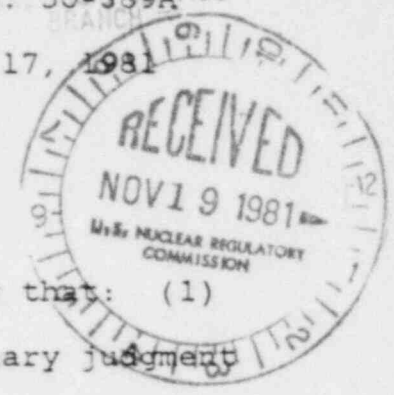
FPL: 11/17/81

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)	)	November 17, 1981



SUPPLEMENTAL REPLY MEMORANDUM OF
FLORIDA POWER AND LIGHT COMPANY

In their Answer, the Cities do not deny that: (1) the record before Judge King when he entered summary judgment for FPL was essentially identical to the record now before the Board; (2) Cities had a "full and fair opportunity" to address the significance of those record materials in proceedings before Judge King; and (3) this Board must apply the basic principles of antitrust policy established by the courts. Notwithstanding these factors, Cities take the position that this Board can ignore Judge King's decision in resolving the antitrust issues raised by this proceeding. As we show below, Cities' arguments are untenable.

I. JUDGE KING'S DECISION IS ENTITLED TO COLLATERAL ESTOPPEL EFFECT

A. The Finality Requirement

The Cities argue that only a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure can be considered "final" for collateral estoppel purposes. This position is squarely at odds with controlling authority. See Zdanok v. Glidden, 327 F.2d 944, 955 (2d Cir.), cert. denied, 377 U.S. 934 (1964) (for collateral estoppel purposes, "'finality . . .

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may mean little more that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again'"); GAF Corp. v. Eastman Kodak Co., 1981 Trade Cas. ¶ 64,205, at 73,749 (S.D.N.Y. August 3, 1981) (decision which is "law of the case" is entitled to collateral estoppel even if it does not constitute a "final judgment").

There can be no dispute that Judge King's decision is neither provisional nor tentative but represents an authoritative ruling on the Cities' nuclear access claims. These factors are sufficient to establish its "finality" for collateral estoppel purposes.

B. Application of Judge King's Decision to Other Cities

1. The Cities argue that they are not collaterally estopped by Judge King's decision because the decision only applies to Tallahassee. The crucial question, however, is not whether Judge King's order "binds" all the Cities in a technical sense but whether the Cities had "a substantial interest in the outcome of the lawsuit and . . . participated in a significant way in the litigation." Pinto Trucking Service, Inc. v. Motor Dispatch, Inc., 1981-1 Trade Cas. ¶ 64,028 at 76,325 (7th Cir. 1981). Even non-parties may be collaterally estopped from relitigating an issue where they effectively received a "full and fair opportunity to be heard" by virtue of their close relationship to parties who were active litigants. Montana v. United States, 440 U.S. 147 (1979); Southwest Airlines v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir. 1977); Cauefield v. Fidelity & Casualty Company of New York, 378 F.2d

876 (5th Cir. 1967); TRW, Inc. v. Ellipse Corp., 495 F.2d 314 (7th Cir. 1974).[1]

These principles bar all the Cities from relitigating the issues decided by Judge King. Most of the arguments advanced by FPL in its summary judgment motion encompassed the nuclear access claims of the Cities as a group. As a result, counsel for plaintiffs opposed FPL's motion on behalf of all the Cities and advanced broad legal and factual arguments that reflected the Cities' common interests. It is thus clear that all the Cities recognized that they had a substantial stake in the disposition of FPL's motion and fully litigated the issues that FPL raised. This is plainly sufficient for the application of collateral estoppel.

2. The Cities also argue that Judge King's decision rests merely on a narrow finding that Tallahassee had not demonstrated a "firm interest" in FPL's nuclear facilities and that this finding cannot be applied to the remaining Cities. Even the most cursory examination of Judge King's decision, however, demonstrates that it rested on a far broader rationale.

While the District Court mentioned Tallahassee's lack of a "firm interest" in passing, this factor was hardly the crux of its ruling.[2] Rather, Judge King specifically found that, in

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[1] Under these decisions, even the three Cities who are not plaintiffs in the Miami litigation would be bound by Judge King's decision. These Cities are represented in this proceeding by counsel for the plaintiffs in the Miami litigation. They were undoubtedly aware of the issues raised by FPL's summary judgment motion and had every opportunity to work with counsel in opposing that motion.

[2] In any event, Judge King's conclusion on this score rested on grounds applicable to all the Cities. As he found, Tallahassee had not requested nuclear access from FPL until 1976,

(footnote cont'd)

constructing and operating its nuclear facilities, FPL violated neither Section 1 nor Section 2 of the Sherman Act. In reaching this conclusion, he determined that: (1) FPL had not engaged in any unlawful concerted action in connection with its nuclear units (Decision, at 6), (2) FPL did not possess monopoly power in the relevant market (id., at 8), (3) FPL's nuclear activities "occurred as a result of its business acumen" (id., at 8), (4) FPL "did not engage in anticompetitive acts in acquiring or maintaining its nuclear facilities" (id., at 8), and (5) FPL had not sought "to block . . . access [by Cities] to nuclear power participation" (id., at 10).[1] In short, contrary to the Cities' contention, Judge King's decision does not depend upon any facts unique to Tallahassee; rather, the decision applies controlling legal standards and holds broadly that the antitrust laws did not obligate FPL to offer the Cities access to its nuclear facilities.[2]

(footnote cont'd)

well after FPL had begun operating its nuclear plants, and this request merely sought an "opportunity to consider" purchasing a share of FPL's nuclear units. Decision, at 11. Significantly, the 1976 request to which Judge King referred was made on behalf of all the Cities, not just Tallahassee.

[1] In an effort to avoid the effect of these determinations, Cities suggest that, where a judicial decision rests on alternative holdings, none of these holdings is entitled to collateral estoppel effect. The law is otherwise. 1 B Moore's Federal Practice ¶ 0.443[5] at 3919 29; Winters v. Lavine, 574 F.2d 46, 66-67 (2d Cir. 1978); GAF Corp. v. Eastman Kodak Co., supra, at 73,750.

[2] Cities also argue that, even if Judge King's decision meets the other criteria for collateral estoppel, they should be free to relitigate the issues resolved by that decision because it is "inconsistent" with Gainesville and Opinion No. 57. The courts have recognized, however, that an apparent "inconsistency" between two or more decisions does not preclude the

(footnote cont'd)

II. JUDGE KING'S DECISION RESOLVES IN FPL'S FAVOR ISSUES THAT ARE CONTROLLING IN THIS PROCEEDING

The Cities alternatively argue that, even if Judge King's decision is entitled to collateral estoppel effect, it should not preclude this Board from finding a situation "inconsistent with the antitrust laws" because FPL's alleged "anticompetitive conduct" is established by the record before the Board, including the findings of FERC in Opinion No. 57.

This contention, however, ignores the fact that a virtually identical record was before Judge King when he entered summary judgment for FPL. In reviewing the evidence proffered by Cities, Judge King found that, whatever FPL may have done in other areas of its business, it "did not engage in anticompetitive acts in acquiring or maintaining its nuclear facilities." Decision, at 10 (emphasis added). Thus, Judge King rejected the Cities' efforts to justify access to FPL's nuclear units by presenting evidence of alleged anticompetitive actions by FPL that were unrelated to its acquisition and use of nuclear power.

(footnote cont'd)

application of collateral estoppel where one of those decisions is entitled to significantly more weight in resolving the issues in dispute. E.g., Carr v. District of Columbia, 646 F.2d 599, 606 (D.C. Cir. 1980).

As FPL has already demonstrated, there are important reasons why Opinion No. 57 and Gainesville are not entitled to collateral estoppel effect. Moreover, the District Court decision was based on the same record as is now before this Board, including Opinion No. 57 and Gainesville, involved the same ultimate issue as presented in this case, and was rendered in a proceeding in which the same parties now before this Board were involved. Since it plainly is entitled to more weight than Gainesville and Opinion No. 57, any inconsistency between the latter decisions and Judge King's ruling must be resolved by according preclusive effect to Judge King's decision.

The same approach must govern here. Section 105c of the Atomic Energy Act requires that "a meaningful nexus must be established between the situation [inconsistent with the antitrust laws] and the 'activities under the license'" before antitrust license conditions may be imposed. Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), CCI-73-7, 6 AEC 48, 49 (1973). As the Commission has explained:

> ". . . [W]e must emphasize that the specific standard which Congress required for antitrust reviews - 'whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a' - has inherent boundaries. It does not authorize an unlimited inquiry into all alleged anticompetitive practices in the utility industry. The statute involves licensed activities, and not the electric utility industry as a whole. If Congress had intended to enact a broad remedy against all anticompetitive practices throughout the electric utility industry, it would have been anomalous to assign review responsibility to the Atomic Energy Commission, whose regulatory jurisdiction is limited to nuclear facilities. It is the status and role of these facilities which lie at the heart of antitrust proceedings under the Atomic Energy Act." Louisiana Power and Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 620 (1973) (emphasis in original).

To prevail in this proceeding, Cities must thus demonstrate a "nexus" between FPL's alleged anticompetitive conduct and the activities it will conduct under its license for St. Lucie Unit No. 2. Yet Judge King's finding that FPL acted lawfully in acquiring and operating its nuclear units precludes the Cities from demonstrating any such "nexus." Accordingly, the Cities are foreclosed from seeking nuclear access in proceedings before this Board.

In their Answer, the Cities suggest that the Board can properly afford relief in addition to nuclear access even if Judge King's decision receives collateral estoppel effect. However, as this Board has recently determined, the required "nexus" is between the alleged situation and construction or operation of the nuclear unit to be licensed, not between the alleged situation and wholly unrelated forms of relief.[1] Equally important, the NRC's antitrust jurisdiction concerns "access to power produced by nuclear facilities." Waterford, supra, 6 AEC at 620. Although the NRC has on occasion inquired into other power supply policies of utilities, it is only to determine whether those policies have been used to frustrate nuclear access. Kansas Gas and Electric Company, et al. (Wolf Creek Geerating Station, Unit No. 1), ALAB-279, 1 NRC 559, 572-73 (1975). Where -- as here -- a party is not entitled to access to a nuclear facility, there is no basis to consider granting any other relief under Section 105c

III. FERC OPINION NO. 57 CANNOT FORM THE BASIS FOR ANY CONCLUSION THAT FPL HAS ENGAGED IN ANTICOMPETITIVE CONDUCT

The Fifth Circuit in Florida Power & Light Co. v. FERC, No. 80-5259 (5th Cir. Nov. 6, 1981), which is appended to Cities' Answer, determined that FERC Opinion No. 57 could not justify a subsequent FERC order requiring FPL to file a transmission tariff. In its decision, the Court pointed out that Section 2 of the Sherman Act required proof not just of

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[1] Memorandum and Order (in this docket) dated August 5, 1981, pp. 21-25; Notice of Conference of Counsel (in this docket dated July 7, 1981, pp. 13-14.

the possession of monopoly power but of conduct constituting "an attempt to restrain trade or an attempt to monopolize." Slip Op. at 12820. The Court then stressed that Opinion No. 57 did not make any finding "that any specific anticompetitive activities or antitrust violations had occurred." Id.

This holding of the Fifth Circuit, in a case arising out of the same FERC docket in which Opinion No. 57 was issued, is conclusive in defining the scope of Opinion No. 57. Accordingly, even if, notwithstanding FPL's arguments, the Board were to accord collateral estoppel effect to Opinion No. 57, it could not rely on that opinion to establish that FPL has engaged in any anticompetitive conduct.

CONCLUSION

The Department of Justice and the NRC Staff have advised the Board that the licensing of St. Lucie No. 2 under the settlement license conditi ns agreed to by FPL will not create or maintain a situation inconsistent with the antitrust laws. The basic legal and factual arguments to the contrary urged by Cities in this proceeding have been rejected by a United States District Court in a case instituted by these Cities. The Board should enter an order, on the basis of the District Court's decision, endorsing the position of the Department of Justice and the NRC Staff and terminating this proceeding.

Respectfully submitted,

J. A. Bouknight, Jr.

J. A. Bouknight, Jr.
Lowenstein, Newman, Reis & Alexrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-8400

Herbert Dym
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5520

Attorneys for Florida Power &
Light Company

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Supplemental Memorandum of Florida Power & Light Company" were served on the following persons by deposit in the U.S. Mail, first class, postage prepaid this 17th day of November, 1981.

Peter B. Bloch, 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 Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

Argil L. Toalston
Acting Chief
Antitrust and Economic Analysis
Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Janet Urban, Esquire
U.S. Department of Justice
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

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

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

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

Herbert Dym

Herbert Dym
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

(202) 662-6000

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