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**UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

**In the matter of:**

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

**Docket No. 50-389A**

**Place:** Orlando, Florida

**Date:** March 5, 1980

**Pages:** 278-375

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

278

In the Matter of:

DOCKET NO. 50-389A

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

Auditorium  
Orlando Utilities Comm.  
500 South Orange Avenue  
Orlando, Florida

Wednesday, March 5, 1980

Pre-hearing Conference in the above-entitled  
cause was convened, pursuant to notice, at 9:00  
o'clock a.m., before:

IVAN SMITH, ESQ., Chairman

ROBERT LAZO, ESQ., Member

VALENTINE DEALE, ESQ., Member

A P P E A R A N C E S:

On Behalf of Applicant, Florida Power & Light:  
HERBERT DYM, ESQ., Covington & Burling,  
888 Sixteenth Street, N.W., Washington,  
D.C. 2006, and  
JOHN E. MATHEWS, JR., ESQ., Mathews, Osborne  
& Ehrlich, 1530 American Heritage Life  
Building, Jacksonville, Florida 32202

On Behalf of the Regulatory Staff, NRC:  
LEE DEWEY, ESQ., Office of Executive Legal  
Counsel, U.S. Nuclear Regulatory Commission,  
Washington, D.C.

On Behalf of Intervenor, Florida Cities:  
BOB JABLON, ESQ., and GEORGE SPIEGEL, ESQ.,  
Spiegel & McDiarmid, Watergate Office Bldg.  
2600 Virginia Avenue N.W., Washington D.C.  
20037, and  
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RPR, CSR



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305/422-1541

A P P E A R A N C E S: (Cont.)

JOSEPH C. JACOBS, ESQ., 305 South Gadsden  
Street, Tallahassee, Florida 32302

On Behalf of the Department of Justice:  
JANET URBAN, ESQ., U.S. Department of  
Justice, Antitrust Division, Washington, D.C.

On Behalf of Orlando Utilities Commission;  
WILLIAM C. WISE, ESQ., Suite 500,  
1200 Eighteenth Street, N.W., Washington,  
D.C. 20036, and  
J. THOMAS GURNEY, SR., and J. THOMAS GURNEY, JR  
ESQS., Gurney, Gurney & Handley, 203 North  
Magnolia Avenue, Orlando, Florida 32801

On Behalf of Fort Pierce Utilities Authority:  
CHARLES R. P. BROWN, ESQ., 301 South Sixth  
Street, Fort Pierce, Florida 33450

On Behalf of Sebring Utilities Commission:  
R. D. PRIEST, Comptroller, City Administra-  
tion Building, 368 South Commerce Avenue,  
Sebring, Florida 33870

On Behalf of the City of Gainesville:  
ANN CARLIN, Assistant City Attorney,  
Gainesville, Florida

Frank Sarll,  
RPR, CSR



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P R O C E E D I N G S

CHAIRMAN SMITH: Good morning, ladies and gentlemen. It has been some time since we last met, so let's take an opportunity to reintroduce ourselves. My name is Ivan Smith. Robert Lazo to my right and Valentine Deale to my left are the two other members of the Board. Mr. Dewey, beginning with you, could you introduce yourself and the members of your staff who will participate in the proceeding?

MR. DEWEY: I am Lee Dewey, the representative of the Nuclear Regulatory Commission Staff. With me this morning is Maurice Messier, an economist with the NRC.

THE COURT: Could you spell your name, sir?

MR. MESSIER: M E S S I E R.

CHAIRMAN SMITH: Mrs. Urban?

MRS. URBAN: I am Janet Urban, and I represent the United States Department of Justice.

MR. JABLON: Robert Jablon, and I represent the Florida Cities except the Orlando Utilities Commission.

MR. JACOBS: My name is Joseph C. Jacobs of Tallahassee. I along with Mr. Jablon represent the Cities.

MR. JABLON: Your Honor, we are going to file a formal appearance for Mr. Jacobs and also George Spiegel if we may do that after today's hearing.

CHAIRMAN SMITH: Okay.

1 MR. BROWN: My name is Charles R.P. Brown. I am  
2 here representing Fort Pierce Utilities.

3 CHAIRMAN SMITH: I am sorry. Give me a moment,  
4 will you please, Mr. Brown?

5 MR. BROWN: Would you repeat that, please?

6 CHAIRMAN SMITH: I wanted an opportunity to get  
7 Mr. Brown's name and his client. Yes, sir.

8 MR. SMITH: J. Paul Smith representing the  
9 Fort Pierce Utilities Authority.

10 MR. MENGE: I am Ewell Menge, the director of the  
11 Fort Pierce Utilities Authority.

12 CHAIRMAN SMITH: Is that M E N G E, sir?

13 MR. MENGE: That is correct.

14 MR. PRIEST: I am Bob Priest, comptroller of  
15 Sebring Utilities Commission.

16 CHAIRMAN SMITH: Would you spell your last name,  
17 please?

18 MR. PRIEST: P R I E S T.

19 MR. MATHEWS: I am John E. Mathews, Jr.,  
20 representing Florida Power & Light.

21 MR. DYM: My name is Herbert Dym, and I am also  
22 with Mr. Mathews representing FPL.

23 CHAIRMAN SMITH: And you, sir?

24 MR. GARDNER: I am Robert J. Gardner, vice  
25 president of FP&L.

1           CHAIRMAN SMITH: Before the session begins, I had  
2 a conversation with Messrs. Gurney, and they are  
3 representing the City of Orlando. I see neither of them  
4 now. Oh, yes, I see Mr. Gurney. Mr. Gurney, Jr.,  
5 requested that we defer the discussion concerning Orlando  
6 until Mr. Wise arrives, and then if possible -- oh, Mr.  
7 Wise has just come in.

8           Then the request is, as I understand it, that the  
9 matters relating to the Orlando Utilities Commission be  
10 given priority because you have a need to leave; is that  
11 right, Mr. Wise?

12           MR. WISE: Yes, sir.

13           MR. GURNEY, SR.: Mr. Chairman, we would like just  
14 a minute to speak to Mr. Wise. He just came in the door  
15 this second. We will then be --

16           CHAIRMAN SMITH: Okay, we will take a short recess  
17 for that purpose, but before we do, in our notice of  
18 hearing published in the Federal Register, we provided an  
19 opportunity for other persons who are not necessarily  
20 parties at the proceeding to request an opportunity to  
21 express -- make statements or express positions. Is there  
22 anyone here who wishes to make such a statement?

23           Now, if you would like to have a short recess,  
24 then we will take up your matters.

25           MR. WISE: Thank you, Mr. Chairman.





1 CHAIRMAN SMITH: How long do you need?

2 MR. LUFF: Should be very brief.

3 CHAIRMAN SMITH: Okay.

4 (Brief recess.)

5 MR. WISE: We are ready, Mr. Chairman.

6 CHAIRMAN SMITH: Back on the record. One of the  
7 reasons why we scheduled this session for Orlando was to  
8 give an opportunity for representatives of the other  
9 municipalities and any interested person in Florida an  
10 opportunity to attend, observe and participate, and while  
11 we were off the record, Mr. Jablon referred to the fact  
12 that there were some representatives here from other  
13 utilities. Would you repeat that, sir?

14 MR. JABLON: Yes, Your Honor. There are  
15 representatives of some other utilities who are either  
16 named Intervenors or being represented as members of the  
17 Florida Municipal Utilities -- FMUA, Florida Municipal  
18 Utilities Association, including the New Smyrna Beach  
19 Utilities Commission, the City of Gainesville, the City of  
20 St. Cloud and the City of Tallahassee.

21 CHAIRMAN SMITH: Thank you. Mr. Wise, would you  
22 like to have room at the table? I am sure we can find it.

23 MR. WISE: No, no, this is all right. I would  
24 rather be with my associate. There isn't enough room there  
25 for --

1           CHAIRMAN SMITH: Will you be speaking, sir, for  
2           the City of Orlando?

3           MR. WISE: Yes, but Mr. Thomas Gurney, Sr., who is  
4           counsel, and Mr. Thomas Gurney, Jr., who isn't here right  
5           now, will be here, and Mr. Harry Luff who is the police of  
6           the City of Orlando as far as the electric utilities are  
7           concerned or so far as these proceedings are concerned,  
8           they will both be prepared to answer any questions you  
9           might have which we are -- we really have very little to  
10          present, as I think you know.

11                         (Mr. Gurney, Jr., entered the room.)

12          MR. WISE: As you know, I entered my appearance  
13          recently. The City of Orlando is proposing to withdraw  
14          from all the proceedings before the anniversary of what I  
15          will refer to briefly as the related proceedings. Its  
16          problems -- its situation is somewhat different than the  
17          other municipalities, so we are entering into a settlement  
18          agreement which has been negotiated almost we will say  
19          ninety percent, and we hope to have it finished in a few  
20          days, and that will trigger the completion of the  
21          negotiations of the participation agreement.

22                         When that is signed at the closing, then Orlando  
23          will withdraw from the various proceedings, will not enter  
24          into any additional proceedings arising out of the matters  
25          which are before the Commission in the present proceeding.

1                   CHAIRMAN SMITH: Do you have any statement you  
2 would like to make?

3                   MR. GURNEY, SR.: No, Mr. Chairman, I think  
4 Mr. Wise has stated the situation very succinctly. I would  
5 say that we made every effort we could in order to finalize  
6 this matter before today, but various things intervened,  
7 including one counsel I believe whose mother passed away in  
8 the last day or so, and it sort of inhibited things  
9 somewhat.

10                  But we are -- as he has indicated, we think there  
11 is a substantial agreement, but there is certain wording  
12 which we have not finalized, and if any of you read the  
13 paper, local paper, here this morning, I saw the article  
14 there, why, I should explain to you that that article is  
15 not exactly correct because while the Commission did meet  
16 yesterday and they did discuss this matter, they authorized  
17 its counsel and assistant general manager here to proceed  
18 with it and consummate it if they approve it. That's the  
19 present state of the inside operation of the OUC.

20                  CHAIRMAN SMITH: Mr. Dym, do you have a comment to  
21 make, sir?

22                  MR. DYM: No, I agree with what counsel for  
23 Orlando has stated. I think the fact is we are in  
24 agreement with Orlando subject to buttoning up a few  
25 details which we expect to be done within the next --

1 within the next few days.

2 As we indicated during the conference call that we  
3 had, once an agreement is executed, we do contemplate  
4 submitting it to the Board for its information and  
5 providing it to all the parties to the proceeding.

6 CHAIRMAN SMITH: Okay, that's fine. In the  
7 telephone conference call that we had, that was not yet --  
8 had not yet been determined, and our particular interest  
9 was will it be submitted for our information, and if it is,  
10 of course, it will be made public.

11 And we wanted to know if there is a need for  
12 further public dissemination of the provisions of the  
13 settlement, thinking of the parallel practice of the United  
14 States District Court proceeding in the Federal District  
15 Court and the Federal Trade Commission where settlements  
16 where there is a wider public interest are sometimes put on  
17 the public record tentatively before they become final.

18 Of course, that would depend upon the nature of  
19 the settlement, whether it is entirely a private settlement  
20 or whether it's one that has broader implications of the  
21 public interest.

22 Excuse me, Mr. Dym?

23 MR. DYM: No, I am sorry for interrupting.

24 CHAIRMAN SMITH: I was done.

25 MR. DYM: Well, I am familiar with the procedure

1 governing the publication of consent judgments that are  
2 entered into with the Department of Justice. I believe  
3 there is a statutory provision calling for publication and  
4 dissemination of comments, and I am unaware of any  
5 comparable provision involving this Commission.

6 Now, the settlement with Orlando will not involve  
7 the imposition of any license conditions. It is a private  
8 settlement with Orlando. So far as I am aware, the only  
9 provision applicable to this proceeding is Orlando's  
10 undertaking to withdraw from it, and I must say I do not --  
11 I do not -- as I say, we do intend to provide the agreement  
12 for the Board's information, but we don't see the need for --  
13 indeed, the basis for any proceedings relating to that  
14 settlement.

15 MR. WISE: Mr. Chairman, that's Orlando's position;  
16 too. We see no need -- I know of no regulation that would  
17 require publication, but, of course, it will be presented  
18 to you. You can make your decision on that. It's our  
19 opinion that there is no further proceedings necessary  
20 insofar as Orlando is concerned.

21 CHAIRMAN SMITH: Does any other party wish to  
22 comment?

23 MR. JABLON: Yes, Your Honor. Speaking on behalf  
24 of the other Cities, first of all, we are very pleased that  
25 Orlando and Florida Power & Light could reach agreement.

1 Of course, the purpose of these cases is to try and  
2 facilitate agreement.

3 And while we haven't seen the specific terms of  
4 the settlement, we fully support the position of Florida  
5 Power & Light Company and Orlando Utilities that the matter --  
6 to the extent the matter can be amicably resolved with the  
7 most dispatch of the least procedural hassle, as it should  
8 be. We support the settlement. We do not oppose it.

9 I would say as a separate and independent matter  
10 that it is my understanding that certain rights or benefits  
11 will be conferred upon the Orlando Utilities Commission.  
12 It is also my understanding that, contingently or otherwise,  
13 Florida Power & Light has offered St. Lucie to capacity to  
14 other Cities in the state.

15 It is the Florida Cities' position that to the  
16 extent that Florida Power & Light voluntarily offers  
17 participation in nuclear plants or related rights to others  
18 and does not make an analogous offer to each of the  
19 Intervenor or the FMJA members, that there would be reason  
20 to show cause why they should not because on its face it  
21 would appear to be discriminatory to do so.

22 I am not saying that there cannot be justifying  
23 reasons for treating one city differently from another, but  
24 I think the Company would have a burden, not merely with  
25 regard to Orlando but with regard to any other city, to

1 explain why it would be granting rights to any particular  
2 city, if that be the case, which were not generally  
3 available.

4 CHAIRMAN SMITH: As I understand it, the Staff and  
5 the Department of Justice has no comment on the proposed  
6 settlement of the City of Orlando. Now, what we are  
7 interested in is not comments at this time, comments upon  
8 the substantive aspects of the settlement, but the need for  
9 the settlement to be reviewed by the Nuclear Regulatory  
10 Commission. Mr. Dewey?

11 MR. DEWEY: Your Honor, I think critical -- the  
12 crucial point on the need for the NRC to look at the  
13 settlement is whether there is going to be the imposition  
14 of license conditions. If there were, then I think that --  
15 if the settlement included license conditions to be  
16 attached to NRC licenses, I think we would have a far  
17 greater responsibility.

18 At this point it's somewhat hard to visualize what  
19 further role we would take if license conditions are not a  
20 part of the settlement, but I think that we should wait and  
21 see what the settlement actually says and then we might  
22 have a further comment.

23 CHAIRMAN SMITH: Yeah, I would be interested in  
24 your comment, too, assuming that there were no license  
25 conditions, but would the Nuclear Regulatory Commission be

1 interested in the effect of the settlement upon the alleged  
2 situation inconsistent with the antitrust laws which we are  
3 charged by the Commission order and by statute to consider?  
4 Mrs. Urban, do you have a comment?

5 MRS. URBAN: Well, I tend to agree with Mr.  
6 Dewey's comments. I think that at some point we should be  
7 made aware of the conditions in the settlement to see how  
8 they do affect the situation inconsistent and the effect of  
9 the conditions vis-a-vis the other Cities in terms of the  
10 situation inconsistent.

11 I guess the only thing analogous I can think of is  
12 a procedure at first where procedures are approved by the  
13 Commission -- I am not entirely -- I frankly forgot my  
14 rules and left them in Washington, but I am not entirely  
15 sure what the NRC rules say about a participant or  
16 Intervenor withdrawing and whether the rules give the  
17 Commission some sort of right to refuse withdrawal or to  
18 look at the conditions under which someone is withdrawing,  
19 and that might pertain.

20 CHAIRMAN SMITH: Well, there is no specific  
21 Commission regulation with which I am familiar which would  
22 pertain to this specific situation in a proceeding under  
23 Section 105. However, we have the Commission's own order  
24 in the case on page 15. I am referring to the order of  
25 June 21st, 1978, in which the Commission stated that if a



1 hearing is convened, we think it should encompass all  
2 significant complaints of NRC licensees, not merely the  
3 complaints of intervening private parties.

4 And the settlement between one of the more  
5 important parties and the licensee could certainly have  
6 significant implications. However, I believe all of this  
7 is premature until the settlement is filed with the Board.,  
8 And I think we have accomplished what we set out to do this  
9 morning.

10 Mr. Dym, go ahead.

11 MR. DYM: Before we leave the subject, I simply  
12 would like to note my disagreement with Mr. Jablon's  
13 observation as to the alleged burden on FPL. I think that  
14 issue is a premature one, but I didn't want the record to  
15 be silent and somehow people argue that we have acquiesced  
16 in his statement.

17 CHAIRMAN SMITH: Okay.

18 MR. GURNEY, JR.: Mr. Chairman, if I may, I am Tom  
19 Gurney, Jr., another attorney for -- local attorney for  
20 Orlando Utilities Commission, and I think it might be  
21 useful just to say for the benefit of the Commission and  
22 the Staff that what is involved here is a fairly short  
23 document entitled, A Settlement Agreement.

24 This settlement agreement contemplates the  
25 ultimate execution of a very long, complicated

1 participation agreement which would provide for a closing,  
2 purchase of property. They are intertwined.

3 In other words, if we cannot reach a satisfactory  
4 participation agreement -- we are optimistic that we will,  
5 but that has not been accomplished at this point -- then  
6 the settlement agreement goes down the drain. And I just  
7 wanted -- this is just as a matter of fact. I wanted the  
8 Staff and the Commission to know that.

9 CHAIRMAN SMITH: Is there anything further on this  
10 particular subject? Since our pre-hearing conference began,  
11 I noted that there were late arrivals in the room. We are,  
12 providing an opportunity for any interested person to  
13 address the Board on these issues upon an application and  
14 demonstration of an interest. Is there anyone who wishes  
15 to do that?

16 MRS. CARLIN: I am Ann Carlin. I represent the  
17 City of Gainesville, but I have no comment to make at this  
18 time.

19 CHAIRMAN SMITH: Thank you. If you are  
20 represented by -- if you are here as one of the parties, of  
21 course, the appropriate procedure would be to cooperate  
22 with counsel. Before we get into the other items on the  
23 agenda, is there any miscellaneous business that any party  
24 would like to raise? Mr. Wise, what is your pleasure? Did  
25 your people wish to leave

1 MR. GURNEY, SR.: Yes, sir.

2 CHAIRMAN SMITH: Is there any priority that you  
3 would like to have? Let me review the proposed agenda to  
4 see if we can change the priorities for your convenience.  
5 We had noted that we would take up any miscellaneous  
6 business that the parties wish to discuss, we will want a  
7 discussion of the possibilities of a general settlement,  
8 whether any further efforts on the part of the parties for  
9 settlement might be productive, have there been changing  
10 conditions in the market which might affect the rather  
11 broad issues which have been accepted for discovery and  
12 which also might affect our ruling on discovery, and then  
13 we will discuss the schedule.

14 So, if there is anything that you would like for  
15 us to take out of order so that you can participate in it,  
16 we will be pleased to do it, sir.

17 MR. GURNEY, SR.: Mr. Wise, we would like to be  
18 permitted to withdraw.

19 CHAIRMAN SMITH: That's fine, and we certainly  
20 appreciate your coming, Mr. Gurney.

21 (Mr. Gurney, Sr., Mr. Gurney, Jr., and  
22 Mr. Luff left the room.)

23 CHAIRMAN SMITH: To avoid any confusion on the  
24 record, when Mr. Gurney was referring to withdrawing, he  
25 was referring to physically leaving the room and going

1 about other business.

2 MR. WISE: That is correct, Mr. Chairman.

3 CHAIRMAN SMITH: Now, are there any other items of  
4 miscellaneous business that any party would like to bring  
5 to our attention?

6 All right, now may we move on if there are none to  
7 the report, if any, on the prospects of settling the case  
8 in general or additional aspects of it? Does any party  
9 have a report beginning with Mrs. Urban?

10 MRS. URBAN: The Department, the NRC Staff and  
11 Florida Power & Light Company have been engaged in  
12 negotiations for an extended period of time, as we know.  
13 We are at this point somewhat optimistic that we will be  
14 able to reach a settlement. It is not yet reached. There  
15 are still essential terms that have to be negotiated. We  
16 are not at the dotting "i's" and crossing "t's" point yet,  
17 but we do hope to get there.

18 And we have agreed that we should be able to give  
19 the Board a much more concrete statement of where we are in  
20 a month's time, beginning of April. At that point I think  
21 we will know whether we will reach a settlement, although,  
22 again, we still may have to work out the final details, or  
23 we will know at that point whether we will be unable to  
24 reach a settlement.

25 CHAIRMAN SMITH: Is there any way that the Board

1 can be helpful?

2 MRS. URBAN: At this point I don't think there is.

3 CHAIRMAN SMITH: Any other comment on that subject  
4 matter?

5 MR. DYM: Your Honor, we, too, are optimistic that  
6 we may be able to resolve our differences with the  
7 Department of Justice and the NRC Staff. We intend to  
8 continue negotiating with them during the next month and  
9 would endorse Mrs. Urban's statement that we would be  
10 prepared to make a report to the Board within a month's  
11 time.

12 CHAIRMAN SMITH: Mr. Dewey?

13 MR. DEWEY: If I could just make one comment,  
14 although these negotiations are ongoing at the time, we  
15 want to urge that the discovery continue and that the  
16 proceedings not be slowed down in discovery. We want to  
17 continue, although we are optimistic and hopeful that we  
18 can arrive at a settlement.

19 CHAIRMAN SMITH: Mr. Jablon?

20 MR. JABLON: Like the other parties, we are  
21 hopeful that a settlement can be reached. Unlike the other  
22 parties, we are less optimistic. We have not been  
23 participants directly in the government-FP&L negotiations  
24 nor have we been invited to be there. We do have some  
25 working knowledge of what is being discussed in general

1 terms.

2 We have negotiations independently with FP&L. We  
3 also, I should mention for the record, have a  
4 confidentiality agreement with FP&L concerning our  
5 negotiations, and I don't want to say too much on the  
6 public record. However, I think -- I do represent most of  
7 the people who have direct economic, competitive rights at  
8 stake, and I don't see -- I am not terribly hopeful at this  
9 time.

10 CHAIRMAN SMITH: Is there any way that you can  
11 envision that this Board can appropriately assist Florida  
12 Cities and FP&L in settlement negotiations?

13 MR. JABLON: Yes. I think there are a number of --  
14 I don't want to speak out of turn, but it really comes down  
15 to what the Board is prepared to do. I think there are two  
16 levels of alternatives which might be helpful.

17 It is my understanding that in District Court  
18 practice in a situation such as this that trial judges very  
19 often will, with varying levels of formality or informality,  
20 depending upon the situation and the desires of the judges,  
21 get the parties together and to some extent hear what the  
22 parties' positions are, their last offers or what they are  
23 willing to do and give tentative judgments which, of course,  
24 are not binding or have no necessary impact in litigation  
25 but which do give an inclination of the Board.



1 Obviously in a situation where there are  
2 differences between parties which are serious, the  
3 inclinations of the people who are going to try the case  
4 have some weight on their thinking.

5 If the Board decided to elect this kind of process  
6 and if it were unavailing, the other thought I had, which  
7 is a more formal type of arrangement, would be analogous to  
8 a show cause order. As Florida Cities perceive the  
9 situation, there are ample grounds on a preliminary basis --  
10 I am not talking on a final basis at the end of trial but  
11 on a preliminary basis -- for presuming that the situation  
12 inconsistent with the antitrust laws does exist.

13 Apart from the orders granting intervention, it's  
14 manifest in the Fifth Circuit decision in the Gainesville  
15 situation and the FERC decision and the Wholesale Power and  
16 Transmission context that other governmental agencies or  
17 courts have determined that there is a prima facie basis  
18 for determining that an antitrust situation may exist.  
19 Indeed, to some extent those decisions may be precedential  
20 or may even rise to collateral estoppel.

21 Given that -- now, the FPC, the Federal Energy  
22 Regulatory Commission or other agencies tend to go through  
23 less judicialized type procedures where, within a couple of  
24 months after filing a petition to intervene, a party will  
25 file prepared testimony and answering testimony will be



1 filed and there will be a hearing.

2 I was thinking the problem with the NRC procedures,  
3 I think for the agency and at least from representing some  
4 parties, is both a tremendous time delay and the tremendous  
5 cost, and it literally has taken years in most of the cases  
6 I have been involved in to get any kind of judgment on the  
7 merits with regard to the major issues.

8 We raised this question in the context of the  
9 consumer's case, I did, and the government stressed, well,  
10 that would be a path breaker, that would set the way, but  
11 once you got one or two of these major litigated decisions  
12 underway, that precedent or outline would be set and we  
13 wouldn't have to continually go through the same type of  
14 procedure.

15 Therefore -- and I am sorry to take so long, but  
16 what I am contemplating is perhaps some kind of a written  
17 evidentiary presentation say by the Cities as to what the  
18 major elements of the situation inconsistent would be, what  
19 they think it would be, and some kind of proposal in  
20 written form as to what relief they would consider  
21 appropriate, say proposed license conditions, and some  
22 answering testimony or license conditions, so that within  
23 three or four months' time the Board could indicate whether  
24 they have found, analogous to a show cause order, the  
25 situation inconsistent does exist.

1           Now, the parties obviously in that kind of  
2       procedure I guess could reserve certain rights or issues,  
3       but I think faced with that kind of show cause or  
4       abbreviated type procedure there would be a mechanism  
5       whereby, without going through what are effectively two or  
6       three-year trials and literally what can be over a million  
7       dollars of expenditures for private parties, one could get  
8       rulings from the Board.

9           Therefore, I would suggest a two-step procedure.  
10       Since the Justice Department and the NRC Staff and the  
11       Company believe that they are likely to have something  
12       within a month, it seems appropriate to give them the month,  
13       but I do think that we ought to be invited directly into  
14       the negotiating process. We don't insist on it, but I  
15       think to some extent the negotiations are taking place  
16       without Hamlet.

17           I think, second, that at the end of the time, if  
18       either the Cities or other parties have not reached  
19       settlement within a two or three-week time period, the  
20       parties should be directed to submit a proposed offer of  
21       settlement and with the reasons therefor, and say in a week  
22       or two weeks afterwards that opposing parties could respond  
23       to it and the Board could give its inclinations so that you  
24       would at least have the settlement offers on the table and  
25       the Board could give indications based on what the parties

1 said as to what they deem most appropriate.. Those  
2 settlement pleadings would obviously not be evidentiary if  
3 the case were to go to trial.

4 If that failed, I would think there should be  
5 analogous to a show cause proceeding on a situation  
6 inconsistent and on relief stemming from that situation  
7 inconsistent.

8 With regard to discovery, the Florida Cities and  
9 Florida Power & Light are in litigation in the United  
10 States District Court for Miami based on claimed violations  
11 of the antitrust laws which are -- which very much cover  
12 the same ground. Documentary requests and depositions -- I  
13 am sorry, not depositions. Documentary requests and  
14 interrogatories have been submitted on both sides, and  
15 discovery on the initial documents request and  
16 interrogatories is almost complete.

17 I think Florida Power & Light's responses are due  
18 in about a month and a half or a month, something like that.  
19 We have responded to the interrogatories, and Florida Power  
20 & Light discovery teams are now in our Cities.

21 I could submit -- in fact, I would move to submit  
22 those requests to the Board. I believe they pretty much  
23 cover anything which is asked in these discovery requests.  
24 And that would have two advantages. First, I think that  
25 there is no sense going through the time and tremendous

1 expense of duplicating that discovery. Second, that means  
2 in terms of any show cause type proceeding that both sides  
3 will have had the benefit of a tremendous amount of  
4 discovery both in this case and the other case so that it  
5 won't be on a clean record.

6 I think if these suggestions were adopted, this  
7 agency might achieve something which it has been striving  
8 for for years and years and years, which is a way to meet  
9 its antitrust responsibilities without going through  
10 literally years of agony in a way that serves the public  
11 interest and the agencies' interest efficiently.

12 CHAIRMAN SMITH: Mrs. Urban?

13 MRS. URBAN: I have several comments on Mr.  
14 Jablon's comments. First, in reference to the settlement  
15 negotiations that have been going on between the Company  
16 and the NRC Staff and Florida Power & Light, we, too, had  
17 agreed to confidentiality. With the permission of the  
18 Company, Mr. Jablon and the Cities have been made aware of  
19 proposed settlement agreements and they have been given the  
20 opportunity to comment extensively, and they have commented  
21 on these settlement agreements.

22 I also am somewhat concerned with the inference in  
23 Mr. Jablon's statements that we are sort of proceeding  
24 without Hamlet. While the Department obviously does not  
25 represent the Cities, we feel that we represent the public



1 interest and that any settlement that we reach will  
2 eliminate the situation inconsistent. We have no intention  
3 of reaching a settlement that does not do that.

4 As to Mr. Jablon's suggestion for a show cause  
5 order, I think that I would certainly agree if we could  
6 stipulate to certain facts in perhaps determining whether  
7 those facts do indicate a situation inconsistent.

8 I do not think that prepared factual testimony in  
9 a hearing is a good idea. My experience with the  
10 Davis-Besse hearing and my experience with some further  
11 proceedings make me believe that one gets a much better  
12 view of the facts and what's really going on if you have  
13 live factual testimony.

14 I think that written testimony becomes the first  
15 draft of the attorney's findings of facts, and I think we  
16 are better off doing it live. I certainly believe in  
17 written expert testimony because of the complicated issues.  
18 I am not sure if that was what Mr. Jablon was suggesting or  
19 not or whether he wanted something kind of in between.

20 MR. JABLON: We would agree with really any  
21 procedures along those lines.

22 MRS. URBAN: And as to Mr. Jablon's suggestion for  
23 discovery, the Department in theory would agree. We would,  
24 of course, like to look at what the discovery requests say,  
25 and we would also like to make sure that the discovery



1 requests and that the agreement between the Cities and the  
2 Company encompass the agreements that we reach with the  
3 Cities and with the Company, specifically that the  
4 documents turned over be keyed, to the extent possible, to  
5 certain discovery requests.

6 And I understand how it could be extremely  
7 confusing and extremely difficult for anyone to start  
8 keying sets of documents to one set of requests in another  
9 place and then have to renumber and everything else, so we  
10 certainly would like to do everything we can to facilitate  
11 the ease of the discovery process, but, again, we would  
12 like the right to examine the discovery requests and make  
13 sure they encompass everything we agreed to.

14 CHAIRMAN SMITH: Mr. Dewey?

15 MR. DEWEY: Well, I think that there are a number  
16 of topics to address right now and perhaps I will be given  
17 the opportunity to come back a little later, too, because  
18 Mr. Jablon did touch on so many separate things. But  
19 preliminarily I would like to state that if the Department  
20 and the Staff and the applicant can come to a settlement,  
21 then this is a basis I think for reducing the scope of the  
22 proceeding.

23 Now, there have been two NRC proceedings where an  
24 applicant has agreed to a set of license conditions as a  
25 base, as a base; in other words, these are minimum



1 conditions that the applicant will accept no matter what  
2 kind of a hearing or what happens at a later date.

3 The first proceeding was in Louisiana. That was  
4 the Waterford proceeding and, as a matter of fact, that's  
5 AEC at page 718 on October 24, 1974. That's the decision  
6 reported on that. And in that proceeding the applicant  
7 gave an assumed arguendo that there was a situation  
8 inconsistent with the antitrust laws, and the scope of that  
9 proceeding was greatly shortened because at that point the  
10 only thing to be decided was the type of relief and the  
11 extent of relief.

12 The second proceeding in which the applicant  
13 agreed to a set of license conditions was the Wolf Creek  
14 proceeding, and that involved Kansas Gas and Electric  
15 Company, Docket 50-382A, and in that proceeding the  
16 applicant did not agree to a situation in arguendo, but he  
17 did say here is a set of license conditions, we agree to  
18 these as minimum conditions, and anything else, you know,  
19 that you can show we will add to.

20 Now, that was -- that had the potential to be a  
21 full-blown proceeding in effect because you still had to  
22 establish a situation inconsistent with antitrust laws, but  
23 at the same time I think it also had the potential to  
24 shorten the proceeding. And I think -- with innovation and  
25 innovative ideas in this proceeding, I think we could

1 follow either one of these and be able to cut back on this  
2 proceeding.

3 Now, incidentally, the Wolf Creek -- I will give  
4 you a cite on that. This is a January 8th, 1976,  
5 memorandum and order from the Board in Wolf Creek. That  
6 was not reported, so if anybody is interested, I will  
7 supply them copies of the Board's order in that, but it was  
8 not reported in the NRC Reporters.

9 CHAIRMAN SMITH: That was a memorandum and order  
10 after a remand from the Appeal Board.

11 MR. DEWEY: The one I am referring to right now is  
12 the memorandum and order where the Board sets forth the  
13 matters in controversy.

14 CHAIRMAN SMITH: Okay.

15 MR. DEWEY: Now, even if the applicant and Staff  
16 do not agree, I mean do not come to settlement, there is  
17 still a potential for a shortened proceeding if the  
18 applicant comes forward with a set of license conditions  
19 and says these are license conditions we think would be --  
20 would satisfy the situation consistent with the antitrust  
21 laws. And the applicant could do this perhaps unilaterally,  
22 so I think there is a potential that something like this  
23 might happen if we can work that out.

24 Now, with respect to some of Mr. Jablon's ideas,  
25 the Staff would like to adopt anything that really could

1 shorten these proceedings. However, we have to see in:  
2 perhaps greater detail exactly some of the allegations -- I  
3 mean some of the methods that were described by Mr. Jablon  
4 just a few minutes ago. I think there is a potential that  
5 something like this could be done.

6 Now, Mr. Jablon did however say that he wanted to  
7 see the discovery in the District Court proceeding  
8 consolidated with the discovery -- I mean as a means of  
9 satisfying the discovery in this proceeding. The Staff,  
10 although we would like to make the discovery turn as easily  
11 as possible for all parties, we can't unqualifiedly accept  
12 this offer because we don't know, at least at this point,  
13 that everything that's asked for in the District Court  
14 corresponds to what our discovery requests are and would be  
15 covered therein.

16 Also, we want to be assured that the documents we  
17 receive are presented to us in a well organized and orderly  
18 fashion in compliance with our discovery request. Our  
19 discovery requests specifically state that the documents  
20 that are furnished to us have to be specifically referred  
21 to certain discovery requests.

22 I think that this can be done with the District  
23 Court discovery. It's going to take a little work on the  
24 part of those parties, but we do not want to waive our  
25 right to receive the discovery as we requested it. However,

1 we will be as flexible as we can and do everything we can  
2 to accommodate the parties on that.

3 Now, Mr. Jablon is talking about a show cause  
4 proceeding. This is exactly what they had in the Waterford  
5 proceeding, a show cause proceeding, why the license  
6 conditions requested would not satisfy the situation  
7 consistent with the antitrust laws. This is probably the  
8 proper procedural method to go about this if a set of  
9 license conditions are agreed to.

10 Let me see if there are any other points I wanted  
11 to make here. Oh, one point about discovery I would like  
12 to make now. This is a little bit off the subject, but  
13 that does deal with discovery. Orlando, since it is no  
14 longer a party to this proceeding, I don't know if we can  
15 rely on the same amount of voluntary information that we  
16 receive --

17 CHAIRMAN SMITH: This would be one of the things  
18 that the Board might wish to inquire into, and that is  
19 would a settlement with Orlando involve an agreement  
20 concerning cooperation in the proceeding, an agreement with  
21 respect to cooperation and discovery or any other  
22 agreements which might have an impact upon the actual  
23 hearing, the actual trial? That's just an aside, but he  
24 just reminded me of it.

25 MR. DEWEY: That's the point.

1 CHAIRMAN SMITH: And this is something that I  
2 believe the Board would want to inquire into. There is an  
3 element there.

4 MR. DEWEY: That's the point that I was trying --  
5 was about to get into, that since Orlando is no longer in  
6 the case and if we cannot get information from Orlando  
7 voluntarily, we would want to do so by being able to file  
8 with the Board a request for discovery.

9 CHAIRMAN SMITH: You are speaking now as if  
10 Orlando has withdrawn.

11 MR. DEWEY: If they do withdraw. When they do  
12 withdraw, right.

13 MR. LAZO: When they are permitted to withdraw by  
14 the Board.

15 MR. DEWEY: Right. Yes, sir. The Board does  
16 have --

17 MR. WISE: Of course, we have to obtain the  
18 permission, but we hope to do that very soon and we would  
19 not hope -- we would hope that we would not have to  
20 participate in any discovery proceedings. In fact, the  
21 cost of that might be one of the considerations that led  
22 Orlando to take the position they did. I am not certain of  
23 that.

24 CHAIRMAN SMITH: We had digressed there for a  
25 moment on a limited subject, and that was that the Board

1 | may have a interest in whether the settlement agreement  
2 between Florida Power & Light and the Orlando Utilities  
3 Commission involved any agreement or any arrangement which  
4 would make the production of evidence in our proceeding  
5 more difficult.

6 MR. WISE: Well, I don't see how it would except  
7 we would no longer be a party to the proceedings.

8 CHAIRMAN SMITH: I am just preliminarily telling  
9 you to anticipate an interest in the Board of that nature.

10 MR. DYM: I can answer the question by saying that  
11 the answer is no.

12 MR. DEWEY: Well, I was going to say that even  
13 though we have already filed our discovery request, we  
14 would want to have the opportunity, if necessary, to file  
15 further discovery against Orlando pursuant to Section  
16 2.720 A and Section 2.740 F-3 of the Commission's rules of  
17 practice.

18 Incidentally, the most recent decision on third  
19 party discovery is 9 NRC 683. That's a LAB 550, and we  
20 would want to be able to file with the Board if we feel  
21 discovery with Orlando is necessary at a later date.

22 CHAIRMAN SMITH: Excuse me.

23 MR. DEWEY: Well, that covers the point on Orlando.  
24 And as far as Mr. Jablon's proposals are concerned, I would  
25 like to reiterate that we are very interested in what Mr.

1 Jablon is suggesting and we perhaps would like to see in  
2 greater detail some of his suggestions so that we could  
3 comment more specifically.

4 CHAIRMAN SMITH: Mr. Dym?

5 MR. DYM: Yes. Your Honor, first of all, let me  
6 say that FPL is in the electric utility business, not in  
7 this litigation business, so it is prepared to cooperate  
8 fully with the Board and with the parties to attempt to  
9 narrow the scope of this proceeding as much as possible and  
10 to move it along as expeditiously as possible.

11 I think we share the views of the Department of  
12 Justice and the NRC Staff that the most promising way of  
13 accomplishing that perhaps lies in negotiations with the  
14 government parties that we have undertaken.

15 And I say that. I think that these discussions,  
16 which have been -- which have taken a good deal of time and  
17 have been very intensive, will, in fact, result in a  
18 narrowing of the scope of this proceeding whether or not  
19 ultimately a final agreement is reached on all issues with  
20 the government parties. So, we would like to pursue those  
21 negotiations and to report to the Board on them.

22 In light of that, I think -- let me say I do not  
23 hold -- and I also share Mr. Jablon's view that while we  
24 are prepared and will continue to negotiate with him, I am  
25 by nature optimistic, but I cannot be optimistic that we





1 will be able amicably to resolve our differences with  
2 Mr. Jablon.

3 I think, however, it is premature for the Board to  
4 become involved in these negotiations at least until we see  
5 what is forthcoming as a result of the negotiations between  
6 FPL and the government parties. I really do think that  
7 offers some promise of both narrowing the issues in the  
8 proceeding and permitting it to move along expeditiously.  
9 As I say, we will be prepared to report to the Board within  
10 a month as to the status of those negotiations.

11 I think in light of that, everything that Mr.  
12 Jablon said, at least in my view, is premature. The notion  
13 of involving the Board in negotiations between FPL and the  
14 Cities, the notion of having some sort of a mini hearing,  
15 which I gather is what Mr. Jablon is proposing, it does  
16 seem to me to be premature at this point because I repeat  
17 that I think that the discussions that we have had with the  
18 government parties will prove helpful in this proceeding.

19 I think the other point that Mr. Jablon made was  
20 his suggestion that perhaps the parties could agree to have  
21 the discovery that's undertaken in the District Court  
22 proceeding serve as a substitute for the outstanding  
23 discovery requests that are pending in this proceeding and  
24 that have been ruled upon by the Board.

25 Now, we are proceeding to comply with those

1 discovery requests. We are searching our files, we are  
2 preparing answers to Mr. Jablon's requests. We assume that  
3 he is doing the same. I don't think it is going to be  
4 possible simply to say let's forget about those discovery  
5 requests and let's use instead the discovery requests that  
6 are pending in the District Court proceeding.

7 So far as our discovery is concerned in the  
8 District Court proceeding, it was tailored very  
9 specifically to the allegations in the complaint in that  
10 case, and I would have to go back over it, but I am  
11 reasonably confident that our discovery at least in the  
12 District Court case is not as extensive as the discovery we  
13 are seeking in this proceeding and that the Board has  
14 already approved. So, I just don't think that the  
15 procedure that Mr. Jablon proposes will be workable.

16 Now, it is possible that we will be able to --  
17 that as a result of the narrowing of the issues that may  
18 result from the negotiations with the Department of Justice  
19 and the NRC Staff, we may be able to sit down and Mr.  
20 Jablon may be able to sit down and narrow the outstanding  
21 requests that are pending in the proceeding because if the  
22 issues are narrowed, obviously the discovery should be  
23 narrowed, and that I think is the appropriate tact to take  
24 and I am hopeful that something useful will be accomplished.

25 CHAIRMAN SMITH: Yes, sir?



1 MR. SPIEGEL: Your Honor, my name is George  
2 Spiegel, and I am associated with Mr. Jablon in  
3 representing the City Intervenors. And I think it would be  
4 well if we get on the record, if we can, why it is the  
5 Cities have not been invited to participate in these  
6 negotiations.

7 Let me say, based upon my experience, I did, I  
8 think, negotiate with the Justice and the Staff the first  
9 set of conditions in connection with Florida Power  
10 Corporation, had that experience, and I have had the  
11 experience of having been excluded by the government or the  
12 Justice Department in the Waterford situation, excluded by  
13 the Department of Justice in negotiations in the Pacific  
14 Gas & Electric status loss situation.

15 And I can say that you do not simplify the  
16 proceeding by allowing the government to negotiate with a  
17 party separately. I think that they should voluntarily  
18 allow us to come in or, if the Board has the authority,  
19 they should direct it. All you are doing, Your Honor, if  
20 they come to some separate agreement, is forcing something  
21 like five hundred thousand dollars worth of procedural  
22 costs on the Cities.

23 Now, in the case of Pacific Gas & Electric, we  
24 begged the Justice Department to let us in. We told them  
25 they didn't understand the highly technical aspects of what

1 they were agreeing to, and the result has proven that's  
2 true. That status loss is probably going to be the most  
3 expensive proceeding that the AEC has ever seen. Of course,  
4 in that case you have what in my opinion, speaking in plain  
5 English, is a utility that has a genius to drag it out to  
6 make things difficult.

7 But I am saying that you are setting the grounds  
8 for the same situation here. FP&L will reach some kind of  
9 agreement with the Staff. There will be difficulties and  
10 ambiguities in it because, in all due respect to the Staff,  
11 they will not understand some of the things, they will not  
12 cover some of the more important points, and you and us  
13 will find ourselves in a bigger proceeding.

14 I beg the Board to go along with the approach that  
15 Mr. Jablon has suggested. It makes sense. There is no  
16 need, it seems to me, for these two extensive discoveries.  
17 They can be consolidated. All these things can make sense.  
18 We will be happy to cooperate. We will give it in detail.  
19 We principally just don't want to drag the thing out.

20 MR. CHAIRMAN: Mrs. Urban?

21 MRS. URBAN: I was not personally involved in the  
22 PG&E negotiations; however, I must comment that Mr.  
23 Spiegel's comments and sort of the underlying thoughts  
24 about our settlement, I must disagree with those. I think  
25 the Department made a good settlement. I think we

1 understand the issues. I, of course, cannot speak for the  
2 people who negotiated, and I frankly don't know the details  
3 of it.

4 In terms of these negotiations, I feel like I  
5 understand what's going on very well, and I feel like if we  
6 do reach a settlement, it will be a good settlement. I  
7 think one of the problems with negotiating where you have  
8 the private parties and the government involved, the  
9 private intervenors, is that the government's interest is  
10 somewhat different.

11 We do not, of course, have a personal economic  
12 stake in it as do the clients of Mr. Jablon, as do the  
13 intervening parties, and I think that occasionally the  
14 economic interests of the intervenors as they see them and  
15 the broader public interest standards as we see them -- and  
16 by that I am not trying to indicate anything about Mr.  
17 Jablon's clients or his representation of them, but I think  
18 we do have different viewpoints and I think that  
19 occasionally they clash.

20 If it would be productive, we certainly would be  
21 quite willing to have everyone involved, but from some of  
22 the discussions we have had -- and I don't want to start  
23 getting into details -- I think perhaps there are differing  
24 viewpoints that may not be settled. I do not want to  
25 elongate this procedure. I obviously have no desire to

1 litigate for three years, particularly after the Department  
2 has reached a settlement if that is the case.

3 But I think our role has to be to reach the best  
4 settlement we can and to not be linked or committed or held  
5 back by Intervenorors if we feel that their viewpoints are  
6 more in the area of their private interests rather than the  
7 broader public interest. I do not think that the  
8 Department is incapable of reaching a settlement without  
9 the aid of the Intervenorors.

10 CHAIRMAN SMITH: Mr. Dewey?

11 MR. DEWEY: Your Honor, I would like to address  
12 Mr. Spiegel's remarks in several ways. We have had quite a  
13 lengthy discussion on settlement with Florida Power & Light.  
14 During these discussions we were actively obtaining  
15 information from the Florida Cities with respect to almost  
16 all aspects of the type of conditions we were entering into.  
17 In other words, we would check with the Florida Cities and  
18 ask them for certain information in a certain area and then  
19 certain information in another area.

20 We even went further than this, however. We told  
21 the Florida Cities that we would give them a settlement  
22 license that we were tentatively agreeing to and that they  
23 could comment upon these conditions and give us all the  
24 information that they wished to.

25 Now, we have done this, so they have had

1 opportunities to give us the facts, change our minds and  
2 comment fully upon everything that's being done before we  
3 agree to a final settlement. Now, I don't know how we  
4 could go any further than that aside from -- I think we  
5 have just given them about every opportunity.

6 Now, Mrs. Urban has stated that we do have  
7 different goals to reach than the Cities; therefore,  
8 sometimes a three-party settlement in which the Cities  
9 would be involved and we could get everybody on board with  
10 respect to everything would be very, very, very difficult.

11 This settlement negotiation with Florida Power &  
12 Light that we are trying to reach, we have been doing this  
13 for almost a year just between our parties. So, I do want  
14 to reiterate, though, that the Cities have been given ample  
15 opportunity to comment upon any license conditions, and we  
16 know what they feel. We are not doing this in the dark by  
17 any means.

18 MR. JABLON: Your Honor, I don't want to prolong  
19 this. I perhaps have been involved in these negotiations  
20 too long, but I think what we are talking about is a  
21 dynamic. The language in settlements by definition, and I  
22 have been through a lot of them, involves compromise and  
23 they involve, frankly, language which very often is  
24 intentionally ambiguous because people put things under the  
25 rug until tomorrow.



1           The problem is if something that has an important  
2   impact is put under the rug and it shouldn't be or if  
3   something is conceded which has an important practical  
4   impact, the parties involved can be at a tremendous  
5   disadvantage.

6           The Justice Department and the Staff is certainly  
7   correct that they have solicited our views and received  
8   them. On the other hand, the settlement discussions each  
9   have confidentiality agreements which does tend to block  
10   communication with regard to what FP&L's position is with  
11   each of the parties. And that blockage of information can  
12   block and impede communication.

13          The second problem is a practical problem in that  
14   in settlement negotiations on all sides -- and I am just  
15   talking about the dynamics of it; I am not talking who is  
16   right or wrong -- negotiators probe for weaknesses, they  
17   probe for areas of potential compromise, they probe for  
18   satisfactory language. If one of the central parties is  
19   not in the room -- it has nothing to do with competence or  
20   lack of competence or anything else, but if you are not  
21   there, things can be said or written or tentatively agreed  
22   to which is very hard to dislodge.

23          I have lived with these Cities and their  
24   representatives for years. I think I know their problems,  
25   and without trying the case, I think it's fair to say that

1 they perceive their practical power supply rights as being  
2 limited by a very powerful adversary. I don't want to get  
3 too melodramatic, but they perceive themselves very much  
4 disadvantaged to the point that their very existence is  
5 threatened.

6 Quite candidly, they perceive this licensing  
7 procedure as a potential disastrous disadvantage to them  
8 and a potential opportunity, the disadvantage being if FP&L  
9 can lock in its nuclear monopoly position, they are very  
10 much threatened; if relief can come out which opens up  
11 power supply opportunities to them practically, they can  
12 survive.

13 If a settlement process -- and I am just talking  
14 about a process -- takes place where they are excluded from  
15 the dynamics so that they are forced into a position of  
16 either having to accept what comes out of the Justice  
17 Department-NRC-FP&L negotiations or to litigate all alone,  
18 they are placed terribly between the rock and the hard  
19 place.

20 Now, I agree fully and I agree totally that if the  
21 Justice Department and the NRC Staff disagree with us, of  
22 course, they ought to be able to tell the Board. Of course,  
23 they ought to be able to make recommendations. They are  
24 representing the public interest here and they ought to be  
25 able to do so.

1 But if you set up a process where the dynamics of  
2 it is that they are negotiating with a confidentiality  
3 agreement which, yes, in certain aspects they get limited  
4 relief and where the language is negotiated without the  
5 parties whom they are ostensibly trying to help -- and when  
6 we talk of the public interest in an antitrust context,  
7 what are we talking about but creating opportunities for  
8 the smaller systems to power supply rights -- then it leads  
9 to a road to disaster.

10 The reason Mr. Spiegel and I are pressing so hard  
11 on these points is I think very sincerely we view it as the  
12 life blood of our clients and we get very, very nervous --  
13 I am not talking about the results but not being able to  
14 participate in the dynamics, because the economic  
15 implications of these Cities having to litigate against  
16 Florida Power & Light all alone does not serve the public  
17 interest.

18 I agree with Mr. Dym. Settlement is possible and  
19 what we are arguing about here is terms. It's not that the  
20 parties on any side have not submitted offers, but the  
21 offers of Florida Power & Light to us and us to Florida  
22 Power & Light, I don't think I am revealing any deep secret,  
23 have apparently not been satisfactory to each other as of  
24 this point.

25 Now, the question -- practical question comes

1 whether it pays to go down the road with these  
2 confidentiality agreements, with the government negotiating  
3 with Florida Power & Light over very important specifics  
4 without our being there and without our having been there  
5 from the beginning so that you set up a certain kind of  
6 dynamics.

7 Just briefly on the other points that were raised,  
8 if settlement cannot be reached, really for the same  
9 reasons I am terribly concerned about the cost of these  
10 proceedings. We would like some kind of a try at  
11 abbreviated proceedings to get your practical input, your  
12 views into it.

13 We are very, very flexible as to details, and  
14 really it's the details that make most sense to the Board.  
15 If there were a show cause type proceeding, we have  
16 preferences, but I don't think it matters much in the  
17 course of things, for example, if there is live testimony  
18 or canned testimony.

19 With regard to the discovery proceedings, I can  
20 assure the Board that there is a tremendous overlapping. I  
21 think if the Board were to direct, the parties have all  
22 indicated that it would be easier to deal with these issues  
23 if you had something concrete in writing before you.

24 And we would undertake the burden of showing  
25 specifically what the discovery requests are and setting

1     forth specific proposals, but I think it may be useful to  
2     lay out our thinking here and get the direction or thinking  
3     of the Board, but we would be perfectly willing to put  
4     something in writing in terms of concrete proposals.

5             CHAIRMAN SMITH: Mr. Dym?

6             MR. DYM: I would like to be very brief because I  
7     think we are sort of beating a dead horse on this, but  
8     there are only two points I would like to make. One is Mr.  
9     Jablon's assertion that somehow during the negotiations  
10    that we are undertaking with the Department of Justice and  
11    the NRC Staff anything is going to be swept under the rug.  
12    I must say I personally resent that. That has not happened  
13    and will not happen.

14            The results of our negotiations whether successful  
15    or not will be presented to the Board, and Mr. Jablon will  
16    have a full opportunity to deal with them in such manner as  
17    he sees fit. And knowing Mr. Jablon, he will deal with  
18    them extensively.

19            Now, the other thing, I think it important to put  
20    your finger on exactly what Mr. Spiegel and Mr. Jablon are  
21    asking of this Board. Now, Your Honor, you have heard  
22    today from the Department of Justice, from the NRC Staff  
23    and from FPL that there is reason for optimism that the  
24    negotiations between the government parties and FPL will,  
25    in fact, be successful.

1           What Mr. Spiegel and what Mr. Jablon are  
2 asking -- although they don't quite put it this way, what  
3 they are asking is for the Board to tell the Department of  
4 Justice and the NRC Staff and Florida Power & Light, you  
5 may not continue your negotiations unless the Florida  
6 Cities participate. And I think the reason for that  
7 request is obvious.

8           I think it will disrupt the continuing  
9 negotiations and, as I repeat again, we think there is a  
10 good hope that those negotiations will bear fruit and, as a  
11 result of negotiations, this proceeding will be shortened  
12 both in terms of scope and in terms of the time that it  
13 will take to resolve them.

14           CHAIRMAN SMITH: As I understand it, your  
15 reference to confidentiality agreements is a reference to  
16 agreements where the conditions of the negotiations are  
17 confidential and not a reference to negotiations predicated  
18 upon confidential information?

19           MR. JABLON: That's right. What I was referring  
20 to is that the discussions would not be revealed between  
21 Florida Power & Light and the Company --

22           CHAIRMAN SMITH: I think that was clear. I just  
23 wanted to be sure that the record demonstrated that. Why  
24 would not the interest of the Florida Cities be served in a  
25 proceeding where perhaps the settlement, if any, between

1 the government parties and the licensee and the bases for  
2 any such settlement were to be the focal point for an  
3 evidentiary hearing in which the Florida Cities might  
4 demonstrate why they believe such a settlement does not  
5 satisfy their requirements or perhaps demonstrate why the  
6 settlement continues to permit a situation inconsistent  
7 with antitrust laws to prevail? Is that an area that has  
8 been considered? Is it an area that might have promise?

9 MR. JABLON: Can I have a second?

10 MR. SPIEGEL: Your Honor, I would like to answer  
11 in principle and turn it back to Mr. Jablon. And I realize  
12 we may be imposing upon our rights here by having the two  
13 of us speak.

14 CHAIRMAN SMITH: No one has objected.

15 MR. SPIEGEL: But this matter is so important to  
16 us who have to deal with what it is to go to a client and  
17 get five hundred thousand dollars to go through twenty,  
18 thirty or fifty or a hundred days of hearing. I mean  
19 that's where our clients lose their rights.

20 Now, I don't understand this proceeding. In every  
21 case that I have dealt with public agencies and regulated  
22 proceedings, state or federal, the Staff, the government,  
23 is supposed to represent the public. And in every case I  
24 have been in, except these few little NRC cases I don't  
25 understand, before the Staff goes to the Company, the



1



1       adversaries, to make a settlement, they first come to  
2       agreement with us.

3               Why didn't the Staff come and sit down with us  
4       rather than FP&L and see what it is we need? We are not  
5       here to play games. We are not here as lawyers trying to  
6       make money on these Cities. I can tell you that. Why  
7       doesn't the Staff come to us, reach a total agreement with  
8       all the Intervenors and all the parties and then present it  
9       to the Company?

10              What they are setting up is another stage of  
11       proceeding. They are setting themselves up as judges, mini  
12       judges, who negotiate with the Company. They come up with  
13       an agreement, and then we have a chance to comment, they  
14       decide whether we are right or wrong, then it goes to you.  
15       Now we are into an appellate proceeding before this Board.

16              And then we go through that, and at that point  
17       naturally the government is fighting against us because  
18       they are trying to defend their position. And we have to  
19       spend more money and you have to spend more time. The  
20       formula is, Your Honor -- and you just have to look at the  
21       status loss case. It's a formula to drag this thing out  
22       and make this case last twice as long. It just won't work.

23              What Mr. Jablon says about the ambiguity in these  
24       settlements, you have to look at them from a practical  
25       point of view, not the idea that the Justice Department is

1     some great abstraction. The Justice Department is made up  
2     of people. The lawyer for the Justice Department who  
3     negotiated the status loss for the Pacific Gas & Electric  
4     case, he is not there anymore.

5             Nobody over at the Justice Department knows what  
6     those words mean except in some kind of institutional sense.  
7     There are ambiguities in that thing. We have tried ten  
8     years -- seven years to negotiate a connection agreement  
9     with FP&G and we still don't have it, even though  
10    theoretically they are the conditions that Justice had  
11    negotiated. The only thing they accomplished is they sort  
12    of washed their hands of it, we did our job and the Cities  
13    were unreasonable, now you people go fight.

14            That's not their function. I think they have an  
15    important function to look into the public position of  
16    every party and not set themselves up as judges, and if  
17    this thing can't be settled, they ought to stay in it and  
18    not dump it in the hands of the principal subjects of what  
19    is perfectly obviously a massive monopolization that the  
20    Cities have to deal with. We want the government to help  
21    us, not fight us.

22            MR. JABLON: Your Honor, I think -- responding  
23    directly to your question, I think in terms of commitment,  
24    Your Honor, you see it with Orlando, that private parties  
25    on all sides tend to want agreements nailed down by and

1 large to know what the general license conditions mean. I  
2 think Orlando would be remiss if it withdrew before there  
3 was a contract so that they knew what the generality of  
4 their settlement agreement meant.

5 All parties in the Midland case, which ought to be  
6 some kind of a guide, wanted the agreement to show what the  
7 license conditions meant. What would be presented to the  
8 Board -- I think this is what troubles us in terms of a  
9 Justice Department-NRC-Company settlement, which could form  
10 the base of a show cause order -- would be generalized  
11 license conditions.

12 All I can say is, you know, if there can't be a  
13 settlement, you can use anything as a springboard to have a  
14 hearing, including those license conditions, but it  
15 petrifies me, absolutely petrifies me to have license  
16 conditions negotiated or proposed license conditions  
17 negotiated when we weren't there. And it's not the  
18 question of our having an opportunity to see them. The  
19 government and FP&L would let us see them, but wording gets  
20 in there.

21 CHAIRMAN SMITH: On one hand you suggest,  
22 Mr. Jablon, that the government parties need the expertise  
23 of the Florida Cities to arrive at a reasonable settlement,  
24 but on the other hand you suggest that the same Florida  
25 Cities do not have the expertise to look at the finished

1 product and explain to the Board what is wrong with it. I  
2 perceive an inconsistency there.

3 MR. JABLON: No, I don't think there is an  
4 inconsistency. With regard to the first side of the  
5 equation, first of all, I am not sure it's a matter of  
6 expertise in terms of the way it's commonly thought of.

7 I think there are two kinds of expertise. One is  
8 whether you know the subject matter, whether you can read,  
9 whether you know the law, that kind of thing. The second  
10 type of expertise is involved in a factual dynamic.

11 In one section of the country in one area to one  
12 set of clients to one situation one type of right can be  
13 very important and another less important. In terms of the  
14 simple sale of wholesale power, for example, in Florida  
15 there has been a dispute as to the ability and pricing of  
16 economy exchange by somebody who is also buying wholesale  
17 power. If people who are negotiating license conditions  
18 aren't specifically and factually alert to that type of  
19 very specific problem and the history of it, language can  
20 creep in which can favor one side or another.

21 Now, it is true that if that happens, as Mr. Dym  
22 accuses me of, I would very much try to be articulate as to  
23 what we are worried about. But it is very difficult when  
24 you have twenty pages of license conditions and some are  
25 very important and you know you have got to fight about and

1 some are less important, some raise nuances, and none of  
2 them are self-executing, to be able to persuasively focus  
3 an attack when, if you were there, if you were at the  
4 negotiating table, the negotiating dynamic would have been.  
5 different. And I think that's the problem, that there is a  
6 negotiating dynamic.

7 Now, what's the most difficult thing, Judge Smith,  
8 for a lawyer, is when a question is asked by a judge which  
9 ultimately goes to a fall-back position. Your question to  
10 me was, in essence, well, if the Justice Department, if the  
11 government and Florida Power & Light can come up with  
12 something, can't we use that as a springboard for a show  
13 cause proceeding.

14 And I guess the answer is we can. I would  
15 certainly prefer to see that than embarking on two or three  
16 years of litigation, but I somehow know in my very bones,  
17 in my essence, that we would be -- that my clients would be  
18 at a tremendous disadvantage not having had a practical  
19 input. And what I am trying to avoid for my clients is  
20 that disadvantage.

21 CHAIRMAN SMITH: You see practical difficulties in  
22 the Board ordering persons to negotiate? I regard  
23 negotiation as an art as well as a skill that to me would  
24 be a very difficult thing to manage if we had to be  
25 involved in it, which raises another point.

1 I have now -- now I am approaching my fourth  
2 anniversary since your original petitions were filed, and  
3 the broad issues are the same from the South Dade case.  
4 Discovery has been going on intermittently since then. We  
5 just changed the title of the case without even a change of  
6 pace, and this Board still knows nothing about the alleged  
7 situation inconsistent with antitrust laws in this state.

8 I think it would be quite difficult for us to  
9 insert ourselves, unless all the parties were willing, in  
10 negotiation settlements. It just seems to me it may -- it  
11 may be more just, I don't know, but as a practical matter  
12 it seems to me it would be difficult to manage.

13 MR. JABLON: Well, I think in answer to your first  
14 part, it depends on why we were excluded from negotiations.  
15 In other words, the question is, is that something the  
16 government and FP&L wanted or is that something FP&L wanted.

17 The second question, to what you should properly  
18 order, I think the question is the reasons for exclusion.  
19 I tried to set forth a procedure, and if I -- and I am  
20 willing to rethink it or modify it, whereby the Board could  
21 be educated in perhaps a more summary fashion than a two,  
22 three-year case, so that you would have the practical input  
23 of what we allege the situation inconsistent to be and a  
24 basis through pleadings and abbreviated hearings to make a  
25 decision. In other words, I am not suggesting that you

1 interject yourself blindly.

2 CHAIRMAN SMITH: Mrs. Urban?

3 MRS. URBAN: I really dislike belaboring the point,  
4 but I must vehemently object to Mr. Spiegel's implication  
5 that the Department of Justice is not competent to  
6 negotiate a settlement which represents the public  
7 interests. I assure you we are quite competent.

8 I also must object to his implication that his  
9 clients' views and his clients' needs are identical to the  
10 public interest. I think that they are private parties. I  
11 think they want and need certain things. I am not entirely  
12 sure that everything that is represented as part of their  
13 negotiating position -- and I do not know the details  
14 because of the confidentiality requirement, but I am not  
15 entirely sure that everything is necessary.

16 I find myself in a very uncomfortable position  
17 right now, quite frankly, because I am starting to be  
18 forced into making substantive comments on this case and we,  
19 of course, do not have all the information yet.

20 I also feel very uncomfortable being drawn into  
21 the kind of controversy where I have got to start saying  
22 that, you know, this party has selfish interests and that  
23 one does and we are pure and they are not pure, and I find  
24 that very uncomfortable.

25 I also, however, find myself in a position where I

1 am forced to defend a settlement agreement which is not yet  
2 public and where I am forced to defend the competency of  
3 the Department and, in fact, even to some extent the  
4 morality of the Department.

5 There are some complications and some hints here  
6 that the Department has sold out in PG&E and the Department  
7 might sell out in this case, and I don't like having to  
8 defend myself against that. I think that's a very unfair  
9 comment. I think that's a completely untrue comment. I  
10 don't like to defend against it, and I don't like to start  
11 slinging mud in the same fashion and I won't do it.

12 CHAIRMAN SMITH: Mrs. Urban, I didn't understand  
13 Mr. Jablon to suggest that, and even if he did, it is  
14 nothing I really believe that the Department has to be  
15 concerned about as far as the Board is concerned.

16 MR. SPIEGEL: Excuse me.

17 CHAIRMAN SMITH: Mr. Dewey was seeking our  
18 attention. Mr. Dewey?

19 MR. DEWEY: Well, I don't want to continue beating  
20 this dead horse either, but there has been the inference  
21 made by Florida Cities that somehow or another the Staff  
22 and the Department are operating from some kind of position  
23 of ignorance with respect to the Florida situation insofar  
24 as these license conditions that we are negotiating are  
25 concerned.



1           Now, I am going to give you some more details on  
2       this because I want to assure the Board that we are not.  
3       We have made trips to Florida to talk to various Cities, to  
4       find out the adequacy of certain license conditions. We  
5       have made numerous telephone calls on different occasions,  
6       calling up, finding out is this what you need, maybe being  
7       more indirect in our questioning, of course, but finding  
8       out all these types of things.

9           Now, there was an elusion made that the license  
10       conditions as written as written are somewhat vague. I  
11       guess in any document you will find a certain amount of  
12       vagueness. However, I want to state one thing, and that is  
13       when we turned these license conditions over to the Cities  
14       and said, Here you are, dot the "i's", cross the "t's",  
15       they declined to do so because they said they were too busy  
16       at the time.

17           So, we are operating as best we can, but we did  
18       not get that information back. Now, maybe it will be  
19       forthcoming later. This is getting a little bit late in  
20       the game here. But I am assuring the Board that everything  
21       is being done to obtain all necessary information in these  
22       license conditions.

23           CHAIRMAN SMITH: All right, Mr. Spiegel, we will  
24       give you an opportunity to respond, but the Board believes  
25       that a short recess might be helpful now.



1 (Brief recess.)

2 MR. JABLON: Your Honor, Mr. Blasdel is here from  
3 Lake Worth, and also the City Attorney of Homestead is  
4 present.

5 CHAIRMAN SMITH: Thank you. Mr. Spiegel?

6 MR. SPIEGEL: Your Honor, I thank you for the  
7 recess. It gave me a chance to calm down a little bit. I  
8 would like to make it absolutely clear we are not  
9 questioning the good faith or the competency, technical  
10 competency, of the Staff. We are not saying they are  
11 selling us out. We are not saying we have ever been sold  
12 out. No question of that kind of thing.

13 We work day in and day out with the NRC Staff and  
14 the Justice Staff, and there is nothing of that whatever.  
15 What I am trying to reach for, based on real experience --  
16 I have been before the NRC. Mr. Deale, we were together on  
17 the Vermont-Yankee case that goes back to the very  
18 beginning.

19 MR. DEALE: First case.

20 MR. SPIEGEL: And I got the case in the City of --  
21 I forgot where it was. And that was an extraordinary case  
22 where we won, I thought. Our side won in the Court of  
23 Appeals in that the Company would be required to make the  
24 financial disclosure while at the same time in another case  
25 they were making a financial disclosure.

1           So, there has been a great deal of involvement,  
2           procedural and otherwise, involving the NRC cases, and I am  
3           merely trying to draw on my experience. And what I am  
4           saying is as a practical point, for all parties but one or  
5           two to come to settlement in any proceeding never expedites  
6           anything. It makes it longer.

7           Sure, we have the competence to advise them, we  
8           have the competence to advise you, but what procedure are  
9           we talking about? If we were to set up some new procedure  
10          and it were binding whereby they reached agreement with  
11          FP&L and it comes before the Board and the Board sits like  
12          an appellate tribunal, I don't know -- or does the Board  
13          say all right, FP&L and the government are bound by what  
14          they agreed and now we will have a further hearing in which  
15          the Cities have an opportunity to go on and show where they  
16          have more?

17          Certainly, if you very carefully spell out the  
18          procedural steps from here on in the event of such an  
19          agreement, the thing can be managed, but unless it's  
20          carefully spelled out, we get chaos. That's what I am  
21          concerned about.

22          Now, she says, well, you know, why should we bring  
23          in just the Cities -- Mrs. Urban, I am sorry, the Justice  
24          Department attorney, states that, you know, why should they  
25          just bring in the Cities? We are not saying just bring in

ities. We are saying bring in all the parties.

The Justice feels it represents a lot of public  
ies. What we are saying is don't settle without  
ody who is interested. Bring in the Florida Public  
rice Commission. Bring in whoever it is they feel is  
ir constituency so that all the interests can be settled  
once.

Now, I might add I am sure that Justice doesn't  
an, when they refer to the Cities, these municipalities  
are as private parties. I mean these municipalities are  
overnments.

CHAIRMAN SMITH: We understand that.

MR. SPIEGEL: You know, these are state  
overnments. And I will not say, as Cicero used to say,  
that the Federal Government looks at everybody that's not  
part of the Federal Government as some other kind of breed.  
I will not say that.

So, what we are talking about here is the fact  
that I believe that separate negotiations will not, as I  
evaluate it, be successful. I am not even sure they are  
appropriate under the statute, under the Commission's rules,  
and I just don't think it's productive for the government.  
Maybe it is appropriate and maybe it's lawful. I don't  
think it's good policy.

Now, here are the people in Florida and here is

1 the Federal Government saying we are going to exclude you  
2 from negotiations and we, the Federal Government, are going  
3 to negotiate with Florida Power & Light. I just don't  
4 think it's good policy, and I don't think its practical.

5 But if they want to set up a procedure where they  
6 have the separate negotiations and we understand what the  
7 rules are going to be, our great nightmare, Your Honor, is  
8 that the first four years you have spent in this office  
9 here are just a prelude not to two terms but maybe four or  
10 five terms. I don't think the Constitution limits the  
11 trial boards to just eight years.

12 CHAIRMAN SMITH: Any further comments on this  
13 subject?

14 MR. DEALE: Mr. Chairman, Mr. Spiegel had asked a  
15 question almost when he first came, and perhaps the matter  
16 has been touched upon by the other three parties, but it  
17 seems to me it would be useful for the three parties to  
18 indicate why the three of them are involved in the  
19 negotiation and not the four, meaning the Florida Cities,  
20 too. It seems to me that responses from the other parties  
21 might be useful or would be useful. So, who goes first?

22 MR. DYM: Well, let me say I can respond to that.

23 MR. DEALE: Florida Power & Light I think should  
24 go first.

25 MR. DYM: We are involved in negotiations with the

1 Cities. We are involved in negotiations with the Cities  
2 and we have been for a period of time.

3 MR. DEALE: But in a manner different than you are  
4 involved with negotiations with the NRC Staff and Justice.

5 MR. DYM: Not in a manner that's different. What  
6 I am concerned about is that the result will be different.  
7 We find ourselves -- we think it unlikely that -- on the  
8 basis of our negotiations with the Cities that have been  
9 going on for a good length of time and are still going on,  
10 we think it unlikely that we will be able to reach an  
11 agreement. It's kind of possible, but we think it unlikely.

12 We think it is likely that we will be able to  
13 reach an agreement with the Department of Justice and the  
14 NRC Staff. If any settlement required the concurrence of  
15 FPL, the Cities and the Department of Justice and the NRC  
16 Staff, I don't think -- I do not think that there would be  
17 a settlement, whereas I do think that it is possible that  
18 the negotiations with the Department of Justice and the NRC  
19 Staff will succeed and that will offer a possible framework  
20 for resolution of this proceeding.

21 Right now our concern is that turning what has  
22 been two-sided or rather three-sided negotiations -- the  
23 Department of Justice and the NRC Staff do not necessarily  
24 speak with the same voice, but the government parties and  
25 us, turning them now into three-party negotiations when

1 they have been going on for at least since April, at least  
2 a year, will be counterproductive and I think will result  
3 in there not being anything that can be put to the Board  
4 that might be helpful in resolving this proceeding.

5 I guess a short answer to your question is that we  
6 were and are pessimistic of being able to resolve our  
7 differences with the Cities. We are not pessimistic about  
8 being able to resolve our differences with the government  
9 parties.

10 MR. DEALE: So, the point is you would rather  
11 result in a plus, although it might not go the full way?

12 MR. DYM: Exactly. Exactly. We recognize --

13 MR. DEALE: As against probably very little, if  
14 anything.

15 MR. DYM: We would like to accomplish something,  
16 even though that something is not everything. Now, no one  
17 can argue that a settlement among all the parties here  
18 wouldn't be more desirable than a settlement just among  
19 limited parties, but I just don't think that that's --  
20 that's foreseeable or feasible in the foreseeable future.

21 MR. DEALE: And in the meantime, as I understand  
22 what you are saying, you are making sure or keeping the  
23 Florida Cities informed of the negotiations?

24 MR. DYM: The Department of Justice and the NRC  
25 Staff are, as I understand it -- I understand from what



1 they have said that they have provided Mr. Jablon with I  
2 guess the current draft of an agreement, I think.

3 MRS. URBAN: Yes.

4 MR. DEALE: Thank you. Thank you very much.  
5 Mr. Dewey?

6 MR. DEWEY: Yes, sir. Well, perhaps it would be  
7 helpful if I would describe just a little bit of the NRC  
8 procedure with respect to settlements. It's been my  
9 experience at least that over the years as far as  
10 negotiating license conditions that usually it always just  
11 entails the applicant and the Staff and the Department of  
12 Justice, and I am talking about, you know, conditions for  
13 most of the NRC license conditions which we now have where  
14 they haven't gone to hearing, et cetera, have been just  
15 negotiated by just those three parties.

16 In the earlier cases where they tried to bring in  
17 all the parties, for example, co-ops and cities, et cetera,  
18 they just didn't prove to be successful because it was just  
19 too many diverse parties that had too many different things  
20 them felt like they needed.

21 The Staff and the Department felt that they do  
22 have expertise to judge what's in the public interest on  
23 these settlements, and I think most of the license  
24 conditions have been fair.

25 So, anyway, getting back to it, as a matter of

1 historical significance we have found that it does not  
2 prove practical to get all the parties to try to work out a  
3 set of license conditions. It just hasn't worked in the  
4 past. We haven't been able to do it.

5 In this case we have known all along for the most  
6 part what the Cities want, how much of this, what do they  
7 want from that. We have asked them; they have told us.

8 If we felt I guess that there was a very good  
9 chance that we could all three get together, then perhaps  
10 we would have brought the Cities in, but apparently at this  
11 stage, and I don't want to get into all the details, we  
12 just didn't feel it was a practical thing to bring the  
13 Cities in. We couldn't -- we wouldn't have gotten a  
14 settlement that way. So, based upon our judgment and based  
15 upon the history of this, we proceeded in this fashion.

16 MR. DEALE: Yes?

17 MRS. URBAN: I would agree with Mr. Dewey. I  
18 think that we decided early on that it would be more  
19 efficient to litigate the government parties with the  
20 applicant. I do not want to get into details because if we  
21 don't reach a settlement, I might endanger our litigating  
22 position, and I also do not want to in any way endanger or  
23 influence the litigating position of the Cities, so I think  
24 I will just have to stay with my original comments.

25 CHAIRMAN SMITH: Mr. Spiegel.

1 MR. DEALE: Oh, yes, Mr. Spiegel?

2 MR. SPIEGEL: Could we have just a short recess to  
3 discuss a matter with the counsel for Florida Power & Light?

4 CHAIRMAN SMITH: Sure.

5 (Brief recess.)

6 MR. SPIEGEL: Can we go back on the record?

7 MR. DEALE: Go on, Mr. Spiegel.

8 MR. SPIEGEL: In our little conference there, the  
9 Company is willing that the Cities can state that they have  
10 made a counterproposal to Florida Power & Light to settle  
11 not only this case but the District Court case.

12 MR. DEALE: Mr. Spiegel, this is just a question  
13 of hearing. I want to make sure that you mentioned that  
14 the Cities have made a proposal to Florida Power & Light?

15 MR. SPIEGEL: Yes. But that counterproposal has  
16 not been disclosed to Justice or the NRC, and that is  
17 procedure. Now, what I am willing to state on behalf of  
18 the Cities here and now, recognizing the importance of all  
19 this litigation and the dangers that necessarily fall upon  
20 an attorney before trial involving settlement negotiations,  
21 we are willing, if the parties will give us permission, to  
22 make our counterproposal public because we think that if  
23 this Board could see our counterproposal, you would realize  
24 factually that what the other parties have said here  
25 doesn't make sense.

1           We are not difficult to deal with much, and I  
2       don't know where -- why there is that belief. Now, I  
3       recognize that the Justice has the disadvantage of not  
4       knowing what we are proposing, and, therefore, I can only  
5       say -- because I can appreciate it and I don't intend to  
6       make the Company look bad, but if they were to give us  
7       leave, we would be willing to either in a privileged way or  
8       in a public way make public our counterproposal because we  
9       think that it will show that it would be very cooperative,  
10      number one.

11           Number two, I don't know why from the beginning it  
12      was assumed that the Cities' presence in the negotiations  
13      would somehow impede negotiations. It somehow seemed to be  
14      an assumption from the beginning. I do know the practical  
15      matter, we all know as attorneys, that when one side is  
16      faced with a group on other side, the first desire of that  
17      one side is to split the opponents.

18           Particularly here you have three groups of  
19      government agencies and, of course, the power company is  
20      going to say let's see how little we can get away with in  
21      dealing with these two public agencies, then we will split  
22      the group, and then those Cities will be off on their own  
23      and those Cities don't have the kind of resources, the  
24      money.

25           And I have to go to these Cities and look at these

1 people and ask for astronomical amounts of money because of  
2 the costs that we have to go try the case. We don't have  
3 Congress to appropriate for us. We have taxpayers that  
4 have to put their money up, and those taxpayers are the  
5 customers. They don't pass it on. Every cent that Florida  
6 Power & Light is spending here is passed on to their rate  
7 payers, not to their stockholders. So, the Cities, every  
8 cent they spend on me is paid by every citizen in that town.

9 So, it's perfectly obvious. I mean you would have  
10 to be blind, you know, you would have to come from another  
11 planet to see -- to come to any other conclusion but that  
12 the power company wants to split us. They have already  
13 settled with one city, and now it's perfectly obvious that  
14 they would split us and then they would only have to deal  
15 with us, no other explanation for it.

16 And I think that that's where -- and I say in all  
17 due respect to the Justice Department -- I do respect them.  
18 They have done wonderful things in cases. I do respect  
19 them, but in all due respect, on my theory, the practice of  
20 law that talks in plain English, I think they are being  
21 taken because I think if the Company had to sit down with  
22 the three of us and say, all right, let's get a settlement,  
23 you would have it.

24 As long as the Justice Department and NRC are  
25 holding out this carrot or they are holding out carrots to

1 each other, they are not going to give their bottom dollar.  
2 And their bottom dollar will come and there will be a  
3 settlement and there can be a settlement in my judgment if  
4 the government would close ranks and not have the Federal  
5 Government playing off against the state government or the  
6 Cities.

7 And that's what's happening here. They are  
8 dealing with the power companies, and the Cities are out  
9 there dangling, and these Cities are whispering to me: We  
10 pay taxes to the Federal Government. Why aren't the  
11 government agencies in there negotiating with us? Why are  
12 they going to leave us out there on the limb?

13 And I think also there was something said here,  
14 and I don't disagree with what Mr. Dewey has said, that in  
15 the past, given the framework of the statute in which the  
16 Justice Department and NRC have an informal kind of a  
17 review or semiformal, it has always not been productive to  
18 bring all the parties in. I think it may well be that at  
19 that stage before interventions, before hearings, it may  
20 well be that the Cities and the cooperatives -- maybe we  
21 would have been in that same situation -- not yet committed  
22 to litigation might ask for more.

23 It may be difficult, but that's no longer where we  
24 are now. It's some sort of a cultural lag that they have  
25 carried over from other cases where the concept they have

1 is not applicable. We are now in hearing, the public  
2 hearings, and we are all having to bite the bullet.

3 And, Your Honor, I can only say if you think that  
4 I am going to be unreasonable in settlement having to go to  
5 these people for five hundred thousand dollars to try this  
6 case, you are wrong.

7 The Justice Department has so much leverage over  
8 us, and the NRC Staff has so much leverage over us, and the  
9 Company has so much leverage over us, and my buying power  
10 is weak, but it's not nonexistence because although these  
11 people don't like to spend the money, these people have  
12 backbone.

13 I have represented them over fifteen years in  
14 litigation with Florida Power & Light Corporation and  
15 Florida Power Corporation, and they will spend money and we  
16 will go to trial. We will. All I am saying is from what I  
17 have seen of the proposed settlement, it's not going to  
18 solve the case, it's not going to shorten the case, it's  
19 going to lengthen the case.

20 Now, I want to address one more point. And  
21 Mr. Dewey is quite correct. They have sent us the  
22 technical language of the settlement conditions, some  
23 thirty pages of very finely written language, and we have  
24 said we don't have time to review it, but we have sent them  
25 back a draft.

1 MR. DEWEY: Well, we haven't received the draft.  
2 I didn't even know of its existence, that it was being sent.

3 MR. SPIEGEL: But in truth, in fact, you know, as  
4 I have discussed it with my partner, we have sent them back  
5 a draft. An answer has been sent just as we told Mr. Dewey.  
6 We are involved in discovery, in answering interrogatories  
7 in this case. We have four lawyers working full time, and  
8 our judgment was to take one lawyer off and go through  
9 thirty-two pages of fine print.

10 At that stage of the negotiations when the  
11 economic package that goes with all that fine print is not  
12 something that's acceptable to us on a judgment basis, we  
13 just don't have the resources to do all these things. The  
14 Company is saying you have to answer the interrogatories,  
15 and we have just gotten out a book that thick answering all  
16 their interrogatories in the District Court case.

17 So, I think Mr. Dewey does have some cause for  
18 criticism. I am not saying we are perfect. All I am  
19 saying, as a practical matter, the way the three other  
20 parties are proposing to do it just won't work.

21 CHAIRMAN SMITH: The proposed --

22 MR. SPIEGEL: It won't work for the Board and it  
23 won't work for us. It will work for Justice and NRC  
24 because they will withdraw from the case, and this Board  
25 will sit with a prolonged proceeding between the two of us,



1 and this Board will have to operate without their help and  
2 their assistance. Once they settle out, they won't be  
3 available to help the Board, I believe.

4 CHAIRMAN SMITH: Were you going to address the  
5 latest statement that Mr. Spiegel made about not being  
6 available?

7 MRS. URBAN: Yes. May I?

8 CHAIRMAN SMITH: Yes.

9 MRS. URBAN: The Department at this time has no  
10 position on whether we would withdraw or whether we would  
11 be available. I imagine, and this is a very preliminary  
12 statement, but if there is a settlement agreement and there  
13 is some sort of procedure based on the settlement agreement,  
14 we will participate but, again, that's a very preliminary  
15 statement and, of course, it's subject to discussion with  
16 other people in the Department.

17 MR. LAZO: Mr. Dewey?

18 MR. DEWEY: I will guarantee everyone that one way  
19 or another, the Staff will attend all sessions. What our  
20 role will be I think it's a little premature to say without,  
21 you know, concurring with the rest of the Staff on this,  
22 but we will be there and I would assume we will take some  
23 type of role.

24 CHAIRMAN SMITH: Do you think that either of the  
25 Federal Government agencies could take the position that we

1 have settled with the Florida Power & Light Company as a  
2 matter of expediency but not as a matter of arriving at an  
3 ideal solution to the case?

4 MR. DEWEY: I -- excuse me.

5 MRS. URBAN: Go on.

6 MR. DEWEY: I have my own personal views as to  
7 that. In Louisiana the -- this is what happened. The  
8 Staff and the Department, once the agreement was entered  
9 into, they said that they looked at the settlement as a  
10 package, that they felt that, therefore, they did not --  
11 well, they did not comment about the remainder of the  
12 proceeding. I personally feel that I think our role would  
13 be different in this, but I can't say for sure.

14 CHAIRMAN SMITH: Mrs. Urban?

15 MRS. URBAN: Obviously, if you reach a settlement  
16 agreement, there are compromises that must be made and --

17 CHAIRMAN SMITH: Do you think that the Department  
18 of Justice is capable of taking a litigative approach  
19 consistent with that statement?

20 MRS. URBAN: I am not sure I understand your  
21 question.

22 CHAIRMAN SMITH: Well, the concern that counsel  
23 for Florida Cities has expressed is that once a settlement  
24 is arrived at by the Federal Government parties that they  
25 will then have a tendency to defend the settlement. Among



1 private parties a settlement very often is regarded as an  
2 expediency, something that you compromise to avoid  
3 litigation. And you would not have necessarily a  
4 litigative commitment to the settlement as being the best  
5 way of meeting your ideal of a settlement.

6 Now, a Federal Government agency cannot freely  
7 concede, it would seem to me, that it has agreed to  
8 something less than that which fully protects the public  
9 interest. They would almost have to eliminate that as a  
10 position. But could the Department of Justice and the  
11 Staff go into such a proceeding and with candor point out  
12 and assist in developing weaknesses in a settlement that  
13 they agreed to?

14 MRS. URBAN: I am frankly not sure how we would  
15 handle that. I am confident that quite obviously we  
16 haven't gotten everything that we could have, you know, if  
17 we could have our way and get every single thing we ever  
18 wanted. I mean I don't -- I consider the Davis-Besse case  
19 a rather strong victory and a very, very good decision, but  
20 perhaps if we had our way, you know, we could fine tune it.

21 I am not sure what position we would take, whether  
22 we would go in there and put on a strong case defending the  
23 settlement, whether we would point out weaknesses, whether  
24 we would participate at all. Our position is somewhat  
25 different from the Staff's in that we do not have to

1 participate.

2 We have -- because of the Congressional  
3 requirement that we file competitive impact statements with  
4 our settlements in District Court cases, we are in the  
5 position where we often have to comment upon that, and I  
6 assume we would be prepared to do so particularly in  
7 response to direct questions.

8 Again, I find it a very awkward position to have  
9 to argue that our settlement is not perfect and, on the  
10 other hand, we obviously do not want to injure the  
11 litigation positions of any other parties. That is  
12 something that we have thought about and have not come to a  
13 conclusion about yet.

14 CHAIRMAN SMITH: I have one further question along  
15 this line. The proposed settlement that you have submitted  
16 to the Florida Cities, has it come far enough that it could  
17 be called an agreement in principle?

18 MRS. URBAN: Your Honor, there are certain -- many  
19 of the provisions have been agreed upon. There are certain  
20 very -- there are certain very significant provisions which  
21 have not been -- which we have not reached an agreement  
22 upon with the Company, although we are optimistic.

23 CHAIRMAN SMITH: Would it be possible -- if and  
24 when the government parties and they do agree upon a  
25 settlement in principle, would it be possible then to bring

1 in the Florida Cities in non-public private negotiations?  
2 Might not that be a compromise satisfying all of the -- not  
3 all of them, but eliminate some of the objections that all  
4 the parties have?

5 In other words, I can appreciate why you --  
6 appreciate the efficiency or why you want the efficiency of  
7 negotiating toward an agreement in principle with only the  
8 government parties and the licensee, but then after that  
9 agreement has been reached in principle, efficiency is no  
10 longer your problem and then you could include, it would  
11 seem, the Florida Cities in further negotiations.

12 MRS. URBAN: The way the negotiations are  
13 proceeding I think is we are working out different  
14 provisions so that what happens is we tend -- because the  
15 language -- as Mr. Spiegel has pointed out and Mr. Jablon,  
16 because the language and, you know, the exact way it is  
17 worded is so important, they tend -- the agreements and  
18 principle and the wording of the specific agreements tend  
19 to be worked out the same.

20 We have, as has been discussed, shown the Cities  
21 conditions that are fairly complete and, you know, that  
22 have the language. We agreed with the Company on the type  
23 of negotiations we are conducting, and I frankly would  
24 hesitate to committee to allowing or to then joining with  
25 the Cities without consulting with the Company or without

1 at least hearing their views on that. The Department I  
2 think in principle has no disagreement, although once we  
3 have reached a settlement, I think we perhaps would be  
4 unwilling to negotiate for two more years.

5 MR. DYM: That's precisely our concern. I also  
6 don't --

7 MR. JABLON: Excuse me. Just as a matter of  
8 clarity, the Company has no disagreement with what? Can  
9 you read the sentence back?

10 (Thereupon, the last statement of Mrs. Urban  
11 was read back.)

12 MRS. URBAN: No disagreement with then having at  
13 least a limited number of three-way negotiating sessions  
14 once we have reached an agreement, but we do not intend to  
15 start all over again.

16 CHAIRMAN SMITH: Mr. Dym?

17 MR. DYM: I think that's basically the problem. I  
18 don't think we are going to be in a position where first  
19 there is going to be an agreement in principle and then  
20 there is going to be a set of detailed conditions. We are  
21 trying to short-circuit that. What we will end up with, if  
22 we reach an agreement, is a detailed set of license  
23 conditions, and we contemplate that if there -- if an  
24 agreement is reached, we would then submit those license  
25 conditions to the Board.

1           And if we have reached an agreement with the  
2 Department of Justice and the NRC Staff, we would be  
3 perfectly willing to sit down with Mr. Jablon, as we are  
4 doing now in negotiations -- one problem is that this is  
5 not the only proceeding, the only litigated proceeding  
6 between the Cities and FPL. There is a District Court case  
7 that the Cities have brought against FPL. The discussions  
8 that we have had with the Cities have basically been  
9 involved in an effort to resolve all of our differences.

10           As I say, I don't think that's going to happen.  
11 From our standpoint, I would like -- we would like to move  
12 this forward one step at a time. We would like to see  
13 whether we can resolve our problems with the Department of  
14 Justice and the NRC Staff, which has an interest only in  
15 this proceeding.

16           And as they have said, they look toward the public  
17 interest in determining whether these license conditions  
18 will eliminate any action inconsistent with the  
19 antitrust laws. That's their focus, and that's what we are  
20 looking at now in this proceeding.

21           As I say, we are able to reach an agreement, I  
22 think we are perfectly prepared to sit down with the Cities  
23 at that point. The thing that troubles me -- the thing  
24 that troubles me at requiring their involvement at  
25 this point could well mean that instead of our being



1 in a position to report to the Board within a month as to  
2 where matters stand, it would take six months to report to  
3 the Board, and I just don't think that time will be spent  
4 productively.

5 And, further, I must say that I am just unaware of  
6 any other situation where there is a litigated proceeding  
7 and two of the parties to that proceeding decide, well, the  
8 differences between us don't appear to be that great, let's  
9 see if we can resolve them -- it happens all the time both  
10 with the government and with private parties.

11 There may be other parties in the proceeding who  
12 have a different position, and it doesn't appear as if  
13 settlement between -- with those parties is feasible, but  
14 that doesn't mean -- I know of no situation where it means  
15 that the parties who desire to try to work out a settlement  
16 are precluded from doing so. And that really is what Mr.  
17 Jablon is saying.

18 He is saying you, FPL, and you, the Department of  
19 Justice, and you, the NRC Staff, may not attempt to resolve  
20 your differences. And I see no legal basis for that  
21 decision nor do I see any public policy basis in support of  
22 it.

23 CHAIRMAN SMITH: I think we have covered this  
24 subject rather thoroughly. Is there anything further on  
25 the subject?

1 MR. SPIEGEL: Well, I would still make as a formal  
2 request that Florida Power & Light permit us to submit to  
3 the Board and the Justice and NRC the Cities'  
4 counterproposal, which is outstanding for the settlement  
5 not only of this proceeding but of the antitrust case. All  
6 I am asking is that FPL -- we are requesting on this record  
7 that FP&L give us that permission.

8 CHAIRMAN SMITH: Are you aware that this Board is  
9 in a record void? I mean we know very little about this  
10 case. We know the affidavits. We are familiar with the  
11 affidavits that originally accompanied the petition for  
12 leave to intervene. Those are -- we read those sometime  
13 ago, a long time ago. What meaning would your  
14 counterproposal have to us in an evidentiary void?

15 MR. SPIEGEL: First of all, let me amend my  
16 proposal because you have raised something in my mind. We  
17 are asking Florida Power & Light to permit us to make our  
18 counterproposal, not their proposal, our proposals that we  
19 have given them, available, either severally or jointly,  
20 either to the Justice and just to the Justice, if that's  
21 all FP&L is willing to do, or NRC Staff and just NRC Staff  
22 or NRC Staff and Justice or to the Board and Justice and  
23 NRC Staff or to the Board alone.

24 In other words, what I am saying is if they will  
25 waive their right, because they have a right to refuse.

1 Now, how does it come into it? I think all government  
2 agencies involved in litigation have a duty to do what they  
3 can within their powers to reach settlements between all  
4 parties.

5 Now, different District Court judges -- you look  
6 at the Rules of Civil Procedure. They are one thing.  
7 Different judges have different ways of getting the parties  
8 to resolve things and getting the procedures.

9 I remember a case before Judge Gesell, I believe a  
10 former associate or partner of Mr. Dym, when this involved  
11 Central Valley Project. We filed our complaint. It was a  
12 very complex case. Before the government answered, the  
13 judge's secretary called us, said he wanted a meeting.

14 We had a meeting with the Justice -- with the  
15 judge among all parties. He said, Now, what's this case  
16 about, and he explained the procedures and said, Now, here  
17 is the way I want this case handled procedurally. He said,  
18 It may well be that a motion to dismiss by the government  
19 rather than answer may resolve the question.

20 Now, he was interested in one thing. It was an  
21 extremely moving experience for me as an attorney. He  
22 wanted that case disposed of and he wanted it disposed of  
23 properly on the merits and he wanted it disposed as quickly  
24 as it could, and the parties agreed that that would be an  
25 agreeable procedure. The motion to dismiss was filed and

1 the whole case was revolved. Now, he sharpened up his  
2 procedure that way.

3 We have had other experiences with other District  
4 Court judges. We think the Board has that kind of general  
5 or judicial elbow room to set up procedures for getting  
6 things resolved, and we think also that they have  
7 procedures for impelling the parties toward settlement by  
8 bringing things out at least in the open sufficiently so  
9 that the parties involved can get a feeling of what the  
10 Board is thinking about the issues and thereby encouraging  
11 the parties to settle.

12 Now, you know, maybe this is not, you know, black  
13 and white law, but you know the law and the procedures are  
14 not exact and I think there is enough authority. What we  
15 would like to do is present it to the Board and then have  
16 the Board say, Well, just as a matter of record, what's  
17 wrong with what the Cities are proposing here? Justice  
18 Department, what's wrong?

19 You don't have to take a position at all, but I do  
20 not believe that in Twentieth Century America judges have  
21 to put blinders on and sort of walk along a narrow path.  
22 You got a practical problem, let's get that practical  
23 problem solved. And I am so satisfied within myself -- we  
24 have worked it out with these clients and we have had all  
25 sorts of meetings -- that we have come up with something

1       that is so reasonable that all this lawyer talk that you  
2       are having here, when you look at the facts, doesn't make  
3       sense, even though in the abstract without Hamlet it seems  
4       to make sense.

5               MR. DEALE: Mr. Spiegel, from my standpoint, I  
6       don't understand what's preventing you from passing along  
7       whatever proposals you have to the parties and to us, too.  
8       What is preventing you from doing this? You want some sort  
9       of a blessing to the proposal from the Board. I don't  
10      think we are disposed to do this. We are not blessing  
11      these proposals. We haven't even seen them.

12             And we are not concerned, at least from my present  
13      viewpoint, of asking for anybody to disclose what they are  
14      proposing, so go ahead and send them out. And if they fly,  
15      fine. If they don't, so be it. This is negotiation among  
16      the parties.

17             MR. SPIEGEL: If -- that's why I am putting it on.  
18      Is Florida Power & Light willing --

19             MR. JABLON: There is a restriction by Florida  
20      Power & Light against our disclosing our positions and then  
21      disclosing their positions?

22             MR. SPIEGEL: We have got a confidentiality  
23      negotiation. Let me say -- I want it very clear on this --  
24      they have a right, if I understand it, to say no. I am  
25      trying to find out whether they are going to say no.

1 MR. DYM: My understanding is that Mr. Jablon and  
2 Mr. Spiegel have had discussions with the Department of  
3 Justice and the NRC Staff at which we were not present  
4 where they stated their position and attempted to persuade  
5 the Department of Justice and the NRC Staff to accept their  
6 position. We haven't prevented that from happening. I see  
7 no reason why we could prevent it or how we could prevent  
8 it from happening.

9 If they want to tell the Department of Justice and  
10 the NRC Staff, Wait a minute, we -- what we told you  
11 earlier we have backed off from, all right, our demands are  
12 more modest now, I have no problem with that. I have no  
13 problem with that at all. But what I do have a problem  
14 with, though, is the apparent effort to delay the  
15 discussions that we have underway with the Department of  
16 Justice and the NRC Staff.

17 See, what they are trying to do is to put their  
18 proposal on the table as the one that each of the parties  
19 will then have to deal with. We are past that stage. We  
20 are involved in negotiations. I think they will be  
21 successful, and we will have a document that we are hopeful  
22 we will be able to present to the Board, and then if the  
23 Cities don't like it, they can come in and explain why they  
24 don't like it.

25 MR. DEALE: Mr. Dym, Mr. Spiegel was asking you

1 for permission for him to send you his proposal.

2 MR. DYM: No. I mean I have his --

3 MR. DEALE: This is what I heard him say.

4 MR. DYM: I have his proposal. It is now being  
5 considered and we will get back to him on his proposal.  
6 All I am saying is I have no problem with his engaging in  
7 discussions with the government parties, at which I am not  
8 present, in which they try to persuade the government that  
9 their position is a reasonable one just as I am trying to  
10 persuade the government that my position is a reasonable  
11 one.

12 MR. DEALE: So, what else is new?

13 MR. DYM: Nothing else is new.

14 CHAIRMAN SMITH: Mrs. Urban?

15 MRS. URBAN: In the discussions we have had with  
16 the Cities, they have commented on our proposal, the  
17 Florida Power & Light and Federal Government agencies'  
18 tentative agreement. They have not, because of their  
19 agreement with the Company, been able to give us any  
20 concrete comments on things like number of megawatts and  
21 that kind of thing.

22 I think that it would be helpful for the Federal  
23 Government parties to see their proposal because I think it  
24 would take things out of the vague area and into the  
25 somewhat more concrete, and I think we would be able to

1 deal with that. I think the government -- Federal  
2 Government parties would have the ability to deal with what  
3 they have seen without holding things up. I think we can  
4 evaluate that reasonably expeditiously.

5 MR. DYM: I had understood that Mr. Spiegel was  
6 concerned with advancing his position with the NRC Staff.  
7 He is perfectly free to do it as far as I am concerned. I  
8 don't want to be a participant in his discussions.

9 CHAIRMAN SMITH: Just a moment, please. There is  
10 apparently some confusion among these three places. I  
11 observe signs of confusion, so why don't we just take a few  
12 minutes to straighten it out?

13 MR. JABLON: Excuse me, if I may. There is a  
14 factual question here. In answer to your question what is  
15 getting in the way, Florida Power & Light's counsel has  
16 interpreted our confidentiality agreements and that has  
17 been communicated to me, that we cannot state to the  
18 government our positions with Florida Power & Light in the  
19 parallel negotiations, that we cannot tell the government,  
20 and that is the problem, and what we are saying is that  
21 negotiations where the parties are forced not to  
22 communicate as between the two negotiations are  
23 unproductive.

24 MR. DEALE: Mr. Dym has an entirely different  
25 viewpoint of that.



1 MR. JABLON: That's fine.

2 MR. DYM: I think I have stated that so far as I  
3 am concerned, they are free to take whatever position they  
4 want with the Department of Justice and the NRC Staff.

5 MR. SPIEGEL: What I asked was whether we are free  
6 to take the formal proposal for settlement that we made,  
7 the written proposal, that document, and make it available  
8 to Justice and NRC?

9 MR. DYM: Yes..

10 MR. SPIEGEL: We are free to do that?

11 MR. DYM: Yes. I would like to -- I would like to  
12 get an assurance, though, that there will be no delay in  
13 our efforts to resolve our differences with the Department  
14 of Justice as a result of whatever Mr. Spiegel and Mr.  
15 Jablon want to do. We would like to get at it. We would  
16 like to negotiate. We would like to sit down with them to  
17 work out a piece of paper.

18 CHAIRMAN SMITH: Well, the Board has observed that  
19 the Commission's order of 19 --

20 MR. DEALE: June 21st, 1978..

21 CHAIRMAN SMITH: -- directed the Board to proceed  
22 expeditiously, and I hope I don't have to explain the  
23 schedule to the commissioners, but I do think it is time  
24 for the parties to either settle or get on with the hearing.

25 MRS. URBAN: Mr. Smith, I think seeing the piece

1 of paper that we have been discussing for the past ten  
2 minutes at least in my view will help settlement. I find  
3 it much easier to deal with things in black and white  
4 and concrete proposals than I do with the kind of  
5 generalization, general discussions that we have been  
6 having with the Cities. I certainly think it will speed it  
7 up at least from the point of view of the Department.

8 CHAIRMAN SMITH: I think the next item that we had  
9 in mind has been fairly well answered. Has there been any  
10 change in conditions in the industry which the Board should  
11 know about which might affect the issues as we originally  
12 approved them or perhaps even the discovery rulings? I  
13 assume that had there been, it would have been brought to  
14 our attention, but we are meeting here and now is an  
15 opportunity to officially advise us if we should be advised.

16 MR. JABLON: I think, Your Honor, the District  
17 Court action and the discovery in that was one of them, but  
18 that was covered. I think the interim decisions are a  
19 second factor, but you are aware of them.

20 CHAIRMAN SMITH: The interim --

21 MR. JABLON: Decisions of the Federal Regulatory  
22 Commission of the Fifth Circuit Court of Appeals decision  
23 in the Gainesville case.

24 CHAIRMAN SMITH: Now we are down to the question  
25 of ruling on the proposed schedule for resuming the

1 proceeding. We have a letter from Mr. Dewey dated January  
2 17 in which all the parties have agreed to proceed under  
3 the attached schedule. Is that correct? Does everyone  
4 agree that this attached schedule -- well, is it still a  
5 reasonable schedule?

6 MR. DYM: We believe that it is. We think that --  
7 we are hopeful that we will be able to resolve this matter  
8 more expeditiously than is reflected in this schedule, but  
9 I think when this schedule was put together -- I think all  
10 of the parties worked together in arranging a schedule with  
11 a realistic expectation that it will not be necessary for  
12 us to come before the Board to seek extensions of time.

13 I don't want to preclude ourselves from doing that,  
14 but it was intended to be a realistic schedule as opposed  
15 to coming in with what the parties would view as  
16 unrealistic but expecting to get extensions of time from  
17 the Board.

18 CHAIRMAN SMITH: Any further comments on it?  
19 Mr. Dewey?

20 MR. DEWEY: Well, my comment is that in the event  
21 that we can have a shortcut proceeding as we have talked  
22 about earlier today, then perhaps we could cut back on the  
23 length of the schedule.

24 CHAIRMAN SMITH: What is needed from the Board now,  
25 just approval of the schedule? You have made a request

1 that discovery be permitted to proceed again?

2 MR. DEWEY: Yes, sir.

3 CHAIRMAN SMITH: That is what is needed now,  
4 permission to proceed in discovery?

5 MR. DEWEY: (Nods head)

6 MR. JABLON: Your Honor, we support the schedule  
7 assuming this type of proceeding is going to be. I think  
8 the most appropriate thing, I would like to submit a formal  
9 motion to rely on the District Court discovery in writing --  
10 I don't think it ought to be handled here -- to rely on the  
11 District Court discovery in certain of the procedural  
12 aspects, which could short-circuit or impact on this, but I  
13 think if we are going the long route that this schedule is  
14 appropriate.

15 MR. DYM: I obviously acquiesce in Mr. Jablon's  
16 right to file a motion seeking relief. I do think, though,  
17 it important to emphasize that we, FPL, are now proceeding  
18 to comply with the Cities' discovery request in this  
19 proceeding.

20 CHAIRMAN SMITH: In this proceeding?

21 MR. DYM: In the NRC proceeding. The stay of  
22 discovery that was approved by the Board expired in January.  
23 We view ourselves at this point as being obligated to do  
24 what is necessary to comply with outstanding discovery  
25 requests, and I assume that Mr. Jablon occupies no

1 different position. If he does, I would like to know it  
2 because we are doing an awful lot of work now.

3 CHAIRMAN SMITH: Yeah, I had not thought of it  
4 that way. I thought that the matter was in suspense until  
5 we started it again.

6 MR. DYM: No, that wasn't our understanding. I  
7 don't think it was the government lawyers' understanding  
8 either.

9 MR. DEWEY: No, we thought that discovery was in  
10 progress.

11 MR. JABLON: I think as a practical matter --  
12 first of all, as a practical matter, we can live with this  
13 schedule. The practical fact is that this proceeding is  
14 scheduled on a much slower track than the District Court  
15 proceeding and that we acquiesced in that schedule knowing  
16 it. The practical matter is that there is nearly a hundred  
17 percent overlap in terms of discovery requests in the  
18 District Court, and all my motion would do is go to the  
19 question of not seeing wasted, burdened time and effort.

20 There is no sense having a complete or nearly  
21 complete duplication involving file searches in fifteen  
22 cities of essentially the same discovery. However -- and  
23 what the proposal will be would be to presumptively rely on  
24 that District Court discovery, but since you don't have  
25 before you the District Court discovery requests, I think

1 it would be premature to rule on it at this time. I wanted  
2 to alert the parties that I was planning to file a motion  
3 to that effect.

4 CHAIRMAN SMITH: All right. In the meantime,  
5 however, do you now agree that discovery under the NRC  
6 rules of practice is in effect?

7 MR. JABLON: Yes, Your Honor.

8 CHAIRMAN SMITH: Is anybody in default? Has there  
9 been any problem? There is no default?

10 MR. JABLON: I am sorry, I missed your question.

11 CHAIRMAN SMITH: Apparently no one is in default  
12 in discovery responses.

13 MR. JABLON: Not to my knowledge.

14 MR. DEWEY: Well, there is only one point as far  
15 as discovery is concerned. To the extent that the footnote  
16 does say that the parties will begin production as soon as  
17 possible, we have not received any production under this  
18 document, under our document requests as of now, but it  
19 should be coming in on a regular basis now because that was  
20 the agreement and that was the footnote in our discovery --  
21 in our proposed schedule.

22 CHAIRMAN SMITH: Okay. Well, everyone has agreed  
23 that that is a suitable discovery schedule for now, and the  
24 Board would approve it. Anything further? If there is  
25 nothing further, we will adjourn.

1 MR. SPIEGEL: May I confer with counsel?

2 MR. JABLON: Your Honor, as a matter of caution, I  
3 made certain introductory requests. Assuming that these  
4 negotiations between FP&L and the government, the Justice  
5 Department and the NRC Staff, do not come to fruition in  
6 terms of expediting the proceedings, I plan to file formal  
7 motions on that, and I assume that they would be ruled upon.  
8 In other words, there were certain proposals with regard to  
9 what the Board could do to facilitate settlement.

10 CHAIRMAN SMITH: Settlement?

11 MR. JABLON: Yean.

12 CHAIRMAN SMITH: You plan to file a formal motion  
13 concerning settlement negotiations?

14 MR. JABLON: No. I made two proposals, three  
15 proposals, actually: First, putting it colloquially, that  
16 the Board get the parties together and knock heads, we make  
17 certain formal submissions to you; second, that if that  
18 were unavailing, to have what I called in the nature of a  
19 show cause proceeding; and, third, the matter I just  
20 alluded to, the reliance on the District Court discovery.  
21 The Board hasn't commented on the first two proposals. I  
22 didn't want to leave them hanging.

23 CHAIRMAN SMITH: Well, the knocking of heads was  
24 done gently but nevertheless sincerely today. We do  
25 believe that it's time to settle this case or get on with

1 the hearing.

2 Your next motion, as I understood it, was a -- was  
3 almost a complaint and not a motion that you were being  
4 excluded from settlement negotiations. I thought that much  
5 of your complaint has now been satisfied. You are going to  
6 be given an opportunity for direct input. We have nothing  
7 formal to rule upon as far as the negotiating status  
8 between the government parties and licensee. You did not  
9 make a specific formal motion.

10 MR. JABLON: Well, maybe the best way to handle it  
11 would be this, that just as an aside, because there is a  
12 printed record, I don't want to imply that -- well, I think  
13 it moves forward that we are able to give our proposal to  
14 the government. We are not really satisfied in being  
15 excluded directly from the negotiations.

16 There was an interim -- there were two specific  
17 interim proposals. One was that the Board be informed of  
18 the specific status of settlement discussions, and the  
19 second was the procedural shortcuts, and let me ask, would  
20 the Board be receptive to my putting those proposals more  
21 concretely in writing?

22 CHAIRMAN SMITH: I do believe you are talking  
23 about two basic proposals. One is that you be given leave  
24 to submit to the Board a settlement proposal? That is one  
25 proposal that you are speaking of?



1 MR. JABLON: Well, that the parties -- that if a  
2 settlement does not come about -- what I am trying to do is  
3 set up procedures that if this process that is going on now  
4 between the Justice Department and the NRC Staff and the  
5 FP&L does not work, what I had suggested, Your Honor, was  
6 that the parties submit formally to the Board their  
7 proposals along with the reasons therefor and that there be  
8 answering responses and that the Board give an indication  
9 as to their attitude so that you wouldn't be acting on a  
10 blank sheet of paper as you inferred. I understand that  
11 this type of proposal is analogous to procedures which  
12 District Court judges have been known to use.

13 The second proposal was then if that were  
14 unavailing, to have what would be in the nature of a show  
15 cause proceeding so that rather than going through the  
16 extensive time for discovery that there be an initial  
17 proceeding more analogous to the Federal Energy Regulatory  
18 Commission.

19 CHAIRMAN SMITH: I would anticipate, Mr. Jablon,  
20 that if there is a settlement proposal submitted to the  
21 Board in this proceeding that we would then have another  
22 pre-hearing conference to address how we approach the  
23 hearing. So, that takes care of a part of your proposal.

24 I think it would be premature for us to rule now  
25 what to do in various eventualities. I think that we would

1 be better able to rule if we actually had something before  
2 us to depart from. But, still there is the other matter  
3 which I still don't quite understand. All right, would you  
4 please repeat then what the third -- go ahead.

5 MR. LAZO: May I ask, Mr. Jablon, what type of a  
6 submittal is it that you are thinking of? Would this be  
7 something in the nature of a pretrial brief?

8 MR. JABLON: I think essentially close to it, yes.  
9 In other words, I think it would be fruitful, given the  
10 years of time and given the background in the case, for the  
11 parties to set forth before the Board what relief they  
12 think is appropriate.

13 As the settlement negotiations must indicate,  
14 there are at least some areas where there is an overlap or  
15 where there would be an agreement. I would think that it  
16 would be incumbent upon the Cities or the complaining  
17 parties to specify at least their principal areas which  
18 they deem constitute the situation inconsistent and why and  
19 the justifications for relief and responsive pleadings.

20 What that would do is give the Board, in an  
21 informed way, a means of having the input of their views,  
22 in light of the Midland and Davis-Besse proceedings, that  
23 NRC is no longer acting on a clean slate as to what might  
24 be an appropriate resolution of the case.

25 MR. LAZO: So that based upon the summaries of

1 physicians, the knocking of heads might become a little  
2 less gentle.

3 CHAIRMAN SMITH: But isn't it premature,  
4 Mr. Jablon, when we have just been advised that within a  
5 matter of weeks there may be a settlement before us and we  
6 have just been advised that there is no impediment for  
7 Florida Cities -- preventing Florida Cities from submitting  
8 to the government parties what they believe should be in a  
9 settlement? Wouldn't it be better to have that come to  
10 pass before the Board required the parties to submit your  
11 summaries?

12 MR. JABLON: Mr. Smith, I guess I was acting -- I  
13 am acting under mixed premises. We have -- I was setting  
14 forth -- I had agreed initially that I had no problem with  
15 the Justice Department and the NRC and FP&L taking another  
16 month to negotiate to see if they could reach agreement,  
17 setting aside the problems with our exclusion, and then  
18 adopting these proposals or not adopting them.

19 It may be premature to rule on them, but what I  
20 was thinking of is taking the time now or beginning to look  
21 towards a mechanism if settlement were unavailing. I guess  
22 from the perspective -- settlement seems less assured to me  
23 from the perspective where I am sitting than perhaps the  
24 statements of the Justice Department and the NRC Staff and  
25 FP&L will imply.

1 I do think that whether a settlement between the  
2 Justice Department, NRC and FP&L comes about or not, that  
3 if it's not an all party settlement that some procedures  
4 ought to be adopted.

5 CHAIRMAN SMITH: My question is when? When should  
6 they be adopted?

7 MR. JABLON: I would propose to -- I would propose  
8 to file a formal motion and the Board could rule before you  
9 determine whether there would be a settlement with the  
10 government.

11 CHAIRMAN SMITH: Well, that's what I thought you  
12 were saying.

13 MR. JABLON: Because the parties would be on  
14 notice that the Board is prepared to pursue it.

15 CHAIRMAN SMITH: Well, the Board is prepared as we  
16 have stated. We are prepared to explore ways of  
17 symplifying the hearing, of reducing the issues where  
18 possible and to do whatever will be helpful to move the  
19 matter along, and certainly you can file, Mr. Jablon,  
20 whatever you wish, but myself, I think I would have a  
21 difficult time of approaching such a motion until I saw  
22 what's going to happen in the next few weeks.

23 MR. JABLON: Then I would wait until we saw the  
24 results of the FP&L and the Justice Department and the NRC .  
25 settlement.

1           CHAIRMAN SMITH: If for no other reason than  
2 efficiency, because if you file such a proposal and the  
3 parties have to be taken away from the negotiating table to  
4 respond to it and envision every conceivable danger lurking  
5 in your proposal in a void, I just don't think it's  
6 efficient and certainly not efficient for the Board either,  
7 so I really think you should wait until the next few weeks  
8 have passed and then see where we are.

9           However, if time passes and you don't believe that  
10 progress is being made and you believe that it is time for  
11 the Board to assemble the parties and discuss it and set  
12 the matter down for hearing if we have to, if that relief  
13 is required, we will certainly consider it.

14           MR. JABLON: Thank you, Your Honor.

15           CHAIRMAN SMITH: If there is nothing further, we  
16 are adjourned.

17                           (Pre-hearing conference adjourned at 12:05 PM)

18  
19                           \* \* \* \* \*