

NUCLEAR REGULATORY COMMISSION

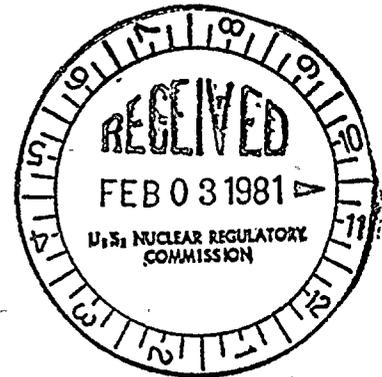
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In the Matter of:

FLORIDA POWER AND LIGHT) DOCKET NO., 50-389A
(St. Lucie Plant, Unit No. 2)

DATE: February 2, 1981 PAGES: 1 thru 149

AT: Bethesda, Maryland



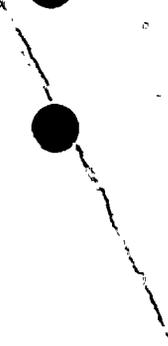
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BEFORE THE NUCLEAR REGULATORY COMMISSION

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

- Main Hearing Room, Fifth Floor
East-West Towers Building
4350 East-West Highway
Bethesda, Maryland

Monday, February 2, 1981

The above-entitled matter came on for prehearing
conference at 1:05 p.m.

BEFORE:

IVAN W. SMITH, Administrative Law Judge, presiding
MICHAEL A. DUGGAN, Administrative Law Judge
ROBERT M. LAZO, Administrative Law Judge

APPEARANCES:

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On behalf of Florida Power and Light

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On behalf of Florida Cities

LEE SCOTT DEWEY, Esq.
Nuclear Regulatory Commission

JANET R. URBAN, Esq.
ROBERT FABRIKANT, Esq.
U. S. Department of Justice

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JUDGE SMITH: On the record.

I would like to introduce Professor Michael Duggan, who has replaced Valentine Diehl on the Board. Professor Duggan has served on the panel as an economist, however he has had experience as a trial attorney at the Justice Department, Antitrust Division. He is presently professor at the University of Texas in Austin, Texas, in business law.

Are there any preliminary matters before we start with the agenda for today?

The Board is prepared to rule on the motion by Florida Cities to file an attached reply. We deny the motion. Then, the answer will be also, of course, an unauthorized answer.

We will permit, however, the parties to demonstrate particular places in those pleadings where new material is raised, and demonstrate why it was necessary to file unauthorized pleadings.

The Board has many questions on the papers, but we want to organize the discussion today in the following manner.

Going to the order for the prehearing conference, we want to hear from the parties on items No. 1 and No. 2. Item No. 1 being whether the proposed license conditions



1 would have a material or adverse impact upon the intervening
2 Florida Cities.

3 No. 2, whether the proposed license conditions
4 contain anti-competitive, discriminatory, or unfair
5 provisions which would create or maintain a situation
6 inconsistent with the antitrust laws.

7 Then we will reserve the final item, and that is
8 if the licensing conditions are not satisfactory, what do we
9 do about it then. We will reserve that to the end of the
10 session.

11 The Board particularly requests in the discussion
12 that the comments be, as much as possible, limited to the
13 discrete area under consideration. That is, when we talk
14 about what material or adverse impact the license conditions
15 could have upon the Florida Cities, we want that to be the
16 sole discussion under that part of the discussion.

17 I believe, Mr. Jablon, that we should begin with
18 you.

19 MR. JABLON: Thank you, Your Honor.

20 First of all, as a preliminary matter, I would
21 like to introduce to the Board Marta Manildi. She has not
22 filed an appearance form, but she will do so today or
23 tomorrow.

24 She did brief, and is prepared to discuss the
25 question of the admissibility of certain documents labeled,

1 settlement documents, but I think in their unauthorized
2 reply Florida Power and Light has said that she could look
3 at them for these purposes.

4 In any event, I would like to introduce to you Ms.
5 Manildi.

6 With regard to the first question which you have
7 propounded, whether the proposed license conditions would
8 have a material or adverse impact upon the intervening
9 Florida Cities, I would like to break down the response in
10 two regard.

11 In a broader context, to the extent that the
12 license conditions perpetuate a situation inconsistent, or
13 to the extent that a situation inconsistent continues, the
14 license conditions have an immediate adverse impact.

15 JUDGE SMITH: This is what I was hoping we would
16 not go to.

17 MR. JABLON: But Florida Cities are willing to
18 limit their request for relief to only those matters where
19 there would be an immediate adverse impact from the fact of
20 implementation per se with regard to the generality.

21 We have asked for approximately five conditions to
22 be placed upon acceptance of the license conditions, and the
23 acceptance conditions all relate to the question of
24 participation in the nuclear plant contracts in St. Lucie 2,
25 because it is there where the Florida Cities would have to
enter

1 into contracts now, and make decisions where to contract.

2 If the Board will indulge me, in the Florida
3 Cities reply to the Florida Power and Light's response to
4 the joint motion, which you have denied, there is specific
5 language as to proposed conditions which would be acceptable
6 to Florida Cities.

7 I think that it might be helpful if, at least in
8 ruling, the Board could refer to that language because it
9 would give you something specific, and the specific pages of
10 the language are referred to in the conclusion.

11 Without any preliminaries, what I would like to do
12 is to refer to specific conditions we would seek, and
13 explain to you why we would seek conditions in those
14 specific areas.

15 JUDGE SMITH: This is going to explain why the
16 imposition of conditions would have a material or adverse
17 impact per se?

18 MR. JABLON: Yes, Your Honor. I am willing to
19 handle it any other way, but I think it would be better if
20 we deal with specifics.

21 To put the matter in general context, perhaps that
22 would be helpful, the harm of immediate impact comes from
23 three regards, Your Honor.

24 The most tangible regard, the most immediate
25 regard is that if the license conditions are immediately



1 implemented, some of my clients and other Cities will have
2 to make decisions whether to buy into St. Lucie, and
3 doubtless will.

4 Under the proposed license conditions, Florida
5 Power and Light is to present a proposed contract, and there
6 are to be contract negotiations. If agreement is not
7 reached with regard to those contracts, rather than this
8 Board, an arbitrator would make the decision.

9 Florida Power and Light has taken the position,
10 and I presume is taking the position, that the Florida
11 Cities in various respects would be bound by those
12 contracts. So what element of harm is that the Florida
13 Cities, at minimum, would be placed in the position where
14 they arguably would have waived rights in order to get one
15 of the advantage of the license conditions.

16 JUDGE SMITH: What rights would they have waived?

17 MR. JABLON: For example, if this Board in a
18 subsequent order, Judge Smith, came out with a ruling which
19 would imply different license conditions, Florida Power and
20 Light has stated, if I understand them correctly, that they
21 would argue that the Florida Cities are still bound by the
22 contract. They would still be contractually bound. Parties
23 can actually waive rights.

24 Therefore, one conditions we have proposed, which
25 quotes from their pleading, is on page 8 of our reply, which

1 simply says that the attached conditions do not impair the
2 right of any intervenor to have its case heard on the
3 merits, and to avail itself of any different or additional
4 conditions regarding participation in St. Lucie Unit 2, to
5 avoid immediate implementation, creating an implication that
6 there can be a waiver.

7 JUDGE SMITH: We are having trouble over this.

8 MR. JABLON: Yes, Your Honor.

9 JUDGE SMITH: If a Florida Cities enters the
10 participation contracts, and you successfully argue that the
11 participation agreements or license conditions do not
12 eliminate a situation inconsistent, and we have a hearing.
13 If we should find that additional conditions have to be
14 imposed, then the Florida Cities will not have been hurt by
15 the immediate imposition of the conditions. Is that
16 correct?

17 MR. JABLON: Providing that the new conditions,
18 which you order, the new licensing conditions or ruling can
19 be made effective as to the Cities. In other words,
20 providing that their having signed a participation agreement
21 before --

22 Let me make it very concrete. Suppose the Cities
23 agree to a liability clause, which they think is wrong, but
24 they agree to it, because under the settlement license
25 conditions that is all they can get. I think that this is

1 one of the items that you can rule on now, but suppose you
2 don't.

3 Suppose subsequently in new license conditions, a
4 year or two years from now, you determine that license
5 conditions removing the settlement restriction on the kind
6 of liability clause that the arbitrator has to accept would
7 have been appropriate. I would not want my clients to be
8 placed in a position where having signed the original
9 participation agreement, they are deemed to have been bound
10 by that liability provision.

11 Or, having signed a contract which sets forth a
12 certain mechanism for operating the plant, a certain
13 division of responsibility between the parties, and you
14 should subsequently rule that the present license conditions
15 which controlled those restrictions were wrong, I would not
16 want that to control.

17 Florida Power and Light in their new proposal has
18 said, with regard to the latter, that the Florida Cities
19 would not be bound, but they have not said that with regard
20 to the former.

21 So, all we have suggesting, which is what the
22 Justice Department has suggested in their pleading, and what
23 Florida Power and Light has ambiguously suggested in their
24 pleading, that the Board make clear that any rulings
25 granting immediate implementation are without prejudice to

1 the Florida Cities getting better terms if they can convince
2 the Board.

3 JUDGE SMITH: I thought that this had been made
4 quite clear several places throughout the papers. Let's
5 make it clear now, if it is necessary.

6 MR. JABLON: I don't think it has, and I refer to
7 page 6, note 6. But if you are correct, then I have no
8 problem, and there is no need for that provision.

9 JUDGE SMITH: Let's find out.

10 Mr. Bouknight?

11 MR. BOUKNIGHT: Judge Smith, I think that our --

12 JUDGE SMITH: Gentlemen, if you prefer to sit
13 down, the microphone is available, make yourself
14 comfortable.

15 MR. BOUKNIGHT: Judge Smith, our position is that
16 these license conditions require that Florida Power and
17 Light make a commercial offer to the Florida Cities. If the
18 Florida Cities then accept that commercial offer, and enter
19 into a participation agreement, Florida Power and Light is
20 not conceding that as a result of a Board decision, which
21 happened later, requiring that a different kind of offer be
22 made later on down the road, that that contract is
23 vitiated.

24 Our position really is the mirror image of what
25 you see in the second full paragraph of Florida Cities'

1 answer of October 9th, there on the first page, where they
2 indicate how important it is to them to understand that if
3 they accept this offer, and enter into a participation
4 agreement, even if there is a hearing on which Florida Power
5 and Light prevails on the merits, Florida Power and Light
6 cannot later vitiate any aspect of that participation
7 agreement.

8 So what it comes down to is that the Florida
9 Cities will be made an offer. No city is inhibited from
10 declining that offer, and litigating to get a better offer.
11 If you rule that a better offer has to be made, that he can
12 accept that offer.

13 Those that decide now that they will enter into a
14 participation agreement, there is some disagreement between
15 the Florida and Florida Power and Light as to whether later
16 the NRC has the authority to come back and require that
17 changes be made in that participation agreement. But it
18 would be Florida Power and Light's position that those who
19 enter into those participation agreements are entering into
20 contracts.

21 JUDGE SMITH: If we were to find, after a hearing,
22 that implementation of the participation agreement may have
23 a tendency to create a situation inconsistent with the
24 antitrust laws, would you argue that we could not, then,
25 require as a license condition an adjustment in the

1 participation agreement?

2 MR. BOUKNIGHT: No, sir, I think probably not.

3 I think our position would be that in carrying out
4 this Board's antitrust authority, if it found that a
5 contract, this or any other contract that Florida Power and
6 Light had entered into, was inconsistent with the antitrust
7 laws, arguably so long as nexus is found, at least, you
8 would be in a position to require as a condition of the
9 license that we agree to change it.

10 That is a different matter, though, than placing
11 the terms of a participation agreement that don't have any
12 antitrust implications, that have simply commercial
13 implications, before an NRC Licensing Board hearing an
14 antitrust case.

15 JUDGE SMITH: If after a hearing we find that a
16 particular condition or provision of the participation
17 agreement is simply irrelevant to whether a situation
18 inconsistent exists or not, it would be your position then
19 that the parties would be bound?

20 MR. BOUKNIGHT: Yes, sir, it would.

21 JUDGE SMITH: That you believe is materially
22 detrimental to the Florida Cities?

23 MR. JABLON: No, I do not, provided that the
24 provisions did not come about in relationship to the
25 existing settlement license conditions. Let me give you an

1 example.

2 The liability clause is a good example, and there
3 are others. We take the position, without debating it for
4 the moment, that the discussion in the settlement license
5 conditions would allow Florida Power and Light to impose
6 liability provisions which are both anti-competitive and
7 against the public interest.

8 The arbitrator, under the proposed settlement
9 license conditions, would be bound to accept the liability
10 clause which Florida Power and Light proposes. All I am
11 trying to protect against is a situation where either the
12 Florida Cities agreed to a liability clause, knowing what
13 the license conditions said, and knowing that they would
14 likely lose before an arbitrator, because the arbitrator
15 would look to the settlement license conditions.

16 Then, coming back, and successfully convincing
17 this Board that our position on the merits had been correct,
18 so that under Section 105(c)(6), if there were no contract,
19 you would propound different license conditions, or the
20 license conditions would just be silent, which would
21 eventually go to the arbitrator, and yet be met with a claim
22 that the Florida Cities have waived rights.

23 To give another example, and I don't know how this
24 would work, the settlement license conditions state that
25 Florida Power and Light will have complete control over the

1 construction and operation of the plant, and they say no
2 more.

3 Incidentally, we have no quarrel with that, but we
4 think if the settlement license conditions are to say that,
5 they should also say that in constructing and operating the
6 plant, Florida Power and Light should take into account
7 other interests.

8 Florida Power and Light has said that if we are
9 successful on that point, they would agree to amend the
10 contracts. But you would have gone through arbitration
11 procedure, or agreement with Florida Power and Light again
12 knowing what the settlement license conditions say.

13 I don't know to what extent we would be bound. I
14 guess it would depend on what you put in your subsequent
15 order.

16 The settlement parties have come before you, Judge
17 Smith, and have at least implied that the Florida Cities
18 can't be hurt by immediate implementation of the settlement,
19 and in general we want immediate implementation of the
20 settlement because we get benefits. But all we were trying
21 to seek is what would affect a waiver of subsequent rights,
22 should we be able to convince the Board.

23 JUDGE SMITH: It seems to me that that has been
24 conceded now by the applicant. If you should be able to
25 convince the Board, after a hearing, that the license

1 conditions as they relate to the participation agreement are
2 essential or desirable to alleviate a situation inconsistent
3 with antitrust laws, we would then have the authority to
4 require a license condition change which would reflect a
5 change in the participation agreement.

6 MR. JABLON: I did not hear Florida Power and
7 Light that way. If Florida Power and Light assents to that
8 statement, I have no problem.

9 MR. BOUKNIGHT: Judge Smith, let's make certain
10 that we are talking about exactly the same thing.

11 My understanding of what I told you a few minutes
12 ago is, if you conclude after a hearing that a provision of
13 a contract between Florida Power and Light Company and one
14 of these Cities is inconsistent with antitrust laws, and you
15 find a nexus between that inconsistency and activities under
16 the license under Section 105(c)(5), then would appear that
17 the NRC has the authority to impose a license condition
18 requiring Florida Power and Light Company to assent to a
19 change in the contract.

20 JUDGE SMITH: Let's take another example. Let's
21 say that we find that because of a condition, and because of
22 a provision of the participation agreement, the situation
23 alleged to exist continues to exist. That is, the agreement
24 does not go far enough to eliminate the alleged situation
25 inconsistent.

1 What would be your position there as to our
2 authority to determine that a liberalization of the offer
3 would have to be made? .

4 MR. BOUKNIGHT: If the hypothetical is that the
5 contract itself has not been found to be inconsistent with
6 the antitrust laws, but because of some other situation
7 inconsistent with the antitrust laws the Board believes that
8 a change in the contract would be appropriate relief, then I
9 think we would reserve our position to challenge that.

10 JUDGE SMITH: Yes, challenge it, but challenge it
11 in the NRC adjudicative process, in the courts, or enforce
12 it contractually with the parties to the participation
13 agreement?

14 MR. BOUKNIGHT: I think, certainly what we would
15 do, we would appeal the order within the NRC, and within the
16 courts. If ultimately it were held by the courts that the
17 NRC had the authority to require this change in the
18 contract, then obviously we would be bound to do so.

19 All I am saying is that we don't want today to
20 waive our right to argue to you at the end of this hearing
21 that you don't have the authority to do it, and then to
22 argue to the Appeal Board.

23 JUDGE SMITH: And to the courts.

24 MR. BOUKNIGHT: Yes.

25 JUDGE SMITH: All right.

1 Mr. Jablon, does that help?

2 MR. JABLON: I have no problem with that
3 reservation of rights as to the argument they can make to
4 you.

5 JUDGE SMITH: Does that eliminate one of the
6 concerns that you started to list; that was the first one?

7 MR. JABLON: Yes, I think it does.

8 JUDGE SMITH: May we hear from the Department, Ms.
9 Urban?

10 MS. URBAN: The parties in interest seem to agree
11 on this topic, and the Department certainly does not object
12 to that agreement. I perhaps would think that the Board has
13 a little more authority than Florida Power and Light thinks
14 it has, but I think that is something to be argued about the
15 hearing if such becomes necessary.

16 MR. JABLON: Just so that I be made terribly
17 clear, because people may cite this transcript later, my
18 position is that whatever the 105(c)(6) public interest
19 standard is as it relates to the 105(c)(5) finding, that if
20 the Board comes out with conditions under 105(c)(6), and
21 Florida Power and Light reserves any rights to appeal, to
22 contest, to argue, to make any argument to this Board, or on
23 appeal with regard to the Board's authority. But if the
24 Board comes out with a license condition under 105(c)(6)
25 that that license condition -- that we will not be waiving

1 rights by signing contracts now which would not otherwise
2 have been waived.

3 MR. BOUKNIGHT: I am not sure that this changes
4 what we are talking about or not. I am not sure that I
5 understand that.

6 If the Board promulgates a license condition
7 directing that Florida Power and Light change a contract
8 that it has entered into in accordance with these settlement
9 conditions, and that Board order is upheld through the
10 processes of the NRC and the courts, then Florida Power and
11 Light certainly intends to comply with it, and merely wishes
12 to reserve its right to argue what it desires to argue at
13 the time.

14 JUDGE SMITH: Does that help?

15 MR. JABLON: Yes.

16 What is flashing through my mind is that Florida
17 Power and Light may argue that the Florida Cities by signing
18 the participation contract now have waived rights. I think
19 in view of Mr. Bouknight's statement that that argument
20 would not hold water, because obviously these contracts are
21 being signed in the context of implementing these license
22 conditions, and they would be without prejudice to future
23 license conditions which you might or might not find
24 desirable under 105(c)(6).

25 I certainly agree that Florida Power and Light

1 believes that the Board's authority does not exist to attach
2 any license condition in the world, they have the right to
3 argue it.

4 They have the right to make their argument to the
5 Board, and I am not trying to foreclose that. I am just
6 trying to foreclose a possibility of an argument of waiver
7 for signing these contracts under these license conditions.

8 JUDGE SMITH: To summarize; I think we have
9 established that if the Board should find, after a hearing,
10 that certain sections of the participation agreement are
11 either irrelevant to our consideration, irrelevant to the
12 intervention, or irrelevant to the Commission's order
13 requiring this hearing, then it is outside our scope, and
14 they would have the right to enforce those.

15 If we should find that a provision of the
16 participation agreement in itself maintains, or creates, or
17 exacerbates a situation inconsistent, they concede that we
18 would have the right to require license modifications.

19 The third circumstance is, if in its entirety the
20 participation agreement fails to cure a situation
21 inconsistent with antitrust law, then we would have the
22 authority to require modifications to the license which
23 would affect a cure.

24 It seems to me that you have an agreement on those
25 three. We have been through it, and you have an agreement

1 on those three.

2 MR. JABLON: Yes, Your Honor.

3 MR. BOUKNIGHT: Mr. Smith, the phraseology of the
4 last thing that you said. What we are saying is that the
5 Board has the authority to remedy a situation inconsistent
6 with the antitrust laws by imposing license conditions. The
7 extent to which that may include the ability to require a
8 change in an existing contract, not because of your finding
9 that existing contract to be inconsistent with the antitrust
10 laws, but because of your believing that that would be
11 appropriate relief under Section 105(c)(6) --

12 JUDGE SMITH: Yes.

13 MR. BOUKNIGHT: That is where Florida Power and
14 Light reserves its right to make any arguments on at that
15 time.

16 JUDGE SMITH: To us.

17 MR. BOUKNIGHT: Yes, sir.

18 JUDGE SMITH: And the courts.

19 MR. BOUKNIGHT: Yes.

20 JUDGE SMITH: Exactly.

21 MR. DEWEY: Your Honor, the staff does not have
22 any problem with the scenario that you have outlined. We
23 agree that this is the proper procedure to be taking.

24 JUDGE SMITH: Then if it is all right with the
25 parties, we will move on to your next concern.

1 Do you feel that the discussion is complete on
2 this point now?

3 MR. JABLON: Yes, Your Honor.

4 MR. BOUKNIGHT: Yes, sir.

5 JUDGE SMITH: Mr. Jablon.

6 MR. JABLON: On page 16 of the proposed license
7 conditions, which is Section VII-E-1, that section of the
8 license conditions states that "The provisions proposed by
9 the company as to its liability to the other participants,
10 and as to sharing of the cost of discharging uninsured third
11 party liability, shall be approved by the arbitrator -- I
12 have skipped some words -- unless he determines that the
13 provision proposed by the company constitutes an
14 unreasonable proposal which renders meaningless the
15 company's offer of participation."

16 This license condition wording would permit the
17 company to propose to the Florida Cities, or any city
18 participant, virtually any clause with regard to liability
19 whatsoever. The Florida Cities, therefore, in determining
20 whether to participate, and in terms of financing
21 participation, would be faced with an agreement as to this
22 item.

23 Florida Cities believe that they are hurt by this
24 clause. The clause has a further clause which I think you
25 can and should look to.

 Florida Power and Light has lodge with the Board

1 the Orlando participation agreement, and has indicated that
2 that is the agreement which is plans to offer the Florida
3 Cities. The Orlando participation agreement has liability
4 as among the parties hinged on whether there was a willful
5 action by the company.

6 Willful action is defined in Section 1.32 as an
7 action knowingly or intentionally taken or not taken by an
8 officer or employee of the owner. There are two
9 qualifications. It has to be knowingly taken, it has to be
10 an officer or an employee exercising managerial
11 responsibility at a senior level -- the third qualification
12 -- with either the intent to cause injury or damage to
13 another, or the knowledge that such action is a material
14 breach of the provisions of this participation agreement.

15 We submit to you that under this proposed clause,
16 if, for example, a company were to put a plant on line
17 unsafely, in violation of NRC regulations, for a tax
18 advantage or any other commercial advantage -- if it were to
19 do so purposely, the company could at least make an argument
20 under that clause that there is no responsibility to its
21 co-owners because the person did not intend to injure the
22 other participants. He thought that it would work out all
23 right.

24 I can't imagine a company in the country acting
25 purposefully to cause damage to a plant, although employees

1 have apparently done so, or to cause that kind of injury.

2 Furthermore, if there were a delegated action, a
3 contractor, for example, apparently the clause would not be
4 covered, which I think is contrary to the standard in the
5 North Anna situation in another context.

6 It would not cover the plant operator, or arguably
7 it would not cover the plant operator, because he would not
8 be a senior management personnel, even if the plant operator
9 did intentional harm. Even if there were purposefully lax
10 training determined at the managerial level, it arguably
11 would not be covered unless there were an intention to do
12 harm.

13 It excludes purposeful acts, gross negligence, at
14 least in part.

15 JUDGE SMITH: Excuse me, but did you knowingly
16 leave out a part of the provision of 1.32, and that is, to
17 do harm or to abrogate the terms of the participation
18 agreement?

19 MR. JABLON: No, I did not. Let me discuss the
20 other part.

21 The other part presumes that the person who did
22 the act first had read the participation agreement, because
23 it has the word "knowingly." In other words, the standard
24 is not whether it is a breach of the participation
25 agreement, which would solve our problem. The standard is a

1 knowing act.

2 Coming down to the nub of it, we can accept a
3 generally accepted utility practice standard, which is
4 provided for in the participation agreement. But in the
5 Orlando participation agreement, right after the obligation
6 that the company use generally accepted utility practices,
7 is a sentence which says: "But this is not to be taken into
8 account in terms of determining liability, except in
9 accordance with," whatever the liability section number is.

10 So unless that sentence is a meaningless sentence,
11 it means that the company is not to be held to a generally
12 accepted utility practices standard, at least for this
13 purpose, or may not be.

14 JUDGE SMITH: Is it not possible that at the later
15 stage of the proceeding you might convince the Board that
16 this provisions is so unreasonable so as to make it
17 functionally unavailable to Florida Cities. But as for now,
18 what harm does it do to Florida Cities for immediate
19 implementation?

20 MR. JABLON: First of all, again, I would like to
21 hear from Florida Power and Light, frankly, with regard to
22 part of your question, as to whether it would be
23 functionally available later. I would just like them to
24 confirm that.

25 JUDGE SMITH: That was not the point of my



1 remark.

2 Let's say that the Board orders the conditions
3 attached, which brings into play the participation
4 agreement. Then you say, "This does not do it because that
5 provision is so unreasonable that it makes the offer, which
6 we accepted, or it makes our participation functionally
7 unavailable. It should be amended to cure the situation
8 inconsistent."

9 I am saying that we are looking now for, how does
10 the immediate implementation of the conditions have a
11 material adverse impact, compared to being able to later
12 argue that this particular condition is so unreasonable that
13 you cannot avail yourself reasonably of the participation
14 agreement.

15 MR. JABLON: I have got a tri-party answer to
16 that.

17 First, the functionally unavailable test in the
18 license condition refers to what the arbitrator shall look
19 to.

20 JUDGE SMITH: I am talking about the Board.

21 MR. JABLON: You are talking about the Board.

22 I would use a different test because the problem
23 of the functionally unavailability test is that anybody who
24 took it by definition, although they took it under a
25 situation of duress, could in fact take it.



1 But accepting the premise of your question, which
2 is that the Board could later rule under 105(c)(6) that that
3 was unreasonable, let me refer to a concrete situation.

4 The City of Gainesville bought into Chrystal River
5 Florida Power Corporation's nuclear plant. It desired
6 participation opportunities in St. Lucie 2, and Florida
7 Power and Light's other nuclear plants. It couldn't get
8 them. It went ahead and built coal generation. By not
9 having access to alternative nuclear capacity at the time,
10 it had to make other options.

11 Florida Cities are planning all the time, as is
12 Florida Power and Light. Therefore, Cities are hurt by
13 delay in being able to make decisions. So that if a city
14 chooses not to buy into nuclear capacity because of the
15 existence of onerous contract provisions, pursuant to Board
16 approved license conditions, that would hurt them now in
17 terms of limiting their present opportunities.

18 The Cities as public bodies, their managers, their
19 officials, right now, will have to make decisions on very
20 important matters based on license condition language which
21 we believe offends public policy.

22 I think everybody in this room would agree that if
23 something in the license conditions said that the Cities had
24 to sign a contract which violates law, which forces them to
25 do something illegal, that that would be against the public

1 interest, and that the Board could not put its imprimatur on
2 those conditions.

3 We are saying, by the same token, that the
4 settlement license condition language with regard to
5 liability is so harsh that it forces the Cities to make the
6 kind of decision which is inherently against public policy.
7 Therefore, the license condition should be accepted upon
8 condition of modification of that provision.

9 JUDGE SMITH: Let's go both ways. The Cities
10 decide, despite the onerous provision, to enter into the
11 participation agreement. How are they hurt?

12 MR. JABLON: They are hurt in two ways.

13 One way, we honestly don't know what impact it
14 would have on financing, it has to be tested, but I have
15 spoken with FMP Bond counsel, and according to him the
16 contract provisions could have an impact.

17 JUDGE SMITH: I suggest in that case, then, during
18 the hearing you convince the Board that the offer was
19 functionally unavailable.

20 MR. JABLON: Okay.

21 Second, I am suggesting to you, if your statement
22 is, "Well, since it can be changed, if the Cities decide to
23 go in and they are not hurt -- If they don't decide to go
24 in, they are not hurt, just completing where I think you are
25 going, they would not be hurt because they could make a

1 decision later --

2 JUDGE SMITH: Yes.

3 MR. JABLON: I am suggesting that given the NRC's
4 special mandate that presenting the Cities this kind of
5 option is a present hurt.

6 You asked me to address the Board to what sections
7 of the supplemental pleading we sought to file would raise
8 new matters which would be necessary for you to look to. We
9 cited cases and case law in that reply memorandum dealing
10 with the type of contract choice, or the type of license
11 condition choice by analogy, which puts people in the
12 position of making coercive choices, choices under duress.

13 That case law points that there are certain
14 choices people can have to make which cant be against public
15 policy by their nature.

16 JUDGE SMITH: We will listen to public policy
17 arguments, but now we have asked that you limit your
18 discussion as to how the Florida Cities can be hurt
19 materially by the immediate imposition of the license
20 conditions.

21 MR. JABLON: First, they would be hurt materially,
22 as I have stated, by having to make a choice under that
23 circumstance.

24 Second, they would be hurt because there are
25 delays and costs of not inconsiderable magnitude with regard

1 to the litigation process.

2 JUDGE SMITH: I don't want to lose the thread of
3 where the pathway led before we took you, are you hurt if
4 you decide, despite the onerous nature of the condition, to
5 enter into the participation agreement.

6 Then we pointed out that if your experience is, or
7 if in later hearing the terms on their face should be so
8 onerous as to be not available to you. You never did answer
9 that.

10 MR. JABLON: I did not intend to evade the
11 question. I guess my answer is that the process of getting
12 that subsequent relief would create present onerous damage.
13 If your prediction comes to pass, the Florida Cities will
14 only have been harmed if the agreement will have impacted on
15 financing, or if you accept the position that placing them
16 in that position creates harm.

17 With regard to the other side of the equation,
18 obviously if they choose not to buy in, and therefore have
19 to make or choose to make other power supply planning
20 options, the situation would not have been remedial.

21 JUDGE SMITH: That is another matter.

22 MR. JABLON: Yes.

23 With regard to the first question, though,
24 obviously if the predicate of the question is you grant the
25 relief later, then the only way they are harmed is by what



1 happens in the interim. The only things that would happen
2 in the interim, setting aside litigation risk, are the costs
3 of the litigation which are no inconsiderable burden.

4 JUDGE SMITH: The cost of litigation here?

5 MR. JABLON: Yes.

6 JUDGE SMITH: That is the harm?

7 MR. JABLON: The harm, and again the potential
8 impact on financing. I am not saying that there would be
9 one, but there would be something. Once the bonds are
10 floated --

11 JUDGE SMITH: That goes to the inadequacy of the
12 participation agreement, not to the question harm to Florida
13 Cities.

14 MR. JABLON: No, Your Honor, as follows:

15 In order to buy into the plant now, the Cities, or
16 more realistically FMFA, the Joint Municipal Financial
17 Agency, is going to have to float long-term bonds. If they
18 retire those bonds, there will be a cost to the retirement.
19 So obviously, they would be floating bonds now, in light of
20 the present agreements and the present arrangements.

21 If there were an additional cost, and nobody can
22 really predict, it would depend on the state of the market,
23 or how the market looks at it -- but if there were a cost
24 that would go presumably for the life of the bonds. It
25 could be 30 years. There is no way, except, I guess,

1 ordering Florida Power and Light to recompense the Cities as
2 a license condition, to make that back.

3 JUDGE SMITH: So your view is that even if, after
4 litigation, we did decide that that provision was onerous,
5 that you, by electing to go into it, would be irreparably
6 damaged by it.

7 MR. JABLON: We could be.

8 JUDGE SMITH: Or could be.

9 MR. JABLON: I am not saying that we would be.
10 All I can represent to the Board is that I have spoken to
11 FMPA bond counsel on the subject, and quite candidly he
12 doesn't know. He says that it could have an impact, but it
13 could not have an impact, and you don't know until you make
14 the decision, and try to float the bonds.

15 JUDGE SMITH: I understand, and I think you made
16 that point.

17 MR. JABLON: I just don't want to be
18 misinterpreted. I don't want to mislead.

19 JUDGE SMITH: Let's take the other tree, then. If
20 you believe that there is a material risk that you will be
21 damaged financially, your option is to not enter the
22 participation agreement individually.

23 How does the implementation of the license
24 conditions prejudice any city who wishes to make that
25 election?

1 MR. JABLON: To the extent that they make
2 alternative power supply choices in the interim, which is
3 their option, or just to the extent that the participation
4 costs are higher, because later when they go in, they go in
5 having borne of Florida Power and Light's interim financing,
6 they would have been hurt.

7 Incidentally, if I can say one thing on the
8 liability clause. The question of the liability clause
9 itself is largely a legal question insofar as it touches the
10 public policy, and it is the kind of thing that can be
11 decided quickly under the public interest standards.

12 JUDGE SMITH: Let's take your last point. You say
13 that in the interim, the Cities would have to make
14 alternative power choices until there is a judgment on
15 whether a particular provision is onerous. However, if you
16 convince us that we should not impose these license
17 conditions, that same situation will prevail.

18 If you convince us that this agreement should not
19 be implemented, and that the condition should not be
20 attached, the very same delay about which you complain could
21 happen.

22 MR. JABLON: Your Honor, Florida Power and Light
23 has not represented to this Board that it would not accept a
24 license condition that this Board ordered in the public
25 interest, and I suspect they would.

1 I find it very hard to believe that if this Board
2 found, under the public interest standard --

3 JUDGE SMITH: Please, the public interest, we will
4 come back to the public interest as a separate section. I
5 want to talk about damage to Florida Cities.

6 MR. JABLON: In response to your last preceding
7 question, Judge Smith, your question to me was, would not
8 the same situation obtain if FP&L withdrew the license
9 conditions.

10 The answer is, yes --

11 JUDGE SMITH: The real question was, if you
12 convince the Board that the settlement is so mischivious, so
13 capable of causing damage to you that we have to order a
14 hearing, then you would be in the exact position, it seems
15 to me, that you said would obtain if you did not enter the
16 participation agreement.

17 MR. JABLON: No, Your Honor.

18 JUDGE SMITH: It is a question of time lapse.

19 MR. JABLON: Let me explain why not.

20 I believe that the responsibility of this Board,
21 and what the Florida Cities are asking you to do is to
22 accept immediate implementation, but to attach certain
23 license conditions.

24 JUDGE SMITH: Is that option available to us?

25 MR. JABLON: Yes, it is, Your Honor. I think that

1 it is not only available, I think that it is required under
2 law.

3 JUDGE SMITH: Without a hearing?

4 MR. JABLON: Yes, Your Honor.

5 The most basic question is, what standard you are
6 operating under in reviewing the settlement. Florida Power
7 and Light, in response to what you have called our
8 unauthorized pleading, and we both agree that you do have a
9 review function under a public interest standard.

10 We might disagree as to the application of that
11 standard, but you have a review function.

12 JUDGE SMITH: That is the public interest
13 standard, and I understand that.

14 MR. JABLON: I think under the Catawba case, cited
15 by the government, and cited by Florida Power and Light in
16 their pleading, they used the term "public interest" by
17 which I take to mean, and which is all we are asking for
18 here, is if certain elements in those license conditions
19 would be offensive of the public interest, so that even as a
20 settlement you could not or should not accept it, but that
21 the standard would be cured if there were conditions, you
22 could approve the settlement on conditions.

23 JUDGE SMITH: All right.

24 MR. JABLON: Florida Power and Light would then
25 have the choice --



1 JUDGE SMITH: I understand that.

2 MR. JABLON: I would submit --

3 JUDGE SMITH: But it doesn't mean that we have the
4 authority to impose conditions in addition to the conditions
5 consented to by the agreeing parties.

6 MR. JABLON: They could withdraw the settlement,
7 if they do not accept the conditions.

8 JUDGE SMITH: Yes.

9 MR. JABLON: But they haven't. It seems to me
10 that as a practical matter --

11 Let me trace the scenarios through with the
12 options. Take this liability clause, for example. If you
13 ordered a condition that eliminated the language we are
14 complaining about with regard to this clause, Florida Power
15 and Light realistically would be faced with the following
16 choices: either to accept modified language, and accept the
17 settlement whereby it would get certain advantages, which is
18 a cessation of litigation with the government; or to reject
19 it.

20 I say to you candidly here today, if FP&L were to
21 reject the conditions, and put us in the analogous situation
22 you are talking about where we couldn't get anything, we
23 would have to say to you, "Give us that option." But I
24 think it would be preferable for you to give the option of
25 your judgment as to whether the license conditions are in

1 the public interest with regard to the limited category of
2 items we have placed before you under Scenic Hudson, and
3 under Atlantic Refining.

4 JUDGE SMITH: Let's remember that that was a
5 digression.

6 MR. JABLON: Yes.

7 JUDGE SMITH: Let's assume that the Licensing
8 Board concludes that in the absence of an evidentiary
9 hearing, in the absence of some type of inquiry into the
10 facts, we could make no determination as to whether any
11 particular provision is or is not in the public interest.

12 MR. JABLON: Yes, Your Honor.

13 JUDGE SMITH: So our only choice is to either
14 approve the conditions in the settlement agreement or not.
15 Going back to that, under that assumption, are you any more
16 injured by a delay in the hearing and arriving at a decision
17 on the record -- a delay encompassed by that, or by not
18 signing the participation agreement and seeking relief
19 before the Board. Both are a question of time according to
20 your demonstration of the injury.

21 MR. JABLON: Under your hypothesis, no, Your
22 Honor. We are not more injured.

23 If the Board were to rule that it cannot make a
24 relatively expeditious ruling on the proposed conditions,
25 and therefore there would have to be a hearing, then



1 obviously we would be equally injured by the delay one way
2 or the other, if I understand your question. I am going on
3 the basis of your hypothesis.

4 JUDGE SMITH: Then I think we would come to the
5 conclusion, then, that the immediate implementation, absent
6 the public interest considerations, of the conditions, with
7 the opportunity of Florida Cities, after hearings, to argue
8 for adjustment, would not immediately cause materially
9 adverse impact.

10 MR. JABLON: Assuming that there were no impact on
11 the financing, and assuming that there were no carry-over
12 from the contract provisions, yes.

13 JUDGE SMITH: My point is that if we were to
14 impose the conditions, and you thought that the terms were
15 so onerous that you did not sign them, then the imposition
16 of the conditions would not injure you any more than if we
17 decided we had to have a hearing in the public interest.

18 MR. JABLON: May I have that question read?

19 JUDGE SMITH: I have tried to take you both ways.
20 One way is how you are injured if you signed. You say, we
21 may incur expenses that we will never recover. That would
22 be an injury from the immediate imposition of the
23 conditions.

24 MR. JABLON: Right, Your Honor.

25 JUDGE SMITH: On the other side, how would you be

1 injured if we ordered the immediate imposition of the
2 conditions, but you did not sign, you did not accept them.
3 I think we have to come to the conclusion that you would be
4 no more injured than if you prevailed upon us not to impose
5 the conditions, and we set it down for hearing.

6 MR. JABLON: We are not asking you not to approve
7 the conditions. We are asking you to approve them with
8 conditions. Obviously, to the extent the harm comes from
9 delay and litigation costs, to that extent whatever causes,
10 it creates the same harm.

11 JUDGE SMITH: Let's ask what your position would
12 be if looking at the papers, and even your unauthorized
13 filings, we could not find a public interest impediment to
14 approving the conditions. What would you have us do?

15 MR. JABLON: Approve them.

16 JUDGE SMITH: Approve them.

17 MR. JABLON: If you could not find a public
18 interest impediment.

19 JUDGE SMITH: Based upon the papers you have
20 filed?

21 MR. JABLON: Yes.

22 JUDGE SMITH: You are willing to have us look at
23 these papers, and if we cannot find that there is a public
24 interest contra-indication to imposing the conditions, then
25 you would support us in imposing the conditions.

1 MR. JABLON: Yes, Your Honor.

2 JUDGE SMITH: Is this new information?

3 MR. BOUKNIGHT: Yes, Your Honor.

4 JUDGE SMITH: Is it helpful?

5 MR. BOUKNIGHT: Yes, it is quite helpful.

6 MR. JABLON: Obviously, just because it is a
7 printed record, the opportunity to seek to prove a situation
8 inconsistent, and to get them approved.

9 JUDGE SMITH: Yes.

10 MR. JABLON: I would have an additional comment.

11 Your hypotheticals have gone, suppose after a
12 hearing, the Board does this, or the Board does that. I
13 still believe that in the same way, and for much the same
14 reason, there is a harm when you go to park your car at the
15 theatre, and you see stamped on the ticket that "We are not
16 liable for anything," and you have got the tickets for the
17 theatre a little later.

18 Not to trivialize it, but there is a harm to
19 people making choices in a world of uncertainty, when those
20 choices have a coercive impact.

21 JUDGE SMITH: I don't think I can quarrel with
22 that, but its application to this case, I think, has to
23 depend upon the realities.

24 We are going to have to make a decision one way or
25 the other, either to approve, set it down for a hearing, or

1 take the recommendations that you made, say, only on certain
2 conditions.

3 MR. JABLON: May I discuss, with regard to the
4 liability clause now, what you have referred to as the
5 public interest?

6 JUDGE SMITH: We will be come bac to that, and I
7 would appreciate it if you would go to the next way in which
8 you believe that the immediate imposition of the conditions
9 will injure the Florida Cities.

10 MR. JABLON: Yes, Your Honor.

11 In the Orlando and Ft. Pierce settlement
12 agreements, provisions were made for what is called an
13 "amusing industry."

14 JUDGE SMITH: I think I was premature there. I
15 think that we should have gone to the parties for comment on
16 this allegation of injury before we move on to the next
17 one.

18 MR. JABLON: Certainly, Your Honor.

19 JUDGE SMITH: Mr. Bouknight?

20 MR. BOUKNIGHT: Mr. Smith, it seems to me us that
21 the matter is pretty simple. As things stand without a
22 settlement, the Cities have no choice to make. The
23 settlement gives them choice to make.

24 It also gives them that choice, without
25 prejudicing their right simply to say, no, and continue with

1 the litigation. So that delay is inherent without the
2 settlement.

3 Would you prefer that I hold any comments that I
4 have on the public interest aspect of what Mr. Jablon has
5 been saying?

6 JUDGE SMITH: Yes, I think so. I think that it
7 would be helpful if we had that all in one section. I think
8 if we had a listing of the way in which immediate
9 implementation will materially adversely impact upon the
10 Florida Cities, it would help the Board understand what we
11 have to consider.

12 MR. BOUKNIGHT: All right.

13 JUDGE SMITH: I understand now that you have put
14 necessarily a limit on all of the injuries, because you say
15 you would rather have it imposed.

16 MR. JABLON: There is no question about that.

17 JUDGE SMITH: Continue.

18 MR. JABLON: I never meant to imply otherwise.
19 Our original motion said, to approve the settlement on
20 condition.

21 Let me make a general comment, because this
22 applies to every condition I am going to state, rather than
23 to go through these same questions.

24 In terms of the financing of the participation
25 agreements, and in terms of the considerations the city

1 boards have to make, they will have to take into account the
2 package.

3 In our judgment, the settlement license
4 conditions, either by dint of what is there or what is not
5 there in a number of respects which I would list, make the
6 deal less good. These things could have a cumulative
7 effect. The same impacts we have been discussing would
8 apply to each one. I think the best thing is just to list
9 each item.

10 JUDGE SMITH: This is, less good. This is,
11 inadequate. This is not per se injurious, but this is
12 something less than what you need, that you are talking
13 about.

14 MR. JABLON: No, I think in the totality, the
15 failure to condition the license conditions as we request
16 would and certainly could cause harm, because I think the
17 total package would be so much less advantageous.

18 I do not say that in derogation of my previous
19 statement, that I want to give my clients a choice, and a
20 meaningful choice. If the Board determines against me, that
21 I have not made an adequate showing, and if you determine
22 that the public interest conditions are not warranted, I
23 want you to approve this settlement.

24 Coming to the next item, the license, as I have
25 alluded to, dealing with participation, gives the company

1 the sole discretion to contract and manage the plant. With
2 regard to that license condition, there is no counter-factor
3 which says that the company in exercising that discretion
4 shall either give consideration to the needs of the other
5 parties.

6 We believe that it is fair for the company, as
7 majority owner, and taking into account my clients, the only
8 system I believe practicably who could operate the nuclear
9 plant, we believe that it is fair to give it that control.
10 We believe that in the exercise of that control, it should
11 be constrained to take into account the interests not only o
12 itself, but the other parties.

13 We believe that if in making the decision it
14 chooses to favor its own interest as against the interest of
15 the other parties, that it should reasonably agree to make
16 the Cities whole. The suggested wording which would be
17 acceptable to the Cities is in our reply pleading on page
18 20.

19 JUDGE SMITH: This is your answer to the joint
20 motion?

21 MR. JABLON: Yes, page 20. This is the reply of
22 Florida Cities January 8, which you have rejected. The
23 suggested language is there.

24 Let me explain what I did. I originally took
25 Florida Power and Light's motion as it was, and the Staff's

1 and the Justice Department's motion, as a procedural motion,
2 making an assessment, if you will, of Florida Power and
3 Light's reply -- In other words, a procedural motion on how
4 to handle it.

5 Making an assessment from their reply, it seemed
6 ill-advised to me not to have given specific language, so
7 that you could rule based on the pleadings as to what was
8 and what was not in the public interest with regard to these
9 conditions. So I set down language for you which would be
10 acceptable to us.

11 We regard to the control provisions, we are
12 saying, no more than a license condition which says that
13 they have complete control with regard to the operation of
14 the plant, and ought to put some responsibility on them as
15 to taking into account the interests of other participants.
16 Therefore, we suggest the provision.

17 For reasons expressed in the pleading, this could
18 have serious impacts. For example, they could make
19 operating decisions based on their own operating needs, so
20 that we would have paid for capacity or energy, but not get
21 it.

22 JUDGE SMITH: First let me inquire. Is this
23 provision unacceptable?

24 MR. BOUKNIGHT: Yes, sir, it is entirely
25 unacceptable. What it would do --

1 JUDGE SMITH: We will come to that.

2 There is a question that has been raised here,
3 which I have never heard the answer to, and that is, if
4 Florida Power and Light has the potential liability for
5 failure to discharge its authority in accordance with good
6 utility practice -- if they have the additional liability,
7 but they only receive pro rata the benefits of the plant,
8 should they not be compensated then for the additional
9 liability.

10 MR. JABLON: I would think not.

11 JUDGE SMITH: All right, give your reasons for
12 that.

13 MR. JABLON: The reason FP&L would be making
14 available participation shares -- Let me back up.

15 It is not true that they would not make any
16 "profit," or they wouldn't be compensated at all, in the
17 sense that in constructing the plant, they would expect to
18 receive and would receive compensation for their equity
19 costs, which in common parlance is what we call profit.

20 They would not receive additional profit, or
21 additional compensation above costs. The reason for that, I
22 think, enures in public policy that under the Atomic Energy
23 Act there is a purpose to disseminate the benefits of
24 nuclear power broadly. They would be selling the
25 participation shares in consideration of a settlement

1 agreement with the government, which I think is valuable to
2 them.

3 JUDGE SMITH: Is it proportionally more valuable
4 to them than it is to the other participants?

5 MR. JABLON: Certainly, if the other participants
6 do not have access to nuclear power, an equal amount is
7 proportionally more beneficial to them.

8 If they own the plant and simply sell power from
9 that plant, they sell it at a regulated rate of return which
10 only compensates them for their equity investment. In that
11 sense they do not make "a profit," or an additional
12 "profit."

13 What they are doing, when they make available
14 capacity, is that they are giving the Cities a right to get
15 those purchases in an ownership context, rather than having
16 to purchase power from them.

17 I would say that the fact that they are applying
18 for a license to construct, and ultimately to operate a
19 nuclear plant, that is to make use of governmentally paid
20 for and developed technology.

21 The fact that they are the only ballgame in town
22 in an antitrust sense would mean that they ought to have
23 obligations to operate the place for the interest of all
24 participants, without any extra profits.

25 JUDGE SMITH: Not extra profits. I am not talking

1 about extra profits. I am asking what compensation would
2 you suggest that they should have, if any, for extra risk?

3 MR. JABLON: Not for extra risk, but we would pay
4 our share, our proportionate share of the investment and
5 operating costs of the unit the same as they would.

6 They have an obligation in law, Your Honor, to
7 operate the plant in accordance with some reasonable
8 standard of care. The reason why we have not stated to this
9 Board that they ought to have a stricter liability standard
10 is in recognition of the fact that you are questioning.
11 That is, we have not said that they should be liable for
12 their negligent acts in all events, or that kind of thing.

13 JUDGE SMITH: You are going to public interest
14 now.

15 MR. JABLON: I am trying to explain why I don't
16 think they should get an additional profit. The reason I
17 use the term "additional" is because they are being
18 compensated for their managerial costs in operating the
19 plant and their equity investment, it is because of these
20 factors, for the additional risk, if you want to call it
21 that, that they are taking.

22 JUDGE SMITH: All right.

23 MR. JABLON: In other words, I am trying to answer
24 your question as to why we should not have to pay them extra
25 in order for them to have a responsibility for operating the

1 plant under normally acceptable standards of care.

2 JUDGE SMITH: I understand that, and I was trying
3 to inquire as to whether part of the argument is that the
4 public interest requires that they do it well. You made
5 that argument somewhere in your papers.

6 But now I am talking vis-a-vis the partners in the
7 plant, what justification do you have to assign a
8 disproportionate amount of risk, but only proportionate
9 benefits from the plant?

10 MR. JABLON: I would think, in answer to your
11 prior question, there is a public interest argument. I
12 would list a number of factors for you.

13 The first factor is that --

14 JUDGE SMITH: You are going to talk about the
15 public interest in running the plant well?

16 MR. JABLON: Yes, Your Honor. I am not trying to
17 be argumentative, I am trying to take a second to
18 understand.

19 JUDGE SMITH: I would like to avoid a digression,
20 so summarize what you are going to do, but I am still trying
21 to come back to the original thing, how are you going to be
22 materially adversely impacted upon by the immediate
23 imposition of these conditions.

24 Still, you are talking about an onerous condition,
25 and the onerous condition which you describe is one which

1 onerous apparently solely in the public interest. I want to
2 talk about how it is onerous to Florida Cities.

3 MR. JABLON: You are treating the fact of the
4 Cities making a decision under these circumstances as a
5 public interest consideration. If that is the case, then
6 the only factors I have for really all of these would have
7 been the factors that I discussed before.

8 This clause is offensive to the public interest,
9 and in cumulation these clauses and the contracts clauses
10 that come out of it could impact adversely on financing if
11 we go into it.

12 JUDGE LAZO: Mr. Jablon, why don't you give a
13 specific example of where the interest or the needs of the
14 parties might conflict related to the construction or the
15 operation of the plant.

16 MR. JABLON: Surely, I think this situation
17 happened in the Midwest, and it certainly could happen in
18 Florida.

19 Florida Power and Light, I believe, is planning
20 the construction of coal plants. It has three nuclear
21 plants now, and this will be a fourth. During conditions of
22 low load availability, Florida Power and Light might decide
23 to cut back from generation, or shutdown St. Lucie 2, to
24 operate its coal plants because during periods of high load
25 availability it would need the coal plants, and I



1 understand, although I am not an engineer, that you have got
2 to keep those coal plants running at some level, or it takes
3 a long time to bring the steam up so that they can generate
4 electricity.

5 For example, Florida Cities would not have an
6 interest in Florida Power and Light's coal plants. I am not
7 suggesting that in the situation where Florida Power and
8 Light shutdown the nuclear plant for its operational needs,
9 that it should not be able to do so. As owner of the
10 majority interest of the plant, it ought to be able to do
11 so.

12 On the other hand, it might be reasonable, under
13 such circumstances, for it to sell us some of the
14 alternative coal power at its cost, rather than Florida
15 Power and Light, having shutdown the plant in which we
16 invested, and we having to replace the electrical energy
17 with oil generation. It is that kind of consideration.

18 JUDGE SMITH: The economic considerations.

19 MR. JABLON: I can hypothesize non-economic
20 considerations, but I think they would largely be economic,
21 yes, Your Honor.

22 I think that this is unlikely with regard to St.
23 Lucie 2, but it could happen, accelerating or delaying the
24 time scheduling of the plant coming on line for FP&L's
25 financial or other needs, load needs, when we have

1 invested.

2 Again, I am not suggesting that they ought not to
3 be able to make that decision. But I am suggesting that NRC
4 license conditions, which point to this sole discretion, and
5 which are slightly but only very slightly ameliorated by the
6 Orlando contract, are not in the public interest.

7 I am suggesting that if you cumulate these things,
8 and given that FMPA is the new entity which would have to
9 finance, that that could create problems.

10 I am finally suggesting that we are really making
11 a legal policy argument, in part, which is what you
12 criticized me for, Judge Smith, but that you can look at
13 these license conditions, and you should look at them, in
14 the context that if they could one way or the other, but not
15 terribly bad, whatever I said, you would probably be
16 inclined to approve them. But if I convince you that some
17 of these provisions are, in fact, offensive, it seems to me
18 that you have the authority, and should say that acceptance
19 of the settlement license conditions under these conditions
20 are offensive --

21 JUDGE SMITH: I understand that argument, and you
22 are going to have ample opportunity to talk about the public
23 interest. What I am trying to reconcile now is, you wish to
24 preserve the right to sue Florida Power and Light if they do
25 not operate in accordance with good utility practice, but



1 you don't give a commercial justification for it. You give
2 solely a public interest justification for it.

3 MR. JABLON: No, to the extent we said that the
4 contract provisions could impact upon the financing, that
5 would be a commercial justification.

6 JUDGE SMITH: But as far as the provision of good
7 utility practice is concerned, you agree that you don't have
8 in itself a justification for being able to sue them with
9 the enhanced risk, without compensating them for the risk,
10 except for a public interest.

11 MR. JABLON: I was addressing myself in the
12 previous question to the control provisions.

13 No, I think I responded the other way. Let's put
14 it this way. I think that provision would create commercial
15 harm to us. Otherwise, I don't know how to answer your
16 question, Judge Smith.

17 JUDGE SMITH: Let me review once again.

18 Would you concede that this provision would expose
19 Florida Power and Light to a financial risk that was not
20 shared by the other owners of the plant?

21 MR. JABLON: Under some circumstances, yes.

22 JUDGE SMITH: And it would not be reflected in any
23 adjustment in costs, or in compensation to them for taking
24 this risk?

25 I mean, would you all chip in pro rata to an

1 insurance policy on it, for example?

2 MR. JABLON: We would share the cost -- Under the
3 Orlando agreement, we would share the total cost of
4 insurance, yes. But let me be candid with you, the reason
5 for the liability clause is because these things may not be
6 totally compensated for by insurance, so to that extent your
7 question is correct -- that is the thrust of your question
8 is correct.

9 JUDGE SMITH: So you are still arguing, then, in
10 sum, that this condition which requires them to expose
11 themselves to additional financial risk out of proportion to
12 their ownership, injures you only in that it may interfere
13 with your financing. But your main argument is that it is
14 against the public interest to do it.

15 MR. JABLON: Yes, -Your Honor.

16 JUDGE SMITH: If we find that the public interest
17 is otherwise protected, let's say, for example, by the NRC,
18 would your argument prevail?

19 MR. JABLON: If you find that I am wrong, my
20 argument would not prevail.

21 JUDGE SMITH: You depend very heavily, then, upon
22 the public interest argument.

23 MR. JABLON: Yes.

24 JUDGE SMITH: And you don't assert a commercial
25 fairness to it?



1 MR. JABLON: I think there is a commercial
2 unfairness --

3 JUDGE SMITH: This is what I have been unable to
4 try put. I can't find what that is.

5 MR. JABLON: I think there is a commercial
6 unfairness for dependent parties in competition with FP&L --
7 we must have them operate the plant, that is the only way we
8 have access -- for them not to act in accordance with some
9 standard.

10 JUDGE SMITH: What if the Board would say, "You
11 are right. You have a right to expect them to perform in
12 accordance with good utility practice. However, that
13 additional risk you have to pay for." Would you accept
14 that?

15 Certainly you have the right to expect them to
16 perform well, but they are the only people who have any
17 liability for failure to do it. Are you willing to
18 compensate them for that?

19 MR. JABLON: The answer is, I don't know. I have
20 not consulted with my clients, and I don't know. However,
21 for reasons stated in my pleadings, I don't think there
22 ought to be that requirement.

23 I guess what you are asking me is, if the Board
24 were to come down with a condition, which would place
25 burdens on the Cities without defining those burdens, what

1 would my reaction be.

2 I would like to give you a definitive answer, but
3 the question is too abstract for me to deal without giving
4 it some consideration, especially in view of my primary
5 position that in view the government investments in the
6 technology, and what-have-you, they have an obligation.

7 I would certainly look closely at anything the
8 Board deemed fair.

9 JUDGE SMITH: All right.

10 Have we completed the third area in which you
11 believe that implementation would have an adverse impact?

12 MR. JABLON: Yes, except that I would like to
13 alert the Board that the example of cutting back on
14 operation was simply an example. It goes to the totality of
15 the operations of the plant, and obviously there are all
16 sorts of ways in which they could act solely based on their
17 company's interest, without taking into account other
18 interests.

19 JUDGE SMITH: All right.

20 MR. JABLON: I started to comment before on the
21 issue of what I call reliability and sell back.

22 May I ask, is the Board familiar with the terms;
23 because if you are I will not define them.

24 In the Orlando and Ft. Pierce settlements, and in
25 other participation contracts, there have been recognized

1 two commercial concepts. The first concept I would refer to
2 as "sell-back."

3 Very often municipal systems, or for that matter
4 rural electric co-operative systems, can finance plant
5 participation at lesser financing costs than can an investor
6 own utility, such as Florida Power and Light.

7 Therefore, if the municipal system buys more of
8 the plant than he would have without the sell-back provision
9 or, putting it another way, sells a portion of the capacity
10 in energy from what he buys to Florida Power and Light,
11 Florida Power and Light could receive the economic benefits
12 of that capacity in energy at less cost than had it financed
13 it itself. There are Internal Revenue standard limitations
14 on the extent to which you can do it and preserve municipal
15 bond financing.

16 By the same token, the municipals can make a
17 profit on the sale, so both sides are commercially better
18 off. Depending on the characteristics of the particularly
19 deal, it is advantageous to the municipals in that they can
20 grow into future capacity as load grows.

21 The concept of a reliability exchange is that,
22 say, as is the case here, Florida Power and Light owns St.
23 Lucie 1, or three operating nuclear plants, and the Cities
24 would own an interest in the fourth. If the Cities pay for
25 that entire interest at the cost of the fourth plant, which



1 would be more expensive, but immediately trade that capacity
2 for interest in the other plants on a megawatt for megawatt
3 basis, they have the same amount of capacity, but you have,
4 in effect, an insurance scheme among the parties which is
5 advantageous to both parties, because you are sharing the
6 risk of that unit, and all of your plants being out of
7 service at one time, or being in service at one time.

8 In the Orlando and Ft. Pierce settlement
9 agreements, provision was made for those systems to have the
10 advantage of a sell-back and reliability exchange. As I
11 have said, these have been in other license provisions.
12 They are not provided for in the license conditions, and
13 Florida Power and Light has said that they would not make it
14 available to the Cities, because the Cities have not
15 settled.

16 I can argue the point, but essentially this is one
17 of the points which has a good deal of commercial advantage
18 for the Cities. We think that if it is to be made available
19 to other parties in this case, that it ought to be made
20 available here because it is discriminatory not to do so.

21 Do you want me to argue the point, or should I
22 just go on to the next one?

23 JUDGE SMITH: Does it relate again to the adequacy
24 of the participation agreement, or does it relate to the
25 adverse which might flow from the immediate imposition of

1 the conditions?

2 MR. JABLON: Only to the same extent that the
3 Cities are deprived of what could be highly advantageous
4 contract clauses to them, that it could impact on financing,
5 how the market views it, and it could impact on the
6 decisions the Cities make.

7 All of these, Your Honor, ultimately impact in
8 only the same way, plus the public interest considerations
9 inherent in what we would deem a discriminatory --

10 JUDGE SMITH: Which we are going to come back to.

11 MR. JABLON: Yes.

12 JUDGE SMITH: Why don't you summarize the
13 different ways in which an onerous condition could affect
14 your financing.

15 MR. JABLON: In terms of the other provisions, our
16 back up, I think we are all right on it, but we are unclear
17 as to how and if the company would provide backup when the
18 plant is down to systems who may need it. We may have a
19 problem, depending on what the company says.

20 With regard to the timing issue, which the Cities
21 have raised, my understanding is that FMPA has reached an
22 agreement with Florida Power and Light on it, so that is no
23 longer an issue which you have to rule on.

24 With regard to the deposits under the license
25 conditions, the Cities would have to make a 10 percent

1 deposit before receiving the contract. The Cities can do
2 it. I am informed the Cities can, from FMPA practically,
3 get the deposit.

4 My understanding also is that if the Cities do not
5 sign, because they feel they cannot accept the contract
6 terms that may come out of arbitration, or otherwise, that
7 they would get the deposit returned. I would argue,
8 however, that for public interest factors, the deposit ought
9 not to be imposed.

10 Second, it would be easier, or could be easier for
11 the Cities to finance, I am informed by FMPA counsel, if the
12 money were escrowed, and if they received the interest
13 back. I think on this one my argument is slightly
14 different. I can't imagine any city not choosing to go into
15 the investment because of the deposit. I am informed that
16 the FMPA can finance it.

17 The terms of the deposit could be less good, that
18 is they would have to pay higher interest rates to borrow
19 the money, it could be more difficult for them to get the
20 deposit, if they are not guaranteed return of the interest,
21 and if the money is not escrowed.

22 I think that completes of areas where we believe
23 conditions would be appropriate. I, of course, don't mean
24 to imply that there aren't other areas where the license
25 conditions are not, in my clients' view, atrocious, but they



1 would not have a bearing upon the immediate implementation
2 issue.

3 JUDGE SMITH: Then would you summarize once again,
4 since many of these issues are related to the ability of the
5 Cities to raise financing, how frustrating that ability has
6 an immediate adverse impact?

7 MR. JABLON: Yes, Your Honor.

8 The way the Cities will finance their
9 participation shares, this is almost a certainty, although a
10 city could go its separate way, is through the Florida
11 Municipal Power Agency, which is a joint municipal agency.
12 That agency would plan to float long-term bonds, which would
13 be rated, of which the financing would depend upon the
14 various factors which Wall Street looks to.

15 To the extent that the participation contract in
16 toto is less advantageous, it could have an impact, or could
17 not, on the way Wall Street looks at the bonds. Based on
18 the discussions I have had, we simply can't predict to what
19 extent Wall Street would take into account these factors.

20 I would like to be able to say more, but this is a
21 new agency. It has never floated bonds before, never for a
22 project like this. The Cities are relatively small, say,
23 compared to even Orlando or Jacksonville, and we assume that
24 we can float bonds, and I think the impact, if any, would be
25 in terms of the terms which could have a definable cost.

1 JUDGE SMITH: That is irreversible?

2 MR. JABLON: Yes, Your Honor.

3 You have classified the other matter as a public
4 interest matter, but I do deem it an irreversible effect to
5 have public bodies making a consideration where the result
6 of that consideration, the outcome is at risk if there are
7 terms which on their face are onerous or against the public
8 interest.

9 It is not a dollar and cents matter, but I think
10 it is a very real matter.

11 JUDGE SMITH: Mr. Bouknight.

12 MR. BOUKNIGHT: It seems to me, Mr. Smith, we are
13 down to two arguments that the Cities are making as to how
14 they are affected adversely by the immediate
15 implementation.

16 The first is the question of being put to a
17 choice, and choice that they may find unpleasant. As I
18 mentioned to you a few minutes ago, that is a choice that
19 they don't have now. It would add one additional choice to
20 their range of choices, and it is difficult to see how that
21 is prejudicial.

22 The financing point, I think we ought to talk just
23 a little bit about just how these Cities go about
24 financing. The security for these bonds issued by the
25 Florida Municipal Power Agency is two things.



1 First, contracts from each of the member Cities
2 committing to make payments to FMPA sufficient to pay all
3 of its costs, including debt service, unconditionally, 'come
4 hell or high water," as the term used on Wall Street,
5 whether or not the plant operates, whether or not it
6 produces any electricity.

7 The second element of the security is a covenant
8 by each municipality that it will fix retail rates at a
9 level that is sufficient to meet all of its costs, and to
10 make all of the payments that it has to make under the FMPA
11 contract.

12 That is the underlying security, and that is why
13 neither FMPA's bond counsel, or anyone on Wall Street is
14 going to come in here and testify that the financing for
15 these Cities is going to be higher because of a particular
16 provision of a participation agreement.

17 I think the second thing that has to be added to
18 that is that three weeks ago today, the City of Orlando --
19 and FPYL closed under the participation agreement -- paid
20 Florida Power and Light that day a little more than \$45
21 million, and received a 6 percent interest in St. Lucie Unit
22 No. 2.

23 I don't think anyone in Florida Power and Light
24 has heard any complaining by Orlando that they were
25 adversely affected in the financing by any element of the



1 contractual arrangement with FP&L.

2 It seems to me that several of the things raised
3 by Mr. Jablon go probably to the point that you asked be
4 deferred for a few moments. But a couple of statements that
5 were made are troubling, and I would like to correct them.

6 First, in the explanation of the reliability
7 exchange agreement between Florida Power and Light and
8 Orlando, Mr. Jablon indicated, I am sure inadvertently, that
9 an agreement of that sort took effect immediately upon
10 payment.

11 That is not the case in the deal between Florida
12 Power and Light and Orlando. It is the case in some deals
13 that Mr. Jablon has proposed from time to time to FP&L.

14 MR. JABLON: I am sorry. I did not mean to
15 characterize the particular terms of the deal. All we were
16 arguing was the same deal as was offered to Ft. Pierce and
17 Orlando. If I misspoke myself, I apologize.

18 MR. BOUKNIGHT: It also may be of some note that
19 neither Ft. Pierce nor Orlando has indicated any interest in
20 that arrangement. The settlement agreements contain an
21 option, the option is still open, but there have been no
22 expressions of interest in that arrangement to this point.

23 It seems that what we are hearing, aside from
24 those objections to immediate implementation, which Florida
25 Power and Light submits don't have any merit, are two

1 things.

2 The Cities would like to have more. They would
3 like to have provisions that are in the settlement agreement
4 with Orlando that are not in these license conditions. It
5 is understandable that they would like to have more.

6 They also would like very much for this Board to,
7 in effect, negotiate FP&L a bit further along the track,
8 without the Cities giving up any of their litigating
9 rights. That strikes us as terribly, terribly unfair.

10 A settlement has been struck here between FP&L and
11 the two government parties. The Cities had an opportunity
12 to enter into that settlements. There were discussions with
13 the Cities, and FP&L and the Cities just didn't settle.

14 It is not right now for the debate to be about
15 what more should FP&L do, without the Cities giving up their
16 litigation rights.

17 MR. VYM: If I might just add to what Mr.
18 Bouknight has said, just to make a rather obvious point.

19 This joint motion has been pending before the
20 Board for almost five months. It was filed on September 12,
21 and we are it is now February 2nd.

22 In his initial pleading, I believe Mr. Jablon made
23 some reference to the problems that the license conditions
24 might present for the financing of his clients. In
25 response, I know Florida Power and Light pointed out in its

1 pleading, let's have some specifics, let's not just rely on
2 what a lawyer is saying.

3 Here it is five months later, and the most that
4 Mr. Jablon can say is that, maybe I will, and maybe I won't
5 have some problems if the financing. That is as far as he
6 can go. He has not made any showing whatever that
7 implementation of these conditions will present any
8 prejudice to his clients.

9 It seems to me that that obligation is his, and he
10 has simply has not met that burden. I think that it is
11 rather obvious that he hasn't.

12 JUDGE SMITH: Do you agree?

13 MR. JABLON: No.

14 JUDGE SMITH: I am not talking about the public
15 interest. Let's talk about the financing. Other than the
16 financing, what injury have you shown immediate
17 implementation is going to cause?

18 MR. JABLON: Other than that, and the public
19 interest, or in that context, I haven't.

20 JUDGE SMITH: I am talking injury to Florida
21 Cities.

22 MR. JABLON: Other than those two aspects, I would
23 agree, Your Honor.

24 JUDGE SMITH: All right.

25 MR. JABLON: You are asking the question in the

1 context of the hypothetical you gave me before, which is a
2 very controlled context which talks of two choices, when
3 there is a middle ground.

4 If, for example, the Cities feel, on the one hand,
5 that due to any number of factors, the burden of litigation,
6 the lack of availability of what they consider appropriate
7 now, and make a decision to go into other power supply
8 options now, or not to, that has an impact.

9 Your hypothetical assumed that there wasn't a
10 third ground, a third possibility to a hearing, and then
11 additional relief, that is, delay, but a possibility of
12 modification of the license conditions now.

13 JUDGE SMITH: But the only thing that you have
14 given us that it seems to me, it would not be a
15 modification, it would be a conditional modification. The
16 only thing that you have given me that I can identify so far
17 is the public interest, and whatever damage we can see with
18 the uncertainty of the financing.

19 MR. JABLON: The reason that the only thing I can
20 give is a conditional modification, is that it is the
21 position Florida Power and Light has placed you in, because
22 they have the legal right to withdraw the settlement.

23 However, in a real practical world, if it is the
24 sense of this Board that certain provisions are antithetical
25 to the public interest under the standard they cite, there



1 is certainly the possibility for good and obvious reasons
2 that they would choose to follow that advice.

3 If they did, then Cities could make decisions in
4 planning now, obviating the problems of a Hobson's choice.

5 JUDGE SMITH: We are going to come to public
6 interest.

7 MR. JABLON: I understand.

8 JUDGE SMITH: You are afraid that we are going to
9 forget.

10 MR. JABLON: I am really afraid that this
11 transcript can be quoted as my having made concessions on
12 very important matters with regard to my clients. I am not
13 overly cautious --

14 JUDGE SMITH: No, you are being careful. I assure
15 you that we are going to come to the public interest part of
16 it. We are also going to come to the section part which is,
17 do the conditions create or maintain a situation
18 inconsistent, and we have some questions about that.

19 MR. JABLON: Thank you, Your Honor.

20 JUDGE SMITH: As to the arguments that you have
21 made so far, does the Department of Justice have a
22 position?

23 MS. URBAN: Our position is essentially the same
24 Florida Power and Light at this point. My understanding of
25 everything Mr. Jablon has said is that there are some



1 provisions in the license conditions, and in the
2 participation agreement with Orlando that he doesn't like.
3 Some of them, he finds worse than others.

4 He is disturbed that his clients are going to have
5 to make decisions which are a combination of economic and
6 business decisions, and litigation decisions, and he doesn't
7 want to have to make those.

8 I think what we are talking about are real world
9 decisions that you face all the time. As Mr. Bouknight
10 said, there are now more choices than there were six months
11 ago, and there is nothing wrong with that.

12 I would also echo the comment on the financing.
13 The Department understood a while ago that we would be
14 getting some information on the problems, so we would have
15 something concrete to deal with, and we have not seen it
16 yet.

17 This is all I have to say.

18 JUDGE SMITH: Mr. Dewey?

19 MR. DEWEY: To summarize. The only provisions
20 with the Cities are objecting with respect to immediate
21 implementation of the license conditions at this time are
22 the liability provision, the management control provision,
23 and the lack of a reliability and sell-back provision in the
24 license conditions, and the 10 percent deposit aspect.

25 The only substantial reason, as has been discussed



1 by the parties, that he objects to the immediate
2 implementation is the financing aspect. It is the only
3 substantial thing he has been able to do.

4 I don't think he has cited, except for a
5 hypothesis that somehow or another this might adversely
6 affect the financing, anything substantial there.

7 I would like to point out to the Board that there
8 have been past participation agreements for nuclear
9 facilities with some of these same provisions, like the
10 liability that he presently objects to, and the management
11 control provisions have been in these past participation
12 agreements, and to my knowledge, at least, financing was
13 never adversely affected.

14 So the record does point to the fact that contrary
15 to Mr. Jablon's assertion, financing is not going to be
16 adversely affected. Just recently cited by FP&L, the
17 Orlando provision, there has been no adverse kickback from
18 that either, where the financing was affected.

19 I really don't think that Cities has shown why
20 immediate implementation can't go ahead right now, subject
21 to a hearing in which the license conditions can be changed
22 at a later date.

23 JUDGE SMITH: We will take a 10 minute recess.
24 When we come back, we will discuss whether the conditions in
25 the participation agreement would themselves create or

1 maintain a situation inconsistent. Then we will take up the
2 public interest aspects of the participation agreement.

3 (Whereupon, at 3:00 p.m., a short recess was
4 taken.)

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1 JUDGE SMITH: Mr. Jablon.

2 MR. JABLON: Thank you, Your Honor.

3 With regard to the public interest aspects, I
4 think the most helpful thing I can do is to list the sources
5 of that public interest because these spell out the factors
6 that ought to be taken into account in my judgment.

7 Turning to the liability clause specifically, I
8 have set forth for your consideration that the license
9 conditions that we are talking about read in the context of
10 the Orlando agreement can be read to avoid liability by
11 Florida Power and Light to the Cities or to the other
12 co-owners even for intentional harm, even for gross
13 negligence and even where I think counsel for FP&L would
14 agree that if the company did something like that if you
15 focused on the specific that the company ought to be liable.

16 I would say at the outset that we agree at least
17 in part with Florida Power and Light's basic premise and a
18 premise which was in some of your questioning to me, Judge
19 Smith, before; that is, we are seeking to become co-owners
20 of the plant.

21 There is a reasonable argument that can be made
22 that as a co-owner, whatever the source of how we get to be
23 a co-owner, that fairly we ought to bear some of the burden
24 of error or bad management or -- I don't know about bad
25 management but certainly error or negligence or call it what



1 you will. The question is where you draw the line and
2 obviously there are a number of places where one could draw
3 the line.

4 I simply submit to you that where Florida Power
5 and Light has drawn the line is so far over to one side that
6 it does offend public policy.

7 As to the source of the obligation, I think first
8 of all one source to look to is the Atomic Energy Act itself
9 and the purposes leading to the Atomic Energy Act. After
10 all, whatever order you issue will be issued pursuant to a
11 statutory and Congressional concern with the development of
12 nuclear energy.

13 The first factor to be considered, it seems to me,
14 is that ultimately while FP&L postures itself as a company
15 which is taking risks in the language of your question,
16 which is developing nuclear capacity, which is making
17 expenditures and that what we are seeking for may be termed
18 an advantage, that ultimately FP&L is getting a license from
19 a governmental agency to use governmentally developed
20 technology.

21 Unlike the oil leases where companies beg millions
22 and tens of millions of dollars for leases, by and large it
23 is getting that license to use that technology without
24 making payments.

25 JUDGE SMITH: Without paying the developmental



1 costs.

2 MR. JABLON: To the government.

3 JUDGE SMITH: Right. Well, isn't that also true
4 of the other participants?

5 MR. JABLON: That is true, Your Honor, but Florida
6 Power and Light if it gets its licence with or without
7 paying developmental costs would get something very, very
8 advantageous because these licenses are both valuable to its
9 shareholders and customers and are additionally valuable to
10 it in competition. So the granting to us of access is
11 reflective of a public policy.

12 Now, where you have got a monopoly concern, and
13 this would be the third source of rights, their nature of an
14 ability both to monopolize or quasi-monopolize nuclear
15 technology and specific and their just size which permits
16 them to own and operate a nuclear plant, assuming they have
17 a right to those benefits unimpeded, there is an obligation
18 to deal.

19 Now, in that context, if I may summarize three
20 sources of rights, the Atomic Energy Act, the fact of public
21 development but they are benefitting from the public domain
22 and their status of a public interest corporation, if you
23 will, effective with the public interest in the words of
24 Munn, Veel and Noi, it seems to me then that they have an
25 admitted responsibility of great care in operating a

1 dangerous instrumentality.

2 JUDGE SMITH: Are you talking about danger in the
3 sense of public health and safety?

4 MR. JABLON: Yes, Your Honor. For example, if you
5 were to have another Three Mile incident or worse, there
6 would be danger to the public health and safety, but of
7 course the net impact of this is that the owners, Florida
8 Power and Light and the Cities, might be sued.

9 Let's assume that that danger came about because
10 of an action by Florida Power and Light of not training its
11 personnel or an action of Florida Power and Light to operate
12 that plant unsafely for its commercial advantage. Under
13 these license conditions it could defend on the ground that
14 it did not will harm or that it may not have trained its
15 operating personnel and it could defend on grounds of the
16 exculpation clause.

17 In the law where you have an agency, even where
18 you have an agency where you are doing something for me for
19 my benefit, there is some standard of care. If I ask you to
20 take care of my bicycle for my benefit and not from your
21 benefit you still have some standard of care.

22 If there were no exculpation clause, no clause
23 regarding liability whatsoever, Florida Power and Light in
24 court or any place else could defend, based upon whatever
25 principles of agency and negligence and tort liability and



1 contract liability it could conjure up.

2 But what FP&L is saying to this Board is that you
3 should approve a license condition under which it doesn't
4 have to take its chances which would automatically absolve
5 it. I think that such license condition is offensive to
6 public policy.

7 I have some cases which I have cited in a pleading
8 which you have rejected.

9 JUDGE SMITH: We have invited you, however, to
10 restore portions of it upon a demonstration that it was new
11 and necessary.

12 MR. JABLON: Okay. Well, with regard to the
13 liability clause I have cited cases showing the source of
14 the law which I would suggest suggest the standards as to
15 why it is offensive to public policy to contract from
16 liability in the sense which FP&L seeks to do. I would
17 request that you look at that section and at Florida Power
18 and Light's reply.

19 I guess what I am saying in summation is if the
20 settlement is approved FP&L will get benefits. It is asking
21 for approval of a settlement in an NRC imprimatur which
22 takes the government parties as party litigants from its
23 back which practically is valuable so FP&L so feels.

24 Under the Orlando contract which it says it will
25 give to the other parties it makes itself the sole agent for

1 any participant in operating the plant even to the point of
2 contacts with the NRC and even saying that the Cities, if
3 they thought FP&L were doing something wrong in the
4 operation of the plant, can't go to the NRC as owner and
5 protest about it.

6 As I say, FP&L is entitled to control of the
7 operation of the plant. We can't do it. But I think there
8 is some level of responsibility considering its source of
9 rights and for the reasons stated in the cases that the
10 complete absolving from liability is offensive to public
11 policy.

12 JUDGE SMITH: Is it that the participation
13 agreement would foreclose other owners of the plant from
14 bringing to the attention of the NRC issues of public health
15 and safety?

16 MR. JABLON: It could be read as such.

17 JUDGE SMITH: Is that your intention?

18 MR. BOUKNIGHT: No, sir, and I don't think it
19 could be read as such.

20 MR. JABLON: Well that is good.

21 JUDGE SMITH: Well can it be clarified that that
22 is not the case?

23 MR. BOUKNIGHT: Yes, sir. I think it is clear in
24 the agreement. All the agreement says is that the
25 participant cannot invoke its status as an owner to apply



1 for an amendment to the license with the Commission.

2 You may recall that some two or three years ago a
3 position was taken by several parties in one proceeding
4 before this Commission that any participant can simply come
5 in and propose license conditions applying to another
6 participant as an applicant just as if it were the applicant
7 in the project. We intend for Florida Power and Light to
8 deal with the NRC as the applicant and as the licensee.

9 To the extent that the Cities know of anything
10 that offends the public health and safety, they are
11 certainly not foreclosed from bringing it to the attention
12 of the NRC as any other citizen could.

13 JUDGE SMITH: And use the information gathered as
14 co-owners for that purpose?

15 MR. BOUKNIGHT: Yes, sir.

16 MR. JABLON: That is helpful, Your Honor.

17 JUDGE SMITH: Does that alleviate your concern
18 along that line, I mean the public interest concern?

19 MR. JABLON: It alleviates my concern along the
20 specific line of our not being to complain to the NRC. It
21 does not alleviate my concern with regard to the liability
22 clause because ultimately you still have a proposition that
23 the operative of the unit can do purposeful acts which
24 directly cause great harm and subject the Cities and their
25 ratepayers to great harm with it taking no responsibility

1 vis-a-vis the Cities for those acts.

2 Now, with regard to the commercial context, Your
3 Honor, there is no question, setting aside whether we can
4 prove a situation is consistent or not because I agree that
5 is not the standard, but there is no question that the offer
6 of participation and the request for license conditions to
7 the NRC does come about in the context of a Congressionally
8 perceived concern that larger entities practically would be
9 able to construct and operate nuclear plants, and smaller
10 ones might be injured if they do not get injured
11 competitively and for that matter economically if they
12 cannot get access. So that the commercial deal has that
13 context.

14 The Cities may well perceive that if FP&L is into
15 nuclear power that they have no commercial choice if they
16 are going to continue to exist as independent entities but
17 to invest in the plant. Obviously, as we have discussed
18 before, they have choices. They can simply not do it, but
19 that does not make the choice a practical choice.

20 The case law in terms of objecting to exculpatory
21 clauses of one kind or another talks about precisely this
22 kind of situation where one side of an equation has a
23 natural leverage. I think that you can well find here that
24 this is precisely the kind of situation that was meant.

25 I think also the company and so some extent the



1 government, although the government has stipulated that it
2 would support the license conditions without changes, but
3 certainly the company is taking the position that, well, you
4 take the settlement agreement as you find it, that the
5 settlement agreement provides for certain rights, and it
6 does, there is no gainsay in that, and that therefore why
7 ought there to be more.

8 But there is one "but" to that proposition. The
9 company is asking this Board's imprimatur on this and it
10 agrees that you have a public interest review function.
11 When they get a government imprimatur on something not only
12 may it have value, the seal of approval if you will, but you
13 ineluctably involve yourself in the process in asserting
14 that something is all right.

15 Under the Scenic Hudson case I would submit that
16 even though this is an approval of a settlement you can
17 stand back from the fray. What we are talking of here is in
18 one sense ancillary. It is a contract provision for
19 participation which FP&L for its own reasons has decided to
20 give. It is before an agency which has determined that
21 there are certain responsibilities which are non-deligable
22 under your statute. I think in that context there is an
23 obligation and an ability to rule on the liability component
24 of the license conditions.

25 I have no more on that.



1 JUDGE SMITH: is that your entire argument on
2 public interest?

3 MR. JABLON: With regard to the liability clause,
4 yes.

5 JUDGE SMITH: Aren't you asking the Scard to walk
6 a very fine line as far as your case is concerned? You want
7 us to find that the public interest requires some conditions
8 to the approval but you don't want us to find that the
9 public interest requires rejecting the settlement out of
10 hand.

11 MR. JABLON: That is the line I am asking you to
12 walk for the following reason, that the parties have reached
13 a settlement agreement and the settlement agreement provides
14 for certain benefits and if the offensive portions can be
15 cured then there is no reason to reject the settlement
16 agreement.

17 JUDGE SMITH: Let's pin you down to this, too.
18 Let's say that we simply look at it and we say that we don't
19 know how to do it, we don't know how to write up a
20 participation agreement, we have no evidentiary record and
21 we are going to have to say yes or no. Of course, I think
22 you have made it clear that you want us to say yes rather
23 than let the settlement fail.

24 MR. JABLON: Is there a question?

25 JUDGE SMITH: Yes. You see, before you agreed

1 that if the Board could not find that the public interest is
2 affected adversely by the settlement agreement then we
3 should impose the conditions. Now the question is slightly
4 different. What if we come to the conclusion that we don't
5 know, that we don't know how to modify, we have no
6 evidentiary record, we have no expert witnesses and we have
7 no basis upon which to meddle with the contract, with the
8 participation agreement. Then what do we do?

9 MR. JABLON: Let me suggest as follows. If you
10 would reverse your prior ruling and take a look at our
11 supplemental pleading and Florida Power and Light's response
12 we have presented to you legal reasons and cases both with
13 regard to your obligation as we perceive it and the reasons
14 why the provision as it stands is offensive under the law.

15 If after reviewing those materials, obviously if
16 you disagree as to your responsibility you will rule against
17 us, but assuming you agree as to your responsibility but
18 disagree that we have presented enough to you at this time
19 so that you can make a finding in our favor, I might quarrel
20 for the basis for the finding but then I would have to take
21 the position that you should not adopt the condition we have
22 requested at this time.

23 I don't mean to be impertinent. If I can qualify
24 my getting you off the hock this much I would like to do
25 so. I think other agencies have faced similar problems,

1 this is not a new problem, where an applicant for one thing
2 or another says to the agency well, you must take this
3 course or we will withdraw the benefit. I would hope and
4 assume, in fact I know, that you would look seriously at the
5 arguments we have presented. But, yes, after looking
6 seriously at them if you find that we have not made a case
7 for a public interest condition, then my recommendation to
8 you is to approve the settlement without that condition.

9 JUDGE SMITH: And you would not ask for an interim
10 evidentiary hearing on modifications?

11 MR. JABLON: The answer is we would like that, but
12 in my judgment you have enough before you to make the ruling
13 now. We are going to propose to you in Phase 3 procedures
14 which I think could resolve the whole matter between the
15 Florida Cities and FP&I much more expeditiously than I think
16 has been contemplated.

17 Yes, we think this is the kind of matter which
18 could be expeditiously decided and we could have hearings
19 restricted, you know, to this one issue. We have presented
20 to you materials, Your Honor, and cases which we think are
21 determinative.

22 JUDGE SMITH: If we disagree or if we cannot find,
23 based upon the papers you submit, that the conditions are
24 contrary to the public interest, then it is your position
25 that we should implement the conditions?

1 MR. JABLON: Let me put it this way. If there
2 were a narrow factual basis which you felt ought to be
3 determined, in other words, if you determined that in general
4 we have raised a good public interest claim but there is a
5 narrow factual matter which you just don't know about, I
6 would think that you could set that for a narrow hearing.

7 JUDGE SMITH: Is that a condition on your part? I
8 am trying to pin you down. I started the question and I
9 just want to pin you down as to what your position is.

10 MR. JABLON: I guess what is giving me pause is I
11 am not in the position to set "conditions." You have before
12 you a motion by the government and FP&L to approve a
13 settlement. You had a response by the Cities, which can be
14 treated as a motion, to accept it subject to certain
15 conditions. I represent real live clients who are hurting
16 for want of access and want the opportunity for access.

17 I do not want to recommend to this Board delayed
18 procedures of the kind that would make this settlement into
19 a non-settlement. I think if there is a narrow factual
20 issue I would request a hearing. But if Florida Power and
21 Light would say that they would withdraw the settlement
22 under those circumstances, and if you made the determination
23 that you can't order the condition based upon what is before
24 you, then on behalf of my clients I would have to say
25 implement the settlement.

1 JUDGE SMITH: There is another problem, too, and
2 that is say that we did have some doubts about whether the
3 public interest arguments should apply and we don't think
4 that we can decide without something else and we just don't
5 have time to do it for a long time. As you know, the
6 Commission boards are faced now with a lot of litigation
7 that immediately affects the public health and safety and we
8 all have a busy schedule. Your position there would be you
9 don't want delay.

10 MR. JABLON: Yes, Your Honor. .

11 I am faced with a practical problem, my clients
12 are. The settlement has been entered into between Florida
13 Power and Light and the government presumably because the
14 government believes that the overall settlement is in the
15 public interest and these things have been bargained for.
16 As they say, there must have been concessions on both
17 sides. The Cities believe that there are aspects of the
18 settlement which are both offensive and that there are
19 matters of policy of a nature that can be cured
20 expeditiously.

21 I am not saying nor I have said to you nor do the
22 Cities say to you that we don't want a result or we want to
23 drag things out. Now, what I am trying to respond is a
24 various range of hypotheticals in your mind as to what can
25 happen and it is very difficult for me.

1 In any event, I think the types of questions I
2 have raised to you are the kinds of things which truly are a
3 matter of public policy. The standards enure in the Act and
4 all I can do is beg you to spend some time to focus on them
5 because I think they are important.

6 JUDGE SMITH: I think you have made your point
7 there.

8 MR. JABLON: Okay. With regard to the other
9 questions, the control question again, I think it is
10 reasonable if under the Atomic Energy Act, the standards of
11 the Atomic Energy Act for reasons I have stated in the
12 pleading, that the operator of the plant would have to give
13 some consideration to the needs of the other parties. The
14 suggested language we have put before you is almost a matter
15 of common sense. You will note it is qualified with words
16 like "reasonable." We are not asking for anything
17 absolute. The standards would be more or less the same and
18 there is no sense making a reargument.

19 JUDGE SMITH: That public interest argument is
20 that the public interest segment that you identify is the
21 public interest represented by Florida Cities, a broader
22 public interest for health and safety?

23 MR. JABLON: I think that almost as a matter of
24 definition when you give a utility the sole discretion ---

25 JUDGE SMITH: They don't have the sole

1 discretion. They have NRC investigators crawling all over
2 the place telling them how to run the place.

3 MR. JABLON: No, I am talking about the control
4 provisions in terms of commercial operations of the plant.
5 In other words, under what circumstances can they cancel the
6 plant and under what circumstances can they shut down the
7 plant because they have a coal unit.

8 JUDGE SMITH: So you are not talking about health
9 and safety decisions?

10 MR. JABLON: I think these are more economic, Your
11 Honor.

12 JUDGE SMITH: So the public interest segment that
13 you are identifying then is that represented by the Florida
14 Cities?

15 MR. JABLON: No, I think there is a broader public
16 interest to competition, if you will.

17 JUDGE SMITH: All right.

18 MR. JABLON: With regard to the reliability and
19 sell-back provisions a different type of public interest is
20 raised, that is a different concern, and that is the concern
21 with regard to what I will call discrimination.

22 FP&L has said that you ought not to condition the
23 settlement on the Cities having an opportunity for equal
24 treatment with Orlando and Fort Pierce on three grounds.
25 First, their theme that after all this is a settlement and



1 the Cities have not settled and therefore you take a
2 settlement as you find it, and that we are not entitled to
3 more benefits because why should our portion of the deal or
4 the portion of the deal applicable to us be improved by the
5 coercion of government order.

6 The second claim they have raised is that these
7 commercial arrangements are unrelated to participation.

8 The third claim they have raised is that
9 discrimination is not an antitrust concept.

10 Let me say one other thing on this. Florida Power
11 and Light makes an encompassing point and they have made it
12 in the reply pleading to our pleading, but they do make an
13 encompassing point. Their point really comes to that
14 Orlando and Fort Pierce have given it an antitrust release
15 if you really get down to the guts of what they are
16 saying. So that Orlando and Fort Pierce have given Florida
17 Power and Light more. They have given them something which
18 the Cities are not willing or at least have not been willing
19 to give Florida Power and Light.

20 The implication is, although it is not stated and
21 FP&L reserves its rights on it, that if Florida Cities would
22 give Florida Power and Light an antitrust release that they,
23 too, could get these things.

24 There are two problems with that. First is this
25 agency. The Cities are here because the Commission has
granted us intervention upon a finding that the public



1 interest warranted that intervention and indeed upon your
2 finding and the other members of the then constituted board,
3 Judge Smith, that the public interest in Florida warranted
4 it.

5 If Florida Cities can be impeded from obtaining
6 effectively equal contract terms because they refuse to
7 waive their rights to complain to this Board, which is
8 effectively what an antitrust release does, then I think
9 that that is offensive to the public interest.

10 Further, an antitrust release would do something
11 else. Florida Cities or some of them have brought suit
12 against Florida Power and Light in the District Court. As
13 you will recall, the Florida Cities have stated to this
14 Commission that they believe they have access rights to
15 FP&L's operating plants.

16 Florida Power and Light argued that they had
17 rights, the Cities, to go to court but that the NRC does not
18 have jurisdiction over the matter.

19 It seems to me blatantly against the public
20 interest to say to the Cities that if they want equal
21 commercial terms that they must effectively settle their
22 cases with the companies in a context of determination of
23 antitrust matters subject to this Board or the court's
24 jurisdiction.

25 Now let me draw a distinction for you. I have

1 absolutely no doubt that Orlando or Fort Pierce or any of
2 the cities can settle with Florida Power and Light, sign an
3 antitrust release and that Florida Power and Light could
4 give a cash consideration. An antitrust release is valuable.

5 Where I draw the line is where the consideration
6 for the antitrust release is an integral part of the
7 commercial terms under which this transferred nuclear
8 capacity is being contracted. If you don't draw the line
9 there you are saying that it is okay for FP&L, which
10 practically is the only one apart from Florida Power and
11 Light who can build these plants, it is okay for FP&L to use
12 its leverage by dint of having ownership of the plants to
13 exact less favorable terms.

14 The source of that, the source of the principle
15 that there should not be discrimination comes from two
16 sources. The first source, and I think you can look to
17 this, is utility law. A utility law has long held that
18 utilities cannot unreasonably discriminate, and I have got
19 cases cited on it.

20 JUDGE SMITH: The Federal Power Commission Act is
21 not listed in 105. Now, you have the Clayton Act and the
22 Federal Trade Commission Act which would address
23 discrimination where it has competitive effects, but the
24 Federal Power Commission Act is not one of those antitrust
25 laws that were listed in Section 105.

1 MR. JABLON: I would say it is encompassed in the
2 public interest test, Your Honor. But if it were not, if it
3 were not, it is an antitrust test, too. What Otter Tail was
4 all about, the Consumers Power Company case, is that a large
5 utility which controls essential resources cannot use that
6 control in a discriminatory manner. Consumers Power
7 Company, Your Honor, could not use its control of the lines
8 to say they wouldn't weild for the smaller systems but they
9 would to the larger ones.

10 JUDGE SMITH: Was that predicated upon a concept
11 of discrimination in Consumers?

12 MR. JABLON: I think certainly the Appeal Board
13 discussed the differences of treatment, yes, between Detroit
14 Edison, for example. I can't cite you a page now, but I
15 think certainly the concept came up and underlies it that
16 Consumers Power Company was treating the Cities differently
17 from Detroit Edison, for example.

18 MR. JABLON: In the first place, doesn't
19 discrimination imply or require a privity between the
20 parties discriminated among?

21 MR. JABLON: No.

22 JUDGE SMITH: Doesn't discrimination itself
23 anticipate that there is some type of relationship between
24 the parties which would justify equal treatment?

25 MR. JABLON: A relationship, yes.

1 JUDGE SMITH: What is the relationship to which
2 you refer now?

3 MR. JABLON: Well, Florida Power and Light, the
4 settlement establishes the relationship if nothing else that
5 Florida Power and Light ---

6 JUDGE SMITH: What is the relationship between
7 Vero Beach and Orlando, for example, that requires Vero
8 Beach under the antitrust laws to have the same terms and
9 conditions as Orlando?

10 MR. JABLON: Well, they were all customers, Your
11 Honor, similarly situated. If FP&L can use its power to
12 favor one customer as opposed to another ---

13 MR. JABLON: As opposed to another, but what is
14 this "opposed"? Describe the opposed, how you use the word
15 "opposed."

16 MR. JABLON: Say FP&L offered to sell nuclear
17 capacity to Fort Pierce but not to Vero Beach or to Vero
18 Beach but not to Fort Pierce it would be using its status as
19 being the sole controller of in this case St. Lucie to
20 advantage whichever system I said got the capacity to the
21 disadvantage of Florida Power.

22 JUDGE SMITH: That is what you don't go to. What
23 is the disadvantage? Now, I understand the concept of
24 refusal to deal in antitrust but now you are going into a
25 discrimination concept but you don't show any privity

1 between the parties being discriminated against or any
2 relationship that would come within the purview of the
3 antitrust laws that I can see. You don't identify price
4 squeeze and you don't identify discrimination used as
5 against a competing potential competitor or you don't
6 describe discrimination against potentially competing
7 customers.

8 MR. JABLON: Just continuing my example, Fort
9 Pierce and Vero Beach are two cities right next door to each
10 other. They are interconnected and they are also
11 interconnected with Florida Power and Light. If Florida
12 Power and Light uses its nuclear advantage to jack up Fort
13 Pierce's costs, for example, or Vero Beach's and they are
14 each buying and selling power, people may move to either
15 Fort Pierce or Vero Beach.

16 JUDGE SMITH: Do you allege that that is the case
17 here with respect to the favorable Orlando settlement?

18 MR. JABLON: Yes, Your Honor.

19 JUDGE SMITH: You see, this goes to the questions
20 that we had whether the settlement itself could maintain or
21 create a situation that was inconsistent.

22 MR. JABLON: Let me just suggest to you the Gamco
23 case and there, if my memory is correct, what you had is the
24 produce dealers, I believe, got together and rented a
25 building or bought into a building or owned a building where

1 people could go to get fresh fruit or whatever it was, but
2 they left out ---

3 JUDGE SMITH: That is not a discrimination. That
4 is the control of a vital resource type of case.

5 MR. JABLON: Well, this is a control of a vital
6 resource. In other words, they are willing to dispce of
7 this vital resource on less advantageous terms to the
8 nonsettling parties with regard to contract provisions which
9 are common to these kinds of agreements and affect the
10 economics, the buying and selling of power. Discrimination
11 is the other side of the coin of exercise of control.
12 Nobody doubts if Otter Tail rather than saying we would not
13 sell said, yes, we will sell at twice the price to the
14 municipals.

15 JUDGE SMITH: So in sum you are asserting to the
16 Board then that the settlement would bring about
17 discrimination to the competitive disadvantage of competing
18 entities?

19 MR. JABLON: Yes, Your Honor. Yes.

20 Again, I just don't want to lose sight of it. In
21 all of these arrangements for buying into the plant
22 obviously at sometime the plant will go out of service. To
23 the larger utilities in Orlando, for example, back-up
24 arrangements are relatively less important because they tend
25 to have a large amount of generations on their own and they

1 can back up the plant themselves.

2 The utilities for whom participation is being
3 offered have various sizes. I have no reason to
4 affirmatively believe that FP&L's offers of participation
5 won't encompass reasonable back-up arrangements. They have
6 not said it won't, but I got scared in one of the footnotes
7 in their pleading. I don't know. I simply don't know what
8 kind of arrangements are contemplated, and I am not talking
9 of the writing of the contract, but there ought to be some
10 and I would like to hear from FP&L just what it contemplates.

11 JUDGE SMITH: All right. We will come back to
12 that in just a moment. Before we get too far away from your
13 allegation that the conditions would cause discrimination
14 among competitors, is this an immediately effect that would
15 have significant competitive effects if the conditions were
16 implemented, or is it a circumstance which could be looked
17 at after a hearing to determine whether that allegation is
18 correct?

19 MR. JABLON: It would not come into play in terms
20 of the buying and selling of power until the plant went on
21 line or the economic conditions took affect, and to that
22 extent it could be ruled upon later. But these are
23 substantially important enough arrangemnts that in terms of
24 the types of considerations whether to buy in financing and
25 what-have-you, that knowledge of whether they were available



1 and the fact of whether they are available would be
2 important. In other words, you wouldn't start a sell-back
3 arrangement, for example, until the plant was on line, or at
4 least that is not what is contemplated under the
5 Orlando/Fort Pierce agreements. All we are asking for is
6 equality of treatment.

7 As I say, with regard to all of the things that I
8 have raised the same kinds of factors come into play, but I
9 think candidly you only have to rule on them once. That is,
10 you could determine well, we have made a case on the
11 liability clause but not the control provisions, or vice
12 versa. But the underlying legal considerations would tend
13 to be the same for each item and therefore I don't want to
14 take up your time to argue them in the context of each item
15 unless you have questions.

16 Before passing over the microphone I would like to
17 call just one thing to your attention and in a sense
18 highlight it merely to avoid something which could be
19 important in passing.

20 In their response to our pleading Florida Power
21 and Light made allegations against my senior partner, George
22 Spiegel, our our law firm that we sought delay.

23 JUDGE SMITH: Now, this is particularly what the
24 Board had in mind when we began to review the unauthorized
25 pleadings and we thought that they were extraneous.



1 MR. JABLON: Let me just say this. First, we deny
2 them. Second, if the Board is not going to consider FP&L's
3 allegations then insofar as we are concerned there is no
4 need for the Board to consider the reply but I did not want
5 a situation with an allegation like that to go where we
6 hadn't responded to it.

7 JUDGE SMITH: It was my view that the entire
8 discussion about Mr. Spiegel and his appearances before
9 Cities counsel occupied an awful lot of time and a lot of
10 attention. We read it all and we didn't know quite what to
11 do with the information. If you think it is important
12 enough for us to go into that and to go into the argument
13 and the whole bit, we will. But I think it is digressive.
14 and I think that you need our attention more on the
15 antitrust aspects of it.

16 Now, do you want us to inquire into that?

17 MR. POUKNIGHT: No, sir, we don't.

18 MR. JABLON: No.

19 JUDGE SMITH: So then by agreement of the parties
20 we can disregard those allegations which we have
21 functionally done anyway because we read them to see what
22 they were about but we haven't analyzed them at all.

23 MR. JABLON: Thank you.

24 Can I make a motion to reaccept both pleadings for
25 the matters we have been talking about and I will write a

1 letter and pinpoint the pages. I don't believe there is a
2 need for the Board to rule on the other matters unless they
3 want you to.

4 JUDGE SMITH: The other matters being what?

5 MR. JABLON: Their allegations of delay against
6 the Cities.

7 JUDGE SMITH: The parties have just agreed that
8 the Board may disregard the entire subject matter.

9 MR. JABLON: I am satisfied.

10 On the public interest aspects of it I would like
11 to reiterate what I had said before and I don't want to be
12 disrespectful to anybody. I do recognize that the government
13 has settled. We are asking for certain conditions. I do
14 think that the government position ought to be considered at
15 least in light that they have stipulated that they would not
16 request any other conditions so that they review is at least
17 in that context.

18 JUDGE SMITH: I think I get a message there that
19 we should look for something but I don't know what it is.

20 (Laughter.)

21 MR. JABLON: Well, I guess what I am saying is the
22 NRC staff, for example, and the government prides itself on
23 taking an independent role. In exercising that independent
24 role they have entered into a settlement which they
25 apparently feel is a good settlement. We have asked for

1 certain conditions but they have stipulated in advance that
2 they will oppose any conditions. So that their consideration
3 they are giving is in that context.

4 JUDGE SMITH: I see. I also would expect that no
5 government counsel, despite such a stipulation, would make a
6 misrepresentation to the Board as to the existence or the
7 non-existence of a situation inconsistent from what the
8 considerations were if we had to go to a hearing. I won't
9 even insult them by asking them that.

10 MR. JABLON: I would not assume so and I am not
11 suggesting so.

12 JUDGE SMITH: Mr. Bouknight.

13 MR. BOUKNIGHT: Mr. Chairman, I think we have two
14 things. The first is the public interest question and the
15 second is the allegation which was brought up in the midst
16 of that discussion that certain aspects of the settlement
17 may create an anticompetitive effect. I intend to respond
18 to the former and Mr. Dym to the latter.

19 As far as the public interest is concerned as we
20 see the legal issue that is before you the question is
21 whether the settlement among FP&L, the Department and the
22 staff is a reasonable settlement of the differences between
23 them within the public interest.

24 As we read the Catawba case the only thing that
25 you have to look at to determine whether that settlement is

1 in the public interest is whether it unduly prejudices or
2 disadvantages the Cities either in the ways that have been
3 discussed earlier today or by creating some affirmative new
4 anticompetitive situation which I believe is the next topic
5 on the agenda.

6 As we see it, that is all that you are looking at
7 under this public interest standard at this point. You are
8 not looking at substantive antitrust consideration which you
9 can't decide until you have had a hearing or until you have
10 some sort of evidentiary record before you.

11 I think you are certainly not looking at questions
12 like whether certain contractual provisions violate the
13 public policy of state. If they do then when an effort is
14 made to enforce those contractual provisions that is a
15 defense that is available to any party to the contract. But
16 the idea that an NRC/Atomic Safety and Licensing Board would
17 begin considering all these cases of insurance companies
18 imposing certain fine print clauses on citizens and deciding
19 whether under the laws of Florida or generally in other
20 states in the United States that some aspects of this
21 agreement might violate that kind of public policy seems to
22 me to be far beyond the pale.

23 JUDGE SMITH: Do you think it would be appropriate
24 for us to limit our review of public policy to public policy
25 within the jurisdiction of the NRC or could we go further



1 and say we would not contenance criminal acts if we saw them
2 in the settlement agreement?

3 MR. BOUKNIGHT: Judge Smith, I don't know the
4 answer to that. I think an agreement with the United States
5 Department of Justice and the NRC staff as parties to it
6 that it is unlikely to go that far.

7 JUDGE SMITH: Yes, it is, but we would have a
8 particular responsibility, you would say, to look at the
9 public policy with respect to our jurisdiction.

10 MR. BOUKNIGHT: Yes, sir.

11 JUDGE SMITH: And then not so great a
12 responsibility as to public policy outside our jurisdiction.

13 MR. BOUKNIGHT: I think that is correct, and I
14 think where you are now is that a settlement agreement has
15 been put before you before there has been any kind of
16 evidentiary record. It should be kept in mind that this
17 Board is going to have an opportunity to conduct evidentiary
18 hearings and to make a decision that different conditions
19 may be in order.

20 So at this point all that is before you is does it
21 unduly hurt somebody to let this settlement take effect and
22 then for you to go ahead and exercise your jurisdiction in
23 due course after a hearing is held. As we see it, that is
24 all that is before you.

25 The issues that Mr. Jablon has been raising really

1 concern two things. One of them is these cases which he
2 cited in his reply and we have no objection to those aspects
3 of his reply and our response in pleading being considered
4 by the Board. Those cases in the liability area concern
5 harm to the public. They don't concern the relationship
6 between co-owners to a facility.

7 The cases that concern so-called public policy
8 considerations are a line of cases that involve doctrines of
9 state law that at some point somebody who is doing something
10 with a dangerous instrumentality or someone who has the
11 power that an insurance company often has over the various
12 individual holders of policies can't go out and impose
13 certain contractual provisions on people. That is a
14 question of state common law and not a question that we can
15 see arises under the Atomic Energy Act.

16 Some of the things that have been said about the
17 liability and control provisions are just very, very wrong
18 and are troubling. The problem of the liability provision
19 in this contract and in any contract for a nuclear
20 generating facility is that somebody who is operating that
21 power plant who is an employee of some utility company might
22 do something wrong.

23 Now, Mr. Jablon continually used the phrase
24 "operator" when he was talking about the operator could do
25 something intentionally wrong. I don't know whether he is

1 talking about the man who is sitting in that control room or
2 whether he is talking about the Florida Power and Light
3 Company which employed that man.

4 I think that the participation agreement makes
5 quite clear that where an intentional violation of the
6 participation agreement is perpetrated with the management
7 of Florida Power and Light being implicated that there can
8 be liability. The hypothetical that was thrown before you a
9 while ago of a corporate decision to violate NRC
10 requirements for pecuniary gain, that is certainly something
11 where an argument can be made that there is a liability
12 under this participation agreement if the management of the
13 company is involved. That is not where the problems are
14 going to come in.

15 The problems are going to come in precisely like
16 the situation that you have been dealing with for a number
17 of months now where somebody in a control room makes some
18 decisions on the spur of the moment which can end up costing
19 people several hundred millions of dollars if they prove to
20 be wrong.

21 Florida Power and Light Company is simply taking
22 the position that because it is the company that employs
23 that control room operator it shouldn't be taking all of the
24 risks of what is going to happen there.

25 In the control area it is clear that Florida Power

1 and Light is required to operate this plant consistent with
2 the generally accepted utility practice. It is also true
3 that liability doesn't lie for a violation of that
4 commitment unless the violation was intentional and
5 implicates the management of Florida Power and Light Company.

6 I think that something that is being overlooked is
7 that an obligation to operate a facility in accordance with
8 generally accepted utility practice means that if the Cities
9 are unhappy with how personnel are being trained and are
10 unhappy about operating procedures they have got a forum for
11 doing something about it prospectively. That is quite
12 different from waiting and seeing how it works out and if it
13 doesn't work out well then suing for money damages. That is
14 an important distinction.

15 JUDGE SMITH: What is that forum?

16 MR. BOUKNIGHT: That forum is either an
17 arbitration or in court under the contract. The contract
18 contemplates that if Florida Power and Light Company is not
19 operating the facility in accordance with generally accepted
20 utility practice the participant has remedies. Those
21 remedies just don't include monetary damages after the fact
22 unless there is willful action. But if the participant is
23 concerned with safety, if it is concerned with seeing to it
24 that personnel are well trained and that good operating
25 procedures are being

1 followed, the contract provides a mechanism for doing that.

2 JUDGE SMITH: Will Cities have access to
3 information upon which they can seek their prospective
4 relief?

5 MR. BOUKNIGHT: Yes, sir. The agreement is pretty
6 clear on that.

7 So I think in summary that while it is not the
8 province of the Board at this time to decide whether these
9 are the provisions that you believe are the very best or
10 even whether after an evidentiary hearing you might find
11 that there is something anticompetitive about any of these
12 provisions, I believe that nonetheless the description that
13 has been given of them is not very fair.

14 I think the final thing that I would say in the
15 area of the public interest is that it is troubling for
16 Florida Power and Light to be characterized as in the
17 position of putting an ultimatum before the Licensing
18 Board. The fact is that Florida Power and Light Company
19 entered into a settlement. It is the Cities over here who
20 are telling you we rejected the settlement and just flatly
21 didn't enter into it, we insist on our rights to go to a
22 hearing and we insist on our rights to ask for every bit of
23 relief that we requested in our initial pleading and the
24 settlement to the contrary notwithstanding.

25 I think it is FP&L who has made the substantial



1 move towards settlement and towards trying to simplify the
2 issues that remain to be determined in this proceeding. I
3 think in that posture that Florida Power and Light Company
4 is not inclined to now go into a proceeding where the
5 question will simply be can a different settlement agreement
6 be adopted at this point which would bind Florida Power and
7 Light Company and wouldn't bind the Cities. So I don't
8 think that that is an alternative that Florida Power and
9 Light Company would be agreeable to.

10 I think that is about all I had to say.

11 JUDGE DUGGAN: I have one question for you.

12 MR. BOUKNIGHT: Yes, sir.

13 JUDGE DUGGAN: You mentioned the evidentiary
14 hearing with respect to the Department of Justice and the
15 staff. Is it your position that despite the stipulation
16 that Justice and staff would be able to participate fully in
17 that particular hearing?

18 MR. BOUKNIGHT: I don't know what "fully" means in
19 that context. My understanding is that the Department and
20 the staff are bound to support the license conditions. I
21 certainly agree with what the Chairman said a few moments
22 ago that the obligation to support doesn't go to the point
23 of responding untruthfully to questions that are asked by
24 the Board.

25 We would not contemplate that the Department of

1 Justice and the NRC staff would be putting on affirmative
2 cases against Florida Power and Light Company, no, sir.

3 JUDGE DUGGAN: That answers my question.

4 The other aspect of it is that you keep mentioning
5 settlement. This was essentially a settlement between you
6 and the government with the exclusion of Florida Cities;
7 that is correct, isn't it?

8 MR. BOUKNIGHT: Well, they didn't enter into the
9 settlement. They were certainly offered this settlement.

10 JUDGE DUGGAN: They didn't enter into the
11 negotiations at all, did they?

12 MR. BOUKNIGHT: Well, there were negotiations with
13 the Florida Cities. There have been negotiations off and on
14 for a long period of time with the Florida Cities. I think
15 it is fair to say that when those negotiations stopped short
16 of this settlement that the Florida Cities and Florida Power
17 and Light were not very close together.

18 JUDGE DUGGAN: That still is essentially an
19 agreement excluding the cities from the settlement process.

20 MR. BOUKNIGHT: No, sir, I don't think that is
21 fair. There were negotiations between Florida Power and
22 Light Company and the Cities and a decision certainly by
23 Florida Power and Light Company that those differences were
24 so broad they weren't going to be narrowed in the near
25 future.

1 Florida Power and Light then went into
2 negotiations with the Department of Justice and the NRC
3 staff who advised us at the outset that before they entered
4 into any sort of an agreement they were going to consult
5 with the Cities and they were going to show them the entire
6 proposed agreement. They were going to listen to what they
7 had to say and they reserved the right to change their
8 position in dealing with us based on what they had to say.

9 Now, our understanding is that all that was done
10 over a period of months. Indeed, on one occasion the NRC
11 staff insisted that there be a meeting of all parties,
12 including Florida Power and Light Company and the Cities to
13 discuss these license conditions and that is before the
14 government assented to the license conditions and that
15 occurred.

16 So I don't think exclusion is fair. I think what
17 is fair to say is that the Cities were not then and are not
18 now prepared to settle in this ball park and this is the
19 ball park in which the other parties to the proceeding were
20 prepared to settle.

21 JUDGE SMITH: Ms. Urban.

22 MS. URBAN: Thank you.

23 If I can comment from the point of view of the
24 Department concerning participation in the proceeding. AT
25 this time the Department does not contemplate participating



1 at all.. We would of course be available upon request of the
2 Board to answer questions or to take any other role, but
3 right now we do not contemplate putting on any case. We in
4 fact don't even contemplate sitting through the entire set
5 of hearings.

6 As to the negotiations, the Department felt that
7 having negotiations between the company, the Department and
8 the Cities was not productive and we did not anticipate that
9 that form of negotiating would lead to any settlement. We
10 therefore negotiated independently with Florida Power and
11 Light and with the NRC staff.

12 We, however, remained in contact with the Cities
13 throughout this negotiating process and in our pleading that
14 we filed we set forth a list of dates and contacts that the
15 Cities had with personnel from the Department. All of this
16 occurred prior to the settlement being entered into and in
17 fact input from the Cities resulted in changes in the
18 Department's position and ultimately resulted in changes in
19 the settlement agreement.

20 So that I think it would be unfair to say that the
21 Cities were excluded and that they were not given any role
22 in reaching the settlement.

23 Thank you.

24 MR. JABLON: It is certainly true that we were
25 consulted and that we had meetings with various governmental

1 officials. It is also equally true that we were not at the
2 bargaining sessions. One never knows what would have
3 happened had we been there. There is a far different type
4 of process when the government settles with a company in
5 principle or almost settles or reaches tentative agreements
6 and then checks with parties of interest whether they are
7 all right and whether you are in the room to comment on a
8 specific matter as it comes up.

9 I think with regard to the decision you now have
10 before you it does place matters in context.

11 JUDGE DUGGAN: It is kind of fair to say that the
12 government will be negotiating from broad public policy with
13 anticompetitive considerations while you who are
14 representing the Cities will be representing their economic
15 interests, isn't it?

16 MR. JABLON: No, I don't think so. No, I don't
17 think that is fair. I represent governments. They are
18 municipal governments and they are in the power business but
19 they are governments. I know the people and I can affirm to
20 this Board that they take into account the kind of factors
21 which you would expect government to take into account,
22 public interest factors.

23 I think, secondly, the fact that they are parties
24 in interest has multiple impacts. It may be that the
25 government being more removed from the practical impacts of

1 the decisions may be more disinterested for better and for
2 worse and they may be less intuned to practical impacts.

3 JUDGE DUGGAN: I get kind of confused because you
4 seem to bounce back and forth between your clients being
5 governments on the one hand and being interested in a
6 practical aspect on another.

7 MR. JABLON: Well, it can be both. One can do
8 both.

9 JUDGE SMITH: Mr. Dym.

10 MR. DYM: I think Your Honor did put your finger
11 on the issue here. Although Mr. Jablon seeks to lable his
12 argument on the liability clause a public interest argument,
13 I don't think it is that. It really relates to the
14 commercial relationships between his clients and Florida
15 Power and Light. That liability clause has no effect
16 whatever on FP&L's responsibilities to this Commission. It
17 has no effect whatever on FP&L's responsibilities to the
18 public. It has no effect whatever on FP&L's incentive to
19 operate the plant safely.

20 All it deals with is what the commercial relations
21 are between Mr. Jablon's clients as co-owners of the plant
22 and FP&L.

23 JUDGE DUGGAN: Aren't there antitrust laws
24 concerning with commercial relations?

25 MR. DYM: Yes, there are and I will come to that.

1 I don't think that his argument on the liability clause at
2 all touched on anticompetitive considerations. It merely
3 was an argument that if a mistake is made in the operation
4 of the plant the only entity that should suffer is FP&L and
5 his clients shouldn't bear the risk at all. They should
6 have the benefits of the plant but not have the associated
7 risks. That argument is basically a commercial argument.
8 Whether one accepts it or not, it doesn't seem to me to rise
9 to the dignity of public interest.

10 JUDGE DUGGAN: Of course one of the public
11 interests is the protection of small competitive enterprises
12 and therefore that clause could protect the small
13 enterprises and hence be in the public interest as opposed
14 to a large one like FP&L.

15 MR. DYM: There is a question at least, and I
16 don't think there is anything before the Board that would
17 entitle it to rule upon this question, and that is whether
18 in fact the entities that Mr. Jablon represents and Florida
19 Power and Light Company are competitors. That was the
20 premise of the question and the premise of Mr. Jablon's
21 argument.

22 JUDGE SMITH: Not necessarily that the Florida
23 Power and Light and its customers are competitors. I think
24 that Mr. Jablon suggested that Florida Power and Light's
25 customers are competitors among each other.

1 MR. DYM: I don't think he represented that.

2 JUDGE SMITH: That was the question and that was
3 the answer that I thought we received.

4 MR. JABLON: I would take the position that
5 Florida Power and Light and the Cities are competitors and
6 in addition that in some respects the Cities are competitors
7 with each other.

8 MR. DYM: Let me deal with that if I can. As I
9 understand Mr. Jablon's argument it is that Orlando and Fort
10 Pierce in settlements with FP&L were able to obtain certain
11 provisions in their settlement agreements that are not
12 contained in the license conditions and that is
13 discriminatory and has anticompetitive implications.

14 I think there are really two responses to that.
15 First of all, I can represent to this Board that the same
16 settlement offer that was found acceptable by Orlando was
17 offered by FP&L to all of Mr. Jablon's clients that are
18 similarly situated.

19 JUDGE DUGGAN: Including the most favored nation
20 clause?

21 MR. DYM: No, sir. That was not included.

22 JUDGE DUGGAN: Then it is not the same?

23 MR. DYM: You are absolutely right. Aside from
24 that, the two things that he was talking about, the
25 sell-back and the reliability provision.

1 JUDGE DUGGAN: No, I was asking about the whole
2 agreement between them.

3 MR. DYM: The elements that Mr. Jablon is
4 complaining about now were in fact not restricted to an
5 offer to Orlando. They were offered to all of Mr. Jablon's
6 other clients who were similarly situated. So I don't see
7 how there can be any discrimination between Orlando and Fort
8 Pierce on the one hand and Mr. Jablon's other clients on the
9 other.

10 JUDGE SMITH: Well, the discrimination could arise
11 in this fashion. Let's say that utility "A" had a very
12 large important serious cause of action against Florida
13 Power and Light and utility "B" had a trivial one and you
14 offered them both the same conditions providing that they
15 give you an antitrust release. Well, those are not similar
16 offers to persons similarly situated. Of course, we don't
17 know if that situation prevails here.

18 MR. DYM: I don't know how one can evaluate that.
19 Each city presumably evaluates its own claim differently
20 although they are represented by the same counsel. I just
21 fail to see how there is an element of discrimination.

22 JUDGE SMITH: Also it would be interesting to try
23 to envision how the factor of favoritism, that is the
24 liability provision, can be a competitive advantage. I
25 don't understand how that would arise.

1 MR. DYM: I don't see how it would either. The
2 other thing is all of us may be missing the forest for the
3 trees. If there had been no settlement between FP&L and the
4 government parties but merely FP&L had gone along and
5 settled with Orlando and Fort Pierce would Mr. Jablon's
6 clients be worse off or better off? I think it is clear
7 they are better off.

8 JUDGE SMITH: I was hoping somebody would discuss
9 this aspect of the Commission's order that I thought we
10 would be seeing from time to time in this discussion and
11 that is bearing in mind that the Commission did not adopt
12 the Licensing Board's determination that the Florida Cities
13 other than Orlando had their own cause of action but the
14 Commission found that Orlando did and would admit them as
15 intervention. Then they said that the other cities may
16 follow.

17 Then the final statement was "In shaping the
18 timing and extent of relief the License Board is not
19 required to ignore that the request for an antitrust hearing
20 was very late, particularly where the requester rode the
21 coat-tails of another's good cause showing."

22 How do we use that factor in this case or should
23 we? Is it an appropriate factor?

24 MR. JABLON: I don't think so, Your Honor, if the
25 question is addressed to me.

1 JUDGE SMITH: Yes.

2 MR. JABLON: The questions we have raised with
3 regard to the conditioning here are whether there are
4 specific aspects with regard to a settlement entered into by
5 the government which sufficiently offends the public
6 interest that the Board can and should rule acceptance of
7 the settlement on conditions. The factors we have raised
8 either do or do not offend the public interest or, as you
9 suggested, Judge Smith, maybe you can't tell at this time.

10 The Commission in granting intervention, I might
11 note also, was very much concerned that justice be done and
12 the public interest be looked into on a broad scale. The
13 Commission order of granting intervention and the oral
14 argument before the Commission enunciated concerns such as
15 the amount of capacity.

16 I remember some discussion with the Cities whether
17 perhaps because of their lateness the Cities might get
18 delayed capacity to allow FP&L to make other arrangements
19 and this kind of thing.

20 These questions are simply not before the Board at
21 this time. The questions before you are much more narrow.
22 Now, I would agree that in a 105-C5 hearing these
23 considerations could be taken into account with regard to
24 the relief aspect.

25 JUDGE SMITH: I was reading incidentally from the

1 Commission's memorandum and order in this case dated June
2 21st, 1978, page 15 of the opinion.

3 MR. DYM: I must say that I do basically agree
4 with Mr. Jablon on this question.

5 JUDGE SMITH: You want?

6 MR. DYM: I basically agree with Mr. Jablon that
7 it is a little difficult to see what weight can be ascribed
8 to that consideration in this proceeding as it now stands
9 with these settlement conditions before the Board, although
10 I think it is and will be quite significant if we go through
11 a hearing on this matter in terms of the relief that may
12 ultimately be granted.

13 One thing I neglected to say that I think should
14 be said. A good deal of Mr. Jablon's argument seems to be
15 an assertion that settlement with Orlando was somehow
16 contrary to the public interest or inadequate. I would
17 think that contention really should and really must be
18 disregarded by this Board.

19 The settlement with Orlando was reached after
20 arm's-length negotiations and discussions. Orlando is a
21 competent, sophisticated utility. The fact is that there is
22 a strong public interest in resolving matters through the
23 settlement process rather than through the litigating
24 process. It seems to me that Orlando and FP&L rather than
25 being criticized for entering into the settlement that they

1 did should be applauded for it.

2 MR. BOUKNIGHT: Judge Smith, before we get further
3 away, Judge Duggan you said something a moment ago I want to
4 clarify if I may.

5 The contractual provisions that provide the
6 so-called reliability exchanges and sell-backs are not in
7 the participation agreement. They are in another document,
8 a settlement agreement between Orlando, FP&P and Fort Pierce
9 and FP&L.

10 At the time that that settlement agreement was
11 entered into with Orlando I believe that the most favored
12 nation provision of that settlement agreement was available
13 to each of the cities. That contrasts with the most favored
14 nation provision of the participation agreement which we
15 indicated in our pleading was something that we were not
16 committing to offer to the non-settling cities at this time.

17 JUDGE DUGGAN: Then it is also fair to recognize
18 that Fort Pierce had other reasons for settling with you and
19 it might have been settled at less advantageous terms
20 because of that. I am talking about the lawsuit.

21 MR. BOUKNIGHT: There is no question but that Fort
22 Pierce settled another lawsuit at the same time that it
23 settled this with FP&L. I don't have any basis for
24 believing that Fort Pierce is dissatisfied or feels that in
25 any way it made a mistake in entering into this settlement

1 on its own merits from my own conversations with the lawyers
2 in developing the settlement agreement for those people.

3 JUDGE SMITH: Are we completed with the public
4 interest discussion now? No, we are not. We didn't give
5 Justice an opportunity to comment.

6 MS. URBAN: No comment.

7 JUDGE SMITH: All right.

8 Mr. Dewey.

9 MR. DEWEY: Well, Your Honor, the only thing that
10 I wish to add at this point is that there has been
11 discussion pro and con as to whether some of these license
12 conditions are good or bad. I would just like to emphasize
13 to the Board that the first question that has to be
14 determined at this time is whether the license conditions
15 can attach now.

16 I believe that there hasn't been any real
17 prejudice shown if they would attach. Even if after a
18 hearing some of these license conditions are changed it
19 still doesn't change the premise right now that the license
20 conditions can attach because there is no real prejudice to
21 Cities to have them attached.

22 Now, there are some basic benefits by having the
23 license conditions attach right now which I submit are in
24 the public interest. If the license conditions can attach
25 immediately first the utilities can go ahead and have

1 assurance of having access to St. Lucie 2. So the utilities
2 can have the other benefits that are allowed in the license
3 conditions.

4 Then the third thing I would like to point out is
5 that there are Florida utilities that are benefitting from
6 the license conditions who are not intervenors in this
7 proceeding and would have maybe a stronger reason at this
8 point to be benefitted if the license conditions were
9 attached effective immediately.

10 The only point I wanted to point out was the main
11 issue to decide today is whether the license conditions
12 should attach immediately.

13 JUDGE SMITH: That goes to another question that
14 each of the Board Members had and that is those cities who
15 are listed together with their shares, how were those cities
16 selected and how were their shares arrived at and what
17 municipal utilities in your service area were omitted, if
18 any? Just fill us in. This page 8, how did we get to that?

19 MR. BOUKNIGHT: First, Judge Smith, we can
20 certainly say that there are no municipal utilities in
21 Florida Power and Light Company's service area who have been
22 omitted. There are utilities listed on this page that
23 Florida Power and Light Company would take the position are
24 not in its service area. Those really consist of one group
25 of very small cities, the City of Orlando and the

1 Gainesville.

2 I think it is fair to say, and I don't know that
3 elaboration would help very much, that both the NRC staff
4 and the Department of Justice were of the view that there
5 were reasons for considering Orlando and Gainesville as
6 within FP&L's service area.

7 As to the very small cities who are slightly
8 beyond FP&L's service areas the Department and the staff
9 also wished that these cities be included and the applicant
10 was willing primarily because the numbers involved are very,
11 very small.

12 JUDGE SMITH: Mr. Jablon, you have not raised any
13 question about the shares and the identity of the
14 participants listed on page 8.

15 MR. JABLON: We take the position in response to
16 your question two that the settlement is anticompetitive on
17 its face because it reinforces the illegal territoriality
18 found by the Fifth Circuit because of the exclusion of some
19 but not all cities outside of FP&L's retail service area.
20 We have not asked as a condition for immediate
21 implementation correction of that, although we reserve our
22 rights subsequently because we felt that there were benefits
23 to immediate implementation.

24 We recognized that FP&L was raising a legal issue
25 as to its responsibilities and we felt that therefore the

1 overall public interest would be served by resolving that
2 problem secondly.

3 Let me draw the distinction the cities made. With
4 regard, for example, whether Tallahassee should get capacity
5 or whether Cassindie or other cities who are outside FP&L's
6 retail service area the Board can rule separately that they
7 will.

8 These cities are not seriously hurt in a sense
9 that would justify holding up the settlement and granting
10 relief to those cities that get benefit from immediate
11 implementation. I note the cities can sell capacity among
12 themselves or capacity rights.

13 The issues we raised like the liability clause
14 were those where we deemed decisions had to be made now
15 which would be adversely impacted, but I don't mean to imply
16 that we don't think that the settlement is anticompetitive
17 on its face because of the limitations of coverage.

18 JUDGE SMITH: Are there any intervenors surviving
19 who are not on this list, intervening cities?

20 MR. JABLON: Yes.

21 JUDGE SMITH: Who are they? Incidentally, one
22 reason why we don't know some of these answers is that the
23 map that is attached to the settlement, our copy is not very
24 good.

25 MR. BOUKNIGHT: Let us undertake to provide you

1 with a large copy of this map that is in good shape. One
2 problem, Judge Smith, as I think you can see from even
3 looking at the map in its present form, is that Florida
4 Power and Light Company's service area is shaped in a rather
5 irregular fashion.

6 Therefore when we, the Department and the staff
7 began discussing exactly where that service area extended we
8 concluded that we could do it as effectively by centering in
9 on who was included and who wasn't than on drawing this any
10 more precisely than it is now drawn.

11 MR. JABLON: The following cities are named, Your
12 Honor, who do not get capacity entitlements under the
13 settlement. The Sebring Utilities Commission, Alachua,
14 Bartow, Fort Mead, Mount Dora, Newberry, Saint Cloud,
15 Tallahassee and those cities who may be relying on the
16 Florida Municipal Utilities Association, the membership
17 organization for entitlements.

18 MR. BOUKNIGHT: Mr. Chairman, I think it is fair
19 to say that each of the cities which Mr. Jablon has named is
20 either a wholesale customer of the Florida Power Corporation
21 or in the case of Tallahassee is a large self-sufficient
22 system located in the Florida Power Corporation's system.

23 JUDGE DUGGAN: Just for curiosity is there still
24 that limit that you do not sell to the Florida Power
25 Company's customers?

1 MR. BOUKNIGHT: Judge Duggan, the tariff on file
2 at the FERC requires FP&L to serve in the area where the
3 company provides service.

4 JUDGE DUGGAN: I was asking that as a practical
5 question because that came out in the Gainesville case.

6 MR. BOUKNIGHT: Yes, sir, as a practical matter
7 FP&L with its tariff has not extended service to people
8 outside of FP&L's service territory. I would stress that
9 that is not pursuant to any agreement between FP&L and any
10 other utility.

11 JUDGE DUGGAN: It could be called conscious
12 parallelism.

13 (Laughter.)

14 MR. BOUKNIGHT: We like to think it could not.

15 JUDGE SMITH: Mr. Jablon, we will depend upon you
16 very heavily to point out any anticompetitive effects, not
17 inadequacies, but affirmative anticompetitive effects the
18 conditions would have.

19 MR. JABLON: Yes, Your Honor. The Board
20 apparently wants me to do it that way and I shall do it that
21 way.

22 JUDGE SMITH: We had many questions but we are
23 running out of time.

24 MR. JABLON: Yes, Your Honor. Let me respond to
25 your question as you asked it, although it is not exactly

1 how I had planned to go forward.

2 First, I am just going to hit the big ones. There
3 are a lot of wrinkles we object to.

4 Can I give a summary paragraph and then answer
5 your question because it will put what I say in context?

6 JUDGE SMITH: Yes.

7 MR. JABLON: We believe that there is a situation
8 inconsistent with the antitrust laws which can be
9 established as a matter of law under the Board's standards
10 or in the nature of a summary judgment. Let me explain what
11 I mean by that.

12 For example, the Gainesville case has determined
13 that FP&L had entered into a territorial agreement which
14 restricted wholesale power supply which we submit would
15 compel a finding by this Board as to a situation
16 inconsistent.

17 Opinion 57 of the Federal Energy Regulatory
18 Commission reviewed FP&L's practices with regard to dealings
19 as among other utilities and made certain findings with
20 regard to those practices that there were refusals to deal
21 and held that a proposed change in Florida Power and Light's
22 tariff to restrict wholesale power service availability
23 violated Section 205 and 206 of the Federal Power Act.

24 The company went back to the Commission and asked
25 them to say that they were not ruling on the basis of any

1 antitrust determination and the Commission on rehearing
2 stated that they had ruled a violation of the Federal Power
3 Act principally on account of the anticompetitive effects.

4 You have in addition acquisition of a newspaper
5 article, for example, seeking to acquire Vero Beach.

6 JUDGE SMITH: Yes, we have seen that. I will take
7 as a basis for your question your view of the situation
8 inconsistent.

9 MR. JABLON: Okay. Now, the reason I wanted to
10 put them in context is if we are correct, and this goes to
11 the procedures, then you can have a type of summary
12 proceedings to rule.

13 Now, with regard to the license conditions
14 themselves, we submit that whatever else the license
15 conditions are they are evidence of what FP&L is willing to
16 do and FP&L is not willing to do.

17 The license conditions provide for no relief in
18 the major areas of nuclear capacity or transmission beyond
19 Florida Power and Light's retail area for wholesale power.
20 But that actually is not strictly true. It does provide for
21 relief for Orlando which had always been considered in
22 Florida Power's area or certainly not in Florida Power and
23 Light's.. It provides relief for Gainesville. It provides
24 relief for Lake Helen, a small wholesale purchaser of
25 Florida Power and Light which incidentally was mentioned by

1 name in the Gainesville decision.

2 So what is compelled to be asked is by what
3 conceivable standard there is relief for Gainesville but not
4 Alachua and Newberry, two small systems?

5 JUDGE SMITH: So you are going to use the
6 settlement as evidence of a refusal to deal with some
7 entities?

8 MR. JABLON: Yes, Your Honor. I think it is there
9 on the face.

10 JUDGE SMITH: All right. That is evidence
11 compared with an anticompetitive effect and compared with
12 adequacy.

13 MR. JABLON: In terms of the anticompetitive
14 effect and compared with adequacy the Fifth Circuit found ---

15 JUDGE SMITH: I don't want to hear about adequacy.

16 MR. JABLON: I am sorry. What do you want to hear
17 about?

18 JUDGE SMITH: I want to know what affirmative
19 anticompetitive effect the imposition of this condition will
20 have, not where it is inadequate. We will talk about where
21 it is inadequate some other day, but today is if these
22 conditions are imposed how will it create or exacerbate a
23 situation inconsistent?

24 MR. JABLON: It will deprive some of the cities in
25 Florida Power Corporation's area of access to St. Lucie 2 ---

1 JUDGE SMITH: Anything else?

2 MR. JABLON: --- thereby raising their costs and
3 thereby making it more difficult for them to compete.

4 Furthermore, to the extent that relief is denied
5 and to the extent that the license conditions do not provide
6 for a statewide access to transmission on a uniform basis it
7 makes it more difficult for the cities to compete in
8 constructing an operating plant.

9 JUDGE SMITH: You see what happens to my mental
10 process is when I ask you not to talk about adequacy and I
11 hear answers which seem to me to be talking about adequacy
12 then I think I don't understand the answer.

13 MR. JABLON: I misunderstood the question. You
14 are asking in terms of effect?

15 JUDGE SMITH: Yes. I want to know how would these
16 license conditions, together with the participation
17 agreement, create or exacerbate the situation inconsistent
18 with the antitrust laws as you allege it to be?

19 MR. JABLON: To the extent that they do not cure
20 the question of territoriality, and the cities can't get it
21 any other way, obviously they leave the cities in an adverse
22 position.

23 JUDGE SMITH: Adverse to what?

24 MR. JABLON: Adverse to in competition with FP&L.
25 FP&L, Tampa and Florida Power, Your Honor, have formed what

1 is essentially that they have arrangements among themselves
2 on a statewide basis. To the extent that you impose license
3 conditions which do not provide for transmission for the
4 cities on a statewide basis, that is to the extent you leave
5 the situation as you find it, I suppose the license
6 conditions don't create a new effect, but they allow to
7 continue an adverse competitive effect.

8 JUDGE SMITH: All right, that is maintain one.

9 MR. JABLON: Yes.

10 JUDGE SMITH: The question was create or
11 exacerbate.

12 MR. JABLON: Well, I suppose in and of themselves
13 with one exception, which I will come to, or two exceptions
14 in and of themselves, the license conditions can't create an
15 adverse effect in and of themselves, but they can represent
16 Florida Power and Light's positions because the license
17 conditions under law only grant rights in the sense. They
18 only say to Florida Power and Light you must do "X".
19 Florida Power and Light can do these things independently,
20 but to the extent that they represent a position of FP&L or
21 to the extent actions are taken or not taken in light of
22 them those have effects.

23 The most immediate impact is the license
24 conditions provide for resell restrictions on the part of
25 the wholesale power. For example, the license conditions

1 say that if an entity buys into St. Lucie 2 or if an entity
2 gets transmission power transmitted in that that entity's
3 right to wholesale power under the license conditions may be
4 reduced.

5 If in fact FP&L acts that way, it doesn't have to,
6 but if in fact FP&L can act that way that creates an
7 anticompetitive effect.

8 But I would agree with you that since the license
9 conditions only in effect create obligations on the part of
10 the company to do something which conceivably it is not
11 doing now, only to the extent that they are discriminatory
12 and this injures some cities in competition or leaves the
13 situation where it is, only to that extent would they have
14 an adverse impact. That is why we do not object to
15 immediately implementation on those grounds.

16 JUDGE SMITH: We have spent the early part of this
17 afternoon talking about the relief that the cities would be
18 free to seek even with the settlement in place and they
19 could address the inadequacies of it.

20 Right now to summarize, the only anticompetitive
21 effect affirmatively caused by the settlement agreement and
22 the license conditions might be to favor one competitor over
23 another; is that a fair statement of your position?

24 MR. JABLON: Yes.

25 JUDGE SMITH: You have restraints on resale. Did

1 those sales contracts exist before?

2 MR. JABLON: Yes.

3 JUDGE SMITH: Now, are these new restraints?

4 MR. JABLON: Excuse me. I am sorry. For example,
5 the wholesale power restraint, I would take the position
6 that they would not be legal now and they would be contrary
7 to the company's tariff on file with the Federal Energy
8 Regulatory Commission but they represent an apparent policy
9 of the company as to what it wants to do.

10 I may have answered "Yes" to your question too
11 quickly. Apart from the condition which we talked about
12 this morning with regard to the list I have just given you,
13 for example, the capacity or transmission rights are not
14 provided for what I will call the outside cities, to the
15 extent that those represent a policy determination and are
16 in recognition of a policy determination of what FP&L is
17 willing to do it affects planning.

18 The NRC license conditions does not create a new
19 limitation, and to that extent I would agree with the thrust
20 of your question that the NRC license condition in and of
21 itself recognizes harm but does not create it apart from
22 discrimination.

23 JUDGE SMITH: Apart from discrimination.

24 MR. JABLON: Apart from discrimination.

25 JUDGE SMITH: And discrimination, as we talked

1 about earlier, is something that would not delay the
2 settlement and can be addressed later? The discrimination
3 is not so immediate and so severe and so damaging that that
4 in itself creates a situation more anticompetitive than if
5 the agreement was not in effect?

6 MR. JABLON: Let me put it this way. The Cities
7 support immediate implementation without conditioning as to
8 those latter matters I just mentioned.

9 JUDGE SMITH: All right.

10 MR. JABLON: Judge Smith, what I would like to
11 suggest, and that is what I was trying to move into, and I
12 am not sure I fully understood the thrust of what the Board
13 wanted, there are obviously differences between the company
14 and the cities which are wide differences. I would hope
15 they can be settled and I am not trying to imply they can't
16 be settled but there are differences.

17 We submit to you, for whatever reasons, and I am
18 happy to go into the reasons, but we submit to you that we
19 could file a pleading to you demonstrating that as a matter
20 of law a situation inconsistent exists in accordance with
21 your statutory standards.

22 As you can see from the settlement that has been
23 filed with you there are certain issues which fly out. Does
24 FP&I have an obligation to cities outside of its service
25 area or doesn't it? Differences on these questions must

1 have impacted on relief. Do they have an obligation with
2 regard to the sale of capacity from their operating units or
3 not?

4 What I would like to propose to the Board and I am
5 really summarizing what is a much longer argument is that
6 the cities have an opportunity to present to the Board the
7 materials based upon which we believe you can find a
8 situation inconsistent with the antitrust laws now or at
9 least that there is likely a situation inconsistent, that
10 Florida Power and Light can respond to that pleading raising
11 any factual issues which they believe must be addressed in
12 hearing or reasons why the material we submit to you are not
13 determinative and that the Board at that time at least
14 consider with the issues thus narrowed a limited hearing in
15 the nature of the types of hearings that there have been
16 before the Federal Energy Regulatory Commission so that we
17 can get rulings on these questions within six months.

18 JUDGE SMITH: You mean hold up the settlement?

19 MR. JABLON: No. Implement the settlement. But
20 it is very important to the cities, and Florida Power and
21 Light has alleged it is important to Florida Power and Light
22 now to have delay.

23 I am asserting to you that based upon the
24 information we have now, which is what I call top-copy
25 documents, an offer to acquire another system, you know, the

1 offer speaks for itself, a court or agency ruling, that you
2 have enough to make rulings and then the question would
3 merely be the scope of relief. I am suggesting those future
4 procedures.

5 JUDGE SMITH: Well, we did note that we would ask
6 for suggestions on how we address the inadequacies perceived
7 by the cities.

8 Do you like that proposal?

9 MR. BOUKNIGHT: I am not sure that I fully
10 comprehend it.

11 JUDGE SMITH: I don't know if we have time to
12 resolve it this evening.

13 MR. DYM: Well, we will respond to whatever motion
14 Mr. Jablon may file. The thing that troubles me, though, is
15 what he is really asking for is a six-month delay to follow
16 the procedure that he suggests. Meanwhile the parties just
17 sit where they are now in terms of preparing for a hearing
18 in this matter. I don't see the reason for that delay.

19 JUDGE SMITH: But he is saying, however, implement
20 the settlement.

21 MR. DYM: Oh, I agree with that completely. We
22 can implement the settlement.

23 JUDGE SMITH: Then the delay will be at the
24 expense, it seems to me, of the intervenors, any such delay.

25 MR. DYM: We would like to move forward though.

1 We have some interrogatories that are outstanding and we
2 would like Mr. Jablon to respond to and he has some
3 interrogatories that we can respond to.

4 MR. JABLON: I would like to be as candid as I can
5 be. The problem for clients such as my problem is a very
6 practical problem. They are litigating against one of the
7 largest companies in the country and in this context size
8 matters. If we are right that there is the material on
9 which you can find a situation inconsistent now we save time
10 and we save money.

11 I don't know the Board's history. I am trial
12 lawyer. I represent these cities. If litigation becomes
13 costly and drawn out enough Florida Power and Light can
14 win. I am proposing procedures where I think as a matter of
15 law we are right and they can be determined. If we are
16 wrong, if the Board that we have nothing to it obviously it
17 will affect our settlement and our litigating posture.

18 JUDGE SMITH: This is a problem, Mr. Jablon. The
19 Board Members simply don't have time to suspend our other
20 proceedings to give the type of consideration and the type
21 of study that you are asking for as far as going forward on
22 the merits or looking at the merits of it.

23 What you want, as I understand it, is a
24 preliminary ruling as to do we agree with your concept of
25 the scope of the proceeding on the situation inconsistent,

1 and then after we rule upon that then you decide whether you
2 want to oppose the settlement.

3 MR. JABLON: No. We are saying implement the
4 settlement. This is future proceedings with conditions, but
5 this is in terms of future proceedings. We are saying
6 either order the conditions or don't order the conditions
7 but rule on the settlement as a separate matter. That
8 leaves the posture that Florida Power and Light and the
9 Cities still have a dispute and there is still a case.

10 We are saying that we believe the case is ripe for
11 summary determination. For example, there is the
12 Gainesville decision. I can't imagine this Board not
13 finding a situation inconsistent based upon the
14 territoriality of the Gainesville decision. It is a legal
15 question as to what equitable effect you should give to the
16 Gainesville decision.

17 If you agree with the Cities that based upon what
18 they present to you you can rule now that there should be a
19 summary judgment, or if you don't like that term a summary
20 disposition, and then the only question would be with regard
21 to relief.

22 Now, what we would like to be able to either
23 continue this prehearing conference relatively quickly to
24 discuss the scheduling matter or to have us file a
25 procedural pleading but to have some means whereby without

1 two, three or four years of additional litigation that we
2 can get disposition where we as the parties in interest are
3 saying that we believe we have enough to have a ruling now.

4 What they want is years of discovery and an
5 expenditure of money without your ever ruling one way or the
6 other as to whether we are right on our basic legal premises.

7 JUDGE DUGGAN: Do you have a comment on that?

8 MR. BOUKNIGHT: I guess the only comment that we
9 could make is that summary disposition is appropriate when
10 there is no material issue of fact in dispute.

11 Mr. Dym and I have been spending the last few
12 months going around Florida taking depositions in the action
13 that has been filed in the Miami case and there are facts in
14 this case that are quite hotly in dispute. I don't believe
15 that either side is going to be prepared to say that all the
16 documents speak for themselves.

17 If Mr. Jablon believes that he is entitled to
18 summary disposition he is entitled to file a motion and we
19 will respond to it, but Florida Power and Light is not
20 looking for years of litigation. Florida Power and Light is
21 looking to get an operating license for this power plant at
22 the end of next year. That is one of the reasons that we
23 are concerned with proceeding with discovery. If the case
24 can't be resolved on summary judgment, then let's not allow
25 several months to pass trying to follow a summary judgment

1 procedure.

2 MR. JABLON: Look at the kinds of things we are
3 talking about. We are talking about a Fifth Circuit finding
4 of illegality in the antitrust laws.

5 JUDGE SMITH: We don't have to hear the merits,
6 Mr. Jablon.

7 MR. JABLON: , I was using it illustratively for you
8 to understand the kind of materials I would place before
9 you. Certainly you can make a ruling, and I submit should
10 make a ruling, based on that kind of material.

11 You talk about a competition issue. If you had an
12 offer to buy out a system and a public newspaper article
13 that went to every resident, it is not a question of what
14 they intended but it is what was perceived, an application
15 to an agency.

16 If we can accumulate this material to demonstrate
17 that the situation inconsistent does in fact exist, that
18 however nicely what Florida Power and Light says now you
19 make the cost of determining rights bearable. It seems to
20 me that when you have got this kind of evidence, this kind
21 of thing, and I know you have got other proceedings, but
22 there is an obligation for it to be reviewed because this
23 litigation can takes hundreds of thousands and even millions
24 of dollars. That is what I am trying to avoid.

25 JUDGE SMITH: I am very pessimistic. We walked in

1 here with seven filings constituting about six or seven
2 inches of paper to find out that we could summarize the
3 entire position probably in a few pages. I am very
4 pessimistic that the parties in this proceeding are able to
5 do what you are suggesting.

6 I think that this whole matter could have been
7 presented to us quite simply. It took us all afternoon and
8 all of these findings and all of these pleadings to find out
9 exactly what your position was as far as being hurt.

10 Now you are suggesting another abbreviated process
11 that I simply have no confidence in. It is not the history
12 of this case. You overwhelm us with papers and with
13 arguments and you don't seem to be able to condense them and
14 to bring them into focus for us.

15 MR. JABLON: I think the Fifth Circuit has
16 condensed it. I think what has happened is that Florida
17 Power and Light and the government appropriately so took
18 months and months and months to reach a settlement and the
19 settlement process is good, Your Honor.

20 JUDGE SMITH: Well, we are still faced with the
21 burden of going back to our offices sometime and making
22 broad public interest decisions when you admit at the very
23 beginning that if we can't make them they don't matter.
24 That is your request and that is what you are going to get.

25 MR. JABLON: Yes, Your Honor, and I think the

1 parties have submitted a settlement to you. You know, they
2 have made a motion and these matters we are talking about
3 are not trivial.

4 I submit that the question of what kind of
5 liability clause you are going to have is important. It is
6 worth the Board's time. If you disagree there is not more I
7 can say.

8 JUDGE SMITH: Well, the Board has not had a chance
9 to consult. Your entire argument boils down to this. You
10 would like for us, and I know that it is going to take a
11 great deal of time, to read your filings and make a
12 determination about the public interest. I don't know any
13 shortcut to that.

14 Then you say put some conditions on and then maybe
15 they will comply with them and maybe they won't. All right,
16 then where are we? Right back in this room. We are right
17 back in this room and they don't comply with our conditions.

18 MR. JABLON: Let me say that what you do has
19 consequences. It has great consequences because it
20 influences the positions of the parties. If you make a
21 finding that something is not in the public interest it
22 obviously impacts on their position.

23 I can't be predictive and it is unfair to ask
24 counsel for FP&L to determine now what position he will take
25 with regard to something on which you haven't ruled.

1 With regard to the broader question what I am
2 saying is my clients have been threatened with going out of
3 business. They see before them for reasons which you have
4 stated, and maybe it is Mr. Dym's and Mr. Bouknight's and my
5 disabilities. Maybe it is the counsel's disabilities, but
6 they see before them potentially years of litigation. That
7 is the reality.

8 JUDGE SMITH: Yes, that is right, exactly right,
9 and that is very predictable if you look at what has
10 happened in this case. If you hadn't opposed the settlement
11 agreement as it was presented last September we could right
12 now have been talking about how to resolve the remaining
13 issues of inconsistent.

14 MR. JABLON: But I opposed it and the cities
15 opposed it because they perceived that certainly aspects of
16 the settlement agreement which were limited created harm.
17 It was the nature of the beast.

18 JUDGE SMITH: Yes, I understand that, and it took
19 us all this time to try to find out exactly what the harm is.

20 MR. JABLON: Well, in that case I have not done my
21 job for which I apologize.

22 JUDGE SMITH: I am not criticizing you. You have
23 a right to file those papers and you have a right to get the
24 Board's judgment on any issue which is meritorious and you
25 are going to get that. But I am saying that that does not



1 bode well for any easy process to resolve the rest of the
2 case. We are going to have to go back and get done with
3 this now, this mess. It is not simple to us. It may be
4 simple to you but it is not to us.

5 MR. JABLON: These are important matters of law
6 and of policy. I am not suggesting they are simple in terms
7 of easy for you nor are they easy for us. But I am
8 suggesting that the issues that divide Florida Power and
9 Light and the cities can be articulated simply. They
10 disagree that they have an obligation to serve outside their
11 service area.

12 JUDGE SMITH: I understand.

13 MR. JABLON: The factors on which you will have to
14 make a decision if the case is not settled given the talent
15 of their law firm and I hope ours has some, too, may not may
16 not be so simple but they raise legal questions. Isn't it
17 better to decide them now than three years from now?

18 JUDGE SMITH: I am not suggesting that you don't
19 take actions to simplify the issues. I am telling you that
20 with my five years history on this case that I just don't
21 think it is going to happen. The first thing we have to do
22 is we will rule on the settlement agreement. I have been on
23 this case now for five years and we don't seem to be any
24 closer to hearing than we ever were.

25 MR. JABLON: So have we. As Power and Light had a



1 right to do the matter was appealed all the way up to the
2 Commission and things have happened. Now what I am
3 suggesting in the interim is that there have been certain
4 legal decisions. There has been discovery and a lot of it
5 in the District Court case. We know a lot more than we knew
6 then.

7 Isn't it time to take stock because if the NRC has
8 a broader function to prevent anticompetitive use of these
9 plants a process which cannot simplify must work against the
10 purposes of the agency.

11 JUDGE SMITH: I fully agree with you. You can
12 file whatever you want to file.

13 MR. JABLON: Okay. What I would like to do is
14 file a procedural motion, and I will try to keep it as
15 simple as I can, setting forth the suggestions for
16 subsequent procedures and giving you an illustration so you
17 are not working in a vacuum of the basis for it. If FP&L
18 disagrees with those procedures, so be it.

19 MR. DYM: While stock taking is going forward can
20 this case move forward as well?

21 JUDGE SMITH: Oh, yes. I don't know. I have to
22 consult with the Board. In the first place how do you know
23 what the issues are until we rule upon the settlement? So
24 isn't that a priority that we have to get the settlement
25 ruled upon?

1 MR. JABLON: Well, I think there is a priority to
2 get the settlement ruled on and I think the issues are
3 pretty apparent regardless. In my own judgment, I think you
4 are going to have an issue of territoriality. You are going
5 to have an issue FP&L has used its power with regard to
6 nuclear power and transmission to refuse to deal (a) to
7 maintain its existing or expand its existing retail service
8 area and (b) in competition for power supply throughout the
9 state.

10 You are going to have two more issues. One
11 relates to whether they maintain their base load power
12 monopoly because of certain gas arrangements. I think both
13 sides would agree that that is ripe for summary disposition
14 because Florida Power and Light has filed a motion for
15 summary disposition in the District Court. The second is
16 you are going to have an issue of whether FP&L misled the
17 NRC and other governmental agencies. I think those are the
18 issues.

19 What I am suggesting to you is that I can present
20 to you filings with government agencies and decisions, that
21 kind of thing, which speak for themselves.

22 JUDGE SMITH: Let's say you file whatever you
23 believe is going to be helpful and we will rule upon it.

24 MR. JABLON: Thank you.

25 JUDGE SMITH: In the meantime the Board is going

1 to have to pay attention to the rule on the settlement
2 agreement. You could be very helpful to the Board after
3 everything that has transpired today if you would give us a
4 very careful and very well considered list of the conditions
5 that you feel are necessary before we should approve this
6 settlement.

7 MR. JABLON: I shall do so, Your Honor.

8 JUDGE SMITH: Just No. 1, No. 2 and No. 3, your
9 minimum requirements.

10 MR. JABLON: I shall do that.

11 JUDGE DUGGAN: The young lady from Justice has a
12 comment.

13 MS. URBAN: I just have one comment on the case
14 going forward. I think Mr. Dym made that suggestion and I
15 assume he is talking about discovery.

16 Now, the Department has a problem with that
17 because we have discovery requests outstanding. Of course,
18 once the settlement attaches we will withdraw those requests
19 and basically, as I mentioned, participate minimally, if at
20 all. Certainly we will not participate in any of the
21 discovery.

22 Until the settlement is attached, which I hope it
23 will be, we don't know whether to withdraw. I frankly would
24 prefer not to have to go through this with this mass of
25 discovery or have the parties make one more copy in massive

1 production if we are going to be out of the proceeding.

2 JUDGE SMITH: I think you might have an agreement
3 with Mr. Jablon. As far as he is concerned, the settlement
4 will attach one way or the other. Didn't we come to that
5 point this afternoone? One way or the other in a short
6 period of time the settlement will attach.

7 MR. JABLON: Yes, Your Honor.

8 JUDGE SMITH: The question will be does the Board
9 attach conditions. If we attach conditions that may destroy
10 the settlement. That is the circle that I think we are in.

11 MS. URBAN: If we are in that position where the
12 settlement is destroyed the Department is once again part of
13 the litigation. So I guess we will have to request,
14 although I am quite reluctant to do so, that you defer
15 reinstituting discovery until you have made a ruling on
16 whether the settlement will attach with or without
17 conditions just because I think it would be very burdensome
18 on all the parties to go through that sort of discovery and
19 then find out it was useless.

20 JUDGE SMITH: I see Mr. Dym agreeing to that.

21 Mr. Dewey.

22 MR. DEWEY: We would consult with counsel for
23 Florida Power and Light on procedures regardless of what
24 path is taken. We have always been able to work out this
25 kind of problem and I would hope we could do so.

1 JUDGE SMITH: Were you going to summarize then
2 what your minimum requirements are before you give your
3 blessings to this settlement?

4 MR. JABLON: Yes, Your Honor.

5 JUDGE SMITH: Were you going to do it now?

6 MR. JABLON: No. I thought you wanted me to make
7 a list.

8 JUDGE SMITH: I thought perhaps you could do it
9 now.

10 MR. JABLON: Yes, Your Honor.

11 JUDGE SMITH: If it is too late we will get it in
12 writing.

13 MR. JABLON: We are asking you to rule on the
14 request for relief at page 8, 18, 20, 24 and 28 of the reply
15 of Florida Cities to Florida Power and Light Company's
16 response to joint motion dated January 8, 1981, and the
17 specific requests are set forth on those pages. I will
18 confirm that. I just want to glance at those pages and I
19 will confirm it in a letter.

20 JUDGE SMITH: Has anything developed this
21 afternoon which has changed your position on those requests?

22 MR. JABLON: No, Your Honor.

23 JUDGE SMITH: Has anything developed this
24 afternoon which gives the parties another new basis for
25 agreement?

1 MR. DYM: I don't think so, Your Honor.

2 JUDGE SMITH: Then it is ready for the Board to
3 rule.

4 JUDGE LAZO: I just had one thing, Mr. Jablon.
5 Looking at page 20, and I had looked at it earlier, you have
6 a footnote there regarding an acceptable contention. The
7 last two sentences don't seem to be correct.

8 MR. JABLON: Thank you, Your Honor. Let me glance
9 at it for one second.

10 JUDGE LAZO: Yes.

11 (Short pause.)

12 MR. JABLON: Oh, the period should have been a
13 comma.

14 JUDGE LAZO: All right.

15 MR. JABLON: "In the event that certain things
16 happen, FP&L shall take reasonable steps to assure."

17 JUDGE LAZO: I just wanted to be certain.

18 MR. JABLON: Thank you, Your Honor. I intended to
19 call that to your attention and I forgot.

20 MR. DYM: Your Honor, just so that the record is
21 absolutely clear, I think it is FP&L's position that the
22 settlement it has entered into with the Department of
23 Justice and the NRC is reasonable and in the public
24 interest. As stated in the answer that FP&L filed to
25 Mr. Jablon's reply, we believe his proposed conditions are

1 MR. DYM: I don't think so, Your Honor.

2 JUDGE SMITH: Then it is ready for the Pcard to
3 rule.

4 JUDGE LAZO: I just had one thing, Mr. Jablon.
5 Looking at page 20, and I had looked at it earlier, you have
6 a footnote there regarding an acceptable contention. The
7 last two sentences don't seem to be correct.

8 MR. JABLON: Thank you, Your Honor. Let me glance
9 at it for one second.

10 JUDGE LAZO: Yes.

11 (Short pause.)

12 MR. JABLON: Oh, the period should have been a
13 comma.

14 JUDGE LAZO: All right.

15 MR. JABLON: "In the event that certain things
16 happen, FP&L shall take reasonable steps to assure."

17 JUDGE LAZO: I just wanted to be certain.

18 MR. JABLON: Thank you, Your Honor. I intended to
19 call that to your attention and I forgot.

20 MR. DYM: Your Honor, just so that the record is
21 absolutely clear, I think it is FP&L's position that the
22 settlement it has entered into with the Department of
23 Justice and the NRC is reasonable and in the public
24 interest. As stated in the answer that FP&L filed to
25 Mr. Jablon's reply, we believe his proposed conditions are

1 unreasonable and they are unacceptable.

2 JUDGE SMITH: So you are telling us in advance
3 that if we were to condition the settlement upon the relief
4 requested that the settlement would not be effected?

5 MR. DYM: I won't quite go that far. I think we
6 obviously will consider what the Board has to say and
7 obviously consult with our client.

8 What I am saying is that we have considered what
9 Mr. Jablon has proposed. Our reply deals with it and that
10 is our position.

11 JUDGE SMITH: Is there anything further?

12 (No response.)

13 JUDGE SMITH: All right, we are adjourned.
14 Thank you.

15 (Whereupon, at 5:20 p.m., the prehearing
16 conference adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

in the matter of: FLORIDA POWER AND LIGHT
(ST. LUCIE PLANT, UNIT NO. 2
Date of Proceeding: February 2, 1981

Docket Number: 50-389

Place of Proceeding: Bethesda, Md.

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Patricia A. Minson

Official Reporter (Typed)

Patricia A. Minson

Official Reporter (Signature)

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Mary C. Simons

Official Reporter (Typed.)



Official Reporter (Signature)