through restraining peninsular-wide dealings in wholesale power supply, FPL continues

1/ To contend otherwise merely permits FPL to benefit from delays in the legal process. Compare Gainesville, supra, 573 F.2d at 293.

2/ Attachment B to "Florida Cities' Answer to 'Motion of Florida Power & Light Company for Declaratory Order" (July 27, 1981).

2/ Significantly, in the Florida Power-Tampa Electric territorial case, the applicable consent decree restricted the parties from agreeing to or enforcing territorial or market limitations in the sale or resale of bulk power. See, United States v. Florida Power Corporation and Tampa Electric Company, CIV No. 68-297-T cited at Motion to Establish Procedures, p. 19.

to advantage itself in competition for retail and wholesale sales and power supply. 1/

Arguments as to the cessation of the conspiracy at least under the Section 105 "situation inconsistent" standard must be foreclosed because FPL continues the evil. Indeed, the major focal point of this continued litigation is FPL's continued refusal to deal with smaller systems outside its retail service area. By contrast, Florida Power Corporation offered Crystal River to utilities throughout Peninsular Florida. 2/ However, FPL limited the offerings of St. Lucie Unit 2 to systems in or near its own retail service area. Under the St. Lucie 2 license conditions FPL not only refuses to offer wholesale power to systems outside its retail service area, but imposes resale restrictions

1/ The Federal Energy Regulatory Commission found in Opinion No. 57, both that FPL had monopoly power over a retail service area and "over bulk power transactions as well" within its retail area. Opinion No. 57, 32 PUR 4th at 322, 324; Sl. Op. pp. 13, 15. The Commission further found, p. 327, Sl. Op. pp. 20. "The record is richly detailed with evidence of retail competition to serve entire communities between FPL and existing municipal systems". Finally, it found that through its "wholesale sales policies", it could increase its retail and wholesale monopoly power (Id., p. 331, 330; Sl. Op. pp. 26, 24, and generally) and, indeed, that FPL had specifically compared the rates of municipal utilities throughout Florida in a recent franchise renewal campaign. Id., p. 331; Sl. Op. pp. 25-26. In concluding that FPL's proffered restrictions on the sale of wholesale power were anti-competitive, FERC found: "Of even greater importance to the Company [than encouraging acquisitions] would be the assurance that in future franchise renewal contests with potential retail market entrants, it could point to existing municipal utilities as characteristically expensive and unable to exploit scale economies". Id., p. 339; Sl. Op. p. 38.

2/ If summary disposition is not ordered, Florida Cities will show that FPL's transmission and other policies made this offer largely ineffective for Cities within FPL's service area.

that could limit the resale of such power to systems within Florida Power's area. In short, the Company absolutely refuses to deal with these systems in nuclear power, firm power, or base-load power services, thereby severely limiting competition for power supply. 1/

- B. Opinion No. 57 Separately Establishes The Existence Of A "Situation Inconsistent" With The Antitrust Laws.

Opinion No. 57 both reinforces the applicability of Gainesville in compelling a finding that a situation inconsistent exists and provides independent grounds for such finding.

1/ Because of its direct interconnections with Florida Power Corporation and Tampa Electric Company, FPL can buy and sell power without paying additional transmission charges. It refuses to agree to reciprocal transmission rights, should the Cities construct transmission and none are provided for in the license conditions. The effect of the dual transmission system or double rate is to give FPL a market advantage in buying and selling power of any sort with systems to which it is directly interconnected and to give Florida Power the same, thereby reinforcing territoriality. For example, if Homestead, located in or near Florida Power & Light's retail service area, wants to purchase or sell economy exchange, where FPL and Florida Power have the same generation costs, it will always be cheaper for Homestead to deal with FPL. If Tallahassee, a municipal near Florida Power Corporation's retail service area, has the same costs, Tallahassee will be doubly disadvantaged in dealing with Homestead, since a transmission charge must be paid to both FPL and Florida Power Corporation. Thus, Tampa Electric, Florida Power and Florida Power & Light are always at an advantage dealing with each other; municipals are always at an advantage dealing with the major supplier to which they are directly interconnected. A market for power sales and purchases from plants throughout the entire peninsula of Florida has been created under which the municipals are at a permanent disadvantage.

Opinion No. 57 found that proposed tariff restrictions of FPL "would eliminate the only practical source of base-load power or energy to competing utilities within the markets dominated by the Company" ^{1/} that such restrictions would "create the potential for additional anticompetitive effects by inhibiting the formation of new distribution utilities within these markets", that FPL's reasons for refusing to deal were unsupported, Id., pp. 336-338; that FPL "failed to satisfactorily demonstrate countervailing public interests to warrant the approval of any of these [restrictive wholesale and coordination] proposals" (32 PUR 4th, p. 314; Sl. Op. p. 2), and in general, that "FPL's proposals were unjust and unreasonable under Sections 205 and 206 of the Federal Power Act, particularly because of their anticompetitive effects." Opinion No. 57-A, p. 1 (emphasis supplied).

^{1/} When it commenced proceedings in Docket No. ER78-19, et al., which led to Opinion No. 57, the Commission initiated an Investigation to determine whether in refusing to sell wholesale power to Ft. Pierce, FPL had violated its tariff obligations and the Federal Power Act. "Order to Show Cause", Florida Cities v. Florida Power & Light Co., FERC Docket No. EL78-4 (June 12, 1978). A Staff Investigation Report found that FPL had refused to serve Ft. Pierce and that such refusals violated its filed SR-1 tariff and Section 205 of the Federal Power Act and that FPL's defenses were "not viable" (Report, pp. 1-2, April 7, 1978). The Commission also consolidated a case concerning FPL's proposed cancellation of firm partial requirements service to Homestead. Following the Commission's finding as to the illegality of the proposed tariff availability restrictions, the other dockets were also terminated. E.g., see Opinion No. 57, pp. 40, 41. City of Homestead, Florida v. Florida Power & Light Co., Docket No. EL78-28 (November 8, 1979); "Order Terminating Proceeding", Florida Cities v. Florida Power & Light, supra (November 8, 1979).

The significance of Opinion No. 57 is not merely its holding that FPL's proposed refusals to deal were illegal, but its thorough review of FPL's conduct over a number of years in light of industry requirements and practices. The Commission made specific findings that FPL possessed monopoly power, pp. 323-325; Sl. Op. pp. 13-16; that its territorial allocations provided an effective barrier to new retail competition, p. 324; Sl. Op. p. 14; and that the absence of wheeling would reinforce barriers to retail competition, even where potential customers overcome the effects of the territorial allocations or the substantial cost of acquiring utility property at the expiration of franchises, Id., p. 324; Sl. Op. p. 14; that FPL controlled three of the four operating nuclear plants in the state and that its nuclear generating capacity and "substantially all of the gas-fired generation available within the relevant market, each of which give the Company a significant edge in the production of low-cost power for base load requirements," Id., p. 324; Sl. Op. p. 15; and that FPL has a "strategic dominance" over transmission. Id., p. 325; Sl. Op. pp. 16.

The Commission also found that "[t]he record is richly detailed with evidence of retail competition to serve entire communities between FPL and existing municipal systems". Id., p. 327; Sl. Op. p. 20. It detailed FPL's acquisition efforts, pp. 327-330; Sl. Op. pp. 20-24. It found, in part based upon testimony by FPL, that self-generation by municipals is becoming less

economically attractive, that FPL controls municipals' remaining bulk power options in or near its monopoly service area and that FPL had "constrained" and "inhibited" competition in the wholesale bulk power market. Id., p. 323, 327; Sl. Op. pp. 13, 19-20.

The Commission also finds, "Unrebutted Company documents in evidence indicate that it is FPL's policy to retain full ownership of the nuclear generating plants which it constructs,"; that FPL has not filed a tariff providing for firm transmission services and that its filings limited the availability of transmission. Id., p. 335; Sl. Op. pp. 32-33. 1/

The Commission finds (p. 314; Sl. Op. p. 2):

"On the basis of our analysis of the record before us, we conclude that FP&L's proposed tariff restrictions would eliminate the only practical source of base-load power or energy to competing utilities within the markets dominated by the Company."

The Commission also finds (p. 339, 40):

1/ In its "Order Directing the Submission of a Transmission Tariff", supra, and its "Order Denying Rehearing", supra, FPL was ordered by FERC to file its transmission policies in tariff form. On rehearing, FPL sought to limit the filing to transmission for interchange service. The Commission stated:

"Our order required FP&L to consolidate its numerous rate schedules into a single tariff for interchange transmission services, and include therein its statement of company policy on wheeling availability. The order did not purport to interpret FP&L's policy. That policy may encompass more than interchange services; however, FP&L itself must clarify any ambiguities by delimiting its scope."

FPL still has not filed a firm transmission tariff.

"The proposed restrictive provisions are anticompetitive, we find no countervailing reasons for their implementation, and they are to be deleted." 1/

It also concludes (p. 339; Sl. Op. p. 39) that:

"The restriction of wholesale service to named and existing customers is an even greater threat to potential franchise competition. . . The signal to potential retail distributors in areas presently served by FPL at retail and over which FPL has wholesale monopoly power is quite clear. Cf. City of Mishawaka v. American Electric Power Co., supra.

There is a disclaimer at p. 315, Sl. Op. p. 3, of Opinion 57 that the Commission is not attempting to determine factual issues which may be the subject of litigation in other forums. Further, the Commission does not purport to find a violation of the antitrust laws themselves. Id. However, these disclaimers notwithstanding, the Commission specifically looks to FPL's past conduct and applies classic antitrust analysis to determine whether FPL's proposed restrictions in the sale of power are justified; it examines whether FPL's specific conduct has "anticompetitive effects". Id. 2/ The Commission finds that the Company's "record of past conduct cast a shadow over FPL's claimed need to restrict service." Further, in response to the Company's request in its application for rehearing for a declaration that the decision was decided solely under the Federal Power

1/ It finds the proposed cancellation of service to Homestead violative of the understanding of the parties. Id. See p. 1(), n. 1, supra.

2/ The Commission recognizes an obligation under the Federal Power Act to consider antitrust law and policies. E.g., Gulf States Utilities v. FPC, 411 U.S. 747 (1973) cited at Decision, p. 315, Sl. Op. p. 2.

Act, perhaps an attempt by FPL to avoid a collateral estoppel effect, the Commission states that illegality is found "under the standards of Section 205 and 206 of the Federal Power Act, particularly because of their anticompetitive effects." Id.

(Emphasis supplied.)

Courts give conclusive weight to a carefully determined agency decision. E.g., City of Anaheim v. Southern California Edison Co., C.D.Cal. No. CV-78-810-MML (May 19, 1981). As is set forth in Florida Cities' "Motion to Establish Procedures", p. 12, the Supreme Court has approved giving determinative weight to administrative agency decisions. United States v. Utah Mining and Construction Co., 384 U.S. 394, 422 (1966). This Commission has acted similarly. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 70 (1977). It is of course for this agency 1/ and not the Federal Energy Regulatory Commission to determine the collateral estoppel effect that will be given Opinion No. 57, and there is every reason to give it binding effect here. 2/

Moreover, if as Farley reaffirms, the question is not whether FPL has violated the law, but whether a situation inconsistent with the antitrust laws is likely to be "created or maintained" by the grant of the NRC license, Opinion No. 57 must

1/ Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 573 (1979), affirmed, ALAB-574, 11 NRC 7 (1980).

2/ See supra, p. 10.

be conclusive. As an agency expert to make such determination, the Federal Energy Regulatory Commission has determined that FPL's control of base load generating units, including nuclear, and transmission gives it dominant economic power, that without appropriate access the smaller systems' competitive opportunities will be impeded and that FPL has acted to achieve such competitive restraints. Indeed, the Company's proposed tariff itself shows a clear desire to restrict municipal access to bulk power supply, provided it can achieve such result. Thus, the filing, as well as the FERC opinion holding the filing illegal, establishes the likelihood that, if permitted, FPL will act to restrict such power supply in the future.

The FERC decision is especially compelling when read in the context of the standards established by Midland and Davis-Besse, and recently confirmed by Farley. Supra, pp. 109-111 of Slip Opinion. Where a company has monopoly power, it cannot justify conduct, such as refusals to deal:

" . . . designed to preserve or enhance its dominant position in the competitive market. At the very least, if not a violation of the antitrust laws, such conduct runs counter to the policies underlying those laws."

In light of Farley, there can be no doubt that the conduct found in Opinion Nos. 57 and 57-A meets the tests of Section 105 for remedial relief. Accord, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

C. Gainesville and Opinion No. 57 Can Be Relied Upon In Support Of Summary Disposition.

Even if the above decisions were not deemed sufficient on their own to compel summary disposition here, as is stated in Florida Cities' "Motion to Establish Procedures", these decisions must be given binding effect in light of abundant additional evidence, which is consistent with Gainesville and Opinion No. 57 and which confirms a situation inconsistent with the antitrust laws exists, thereby justifying summary disposition in this case. As we have stated, such material is of the type that the Fifth Circuit found conclusive in Gainesville, supra, where the Court ruled as a matter of law without remand that there had been a violation of the antitrust laws. And, as has been discussed, the settlement offer in this case itself constitutes a refusal to deal with outside cities.

Furthermore, as we have explained above, in spite of orders by the Federal Energy Regulatory Commission in Docket No. ER78-19 that FPL file a tariff stating its transmission policies, FPL has filed no firm transmission service tariff. "Motion to Establish Procedures", pp. 63-64. In License Condition IX, FPL would reduce wholesale power availability if a system uses FPL's transmission facilities to acquire alternative power supply or if it purchases access in a nuclear unit. "Motion to Establish Procedures", pp. 55-56. And, indeed, in its most recent acquisition attempt relating to Vero Beach, the Company

itself filed with the Federal Energy Regulatory Commission a report prepared for Vero Beach, which sets forth the alternatives to Vero Beach's sale of the electric system and states that wheeling options (and therefore alternative power supply) were not available. "Motion to Establish Procedures", p. 57. Compare Otter Tail Power Co. v. United States. 1/ The Cities have presented abundant other evidence of FPL's continuing anticompetitive conduct. "Motion to Establish Procedures," passim.

* * * *

In conclusion, Gainesville and Florida Power & Light hold that FPL has acted illegally and anticompetitively. The decisions themselves justify a finding that the activities under St. Lucie 2 sill create or maintain a "situation inconsistent" with the antitrust laws. They are further confirmed by contemporaneous and subsequent refusals to deal by the Company, including the settlement license conditions.

1/ FPL's Vice President, Robert J. Gardner, has indicated a continued interest on the part of the Company in acquiring the Vero Beach electric system. See Attachment C to "Florida Cities' Answer to Motion of Florida Power & Light Company for Declaratory Order, or in the Alternative, to Dismiss Florida Cities from the Proceeding" (July 27, 1981). Florida Cities rely upon the evidence set forth in their May 27, 1981 Motion to Establish Procedures, including the public statements of FPL in conjunction with its acquisition attempt. They respectfully move to incorporate by reference Mr. Gardner's statement to the Vero Beach Commission, which is Attachment C to "Florida Cities' Answer", supra. This statement confirms the correctness of the statement of Commissioner Gregg of Vero Beach at Appendix D113, "Motion to Establish Procedures":

"Should in the future the climate for regulatory approval change, it shall be the intent of both parties to re-initiate dicussions [of FPL's takeover of the Vero Beach system]".

Question:

- (2) Should the market definitions contained in Gainesville and Florida Power & Light bind us in this proceeding? (See FERC memorandum opinion at 11-13).

Answer:

The market definitions contained in Gainesville and Florida Power & Light are binding against FPL. However, they do not preclude consideration of additional markets in which situations inconsistent with the antitrust laws may exist.

Gainesville On Markets:

The Court finds a conspiracy "to divide a wholesale power market in Florida." 573 F.2d at 294. Gainesville finds a Section 1 violation. To the extent that a product market was found it is "wholesale power". Id.

The geographic extent of the conspiracy is the combined service area of Florida Power & Light and Florida Power. Thus, at 573 F.2d 302 the Court refers to "the concentration of the electric power industry in Florida". At p. 303, the Court states: "but when only two companies dominate a market, it is unlikely that any formal agreement is needed or would be risked." The context makes plain that the Court considered the area of foreclosure the combined territories of Florida Power & Light and Florida Power.

The illegal action was the refusal to deal in wholesale power 1/ by FPL throughout Florida Power Corporation's "territory" and vice-versa. The Court uses the term "in Florida", but the context is FPL and Florida Power Corporation's service area.

Gainesville also refers to a separate, more limited area, stating FPL "operates generally in the eastern and southern parts of Florida from Jacksonville in the north to the Miami area in the south. P&L serves two cities on the eastern edge of Alachua County." 573 F.2d at 294. 2/

Florida Power & Light Company FERC Decision On Markets:

Opinion 57 finds a retail market and a bulk power product market, which is divided into "discrete firm requirements and coordination markets." Decision, p. 321; Sl. Op. p. 11. However, the decision recognizes and "does not dispute" the validity of further subdivisions of the firm requirements and coordination submarkets, but uses a broader product market division as more practical "for purposes of this proceeding."

1/ By "wholesale power" the Court obviously means transactions among utilities, distinguishing them from retail sales. Thus, at p. 294 the Court states:

"This case grew out of Gainesville's long struggle to obtain an interconnection for its electric system with either of these two power companies."

Then it quotes Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1972), describing the importance of an interconnection in reducing the need for reserve generating capacity and the sale of deficiency energy.

2/ The case plainly treats Cities such as Orlando and Lake Helen as outside FPL's "territory". 573 F.2d at 298. This is not, of course, inherent, but a recognition that such cities were outside the "territory" assigned to FPL in the market division.

At pp. 321-325; Sl. Op. pp. 11-16, 321, approving the testimony of the Staff economic witness (which is provided with exhibits cited by Opinion 57, for the Board's reference), the Commission finds a retail market that follows the retail service area of Florida Power & Light, but excludes the "service territories of larger bordering utilities." Decision, p. 322; Sl. Op. pp. 12. 1/

In Opinion No. 57, 32 PUR 4th at p. 323; Sl. Op. p. 13, FPL's bulk power monopoly is defined as coextensive with the retail market. 2/ This bulk power market or submarket is characterized by the FERC as "similarly constrained because relatively few wholesale transactions are made across its boundaries." This is attributed to "wholesale territorial agreements and the absence of firm power transmission services." A potential for competition in the wholesale market is recognized, but the Commission finds that "actual competition had been inhibited by FPL."

1/ Municipalities near FPL's retail service area are included. Thus, there is a slightly larger retail market found in Opinion No. 57 than in Gainesville, supra. The Gainesville definition of FPL's retail market is limited by FPL's territorial agreements. As is explained in Opinion 57, the neighboring territories of larger investor-owned utilities are excluded because of retail territorial agreements approved by the Florida Public Service Commission and the unavailability of wheeling, but certain nearby systems are included. Opinion No. 57, p. 322, n. 12; Sl. Op. p. 12, n. 12. Compare, Gainesville, supra, 573 F.2d at 299.

2/ This wholesale rate case included intervention only by municipal or rural electric utilities in this geographic market. Opinion No. 57, p. 316, n. 2-3; Sl. Op. p. 4, n. 2-3.

While broader product markets are used, at p. 335; Sl. Op. p. 32, as we have stated before, the Commission also finds that FPL is the sole owner of three operating nuclear plants and principal owner of a fourth. A similar finding is made at p. 324; Sl. Op. p. 15.

"Three of the four operating nuclear plants in the State of Florida are solely owned by FPL (Tr. 588, 1625)."

The Commission finds at p. 325; Sl. Op. p. 16, "that FPL owns 81% of the transmission lines within the relevant market with operating voltages of 69 Kv or above" and that "FPL's ownership share gives it 'strategic dominance' over transmission."

The Commission concluded that the Company's exercise of control of generation and transmission has sufficiently restricted sources of base load wholesale capacity so as to impede the Cities in competition.

Summary Of Findings Concerning Market:

Based upon the above, Florida Cities submit that Gainesville and Florida Power & Light establish:

(1) that FPL has monopoly power over a retail market for the sale of electricity;

(2) that FPL has monopoly power over firm wholesale and coordination power in the same geographic market;

(3) that FPL has a transmission monopoly in its retail area of service;

(4) that FPL controls sources of "base-load wholesale capacity" in the same geographic market (Opinion No. 57, p. 339; Sl. Op. p. 38);

(5) that FPL "has monopoly power over bulk power transactions" in the same geographic market (Opinion No. 57, p. 324; Sl. Op. p. 15;

(6) that FPL possesses monopoly power over firm wholesale sales in the same geographic market;

(7) that FPL has a nuclear monopoly in the combined service areas of Florida Power & Light and Florida Power Corporation;

(8) that FPL has "constrained" the wholesale bulk geographic market (Opinion No. 57, p. 323; Sl. Op. p. 13), which includes the "firm requirements and coordination submarket". (Id., p. 321; Sl. Op. p. 11). 1/

Legal Implications Of Market Findings:

The market definitions contained in Gainesville and Opinion No. 57 establish FPL's monopoly power over a relevant market for municipals in or near FPL's retail service monopoly area.

1/ Further, Farley, pp. 30-51, supra, confirms the appropriateness of a "coordination services" and firm wholesale market as reflecting trade realities.

By the same token, the market definitions in Gainesville and Florida Power & Light require judgment in favor of all Florida Cities (not only cities in or near FPL's retail service area), assuming acceptance of those decisions with regard to FPL's restrictive conduct.

FPL has been found to have entered into an illegal wholesale market division. "No proof of relevant market is required under Section 1 [of the Sherman Act] where a per se violation is established." TV Signal of Aberdeen v. Am. Tel. & Tel., 617 F.2d 1302, 1309, n. 8, (8th Cir. 1980), citing United States v. Topco Associates, Inc., 405 U.S. 596 (1972) and Radiant Burners v. Peoples Gas Co., 364 U.S. 656 (1961). As the Topco Court explained, per se violations are so invidious that further judicial inquiry into the relevant (geographic and product) markets is unnecessary and often fruitless. 405 U.S. at 607, quoting Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958) (preferential tying arrangements per se unreasonable). See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210, 224-228 (1940) (price fixing unreasonable per se, without regard to power of the conspirators to control the market). 1/

1/ Similarly, market definitions need not be proved in Section 2 conspiracies to monopolize. E.g., Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1376-77 (10th Cir. 1979); United States v. Consolidated Laundry Corp., 291 F.2d 563, 573 (2d Cir. 1961).

A Section 1 per se violation has as its very purpose trade restraints and is by definition inconsistent with the antitrust laws. It is for this reason that proof of market is not required. 1/ Of course, FPL does not and cannot deny that it has direct "coordination" dealings with Florida Power Corporation, whose geographic scope would economically and electrically include municipal entities in the Florida Cities' group that are not within FPL's retail service area. The geographic scope of the Florida Electric Coordinating Group ("FCG"), which includes utilities throughout Peninsular Florida, precludes arguments that FPL's business transactions are confined to a more limited area, except of course to the extent that it constrains the market in its dealings with the Cities. 2/

1/ "[A] per se violation is conclusively presumed to be unreasonable, and hence illegality does not depend on a showing of the unreasonableness of the practice and it is unnecessary to have a trial to show the nature, extent, and degree of its market effect." TV Signal Co. of Aberdeen v. Am. Tel. & Tel., *supra*, 617 F.2d at 1312, n. 3 (concurring opinion), quoting 54 Am. Jur. 2d Monopolies §32 (1971).

2/ The Gainesville court (at 573 F.2d at 300) relies upon Montana-Dakota Utilities Co. v. Williams Electric Cooperative, 263 F.2d 431 (8th Cir. 1959) and Pennsylvania Water & Power Co. v. Consolidated Gas Electric & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 for the proposition that "contracts between utility companies [that] provide for territorial divisions are per se Sherman Act violations". These cases support the conclusion that the territorial division found in Gainesville either establishes a market definition that includes cities located in Florida Power Corporation's area or eliminates the need for such definition. Indeed, Montana-Dakota holds that where a territorial division has been found, competitive injury need not be established. Pennsylvania Water & Power generally condemns a contract which prevents a utility from dealing at wholesale with other electric utilities. The Fifth Circuit specifically found that "the concentration of the electric power

(footnote continued on next page)

Thus, a finding of a territorial division in wholesale power by the Fifth Circuit and of territorial constraints by the Federal Energy Regulatory Commission establish the right of all Florida Cities to the benefit of corrective license conditions. 1/

The inconsistency with the antitrust laws -- FPL's refusals to deal with Florida Cities in the context of the markets found in Gainesville and Florida Power & Light -- is confirmed by United States v. Griffith, 334 U.S. 100 (1948). Griffith owned movie houses. It had a monopoly in some towns, but faced competitors in other towns. Griffith conspired and contracted with various film distribution companies to give itself preferential runs, thereby strengthening its power in its monopoly towns, threatening to extend its monopoly to other towns, and otherwise disadvantaging competitors in the remaining towns. The Supreme Court held that Griffith's use of its monopoly power to extend its control into related markets constituted violations of Section 1 and 2 of the Act.

(footnote continued from previous page)

industry in Florida supports our holding that a conspiracy to divide the market existed", and the Court adverted to the power supply alternatives as being limited because of such market division. 573 F.2d at 302. Given the already highly monopolized nature of the electric power industry in Florida, refusals to deal with adjacent power companies outside FPL's "retail" service area severely limit the market. Failure to find that such actions are inconsistent with the antitrust laws would severely undercut, if not totally vitiate Penn Water, *supra*. Such assertedly "unilateral" refusals to deal effectively create the kinds of territorial barriers which would be outlawed by agreement. Further, refusals to deal by utilities outside their retail service area where a territorial division had been found are not only themselves "inconsistent" with the antitrust laws, but would continue past illegal conduct.

1/ See "Motion to Establish Procedures", pp. 20-43, esp. at 22-23, 40-43.

As Opinion No. 57 establishes, FPL has used its dominance over base load power sources and transmission facilities to restrict coordination and power supply access of the municipal systems located within its geographic monopoly area. (E.g., 314, 322-323, 325, 335-336, 339-340; Sl. Op. pp. 2, 12-13, 16, 32-33, 38-40). Such actions restrain competitive opportunities, including access to power supply, by municipals both within and without its monopoly area. Under Griffith, FPL is legally responsible for this effect of its actions both inside and outside its monopoly service area. Accord, United States v. Crescent Amusement Co., 323 U.S. 173 (1944). And under United States v. Yellow Cab Co., 332 U.S. 218, 224-228 (1947), the area of trade restraint under Section 1 and Section 2 conspiracies to monopolize are coextensive with the tainted operations of the conspirators, regardless of the amount of commerce affected.

The case law makes plain that antitrust liability arises for injuries within the natural target area of antitrust violations. Thus, assuming that cities in Florida Power Corporation's service area are found outside FPL's retail or wholesale monopoly market area (setting aside the constraints which FPL has created), the cities in Florida Power Corporation's service area are still within the target area of FPL's antitrust violations and are entitled to relief. For example, South Carolina Counsel of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934 (1966), the complaint alleged that grocery store owners had engaged in a horizontal conspiracy

to monopolize the grocery business by entering the milk processing business and selling the milk in their stores at loss leader prices, forcing the plaintiff's raw milk suppliers to sell at very low prices. The Fourth Circuit refused to dismiss the complaint, holding that the defendants were potentially liable under Sections 1 and 2 of the Sherman Act for the consequent injury to raw milk suppliers, who are not in the grocery business or milk processing business. 1/

"If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under Section 4 [of the Clayton Act]. 360 F.2d at 418. (Cited approvingly in Jeffrey v. Southwestern Bell, 518, F.2d 1129, 1131 (5th Cir. 1975); Battle v. Liberty National Life Insurance Co., 483 F.2d 39, 49 (5th Cir. 1974).)

Question:

- (3) Is it necessary in this proceeding to determine whether there is a separate market for nuclear power?

Answer:

No. However, such proof would be sufficient to establish a "situation inconsistent". Should hearings be necessary, Florida Cities will seek to demonstrate such market. Florida Cities again note that in Opinion 57, the Commission found:

1/ Similarly, in Peelers Co. v. Wendt, 260 F.Supp 193 (W.D.Wash. 1966), the holder of a shrimp peeling process patent was held liable under Section 2 of the Sherman Act for the discriminatory pricing of the right to use the shrimp peeling process, even though the injured shrimp canners were not directly in competition with the patent holder. Here, there is clearly competition for coordination services.

" . . . [I]t is clear that the Company has monopoly power over bulk power transactions as well . . . Moreover, included in FPL's bulk power resources are virtually all of the nuclear generating capacity and substantially all of the gas-fired generation available within the relevant market, each of which give the Company a significant edge in the production of low-cost power for base load requirements. Three of the four operating nuclear plants in the State of Florida are solely owned by FPL . . ." Id., p. 324; Sl. Op. p. 15. Accord, p. 335; Sl. Op. pp. 32.

and found that:

" . . . joint ownership of such facilities would provide municipal and cooperative utilities (as well as other utilities in the region) with access to FPL's economies of scale. . . ." Id.

These findings provide a basis for determining that such a separate market exists, which FPL monopolizes or, at minimum, dominates. Compare Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

In Midland, Davis-Besse and Farley, relief was ordered, including access to nuclear facilities, without finding a separate market for nuclear power. As is set forth in those cases, nuclear power affords a source of economic base load generation, which is used in conjunction with a utility's other generation and transmission. The licensing of nuclear units adds to a utility's economic power, which can be used to disadvantage smaller systems. If such economic power is or will likely be used anticompetitively, that constitutes grounds for relief granting nuclear access. As the Appeal Board states in Midland:

Consumers' denial of access to nuclear power from Midland completes the circle foreclosing the small systems from economical generation. Their inability to obtain that access increases their power production costs, and this in turn enhances Consumers' competitive position at both the wholesale and retail levels. In the circumstances of this case, therefore, Consumers' refusal to allow participation by the small utilities in Midland will have an anticompetitive effect in the relevant retail and wholesale markets when Midland comes on line, and Consumers' monopoly position in those markets will be enhanced commensurately.

The nuclear industry originated as a government monopoly developed in great measure with public funds. Section 105c reflects 'a basic Congressional concern over access to power produced by nuclear facilities' and legislative intent that nuclear power not be used as a tool to further the monopolization of electric generation. Waterford, supra, fn. 5. The record in this case reveals that Consumers' refusal to allow the small utilities access to Midland is part and parcel of its monopolization of electric generation within the relevant geographic market. That refusal thus falls within the proscriptions of Section 2 of the Sherman Act and is counter to antitrust law and policy."

Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892, 1079-1085 (1977, footnotes omitted).

Like Consumers, FPL is advantaged by arrangements with other systems which aid it in its operation of nuclear units. Indeed, FPL will benefit financially from the sale of participation shares to others. 6 NRC at 1083. Therefore, it is not necessary to establish a separate nuclear product market, although Florida Cities will do so if summary disposition is denied.

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Questions (4)-(7) are inapplicable to Florida Cities.

Question:

- (8) Specifically, what additional relief does Cities seek?

Answer:

Florida Cities set forth below specific requested changes to the license conditions that have been approved by the Board, subject to Cities' right to seek additional relief. "Memorandum and Order" (April 27, 1981). It is of benefit to Florida Cities to resolve remaining issues without protracted hearings. Therefore, they are willing to accept less relief now than they would argue for in hearing. Where this is the case, they so indicate.

The principal additional relief sought by Florida Cities is:

1. License condition rights (as modified below) should be extended to all interveners in Peninsular Florida, including all Florida Cities hereby represented, and not geographically limited to the entities listed in License Condition I.
2. Transmission services should be made available in accordance with tariffs to be filed at the Federal Energy Regulatory Commission. Transmission investments by Florida Cities should be recognized by FPL on a peninsular-wide reciprocal basis in establishing transmission rates. FPL should be barred from opposing transmission in Peninsular Florida on either a regional investment-recognition basis 1/ or joint rate basis.

1/ Such as the Florida Municipal Power Agency proposal, which has been made to FPL and is provided. Attachment 10.

3. FPL should be required to offer Florida Cities access to FPL's operating nuclear units on a load ratio basis either through participation at investment cost or through unit power sales, at FPL's option. However, Florida Cities would accept an alternative license condition, if ordered or agreed to now, providing for FPL's sale of either reserved or unreserved base load power at Cities' option, on an annual contract basis. Such power should be made available by FPL for at least ten years in duration, although Cities could designate shorter periods. The power would be limited to the load ratio equivalent of Florida Cities' participation in FPL's operating nuclear units. Such power would be priced at the average capacity cost for such base load units planned to meet base load requirements on the FPL system for such year, including such firm annual base load power sales. Energy will be priced at the average fuel cost plus appropriate variable operation and maintenance costs from all units actually scheduled to supply base load requirements on the FPL system, including such firm annual base load power sales.

The following set forth the specific proposed changes to the effective license conditions that Florida Cities propose:

I. DEFINITIONS

(a) "Applicable area" should include all of Peninsular Florida.

Explanation: For most purposes, the "applicable area" comprehends entities which are entitled to the benefit of license conditions. Since a major part of the "situation inconsistent" relates to actions by FPL that have had the effect of limiting power supply rights and opportunities of smaller systems throughout Peninsular Florida, including the wholesale territorial agreement found by the Fifth Circuit in the Gainesville case, the "applicable area" should cover Peninsular Florida.

(b) Acceptable.

(c) Add the words "directly or indirectly" to (c)(1) after the clause "technically feasible of interconnection with those of the Company". Add the words "in Peninsular Florida" after "facilities". The definition of "neighboring entity" should be changed to include intervening entities and entities represented by the intervenor FMUA (excluding, however, interveners which have settled or withdrawn), plus such non-intervening entities as FPL proposes or as the Board may designate.

Explanation: These additions cover utilities in Peninsular Florida which may be connected to other systems which in turn are interconnected with Florida Power & Light Company. FPL now interchanges power through such "indirect" interconnections.

(d) Add "directly or indirectly" after the words "connected or technically feasible of connection". Add the words

"in Peninsular Florida" after "facilities". Also, the definition of "neighboring distribution system" should be changed to include intervening systems and systems represented by FMUA (excluding, however, interveners which have settled or withdrawn), plus such non-intervening systems as FPL proposes or as the Board may designate.

Explanation: As stated in paragraph (c)(1) above.

(e) This definition appears to be acceptable as written. However, we understand "costs" to be costs as recognized and affected by regulation. If this is not the understanding of the parties, those words should be added to the definition to make clear that "appropriate" costs take into account regulatory standards.

(f) Acceptable, subject to changes regarding service area limitations.

II. INTERCONNECTIONS

(a) Acceptable.

(b) Acceptable.

(c) Acceptable.

(d) Acceptable.

(e) Add: "The cost of interconnection facilities with another system shall be shared in a manner which takes into account the various transactions for which the interconnection facility is to be utilized."

Explanation: While this language does not apply a specific standard, in accordance with the Midland Appeal Board decision, supra, 6 NRC at 1050, and general industry standards, it recognizes that there should be a sharing of the costs of interconnections on a reasonable basis.

III. RESERVE COORDINATION AND EMERGENCY POWER

Acceptable.

IV. MAINTENANCE POWER AND ENERGY

Acceptable.

V. ECONOMY ENERGY

Add after the first sentence: "Licensee shall sell to, purchase from or exchange with any neighboring entity other firm or non-firm capacity or energy which the supplying system deems to be surplus, when such transactions would serve to reduce the overall costs of bulk power supply without a loss to either party. Such bulk power transactions shall be on terms and conditions consistent with good utility practice under regulatory standards. Licensee shall enter into pooling, economic dispatch, generation coordination and joint planning with neighboring entities and neighboring distribution systems. However, it shall not be required to do so when transactions would result in a net economic detriment to the Company (not including loss of revenues resulting from loss of sales of power which it otherwise might have obtained)."

Change heading to "ECONOMY ENERGY AND COORDINATION".

Explanation: The clause rightly expands or clarifies coordination obligations.

VI. SHARING OF INTERRUPTIONS AND CURTAILMENTS

Acceptable.

VII. ACCESS TO ST. LUCIE UNIT NO. 2

(a) "Applicable area" should be Peninsular Florida.

Florida Cities have in the past objected to the terms and procedures involving participation. In the event there is a hearing, they would reserve the right to seek elimination of the deposit requirement and changes in the procedures concerning participation. However, the opportunity for participation under the settlement license conditions will in general provide a practical test of those conditions. Under these circumstances, Florida Cities do not seek present changes to this Section, except as follows:

(e)(1) Delete the following language: "provided, however, that the provisions proposed by the Company as to its liability to the other participants, and as to the sharing of costs discharging uninsured third party liability, */ in connection with the design, construction, operation, maintenance and decommissioning of St. Lucie Unit No. 2 shall be approved by the arbitrator unless he determines that the provision proposed by the Company constitutes an unreasonable proposal which renders meaningless the Company's offer of participation in St. Lucie Unit No. 2."

(i) Add at the beginning: "In accordance with good utility practice and on behalf of all participants in a non-discriminatory basis". Add at the end of the paragraph: "If Company takes voluntary actions detrimental to the interests of other parties, in the design, engineering, construction, operation and maintenance of St. Lucie Unit No. 2, including actions regarding changes in construction schedules, modification or cancellation of the unit, then it shall compensate them for any loss or harm suffered as a result of such decisions."

Explanation: To the extent that the Company claims the right to retain complete control of the unit, it should be subject to a standard such as good utility practice. In some situations there could be a divergence of interests between the Company and others. FPL should not be entitled to take operational actions for its own benefit without compensating co-owners for the harm to them. There is no justification for permitting FPL to have complete control over the unit, yet excusing the Company from all liability as a result of its actions. While Cities are flexible as to the specific language for improving the conditions, they believe that the present terms of the license conditions as to control and liability reflect the bargaining power inherent in the Company's nuclear monopoly.

VIII. ACCESS TO FUTURE NUCLEAR PLANTS

Eliminate the "provided" clause after "January 1, 1990".

Explanation: Future units should be sized in accordance with needs. FPL should not be allowed to perpetuate its nuclear advantage into the future. The offending language implies that there should be a ceiling for future nuclear participation so that Cities cannot obtain more nuclear capacity than FPL. Interestingly, the restrictions imposed by FPL admit the importance it places on nuclear capacity. The strictures placed on the Cities obtaining more nuclear capacity than FPL admit an anticompetitive design.

IX. WHOLESALE FIRM POWER SALES

(a) The paragraph should read: "Subject to the limitations contained in paragraphs (c) and (d), Company, upon timely request, shall sell firm wholesale power on a full or partial requirements basis to any neighboring entity or neighboring distribution system up to the amount of that system's retail load. Any sales made under this subsection may be decreased by the sum at any one time of power made available to such neighboring entity or neighboring distribution system as a result of participation in (or purchase of unit power from) one of Company's generating units. However, neighboring entity or neighboring distribution system shall be entitled to all energy associated with the maximum billing demand and with that system or entity's wholesale power entitlements."

Explanation: Proposed additional restrictions are anticompetitive. The modifications make clear that Cities are entitled to purchase and resell energy associated with wholesale power up to the amount of their entitlement. Otherwise, Cities may be forced to pay for capacity, but could be restricted in the use of associated energy.

FPL is in the business of selling wholesale power. The only colorable basis for a restriction on FPL's obligation to sell, subject to reasonable notice, would be the extent of the system's retail needs. However, such restriction to retail load (which is accepted) limits the ability of purchasers to sell wholesale in competition with the Company and this restriction is therefore questionable (but accepted). The further restriction on resale of energy under the settlement license conditions is truly anticompetitive and unacceptable, as the FERC has held. E.g., Georgia Power Co. v. FPC, 373 F.2d 485 (5th Cir. 1967); Mississippi Power Co., 45 FPC 269 (1971); "Order Approving Settlement Subject to Condition", Gulf States Utilities Co., Docket No. ER76-816 (October 20, 1978) (Attachment 11). Accord, United States v. Topco Associates, 405 U.S. 596, 603, 612 (1972); Consumers Power Co., supra, 6 NRC at 1092.

In view of the decision of the Federal Energy Regulatory Commission in Florida Power & Light Company, Docket No. ER78-19, the further restrictions on Cities' purchase of wholesale power are anticompetitive and otherwise unreasonable.

(b) Acceptable.

(c) Acceptable.

(d) Delete.

Explanation: This section incorporates added restrictions on FPL's obligations to deal and are not justified. Even the largest of the Cities cannot add base load plants comparable to those of FPL. There is no reason for such restrictions other than that FPL desires to restrain trade in wholesale power.

(e) Acceptable.

(f) Add the following provision: "Company shall offer to neighboring entities and neighboring distribution systems _____ megawatts of base load power. The power shall be offered on a reserved or unreserved basis at each entity's option. The power shall be made available for at least ten years, although entity may designate shorter periods, and priced at the average fuel cost plus appropriate variable operation and maintenance costs from all units actually scheduled to supply base load requirements on the FPL system, including the firm annual base load sales. At an entity's or system's request, the power shall be priced at FPL's bus bar.

Explanation: See p. 40, supra. Power is priced at bus bar to avoid paying double transmission charges, if transmission is provided separately. FPL has testified that it will price power at bus bar 1/ (but it objects to use of joint transmission rates).

1/ See testimony of Robert Gardner, Florida Power & Light Co., FERC Docket No. ER78-19, et al. Attachment 7.

(7) Add the following provision: "Company shall offer to neighboring entities and neighboring distribution systems participation in each of its operating nuclear units on either a unit power or ownership basis at Company's option. Each neighboring entity or neighboring distribution entity shall have a right to such access on a load basis equivalent share with Florida Power & Light Company. FPL shall not discriminate as among neighboring entities and neighboring distribution systems with regard to the terms of participation.

Explanation: See pp. 39-40, supra.

X. TRANSMISSION SERVICES

(a) Modify as follows: "The Company shall transmit power (1) between or among Company or other power sources" Eliminate the clause: "(5) a reasonable magnitude, time and duration for the transactions is specified prior to the commencement of the transmission." The notice clause reinforces Company restrictions on transmission, making it more difficult for neighboring entities to obtain service and giving the Company added leverage. The Company should file a tariff with the Federal Energy Regulatory Commission and be governed by it.

Explanation: This assures transmission availability from power sources other than the Company to various entities. As written, the license conditions could be interpreted to

exclude transmission from independent generation sources.

(b) Eliminate the words: "a transmission agreement(s)" in the first and second sentences. Eliminate the third sentence. The subparagraph should read:

"(b) Company's provision of transmission service under this section shall be on the basis which compensates the Company for its costs reasonably allocable to the service. Company shall file tariffs providing for such transmission service with the Federal Energy Regulatory Commission or its successor agency, including transmission to and from Georgia. Company shall also file a transmission tariff providing for regional or joint service and shall agree to provide transmission on a reciprocal basis to neighboring entities or neighboring distribution systems (including when joint agencies act on their behalf) when and to the extent that such neighboring entities or neighboring distribution systems invest or contribute in the State or Company transmission grid. Nothing in this license shall be construed to require Company to wheel power and energy to or from a retail customer. However, a co-generator or municipally or governmentally owned source of generation shall not be deemed a retail customer."

Explanation: The basic "situation inconsistent" involves monopolization through blocking Florida Cities from alternative generation sources, including refusals by FPL to deal outside its retail area of service. The Company's refusal to agree to a joint or regional transmission rate or to give Cities credit for transmission investments can only have an anticompetitive purpose or effect. FPL should not be able to preempt transmission to new potential markets in Georgia. The final sentence proposed here would avoid wheeling restrictions that could kill beneficial projects which may compete with FPL generation, such as generation from waste disposal plants, and would avoid the Company's monopolizing generation output from such plants.

(c) Acceptable.

(d) Change "not decline to cooperate in transmitting power produced" to "shall transmit power produced in accordance with paragraph (b), supra. Add at the end of the last sentence, "but shall afford them reciprocal nondiscriminatory transmission rights in accordance with paragraph (b)."

Explanation: FPL should not be able to bottleneck transmission to Georgia. If Cities make transmission investments, they should obtain fair access to the Florida grid.

XI. ACCESS TO POOLING ARRANGEMENTS

Modify as follows:

"Company shall sponsor the membership of any neighboring entity in any pooling, interconnection or coordinating arrangement, including power supply arrangements, to which Company is presently a party or which, during the term of this license, becomes a party; provided, however, that the neighboring entity, or, as applicable, neighboring distribution system satisfies membership qualifications which are reasonable and not unduly discriminatory. To the extent that Company enters into pooling, interchange or coordination arrangements (including power supply arrangements) during the term of this license, it shall use its best efforts to include provisions therein which permit requesting neighboring entities the opportunity to participate in the arrangement on a basis that is reasonable and not unduly discriminatory. Company shall not enter into any joint generation or transmission projects without offering participation on a non-discriminatory basis to neighboring entities or neighboring distribution systems."

Explanation: The disability facing small systems is that FPL has monopolized or restricted access to economic generation sources and has restricted coordination opportunities. Whatever corrective measures may be taken relating to past FPL actions, certainly future joint action by the Company should be on a non-restrictive basis. If FPL enters into joint generation or transmission projects, it should make available such par-

ticipation to all on a non-discriminatory basis rather than to be subject only to a best efforts obligation. Exclusionary joint ventures would be plainly illegal, and FPL should not be able to enter into new exclusionary power supply arrangements on grounds that its co-participants refused to accede to municipal participation.

XII. JURISDICTION OF OTHER REGULATORY AGENCIES

Acceptable.

XIII. IMPLEMENTATION

Acceptable.

Question:

- (9) What are FPL's current policies concerning wholesaling, interconnection, wheeling, sales of unit power, and sales of interests in the St. Lucie plant to Cities?

Answer:

Cities presume that FPL's current policies are expressed in the settlement license conditions. Florida Cities would seek a statement as to FPL's current policies, if they are otherwise, and a statement concerning sale of base load power to Cities. Florida Cities would also seek confirmation that FPL is willing to price power sales at the bus bar. (FPL testified in Locket No. 78-19 that it would.) 1/

Question:

- (10) What is a reasonable schedule for the completion of discovery, including estimates of reasonable time periods in which others may be expected to respond to discovery requests which you expect to make?

Answer:

Scheduling will depend on the Board's Order on the Motion for Summary Judgment. Of course, if the Board grants Cities' Motion for summary disposition, there would be no need

1/ See p. 48, n.1, supra.

for further discovery with respect to finding a situation inconsistent, and the parties can proceed almost immediately to discovery and hearing with regard to relief. If the motion is denied in whole or in part, Cities believe discovery can be rapidly and efficiently moved to a close. As has been discussed in previous filings, discovery in this proceeding has been substantially completed. Cities believe little or no further discovery would be needed before proceeding to hearing to determine relief, or relief and other issues unresolved by summary disposition. 1/

A. Status of document discovery.

1. Cities have substantially responded to requests for document production for 11 of the 13 interveners issued in this docket; they have substantially responded to broad requests for production of documents from Cities' consultants, R.W. Beck & Associates and Smith & Gillespie in district court litigation against FPL.

1/ The schedule Cities propose in this answer would be appropriate if the Board orders a little or a moderate amount of additional discovery. However, the proposed expedited discovery schedule is not meant to preclude use of other expedited scheduling devices. For example, it may be that following the Board's decision on Cities' motion only a few issues will remain to be resolved in order for the Board to determine whether a situation inconsistent with the antitrust laws exist. In that case, the proceeding may be best expedited by providing for rapid discovery and hearing concerning outstanding issues relevant to the determination of the inconsistency with the antitrust laws and providing for separate, phased proceedings on the issue of relief.

Of the two intervenors whose offices have not been searched, one, Lake Helen, has sold its electric utility system and will move to withdraw from this proceeding. The other intervenor, FMUA, has offered to produce all responsive documents for FPL's inspection on two week's notice.

In the other Cities, and at R.W. Beck & Associates, a number of loose ends remain outstanding; however, Cities will complete all outstanding discovery by September 15, 1981.

As far as Cities are aware, FPL is likewise close to completing production in response to the document request directed to the Company in this case. Therefore, Cities believe FPL can complete previous discovery requests relating to documents within 30 days of any Board order, if not sooner.

B. Interrogatories.

Neither Cities nor FPL have responded to interrogatories served upon them in this case. However, because these interrogatories substantially parallel interrogatories in the district court case, it should take little time to file responses. Cities propose that counsel mutually agree on a date for completion of these interrogatories (if such a date can be set before a Board order) or, alternatively, that the Board require completion of interrogatories 20 days after any Order.

C. Future discovery. Because of the scope of the initial interrogatories and document requests, 1/ Cities believe that

1/ As the Board is aware, FPL served 421 interrogatories, more or less, and document requests on each of the Cities; Cities served 75 interrogatories and document requests on FPL.

few, if any, additional document requests or interrogatories are required. The need to depose experts should be eliminated if the Board adopts Cities' suggestion that experts file written testimony with exhibits four weeks before hearing. The attached schedule can be expanded slightly or contracted to reflect Board determinations as to the future scope of discovery. However, in view of the amount of discovery that has already been made available, Cities support immediate cessation of discovery and proceeding to hearing.

Depositions of City officials may not be necessary or appropriate. The Board is given broad authority over discovery matters. The Board has indicated a strong desire to streamline discovery consistent with protecting procedural rights. Given the extent of discovery here, depositions should be allowed only on motion, and scrutinized and limited, if allowed at all.

If any further discovery is allowed, Cities propose the following schedule:

1. By 15 days after any Board Order, parties should initially designate the witnesses they expect to appear at a hearing;
2. By 30 days after any Board Order, compliance with all outstanding discovery requests, including answers to interrogatories, should be completed;
3. By 30 days after any Board Order, subject to the supervision of the Board, parties should serve on each other all requests for any additional discovery that may be warranted and permitted;

4. By 40 days after any Board Order, a pretrial conference should be held. Parties may object to discovery or seek any additional relief. Discovery should close no later than 70-100 days after the Board Order (depending on the nature of discovery permitted);

5. Ninety-120 days after the Board Order, all testimony should be filed (depending on the nature of discovery permitted);

6. Hearings should begin 120-150 days after the Board Order (depending on the nature of discovery permitted).

In seeking to close discovery, Cities do not, of course, preclude special information requests for good cause, such as for witness' workpapers, or narrowly specified types of documents necessary for trial. Because Cities and, we are sure, FPL seek to complete this proceeding before St. Lucie 2 goes into operation, a target schedule which rapidly moves the parties to hearing is required; this schedule suggests that even if additional discovery is required, hearings can begin as early as December of this year. If no additional discovery is ordered, Cities believe hearings can begin 60 days after any Board Order.

The schedule should present no hardship to any party. Since the Board's Memorandum and Order of July 7, 1981, the parties have been on notice that discovery has resumed. All parties have thus had due opportunity (and have been under Board Order) to consider what further discovery is required. They have further been on notice that they should move to complete outstanding discovery. The schedule prescribed above simply provides dates by which the parties each must comply, so that no party is placed at a disadvantage to the other.

Question:

(11) What special rules could expedite discovery or otherwise hasten its conclusion?

Answer:

The key to moving discovery to a close will be supervision by the Board. Thus:

If the Judge assumes special judicial control of the case, ascertains counsel's current views of the issues ..., allows early discovery to narrow the issues, schedules early submission and determination of preliminary legal questions to narrow issues and denies requests for abusive discovery, it will be impossible for any party to engage in abusive discovery.

1 Moore's Federal Practice, 0.60 (Manual for Complex Litigation).

Early discovery has already been ordered and is now nearing completion. The Board has already taken a significant step toward hearing by ordering FPL to respond to Cities' motion for summary disposition. Should the Board grant summary disposition, all that will remain to be resolved is the issue of relief; future proceedings can be tailored accordingly to allow discovery relevant to this issue, if any is required at all. If the motion is wholly or partially denied, the Commission may speed up proceedings by defining the remaining issues.

In addition, the Board's Order may expedite prehearing proceedings by (1) establishing a target hearing date; (2) limiting time and subject matter for discovery; and (3) scheduling two additional pretrial conferences to resolve issues.

1. Establishing a target hearing date. It has been recognized that establishing a target hearing date will better permit scheduling of pretrial procedures. 1 Moore's Federal Practice ¶2.80. Here, it is particularly important that this Commission and the parties are able to aim toward some date, so that discovery does not lag, and thus create unnecessary delay.

2. Limiting time and subject matter of discovery on the merits. Significant amounts of discovery have been completed; FPL has been ordered to clearly indicate the questions it will explore in future discovery. This Board should, on the basis of this showing, fix a date for filing additional requests (assuming the parties have shown good cause for engaging in any discovery at all); limit requests in light of the issues unresolved by Cities' motion; and set a time for completion of this discovery. (And, as noted below, this Commission should establish a date for a further pretrial conference to speed discovery).

3. Prepared testimony. To eliminate the need for depositions, to speed hearings and to facilitate cross-examination, Cities suggest the filing of written prepared testimony with attached exhibits two weeks before trial. At the least, expert direct testimony should be prefiled. This the the practice at other agencies, notably the F.E.R.C. It aids comprehension and trial preparation.

4. Pretrial conferences. Cities suggest a pretrial conference should be held following filing of all remaining discovery requests. The reason for this conference is twofold: First, the Board may be able to quickly rule on disputes concerning discovery so that the parties' precise obligations are defined. Second, the Board will be able to establish firm dates for completion of discovery in light of the substance of the requests and will hence be in a position to move firmly establish subsequent procedures.

The dates to be set at this conference would include a final, firm date for close of all discovery; lists of witnesses; and testimony.

Cities suggest a final prehearing conference be held at which all important aspects of the hearing, and methods for expediting presentation of evidence, would be considered.

In the event that, contrary to Cities' recommendations, the Board deems either that the major issues of liability are not ripe for summary disposition or that substantial additional discovery is required, then the schedule proposed by Cities should be stretched perhaps 60 days, but not stretched so long as to delay completion of this proceeding beyond the expected in-service date for St. Lucie Unit No. 2.

Miscellaneous:

Florida Cities desire to address briefly the following question (not asked by the Board) at the August 17 Conference:

Question:

"How are these proceedings affected by Florida Power & Light Co., Opinion No. 517, 37 FPC 544, and the orders in Florida Power & Light Co., FERC Docket No. ER78-19 of December 21, 1979 and February 6, 1980?"

Answer:

Cities believe that these decisions also support summary disposition for reasons stated in the text of this pleading.

Respectfully submitted,

Robert A. Jablon
Alan J. Roth
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BY Robert A. Jablon

Attorneys for The Lake Worth Utilities Authority, the Utilities Commission of New Smyrna Beach, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Key West, Mount Dora, Newberry, St. Cloud and Tallahassee, Florida, and the Florida Municipal Utilities Agency

August 7, 1981

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BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo
Ivan W. Smith, Alternate

FLORIDA POWER & LIGHT COMPANY)	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2))	August 7, 1981

FLORIDA CITIES' RESPONSE TO
BOARD QUESTIONS

INDEX OF ATTACHMENTS

- | | |
|--------------|--|
| Attachment 1 | <u>Florida Power & Light Company, FERC Docket Nos. ER78-19, et al., "Order Denying Rehearing, Accepting for Filing and Suspending Rate Schedules and Denying Motion for Extension of Time", February 6, 1980 (and Erratum Notice, February 26, 1980)</u> |
| Attachment 2 | <u>Florida Power & Light Company, FERC Docket No. ER78-19, et al., "Order Directing the Submission of a Transmission Tariff in Substitution for Individual Rate Schedules", December 21, 1979</u> |
| Attachment 3 | <u>City of Homestead, Florida v. Florida Power & Light Company, FERC Docket No. EL78-28, "Order Terminating Proceeding", November 3, 1979</u> |
| Attachment 4 | <u>Florida Power & Light Company, FERC Docket No. EL78-4, "Order Terminating Proceeding, November 3, 1979</u> |

- Attachment 5 Florida Cities v. Florida Power & Light Company, FERC Docket No. EL78-4, "Order to Show Cause", June 12, 1978
- Attachment 6 Florida Cities v. Florida Power & Light Company, FERC Docket No. EL78-4, "Staff Investigation Report", April 7, 1978
- Attachment 7 Florida Power & Light Company, FERC Docket No. ER78-19 (Phase II), Excerpts of testimony of Robert J. Gardner as to FPL's willingness to file wholesale power rate for power at the bus bar, November 15, 1979
- Attachment 8 Florida Power & Light Company, FERC Docket Nos. ER78-19 (Phase I) and ER78-81, Excerpt from "Application for Rehearing of Florida Power & Light Company", September 4, 1979
- Attachment 9 Letter from Calvin R. Henze to William Lesnett dated July 3, 1979, transmitting "Proposal for a Joint Transmission System in the State of Florida by the Florida Municipal Power Agency to the Technical Advisory Group of the Florida Electric Power Coordinating Group"
- Attachment 10 Excerpts from 1970 National Power Survey (Part II), Federal Power Commission.
- Attachment 11 Gulf States Utilities Company, FERC Docket No. ER76-816, "Order Approving Settlement Subject to Condition", October 20, 1978

Attachment 1

Florida Power & Light Company, FERC Docket
Nos. ER78-19, et al., "Order Denying
Rehearing, Accepting for Filing and Suspending
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