UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 57

Florida Power & Light Company	)	Docket Nos. ER78-19 (Phase I) and ER78-81

OPINION AND ORDER REVERSING INITIAL DECISION AND REJECTING TARIFF AVAILABILITY LIMITATIONS AND NOTICE OF CANCELLATION

Issued: August 3, 1979

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APPEARANCES

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William H. Chandler, William C. Wise and Robert Weinberg for Seminole Electric Cooperative

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Robert F. Shapiro and Harvey L. Reiter for the Staff of the Federal Energy Regulatory Commission

WHOLESALE ELECTRIC
SERVICE: AVAILABILITY:
ANTITRUST

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon, and Matthew Holden, Jr.

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(Issued August 3, 1979)

Before the Commission is a consolidated proceeding to determine whether certain limitations on the availability of firm wholesale requirements service, along with notices of cancellation of such service to specific wholesale customers, are unjust, unreasonable or unduly discriminatory, and particularly whether they are anticompetitive in effect. With one exception, we find that the proposed limitations on requirements service availability have not been justified. Accordingly, we reject these tariff provisions. Moreover, since the notices of cancellation are founded upon one of these rejected limitations on availability, they must likewise be rejected.

To set the stage for our discussion, we wish to state at the outset our view that, where a utility possessing market power in a relevant market seeks to amend a general tariff to impose conditions which foreclose supply options or increase the costs of competitors, or which otherwise contribute to the acquisition or maintenance of monopoly power, its application for amendment must be rejected and found unjust and unreasonable under Sections 205 and 206 of the Federal Power Act - unless the utility can show that compelling public interests justify the service conditions.

Moreover, even where overriding public policy objectives are shown to justify some restriction on wholesale service, such a utility must be called upon to demonstrate that its proposal is the least anticompetitive method of obtaining legitimate planning or other objectives.

On the basis of our analysis of the record before us, we conclude that FP&L's proposed tariff restrictions would eliminate the only practical source of base-load power or energy to competing utilities within the markets dominated by the Company. Furthermore, the proposed restrictions would appear to create the potential for additional anti-competitive effects by inhibiting the formation of new distribution utilities within these markets. FP&L has failed to satisfactorily demonstrate countervailing public interests that warrant approval of any of these proposals, except for the one which would provide separate partial requirements service. To the extent that legitimate purposes are sought to be attained by FP&L, there appear to be a number of alternative means of less anticompetitive effect for their accomplishment. The Commission wishes to emphasize that we are not today holding that a utility with market power is, per se, precluded from amending a general tariff to impose conditions which limit service availability. The Federal Power Act accords a utility the right to propose such limitations and an opportunity to demonstrate that its proposed change in service is just and reasonable. In the instant case, we find only that FP&L has failed to carry its burden of justification.

An initial comment is also in order concerning the applicability of antitrust laws and policies to our proceedings. From its inception, this proceeding has focused on issues related to the justness and reasonableness of FP&L's rate proposals when evaluated in light of their alleged anticompetitive effects. The allegations and evidence of staff and the intervenors together with the associated responses of the Company have coalesced into issues typically examined in the context of a monopolization case under Section 2 of the Sherman Act. The Commission acknowledges that it is not specifically responsible for enforcing the Sherman Act or any other of this nation's antitrust laws. And we wish to emphasize that in evaluating the anti-competitive effects of a proposed rate change and in making findings with respect thereto, we do not make findings that violations of the antitrust laws have occurred. Instead, it is our obligation to evaluate the public policies expressed in Federal antitrust laws and to reflect those policies in the conduct of our responsibilities under the Federal Power Act. 1/ This we have endeavored to do in the instant case.

1/ It is now beyond question that antitrust law and policies do relate to this Commission's responsibilities under the Federal Power Act. See, Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); and FPC v. Conway Corporation, 426 U.S. 271 (1976).

While we believe our evaluation of the anticompetitive effects of the proposal is correct and supported by the record, we recognize that these anticompetitive effects may not have been demonstrated with the rigor as would be demanded in proceedings where specific findings of violations of the antitrust laws are at issue with attendant potential for the imposition of civil and criminal penalties. Lastly, we wish to note that the fairly elaborate account of FP&L's past conduct in its market place is not intended by this Commission to be a determination of factual disputes which may be the subject of litigation in other forums. Rather we merely observe that the evidence in this record of that past conduct casts a shadow over FP&L's claimed need to restrict service and, therefore, is of probative value in determining whether the Company has satisfactorily carried its burden of justification for the proposed service limitations. The structural and conduct analyses required in an antitrust proceeding, and presented to us here, are of considerable assistance in isolating demonstrated anticompetitive effect from unfocused allegations. It is important to examine the markets in which relevant electric services are bought and sold and then determine how the questioned rate provisions may affect the competition, or potential competition, in these markets. This opinion attempts to present our interpretation of the facts and law along these lines.

BACKGROUND

The Procedural History On October 14, 1977, FP&L filed in Docket No. ER78-19 proposed changes to its firm wholesale electric tariff, schedule SR-1, which would bifurcate that schedule into a full requirements schedule SR-2 and a separate partial requirements schedule PR, and increase the rates for each of these services. Under schedule SR-1 firm service has been generally available "in all territory served by the Company." FP&L now proposes to limit the availability of firm wholesale services to those existing customers named in the two new schedules, which previously purchased under schedule SR-1. Also, the Company would limit service under schedule PR to existing customers which do not own sufficient generating capacity to meet their peak load requirements.

In a related action, FP&L filed in Docket No. ER78-81, on December 1, 1977, a notice of cancellation of firm partial requirements service to one of its SR-1 customers, the City of Homestead, Florida, which has sufficient capacity to meet its load. Instead, the Company would make wholesale sales to Homestead under rate schedules in an interchange agreement between these two parties. Under Sections 205 and 206 of the Federal Power Act, a utility must receive Commission approval to replace one service to a wholesale customer with another service. Commission jurisdiction over changes in rates, charges, classification or service necessarily encompasses this situation. The Commission must first find that this customer reclassification is in the public interest. See, Pennsylvania Water and Power Company v. FPC, 343 U.S. 414, 422-424 (1952).

By order of December 30, 1977, the Commission consolidated these dockets, suspended both the tariff availability restrictions and the Homestead cancellation for five months, and suspended the proposed rate changes for two months. Phase I of these consolidated proceedings was established to allow for separate hearing and decision on the legality of the tariff availability restrictions and the cancellation of the firm service to Homestead.

Following a schedule of conferences, evidentiary submissions, hearings and briefs, Presiding Administrative Law Judge Curtis Wagner issued his Initial Decision on April 21, 1978. He concluded that the proposed availability limitations for full and partial requirements services are just and reasonable, and approved the cancellation of firm partial requirements service to Homestead.

Briefs on exceptions to the Initial Decision were filed on May 8, 1978, by the Commission Staff, the Cooperative group of wholesale customers, 2/ and the municipal group of wholesale customers (the Florida Cities). 3/ On May 12, 1978, FP&L filed its brief opposing these exceptions.

2/ The Cooperatives include Seminole Electric Cooperative, Clay Electric Cooperative, Lee County Electric Cooperative, Okefenoke Rural Electric Membership Corporation, and Suwannee Valley Electric Cooperative.

3/ The Florida Cities include Fort Pierce, New Smyrna Beach, Homestead, and Starke.

By order issued June 1, 1978, the Commission stated its intention to issue a final decision in Phase I as soon as possible and urged FP&L to refrain from implementing the tariff availability restrictions and cancellation of requirements service to Homestead, pending a final ruling on these issues. By letter dated June 9, 1978, FP&L informed the Commission that, without waiving its legal rights, it would provide PR service to Homestead and also to the City of Ft. Pierce, Florida, pending final Commission action.

The Rate Change Proposals Firm wholesale service under FP&L schedule SR-2, filed on October 14, 1977, would be available to meet the total capacity and energy requirements of purchasing utilities over the indefinite future. It is comprised of a two-part demand and energy rate, based on FP&L's average system costs which includes the production costs of its nuclear, gas and oil-fired generating plants. Its predecessor, schedule SR-1, was made available to all wholesale purchasers within FP&L's service territory. However, the Company now proposes to limit full requirements service to six rural electric cooperatives which presently take this service. A potential purchaser requesting full requirements service from FP&L in the future could not anticipate receiving this service and would not receive the SR-2 rate for any service it was able to arrange. 4/ While there will be no abatement of retail sales to new customers, FP&L has stated that it is not willing to commit itself to serve any new wholesale customers but would be willing to discuss the possibility when the situation arises. 5/

FP&L wholesale schedule PR, also filed on October 14, 1977, is a modification of schedule SR-1 designed to meet partial power and energy requirements, complementing the purchaser's own generation or other firm power purchases. Like schedule SR-2, it is composed of a two-part demand and energy rate based on average system costs; however, the rate levels are different and the demand component is stratified to reflect differing prices for peak and base/intermediate demand. Each tariff has two energy rate blocks, but the SR-2 lower block is attained after purchase of

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4/ FP&L brief opposing exceptions at 10.

5/ Id.

275 kWh per kW of billing demand, versus 400 kWh under schedule PR. Moreover, schedule PR requires the customer to specify its "contract demand" on FP&L for succeeding 12 month periods. The customer's monthly billing demand is never less than 90% of its contract demand plus 75% of its maximum recorded peak demand. Conversely, the demand charge for purchases above 110% of contract demand is higher and the customer may not increase its contract demand for succeeding 12 month periods by more than 125% without the consent of FP&L. The Company asserts that these design differences between schedules PR and SR-2 encourage partial requirements customers to increase their load factors.

Partial requirements customers, including the Cities of Homestead and New Smyrna Beach, previously took service under schedule SR-1 which, as noted earlier, was available to all customers in FP&L's service territory. With the filing of schedule PR, however, FP&L proposes to limit this service to three customers, the Keys Electric Cooperative and the Cities of New Smyrna Beach and Starke. Homestead which, like Fort Pierce, has sufficient generating capacity to meet its load, would be excluded from this service. 6/

Although not directly at issue in this proceeding, it would aid the clarity of this decision to describe the four interchange power and energy services which FP&L and several utilities reciprocally provide under bilateral agreements. The transactions under these agreements are voluntary and of relatively short duration. Rates are determined at the time of sale, based on incremental instead of average system costs. Emergency intercharge service, denominated Schedule A, provides the buyer with capacity and energy in the event of a forced outage, for a period lasting no longer than 72 hours. For pricing purposes, Schedule A service is deemed to be provided by the seller's designated fossil-fired steam or combustion turbine generators and recovers only out-of-pocket energy costs. 7/

6/ As will be discussed later, Fort Pierce began purchasing under schedule PR on March 28, 1978. Homestead also continues to receive service by agreement of FP&L. However, FP&L asserts that it will terminate service to both, if the Commission approves its rate changes.

7/ Under certain circumstances, the buyer may alternatively return capacity and energy in kind within the current billing period.

Scheduled interchange service, Schedule B, provides capacity and energy for periods of less than 12 months, when the buyer is short of capacity primarily due to forced or scheduled plant outages. The buyer must meet the reserve requirement associated with Schedule B service. Delivery of Schedule B power and energy occurs when in the seller's discretion no impairment of fuel stocks or service to other customers would result. Capacity and energy rates are based on the production costs of the seller's fossil-fired and combustion turbine generating units. Economy interchange service, Schedule C, provides for non-firm energy exchanges of short duration, priced to split the savings between the seller's incremental cost of generation and the buyer's decremental cost. 8/ Finally, firm interchange power, Schedule D, provides capacity and energy for periods of 12 to 36 months. Unlike firm service under Schedule SR-2 and PR, this service is curtailable during extreme cold weather and emergency conditions, in which case the demand charge may be adjusted. Schedule D service is apparently priced at the scheduled outage rate, Schedule B, for fossil-fueled and combustion turbine capacity and energy (Exhibit 29). With intermittant usage Schedule D may be cheaper than the PR rate; however, it apparently becomes more expensive than Schedule PR as the customer's load factor increases (Tr. 254). FP&L proposes to provide firm service to Homestead and Fort Pierce only under Schedule D, and has offered them 240 MW of Schedule D capacity through 1980.

The Initial Decision The basic issue of this proceeding as characterized by the Presiding Judge is whether FP&L can justify a reclassification of wholesale services based on the relationship of customer load to customer generating capacity. In hearing this case, the Judge imposed the burden of proof on FP&L to demonstrate that its proposed tariff modifications and restrictions were just and reasonable. He largely refrained from considering the evidence presented by Staff and the Florida Cities intended to demonstrate that the proposed restrictions

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8/ The price of interchange energy is characteristically determined by FP&L's generating units with high operating costs, not by base-loaded nuclear or natural gas-fired units.

were part of an anticompetitive pattern of activities by the Company, leading toward monopolization of the the retail power market.

The Presiding Judge concluded that FP&L's proposed restrictions on eligibility for wholesale services were justified on the basis of differences in cost of service. He agreed with the Company that the load patterns of customers with capacity equal to their peak demands could be so eratic as to make FP&L system planning unduly difficult, warranting the complete exclusion of such customers from wholesale service at average-cost rates. He decided that incrementally-priced interchange services, described above, were acceptable alternatives for customers such as Homestead and Fort Pierce. The Judge found that interchange power could be used to meet their base load requirements "at a lower rate than under the partial requirements schedule," Initial Decision at 14, and suggested that these self-sufficient utilities could purchase bulk power from other sources because FP&L has agreed to wheel. He deferred to civil courts the allegations of these two customers that FP&L had breached contractual obligations to serve them under schedule SR.

The Judge also found that the bifurcation of schedule SR-1 into separate SR-2 and PR schedules was just and reasonable. Moreover, he concluded that the Company could change the availability provision of its tariff to limit wholesale services to customers named in schedules SR-2 and PR. This was based on his assessment of certain financial, operational and capacity planning problems asserted by FP&L and his determination that the two-year notice of termination provision in the schedules did not assure that the Company would recover all capacity costs.

The Judge dismissed the allegations that FP&L's proposals would have an anticompetitive effect, based on a Company representation that it had no interest in acquiring new retail franchises because of fuel problems. Finally, he sought to mitigate concern that FP&L would strictly construe its tariff limitations by reciting several of the Company's interpretations made during the course of the proceedings, but not added to the proposed tariffs.

In sum, the Presiding Judge approved each of the Company's proposed changes to its wholesale tariff. Based on this, he also approved the proposal that Homestead (and Fort Pierce) become ineligible for service under FP&L's average-priced wholesale rates and allowed to take firm intercharge service only.

Positions of the Parties The position of the applicant, FP&L, has been summarized in the two proceeding sections of this opinion. It further states that public utility obligations under the Federal Power Act are limited. However, we are basically concerned here with the obligations undertaken by FP&L itself in its schedule SR-1 tariff, which makes wholesale service generally available throughout the Company's service territory, in contrast to the proposed limitations on availability of schedules SR-2 and PR. 9/ Finally, FP&L denies that it has engaged in anticompetitive activities, states that Staff's and Florida Cities' allegations are largely irrelevant and questions their application of the antitrust laws.

Exceptions to the Initial Decision raised by Florida Cities are prolix. However, they may be simplified, briefly.

Florida Cities contend that the proposed tariff is an attempt to abandon service to the City of Homestead because Homestead is currently receiving full interchange service and under the terms of the proposed rate schedule could no longer receive partial requirements service although it desires to do so. Cities claim that restrictions in the proposed full and partial requirements tariffs are tanamount to refusals to deal in either total or partial requirements service. FP&L's partial requirements tariff, they assert, is designed to limit the sale of wholesale power. This is accomplished by restructuring the sale of partial requirements service to only those systems which require such service to complement the insufficient generating capacity or firm power purchases to meet their native loads and therefore does not apply to systems which nominally have generation sufficient to meet their loads regardless of the age or efficiency of such generation. Both Homestead and Fort Pierce would be served only at interchange rates, creating a price squeeze.

9/ To the extent the Presiding Judge may suggest that schedule SR-1 does not make wholesale service generally available because service contracts may still be required, Initial Decision at 8, this is not reflected in the provision itself. During cross examination FP&L's rate design witness acknowledged that utilities within the Company's service territory, such as Fort Pierce, Jacksonville and Orlando, were eligible for firm service under the terms of Schedule SR-1. See, infra at 30. After all, the purpose of this proceeding has been to limit that provision to certain named and existing customers. Moreover, FP&L has in the past filed unexecuted service "agreements" when customers have commenced service.

Cities contend that FP&L is attempting to deny or make it more difficult for them to establish economic alternatives. Apart from the tariff proposals at issue, this is accomplished by denying joint participation in new nuclear generation, opposing municipally supported legislation, and refusal to file or establish a general rate for transmission. They also state that FP&L has refused to support a general integrated power pool in Florida.

The Cooperatives assert in their brief on exceptions that the Initial Decision ignored their position and relied excessively on FP&L testimony. The Cooperatives, which through Seminole are planning base load generating units, will require partial requirements service in the future instead of schedule SR-2 service. Because they are not named in the PR tariff they are not assured of this service, so that these limitations deny them the necessary supply flexibility to account for changing situations.

Staff alleges several acts of monopolization by FP&L. Staff states that FP&L has refused to sell wholesale power to the municipal utilities, thereby constituting a refusal to deal proscribed by United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), aff'd, 410 U.S. 366 (1973). In this regard, it points to an historic FP&L policy not to serve municipal systems at wholesale, an FP&L refusal to serve Fort Pierce under the SR-1 tariff, and the limitations on the availability of the SR-2 and PR tariffs presently at issue. Staff views FP&L's dominance over transmission facilities and its corresponding refusals to wheel as bottleneck monopolization proscribed in United States v. Otter Tail Power Co., supra. Staff cites examples of FP&L's refusing to wheel third party bulk power to the Cities of Jacksonville, Homestead, and Lake Worth, and it asserts that, while FP&L has very recently announced in Docket No. ER77-175 a new policy to permit wheeling, that policy is far too restrictive in terms of rates and terms. Staff sees another example of monopolization in FP&L's restrictions on access to its nuclear generating units. Specifically, Staff asserts that smaller utilities do not have the individual loads to justify a nuclear unit but, due to the economies of such units, utilities may become uncompetitive without access. Staff also alleges that FP&L has unreasonably restricted coordination, both in terms of economy exchanges and power pooling. It then contends that FP&L has established barriers to entry in the form of restrictions in its franchise agreements with municipalities, particularly the standard thirty year term. This is occurring, according to Staff, while FP&L maintains a policy of acquiring municipal systems; however, FP&L has not acquired another utility in recent years. The Staff concludes that FP&L's proposed tariff restrictions would further its monopoly power in the relevant markets, as defined by its economic witness.

THE EXISTENCE OF COMPETITION AND MONOPOLY POWER

The Relevant Markets We begin our discussion of FP&L's tariff proposals by defining the relevant markets, which provide a framework for determining the possible existence of monopoly power, the opportunities for competition and the required breadth of any remedial action we may order. The Staff economic witness identified two broadly-defined product markets as relevant to the investigation of the anticompetitive effect of FP&L's proposed tariff restrictions. This analysis was not challenged by any party and reflects FP&L's own conceptualization of its business. 10/ The retail market involves sales of capacity and energy to ultimate consumers by vertically integrated utilities such as FP&L and by distribution utilities. The bulk power market involves sales of wholesale power and energy to retail distributors (including the captive retail distribution centers of vertically-integrated systems) by bulk power producers and suppliers. These product market definitions are amply supported by the record, and we adopt them in our analysis.

The bulk power product market was further disaggregated by the Staff witness into five submarkets essentially consisting of full requirements power, partial requirements and coordination services, component bulk services, sales at transmission voltages to ultimate consumers and transmission services. In so doing he attempted to demonstrate the interchangeability of firm full requirements power with "unbundled" bulk power services which may be purchased from several sources to meet the requirements of a retail distributor, in conjunction with generation owned by that distributor.

While we do not dispute the validity of this subdivision of the wholesale market, a more practical method of analyzing that market for purposes of this proceeding is to separate bulk power transactions into discrete firm requirements and coordination submarkets. Essentially, this parallels the distinction between FP&L's schedule SR-2 and PR firm services on the one hand and its interchange services on the other. FP&L's firm services are non-interruptible; priced on the basis of average system costs; designed to meet a

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10/ In a 1976 presentation to the Company's Senior Management Council, FP&L's vice president for strategic planning subdivided the Company's activities into discrete bulk power and electric service businesses (Exhibit GT-3, at 3).

customer's base, intermediate and/or peak load requirements; and continuously available over the indefinite future. Conversely, interchange services are interruptible; incrementally priced on the basis of oil-fired generation costs; ancillary to bulk power supply and not practicable sources of base load power; and of limited duration. Depending on the feasibility to the customer of self-generation or supplementary firm-power purchases, partial requirements service is reasonably interchangeable with full requirements power to meet a retail load. Such interchangeability is a requisite for grouping products in a common market. See, United States v. du Pont & Co., 351 U.S. 377, 393 (1956). Of course, FP&L did not itself distinguish between these two firm services in its SR-1 schedule prior to this case. However, interchange services cannot be used to sustain load requirements and may only be used to augment other primary sources of bulk supply. In particular, FP&L's wholesale customers do not regard Schedule D firm power as interchangeable with SR or PR firm power and the Company describes them as different services.

FP&L sells electric power and energy to most of the heavily populated areas along the eastern and lower western coasts of peninsular Florida and portions of central and north-central Florida. Within or adjacent to this service territory are 22 smaller areas served by municipal and cooperative utilities. The Staff witness identified this composite area, comprised of some 35 Florida counties, as the relevant geographic market for both retail and wholesale product markets. This was primarily determined from information in FP&L's 1975 annual report. The service territories of larger bordering utilities 11/ were excluded from the retail geographic market because of the unavailability of wheeling service into the FP&L service territory and the existence of retail territorial allocation agreements with FP&L which prohibit retail competition (Exhibit GT-6, at 8-9). 12/ This is not to say that competition does not exist in the relevant retail market. As we discuss later, there is significant competition, primarily franchise and yardstick competition,

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11/ Florida Power Corporation and Tampa Electric Company.

12/ These retail territorial agreements are not at issue in this proceeding and we express no opinion as to their merit. They require approval by the Florida Public Service Commission and have been upheld on judicial review. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. den., 395 U.S. 909 (1969). In 1974 this authority was expressly given to the Florida Commission. See, Florida Statutes Annotated §366.04.

and FP&L itself has recognized that its neighboring utilities are both customers and competitors (Exhibit GT-6, at 1). Furthermore, even territorial allocation agreements are subject to modification under limited circumstances in proceedings before the Florida Public Service Commission. Peoples Gas System v. Mason, 187 So.2d 335 (Fla. 1966).

The wholesale bulk power geographic market was similarly constrained because relatively few wholesale transactions are made across its boundaries. This geographic limitation applies as well to the bulk power submarkets, particularly the firm requirements submarket, described supra, because of wholesale territorial agreements and the absence of firm power transmission services. Although there is a potential for competition in the wholesale market, actual competition has been inhibited by FP&L, as we discuss below. We are not required to remedy that situation now. This opinion reflects our concern that wholesale monopoly power not be used to maintain or enhance a utility's retail market position.

Monopoly Power Monopoly power has been defined as the ability to control prices or exclude competition from a relevant market. United States v. Aluminum Co. of America, 148 F.2d 416 (2d. Cir. 1945). It may be readily apparent in cases where prices have been controlled or competition demonstrably excluded; however, such showings are not essential. American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946). 13/ Instead, the characteristic test is based on a firm's share of the market, and a predominant share warrants the inference of monopoly power. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966). In United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), aff'd, 410 U.S. 366 (1973), an inference of monopoly power was based on a finding that the defendant utility possessed a 75.6% share of the relevant market. We find that FP&L has monopoly power in these relevant markets, as determined by Dr. Taylor in unrebutted testimony.

Based on 1976 data, FP&L has been shown to possess a 76% share of the retail market in terms of customers served. Its closest rivals are the eight municipal utilities located within FP&L's service territory which generate a portion of their power requirements. 14/ Collectively, these eight

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13/ Monopoly power can be exercised as well through subtle efforts to prevent competition from developing. United States v. Griffith Amusement Co., 334 U.S. 100 (1948).

14/ The eight utilities are Florida Public Utilities in Fernandino, Fort Pierce Utilities Authority, the City of Homestead, Jacksonville Electric Authority, City of Key West, Lake Worth Utilities, the City of New Smyrna Beach and the City of Starke (Exhibit GT-5).

systems have a 12% share of retail customers served (Exhibit GT-3). In 1976 FP&L's share of total kilowatthours sold at retail was 75%, compared to the collective 13% sold by the eight generating municipals. 15/

The statistical measurement of monopoly power adopted in United States v. Otter Tail Power Co., supra, was the percentage of towns served at retail within the relevant market. FP&L provides retail service to approximately 90% of the communities in the relevant market with populations of over 1000 people (Tr. 1569). 16/

The inference of FP&L's monopoly power in the retail market is strengthened by several additional considerations. First, the existence of territorial allocations obviously provides a very effective barrier to new retail competition from existing utilities. Second, the substantial cost of acquiring utility property at the expiration of an existing supplier's franchise could be a barrier to competition for existing firms and new entrants as well (Exhibit ST-8). Third, the absence of wheeling services that would allow a utility to provide retail service to a noncontiguous area would stop any retail competition which overcame the first two barriers. 17/ In sum, these high market entry barriers confirm the inference of monopoly power based on

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15/ FP&L's share of the relevant market has grown somewhat between 1966 and 1976 from 73% to 76% of total retail customers and from 74% to 75% of retail sales (Tr. 1568).

16/ Cf., Brown Shoe Co. v. United States, 370 U.S. 294, 337 (1962), a case brought under §7 of the Clayton Act where monopoly power was measured on the basis of cities in the relevant market with populations exceeding 10,000. In City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320, 1325 (N.D. Ind. 1979), the court found monopoly power where the defendant served at retail 89% of the municipalities in the relevant market.

17/ Cf., Boston Edison Co., Docket Nos. E-8187 and E-8700, Order Reversing in Part and Affirming in Part Initial Decision, mimeo at 3 (December 7, 1976), where the Commission dealt with a transmission rate for retail service to a noncontiguous territory.

FP&L's market share. Consumers Power Company, 6 NRC 892, 1013 (1977). Moreover, entry barriers enhance the opportunities for exploitation of this power.

Although the record does not contain precise statistical indicia of FP&L's share of the wholesale power market, it is clear that the Company has monopoly power over bulk power transactions as well. FP&L's share of the retail market is a suitable base on which to assess its share of the wholesale market, because the bulk power which the Company produces to serve its own captive retail service territory must be included as part of the wholesale market. United States v. Aluminum Co. of America, supra, 148 F.2d at 424. Thus, FP&L possesses at least a 75% share of the wholesale market, to which must be added the Company's wholesale sales to municipal and cooperative utilities within the relevant market. The only other supplier of wholesale requirements service within the relevant market is the Jacksonville Electric Authority which supplies its own distribution system, plus the distribution utilities in Jacksonville Beach and Green Cove Springs.

Moreover, included in FP&L's bulk power resources are virtually all of the nuclear generating capacity and substantially all of the gas-fired generation available within the relevant market, each of which give the Company a significant edge in the production of low-cost power for base load requirements. Three of the four operating nuclear plants in the State of Florida are solely owned by FP&L (Tr. 588, 1625). 18/ Only New Smyrna Beach and the Cooperatives, acting through their generation and transmission subsidiary, have gained direct access to nuclear generation, through small ownership interests in Florida Power Corporation's nuclear plant. The Company does not dispute that its long-term, noncurtailable supply of natural gas gives it an advantage over municipal generating systems; 19/ however, it asserts that it should be allowed to retain this bargained-for advantage for sales to existing customers (Tr. 205). By comparison, municipal generating units are small-capacity, oil-fired steam or internal combustion machines

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18/ See, Fort Pierce Utilities Authority v. Nuclear Regulatory Commission, ____ F.2d ____, D.C. Cir. Nos. 77-1923 and 77-2101 (March 23, 1979).

19/ See generally, Sebring Utilities Commission v. FERC, ___F.2d___, 5th Cir. Nos. 77-2911 and 77-2972 (March 20, 1979).

which characteristically have high operating costs and are ill-suited to provide baseload requirements. 20/

Finally, we note that FP&L owns 81% of the transmission lines within the relevant market with operating voltages of 69 kV or above. The Jacksonville Electric Authority owns the next-largest share, 5% (Exhibit GT-5). These are the facilities over which bulk power is transported within the relevant market and FP&L's ownership share gives it "strategic dominance" over transmission. United States v. Otter Tail Power Co., supra, 331 F. Supp. at 60.

As noted above, FP&L did not undertake to define relevant markets and did not challenge the analysis of Staff's economic witness. Instead, its economic policy witness challenged the basic relevance of structural analysis to regulated public utilities. The Company's thesis is that regulation prevents a utility having monopoly power from controlling prices and excluding competition from the market, i.e., the indicia of monopolization under Section 2 of the Sherman Act. 21/ However, this is not really a rebuttal to Staff's position. Instead, it simply confirms the role of the Commission in eliminating or modifying rate provisions, designed by a utility, which would otherwise facilitate price control or exclusion of competitors. 22/ We believe the idea that regulated utilities are immune from charges based on the exercise of monopoly power has been thoroughly discredited by United States v. Otter Tail Power Co., supra.

ACTIONS OF COMPETING UTILITIES WITHIN THE RELEVANT MARKETS

Introduction In cases where the anticompetitive effects of wholesale rate schedules are at issue, we anticipate focusing primarily on structural analysis to measure the existence of monopoly power, and on the suspect rate provisions themselves to determine their effects on the

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20/ Florida Cities' brief on exceptions at 76-77. See, Exhibits 28 (REB-C) and 41 (JW-1, at 3-4).

21/ FP&L brief opposing exceptions at 43.

22/ Clearly, regulation does not insulate electric utilities from operation of the antitrust laws. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); see, Consumers Power Power Company, supra, 6 NRC at 1011-12. Nor is this Commission precluded from considering antitrust law and policy. Gulf States Utilities Co., Docket No. ER76-816, Order Approving Settlement Subject to Condition (October 20, 1978).

enhancement or maintenance of monopoly power. If, for example, a rate provision would weaken a competitor or raise the entry barriers to a market where competition can exist, that will likely be sufficient evidence of anticompetitive effect to warrant its elimination or modification -- absent a weightier showing that the provision serves some countervailing public interest. City of Huntingburg v. FPC, 498 F.2d 778 (D.C. Cir. 1974); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 971 (D.C. Cir. 1968). 23/

Unlike presentations in civil and criminal actions to enforce the antitrust laws, it is not necessary in our deliberations to have an extensive record on the past conduct of a utility towards its customers, or its intent in establishing or maintaining a restrictive rate provision. See, Missouri Power & Light Company, Opinion No. 31, mimeo at 9-10 (October 27, 1978). 24/ Every rate case in which anticompetitive effects are alleged need not become a full-blown antitrust proceeding.

23/ In rate change proceedings such as this one, heard under Section 205 of the Federal Power Act, the applicant bears the ultimate burden of nonpersuasion. However, Staff and intervenors may be required to come forward with some evidence to focus their allegations of anticompetitive effect, and to relate that evidence to the targeted rate provision. See, Northern California Power Agency v. FPC, 514 F.2d 184 (D.C. Cir. 1975).

24/ However, there may be situations in which the rate proponent may demonstrate the innocuity of a questioned provision because, for example, the utility has a general wheeling tariff, or undertaken other actions which weaken or eliminate its monopoly power. See, New England Power Pool, Opinion No. 775, mimeo at 33 (September 10, 1976), aff'd sub. nom., Municipalities of Groton, et al. v. FERC, 587 F.2d 1296 (D.C. Cir. 1978).

However, as noted supra, at 2, conduct may be relevant to our assessment of the justification for and purpose of a service limitation. In the case before us a full record has been compiled and we are further aided by a recent decision of the Court of Appeals for the Fifth Circuit 25/ in fully understanding the anticompetitive effects of FP&L's rate proposals. 26/ Moreover, the documentary evidence of Staff and the Cities, largely obtained from Company files, is frequently incongruous with the testimony of Company witnesses. 27/ By and large the testimony of witnesses presented by Staff and the Cities is a summary recapitulation of hundreds of pages of correspondence and internal company documents contained in over 200 exhibits. This evidence has been of significant assistance in probing the effects of FP&L's alleged need to restrict the availability of service under schedules SR-2 and PR.

The Company's reaction to the voluminous evidence of the Cities and the Staff relating to anticompetitive conduct is essentially a demurrer. FP&L asserts that this evidence is irrelevant to its proposed tariff modifications and that issues of anticompetitive conduct should be raised in other forums. While we agree that the Commission has no authority to enforce the antitrust laws, this does not make the evidence irrelevant to the formulation of remedies well within our authority. 28/

25/ Gainesville Utilities Department v. Florida Power & Light Co. 573 F.2d 292 (5th Cir. 1978), cert. denied, ___ U.S. ____, 99 S. Ct. 454 (1978). This opinion was issued after Judge Wagner wrote his Initial Decision.

26/ This evidence confirms our conclusion that FP&L has monopoly power in the relevant markets. Judge Wagner was also concerned by what he characterized as "disturbing episodes of Florida Power & Light Company's past conduct which raise serious antitrust questions." Initial Decision at 5. However, time constraints led him to defer to the Commission or the Justice Department.

27/ See, Gainesville Utilities Department v. Florida Power & Light Co., supra, 573 F.2d at 301, note 14.

28/ Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976); City of Pittsburg v. FPC, 237 F.2d 741, 751 (D.C. Cir. 1956); Pacific Gas and Electric Co., FPC Project Nos. 1988 and 2735, mimeo at 10-13, order of April 1, 1976.

Wholesale Market Division FP&L has been found to have engaged in a per se violation of the Sherman Act by conspiring with Florida Power Corporation to divide the Florida wholesale power market. In Gainesville Utilities Department v. Florida Power & Light Company, 29/ the United States Court of Appeals for the Fifth Circuit reversed and remanded a district court judgment, based on a review of the evidence which "compelled" a finding that the two largest utilities in the State of Florida had conspired to avoid selling wholesale power to customers in each other's service territories. 30/

This case arose from efforts by the Gainesville, Florida, municipal utility system to end its costly operation in isolation by interconnecting with either FP&L or Florida Power Corp. 31/ The Court found that beginning in 1965 Gainesville's efforts to interconnect and coordinate its operations were met with a joint strategy to induce the municipal to interconnect with Florida Power Corp., on precondition that all three systems agree to a retail territorial allocation. Correspondence sent to Gainesville and to the Federal Power Commission, regarding an interconnection application under Section 202(b) of the Federal Power Act, was routinely passed between FP&L and Florida Power Corp. with the understanding that concerted action was contemplated and invited. 32/

29/ Supra, note 24. The record in this case contains a number of exhibits from that antitrust proceeding.

30/ Gainesville Utilities Department v. Florida Power & Light Co., supra, 573 F.2d at 299, 303. Gainesville and Florida Power Corp. reached a settlement before the action was tried.

31/ See, Gainesville Utilities Department v. Florida Power Corporation, 40 FPC 1227 (1968), reversed, 425 F.2d 1196 (5th Cir. 1970), reversed, 402 U.S. 515 (1971).

32/ See also the consent decree in United States v. Florida Power Corp. and Tampa Electric Co. (1971 Trade Cases para. 71, 637, M.D. Fla. 1970).

The court was particularly impressed by the documentary evidence which demonstrated a "routine" course of conduct spanning two decades whereby each utility would refuse to sell power to existing wholesale customers of the other or to municipalities served at retail by the other which were attempting to establish new distribution utilities. On remand, the case is once again before the district court for precise determination of the effect of the wholesale territorial allocation on Gainesville's difficulty in obtaining an interconnection, plus attendant damages. Until the trial court enters its new judgment, we shall not know how FP&L is to be enjoined from engaging in anticompetitive conduct against municipal utilities or directed to remedy the damage done.

Acquisition Efforts and Franchise Competition The principal allegation leveled against FP&L's tariff limitations is that by restricting access to wholesale power the Company may thereby increase its dominance as a retail supplier. The record is richly detailed with evidence of retail competition to serve entire communities between FP&L and existing municipal systems.

FP&L's first attempt to acquire the Lake Worth utility is documented in a letter to FP&L employees from the Company's West Palm Beach Division Manager, dated June 18, 1958, which sought "a list of your relatives and friends who live in Lake Worth." The District Manager proposed to send these sympathetic members of the community information concerning a forthcoming election on a proposed 30-year lease of the municipal system to FP&L, where a successful vote would "assist us in our negotiations for other municipal systems" (Exhibit GT-34, at 64). Literature distributed to Lake Worth voters promised better service and an immediate rate reduction averaging 20%, plus an aggregate reduction of $14 million over the 30-year lease. Although winning a simple majority vote, the election failed to attract the requisite 60% voter participation and the proposition failed. Efforts were renewed in 1968 through a Lake Worth property owner; however, preliminary discussions were terminated without action.

FP&L offered to furnish firm power to the New Smyrna Beach municipal utility during the winter of 1958, provided the City Commission would agree not to order any additional generating equipment and enact an ordinance which would permit disposition of its electric utility on a majority

vote. 33/ FP&L then planned to negotiate a lease of the utility the following spring and submit it to the voters for approval (Exhibit GT-34). An April 1959 report to Company management stated that the proposed acquisition "certainly provides some distinct advantages other than just taking over a municipally owned property." The report noted the considerable possibilities of industrial and residential development in the area (Exhibit GT-34, at 73).

The Company's action in 1959 did not win it a lease of the New Smyrna Beach system (Exhibit GT-34, at 61); however, FP&L tried again in 1965, sending an inquiry to the City Commission which was virtually identical to the letter sent to Fort Pierce in May of that year (Exhibit GT-34, at 75). 34/ FP&L Executive Vice President R. C. Fullerton described the prospect of taking over the New Smyrna Beach municipal system to the chairman of another investor-owned utility as something the Company viewed "with natural enthusiasm" (Exhibit GT-34, at 75). Also in 1965, FP&L purchased from New Smyrna Beach all of its electric utility facilities in the City of Edgewater where it had previously provided retail service to only a portion of the community.

Intermittent negotiations occurred between FP&L and New Smyrna Beach in 1970 and 1973. In 1974, the Company devised an internal plan for acquiring the municipal utility (Exhibit GT-34, at 32), and sent senior management representatives to discuss an acquisition proposal with the city utility commission, estimating a rate reduction of more than $600,000 under FP&L ownership. Company management informed the utility commissioners that FP&L could provide cheaper and more dependable service because of its greater power plant capacity and

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33/ Characteristically, Florida municipal charters require the approval of greater than simple majority of voters for disposition of local utilities. Similar terms were extracted from the City of Clewiston in 1965. See, the initial decision in Florida Power & Light Co., 37 F.P.C. 560, 573, adopted, 37 FPC 544 (1967), affirmed sub nom., Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972).

34/ Infra, at 22.

its diversity of fuels (Exhibit GT-34, at 34). Another acquisition presentation was made to the utility commission in 1975, at the City's request.

FP&L sought to acquire the Fort Pierce utility in 1965 when the subject was raised by a city commissioner at a meeting convened to discuss a possible interconnection of the two systems (Exhibit GT-59). The response of the Company's division manager mentioned the interconnection only as an interim arrangement, concentrating instead on the sale or lease of the municipal utility. FP&L stated that any lease should be for a period of 30-years to coincide with the term of a standard electric franchise. In return, the Company offered to immediately interconnect the systems, apply FP&L's lower retail rates and "lend its full support toward attracting industry to the area." Fort Pierce thereafter invited lease or sale proposals; however, negotiations stopped short of acquisition.

Acquisition was again raised by Fort Pierce officials in March of 1976. The minutes of a meeting with FP&L senior management officials record that the City felt that disposition of its utility system was necessitated by an inability to exploit the economies of scale in electricity production:

> Mr. Skinner [Fort Pierce's Chief Engineer] said we think its very efficiently operated. We realize the big problem facing us is not the high cost of fuel or the inefficiency of our system, but the inefficiency as compared with putting oil into a larger boiler and turbine. That's where we're getting caught short on the heat rate input to the boiler. We have a problem competing with FP&L favorably today because it represents around 65% roughly of the cost of doing business, the cost for fuel oil. (Exhibit GT-31.)

When Fort Pierce inquired at that same meeting about the purchase of 30 MW of base-load firm power, the Company responded that it did not wish to sell firm power unless the purchaser could reciprocate with sales of firm power to the Company. This would require Fort Pierce to maintain generating capacity sufficient to meet its own load. FP&L also discouraged purchase under the SR-1 schedule,

indicating that it was not really firm and "awfully expensive" (Exhibit GT-31, at 17).

The Company continued to develop an acquisition proposed throughout 1976 (Exhibit GT-34). However, enthusiasm was apparently dampened when Fort Pierce intervened in proceedings before the Nuclear Regulatory Commission regarding FP&L's proposed South Dade nuclear generator.

FP&L proposed a sale or lease of the Homestead utility in 1976 when its president met with city officials to discuss Homestead's request for a retail territorial agreement, an emergency interconnection and wholesale purchases (Exhibit GT-18, at 1). In 1976 the Homestead City Council discussed the topic with FP&L; however, negotiations were apparently not continued.

The record indicates that acquisition of the Vero Beach utility was considered by FP&L in 1957, 1958 and 1959. 35/ Thereafter, a serious effort to acquire the Vero Beach system was undertaken in 1976 which culminated in approval of the sale by the City electorate and an application to the Federal Power Commission under Section 203 of the Federal Power Act. Internal management correspondence concerning implementation of the acquisition by FP&L suggests that Vero Beach would be viewed as a bellwether by other municipals thinking of entering or leaving the utility business:

> The impact potential of the Vero Beach acquisition on the franchise election in Daytona Beach and other Municipal operations such as Ft. Pierce, Homestead, etc. makes it imperative that we not under achieve with our Vero Beach operation. (Emphasis supplied.) 36/

After hearings in Docket No. E-9574, the Vero Beach acquisition was approved by an administrative law judge on grounds, advocated by FP&L, that the municipal utility could no longer efficiently generate its own power requirements and that FP&L would provide an economic source of retail supply for the citizens of Vero Beach. This con-

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35/ Exhibits GT-34, at 74; GT-52; and GT-62.

36/ Staff Exhibit GT-34, at 1.

trasts with the finding by the Presiding Judge that Vero Beach was a "truly excellent" utility with outstanding growth potential. See, Florida Power & Light Co., Docket No. E-9574, Initial Ruling and Order on Phases I and II (February 6, 1978). However, FP&L thereafter withdrew its application in early 1978 prior to the commencement of a final phase of the acquisition proceeding which was to consider the possible anticompetitive effects of the proposal.

In summary, the record documents 20 years' worth of franchise competition between FP&L and the municipal utilities located within its service territory. At various times FP&L has promoted acquisition or willingly received municipal proposals. Most, if not all, of those incidents occurred when the municipal systems were arranging new bulk power supplies from the options of self-generation, wholesale purchase from FP&L, and retail purchase from FP&L after franchise disposition. The Company has not succeeded in many acquisitions, because the municipal candidates solved their supply problems by adding generation. However, the record strongly indicates that self-generation is becoming less and less attractive to the point where FP&L's witness Gerber has described small scale generation as an anachronism. Since FP&L controls the remaining two options, 37/ we conclude that its wholesale monopoly power can only increase, and, thereafter, its retail power as well. See, Borough of Ellwood City v. Pennsylvania Power Co., 462 F. Supp. 1343, 1346 (W.D. Pa. 1979).

The Presiding Judge expressly accepted the Company's representation that it was not interested in acquiring Homestead or Fort Pierce because of capacity problems and operating difficulties. Since we find the premise of this representation unconvincing, 38/ we would be remiss to wholeheartedly accept its conclusion. In any event, it does not overcome the weight of the evidence to the contrary. 39/

37/ As discussed infra, at 31, municipal purchase of entitlements in large generating units constructed by FP&L does not currently appear to be a viable option.

38/ Infra at 34-37.

39/ Alternatively, it appears that the Florida Public Service Commission could require FP&L to provide retail service if the customers of a municipal utility voted to disband operations. See, Florida Statutes Annotated, §366.03.

Potential Losses of Franchises The Company appears well aware of the relationship between its wholesale sales to municipal utilities and its ability to retain existing retail franchises. In March of 1977, a market development presentation was made to FP&L management which stressed, inter alia, the need to maintain the integrity of the Company in relation to publicly financed utilities (Exhibit GT-64). 40/ Between 1976 and 1985, for example, franchises covering retail sales to 41.8% of FP&L's customers are to expire (Exhibit GT-66). In addition, FP&L serves another 93 communities at retail with no franchise agreement. Franchise competition can be a positive force to encourage better service and lower rates; thus, a utility should not be allowed to tilt the balance by artificially making wholesale service unattractive to potential retail market entrants. United States v. Otter Tail Power Co., supra, 331 F. Supp. at 61. The record contains evidence relating to three franchise expirations, of which Daytona Beach is the most fully documented.

In 1975 or 1976, the City of Daytona Beach undertook a study of municipal distribution versus FP&L franchise renewal. In response, the Company mounted a significant effort to inform City residents of the benefits of franchise renewal. Of particular note are the Company's statements that each of the Florida municipal utilities had rates higher than FP&L (except for two with access to hydroelectric power) and that municipals charge these higher rates because FP&L "can gain greater economies of scale in all facets of its operation" (Exhibit ST-5, at 1 and 3). FP&L won renewal

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40/ In a 1975 paper on "Strategic Issues In Inter-utility Relations" prepared by Company witness Gardner, emphasis was placed, inter alia, on franchise renewals and phase out of wholesale tariffs (Exhibit GT-30). See also, Exhibit GT-49.

of its franchise after a record high election expenditure (Exhibit GT-76). Due to the continuing expirations of retail franchises, we conclude that vigorous franchise competition exists within the retail market which FP&L can influence through its wholesale sales policies.

The Company characterizes its efforts to renew franchises and acquire others as sales promotion and business preservation. 41/ However, these actions may still run afoul of antitrust law and policy when undertaken by a possessor of monopoly power. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); and City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320, 1329-32 (N.D. Ind. 1979).

FP&L's Relationship with Homestead Traditionally, FP&L has demonstrated considerable reluctance to engage in firm power transactions with municipal utilities, even within its own service territory. During the 1950's and 1960's this amounted to an unqualified refusal. Rate schedule RC under which firm service was provided to cooperatives required that capacity and energy "not be resold or distributed by the Customer to any municipality or unincorporated community for resale" (Exhibit GT-51). In an initial decision adopted by the FPC in Florida Power & Light Co., 37 FPC 544 (1967), 42/ Hearing Examiner Wenner recounted six separate instances over a period of 13 years when the Clewiston municipal utility requested and was refused wholesale service by FP&L. 43/ In 1963, the Company's president informed the City of Winter Garden that FP&L did not "supply

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41/ FP&L brief on exceptions at 45.

42/ Affirmed, Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972).

43/ 37 FPC at 572-73.

municipal systems firm wholesale power for distribution through a municipal distribution system" (Exhibit GT-16). 44/

Homestead first requested firm wholesale service from FP&L in 1967, to which the Company responded that it did not provide this service to municipalities and did not wish to serve any. Wholesale power from FP&L was Homestead's alternative to the immediate installation of new generation or disposition of its system (Exhibit GT-22). Robert Fite, the Company's president, and F.E. Autrey, a vice president, stated that FP&L would not refuse to sell wholesale power, if that was the only arrangement negotiable; however, they added that the City would not receive the rate at which firm sales were made to cooperatives and that a retail territorial allocation was a necessary precondition to any service. FP&L emphasized the comparative benefits of an emergency interchange agreement or sale of the municipal system in lieu of wholesale purchases (Exhibit GT-18). Homestead was unable to negotiate a firm wholesale contract and instead made intermittent purchases from FP&L over the ensuing five years at average prices that were considerably higher than those paid by FP&L's cooperative customers (Exhibit GT-29, at 33).

In April of 1972, Homestead requested a more sophisticated interchange agreement with FP&L including the purchase of firm power to meet a portion of the City's load; however, FP&L negotiators responded that FP&L was only interested in an interchange where both parties had capacity to meet their own demands plus ample reserves (Exhibit GT-29, at 1-3). Instead, Homestead and FP&L entered into new emergency service agreements whereby the Company only agreed to supply emergency power needs "to the extent it has capacity available. . . ." FP&L applied its then-existing rate schedule "WH," applicable to total requirements purchases by cooperative customers (Exhibit GT-29, at 4-11).

Homestead next requested power from FP&L in August of 1973, proposing a firm purchase of 12-16 MW from 1975 through 1980. The City stated that it intended to use

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44/ See also, Gainesville Utilities Department v. Florida Power & Light Co., supra, 573 F.2d at 298.

this capacity for base load, purchase interchange energy to meet its intermediate load and use its own generation only for peak load capacity and reserve (Exhibit GT-29, at 12). 45/

The Company first decided to respond to Homestead's request with the so-called "Marshall Theory": Homestead was to be told that FP&L had no firm power to sell. Company negotiators were advised to have load and reserve estimates available to substantiate this response (Exhibit GT-29, at 14). Immediately thereafter, however, the Company concluded that Homestead had been listed as a customer under all requirements schedule SR and was actually receiving firm power at committed intervals. 46/ FP&L then decided that if Homestead requested a transmission interchange agreement as well as firm power, it would employ Schedule D and use Schedule SR as the negotiated rate thereunder.

In October of 1973, Homestead submitted a comprehensive request for an interchange agreement and simultaneous purchase of firm power from FP&L to serve the base-load portion of the City's requirements (Exhibit GT-29, at 24-28). However, Exhibit GT-29 (at 29-31) reveals that the Company wanted to avoid any obligation to sell firm power to Homestead by withdrawing schedule SR from its existing wholesale customers, including Homestead and replacing it with an "Emergency Rate Schedule" telling the City that it has no firm power to sell.

45/ The Company's chief representative at this meeting was its vice president, E.L. Bivans, who later testified in this proceeding. Copies of Bivan's notes (Exhibit GT-29, at 12) were sent to the Company's president and other executives.

46/ This discussion is recounted in the notes of Company employee "WMK" (apparently W.M. Klein, a negotiator in dealings with Homestead), Exhibit GT-29, at 15. The notes bespeak a certain surprise in learning that Homestead was an SR customer: "Rate SR offers firm power. Apparently, the Company has been honoring their request for a number of years, and is not in a good position to refuse to continue offering firm base load power of 12 MW to 14 MW, which is consistent to [sic] their previous demands."

Alternatively, it considered offering Homestead a Schedule D (firm interchange) rate lower than schedule SP in return for a signed contract stating that the City would install additional generation capable of carrying its electrical load. The final paragraph of this internal memorandum seems an apt summarization of FP&L's reaction to Homestead's request for firm power:

> It is our belief that if we refuse to sell the City of Homestead Firm Power they will immediately request us to wheel from other municipalities. If we encourage them to increase their generation where we can purchase power from them, we may offset the demand for wheeling as well as avoid a long-term Firm Power commitment. (Exhibit GT-29, at 31.)

FP&L's hope to induce Homestead to construct additional generation for base load requirements in lieu of firm power purchase was not done without knowledge of the consequences for the City. In December of 1973, FP&L's financial planning department prepared an analysis of FP&L and the municipalities in or near its service area entitled "Comparative Analysis of Municipal and Investor Owned Utilities and the Benefits to Their Customers" (Exhibit GT-34, at 42-44). This study determined that, except for Orlando and Jacksonville, municipal utilities charged higher retail rates than FP&L, because:

> The size of most municipal units is limited by the size of the city. This limit on size prevents the smaller municipal utilities from realizing many of the economies of scale available to large utilities. This fact was clearly revealed in the analysis. The smaller utilities had less efficient heat rates and higher fuel and operating costs per KWH of power sold. These higher costs appeared to be major contributing factors in the high cost of power to their customers.

Negotiations on the Homestead interchange agreement continued and in December of 1973 a final set of discussions occurred, from which FP&L learned that the

"key" to this agreeement was FP&L's willingness to simultaneously supply service under both the interchange agreement and schedule SR after construction of necessary interconnection facilities by Homestead. Engineering and billing problems were not considered serious by FP&L personnel. However, Company negotiators opposed a written commitment to serve the City under Schedule SR after completion of the interconnection "because we [FP&L] already have a contract to serve them on SR and the agreement does not necessarily prohibit such an arrangement to continue" (Exhibit GT-29, at 39). Instead, FP&L's vice president, R. G. Mulholland did send a letter to Homestead's City Manager, in January of 1974, after the interchange agreement was signed, stating the Company's understanding that it would provide Homestead with electric power for 36 months after completion of the City's new interconnection facilities at a rate not to exceed the Company's approved wholesale rate schedule in effect at that time (Exhibit GT-29, at 43).

Homestead's high-voltage interconnection facilities were completed in October of 1977. Without advance notice to Homestead or any indication from the City that it no longer wanted average-priced firm power, FP&L filed the rate change application with this Commission which proposes to terminate SR service to Homestead. In place of SR power, FP&L states it will sell Homestead incrementally-priced, curtailable Schedule D power, which the Company admits is more expensive than schedule PR when used for base load.

Thus, Homestead has received wholesale service from FP&L since the 1950's, including firm requirements service under the SR-1 tariff since that tariff first became effective. From the time of agreement in 1973 to completion of the interconnection in October 1977, FP&L served Homestead under the SR-1 tariff (Exhibit 29). We find no evidence to support FP&L's contention that completion of the interconnection somehow eliminated Homestead as an existing wholesale requirements customer. Nor is it persuasive to assert that the parties intended for Homestead to be served at an incrementally-priced Schedule D rate instead of the average-cost schedule SR. 47/

47/ The record indicates that FP&L did not publish a rate level formula for Schedule D until February 10, 1978, when it made an offer of Schedule D capacity to Fort Pierce.

Indeed, knowing Homestead's desire for base-load firm power, the Company's representations as to the meaning of their interchange agreement in January of 1974 are quite to the contrary. It would be difficult to reach any other conclusion, given the weight of this largely unrebutted evidence.

FP&L's Relationship with Fort Pierce The efforts of Fort Pierce to purchase firm power from FP&L bear a marked similarity to those of Homestead. In March of 1976, Fort Pierce approached the Company about purchasing firm power to meet the the City's base load requirements and using its own generators for peaking purposes. Fort Pierce renewed its request in letters to FP&L in April and December of 1976. The December letter requested separate price quotations for base, intermediate and peaking capacity. The City also informed FP&L that it immediately wished to begin purchasing "base capacity and energy on a year-round basis in amounts ranging from 25 MW to 30 MW," and requested a statement of the Company's terms and conditions. Although FP&L recognized its obligation to provide service under schedule SR-1, both in an internal memorandum and in a letter to Fort Pierce, the Company failed to respond with specific information on which Fort Pierce could act. After another letter to FP&L in April of 1977, the parties met in July and Fort Pierce was told that FP&L had no firm power to sell. 48/

Fort Pierce maintained its position that it was entitled to firm power under the SR-1 tariff throughout the remainder of 1977. On October 14, 1977, FP&L filed changes to the tariff which limited its availability to existing customers. Thereafter, the Company offered Fort Pierce up to 240 MW of capacity through the end of 1980, but under the terms of interchange Schedule D, not schedule SR.

On March 24, 1978, during the cross examination of FP&L's rate design witness, Lloyd Williams, by counsel for Fort Pierce, Mr. Williams acknowledged that the City was eligible to purchase firm service under the SR-1 tariff. The same day, FP&L delivered a draft service agreement to the City and firm service began immediately. However, a dispute remains concerning the duration of service and FP&L has stated its intention to terminate service to Fort Pierce if we approve its proposed restriction of firm service to named and existing customers

48/ However, in July of 1976 FP&L's System Planning Department prepared a market assessment of firm intercharge sales between 1977 and 1985 which projected an "available supply from FPL" ranging between 1604 MW and 1995 MW in 1977. This report assessed the opportunities for sale of firm power to 10 different utilities in peninsular Florida, including Fort Pierce (Exhibit GT-7).

which do not have generating capacity sufficient to meet their peak loads.

Limitations on Alternative Sources of Capacity Unrebutted Company documents in evidence indicate that it is FP&L's policy to retain full ownership of the nuclear generating plants which it constructs. The Company has stated that the full capacity of these units is needed to serve its own customers, so sharing is not to be anticipated until FP&L reaches the optimum amount of nuclear capacity for its system (Exhibit 27). However, no party disputes that joint ownership of such facilities would provide municipal and cooperative utilities (as well as other utilities in the region) with access to FP&L's economies of scale (Exhibit GT-1, at 6).

FP&L is the sole owner of three operating nuclear plants having aggregate capacity of 2,188 MW. FP&L has agreed to share a portion of St. Lucie No. 2 nuclear plant with neighboring systems including Homestead and New Smyrna Beach; however, FP&L documents in evidence indicate that this was done at the insistance of the Justice Department and that FP&L has not committed itself to share the capacity of any future unit (Exhibit GT-71, at 22). 49/

The Availability of Transmission Services FP&L now offers four wheeling services which correspond to its interchange capacity and energy services. 50/ Wheeling may be provided for one-year periods, with service available at the sole discretion of FP&L when transmission capacity is not otherwise required by the Company. Transmission schedules TA, TB and TC correlate to inter-

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49/ In 1973 FP&L considered cancelling St. Lucie No. 2 because of "escalating costs and Justice Department review of our antitrust status" (Exhibit 20). Then in 1976 the Company considered a shift to coal-fired plants for future base-load generation "to eliminate the Atomic Energy Act as a route to municipals' investment in generation" (Exhibit GT-1, at 13). See also, the decision of the Atomic Safety and Licensing Appeal Board, Nuclear Regulatory Commission, in Florida Power & Light Co., Docket No. 50-389A (ALAB-420, July 12, 1977), regarding antitrust review proceedings on St. Lucie No. 2.

50/ A complete description of these four services is found in Exhibit 28 (REB-AX), a draft service agreement sent to the City of Fort Pierce on December 6, 1977. The rate for these services is currently under adjudication.

change schedules for emergency, scheduled and economy capacity and/or energy services. 51/ Of particular significance to this case is schedule TD, denominated "firm transmission service." However, "firm" is a misnomer because Schedule TD service may be reduced or interrupted at the Company's discretion for periods up to 30 days. 52/

In short, these four wheeling services only offer surplus transmission capacity on an as-available basis. FP&L does not contend that any of these four wheeling services could be utilized to transmit alternative power supplies to utilities within the relevant markets from third parties equivalent to those obtainable under schedules SR-2 or PR. The Company states that an appropriate rate would have to be negotiated at the time a potential wheeling customer arranged its alternative power supply. 53/

51/ Supra at 4-5.

52/ Section E of the draft agreement (Exhibit 28, REB-AX) provides:

> In the event that Firm Transmission Service cannot be provided due to an unanticipated reduction or interruption of FP&L's transmission facilities supplying such service, or if such service is provided in an amount less than 80% of the Contracted Demand for Firm Transmission Service as a result of unanticipated reduction or interruption of power delivered by the Commission to FP&L for the City's account pursuant to Service Schedule D of the City-Commission Contract, and such reduction or interruption continues for a period of thirty (30) days, the Charge for Firm Transmission Service will be adjusted as follows: In each succeeding month, the higher of (a) the maximum MW delivered to FP&L in any one hour during that month, or (b) the maximum MW delivered to FP&L in any one hour during the preceding six months, will be substituted for the Contract Demand for Firm Transmission Service for purposes of calculating the Charge for Firm Transmisison Service. Upon such reduced or interrupted service being restored to 80% or more of the Contract Demand for Firm Transmission Service, the Charge in each succeeding month shall be based upon the full Contracted Demand for Firm Transmission Service.

53/ FP&L brief opposing exceptions at 42.

THE REASONS GIVEN BY FP&L FOR ITS TARIFF LIMITATION PROPOSALS

FP&L would seek to justify its proposed limitations on full and partial requirements availability in terms of operational constraints. Specifically, it asserts that future power supply is too uncertain to allow unlimited access to its requirements service.

According to FP&L, customers which are self-sufficient in generating capacity could arbitrarily shift their load between service from FP&L and their own generation. This would purportedly lead FP&L to maintain capacity in excess of its other customers' needs but with no assurance that such capacity would be fully utilized, thereby increasing rates to all customers. The Company proposes to remedy this uncertainty by making these on-again/off-again customers ineligible for service under schedule PR.

However, the difficulty with this proposition is that it has virtually no record support and is based on a few conjectural statements by Company witnesses. In fact, FP&L's rate design witness prepared a model load duration curve in 1975 showing that customers with generating capacity less than peak demand and customers with capacity greater than peak demand would each purchase base-load requirements from the Company, under an SR schedule modified for parallel operation, and use their own capacity intermittently to meet intermediate, peak and reserve demands (Exhibit GT-71, at 33). This is consistent with the repeated requests of Homestead and Fort Pierce for base-load firm power. 54/ Moreover, the natural inclination of these systems to buy base-load power would apparently be reinforced by the design of FP&L's PR rate which is intended to promote high load factors. 55/

54/ Supra at 27-31. Again in their testimony, Florida Cities state their intention to use schedule PR for base-load purposes and use their own generation for peaking (Tr. 659).

55/ Supra at 3-4. While FP&L is discouraging purchases by self-sufficient municipals it has apparently adopted a marketing strategy which promotes high load factor usage as a means of improving its declining system load factor (Exhibit GT-64).

FP&L relies on oil, natural gas and uranium to fuel its generation. It cites the 1973 oil embargo and resulting drastic oil price increases and the expiration of long-term oil supply contracts and replacement by three-year contracts to cast uncertainty upon its oil supply. As for gas supplies, it references high levels of curtailment and the expiration of a major gas supply contract in 1979. Concerning nuclear fuel, FP&L notes that it only has a two year inventory and that its long-term supply contract was cancelled by the seller in 1975.

FP&L may well face fuel supply problems, as do other suppliers in the electric utility industry. However, they are not of a magnitude that would justify the proposals before us in this case. It appears that FP&L continues to possess long-term fuel oil contracts and that it has entered into shorter-term oil contracts (3 years) with favorable cancellation provisions in order to gain greater flexibility in responding to price changes on the open market (Exhibits 22, at 3; 51, at 9). FP&L's natural gas warranty contract with Amoco Production Company provides for daily deliveries of 200 MMcf through 1988, such deliveries being beyond the purview of the present curtailment plan of the transporter of this gas, Florida Gas Transmission Corporation (Exhibit 51, at 9; Tr. 431). 56/ Finally, an affiliate of FP&L is engaged in uranium exploration (Tr. 454) and FP&L's existing nuclear units do not appear in danger of being curtailed due to fuel shortage. 57/

56/ See, Sebring Utilities Commission v. FERC, ____F.2d____, 5th Cir. Nos. 77-2911 and 77-2972 (March 20, 1979).

57/ In 1978 FP&L and several other utilities won a judgment in federal district court against their nuclear fuel requirements supplier, Westinghouse Electric Corporation. Virginia Electric & Power Co. v. Westinghouse Electric Corp., Civ. No. 75-0514-R (E.D. Va. October 27, 1978). In an unreported opinion the court held that Westinghouse was not excused for delivering nuclear fuel by reason of force majeure provisions in its contracts with the various utilities. See, Antitrust Trade Regulation Reporter, No. 887, at A-15 (November 2, 1978).

Among the fuel-related problems which FP&L gives as a reason for limiting firm wholesale service is its inability to procure a coal supply contract. However, on cross examination, FP&L vice president Gardner acknowledged that the Company has no coal-fired generation and has no plans to construct any. These points are confirmed by the testimony of FP&L's vice president in charge of fuel procurement which was presented to the Florida Public Service Commission in the spring of 1977 (Exhibit 22). 58/ On brief, FP&L has argued that the inability to obtain a coal supply contract has impaired its ability to plan coal-fired generation. However, the only evidence in the record of FP&L's need for such a plant was its desire to avoid municipal access to nuclear generation, the base load alternative to coal, which could come from antitrust review before the Nuclear Regulatory Commission. 59/

FP&L points to environmental regulations which make construction of coal-fired units difficult and make nuclear units almost impossible to build. It also points to escalating costs, litigation and regulatory delays and requirements as additional factors stopping future nuclear unit construction, or at least yielding a 12 year lead time which necessitates equal lead time for load forecasting. It refers to its cancellation of the proposed South Dade nuclear units and the substantial delay in licensing and resulting increase in capital costs of its St. Lucie No. 2 nuclear unit. As for existing generating units, FP&L states that its Turkey Point nuclear units have experienced steam generator leaks causing unscheduled outages in the past and requiring extensive scheduled outage in the future for repair, and that its combined cycle Putnam units, due to their novel design, have not been reliable. Finally, FP&L refers to its common stock selling below book value as evidence of financial difficulties which have limited its construction budget to internally generated cash.

58/ Exhibit 22 indicates that while coal may well be used in the future, economic, environmental and reliability problems make it largely irrelevant to FP&L's current capacity planning.

59/ Supra at 32, n. 48.

We certainly cannot deny that these constraints do pose problems for utilities such as FP&L, but the record fails to establish that FP&L is so hampered by regulatory requirements and financial difficulties as to be incapable of expanding its generating capacity as needed in the future. FP&L is, after all, offering 240 MW of Schedule D capacity to Homestead and Fort Pierce, and the recent rate of increase in demand by FP&L's other customers cannot be characterized as rapid. FP&L has been greatly reducing its demand and load forecasts in recent years, with the actual rate of growth being relatively low averaging at most around four percent annually (Tr. 848). To the extent that the record gives any indication of FP&L's current financial condition, it reveals that FP&L has experienced significant improvement in earnings and related market factors. About the time FP&L filed this case, it was reporting lower, more manageable growth; greater internal generation of funds; improved earnings and coverage ratios; and increased dividends (Exhibit GT-78). Suffice it to say that the record, comprised largely of company documents, is ambivalent on this issue.

FP&L would support the separation of full and partial requirements tariffs in terms of costs of service on the basis of different load patterns. 60/ These separate full and partial requirements tariffs differ both in terms of demand and energy charges. FP&L contends, therefore, that it has designed different rates to reflect more precisely the different costs of serving these different customer groups. Establishment of separate full and partial wholesale requirements rates is common practice. We have in fact recognized the differences in the costs of serving full and partial requirements customers, not to mention different types of partial requirements customers. 61/ In the present case, FP&L's proposal of separate full and partial requirements rates appears reasonable. 62/

60/ FP&L asserts that its wholesale customers without any generating capacity have relatively stable and predictable load patterns which allows it to plan operations and design rates to recover costs of serving these full requirements customers. It further contends that partial requirements loads are less stable but that the PR tariff allegedly encourages such customers to stabilize their purchases of power.

61/ E.g., Boston Edison Company, Opinion No. 809-A, Docket Nos. E-7738 and E-7784, issued December 9, 1977 (mimeo at 20).

62/ Of course, in Phase I of this docket we are not addressing the specific costs of service and rate designs of the SR-2 and PR tariffs. Accordingly, our determination does not reflect on how these two rates will actually function.

BALANCING THE PUBLIC INTEREST CONSIDERATIONS

When the SR-2 and PR tariffs are viewed from a perspective on the relationships between FP&L and other utilities within the relevant markets, the Presiding Judge's conclusion that the Company's proposal has "no discernible anticompetitive effect in and of itself" is inadequate. 63/ With alternative sources of base-load wholesale capacity unavailable, FP&L's tariff restrictions would deny to Homestead, Fort Pierce and other nominally self-sufficient utilities within the relevant market the only remaining source of supply, schedule PR. It would conclude, finally, the municipals efforts over ten years to obtain a source of economically-priced, base-load power. Municipals like Homestead and Fort Pierce would become likelier to leave the utility business. Indeed, the citizenry might force these utilities to come to FP&L requesting takeover. See, City of Mishawaka v. American Electric Power Co., supra, 465 F. Supp. at 1329. Of even greater importance to the Company would be the assurance that in future franchise renewal contests with potential retail market entrants, it could point to existing municipal utilities as characteristically expensive and unable to exploit scale economies.

Homestead and Fort Pierce would not be able to economically utilize higher-priced, lower-quality Schedule D service to meet their base-load requirements. Such offers to sell at impractical prices and terms have been construed as unlawful refusals to deal, when done to further monopoly power. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).

63/ We recognize and fully appreciate that the Initial Decision was written before FP&L agreed to continue to serve Homestead and Fort Pierce under its PR tariff pending the final outcome of this case. We have not been burdened by the time constraints faced by the Presiding Judge. Under the circumstances the Judge is to be commended for his efforts.

The restriction of wholesale service to named and existing customers is an even greater threat to potential franchise competition. The record indicates that FP&L generally plans to minimize sales of average-priced wholesale power to municipals and cooperatives (Exhibit ST-17). After reviewing the record of FP&L's efforts to renew the Daytona Beach frachise, it does not appear likely that the Company would offer a potential distribution utility an average-cost rate. The signal to potential retail distributors in areas presently served by FP&L at retail and over which FP&L has wholesale monopoly power is quite clear. Cf., City of Mishawaka v. American Electric Power Co., supra. FP&L's offer to discuss the feasibility of service to new customers under specific contract rates does not reassure us. 64/

The balancing of competition against other public interest considerations, required by City of Huntingburg v. FPC, 65/ becomes relatively simple once this case is

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64/ As Staff notes in its brief on exceptions, at 9, the Presiding Judge erred in finding that FP&L had committed to serve new systems in FP&L's service territory.

65/ 498 F.2d 778 (D.C. Cir. 1974).

stripped to its essential elements. The proposed restrictive provisions are anticompetitive, we find no countervailing reasons for their implementation, and they are to be deleted. The Company has not demonstrated that it should be allowed to change the general availability provision of schedule SR-1 which makes wholesale service available to all municipal and cooperative customers in FP&L's service territory. 66/ Proposed terminations of firm, average-cost service to Homestead and Fort Pierce are based on these restrictive provisions, so the proposed cancellations are rejected. The Homestead cancellation would also violate the understanding of the parties that this customer would continue to purchase schedule SR after the completion of their interconnection. FP&L shall continue to serve Homestead and Fort Pierce, under schedulle PR. However, the proposal to bifurcate schedule SR-1 into separate rates for total requirements and partial requirements service is soundly based with no discernible anticompetitive effect and we approve it.

In spite of the anticompetitive conduct recounted above, we wish to stress that there may be acceptable service limitations with diminished anticompetitive effects which ameloriate some legitimate operational problems faced by FP&L. Indeed, the intervenors recognize that the Company should be allowed to fashion reasonable terms and conditions to wholesale service. However, FP&L has not provided us with any middle ground, much less a showing that it has selected a tariff limitation that is the least anticompetitive means of solving any such operational problem.

Finally, we note that FP&L has matters pending before us in over 30 dockets, most involving interchange transmission service filings in which antitrust allegations have been made.

66/ Schedule SR-1 provides:

AVAILABLE:

In all territory served by the Company.

APPLICATION:

To electric service supplied to a municipal electric utility or to a cooperative non-profit membership corporation organized under the provisions of the Rural Electric Cooperative law for their own use for resale.

We see little need in those cases for the kind of elaborate presentation made in this one. It would be helpful to the Commission for the parties to pinpoint the competitive problems and defenses relating to the filings in each of these cases.

The Commission orders:

(A) The Initial Decision issued in these consolidated proceedings on April 21, 1978, is hereby reversed.

(B) All limitations on the availability of wholesale requirements service, as proposed by FP&L, except for the limitation of full requirement service under the SR-2 tariff to utilities with no generating capacity, are hereby rejected.

(C) FP&L is directed to revise its proposed SR-2 and PR tariffs to conform to this order within 60 days. Until revised tariffs are accepted by the Commission, the availability provisions of the otherwise superseded SR-1 tariff shall remain in effect.

(D) The notices of cancellation of requirements service to Homestead and Fort Pierce are hereby rejected.

(E) Exceptions not granted are denied.

By the Commission.

(S E A L)

Lois D. Cashell,
Acting Secretary.

ment of $87,174,000. We will therefore permit the company to file tariffs designed to produce annual revenues of $384,597,000.

FEDERAL ENERGY REGULATORY COMMISSION

Re Florida Power and Light Company

Opinion No. 57, Docket Nos. ER78-19 (Phase I) and ER78-81
August 3, 1979

OPINION *and order reversing initial decision and rejecting tariff availability limitations and notice of cancellation.*

Monopoly and competition, § 21 — Electric company — Tariff amendments.

[F.E.R.C.] Where a public utility possessing market power in a relevant market seeks to amend a general tariff to impose conditions which foreclose supply options or increase the costs of competitors, or which otherwise contribute to the acquisition or maintenance of monopoly power, its application for amendment must be rejected and found unjust and unreasonable under §§ 205 and 206 of the Federal Power Act, unless the utility can show that compelling public interests justify the service conditions. [1] p. 314.

Monopoly and competition, § 21 — Electric company — Restrictions.

[F.E.R.C.] Even where overriding public policy objectives are shown to justify some restriction on wholesale service, a public utility must be called upon to demonstrate that its proposal to place limitations on the availability of firm wholesale requirements service is the least anticompetitive method of obtaining legitimate planning or other objectives. [2] p. 314.

Monopoly and competition, § 22 — Immunity — Public utilities.

[F.E.R.C.] The idea that a regulated public utility is immune from charges based on the exercise of monopoly power has been thoroughly discredited. [3] p. 323.

Monopoly and competition, § 21 — Competition — Anticompetitive rates.

[F.E.R.C.] Where a rate provision would weaken a competitor or raise the entry barriers to a market where competition could exist, that will likely be sufficient evidence of anticompetitive effect to warrant its elimination or modification, absent a weightier showing that the provision serves some countervailing public interest. [4] p. 325.

Monopoly and competition, § 21 — Commission power — Antitrust laws.

[F.E.R.C.] While the Federal Energy Regulatory Commission had no authority to enforce the antitrust laws, that did not make the evidence irrelevant to the formulation of remedies well within its authority. [5] p. 326.

Monopoly and competition, § 21 — Electric company — Franchise renewal.

[F.E.R.C.] Where a power company characterized its efforts to renew franchises and acquire others as sales promotion and business preservation, those actions could still run afoul of antitrust law and policy

when undertaken by a possessor of monopoly power. [6] p. 331.'

Before Charles B. Curtis, chairman, and Georgiana Sheldon and Matthew Holden, Jr., commissioners.

APPEARANCES: Harry A. Poth, Jr., Robert T. Hall III, James K. Mitchell, and Floyd L. Norton IV (Reid & Priest) for Florida Power and Light Company; William H. Chandler, William C. Wise, and Robert Weinberg for Seminole Electric Cooperative; Robert A. Jablon, Daniel J. Guttman, and Sandra J. Strebel for the Utilities Commission of New Smyrna Beach, Fort Pierce Utilities Authority, cities of Starke and Homestead, Florida; Robert F. Shapiro and Harvey L. Reiter for the staff of the Federal Energy Regulatory Commission.

By the COMMISSION: Before the commission is a consolidated proceeding to determine whether certain limitations on the availability of firm wholesale requirements service, along with notices of cancellation of such service to specific wholesale customers, are unjust, unreasonable, or unduly discriminatory, and particularly whether they are anticompetitive in effect. With one exception, we find that the proposed limitations on requirements service availability have not been justified. Accordingly, we reject these tariff provisions. Moreover, since the notices of cancellation are founded upon one of these rejected limitations on availability, they must likewise be rejected.

[1, 2] To set the stage for our discussion, we wish to state at the outset our view that, where a utility possessing market power in a relevant market seeks to amend a general tariff to impose conditions which foreclose supply options or increase the costs of competitors, or which otherwise contribute to the acquisition or maintenance of monopoly power, its application for amendment must be rejected, and found unjust and unreasonable under §§ 205 and 206 of the Federal Power Act — unless the utility can show that compelling public interests justify the service conditions. Moreover, even where overriding public policy objectives are shown to justify some restriction on wholesale service, such a utility must be called upon to demonstrate that its proposal is the least anticompetitive method of obtaining legitimate planning or other objectives.

On the basis of our analysis of the record before us, we conclude that FP&L's proposed tariff restrictions would eliminate the only practical source of base-load power or energy to competing utilities within the markets dominated by the company. Furthermore, the proposed restrictions would appear to create the potential for additional anticompetitive effects by inhibiting the formation of new distribution utilities within these markets. Florida Power and Light Company has failed to satisfactorily demonstrate countervailing public interests that warrant approval of any of these proposals, except for the one which would provide separate partial requirements service. To the extent that legitimate purposes are sought to be attained by FP&L, there appear to be a number of alternative means of less anticompetitive effect for their accomplishment. The commission wishes to emphasize that we are not today holding that a utility with market power is, per se, precluded from amending a general tariff to impose con-

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

An initial comment is also in order concerning the applicability of antitrust laws and policies to our proceedings. From its inception, this proceeding has focused on issues related to the justness and reasonableness of FP&L's rate proposals when evaluated in light of their alleged anticompetitive effects. The allegations and evidence of staff and the intervenors together with the associated responses of the company have coalesced into issues typically examined in the context of a monopolization case under § 2 of the Sherman Act. The commission acknowledges that it is not specifically responsible for enforcing the Sherman Act or any other of this nation's antitrust laws. And we wish to emphasize that in evaluating the anticompetitive effects of a proposed rate change and in making findings with respect thereto, we do not make findings that *violations* of the antitrust laws have occurred. Instead, it is our *obligation* to evaluate the public policies expressed in federal antitrust laws and to reflect those policies in the conduct of our responsibilities under the Federal Power Act.[1] This we have endeavored to do in the instant case.

While we believe our evaluation of the anticompetitive effects of the proposal is correct and supported by the record, we recognize that these anticompetitive effects may not have been demonstrated with the rigor as would be demanded in proceedings where specific findings of violations of the antitrust laws are at issue with attendant potential for the imposition of civil and criminal penalties. Lastly, we wish to note that the fairly elaborate account of FP&L's past conduct in its marketplace is not intended by this commission to be a determination of factual disputes which may be the subject of litigation in other forums. Rather we merely observe that the evidence in this record of that past conduct casts a shadow over FP&L's claimed need to restrict service and, therefore, is of probative value in determining whether the company has satisfactorily carried its burden of justification for the proposed service limitations. The structural and conduct analyses required in an antitrust proceeding, and presented to us here, are of considerable assistance in isolating demonstrated anticompetitive effect from unfocused allegations. It is important to examine the markets in which relevant electric services are bought and sold and then determine how the questioned rate provisions may affect the competition, or potential competition, in these markets. This opinion attempts to present our interpretation of the facts and law along these lines.

Background

The Procedural History. On October 14, 1977, FP&L filed in Docket No. ER78-19 proposed changes to its firm

[1]It is now beyond question that antitrust law and policies do relate to this commission's responsibilities under the Federal Power Act. See, Gulf States Utilities Co. v Federal Power Commission (1973) 411 US 747, 98 PUR3d 262, 36 L Ed 2d 635, 93 S Ct 1870; and Federal Power Commission v Conway Corp. (1976) 426 US 271, 14 PUR4th 331, 48 L Ed 2d 626, 96 S Ct 1999.

wholesale electric tariff, Schedule SR-1, which would bifurcate that schedule into a full requirements Schedule SR-2 and a separate partial requirements Schedule PR, and increase the rates for each of these services. Under Schedule SR-1 firm service has been generally available "in all territory served by the company." Florida Power and Light Company now proposes to limit the availability of firm wholesale services to those existing customers named in the two new schedules, which previously purchased under Schedule SR-1. Also, the company would limit service under Schedule PR to existing customers which do not own sufficient generating capacity to meet their peak-load requirements.

In a related action, FP&L filed in Docket No. ER78-81, on December 1, 1977, a notice of cancellation of firm partial requirements service to one of its SR-1 customers, the city of Homestead, Florida, which has sufficient capacity to meet its load. Instead, the company would make wholesale sales to Homestead under rate schedules in an interchange agreement between these two parties. Under §§ 205 and 206 of the Federal Power Act, a utility must receive commission approval to replace one service to a wholesale customer with another service. Commission jurisdiction over changes in rates, charges, classification, or service necessarily encompasses this situation. The commission must first find that this customer reclassification is in the public interest. See, Pennsylvania Water & Power Co. v Federal Power Commission (1952) 343 US 414, 422-424, 94 PUR NS 1, 96 L Ed 1042, 72 S Ct 843.

By order of December 30, 1977, the commission consolidated these dockets, suspended both the tariff availability restrictions and the Homestead cancellation for five months, and suspended the proposed rate changes for two months. Phase I of these consolidated proceedings was established to allow for separate hearing and decision on the legality of the tariff availability restrictions and the cancellation of the firm service to Homestead.

Following a schedule of conferences, evidentiary submissions, hearings, and briefs, Presiding Administrative Law Judge Curtis Wagner issued his initial decision on April 21, 1978. He concluded that the proposed availability limitations for full and partial requirements services are just and reasonable, and approved the cancellation of firm partial requirements service to Homestead.

Briefs on exceptions to the initial decision were filed on May 8, 1978, by the commission staff, the cooperative group of wholesale customers,[2] and the municipal group of wholesale customers (the Florida cities).[3] On May 12, 1978, FP&L filed its brief opposing these exceptions.

By order issued June 1, 1978, the commission stated its intention to issue a final decision in Phase I as soon as possible and urged FP&L to refrain from implementing the tariff availability restrictions and cancellation of requirements service to Homestead, pending a final ruling on these issues. By letter

[2]The cooperatives include Seminole Electric Cooperative, Clay Electric Cooperative, Lee County Electric Cooperative, Okefenoke Rural Electric Membership Corporation, and Suwannee Valley Electric Cooperative.

[3]The Florida cities include Fort Pierce, New Smyrna Beach, Homestead, and Starke.

dated June 9, 1978, FP&L informed the commission that, without waiving its legal rights, it would provide PR service to Homestead and also to the city of Fort Pierce, Florida, pending final commission action.

The Rate Change Proposals. Firm wholesale service under FP&L Schedule SR-2, filed on October 14, 1977, would be available to meet the total capacity and energy requirements of purchasing utilities over the indefinite future. It is comprised of a two-part demand and energy rate, based on FP&L's average system costs which includes the production costs of its nuclear, gas, and oil-fired generating plants. Its predecessor, Schedule SR-1, was made available to all wholesale purchasers within FP&L's service territory. However, the company now proposes to limit full requirements service to six rural electric cooperatives which presently take this service. A potential purchaser requesting full requirements service from FP&L in the future could not anticipate receiving this service and would not receive the SR-2 rate for any service it was able to arrange.[4] While there will be no abatement of retail sales to new customers, FP&L has stated that it is not willing to commit itself to serve any new wholesale customers but would be willing to discuss the possibility when the situation arises.[5]

Florida Power and Light Company wholesale Schedule PR, also filed on October 14, 1977, is a modification of Schedule SR-1 designed to meet partial power and energy requirements, complementing the purchaser's own generation or other firm power purchases. Like Schedule SR-2, it is composed of a two-part demand and energy rate based on average system costs; however, the rate levels are different and the demand component is stratified to reflect differing prices for peak and base/intermediate demand. Each tariff has two energy rate blocks, but the SR-2 lower block is attained after purchase of 275 kwh per kw of billing demand, versus 400 kwh under Schedule PR. Moreover, Schedule PR requires the customer to specify its "contract demand" on FP&L for succeeding 12-month periods. The customer's monthly billing demand is never less than 90 per cent of its contract demand plus 75 per cent of its maximum recorded peak demand. Conversely, the demand charge for purchases above 110 per cent of contract demand is higher and the customer may not increase its contract demand for succeeding 12-month periods by more than 125 per cent without the consent of FP&L. The company asserts that these design differences between Schedules PR and SR-2 encourage partial requirements customers to increase their load factors.

Partial requirements customers, including the cities of Homestead and New Smyrna Beach, previously took service under Schedule SR-1 which, as noted earlier, was available to all customers in FP&L's service territory. With the filing of Schedule PR, however, FP&L proposes to limit this service to three customers, the Keys Electric Cooperative and the cities of New Smyrna Beach and Starke. Homestead which like Fort Pierce, has sufficient generating capacity

[4]Florida Power and Light Company brief opposing exceptions at p. 10.

[5]Id.

to meet its load, would be excluded from this service.[6]

Although not directly at issue in this proceeding, it would aid the clarity of this decision to describe the four interchange power and energy services which FP&L and several utilities reciprocally provide under bilateral agreements. The transactions under these agreements are voluntary and of relatively short duration. Rates are determined at the time of sale, based on incremental instead of average system costs. Emergency interchange service, denominated Schedule A, provides the buyer with capacity and energy in the event of a forced outage, for a period lasting no longer than seventy-two hours. For pricing purposes, Schedule A service is deemed to be provided by the seller's designated fossil-fired steam or combustion turbine generators and recovers only out-of-pocket energy costs.[7] Scheduled interchange service, Schedule B, provides capacity and energy for periods of less than twelve months, when the buyer is short of capacity primarily due to forced or scheduled plant outages. The buyer must meet the reserve requirement associated with Schedule B service. Delivery of Schedule B power and energy occurs when in the seller's discretion no impairment of fuel stocks or service to other customers would result. Capacity and energy rates are based on the production costs of the seller's fossil-fired and combustion turbine generating units. Economy interchange service, Schedule C, provides for nonfirm energy exchanges of short duration, priced to split the savings between the seller's incremental cost of generation and the buyer's decremental cost.[8] Finally, firm interchange power, Schedule D, provides capacity and energy for periods of twelve to thirty-six months. Unlike firm service under Schedules SR-2 and PR, this service is curtailable during extreme cold weather and emergency conditions, in which case the demand charge may be adjusted. Schedule D service is apparently priced at the scheduled outage rate, Schedule B, for fossil fueled and combustion turbine capacity and energy (Exh 29). With intermittent usage Schedule D may be cheaper than the PR rate; however, it apparently becomes more expensive than Schedule PR as the customer's load factor increases. Florida Power and Light Company proposes to provide firm service to Homestead and Fort Pierce only under Schedule D, and has offered them 240 mw of Schedule D capacity through 1980.

The Initial Decision. The basic issue of this proceeding as characterized by the presiding judge is whether FP&L can justify a reclassification of wholesale services based on the relationship of customer load to customer generating capacity. In hearing this case, the judge imposed the burden of proof on FP&L to demonstrate that its proposed tariff modifications and restrictions were just and reasonable. He largely refrained from considering the evidence presented

[6]As will be discussed later, Fort Pierce began purchasing under Schedule PR on March 28, 1978. Homestead also continues to receive service by agreement of FP&L. However, FP&L asserts that it will terminate service to both, if the commission approves its rate changes.

[7]Under certain circumstances, the buyer may alternatively return capacity and energy in kind within the current billing period.

[8]The price of interchange energy is characteristically determined by FP&L's generating units with high operating costs, not by base loaded nuclear or natural gas-fired units.

by staff and the Florida cities intended to demonstrate that the proposed restrictions were part of an anticompetitive pattern of activities by the company, leading toward monopolization of the retail power market.

The presiding judge concluded that FP&L's proposed restrictions on eligibility for wholesale services were justified on the basis of differences in cost of service. He agreed with the company that the load patterns of customers with capacity equal to their peak demands could be so erratic as to make FP&L system planning unduly difficult, warranting the complete exclusion of such customers from wholesale service at average cost rates. He decided that incrementally priced interchange services, described above, were acceptable alternatives for customers such as Homestead and Fort Pierce. The judge found that interchange power could be used to meet their base-load requirements "at a lower rate than under the partial requirements schedule," initial decision at p. 14, and suggested that these self-sufficient utilities could purchase bulk power from other sources because FP&L has agreed to wheel. He deferred to civil courts the allegations of these two customers that FP&L had breached contractual obligations to serve them under Schedule SR.

The judge also found that the bifurcation of Schedule SR-1 into separate SR-2 and PR schedules was just and reasonable. Moreover, he concluded that the company could change the availability provision of its tariff to limit wholesale services to customers named in Schedules SR-2 and PR. This was based on his assessment of certain financial, operational, and capacity planning problems asserted by FP&L and his determination that the two-year notice of termination provision in the schedules did not assure that the company would recover all capacity costs.

The judge dismissed the allegations that FP&L's proposals would have an anticompetitive effect, based on a company representation that it had no interest in acquiring new retail franchises because of fuel problems. Finally, he sought to mitigate concern that FP&L would strictly construe its tariff limitations by reciting several of the company's interpretations made during the course of the proceedings, but not added to the proposed tariffs.

In sum, the presiding judge approved each of the company's proposed changes to its wholesale tariff. Based on this, he also approved the proposal that Homestead (and Fort Pierce) become ineligible for service under FP&L's average priced wholesale rates and allowed to take firm interchange service only.

Positions of the Parties. The position of the applicant, FP&L, has been summarized in the two preceding sections of this opinion. It further states that public utility obligations under the Federal Power Act are limited. However, we are basically concerned here with the obligations undertaken by FP&L itself in its Schedule SR-1 tariff, which makes wholesale service generally available throughout the company's service territory, in contrast to the proposed limitations on availability of Schedules SR-2 and PR.[9] Finally, FP&L denies that it

[9]To the extent the presiding judge may suggest that Schedule SR-1 does not make wholesale service generally available because service contracts may still be required, initial decision at p. 8, this is not reflected in the provision itself. During cross-examination FP&L's rate design witness

has engaged in anticompetitive activities, states that staff's and Florida cities' allegations are largely irrelevant, and questions their application of the antitrust laws.

Exceptions to the initial decision raised by Florida cities are prolix. However, they may be simplified, briefly.

Florida cities contend that the proposed tariff is an attempt to abandon service to the city of Homestead because Homestead is currently receiving full interchange service and under the terms of the proposed rate schedule could no longer receive partial requirements service although it desires to do so. Cities claim that restrictions in the proposed full and partial requirements tariffs are tantamount to refusals to deal in either total or partial requirements service. Florida Power and Light Company's partial requirements tariff, they assert, is designed to limit the sale of wholesale power. This is accomplished by restructuring the sale of partial requirements service to only those systems which require such service to complement the insufficient generating capacity or firm power purchases to meet their native loads and therefore does not apply to systems which nominally have generation sufficient to meet their loads regardless of the age or efficiency of such generation. Both Homestead and Fort Pierce would be served only at interchange rates, creating a price squeeze.

Cities contend that FP&L is attempting to deny or make it more difficult for them to establish economic alternatives. Apart from the tariff proposals at issue, this is accomplished by denying joint participation in new nuclear generation, opposing municipally supported legislation, and refusal to file or establish a general rate for transmission. They also state that FP&L has refused to support a general integrated power pool in Florida.

The cooperatives assert in their brief on exceptions that the initial decision ignored their position and relied excessively on FP&L testimony. The cooperatives, which through Seminole are planning base-load generating units, will require partial requirements service in the future instead of Schedule SR-2 service. Because they are not named in the PR tariff they are not assured of this service, so that these limitations deny them the necessary supply flexibility to account for changing situations.

Staff alleges several acts of monopolization by FP&L. Staff states that FP&L has refused to sell wholesale power to the municipal utilities, thereby constituting a refusal to deal proscribed by United States v Otter Tail Power Co. (DC Minn 1971) 90 PUR3d 419, 331 F Supp 54, affd (1973) 410 US 366, 97 PUR3d 209, 35 L Ed 2d 359, 93 S Ct 1022. In this regard, it points to an historic FP&L policy not to serve municipal systems at wholesale, an FP&L refusal to serve Fort Pierce under the SR-1 tariff, and the limitations on the availability of the SR-2 and PR tariffs presently at issue. Staff views FP&L's dominance over transmission facilities

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acknowledged that utilities within the company's service territory, such as Fort Pierce, Jacksonville, and Orlando, were eligible for firm service under the terms of Schedule SR-1. See, *infra*, p. 334. After all, the purpose of this proceeding has been to limit that provision to certain named and existing customers. Moreover, FP&L has in the past filed unexecuted service "agreements" when customers have commenced service.

and its corresponding refusals to wheel as bottleneck monopolization proscribed in United States v Otter Tail Power Co., *supra*. Staff cites examples of FP&L's refusing to wheel third party bulk power to the cities of Jacksonville, Homestead, and Lake Worth, and it asserts that, while FP&L has very recently announced in Docket No. ER77-175 a new policy to permit wheeling, that policy is far too restrictive in terms of rates and terms. Staff sees another example of monopolization in FP&L's restrictions on access to its nuclear generating units. Specifically, staff asserts that smaller utilities do not have the individual loads to justify a nuclear unit but, due to the economies of such units, utilities may become uncompetitive without access. Staff also alleges that FP&L has unreasonably restricted coordination, both in terms of economy exchanges and power pooling. It then contends that FP&L has established barriers to entry in the form of restrictions in its franchise agreements with municipalities, particularly the standard 30-year term. This is occurring, according to staff, while FP&L maintains a policy of acquiring municipal systems; however, FP&L has not acquired another utility in recent years. The staff concludes that FP&L's proposed tariff restrictions would further its monopoly power in the relevant markets, as defined by its economic witness.

The Existence of Competition And Monopoly Power

The Relevant Markets. We begin our discussion of FP&L's tariff proposals by defining the relevant markets, which provide a framework for determining the possible existence of monopoly power, the opportunities for competition, and the required breadth of any remedial action we may order. The staff economic witness identified two broadly defined product markets as relevant to the investigation of the anticompetitive effect of FP&L's proposed tariff restrictions. This analysis was not challenged by any party and reflects FP&L's own conceptualization of its business.[10] The retail market involves sales of capacity and energy to ultimate consumers by vertically integrated utilities such as FP&L and by distribution utilities. The bulk power market involves sales of wholesale power and energy to retail distributors (including the captive retail distribution centers of vertically integrated systems) by bulk power producers and suppliers. These product market definitions are amply supported by the record, and we adopt them in our analysis.

The bulk power product market was further disaggregated by the staff witness into five submarkets essentially consisting of full requirements power, partial requirements and coodination services, component bulk services, sales at transmission voltages to ultimate consumers, and transmission services. In so doing he attempted to demonstrate the interchangeability of firm full requirements power with "unbundled" bulk power services which may be purchased from several sources to meet the requirements of a retail distributor, in conjunction with generation owned by that distributor.

[10]In a 1976 presentation to the company's senior management council, FP&L's vice president for strategic planning subdivided the company's activities into discrete bulk power and electric service businesses.

While we do not dispute the validity of this subdivision of the wholesale market, a more practical method of analyzing that market for purposes of this proceeding is to separate bulk power transactions into discrete firm requirements and coordination submarkets. Essentially, this parallels the distinction between FP&L's Schedule SR-2 and PR firm services on the one hand and its interchange services on the other. Florida Power and Light Company's firm services are noninterruptible; priced on the basis of average system costs; designed to meet a customer's base, intermediate, and/or peak-load requirements; and continuously available over the indefinite future. Conversely, interchange services are interruptible; incrementally priced on the basis of oil-fired generation costs; ancillary to bulk power supply and not practicable sources of base-load power; and of limited duration. Depending on the feasibility to the customer of self-generation or supplementary firm power purchases, partial requirements service is reasonably interchangeable with full requirements power to meet a retail load. Such interchangeability is a requisite for grouping products in a common market. See, United States v du Pont & Co. (1956) 351 US 377, 393. Of course, FP&L did not itself distinguish between these two firm services in its SR-1 schedule prior to this case. However, interchange services cannot be used to sustain load requirements and may only be used to augment other primary sources of bulk supply. In particular, FP&L's wholesale customers do not regard Schedule D firm power as interchangeable with SR or PR firm power and the company describes them as different services.

Florida Power and Light Company sells electric power and energy to most of the heavily populated areas along the eastern and lower western coasts of peninsular Florida and portions of central and north-central Florida. Within or adjacent to this service territory are 22 smaller areas served by municipal and cooperative utilities. The staff witness identified this composite area, comprised of some 35 Florida counties, as the relevant geographic market for both retail and wholesale product markets. This was primarily determined from information in FP&L's 1975 annual report. The service territories of larger bordering utilities[11] were excluded from the retail geographic market because of the unavailability of wheeling service into the FP&L service territory and the existence of retail territorial allocation agreements with FP&L which prohibit retail competition.[12] This is not to say that competition does not exist in the relevant retail market. As we discuss later, there is significant competition, primarily franchise and yardstick competition, and FP&L itself has recognized that its neighboring utilities are both customers and competitors. Furthermore, even territorial allocation agreements are subject to modification under limited circumstances in proceedings before the Florida Public Service Com-

[11]Florida Power Corporation and Tampa Electric Company.

[12]These retail territorial agreements are not at issue in this proceeding and we express no opinion as to their merit. They require approval by the Florida Public Service Commission and have been upheld on judicial review. Storey v Mayo (Fla Sup 1968) 77 PUR3d 411, 217 So 2d 304, cert den (1969) 395 US 909. In 1974 this authority was expressly given to the Florida commission. See, Florida Statutes Annotated § 366.04.

mission. Peoples Gas System v Mason (Fla App 1966) 187 So 2d 335.

The wholesale bulk power geographic market was similarly constrained because relatively few wholesale transactions are made across its boundaries. This geographic limitation applies as well to the bulk power submarkets, particularly the firm requirements submarket, described, *supra*, because of wholesale territorial agreements and the absence of firm power transmission services. Although there is a potential for competition in the wholesale market, actual competition has been inhibited by FP&L, as we discuss below. We are not required to remedy that situation now. This opinion reflects our concern that wholesale monopoly power not be used to maintain or enhance a utility's retail market position.

[3] *Monopoly Power.* Monopoly power has been defined as the ability to control prices or exclude competition from a relevant market. United States v Aluminum Co. of America (CA2d 1945) 148 F2d 416. It may be readily apparent in cases where prices have been controlled or competition demonstrably excluded; however, such showings are not essential. American Tobacco Co. v United States (1946) 328 US 781, 811.[13] Instead, the characteristic test is based on a firm's share of the market, and a predominant share warrants the inference of monopoly power. United States v Grinnell Corp. (1966) 384 US 563, 571. In United States v Otter Tail Power Co. (DC Minn 1971) 90 PUR3d 419, 331 F Supp 54, affd (1973) 410 US 366, 97 PUR3d 209, 35 L Ed 2d 359, 93 S Ct 1022, an inference of monopoly power was based on a finding that the defendant utility possessed a 75.6 per cent share of the relevant market. We find that FP&L has monopoly power in these relevant markets, as determined by Dr. Taylor in unrebutted testimony.

Based on 1976 data, FP&L has been shown to possess a 76 per cent share of the retail market in terms of customers served. Its closest rivals are the eight municipal utilities located within FP&L's service territory which generate a portion of their power requirements.[14] Collectively, these eight systems have a 12 per cent share of retail customers served. In 1976 FP&L's share of total kilowatt-hours sold at retail was 75 per cent, compared to the collective 13 per cent sold by the eight generating municipals.[15]

The statistical measurement of monopoly power adopted in United States v Otter Tail Power Co., *supra*, was the percentage of towns served at retail within the relevant market. Florida Power and Light Company provides retail service to approximately 90 per cent of the communities in the relevant

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[13]Monopoly power can be exercised as well through subtle efforts to prevent competition from developing. United States v Griffith Amusement Co. (1948) 334 US 100.

[14]The eight utilities are Florida Public Utilities in Fernandino, Fort Pierce Utilities Authority, the city of Homestead, Jacksonville Electric Authority, city of Key West, Lake Worth Utilities, the city of New Smyrna Beach, and the city of Starke.

[15]Florida Power and Light Company's share of the relevant market has grown somewhat between 1966 and 1976 from 73 per cent to 76 per cent of total retail customers and from 74 per cent to 75 per cent of retail sales.

market with populations of over 1,000 people.[16]

The inference of FP&L's monopoly power in the retail market is strengthened by several additional considerations. First, the existence of territorial allocations obviously provides a very effective barrier to new retail competition from existing utilities. Second, the substantial cost of acquiring utility property at the expiration of an existing supplier's franchise could be a barrier to competition for existing firms and new entrants as well. Third, the absence of wheeling services that would allow a utility to provide retail service to a noncontiguous area would stop any retail competition which overcame the first two barriers.[17] In sum, these high market entry barriers confirm the inference of monopoly power based on FP&L's market share. Re Consumers Power Co. (1977) 6 NRC 892, 1013. Moreover, entry barriers enhance the opportunities for exploitation of this power.

Although the record does not contain precise statistical indicia of FP&L's share of the wholesale power market, it is clear that the company has monopoly power over bulk power transactions as well. Florida Power and Light Company's share of the retail market is a suitable base on which to assess its share of the wholesale market, because the bulk power which the company produces to serve its own captive retail service territory must be included as part of the wholesale market. United States v Aluminum Co. of America, *supra*, 148 F2d at p. 424. Thus, FP&L possesses at least a 75 per cent share of the wholesale market, to which must be added the company's wholesale sales to municipal and cooperative utilities within the relevant market. The only other supplier of wholesale requirements service within the relevant market is the Jacksonville Electric Authority which supplies its own distribution system, plus the distribution utilities in Jacksonville Beach and Green Cove Springs.

Moreover, included in FP&L's bulk power resources are virtually all of the nuclear generating capacity and substantially all of the gas-fired generation available within the relevant market, each of which give the company a significant edge in the production of low cost power for base-load requirements. Three of the four operating nuclear plants in the state of Florida are solely owned by FP&L.[18] Only New Smyrna Beach and the cooperatives, acting through their generation and transmission subsidiary, have gained direct access to nuclear generation, through small ownership interests in Florida Power Corporation's nuclear plant. The company does not dispute that its long-term, noncurtailable supply of natural gas gives it an advantage over municipal generating systems[19]; however, it asserts that it

[16]Cf., Brown Shoe Co. v United States (1962) 370 US 294, 337, a case brought under § 7 of the Clayton Act where monopoly power was measured on the basis of cities in the relevant market with populations exceeding 10,000. In City of Mishawaka v American Electric Power Co. (DC Ind 1979) 465 F Supp 1320, 1325, the court found monopoly power where the defendant served at retail 89 per cent of the municipalities in the relevant market.

[17]Cf., Re Boston Edison Co. (1976) Docket Nos. E-8187 and E-8700, where the commission dealt with a transmission rate for retail service to a noncontiguous territory.

[18]See, Fort Pierce Utilities Authority v United States (1979) — US App DC —, 606 F2d 986.

[19]See generally, Sebring Utilities Commission v Federal Energy Regulatory Commission (CA5th 1979) 591 F2d 1003.

should be allowed to retain this bargained for advantage for sales to existing customers. By comparison, municipal generating units are small capacity, oil-fired steam or internal combustion machines which characteristically have high operating costs and are ill-suited to provide base-load requirements.[20]

Finally, we note that FP&L owns 81 per cent of the transmission lines within the relevant market with operating voltages of 69 kv or above. The Jacksonville Electric Authority owns the next largest share, 5 per cent. These are the facilities over which bulk power is transported within the relevant market and FP&L's ownership share gives it "strategic dominance" over transmission. United States v Otter Tail Power Co., *supra*, 90 PUR3d 419, 331 F Supp at p. 60.

As noted above, FP&L did not undertake to define relevant markets and did not challenge the analysis of staff's economic witness. Instead, its economic policy witness challenged the basic relevance of structural analysis to regulated public utilities. The company's thesis is that regulation prevents a utility having monopoly power from controlling prices and excluding competition from the market; i.e., the indicia of monopolization under § 2 of the Sherman Act.[21] However, this is not really a rebuttal to staff's position. Instead, it simply confirms the role of the commission in eliminating or modifying rate provisions, *designed by a utility*, which would otherwise facilitate price control or exclusion of competitors.[22] We believe the idea that regulated utilities are immune from charges based on the exercise of monopoly power has been thoroughly discredited by United States v Otter Tail Power Co., *supra*.

Actions of Competing Utilities Within the Relevant Markets

[4] *Introduction.* In cases where the anticompetitive effects of wholesale rate schedules are at issue, we anticipate focusing primarily on structural analysis to measure the existence of monopoly power, and on the suspect rate provisions themselves to determine their effects on the enhancement or maintenance of monopoly power. If, for example, a rate provision would weaken a competitor or raise the entry barriers to a market where competition can exist, that will likely be sufficient evidence of anticompetitive effect to warrant its elimination or modification — absent a weightier showing that the provision serves some countervailing public interest. City of Huntingburg v Federal Power Commission (1974) — US App DC —, 498 F2d 778; Northern Nat. Gas Co. v Federal Power Commission (1968) 130 US App DC 220, 76 PUR3d 321, 399 F2d 953, 971.[23]

[20] Florida cities' brief on exceptions at pp. 76, 77.

[21] Florida Power and Light Company brief opposing exceptions at p. 43.

[22] Clearly, regulation does not insulate electric utilities from operation of the antitrust laws. Cantor v Detroit Edison Co. (1976) 428 US 579, 15 PUR4th 401, 49 L Ed 2d 1141, 96 S Ct 3110; Re Consumers Power Co., *supra*, 6 NRC at pp. 1011, 1012. Nor is this commission precluded from considering antitrust law and policy. Re Gulf States Utilities Co. (1978) Docket No. ER76-816.

[23] In rate change proceedings such as this one, heard under § 205 of the Federal Power Act, the applicant bears the ultimate burden of nonpersuasion. However, staff and intervenors may be required to come forward with some evidence to focus their allegations of anticompetitive effect, and to relate that evidence to the targeted rate provision. See, Northern California Power Agency v Federal Power Commission (1975) 168 US App DC 288, 9 PUR4th 472, 514 F2d 184.

Unlike presentations in civil and criminal actions to enforce the antitrust laws, it is not necessary in our deliberations to have an extensive record on the past conduct of a utility towards its customers or its intent in establishing or maintaining a restrictive rate provision. See, Re Missouri Power & Light Co. (1978) — FERC —, 26 PUR4th 365, Opinion No. 31.[24] Every rate case in which anticompetitive effects are alleged need not become a full-blown antitrust proceeding.

However, as noted, *supra*, p. 314, conduct may be relevant to our assessment of the justification for and purpose of a service limitation. In the case before us a full record has been compiled and we are further aided by a recent decision of the court of appeals for the fifth circuit[25] in fully understanding the anticompetitive effects of FP&L's rate proposals.[26] Moreover, the documentary evidence of staff and cities, largely obtained from company files, is frequently incongruous with the testimony of company witnesses.[27] By and large the testimony of witnesses presented by staff and the cities is a summary recapitulation of hundreds of pages of correspondence and internal company documents contained in over 200 exhibits. This evidence has been of significant assistance in probing the effects of FP&L's alleged need to restrict the availability of service under Schedules SR-2 and PR.

[5] The company's reaction to the voluminous evidence of the cities and the staff relating to anticompetitive conduct is essentially a demurrer. Florida Power and Light Company asserts that this evidence is irrelevant to its proposed tariff modifications and that issues of anticompetitive conduct should be raised in other forums. While we agree that the commission has no authority to enforce the antitrust laws, this does not make the evidence irrelevant to the formulation of remedies well within our authority.[28]

Wholesale Market Division. Florida Power and Light Company has been found to have engaged in a per se violation of the Sherman Act by conspiring with Florida Power Corporation to divide the Florida wholesale power market. In Gainesville Utilities Dept. v Florida Power & Light Co.,[29] the United States court of appeals for the fifth circuit reversed and remanded a district court judgment, based on a review of the

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[24]However, there may be situations in which the rate proponent may demonstrate the innocuity [sic] of a questioned provision because, for example, the utility has a general wheeling tariff, or undertaken other actions which weaken or eliminate its monopoly power. See, Re New England Power Pool (1976) — FPC —, Opinion No. 775, affd sub nom. Municipality of Groton v Federal Energy Regulatory Commission (1978) — US App DC —, 587 F2d 1296.

[25]Gainesville Utilities Dept. v Florida Power & Light Co. (CA5th 1978) 573 F2d 292, cert den (1978) — US —, 99 S Ct 454. This opinion was issued after Judge Wagner wrote his initial decision.

[26]This evidence confirms our conclusion that FP&L has monopoly power in the relevant markets. Judge Wagner was also concerned by what he characterized as "disturbing episodes of Florida Power and Light Company's past conduct which raise serious antitrust questions." Initial decision at p. 5. However, time constraints led him to defer to the commission or the Justice Department.

[27]See, Gainesville Utilities Dept. v Florida Power & Light Co., *supra*, 573 F2d at p. 301, footnote 14.

[28]Federal Power Commission v Conway Corp. (1976) 426 US 271, 14 PUR4th 331, 48 L Ed 2d 626, 96 S Ct 1999; City of Pittsburgh v Federal Power Commission (1956) — US App DC —, 237 F2d 741, 751; Re Pacific Gas & E. Co. (1976) FPC Project Nos. 1988 and 2735.

[29]*Supra*, footnote 24. The record in this case contains a number of exhibits from that antitrust proceeding.

evidence which "compelled" a finding that the two largest utilities in the state of Florida had conspired to avoid selling wholesale power to customers in each other's service territories.[30]

This case arose from efforts by the Gainesville, Florida, municipal utility system to end its costly operation in isolation by interconnecting with either FP&L or Florida Power Corporation.[31] The court found that beginning in 1965, Gainesville's efforts to interconnect and coordinate its operations were met with a joint strategy to induce the municipal to interconnect with Florida Power Corporation, on precondition that all three systems agree to a retail territorial allocation. Correspondence sent to Gainesville and to the Federal Power Commission, regarding an interconnection application under § 202(b) of the Federal Power Act, was routinely passed between FP&L and Florida Power Corporation, with the understanding that concerted action was contemplated and invited.[32]

The court was particularly impressed by the documentary evidence which demonstrated a "routine" course of conduct spanning two decades whereby each utility would refuse to sell power to existing wholesale customers of the other or to municipalities served at retail by the other which were attempting to establish new distribution utilities. On remand, the case is once again before the district court for precise determination of the effect of the wholesale territorial allocation on Gainesville's difficulty in obtaining an interconnection, plus attendant damages. Until the trial court enters its new judgment, we shall not know how FP&L is to be enjoined from engaging in anticompetitive conduct against municipal utilities or directed to remedy the damage done.

Acquisition Efforts and Franchise Competition. The principal allegation leveled against FP&L's tariff limitations is that by restricting access to wholesale power the company may thereby increase its dominance as a retail supplier. The record is richly detailed with evidence of retail competition to serve entire communities between FP&L and existing municipal systems.

Florida Power and Light Company's first attempt to acquire the Lake Worth utility is documented in a letter to FP&L employees from the company's West Palm Beach division manager, dated June 18, 1958, which sought "a list of your relatives and friends who live in Lake Worth." The district manager proposed to send these sympathetic members of the community information concerning a forthcoming election on a proposed 30-year lease of the municipal system to FP&L, where a successful vote would "assist us in our negotiations for other municipal systems." Literature distributed to Lake Worth voters promised better service and an immediate rate reduction averaging 20 per cent, plus an aggregate reduction of $14 million over the 30-year lease. Although winning a simple majority vote, the election failed to attract the requisite 60 per

[30]Gainesville Utilities Dept. v Florida Power & Light Co., *supra*, 573 F2d at pp. 299, 303. Gainesville and Florida Power Corporation reached a settlement before the action was tried.

[31]See, Gainesville Utilities Dept. v Florida Power Corp. (1968) 40 FPC 1227, 79 PUR3d 269, Opinion No. 550, reversed (CA5th 1970) 84 PUR3d 478, 425 F2d 1196, reversed (1971) 402 US 515, 90 PUR3d 163, 29 L Ed 2d 74, 91 S Ct 1592.

[32]See also the consent decree in United States v Florida Power Corp. (1971 Trade Cases par 71, 637, MD Fla 1970).

cent voter participation and the proposition failed. Efforts were renewed in 1968 through a Lake Worth property owner; however, preliminary discussions were terminated without action.

Florida Power and Light Company offered to furnish firm power to the New Smyrna Beach municipal utility during the winter of 1958, provided the city commission would agree not to order any additional generating equipment and enact an ordinance which would permit disposition of its electric utility on a majority vote.[33] Florida Power and Light then planned to negotiate a lease of the utility the following spring and submit it to the voters for approval. An April, 1959, report to company management stated that the proposed acquisition "certainly provides some distinct advantages other than just taking over a municipally owned property." The report noted the considerable possibilities of industrial and residential development in the area.

The company's action in 1959 did not win it a lease of the New Smyrna Beach system; however, FP&L tried again in 1965, sending an inquiry to the city commission which was virtually identical to the letter sent to Fort Pierce in May of that year.[34] Florida Power and Light Company Executive Vice President R. C. Fullerton described the prospect of taking over the New Smyrna Beach municipal system to the chairman of another investor-owned utility as something the company viewed "with natural enthusiasm." Also in 1965, FP&L purchased from New Smyrna Beach all of its electric utility facilities in the city of Edgewater where it had previously provided retail service to only a portion of the community.

Intermittent negotiations occurred between FP&L and New Smyrna Beach in 1970 and 1973. In 1974, the company devised an internal plan for acquiring the municipal utility, and sent senior management representatives to discuss an acquisition proposal with the city utility commission, estimating a rate reduction of more than $600,000 under FP&L ownership. Company management informed the utility commissioners that FP&L could provide cheaper and more dependable service because of its greater power plant capacity and its diversity of fuels. Another acquisition presentation was made to the utility commission in 1975, at the city's request.

Florida Power and Light Company sought to acquire the Fort Pierce utility in 1965, when the subject was raised by a city commissioner at a meeting convened to discuss a possible interconnection of the two systems. The response of the company's division manager mentioned the interconnection only as an interim arrangement, concentrating instead on the sale or lease of the municipal utility. Florida Power and Light Company stated that any lease should be for a period of thirty years to coincide with the term of a standard electric franchise. In return, the company offered to immediately interconnect the systems, apply FP&L's lower retail rates, and "lend

[33]Characteristically, Florida municipal charters require the approval of greater than simple majority of voters for disposition of local utilities. Similar terms were extracted from the city of Clewiston in 1965. See, the initial decision in Re Florida Power & Light Co. (1967) 37 FPC 560, 573, adopted (1967) 37 FPC 544, 68 PUR3d 249, Opinion No. 517, affd sub nom. Federal Power Commission v Florida Power & Light Co. (1972) 404 US 453, 92 PUR3d 149, 30 L Ed 2d 600, 92 S Ct 637.

[34]*Infra*, this page.

its full support toward attracting industry to the area." Fort Pierce thereafter invited lease or sale proposals; however, negotiations stopped short of acquisition.

Acquisition was again raised by Fort Pierce officials in March of 1976. The minutes of a meeting with FP&L senior management officials record that the city felt that disposition of its utility system was necessitated by an inability to exploit the economies of scale in electricity production:

"Mr. Skinner [Fort Pierce's chief engineer] said we think its very efficiently operated. We realize the big problem facing us is not the high cost of fuel or the inefficiency of our system, but the inefficiency as compared with putting oil into a larger boiler and turbine. That's where we're getting caught short on the heat rate input to the boiler. We have a problem competing with FP&L favorably today because it represents around 65 per cent roughly of the cost of doing business, the cost for fuel oil."

When Fort Pierce inquired at that same meeting about the purchase of 30 mw of base-load firm power, the company responded that it did not wish to sell firm power unless the purchaser could reciprocate with sales of firm power to the company. This would require Fort Pierce to maintain generating capacity sufficient to meet its own load. FP&L also discouraged purchase under the SR-1 schedule, indicating that it was not really firm and "awfully expensive."

The company continued to develop an acquisition proposed throughout 1976. However, enthusiasm was apparently dampened when Fort Pierce intervened in proceedings before the Nuclear Regulatory Commission regarding FP&L's proposed South Dade nuclear generator.

Florida Power and Light Company proposed a sale or lease of the Homestead utility in 1976, when its president met with city officials to discuss Homestead's request for a retail territorial agreement, an emergency interconnection, and wholesale purchases. In 1976, the Homestead city council discussed the topic with FP&L; however, negotiations were apparently not continued.

The record indicates that acquisition of the Vero Beach utility was considered by FP&L in 1957, 1958, and 1959.[35] Thereafter, a serious effort to acquire the Vero Beach system was undertaken in 1976 which culminated in approval of the sale by the city electorate and an application to the Federal Power Commission under § 203 of the Federal Power Act. Internal management correspondence concerning implementation of the acquisition by FP&L suggests that Vero Beach would be viewed as a bellwether by other municipals thinking of entering or leaving the utility business:

"The impact potential of the Vero Beach acquisition on the franchise election in Daytona Beach and other municipal operations such as *Fort Pierce, Homestead,* etc., makes it imperative that we not underachieve with our Vero Beach operation." (Emphasis supplied.)[36]

After hearings in Docket No. E-9574, the Vero Beach acquisition was approved by an administrative law judge on grounds, advocated by FP&L, that the municipal utility could no longer efficiently generate its own power require-

hibits GT-34, at 74; GT-52; and GT-62.

[36]Staff Exh GT-34, at 1.

ments and that FP&L would provide an economic source of retail supply for the citizens of Vero Beach. This contrasts with the finding by the presiding judge that Vero Beach was a "truly excellent" utility with outstanding growth potential. See, Re Florida Power & Light Co. (1978) Docket No. E-9574. However, FP&L thereafter withdrew its application in early 1978 prior to the commencement of a final phase of the acquisition proceeding which was to consider the possible anticompetitive effects of the proposal.

In summary, the record documents twenty years' worth of franchise competition between FP&L and the municipal utilities located within its service territory. At various times FP&L has promoted acquisition or willingly received municipal proposals. Most, if not all, of those incidents occurred when the municipal systems were arranging new bulk power supplies from the options of self-generation, wholesale purchase from FP&L, and retail purchase from FP&L after franchise disposition. The company has not succeeded in many acquisitions, because the municipal candidates solved their supply problems by adding generation. However, the record strongly indicates that self-generation is becoming less and less attractive to the point where FP&L's witness Gerber has described small scale generation as anachronism. Since FP&L controls the remaining two options,[37] we conclude that its wholesale monopoly power can only increase, and, thereafter, its retail power as well. See, Borough of Ellwood City v Pennsylvania Power Co. (DC Pa 1979) 462 F Supp 1343, 1346.

The presiding judge expressly accepted the company's representation that it was not interested in acquiring Homestead or Fort Pierce because of capacity problems and operating difficulties. Since we find the premise of this representation unconvincing,[38] we would be remiss to wholeheartedly accept its conclusion. In any event, it does not overcome the weight of the evidence to the contrary.[39]

Potential Losses of Franchises. The company appears well aware of the relationship between its wholesale sales to municipal utilities and its ability to retain existing retail franchises. In March of 1977, a market development presentation was made to FP&L management which stressed, inter alia, the need to maintain the integrity of the company in relation to publicly financed utilities.[40] Between 1976 and 1985, for example, franchises covering retail sales to 41.8 per cent of FP&L's customers are to expire. In addition, FP&L serves another 93 communities at retail with no franchise agreement. Franchise competition can be a positive force to encourage better service and lower rates; thus, a utility should not be allowed to tilt the balance by artificially making wholesale service unattractive to potential retail

[37]As discussed, *infra*, p. 334, municipal purchase of entitlements in large generating units constructed by FP&L does not currently appear to be a viable option.

[38]*Infra*, at pp. 336-338.

[39]Alternatively, it appears that the Florida Public Service Commission could require FP&L to provide retail service if the customers of a municipal utility voted to disband operations. See, Florida Statutes Annotated, § 366.03.

[40]In a 1975 paper on "Strategic Issues in Interutility Relations" prepared by company witness Gardner, emphasis was placed, inter alia, on franchise renewals and phaseout of wholesale tariffs.

market entrants. United States v Otter Tail Power Co., *supra*, 90 PUR3d 419, 331 F Supp at p. 61. The record contains evidence relating to three franchise expirations, of which Daytona Beach is the most fully documented.

In 1975 or 1976, the city of Daytona Beach undertook a study of municipal distribution versus FP&L franchise renewal. In response, the company mounted a significant effort to inform city residents of the benefits of franchise renewal. Of particular note are the company's statements that each of the Florida municipal utilities had rates higher than FP&L (except for two with access to hydroelectric power) and that municipals charge these higher rates because FP&L "can gain greater economies of scale in all facets of its operation." Florida Power and Light Company won renewal of its franchise after a record high election expenditure. Due to the continuing expirations of retail franchises, we conclude that vigorous franchise competition exists within the retail market which FP&L can influence through its wholesale sales policies.

[6] The company characterizes its efforts to renew franchises and acquire others as sales promotion and business preservation.[41] However, these actions may still run afoul of antitrust law and policy when undertaken by a possessor of monopoly power. Otter Tail Power Co. v United States (1973) 410 US 366, 97 PUR3d 209, 35 L Ed 2d 359, 93 S Ct 1022; and City of Mishawaka v American Electric Power Co. (DC Ind 1979) 465 F Supp 1320, 1329-1332.

Florida Power and Light Company's Relationship with Homestead. Traditionally, FP&L has demonstrated considerable reluctance to engage in firm power transactions with municipal utilities, even within its own service territory. During the 1950's and 1960's this amounted to an unqualified refusal. Rate Schedule RC under which firm service was provided to cooperatives required that capacity and energy "not be resold or distributed by the customer to any municipality or unincorporated community for resale." In an initial decision adopted by the FPC in Re Florida Power & Light Co. (1967) 37 FPC 544, 68 PUR3d 249, Opinion No. 517,[42] hearing examiner Wenner recounted six separate instances over a period of thirteen years when the Clewiston municipal utility requested and was refused wholesale service by FP&L.[43] In 1963, the company's president informed the city of Winter Garden that FP&L did not "supply municipal systems firm wholesale power for distribution through a municipal distribution system."[44]

Homestead first requested firm wholesale service from FP&L in 1967, to which the company responded that it did not provide this service to municipalities and did not wish to serve any. Wholesale power from FP&L was Homestead's alternative to the immediate installation of new generation or disposition of its system. Robert Fite, the company's president, and F. E. Autrey, a vice presi-

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[41] Florida Power and Light Company brief on exceptions at p. 45.

[42] Affirmed, Federal Power Commission v Florida Power & Light Co. (1972) 404 US 453, 92 PUR3d 149, 30 L Ed 2d 600, 92 S Ct 637.

[43] 37 FPC at pp. 572, 573, 68 PUR3d 249, Opinion No. 517.

[44] See, also, Gainesville Utilities Dept. v Florida Power & Light Co., *supra*, 573 F2d at p. 298.

dent, stated that FP&L would not refuse to sell wholesale power, if that was the only arrangement negotiable; however, they added that the city would not receive the rate at which firm sales were made to cooperatives and that a retail territorial allocation was a necessary precondition to any service. Florida Power and Light Company emphasized the comparative benefits of an emergency interchange agreement or sale of the municipal system in lieu of wholesale purchases. Homestead was unable to negotiate a firm wholesale contract and instead made intermittent purchases from FP&L over the ensuing five years at average prices that were considerably higher than those paid by FP&L's cooperative customers.

In April of 1972, Homestead requested a more sophisticated interchange agreement with FP&L including the purchase of firm power to meet a portion of the city's load; however, FP&L negotiators responded that FP&L was only interested in an interchange where both parties had capacity to meet their own demands plus ample reserves. Instead, Homestead and FP&L entered into new emergency service agreements whereby the company only agreed to supply emergency power needs "to the extent it has capacity available. . . ." Florida Power and Light Company applied its then existing rate Schedule "WH," applicable to total requirements purchases by cooperative customers.

Homestead next requested power from FP&L in August of 1973, proposing a firm purchase of 12-16 mw from 1975 through 1980. The city stated that it intended to use this capacity for base load, purchase interchange energy to meet its intermediate load, and use its own generation only for peak-load capacity and reserve.[45]

The company first decided to respond to Homestead's request with the so-called "Marshall Theory": Homestead was to be told that FP&L had no firm power to sell. Company negotiators were advised to have load and reserve estimates available to substantiate this response. Immediately thereafter, however, the company concluded that Homestead had been listed as a customer under all requirements Schedule SR and was actually receiving firm power at committed intervals.[46] Florida Power and Light then decided that if Homestead requested a transmission interchange agreement as well as firm power, it would employ Schedule D and use Schedule SR as the negotiated rate thereunder.

In October of 1973, Homestead submitted a comprehensive request for an interchange agreement and simultaneous purchase of firm power from FP&L to serve the base-load portion of the city's requirements. However, Exh GT-29 reveals that the company wanted to avoid any obligation to sell firm power to Homestead by withdraw-

[45]The company's chief representative at this meeting was its vice president, E. L. Bivans, who later testified in this proceeding. Copies of Bivan's notes were sent to the company's president and other executives.

[46]This discussion is recounted in the notes of company employee "WMK" (apparently W. M. Klein, a negotiator in dealings with Homestead). The notes bespeak a certain surprise in learning that Homestead was an SR customer: "Rate SR offers firm power. Apparently, the company has been honoring their request for a number of years, and is not in a good position to refuse to continue offering firm base load power of 12 mw to 14 mw, which is consistent to [sic] their previous demands."

ing Schedule SR from its existing wholesale customers, including Homestead, and replacing it with an "emergency rate schedule" telling the city that it has no firm power to sell. Alternatively, it considered offering Homestead a Schedule D (firm interchange) rate lower than Schedule SR in return for a signed contract stating that the city would install additional generation capable of carrying its electrical load. The final paragraph of this internal memorandum seems an apt summarization of FP&L's reaction to Homestead's request for firm power:

"It is our belief that if we refuse to sell the city of Homestead firm power they will immediately request us to wheel from other municipalities. If we encourage them to increase their generation where we can purchase power from them, we may offset the demand for wheeling as well as avoid a long-term firm power commitment."

Florida Power and Light Company's hope to induce Homestead to construct additional generation for base-load requirements in lieu of firm power purchase was not done without knowledge of the consequences for the city. In December of 1973, FP&L's financial planning department prepared an analysis of FP&L's and the municipalities in or near its service area entitled "Comparative Analysis of Municipal and Investor-owned Utilities and the Benefits to Their Customers." This study determined that, except for Orlando and Jacksonville, municipal utilities charged higher retail rates than FP&L, because:

"The size of most municipal units is limited by the size of the city. This limit on size prevents the smaller municipal utilities from realizing many of the economies of scale available to large utilities. This fact was clearly revealed in the analysis. The smaller utilities had less efficient heat rates and higher fuel and operating costs per kwh of power sold. These higher costs appeared to be major contributing factors in the high cost of power to their customers."

Negotiations on the Homestead interchange agreement continued and in December of 1973 a final set of discussions occurred, from which FP&L learned that the "key" to this agreement was FP&L's willingness to simultaneously supply service under both the interchange agreement and Schedule SR after construction of necessary interconnection facilities by Homestead. Engineering and billing problems were not considered serious by FP&L personnel. However, company negotiators opposed a written commitment to serve the city under Schedule SR after completion of the interconnection "because we [FP&L] already have a contract to serve them on SR and the agreement does not necessarily prohibit such an arrangement to continue." Instead, FP&L's vice president, R. G. Mulholland, did send a letter to Homestead's city manager, in January of 1974, after the interchange agreement was signed, stating the company's understanding that it would provide Homestead with electric power for thirty-six months *after* completion of the city's new interconnection facilities at a rate not to exceed the company's approved wholesale rate schedule in effect at that time.

Homestead's high voltage interconnection facilities were completed in October of 1977. Without advance notice to Homestead or any indication from the city that it no longer wanted average

priced firm power, FP&L filed the rate change application with this commission which proposes to terminate SR service to Homestead. In place of SR power, FP&L states it will sell Homestead incrementally priced, curtailable Schedule D power, which the company admits is more expensive than Schedule PR when used for base load.

Thus, Homestead has received wholesale service from FP&L since the 1950's, including firm requirements service under the SR-1 tariff since that tariff first became effective. From the time of agreement in 1973 to completion of the interconnection in October, 1977, FP&L served Homestead under the SR-1 tariff. We find no evidence to support FP&L's contention that completion of the interconnection somehow eliminated Homestead as an existing wholesale requirements customer. Nor is it persuasive to assert that the parties intended for Homestead to be served at an incrementally priced Schedule D rate instead of the average cost Schedule SR.[47] Indeed, knowing Homestead's desire for base-load firm power, the company's representations as to the meaning of their interchange agreement in January of 1974 are quite to the contrary. It would be difficult to reach any other conclusion, given the weight of this largely unrebutted evidence.

Florida Power and Light Company's Relationship with Fort Pierce. The efforts of Fort Pierce to purchase firm power from FP&L bear a marked similarity to those of Homestead. In March of 1976, Fort Pierce approached the company about purchasing firm power to meet the city's base-load requirements and using its own generators for peaking purposes. Fort Pierce renewed its request in letters to FP&L in April and December of 1976. The December letter requested separate price quotations for base, intermediate, and peaking capacity. The city also informed FP&L that it immediately wished to begin purchasing "base capacity and energy on a year-round basis in amounts ranging from 25 mw to 30 mw," and requested a statement of the company's terms and conditions. Although FP&L recognized its obligation to provide service under Schedule SR-1, both in an internal memorandum and in a letter to Fort Pierce, the company failed to respond with specific information on which Fort Pierce could act. After another letter to FP&L in April of 1977, the parties met in July and Fort Pierce was told that FP&L had no firm power to sell.[48]

Fort Pierce maintained its position that it was entitled to firm power under the SR-1 tariff throughout the remainder of 1977. On October 14, 1977, FP&L filed changes to the tariff which limited its availability to existing customers. Thereafter, the company offered Fort Pierce up to 240 mw of capacity through the end of 1980, but under the terms of interchange Schedule D, not Schedule SR.

On March 24, 1978, during the cross-

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[47]The record indicates that FP&L did not publish a rate level formula for Schedule D until February 10, 1978, when it made an offer of Schedule D capacity to Fort Pierce.

[48]However, in July of 1976, FP&L's system planning department prepared a market assessment of firm intercharge sales between 1977 and 1985 which projected an "available supply from FPL" ranging between 1,604 mw and 1,995 mw in 1977. This report assessed the opportunities for sale of firm power to ten different utilities in peninsular Florida, including Fort Pierce.

examination of FP&L's rate design witness, Lloyd Williams, by counsel for Fort Pierce, Mr. Williams acknowledged that the city was eligible to purchase firm service under the SR-1 tariff. The same day, FP&L delivered a draft service agreement to the city and firm service began immediately. However, a dispute remains concerning the duration of service and FP&L has stated its intention to terminate service to Fort Pierce if we approve its proposed restriction of firm service to named and existing customers which do not have generating capacity sufficient to meet their peak loads.

Limitations on Alternative Sources of Capacity. Unrebutted company documents in evidence indicate that it is FP&L's policy to retain full ownership of the nuclear generating plants which it constructs. The company has stated that the full capacity of these units is needed to serve its own customers, so sharing is not to be anticipated until FP&L reaches the optimum amount of nuclear capacity for its system. However, no party disputes that joint ownership of such facilities would provide municipal and cooperative utilities (as well as other utilities in the region) with access to FP&L's economies of scale.

Florida Power and Light Company is the sole owner of three operating nuclear plants having aggregate capacity of 2,188 mw. Florida Power and Light Company has agreed to share a portion of St. Lucie No. 2 nuclear plant with neighboring systems including Homestead and New Smyrna Beach; however, FP&L documents in evidence indicate that this was done at the insistence of the Justice Department and that FP&L has not committed itself to share the capacity of any future unit.[49]

The Availability of Transmission Services. Florida Power and Light Company now offers four wheeling services which correspond to its interchange capacity and energy services.[50] Wheeling may be provided for one-year periods, with service available at the sole discretion of FP&L when transmission capacity is not otherwise required by the company. Transmission Schedules TA, TB, and TC correlate to interchange schedules for emergency, scheduled and economy capacity, and/or energy services.[51] Of particular significance to this case is Schedule TD, denominated "firm transmission service." However, "firm" is a misnomer because Schedule TD service may be reduced or interrupted at the company's discretion for periods up to thirty days.[52]

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[49]In 1973 FP&L considered canceling St. Lucie No. 2 because of "escalating costs and Justice Department review of our antitrust status." Then in 1976, the company considered a shift to coal-fired plants for future base-load generation "to eliminate the Atomic Energy Act as a route to municipals' investment in generation." See also, the decision of the Atomic Safety and Licensing Appeal Board, Nuclear Regulatory Commission, in Re Florida Power & Light Co. (1977) Docket No. 50-389A, regarding antitrust review proceedings on St. Lucie No. 2.

[50]A complete description of these four services is found in Exh 28 (REB-AX), a draft service agreement sent to the city of Fort Pierce on December 6, 1977. The rate for these services is currently under adjudication.

[51]*Supra*, at pp. 316, 317.

[52]Section E of the draft agreement provides:

"In the event that firm transmission service cannot be provided due to an unanticipated reduction or interruption of FP&L's transmission facilities supplying such service, or if such service is provided in an amount less than 80 per cent of the contracted demand for firm transmission service as a result of unanticipated reduction or interruption of power delivered by the commission to FP&L for the city's account pursuant to service Schedule D of the city-commission contract, and such reduction or interruption continues for a period of thirty

In short, these four wheeling services only offer surplus transmission capacity on an as-available basis. Florida Power and Light Company does not contend that any of these four wheeling services could be utilized to transmit alternative power supplies to utilities within the relevant markets from third parties equivalent to those obtainable under Schedules SR-2 or PR. The company states that an appropriate rate would have to be negotiated at the time a potential wheeling customer arranged its alternative power supply.[53]

The Reasons Given by FP&L for Its Tariff Limitation Proposals

Florida Power and Light Company would seek to justify its proposed limitations on full and partial requirements availability in terms of operational constraints. Specifically, it asserts that future power supply is too uncertain to allow unlimited access to its requirements service.

According to FP&L, customers which are self-sufficient in generating capacity could arbitrarily shift their load between service from FP&L and their own generation. This would purportedly lead FP&L to maintain capacity in excess of its other customers' needs but with no assurance that such capacity would be fully utilized, thereby increasing rates to all customers. The company proposes to remedy this uncertainty by making these on-again/off-again customers ineligible for service under Schedule PR.

However, the difficulty with this proposition is that it has virtually no record support and is based on a few conjectural statements by company witnesses. In fact, FP&L's rate design witness prepared a model load duration curve in 1975 showing that customers with generating capacity less than peak demand and customers with capacity greater than peak demand would each purchase base-load requirements from the company, under an SR schedule modified for parallel operation, and use their own capacity intermittently to meet intermediate, peak, and reserve demands. This is consistent with the repeated requests of Homestead and Fort Pierce for base-load firm power.[54] Moreover, the natural inclination of these systems to buy base-load power would apparently be reinforced by the design of FP&L's RP rate which is intended to promote high load factors.[55]

Florida Power and Light Company relies on oil, natural gas, and uranium to fuel its generation. It cites the 1973 oil embargo and resulting drastic oil price

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days, the charge for firm transmission service will be adjusted as follows: In each succeeding month, the higher of (a) the maximum mw delivered to FP&L in any one hour during that month, or (b) the maximum mw delivered to FP&L in any one hour during the preceding six months, will be substituted for the contract demand for firm transmission service for purposes of calculating the charge for firm transmission service. Upon such reduced or interrupted service being restored to 80 percent or more of the contract demand for firm transmission service, the charge in each succeeding month shall be based upon the full contracted demand for firm transmission service."

[53]Florida Power and Light Company brief opposing exceptions at p. 42.

[54]*Supra*, at pp. 331-334. Again in their testimony, Florida cities state their intention to use Schedule PR for base-load purposes and use their own generation for peaking.

[55]*Supra*, at pp. 315, 316. While FP&L is discouraging purchases by self-sufficient municipals it has apparently adopted a marketing strategy which promotes high load factor usage as a means of improving its declining system load factor.

increases and the expiration of long-term oil supply contracts and replacement by three-year contracts to cast uncertainty upon its oil supply. As for gas supplies, it references high levels of curtailment and the expiration of a major gas supply contract in 1979. Concerning nuclear fuel, FP&L notes that it only has a two-year inventory and that its long-term supply contract was canceled by the seller in 1975.

Florida Power and Light Company may well face fuel supply problems, as do other suppliers in the electric utility industry. However, they are not of a magnitude that would justify the proposals before us in this case. It appears that FP&L continues to possess long-term fuel oil contracts and that it has entered into shorter term oil contracts (three years) with favorable cancellation provisions in order to gain greater flexibility in responding to price changes on the open market. Florida Power and Light Company's natural gas warranty contract with Amoco Production Company provides for daily deliveries of 200 MMcf through 1988, such deliveries being beyond the purview of the present curtailment plan of the transporter of this gas, Florida Gas Transmission Corporation.[56] Finally, an affiliate of FP&L is engaged in uranium exploration and FP&L's existing nuclear units do not appear in danger of being curtailed due to fuel shortage.[57]

Among the fuel-related problems which FP&L gives as a reason for limiting firm wholesale service is its inability to procure a coal supply contract. However, on cross-examination, FP&L Vice President Gardner acknowledged that the company has no coal-fired generation and has no plans to construct any. These points are confirmed by the testimony of FP&L's vice president in charge of fuel procurement which was presented to the Florida Public Service Commission in the spring of 1977.[58] On brief, FP&L has argued that the inability to obtain a coal supply contract has impaired its ability to plan coal-fired generation. However, the only evidence in the record of FP&L's need for such a plant was its desire to avoid municipal access to nuclear generation, the base-load alternative to coal, which could come from antitrust review before the Nuclear Regulatory Commission.[59]

Florida Power and Light points to environmental regulations which make construction of coal-fired units difficult and make nuclear units almost impossible to build. It also points to escalating costs, litigation, and regulatory delays and requirements as additional factors stopping future nuclear unit construction, or at least yielding a 12-year lead time which necessitates equal lead time for load forecasting. It refers to its cancellation of the proposed South Dade nuclear units and the substantial delay

[56]See, Sebring Utilities Commission v Federal Energy Regulatory Commission (CA5th 1979) 591 F2d 1003.

[57]In 1978 FP&L and several other utilities won a judgment in federal district court against their nuclear fuel requirements supplier, Westinghouse Electric Corporation, Virginia Electric & Power Co. v Westinghouse Electric Corp. (DC Va 1978) Civ. No. 75-0514-R. In an unreported opinion the court held that Westinghouse was not excused for delivering nuclear fuel by reason of force majeure provisions in its contract with the various utilities. See, Antitrust Trade Regulation Reporter, N. 887, at A-15 (November 2, 1978).

[58]Exhibit 22 indicates that while coal may well be used in the future, economic, environmental, and reliability problems make it largely irrelevant to FP&L's current capacity planning.

[59]*Supra*, at p. 334, footnote 48.

in licensing and resulting increase in capital costs of its St. Lucie No. 2 nuclear unit. As for existing generating units, FP&L states that its Turkey Point nuclear units have experienced steam generator leaks causing unscheduled outages in the past and requiring extensive scheduled outage in the future for repair, and that its combined cycle Putnam units, due to their novel design, have not been reliable. Finally, FP&L refers to its common stock selling below book value as evidence of financial difficulties which have limited its construction budget to internally generated cash.

We certainly cannot deny that these constraints do pose problems for utilities such as FP&L, but the record fails to establish that FP&L is so hampered by regulatory requirements and financial difficulties as to be incapable of expanding its generating capacity as needed in the future. Florida Power and Light Company is, after all, offering 240 mw of Schedule D capacity to Homestead and Fort Pierce, and the recent rate of increase in demand by FP&L's other customers cannot be characterized as rapid. Florida Power and Light Company has been greatly reducing its demand and load forecasts in recent years, with the actual rate of growth being relatively low averaging at most around 4 per cent annually. To the extent that the record gives any indication of FP&L's current financial condition, it reveals that FP&L has experienced significant improvement in earnings and related market factors. About the time FP&L filed this case, it was reporting lower, more manageable growth; greater internal generation of funds; improved earnings and coverage ratios; and increased dividends. Suffice it to say that the record, comprised largely of company documents, is ambivalent on this issue.

Florida Power and Light Company would support the separation of full and partial requirements tariffs in terms of costs of service on the basis of different load patterns.[60] These separate full and partial requirements tariffs differ both in terms of demand and energy charges. Florida Power and Light Company contends, therefore, that it has designed different rates to reflect more precisely the different costs of serving these different customer groups. Establishment of separate full and partial wholesale requirements rates is common practice. We have in fact recognized the differences in the costs of serving full and partial requirements customers, not to mention different types of partial requirements customers.[61] In the present case, FP&L's proposal of separate full and partial requirements rates appears reasonable.[62]

Balancing the Public Interest Considerations

When the SR-2 and PR tariffs are

[60]Florida Power and Light Company asserts that its wholesale customers without any generating capacity have relatively stable and predictable load patterns which allows it to plan operations and design rates to recover costs of serving these full requirements customers. It further contends that partial requirements loads are less stable but that the PR tariff allegedly encourages such customers to stabilize their purchases of power.

[61]E.g., Re Boston Edison Co. (1977) — FERC —, 23 PUR4th 416, Opinion No. 809-A.

[62]Of course, in Phase I of this docket we are not addressing the specific costs of service and rate designs of the SR-2 and PR tariffs. Accordingly, our determination does not reflect on how these two rates will actually function.

viewed from a perspective on the relationships between FP&L and other utilities within the relevant markets, the presiding judge's conclusion that the company's proposal has "no discernible anticompetitive effect in and of itself" is inadequate.[63] With alternative sources of base-load wholesale capacity unavailable, FP&L's tariff restrictions would deny to Homestead, Fort Pierce, and other nominally self-sufficient utilities within the relevant market the only remaining source of supply, Schedule PR. It would conclude, finally, the municipals efforts over ten years to obtain a source of economically priced, base-load power. Municipals like Homestead and Fort Pierce would become likelier to leave the utility business. Indeed, the citizenry might force these utilities to come to FP&L requesting takeover. See, City of Mishawaka v American Electric Power Co., *supra*, 465 F Supp at p. 1329. Of even greater importance to the company would be the assurance that in future franchise renewal contests with potential retail market entrants, it could point to existing municipal utilities as characteristically expensive and unable to exploit scale economies.

Homestead and Fort Pierce would not be able to economically utilize higher priced, lower quality Schedule D service to meet their base-load requirements. Such offers to sell at impractical prices and terms have been construed as unlawful refusals to deal, when done to further monopoly power. Eastman Kodak Co. v Southern Photo Materials Co. (1927) 273 US 359.

The restriction of wholesale service to named and existing customers is an even greater threat to potential franchise competition. The record indicates that FP&L generally plans to minimize sales of average priced wholesale power to municipals and cooperatives. After reviewing the record of FP&L's efforts to renew the Daytona Beach franchise, it does not appear likely that the company would offer a potential distribution utility an average cost rate. The signal to potential retail distributors in areas presently served by FP&L at retail and over which FP&L has wholesale monopoly power is quite clear. Cf., City of Mishawaka v American Electric Power Co., *supra*. Florida Power and Light Company's offer to discuss the feasibility of service to new customers under specific contract rates does not reassure us.[64]

The balancing of competition against other public interest considerations, required by City of Huntingburg v Federal Power Commission,[65] becomes relatively simple once this case is stripped to its essential elements. The proposed restrictive provisions are anticompetitive, we find no countervailing reasons for their implementation, and they are to be deleted. The company has not demonstrated that it should be allowed to change the general availability provision of Schedule SR-1 which makes

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[63]We recognize and fully appreciate that the initial decision was written before FP&L agreed to continue to serve Homestead and Fort Pierce under its PR tariff pending the final outcome of this case. We have not been burdened by the time constraints faced by the presiding judge. Under the circumstances the judge is to be commended for his efforts.

[64]As staff notes in its brief on exceptions, the presiding judge erred in finding that FP&L had committed to serve new systems in FP&L's service territory.

[65](1974) — US App DC —, 498 F2d 778.

wholesale service available to all municipal and cooperative customers in FP&L's service territory.[66] Proposed terminations of firm, average cost service to Homestead and Fort Pierce are based on these restrictive provisions, so the proposed cancellations are rejected. The Homestead cancellation would also violate the understanding of the parties that this customer would continue to purchase Schedule SR after the completion of their interconnection. Florida Power and Light Company shall continue to serve Homestead and Fort Pierce under Schedule PR. However, the proposal to bifurcate Schedule SR-1 into separate rates for total requirements and partial requirements service is soundly based with no discernible anticompetitive effect and we approve it.

In spite of the anticompetitive conduct recounted above, we wish to stress that there may be acceptable service limitations with diminished anticompetitive effects which ameliorate some legitimate operational problems faced by FP&L. Indeed, the intervenors recognize that the company should be allowed to fashion reasonable terms and conditions to wholesale service. However, FP&L has not provided us with any middle ground, much less a showing that it has selected a tariff limitation that is the least anticompetitive means of solving any such operational problem.

Finally, we note that FP&L has matters pending before us in over 30 dockets, most involving interchange transmission service filings in which antitrust allegations have been made. We see little need in those cases for the kind of elaborate presentation made in this one. It would be helpful to the commission for the parties to pinpoint the competitive problems and defenses relating to the filings in each of these cases.

NORTH CAROLINA SUPREME COURT

North Carolina ex rel. Utilities Commission et al.

v

Mebane Home Telephone Company

No. 56
— NC —, 257 SE2d 623
September 4, 1979

APPEAL *from commission order granting only part of telephone company's requested rate increase; order affirmed.*

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[66]Schedule SR-1 provides:
"Available:
"In all territory served by the company.
"Application:
"To electric service supplied to a municipal electric utility or to a cooperative nonprofit membership corporation organized under the provisions of the rural electric cooperative law for their own use for resale."