

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In The Matter of)
)
Florida Power & Light Company) Docket No. 50-389A
)
(St. Lucie Plant, Unit No. 2)) August 7, 1981

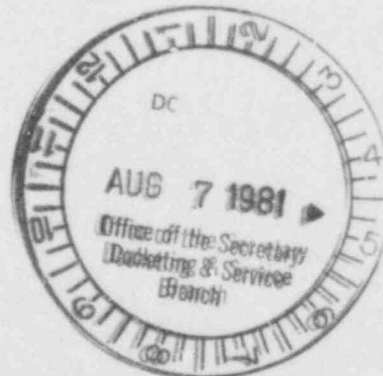
RESPONSE OF FLORIDA POWER & LIGHT COMPANY TO
CITIES' MOTION TO ESTABLISH PROCEDURES, FOR A
DECLARATION THAT A SITUATION INCONSISTENT WITH THE
ANTITRUST LAWS PRESENTLY EXISTS AND FOR RELATED RELIEF

J. A. Bouknight, Jr.
Douglas G. Green
LOWENSTEIN, NEWMAN, REIS & AXELRAD

Herbert Dym
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Florida Power & Light Company

Dated: August 7, 1981



8108140355 810807
PDR ADCK 05000389
M PDR

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CITIES' MOTION TO ESTABLISH PROCEDURES, FOR A
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ANTITRUST LAWS PRESENTLY EXISTS AND FOR RELATED RELIEF

INTRODUCTION

The Cities advance in their Motion essentially three legal arguments in support of their contention that there exists a "situation inconsistent with the antitrust laws." The first is that FPL's offer of ownership shares of St. Lucie No. 2 to cities in or near its retail service area constitutes, as to other cities in Florida outside FPL's retail service area, a combination in restraint of trade violating Section 1 of the Sherman Act. Second, the Cities contend that the relief they seek is needed to eliminate the impact of past concerted conduct involving FPL and Florida Power Corporation. Finally, the Cities argue that FPL has refused historically, and continues to refuse, to deal with them in a variety of areas -- including nuclear power, transmission, wholesale power and coordination -- in violation of Section 2 of the Sherman Act. These arguments rest largely upon the contention

that the Gainesville decision¹ and Opinion No. 57² are entitled to collateral estoppel effect and that the documents on which the Cities rely establish various undisputed facts.

Section I of this brief responds to Cities' legal arguments concerning a "situation inconsistent," and demonstrates that Cities' Motion must be rejected -- even if collateral estoppel effect is provided to Gainesville and Opinion No. 57 and even if the Cities are assumed to have established a proper foundation for the admissibility of all the documents on which they rely. We show in that section that Cities' legal arguments are especially untenable in light of the settlement license conditions now in effect and the fact, not disclosed by the Cities, that by reason of these conditions all of the Cities (including outside Cities) have been given an opportunity to participate, through the Florida Municipal Power Agency ("FMPA"), as owners of St. Lucie No. 2.

Section II of this brief addresses Cities' collateral estoppel arguments and shows that neither Gainesville nor Opinion No. 57 can properly be accorded collateral estoppel effect. We also show in that section that the Cities have failed to establish the necessary foundation for admissibility

¹ Gainesville Utilities Department v. Florida Power & Light Co., 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978).

² Florida Power & Light Co., Opinion No. 57, 32 PUR 4th 313 (1979), appeal dismissed sub nom. Florida Power & Light Co. v. FERC, D.C. Cir. No. 79-2414 (April 25, 1980).

of the documents on which they rely and that those documents, as a consequence, are not properly before the Board.

Finally, Section III of this brief deals with Cities' factual assertions and demonstrates that essential facts remain in dispute. We also identify in that section other factual issues that must be litigated if this proceeding is not resolved in FPL's favor without the need for an evidentiary hearing. In addition, we indicate in Section III the further discovery that is needed in connection with the remaining factual issues and suggest a schedule for resolution of those issues in the event a hearing is deemed necessary.

I. CITIES' LEGAL THEORIES ARE DEFECTIVE
AS A MATTER OF LAW

We deal below with each of the three "principal" legal arguments advanced by the Cities.¹ See Motion, p. 17. Some preliminary comments, however, are appropriate.

Although Cities' arguments are accompanied by an extensive factual recitation (albeit a recitation whose relevance to Cities' legal arguments is not at all clear), the arguments are presented in a vacuum because the Cities seek to minimize the importance of the settlement license conditions

¹ If Cities have other legal arguments, it is essential that they be directed by the Board to state with specificity now the nature of any such additional arguments. Otherwise, it will be impossible to define all of the issues in this proceeding and to consider the appropriate schedule for their resolution.

approved by the Board on April 24, 1981. These license conditions impose legally binding obligations on FPL with respect to interconnections, reserve coordination and emergency power, maintenance power and energy, economy energy, access to St. Lucie Unit No. 2 and future FPL nuclear plants, wholesale power sales, transmission services and access to pooling arrangements. The ultimate issue, thus, is whether the licensing of St. Lucie No. 2 under these conditions will create or maintain a situation inconsistent with the antitrust laws.¹

The settlement license conditions require FPL to enter into specified commercial transactions with municipal utilities located in or adjacent to areas in which FPL generates, transmits or distributes electricity. Accordingly, so far as such utilities are concerned, Cities' claims based on assertions of past refusals by FPL to deal are irrelevant to this proceeding. This proceeding seeks to determine whether the licensing of St. Lucie No. 2 under the settlement license

¹ The Department of Justice and the NRC Staff have advised the NRC that no such situation will be created or maintained. The Cities, alone, dispute this conclusion.

The Cities do not appear to recognize that included in the "antitrust laws" is a four-year statute of limitations. 15 U.S.C. § 15b. To the extent the Cities rely on events in the 1950's and 1960's, they fail to give any weight to the statute of limitations and its underlying policies. Those policies would be subverted were the Cities to be permitted to base their claims on these past events, when many of the persons involved are unavailable. See, e.g., *AMF, Inc. v. General Motors Corp.*, 591 F.2d 68, 70-74 (9th Cir.), cert. denied, 444 U.S. 900 (1979); *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 123-29 (5th Cir. 1975), cert. denied, 423 U.S. 1054 (1976).

conditions will create or maintain a situation inconsistent with the antitrust laws -- not whether there should be an award of damages based on FPL's past actions.¹ Thus, most of Cities' charges of refusals to deal, which relate to utilities located in or adjacent to FPL's retail service area, have no bearing on the issues before the Board.

We do not contend that the settlement license conditions render irrelevant all of the charges of refusals to deal with utilities outside FPL's retail service area. Such charges, however, are limited; and we show below that Cities' arguments with respect to those asserted refusals to deal are untenable as a matter both of fact and law.

One basic fact is that, as a result of the settlement license conditions, all of the intervening Cities, including those located outside FPL's retail service area, have been provided an opportunity to purchase ownership shares of St. Lucie No. 2 through FMPPA. The reason is that, although the license conditions provide for access to St. Lucie No. 2 for municipal utilities identified in the conditions, all of which are located in or adjacent to FPL's retail service area, all Cities that have intervened in this proceeding have agreed

¹ Cities are seeking such damages in an antitrust action they have instituted. *City of Gainesville v. Florida Power & Light Co.*, No. 79-5101-Civ-JLK (S.D. Fla.). FPL has denied Cities' allegations in that litigation and has filed a counterclaim alleging a conspiracy among the Cities in violation of Section 1 of the Sherman Act. Cities' motion to dismiss the counterclaim has been denied.

to yield to the other intervening Cities a portion of their entitlements to St. Lucie No. 2.¹ As a result, (a) the Cities identified in the settlement license conditions are foreclosed from arguing that they are entitled to a greater share of St. Lucie No. 2, since they have voluntarily yielded to others a portion of the interest they otherwise could have acquired; and (b) the so-called "outside Cities" cannot contend that they have been denied access to St. Lucie No. 2.

Finally, the City of Tallahassee has formally rejected the opportunity to purchase an ownership share of St. Lucie No. 2.² For this reason, among others, its contention that St. Lucie No. 2 is an essential facility (and, by the same token, the same contention of the other Cities) is demonstrably incorrect.

A. The Claim of a Group Boycott
Is Untenable

One of Cities' "principal" legal arguments is that FPL's offer of St. Lucie No. 2 capacity to some municipal systems is of itself unlawful. Motion, pp. 20-23, 93-99. According to Cities (Motion, p. 21):

"[H]aving made the choice to offer St. Lucie to some systems, * * * FPL cannot lawfully exclude others. Failure to offer similar rights and benefits to others constitutes a group boycott condemned under Section 1 of the Sherman Act."

¹ See Smith Affidavit, ¶ 2 [Appendix F, pp. 1-2].

² Resolution No. 81-R-1107 of the City Commission of Tallahassee (June 23, 1981) [Appendix F, p. 3].

The frivolous nature of this claim is apparent on its face. Indeed, it may be doubted that Cities' counsel have considered the implications of this charge since, if there is a group boycott as the Cities allege, it means that the Cities are charging that not only FPL but also other members of the "group" are violating Section 1 of the Sherman Act. These other members, of course, include some of the Cities - those offered St. Lucie capacity under the settlement license conditions. Are Cities' counsel contending that some of their clients have joined with FPL to boycott other of their clients? If so, Cities' counsel find themselves in a patent conflict-of-interest position.¹

In fact, there is no basis for the charge of a group boycott. As the cases cited by the Cities make clear (see Motion, pp. 93-99), a necessary predicate for a group boycott among FPL and municipal systems is a showing that FPL has agreed with those systems to exclude others from St. Lucie No. 2. There is nothing in the Cities' Motion, however, that even suggests such an agreement,² and the settlement license

¹ See ABA Model Code of Professional Responsibility, EC5-15 (1980) ("A lawyer should never represent in litigation multiple clients with differing interests * * *") DR5-105; *Jedwabny v. Philadelphia Transportation Co.*, 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), cert. denied, 355 U.S. 966 (1958).

² The Cities also claim that FPL's decisions to construct nuclear facilities were not made unilaterally by FPL but were made in the context of nuclear planning and coordination arrangements with other utilities. However, even if Cities'

conditions themselves and actions taken by the Cities as a consequence of those conditions establish the absence of any agreement.

Section VII(f) of the settlement license conditions specifies that FPL is to permit a transfer to FMPA of all or a portion of the entitlements to St. Lucie No. 2 provided for in the license conditions. Such transfers have in fact been made and, as a consequence, there has been made available to all of the Cities, including those not identified in the license conditions, an opportunity to participate through FMPA as owners in St. Lucie No. 2. It is simply incredible, therefore, that Cities would claim that FPL is a participant in a group boycott. So far as this issue is concerned, a ruling now in favor of FPL would be appropriate.

B. The Claim of a Conspiracy With Florida
Power Corporation Is of No Benefit
to Cities

The same is true of the Cities' other "principal" legal argument that arises under Section 1 of the Sherman Act -- the claim of a conspiracy with Florida Power Corporation.

(footnote cont'd)

factual assertions are accepted, they do not establish any agreement between FPL and any other utility to bar access to any FPL nuclear facility, an essential element under Section 1 of the Sherman Act. In fact, moreover, the nuclear planning had nothing to do with FPL's decisions to construct nuclear facilities (Gardner Deposition (April 10, 1981), pp. 60-62 [Appendix F, pp. 7-9]); those decisions were made unilaterally by FPL (Gardner Affidavit, ¶ 16 [Appendix C]), and coordination arrangements with other utilities did not play any role in FPL's decisions (Bivans Affidavit, ¶ 14 [Appendix B]).

Motion, pp. 17-20. That claim is premised on the argument that collateral estoppel effect may be accorded the Gainesville decision. We show below (pp. 81-88 infra) that Cities' collateral estoppel argument is unavailing. But even if the conspiracy found by the Fifth Circuit were binding on FPL in this proceeding, the Gainesville case does not begin to establish that the licensing of St. Lucie Unit No. 2, particularly under conditions agreed to by FPL, the NRC Staff and the Antitrust Division of the Department of Justice, will create or maintain a situation inconsistent with the antitrust laws.

First, Cities' Motion is replete with assertions (e.g., Motion, pp. 17-23, 54-55) as to the impact of this conspiracy on them. These, however, are mere assertions, backed up by absolutely no proof. Even as to Gainesville, the only plaintiff in the Gainesville case, there has been no finding as to any impact of the conspiracy; the case was remanded by the Fifth Circuit for a trial on the question of any impact on Gainesville. There is nothing in the Fifth Circuit's opinion, or in Cities' Motion for that matter, that suggests that that conspiracy affected any of the other Cities. There is a complete failure of proof on this issue.

Second, the Gainesville conspiracy is ancient history. The most recent evidence cited by the Fifth Circuit in finding a violation is an October 24, 1966 letter (573 F.2d at 296), and it cannot even be contended that the conspiracy continued past 1971. In that year, Florida Power Corporation, FPL's Gainesville co-conspirator, entered into a consent

decree, in an antitrust action brought by the United States against it and Tampa Electric Company, under which it was enjoined from entering into any agreement to allocate or assign wholesale customers or territories, the very violation found in Gainesville. United States v. Florida Power Corp., 1971 Trade Cas. ¶ 73,637 (M.D. Fla.).¹ Moreover, the Cities themselves have disclaimed any ongoing conspiracy between FPL and Florida Power Corporation.²

¹ No presumption of the continuation of this conspiracy can survive the entry of this federal court decree against one of the two alleged co-conspirators. Agreement to a consent decree certainly qualifies as an "[a]ffirmative [act] * * * inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators * * *," which the Supreme Court has held to be sufficient to establish abandonment of a conspiracy. United States v. United States Gypsum Co., 438 U.S. 422, 464 (1978).

² The Cities state, for example, in their 1976 Joint Petition to intervene in the NRC proceeding with respect to FPL's then-proposed South Dade plant:

"Cities do not allege any current violations of antitrust law or policy by Florida Power, nor does counsel for Cities have any reason for believing that such conduct is taking place. Florida Power has affirmatively agreed to actions that would avoid anticompetitive situations. E.g., see license conditions to Florida Power Corp. (Crystal River Unit No. 3), NRC Docket No. 50-302A; Florida Power Corp., FPC Electric Tariff."

Joint Petition of Florida Cities, p. 31 n. 2 (April 14, 1976), Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636A.

See also id. at 53:

"Cities do not allege any present conduct by Florida Power Corporation in violation of the antitrust laws."

(footnote cont'd)

In sum, the Gainesville conspiracy has not been shown to be the cause of any of Cities' asserted problems. To the extent there is any real issue in this proceeding, it relates to unilateral actions of FPL and Cities' claim that those actions constitute an unlawful refusal to deal. It is to this remaining legal argument that we now turn.

C. Cities' Claim of an Unlawful Unilateral Refusal To Deal Is Defective as a Matter of Law

There can be little doubt of the reason for Cities' tortured, although patently untenable, effort to posture this proceeding as involving a conspiracy or group boycott. Joint action at a horizontal level that disadvantages excluded competitors may amount, in certain circumstances, to a per se violation of Section 1 of the Sherman Act. E.g., United States v. General Motors Corp., 384 U.S. 127, 145-47 (1966); Klor's,

(footnote cont'd)

Further, in their Joint Petition in an earlier phase of this proceeding, the Cities stated:

"Cities do not allege that Florida Power Corporation is involved in antitrust violations. Florida Power Corporation has settled any cases involving such allegations and has affirmatively agreed to actions that would avoid anticompetitive situations. E.g., see license conditions agreed to in Florida Power Corp. (Crystal River Unit No. 3), NRC Docket No. 50-302A; Florida Power Corp., FPC Electric Tariff."

Joint Petition of Florida Cities, pp. 68-69 n. 1 (August 6, 1976), Florida Power & Light Co., (St. Lucie Plant, Units 1 and 2, Turkey Point Plant, Units 3 and 4), NRC Docket Nos. 50-335A, 50-389A, 50-250A, 50-251A.

Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-14 (1959). Such a per se violation cannot be justified by evidence of benign intent or by showing that the joint action served some legitimate business purpose. E.g., Silver v. New York Stock Exchange, 373 U.S. 341, 364-65 (1963). Of equal importance to the Cities, allegations of concerted action may substantially reduce or entirely eliminate the complaining party's burden -- which seldom can be carried on summary judgment -- of establishing the contours of a relevant market, the possession and use of monopoly power and an intent to monopolize.

Allegations of a unilateral refusal to deal, by contrast, are governed by a distinctly different set of legal principles. As a general rule, unilateral refusals to deal are entirely lawful, offending neither the letter of the antitrust laws nor their underlying policies. A charge under Section 2 necessarily requires, inter alia, proof of a relevant market, the possession of monopoly power in that market and the existence of competition between the firms involved. In addition, the firm charging a violation of Section 2 must show that the refusal to deal is "unreasonably restrictive of competition" and cannot be justified by legitimate business considerations. California Computer Products, Inc. v.

International Business Machines Corp., 613 F.2d 727, 736 (9th Cir. 1979) (footnote omitted)¹ (emphasis added).

The unilateral refusal to deal claim that the Cities have advanced in this proceeding has two components. First, the Cities argue that FPL's failure to offer cities located outside FPL's retail service area direct access to St. Lucie No. 2 constitutes an unlawful refusal to deal in nuclear power. Second, the Cities contend that FPL has refused historically, and continues to refuse, to provide certain cities with a variety of other services, including transmission services and wholesale power, to which those cities purportedly are entitled.

Although we deal separately below with these two branches of Cities' unilateral refusal to deal claim, several preliminary observations -- applicable to both aspects of the claim -- are in order. One searches Cities' Motion in vain for a coherent definition of a relevant market -- whether for nuclear power, coordination services, or some other commodity or service. Without a specific product market, covering some

¹ Accord, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486, 494 (8th Cir. 1975), cert. denied, 423 U.S. 1055 (1976); Wilson v. I. B. E. Indus., Inc., 510 F.2d 986, 988-89 (5th Cir. 1975); Scott Medical Supply Co., Inc. v. Bedsole Surgical Supplies, Inc., 488 F.2d 934, 938-39 (5th Cir. 1974); Clark v. United Bank of Denver Nat'l Ass'n, 480 F.2d 235, 238 (10th Cir.), cert. denied, 414 U.S. 1004 (1973); Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 667-68 (9th Cir. 1963); Thomas v. Amerada Hess Corp., 393 F. Supp. 58, 74 (M.D. Pa. 1975).

defined geographic area, Cities' unilateral refusal to deal claim is meaningless. See, e.g., Consumers Power Co. (Midland Units 1 and 2), ALAB-452, 6 NRC 892, 945-97 (1977). Neither have the Cities made a credible showing that FPL possesses monopoly power in any relevant market having some relation to their conduct allegations and to the relief they seek in this proceeding. Further, Cities' Motion is devoid of evidence showing that meaningful competition exists between FPL and any of the Cities' asserting a refusal to deal claim. Finally, the Cities ignore entirely the many business justifications for FPL's declining to offer every Florida municipal system capacity shares of St. Lucie No. 2.

These are not mere technical omissions, which might save a firm from an actual violation of the antitrust laws but nonetheless bring the firm into conflict with the policies of those laws. The antitrust laws, by necessity, do not impose a general requirement that a firm share its resources with its alleged competitors, as Cities would have it. Such a requirement would result in economic chaos -- indeed, would defeat rather than further the purposes of the antitrust laws. Contrary to Cities' contentions, the antitrust laws are designed to encourage, rather than discourage, individual sagacity and enterprise. The Cities have failed utterly to come to grips with or to acknowledge these fundamental tenets of the antitrust laws, and their motion is as a consequence defective as a matter of law.

1. FPL Has Not Unlawfully Refused
To Deal in Nuclear Power

The Cities contend in their Motion that "[a] large body of case law confirms that a firm which controls essential facilities, such as the nuclear facilities in this case, has obligations under the antitrust laws to permit fair access to them" (Motion, pp. 99-100). The Cities then assert that this legal principle, which they attribute to the so-called "bottleneck" monopoly cases, requires that they be afforded direct access to St. Lucie No. 2. In fact, the Cities have both misstated and misapplied the relevant law.

(a) There Is No Nuclear Power Market
in Peninsular Florida

One of the essential, although wholly unsupported, premises of Cities' Motion is that there exists in Peninsular Florida a nuclear power market.¹ The Cities assert, for example, that "FPL controls three out of the four operating nuclear units in Peninsular Florida and is constructing its fourth * * * and has effective monopoly control over such facilities there * * *" (Motion, Attachment 1 (Material Facts Not Genuinely In Dispute), ¶ 1). But the Cities offer no evidence tending to show that nuclear power is a relevant product market or submarket -- or showing that any such market

¹ It is essential to Cities in this proceeding that they establish a nuclear power market. The reason is that FPL plainly lacks monopoly power in any retail, wholesale or coordination services market -- encompassing the so-called outside cities -- that extends beyond FPL's retail service area. See discussion at pages 57-62, infra.

can properly be limited to Peninsular Florida. The available evidence is, indeed, decidedly to the contrary.

The delineation of relevant product and geographic markets are, preeminently, questions of fact, which must be proven rather than assumed. The basic test for defining a relevant product market, endorsed by this Board for purposes of Section 105c analyses,¹ is contained in the Supreme Court's decision in United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956). That test requires, in essence, consideration of the "price, use and qualities" of individual products, and the inclusion of products in the relevant product market where they have "reasonable interchangeability" (*id.* at 404). "Reasonable interchangeability" does not mean that the products in question must be identical in terms of any of the pertinent criteria (*e.g.*, price, use or qualities) but simply that "a high cross-elasticity of demand exists between them; that the products compete in the same market" (*id.* at 400).

The suggestion that the power produced by nuclear generating units constitutes a separate product market for antitrust purposes borders on the frivolous. Obviously, regardless of fuel source, the essential commodity produced by a generating plant is electricity. Indeed, the only conceivably relevant difference between nuclear-generated power and the power produced by conventional plants centers on price.

¹ *E.g.*, Midland, *supra*, 6 NRC at 960.

But, so far as we are aware, there is no reported decision in which a mere difference in the price of otherwise fungible products has been held to be sufficient to justify the creation or recognition of separate product markets. In fact, in the few cases in which such a claim has been advanced, it has been summarily rejected. See, e.g., United States v. E. I. du Pont de Nemours & Co., supra, 351 U.S. at 394-96; Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977). While differences in price may be relevant where there also are other differences in the particular products, such as appearance or possible use, differences in price alone clearly may not be relied upon to create separate product markets. Moreover, even if one assumes the contrary, the simple fact is that the Cities have not made even a minimally adequate showing that nuclear generation does not compete with conventional generation because of price differences.

There is, in fact, overwhelming evidence of the "reasonable interchangeability" of and "cross-elasticity of demand" between nuclear and conventionally generated power. Tallahassee officials stated on deposition in connection with the district court case involving FPL and the Cities, for example, that Tallahassee presently is considering a variety of options so far as additional generation is concerned. These options include, according to those officials, (1) purchasing 50 megawatts of long-term power from the Southern

Company; (2) completing a hydro-electric project at Jackson Bluff; (3) constructing a 235 megawatt coal-fired generating unit; (4) converting to coal Tallahassee's existing Hopkins Unit No. 2, which presently is equipped to burn oil and gas; (5) purchasing 80 megawatts of capacity in coal-fired units being planned by Florida Power Corporation; (6) constructing a tie line to the Georgia Power Company; (7) participating individually or through FMPA in Georgia Power Company's Vogtle nuclear units; (8) purchasing an ownership share of Gainesville's Deerhaven Unit No. 2, a coal-fired generating unit; and (9) purchasing an ownership share of coal-fired units being planned by Orlando.¹ There is no way, in light of this evidence, that the Cities can contend seriously that the power produced by nuclear generating units constitutes a separate product market.

¹ Kleman Deposition (May 28, 1980), pp. 36-39, 123-24; Morgan Deposition (July 21, 1980), pp. 12-21, 27-30, 118; Morgan Deposition (July 22, 1980), p. 132; Corn Deposition (July 23, 1980), pp. 43-44 [Appendix F, pp. 31-34, 46-47, 49-62, 65, 73, 75-76].

The suggestion, at least as to Tallahassee, that the power produced by nuclear generating units is so uniquely attractive in terms of price that it should be considered a separate product market also is conclusively refuted by Tallahassee's recent rejection of an opportunity to purchase an ownership share of St. Lucie No. 2. (Resolution No. 81-R-1107 of the City Commission of Tallahassee (June 23, 1981)) [Appendix F, p. 3]. Among the reasons for Tallahassee's rejection of the opportunity to acquire an ownership share of St. Lucie No. 2 was that the cost of St. Lucie No. 2 capacity, coupled with the economic uncertainties and other risks associated with nuclear generating units, were seen as making St. Lucie less attractive from an economic standpoint than other available power supply options.

The evidence of interchangeability provided by Tallahassee officials is consistent with and has been confirmed by the deposition testimony of officials of other Florida cities.¹ It also is confirmed by the fact that EMPA, which was created in 1978 to investigate and acquire generating facilities on behalf of municipal utility systems in Florida, is currently investigating five power supply options, only one of which (Georgia Power Company's Vogtle Units) would involve nuclear generation.² Moreover, the fact that no utility anywhere in the United States has ordered a nuclear generating unit since 1978,³ while orders for conventional units have continued to be placed, provides additional evidence, if any were needed, that nuclear-generated

¹ E.g., Dake Deposition (August 6, 1980), pp. 76, 83-85 (Mount Dora); David Deposition (October 28, 1980), pp. 35-37 (Kissimmee); Smith Deposition (October 27, 1980), pp. 24, 64-65 (Kissimmee); Dorsey Deposition (July 15, 1980), pp. 35-36 (Lake Worth); Howe Deposition (September 17, 1980), pp. 71-72 (Fort Meade); Peters Deposition (April 23, 1981), pp. 115-16 (Homestead) [Appendix F, pp. 89, 90-92, 97-99, 101, 103-04, 106-07, 109-10, 115-16].

² Morgan Deposition (July 21, 1980), p. 30 (Tallahassee); Morgan Deposition (July 22, 1980), p. 129; Kleman Deposition (May 28, 1980), p. 37 (Tallahassee); Howe Deposition (September 18, 1980), p. 134 (Fort Meade) [Appendix F, pp. 32, 62, 72, 129].

³ Office of Nuclear Reactor Programs, U.S. Dept. of Energy, Nuclear Reactor Program, Information and Data, p. 4 (March/April 1981) [Appendix F, pp. 133-34].

power cannot be considered a separate product market for antitrust purposes.¹

The Cities also have failed to adduce substantial evidence to support their assertion that the market for nuclear power, assuming arguendo that such a market could be deemed to exist, is limited to Peninsular Florida. The geographic contours of a relevant market or submarket must correspond to and be consistent with market realities, and such market must in addition "be economically significant" (Midland, supra, 6 NRC at 977; citing Brown Shoe Co. v. United States, 370 U.S. 294 (1962)). Moreover, like the delineation of a relevant product market, determining the geographic extent of a market is a question of fact -- a question that "must be 'charted by a careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for suppliers'" (6 NRC at 977; quoting from United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)). Again, the Cities have not made even a minimally adequate showing of a relevant geographic market. The evidence that is available, however, suggests strongly that any nuclear power market could not appropriately be limited to Peninsular Florida.

¹ As we show below (see pp. 50-54, infra), no NRC decision supports the notion that there is a nuclear power product market. In no such decision has the existence of such a "market" even been suggested, although the central issue in these cases has related to access to nuclear facilities.

Clearly, the existence of a state line has no significance so far as the sale or purchase of bulk power is concerned.¹ Neither are municipal utility systems in Florida precluded by law or economics from purchasing power from sources located outside Florida, or from purchasing capacity shares of generating units located in other states.² In fact, as already noted, one of the options being considered by FMPA on behalf of all Florida cities, and by Tallahassee (and perhaps other cities) independently, is the purchase of capacity shares of Georgia Power Company's Vogtle nuclear units.³ In fact, 10 operating nuclear generating units, not owned by FPL, are within 330 miles of Tallahassee, which is the distance between Tallahassee and FPL's St. Lucie Nos. 1 and 2. Moreover, 36 nuclear generating units that are either

¹ Kinsman Deposition (May 1, 1981), p. 241 [Appendix F, p. 140].

² E.g., Edwards Deposition (January 14, 1981), pp. 50-52, 93-94 (Starke); Kleman Deposition (May 28, 1981), pp. 28, 36-49, 53 (Tallahassee); Smith Deposition (October 27, 1980), pp. 63-64 (Kissimmee) [Appendix F, pp. 23, 31-45, 102-03, 152-56].

³ Caldwell Deposition (May 21, 1981), pp. 217-24 (Newberry); Dake Deposition (August 6, 1980), pp. 71-76 (Mt. Dora); Farmer Deposition (August 5, 1980), pp. 246-47 (Mt. Dora); Dykes Deposition (July 31, 1980), pp. 119-23 (Tallahassee); Kleman Deposition (May 28, 1980), pp. 28, 36-49, 53 (Tallahassee); Morgan Deposition (July 21, 1980), pp. 27-32, 118-23 (Tallahassee); Edwards Deposition (January 14, 1981), pp. 50-52, 93-94 (Starke); Howe Deposition (September 18, 1980), pp. 134-35 (Fort Meade); Peters Deposition (April 23, 1981), pp. 121-24, 143-45 (Homestead); Smith Deposition (October 27, 1980), pp. 63-64 (Kissimmee) [Appendix F, pp. 31-45, 59-70, 84-89, 102-03, 118-20, 122-24, 129-30, 152-54, 159-66, 170-71, 173-77].

in operation or under construction, and are not owned by FPL, are as close to Tallahassee as is FPL's Turkey Point plant, which is more than 400 miles from Tallahassee.¹ While the figures for other cities located outside FPL's retail service area may not be exactly the same as for Tallahassee, the point remains: there are numerous nuclear generating units, either already in operation or under construction, that are as close to the Florida cities outside FPL's retail service area as are FPL's nuclear plants, and the Cities have not offered a scintilla of evidence that would justify excluding those non-FPL facilities from any nuclear power market.²

(b) FPL Does Not Have Monopoly Power
in Any Nuclear Power Market, Even
Such a Market Could Be Deemed
To Exist

Because of Cities' failure to establish the contours of a relevant market, their assertions concerning FPL's possession of monopoly power are meaningless. Obviously, monopoly power cannot be considered in a vacuum. The concept of monopoly power has meaning only in relation to particular markets

¹ Gardner Affidavit, ¶ 18 [Appendix C].

² The joint ownership of generating facilities, including nuclear facilities, by utilities located in different states is not uncommon. Millstone Nos. 1 and 2, Quad Cities Nos. 1 and 2, Peach Bottom No. 3 and Salem Nos. 1 and 2 are examples of nuclear generating units jointly owned by utilities located in more than one state. See U.S. Dep't of Energy, U.S. Central Station Nuclear Electric Generating Units: Significant Milestones, pp. 4, 5, 7 & 9 (June 1981) [Appendix F, pp. 178-82].

or submarkets, having both a product and geographic component. E.g., Midland, supra, 6 NRC at 919-20.

But even if it is assumed, for purposes of this discussion, that there is a nuclear power market and that that market is limited to Peninsular Florida, there is no basis for Cities' assertion that FPL possesses monopoly power in that market. The Cities are correct, of course, in stating that FPL owns three of the four nuclear generating plants in operation in Florida. And, under the settlement agreement that has been entered into in this proceeding, FPL will retain an approximate 80 percent ownership share of St. Lucie No. 2, with the remaining ownership of that plant being allocated among various Florida cities -- including cities located outside FPL's retail service area. Thus, if Cities purchase that portion of St. Lucie No. 2 that has been made available to them, FPL will own approximately 70 percent of the nuclear generating capacity in Peninsular Florida as of the time St. Lucie No. 2 becomes operational.

While control of 70 percent of a relevant market may be sufficient to raise a question of market power, a finding of monopoly power hardly follows conclusively from such a market share. The courts have noted that, at best, a market share of 75 to 80 percent "should be regarded as a starting point" in an analysis of monopoly power; "[o]nly a careful factual analysis of the market in question will reveal whether monopoly power, in fact, exists" (Byars v. Bluff City News

Co., Inc., 609 F.2d 843, 851 (6th Cir. 1979) (footnote omitted)). Ultimately, the determinative question is whether the particular firm, in the context of the relevant market, has "the power to control prices or exclude competition" (United States v. Grinnell Corp., 384 U.S. 563, 571 (1966)). Accord, e.g., United States v. E. I. du Pont de Nemours & Co., supra, 351 U.S. at 391.

There is no basis for concluding here that FPL has, because of its ownership of nuclear generating facilities, the power to control prices in or to exclude competition from the nuclear power market the Cities have posited -- or in connection with any other market. The most that the Cities have been able to do in their Motion is to suggest that power will be produced more cheaply by St. Lucie No. 2 than by certain other generating facilities, either presently in operation or likely to become operational in the foreseeable future. But even that suggestion is without the slightest evidentiary basis. The Cities offer, for example, no cost projections for any of the conventionally fueled plants being constructed in Florida (or in adjacent states). This includes Gainesville's Deerhaven Unit No. 2, a coal-fired plant that is about to become operational and in which ownership shares were offered to various Florida cities. Similarly, the Cities neither assert nor attempt to show that the cost of power from St. Lucie No. 2 will be below the cost of power produced by Florida Power Corporation's Crystal River nuclear unit. Nor do they

provide any comparative cost data on St. Lucie No. 2 and other generating units, whether nuclear or conventionally fueled, that might be ordered now or in the future. Without such comparative data, the Cities cannot reasonably contend that FPL has the power to control prices in any market because of its ownership of nuclear generating facilities.¹

The Cities' effort to show that FPL has the power to exclude competition from particular markets because of its ownership of nuclear facilities is no more successful. In fact, that effort relies entirely on two isolated incidents, widely separated in time -- FPL's consideration in 1965 whether to attempt to obtain a franchise in Clewiston and FPL's offer in 1976 to purchase the Vero Beach system. An internal FPL memorandum written at the time of the Clewiston discussions listed as a possible advantage of an FPL franchise the participation by Clewiston residents "in any future savings in the cost of electricity resulting from the large scale development of conventional and nuclear plants" (see Motion, p. 49). Some eleven years later, at the time of the Vero Beach discussions, FPL placed an advertisement in the Vero

¹ Moreover, the reasonableness of FPL's pricing of power it produces is overseen by regulatory agencies both at the federal and state level. Appropriate pricing levels are not determined by the cost of power generated from particular units, but rather by the average cost of power. Accordingly, the notion that FPL can control the price of nuclear-generated power is untenable.

Beach newspaper that stated in relevant part (ibid. (emphasis omitted)):

"We expect to have a new nuclear generating unit at St. Lucie in service in the near future. This should bring annual fuel savings of more than \$ 100 million that will be passed directly to our customers through a reduction in the fuel adjustment, which has been reflected above."¹

But what the Cities conveniently ignore is that the electric utility systems in Clewiston and Vero Beach were not acquired by FPL even though a majority of the voters in Vero Beach favored FPL's proposal. Moreover, the Cities have not presented any evidence showing that FPL's ownership of nuclear facilities had any impact on the course of the discussions with either city, or played a role in either city's decision to solicit a purchase offer from FPL. Even more significantly, Cities' Motion is completely silent concerning the impact of FPL's ownership of nuclear generating facilities on cities outside of FPL's service area, which are the pertinent entities for purposes of Cities' Motion. There is no evidence that any city outside FPL's service area has ever considered selling its distribution or generating facilities to FPL -- or, more specifically, felt pressured to do so because of FPL's ownership of nuclear facilities. Indeed, since the first of FPL's nuclear generating units became operational in 1972 (Turkey Point No. 3), FPL has not acquired a single new franchise in a

¹ See also Motion, p. 14.

city that it had not previously served and has not acquired a single previously independent electric utility system. In short, there is here a complete failure of proof as to the prerequisite power to exclude competition.

(c) There Is No Meaningful Competition
Between FPL and Cities Located
Outside FPL's Retail Service Area

A further defect in Cities' unilateral refusal to deal claim, which applies as well as to matters discussed in subpart C.2. below (pp. 54 ff.), is that the Cities have failed to establish the existence of meaningful competition between FPL and cities outside FPL's retail service area.¹ As noted, a unilateral refusal to deal does not offend either the letter or the spirit of the antitrust laws unless, inter alia, it is "unreasonably restrictive of competition" (California Computer Products, Inc. v. International Business Machines Corp., supra, 613 F.2d at 735). Obviously, a refusal to deal cannot unreasonably restrict -- or restrict at all -- competition between two firms unless there is meaningful competition between those firms.

¹ The thrust of Cities' Motion concerns FPL's asserted obligation to deal with cities outside FPL's retail service area. The discussion that follows therefore focuses on Cities' failure to demonstrate the existence of competition between FPL and such outside cities. It may be noted, however, that there is little in Cities' Motion tending to establish any competition between FPL and many of the cities located within FPL's retail service area, and FPL does not concede the existence of such competition.

The question of competition, like the cognate question of relevant markets, is primarily a question of fact, which must be resolved on the basis of a careful assessment of the realities of the marketplace. See, e.g., West Texas Utilities Co. v. Texas Electric Service Co., 470 F. Supp. 798, 820 (N.D. Tex. 1979). Although the Cities refer repeatedly in their Motion to alleged "anticompetitive" activities by FPL, they make no real effort to establish that there is either actual or potential competition, of a meaningful nature, between FPL and cities outside FPL's retail service area. In fact, deposition testimony in connection with the district court case involving FPL and the Cities suggests strongly that no such competition exists now or is likely to exist in the foreseeable future.

To take an example, Everett B. Howe, City Manager of Fort Meade, stated that he could not recall a single instance when Fort Meade and FPL were in competition to attract a particular industrial entity to their respective service areas. Mr. Howe also admitted, on the issue of possible wholesale competition, that Fort Meade had never attempted to sell power at wholesale to another utility.¹ Joe C. David, Director of Utilities in Kissimmee, testified that he could not recall an instance of wholesale or retail competition between FPL and Kissimmee, or competition with respect to any

¹ Howe Deposition (September 18, 1980), pp. 151-52 [Appendix F, pp. 131-32].

other electric utility service or operation.¹ Similarly, William A. Farmer, City Manager of Mt. Dora, admitted that Mt. Dora and FPL do not compete "in the provision of electric services to any customer or class of customers."²

J. W. Caldwell, Director of Utilities in Newberry, asserted on deposition that Newberry and FPL were in competition -- but, on further questioning, explained that he meant only that Newberry "want[s] to have a bottom line figure on the lowest power cost we can get."³ Mr. Caldwell acknowledged that Newberry and FPL do not compete in the sale of power either at retail or wholesale.⁴ Finally, Daniel A. Kleman, City Manager of Tallahassee, testified on deposition that he was not aware of any instance in which Tallahassee had competed with FPL to provide electric service to any customer or prospective customer or of any instance in which Tallahassee had competed with FPL for the right to provide electric service to a particular geographic area. Mr. Kleman also admitted

¹ David Deposition (October 28, 1980), pp. 30-32 [Appendix F, pp. 94-96].

² Farmer Deposition (August 4, 1980), pp. 195-96; see also id. (August 5, 1980) at 206-07 [Appendix F, pp. 167-169].

³ Caldwell Deposition (May 18, 1981), p. 31 [Appendix F, p. 187].

⁴ Id. at 31-32, 162-63 [Appendix F, pp. 187-88, 192-93].

that he knew of no occasion when Tallahassee and FPL had been in competition to attract a particular industrial customer.¹

In short, while Cities' Motion is replete with assertions of "anticompetitive" conduct by FPL vis-a-vis cities outside FPL's retail service area, those assertions fly directly in the face of substantial evidence of the absence of any competition -- either in the past or in the foreseeable future -- between FPL and outside cities. As suggested by J. W. Caldwell, Director of Utilities in Newberry, cities outside FPL's retail service area may want "a bottom line figure on the lowest cost power"; but that is a goal shared by all utilities, both in Florida and elsewhere, and in no sense establishes the existence of competition between individual utilities.

(d) FPL's Refusal To Offer Cities
Outside Its Retail Service Area
Direct Access to St. Lucie No. 2
Does Not Unreasonably Restrict
Competition

Even if FPL could be said to possess monopoly power in a market having some relationship to Cities' conduct allegations, as well as to the relief the Cities seek in this proceeding, and the existence of competition involving FPL and all Florida cities outside FPL's retail service area could be

¹ Kleman Deposition (May 28, 1980), pp. 30-36 [Appendix F, pp. 25-31]. Mr. Kleman did suggest that Tallahassee and FPL are at least theoretically in competition for the sale of excess capacity, but he was unable to point to any sale of power at wholesale that Tallahassee had lost to FPL.

assumed, the nuclear aspect of Cities' refusal to deal claim could not be sustained. As noted, even a firm possessing monopoly power is entitled to refuse to deal with competitors unless that refusal is "unreasonably restrictive of competition" and lacks legitimate business justification. California Computer Products, Inc. v. International Business Machines Corp., supra, 613 F.2d at 735. Cities' Motion does not make even a credible, much less a dispositive, showing on this essential element.

Indeed, Cities' Motion is, in this respect, more significant for what it omits than for what it includes. There is no contention that access to FPL's nuclear plants is essential to the competitive viability of any of the Cities. Moreover, evidence discussed in FPL's pending motion for summary judgment in the district court case shows that no city outside FPL's retail service area expressed the slightest interest in acquiring either an ownership share of or "unit" power from St. Lucie No. 2 (or any of FPL's other nuclear plants) until 1976. At that time, two of FPL's nuclear units already were in operation, the third was within weeks of becoming operational, and construction of St. Lucie No. 2 was about to begin following more than three years of planning by FPL. The Cities have not disputed, moreover, that were FPL to have transferred to them, in 1976 or thereafter, a portion of the capacity of St. Lucie No. 2 (or of its other nuclear facilities), FPL would have had to replace that lost capacity

with capacity from other units at higher cost -- so that, in effect, FPL and its customers would have been subsidizing the Cities and their customers.¹ Finally, the unchallengeable fact is that FPL assumed the entire risk associated with the decision to build nuclear units, including St. Lucie No. 2 (subject, of course, to whatever commercial arrangements it was able to negotiate with consulting engineers and suppliers).²

¹ Gardner Affidavit, ¶ 16 [Appendix C].

² Even Cities' counsel in this proceeding have conceded that FPL's decision to move ahead on its own with nuclear development, despite the magnitude of the investments required and the substantial risks involved, was to FPL's credit. Mr. George Spiegel informed the Fort Pierce Utilities Authority and City Commission in March 1976 (City Commission Minutes, p. 2) [Appendix F, p. 195]:

"Today Florida Power and Light's rates are lower than Fort Pierce's rates. There are a number of reasons, a lot of which are to the credit of Florida Power & Light. They've gone deeply into nuclear generation. They took their chances. They made their judgments [sic] and made the investments. As long as those nuclear generators are running and they don't run into any special problems, great. You don't know what could happen tomorrow. If they develop problems with some of these nuclear generators, suddenly the situation could change * * *."

At the same time, Mr. Spiegel advised Fort Pierce that it should not move too quickly in assuming any of the risks associated with FPL's nuclear projects or in offering to invest capital in those projects. According to Mr. Spiegel [id. at p. 197]:

[T]he ideal situation is that you argue with Florida Power & Light up until the day the plant is ready to go into operation. At that time you finally get your contract. Once they decide to go ahead with you, they want to see your money as fast as possible.

Cities' assertion that, despite these circumstances, FPL has an obligation to offer cities in Florida outside its retail service area direct access to St. Lucie No. 2 is squarely refuted by the controlling case law. Indeed, Cities' arguments, if accepted, would pervert rather than vindicate antitrust law and policies. Among other things, the Cities completely ignore the fact that the antitrust laws are intended to preserve and encourage competition, not to protect individual competitors. E.g., Brown Shoe Co. v. United States, supra, 370 U.S. at 320. The antitrust laws do not operate as a safe harbor for the inefficient or high-cost producer; as Justice Powell has so aptly observed: "[C]ompetition based on efficiency is a positive value that the antitrust laws strive to protect" (Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 623 (1975)). The decisions in a number of recent cases illustrate clearly the application of these principles, and show why FPL's refusal to offer cities outside its retail service area direct access to St. Lucie No. 2 does not represent an abuse of any monopoly power -- and therefore cannot be viewed as creating or maintaining a situation inconsistent with the antitrust laws.

The charge in Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), for example, was that Kodak had abused its monopoly position by the manner in which it had introduced a new system consisting of a camera with its own unique film and

photofinishing process (the "110 system"). The evidence in the case established that Kodak was the dominant firm in three markets: amateur conventional still cameras, conventional film and color print paper. Berkey was a customer for Kodak film, cameras and photofinishing supplies. Berkey contended that Kodak's introduction of the 110 system gave Kodak an unlawful competitive advantage in the photofinishing and photofinishing supplies business. In Berkey's view, Kodak, possessing monopoly power in the film and camera markets, had a duty under Section 2 of the Sherman Act to "pre-disclose" to its competitors sufficient information concerning the new system to permit them simultaneously to enter the market for those products.

In reversing the trial court's verdicts for Berkey on these claims, the Court of Appeals for the Second Circuit acknowledged that the effect, and indeed the purpose, of the manner in which Kodak had chosen to introduce the new system was to give Kodak at least a temporary advantage over its rivals -- perhaps increasing its monopoly position in the camera, film and color print paper markets. Id. at 82-85. The Second Circuit also recognized that a monopoly had not been "thrust upon" Kodak.¹ But even though Kodak's monopoly position did not stem from circumstances beyond Kodak's control,

¹ Thus, Kodak could not take advantage of the dicta in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), excusing a monopoly that is "thrust upon" a firm.

the Second Circuit held that Kodak had not monopolized in violation of Section 2.

The Second Circuit concluded that "it would be inherently unfair to condemn [Kodak's] success when the Sherman Act itself mandates competition" (id. at 273). The court pointed out that any other interpretation of the Sherman Act might "deprive the leading firm in an industry of the incentive to exert its best efforts", thereby "compel[ling] the very sloth [the antitrust laws] were intended to prevent" (ibid.). Of particular pertinence to the facts here, the court then noted that (id. at 276) --

"[a] large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad based activity -- more efficient production, greater ability to develop complementary products, reduced transportation costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power."

Finally, the court rejected Berkey's contentions concerning predisclosure in terms having obvious relevance to FPL's planning and construction of nuclear generating units, including St. Lucie No. 2 (id. at 281 (citation omitted)):

"[A] firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is

introduced. * * * It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated."

The Ninth Circuit's decision in California Computer Products, Inc. ("CalComp") v. International Business Machines Corp., supra, also demonstrates why Cities' contentions cannot be accepted. The plaintiffs in CalComp manufactured disk products that were "compatible" with IBM computer systems. Plaintiffs developed these products by copying and, whenever possible, improving upon IBM disk designs. They then attempted to undersell IBM, the dominant firm in the industry. The complaint charged IBM with having excluded competition in the market for IBM-compatible disk products by reducing prices and making design changes. Plaintiffs alleged that these actions were undertaken solely to injure plaintiffs and to frustrate competition.

In affirming a directed verdict for IBM, the Ninth Circuit began by noting that a firm having a monopoly violates Section 2 of the Sherman Act only if its conduct is "unreasonably restrictive of competition" or "'unnecessarily exclude[s] competition' from the relevant market" (613 F.2d at 735; quoting from Greyhound Computer Corp. v. International Business Machines Corp., 599 F.2d 488 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978)). The court held that IBM's conduct was

lawful under these standards since IBM's dominant position was attributable to IBM's long history of technical innovation and had been maintained by normal -- albeit aggressive -- business practices. The Ninth Circuit viewed CalComp's position, complaining of IBM's efforts, as contrary to (id. at 742) --

"the very competitive process the Sherman Act was designed to promote. To accept CalComp's position would be to hold that IBM could not compete if competition would result in injury to its competitors, an ill-advised reversal of the Supreme Court's pronouncement [in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)] that the Sherman Act is meant to protect the competitive process, not competitors. * * *"

So far as IBM's design changes were concerned, the court stated (id. at 744 (citation omitted)):

"IBM, assuming it was a monopolist, had the right to redesign its products to make them more attractive to buyers -- whether by reason of lower manufacturing cost and price or improved performance. It was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand. IBM need not have provided its rivals with disk products to examine and copy * * * nor have constricted its product development so as to facilitate sales of rival products
* * *."

¹ The courts in other cases involving IBM have reached similar conclusions. E.g., Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 927 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975) ("[T]echnical attainments were not intended to be inhibited or penalized [by Section 2 of the Sherman Act] * * *"); Transamerica Computer Co. v. International Business Machines Corp., 481 F. Supp. 965, 991 (N.D. Cal. 1979) ("If [a] monopoly is attained or preserved because the monopolist is profitable at price levels where others are not, so be it. Lower prices and increased efficiency are to

Even more recently, the Federal Trade Commission in In the Matter of E I. du Pont de Nemours & Co., FTC Docket No. 9108 (decided October 20, 1980),¹ applied these principles in a case, arising under Section 5 of the Federal Trade Commission Act, involving claims analogous in important respects to those that have been made by the Cities. The complaint charged du Pont with having attempted to monopolize the production of titanium dioxide pigment ("TiO₂").² Despite du Pont's substantial market power, the Commission concluded that du Pont was entitled under the antitrust laws to take maximum advantage of its technological superiority, scale economies and lower costs -- in essence, to compete vigorously for the available business regardless of the adverse impact on competitors.³

(footnote cont'd)

be fostered."); ILC Peripherals v. International Business Machines Corp., 458 F. Supp. 423, 444 (N.D. Cal. 1978) (Complaining of new products introduced by IBM, eliminating Memorex's cost advantage, "Memorex sought to use the antitrust laws to make time stand still and preserve its very profitable position. This court will not assist it and the others who would follow after in this endeavor.").

¹ The Commission's opinion in the du Pont case is reproduced in Appendix F, pp. 727-776.

² Titanium dioxide is used to impart whiteness or an opaque quality to products such as paint and paper. The Commission found that there were no practical substitutes for titanium dioxide pigment, so that the product constituted a distinct product market. Slip op. 2 [Appendix F, p. 728].

³ Du Pont's technological and cost advantage was based on a process that only du Pont was in a position to employ. Significantly, there was no contention that TiO₂ produced by the lower-cost du Pont process presented a product market distinct from TiO₂ produced by other, more costly processes.

The Commission reasoned that the pivotal inquiry was not whether du Pont had sought to prevail over its rivals but whether the means it had employed in that effort were objectively unreasonable.¹ After carefully analyzing the judicial authority and economic literature describing the limits of reasonable conduct permitted a monopolist or near monopolist, the Commission concluded that to deny du Pont the opportunity to compete for all of the projected demand growth would destroy competitive incentives, deny consumers the benefits of competition and "unduly penalize" du Pont for its technological success.

¹ The Commission viewed the case as raising "fundamental questions about the extent to which dominant firms may aggressively pursue competitive opportunities, especially where they enjoy some form of cost or technological advantage over their rivals" (slip op. 20 [Appendix F, p. 746]).

The Commission pointed out that "'an intent to win every sale, even if that would result in the demise of a competitor,'" does not, standing alone, violate the antitrust laws. "'[T]here must be some element of unfairness in the conduct before an anticompetitive intent can be found, as distinguished from the benign intent to beat the opposition'" (slip op. 25 [Appendix F, p. 751]; quoting from *Transamerica Computer Co. v. International Business Machines Corp.*, supra). A contrary rule, the Commission noted, "'would defeat the antitrust goal of encouraging competition on the merits, which is heavily motivated by such an intent'" (slip op. 23 [Appendix F, p. 749]; quoting from P. Areeda & D. Turner, *Antitrust Law* ¶ 822a, p. 314 (1977)). Accord, e.g., R. Bork, *The Antitrust Paradox* 114 (1978); L. Sullivan, *Handbook of the Law of Antitrust* 111 (1977); C. Kaysen and D. Turner, *Antitrust Policy* 20 (1959); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 328 (1977); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373, 395 (1974).

The Commission flatly rejected the contention that the antitrust laws required du Pont to license its technology to competitors. In terms directly relevant to Cities' claim that FPL has an obligation to sell capacity shares of St. Lucie No. 2 to any electric utility system in Florida that might want to acquire a share, the Commission stated (slip op. 48-49 [Appendix F, pp. 773-74]):

"To be sure, DuPont * * * could have licensed its technology to competitors * * * thereby enabling [du Pont's] rivals to close the technological gap more quickly. But, we can find no basis for concluding that DuPont's refusal to license its technology * * * was unjustified. There is no evidence, for example, that [du Pont] used unreasonable means to acquire its knowhow, or that it joined with others in preventing access by competitors. * * * Whatever may be the proper result in other factual settings, we are not persuaded that the refusal to license in this situation provides a basis for liability; in fact, imposition of a duty to license might serve to chill the very kind of innovative process that led to DuPont's cost advantage."

Finally, the Commission summarized its conclusions, emphasizing that the antitrust laws must not be construed in a manner that inhibits scale economies, technological innovation or aggressive competition on the merits -- despite the possible adverse effect on competitors (slip op. 51) (footnote omitted) [Appendix F, p. 775]:

"[T]he essence of the competitive process is to induce firms to become more efficient and to pass the benefits of the efficiency along to consumers. That process would be ill-served by using antitrust to block hard, aggressive competition that is solidly based on efficiencies and growth opportunities,

even if monopoly is a possible result. Such a view, we believe, is entirely consistent with the 'superior skill, foresight and industry' exception in [United States v. Aluminum Company of America, supra] and subsequent cases, for those decisions clearly indicate that monopolies may be lawfully created by superior competitive ability."

The antitrust principles applied in Berkey, Calcomp and du Pont require the conclusion that any FPL refusal to offer Florida municipal systems access to St. Lucie No. 2 would not be "unreasonably restrictive of competition." A further FPL offer would take from FPL generating capacity that it needs to serve its present wholesale and retail customers. It would lead to an increase in FPL's generating costs (as it replaced the lost capacity with capacity from other units at higher cost) and, consequently, to an increase in the costs of electricity for FPL's customers. Nothing in the antitrust laws remotely requires this result.

What the Cities are seeking here, in essence, is a classic free ride. Having assumed none of the risks of nuclear research and development, the Cities now claim an absolute right to take a portion of St. Lucie No. 2 capacity. What they seek is not a fair opportunity to compete but an escape from the rigors of competition; they seek a selective symbiotic relationship with FPL, gaining access to the most efficient of FPL's generating facilities while leaving the balance of these

facilities and the relatively less efficient units on FPL's system to serve the needs of FPL's present customers.¹

Even if one assumes that St. Lucie No. 2 will be able to generate power more cheaply than some or all of the generating units owned by or otherwise available to the Cities,² that would not distinguish the present situation from those discussed in Berkey, CalComp and du Pont. The defendants in those cases enjoyed a distinct cost advantage over competitors. In Berkey and CalComp, the cost advantage stemmed from a lead the defendants had been able to achieve in developing new products; in du Pont, the defendant's cost advantage was attributable to the defendant's early investment in a particular

¹ These considerations apply with even greater force to the Cities' claims for access to FPL's operating nuclear plants, which had proven themselves from both a technological and economic standpoint before the Cities expressed any interest in them. Moreover, the Cities apparently would prefer to forget that their requests for post-licensing antitrust reviews of the three operating plants were rejected by this Board, the Appeal Board, the Commission, a United States Court of Appeals and, on denial of an application for a writ of certiorari, the United States Supreme Court. Florida Power & Light Co., (St. Lucie Units 1 and 2, Turkey Point Units 3 and 4), LBP-77-23, 5 NRC 789 (granting petition to intervene for St. Lucie Unit 2, denying petition to intervene for St. Lucie 1, Turkey Point Units 3 and 4), aff'd, ALAB-420, 6 NRC 8, review denied, CLI-77-26, 6 NRC 538 (1977), aff'd sub nom. Ft. Pierce Utilities Authority v. NRC, 606 F.2d 986 (D.C. Cir.), cert. denied, 444 U.S. 842 (1979). FPL believes that the antitrust review in this proceeding must focus upon the arrangements for access to St. Lucie Unit No. 2, not upon access to plants that are not under review here and were exempted from such review by act of Congress. Atomic Energy Act, §§ 102b and 104b, 42 U.S.C. §§ 2132(b) and 2134(b).

² As noted, the Cities have offered no such evidence -- in fact, have offered no comparative cost data at all. See discussion at pages 16-20 supra.

production process, coupled with a "growth strategy" designed to build capacity necessary to supply the growth in the market. And in each of those cases, the plaintiff sought protection from competition based upon the defendant's efficiency and consequent cost advantage.

The primary lesson of Berkey, CalComp and du Pont, and of the substantial judicial and scholarly authority upon which the decisions in those cases were based, is that the antitrust laws cannot be invoked to protect an inefficient or high-cost firm from the rigors of competition.¹ Indeed, "[i]t

¹ The Berkey, CalComp and du Pont decisions are only the most recent statements of this principle, which is deeply rooted in cases construing and applying Section 2 of the Sherman Act. See, e.g., Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568, 598 (1967) (Harlan, J., concurring) ("Economies achieved by one firm may stimulate matching innovation by others, the very essence of competition."); Brown Shoe Co. v. United States, supra, 370 U.S. at 320 (Congress was concerned in the antitrust laws with "the protection of competition, not competitors * * *"); United States v. Aluminum Co. of America, supra, 148 F.2d at 430 ("The successful competitor, having been urged to compete, must not be turned upon when he wins."); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition."); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978) ("It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms."); International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 721 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976) ("[No] social value compels the sheltering of an individual competitor, at the expense of the public interest, from the competitive process."); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977) ("The Sherman Act is not a subsidy for inefficiency."); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 972 (8th Cir. 1968),

is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests" (Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F.2d at 281).

The cases relied upon by the Cities are either inapposite or, more often, lend further support to FPL's position. It is simply ludicrous to suggest, as the Cities do repeatedly,¹ that St. Lucie No. 2 is a "bottleneck" facility without, at a bare minimum, coming forward with any comparative cost data. That suggestion also is refuted by the decision of

(footnote cont'd)

cert. denied, 395 U.S. 961 (1969) ("[P]laintiffs seek to use the anti-trust laws to freeze market shares and to insulate them from the impact of competition -- a subversion of the anti-trust laws."); Calnetics Corp. v. Volkswagen of America, Inc., 348 F. Supp. 606, 619-20 (C.D. Cal. 1972) ("The antitrust laws were not enacted nor have they ever been implemented by the courts to secure to any producer of goods a private preserve for its own exploitation."); Atlas Bldg. Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960) ("Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise."); Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 140 (D. Mass. 1959), aff'd, 284 F.2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961) ("To prove that a person has that type of exclusionary intent which is condemned in antitrust cases there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons."); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 341 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954) (Section 2 does not condemn one "who merely by superior skill and intelligence * * * got the whole business because nobody could do it as well.").

¹ Motion, pp. 100-02, 110-14.

the "inside" Cities to yield to others a portion of the share of St. Lucie to which they are entitled under the license conditions, as well as by Tallahassee's recent rejection of an opportunity to purchase an ownership share of St. Lucie No. 2.¹ Obviously, if St. Lucie No. 2 were a "bottleneck" facility -- like the bridge involved in United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912), or the transmission facilities involved in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) -- Tallahassee would have jumped at the chance to acquire an ownership share, and the "inside" Cities would not have ceded to others a portion of their ownership shares.

In fact, the decision in Otter Tail points up rather clearly some of the fundamental deficiencies in Cities' contentions. There was a specific and detailed showing in that case that Otter Tail possessed monopoly power in a wholesale and transmission market that included a number of municipalities. Otter Tail's wrongful conduct consisted, among other things, of refusing to provide needed backup power and transmission services to any municipality within the relevant market area that proposed to replace Otter Tail as franchisee -- while it continued to provide such services to municipalities that already had their own power companies. In addition, Otter Tail was found to have engaged in a pattern of harassing litigation for the purpose of preventing the creation of

¹ See discussion at pp. 18-19 n.1 supra.

new municipal electric systems in its retail service area. Thus, as the Sixth Circuit pointed out recently in Byars v. Bluff City News Co., Inc., supra, 609 F.2d at 857 (footnotes omitted):

"As can be seen, Otter Tail did much more than simply refuse to deal. Its overall conduct made it plain that it was seeking to destroy a potential competitor in the local retail market. Moreover, Otter Tail could advance no evidence showing that its conduct was at all beneficial to the public. If anything, the evidence showed the contrary. The only justification offered was self-preservation, and the court rejected that defense. * * *

The situation here is in sharp contrast to the situation in Otter Tail. There is no evidence here that FPL is selectively withholding a needed commodity or service in order to prevent or impair competition. The evidence, in fact, is decidedly to the contrary; FPL has declined to issue a blanket invitation to purchase ownership shares of St. Lucie No. 2 because it needs the capacity involved to serve the needs of its present customers.¹ That conduct is of direct

¹ Even in Otter Tail, which involved a pattern of conduct that was clearly predatory, the Supreme Court cautioned that compulsory interconnection could not and should not be ordered if to do so "would impair [Otter Tail's] ability to render adequate service to its customers'" (410 U.S. at 381; quoting from 16 U.S.C. § 824a(b)). Accord, e.g., Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978) ("[T]he antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."); Thomas v. Amerada Hess Corp., supra, 393 F. Supp. at 74 ("The fact that a number of gasoline

(footnote cont'd)

benefit to the public to which FPL owes its primary duty, its retail customers, since further sales of St. Lucie capacity would lead to an increase in the electric rates of those customers. Finally, FPL cannot be said to have engaged in a pattern of harassing litigation against any entity, either within its retail service area or without.¹

(footnote cont'd)

suppliers, when faced with a shortage of impending scarcity, impose a rationing program on or allocate scarce supplies to their then-existing customers and meanwhile refuse to acquire new accounts is reasonable business behavior and will not supply a legal inference of an intent to monopolize.").

Moreover, the Supreme Court expressly acknowledged in Otter Tail that even a firm possessing monopoly power may, without violating Section 2 of the Sherman Act, "protect itself against loss by operating with superior service, lower costs, and improved efficiency" (410 U.S. at 380). The Cities apparently would read this passage out of Otter Tail -- while ignoring cases like Berkey, CalComp and du Pont -- contending that any firm that has achieved lower costs or improved efficiency must share those benefits with its asserted competitors, despite the adverse effects on the efficient firm's customers. This contention, if accepted, would turn Otter Tail squarely on its head.

¹ The other so-called "bottleneck" cases on which the Cities have relied in their Motion are similarly inapposite. In United States v. Terminal Railroad Ass'n, supra, United States v. Pacific & Arctic Co., 228 U.S. 87 (1913), and Associated Press Ass'n v. United States, 326 U.S. 1 (1945) -- the Supreme Court rested its decision on the fact of concerted action, which is not present here. In the Terminal Railroad case, for example, the Court emphasized that "[t]he fact that the Terminal Company [which controlled all access by rail into and out of St. Louis] is not an independent corporation at all is of utmost significance" (224 U.S. at 398). Similarly, in the Pacific & Arctic case, the indictment charged, inter alia,

(footnote cont'd)

In sum, Cities' claim of an unlawful unilateral refusal to deal by FPL in nuclear power is woefully deficient

(footnote cont'd)

that the defendants had refused to permit competing steamship companies to share in the through-rate agreements they had negotiated, and that the rates charged to competing companies for the use of the defendants' facilities were discriminatory. The Court held that these allegations, if proven, were sufficient to charge a violation of Section 2 of the Sherman Act. According to the Court, the charge of the indictment in the Pacific & Artic case was "that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines * * *, but as a combination and conspiracy in restraint of trade by preventing and destroying competition * * * and obtaining a monopoly of the traffic * * *" (228 U.S. at 104). And, in the Associated Press case, the Court concluded that the only reason for certain restrictive provisions in the AP's by-laws was to prevent competition from non-member newspapers. See 326 U.S. at 13. Thus, these cases -- like the related group boycott cases (e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963), Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), Klor's, Inc. v. Broadway-Hale Stores, Inc., supra, Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941)), on which the Cities also rely -- involved concerted action by one group of competitors designed to disadvantage other competitors, an element that is not present here. Accord, e.g., Gamco v. Providence Fruit & Produce Building, 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952) (plaintiff denied access to a warehouse jointly owned and controlled by its competitors).

Finally, this is not a case -- like Lorain Journal v. United States, 342 U.S. 143 (1951), North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977 (1966), and Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir.), cert. denied, 354 U.S. 923 (1957) -- in which a firm possessing monopoly power has attempted to destroy a competitor by refusing to deal with customers that have business dealings with the firm's rivals.

as a matter both of fact and law. In addition to Cities' failure to demonstrate the existence of competition between FPL and cities out of FPL's retail service area, or the possession of monopoly power by FPL in a market properly limited to nuclear-fueled generation, Cities' assertions ignore entirely the controlling case law under Section 2 of the Sherman Act. That case law confirms, inter alia, that Cities' contentions, if accepted, would pervert antitrust law and policy by denying FPL the ability to operate with maximum efficiency for the benefit of its customers.

(e) Decisions by This Board Imposing
Expanded Access Conditions on
Nuclear Licensees Do Not Support
the Relief That Cities Are Seeking

Contrary to Cities' assertions, the Appeal Board's decisions in the Midland¹ and Davis-Besse² proceedings do not support their contention that FPL has unlawfully refused to deal in nuclear power with cities outside its retail service area. Neither does the Appeal Board's recent decision in the

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¹ Consumers Power Co. (Midland Units 1 and 2), ALAB-450, 6 NRC 887 (1977).

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

Farley¹ proceeding provide the support the Cities need.

In none of those proceedings did the Appeal Board recognize a relevant product market limited to nuclear-generated power.² Moreover, the entities granted direct access to the nuclear units involved in Davis-Besse and Farley were located within, not outside, the applicants' retail service areas.³ In none of those proceedings did the Licensing or Appeal Board conclude that a "situation inconsistent with the antitrust laws" would exist unless the applicants offered to share the facilities at issue with electric utility systems located outside their retail service areas.

Further, the Appeal Board's findings of monopoly power in the Midland, Davis-Besse and Farley proceedings are in sharp contrast to the situation presented in this proceeding.

¹ Alabama Power Co. (Farley Units 1 and 2), ALAB-646 (decided June 30, 1981).

² The markets at issue in those prior proceedings were the markets for retail and wholesale power sales and for coordination services. As noted earlier (see page 15 n.1 *supra*), it is essential to the Cities in this proceeding that they establish a relevant market limited to nuclear-generated power.

³ Before the question of relief could be resolved by the Licensing Board on remand in the Midland case, the parties entered into a settlement that made unnecessary a decision by the Board as to the parties entitled to relief. The settlement agreement was approved by the Licensing Board (LBP-80-21, 12 NRC 177 (August 4, 1980)), and the Appeal Board declined to review the matter (ALAB-610, 12 NRC 174 (August 26, 1980)).

In Midland, for example, the Board concluded that the applicant's (6 NRC at 1004-05) --

"strategic dominance over high voltage transmission gives the company control over the small utilities' access to other large nearby utilities. The small utilities are thus forced to turn to [the applicant] for their needs, either directly in the form of coordination power and services, or indirectly to have these wheeled into them from 'outside' utilities. Consequently, [the applicant] has monopoly power in the coordination services market submarket, for it can control the terms by which the small utilities can obtain these important coordination services. * * *"

In addition, the applicant in Midland already controlled approximately 80 percent of the generating capacity in the relevant geographic market. Ibid.

The situations in Davis-Besse and Farley were comparable to Midland so far as the applicant's possession of monopoly power in relevant product markets that included the intervening utilities. The applicants in Davis-Besse controlled a 95 percent or greater share of the bulk power generation and transmission facilities in their respective service areas. 10 NRC at 273. In Farley, the applicant controlled 98 percent of the generating capacity in the relevant market area, owned all of the transmission lines and facilities providing access by the intervenors to utilities outside the market area, and supplied 88 percent of the power in the relevant retail market. See op. at 75-76, 80-81. Because of the applicant's complete control of all transmission surrounding the intervenors, the Appeal Board noted in Farley that

"[b]y refusing to 'wheel' power, * * * [the applicant] is able as a practical matter to prevent other utilities operating in the area from coordinating with the larger utilities outside it" (id. at 77).

By contrast, the Cities have not even provided data as to FPL's share of any wholesale, retail or coordination services "market" that would include cities outside FPL's retail service area.¹ Of equal significance, cities outside FPL's retail service area clearly do not depend on FPL's transmission facilities for access to coordination opportunities.² In addition, FPL has stated its willingness to engage in wheeling transactions, and has transmission service agreements on file with the Federal Energy Regulatory Commission for all municipal utility systems that have requested them. Thus, while there was overwhelming evidence in Midland, Davis-Besse and Farley of the applicants' possession of monopoly power in markets that included the intervenors, such evidence is wholly lacking in this proceeding.

Neither is there evidence here, as there was in Midland, Davis-Besse and Farley, of any misuse of market power by the applicant. The Cities' claims concerning FPL's practices and policies with respect to wholesale and retail

¹ See discussion at pages 57-61 infra.

² The settlement license conditions require FPL to wheel power on reasonable terms for cities inside its retail service area. See discussion at pages 69-71 infra.

sales, franchise activities and coordination are discussed below (see pages 62-80); as demonstrated there, Cities' claims of unfair or anticompetitive conduct by FPL in those areas cannot be sustained. As to FPL's refusal to offer outside Cities an ownership share of St. Lucie No. 2, again the situation here contrasts markedly with prior proceedings. In Farley, for example, the applicant did not give any reason for refusing direct access to the nuclear units for which it was seeking a license until two years after the intervening utilities had requested access -- and, at that point, it cited only "complex problems which would arise from any at empt at this time to restructure the ownership of the Farley units" (slip op. at 103 n.175). Moreover, the Appeal Board found in Farley that the applicant's refusals to provide direct access "were deliberately directed toward avoiding sharing * * * for fear that granting * * * an ownership interest in the plant would lead to erosion of the applicant's wholesale and retail business" (id. at 110).

As noted, FPL has declined to offer every municipal system in Florida an ownership share of St. Lucie No. 2 because it needs that capacity to serve its present customers. Transferring some of that capacity to outside cities would result in increased costs for FPL's customers, as FPL moved to replace the lost capacity with capacity from other generating sources. There is no reason, and Cities have suggested none, why FPL and its customers should be required to subsidize any of the

Cities in that manner. In short, while FPL has declined to extend an open invitation for direct access to St. Lucie No. 2, that conduct is by no means unfair or "unreasonably restrictive of competition" but is, instead, amply justified by wholly legitimate business considerations.

2. Cities' Non-Nuclear Refusal To Deal
Claims Are Demonstrably Without Merit

The gist of Cities' non-nuclear refusal to deal claims is that FPL has refused to deal with them in areas such as wholesale power sales, transmission services and some forms of "coordination." The Cities do not articulate a coherent antitrust theory relating to these claims, nor do they address in any respect the April 24, 1981, settlement license conditions. The only thing that is clear about Cities' market theory is that they believe the relevant geographic area is "Peninsular Florida," a region large enough to include all of the Cities. The Cities make no effort to define product markets with any specificity or to show that competition in those markets has been affected adversely by the practices of which they complain.

These flaws preclude granting of the Cities' Motion. Moreover, as shown in subpart (a) below, it is impossible for the Cities to establish that FPL has monopoly power in any "Peninsular Florida" wholesale power or coordination services market. Subpart (b) demonstrates that, even if Cities could surmount the hurdle of establishing that FPL possesses monopoly power in some relevant market, they have failed to establish

the second element of the offense of monopolization: the "willful" acquisition or maintenance of monopoly power.¹ In fact, where FPL has been reluctant to enter into arrangements proposed by the Cities, its reluctance has been based upon legitimate business considerations, and has not been motivated by any intent to acquire or maintain monopoly power.

(a) FPL Does Not Possess Monopoly Power in Any Market Relevant to Cities' Non-Nuclear Claims

The Cities' description of the markets that they assert are relevant to their non-nuclear monopolization claims is, for all practical purposes, limited to the following (Motion, p. 91):

"There is a Peninsular Florida geographic market for at least some wholesale and co-ordination power supply."²

The Cities do not explain the nature of these alleged "markets" or whether, as the language they use implies, they believe these markets include "some" activities and not others.

The notion that FPL could have monopoly power in any "market" encompassing Peninsular Florida cannot withstand even

¹ United States v. Grinnell Corp., supra, 384 U.S. at 571. The Cities themselves acknowledge that they must establish that the alleged unilateral refusals to deal of which they are complaining were "motivated by a purpose to preserve a monopoly position * * *." Motion, p. 100 (quoting from United States v. Otter Tail Power Co., supra).

² Markets bearing these denominations have been found to be relevant in some NRC decisions, although FPL is not aware of any instance in which the NRC has found relevant a geographic market extending beyond the general service area of the applicant or applicants. See discussion at pages 50-54, supra.

the most cursory analysis. "Peninsular Florida" includes approximately twenty generating utilities, including two large privately-owned systems (Tampa Electric Company and Florida Power Corporation) and a number of large municipal utilities. Those Cities that are not included within the definitions of "neighboring entity" and "neighboring distribution system," as defined in the settlement license conditions, are located beyond FPL's general area of operations; in fact, some of the Cities are located a hundred or more miles from any of FPL's facilities. The Cities do not submit any evidence tending to show that FPL possesses monopoly power in any Peninsular Florida market, do not delineate market shares and, indeed, in apparent recognition of the factual problems they face, do not clearly aver that FPL has monopoly power in any such "markets."¹ But even if one assumes that there is a Peninsular Florida "market" for wholesale power or coordination services, it is clear that FPL lacks monopoly power in that market.

(b) FPL's Market Share Precludes a Finding of Monopoly Power

Although the Cities make no effort to establish FPL's share of any Peninsular Florida "market" for wholesale power or coordination services, the available evidence shows

¹ While their argument implies monopoly power allegations (e.g., Motion, p. 100), in an attachment entitled "Material Facts Not Genuinely in Dispute" the Cities aver that FPL has a "monopoly" in its retail service area and "dominance" (by which apparently something less than monopoly power is meant) in Peninsular Florida (Cities' Attachment 1, p. 1).

clearly that FPL's share of any such market would be less than 50 percent.¹ The courts have held on numerous occasions that "control over less than 50 percent of the relevant market is by itself sufficient evidence that monopoly power does not exist." J. von Kalinowski, Antitrust Laws and Trade Regulation ¶ 8.02[2], pp. 8034 and 8141 (1979 ed.) In fact, in those instances in which the Supreme Court has sustained findings of monopoly power, the market shares involved have ranged from a minimum of 70 percent (United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)) to a high of 90 percent (Standard Oil Co. v. United States, 221 U.S. 1 (1911)). As the Court explained in United States v. United States Steel Corp., 251 U.S. 417, 444 (1920), in discussing the significance of a

¹ FPL's bulk power production contributed about 45% of all bulk power supplied in Peninsular Florida in 1980. See Excerpt from FPL's 1980 Form 1 and Southeastern Energy Reliability Council, Coordinated Bulk Power Supply Program 1981-2000, April 1, 1981. This approximation of FPL's share of the wholesale Peninsular Florida sales -- even if power produced by FPL for sale at retail is included, as FPL believes it should not be -- may change slightly as refinements are made, but it is clear that FPL's market would remain below fifty percent [Appendix F, pp. 1201-04].

While a coordination services market does not lend itself as readily to market share calculations, data relating to the Florida Power Broker arrangement, whereby economy energy transactions are made on a state-wide basis, shows that FPL sells far less than 50 percent of the energy that is brokered. Florida Electric Power Coordinating Group, Inc., Monthly Summary of Economy Interchange Transaction savings, December 1980 and January-June 1981. [Appendix F, pp. 1204-1211]. Moreover, FPL has no generation or transmission facilities in any area that encompasses or reaches the outside cities.

substantially larger market share than the Cities can establish here:

"The power attained was much greater than that possessed by any one competitor -- it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved.
* * *"

To the same effect are Byars v. Bluff City News Co., supra, 609 F.2d at 850-53 (market share of 75-80 percent or greater "should be regarded as a starting point" in an analysis of market power); Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 33 (7th Cir. 1976) (monopolization claim rejected since, even assuming the appropriateness of the market plaintiff had alleged, plaintiff failed to prove that defendant "had a dominant share exceeding 60 percent of the market"); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975) (50 percent market share insufficient to establish monopoly power); Telex Corp. v. International Business Machines Corp., supra, 510 F.2d at 915-16 (36.7 percent of the relevant market "is insufficient to justify any inference or conclusion of market power," and further, "something more than 50 percent of the market is a prerequisite to a finding of monopoly"); White Bag Co. v. International Paper Co., 1974-2 Trade Cas. ¶ 75,188, at p. 97,357 (4th Cir. 1974) (tabulation of cases revealed monopoly power is found only when share of relevant market is 70 percent or more); Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 104 (10th Cir.), cert. denied, 414 U.S. 975

(1973) ("[I]t is fairly clear that a market share of fifty-one percent would not constitute monopoly power."); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 n. 2 (5th Cir. 1969) ("It appears that something more than 50 percent of the market is a prerequisite to a finding of monopoly."); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (Over 90 percent of the relevant market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."); Mowery v. Standard Oil Co. of Ohio, 463 F. Supp. 762, 771 (N.D. Ohio 1976), aff'd, 590 F.2d 335 (6th Cir. 1978) ("The controlling case law clearly indicates that control of less than fifty percent of the relevant market is by itself sufficient evidence that monopoly power does not exist."); Nankin Hospital v. Michigan Hospital Service, 361 F. Supp. 1199, 1209 (E.D. Mich. 1973) (market share below fifty percent insufficient to show monopoly power).

The cases cited above dispose of Cities' non-nuclear refusal to deal claims. In order to prevail on summary judgment, the Cities would have to establish as a matter of law that FPL possesses monopoly power in the "markets" alleged to be relevant to their non-nuclear claims. The case law establishes precisely the contrary: FPL's less than 50 percent share of the "markets" posited by the Cities precludes as a

matter of law a finding of monopoly power.¹ Indeed, no court or tribunal, to our knowledge, has ever found a defendant in such a situation to possess monopoly power -- even after trial -- much less before.

(c) FPL Manifestly Lacks the Power
To Control Prices or Exclude
Competitors in Any Market Relevant
to the Outside Cities

Even if it were assumed, contrary to the evidence, that FPL's market share were sufficient to support a finding

¹ Nor can Cities' claims survive the standard adopted in *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 1981-1 Trade Cas. ¶ 64,068 (2d Cir. 1981). In that case, the court was unwilling to hold that possession of less than a 50 percent market share was automatically conclusive on the question of monopoly power, indicating that it wished to leave open the possibility that a plaintiff in a rare case might be able to produce such "unambiguous evidence" of control over prices and competition to permit submission of the issue to a jury. *Id.* at p. 76,470. However, the Court did not cite any case in which a plaintiff had been able to sustain a monopoly power allegation in the absence of a 50 percent market share -- nor are we aware of any such case. Clearly, *Broadway Delivery* was not such a case: there the court, noting that "isolated instances of anticompetitive conduct" were not sufficient to establish monopoly power, affirmed a verdict for the defendant.

Moreover, in a finding directly applicable to Cities' non-nuclear refusal to deal claims, the court indicated that lack of monopoly power is the only conclusion possible if the defendant's market share is "fifty percent or even somewhat above that figure" and the plaintiff has come forward "with no significant evidence concerning the market structure to show the defendant's share of the market gives it monopoly power" (*id.* at 76,469). The Cities have come forward with no evidence of "market structure" of any kind, much less any cogently supportive of its contentions. Thus, even the standard articulated in *Broadway Delivery*, the one decision that would hold open the possibility of an exception to the established rule that prevails elsewhere, would require Cities' non-nuclear claims to be rejected as a matter of law.

of monopoly power, that would not salvage Cities' non-nuclear refusal to deal claims. Such a showing is just a "starting point." The law then requires that an assessment be made to determine whether, in view of the characteristics of the industry, the company has "the power to control prices or exclude competition" in the relevant market. United States v. Grinnell, supra, 384 U.S. at 571; United States v. E. I. du Pont de Nemours & Co., supra, 351 U.S. at 391; Byars v. Bluff City News Co., supra, 609 F.2d at 850. The Cities have tendered no evidence whatsoever that FPL has the power to control prices or exclude competitors throughout Peninsular Florida, and it is clear beyond reasonable dispute that FPL does not possess such power.¹

¹ For example, with respect to wholesale power in Peninsula Florida, the evidence establishes, inter alia, that FPL (1) makes no sales of requirements or partial requirements power outside its retail service area and (2) has no facilities outside that area. FPL cannot have the power to control the prices of transactions in which it does not engage, over areas encompassing numerous utilities hundreds of miles beyond its sphere of operations or its nearest facilities.

With respect to coordination power supply, it is uncontested that every generating utility outside FPL's service area has interconnections with other generating utilities besides FPL, and thus has a wide array of coordination alternatives. Nor do these alternatives exist only in Peninsular Florida; for example, the City of Tallahassee recently has decided to proceed with a 240 kv transmission line to Georgia, and other northern interconnections are under consideration by several other utilities located in Peninsular Florida. With respect to economy energy transactions, these alternatives are exemplified in the Florida Power Broker Arrangement, described in Mr. Bivan's Affidavit ¶¶ 33-34 [Appendix B]. Under that arrangement, scores of economy transactions occur daily among

(footnote cont'd)

(d) FPL's Alleged Non-Nuclear Refusals
To Deal Have Not Been Shown To Be
Motivated by Anticompetitive
Considerations

As shown in the foregoing discussion of Cities' nuclear power claim, the offense of monopolization has two elements: a showing that the defendant possesses monopoly power as well as "the willful acquisition or maintenance of that power" (United States v. Grinnell, supra, 384 U.S. at 570-71). The Cities seek to establish "willful[ness]" by alleging instances of alleged refusals to deal on the part of FPL.

As to many of these allegations (see Motion, pp. 63-64), there are factual disputes concerning whether FPL rejected bona fide requests to deal.¹ However, even if the allegations are accepted, arguendo, as true, the Cities could not prevail on their Motion since they have failed to demonstrate that any of the alleged refusals were motivated by anticompetitive considerations. As shown below, legitimate

(footnote cont'd)

many utilities, and FPL has not sold as much of this power as it has needed to buy. [Appendix F, pp. 1209-11]. As noted above, moreover, FPL has no facilities outside its service area and has no power to prevent outside utilities from using their own facilities and coordinating among themselves or with many others. In short, FPL cannot "dictate the economic terms" upon which utilities in Peninsular Florida may coordinate and demonstrably does not possess monopoly power over any Peninsular Florida coordination power supply. See, e.g., Midland, supra, 6 NRC at 999.

¹ See Appendix A, hereto.

business considerations underlie FPL's position on each of the commercial matters in dispute.¹

It must be noted, moreover, that Cities do not contend that the refusals to deal that they allege made it impossible for them to compete with FPL. Their position, instead, seems to be that, had FPL complied with their alleged requests for various transactions, their costs would have been reduced. For reasons discussed at pp. 33-50, supra, it cannot reasonably be contended that the antitrust laws require even a business with monopoly power to assist its competitors in reducing their costs. Any such contention, indeed, would be inconsistent with the basic premise of the antitrust laws, which is to encourage competition based on economic efficiencies and lower costs. See Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

(1) Wholesale Power Sales

The Cities allege that FPL has refused to deal in wholesale power. The settlement license conditions already contain a comprehensive provision (Section IX) that requires FPL to sell power at wholesale to all small utilities that are located in or adjacent to the area served by FPL. Essentially,

¹ The standards by which refusals to deal by a firm with monopoly power are judged under the antitrust laws are discussed at pages 33-50 above. Refusals based on considerations such as engineering or technical problems and avoiding unprofitable ventures are not acts of monopolization. See International Railways of Central America v. United States, 532 F.2d 231, 239-40 (2d Cir. 1976); Otter Tail Power Co. v. United States, supra, 410 U.S. at 380-81.

the Cities object to these conditions on two grounds: first, they contend that FPL should be required to extend wholesale service throughout the State of Florida; and, second, they argue that FPL should not be permitted to limit the quantity of power that a customer may purchase at wholesale.¹ In fact, FPL perceives, for good reason, that any expansion of its obligation to sell wholesale power -- particularly in the manner suggested by the Cities -- would affect adversely both its customers and shareholders.

As Mr. Bivans states in his affidavit, FPL's existing electric generating facilities are carried on its books at an average of \$200 per kilowatt of installed capacity.² A new coal plant on which FPL embarks today is expected to cost \$1800-2000 per kilowatt, or 10 times the cost of existing facilities.³ New capacity additions must be financed with bonds that bear interest of 15 percent or more, in comparison with FPL's average embedded cost of debt of 9.94 percent, and with new issues of common stock that necessarily would be marketed at a price below their book value.⁴ To supply the

¹ As demonstrated above (pp. 56-61), Cities' argument that FPL has monopolized by refusing to sell wholesale power to cities distant from FPL's service area also must be rejected because of FPL's lack of monopoly power in any "Peninsular Florida" market for wholesale power.

² Bivans Affidavit, ¶ 18 [Appendix B].

³ Ibid.

⁴ Howard Affidavit, ¶ 4-6 [Appendix E].

energy demands of new or additional wholesale loads, FPL must burn more oil.¹ Oil is FPL's most expensive fuel, and when more of it is burned FPL's average fuel cost per kilowatt hour is increased.²

In short, the marginal or incremental costs of serving significant new loads greatly exceed FPL's average costs. However, under the standards applied by the Federal Energy Regulatory Commission ("FERC"), firm wholesale power must be priced at average system cost.³ Thus, the consequences of FPL's assuming new or additional firm wholesale power obligations would be as follows: (1) FPL's average costs, and therefore its rates to all customer classes, would be increased; (2) because of regulatory law FPL's profits would be reduced until rate increases that reflect the higher average costs could be obtained;⁴ and (3) the value of the shares held by FPL's existing shareholders would be diluted.⁵

Under these circumstances, it would be irrational for FPL to expand the availability provisions of its wholesale power tariffs and to "compete" for the wholesale business of nonadjacent utilities. Certainly, FPL's reasons for deciding

¹ Bivans Affidavit, ¶ 16 [Appendix B].

² Ibid.

³ Opinion No. 57, supra, 32 PUR 4th at 339-40.

⁴ Howard Affidavit, ¶ 7 [Appendix E].

⁵ Id. at ¶¶ 5-6 [Appendix E].

not to do so are legitimate business considerations by any standard.¹

For the same reasons, it is essential that FPL be permitted to impose reasonable limitations on the amount of power individual customers may purchase at wholesale. The license conditions permit FPL to limit the quantity of wholesale power sold to a neighboring entity to the amount required to serve the entity's retail customers plus any wholesale customers that previously were supplied by FPL. They also permit FPL to decrease that quantity by the amount of power FPL makes available to the entity on other than a wholesale basis. The net result is that the wholesale customer may use or resell the power supplied by FPL, and any other resources available to it, in any manner that it sees fit.² The customer also may increase its wholesale purchases to compete at wholesale for any load now being served by FPL.³ To suggest that

¹ FPL is prepared to sell power to any electric utility system, in Florida or elsewhere, if the terms of the transaction permit FPL to benefit its shareholders or ratepayers without disadvantaging either. For example, FERC Opinion No. 57 notes FPL's willingness to sell firm power to systems that would not have been eligible for wholesale service under FPL's proposed tariffs, at a rate that would permit FPL to recover its incremental costs. Opinion 57, supra, 32 PUR 4th at 318.

² Contrary to Cities' statements (Motion, p. 56), the settlement license conditions (Section IX(e)) expressly provide that FPL may not restrict the "use or resale of power sold" at wholesale.

³ The rationale for the latter is that, since FPL already is supplying the load, transfer of the load to a wholesale supplier that in turn is supplied by FPL would not increase the power demands imposed upon FPL.

a wholesale customer is entitled to buy, at FPL's average system cost, all of the power that it can resell (anywhere in Florida, or elsewhere) is no more sensible than to suggest that a city is entitled to acquire as great a percentage of St. Lucie No. 2 capacity as it can use or resell, without limitation.¹

¹ In light of the settlement license conditions, there is no reason to deal here with Cities' allegations that at times in the past FPL either refused to sell power at wholesale or proposed to limit the applicability of its wholesale tariff to a class of customers more narrowly defined than would be permitted by the license conditions. As Appendix A demonstrates, disputes over wholesale power sales that arose prior to the filing of FPL's first wholesale power tariff with FERC centered on the question of "firmness"; i.e., whether FPL could withdraw the service in times of capacity shortage to protect the reliability of service to its pre-existing customer groups. Appendix A, pp. 3-11.

During the 1960s and 1970s the prospect of capacity shortages was of real concern to FPL's management. Bivans Affidavit, ¶ 15 [Appendix B]; McDonald Deposition (May 12, 1981), pp. 64-65, 121-22, 146; *id.* (May 13, 1981), pp. 296-97, 345-46, 407-11 [Appendix F, pp. 258-72]. Any reluctance by FPL to assume a firm obligation to supply load that previously had been the responsibility of the Cities was grounded upon the legitimate concern of providing reliable service to those customers that FPL already was obligated to serve. FPL's proposal in 1977 (FERC Docket No. ER78-19) to modify the availability provisions of its wholesale tariffs was grounded upon the economic considerations described above as well as upon a concern that the need to repair the steam generators of its Turkey Point nuclear units could result in capacity shortages. (Testimony of Robert J. Gardner, FERC Docket No. ER78-19 (Phase I), Vol. 4, p. 463; Vol. 11 pp. 1864-66) [Appendix F, pp. 274-89]. In any event, the proposal was never placed into effect; indeed, FPL voluntarily forebore from implementing the proposal until FERC had ruled finally upon it. Opinion No. 57, supra 32 PUR 4th at 339 n.63.

(2) Interconnections

The Cities also allege that "FPL's refusal to interconnect and/or efforts to unlawfully condition interconnections" constitute monopolistic practices.¹ Motion, p. 63. But the Cities admit that the license conditions now in effect require FPL to interconnect with neighboring entities and neighboring distribution systems. Motion, p. 63. Their one remaining complaint is that the conditions do not contain any requirement "that FPL share in the costs on a reasonable basis" (*ibid*).

This question of cost allocation, however, is one that should be left to FERC under Section XIII(c) of the settlement license conditions.² What is beyond reasonable dispute for present purposes is that it is not a monopolistic practice for FPL to decline to offer the Cities more favorable cost terms for interconnections than the terms the Federal Power Commission or FEPC determines to be fair.

(3) Transmission Service

The Cities also complain of FPL's alleged refusals to deal with respect to transmission service. Motion, pp. 63, 74, 103. As with wholesale power and interconnections, however, the settlement license conditions contain comprehensive

¹ FPL denies that it has ever refused to interconnect with another system or sought unlawfully to condition any such interconnection. See Appendix A, pp. 13-23.

² Section XIII(c) reads: "Nothing herein shall be construed to affect the jurisdiction of FERC or any other regulatory agency."

provisions (Section X) that require FPL to provide transmission service for adjacent entities and neighboring distribution systems. Cities' complaints about the situation that will exist under the license conditions appear to be that (1) FPL retains the right to provide transmission service by contracting with individual customers instead of by filing a generally applicable transmission tariff with FERC;¹ (2) FPL's rates for transmission service as approved by two FERC Administrative Law Judges ("ALJs") are too high, because FPL and Florida Power Corporation have not offered a "joint rate" for transactions that involve both systems and because the Cities disagree with the allocation method used by FPL in developing the rate (and approved by the ALJs);² and (3) FPL has not agreed to participate in a vaguely defined scheme under which the Cities would invest in transmission facilities in lieu of paying a rate for transmission service.³ (Motion, p. 117).

¹ Motion, pp. 58-60, 103.

² Motion, p. 117; Cities' Appendix at C179-C180; Initial Decision, Florida Power & Light Co., FERC Docket No. ER77-175, mimeo at 9-10 (November 28, 1978); Initial Decision, Florida Power & Light Co., FERC Docket No. ER78-19, mimeo at 33-45 (July 24, 1980) (appeal pending).

³ FPL has alleged in a counterclaim against the Cities in the Florida district court litigation that they have unlawfully conspired to establish a pricing formula for transmission service sales and purchases, and that the Cities' joint rate proposal is an aspect of this conspiracy. This allegation has withstood the Cities' motion to dismiss. The Cities' transmission claims in this proceeding are a continuation of their unlawful effort. Cf. ILC Peripherals v. International Provision Machines Corp., supra, 458 F. Supp. at 444.

The Cities' arguments completely ignore the fact that FPL's transmission system was designed and built to serve FPL's customer loads and to provide sufficient margins of reserve capacity to provide reliable service in the face of various contingencies. To the extent the system can accommodate transmission service requests without undue interference, FPL is prepared to provide service, upon terms that fairly compensate it for the use of its facilities.¹

The disadvantages of filing a tariff, as contrasted with contracting individually with transmission service customers, arise from the legal consequences of such a filing. FPL would subject itself, by filing a tariff, to regulatory control that would not otherwise apply. Congress, in enacting Part II of the Federal Power Act, withheld from FERC authority to expand the transmission service obligations voluntarily assumed by utilities under private contract.² Once a tariff obligation is undertaken, however, FERC may interpret and apply the tariff, modify the tariff in some circumstances, approve or disapprove proposed changes in the tariff, and prevent withdrawal of the tariff without its prior permission.³

¹ Bivans Affidavit, ¶ 23 [Appendix B].

² New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 400-03 (2d Cir. 1980); see also Richmond Power & Light Co. v. FERC, 574 F.2d 610, 619-20 (D.C. Cir. 1978).

³ Ibid.

Moreover, the tariff must be complied with as if it were law,¹ even in circumstances that were not anticipated at the time of the filing.

This regulatory scheme involves at least two specific disadvantages for a utility like FPL.² First, judgments about capacity limitations and reliability considerations would no longer be within FPL's province, nor within the province of the state regulatory commission that represents the interests of some 95 percent of FPL's customer loads, but would be in the hands of FERC.³ Second, FPL would lose the flexibility to tailor contracts to specific arrangements and, unless its management were sufficiently prescient to predict the future unerringly, FPL might be forced to apply the tariff under circumstances when the compensation received by FPL would be patently inadequate.

The only argument the Cities have advanced in the past to support their demand that FPL file a transmission tariff is that, for planning purposes, they desire assurance that FPL's transmission policies will not be repudiated. That

¹ Northwestern Public Service Co. v. Montana-Dakota Utilities Co., 181 F.2d 19, 22 (8th Cir. 1950), aff'd, 341 U.S. 246 (1951).

² It is proper and lawful for a firm to accept Congress' invitation to structure its affairs to avoid subjecting itself to additional regulation. Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 517-18 (1945).

³ Bivans Affidavit, ¶ 24 [Appendix B].

argument is transparent at best,¹ and, in any event, is clearly obviated by the settlement license conditions. Those conditions assure the Cities that FPL will provide transmission service in accordance with the license conditions during the operating life of St. Lucie Unit No. 2.² Accordingly, there is no merit whatsoever to Cities' claim that FPL's unwillingness to substitute a tariff filing for transmission service contracts is an act of monopolization.

The Cities' "joint rate" argument can be dealt with briefly. Cities' proposal would result in FPL's receiving approximately one-half the compensation that it now receives under rates approved by two FERC ALJs, for transactions that also involve use of the transmission facilities of Florida Power Corporation. As the ALJ in ER78-19 said in rejecting Cities' proposal:

"Cities would prefer a transmission rate which is derived by treating FPC and FPL as a single, merged transmission grid, a rate less than half the sum of the two current costs of service. The shortfall in revenue, of course, will come from customers who transmit on only one system and are charged on the basis of costs on one of the two unmerged systems. Such a subsidy is rather obviously discriminatory.

¹ As is shown elsewhere (Appendix A, p. 23), FPL has provided transmission service in every case where a bona fide request for such service has been received and, indeed, has actively offered transmission service agreements since the "energy broker" operation began in 1978.

² The license conditions set basic rules that FPL must follow in providing transmission service. However, they do not prescribe specific rates or terms and conditions for service. These would be embodied in the contracts between the parties and would be subject to plenary review by FERC.

"The alternative, to bill all customers on the basis of the merged FPL/FPC system is likewise unacceptable. Creating a merged transmission system for billing purposes would force FPC customers to pay for FPL facilities and vice versa. One or the other set of ratepayers would be forced to adopt and pay for a less efficient system, merely for the convenience of Cities, and without the ability to make use of that other system.

* * * *

"[T]he specific proposal offered by Cities would result in unjust, unreasonable and unduly discriminatory rates."¹

Obviously, FPL has legitimate business reasons for declining to halve a transmission rate that has been approved by FERC as just and reasonable and requiring either its other customers or shareholders to absorb the difference. Moreover, questions of cost allocation for ratemaking purposes are within FERC's province and expertise, as Section XIII of the license conditions recognizes.

Finally, the Cities contend (in the depths of an appendix to their Motion) that it is monopolistic for FPL to decline to substitute, in lieu of a transmission service rate, some sort of "credit" for investments in transmission facilities that the Cities allegedly are prepared to make.² Cities'

¹ Initial Decision, Florida Power & Light Co., FERC Docket No. ER78-19, mimeo at 35-36 (July 24, 1980) (appeal pending). The same decision held that Cities' proposal to exclude a significant portion of FPL's transmission facilities from the rate base was "simply not justified" (id. at 39).

² The Motion does not reveal the terms on which the Cities propose to enter into any such arrangement.

Appendix at C181. As Mr. Bivans' affidavit states, however, FPL desires to retain sufficient control over its transmission facilities to assure the provision of reliable service to FPL's firm customers.¹ Accordingly, FPL would view with some concern a proposal that conveyed to others ownership rights in its transmission system. The Cities cite no authority under the antitrust laws that would require FPL to agree to any such arrangement, and FPL is aware of none.²

(4) "Coordination"

The Cities also charge that FPL has refused improperly to deal with them by declining requests for "coordination." To the extent this allegation is understandable from the papers filed by the Cities, it appears to consist of two complaints:³ (1) that, prior to formation of the Florida Coordinating Group ("FCG") in 1972, FPL participated in pooling arrangements with other utilities in Florida and excluded Cities from those arrangements; and (2) that, after the FCG

¹ Bivans Affidavit, ¶ 24 [Appendix B].

² Cities' Motion contains allegations of past refusals by FPL to provide transmission service. FPL denies these allegations. Moreover, the relevance of the allegations in light of the settlement license conditions is not at all apparent. That FPL did not receive a request for transmission service from any of the Cities until 1975, and perceived no reason to offer the service affirmatively prior to that time, is not surprising in view of the absence of economic incentives for bulk power transactions prior to the 1973-74 fuel crisis. Bivans Affidavit, ¶ 25 [Appendix B].

³ To a large extent, Cities' discussion of this coordination claim is simply a rehash of allegations made elsewhere in their motion and dealt with elsewhere in this response.

was established, FPL refused to participate in arrangements requested by the Cities that would have resulted in a "fully integrated" power pool consisting of FPL and most (or perhaps all) other electric utility systems in Peninsular Florida.¹ The first issue is treated elsewhere in this response.² The second is addressed here.

The antitrust laws stop far short of imposing upon any firm, even one with monopoly power,³ an obligation to pool its operating assets with those of its competitors. The Cities have cited no authority for their position, for the good reason that none exists.⁴ In fact, the imposition upon a firm with monopoly power of an obligation to pool its resources with competitors cannot be squared with the unbroken line of cases under Section 2 of the Sherman Act holding that even a firm with monopoly power may compete with other firms so long as it does so fairly.⁵

¹ Motion, pp. 24-54; Cities' Appendix at D60-D87.

² See discussion at pages 112-16 infra.

³ As is discussed elsewhere (pp. 56-61 supra), the Cities have not established that FPL has monopoly power in any market and cannot conceivably establish that FPL has monopoly power in any Peninsular Florida market for coordination services.

⁴ Entirely different antitrust issues are raised by allegations that a firm has pooled its resources with some competitors and that the parties to the pool have selectively excluded others from the pool. See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC 265 (1979). There is no allegation here that such is the case or that it has been the case in the years since the FCG was formed.

⁵ See discussion at pages 33-49 supra.

Even if it were assumed, arguendo, that in some circumstances the refusal of a firm to pool its resources with self-styled competitors may run afoul of Section 2 of the Sherman Act, a refusal that is based on legitimate business considerations could not be so construed. As demonstrated in Appendix A (p. 28), FPL's position on pooling with other utilities has been entirely reasonable, and its unwillingness to commit itself to what the Cities term a "fully integrated" power pool is grounded upon well-founded concerns that the costs of establishing and operating the pool would outweigh the benefits, and that the associated loss of managerial authority would impair the efficiency with which FPL conducts its electric business. See Bivans Affidavit, ¶¶ 7-12 [Appendix B].

Cities do not allege that FPL would gain any expertise in planning or operating its electric system by participating in a "fully integrated" power pool. It is indisputable that FPL is now capable of managing and conducting these activities on its own. Thus, if FPL were to cede its managerial prerogatives to committees representing the members of a pool, it would gain nothing but would lose a great deal of freedom and flexibility. FPL's management believes that it is capable of making better, quicker decisions than would result from the deliberations and compromises of a committee. FPL's attitude in this respect is entirely consistent with the policies underlying the antitrust laws -- policies that

encourage a firm to strive to outperform other firms by making better and faster management decisions.

Moreover, FPL's belief that the costs of centralized statewide planning of generating facilities and centralized dispatch of generation facilities outweigh any possible benefits has been confirmed by studies performed by the FCG. Those studies were planned and conducted by task forces of the FCG that included representatives of numerous electric systems in Florida, including many of the Cities.¹ In 1980, the FCG completed a study that considered whether the potential benefits of a "fully-integrated" pool are sufficient to justify abandoning the present "broker" program in favor of a centralized dispatch arrangement.² Among the many comments submitted by electric systems after review of the study results were the following:

"[Lake Worth] Based on study findings, there is no immediate urgency in implementing an elaborate and expensive central dispatch as modeled in the study.

* * * *

¹ See Bivans Affidavit, ¶¶ 31-35 [Appendix B], and particularly attachments C and D thereto.

² In describing the Florida energy broker, the DOE has stated: "It's one of the best things that's happened in terms of power coordination anywhere in the country. Those folks down there are getting the benefits of economic dispatch for a fraction of the cost that the pools and the holding companies have invested in their systems." Power Brokering Saved Florida \$10-Million-'Poor Man's Economic Dispatch', Electrical Week, Jan. 29, 1979, at 2. [Appendix F, pp. 290-91].

"[Orlando Utilities Commission] Since OUC received less revenue in the Central Dispatch operation as compared to the "As Dispatched" (actual) operation, OUC's customers would have paid more if Central Dispatch operation had been implemented in 1978.

* * * *

"[Tallahassee] A utility cannot be expected to participate in any undertaking at the expense of its customers simply to benefit the customers of other utilities in Peninsular Florida."

* * * *

"[Jacksonville] It is urged that the FCG pursue the maximum use of the brokerage system However, without additional study, it is urged that no effort be expended towards the implementation of a central dispatch operation."¹

The gist of these comments is that centralized dispatch would not appear economically desirable. Cities' suggestion, despite these comments, that FPL is acting unreasonably in not agreeing to centralized planning and dispatch is absurd on its face.

(5) Acquisition Proposals

Finally, the Cities apparently believe that FPL has acted unfairly in making acquisition proposals to municipal systems in its retail service area. (Motion, p. 64). This argument merits only a brief response.

¹ FCG Peninsular Florida Central Dispatch Study, Final Report, Part I, at 149, 159, 179, 138. (May 14, 1980). [Appendix F, pp. 451, 461, 481, 440].

FPL has not acquired any municipal electric system since World War II. It has made only two acquisition proposals since 1957, to New Smyrna Beach in 1974 and to Vero Beach in 1976. Each of those proposals was made at the request, indeed at the urging, of the officials of the municipalities involved. It is difficult, to say the least, to see how FPL's good faith response to these solicitations could amount to a wrongful refusal to deal.¹

Moreover, it is clear that such proposals do not and cannot contravene the antitrust laws. If those laws protect "franchise competition," and if such competition exists here (which Cities neither allege nor demonstrate), then such "competition" cannot of itself be unlawful.

Finally, in light of the settlement license conditions, the primary questions still arguably at issue in this proceeding involve cities located some distance from the area where FPL provides service. It is undisputed that FPL has never acquired, nor made an acquisition proposal to, any such city.

¹ Cities appear to argue, in one of their appendices, that FPL's proposal to New Smyrna Beach was improper because New Smyrna Beach simultaneously desired an interconnection that was different in design from the interconnection FPL had offered and was willing to provide. In fact, however, FERC fully considered the interconnection that had been proposed by New Smyrna Beach and found that it was "of unconventional design and not widely accepted by the industry" and that the interconnection proposed by FPL was "appropriate." Florida Power & Light Co., FERC No. E-8008, slip op. at 60-61 (November 26, 1974).

II. CITIES' MOTION MUST BE DENIED BECAUSE
IT INCORRECTLY ASSUMES THAT THEY NEED
NOT PROVE THEIR ALLEGATIONS

Cities' Motion is premised on the notion that they are entitled to procedural shortcuts in this proceeding. Their premise is that they are not obligated to prove matters found by the Fifth Circuit in the Gainesville case and by FERC in Opinion No. 57. Their further premise is that they need not establish any foundation for the admissibility of the documents on which they rely.

There is no basis for either of these assumptions. Cities' effort to avoid proving their allegations with admissible evidence and to prevent FPL from having an adequate opportunity to address the merits of their contentions must be rejected.

A. The Gainesville Decision Provides
No Estoppel in Favor of the Cities

The Gainesville case was filed in August 1968 by the City of Gainesville against FPL and Florida Power Corporation. At trial, FPL was the only defendant, with Florida Power Corporation having settled with Gainesville. There were three liability issues in the case: (1) the charge that FPL would not interconnect with Gainesville because FPL and Florida Power Corporation had agreed upon a division of territories in violation of Section 1 of the Sherman Act; (2) the charge that FPL had violated Section 1 by agreeing with Florida Power Corporation that neither would interconnect with Gainesville unless Gainesville entered into a retail territorial agreement;

and (3) the charge that FPL had attempted to monopolize the sale and distribution of electric power by refusing to interconnect with Gainesville without a territorial agreement. See 573 F.2d at 294 n.3, 303.

The jury found for FPL on all of these theories of liability, and the district court denied a motion for judgment n.o.v. The Court of Appeals affirmed the finding for FPL on the latter two theories (id. at 303), but determined that FPL and Florida Power Corporation had entered into a wholesale territorial agreement (id. at 294). The case was remanded for a determination as to whether the conspiracy found by the Fifth Circuit had any impact on Gainesville and, if so, the amount of damages recoverable by Gainesville. That litigation has recently been settled.¹

The Cities, who were not parties to the Gainesville litigation, urge that they are entitled to the benefit of the Fifth Circuit finding of a conspiracy. At the same time, however, they do not view themselves as bound by the finding in FPL's favor on the monopolization charge.² Such use of collateral estoppel is impermissible.

¹ It is FPL's understanding that Gainesville intends to file papers withdrawing its claims, by reason of this settlement, by the date this pleading is served upon the Board.

² The Court refused to disturb, in this regard, the jury's finding that Gainesville had not requested an interconnection with FPL.

The issue of the use of collateral estoppel by a stranger to prior litigation was considered by the Supreme Court in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The Court first described the policy considerations that differentiate offensive collateral estoppel from its defensive use (id. at 329-30 (citations and footnotes omitted)):¹

"[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely 'switching adversaries.' * * * Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude in the hope that the first action by another plaintiff will result in a favorable judgment. * * * Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action."

¹ As the Court explained in Parklane Hosiery (id. at 326 n.4):

"[O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant."

Cities are here attempting to make offensive use of collateral estoppel.

Although the Court determined that these considerations, as well as considerations of fairness (id. at 330-31), did not automatically preclude offensive collateral estoppel, the Court stated (id. at 331):

"The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where * * * the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."¹

Accord, e.g., Carr v. District of Columbia, 646 F.2d 599, 605-06 (D.C. Cir. 1980) (courts should not reward "sideline sitters" who could easily have joined in the earlier action but who instead adopted a "wait and see" attitude "while others carried the ball"); Starker v. United States, 602 F.2d 1341, 1349-50 (9th Cir. 1979) (offensive collateral estoppel cannot be invoked by a litigant who adopted a "wait and see" attitude to avoid the binding force of a possibly adverse initial resolution); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 247 (E.D. Tex. 1980) (collateral estoppel cannot be used offensively by a plaintiff who has "waited until another case had gone to judgment before filing his action so that he could

¹ The Court noted that "[t]he Restatement (Second) of Judgments § 38(3) (Tent. Draft No. 2, Apr. 15, 1975) provides that application of collateral estoppel may be denied if the party asserting it 'could have effected joinder in the first action between himself and his present adversary'" (id. at 330 n. 13).

take advantage of any possible prior judgment"; once a party knows of his action he should file it).¹

Under the Supreme Court's formulation, if Cities "could easily have joined" in the Gainesville litigation, offensive use of collateral estoppel should not be permitted. There is no question here but that the Cities could readily have participated in that litigation. Indeed, they have represented to this Board:

¹ The policies against parties attempting to secure the benefits of an action without participating in it were articulated in In re Yarn Processing Patent Validity Litigation, 472 F. Supp. 174, 177 (S.D. Fla. 1979) (citations omitted):

"None of the relevant considerations including judicial economy, consistency in result, or fairness to the parties is advanced by allowing parties to the consolidated pretrial action to deliberately stand by while others litigate in their interest, in the hope of receiving additional opportunities to relitigate a question if decided adversely. These non-participants should not be permitted to seek a benefit from the risk and effort of others, without the risk of their own participation.

"The Supreme Court in Parklane and Blonder Tongue indicated that in certain circumstances the mutuality doctrine should not be woodenly applied. In Blonder Tongue the Court spoke of a 'trial court's sense of justice and equity,' * * * while in Parklane the Court's central inquiry was into the 'fairness' of the doctrine's application. * * * Underlying the 'fairness' doctrine were the twin goals of judicial economy and consistent result. * * * It is clear that in the present action, allowing these non-participants the opportunity to amend their answers at some later time to assert collateral estoppel would not be consistent with these underlying policies."

"There can be little question that FPL/FPC's longstanding anticompetitive practices and policies were well known to municipal systems * * *." (Motion, p. 69.)¹

* * *

"3. The Gainesville litigation.

"If the smaller systems needed further proof of their inability to gain access to the statewide grid created by FPL and the Florida Operating Committee, it was dramatically provided in 1965-1966 by FPL's and Florida Power Corp.'s refusal of Gainesville's requests for interconnection.

"Following these refusals Gainesville undertook costly and protracted litigation to establish its right and, by extension, the rights of other systems vis-a-vis FPL and Florida Power Corporation. This litigation, which other Cities followed closely (see App. D239-D240) resulted in a Supreme Court holding for Gainesville and a Court of Appeals verdict for Gainesville in 1978." (Motion, p. 79, emphasis added.)²

¹ The reference is to the practices litigated in the Gainesville case (see Motion, pp. 66-68).

² The reference (App. D239-D240) is to a letter written in July 1968 by the Acting City Manager of Gainesville to Tallahassee's City Manager. The letter notes the "real service" being provided by Gainesville through its litigation "to our many Florida friends in the [Florida Municipal Utilities Association, a trade group comprised of and limited to municipal utilities in Florida]." It contains the following postscript, with reference to the precise issue that Cities now claim FPL is barred from relitigating:

"I am sure that you saw the recent press notice (July 9) that the Justice Department has filed an anti-trust suit against Florida Power Corporation and Tampa Electric Company. The allegation is based on the fact that since 1960 those two companies have been acting to restrain competition by dividing the territories they serve at wholesale. Much of the material (contracts, etc.) came from our case, so again I feel that we have rendered a service to our fellow cities."

It thus appears, based on these representations, that (1) the Cities were well aware of the facts regarding the relationship between FPL and Florida Power Corporation in the 1960's, the subject matter of the Gainesville litigation; (2) Gainesville litigated that case as the champion of the other Cities; and, (3) since 1968, those Cities were following the Gainesville litigation closely.¹ The Cities determined, however, not to participate in the litigation and yet now seek its benefits, without having borne the risk of an adverse determination. Under controlling law, the Cities are not entitled to this result.

There is yet another reason why the Gainesville decision may not be given collateral estoppel effect in favor of the Cities. It would be patently inequitable and unfair for the Cities to bar FPL from relitigating the territorial-division issue while the Cities would not be barred from litigating issues resolved in FPL's favor. The Board has the discretion to refuse to permit offensive use of collateral estoppel (Parklane, supra, 439 U.S. at 331),² and the inequity

¹ Should the Cities seek to modify these representations, and should the Board determine that the Cities are not bound by them, FPL clearly would be entitled to discovery with respect to the subject matter of the representations since they bear heavily on the propriety of offensive use of collateral estoppel.

² See also Olegario v. United States, 629 F.2d 204, 215 (2d Cir. 1980); In re Yarn Processing, supra, 472 F. Supp. at 177.

being advocated by the Cities calls for the exercise of that discretion.¹

B. Opinion No. 57 Provides No Estoppel
in Favor of the Cities

The hearing that led to FERC Opinion No. 57 was held pursuant to a FERC order entered on December 30, 1977.² That order related to limitations proposed by FPL on the availability of service under FPL's wholesale tariff then on file at FERC. It also related to a notice filed by FPL cancelling service to Homestead under the tariff; Homestead, instead, was to be served under its Interchange Agreement with FPL, a rate schedule also on file with FERC.

The order suspended the effectiveness of the proposed service limitations for five months and established expedited procedures for consideration of those limitations, as well as the cancellation of service to Homestead under the tariff. The procedures were designed to allow the Commission to issue its final decision before the end of the ordered suspension period on June 1, 1978. Initial Decision, p. 1, 8 Fed. Power Serv. 816 (1978).

¹ Cf. *North Carolina v. Charles Pfizer & Co.*, 537 F.2d 67, 74 (4th Cir.), cert. denied, 429 U.S. 870 (1976).

² *Florida Power & Light Co.*, Docket Nos. ER78-19 and ER78-81; "Order Accepting for Filing and Suspending Proposed Increased Rates, Suspending Notice of Cancellation, Denying Motion to Reject, Denying Motion to Consolidate, Granting Intervention, Consolidating Proceedings, and Establishing Procedures" (Issued December 30, 1977).

In accordance with the Commission's order, the Law Judge conducted the proceeding with the primary emphasis on expedition. Initial Decision, pp. 1-3, 8 Fed. Power Serv. at 816-18. Staff filed its direct case on February 24, 1978; the Cities filed their direct case on February 27, 1978; and FPL filed its rebuttal case on March 10. The hearing began on March 15 and concluded on March 28, 1978 -- some three months after the hearing had been ordered by FERC. In his Initial Decision, issued on April 21, 1978, just slightly more than three and one-half months after the Commission initiated the proceeding, the Law Judge found for FPL in all material respects.

The Initial Decision was reversed in Opinion No. 57, issued on August 3, 1979,¹ at which time FERC rejected the service limitations proposed by FPL, holding that (32 PUR 4th at 315):

"The Federal Power Act accords a utility the right to propose such limitations and an opportunity to demonstrate that its proposed change in service is just and reasonable. In the instant case, we find only that FP&L has failed to carry its burden of justification."

The Commission went on to discuss structural issues -- relevant markets and monopoly power -- as well as issues relating to what the Commission viewed as FPL's anticompetitive conduct. According to the Commission, its factual recitation

¹ Florida Power & Light Co., 32 PUR 4th 313 (1979) ["Opinion 57"].

-- 'for which the Cities are asserting collateral estoppel effect --

"is not intended by this commission to be a determination of factual disputes which may be the subject of litigation in other forums."

Instead, the Commission stated, the evidence of FPL's past conduct bears on "whether the company has satisfactorily carried its burden of justification for the proposed service limitations" (32 PUR 4th at 315).

The Cities now assert that FPL is collaterally estopped from relitigating issues determined in Opinion No. 57, although they fail to identify with any specificity what those issues are or their relevance to this proceeding.¹ It is clear in any event, however, that under controlling law Opinion No. 57 may not be provided collateral estoppel effect in favor of the Cities.

1. Different Legal Standards

The NRC has determined that collateral estoppel effect may not be given to issues resolved in one proceeding when those issues arise in a subsequent proceeding governed by different substantive legal standards:

¹ For example, in Opinion No. 57, all relevant markets found by FERC were limited geographically to FPL's service territory and the adjacent area. Is it Cities' contention in this proceeding that the appropriate geographic markets are as determined by FERC? If so, it is difficult to comprehend the basis for their claim that FPL is obligated to deal with systems outside those markets.

"[C]onsideration must be given to the comparability of the issues involved in the two proceedings when the application of res judicata or collateral estoppel is invoked. Issues are not identical if the second action involves the application of a different legal standard, even though the factual setting of both proceedings may be the same. Thus, the same historical facts may be involved in two actions; but the legal significance of the facts may differ because different legal standards are applicable to them. * * * [W]here, as here, the legal standards of two statutes are significantly different, a decision of issues under one statute does not give rise to collateral estoppel in the litigation of similar issues under a different statute."

Houston Lighting & Power Co., (South Texas Project, Units 1 and 2) LBP-79-27, 10 NRC 563, 569-71 (1979) (footnotes omitted).¹

This determination, which is in accordance with well-established law,² precludes collateral estoppel effect to Opinion No. 57 in this proceeding, for it is clear that FERC and the NRC are governed by different legal standards. Opinion No. 57 arose under Sections 205 and 206 of the Federal

¹ This conclusion of the NRC was quoted approvingly in City of Cleveland v. Cleveland Elec. Illuminating Co., C.A. No. C75-560 (N.D. Ohio, January 11, 1980). See also In the Matter of Florida Power & Light Company (South Dade Plant), Docket No. P-636A, Prehearing Conference Order No. 1, July 29, 1976, p. 5, in which the Licensing Board determined that collateral estoppel effect should not be given to findings favorable to FPL in the Gainesville litigation because the standard under § 105 of the Atomic Energy Act differs from that under § 1 of the Sherman Act, the statute involved in Gainesville.

² See, e.g., North Carolina v. Charles Pfizer & Co., *supra*, 537 F.2d at 73-74; Tippler v. E. I. du Pont de Nemours & Co., 443 F.2d 125, 128-29 (6th Cir. 1971); Title v. Immigration & Naturalization Service, 322 F.2d 21, 25 n. 11 (9th Cir. 1963); 2 K. Davis, Administrative Law Treatise 578 (1958 ed.).

Power Act, 16 U.S.C. §§ 824d, 824e (see Opinion No. 57, 32 PUR 4th at 313), which, to the extent relevant here, require that "rates and charges" of public utilities for various services and "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable * * *." Although it has been held that antitrust considerations are pertinent under this standard, there is nothing to indicate that, in determining what is "just and reasonable," FERC applies the statutory standard that applies in this proceeding -- inconsistency with the antitrust laws.¹

2. Different Burdens of Proof

There is another basic difference between this proceeding and Opinion No. 57 -- the burden of proof borne by FPL in the proceedings leading to Opinion No. 57 (32 PUR 4th at 314-15) is borne by the Cities in this proceeding. Toledo Edison Co., (Davis-Besse Units 1, 2, and 3), LBP-77-1, 5 NRC 133, 253-54 (1977); Consumers Power Co. (Midland Units 1 and 2), LBP-75-39, 2 NRC 29, 45 (1975). This shift in the burden of proof precludes collateral estoppel effect being given to Opinion No. 57 against FPL.

¹ According to FERC, its obligation is to "reflect" the "policies" expressed in the antitrust laws "in the conduct of [its] * * * responsibilities under the Federal Power Act." (Opinion No. 57, 32 PUR 4th at 315.) That is a more nebulous undertaking than that confronting the Board in this proceeding. See Davis-Besse, supra, 10 NRC at 362-63 (collateral estoppel inapplicable as to FERC findings of lack of anticompetitive practices).

It is well established that even differences in the nature of the burden of proof placed on a litigant in two different proceedings bar application of the doctrine of collateral estoppel. The prime example, of course, is that the Government's loss of a criminal case does not bar the Government from relitigating the same issues in a civil proceeding, for the Government bears a heavier burden in the criminal proceeding. E.g., One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-36 (1972) ("difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"); see also Shimman v. Frank, 625 F.2d 80, 89 (6th Cir. 1980); United States v. Gil, 604 F.2d 546, 549 (7th Cir. 1979); Neaderland v. Commissioner of Internal Revenue, 424 F.2d 639, 641-42 (2d Cir.), cert. denied, 400 U.S. 827 (1970). The same principle applies in civil cases, in situations where there is a variance in the nature of the burden of proof imposed on a litigant in different proceedings. In Young & Co. v. Shea, 397 F.2d 185, 189 (5th Cir. 1968), for example, a longshoreman did not prevail in a civil action based on an alleged injury but was permitted to maintain an administrative proceeding in which the same claim was advanced because "the applicable legal rules enable a claimant to establish the existence of an actionable injury before the Commissioner more easily than in a civil tort action * * *." See also International Tel. & Tel. Co. v. AT&T, 444 F. Supp. 1148, 1156-57 (S.D.N.Y. 1978); In re Four

Seasons Security Laws Litigation, 370 F. Supp. 219, 233, 236 (W.D. Okla. 1974) (quoting Restatement (Second), Judgments § 68.1 (Tent. Draft No. 1, 1973)).

Here, we have an a fortiori situation. These principles would preclude collateral estoppel effect to Opinion No. 57 even if FPL had a lesser burden in this proceeding than before FERC. But FPL does not have any burden of proof in the instant proceeding; the burden of proof is on the Cities. As a consequence, there can be no real issue as to the inapplicability of collateral estoppel with respect to Opinion No. 57.

3. Lack of Full and Fair Opportunity
To Litigate

Even if the legal standards and burdens of proof were identical in this proceeding and the proceeding leading to Opinion No. 57, collateral estoppel effect may not be given to Opinion No. 57 against FPL because FPL did not have an adequate opportunity to litigate in the Opinion No. 57 proceeding. Absent a "full and fair opportunity" to litigate issues in a prior proceeding, the doctrine of collateral estoppel does not apply. See, e.g., Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 332-33; North Carolina v. Charles Pfizer & Co., supra, 537 F.2d at 73-74; International Tel. & Tel. Co. v. AT&T, supra, 444 F. Supp. at 1155-59. See also United States v.

Utah Construction & Mining Co., 384 U.S. 394, 422 (1966).¹

Here, because of the expedition ordered by FERC, FPL did not have an adequate opportunity to litigate the issues that the Cities would bar FPL from litigating in this proceeding.

According to FERC, the issues considered in Opinion No. 57 were those "typically examined in the context of a monopolization case under § 2 of the Sherman Act" (32 PUR 4th at 315). Yet, the Commission's Order of December 30, 1977, directed that the proceeding, including an appeal to the Commission, be concluded within five months.² As a result, FPL was forced to a hearing on March 15, 1978, two and one-half months after FERC determined that a hearing would be held -- and the hearing itself was held under such loose evidentiary standards as to be patently unfair to FPL.

It is apparent that the rigid time constraints imposed by FERC precluded adequate discovery and preparation for a hearing on the antitrust issues considered by FERC in Opinion No. 57. As stated by the Administrative Law Judge (8 Fed. Power Serv. 816, Initial Decision, pp. 5-6):

¹ The Supreme Court recognized that collateral estoppel should not be applied where "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 331.

² As it turned out, the hearing and all briefing, both to the Administrative Law Judge and to the Commission, took place during this five-month period, but the Commission did not issue its opinion until more than a year after the record was submitted to it.

"In the short time available for consideration of this case, it was not possible to adequately explore these incidents to determine whether antitrust violations have occurred as alleged. Establishing an antitrust violation involves massive documentation, which requires far more time to prepare than the few weeks which counsel had for trial preparation in this case. An overall investigative effort by this Commission or by the Department of Justice, focusing more specifically upon past alleged anticompetitive conduct by [FPL], can more adequately delve into the circumstances surrounding these charges to determine whether [FPL] has in fact violated the antitrust laws of the United States.

"Given the time constraints under which this case must proceed, this decision will deal only with the justness and reasonableness of the limitation on the availability of total and partial requirements service and cancellation of service to the City of Homestead proposals, and will not explore whether the company has engaged in anticompetitive practices in the past."

Moreover, because of the time constraints imposed on the Law Judge by the Commission's order, the Law Judge, in order to avoid delays resulting from FPL's full exercise of its rights to oppose admission of the evidence against it with respect to antitrust allegations, applied standards even more lenient than the relatively lax standards for admission of evidence at FERC. Thus, the Law Judge admitted voluminous testimony and exhibits offered by Cities and Staff to support their antitrust contentions even over his doubts that such

evidence would normally be admissible.¹ This inadmissible

¹ The following rulings of the Presiding Judge, concerning the exhibits of the Cities' witness Bathen that were admitted over FPL's objection, demonstrate the effect of the expedited schedule on FPL's efforts to refute allegations of anticompetitive conduct:

"The problem is it is not properly identified, and we don't know who it is to, for what, whether it is to be used in a meeting with Homestead, whether this is to be used in discussions among the members of the company '* * *. I am not talking about the type of document that we have got at all, I am talking about here the lack of identification. Quite frankly, if we did not have the time restraints on us I would be reluctant to admit this at all without having a further identification and further description as to what it is.

"At this point we don't know what it is, anything about it, other than the fact that somebody talked to Jim Berry and got some information, and Jim Berry is going to have more information on the subject at a later date. Then they end up with a couple of questions that say 'hedge on it.' Is all it says. It doesn't show direction one way or the other.

"But in view of the time restraints I am going to admit the document into evidence anyway * * *." (Tr. 780.)

* * *

"PRESIDING JUDGE: I think, gentlemen, that with regard to my ruling, we must bear in mind that with the time restraints with which we are faced in a case like this, we have to be somewhat more lenient in the admission of documents and other material into evidence than we would normally be, and where a document in the normal course would require a witness to authenticate it or to tell us what it is, in this type of expedited

(footnote cont'd)

testimony and exhibits, FERC made clear, formed the basis for its conclusion in Opinion No. 57. (32 PUR 4th at 318-19.)

The Commission itself recognized that the procedures followed were not suitable for entry of any findings on anti-trust issues, and that Opinion No. 57 should under no circumstances be construed as containing any findings, stating (32 PUR 4th at 315 (emphasis in original)):

"[W]e recognize that these anticompetitive effects may not have been demonstrated with the rigor as would be demanded in proceedings where specific findings of violations of the antitrust laws are at issue * * *."

* * *

"[W]e do not make findings that violations of the antitrust laws have occurred."

Of particular relevance to the issue here, FERC accordingly disclaimed any intention of having its opinion construed as binding in other forums (32 PUR 4th at 315 (emphasis added)):

(footnote cont'd)

proceeding we just don't have the luxury of being able to do that." (Tr. 785.)

* * *

"PRESIDING JUDGE: At this point we don't know who prepared them or what they were prepared for, and as I say, this would actually go to letting it in evidence, period. But under the circumstances, since we don't have time to subpoena a witness, I am letting them in * * *." (Tr. 787.)

As is clear from these rulings, the record in the Opinion No. 57 proceeding contains documents and other material that normally would not constitute evidence in a proceeding before FERC, and certainly would not be admissible before the NRC or in a court of law.

"[T]he fairly elaborate account [in Opinion No. 57] of FP&L's past conduct in its market-place is not intended by this commission to be a determination of factual disputes which may be the subject of litigation in other forums."

Thus, as FERC itself has recognized, FPL did not receive the full and fair hearing -- and certainly not the kind of procedures available to it before this Board -- that is required before FPL may be precluded from defending itself against the antitrust allegations made by the Cities in this proceeding.¹

C. The Documents Relied Upon by the Cities Are Not Properly Before the Board

The Cities' Motion also must be rejected because they have failed to establish a foundation for the admissibility of

¹ None of the authorities cited by the Cities disputes any of the collateral estoppel principles discussed above, which establish that Opinion No. 57 is not binding on FPL in this proceeding. In both Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CL1-78-1, 7 NRC 1, 26-27 (1978), and Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 69-71 (1977), collateral estoppel effect was accorded determinations of EPA because of EPA's special expertise with respect to those determinations and because the parties had been afforded a full opportunity to litigate before EPA. As has been shown, neither conclusion can be applied to the FERC determinations at issue here.

In *Cities of Anaheim v. Southern California Edison Co.*, No. CV-78-810-MML (C.D. Cal., May 19, 1981), the court found that the parties had been given a full and fair opportunity to litigate before FERC and also noted that FERC had stated that its findings were final, regardless of the outcome of further hearings. Again, FPL did not have a full and fair opportunity to litigate antitrust issues in the Opinion No. 57 proceeding and FERC itself disclaimed any intention of precluding FPL from litigating in another forum the issues considered by FERC in that proceeding.

the documents on which they rely and, thus, those documents are not properly before the Board.

The Cities' sole contention regarding admissibility is that the internal FPL documents attached to their Motion should be admitted into evidence pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence, as applied in the AT&T and KLM cases.¹ Motion, pp. 15-16. To the contrary, FPL submits that neither AT&T nor KLM, nor any other authority of which we are aware, supports the admissibility of the FPL documents on this record. Moreover, the documents upon which the Cities rely are not limited to internal FPL documents; they include documents apparently drawn from the files of the Cities, their consultants and Florida Power Corporation. Cities' Motion is devoid of any authority for the admissibility, without foundation, of these documents.

The requirements for the admissibility of FPL documents, City documents, and Florida Power Corporation documents -- none of which the Cities have met -- are described below. Before turning to those requirements, however, we note that admissibility must be considered on a document-by-document basis. The foundation requirements codified in the Federal Rules of Evidence, like the fundamental requirement that the declarant have personal knowledge of the matters in his

¹ United States v. American Telephone and Telegraph Co., 1981-1 Trade Cas. ¶ 63,938 (D.D.C. 1981); Koninklijke Luchtvaart Maatschappij N.V. KLM v. Tuller, 292 F.2d 775 (D.C. Cir.), cert. denied, 368 U.S. 921 (1961).

statement,¹ make no sense when applied to categories of documents. A party like FPL, against which voluminous documents are offered, is not required to show the inadmissibility of particular documents. Rather, as the proponents of the documents, the Cities bear the burden of establishing admissibility, and they bear the burden with respect to each document on which they would rely.

1. Internal FPL Documents

Rule 801(d)(2)(D) of the Federal Rules of Evidence makes admissible (1) a statement by an agent, (2) concerning a matter within the scope of his agency, (3) made during the existence of the relationship. In addition, documents admitted under Rule 801(d)(2)(D) must be based on the writer's personal knowledge. Cedeck v. Hamiltonian Federal Savings & Loan Ass'n, 551 F.2d 1136, 1138 (8th Cir. 1977); 4 Weinstein's Evidence ¶ 801(d)(2)(D)[01], at 801-164 (1980 ed.).

Although relying on Rule 801(d)(2)(D), the Cities assert that they should not have to bother laying this foundation, in light of AT&T and KLM. But neither AT&T nor KLM relieves a party from laying a foundation when it is within his grasp to do so.

¹ Rule 602 of the Federal Rules of Evidence provides in pertinent part that --

"[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

AT&T involved the "unknown author problem."¹ Specifically, the court had before it a memorandum bearing no addressee or author, and it declined to require the Government to "provid[e] a name from the thousands of Bell employees who might have written the particular document."² Without the name, the Government could not even attempt to establish that the declarant was an agent of Bell and that his statements concerned matters within the scope of his employment.

Here, in comparison, the Cities can identify the authors of the FPL documents on which they would rely. In fact, in their treble damage action against FPL,³ the Cities have deposed many of these individuals in depth concerning their duties and participation in the very incidents in question here. The Cities also have had ample opportunity to inquire as to the duties and activities of the authors of other FPL documents, and they have done so. AT&T betrays no purpose to relieve a party of its burden of laying a foundation when such information is available. Thus, even if AT&T was correctly decided, it does not support admissibility of the internal FPL documents upon which the Cities rely.

Nor is the KLM case of any assistance to the Cities. In KLM, the court admitted the out-of-court statement of a

¹ 1981-1 Trade Cas. ¶ 63,938, at pp. 75,850-51.

² Id. at 75,850.

³ City of Gainesville v. Florida Power & Light Co., Civ. No. 79-5101-Civ-JLK (S.D. Fla.).

former employee of KLM where there was proof that the statement "clearly concerned a matter within the scope of [his] employment," and, in addition, the court found evidence of reliability in (292 F.2d at 784) --

"[t]he official nature of the inquiry which elicited the statement, the independent recording of the statement, the source of the utterance, and the interest of the utterer
* * *."

The Cities have not made a comparable showing with respect to even a single FPL document.¹

2. City Documents

The Cities have made no effort to establish a foundation for the admissibility of the many documents attached to their Motion that apparently were drawn from their own files or the files of their consultants. They have not authenticated the documents as required by Rule 901 of the Federal Rules of Evidence. Nor have they even attempted to show that the statements in the documents are other than inadmissible hearsay: the Cities have neither established a foundation for admissibility of the documents as business records under Rule 803(6) nor introduced the documents through affidavits of City officials with personal knowledge of the documents.²

¹ We also note that the Cities have not used the means available under the Federal Rules of Civil Procedure and the NRC's Rules of Practice to authenticate the FPL documents on which they rely.

² The Cities have not contended that the internal FPL documents are admissible as business records, nor could they

The court concluded in AT&T that it would not be unfair to require Bell to trace the origin of a document under its control, should it want to contest its admissibility.¹ A fortiori, there can be no unfairness in requiring the Cities to authenticate and lay a foundation for the admissibility of records within their own control, should they desire to rely on them.

3. Florida Power Corporation Documents

The Cities also have failed -- indeed, have not even attempted -- to establish a foundation for the admissibility of the Florida Power Corporation documents cited in their Motion. It may be anticipated that, consistently with their FPL-Florida Power Corporation "conspiracy" argument, the Cities will argue for the admissibility of these documents under Rule 801(d)(2)(E) of the Federal Rules, which makes admissible statements of a co-conspirator. Such an argument would be without merit.

(footnote cont'd)

reasonably so contend. The requirements for admissibility as business records under Rule 803(6) of the Federal Rules of Evidence cannot be met, as the Cities apparently assume, simply by showing that a document was found in FPL's files. *United States v. Rosenstein*, 474 F.2d 705, 710 (2d Cir. 1973); *United States v. Sherfey*, 384 F.2d 786, 788 (6th Cir. 1967); *Phillips v. United States*, 356 F.2d 297, 305 (9th Cir. 1965); *Cromling v. Pittsburgh & Lake Erie RR.*, 327 F.2d 142, 147 (3d Cir. 1963).

¹ 1981-1 Trade Cas. ¶ 63,938, at p. 75,851.

To invoke Rule 801(d)(2)(E), the proponent of a document must offer evidence, from sources outside the document containing the purported admission, of (1) the existence of the conspiracy and (2) the participation in it of the person against whom the document is offered. Glasser v. United States, 315 U.S. 60, 74 (1942) (decided prior to adoption of the Federal Rules); United States v. Ziegler, 583 F.2d 77, 79 (2d Cir. 1978); United States v. Fredericks, 586 F.2d 470, 475-76 (5th Cir. 1978), cert. denied, 440 U.S. 962 (1980); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978). Moreover, the extrinsic evidence must itself be admissible. United States v. Cambindo Valencia, 609 F.2d 603, 635 n. 24 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980); United States v. Fredericks, supra, 586 F.2d at 475-76.

Since the Cities have introduced no admissible evidence that would show the existence of an FPL-Florida Power Corporation "conspiracy," and since the Gainesville decision is not entitled to collateral estoppel effect (see pp. 80-87 above), the Cities cannot rely on Rule 801(d) (2)(E) as authority for the admissibility of Florida Power Corporation documents.

And even were the existence of a conspiracy assumed, the Florida Power Corporation documents would not be admissible as against FPL unless they contained statements made, in the words of the Rule, "during the course and in furtherance of the conspiracy." The Cities have made no such showings with

respect to any of the Florida Power Corporation documents on which they rely.¹

The Cities' failure to establish a proper evidentiary predicate for the documents on which they rely is not a mere technical omission, but goes instead to the heart of this proceeding. The actual desires of the Cities in the areas of power supply and coordination, the extent to which individual Cities looked to FPL for such services, and when (if ever) the Cities communicated their desires to FPL are central, although not dispositive, issues in this proceeding. Remarkably, while Cities' Motion is full of assertions on these issues, they have not endeavored to support those assertions with a single affidavit from a City official or a single extract from the voluminous deposition testimony taken in connection with Cities' treble damage action against FPL. Instead, the Cities have thrown great quantities of documents into appendices and then their lawyers have supplied "testimony" as to the meaning and significance of the documents. In fact, the testimony of Cities' lawyers is not probative of anything in this proceeding. Cities' total failure to satisfy even the most minimal

¹ Nor would a Florida Power Corporation document be admissible to prove the truth of the facts asserted in it merely because a copy of the document was found in FPL's files. E.g., *United States v. Rosenstein*, supra, 474 F.2d at 709-10; *United States v. Sherfey*, supra, 384 F.2d at 788; *Phillips v. United States*, supra, 356 F.2d at 305-06.

Finally, we note that the Cities have not established the authenticity of the Florida Power Corporation documents, as required by Rule 901 of the Federal Rules of Evidence.

standards governing the admissibility of evidence is yet another reason why their Motion cannot be sustained.

III. CITIES' MOTION MUST BE DENIED BECAUSE THE
FACTUAL ALLEGATIONS ON WHICH IT IS PREDICATED
ARE GENUINELY IN DISPUTE IN EVERY MATERIAL
RESPECT.

Finally, Cities' Motion must be denied under 10 C.F.R. § 2.749. Under that rule, and prevailing law, motions for summary disposition must be denied if there are issues of material fact genuinely in dispute. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977); Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit No. 1), LBP-77-45, 6 NRC 159 (1977). This principle requires rejection of Cities' Motion for two reasons. First, it is manifestly apparent that the factual assertions upon which Cities' Motion is predicated are genuinely in controversy in every material respect. Second, FPL has not yet had an opportunity to complete its discovery.

A. Material Factual Issues Genuinely
in Dispute

The law is clear that "it is the party seeking summary judgment, not the party opposing it, which has the burden of showing the absence of a genuine issue as to any material fact" (Perry, supra, 6 NRC at 753, adopting Adickes v. S. H. Kress & Co., 398 U.S. 144, 159-60 (1970)). See, e.g., Keiser v. Coliseum Properties Inc., 614 F.2d 406, 410 (5th Cir. 1980); Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.

1979).¹ On its face, Cities' Motion does not meet -- or even undertake -- this burden.

The Cities' "Statement of Facts" consists not of "facts" but of characterization and argument. In it, Cities' counsel think nothing of characterizing reams of documents in a sentence or two, or providing interpretations of documents or events that are at odds with the sworn testimony that the City and FPL officials involved in them have given in depositions.² Remarkably, although nineteen depositions of such officials in several of the Cities have been taken in the Miami District Court litigation, Cities' pleading does not mention the existence of those depositions, or once cite to them.³ Instead, the Cities prefer to characterize the voluminous materials that they have appended to their pleading -- materials which the Cities have submitted to the U.S. District Court in Miami under the representation that they demonstrate the existence of materially disputed facts.⁴

¹ In evaluating motions for summary disposition, the NRC is guided by decisions under Rule 56 of the Federal Rules of Civil Procedure. E.g., Stanislaus, supra, 6 NRC at 163.

² For example, see the discussion of Cities' allegations concerning the City of Homestead in Appendix A, pp. 5-9, 14-18.

³ Smith v. Hudson, supra, 600 F.2d at 64-65 (6th Cir. 1979) (failure of party timely to respond to summary judgment motion did not warrant granting that Motion, where the moving parties had failed to cite depositions which had been filed with the Court, and which raised issues of material fact).

⁴ Florida Cities' Answer to "Motion of FPL for Summary Judgment of City of Tallahassee's Nuclear Access Claims," Gainesville v. FPL, No. 70-5101-CIV-JLK (S.D. Fla., filed May 15, 1981).

We have not attempted here, nor would it be appropriate in answering a motion for summary disposition, to respond to every document or piece of testimony the Cities apparently would seek to place into evidence were there a trial in this proceeding. As the Licensing Board explained in Stanislaus, supra, 6 NRC at 163 (footnote omitted):

"In determining such a motion, the record will be viewed in the light most favorable to the party opposing the motion. The opposing party need not show that he would prevail on the factual issues, but only that there are such issues to be tried."

We have endeavored simply to show, as succinctly as possible, that on the factual questions that are material, there is substantial evidence that places the Cities' contentions squarely in dispute.

As the Board pointed out in its July 7, 1981 Order, it is often difficult to determine how Cities' alleged facts relate to the legal arguments they propound in their Motion. The Cities divide their "Statement of Facts," into two sections. The first (Section I, pp. 24-43) purportedly deals with allegations concerning "FPL's planning, construction, and operation of its nuclear facilities." The second (Section II, pp. 43-90) deals with allegations that "FPL refused to deal with Cities." Within those divisions, however, Cities' assertions are often exceedingly hard to follow. We meet those allegations below, to the extent they are comprehensible, following roughly the order in which they are presented by the Cities, except that we also note material issues the Cities have chosen not to address.

1. Cities' Allegations Concerning FPL's Planning, Construction, and Operation of its Nuclear Activities Are Demonstrably Without Basis

(a) Cities Misstate FPL's Nuclear Study Activities From 1956-62

Cities begin their "Statement of Facts" with a characterization of FPL's nuclear study activities with TECO and Florida Power Corporation in 1956-62. Insofar as FPL can discern, Cities, however, do not in their legal argument contend that these characterizations are relevant to their claims, nor could they reasonably do so.

Those activities had no connection with the construction of FPL's Turkey Point and St. Lucie nuclear units, but were associated with the monitoring of, and the consideration of participation in, research and demonstration efforts prior to the time FPL seriously considered constructing a nuclear facility for commercial use.¹ FPL's involvement was as follows:

First, in 1956, "as a result of the efforts of Babcock & Wilcox, [B&W] to sell [FPL, TECO, and Florida Power Corporation] a nuclear plant,"² these utilities, B&W, and Allis-Chalmers entered a contract to consider the development

¹ Kinsman Deposition (April 30, 1981), pp. 22-23, 40-42, 53-56; Kinsman Deposition (May 1, 1981), p. 228; Gardner Deposition (April 10, 1981), pp. 60-62, 73-74 [Appendix F, pp. 792-93, 804-06, 809-11, 7-11].

² Kinsman Deposition (April 30, 1981), p. 23 [Appendix F, p. 793].

of an experimental or demonstration unit, chiefly in conjunction with the AEC's Power Reactor Demonstration Program.¹ The only proposal that ever emanated from this group while FPL was associated with it was for a gas-cooled reactor with a heavy water moderator, created by Dr. Walter Zinn of General Nuclear Engineering Corporation.² The AEC rejected this proposal in January of 1958.³ FPL dropped out of the group shortly thereafter. (Kinsman Deposition (April 30, 1981), pp. 44-45 [Appendix F, pp. 807-08].

Second, from 1960-61, Mr. George Kinsman, an FPL Vice-President assigned to monitor developments in nuclear technology, represented FPL on an "atomic power committee" with TECO and Florida Power Corporation which was formed to make studies of nuclear reactor types. However, no such studies were ever made.⁴

¹ The Power Reactor Demonstration Program wherein the AEC provided for various experimental reactor projects was of course known to everyone in the electric utility industry. For example, see U.S. Atomic Energy Commission, Press Release No. 589, January 10, 1955; Hearings before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 88th Cong., 1st Sess., on Cooperative Power Reactor Demonstration Program (1963).

² Kinsman Deposition (April 30, 1981), pp. 30-42 [Appendix F, pp. 794-806].

³ Kinsman Deposition (April 30, 1981), Exhs. 10 and 11 [Appendix F, pp. 816-18].

⁴ Kinsman Deposition (April 30, 1981), pp. 53-55 [Appendix F, pp. 809-11].

Cities were well aware of the existence of such programs. Their consultant, Robert Bathen of R.W. Beck & Associates advised them that: "Almost every commercial utility organization in the United States had such an atomic study committee," and advised them to do the same.¹ They did not attempt to do so.

There is no showing by Cities that any of them sought to participate in such activities with FPL or that any were excluded from such participation.² Instead, the uncontradicted testimony is that none of them ever made such a request.³

Nor do the Cities show how exclusion could have affected them. Cities' pleading concedes: "the joint efforts

¹ He recommended that the Cities form such a committee among themselves so that they would not

let themselves by default get into the position whereby, at some future date, perhaps not too far off, an accusing finger could be pointed, saying "you have not kept up with the times."

Presentation by Robert E. Bathen, Benefits of Power Pooling and its significance to members of The Florida Municipal Utilities Association (April 1-3, 1964), at 18-19. However, these words went unheeded by the intervenor Cities. [Appendix F, pp. 837-38.]

² (E.g., Kinsman Deposition (May 1, 1981), pp. 228-29, 246-47.) [Appendix F, pp. 1176-79.] For example, in December of 1959 Ft. Pierce proposed a Power Reactor Demonstration Project to the AEC. (Kinsman Deposition (April 30, 1981), Exh. 28.) Ft. Pierce, as the Board is aware, has settled its differences with FPL by accepting an agreement essentially identical to the April 24, 1981 license conditions. [Appendix F, p. 842.]

³ Id.

never bore fruit." (Cities' Motion, p. 28). It is undisputed that nothing was ever built or even commenced as a result of these activities, and that they did not involve FPL's Turkey Point or St. Lucie Plants.¹

(b) Cities' Mischaracterize the Florida Operating Committee in the 1960's

The Cities next proceed to characterize the activities of the Florida Operating Committee in the 1960's (Cities' Motion, pp. 30-34). Cities contend: (1) that its members jointly planned their generation; and imply, without specifically alleging that (2) Cities were excluded. In fact, Cities are wrong on both counts.

As Mr. Bivans, who on behalf of FPL was personally involved in Florida Operating Committee activities, describes

¹ (Kinsman Deposition (May 1, 1981), p. 228, [Appendix F, p. 1176]; Gardner Affidavit ¶ 7-8, [Appendix C].) Cities' allegation that when FPL applied for its Turkey Point licenses it cited its participation in the aforesaid activities as the "sole" evidence of its technical qualifications is wildly inaccurate on the face of the document (Kinsman Deposition (April 30, 1981), Exh. 22), [Appendix F, pp. 867-69], and has no relevance here in any event. Cities have not alleged that they have been denied licenses for nuclear projects due to lack of technical qualifications. The "technical qualifications" mentioned in the application were the acquisition by FPL of Senior Reactor Operator and Reactor Operator Licenses, which, as the document explains at some length, were to be obtained via an extensive training program available to anyone, including, for example, courses at the University of Florida and a tour of the San Onofre Plant. Ibid.

Indeed, Mr. Kinsman, when asked to assess the value of FPL's nuclear study group experience in relation to the Turkey Point project, answered "none" explaining that the technology studied was so "far out" that no facility using it had ever been built. (Kinsman Deposition (May 1, 1981), p. 228, [Appendix F, p. 1176].)

in his attached Affidavit, that Committee [FOC] was created in 1959 as a means for its members to regulate uncontrolled power flows among them, so as to prevent harm to one system by disturbances on another (Bivans Affidavit ¶¶ 7, 9) [Appendix B]. At its inception in 1959, the FOC was composed of FPL, TECO and Florida Power Corporation, as they were the only utilities then appreciably affected by these problems. However, in each instance as soon as it became apparent that the operation of a municipal system was likewise affected, it too became a participant. Thus, Orlando joined the FOC in 1963, and Jacksonville joined in 1964. Late in 1970, Tallahassee and Lakeland became members. (Bivans Affidavit ¶ 8) [Appendix B].¹

Cities' assertion that the FOC engaged in joint planning of generation simply is not true. As Mr. Bivans, in his affidavit explains:

" . . . [FOC] activity also included planning studies of the reliability of the interconnected transmission system. A planning subcommittee was appointed to study the transmission plans of the member utilities and to identify potential weaknesses. In order to test the transmission systems in hypothetical studies, it was necessary to factor into the studies generation plans of the individual interconnected systems. These studies always took the individual generation plans of the members as given, took account of planned transmission additions and then studied the effect of postulated events on the reliability of the interconnected transmission system. The FOC never

¹ In 1972, Vero Beach, Lake Worth, Ft. Pierce and Gainesville were invited to attend the FOC meetings. (Bivans Affidavit ¶ 8), [Appendix B].

engaged in joint planning of generation. To the contrary, I am not aware of any instance in which any FOC member ever commented on the generation plans of another member. It was understood that such decisions were solely within the province of the individual members. 'Joint' as used in the planning subcommittee reports refers to the fact that the FOC members cooperated in providing individual system data, personnel, and in sharing the costs of studies to determine whether individual transmission plans would be adequate for and compatible with interconnected operations. Transmission planning was "joint" only in the sense that studies were performed, based on the individual systems' generating plans, to consider possible transmission configurations to accommodate this planned generation. The results were not binding on any system, and simply served as a useful beginning point for transmission planning by the individual systems."

(Bivans Affidavit ¶ 11) [Appendix B] (Emphasis added).

Cities base their contention to the contrary on counsel's interpretation of specific passages in a few documents culled from among tens of thousands, primarily a presentation by Robert Fite, a former FPL Vice-President, (and later President) and excerpts from two FOC documents, (one sentence in one, and one and a half paragraphs in the other). Mr. Fite's letter, read objectively, confirms Mr. Bivans testimony. And were it necessary, Mr. Fite's other writings on the matter, and his recent sworn deposition testimony, both of which

¹ Nothing in that letter, fairly read, suggests that FPL jointly plans generation with anyone. Its emphasis is on dealing with emergencies and maintenance, and it speaks in terms of each member's plan for its "individual system" and "individual plant expansion programs." Gardner Deposition (April 10, 1981), Exh. 28. [Appendix F, pp. 873-75].

Cities omit to mention, show that Cities' characterization of his letter is just flatly incorrect. It may be contended that Cities were not aware of his other writings, but their failure to apprise the Board of his deposition is more difficult to explain -- they took it themselves and only two months ago.¹ The FOC documents excerpted by Cities are ambiguous and, moreover, irrelevant. A couple of paragraphs by a FOC planning group cannot contradict evidence of what in fact actually happened over the course of a decade.²

¹ (Fite Deposition (May 28, 1981), pp. 128-29 [Appendix F, pp. 128-29]). The nature of FOC activities are described plainly in Mr. Fite's letter dated July 6, 1965 to the Honorable James Richardson, explaining that the FOC is not a "power pool" in any formal sense [Appendix F, pp. 981-82]):

Our participation in the Florida "pool" does not imply or mean that we have any firm power contracts to buy or sell either directly or indirectly from or to any company in or outside the State, nor that we are dependent upon other companies for our normal requirements, nor is our system dispatched from any central office covering a number of systems, nor have we any of the pooling commitments that exist in many "pools" other than commitments to supply or receive emergency power and to coordinate maintenance schedules with the interconnected Florida companies.

² Cities also misconstrue the Federal Power Commission's decision in Florida Power & Light Co., 37 FPC 544, 551-52 (1967), aff'd Florida Power & Light Company v. FPC, 404 U.S. 453 (1972). That decision found simply that by virtue of FPL's participation in the sharing of "spinning reserves, the arrangement of plant maintenance schedules, and the assurance of reliability of frequency control" in the FOC, it was not independent from the interconnected system for purposes of being found in interstate commerce. FPL does not deny that it operates as part of an interconnected system. That no more makes its generation planning non-independent, than the sharing of airport facilities by a particular airline renders "joint" its decisions to purchase new planes.

Cities' veiled suggestions about being excluded from the FOC are similarly unfounded. To our knowledge, every request FPL ever received for FOC admission was accepted.¹ In fact, the FOC evolved as one would reasonably expect. Its focus was on transmission reliability and the effects of one system's electrical operations on the reliability of others; such electrical effects led in natural course to the joinder of Jacksonville, Orlando, Tallahassee, and others.² There is no evidence that municipal status was considered a bar; rather, the facts are to the contrary.

¹ Cities allege that Tallahassee was denied FOC membership in 1966. (Cities' Motion, p. 80). The document cited by Cities for this proposition consists of notes made by Mr. Bathen of R. W. Beck & Associates indicating that employees of Florida Power Corporation had advised, correctly, that the FOC was not a power pool. Nothing in the document indicates that a request for FOC membership by Tallahassee would not be fairly considered or that one was ever denied. In short, there is no evidence that (1) Tallahassee ever made such a request, or that FPL (2) was aware of such a request, if one ever existed; was implicated in any response to such a request; or was party to any agreement to exclude Tallahassee in any respect. Cities' claim is totally without basis. See also Bivans Affidavit ¶ 13 [Appendix B].

² There is no evidence that any of the Cities even desired additional coordination, and some evidence they did not. For example, though Mr. Bathen tried to interest a number of the Cities in pooling plans, they basically ignored his suggestions. Caldwell Deposition (May 18, 1981), pp. 103-05, [Appendix F, pp. 189-91]; Howe Deposition (September 18, 1980), pp. 127-29, [Appendix F, pp. 126-28]. Indeed, due to the low cost and ready availability of fossil fuel in the 1960's, there were few economic incentives for Cities to engage in coordination. (Bivans Affidavit ¶ 25), [Appendix B].

(c) Cities' Allegations Regarding FPL's
"Reliance" on the Florida Operating
Committee in Constructing its
Nuclear Units Are Without Basis

Cities style the longest section of their factual "statement" regarding FPL's nuclear facilities as follows: "FPL relied on coordination with the Florida Operating Committee in constructing its nuclear units." (Cities' Motion, p. 34).

Only the first three pages of that section deal with this alleged reliance. The remainder contains a hodge-podge of allegations to the effect that FPL has unreasonably declined to join in centralized dispatch and/or a formal power pool (though a number of Cities have declined to do so for many of the same reasons articulated by FPL). We have dealt with the merits of the latter contention in the foregoing legal argument, and the applicable facts are set forth, in Appendix A hereto. We deal here with Cities' assertion that FPL "relied" upon the FOC in the construction of its nuclear units; we show the facts are otherwise.

For example, Mr. Kinsman testified that FPL in fact did not rely on the FOC in constructing its nuclear units. (Kinsman Deposition (May 1, 1981), pp. 230-31) [Appendix F, pp. 138-39]. Robert J. Gardner, an FPL Senior Vice-President who has been involved in the planning and development of each of FPL's nuclear ventures, testified to the same effect. (Gardner Deposition (April 10, 1981), pp. 226-27 [Appendix F, pp. 1185-86]; (June 4, 1981), pp. 913-14 [Appendix F, pp. 884-85];

Gardner Affidavit ¶¶ 5, 8, 15 [Appendix C]). And this testimony has been further confirmed by Mr. Bivans. (Bivans Affidavit ¶¶ 12-14 [Appendix B]). Cities have come forward with no showing at all upon which their assertion might be predicated. The evidence -- which is uncontradicted -- demonstrates that in fact FPL did not rely on the FOC in any respect in either the planning or construction of its nuclear facilities.

Moreover, as noted in FPL's pleading in the District Court, [Appendix F, pp. 581 ff.], there are several core facts central to the evaluation of Cities' claims which Cities omit and which are not genuinely subject to any dispute: it cannot be disputed that (1) FPL paid for its nuclear units without any aid from any other utility, (2) it planned those units to serve the needs of its own customers, and (3) it has used them solely for that purpose. (Gardner Affidavit ¶¶ 8, 15, 16) [Appendix C].

(d) Cities' Allegations Concerning
the Sizing of FPL's Nuclear Units
Are Baseless

Lastly, Cities maintain that "FPL could have but did not purchase larger nuclear units than it did at a lesser cost per unit of power." (Cities' Motion, p. 84). Cities provide no evidence in support of this conclusion.

In fact, FPL's decisions on sizing of its nuclear units reflect engineering judgments that it would be prudent to avoid any greater extrapolations from the technology which

had been demonstrated at the time that the orders were placed.¹ Mr. Bivans has testified in his affidavit that FPL's annual load growth during the 1950's and 1960's was large enough to permit FPL to install generating units of a size prevalent in the electric industry, and it did so. (Bivans Affidavit ¶ 14) [Appendix B]. If the Cities do attempt to come forward with any evidence in support of this allegation, a rebuttal will not be difficult. The actual operating experience with the two Turkey Point units and St. Lucie Unit 1, including considerations of outages, compares favorably with larger units committed in the same time frame. The allegation that 700 MW (net electrical output) units committed in 1966 and 800 MW (net electrical output) planned in 1967² were suspiciously small is clearly baseless, and that is readily apparent to anyone having familiarity with the technical side of the nuclear industry.

¹ See Gardner Deposition (April 10, 1981), pp. 245-46, [Appendix F, pp. 1182-83]. At the time of the announcement of the Turkey Point units, no PWR with a net electrical rating of more than 265 MW had been operated in the United States according to official Department of Energy publications. U.S. Central Station Nuclear Electric Generating Units: Significant Milestones, U.S. Department of Energy (Sept. 1980). On information and belief, that unit, Indian Point Unit No. 1, had a nuclear electric power rating of less than 200 MW, less than one-third the size of FPL's units, and achieved higher power levels only by means of an associated fossil fired super-heater.

² Gardner Deposition (April 10, 1981), p. 119, [Appendix F, pp. 1181].

It is by no means clear how any of Cities' foregoing factual allegations relate to their claims in this proceeding. What is clear beyond all else is that whatever the relevance of these assertions, they are, save for the core facts cited above, manifestly in dispute, and substantially so, in every material respect. This would preclude summary disposition, even if it were discernible what these allegations were supposed to dispose of.

2. Cities' Allegations Concerning Their Alleged Refusals to Deal Are Also Without Basis

We turn next to the factual allegations set forth in Section II of the Cities' "Statement of Facts," and which purportedly relate to its refusal to deal claims. We have dealt with those claims at some length in the foregoing legal discussion, supra, and have shown that they are without merit as a matter of law. Cities' factual allegations concerning these claims can be disposed of reasonably briefly.

For the factual allegations on which they predicate their claims, Cities refer in each instance (i.e., wholesale power, interconnections, wheeling, nuclear access, acquisition "attempts") to the appendices to its pleading, and rely heavily on those appendices which consist of their interrogatory answers in the Miami litigation (Cities' Motion, pp. 63-64). These interrogatory answers consist, virtually in their entirety, of Cities' counsel's characterizations of documents (few of which have been produced for the perusal of this Board). Thus, incredibly, many of Cities' assertions are

based on characterizations of their own characterizations. And all are based on inferences drawn by counsel from the material lodged with their pleading. For instant purposes, it would be decisive, without more, that the "material it [the movant, i.e., Cities] lodged must be viewed in the light most favorable" to FPL. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); Stanislaus, supra, 6 NRC at 754.

Here, we meet the Cities' factual assertions directly in Appendix A.¹ Though many of them are irrelevant, particularly given the license conditions, we show that as to each, Cities' allegations are dubious and are genuinely in dispute.

3. Cities Fail to Make a Showing as to
Competition, Injury to Competition,
Relevant Markets, or the Existence,
Vel Non, of Monopoly Power.

Disputed questions of fact also exist, as we have demonstrated in the legal argument section of this pleading, with respect to: the existence of competition or potential competition, injury to any such competition, relevant markets, and the existence vel non of monopoly power in any such markets. These, ordinarily, are central issues in an antitrust proceeding. Cities apparently believe that they need not confront those issues here. However, as we have shown above, this would not be true even were Cities' collateral estoppel arguments meritorious. "A summary judgment is neither a method of avoiding the necessity of proving one's case nor a

¹ Cities' allegations are therein treated seriatim.

clever procedural gambit whereby a claimant can shift to his adversary the burden of proof on one or more issues." Perry, supra, 6 NRC at 753, quoting from United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970). With these failures of proof, Cities' Motion is fatally deficient as a matter of law.

B. Outline of Discovery Necessary to Permit Resolution of Disputed Factual Issues

Cities' Motion is also inappropriate here, in light of the status of discovery. Cities have not yet even responded to the interrogatories directed to them in this proceeding. While discovery has been proceeding in the litigation pending in the U.S. District Court in Miami, and substantial progress has been made in exchanging pertinent documents, other discovery there is far from complete. Cities' Motion, under these circumstances, is simply an attempt to avoid reaching the facts.¹

The Board's July 7, 1981 Order requested the parties to outline the discovery they deem necessary to permit resolution of the factual issues in this proceeding by trial. We do so below.

¹ It has been held that "a motion for summary judgment should not be entertained before discovery has been completed in antitrust cases in which the relevant facts are disputed and intent to injure is an issue." George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d Cir. 1977). See Littlejohn v. Shell Oil Co., 483 F.2d 1140 (en banc), cert. denied, 414 U.S. 416 (1973); Penn Galvanizing Co. v. Lukens Steel Co., 59 FRD 74, 80 (E.D. Pa. 1973).

The consideration which pervades any assessment of the discovery task remaining in the case is that FPL is faced with thirteen separate complainants. Each (except FMUA) is a separate municipal government with separate officials and its own history as an electric utility operation. In many respects, FPL must defend against thirteen separate suits in one proceeding. This renders FPL's task of preparing for a hearing more difficult, by several orders of magnitude, than the task faced by the Cities.

1. FPL's Planned Discovery

We have divided the remaining discovery, for purposes of discussion, into the following categories: (a) pending interrogatory responses; (b) depositions of City officials, former City officials, and consultants knowledgeable about Cities' factual allegations; (c) third party discovery; (d) discovery from FMUA; (e) completion of document discovery from all of the Cities; (f) document discovery and depositions of expert witnesses, and (g) depositions of additional persons listed as witnesses in the proceeding.¹

¹ We assume that the Board's Order denying the late Petition to Intervene of Parsons & Whittemore and subsidiaries will not be disturbed on appeal, so that there will be no need to take discovery concerning Parsons & Whittemore

(a) Pending Interrogatory Responses

At the outset, as noted above, the Cities have not provided answers to FPL's interrogatories in this proceeding.¹ The Cities' answers are important for at least three reasons. First, those answers will provide needed sharpening of Cities' diffuse factual allegations and permit FPL to focus its discovery efforts directly upon matters truly in dispute. Second, FPL would anticipate that Cities' interrogatory answers would reveal Cities' views as to relevant markets, market power, competition, and injury to competition, and the facts on which those views are predicated. It is difficult for FPL to make substantial progress toward completion of discovery on these questions until Cities' claims are stated and their bases given in a clear and straightforward fashion. Third, Cities' interrogatory answers presumably will apprise FPL of their trial witness list. In the absence of the information full and responsive interrogatory answers would provide, progress that could otherwise be made through other avenues of discovery will be foregone.

¹ FPL served its first set of interrogatories on Florida Cities on October 31, 1978. FPL received Florida Cities' interrogatories on the same day. FPL has not yet responded to the Cities' Interrogatories either, in part because its responses may be influenced by the assertions propounded in Cities' answers. However, FPL is prepared to respond to Cities' interrogatories within thirty days after receipt of Cities' answers to FPL's interrogatories.

(b) Depositions of City Officials, Former
City Officials, or Consultants
Knowledgeable About Cities' Claims

FPL intends to take depositions of those persons with knowledge of, or involvement in, the factual allegations propounded by Cities in their pleading and its appendices. FPL accordingly intends to take (or complete) depositions of City officials, former city officials, (and in some instances consultants) in the following cities which are either parties hereto or are represented by those Cities which are parties:¹ Alachua, Bartow, Sebring, Lake Helen and Key West, New Smyrna Beach, Gainesville,² St. Cloud, Lake Worth, Homestead, Tallahassee, Starke, Mt. Dora, Ft. Meade and Newberry. FPL has not yet taken depositions in any of the first nine of these cities. Deposition discovery as to the other five has commenced in the District Court litigation but is considerably

¹ The Cities of Homestead, Starke, and Kissimmee, while parties in the civil antitrust litigation in the District Court, are not formal parties here. However, as noted previously, these three cities have reached an understanding with those cities who are party to this proceeding that a share of any nuclear access obtained by the parties as a fruit of this proceeding will be allocated to these three cities, via arrangements of which FPL is not fully cognizant, developed under the auspices of the Florida Municipal Power Agency.

² FPL has now settled its differences with the City of Gainesville. However, it is not apparent that the remaining cities have withdrawn any of the allegations they have leveled in this case concerning Gainesville, and if those allegations remain, FPL may be required to take depositions of Gainesville officials, at least to the extent necessary to refute Cities' contentions.

short of completion.¹ In sum, very substantial deposition discovery remains.

Such discovery is made all the more time-consuming here because it is often impossible to predict in advance which witnesses will be able to address which subjects concerning a particular city. This problem is particularly acute given the Cities' custom of relying upon counsel's interpretation of a few documents, culled out of context, as a basis for characterizing a whole series of events over a number of months or years. FPL has found that it is often necessary to depose two or three witnesses concerning such allegations, in order to develop the entire perspective and fill in factual details. Further, since so many of Cities' allegations relate to conduct decades in the past, discovery from persons then involved in those events (but who may not be able to give any testimony relevant to the current situation) is also necessary. For these reasons it is not possible to forecast with any degree of confidence the number of depositions in each city that will be necessary to explore Cities' allegations; from

¹ Two depositions in Homestead have been recessed, short of completion, and at least one more may be noticed. Whether additional depositions are necessary in Tallahassee may depend on the outcome of FPL's pending motions as to Tallahassee's nuclear access and gas claims. One more deposition may be noticed regarding Starke. In Mt. Dora, the deposition of Mayor Duke is still incomplete, with others possible. In Newberry, only one deposition, of four noticed so far, has been taken. In Ft. Meade, only one deposition has been taken, that of a city official who submitted an affidavit in connection with a motion pending before the District Court.

experience FPL has learned that at least several depositions will be needed in each city.

Depositions of certain of the Cities' consultants also will be necessary, particularly R.W. Beck & Associates and Smith & Gillespie, and perhaps others. The files of these consultants have revealed documents which contradict Cities' allegations concerning various alleged refusals to deal, and which call for further inquiry.¹ Moreover, there has been testimony that these consultants were authorized to make certain commercial decisions for the cities, and that they played a significant role in Cities' concerted refusal to participate in the Central Florida Nuclear Project headed by FPL in 1976.²

(c) Third Party Discovery

There also remains to be conducted and completed a significant amount of third-party discovery. For example, it will obviously be necessary for FPL to take discovery from Florida Municipal Power Agency concerning Cities' nuclear access and relevant market claims, and perhaps as well from the Orlando Utilities Commission.

The quantum of third-party discovery will depend upon whether the Board includes within the compass of this

¹ For one such example, see Appendix A, p. 4 n.1.

² Dake Deposition (August 6, 1980), pp. 25-26, 30, 32-34; e.g., Dykes Deposition (July 30, 1980) pp. 165-68. [Appendix F, pp. 78-83, 887-890].

proceeding, either (1) Cities' allegations concerning non-nuclear refusals to deal which are obviated by the license conditions, and (2) Cities' contentions that actions by Florida Power Corporation taken in the 1960's are relevant in this proceeding and may be imputed to FPL.

A number of Cities' allegations concerning alleged refusals to deal in wholesale power, interconnections, transmission, and alleged acquisition attempts involve cities which are not parties to this litigation. FPL believes that such allegations are obviated by the wholesale power, interconnections, and transmission sections of the license conditions. However, if the Board rules such alleged conduct to be an issue here, FPL will require discovery as to these parties. They include: Vero Beach, Ft. Pierce, Clewiston and others.

Likewise, if Cities' allegations concerning Florida Power Corporation's conduct are permitted to remain in the proceeding, FPL will require discovery concerning those allegations as well, including discovery of Florida Power Corporation.

(d) Discovery From FMUA

Discovery (both documents and depositions) also remains to be taken from Florida Municipal Utilities Association [FMUA], a party here but not in the District Court litigation. This discovery bears particularly on Cities' allegations concerning power pooling and nuclear access.

(e) Completion of Document Discovery
From the Cities

FPL has made very substantial progress towards completing document discovery of the parties in the District Court litigation -- which include all of the parties here except FMUA, Lake Helen, and Key West.¹ However, even in that litigation, document discovery is not yet complete. While the Cities have made initial production, in several instances upon commencement of deposition discovery it has become apparent that the initial document production was incomplete, and FPL is still awaiting additional documents from a number of the Cities.² Completion of this document production also remains.

(f) Discovery of Experts

Expert witness discovery also remains to be conducted. This involves the selection and designation of expert

¹ A substantial production of documents relating to Key West has been made to FPL, however.

² For example, during depositions in the City of Homestead, it was discovered that Cities apparently failed to review certain categories of documents FPL had requested and did not produce them. Upon inquiry into the matter, Cities' counsel discovered that the same may have been true as regards document production in a number of other Cities, including Gainesville, Starke, Sebring, Kissimmee, and New Smyrna Beach. FPL is still awaiting production of these additional documents. In the City of Newberry, it was discovered as deposition discovery began that a large quantity of documents had not been received by FPL. While it appeared that there part of the problem may have been attributable to a clerical error by FPL personnel, a re-search of the documents revealed that a large number of files containing relevant documents had never been produced to FPL initially.

witnesses, production of the documents those witnesses have prepared in connection with this case, and expert witness depositions.

(g) Discovery of Trial Witnesses

Finally, it will be necessary, in order to prepare for trial, to conduct the depositions of trial witnesses listed by the Cities to the extent that those witnesses are not covered by the discovery outlined above.

2. Proposed Hearing Schedule and Proposed Rules for Expediting the Proceedings

It is quite clear, from the above outline, that the discovery remaining before a trial could be conducted on all of the allegations of the Cities is very considerable and would require a number of months to complete, even at an extraordinary pace. St. Lucie Unit 2 is expected to be ready to load fuel in October of 1982. Thus, to insure a decision by this Board prior to that time,¹ a trial type hearing probably would have to be commenced no later than May 1, 1982, and completed by July 1 of that year. However, it is readily apparent that it is not possible to complete adequate discovery and trial preparation on all of Cities' allegations within this time frame. Thus, if trial proceeds on this timetable, FPL may not have the opportunity to develop completely the factual presentation it desires to place before the Board.

¹ Cities, as the Board is aware, have stated their intention to seek delay of the unit on the grounds of the pendency of this proceeding.

The reason this quandary arises is quite apparent. The Cities here have lumped together, as "allegations," dozens and dozens of vaguely defined incidents, most of which relate to alleged conduct obviated by the license conditions, and all of which are propounded in such a diffuse fashion that extensive discovery is required to sort out the facts. At the same time, Cities have evinced their intention to seek to delay operation of St. Lucie Unit 2 if FPL (and the Board) take the time necessary to wade through these allegations.

The public interest plainly requires that the unit not be delayed. Thus until such time as the Board deems a favorable ruling in order on FPL's motion to estop the Cities from seeking such a delay, FPL believes that the Board should adopt a schedule for further proceedings which will permit it to issue a decision by October 1, 1982. FPL respectfully proposes that trial in this proceeding be scheduled for May 1, 1982, to be completed by July 1, 1982.

FPL fully recognizes that such a trial schedule would require foregoing some necessary discovery and would tend to turn the hearing into in a "paper" battle -- a fact which itself can lead to delay. To minimize these problems and insure expedition, FPL respectfully submits that the Board adopt the following procedural guidelines:¹

¹ The Board can alleviate part of these problems by limiting the proceeding to the situation that will exist under the

- (1) discovery will be permitted until the record in the proceeding is closed;
- (2) written submissions of testimony will not be permitted; all testimony should be presented orally in a concise, non-discursive manner;
- (3) the proceedings shall be continuous;
- (4) the expedited filing of proposed findings will be required.

Permitting discovery to continue until closure of the record will allow the fullest exploration of the facts possible under the circumstances, and may permit depositions of trial witnesses to be deferred, and allow time for factual inquiry. Precluding written testimony will expedite the proceedings, reduce the paper burden upon the record, and avoid "canned" witnesses. The value of continuous hearings and the expedited filing of findings is self-evident.

It is quite plain that the facts in this proceeding are fully and genuinely in dispute.¹ FPL submits that the real question before the Board is not the merits of Cities' Motion, which plainly must be rejected, but rather how to contour the

(footnote cont'd)

license conditions, as the law contemplates. Under such an approach, Cities' allegations that FPL has in the past refused to provide anything which the license conditions obligate it to provide "under the license," would be eliminated from the proceeding. Whatever their merit, and FPL believes there to be none, such allegations here are simply obviated by the license conditions, and should not be permitted to protract this proceeding.

¹ See the "Statement of Material Facts As To Which There Exists A Genuine Issue To Be Heard," attached hereto.

proceeding so that the issues which are truly material to the determination before it can be resolved in a manner which best protects the public interest. FPL believes that the Cities' allegations are without merit as a matter of law. If the Board nonetheless determines that an evidentiary hearing is necessary to dispose of any of those allegations, it should adopt the trial schedule and the procedural guidelines proposed above.

CONCLUSION

For all of the reasons set forth in this pleading, Cities' motion should be denied.

Respectfully submitted,

P. A. Bouknight, Jr. / *DGG*
P. A. Bouknight, Jr.

Douglas G. Green
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Herbert Dym
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Florida Power &
Light Company

Dated: August 7, 1981

Statement of Material Facts As To
Which There Exists a Genuine Issue
To Be Heard

This statement is annexed in accordance with 10 CFR § 2.749. So as to join the issues raised in the Cities' motion, we repeat here each of thirteen numbered "material facts" which the Cities allege are "not genuinely in dispute." (Cities' motion, Attachment 1). Following each such item, we state concisely the issues raised by that item which either are genuinely in dispute or can be resolved against the Cities without evidentiary hearing.^{1/}

Cities' Item 1:

FPL controls three out of the four operating nuclear units in Peninsular Florida and is constructing its fourth. FPL has an effective monopoly control over such facilities there, which it has used to advantage itself in competition. Except as provided under settlement license conditions in this case, FPL refuses to grant Florida Cities access to these facilities.

FPL's Statement of Issues in Response to Item 1:

- (i) Is nuclear power a relevant product market?
- (ii) If so, is Peninsular Florida a relevant geographical market?
- (iii) If the answers to both (i) and (ii) are assumed to be affirmative, does FPL possess monopoly power, i.e., the power to control prices or exclude competition, in this market?
- (iv) Has FPL refused any timely and bona fide request that it grant access to its nuclear facilities?

^{1/} Some issues relate to more than one item. Accordingly, the headings provided here should be regarded as for the convenience of the Board only, and not as limiting the scope of any issue stated.

- (v) If so, was that action unreasonably restrictive of competition and not justified by legitimate business considerations?
- (vi) How has competition in any relevant market or the competition viability of any City been affected by any action by FPL?

Cities' Item 2:

FPL has (a) dominance in Peninsular Florida and (b) a monopoly in its retail service area over economic base load generation (including nuclear generation), transmission and coordination. See Statement of Facts and FERC Opinion Nos. 57 and 57-A.

FPL's Statement of Issues in Response to Item 2:

- (i) Is Peninsular Florida a relevant geographic market with respect to any relevant product market?
- (ii) What product markets are relevant? (One cannot even discern from this item what markets the Cities allege are relevant).
- (iii) What, if any, competition exists between FPL and Cities in that market?

Cities' Item 3:

FPL has a retail service monopoly in eastern and southern Florida. FPL's present or past refusals to deal in nuclear and base load power, wholesale power, transmission and coordination have advantaged it in competition to preserve and extend its retail monopoly and in competition for wholesale or coordination. Opinion No. 57, Statement of Facts.

FPL's Statement of Issues in Response to Item 3:

- (i) Is any retail power market relevant in this case?
- (ii) If so, what are the geographical bounds of that market?

- (iii) What, if any, competition exists in that market?
- (iv) Does FPL have monopoly power, i.e., the power to control prices or exclude competition in such market?
- (v) How is such competition or the competitive viability of any City affected by the actions alleged?
- (vi) Has FPL refused to deal, and is it refusing to deal, in nuclear and "base load power" (if there is any such thing), wholesale power, transmission and "coordination" (whatever else is meant by that term)?
- (vii) If so, were and are FPL's actions unreasonably restrictive of competition and not justified by legitimate business considerations?
- (viii) Assuming arguendo that FPL has refused or is refusing to deal in some product,
 - (A) In what product and geographical markets is competition affected?
 - (B) What is the nature and extent, if any of competition in such market(s)?
 - (C) In what ways is FPL advantaged in such competition by its alleged actions?
 - (D) In what ways have the Cities been affected by such alleged actions?
 - (E) Was FPL's conduct unreasonably restrictive of such competition, if any, as exists and not justified by legitimate business considerations?

Cities Item 4:

FPL has acted to restrict or deny Cities access to baseload generation (including nuclear), transmission, wholesale power and coordination. See Gainesville Utilities Dept. v. Florida Power & Light Co., FERC Opinion No. 57, Statement of Facts and positions taken by FPL in this case.

FPL's Statement of Issues in Response to Item 4:

FPL cannot understand this item as stated. It denies the allegation. However, if this item alleges any matter of fact not also alleged in some other item, FPL is unable to discern that.

Cities Item 5:

A Peninsular Florida geographic market exists for wholesale and coordination power supply. FPL is interconnected with other electric systems in Florida, including Florida Power Corporation, Tampa Electric Company and other municipally and cooperatively operated utilities. FPL has received substantial benefit from its coordination with these other utilities in the operation or planned operation of its nuclear and other baseload generating units. See Statement of Facts, FPC Opinion No. 517.

FPL's Statement of Issues in Response to Item 5:^{1/}

- (i) Are there markets for wholesale and coordination power which have as their boundaries Peninsular Florida?
- (ii) What has been the extent of coordination between FPL and other electric utilities at various times?
- (iii) To what extent, if any, did FPL receive substantial benefits from coordination with other utilities in the operation or planned operation of any of its generating units?

Cities' Item 6:

FPL was part of a conspiracy with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida. See Gainesville Utilities Dept. v. Florida Power & Light Co., Statement of Facts.

^{1/} It is undisputed that -- except for offers of ownership in St. Lucie Unit No. 2 in accordance with NRC license conditions -- all of FPL's nuclear generating units have been financed by FPL without the assistance of any other utility, planned for use in serving FPL's own customers, and used for that purpose. Therefore, FPL does not perceive any relevance to these issues.

FPL's Statement of Issues in Response to Item 6:

- (i) Was FPL part of a conspiracy with Florida Power Corporation to divide the "wholesale power market" in Florida?
- (ii) Is there a market relevant to this proceeding which is a "wholesale power market" in Florida?
- (iii) If such conspiracy were to be assumed arguendo, how has that conspiracy affected any other utility?
- (iv) Of what relevance is any such conspiracy 15 years after the factual events on which the Cities' rely and at least 10 years after any such conspiracy must be deemed, as a matter of law, to have terminated?

Cities Item 7:

FPL and the municipal utilities located within its retail service territory engage in franchise competition. At various times FPL has promoted acquisition and has been receptive to municipal proposals. Most, if not all, of those incidents occurred when the municipal systems were arranging new bulk power supplies from among the options of self-generation, wholesale purchases from FPL and retail purchases from FPL after franchise disposition and without the option of sharing in FPL's nuclear or other base load units. See Statement of Facts and Opinion No. 57.

FPL's Statement of Issues in Response to Item 7:^{1/}

- (i) Is there franchise competition between FPL and municipal utilities located adjacent to its service area?
- (ii) If so, has FPL's participation in that competition been inconsistent with any antitrust law?

^{1/} Again, a portion of the Cities' statement is not comprehensible to FPL. FPL is not aware of any issue which is raised in the Cities' pleading about purchase of power from FPL by any municipality as a retail customer.

- (iii) Does FPL have monopoly power, i.e., the ability to control prices or exclude competition, in the market in which such competition is alleged to take place?

Cities' Item 8:

In filings and public statements, FPL has advertised the economic benefits from its base load generation (including nuclear) and coordination. Such statements were of a nature to induce franchise renewals for FPL or sales of municipal systems to FPL.

FPL's Statement of Issues in Response to Item 8:

FPL acknowledges that it placed the newspaper advertisements attached to the Cities' motion for the purpose of providing information to the citizens of Vero Beach and Daytona Beach, respectively. FPL denies any impropriety on its part in doing so. Moreover, FPL denies that there is any identifiable class of facilities which are denominated "base load generation."

Cities' Item 9:

FPL has sought to acquire independent municipal systems. See Gainesville Utilities Dept. v. Florida Power & Light Co., Opinion 517, Opinion 57, Opinion 57-A, Statement of Facts.

FPL Statement of Issues in Response to Item 9:

Since 1957, FPL has submitted proposals, in 1974, to acquire the New Smyrna Beach Electric System and, in 1973, to acquire the Vero Beach electric system. In both instances the proposals were submitted in response to official requests by the municipal governments concerned. There have been discussions at various times between particular FPL officials

and officials of municipalities about the possibility of submitting other proposals; since 1957, none of these discussions, other than the two listed above, has resulted in a proposal being made. To the extent that item 9 implies more than this, FPL denies it.

Cities' Item 10:

FPL cancelled its proposed South Dade Unit after receiving requests for participation by municipally owned systems. See Statement of Facts.

FPL's Statement of Issues in Response to Item 10:

FPL cancelled its proposed South Dade plant in February 1977. The following issues are implicated by item 10--^{1/}

- (i) Was FPL's cancellation of the proposed South Dade unreasonably restrictive of competition and not justified by legitimate business considerations?
- (ii) Were the communications from certain Cities to FPL bona fide requests for participation in the proposed South Dade plant?
- (iii) Did the Cities, contemporaneously, concertedly and unlawfully refuse to deal with FPL in connection with FPL's offer to manage a joint venture nuclear generation project in central Florida?
- (iv) Have Cities ever evidenced a willingness to share with FPL the risks of licensing and construction of a nuclear generating facility?

^{1/} Item 10 is phrased coyly. There is no dispute that FPL received certain correspondence from some of the Cities in 1975 and 1976, and that the cancellation of the South Dade plant occurred subsequently in 1977.

Cities' Item 11:

Florida Power & Light has agreed to sell the City of Orlando or the Orlando Utilities Commission participation in St. Lucie Unit 2 and has offered participation to some other Cities in Peninsular Florida which have requested such access, but has offered participation to utilities other than those listed in the St. Lucie Unit 2 license conditions. See Statement of Facts.

FPL's Statement of Issues in Response to Item 11:

- (i) Have the systems listed in Section VII of the license conditions joined with FPL to boycott other Cities?
- (ii) To what extent has each of the Cities had an opportunity to participate in St. Lucie Unit No. 2, either through the Florida Municipal Power Agency or otherwise?

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket No. 50-389A
)
(St. Lucie Plant, Unit No. 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF FLORIDA POWER & LIGHT COMPANY TO CITIES' MOTION TO ESTABLISH PROCEDURES, FOR A DECLARATION THAT A SITUATION INCONSISTENT WITH THE ANTITRUST LAWS PRESENTLY EXISTS AND FOR RELATED RELIEF" was served upon the following persons by hand delivery* or by deposit in the U. S. Mail, first class, postage prepaid this 7th day of August, 1981.

*Peter B. Bloch, Esquire
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Robert M. Lazo, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Michael A. Duggan, Esquire
College of Business Administration
University of Texas
Austin, Texas 78712

*Ivan W. Smith, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Station
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas Gurney, Sr., Esquire
203 North Magnolia Avenue
Orlando, Florida 32802

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert E. Bathen
Fred Saffer
R.W. Beck & Associates
P.O. Box 6817
Orlando, Florida 32803

*Robert A. Jablon, Esquire
Alan J. Roth, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

William C. Wise, Esquire
Suite 500
1200 18th Street, N.W.
Washington, D.C. 20036

William H. Chandler, Esquire
Chandler, O'Neal, Avera, Gray
& Stripling
Post Office Drawer 0
Gainesville, Florida 32602

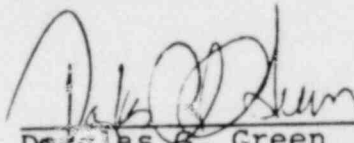
*Janet Urban, Esquire
P.O. Box 14141
Washington, D.C. 20044

Donald A. Kaplan, Esquire
Robert Fabrikant, Esquire
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

Charles R.P. Brown, Esquire
Brown, Paxton and Williams
301 South 6th Street
P.O. Box 1418
Fort Pierce, Florida 33450

*Benjamin H. Vogler, Esquire
Ann P. Hodgdon, Esquire
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Esquire
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



Douglas S. Green
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

(202) 862-8400

DATED: August 7, 1981