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1 P R O C E E D I N G S

2 CHAIRMAN BLOCH: Good morning.

3 My name is Peter Bloch. I am Chairman of the
4 Atomic Safety and Licensing Board.

5 To my right is Robert M. Lazo.

6 To my left is Michael A. Duggan.

7 We may be joined for a portion of this proceeding
8 by Judge Ivan Smith who is serving as alternate on this
9 Board but he is not here at this time.

10 This conference was called by order of July 7,
11 1981. It concerns Florida Power and Light Company's
12 application for a license to construct the St. Lucie Plant,
13 Unit No. 2, and it involves antitrust issues.

14 The purpose of this proceeding is to hear oral
15 argument concerning summary judgment questions set forth on
16 page 5 of our order, plus a question that may be added as a
17 result of motion.

18 I would appreciate it at this time if the parties
19 and their representatives identify themselves for the record
20 starting at my left and proceeding in a clockwise manner,
21 including all of the people who may seek to address the
22 Board this morning, please.

23 MS. HODGDON: I am Ann Hodgdon, from the Nuclear
24 Regulatory Commission Staff.

25 MR. ROTH: I am Alan J. Roth, appearing on behalf

1 of Florida Cities.

2 MR. JABLON: I am Robert Jablon, appearing on
3 behalf of Florida Cities. Daniel Guttman and Marta Manildi
4 may also address the Board.

5 CHAIRMAN BLOCH: I am sorry, who was the last
6 person?

7 MR. JABLON: M-a-r-t-a M-a-n-i-l-d-i. She hasn't
8 entered a formal appearance, Your Honor, but will. She may
9 be here.

10 CHAIRMAN BLOCH: You have a division of subject
11 matter in mind?

12 MR. JABLON: Yes, Your Honor.

13 CHAIRMAN BLOCH: Thank you.

14 MR. BOUKNIGHT: J. A. Bouknight, Jr., appearing
15 for Florida Power and Light Company.

16 MR. DYM: My name is Herbert Dym, also appearing
17 for Florida Power and Light Company.

18 CHAIRMAN BLOCH: Ms. Hodgdon, do you know whether
19 the Justice Department will be represented?

20 MS. HODGDON: I can't state that with any
21 certainty, but I believe that they will not.

22 CHAIRMAN BLOCH: All right.

23 If there is no objection, I would like to start by
24 granting Florida Cities' motion to add to the agenda.

25 Mr. Bouknight, do you plan to object to that?

1 MR. BOUKNIGHT: May I have a moment, Mr. Chairman?

2 CHAIRMAN BLOCH: Surely.

3 (Brief pause.)

4 CHAIRMAN BLOCH: The motion was made at the
5 conclusion of their brief in answer to the Board's questions.

6 MR. BOUKNIGHT: Mr. Chairman, it would be Florida
7 Power and Light Company's position that these decisions have
8 no effect whatsoever on these proceedings.

9 CHAIRMAN BLOCH: That is not the question. The
10 question is whether they should be added to the agenda. I
11 am sure that will be your position.

12 MR. BOUKNIGHT: We have no objection to adding
13 them to the agenda and stating our position on that point.

14 CHAIRMAN BLOCH: In that case they will be added
15 to the agenda. They will be considered a part of the
16 question No. 1. So therefore we will include the question
17 that appears on page 60 of Cities brief and it relates
18 primarily to Florida Power and Light Company's Opinion
19 No. 517 37 FPC 544.

20 I would like to comment briefly on case
21 citations. It would be very helpful to the Board if in the
22 course of argument when you refer to cases you briefly
23 discuss the facts of the case so that the Board can know
24 your opinion as to the relationship between the reason you
25 are citing the case and what the holding of the case was.

1 At times in reading the briefs it would have been helpful to
2 the Board to have had that kind of citation of the principal
3 facts.

4 I would like to know of Mr. Bouknight whether he
5 considers that he answered in his brief each of the Board
6 questions. I wasn't certain in my reading whether I could
7 find the answers to each of the questions.

8 MR. BOUKNIGHT: Mr. Chairman, we think that we
9 did. We certainly attempted to.

10 CHAIRMAN BLOCH: I take it that in the course of
11 the argument we will clarify what Florida Power and Light's
12 answers were to some of those questions?

13 MR. BOUKNIGHT: Yes, sir.

14 CHAIRMAN BLOCH: I think it probably would be best
15 for us to start with just ten minutes of general
16 introduction for each of the parties. Is that an acceptable
17 procedure?

18 MR. BOUKNIGHT: Yes, Mr. Chairman.

19 MR. JABLON: Yes, Mr. Chairman.

20 CHAIRMAN BLOCH: Florida Cities may start. I
21 would suggest using the podium and keeping our interruptions
22 down to a very bare minimum if at all possible.

23 MR. JABLON: Thank you, Your Honor.

24 CHAIRMAN BLOCH: I was directing that to the
25 parties and not necessarily to the Chairman.

1 (Laughter.)

2 ORAL ARGUMENT

3 BY

4 ROBERT A. JABLON

5 ON BEHALF OF FLORIDA CITIES

6 MR. JABLON: We welcome interruptions from the
7 Chairman and from the other Board Members, Your Honor.

8 As you know, my name is Robert Jablon. I
9 represent the Florida Cities here.

10 The Florida Cities are seeking collateral estoppel
11 based upon the Fifth Circuit Gainesville case and based upon
12 the Federal Energy Regulatory Commission's Opinion 57 and
13 certain related cases.

14 The Gainesville case held that Florida Power and
15 Light had violated the law by entering into a territorial
16 agreement to divide wholesale markets in Florida.

17 Opinion 57 held that certain proposed tariffs of
18 Florida Power and Light Company which would have limited
19 their wholesale power sales were anticompetitive.

20 These findings go to the heart of the case really
21 and in reality what Florida Cities are asking for is a
22 finding that a situation inconsistent with the antitrust
23 laws exists. Although I would admit that if we can get
24 beyond that hurdle there are some interesting questions with
25 regard to relief.

1 Quite frankly I think the real issues here come to
2 relief. I think a lot of what Florida Power and Light's
3 answers came to were questions as to what kind of relief is
4 appropriate.

5 CHAIRMAN BLOCH: I take it you do disagree with
6 Florida Power and Light's statement of what the issue is
7 that is involved here after the settlement?

8 MR. JABLON: Yes, assuming the issue you refer to
9 is whether you have to look towards whether there is a
10 situation inconsistent with the antitrust laws.

11 In light of the settlement I disagree very much
12 for the following reason. Really there are a number of
13 reasons. The primary reason is, first of all, whatever else
14 the settlement is, it is an agreement and representation by
15 FP&L as to what it is willing to do.

16 If the settlement license conditions resolve a
17 situation inconsistent with the antitrust laws, then that is
18 all the relief we are entitled to. We are not entitled to
19 any more relief.

20 However, if you say that because of the settlement
21 license conditions you will not look to see whether there is
22 a situation inconsistent, you never really get to the
23 question of the adequacies of the license conditions with
24 regard to relief. But there is something more important.

25 CHAIRMAN BLOCH: I didn't understand that to be

1 Florida Power and Light's argument.

2 MR. JABLON: I am sorry.

3 CHAIRMAN BLOCH: I thought that they argued that
4 you do look to see whether there is a situation inconsistent
5 but you look at it after the settlement was negotiated and
6 you say, as I think the Commission ordinarily does do when
7 there is a settlement at the outset of the case, you say is
8 there a situation inconsistent given the conditions that are
9 already included in the settlement.

10 MR. JABLON: I guess the short answer to that,
11 Judge Bloch, is that we never had an opportunity to present
12 before this Board the questions on the merits as to the
13 efficacy of the settlement agreement. In other words, we at
14 least suggested to the Board to look at the settlement for
15 reasonableness.

16 The position that Judge Smith and I think the
17 Board took is, look, this gives you some relief. It doesn't
18 hurt you. There was some debate as to whether some contract
19 provisions hurt you. The position they took is it doesn't
20 hurt you and you will have an opportunity later.

21 If you then say, well, you can't have an
22 opportunity later because look at all these good license
23 conditions, in effect we have been bootstrapped.

24 CHAIRMAN BLOCH: So you are saying in effect that
25 the approval of the settlement was with the understanding

1 that it would not affect your position in the proceeding?

2 MR. JABLON: That is right, and I would cite you
3 to the oral argument before this Board.

4 There is something else, though. Under 105(c)5
5 the Board has to make a finding whether a situation
6 inconsistent exists. 105(c)6 gives you broad authority to
7 grant relief.

8 If, for example, the Board made a finding as
9 happened in Midland, as the Appeal Board made in Midland
10 that there was a situation inconsistent, at that point the
11 Board would consider a range of relief. There is case after
12 case that an antitrust violator can expect some hemming in.

13 If you reverse the procedure and say, look, this
14 is what Florida Power and Light is willing to do in the
15 context that Florida Power and Light's agreement was at
16 least with one eye towards the question of a situation
17 inconsistent, then effectively you have foreclosed the
18 question of relief. Indeed, what Florida Power and Light
19 said to this Board was that you can change that relief
20 without a finding of a situation inconsistent. So they are
21 presenting you with a closed circle.

22 I think in any event with the settlement
23 conditions or without the settlement conditions there is a
24 situation inconsistent.

25 CHAIRMAN BLOCH. Incidentally, I take it that I am

1 correct in stating, am I not, that the usual role when there
2 is a settlement at the outset of a construction proceeding
3 is that we do apply the principles which Florida Power and
4 Light is advocating; is that correct?

5 MR. JABLON: No. If it were not contested I think
6 as a practical matter yes, but if it were contested I would
7 think you would then go to see if there is a situation
8 inconsistent.

9 CHAIRMAN BLOCH: I am not recalling the name of
10 the precedent, but I seem to recall a precedent in which
11 there was a settlement. There was a challenge by a single
12 party and the standard that I thought the Appeals Board
13 applied, and there are only four cases I guess and someone
14 ought to be able to figure out the name of the precedent,
15 but the standard that I think was applied was whether or not
16 there was a situation inconsistent considering the
17 settlement.

18 It is quite possible that once we have started the
19 proceeding and have gone as far as you have that it isn't
20 fair to apply that same standard but it would be helpful if
21 you were to suggest reasons why it is different.

22 MR. JABLON: I am not familiar with the case so I
23 can't suggest too many reasons in light of the case.

24 CHAIRMAN BLOCH: Can Florida Power and Light
25 supply the name of the case for us?

1 CHAIRMAN BLOCH: Judge Bloch, I believe you are
2 referring to the Wolf Creek case. I recall the facts, but I
3 don't recall the language that you just went into.

4 MR. JABLON: Well, let me give you the two most
5 fundamental reasons.

6 The first most fundamental reason is Judge Smith
7 particularly pressed the parties and pressed Florida Cities
8 how they would be hurt if you approved the settlement.
9 Judge Smith's point is that if all that happened where the
10 Cities were getting some relief early and their rights were
11 not affected that the Cities would not be hurt.

12 Florida Power and Light and the government took
13 the position that the Cities are not hurt by approval of the
14 settlement. Obviously if you now use the settlement to
15 adopt a different standard on liability we would be hurt and
16 I would think an estoppel would result again.

17 The second reason is more fundamental perhaps,
18 that there is case after case which says that if there is an
19 antitrust violation, and here you have a found violator by a
20 court, that, as I said before quoting Otter Tail, that there
21 is some hemming in. If you just look to the settlement
22 license conditions, especially where the party of interest
23 didn't participate effectively, you have got a foreclosure.

24 Let me just shortcircuit this as a matter of
25 time. I think what I want to do is simply express to you in

1 a couple of sentences the fundamental situation inconsistent
2 faced with the Cities as I see it in light of the
3 Gainesville case and the case of Opinion 57.

4 As I have said, Gainesville found a territorial
5 division. Florida historically, and if I need a reference,
6 Opinion 517 and it is throughout Florida Power and Light's
7 reports to the government and in depositions, has looked at
8 Florida as a peninsula and there is no question that there
9 were weak ties to Georgia. So you had the peninsula of
10 Florida.

11 You have like a Chinese wall running down the
12 middle of the state where systems directly interconnected
13 with Florida Power Corporation are limited in their dealings
14 with Florida Power and Light, and situations directly
15 interconnected with Florida Power and Light are limited in
16 their dealings with Florida Power Corporation.

17 At the same time you have a situation where those
18 two companies are directly interconnected with each other
19 and with Tampa Electric Company so that they can buy and
20 sell freely across the border without impediments.

21 The best analogy I can think of to illustrate the
22 harm is in the days before foreign imports if Ford, Chrysler
23 and General Motors divided up the country and each said,
24 gee, new plant costs are higher, we have had inflation. If
25 I am General Motors I don't want to sell in the Midwest. I

1 sell in the South. Chrysler says I don't want to sell
2 outside of California. They couldn't, and practically the
3 reason they couldn't is if you have competition they would
4 fear erosion of their own "market" area and they would have
5 to go out and compete because of their retail monopolies and
6 their power.

7 Florida Power Corporation and Florida Power and
8 Light don't have to do that. So that they feel secure is
9 not trying to expand markets and in limiting dealings.
10 Indeed, Florida Power and Light has used that situation
11 comparing rates and trying to expand its retail markets by
12 quoting rates at Municipal's and Florida Power's area.

13 In any event, looking to what the problem is, the
14 problem for the Cities is that they are constrained to deal
15 with one company or another. Then Opinion 57 comes in.
16 Florida Power and Light says we will restrict the sale of
17 base load power supply and transmission to systems within
18 and without our area. It is not easier for them to go
19 elsewhere putting a squeeze on them. That is the basic
20 situation inconsistent as I see it and I have capsulized or
21 tried to with regard to time.

22 Then if you look at the cases, Gainesville says
23 there was a territorial agreement. It is a per se
24 violation, exactly the kind of thing we are complaining
25 about. Florida Power and Light may argue the passage of

1 time or other factors to militate against this, but I think
2 this is really unfair because as the Fifth Circuit noted the
3 Gainesville case itself took ten years to resolve and
4 another three or four until the settlement. So you have got
5 a system of constant inevitability because these cases take
6 so long that the findings always spring back.

7 In any event, subsequent to that you don't have a
8 company that is "reformed." You have got a company where
9 the chief executive officer of the company in deposition
10 testimony didn't say, well, that is a long time ago and now
11 we will deal with anybody. He said, well, the Fifth Circuit
12 was wrong. He says he has no antitrust compliance program.

13 There has been a subsequent violation against the
14 company, the FERC decision, and the settlement license
15 conditions themselves reinforce this concept of
16 territoriality. Florida Power Corporation offered Crystal
17 River to any municipal in the state. I think any utility in
18 the state. Florida Power and Light under the settlement
19 license conditions offered it on a limited basis.

20 I have used up my ten minutes.

21 CHAIRMAN BLOCH: I have two questions. We will
22 have plenty of time I think later in the argument for you to
23 bring up the details related to these things.

24 I infer from your argument that Florida Cities
25 does not anticipate any problem getting Wheeling from

1 Florida Power in order to obtain power from Florida Power
2 and Light?

3 MR. JABLON: Yes and no, Your Honor. Florida
4 Power Corporation, unlike Florida Power and Light, has a
5 transmission tariff on file with the Federal Energy
6 Regulatory Commission so that there is no problem getting
7 transmission.

8 In the relief phase we would seek reciprocal
9 transmission rights which would affect pricing and practical
10 access but we haven't had the same kind of problems recently
11 that we have had with Florida Power and Light on
12 transmission.

13 CHAIRMAN BLOCH: The other question is I wonder
14 whether your analogy to General Motors and the other auto
15 companies dividing up the country really isn't too weak
16 because wouldn't the analogy be to a situation where those
17 companies not only divided up the markets territorially but
18 then tried to prohibit someone from California to travel to
19 the South to pick up a car?

20 MR. JABLON: Yes, Your Honor.

21 CHAIRMAN BLOCH: Do you have any further arguments
22 to wrap up the introduction?

23 MR. JABLON: I would simply this. The policy of
24 the Atomic Energy Act itself is very clear on two points.
25 First of all, in Sections 1 to 3 it says that there is a

1 policy in disseminating rather than restricting the economic
2 benefits from nuclear power.

3 In 105(c) there is a policy expressed in Midland
4 that licenses not be used to further anticompetitive
5 purposes and it is made especially clear when there is a
6 found law violation. Usually there is not.

7 Under these circumstances there is no reason not
8 to grant collateral estoppel. If there were a reason not to
9 do so based on Opinion 57 or the Gainesville case or both or
10 either, then there should be a limited area carved out which
11 is essential where Florida Power and Light says they can
12 prove something new or something else and let's go to
13 hearing on that. But I don't know from their pleadings
14 exactly what it is, what findings of Opinion 57 or
15 Gainesville they would contest.

16 CHAIRMAN BLOCH: I inferred that they were going
17 to test everything from Florida Power and Light to
18 Gainesville.

19 MR. JABLON: In broad generality, Your Honor, but
20 what specific finding do they disagree with.

21 ORAL ARGUMENT

22 BY

23 J. A. BOUKNIGHT

24 ON BEHALF OF FLORIDA POWER AND LIGHT

25 CHAIRMAN BLOCH: Mr. Chairman, I would like to

1 begin by setting just a bit of perspective of where we are
2 and how we got here.

3 As the Board will recall, the Florida Power and
4 Light Company and the two government parties, the Department
5 of Justice and the NRC staff, settled this case in September
6 of 1980. The Board implemented that settlement in April of
7 this year after some proceedings in which the Cities
8 attempted to state and then clarify the objections that they
9 might have to that settlement.

10 At that point the Board directed the Cities to
11 specify the further proceedings that they desired in the
12 light of the license conditions. Cities filed this paper
13 and later filed a motion for summary judgment.

14 The motion for summary judgment is helpfully
15 clarifying in at least one respect. I think that it pins
16 down the two Section 1 arguments that the Cities may be
17 making in this case and Mr. Dym will address those on their
18 merits as we proceed today. But I believe that Florida
19 Power and Light Company's paper indicates that those two
20 Section 1 arguments can be disposed of and indeed not in the
21 favor of the Cities.

22 As regards the Section 2 claim it appears as
23 though the Cities' motion relies more on weight and volume
24 than it does on any effort to specify and clarify. As a
25 result of that, Florida Power and Light Company is put in a

1 very extensive paper and has attempted to demonstrate to
2 you, first, that we think as a matter of law the arguments
3 that Cities are making lack merit. But moreover there are
4 genuine issues as to every material fact on which the Cities
5 rely in support of that Section 2 argument.

6 CHAIRMAN BLOCH: Mr. Bouknight, to clarify is that
7 argument of yours still valid if we do accept both
8 Gainesville and Florida Power and Light, the FERC opinions
9 as collateral estoppel?

10 MR. BOUKNIGHT: Yes, sir, in every respect. We
11 attempted to point that out in our paper. We believe those
12 two cases should not be given preclusive effect. But if
13 they are given preclusive effect and if you read them for
14 what they say rather than what the Cities would try to make
15 of them, they don't let the Cities there. They really don't
16 accomplish anything for the Cities in this case.

17 CHAIRMAN BLOCH: That is primarily because of
18 failure to find things relating to competition and because
19 of the territoriality problem; is that correct?

20 MR. BOUKNIGHT: No, sir, it is much more than
21 that. The Gainesville case, and again Mr. Dym is going to
22 talk about the Gainesville case in detail, but if you take
23 that for the most that can be made of it you are talking
24 about some events that happened in 1966 and you are talking
25 about a case in which the same kind of monopolization

1 arguments that Cities are making here were made and the
2 finding was entered for Florida Power and Light Company and
3 affirmed by the Fifth Circuit. It was a very limited
4 holding in that case.

5 JUDGE DUGGAN: Just one factual question. Did you
6 in answer to one of my questions in April of this year
7 pretty much indicate that the division agreed to was still
8 existing?

9 MR. BOUKNIGHT: Judge Duggan, what I attempted to
10 state, and let me be very clear about what the situation
11 is. Florida Power and Light Company has a service area in
12 Florida where it has a public utility obligation to serve.
13 That is a little different from the auto industry. There is
14 a certain area where every retail customer and every
15 wholesale customer is entitled to call on FP&L for service.

16 FP&L at this time unilaterally does not want to
17 expand its obligation to sell wholesale power beyond that
18 area.

19 JUDGE DUGGAN: So you wish to honor more or less
20 the division of the territory as was mentioned earlier as a
21 Chinese wall and you have nothing to breach it yet?

22 MR. BOUKNIGHT: No, sir. I think the latter is
23 not fair. The things we have done to breach it, and let me
24 start here. The problem the company has got with wholesale
25 power sales beyond this area is that we have to sell

1 wholesale power at average cost. We can't buy new plants at
2 average cost and we can't buy new fuel at average cost.

3 Every time we expand our wholesale obligation the
4 rates go up to the retail and wholesale customers in the
5 company's service area. The position the company took
6 before the FERC in the case that led to Opinion No. 57 is it
7 is prepared to sell anybody any where as much power as they
8 want on reasonable notice as long as the company recovers
9 its actual cost of doing that, its incremental cost of
10 providing that service.

11 In furtherance of that the company is engaging in
12 a power broker scheme with all of the utilities in Florida
13 exchanging economy energy on a regular basis with everybody
14 in Florida who wants to do that.

15 JUDGE DUGGAN: Does that include all the cities
16 that want to?

17 MR. BOUKNIGHT: Yes, sir, it does.

18 CHAIRMAN BLOCH: Including the ones in Florida
19 Power's area?

20 MR. BOUKNIGHT: Yes, sir. There is no distinction
21 made for those reasons. The only distinction that is being
22 made concerns the utility obligation to sell at embedded
23 cost. We attempted to show through Mr. Bivins' and
24 Mr. Howard's affidavit that that really hurts the company
25 and its customers. That is the reason why the company is

1 doing that.

2 CHAIRMAN BLOCH: Are economy exchanges available
3 whenever a city can obtain cheaper power from you at its
4 costs at a particular time? Is that what you are saying?

5 MR. BOUKNIGHT: The way it works is if there is an
6 increment of generation, an increment of load to be served
7 and someone can serve it at a lower cost than the other
8 fellow, the fellow with the lower cost serves it and you
9 split the saving.

10 CHAIRMAN BLOCH: You say an increment of
11 generation. Suppose as a regular matter you are dealing
12 with base load customers and that you happen to notice that
13 Florida Power and Light has power at a cheaper rate. You
14 can't just come to Florida Power and Light or you can?

15 MR. BOUKNIGHT: You certainly can. Any time that
16 Florida Power and Light has any capacity that is unused on
17 its system that could serve a load on some other system in
18 or outside of Florida at a lower cost we will do it.

19 CHAIRMAN BLOCH: It is interruptible, however?

20 MR. BOUKNIGHT: Yes, sir, it is interruptible.
21 However, there are refinements now being developed to the
22 economy system to try to make it less interruptible and to
23 try to do things such as agree that for a week or for a
24 weekend this power will be available on a firm basis.

25 Now, Florida Power and Light is also prepared to

1 sell power to anybody on a short-term firm basis or on a
2 long-term firm basis if the company can recover the
3 incremental fuel cost and can recover a fair cost for the
4 investment that is going to be devoted to that.

5 JUDGE DUGGAN: Just to cut through that a little
6 bit, am I rephrasing correctly for you that you will sell to
7 a city in the Florida Power territory at the same price as
8 you will sell to a city within your own territory?

9 MR. BOUKNIGHT: Judge Duggan, we will sell economy
10 or we will sell on an interchange schedule at the same price
11 to anyone in Florida and outside of Florida as long as the
12 capacity is available.

13 CHAIRMAN BLOCH: Regardless of whether it is a
14 portion of base load or the entire base load?

15 MR. BOUKNIGHT: Yes, sir. The term "base load"
16 means different things to different people, but yes, sir.
17 We will sell any requirements for whatever purpose that
18 anybody wants so long as Florida Power and Light Company has
19 the capacity available and can recover that incremental cost
20 and a fair return on the investment.

21 The problem comes in with the requirement to serve
22 at average cost and that is what that case at FERC was all
23 about. The company took the same position with respect to
24 the cities inside its service area as it took with the
25 cities outside of its service area. It said we shouldn't

1 have to take on new wholesale loads at average cost.

2 That is a question of public utility law and
3 public utility obligation. The question was prepared to
4 FERC and FERC required Florida Power and Light Company to
5 serve those systems within its service area at average
6 cost. The company is doing that and it is committed in the
7 license conditions to do that.

8 When it does that and when it takes on a new
9 customer it demonstrably costs the company money and costs
10 the company's existing customers money.

11 JUDGE DUGGAN: So cutting through all that you are
12 not willing to sell to the cities in the Florida Power
13 territory at the same price that you are selling to the
14 cities within your territory under the FERC requirement?

15 MR. BOUKNIGHT: That is correct, not willing
16 voluntarily to heap that burden upon Florida Power and Light
17 Company's customers and shareholders.

18 JUDGE DUGGAN: So you are willing to continue
19 discriminating.

20 MR. BOUKNIGHT: Well, Judge Duggan, I think that
21 at some point if you are a public utility you have got to
22 find somebody who will tell you what your public utility
23 obligation is. We went to the FERC and we laid the problem
24 before them and the FERC said here is what your obligation
25 is.

1 Now, if you could buy power, and not just in
2 Florida Power Corporation's service area but anywhere, if
3 the folks here in Washington could get power from plants
4 that Florida Power and Light Company built 20 years ago it
5 would be economically advantageous for them to do so.

6 CHAIRMAN BLOCH: Even considering transmission
7 diseconomies?

8 MR. BOUKNIGHT: Well, with Mr. Jablon's rate that
9 is not a problem any more. Mr. Jablon would let you wheel
10 it from Florida to Washington for precisely the same rate
11 you can send it from Florida Power and Light Company over to
12 the City of New Smyrna Beach.

13 But even with transmission diseconomies the
14 difference is whopping. Mr. Bivens' affidavit indicates
15 that the embedded cost of plant on the FP&L system is \$200
16 per KW and it will cost \$2,000 per KW to build a new coal
17 plant.

18 What is going on that is causing some of these
19 disagreements and causing dislocations in this industry is
20 that there is a requirement that you sell at average cost.
21 If you are a buyer, then there is no alternative available
22 on the marketplace today, no plant that you can buy, no
23 source of power that you can reach that is anything like the
24 average cost of any utility that has been building through
25 the years. So if you can get somebody else's average cost

1 it is certainly advantageous to you economically. What it
2 does is it takes it away from his costumers and gives it to
3 the other customers.

4 So where do you draw the line? If the rule is
5 going to be average cost, which doesn't seem, frankly, to
6 most of us to be a very sensible rule ---

7 JUDGE DUGGAN: Average cost within your
8 territorial division?

9 MR. BOUKNIGHT: Well, the rule even there is
10 average cost. As I say, speaking logically, I have some
11 trouble seeing the sense of that. But if the rule is going
12 to be that within your service area or within wherever you
13 have a public utility obligation you have to sell at average
14 embedded cost, then there is going to be a necessity to draw
15 a line as to where that obligation ends because whoever is
16 beyond that line is going to find it advantageous to take
17 advantage of that if he can.

18 If Florida Power and Light could right now buy the
19 next thousand megawatts of load growth from Florida Power
20 Corporation or Georgia Power at either of those companies'
21 average costs, that would be a bonanza, it would prevent
22 building a new coal plant and the company would jump and do
23 it. You can see why those people want to sell to Florida
24 Power and Light Company on that basis because it will take
25 it away from their customers and it will make them build

1 that coal plant instead of you and make them sell those
2 bonds and sell that stock below book value and you get a
3 bonanza at their expense.

4 JUDGE DUGGAN: I am concerned with one aspect of
5 it, and that is in your planning procedures which took place
6 for St. Lucie 2 where you excluded the cities from that
7 planning it appears that you possibly planned for just
8 enough power to serve FP&L with no power for additional.
9 Then you get the extreme figure that you have mentioned of
10 \$2,000 per average unit cost for the new power.

11 MR. BOUKNIGHT: Well, Judge Duggan at that time
12 there were two cities and seven cooperatives who indicated
13 an interest in participating in St. Lucie Unit 2. They were
14 included and they were offered the opportunity to
15 participate.

16 I think the other basic fact that just can't be
17 overemphasized, and if you want to see it emphasized greatly
18 just read Mr. Jablon's pleading of August 1976 where he
19 wanted to get in this case, is that the world changed in
20 1973 and 1974 in this industry with the oil boycott and what
21 followed upon it. It took most people a few years to figure
22 out what had happened. The Cities indicated that it took
23 them until August of 1976 to fully understand what had
24 happened and that was a timely petition on their part.

25 JUDGE DUGGAN: Historically it had changed earlier

1 when you decided to go to nuclear energy and it changed even
2 earlier when Tampa decided to go coal. So we have had these
3 fundamental changes throughout.

4 MR. BOUKNIGHT: Well, if you look backward you can
5 see that. If you are standing at that time you really can't
6 see that. If you are standing back in the middle 1960's and
7 are looking at the Turkey Point plants, there is a real
8 question as to whether those things are going to prove
9 economical where you have got oil that you can get for 2
10 mils per kilowatt hour and you feel that there is no
11 difficulty in the supply of it and you have got long-term
12 gas contracts and no fault of a disruption and you have got
13 a nuclear technology.

14 At the time that Florida Power and Light built the
15 Turkey Point plant, the biggest plant that it ever operated
16 was the San Onofre 1. So it didn't look that good at the
17 time. It looks awfully good in retrospect, and Tampa's coal
18 maybe even looks better in retrospect.

19 CHAIRMAN BLOCH: Did you say San Onofre 1?

20 MR. BOUKNIGHT: Yes, sir. In going back and
21 looking at the plants that were in operation at that time
22 that was the largest plant that had operated when FP&L
23 committed to Turkey Point.

24 CHAIRMAN BLOCH: Oh, I see. I thought you said
25 you were operating San Onofre 1.

1 (Laughter.)

2 MR. BOUKNIGHT: No, sir, when the company was
3 looking at that. Even looking retrospectively, if the price
4 of oil hadn't increased ten-fold from 1972 until the
5 present, you would have an entirely different ball game. In
6 1973 when FP&L was planning St. Lucie Unit No. 2 it didn't
7 look like a banana.

8 Now, the company did not downsize that power plant
9 for any purpose of just providing enough power for itself.
10 It bought that plant with the idea that it was a twin of
11 St. Lucie Unit No. 1. With the licensing processes of this
12 Commission as they evolved through the years that hadn't
13 turned out to be the case but they were planning that it
14 would be the case. So both of those are approximately 800
15 megawatt units.

16 It was only when you get passed that oil boycott
17 and get to the time when people start sensing what it means
18 that there comes a desire on the part of most of the cities
19 to find something else.

20 JUDGE DUGGAN: That is not factually true, is it?

21 MR. BOUKNIGHT: I think it is.

22 JUDGE DUGGAN: There were a large number of
23 studies during the Sixties with the co-ops and so forth with
24 regards to going nuclear, just like the small nuclears up in
25 Minnesota.

1 MR. BOUKNIGHT: That was during the Fifties. The
2 co-ops did something along those lines, but they were
3 talking about, as you say, the small ones in Minnesota, they
4 were talking about a 50 or 60 megawatt nuclear plant under a
5 special program that the AEC was then funding and it didn't
6 get off the ground. Florida Power and Light looked at the
7 same kind of things. The City of Fort Pierce looked at the
8 same kind of thing and none of them went anywhere.

9 As far as being concerned that oil and gas were
10 going to prove substantially uneconomical, that concern
11 arose just about the time, or it crystalized at about the
12 time this litigation began in about 1976 and I really don't
13 think it crystalized before then.

14 JUDGE DUGGAN: I would have to disagree with you,
15 but that is a political decision.

16 MR. BOUKNIGHT: I think I know of what you speak,
17 and if you go back and look at the late Sixties and the
18 early Seventies some people did see what was coming. I
19 can't say in candor from having reviewed Florida Power and
20 Light documents that they were among them but I have seen
21 studies in another case that I was involved in where some
22 people did see that.

23 JUDGE DUGGAN: Nobody foresaw the uranium price
24 fix either.

25 MR. BOUKNIGHT: That is correct. The case I am

1 thinking of is one pending before this Commission involving
2 the Texas utilities. I represent Houston Lighting and Power
3 in that case. Another party in that case is Texas
4 Utilities. Now they figured out at some point in the late
5 Sixties or early Seventies that they should buy all that
6 lignite that nobody else wanted throughout Texas and they
7 went out and did it. It was a decision which as you look
8 back on all of us wish we had done, but they did and they
9 apparently foresaw the situation.

10 CHAIRMAN BLOCH: We are in a situation now where
11 we are discussing what I think is very important material.
12 It does seem to me that since we are going to continue on
13 these economic issues that we should anticipate that Cities
14 will have an opportunity to respond to the economic
15 questions after we have completed with your argument.

16 MR. BOUKNIGHT: Certainly.

17 CHAIRMAN BLOCH: I would like to ask something
18 about the service area myself, the whole concept of the
19 service area. In most industries we have a market where
20 people can come to it and it doesn't matter where they
21 live. They come to it and that is it.

22 In addition, in most industries we don't draw
23 lines and say well, customers of one manufacturer are set
24 and they are going to benefit as a result of that
25 relationship, and customers who happen to live elsewhere are

1 going to be hurt, because while you are saying your
2 customers will be hurt if you have to serve Cities, the
3 converse is also true, and that is if you don't serve Cities
4 then the customers of Cities are hurt because they can't get
5 access the same way people in your service area can.

6 Now the question is whether that makes economic
7 sense? Does it make sense to maintain this service area
8 concept on a geographic basis or would market concepts not
9 dictate that geographic service areas are artificial and
10 they restrict the availability of benefits in a way that is
11 counter to the operation of a free market.

12 MR. BOUKNIGHT: Judge Bloch, there are two
13 constraints here which are troubling. The problem that a
14 company like Florida Power and Light has is there is no
15 one-stop place where you can go and deal with all of these
16 problems.

17 The first constraint is an obligation to serve, a
18 utility obligation to have the power when anybody wants it.
19 The second is the regulation of rates, the regulation of
20 rates on the average cost embedded cost principle.

21 CHAIRMAN BLOCH: You don't really contend that you
22 don't have the power. I haven't seen that. As I understand
23 it, you are not contending that the addition of these new
24 customers would prevent you from adequately servicing
25 existing customers; is that correct?

1 MR. BOUKNIGHT: Judge Bloch, I don't know from day
2 to day and week to week in the long term taking on these new
3 customers within certain bounds and the bounds could be
4 pretty large if you look at the whole universe that is out
5 there. But within certain bounds, given adequate notice,
6 then what that boils down to is the requirement to build new
7 coal plants.

8 CHAIRMAN BLOCH: That is not necessarily true.
9 Let's just hypothetically assume that the rule were
10 reciprocal. Are there areas within Florida Power and
11 Light's area where the cheapest supplier is Florida Power?
12 It is possible that the way that these loads could be
13 adjusted is that the territoriality breaks down and there
14 would be some jurisdictions within Florida Power and Light's
15 area taking power from Florida Power and you would end up
16 with no more of a load and your average costs for everybody
17 make go down.

18 MR. BOUKNIGHT: Judge Bloch, what would happen,
19 and I am trying to think that scenario through, too, what
20 would happen is that everyone in the Florida Power
21 Corporation's service territory now buys at average cost
22 from Florida Power. Average cost is always exactly the same
23 thing for each company at a given point in time.

24 So if you let those people shift over what is
25 going to happen is they are all going to shift over if they

1 can. They are going to raise Florida Power and Light's
2 average cost gradually by shifting over.

3 CHAIRMAN BLOCH: Wait a second. The first effect,
4 if I understand the way you say the economies work, will be
5 to reduce their average cost because they are going to be
6 able to cut off their most expensive marginal facilities
7 thereby reducing the average costs for their remaining
8 customers.

9 MR. BOUKNIGHT: Well, that becomes a very close
10 question in the short run. In the long run that is
11 absolutely the effect. But in the short run Florida Power
12 Corporation has built the facilities to serve this load.

13 JUDGE DUGGAN: But when you talk about the average
14 cost aren't you talking about long run?

15 MR. BOUKNIGHT: Yes, sir. Yes, I am.

16 JUDGE DUGGAN: You are talking about these few
17 cities bankrupting Florida Power and Light over the
18 long-run, aren't you?

19 MR. BOUKNIGHT: Well, Judge Duggan, we tried to
20 take a look at it. In the first place, they are not just a
21 few cities.

22 JUDGE DUGGAN: May I also point out to you that in
23 order to keep the geographic division in mind you are
24 divided east and west rather than a geographically compact
25 method of north and south with Florida Power and Light;

1 isn't that right?

2 MR. BOUKNIGHT: Judge Duggan, Florida Power and
3 Light Company's service area can be drawn as a "J." It has
4 the lower part of the west coast of Florida and it has most
5 of the east coast of Florida and some down at the bottom and
6 not much in the middle. It is not as though you had a clear
7 geographical line at some parallel in Florida. That is
8 true.

9 The effects that you would have if you said
10 Florida Power and Light you have got to sell everywhere,
11 Florida Power Corporation you have got to sell everywhere
12 and if the Federal Energy Regulatory Commission continued to
13 require that that was done on an average cost basis, then at
14 this point in time it would pay everyone to buy from Florida
15 Power and Light Company because Florida Power and Light
16 Company right now has a lower average cost. It is not
17 greatly lower but it is lower.

18 CHAIRMAN BLOCH: But shortly it would reach an
19 equilibrium.

20 MR. BOUKNIGHT: Well, shortly it would reach an
21 equilibrium and then I think you could predict that Mr.
22 Jablon's clients would shift back.

23 Now, what you are going to end up with with this
24 gradual step for step is you are going to end up with costs
25 that are going to be equalized over the long run between the

1 two companies. There is going to be only one beneficiary
2 and that is the folks who can jump back and forth.

3 CHAIRMAN BLOCH: Well, I am not sure. Aren't you
4 just establishing a competitive system?

5 MR. BOUKNIGHT: Well, you say you are just
6 establishing a competitive system.

7 CHAIRMAN BLOCH: Whichever company has the lower
8 marginal costs by planning their facilities most rationally
9 will have more customers.

10 MR. BOUKNIGHT: Judge Bloch, then those customers
11 are going to drive their costs up. You see, the problem is
12 that you can't price at marginal cost. That is why you
13 can't establish a perfectly competitive system. You also
14 cannot be caught short for load. It is different from
15 airline deregulation in that you can't pick up the telephone
16 and say I want to see it and be told you can't have one when
17 you want electricity from FP&L.

18 CHAIRMAN BLOCH: The reason the costs are always
19 going to go up is because you are envisioning a
20 continuation of a high rate of inflation indefinitely into
21 the future. If there were less inflation it wouldn't
22 necessarily happen, would it?

23 MR. BOUKNIGHT: Well, you have to look at a very
24 long run because right now if you are dealing with \$200
25 average costs and \$2,000 incremental costs per unit of

1 capacity, you don't have to have any more inflation for that
2 to be a very bad situation for a long time to come. Taking
3 on more load continues to hurt. You have got the regulatory
4 constraint of having to serve, the regulatory restriction on
5 price and moreover if what you want to do is establish a
6 competitive economy, why stop with with the cities? Why not
7 let Florida Power Corporation buy and even out? Why not let
8 Georgia Power buy and even out?

9 JUDGE DUGGAN: Aren't they doing that already?

10 MR. BOUKNIGHT: Not on any kind of firm wholesale
11 basis, no, sir. Transactions between utility companies are
12 incrementally priced transactions and they do make economic
13 sense. That is exactly where FP&L is. We will deal with
14 every city in Florida precisely the way we deal with Florida
15 Power Corporation and Georgia Power Company. We will deal
16 with you as another electric utility. We will buy at your
17 incremental cost when it is lower than ours on a split the
18 savings basis, we will sell to you on the same basis and we
19 will engage in long-term transactions with you if we can
20 recover that incremental cost.

21 JUDGE DUGGAN: If I read you correctly in putting
22 it into historical perspective as you are doing, you are
23 gone to the cities through the years and said no, we won't
24 sell to you. Our incremental costs are 200. Now that our
25 incremental costs are 2,000, yes, we will be very happy to

1 sell to you at the 2,000. So you are going ahead and
2 forbidding them to buy now based on the high costs when you
3 refused to allow them to come in at the low costs. Isn't
4 that what this prior situation inconsistent with the
5 antitrust laws is all about?

6 MR. BOUKNIGHT: Judge Duggan, I don't think that
7 is fair. I have to say that when you go back into the
8 1960's that most of the people who were instrumental in
9 whatever was done in the 1960's are either dead or very old
10 and it is going to be hard to figure out what happened 15
11 years ago.

12 I think that what the record shows is that in 1973
13 Florida Power and Light Company filed a wholesale tariff
14 with the Federal Energy Regulatory Commission. I don't
15 believe that since then, with the exception of the question
16 of whether Florida Power and Light Company could restrict
17 the availability provisions of that tariff which it tried to
18 do and was not permitted ever to do by the FERC, I don't
19 believe that since then there is a claim that Florida Power
20 and Light Company would not sell power at wholesale to
21 anybody who qualified under that tariff.

22 CHAIRMAN BLOCH: You mean that even though you
23 wouldn't sell to Homestead you would have sold if a city
24 outside of your service area had asked you?

25 MR. BOUKNIGHT: Oh, no, they did not qualify under

1 the tariff. There was never an effort to put cities outside
2 of the 'EL service territory under that tariff, and that
3 was not by virtue of a conspiracy.

4 Mr. Jablon put in last week the testimony of
5 Dr. Taylor of the FERC staff. I took his deposition a
6 couple of years ago in a case before this Commission where
7 we were talking about the same kind of issues. I asked him
8 if he could tell me of a single electric utility in this
9 country who had a wholesale customer outside of the service
10 area. He couldn't. I can't either.

11 CHAIRMAN BLOCH: Well, it is a very firm
12 tradition. That is clear.

13 MR. BOUKNIGHT: Well, it is more than a
14 tradition. There is a reason for it. You have your
15 facilities in a certain place and you have an obligation to
16 serve anybody who is within that place. Therefore you can
17 identify what you have got to build for through the years.

18 CHAIRMAN BLOCH: If you were like any other
19 industrial company you could anticipate changing demand
20 unless it was territorial.

21 MR. BOUKNIGHT: No, if you were like any other
22 industrial company you wouldn't have to meet changing demand.

23 JUDGE DUGGAN: Are there very many other utilities
24 that have "J" shaped service areas like yours?

25 MR. BOUKNIGHT: I don't know that I can think of

1 any that has quite that service area. I can think of one
2 that has a crescent shape service area. There are peculiar
3 service areas.

4 CHAIRMAN BLOCH: Well, as I understand the
5 geography of Florida, that is really not so surprising, is
6 it, because the central area of Florida is very sparsely
7 populated.

8 MR. BUCKNIGHT: That is correct. You are looking
9 in the middle of that "J" and you are looking at the
10 Everglades National Park and what is above the Everglades
11 National Park. There are peculiar service areas. There is
12 not a claim here, Judge Duggan, that there is a mountain
13 range or some other physical impediment to getting across
14 there. That is not the problem.

15 The problem is that an electric utility with an
16 obligation to serve wants to know where it has got the
17 obligation. That is really what we are talking about.
18 Split off the question of an obligation to serve on a
19 utility basis from a willingness to sell on a business
20 basis. Florida Power and Light has a complete willingness
21 to sell on a business basis. To the extent the company has
22 got the power or can get enough notice and can get its
23 incremental costs, it is perfectly prepared to deal with
24 anybody. The question then comes in of your utility
25 obligation. Who is your public utility obligation owned to.

1 CHAIRMAN BLOCH: You are overstating that, aren't
2 you? Isn't your obligation to serve existing customers and
3 to add new ones within your service area providing it won't
4 interrupt service to existing customers? If it interferes
5 with service to existing customers you don't have to add, do
6 you?

7 MR. BOUKNIGHT: Judge Bloch, I could cite you no
8 authority for the proposition that you don't have to add. I
9 think the general rule is that you do have to add. I think
10 the position that was taken by the witnesses for the Cities
11 and the FERC staff in the case leading to Opinion 57 is yes,
12 you do have to add and you have to curtail pro rata. You
13 have to curtail your retail customers and those new
14 wholesale customers pro rata.

15 CHAIRMAN BLOCH: I take it that was not your
16 position at that time?

17 MR. BOUKNIGHT: No, that was not our position at
18 that time, but that is where the utility obligation leads
19 you.

20 CHAIRMAN BLOCH: I don't understand why. It seems
21 to me it could equally lead you to the position that you
22 have to add if you can and maybe even that you have to
23 rationally plan so that you can add in the future if someone
24 comes to you. But I don't see why it has to necessarily
25 lead to an absolute obligation to serve now even if it

1 interferes with existing service.

2 MR. BOUKNIGHT: Well, the utility obligation of
3 course begins at the retail level. You are talking about
4 wholesale customers and they ultimately are going to be
5 serving retail customers. The proposition that when
6 somebody wants to move to Miami next year that he can't get
7 electricity because you have inadequate reserve margins ---

8 CHAIRMAN BLOCH: What is going to happen is he is
9 going to continue getting it from the previous generating
10 facility. It is very unusual that you are going to get an
11 applicant who had no previous electrical supply and all of
12 the sudden comes to you and you are the only alternative,
13 the only question is whether Florida Power and Light is
14 going to have to add the new customer.

15 MR. BOUKNIGHT: Well, I am stating to you that it
16 is not at all clear and it is very, very doubtful, indeed,
17 that once you file such a tariff with the FERC that made
18 these cities eligible for utility service that you could
19 deny service to one because of inadequate facilities.

20 CHAIRMAN BLOCH: Is this question fleshed out in
21 our record?

22 MR. BOUKNIGHT: No, sir, it is not.

23 CHAIRMAN BLOCH: One other question. You are
24 arguing that your marginal costs are going to go up if you
25 have to take on the cities. Do you have any idea of the

1 magnitude of that change?

2 MR. BOUKNIGHT: I didn't argue that. I argued
3 that our average cost is going to go up.

4 CHAIRMAN BLOCH: Excuse me, that your average cost
5 will go up. Do you know what the magnitude of that will be?

6 MR. BOUKNIGHT: Yes, we do have some ideas. They
7 are not in the record but we have looked at it.

8 CHAIRMAN BLOCH: Could you tell us roughly what
9 your estimate is even though we can't rely on it at this
10 point?

11 MR. BOUKNIGHT: Judge Bloch, we looked at a
12 scenario of adding a thousand megawatts of wholesale load.

13 CHAIRMAN BLOCH: Is that the total amount that
14 these particular cities would like to add?

15 MR. BOUKNIGHT: Well, we have no idea of what they
16 would like to add. Keep in mind that many of these
17 particular cities are smaller cities. Some are not. There
18 are some people in this area who are not parties to this
19 case and who are not small. The municipal load in Florida
20 which FP&L does not now serve exceeds 2,000 megawatts and
21 perhaps is close to 3,000 megawatts. There is a tremendous
22 load out there.

23 JUDGE DUGGAN: How much of that is served by
24 Florida Power?

25 MR. BOUKNIGHT: I would say that less than half of

1 it. I am not sure.

2 JUDGE DUGGAN: So we are talking about 1,500 max
3 then?

4 MR. BOUKNIGHT: If we are talking about just the
5 people who now buy total requirements from Florida Power
6 Corporation, you are talking some number less than 1,000. I
7 am not sure how much less.

8 CHAIRMAN BLOCH: Let's start with a more confined
9 universe. Let's just talk about the cities in this case.
10 How many megawatts do you figure you might have to add for
11 that? Mr. Jablon can clarify this when it gets to be his
12 turn.

13 MR. BOUKNIGHT: I would have to do some quick
14 mental adding. We looked to the thousand megawatt scenario
15 and we looked at a 500 watt scenario.

16 CHAIRMAN BLOCH: Of those two what would be the
17 percentage change in your average costs?

18 MR. BOUKNIGHT: I can't rattle off a percentage.
19 I can rattle off an absolute dollar number.

20 CHAIRMAN BLOCH: All right.

21 MR. BOUKNIGHT: Through 1990 on the thousand
22 megawatt case the increased cost to FP&L's ratepayers
23 exceeded \$2 billion over what they would have paid if that
24 thousand megawatts had not been added.

25 CHAIRMAN BLOCH: I really am interested in the

1 amount per megawatt.

2 MR. BOUKNIGHT: Well, let's see, that is 500
3 megawatts ---

4 CHAIRMAN BLOCH: Or per watt -- per megawatt would
5 do.

6 MR. BOUKNIGHT: I have seen the numbers but the
7 best I could give you is that adding a thousand megawatts
8 the cost exceeded \$2 billion through 1990.

9 CHAIRMAN BLOCH: All right. With respect to what
10 amount in total sales?

11 MR. BOUKNIGHT: Total sales of a thousand
12 megawatts beginning at some time ---

13 CHAIRMAN BLOCH: You said \$2 billion is the
14 increase in average costs. What would be the total average
15 cost?

16 MR. BOUKNIGHT: Let me make sure that I am
17 phrasing your understanding of what I am trying to say.

18 CHAIRMAN BLOCH: All right.

19 MR. BOUKNIGHT: What I am trying to say is we took
20 two scenarios, FP&L as it is with an assumed growth rate
21 through 1990.

22 CHAIRMAN BLOCH: That is a curve.

23 MR. BOUKNIGHT: Yes, sir, it is a curve.

24 CHAIRMAN BLOCH: All right.

25 MR. BOUKNIGHT: We looked at that and we said what

1 is the total amount of money that these customers, these
2 wholesale and retail customers who are here now are going to
3 pay us. Then we said let's add a thousand megawatts of
4 municipal load to the system sometime in the near future,
5 maybe next year. I forget what it was. Let's assume that
6 that is going to grow during this period at the same rate
7 that our existing wholesale load is growing.

8 CHAIRMAN BLOCH: Which is a fairly low rate.

9 MR. BOUKNIGHT: A fairly low rate. Now, let's
10 take that thousand megawatts and then let's see what we
11 would have to do differently, what we would have to install
12 differently, what we would have to finance differently and
13 what we would have to burn that is different. Then let's
14 just take a look at this same group of customers who were
15 over here and see how much more money they will pay, and the
16 amount exceeded \$2 billion by the end of 1990.

17 JUDGE DUGGAN: Roughly the cost of one additional
18 nuclear plant.

19 MR. BOUKNIGHT: That is correct.

20 CHAIRMAN BLOCH: That is an accumulated amount
21 under the curves? You have taken the total difference
22 between the two curves and accumulated them from 1981 to
23 1990?

24 MR. BOUKNIGHT: Approximately, yes, sir.

25 CHAIRMAN BLOCH: That is the accumulated

1 difference?

2 MR. BOUKNIGHT: Yes, sir.

3 CHAIRMAN BLOCH: Well, what is your total
4 megawatts right now?

5 MR. BOUKNIGHT: The total megawatts of load, about
6 10,000, perhaps 10,500, something in that range.

7 CHAIRMAN BLOCH: Is the increase in costs, average
8 costs going to be more than 10 percent or less than 10
9 percent?

10 MR. BOUKNIGHT: The increase in average costs?

11 CHAIRMAN BLOCH: You talked about adding a
12 thousand megawatts to a 10,000 megawatt system. Are you
13 actually going to plan so efficiently that you are going to
14 have average costs go up by more than 10 percent?

15 MR. BOUKNIGHT: Let me say it my way. I am not
16 sure that I understood your question. Right now the company
17 has something like 12,000 megawatts of installed capacity.

18 CHAIRMAN BLOCH: You are selling how much?

19 MR. BOUKNIGHT: Well, the peak demand was
20 something like 10,500 more recently I think.

21 CHAIRMAN BLOCH: Now, you actually don't have to
22 plan for the total peak, right, because you have some
23 sharing arrangements for peak?

24 MR. BOUKNIGHT: No, sir. That is not correct.

25 CHAIRMAN BLOCH: All right.

1 MR. BOUKNIGHT: The peak is weather related.

2 CHAIRMAN BLOCH: Everybody suffers at the same
3 time usually.

4 MR. BOUKNIGHT: That is right, usually. There are
5 exceptions, but usually when FP&L on these very cold days
6 has had trouble it hasn't been able to get any help.

7 CHAIRMAN BLOCH: Your greatest problems are on the
8 cold days and not the hot ones?

9 MR. BOUKNIGHT: It is now. Three or four years
10 ago it was on the hot days. As to whether that represents a
11 change in what people are doing or a change in climate is
12 something that something that people and the New York Times
13 are debating.

14 CHAIRMAN BLOCH: All right. You now have 12,000
15 capacity.

16 MR. BOUKNIGHT: Yes, sir.

17 CHAIRMAN BLOCH: And there is 10,500 peak?

18 MR. BOUKNIGHT: Yes, sir.

19 CHAIRMAN BLOCH: Now, what are your assumptions
20 from which you are going to derive a difference in average
21 costs? Maybe this is the wrong way to do this. Maybe we
22 should ask for an exhibit that would show the way that you
23 want to calculate this.

24 MR. BOUKNIGHT: Well that we could furnish you.
25 If you want to take just horseback numbers keeping in mind

1 that you are hearing from a lawyer who saw the results at
2 some previous time ---

3 CHAIRMAN BLOCH: That seems like an inefficient
4 way to derive anything.

5 (Laughter.)

6 MR. BOUKNIGHT: It is. I confess that.

7 CHAIRMAN BLOCH: Do you know how difficult it
8 would be to get a table sometime during this oral argument,
9 say, tomorrow morning? Would that be that difficult?
10 Perhaps earlier. In fact, is there one in the courtroom
11 right now?

12 MR. BOUKNIGHT: No, there is not a table in the
13 courtroom right now.

14 CHAIRMAN BLOCH: I am talking about a statistical
15 table.

16 MR. BOUKNIGHT: Oh, yes, I know.

17 (Laughter.)

18 MR. BOUKNIGHT: Judge Bloch, if we can do it in
19 rounded numbers and if we can do it in a way where you won't
20 be too mad if you find that we have made some errors, I
21 think we can do it. But if you want to take it just off the
22 top of the hat, the problem is if the capacity costs \$200
23 per KW to put in and you have got 12,000 megawatts of that
24 capacity right now and it costs you \$2.5 billion net to put
25 that system in there, it is going to cost you \$2 billion to

1 put in a new nuclear plant.

2 CHAIRMAN BLOCH: But you also have a very large
3 sunk cost already. I was asking the percentage change
4 because that is the extent to which your customers are going
5 to be hurt. This also assumes that you won't lose any
6 customers because there is more free competition.

7 MR. BOUKNIGHT: No, it doesn't assume that. It is
8 using the growth rates that are not projected for the
9 service area that FP&L expects to have to serve. What is
10 going to happen are two things if you add new customers.
11 One, you are going to burn more oil and, two, you are going
12 to have to build more plants because FP&L is now burning oil
13 on the margin at all times. So any time you add somebody in
14 the short run you burn more oil. In the long run you
15 probably burn more oil, too.

16 The other thing that you have to do is you have to
17 build a new plant and that new plant is going to cost you
18 ten times your existing investment in old plant.

19 Now, those are the two impacts. I don't know how
20 to state either of those as a percentage on how this
21 increment of load will affect you between now and 1990.

22 CHAIRMAN BLOCH: I think it is doable.

23 MR. BOUKNIGHT: Well, it is doable, but what we
24 did was something probably a little fairer than that.
25 Instead of saying let's just take those numbers and

1 extrapolate, we planned the system with the other load
2 there. What could you do to do a better job of it? We
3 still came up with a number of \$2 billion.

4 Now, what I am giving you frankly is some work
5 product studies we have done for our antitrust case in
6 Miami. That is why I had had occasion to look at this.

7 CHAIRMAN BLOCH: I take it also that it is also
8 somewhat likely that if your average costs do go up
9 substantially there will be some franchises that will be
10 lost over that period of time within your service area.

11 MR. BOUKNIGHT: I don't think that is the case. I
12 can't think of any reason why that would be the case.

13 CHAIRMAN BLOCH: You mean because you are always
14 going to be cheaper than any alternative within your service
15 area?

16 MR. BOUKNIGHT: Well, the problem is that for at
17 least a few decades buying at average at somebody's embedded
18 cost is always going to be cheaper than anything new that
19 you can do. So somebody who wants to start a new municipal
20 electric system has got to either buy at somebody's average
21 cost or put something in of his own. If he puts something
22 in of his own it is going to cost him probably more,
23 although he has got a huge tax advantage, but probably more
24 than it is going to cost to buy at average cost from
25 whichever is the lower of FP&P or Florida Power Corporation.

1 So what you are really doing if you do something
2 like this with the cities that are now generating their own
3 requirements is you are telling them that on the margin they
4 have the alternative of buying at average cost. That
5 alternative is better than building new power plants.

6 It is going to mean that FP&L is going to build
7 the new power plants for everybody or at least for all the
8 municipal systems. It is going to gradually raise FP&L's
9 average cost which is going to affect both the shareholders
10 and the ratepayers.

11 In the end, presumably if enough load is added,
12 FP&L's average cost will creep above Florida Power
13 Corporation's or Georgia Power Company's and then these
14 people are going to say let's buy from them for a while.
15 The same thing is going to happen and we are going to go
16 back and forth and the people who are going to come out on
17 top are the people who can switch back and forth. The
18 people who are going to come out on the bottom are the
19 people who have to buy electricity at retail.

20 That bothers the company. That is really the
21 economic underpinning of the problem.

22 CHAIRMAN BLOCH: Would you like to address some
23 concluding remarks?

24 MR. BOUKNIGHT: Yes, Mr. Chairman.

25 CHAIRMAN BLOCH: For this portion of the argument.

1 MR. BOUKNIGHT: For this portion, yes, sir.

2 I think the other things which were raised in Mr.
3 Jablon's argument, first, he suggested that we shouldn't
4 take the license conditions and look at the situation with
5 the license conditions in place. The license conditions
6 here are not just something that FP&L agreed to do. They
7 originally were something FP&L agreed to do. They now have
8 been imposed on this license and they are going to stay
9 there and they are legal requirements. That makes them
10 quite different from merely a proffer by the applicant that
11 his attitude may be the following.

12 What the question comes down to on a question
13 like, for example, the same of wholesale power, is if the
14 company has agreed now and that agreement has been imposed
15 as a license condition that they company will serve the
16 cities that are adjacent to its service area, then why do we
17 need to go back to the 1960's to argue about whether the
18 company in 1965 was hesitant to serve one of those cities.

19 It doesn't get you anywhere unless your theory of
20 the whole case is that the relief is to be punitive rather
21 than remedial. If there is not a problem in that area of
22 wholesale power, then why are we litigating about it?

23 One of the things that we find ourselves facing
24 here, as you know, is we are under some time pressure, and
25 the cities are in the position where, at least for now, they

1 can put us under some time pressure. It is terribly
2 difficult to go back and litigate each of these instances
3 because very often you just can't find the folks. They are
4 not alive or they are not there or they are not working for
5 the utility any more. Having taken a few depositions in
6 Florida, there are very few folks there who recall with a
7 great specificity what they did in 1965. It is a problem.
8 The license conditions can relieve so much of that problem
9 and relieve so much of the burden in this case.

10 Once you have gone through that entire process all
11 you get down to is the question that we have been talking
12 about for the last 20 minutes. Is it unreasonable to draw
13 the line where you have drawn it? So why shouldn't we just
14 address that question and move the proceeding on along those
15 lines.

16 Finally, let me add -- well, I guess we are going
17 to be all day so I won't point for point respond to some of
18 the things that Mr. Jablon said about the facts that riled
19 me, but we will have that occasion as the day goes on.

20 Finally, I would hope that where we go from here
21 is that, first, Cities' motion for summary judgment should
22 be denied. Secondly, the question is how do we structure
23 some procedures to focus on and try the issues that we have
24 got left. There are several things that can be done. The
25 first, of course, is to take the license conditions as a

1 given and that gets us a long way.

2 There are a couple of other areas of allegations
3 that are in the Cities' motion that I think also could be
4 disposed of procedurally.

5 The first is the business of dealings that Florida
6 Power Corporation had with other cities in which FPL was not
7 allegedly directly involved. It would be a terrible waste
8 to have to go about litigating those one by one even if you
9 want to take the Gainesville case and given it collateral
10 estoppel effect which we resist. There is not a particle of
11 evidence in the papers filed by the Cities suggesting that
12 any of these actions of which they complain were taken
13 pursuant to such a conspiracy. We could get rid of those
14 things.

15 CHAIRMAN BLOCH: We would like to leave all
16 questions relating to refusals to deal by Florida Power
17 Corporation.

18 MR. BOUKNIGHT: Yes, sir.

19 Finally, one other thought. There are allegations
20 in this case made by these Cities that involved people who
21 aren't parties to this case other than Florida Power
22 Corporation.

23 I understand that in some instances dealings with
24 a non-party can be of some relevance, but in this instance
25 where we have gotten to the point where the two agencies

1 with the responsibility of looking at the board public
2 interest have said they are satisfied. There ought to be a
3 heavy burden on these cities to make Florida Power and Light
4 Company go out and litigate dealings with non-party cities,
5 which those cities have not chosen to put in issue in this
6 case and there are many of those that are found in the paper.

7 CHAIRMAN BLOCH: That is a little harder, though,
8 isn't it ---

9 MR. BOUKNIGHT: It is harder.

10 CHAIRMAN BLOCH: --- because those dealings would
11 be relevant as to whether there is a situation inconsistent
12 regardless of whether we accept some conspiracy theory with
13 Florida Power.

14 MR. BOUKNIGHT: It is harder. I am searching for
15 some places to draw some lines. As I read the cities
16 pleading and as I see what we had to do to put in the piece
17 of paper that we put in here last week, there is a mammoth
18 job here. I suggest that in light of the order that the
19 Board issued two or three weeks ago on our motion for
20 estoppel or for declarative order that the Board has some
21 opportunity here to suggest to the intervenors in this case
22 that they should be reasonably limiting and focusing what
23 they want to litigate about here. You can't with one hand
24 say no licensing until this case is over and with the other
25 hand say we are just going to litigate everything we can

1 think of that involves us and anybody else in Florida for
2 the past 30 years.

3 CHAIRMAN BLOCH: Have you tried informal attempts
4 to limit the issues?

5 MR. BOUKNIGHT: In the last month we have not.

6 CHAIRMAN BLOCH: You have earlier in the
7 proceeding?

8 MR. BOUKNIGHT: I don't know that you can say in
9 this proceeding that that has happened. In the District
10 Court case we now have outstanding to the cities some
11 interrogatories attempting to pinpoint these kinds of
12 things. At least in the District Court proceeding you can
13 focus on things for which damages are claimed. That is not
14 the case here. But since we have got this piece of paper
15 and since the Board issued its order I will confess that we
16 have been spending our time responding to it and not talking
17 with the cities.

18 CHAIRMAN BLOCH: There are certain issues that
19 Cities is contending that could be stipulated it would seem
20 by Florida Power and Light and there might be other issues
21 if those issues were stipulated that Cities might be able to
22 drop.

23 MR. BOUKNIGHT: Well, Judge Bloch, I am troubled
24 by the idea of our stipulating anything other than the
25 statements that we made in our paper. We are not going to

1 deny uncontroverted facts. There is no question but that
2 Florida Power and Light is not now offering access to its
3 nuclear facilities beyond what is provided in the license
4 conditions. On the other hand, I am not prepared to say
5 that is a refusal to deal when you have got some ---

6 CHAIRMAN BLOCH: It is a legal issue.

7 MR. BOUKNIGHT: That is a legal issue.

8 CHAIRMAN BLOCH: So there is at least one factual
9 issue you could stipulate. I suggest as I look through the
10 papers that there may be other factual issues that can be
11 stipulated without stipulating the legal implications to be
12 drawn from them.

13 CHAIRMAN BLOCH: Well, we attempted in our paper
14 to be candid on matters like that. We attempted not to
15 raise arguments about things where there wasn't something to
16 argue about. But we have got a problem here in that ---

17 CHAIRMAN BLOCH: You seem to be, for example, to
18 be contending generally that every document they have filed
19 is not admissible, and it seems to me that at least some of
20 those documents seem to be genuine documents which you know
21 the origin of. Now, it may be that they haven't proved that
22 yet, but that is another possible area of fruitful
23 stipulation I take it, the genuineness of documents.

24 MR. BOUKNIGHT: Yes, Judge Bloch, the genuineness
25 of document is. We are not alleging that the lawyers for

1 the Cities concocted those documents. That is not the
2 problem. The problem is that very often the people who were
3 involved in those documents can't be found and can't be
4 deposed about the documents. We are not prepared to
5 stipulate the admissibility of documents of that sort. I
6 think we are prepared to work with the Cities on the
7 questions of authenticity. There shouldn't be a wide area
8 of disagreement between us and the Cities as to which
9 documents genuinely did come out of somebody's file, but
10 that doesn't get you to the question of admissibility.

11 CHAIRMAN BLOCH: Well, that again is a legal issue
12 and you wouldn't necessarily have to stipulate to a legal
13 issue.

14 Now, did you have another concluding remark?

15 MR. BOUKNIGHT: No, I think that is all of my
16 concluding remarks for the beginning portion.

17 Thank you.

18 CHAIRMAN BLOCH: We will take a five-minute break
19 at this point.

20 (Whereupon, a brief recess was taken.)

21 CHAIRMAN BLOCH: Back on the record.

22 Ms. Hodgdon, do you intend to make a statement at
23 this time?

24 MS. HODGDON: I would like, if I may, to pass this
25 one. Thank you.

1 CHAIRMAN BLOCH: Are you sure that you wouldn't
2 like to comment at least a little on the issues of
3 competition and the economics of competition across areas?

4 MS. HODGDON: No, I would not.

5 CHAIRMAN BLOCH: Mr. Jablon.

6 REBUTTAL ORAL ARGUMENT

7 BY

8 ROBERT A. JABLON

9 ON BEHALF OF FLORIDA CITIES

10 MR. JABLON: If I may, what I would like to do is
11 just give a bit of classic rebuttal. I would like to then
12 address the first round of your questions. But before I do,
13 I would like to have, if the Board permits, Mr. Guttman to
14 comment on the historical economics in view of Mr.
15 Bouknight's argument.

16 CHAIRMAN BLOCH: I would prefer that we not
17 proceed to the questions.

18 MR. JABLON: Oh, I see. In that case I defer the
19 questions.

20 CHAIRMAN BLOCH: All right. Then we can start on
21 the questions. Actually you are going to be up first on
22 that anyway, but I would like to at least know when you are
23 done with the rebuttal part of the argument and then we will
24 go on to the questions.

25 MR. JABLON: Thank you.

1 First, the Cities do have a desire to be practical
2 our of our self-interest, if for no other reason. It does
3 strike me that Mr. Bouknight and I do agree on one thing and
4 I have my suggestions as to how to get there and he has his
5 suggestions. That is it is important to focus on what the
6 license conditions should be.

7 Mr. Bouknight said that the license conditions
8 should be remedial and not punitive and therefore his
9 suggestion is we will look and reaffirm the existing license
10 conditions. Obviously if you grant summary judgment in
11 whole or in large part you get to the same place. I think
12 the only difference is quite candidly that by establishing
13 that there is a situation inconsistent should give us a
14 broader licensing license.

15 I would say also that with regard to the whole
16 question of the economics and the fairness or unfairness of
17 selling at average system cost, assuming there is a basic
18 situation inconsistent, we would certainly not preclude or
19 attempt to preclude an argument by Florida Power and Light
20 that remedial license conditions which we suggested were
21 unfair because of the economic impact or something like
22 that, and I think I will stop there.

23 CHAIRMAN BLOCH: Those issues you think would have
24 to remain in the case before we could decide on relief?

25 MR. JABLON: Yes, Your Honor. Let me put this in

1 focus a little bit, but I do want to get back to some of the
2 things Mr. Bouknight said.

3 You asked us with some specificity to state the
4 relief we wanted. First we said we wanted the same amount
5 of St. Lucie for the so-called outside, their excluded
6 cities, as the inside cities. Florida Power and Light
7 may ---

8 CHAIRMAN BLOCH: You went further, right? You
9 wanted a share of all the nuclear capacities; isn't that
10 right?

11 MR. JABLON: That is right, and I will define
12 that. But if you stop at the St. Lucie you are talking I
13 think in the range of 80 megawatts give or take and
14 depending on whom you determine is entitled.

15 We said that if we could resolve the thing quickly
16 and if we could resolve it now ---

17 CHAIRMAN BLOCH: Let me ask, that would be 80
18 megawatts share in St. Lucie?

19 MR. JABLON: That is right. I don't want to be
20 exact on that number because it depends on exactly who is
21 entitled and who is not, but that gives you a magnitude of
22 what you are talking about. With regard to St. Lucie,
23 whatever else it is, it is at incremental costs. I mean, it
24 is at their present costs.

25 CHAIRMAN BLOCH: At present costs.

1 MR. JABLON: Otherwise, if we don't get it, and I
2 don't want to argue the relief now, but in ten years in a
3 hearing they will be saying, well, it is all right but you
4 are increasing our average cost because you didn't get it
5 then.

6 CHAIRMAN BLOCH: Correct me if I am wrong, but
7 weren't you also asking for firm wholesale power?

8 MR. JABLON: Yes, Your Honor.

9 CHAIRMAN BLOCH: How much would that be?

10 MR. JABLON: Let me define whom I am talking
11 about. I think what we have asked for is 200 megawatts of
12 what we call base load power which would be essentially firm
13 power. Mr. Bouknight says that it is from their cheapest
14 class. I suppose that is right and it stems from the claims
15 that this is what can be sold and this is what they are
16 monopolizing. But whether we are right or wrong as to our
17 entitlement, we are talking about approximately 200
18 megawatts.

19 CHAIRMAN BLOCH: When you say 200 megawatts from
20 their cheapest plants, base load power is from a particular
21 plant and not from the overall system?

22 MR. JABLON: Let me define what we are asking
23 for. That was a magnitude number, whatever we win within
24 certain bounds.

25 CHAIRMAN BLOCH: Would it be realistic to expect

1 tha: sometime before we concluded this argument you could
2 stipulate what the maximum amount would be?

3 MR. JABLON: I have the following circular problem
4 but I would try to resolve it for you. We represent the
5 Florida Municipal Utilities Association which is a
6 membership organization. The legal question is what
7 conditions are fair and will cure an antitrust situation
8 with regard to the license. So the number would change,
9 depending upon whom you deemed should have entitlements.

10 CHAIRMAN BLOCH: But you could still answer what
11 the maximum amount would be.

12 MR. JABLON: I will give you a range depending
13 upon the options that you decide legally as to the
14 entitlements. I will give you a maximum.

15 CHAIRMAN BLOCH: There will be a maximum if we
16 decide everything the way that your clients would like it
17 decided?

18 MR. JABLON: Yes, Your Honor.

19 CHAIRMAN BLOCH: Incidentally, I would like to
20 clarify the request for the table from Florida Power and
21 Light. We would like to have enough in the table to know
22 the basis for your assumptions, something about where the
23 assumptions are down from at least disclosing the
24 uncertainty of the prejections that you are making, how
25 rough they are and what kind of rough guesses were involved.

1 MR. BOUKNIGHT: We will do our best.

2 MR. JABLON: All I am suggesting, whatever relief
3 you are talking about, is the magnitude on a 10,000 megawatt
4 system isn't very large. I am trying to think how it would
5 be most helpful.

6 The problem the cities are faced with is one of
7 obtaining base load power supply. If you go back to Opinion
8 57, this is the problem the Commission recognized. My
9 clients can put in a peaking unit. Florida Power and Light,
10 they will own four out of the five nuclear plants in the
11 state, except for the amount they share. They have a
12 long-term gas contract and very large base load units which
13 operate largely on gas.

14 These units give them a very great advantage in
15 competing for power supply. Elsewhere in the country like
16 in Georgia, for example, power has been priced and sold
17 broken down in base load units, intermediate units and
18 peaking units. The reason was alluded in Midland that if
19 your problem is you need some power in emergency you don't
20 want to pay thousands of dollars in capital costs for a
21 plant which will be idle all the time. It is a different
22 animal.

23 The Federal Energy Regulatory Commission found
24 that in the base load generation this is where the problem
25 was. Therefore, the claim we are making, if you will, to

1 break the nuclear monopoly is that we are entitled to a load
2 ratio share of the nuclear. Our fall-back position is that,
3 well, if there is something unfair about giving us a piece
4 of the nuclear then take the economic unit, the base load
5 unit.

6 Now, the other comment I would make is that we
7 would pay for this, including a full return. So while the
8 company may have an argument about the impact on its retail
9 customers vis-a-vis the company, the company would be made
10 whole.

11 CHAIRMAN BLOCH: Their argument is that you would
12 pay for it but at average cost and that therefore their
13 average costs for all their customers would go up.

14 MR. JABLON: That is their argument.

15 Let me get down to a question of law and I think
16 that responds to their argument and it responds to why we
17 are saying that the case is ripe for some summary
18 disposition and in fact Mr. Bouknight's arguments, except as
19 they may affect relief, are largely irrelevant.

20 First of all, we say that there has been a
21 division of markets territorially which is exactly what
22 Gainesville said.

23 Florida Power and Light, granted under regulatory
24 compulsion, but Florida Power and Light is selling at
25 average system costs right now within one geographical

1 area. They are doing it.

2 CHAIRMAN BLOCH: Are you going to address their
3 point about why they are selling within one area?

4 MR. JABLON: Yes, because the Federal Energy
5 Regulatory Commission ordered them to and that was raised in
6 the case. They wouldn't be selling at average system cost,
7 as they say, if they didn't have to. All the arguments Mr.
8 Bouknight has discussed were raised and decided in Opinion
9 57.

10 CHAIRMAN BLOCH: All right. But Opinion 57 only
11 decided that they had to sell within their service area and
12 Mr. Bouknight said yes, that is the nature of a public
13 utility. We are not like an automobile company. We must
14 sell within our service area. To require us also to sell
15 outside would be unfair. It is not like an auto company
16 which has no obligation to serve anybody.

17 MR. JABLON: That argument was rejected by the
18 Fifth Circuit where they accepted that there might be able
19 to be retail market divisions. The Fifth Circuit found that
20 the territorial division at wholesale was per se illegal.
21 So that they rejected the argument.

22 Let me run down the reasons why they have a
23 responsibility to the outside cities as matter of law.

24 CHAIRMAN BLOCH: Did Gainesville reject the
25 argument about a service area entirely? It seems to me that

1 we ought to go into that a little bit.

2 MR. JABLON: Certainly.

3 CHAIRMAN BLOCH: Well, no, let's not yet because
4 we are going to. You are going to go into that when we get
5 to that issue.

6 MR. JABLON: Let me give you a conclusion and we
7 will go into it later. The conclusion that I draw from the
8 Gainesville case is that when Florida Power and Light and
9 Florida Power drew a line on the map and said in the same
10 way we refused to deal at retail across this line, we refuse
11 to deal at wholesale. That was the illegality.

12 What the case looked to as the effect of that was
13 that it made it more easier for both Florida Power and Light
14 and Florida Power to use their dominant economic power
15 within their area over retail. When we get to it we will
16 raise other issues such as the target area concept in
17 antitrust law.

18 CHAIRMAN BLOCH: Wasn't it the refusal to sell
19 outside the area that was found in Gainesville to be the
20 problem? It was the refusal to sell under the circumstances
21 of an agreement between the two companies?

22 MR. JABLON: Yes, Your Honor, but Florida Power
23 and Light is continuing exactly the same concept. If you go
24 to Gainesville, what was the real evil in Gainesville? The
25 real evil wasn't that somebody drew a line on the map. The

1 real evil was that it restricted systems to dealing with one
2 entity.

3 Now, if the Federal Energy Regulatory Commission
4 and the Florida Public Service Commission determined that
5 utilities, because of their monopoly status, are subject to
6 dealing at "average system cost" with whatever limitations
7 those Commissions control, I read Gainesville as saying that
8 they can't use the territory, the territory alone, as a
9 reason not to do so or otherwise you vitiate the case.

10 I am not suggesting that there aren't other
11 justifications which might limit relief. Let me be very
12 specific on this. Mr. Bouknight gave you the horror or
13 horrors that, well, a thousand megawatts of load is going to
14 switch overnight and then this company's costs will move a
15 little bit and a thousand megawatts of load will switch
16 again overnight.

17 First, that strikes me as a pretty good
18 competitive model, but setting that aside, the Federal
19 Energy Regulatory Commission in Opinion 57 did not restrict
20 wholesale suppliers from imposing a minimum term and
21 termination notice requirements specifically to permit
22 planning.

23 The Federal Energy Regulatory Commission isn't
24 oblivious to these problems. So the question is ---

25 CHAIRMAN BLOCH: I am sorry, you mean a maximum

1 term?

2 MR. JABLON: The Federal Energy Regulatory
3 Commission has today minimum notice requirements so that
4 when you take service you can't just cancel the next day.

5 CHAIRMAN BLOCH: It is a minimum termination
6 notice.

7 MR. JABLON: Florida Power and Light's initial
8 term is five years, for example. I think that there is a
9 three-year or a two-year notice requirement after that.

10 The point is they can impose reasonable
11 limitations. We recognize that such limitations are and can
12 be reasonable.

13 CHAIRMAN BLOCH: Reasonable limitations, for
14 example, in the maximum amount of power that they will
15 supply to the city?

16 MR. JABLON: We would accept either that or a
17 standard.

18 CHAIRMAN BLOCH: No, I say that is the kind of
19 thing FERC might allow Florida Power and Light to impose as
20 a limit.

21 MR. JABLON: Yes, I think so.

22 CHAIRMAN BLOCH: Or if it could be demonstrated
23 that to supply more than that or to agree to supply more
24 than that would disrupt their overall system.

25 MR. JABLON: Yes, Your Honor, and let me qualify.

1 They are not going to let the lights go out easily. The
2 limitations would have to be justified.

3 One of the things that troubles me is we are
4 asking for a collateral estoppel here. Florida Power and
5 Light litigated before FERC the exact things they are
6 raising for you. Let me raise these as examples of why the
7 Federal Energy Regulatory Commission reached the judgment
8 that did and it is in their decision and this is where there
9 should be an estoppel.

10 Mr. Bouknight told you of the horror to the retail
11 customers and to the company of selling at average system
12 costs. Again, as a matter of law, I think they are required
13 to, and the fact that there are regulated requirements are
14 irrelevant.

15 At the same time as Opinion 57 was in trial by
16 this document number ER-7819, Florida Power and Light had an
17 application to acquire the system of Vero Beach. Now, if
18 you stop right there, had they been successful ---

19 CHAIRMAN BLOCH: That was in ---

20 MR. JABLON: That was in the '76 time frame.

21 CHAIRMAN BLOCH: '76.

22 MR. JABLON: I am not sure of the exact date. Had
23 they been successful in the acquisition one thing is very
24 clear, that they would have sold the generation,
25 transmission and distribution for the entire load at average

1 system costs. So what they were really saying is we will
2 sell the generation and transmission, but if you want to own
3 your own distribution you had better get your generation and
4 transmission elsewhere.

5 Second, Mr. Howard testified in that proceeding,
6 which we have cited to you in our motion for summary
7 tion, and which was relied upon in Docket No.
8 ER-7819, the wholesale case, that Florida Power and Light
9 would be benefitted and their customers would be benefitted
10 by the acquisition because they said the increased loads
11 would more quickly enable them, the company, to get on to
12 nuclear and coal.

13 Florida Power and Light the Commission alluded,
14 they didn't allude, they referenced, they directly
15 referenced an exhibit and testimony and evidence showing low
16 decline in the Florida Power and Light area. So the
17 question of both availability of power and price was
18 litigated there.

19 CHAIRMAN BLOCH: You say actual it was low decline
20 and not a reduction?

21 MR. JABLON: There was a reduction in growth, but
22 Florida Power and Light has actually delayed units which
23 they planned to have on being and this was litigated in that
24 case.

25 Furthermore, as you know, they have cancelled this

1 nuclear unit when the city said let us buy in. Now, again,
2 if on relief they want to argue this, that and the other
3 thing as to why it is not appropriate for us to get the St.
4 Lucie access we want, sobeit, but the point is these matters
5 were litigated in Docket No. ER-7819.

6 Now, it seems to me that if you are not going to
7 give a collateral estoppel to a case that was fully
8 litigated exactly on the grounds that Mr. Bouknight would
9 defined here, that they ought to tell you chapter and verse
10 what it is that they think they didn't have an opportunity
11 to present to the Commission. But again I state that with
12 regard to the harm to Florida Power and Light's customers,
13 lack of capacity and a reasonable amount for the cities,
14 that is precisely the balancing which is appropriate for
15 relief.

16 However, there is no reason that I can tell, and
17 Florida Power and Light has given none, not to give
18 collateral estoppel to the Florida Power and Light
19 Gainesville decision or the Opinion No. 57.

20 If I can just look at my notes for a second.

21 CHAIRMAN BLOCH: Unfortunately, our lines in this
22 type of an agenda are difficult to draw and I have had
23 constant problems deciding whether we are passing them or
24 not.

25 MR. JABLON: I didn't mean to.

1 CHAIRMAN BLOCH: I had hoped that we were going to
2 primarily address economic arguments. As soon as we go into
3 the collateral estoppel area full force I would like to
4 consider that the beginning of the next portion of argument.

5 MR. JABLON: I see. Well, just on the incremental
6 cost argument I would simply repeat three things but I would
7 like to have Mr. Guttman address the historical facts
8 related to them which we have put before you.

9 The first thing is whether Florida Power and Light
10 is right or wrong as to whether it should have to sell at
11 incremental costs. This is a matter that has been decided
12 by the regulatory commissions and is subject to regulatory
13 law. If they do have to, there is no reason for a
14 territorial line.

15 CHAIRMAN BLOCH: I am sorry, I didn't understand
16 that at all.

17 MR. JABLON: I am saying the incremental costs
18 argument is a matter which -- let me turn it around. The
19 reason they have to sell at average system costs is because
20 of regulatory statutes. Had they wanted to defend that they
21 will not sell at incremental costs to anybody, that might
22 have been one thing.

23 But when they say they will sell at average costs
24 to the retail customers in Vero Beach if they take over the
25 system, and when they say they will sell at average costs in

1 their service area, and indeed when they cite the benefits
2 of their base load generation in making acquisitions which
3 are based on average costs, citing the relative costs of
4 municipals throughout Florida, as a matter of law it seems
5 to me they are on awfully weak grounds in saying that we
6 won't sell at average system cost to the very systems whose
7 rates they are comparing in try to acquire systems.

8 CHAIRMAN BLOCH: Wait now. Vero Beach was a
9 matter that was discussed in Opinion 57; is that correct?

10 MR. JABLON: That is correct.

11 CHAIRMAN BLOCH: And you are saying that because
12 it was discussed in 57, and not just the testimony in the
13 case but because of the opinion by FERC in Opinion 57, that
14 we could notice that there was attempt to acquire additional
15 capacity and to stop Florida Power and Light on that
16 question and say therefore having sought additional
17 customers previously they could be estopped from arguing now
18 that it is uneconomic for them to do that with respect to
19 these cities?

20 MR. JABLON: Yes, Your Honor. You know, even if
21 Florida Power and Light is right with regard to the outside
22 cities, there is no reason not to give summary disposition
23 with regard to the inside cities.

24 CHAIRMAN BLOCH: How many cities are there inside
25 still as parties?

1 MR. JABLON: Oh, Key West, Homestead -- well, no,
2 Homestead is through FMUA, but it is very interested in the
3 relief -- Starke, New Smyrna Beach and Lake Worth, five.

4 CHAIRMAN BLOCH: How many cities are there outside?

5 MR. JABLON: I think about seven plus those
6 through FMUA.

7 CHAIRMAN BLOCH: How many members does it have?

8 MR. JABLON: I am not sure, Your Honor. I can get
9 you a list. I would say that they have about 25 or 30
10 members.

11 CHAIRMAN BLOCH: You don't know how many of those
12 are have an interest in St. Lucie?

13 MR. JABLON: Yes, Your Honor, I do not know.

14 CHAIRMAN BLOCH: You also don't know how many of
15 those are interested in firm wholesale power?

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

17 One of the things is the Federal Energy Regulatory
18 Commission was faced with the same kind of exhibit, well, if
19 we have to sell wholesale all over, and there was some very
20 large number of megawatts, assuming that cities with
21 generation, with bonds to pay off, you know, everybody would
22 turn over at once.

23 I think on the economics, strictly on the
24 economics, I would simply reiterate two points.

25 The first point is that the mass of changeover you

1 are talking about is unlikely and the impact would be small
2 given the relative loads. But in any event, we would accept
3 a limitation on relief if Florida Power and Light can
4 demonstrate justification therefor. I don't think there
5 should be a limitation just because Florida Power and Light
6 waves a magic wand.

7 CHAIRMAN BLOCH: Isn't their argument on of
8 degree? That is, if all of the cities who requested it got
9 it, then they would say, well, our average costs would go up
10 the most. If we limited it so that there were fewer, then
11 our average costs would go up a little less.

12 MR. JABLON: Let me put it this way. If they
13 cannot demonstrate harm of a magnitude that is noticeable,
14 then I think they don't have a leg to stand on.

15 CHAIRMAN BLOCH: When you say harm of a magnitude
16 that is noticeable, if you take it in total dollars it
17 sounds like they are going to have to be able to make a case
18 that the total number of dollars is quite noticeable. They
19 have given a rough estimate of \$2 million.

20 MR. JABLON: I come back to two points. The first
21 point is if a situation inconsistent with the antitrust laws
22 is created by the territorial division so that you are
23 limiting competitive opportunities, and that limitation of
24 competition also has a cost impact or a rate impact, it is
25 one thing to say well, as an equitable body we are not going

1 to cure the relief by threatening the availability of power
2 or we are not going to give relief such that the rates of
3 ratepayers in Miami are going to go up \$10 a year. It is
4 quite another thing to say that in principle, in theory, the
5 rates in Miami could go up by a de minimus amount and
6 therefore you are going to maintain a total exclusion.

7 If I am wrong on the premise that the territorial
8 agreement to divide the markets was illegal, then the cities
9 are not entitled to relief. But if there was an illegality,
10 then Florida Power and Light, it seems to me, to limit
11 relief must show real harm.

12 CHAIRMAN BLOCH: Unless there was a disruption of
13 the physical service why would the harm be relevant at all?
14 Whatever harm they suffer I take it is harm to their present
15 customers and benefit to the new customers they are legally
16 required to serve. You seem to be assuming that the harm
17 matters. I am not sure that it does.

18 MR. JABLON: As a matter of law I don't think it
19 matters. But I am representing Cities here who have been in
20 litigation for years. If I can persuade this Board to give
21 partial relief, even though it is less than that to which I
22 think I am entitled to, quite candidly, I will take it. I
23 don't think it should matter. I think the FERC has the
24 ability to correct it.

25 Now, the second point on the economics.

1 CHAIRMAN BLOCH: Let pursue that. How would the
2 FERC correct it?

3 MR. JABLON: For example, for notice. If you are
4 talking about the only harm that could come about is if
5 because of disruptions of load and they have to build a new
6 plant and this kind of thing, and if the notice periods are
7 adequate ---

8 CHAIRMAN BLOCH: I am not sure why they would have
9 to. I take it that under those serious circumstances there
10 would be a lack of sales by Florida Power. Could the FERC
11 also remedy it by requiring sales from Florida Power?

12 MR. JABLON: I think the harm we are talking about
13 is very remote because this is a company which has in fact
14 delayed plant. One of the things we are complaining about
15 is they cancelled South Dade when they knew that the cities
16 wanted participation and when a couple of months before they
17 were saying we need it all for ourselves and they wouldn't
18 let us in.

19 Now, all I am saying the Federal Energy Regulatory
20 Commission, it seems to me, has authority to correct against
21 whatever practical harm there may be. I don't think they
22 can demonstrate in a relief hearing that they need
23 protection.

24 I am simply saying that if you grant the summary
25 disposition that we are seeking that two things. One is I

1 represent to you that we would agree to a limitation on
2 relief in terms of megawatts. I don't think we are required
3 to, but I represent to you that we would, and quite candidly
4 we are being very practical.

5 The second thing is I don't think they can show
6 the justification because when you are all through the
7 amount of megawatts is very small.

8 Can I have Mr. Guttman comment now?

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1 CHAIRMAN BLOCH: Sure, just one comment. If it
2 should happen that Florida Power and Light disagrees with
3 your assessment, if FERC can correct whatever any qualities
4 might arise from our deciding that you could get either
5 nuclear power or firm wholesale power, we may need some
6 more specific discussion on how they would do that or the
7 legal authority as to doing it.

8 MR. JABLON: What you would do, your license
9 conditions are binding, and what I am saying is if, for
10 example, you said yes, the cities are entitled to baseload
11 power, but we will limit to 200 megawatts or some amount of
12 megawatts, we are left and they are left with whatever
13 rights they have at the FERC, but they are bound by the 200
14 megawatts.

15 In the present wholesale power provisions you have
16 something else, which is it's being served pursuant to a
17 FERC tariff, so that if FERC decides that there should be a
18 five-year term, there is; if FERC decides there shouldn't
19 be, there isn't.

20 You don't address the question of a term.

21 (Pause.)

22 MR. GUTTMAN: I will be brief because the panel
23 has, I think, anticipated most of what I have to say. And
24 if it's an admission against interest, my perception of what
25 I was going to say was only crystallized by Mr. Duggan's

1 questioning, which I think really focuses on why there is a
2 nexus and what the situation is that is inconsistent.

3 Mr. Bouknight comes and says what the cities are
4 about are people who weren't able to compete and discovered
5 an oil crisis, and are now saying they want something they
6 should have asked for before.

7 I think the better perception is that here is a
8 company that there can't be any doubt didn't want to give
9 anything to the cities before; now has discovered that
10 costs, capital costs, construction costs and fuel costs have
11 risen dramatically and says, "Aha, here is something which
12 we can claim would hurt us unfairly."

13 The fact of the matter, if you look at the thread
14 of the company's conduct -- Mr. Bouknight suggests in his
15 opening remarks that they are now alleviating situations
16 inconsistent throughout the state by dealing with entities
17 outside of retail service territory.

18 That type of dealing that he referred to is either
19 economy, which is short-term primarily, an hour, two hours,
20 or Mr. Bouknight suggests maybe a weekend, not firm; that
21 is, you can't rely on it.

22 CHAIRMAN BLOCH: He suggested that it could be
23 however much you wanted on an economy exchange, but it was
24 never firm. You are saying in practice that it never gets
25 more than a couple of days at a time.

1 MR. GUTTMAN: That's right. Let me say I was the
2 active lawyer in the case that resulted in Opinion 57, and I
3 was quite surprised to hear Mr. Bouknight said that at that
4 time they said the cities could have as much power as they
5 wanted, only incremental costs.

6 In fact at that time they were saying they didn't
7 have any power to sell, although footnote, they said, "We
8 can sell you for the period 1977-81 up to 200 megawatts on
9 an incremental cost, an oil cost base."

10 So the only so-called firm power the company's
11 going to sell if they have it is the incremental high-cost
12 power. The constant thread of the company's behavior in my
13 mind over the last two or three or four or five decades is
14 not even so much the inside-outside distinction, but they
15 just don't want to sell firm, average cost power, regardless
16 of the time.

17 If you look at the history of the company's sales
18 to any municipal systems in Florida, they now say they were
19 selling wholesale to the inside cities in the 1960's, and
20 they cite FCP filing showing sporadic sales, sometimes
21 continuing for maybe a couple of months to Homestead and and
22 New Severna Beach.

23 Those sales, as the witnesses that Mr. Bouknight
24 alludes to is dead, which does him a disservice, because
25 some of them are very spry and in fact testified very

1 recently -- those sales they are very quick to say were
2 emergency sales. They were sales on a short-term basis,
3 markedly expressly not firm, and in addition, they were not
4 priced at the same price, the average price that the company
5 was selling to the REA Co-ops that it sold to.

6 What happened was 1972, the Supreme Court declared
7 the company juristicial. It had a file, a wholesale tariff,
8 which of course it had included an average cost. Then what
9 really the opinion 57 filing was about was not as Mr.
10 Bouknight called it, an attempt to stop getting new
11 customers.

12 Sure, it was that, but they were trying to cut off
13 existing -- they tried to cut off Homestead, which was
14 getting average cost service, and they wanted to switch it,
15 exclude it from an average cost rate and put it on what they
16 call the interchange rate, which is when available,
17 incremental cost, and degree of firmness, whatever it is,
18 inferior to the firmness provided to retail customers.

19 CHAIRMAN BLOCH: Mr. Naomi, with respect to
20 Homestead, I know what you said is in the opinion --

21 MR. GUTTMAN: Right.

22 CHAIRMAN BLOCH: At least I believe it is in the
23 opinion.

24 MR. GUTTMAN: Right.

25 CHAIRMAN BLOCH: Have you in your earlier

1 statement just now gone beyond the opinion to the certain
2 facts that are part of the record, but which were not
3 available for collateral estoppel purposes?

4 MR. GUTTMAN: Well, I'm not sure what particular
5 facts you --

6 CHAIRMAN BLOCH: Well, you cited a whole bunch of
7 facts, and unfortunately, this is a summary judgment.

8 MR. GUTTMAN: I'm sorry. The nature of the
9 earlier sales, I --

10 CHAIRMAN BLOCH: You said they were only spotty
11 sales?

12 MR. GUTTMAN: That is in the Form 1 filings. That
13 is listed. The company --

14 CHAIRMAN BLOCH: That is not finding of the --

15 MR. GUTTMAN: I understand that. I'm just putting
16 a gloss on what it is that --

17 CHAIRMAN BLOCH: Okay, but my problem is that in
18 order to decide this motion, I have to do it as a summary
19 judgment motion.

20 MR. GUTTMAN: I understand that.

21 CHAIRMAN BLOCH: And I really want to know what I
22 can rely on.

23 MR. GUTTMAN: Right, and what you can rely on is
24 that the company in the filing that resulted in opinion 57
25 was not simply saying, "We don't want additional sales," but

1 literally filed at the same time an abandonment of service
2 under the wholesale tariff to Homestead.

3 That was part and parcel. It was an included
4 docket. It was consolidated with the Opinion 57 docket.

5 Let me just then -- the point that Mr. Jablon
6 made, I think, is the parallel point. At the same time
7 literally that they were trying to abandon service, they
8 were saying, "We will buy the Vero Beach system, "and
9 testifying as we state the quotation that is on page 87 of
10 our May 27, 1981 filing.

11 This is in 1977 before the Federal Power
12 Commission. At the same time they are saying, "We cannot
13 serve new customers, they say in the case of Vero Beach,
14 which had not previously been served as a wholesale
15 customer, "When we put on additional generation in the
16 future, it will be coal or nuclear. Given the present
17 situation in the country, to the extent we displaced oil out
18 of our generation mix sooner than otherwise, I believe it is
19 consistent."

20 This is the testimony of the treasurer of the
21 company. "It is consistent with the interest of the company
22 that the coal generation may well be cheaper than the
23 present generation."

24 In other words --

25 CHAIRMAN BLOCH: I understand that, but since

1 that's just testimony, I take it that we would have to prove
2 that in an argument, right? We can't rely on that because
3 they might want to argue that there are other reasons to
4 place it in context, and that there are other facts that
5 rebut it.

6 MR. GUTTMAN: I don't know. That's conceivable,
7 and if there are I would like to hear them because we have
8 used this testimony and we used it in that case, and at the
9 time this is an admission by the company which was relied
10 on. This is their admission. It is not our testimony. It
11 is the company's testimony.

12 CHAIRMAN BLOCH: I understand that.

13 MR. GUTTMAN: Yes.

14 CHAIRMAN BLOCH: It is fairly strong, but it seems
15 to me it still may not be the basis for a summary judgment.

16 MR. GUTTMAN: That's right, and I understand, Your
17 Honor -- I have no doubt that they can come here now and
18 say, "We've got new experts and new evidence and so forth."
19 I don't doubt that, but in terms of a record which we have
20 labored long and hard to produce, in a similar circumstance
21 they said the contrary four years ago.

22 So again, just to summarize, I think that what
23 we're seeing here is customers, potential customers who 15
24 years ago were denied access at what the company now says is
25 low imbedded costs, and now the company is saying, "Oh, now

1 that you ask, we will give you access at the higher cost of
2 the future."

3 They didn't give access at the average cost 15
4 year ago, and that's the exact nexus, the relationship which
5 should be a basis for granting that relief here, rather than
6 putting it off 20 years from now.

7 CHAIRMAN BLOCH: When you say denied access --

8 MR. GUTTMAN: Yes.

9 CHAIRMAN BLOCH: I'm talking about specific
10 requests that we already have to the collateral estoppel
11 matter, are you? You are talking about a course of practice
12 over that period of time which resulted in cities not
13 applying?

14 MR. GUTTMAN: I'm saying that there was a policy
15 as a collateral estoppel member that the company had a
16 policy of refusing wholesale sales to municipalities by
17 which --

18 CHAIRMAN BLOCH: And therefore that practice
19 should result in our considering that there would have been
20 applications during that period of time, and that there were
21 sort of an implied series of refusals.

22 MR. GUTTMAN: And there were applications. The
23 Opinion 57 case itself -- excuse me -- 7819 came about as a
24 practical matter because Fort Pierce applied for wholesale
25 service, and the company said, "We are reluctant to serve,"

1 and that bit the bullet and followed the tariff.

2 So there is no question there were applications
3 that the company were to ultimately serve; they didn't deny,
4 but were serving only under compulsion, and in the early
5 years I think --

6 Opinion 517 they initiated as a result of a
7 Clewiston effort to get service, and in the record, as
8 stated by the administrative law judge and adopted by the
9 Commission in 37 FPC 544, there is a full blown analysis of
10 the instances in which FP&L had told Clewiston, "We aren't
11 going to provide wholesale service."

12 So I think there is sufficient for collateral
13 estoppel.

14 Thank you.

15 CHAIRMAN BLOCH: Mr. Bouknight, you should have an
16 opportunity to respond at this point, because I think we
17 have about 10 minutes extra for Florida cities at this point.
18 I'm not sure exactly what portion of the argument you intend
19 to respond to at this time. It is possible you could
20 reserve the response to the portions of the agenda which
21 will discuss these things.

22 MR. BOUKNIGHT: I will, and I will be brief.
23 First, I would like to put what I'm trying to say in
24 perspective. I am not talking about relief. I am talking
25 about whether Florida Power and Light Company has done

1 anything wrong.

2 The company's position is that it has not. The
3 settlement which it entered into with the Department of
4 Justice and the NRC Staff does not constitute an admission
5 of any sort.

6 What I am talking about very simply is this: Is
7 it wrong today to refuse to extend wholesale power sales
8 under circumstances where if you do so, it will cost you
9 money?

10 That's the Section 2 question here, in contrast to
11 the Section 1 question. The Section 1 question, if there is
12 a question, is whether Florida Power and Light now declines
13 to sell to certain people because it is engaged in a
14 conspiracy with Florida Power Corporation.

15 We contend that we are not. We don't --

16 JUDGE DUGGAN: Can I ask? Wouldn't it also be
17 correct to phrase it, does Florida Power and Light now reap
18 the benefit of its past conspiracy?

19 MR. BOUKNIGHT: No, Judge Duggan, I don't think it
20 would. I don't see that there is any benefit being reaped
21 or not reaped here.

22 JUDGE DUGGAN: Isn't there certain benefit with
23 Florida Power not coming into your territory?

24 MR. BOUKNIGHT: No, sir.

25 JUDGE DUGGAN: Isn't there certain benefit to

1 Florida Power with you not going into their territory?

2 MR. BOUKNIGHT: I would think that the way the
3 situation stands today --

4 CHAIRMAN BLOCH: Wait a minute. You just said
5 there is no advantage to either company for not dealing in
6 the other's territory?

7 MR. BOUKNIGHT: Well, let me put it this way. I'm
8 trying to make a complete statement. As far as retail
9 service is concerned, it is important to know what you have
10 got to serve and important to know that once you install a
11 line that is going to be used, and that once you install a
12 plant to meet that service, your retail service area is not
13 going to change jurisdictionally.

14 The Florida Public Service Commission recognizing
15 those principles and being concerned with duplication of
16 service regulates retail territory in the State of Florida.
17 That regulation I think is beneficial for both utilities and
18 for the customers, but not beneficial in the sense that it
19 protects you from competition in a conventional sense.

20 JUDGE DUGGAN: And it cannot protect you against
21 violation of the Federal Antitrust laws under *Canter v.*
22 *Detroit*.

23 MR. BOUKNIGHT: Well, it certainly cannot. If we
24 are talking about a wholesale territorial allocation, we are
25 not contending to you that it is all right or legal to

1 engage in a wholesale territorial allocation. We are
2 contending to you that we are not doing it, and their
3 argument to the contrary, if you take it for all it is
4 worth, is that in 1966 there was such an arrangement. But
5 now we are standing in --

6 JUDGE DUGGAN: And again, according to your answer
7 to my question in the spring, what was achieved in '66 is
8 still present today?

9 MR. BOUKNIGHT: Well, Judge Duggan, I cannot
10 answer -- I cannot agree with that. I don't think I told
11 you that. What I told you is that Florida Power and Light
12 today has a wholesale tariff which makes wholesale service
13 available to people adjacent to its service area.

14 That's always been Florida Power and Light
15 Company's position on wholesale power.

16 JUDGE DUGGAN: I guess I have a difficulty. When
17 I see a division of territory in '66, when I see one in '81;
18 it walks like a duck, talks like a duck, I tend to call it a
19 duck.

20 MR. BOUKNIGHT: Well, if you've got a situation
21 where the situation that exists in 1981 is precisely like
22 the situation that exists with every other utility in the
23 United States that is selling power at wholesale, I don't
24 know why you would presume that the situation with respect
25 to this company must result from something that happened 15

1 years ago.

2 JUDGE DUGGAN: Has every other utility in the
3 United States refused to service these municipalities, or
4 was it just a few areas for which these amendments to the
5 Atomic Energy Act were passed?

6 MR. BOUKNIGHT: Judge Duggan, to my knowledge, no
7 municipality outside of Florida Power and Light Company's
8 service territory in Florida ever ask it for any wholesale
9 power prior to this litigation beginning. I don't know that
10 such requests are any more common anyplace else in the
11 country.

12 But the situation as it stands right now, if you
13 began with the presumption that what's going on today must
14 be because there was a conspiracy, we put in evidence
15 telling you why we are doing what we are doing today.

16 JUDGE DUGGAN: I'm not saying that is because.
17 I'm just saying that's a very natural result, the fruit of
18 the poisoned tree.

19 CHAIRMAN BLOCH: But you are saying something
20 else, too -- aren't you saying that really whether or not
21 you have an agreement with Florida Power, there is some
22 other relevance because the economics of running Florida
23 Power and Light are such that you could not afford to deal
24 with anyone in Florida Power's area anyway.

25 MR. BOUKNIGHT: We would lose money by dealing

1 with people in Florida Power's area. That is correct.

2 CHAIRMAN BLOCH: And therefore, whether there is a
3 agreement, you would act exactly the same way. You were
4 acting the same way at the time that the Gainesville
5 decision came down. You must continue to act that way.

6 MR. BOUKNIGHT: Well, a rational utility would in
7 this day and time act that way.

8 CHAIRMAN BLOCH: And it is also okay to act that
9 way. In fact what you were doing you are contending now was
10 merely agreeing to what you had to do.

11 MR. BOUKNIGHT: No, I'm not saying that. I think
12 if you take it back into the middle 1960's, what I would say
13 is that first, there was not any issue floating about about
14 the sale of wholesale power. That is not what the Fifth
15 Circuit held. The Fifth Circuit -- the whole argument
16 before the Fifth Circuit was a question of interconnection,
17 not wholesale power sale.

18 That is what Gainesville is about.

19 JUDGE DUGGAN: To the contrary. Wasn't the Fifth
20 Circuit going very much along the lines of some of the
21 cities who were in Florida Power's territory who would come
22 to you and say, "Will you supply us if we go local at the
23 retail level?" and then you would say, "No, we don't even
24 want to talk to you." And you would send a blind copy of
25 the letter to Florida Power, which was a conspiracy.

1 MR. BOUKNIGHT: Judge Duggan, there were five or
2 six letters over a period of 12 years, in that case of two
3 cities, which were not municipal electric systems in Florida
4 Power Corporation's service territory; asked FPL if it
5 wanted to sell them wholesale power, and FPL said it
6 didn't. That is correct.

7 JUDGE DUGGAN: And you mentioned two cities as if
8 it were de minimis. How many cities were present in
9 Autokale? Three, four?

10 MR. BOUKNIGHT: I recall there were more, but the
11 point I am making to you, though -- I don't question that
12 Florida Power and Light Company at that time didn't have any
13 desire to go into Florida Power Corporation's service
14 territory and market wholesale power. What I am saying to
15 you is what the Gainesville case held and what it arose on
16 as a matter of fact was a question of interconnection for
17 the City of Gainesville.

18 Now, there are two questions in this case legally,
19 and I think we have to frame the issues legally if we are
20 going to focus on them. The first is a Section 1 argument.
21 The Section 1 is that Florida Power and Light Company's
22 position right now is the result of some conspiracy.

23 Let's put that one aside for the moment.

24 The Section 2 argument that is being made by the
25 cities is that it is an act of monopolization for Florida

1 Power and Light Company not to sell wholesale power to these
2 people. The response that we are giving you that is first,
3 that's a market if it is a market, in which Florida Power
4 and Light Company can't be found to have monopoly power, and
5 second, the business justification for the company's
6 position is overwhelming.

7 Now, if you go back to the Section 1 question,
8 then I really don't know what a company today could do to
9 satisfy the objection that you have raised. If to do
10 something now would cost your customers a couple of billion
11 dollars, then a rational management that is living in 1981
12 that wasn't around in the 1960's can't justify doing that.

13 JUDGE DUGGAN: How much would it cost a customer
14 in Miami to see an additional ten percent go on line in
15 these other municipals?

16 MR. BOUKNIGHT: I don't know, but I don't think it
17 matters. I think that what matters is that a utility
18 company has a right not to do business on terms that cost
19 it money, and the idea that that doesn't seem like a lot of
20 money to Mr. Jablon doesn't matter.

21 And when your reason for not doing something is
22 that it would have cost you money, it would have been a net
23 loss to you and your customers, that's an overpowering
24 justification in an anti-trust case.

25 JUDGE DUGGAN: I'm curious about one fundamental

1 question you just raised, where you said that a utility has
2 a responsibility not to do business where it might cost him
3 money. Isn't it a whole theory of public utility regulation
4 to force the utility to service those customers that are,
5 say, remote in the service territory and other places?

6 MR. BOUKNIGHT: That's why you've got to separate
7 public utility regulation from what we are doing here
8 today. This is an anti-trust case.

9 Mr. Jablon pretty well told I like it is when he
10 said he wants what he can get here, and that will be
11 binding, and then we will both stand on whatever footing the
12 utility regulatory commission puts us on.

13 In an anti-trust case, it is more than an adequate
14 justification. It's an overwhelming justification of not
15 wanting to do something that it would be a net loss to you
16 to do it.

17 In a utility case, entirely different issues are
18 involved.

19 JUDGE DUGGAN: We're talking about an anti-trust
20 case with the utility company.

21 MR. BOUKNIGHT: Yes, sir, yes, sir, and you're
22 talking about --

23 CHAIRMAN BLOCH: Can you lose -- didn't you lose
24 on this increased cost argument of '71? Weren't you forced
25 to serve Homestead even though it would cost you more money?

1 MR. BOUKNIGHT: Judge Bloch, we lost on the
2 question of whether we could stop selling power to Homestead
3 at average cost, and whether we had to extend our obligation
4 to sell at average cost. We lost on the legal ground that we
5 had not carried a justification for showing that a change in
6 that tariff would be permissible under Section 205 of the
7 Federal Power Act.

8 CHAIRMAN BLOCH: You say you lost on the tariff,
9 but you also lost on the discontinuation?

10 MR. BOUKNIGHT: That's correct. That was the same
11 question. It was the same question. The notice of
12 discontinuation was simply necessary to implement the tariff.

13 CHAIRMAN BLOCH: But you had arguments before FERC
14 on average cost of service, didn't you?

15 MR. BOUKNIGHT: Yes, we did.

16 CHAIRMAN BLOCH: And you chose instead to say that
17 as a company with monopoly power, you had to serve, and they
18 didn't listen to your arguments about cost, did they?

19 MR. BOUKNIGHT: I guess the question comes down
20 to, can an anti-trust tribunal deliberately decide that even
21 though a company has shown that it would lose money by doing
22 something, that it is good public policy to take a small
23 amount of money from each fellow in Miami and give it to
24 fellows who live in Tallahassee and Koseme.

25 I suggest to you that those kinds of issues really

1 to arise in public utility cases, arise when you are dealing
2 with something like lifeline rates. That is what that comes
3 down to.

4 I suggest that when you are defending an
5 anti-trust case, that it is not necessary and indeed it
6 would be inappropriate for an anti-trust tribunal to start
7 trying to make those kind of inequitable decisions?

8 CHAIRMAN BLOCH: Did you appeal the FERC decision?

9 MR. BOUKNIGHT: Judge Bloch, that was -- we
10 appealed and then we dismissed the appeal to that
11 proceeding. We did so for a very practical reason. We were
12 at that point in the midst of negotiations with the NRC
13 staff and the Department of Justice in this case, and the
14 company decided to acquiesce in the request that they serve
15 this group of customers at wholesale.

16 CHAIRMAN BLOCH: But you want us to find that the
17 opinion of the FERC was erroneous?

18 MR. BOUKNIGHT: Well, Mr. Dent is going to address
19 that. We want you to find that the opinion of the FERC is
20 irrelevant, but what we are doing here today is talking
21 about whether Florida Power and Light Company has wrongfully
22 refused to deal with people under the Sherman Act, and
23 Florida Power and Light Company's justification is for its
24 current position, is that if it took any other position, it
25 would lose a lot of money. Its customers would be --

1 CHAIRMAN BLOCH: The issue isn't strictly whether
2 you have violated the Sherman Act. It would have the same
3 additional jurisdiction that FERC has for purposes of the
4 anti-trust laws. That goes beyond the strict violation of
5 the Sherman Act.

6 MR. BOUKNIGHT: I don't believe you can ever get
7 the purposes of the anti-trust laws to the point where an
8 anti-trust tribunal should be deciding whether it is better
9 for somebody in Miami to pay a little more and somebody
10 someplace else to pay less as a matter of social equity.

11 That's the kind of thing that falls within the
12 Federal Power Act, falls within the Florida Public Service
13 Commission Act, and doesn't really fall on the policies of
14 the anti-trust laws.

15 CHAIRMAN BLOCH: But we would be determining
16 whether or not market principles of competition ought to be
17 applied to this kind of transaction, and then being
18 indifferent as to who pays more or less.

19 MR. BOUKNIGHT: That's right. That's what I think
20 this tribunal will be doing. But in so doing, a market
21 principle, it will cost you money to do it, is strong
22 evidence. That's the one point that I am making.

23 If you are looking at this thing in an anti-trust
24 context, the justification that your applicant is giving you
25 as to why he won't go beyond this in selling wholesale

1 power, is that he believes it will cost his shareholders and
2 ratepayers money, and he's got sound evidence for believing
3 that.

4 CHAIRMAN BLOCH: Let me ask you this. As a
5 general matter of economic theory, isn't it true that a
6 monopolist always wants to restrict supply? I mean, aren't
7 you actually saying that the reason you got to restrict
8 supply is that you are in the position of every monopolist?

9 MR. BOUKNIGHT: No. I don't think so. I don't
10 see that at all. I see that no more than the idea --

11 CHAIRMAN BLOCH: A monopolist constructs a table
12 of the units he can produce for the total property, and he
13 decides how many units he's got to produce to maximize his
14 profits.

15 In a competitive situation you can't do that. You
16 can't do it because that would be --

17 MR. BOUKNIGHT: When somebody comes to see someone
18 who is not a monopolist who is running a hot dog stand and
19 wants to buy a hot dog for less than it costs to buy or
20 produce that hot dog, then a rational fellow is not going to
21 sell him the hot dog at that kind of price.

22 CHAIRMAN BLOCH: But that's not quite what happens
23 because you can always adjust your rate base. You can
24 always say it's not a fair rate of return overall. You are
25 not going to lose money.

1 MR. BOUKNIGHT: Well, let's talk about whether we
2 are going to lose money. We've got two problems. Mr.
3 Jablon pinpointed one of them.

4 Mr. Jablon says that he's perfectly willing to lay
5 it on our other customers, but that we will be made whole
6 because we will get a full rate of return. Well, we won't
7 be made whole by any means because we have to finance that
8 new capacity.

9 Florida Power and Light Company's common stock has
10 been selling below book value now for eight years. If it
11 has to finance this kind of capacity, then while that
12 capacity is being built, then the value of those
13 investments, those investors' shares is going to be diluted.

14 QUIP is not allowed in the rate base before the
15 FERC. Only a portion is allowed in the rate base by the
16 Florida Service Commission. During that time there is going
17 to be a cash squeeze.

18 So Florida Power and Light shareholders are going
19 to get hurt. Mr. Jablon says the company has deferred power
20 plants. Where it can, it certainly is making every effort
21 it can to reduce the rate of growth it is facing, but it
22 hurts both the shareholders and the ratepayers.

23 In an anti-trust case it seems to me that that
24 ought to be a very strong focus, in contrast to whether
25 some re-allocation of resources here meets some other

1 objective.

2 CHAIRMAN BLOCH: What year did this problem
3 occur? It seems to me you are saying you have excess
4 capacity right now.

5 MR. BOUKNIGHT: No, sir.

6 CHAIRMAN BLOCH: On the figures you gave.

7 MR. BOUKNIGHT: No, sir. That's in the area of
8 the 15 to --

9 CHAIRMAN BLOCH: I thought you said you have
10 12,000 megawatts power --

11 MR. BOUKNIGHT: Capacity.

12 CHAIRMAN BLOCH: -- capacity, and 10500 was peak?

13 MR. BOUKNIGHT: Yes, sir.

14 CHAIRMAN BLOCH: I'm sorry.

15 MR. BOUKNIGHT: That's a reserve margin.

16 CHAIRMAN BLOCH: Reserve requirement.

17 MR. BOUKNIGHT: It's a reasonable reserve margin.
18 In giving you the chronology of when this problem occurred,
19 let me lay before you the relationship of this problem to
20 the Vero Beach proceeding, which I think Mr. Jablon was
21 attempting to make a point of a few minutes ago.

22 In 1975 the company did make a proposal to the
23 City of Vero Beach to acquire its system. The background of
24 that was an eyes open, knowledgeable request by the City of
25 Vero Beach that it be done, and a group of city

1 commissioners who were primarily retired corporate
2 executives from elsewhere in the country who made a -- who
3 were tough businessmen to deal with, and who knew that's
4 what they wanted to do.

5 At that time the Vero Beach system had general in
6 capacity very much in excess of its load. The Vero Beach
7 system also had contracts to buy natural gas. When natural
8 gas is available, they are very economical generating
9 units. It's been available in the last few years.

10 However, 1975, when the company talked with Vero
11 Beach, I think the company's prepared to admit that it
12 hadn't realized what happened in the world either as of
13 1975. It at that time was trying to build plants at South
14 Dade. It was thinking about additional nuclear plants.

15 I don't think it had made the transformation from
16 a philosophy that was more typical in previous years to a
17 philosophy that anything we can do to slow down our growth
18 rate is a good idea.

19 The company then entered into a contract with Vero
20 Beach either in late 1975 or early 1976. In late summer
21 1976 the voters of Vero Beach approved that.

22 As we went through the summer of 1976, Mr. Jablon
23 is raising --

24 CHAIRMAN BLOCH: When you're talking you have
25 broader scope than does the cities, because you are talking

1 about what you prepared to show, I take it.

2 MR. BOUKNIGHT: Yes, sir.

3 CHAIRMAN BLOCH: And you don't have to rely on
4 estoppel. But are you saying to me that in acquiring Vero
5 Beach, that their costs of generating power for Vero Beach
6 were lower than your average costs, that you were able to
7 purchase their plant for a low amount of money so that you
8 made an immediate profit on your average costs?

9 MR. BOUKNIGHT: No, I don't want to say that,
10 Judge Bloch. What I would say is that the Vero Beach plant,
11 when it gets natural gas, is to the best of my knowledge a
12 lower cost source of electricity than FPL's average cost.
13 When it doesn't get gas, it is not.

14 CHAIRMAN BLOCH: If their average costs are above
15 yours, then you did increase the average cost of the system
16 by buying their plant, didn't you?

17 MR. BOUKNIGHT: If their average cost had been
18 higher than ours -- there are some other factors that have
19 to be thrown in. For example, the Vero Beach distribution
20 system was surrounded by FPL's distribution facilities and
21 could be integrated at what FPL's people thought would be an
22 overall saving.

23 There were economies of scale involved in
24 integrating the distribution facilities. As far as the
25 generating facilities are concerned, I don't contend that

1 FPL did that with the idea in mind that it would be
2 obtaining cheaper generating capacity than that which it
3 already had.

4 I think that's the way things have worked out in
5 retrospect, but the real --

6 CHAIRMAN BLOCH: The overall package meant that
7 you could take on Vero Beach without increasing overall
8 average --

9 MR. BOUKNIGHT: That's right. That's what the
10 company thought. The company may have been wrong in thinking
11 that. The company may not have realized what coal capacity
12 would cost in 1980 and 1981 when it did that.

13 CHAIRMAN BLOCH: Are you saying that internal
14 studies within the company prior to the acquisition
15 demonstrated to the satisfaction of the company that average
16 costs would not go up by acquiring Vero Beach?

17 MR. BOUKNIGHT: Judge Bloch, I don't know that I
18 can show you an internal study that is on a piece of paper.
19 I know that the company's officials who were involved in
20 considering that will tell you that's what they honestly
21 thought.

22 CHAIRMAN BLOCH: You mean they thought it without
23 doing a study of it?

24 MR. BOUKNIGHT: They did some studies. I don't
25 know that those studies went so far as to estimate what

1 power plants would cost a few years down the road. Again,
2 consider that the capacity of the Vero Beach system was then
3 substantially greater than its load.

4 I don't think that kind of detailed analysis was
5 done. I don't think anybody at FPL in 1975, with maybe a
6 few exceptions, at the first of 1975 would have told you
7 that they believe this industry had turned into an economic
8 situation where future cost would always be higher than past
9 cost.

10 There were people who saw that trend coming. I
11 don't believe that the company as a whole would tell you
12 that it viewed the world that way at that time.

13 CHAIRMAN BLOCH: So I take it that if the rates
14 came down greatly right now, that still might not be true?

15 MR. BOUKNIGHT: No, it's not the prime rate. It's
16 got something to do with the prime rate, but not much to do
17 with the prime rate.

18 CHAIRMAN BLOCH: Material cost of construction?

19 MR. BOUKNIGHT: It's material costs, construction
20 costs and I don't know how to phrase regulatory costs. But
21 the pollution control costs really add to coal plants, and
22 the nuclear area has seen a great deal of escalation, and
23 particularly in light of the Three Mile Island incident and
24 the --

25 CHAIRMAN BLOCH: Are pollution costs going to

1 continue to rise under the --

2 MR. BOUKNIGHT: I hope not, but now we are at a
3 point where cost of new plant is a heck of a lot higher than
4 cost of existing plant.

5 But going back to my chronology, as we went
6 through 1976, the company first slowed down its pattern of
7 expenditures on the South Dade plant, and in early 1977 the
8 day after receiving a decision from the Florida Public
9 Service Commissioner rejecting almost all of an interim rate
10 increase request, cancelled the South Dade plant.

11 Now, Mr. Guttman got the opportunity to ask FPL's
12 chief executive officer why he did it, and he told him. He
13 perceived in 1976 and early 1977 a political climate which
14 would make the regulatory situation intolerable for
15 licensing and building a new nuclear power plant.

16 That's justification that in retrospect has a
17 great deal of merit. Then as we went into the year 1977,
18 FPL frankly was concerned about its Vero Beach commitment in
19 light of the financing constraints that were now thrown on
20 it, and in light of its perception by 1977 of how the world
21 had changed.

22 FPL told Vero Beach that it was hesitant to go
23 very much further. People of Vero Beach said, "You've
24 entered into a contract with us. We went to the voters and
25 had a vote on this; don't tell us now you want to walk away

1 from it."

2 We stayed in this affair until the proceedings of
3 the FERC gave us the impression they would be going for
4 years more, and finally the two parties mutually agreed not
5 to do it.

6 That was in early 1978 when that was done.

7 CHAIRMAN ELOCH: So you did not acquire the Vero
8 Beach?

9 MR. BOUKNIGHT: We did not acquire -- Florida
10 Power and Light Company, and Mr. Barnes pointed out to me
11 earlier there is a typographical error in one of our
12 appendices.

13 Florida Power and Light has not acquired a
14 municipal electric system since World War II, to my
15 knowledge. But as the Vero Beach thing wore on, perceptions
16 changed in the company's mind.

17 In 1977, the company began to focus on what the
18 real cost of its proposed marketing plan was going to be,
19 and it was appalled. At that time I think for the first
20 time it really faced the idea that costs were going to be a
21 lot higher than they had been in the past.

22 That led to the filing with the FERC, and the
23 filing with the FERC boiled down to its essence was the
24 question it was putting to the FERC, "It's going to cost us
25 more if you make us do this. As a public utility, do we

1 have to do it?"

2 They said we did, and that's what the company is
3 now doing, and that's part of these license conditions.

4 Several other points that I would like to make in
5 response to what Mr. Jablon said. First, St. Lucie unit
6 number two is not at incremental cost today. It's at
7 incremental cost for a plant that you started in 1973 or
8 1974, and that's different from starting one today.

9 It's going to be expensive, but it's going to be a
10 bargain in comparison with what people are talking about for
11 plants that are now in the planning stages.

12 Let's see.

13 (Pause.)

14 The question of drawing the line on wholesale
15 sales is an immensely troubling one. The suggestions which
16 some of the questions from the Board contain are -- in a
17 competitive economy, somebody wouldn't draw a line.

18 On the other hand, in this situation with the
19 economics that prevail and with the regulatory situation
20 that prevails, clearly a line has to be drawn. If a line is
21 not drawn, then Florida Power and Light will find itself
22 receiving requests from municipalities in Georgia; perhaps even
23 in the Georgia Power Company; from Florida Power Corporation
24 itself; from people in other states.

25 So some line has got to be drawn somewhere, and

1 the question --

2 CHAIRMAN BLOCH: FERC can draw that line, can't
3 it, regardless of whether you are able to rely on the
4 geographical line. The FERC could draw the line when you
5 were to make a showing; it would be unfair to ask that of
6 additional customers, wouldn't it?

7 MR. BOUKNIGHT: Well, absent an unfavorable
8 decision from an anti-trust court of this Board, yes, sir,
9 and it has. That's what the problem is here.

10 CHAIRMAN BLOCH: Suppose we were to say that you
11 were to add these cities providing that the FERC does not
12 find that it's unduly burdensome for Florida Power and Light
13 to add the cities to their --

14 MR. BOUKNIGHT: Well, unduly burdensome in what
15 respects? If --

16 CHAIRMAN BLOCH: What kind of standard would they
17 apply on the addition of a new city within your jurisdiction?

18 MR. BOUKNIGHT: I'm not certain. I think that
19 they might well apply a standard -- well, right now we are
20 required to serve those people within our service
21 territory. I don't believe that they would even entertain a
22 suggestion that we not provide service to someone unless we
23 could show some very substantial and immediate harm from it.

24 Another thing I should add about Opinion number 57
25 that got left out of Mr. Jablon's and Mr. Guttman's

1 recitation -- the company at that time, they suggested the
2 company had excess capacity at that time.

3 Well, the facts were that the company, if all its
4 capacity were operating, did have plenty of capacity to meet
5 its load at that time. It had just been discovered that the
6 tubes in the Turkey Point steam generators were cracking.

7 There was a question as to whether the NRC was
8 going to require both of those units to be shut down very
9 quickly. If that had happened, the company would have been
10 in a terrible pinch.

11 That's part of the testimony that was put in in
12 Opinion 57. Mr. Guttman says that I misstate what the
13 company was prepared to do as far as selling power to other
14 people. There's a tremendous difference between what you
15 are prepared to do in the next two or three years with
16 facilities that you got and what you are prepared to do if
17 someone will give you adequate notice to build new
18 facilities and pay the incremental costs.

19 It is undeniably true that in the short run,
20 there's a limit on how much power Florida Power and Light
21 Company can sell people, and there was at the time of
22 Opinion number 57 as well.

23 JUDGE DUGGAN: Would that limit be exceeded by
24 the 80 megawatts the city said they're talking about?

25 MR. BOUKNIGHT: Judge Duggan, their 80 megawatts

1 concern St. Lucie number two. Their 200 megawatts seem to
2 describe a request for baseload power, in contrast to a
3 request for wholesale power.

4 When you asked Mr. Jablon who these cities are,
5 they listed for you some folks in FPL service area. He told
6 you there were six or seven outside of FPL service area. He
7 paused and then said, "Plus those who are participating
8 through FMUA."

9 That's the 3,000 megawatts of load out there in
10 Florida. Now, where are you going to draw that line? Can
11 this --

12 JUDGE DUGGAN: Do you think the line would be any
13 more different than the wild J-shaped line that presently
14 separates you from Florida Power?

15 MR. BOUKNIGHT: That wild J-shaped line happens to
16 be an area though where the company has got a public utility
17 responsibility to provide service.

18 JUDGE DUGGAN: Where it sought out to give service
19 to begin with, and then get the utility commissions to
20 recognize it.

21 MR. BOUKNIGHT: Well, that's not entirely correct
22 as a matter of fact. As a matter of fact, there were
23 efforts some years ago that Florida Power and Light disposed
24 of a section of its retail service area that appeared to be
25 illogical and sold it to the Florida Power Corporation.

1 But Judge Duggan, the point that I'm trying to
2 make -- and let me see if I can make it as articulately as
3 possible. Once you -- the first question is, as a public
4 utility, who have you got an obligation to serve? Once you
5 get outside of that question and you face the question under
6 the antitrust laws, who have you got an obligation to serve,
7 then if you take antitrust principles, principles of a free,
8 competitive economy, there is nowhere that you can find the
9 line to draw.

10 JUDGE DUGGAN: In fact, you described that bridge
11 pretty well this morning when you talked about the 1000
12 megawatts, jumping to FPL and so forth. That is about as
13 far from a free economy as you can get. I suggest what you
14 are going to end up with, as long as there are price
15 concerns on Florida Power and Light Company and other
16 utilities as to what they can sell for, what you are going
17 to end up getting is a gradual evening of costs, which is
18 exactly what the antitrust laws are there to keep from
19 happening.

20 The antitrust laws want the people to strive to do
21 better. If in striving, if you have an obligation upon you
22 that you have to sell power --

23 JUDGE DUGGAN: In a competitive economy, doesn't
24 a free company fill up marginal costs? Isn't that the aim
25 in a truly competitive model? Everybody sells at marginal

1 costs.

2 MR. BOUKNIGHT: Yes, sir. If everybody were
3 selling at marginal costs, much of the problem goes away.

4 JUDGE DUGGAN: That is what happens in a free
5 competitive economy.

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1 MR. BOUKNIGHT: Yes, sir. And our problem is that
2 our free competitive model is constrained, and those
3 restraints are what require that if you're going to have to
4 serve --

5 JUDGE DUGGAN: Is there any industry where a free
6 competitive model isn't constrained?

7 MR. BOUKNIGHT: I don't know.

8 JUDGE DUGGAN: I can't think of one myself.

9 MR. BOUKNIGHT: I don't know of one where
10 antitrust principles apply where it is constrained more than
11 it is here. And if you have an obligation to sell power for
12 something less than as I indicated to you in my answer,
13 would be what you would sell in a free competitive economy,
14 then that is about as direct an interference with a free
15 competitive economy as you can find. Now, that is where the
16 problem comes in.

17 There is something of a free competitive economy
18 that is beginning to develop in the sales of electricity
19 between utilities. The municipal systems are participating
20 in it. They're not in any way excluded from it. But when
21 you go to somebody in that economy and say sell me some
22 power, he's not going to sell it to you unless he can make a
23 little bit of money doing it.

24 Now, if competition works, he's not going to make
25 a lot of money, but he is going to want to make some money.

1 JUDGE DUGGAN: And if you make some money over
2 your average cost, say that you are selling for average plus
3 one, then that new municipal coming into your area is
4 contributing to your overhead and your other incremental
5 costs, isn't it?

6 MR. BOUKNIGHT: He is contributing. He is
7 contributing less than the incremental cost that he has
8 imposed upon you, and that has to be borne by two people,
9 the shareholder and the existing customer.

10 JUDGE DUGGAN: That he is supporting you or that
11 you have and you now have an incremental cost spread over a
12 greater base?

13 MR. BOUKNIGHT: I think we can demonstrate that
14 adding these customers imposes an incremental cost on us, a
15 higher.

16 JUDGE DUGGAN: What you are saying, if you add
17 these customers, you will have to bring in a new nuclear
18 reactor according to your figures here?

19 MR. BOUKNIGHT: No. I didn't say that we would
20 have to bring in a new nuclear reactor. That is not what I
21 am equating the \$2 billion with. The effects are when you
22 first do it then you're going to have to burn more oil.
23 That affects people immediately.

24 The second thing that you're going to have to do
25 is you're going to have to, if the quantity is fairly high --

1 JUDGE DUGGAN: Those are startup costs in an
2 overall pattern, aren't they?

3 MR. BOUKNIGHT: Yes, sir. That's the first
4 element of cost.

5 CHAIRMAN BLOCH: Are you suggesting a delay of two
6 years or three years before you have to sell would go
7 partway towards mitigating those problems of average costs?

8 MR. BOUKNIGHT: No, sir. A delay of eight to ten
9 years would mitigate.

10 CHAIRMAN BLOCH: But three would go partway.

11 MR. BOUKNIGHT: Three would go partway in the
12 sense that the cost imposed on you would be over five years
13 instead of eight, but it would not change the basic
14 equation. You've got three kinds of costs that you get
15 imposed on you. The first is your fuel cost immediately
16 goes up. The second is that you have to do something in an
17 interim way in order to provide additional adequate capacity
18 on your system until you can build your new coal plant or
19 your new nuclear plant. And the third is you have to build
20 more of that new capacity.

21 JUDGE DUGGAN: In effect, at the St. Lucie think
22 stage it could have been very easy to go to a 1200 megawatt
23 instead of 800 net, and then you would have had capacity for
24 these. That is second guessing with hindsight, of course.

25 MR. BOUKNIGHT: It is. And what Florida Power and

1 Light Company has done through the years was try to select
2 the size of its reactors with the idea of not extrapolating
3 too far beyond the technology of things that have already
4 been built and operating.

5 JUDGE DUGGAN: In that you kind of resemble a
6 petroleum products pipeline in which you are very careful
7 not to build too much capacity, because then some people
8 would come on board as an interstate carrier.

9 MR. BOUKNIGHT: No, sir, that's dead wrong.
10 That's never been a consideration of any kind in the Florida
11 Power and Light Company's considerations.

12 JUDGE DUGGAN: Considering what you have achieved?

13 MR. BOUKNIGHT: No, sir. That's not what we have
14 achieved in any respect.

15 JUDGE DUGGAN: Then I can't see why you're
16 hesitating in the slightest to put these municipalities on.

17 MR. BOUKNIGHT: Well, to the extent the capacity
18 is there now and to the extent that the municipalities will
19 pay the incremental cost of providing them service, both the
20 short run and the long term incremental costs, the company
21 is prepared to do it.

22 JUDGE DUGGAN: The way you use this incremental
23 cost is if it were something holy.

24 MR. BOUKNIGHT: It is not holy. The problem is
25 right now it is a hole in our pocket if we sell it at

1 average cost. That is what this argument is about. It is
2 not about selling versus not selling.

3 JUDGE DUGGAN: Selling at over an average cost,
4 coming back to where we were a few minutes ago, will give
5 you some money in your pocket that you didn't have before
6 toward meeting your overhead and the other increments.

7 Now, the purely incremental cost which you have
8 been using in itself, you know, in a Bible revelation that
9 is purely a cost that we grant out of the air, and we assume
10 all these different things, and we put them together.

11 Now, it is something that is used in the setting
12 of costs before a utility commission, but does that type of
13 thing have any relevance here in an antitrust hearing?

14 MR. BOUKNIGHT: Yes, sir, yes, sir. It has every
15 relevance here in an antitrust hearing because it costs you
16 money to sell power to these people. The money that you're
17 getting in your pocket, in one pocket, is not as much as the
18 money you're having to take out of the other pocket and
19 actually pay out. And it is demonstrable when you burn oil
20 at 7 cents per kilowatt hour to sell power to someone at 5
21 cents per kilowatt hour that you are losing money, and you
22 are losing money every day.

23 You don't have to take into account any generation
24 planning assumptions. Just in the short run you are losing
25 money. It is equally demonstrable, although more

1 complicated, that in the long run your cost of capacity is
2 going to go up. Your average cost of capacity will go up
3 substantially. And it is also demonstrable that in the
4 interim you are going to have to raise more money on a
5 market that is becoming terribly difficult for a utility
6 like FPL to compete in.

7 JUDGE DUGGAN: Of course, that is all based on the
8 hypothesis, which probably is erroneous, that you take say
9 the added 200 megawatts and put them on top of your peak
10 load where the peak load is the one that runs your
11 incremental cost out and up.

12 MR. BOUKNIGHT: No, sir. In every hour, almost
13 every hour -- I won't say every hour -- in almost every hour
14 Florida Power and Light Company's incremental generation is
15 with oil, and you can demonstrate that to sell 20 megawatts
16 more of power from now until tomorrow means that 20
17 megawatts more of oil generation is going to be fired up,
18 and that oil is going to have to be burned.

19 That flows through in the fuel adjustment clause,
20 and it hits every customer, retail and wholesale, on the FPL
21 system. It is really a problem, short run, intermediate
22 term and long run. And the ways around the problem in the
23 real world and with a market perspective are things like the
24 economy energy sales that are going on all over Florida now.

25 JUDGE DUGGAN: Like you are buying from Georgia at

1 certain times and selling to Georgia at certain times.

2 MR. BOUKNIGHT: We are primarily buying from
3 Georgia. We're almost never selling to Georgia. We are
4 buying from Georgia right now from some new coal plants that
5 Georgia has built, and Georgia is going to make us pay the
6 cost of those new coal plants, which is a higher cost than
7 the embedded cost on their system, and the cost of the coal
8 fuel plus a little something to make their ratepayers and
9 shareholders of that company a littler happier than they
10 otherwise would be.

11 And the result is that we are getting something
12 that is cheaper than we can burn our own system; but it
13 would be nice to get their average cost. If we could do
14 that, then we'd be in business.

15 JUDGE DUGGAN: So the same argument applies to
16 your getting their average cost as they getting your average
17 cost.

18 MR. BOUKNIGHT: Yes, sir.

19 JUDGE DUGGAN: Okay.

20 CHAIRMAN BLOCH: In the course of that discussion
21 something came up which affects the chart I think we asked
22 for. It seems to me that if you add 200 megawatts or 1,000
23 megawatts peak load to your system, you are not going to get
24 an addition of that amount of peak load to your peak load,
25 that you can't assume a mathematical correspondence that

1 they will peak at exactly the same time. I'm just not sure
2 how you're going to deal with that.

3 MR. BOUKNIGHT: We looked at that. We did deal
4 with it, and what we discovered is that almost everyone who
5 is buying partial requirements power from FPL is buying it
6 at a load factor of 95 percent higher.

7 Now, if you are talking about people who are all
8 requirement systems, then you have a different problem. But
9 those who buy partial requirements, they are close to 100
10 percent load factor.

11 CHAIRMAN BLOCH: I see. Because they're not going
12 to buy their total peak from you. They're going to supply
13 their own peaking demands themselves. They're going to make
14 a constant demand from you.

15 MR. BOUKNIGHT: That is what they appear to be
16 trying to do.

17 CHAIRMAN BLOCH: Can you wrap up this portion of
18 the argument?

19 MR. BOUKNIGHT: I will certainly try.

20 Mr. Guttman said two things that just are not
21 correct. First, he indicated that Florida Power and Light
22 Company's sales to Homestead had been a couple of months
23 here and a couple of months there. The deposition testimony
24 indicates that since the middle of the 1960s, a portion of
25 Homestead's system has constantly been served from wholesale

1 service with Florida Power and Light until the time the
2 interconnection was installed in I believe 1977.

3 Secondly, he misspoke on the question of Fort
4 Pierce. Florida Power and Light did not file a tariff
5 because of any pressure from Fort Pierce. Florida Power
6 filed a tariff because it lost a case in the United States
7 Supreme Court as to whether the FERC had jurisdiction over
8 its sales, and shortly after that it filed a tariff. There
9 was a dispute at some later time as to whether Fort Pierce
10 had requested wholesale power from FPL. When Fort Pierce
11 made a clear request, FPL provided them the service under
12 protest and under the condition that should FPL's tariff
13 changes at the FERC be approved, that those would control.
14 All that happened while that case was pending over there.

15 I think that sums it up. Thank you.

16 CHAIRMAN BLOCH: Let's go off the record.

17 (Discussion off the record.)

18 CHAIRMAN BLOCH: We'll go back on the record.

19 Mr. Jablon.

20 MR. JABLON: Thank you.

21 I simply wanted to point out that Opinion 57 dealt
22 with all of these questions to the extent that the bottom
23 line here is that Mr. Bauknight has admitted that the
24 company wanted to take over Vero Beach, the fact that they
25 thought it would be a good deal for them. So be it, they

1 admitted that they wanted to take over Vero Beach and tried
2 to convince Vero Beach residents that this was a good idea
3 because of the cost structure.

4 You've got the exact same situation of Ottertail
5 and Midland where both of those cases rejected the same type
6 of economic argument made here: that refusals to deal by a
7 company with monopoly power were justified on the grounds of
8 economic disability to the company or its customers.

9 Both arguments were raised. The bottom line is
10 that Florida Power and Light does not want to deal in
11 essential utility services, and all Florida Power and Light
12 has done is to admit it.

13 On the incremental cost argument, furthermore,
14 Florida Power and Light are saying that the additional
15 municipal customers cost more because it assigns cost to
16 them at incremental costs, but every other customer on the
17 system is treated as if it is assigned average cost.

18 With regard to the Homestead and Fort Pierce
19 incidents, these were thoroughly litigated in Opinion 57.
20 We believe that Mr. Bouknight misstated the facts with
21 regard to Vero Beach. In Opinion 57 there was the specific
22 recitation of a history of Vero Beach and incorporation of
23 testimony, including FPL's application which had an Ernst
24 and Ernst report for Vero Beach that no wheeling options
25 were available. Therefore, if you accept --

1 CHAIRMAN BLOCH: What was the relevance of the no
2 wheeling options?

3 MR. JABLON: Florida Power and Light, we submit,
4 in Opinion 57 found that the company has economic power over
5 baseload generation and over transmission. That is in the
6 opinion. It further found that there is franchise
7 competition. So Florida Power and Light is using its
8 monopoly base to expand its retail monopoly through
9 advertising its economic cost advantages.

10 In the application to take over the Vero Beach
11 system, Vero Beach did a study of its alternatives. In
12 order to get alternative power supply they needed wheeling.
13 FPL controlled the transmission. Opinion 57 makes the
14 finding, the statement which this Board can recognize which
15 was in the record in Opinion 57, was that no wheeling
16 options were available.

17 The only reason I wanted to take the additional
18 time was to make three points. First, if you accept every
19 single thing Mr. Bauknight has said on the facts -- and we
20 dispute the facts -- but if you accept everything on the
21 facts, they are the exact same facts that were raised in
22 Ottertail and Midland; that is, that it was against the
23 company's interest or customers to sell additional
24 municipals, and that the company wanted to take over Vero
25 Beach. Just the bottom line is Mr. Bauknight mentioned the

1 refusal to deal.

2 CHAIRMAN BLOCH: I don't understand the takeover
3 of Vero Beach in that context. How were you using that? It
4 seems to me they were correct in trying to rebut that
5 because you were arguing that if they wanted to take on any
6 additional load that it must not be against their economic
7 interest, and they said yeah, but in that case we are
8 requiring assets. And therefore, it wasn't against their
9 best interest.

10 MR. JABLON: They require assets and they require
11 customers. In order to take over the Vero Beach system,
12 acquire new retail customers, they had to convince the people
13 of Vero Beach that it was a good deal. It would be a good
14 deal if two things happened: first, Vero Beach's own costs
15 were sufficiently high that they were higher than Florida
16 Power and Light. Okay.

17 The second thing is that --

18 CHAIRMAN BLOCH: Some of that, of course, could
19 have been the inefficiencies in the distribution system, not
20 just the generating costs.

21 MR. JABLON: No question about it. But where you
22 run into the antitrust problem is that Florida Power and
23 Light went into Vero Beach and said look, we have a new
24 nuclear plant coming on line. We have this baseload power
25 resource. Sell out to us to get the advantages so that the

1 Vero Beach retail customers could get the advantage of that
2 baseload capacity, purchase it through retail sales only if
3 the system were sold.

4 So we are saying is just like Ottertail, they are
5 acquiring systems by refusing to deal in essential services,
6 defining "essential" as the people in Vero Beach would look
7 at it, and this is how they characterized it to the people
8 in Vero Beach.

9 Now, furthermore --

10 JUDGE DUGGAN: Let me put in a question right
11 there. They did not acquire Vero Beach, did they?

12 MR. JABLON: They tried to.

13 JUDGE DUGGAN: Would it be correct to term that an
14 attempted monopolization rather than a monopolization?

15 MR. JABLON: I guess it would be attempted
16 monopolization, but the acts of monopolization as found by
17 Opinion 57 which went into this is the refusals to deal, the
18 basic refusals to deal.

19 Mr. Bloch, the relevancy of the transmission is,
20 in addition to refusing to deal themselves, they were saying
21 they could not get the power from elsewhere because there
22 were no wheeling options available.

23 CHAIRMAN BLOCH: Your principal points here deal
24 with acts of monopoly, not with average costs.

25 MR. JABLON: My point is -- yes, yes. My point is

1 that the acts of monopoly are the refusals to deal.

2 CHAIRMAN BLOCH: I understand, but we're going to
3 get into that more. But on the average cost point I have
4 not heard a lot. I don't see how you can infer from the
5 Vero Beach history what the average cost -- the effect on
6 Florida Power and Light's average costs were.

7 MR. JABLON: First, I had assumed de minimus, but
8 the real point was if they had acquired the system, they
9 would sell at average cost at retail.

10 CHAIRMAN BLOCH: That's right. And they are
11 saying that would not cause the customers or themselves a
12 loss because of the whole package, and whereas taking on a
13 new customer without assets could increase their average
14 cost. I think that is the narrow point they were trying to
15 make.

16 MR. JABLON: And the narrow point I am trying to
17 make is that even if you accept that -- and it is highly
18 questionable on the facts -- but even if you accept that,
19 what they said to Vero Beach -- there is no question that
20 Florida Power and Light wanted to acquire Vero Beach,
21 whatever their motivation was. But what they said to Vero
22 Beach is, look, I will effectively sell you power from my
23 entire cost structure, from my old plants, from my new
24 plants, from my nuclear plants, from my nonnuclear plants,
25 but the only way I am willing to sell you that power from

1 the average cost system is if you sell out the system to us.

2 Now, in an Ottetail sense that is where the
3 squeeze is, if they were selling all of their retail
4 customers.

5 CHAIRMAN BLOCH: I agree with you. We haven't
6 really gotten into that part of the argument, and I guess we
7 weren't supposed to. We were only talking about economic
8 problems, about average costs. We were not talking about
9 acts of monopoly.

10 MR. JABLON: I understand that, but every once in
11 a while a lawyer gets nervous, and I wanted to point out to
12 you that when you relate it to the legal principles, it
13 doesn't matter.

14 CHAIRMAN BLOCH: Let's go off the record once
15 again.

16 (Discussion off the record.)

17 CHAIRMAN BLOCH: Back on the record.

18 We will reconvene at 2:00.

19 (Whereupon, at 12:35 p.m., the hearing was
20 recessed for lunch, to be reconvened at 2:00 p.m., the same
21 day.)

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AFTERNOON SESSION

1

2

(2:10 p.m.)

3

CHAIRMAN BLOCH: Mr. Jablon, I would like to suggest that we start this afternoon by addressing a portion of Item Number 1 on the agenda which we have yet to reach. The portion I would like you to address is one which I think, if I read your brief correctly, you have not briefed yet. And that is, I would like to hear the factors involved in whether or not collateral estoppel should be applied to Gainesville and to FERC cases. And for that purpose, I just want to know whether the criteria of Parklane or other criteria you find in the cases are met and therefore whether collateral estoppel is proper.

14

It seems to me we ought to be able to do that in ten or, at most, 15 minutes.

16

MR. JABLON: Yes, Your Honor.

17

I would cite you to page 12 and thereabout of our motion to establish procedures for legal support for our conclusion. I am not going to refer to it; I am just --

20

CHAIRMAN BLOCH: I want to refresh my own memory.

21

My memory is refreshed, and you have argued the point. But I think what I want more is to address the Parklane criteria or other criteria you find applicable for offensive collateral estoppel.

25

MR. JABLON: I will, Your Honor.

1 Judge Bloch, this morning my colleagues told you
2 that I may have been vague with regard to Opinion 57. I
3 merely give you the references on page 40 of the opinion and
4 340 of PUR to the Commission reserving the authority to
5 change the effect of its order if factual circumstances
6 should warrant.

7 Parklane Hosiery, Your Honor, and Blondertong are
8 decisions of the Supreme Court which, in general, of course,
9 support and recognize the equitable doctrines of res
10 judicata and collateral estoppel.

11 Florida Power & Light in its pleading with whether
12 there should be collateral estoppel as to the Gainesville
13 case raises the question as to whether the same standards
14 should apply under Parklane Hosiery with the so-called
15 affirmative collateral estoppel; that is, a plaintiff or
16 petitioner is trying to prevent a defendant from
17 relitigating an issue rather than the other way around.

18 That is at page 83 of Florida Power & Light's
19 response. And Florida Power & Light cites four principal
20 cases there in the text for the proposition that courts
21 should not reward "sideline-sitters" who could have easily
22 have joined in the first action but failed to do so. That
23 appears to be their leading argument against us. And I
24 presume that is the basis for Your Honor's question.

25 CHAIRMAN BLOCH: They also have other arguments on

1 the Parklane criteria application to FERC.

2 MR. JABLON: Yes. I will reach them, too. But I
3 was trying to take the hardest one first, and we will work
4 our way back.

5 First of all, the cases Florida Power & Light
6 cites, including Parklane Hosiery, set forth the proposition
7 Florida Power & Light states; that is, they have quoted the
8 cases correctly. However, it is of at least passing
9 interest and more than passing interest that in every one of
10 the cases they cite collateral estoppel was granted
11 affirmatively. And I am referring to cases on page 83.

12 CHAIRMAN BLOCH: Incidentally, I thought that
13 also. And in my own mind, I wondered whether they should
14 have been compared cites instead of strict cites, but in
15 fact weren't two of them at least remands for the
16 application of that criterion and they were not clear
17 understandings by the Supreme Court about whether it would
18 be applied as collateral estoppel?

19 MR. JABLON: I think the Supreme Court in Parklane
20 itself indicated that there should be collateral estoppel
21 because at the end of the opinion -- and I am going through
22 memory -- they go into -- well, the criteria here were met.
23 In Mooney -- let's see, in Starker, which is the fiberboard
24 case --

25 CHAIRMAN BLOCH: Blondertong was a remand, but

1 Parklane was actually decided in the Supreme Court.

2 MR. JABLON: Parklane was in the Supreme Court.
3 Blondertong was not offensive collateral estoppel; it was a
4 remand. But there was very strong language against the
5 mutuality principle.

6 I am going to show that we meet the Parklane and
7 Blondertong criteria. I just wanted to set forth that the
8 principle Florida Power & Light advances certainly is by no
9 means absolute, as witness the very cases they cite.

10 CHAIRMAN BLOCH: I take it, incidentally, also
11 they are serving an equitable balance in which the ability
12 to join in is an important factor. But I take it that
13 overall the cases do stand for the proposition that you must
14 weigh the pros and cons of recognizing the case and that
15 other factors, perhaps factors not explicitly mentioned,
16 might weigh in that balance.

17 MR. JABLON: I think to the extent there is an
18 equitable judgment you are correct. I think in this case
19 under the standards of Blondertong and Parklane the
20 equities, to the extent there is precedent, point in favor
21 of giving collateral estoppel of that.

22 Let me be very specific before I get to the
23 equities as to the Parklane standards, and then let us go
24 back to the equities.

25 The principal standard, the principal problem

1 Parklane itself was worried about is a litigant who lays
2 waits and does not join in a litigation, hoping for
3 favorable result from his standpoint so that, say, if you
4 have an airline crash, for example, and there are 100 people
5 who can sue the airline, one person sues. Somebody else
6 sitting in the next seat does not sue. Obviously, the
7 judgment would not be collateral estoppel as to the person
8 who does not sue, because he never had his day in court. So
9 that the court was disturbed about the possibility of
10 somebody laying back in that kind of situation waiting to
11 see how the case came out and going to take advantage only
12 of victory but not the defeat.

13 This situation, factually, clearly does not obtain
14 here. The best proof of it is that at the time Florida
15 Cities intervened in the South Dade proceeding before the
16 NRC, there had been a loss in Gainesville, so they certainly
17 were not motivated to intervene to take advantage of a
18 victory.

19 The second factor is that they were intervening
20 pursuant to a statutory right.

21 You look puzzled. The main --

22 CHAIRMAN BLOCH: I was just thinking through what
23 had happened there. You are correct so far.

24 MR. JABLON: The main point I am trying to get to
25 is this is unlike a common accident, unlike an airline

1 situation, that what happened with regard to the Florida
2 Cities is certainly traceable, that regardless of any other
3 litigation which may or may not have taken place, they had a
4 right by statute to seek redress before the Nuclear
5 Regulatory Commission when Florida Power & Light came in to
6 seek a license of a plant. They had an independent right,
7 so that their intervention here --

8 CHAIRMAN BLOCH: But that is not being denied.
9 The only thing that Florida Power & Light is arguing is that
10 the effect on that case of the Gainesville decision should
11 be nil. They are not arguing that you should be banned from
12 this proceeding.

13 MR. JABLOn: Well, Blondertong, going back to
14 Blondertong, the Supreme Court and this Commission has a
15 general premise in favor of collateral estoppel. So the
16 question is they are an exception. The reason for the
17 general premise is, I would submit, to avoid precisely the
18 problems you have in this case.

19 In Blondertong itself, the Supreme Court went
20 through a couple of pages relating chapter and verse not
21 only the burden on the forum but the burden on the litigants
22 seeking rights for litigation which can take hundreds of
23 thousands of dollars or millions of dollars to relitigate.

24 And the Supreme Court established very plainly
25 that collateral estoppel should be the general rule when the

1 facts warrant. They specifically rejected the doctrine of
2 mutuality; that is, the doctrine that if the Cities in this
3 instance cannot be collaterally estopped, then Florida Power
4 & Light should not be collaterally estopped.

5 And this would be reinforced in an action before
6 the Atomic Energy Commission, where the Commission has a
7 duty to make a finding whether a situation inconsistent will
8 result from operation of the license.

9 However, in Parklane they can graft an exception
10 to that general principle, and they say, "Well, where you
11 have a situation where our very rules -- that is, the
12 rejection of the mutuality principle -- can encourage
13 somebody to lay back and not assert his rights, hoping to
14 take advantage of a one-way situation in a subsequent
15 action, then we better look to the equities of the
16 situation."

17 Now, my response to you before was putting it in
18 context, that the Cities did not wait to see whether Florida
19 Power & Light lost the Gainesville case and then intervene
20 in the South Dade proceeding after they had lost the
21 Gainesville case to take advantage of collateral estoppel.
22 The Cities intervened when Florida Power & Light sent
23 letters to them saying, "You cannot get into the South Dade
24 plant."

25 CHAIRMAN BLOCH: Yes, but that is not what they

1 are arguing at all. They are arguing that whatever the
2 outcome of the Gainesville case, the Cities knew of it. Of
3 course, they knew of it before the District Court opinion as
4 well as before the Appeals Court opinion, and that if they
5 are going to get any benefit at all from the Gainesville
6 opinion, then they should have joined in the case at as
7 early a time as possible. Could you have done that?

8 MR. JABLON: It is doubtful. But candidly, I
9 don't know.

10 CHAIRMAN BLOCH: Why is it doubtful? That is
11 important.

12 MR. JABLON: Because Gainesville was a private
13 antitrust suit by Gainesville, and I am not sure how
14 receptive either the City of Gainesville would have been or
15 the District Court to -- this was not a class litigation --
16 to expand it to take account of other claims others may have
17 had.

18 CHAIRMAN BLOCH: So you are saying it is
19 problematical as to whether you could have intervened?

20 MR. JABLON: It is certainly problematical, Your
21 Honor.

22 CHAIRMAN BLOCH: Do you know what the rules are
23 that would prevent intervention or that would have governed
24 a motion to intervene? I will be asking Florida Power &
25 Light the same question.

1 MR. JABLON: My impression is that the District
2 Court has discretion. But take it one step further. The
3 Cities -- I forget the date that the Gainesville case was
4 brought -- to the extent that the Cities did not intervene
5 at that time or did not file a suit and did not do so
6 subsequently within the statute of limitations, they simply
7 did not file a suit. There is no multiple concurrent litigation
8 arising out of the question as to whether they intervened or
9 filed a lawsuit in Gainesville.

10 The question is whether under the Board's -- to
11 put it most simply, the thing that the Supreme Court was
12 worried about and the thing that the Supreme Court and the
13 other courts felt would be unfair would have been the kind of
14 situation where one year after Gainesville had brought its
15 District Court action, had they won, other plaintiffs then
16 would have come in and sought to assert collateral estoppel.

17 CHAIRMAN BLOCH: You mean you think it only
18 applies to causes of action begun after the Gainesville case?

19 MR. JABLON: Yes. I would think so, because the
20 courts are very clear as to the specific harm they are
21 worried about, whereas here the conduct of the Cities was
22 plainly not affected one way or the other by the Gainesville
23 case. What the courts were worried about is simply
24 encouraging a multiplicity of litigation.

25 CHAIRMAN BLOCH: Well, were they not also just

1 worried about the unfairness to the defendant? That is,
2 here you have won; had the court case been lost in
3 Gainesville, there would have been no way of arguing
4 collateral estoppel against you in this proceeding.

5 MR. JABLON: That was the court's -- to the extent
6 the courts were worried about it, both Blondertong and
7 Parklane, flatly rejects that argument. And the cases, the
8 Judge Trainor decision in California, the cases plainly hold
9 that they are rejecting the mutuality doctrine.

10 CHAIRMAN BLOCH: But in Blondertong, which was
11 defensive, that really is not applicable, because the forum
12 was picked by the plaintiff. And in Parklane they expressly
13 included these criteria because I think they were worried
14 about the implications of expanding mutuality. And I think
15 they were worried.

16 Now, whether that is controlling in this case or
17 not, I am not sure. But I think they were very worried that
18 Florida Cities or some other group might know of a pending
19 case and just decide not to join it. Heads we win, tails
20 you lose.

21 MR. JABLON: I think if you go back to the case --
22 and I will not take the trouble to do it now -- but if you
23 go back to both Blondertong and the Parklane Hosiery cases,
24 you will see the following distinction: that they rejected
25 the notion of mutuality; that is, the notion that there is

1 some inherent unfairness if one side can raise a collateral
2 estoppel point but not the other, that they were concerned
3 about the proliferation-of-litigation point. They were
4 concerned about the laying back. They were not concerned
5 about the syllogistic identity, whether both sides can raise
6 collateral estoppel.

7 In any event, at most it is an equitable point,
8 and before the Nuclear Regulatory Commission, Florida Cities
9 sought relief first in South Dade and then in this
10 proceeding under 105(c) of the Atomic Energy Act which gives
11 them an independent right to address a congressional
12 concern. So there is no proliferation. There is no
13 unintended proliferation of litigation.

14 And indeed, if there were any question about the
15 matter, if you are looking to the equities, where Mr.
16 Bouknight this morning says in oral argument that the bottom
17 line of the company is that the company does not want to
18 deal and where the president of the company, the chief
19 executive officer, in deposition says that, "We just think
20 Gainesville is wrong," it seems to me that those equitable
21 points bear in favor of collateral estoppel.

22 To the extent I am wrong on any of the above, I
23 would still state that under the Federal Rules, I think it
24 is 803, those decisions are binding -- not binding -- they
25 support the factual finding which would be rebuttable. And

1 in that case, if there are specific factual findings in
2 those decisions, I think we should simply try those factual
3 findings. But I go back to my main premise that as I read
4 Blondertong and Parklane, they go for us on the mutuality
5 point.

6 CHAIRMAN BLOCH: Two questions: Is the fact that
7 it would have entailed an additional expense on the part of
8 Cities to join in the Gainesville case relevant to whether
9 or not the language on page 562 of Parklane would apply?
10 The language on 562 is the language dealing with -- excuse
11 me, is 562 in the lawyers edition?

12 The language deals with the question Applicant
13 raises, which is the question of laying back. I will read
14 it to you: "The general rule should be that in cases where
15 Plaintiff could easily have joined in the earlier action or
16 where either for the reasons discussed above or for other
17 reasons the application of offensive estoppel would be
18 unfair to a defendant, a trial judge should not allow the
19 use of offensive collateral estoppel."

20 MR. JABLON: Well, the answer to your question is
21 clearly "Yes." What all of the collateral estoppel cases
22 are concerned about when you get down to them, they are
23 concerned about two points, I think. They can be
24 summarized: fairness to the plaintiff and fairness to the
25 defendant. But I do not mean to be glib. I think that is

1 what it comes down to.

2 They are concerned with the type of situation
3 where a defendant is involved in a minor action and chooses
4 not to litigate it to the fullest. It is an irritant. And
5 suddenly, that bootstraps them into a far graver situation.
6 I submit in the case of the Gainesville case, where the
7 company knew that there was a multimillion-dollar damage
8 case, it had an incentive to litigate. The same is true
9 with the FEPC proceeding, where the company was under
10 antitrust attack as the company admits in this forum as well
11 as the Gainesville case. And the last thing the company
12 could afford to do was to take a loss.

13 The second thing the courts are concerned about is
14 the fairness --

15 CHAIRMAN BLOCH: And to that respect, you are also
16 arguing that the length or brevity of the FERC proceeding is
17 irrelevant because it was a serious proceeding, and what is
18 important is that it is serious, not how long it takes.

19 MR. JABLON: Yes, sir. Yes, Your Honor. If you
20 look at the Commission's decision, they went through
21 carefully chapter and verse and any notion that Florida
22 Power & Light did not utilize any strategum -- and I do not
23 mean that in a bad term -- that they could think of. They
24 did. Ultimately, they made a tactical decision not to
25 appeal. But that says more than anything I can say.

1 Getting back to the question of fairness to the
2 plaintiffs, Florida Power & Light notwithstanding, Opinion
3 57 in Gainesville itself demonstrates, and independent
4 evidence that you can look at, that these Cities have been
5 faced with takeover attempts, with going out of business.
6 Their economic lives have been threatened and are being
7 threatened year after year after year, whatever the excuse.

8 Yes, there has been no acquisition attempt by
9 Florida Power & Light since the Vero Beach acquisition
10 attempt, although there has been some indication -- there
11 may be some -- one of our clients is moving to drop out of
12 the proceeding because of an acquisition successful by
13 Florida Power Corporation.

14 These cases cost a lot of money. The rule should
15 not be that a system must intervene in any litigation or
16 bring any litigation it possibly can, especially given the
17 nature of it. And the best equitable support I can get for
18 that is Judge Brown, who opens his opinion saying that the
19 case had taken ten years, which means money and a trip to
20 the Supreme Court in a related case. And after that, I
21 guess, it took another three years.

22 I think the costs of these proceedings are
23 unbelievable, and there is no reason to believe, as the
24 Supreme Court said I think in Blondertong, that the result
25 before you would come out any differently than it came out

1 before the Federal Energy Regulatory Commission.

2 So that even if the equities were evenly balanced
3 between FP&L and the Cities, there is an interest in
4 resolution.

5 CHAIRMAN BLOCH: I take it if you had joined in
6 Gainesville, the issues would have been broadened and the
7 case would have been more complex; would it not have?

8 MR. JABLON: No question about it, because each
9 individual city would have had to bring its own case, its
10 own claims, its own proofs.

11 CHAIRMAN BLOCH: In fact, we would have had the
12 same kinds of arguments in this case about all the people
13 who would have had to have been deposed. So they really
14 would not have joined in the Gainesville case, they would
15 have had to expand the case well beyond its existing borders.

16 MR. JABLON: Yes, Your Honor.

17 There is an irony here. They are -- Florida Power
18 & Light -- is countersuing us in the District Court. And
19 we, you know, hope to win on the grounds that the Cities are
20 acting together and trying to pool bargaining resources or
21 whatever it is in litigation to beat them down. So if you
22 join together you are in trouble, and if you do not.

23 My simple point is what you have here is a finding
24 by the Fifth Circuit United States Court of Appeals of an
25 illegal territorial division against which Florida Power &

1 Light had full opportunity to defend, and it ought to be
2 given weight.

3 CHAIRMAN BLOCH: May I ask if the weight is
4 affected by the fact that it actually was a decision that in
5 examining the record no reasonable person could have come to
6 any other conclusion than that reached by the Fifth Circuit?

7 MR. JABLON: Certainly, Your Honor. The Fifth
8 Circuit did not remand. It looked at the documents and said
9 it was conclusive. And Florida Power & Light does not deny
10 today. Yes, they are willing to deal across boundaries on
11 their terms. Also, if that were not enough, if you look to
12 the policy of the Atomic Energy Act, 105(c) deals with
13 reasonable probability, a reasonable-probability standard,
14 according -- my citation for that is Midland on the Appeals
15 Board. *

16 But 105(a) says that you can open even operating
17 licenses where you have a finding of law violation. I think
18 it would be a very, very strange result that when you have
19 an actual law violation that were not given effect where
20 this agency would give collateral estoppel under appropriate
21 circumstances to less than that.

22 CHAIRMAN BLOCH: Given the fact that the case was
23 remanded for finding what the impact was on Gainesville, is
24 there a complete finding of a law violation?

25 MR. JABLON: There was a settlement, Your Honor.

1 But the Fifth Circuit made the finding as to law violation.
2 They found, and they expressly said so, that there was a law
3 violation. The remand was as to relief.

4 CP, IRMAN BLOCH: Okay.

5 MR. JABLON: I would like to touch upon the
6 factors with regard to -- the additional factors -- which
7 Florida Power & Light raises with regard to Opinion 57.
8 Florida Power & Light raises two main points. They have
9 subsidiary points, but I think it is fair to say that they
10 raise two main points apart from criticisms that they did
11 not get a fair shake.

12 The first point is they claim that the standard
13 under the -- the legal standard -- under the Federal Energy
14 Regulatory Commission is different.

15 The second is they claim the burden of proof is
16 different.

17 With regard to the legal standard, first I would
18 point out that if you are talking about collateral estoppel,
19 collateral estoppel is appropriate when they are far
20 different legal standards and far different facts at issue.
21 Indeed, the interesting thing here is how close the factual
22 pattern is.

23 In any event, Gulf States, a case, Gulf States v.
24 FPC, has plainly decided that the Federal Energy Regulatory
25 Commission has not merely the authority but the requirement

1 to assess the standards under the Federal Power Act in
2 accordance with the standards of the antitrust laws. Now,
3 California v. FPC says they cannot make decisions for other
4 bodies and it is your decision whether to give collateral
5 estoppel effect to it. But they clearly have the authority
6 under the Federal Power Act. In Opinion Number 57 the
7 Commission recognizes it and carried it out.

8 With regard to the burden-of-proof question, first
9 I would point out that it is not so clear that the burden of
10 proof is different in fact.

11 The highest authority in this Commission on burden
12 of proof is Midland. It may sound disrespectful, but I
13 think to some extent the Appeal Board fudged the issue.
14 There have been arguments before the Licensing Board whether
15 the --

16 CHAIRMAN BLOCH: Would you tell me what Midland
17 said about it?

18 MR. JABLON: Yes.

19 CHAIRMAN BLOCH: Unfortunately, we probably have
20 different issues in Midland. If you tell me the section of
21 the opinion, we can cross-reference.

22 MR. JABLON: Yes. I am looking at page 45.

23 CHAIRMAN BLOCH: No, not the page; the section.

24 MR. JABLON: Oh, I am sorry. Unfortunately, I
25 have just got --

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(Pause.)

MR. JABLON: May I have a moment?

1 MR. JABLON: Your Honor, I don't want to take the
2 Board's time to look for it. I did have it. I looked for
3 it last night. It's in 6 NRC.

4 The gist of it is that it says that the decision,
5 the burden which the moving parties have to follow is a
6 preponderance of evidence burden. The point of that is that
7 in the one sense the burden is placed on the moving parties,
8 but the burden is less than that which you would find in an
9 antitrust court.

10 That is what I mean when I said there was somewhat
11 of a fudge. More to the point, however --

12 CHAIRMAN BLOCH: The citation would be interesting
13 because the general rule on burden of proof is that the
14 proponent on order has the burden of proof. And I'm not
15 sure, but I guess it's arguable that the order that is being
16 sought in this case is an order permitting the licensing of
17 the plant. I am not sure who is seeking the order in this
18 proceeding.

19 MR. JABLON: The strongest argument I would make
20 for the cities would be that the Applicant is seeking a
21 license, that the cities have the burden of going forward,
22 but the license cannot issue unless it is found to be
23 overall in accordance with the standards of the Act.

24 CHAIRMAN BLOCH: And Section 2.732 appears to say
25 that.

1 MR. TABLON: Now, that argument was rejected by
2 the Midland Licensing Board, which is cited, I believe, by
3 Florida Power and Light. On appeal the appeal board seemed
4 to discuss the argument in terms of the standard.

5 Now, there's a very interesting comparison here.
6 The Supreme Court itself in *Blondertong*, which I believe was
7 the SEC case -- no, I'm sorry. *Parklane Hosiery* was the SEC
8 case. There you had a different standard, a less stringent
9 standard on the government in seeking a District Court
10 injunction for violation of the Securities and Exchange Act
11 than there would have been on independent plaintiffs. And
12 not only that, but the defendant had to give up the right to
13 a jury trial which led to Justice Rehnquist's defense, but
14 the Supreme Court permitted collateral estoppel anyway.

15 Now, finally, I would note to you that the
16 District Court in the Southern California Edison case gave
17 collateral estoppel effect to an FERC order where plainly
18 the company had the burden of proof because it was a rate
19 case before the Commission, but before the District Court
20 the cities would plainly have the burden of proof.

21 CHAIRMAN BLOCH: Did any of these places
22 explicitly discuss the effect of changes on the burden of
23 proof on collateral estoppel, or do we have to divine the
24 principles ourselves from the fact that they held one thing
25 or another when the burden did change?

1 MR. JABLON: I think they discussed it in more
2 general terms; that is, the test they looked to is a general
3 equitable test, and they used words like full and fair
4 opportunity. They used general equitable language. And I
5 certainly would concede in weighing the equities, one of the
6 factors you could look to is the question of burden of proof.

7 But I would also say that unless Florida Power and
8 Light can indicate some reason why the burden of proof made
9 a difference, something that they could try here which was
10 so unfair there that it ought to come out differently, what
11 they are doing is creating technical differences that don't
12 matter. Every regulatory statute has a different standard.

13 CHAIRMAN BLOCH: I think the general basis of the
14 evidentiary considerations of the Commission appear to be
15 that there was a conflict between the oral testimony of
16 company officials and documents, and that they preferred the
17 inferences to be drawn from the documents, which suggests
18 that regardless of where the burden may have lain, that they
19 in fact were deciding the case because they were persuaded
20 by the documents and that there was not a question of burden
21 of proof.

22 MR. JABLON: Well, on full and fairness I don't
23 think there really was. I have tried a lot of these cases
24 before the FERC. As a practical matter, when you are trying
25 to force a company to do something it doesn't want to, they

1 may say the company has the burden of proof, but you've got
2 to prove something is wrong.

3 In any event, just as the Fifth Circuit had done,
4 as Your Honor points out, they looked to the documents.
5 Florida Power and Light put on witnesses. They put on a
6 professional economist I believe from the National Economic
7 Research Associates. They put on Mr. Gardener, who is in
8 the room, their vice president. And what they found was
9 flat out contradictions between what the company was telling
10 the Commission and what the documents said. And indeed, one
11 of the biggest contradictions was the contradiction between
12 what they were saying in the Vero Beach proceedings, which
13 went on two or three years contemporaneous with this
14 proceeding. And in one case they say gee, it's good if we
15 can serve more load, and in another case they say it's not.

16 Now, coming back to the collateral estoppel
17 question, my only point is that Florida Power and Light has
18 raised general propositions as to why they should not be
19 given collateral estoppel. What they have not done is told
20 you specifically what findings of the FERC was wrong, how
21 the e findings were made on the basis of some obvious
22 unfairness, and why they should have an opportunity to
23 litigate them again.

24 I think that is all I have on this point, but if I
25 could just look at my notes for a second..

1 CHAIRMAN BLOCH: If one of the counsel here was
2 able to find us the section for Midland, that would be
3 terrific.

4 MR. JABLON: I will get you the section for
5 Midland, but if I could take it up separately.

6 CHAIRMAN BLOCH: Perhaps you could just give us
7 the citation later in the session.

8 MR. JABLON: I will, and if I can't get it today,
9 I'll get it first thing in the morning.

10 Did I interrupt you?

11 CHAIRMAN BLOCH: I was going to ask you a
12 nonrelated question, which is frustrating, but I wanted to
13 know when you can estimate the maximum megawattage that your
14 clients are demanding.

15 MR. JABLON: The first thing in the morning I will
16 try to report to you on that.

17 CHAIRMAN BLOCH: Do you have a last comment?

18 MR. JABLON: Yes. I think with an argument a
19 counsel is entitled to a last comment.

20 Yes. I would simply say that with regard to the
21 responsibility of this agency that 105 is clear that you
22 have a strong antitrust, pro-antitrust policy reinforced by
23 Scenic Hudson, so that we have an independent -- and it
24 establishes an independent right for us to be here. And
25 without waxing ecstatic, the cities are faced by horrendous

1 problems which don't come forth in an argument of lawyers.

2 If you don't give collateral estoppel effect, what
3 you are causing these cities to do and Florida Power and
4 Light is spend perhaps years and a very large amount of
5 dollars; and we are litigating against a very deep pocket
6 defendant.

7 If Florida Power and Light convinces you that it
8 is entitled to a favorable ruling on this issue, I would be
9 the last to argue against it. But I think that they
10 shouldn't get one on sentiment, because of the very real
11 costs and burdens on the cities involved.

12 CHAIRMAN BLOCH: That sounds a bit like the final
13 statement that you might want to make at the end of the
14 hearing, if you can avoid that statement.

15 MR. JABLON: I will avoid it, but it is a burden,
16 Your Honor, and I felt I ought to say it.

17 CHAIRMAN BLOCH: Mr. Dym or Mr. Bouknight?

18 MR. DYM: It is my turn, and I will refrain from
19 appealing to sentiment. And let me say right at the
20 beginning I'm glad this argument is now turning to at least
21 what I perceive to be a nice, discrete legal issue that can
22 appropriately be resolved in this proceeding as opposed to
23 complex questions of economic and fact that I don't think
24 can be resolved at this stage in this proceeding.

25 I'll discuss first the Gainesville case and then

1 Opinion number 57. I'll try to be brief, because I really
2 don't have very much to add beyond what we said in our
3 papers.

4 I think the law has been set forth by the Supreme
5 Court in the Parklane case, and the law is, Judge Bloch,
6 which you read from the Supreme Court's opinion; and it
7 reads this way: "The general rule should be in cases where
8 a plaintiff could easily have joined in the earlier action,
9 a trial judge should not allow the use of offensive
10 collateral estoppel."

11 I suggest that that standard is binding not only
12 in federal courts but binding on this board.

13 CHAIRMAN BLOCH: You say that standard. We are to
14 some extent talking about dictum, aren't we?

15 MR. DYM: I don't think so. I don't think so.
16 The Supreme Court was saying this is the standard that we
17 think should apply in the case that was before us. We find
18 that under that standard offensive collateral estoppel is
19 permissible.

20 CHAIRMAN BLOCH: In fact, weren't what they were
21 doing is saying we're going further; no one has ever gone
22 this far. We are a little worried. This is deep water, and
23 we don't want to go too far, so we're going to think up some
24 limitations on what we've done.

25 And it seems to me that under those circumstances

1 where it really is kind of speculative that great weight
2 should be given to their reluctance, but that any court
3 faced with a specific situation should weigh the equities in
4 that situation, including that one but possibly others.

5 MR. DYM: I disagree with that. I really do
6 disagree with that. That suggests that what we should be
7 doing is psychoanalyzing what the Supreme Court justices had
8 in mind as opposed to what they said; and what I am
9 suggesting is that when they say this is the standard that
10 should apply, until the Supreme Court says no, that isn't
11 the standard that should apply, that is the standard that
12 applies.

13 CHAIRMAN BLOCH: Of course, the doctrine that we
14 apply, holding it separate from dictum, is due to the fact
15 that people have limited minds, even Supreme Court justices;
16 and it really is better, isn't it, to decide a situation
17 where it actually has arisen and we are faced with actual
18 equities rather than allowing the Court's speculation as to
19 a situation to bind everyone forever when they never had to
20 face the situation.

21 MR. DYM: Well, Judge Bloch, my understanding is
22 that the Supreme Court does not take a case and does not
23 render an opinion in a case solely to deal with the parties
24 before it and the particular facts before it. It takes a
25 case because it sees an opportunity to lay down a rule of

1 law that will guide other tribunals, both courts and
2 administrative agencies, in deciding what to do when in fact
3 situations like that are presented to it.

4 Now, what I am saying is that rule of law has been
5 laid down by the Supreme Court. The rule of law has been
6 followed since 1979 by other courts.

7 CHAIRMAN BLOCH: Have they ever followed this
8 particular aspect of it? Have you found a case where
9 offensive collateral estoppel was not applied because of the
10 application of this rule?

11 MR. DYM: I think your readings of the case we
12 cited are correct in that I do not know of such a case. I
13 do know of cases that have been remanded for purposes of
14 applying that standard. That is what we are doing here,
15 though, it seems to me.

16 In other words, this is a trial court. The
17 question is application of that standard announced by the
18 Supreme Court and followed by lower courts to the facts
19 here. It seems to me that is what we are doing.

20 CHAIRMAN BLOCH: It would be helpful if another
21 court had faced this specific factual situation and decided
22 to apply it quite the way the Supreme Court has done it.

23 MR. DYM: This board should have the honor of
24 being the first. But as I say, the heart of my argument is
25 this is what the Supreme Court has said, and the question

1 under that standard is could these other plaintiffs easily
2 have joined in the Gainesville litigation.

3 CHAIRMAN BLOCH: What does "easily" mean? That is
4 a very tough one.

5 MR. DYM: Well, let me put it this way. There is
6 no legal or practical bar that I know of that prevents them
7 from joining in this sense. In 1979 Gainesville and 14
8 other cities joined in a single action against FPL. They
9 filed down in the District Court in Miami. What stopped
10 them from doing the same thing in 1968 when Gainesville
11 filed this lawsuit?

12 CHAIRMAN BLOCH: Is the '69 cause of action
13 identical to the Gainesville cause.

14 MR. DYM: '79?

15 CHAIRMAN BLOCH: '79. I'm sorry. As the
16 subsequent court of action?

17 MR. DYM: The identical? No. It includes the
18 Gainesville clause, but it includes other things as well.
19 In general, it's a Section 2 charge that everything FPL has
20 done since 1955 is illegal, but all of them have joined.
21 They each have different claims.

22 CHAIRMAN BLOCH: There is a principle we would
23 establish though, and let's just limit it to municipalities
24 for a while, although I can imagine it going to individuals.

25 If a municipality learns of a case pending

1 somewhere from which it might benefit and it can join, that
2 it therefore is obligated to file a motion to join in that
3 litigation?

4 MR. DYM: I don't think it is necessary for me to
5 establish the principle in this case in light of the
6 representations that have been made by the cities in their
7 pleadings before this board. Now, what the cities have said
8 to this board, and we quote this in our brief on page 85,
9 the cities have told this board, "There can be little
10 question that FPL-FPC's longstanding anticompetitive
11 practices and policies were well known to municipal systems."

12 It is clear from the context that they are talking
13 about the practices and policies as they existed in the
14 mid-1960s and that they were well known in the mid-1960s.
15 Why didn't they sue, the next thing they say.

16 JUDGE DUGGAN: I have a small question right
17 there. You mentioned that there was no practical reason for
18 them to sue.

19 MR. DYM: To not sue.

20 JUDGE DUGGAN: To not sue. And just before you
21 there was a little tete-a-tete going with regard to the
22 practical limit of the resources against a rather deep
23 pocketed defendant.

24 Was there a practical reason that they may have
25 chosen to fight those cases where they could afford it?

1 MR. DYM: Well, apparently the problem with
2 litigation expenses did not preclude them from joining
3 together before this board, in joining together before the
4 District Court in Miami. And what is there to suggest that
5 problems with financing precluded them from joining together
6 in the Gainesville case? Nothing.

7 JUDGE DUGGAN: Would problems with financing be,
8 in your words, a practical matter?

9 MR. DYM: I don't think the problems of financing,
10 even if they were shown to exist, which they have not been
11 shown to exist, would permit collateral estoppel to apply
12 where otherwise it would not. But they haven't shown that
13 there were any problems of financing. Where's an affidavit
14 saying we wanted to join but we couldn't because it would
15 have been too costly? I have not seen anything like that.

16 What I have is a representation by a lawyer. I
17 don't know whether he knows the facts or not. Where is an
18 affidavit saying they thought about joining but they
19 couldn't join because that it would be too expensive?

20 JUDGE DUGGAN: My question was developed to your
21 statement as a lawyer that there was no practical reason
22 that they couldn't have.

23 MR. DYM: I am aware of no practical reason why
24 they could not have.

25 CHAIRMAN BLOCH: I was thinking you were really

1 advocating the principle that if you have a course of
2 litigation and you know about a related case, then you have
3 got to join in it. That would be a possible principle. The
4 problem is the Gainesville case came first.

5 MR. DYM: The Gainesville case came first. The
6 cities have represented to this board that they were all
7 aware of the anticompetitive practices that resulted in the
8 filing of that lawsuit. They have represented to this board
9 that they were keeping track of what was happening in the
10 Gainesville case. They represented to this board that
11 Gainesville was bringing the case not only in its own right
12 but to benefit the other cities.

13 Why didn't they join? And how can they come in
14 now and say well, we didn't join, but we are entitled to the
15 benefits of that decision when we assumed none of the risks
16 of it. And that is what the Supreme Court was saying in
17 Parklane is not permitted.

18 CHAIRMAN BLOCH: I take it you're saying it is a
19 subjective case. If you know that you can benefit from a
20 case, and you are kind of anxiously looking at it, and you
21 are rather gleeful about its existence, then you had better
22 join it or you won't benefit from it.

23 MR. DYM: We have the advantage in this case of
24 having representations from the cities. I will say even
25 absent those representations, collateral estoppel could not

1 be applied. But with those representations --

2 CHAIRMAN BLOCH: I say when should they have
3 joined? Should they have joined after the District Court
4 case was lost?

5 MR. DYM: No. They should have joined right at
6 the beginning or before it went to trial.

7 CHAIRMAN BLOCH: Particularly for the
8 noncontiguous cities, what benefit would they have thought
9 they could gain at that point?

10 MR. DYM: Well, I had an argument this morning
11 that the cities are saying that because of a conspiracy
12 found in Gainesville, all of them were disadvantaged in that
13 none of them could deal with both Florida Power and Light
14 and Florida Power Corporation. That's the argument that was
15 made.

16 CHAIRMAN BLOCH: Of course. But at the time the
17 litigation was started, no one knew about the possibilities
18 that major corporations would have to wheel power.

19 MR. DYM: Gainesville decided to sue.

20 CHAIRMAN BLOCH: But Gainesville was suing for a
21 direct interconnection, weren't they? They weren't suing
22 for wholesale power that required wheeling across the system
23 of another major power company.

24 MR. DYM: They were suing for an interconnection.
25 If other cities had felt disadvantaged because of the lack

1 of an interconnection, they could have sued as well.

2 CHAIRMAN BLOCH: Noncontiguous cities cannot get
3 an interconnection, can they? That's very serious in terms
4 of whether they thought joining in the Gainesville case
5 would have helped them, in noncontiguous cities.

6 MR. DYM: As I understand it, in the Gainesville
7 case Gainesville wanted an interconnection. It sought an
8 interconnection both from Florida Power Corporation, and it
9 alleged that it sought one from Florida Power and Light.
10 I'm not sure I saw any difference between where Gainesville
11 stood and where any other city in Gainesville stood at the
12 time that precluded a lawsuit.

13 CHAIRMAN BLOCH: Because Florida Power was also
14 with the cities, and they could have joined in.

15 MR. DYM: It just seems to me they cannot have it
16 both ways. It just seems to me we are different than
17 Gainesville.

18 CHAIRMAN BLOCH: The other point that I raised
19 before was that if they joined the Gainesville case, this
20 says if they could have easily joined in existing litigation
21 and all they litigated was Gainesville's problem, they would
22 not have been entitled to relief, would they? I mean, would
23 they really have joined in the Gainesville case? Is that
24 what the Supreme Court was talking about? Or would they not
25 have enlarged that litigation massively? Were they required

1 to do that?

2 MR. DYM: I'm not sure it's any different from the
3 airplane accident situation where each plaintiff has its own
4 case in terms of showing impact and damages but where the
5 issues of liability are the same.

6 CHAIRMAN BLOCH: Common issues of liability.

7 MR. DYM: Certainly under the Fifth Circuit's
8 holding, if one accepts that holding, there were some common
9 issues of liability. Where were the cities? Why did they
10 wait?

11 They haven't come forward with any indication of
12 why, and what we do have are representations that -- and I
13 hate to repeat myself -- that they knew a what was
14 happening at the time.

15 CHAIRMAN BLOCH: Well, as judicial economy I could
16 imagine the Supreme Court writing this opinion, urging the
17 usual case which is a case in which the decision rests on
18 the balancing of the evidence. It is a burden of proof
19 problem. It is a review of whether or not the jury was
20 correct or the judge below was correct, and they affirm or
21 deny. It is fairly unusual that the Appeals Court reviews
22 the record and decides that the only way that record could
23 be interpreted by a reasonable man was in behalf of
24 liability. You would think that in terms of judicial
25 economy this was the strongest case for applying collateral

1 estoppel.

2 MR. DYM: I'm not sure that I see that. I guess
3 if you looked at it in hindsight you'll say --

4 CHAIRMAN BLOCH: They would be saying that if we
5 looked at that whole record we wouldn't be reasonable to
6 conclude anything.

7 MR. DYM: But isn't the point rather that
8 presumably the result would have been the same in the Fifth
9 Circuit with the other cities in there, but what the other
10 cities avoided by not joining was the risk that the result
11 would be different. And it is that, it is the avoidance of
12 that risk that precludes collateral estoppel as far as
13 they're concerned.

14 CHAIRMAN BLOCH: Parklane went a little beyond
15 that theory. Before, that risk theory was everything, and
16 Parklane said there's one other thing at stake here, and
17 that is the issue of judicial economy. We are not
18 litigating a gambling match; we are litigating the truth.
19 And to some extent we ought to indulge in the presupposition
20 that maybe some truth was litigated.

21 And the question there is was the Supreme Court
22 really thinking about this kind as the only reasonable
23 conclusion that can be reached, a liability decision, when
24 they wrote that limited language. Shall we really give that
25 much prescience to that language?

1 MR. DYM: I don't think it is really appropriate
2 to look at that in hindsight. One looks at policy
3 considerations behind the Supreme Court's opinion. What the
4 Supreme Court was saying is we should not apply collateral
5 estoppel in a way that encourages litigants not to join in
6 litigation but to sit back and wait, because it is the
7 sitting back and waiting that creates judicial diseconomies.

8 JUDGE DUGGAN: In other words, you would not say
9 to the Supreme Court we're not going to use hindsight with
10 you, but you would say to the cities we will require
11 hindsight for you?

12 MR. DYM: I'm not sure I understand.

13 JUDGE DUGGAN: What I'm saying is you are looking
14 at the cities, and you are saying you should have, you
15 should have, you should have, and you're now looking at the
16 Supreme Court and saying to the Supreme Court oh, we're not
17 going to look at you and say you should have. We will look
18 at what you actually did.

19 MR. DYM: I'm sorry. I still don't understand.

20 JUDGE DUGGAN: In your analogy you said the
21 Supreme Court we shouldn't look at in hindsight, and then
22 you just got through with a long list of things the cities
23 should have done with hindsight.

24 MR. DYM: The Supreme Court's formulation
25 necessarily requires a determination of whether a litigant

1 who is trying to use offensive collateral estoppel could
2 easily have joined in the prior litigation. I see no way of
3 avoiding the need for the inquiry into the Supreme Court's
4 formulation.

5 CHAIRMAN BLOCH: I guess maybe what Judge Duggan's
6 talking about -- I'm not sure, but let me ask -- the
7 decision was reached in Parklane in 1979. How were the
8 cities to have anticipated when the case was filed in '69
9 that they were going to be bound by a reciprocity rule that
10 the Supreme Court didn't announce until '79?

11 MR. DYM: Well, if one looks at it that way, back
12 in 1968 the doctrine of mutuality was extant, so there were
13 other reasons why they should have joined. But there is
14 nothing in the Supreme Court opinion that suggests that it
15 should only be applied prospectively. So we are willing to
16 accept that we have to accept that and the standard that it
17 employs.

18 CHAIRMAN BLOCH: Let me ask something else related
19 to what the cities said before. Are there facts, specific
20 facts found by the Gainesville court that you want to rebut
21 in this proceeding because you have new kinds of evidence?
22 Is there evidence that was not available to the Gainesville
23 court that you want to introduce here in order to change the
24 results? Or doesn't that matter? I mean legally does that
25 matter or not?

1 MR. DYM: I want to say legally it doesn't
2 matter. Legally, what we are saying is, to put it most
3 disadvantageously, we are entitled to a second shot at the
4 issue decided by the Fifth Circuit, and the reason we are
5 entitled to that second shot, even if the evidence is the
6 same, is because under the Supreme Court's formulation, the
7 other cities could have joined in the Gainesville
8 litigation, and they didn't. As a matter of law that is our
9 position, and I think it is a correct one.

10 Now, if you're asking me would we have come in
11 with additional evidence, I think we would, but I'm not in a
12 position of laying out chapter and verse at this point.

13 CHAIRMAN BLOCH: Well, to be more specific, as I
14 read the Court's opinion, we have as close to a smoking gun
15 as I've ever seen in a judicial opinion. We have affidavits
16 written by top people of two major power companies -- or
17 excuse me, letters introduced into evidence that they
18 routinely informed each other of actions taken to allow the
19 other person's economic interest to hold sway, and in
20 addition to that, indicating that they wished the other
21 success in what could have been a competition between the
22 two companies.

23 Now, that seems to me to be fairly strong
24 documentary evidence, and it seems to me that while this
25 perhaps is language that suggests we ought to retry the

1 issue, I have never seen any point in pointless retrials
2 either.

3 MR. DYM: We're not suggesting that it would be
4 pointless.

5 CHAIRMAN BLOCH: What would you expect to produce?

6 MR. DYM: I do not think that the material cited
7 by the Fifth Circuit in its opinion is everything that was
8 in the record of that case. There was testimony that was
9 presented that is not referred to in the Fifth Circuit
10 opinion.

11 JUDGE DUGGAN: Was there anything in there to
12 dispel those two particular letters?

13 MR. DYM: I don't think there was anything to
14 suggest that those letters weren't written, but as to what
15 the meaning was I just don't know.

16 What you are saying is you don't think the result
17 is going to be much different.

18 CHAIRMAN BLOCH: I'm saying that if I have some
19 reason to believe that it might be different, then it places
20 me in a different position as to whether or not to open up
21 that whole issue and retry it again. But if you're telling
22 me that you have nothing that is going to make a substantial
23 difference in the outcome, it seems to me pointless to waste
24 our resources listening to the whole issue.

25 MR. DYM: We think the Fifth Circuit was wrong in

1 the case.

2 CHAIRMAN BLOCH: What are the factual problems you
3 find with their conclusions?

4 MR. DYM: We believe the Court did not give the
5 weight it should have to the testimony that was presented as
6 to the lack of conspiracy.

7 JUDGE DUGGAN: Could you appeal that to the
8 Supreme Court?

9 MR. DYM: We did and cert was denied.

10 JUDGE DUGGAN: It's finally decided.

11 MR. DYM: It's certainly finally decided as far as
12 Florida Power and Light is concerned. We recently settled
13 that case with Gainesville. We obviously recognize that the
14 Fifth Circuit's opinion is binding on us in the Gainesville
15 case, but the issue here is whether it is binding on us in
16 this proceeding in favor of strangers to that litigation.
17 That is that issue.

18 I don't know. I wish I could tell you we think
19 we're going to prevail in that. I don't know whether we're
20 going to prevail, but I do think we are entitled to have
21 that issue litigated against cities who did not participate
22 and who therefore did not assume the risk that the case
23 might have come out differently.

24 CHAIRMAN BLOCH: If we were going to litigate that
25 issue again could we do it on the record already compiled by

1 the Court or just do it on the effect of the record, or
2 would we have to have live testimony?

3 MR. DYM: We would want live testimony.

4 CHAIRMAN BLOCH: How many witnesses? All of the
5 same witnesses to give live testimony?

6 MR. DYM: Not necessarily. I have not in
7 preparation for this argument laid out the witnesses and
8 evidence that we would present, but I know we would want to
9 do so. We would want an opportunity to do so.

10 CHAIRMAN BLOCH: I think I understand the
11 company's position with Gainesville. Can we move on to the
12 other?

13 MR. DYM: Opinion 57. Now, again, I don't think
14 there's any question as to what the legal questions are.
15 And we have advanced three reasons why we don't think
16 Opinion number 57 can be given collateral estoppel effect.

17 The first, that the substantive standard applied
18 by FERC differs from that applied by the NRC.

19 CHAIRMAN BLOCH: I'm not sure it does. We have
20 just finished reading the most recent case which is Farley.
21 It seems to me they make a fairly broad statement of the
22 purposes of the antitrust laws and the standards we were to
23 apply in this proceeding, and that it is the same kind of
24 general antitrust considerations which FERC felt constrained
25 to apply.

1 MR. DYM: I think this part of the standard here
2 is inconsistent with the antitrust laws. There's no
3 question that that is the governing standard here. The
4 question is what is the legal standard that FERC applied,
5 and I acknowledge that what they said is we -- I think what
6 they specifically said is we attempt to reflect the policies
7 underlying the antitrust laws in performing our
8 responsibilities under the Federal Power Act.

9 I suggest that whatever that standard might be, it
10 is vaguer and more nebulous than the standard that applies
11 in this proceeding.

12 CHAIRMAN BLOCH: Referring in particular to the
13 Farley opinion, page 145 and following, we have to decide on
14 the licensing conditions which serve here to harmonize both
15 antitrust and such other interest considerations as may be
16 involved.

17 I think you'll find that the discussion of
18 competition in the standards we have to apply is pretty
19 broad, and it was intended to effectuate fairly broad public
20 work purposes expressed in the Atomic Energy Act and in the
21 hearings at that time.

22 I cannot imagine that the FERC standards are
23 broader or less clearly defined.

24 MR. DYM: Well, maybe we just disagree on that.
25 Maybe we just disagree. I'd like to think that the

1 standards here are somewhere more stringent.

2 CHAIRMAN BLOCH: Do you disagree with my reading
3 of Farley?

4 MR. DYM: I don't disagree that is what the
5 Appeals Board said in Farley.

6 CHAIRMAN BLOCH: Do you think we should narrow
7 what the Appeals Board said?

8 MR. DYM: What I come back to is the fact that the
9 statutory standard here is inconsistent with the antitrust
10 laws. The statutory standard FERC operates under is whether
11 a proposal is just and reasonable. Those statutory
12 standards are different.

13 CHAIRMAN BLOCH: Just and reasonable what? I
14 think it was just and reasonable interpreted in the light of
15 the purpose of the antitrust bills. That is the basic
16 extent it is just and reasonable.

17 MR. DYM: That's right.

18 CHAIRMAN BLOCH: Put as I understand it, they have
19 been commanded to look further than just just and reasonable
20 and use the purposes of the antitrust laws as much as we do.

21 MR. DYM: As I understand it, one factor that FERC
22 takes into account in determining whether someone is just
23 and reasonable are the antitrust laws.

24 CHAIRMAN BLOCH: I see. In other words, if they
25 were to find that it was inconsistent with the antitrust

1 laws, they would be free to do it anyway if they thought
2 other things overrode it. In other words, they have a less
3 stringent antitrust standard than we have. We can't
4 override it. If we find that the purposes of the antitrust
5 laws suggest that you shouldn't be licensed or they should
6 be conditioned, we should do that.

7 You're saying that just and reasonable means that
8 even if they find that, they don't have to take any special
9 action because they could find other purposes that override
10 that.

11 MR. DYM: Well, that is what they say.

12 CHAIRMAN BLOCH: That means they are applying a
13 less stringent antitrust standard than we do.

14 MR. DYM: It seems to me a priori it ought to be
15 harder.

16 MR. DYM: I don't think so. I don't think so.

17 CHAIRMAN BLOCH: Why?

18 MR. DYM: I assume that what the situation should
19 be is that the agency with a more stringent standard should
20 not apply collateral estoppel in fact to a looser decision.

21 CHAIRMAN BLOCH: They said even though we don't
22 have to be bound by antitrust considerations. We feel that
23 it's strong enough in this case that we should be bound, and
24 our standard is that the antitrust considerations by
25 themselves would bind us.

1 MR. DYM: It is a question of how they apply -- I
2 mean what antitrust standards they were applying and how
3 they were applying them. They are doing it differently than
4 this board does or should.

5 CHAIRMAN BLOCH: All right. But why is it not a
6 fortiori binding? I mean they could be doing it a different
7 way by the way they controlled this nevertheless. Are you
8 saying there's no comparison between the two standards at
9 all, or are they similar?

10 MR. DYM: They can be compared like Section 1 of
11 the Sherman Act can be compared to the standard that applies
12 here. But, for example, if this board should decide
13 something under the antitrust laws on a policy basis, the
14 question would be whether that determination, is it entitled
15 to collateral estoppel effect before a court which applies a
16 more stringent standard. And the answer would be no, it
17 should not be.

18 CHAIRMAN BLOCH: And similarly, it seems to me,
19 that if we decided something because the Atomic Energy Act
20 applies the premises of the antitrust laws directly, FERC
21 might not have to follow it because there is it by judicial
22 interpretation, and they are supposed to weigh that as one
23 of the factors in fair and reasonable, but it is not
24 controlling on them. But it seems to me that the opposite
25 does not follow.

1 MR. DYM: I don't think so. Well, I don't think
2 it does. I don't think it does. I think the way the law
3 has developed that if the first decision is rendered by an
4 agency that applies a more stringent standard -- that is the
5 only factor that we are looking at -- that an agency with a
6 looser standard will apply collateral estoppel effect to the
7 first decision but not the other way around.

8 CHAIRMAN BLOCH: And you think our standard is
9 more stringent. You need to prove more for us.

10 MR. DYM: That is correct.

11 CHAIRMAN BLOCH: So if we were to conclude that
12 you're wrong on that, that Farley in fact is at least as
13 loose as the FERC, then we should apply the FERC decision,
14 assuming the other factors that you're going to argue to me
15 in a minute?

16 MR. DYM: If you conclude that, then you're
17 rejecting my argument on this issue.

18 CHAIRMAN BLOCH: I think I understand your
19 position. You may go to the next point.

20 MR. DYM: The next section is burden of proof.

21 CHAIRMAN BLOCH: Where's the burden of proof
22 here? Could you inform me on that?

23 MR. DYM: It is the burden of proof to show a
24 situation inconsistent with the antitrust laws is by my
25 colleague.

1 CHAIRMAN BLOCH: Your authority on that?

2 MR. DYM: We cited Southern California Edison.

3 And let me just add to that there's no question but that the
4 burden of proof in the FERC proceeding was on FPL. Indeed,
5 one looks to what the holding was of FERC. The holding was
6 that FPL had not sustained its burden of proof. That was
7 the holding.

8 CHAIRMAN BLOCH: Now, I need to see that citation
9 also. Is it possible that you can cite me to the version of
10 the opinion which appears in City's brief, since that is the
11 most convenient one to refer to?

12 MR. DYM: Yes.

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1 MR. DYM: If you look at page 315 of the version
2 that is in Cities briefs, 315 is on the bottom. There is a
3 first brief.

4 CHAIRMAN BLOCH: Okay. Please continue.

5 MR. DYM: If you look at the carryover paragraph
6 on the left-hand column, the last sentence, "In the instant
7 case, we find only" -- and I would emphasize the "only" --
8 "that FP&L has failed to carry its burden of
9 justification." The previous sentence says the Federal
10 Power Act accords the utility the right to propose such
11 limitations -- that is, service limitations -- and an
12 opportunity to demonstrate that its proposed change in
13 service is just and reasonable. And FERC decided that FP&L
14 did not carry its burden of justification. That is pretty
15 clear, I think.

16 And I think the law is also clear. And again we
17 refer to a Supreme Court case, on page 92 of our brief.

18 CHAIRMAN BLOCH: One second. That paragraph
19 begins or has a statement earlier -- and I am only thinking
20 aloud; I have not rejected your argument, let me make that
21 clear.

22 "The Commission wishes to emphasize that we are
23 not today holding the utility with market power is, per se,
24 precluded from amending a general tariff to impose
25 conditions which limit service availability. The Federal

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

6 The interpretation that suggests itself to me is
7 that assuming that FP&L has monopoly power, then it still
8 could prove that it could make this tariff change and it has
9 not carried the burden on that. But that does not suggest
10 that the finding on monopoly power itself was made because of
11 the burden of proof.

12 In other words, there is a two-stage finding
13 here. One is a discussion of monopoly power, and I do not
14 see from this one quote that that finding was based on
15 burden of proof. I see only the indication in this one
16 paragraph that the finding that follows next, the finding
17 that if you have monopoly power you have to sustain the
18 burden of proof on the reasonability of the tariff in light
19 of that, that that is where the burden of proof was used.

20 Was the burden of proof also used on the monopoly
21 power finding itself?

22 MR. DYM: Well, let me say the ultimate burden of
23 proof to establish the justness and reasonableness of FPL's
24 proposal was clearly on FPL. There is no question on that.

25 CHAIRMAN BLOCH: That's right.

1 MR. DYM: If what you are suggesting is that that
2 burden shifts back and forth during the course of the
3 proceeding depending upon what issue is being litigated, I
4 do not know of anything that would support that.

5 CHAIRMAN BLOCH: Well, I guess I am suggesting the
6 following: that a shift in the burden of proof could affect
7 the use of an opinion for collateral estoppel purposes,
8 particularly where a court indicates that it was the burden
9 of proof itself that made it determine the issues which are
10 trying to be estopped.

11 Now, I thought you were saying to me this
12 particular tribunal, the FERC, had indicated that on the
13 issue of monopolization they actually decided it because of
14 burden of proof. Now, we could say that automatically
15 whenever the burden of proof shifts, you can apply
16 collateral estoppel, and I take it you would have us do
17 that. But we could also apply a lesser principle, which
18 is: We will not apply it if the burden of proof has
19 shifted, and there is some indication in the initial opinion
20 that it mattered.

21 Now, I am saying that the language of the court
22 here suggests it did matter to them, the burden of proof,
23 but maybe not on the issue of whether or not there was
24 monopolization. As I recall, there is other language in
25 here that is fairly strong on monopolization, comparing the

1 documentary evidence to the oral evidence.

2 MR. DYM: That's correct.

3 CHAIRMAN BLOCH: And that part reads to me as if
4 there was more conclusiveness in FERC's opinion about that
5 issue than mere weight of evidence as appears to have
6 occurred in its mind about the validity of the tariff that
7 was proposed.

8 MR. DYM: I do not find the distinction that you
9 suggest reflected in Opinion Number 57. What I do find is
10 the ultimate holding, the ultimate holding in the case, was
11 specifically based on failure to sustain a burden of proof.

12 Now, if you needed evidence that burden of proof
13 made a difference, it seems to me that's it. When the
14 holding says the reason we are deciding against FP&L is
15 because we are not satisfied that FP&L sustained its burden
16 of proof. That is what that language says. I do not think
17 it is subject to any other interpretation, especially with
18 the word "only" in there. I hate to put all my eggs in that
19 one basket, but it is important.

20 FERC is saying, "This is the reason we decided,
21 this is what we decided, and this is the reason we decided.
22 And our holding is that FP&L did not sustain its burden of
23 proof."

24 Now, if that is accepted, if that reading of
25 Opinion Number 57 is accepted, then I submit that the law is

1 clear that collateral estoppel effect cannot be given to
2 Opinion Number 57, because of well-established law that when
3 there is a shift in the burden of proof, collateral estoppel
4 effect does not apply.

5 CHAIRMAN BLOCH: Okay, now, let us just wait for a
6 second again, and show me where you could -- I am sure that
7 since you have said it is true that it must be true. But
8 where in Midland or in -- where do you find the citation?

9 MR. DYM: Oh, I am sorry. Well --

10 CHAIRMAN BLOCH: No, no, I am sorry. On the
11 burden of proof in our proceeding. The separate print that
12 you raised earlier.

13 MR. DYM: Well, on page 91 of our brief, we cite
14 to Davis Besse and Midland. I do not have the -- okay, I
15 see you do have the opinions there.

16 CHAIRMAN BLOCH: I thought I had Davis Besse with
17 me. I thought I had a yellow book with Davis Besse in it.

18 MR. DYM: Judge Bloch, not the Appeal Board
19 decision. I am referring to the Licensing --

20 CHAIRMAN BLOCH: Whichever one you are referring
21 to.

22 MR. DYM: The Licensing Board decisions are the
23 ones that I cited to.

24 CHAIRMAN BLOCH: I see. Refresh my mind on what
25 the language was involved in the Licensing Board opinion.

1 And then, if you would, since it is a Licensing Board
2 opinion and in both cases there were appeals, you might
3 comment on what the effect of the appeal was on this
4 particular portion.

5 MR. DYM: There was no discussion of which I am
6 aware in the Appeal Board decisions that cast any doubt on
7 the conclusions of the Licensing Board that I cited.

8 CHAIRMAN BLOCH: I take it they also did not
9 affirm it?

10 MR. DYM: I think --

11 CHAIRMAN BLOCH: It did not cast any light at
12 all? Right? No discussion?

13 MR. DYM: There was no discussion.

14 JUDGE DUGGAN: I have one question about the
15 grammar in there, one little question on the grammar. YOU
16 said the shift in the burden of proof. That really is not
17 correctly stating it. What you really mean to say is that
18 there is one burden of proof in Opinion 57 and you contend
19 that there is a different burden of proof in our
20 proceedings; is that correct?

21 MR. DYM: No. It is more than a shift in the
22 burden of proof. It is a complete reversal of the burden of
23 proof. We had, FPL, had the burden of proof in Opinion
24 Number 57.

25 JUDGE DUGGAN: Your contention is that you do not

1 have this burden of proof here?

2 MR. DYM: Yes.

3 JUDGE DUGGAN: Just bear with me on the little bit
4 of ignorance coming in here. When the Applicant files for a
5 license then goes to the Justice Department, among other
6 people, the Justice Department then files a report. If the
7 Attorney General report is such that it is unfavorable
8 because of antitrust considerations, then there must be a
9 hearing. Who has the burden at that point?

10 MR. DYM: I think that whoever tries to establish
11 a situation inconsistent. You know, you recognize that is
12 not the situation here. But even in that case --

13 JUDGE DUGGAN: I am just thinking now, would you
14 not have the burden of establishing that licensing of the
15 reactor would be consistent with the antitrust laws?

16 MR. DYM: I do not think it would, not the way the
17 statute reads.

18 JUDGE DUGGAN: That is something we could check
19 out.

20 CHAIRMAN BLOCH: I know the page in Davis Besse.
21 I would like an opportunity, if we could just take about a
22 ten-minute recess right now?

23 (Brief recess.)

24 CHAIRMAN BLOCH: The Board has now read the
25 sections provided to us by the parties. The burden of proof

1 in the previous Licensing Board opinions in Davis Besse and
2 Midland. I am interested in knowing, since the regulation
3 applies to who is the proponent of the order, I am curious
4 to know what order is being sought here. Are we issuing an
5 order at the end of this proceeding that the Director of
6 Nuclear Regulation may issue a license without regard to
7 concerns about the antitrust laws or with certain conditions
8 attached, or are we issuing an antitrust order at the end of
9 this proceeding?

10 It seems to me that the way the regulation is
11 worded, the nature of the order we are being asked to issue
12 may be determinative of who has the burden of proof. And I
13 do not see a direct address of that in the previous
14 Licensing Board panel decisions.

15 MR. DYM: Well, I think the answer to that is to
16 the extent the Cities are asking you to make a finding of a
17 situation inconsistent with the antitrust laws. That is
18 clearly what they are doing. Had they not intervened in the
19 proceeding and asserted that contention, there would have
20 been -- I assume there would have been -- unconditional
21 license.

22 CHAIRMAN BLOCH: And there would have been no
23 finding by this Board. And that is also true in a safety
24 portion of a proceeding, and in the safety portion what
25 happens is that after the contentions -- excuse me -- in an

1 operating license it would be; not in a construction -- but
2 in an operating license, once the intervenors have come in,
3 the burden of proof still rests on the Applicant because the
4 order being sought is a directive to the Director of Nuclear
5 Regulation that he may issue a license with conditions
6 attached or without conditions.

7 Now, my question is: Is there any difference
8 between the order we issue in this kind of proceeding and
9 the order we issue in the safety portion of a construction
10 license proceeding, or are they the same? Are we really
11 issuing the same kind of authorization to the Director of
12 Nuclear Regulation, or is it a different kind of order?

13 Now, there must be some precedent on what orders
14 have been issued.

15 MR. DYM: I am not an expert on NRC procedure.
16 May Mr. Bouknight address the Board on that?

17 CHAIRMAN BLOCH: Please.

18 MR. BOUKNIGHT: Judge Bloch, I think that the
19 difference is: In the case of an operating license in a
20 health-and-safety proceeding, there are findings that have
21 to be made by the Commission before the license can be
22 issued. The Commission has delegated the power to make
23 those findings to the Director of Nuclear Reactor Regulation
24 except where there is a request for a hearing.

25 And then the Licensing Board takes over with

1 respect to those issues. And when it issues its decision,
2 then the Director is free to go ahead and make any
3 additional findings he needs to make and to issue the
4 license.

5 With respect to the antitrust proceeding, there is
6 precedent by implication in several cases, where when
7 settlements have occurred during the midst of an antitrust
8 proceeding that have involved all the parties, then the
9 Board has simply issued an order stopping the proceeding.
10 They have not made any findings or attempted to issue any
11 directives to the Director of Nuclear Reactor Regulation.

12 CHAIRMAN BLOCH: Well, what about when the orders
13 -- excuse me, but there is one other part to that: What
14 about when the cases are not withdrawn, what kind of order
15 is issued at that point?

16 MR. BOUKNIGHT: Well, when the cases are not
17 withdrawn, the only kinds of order that I have -- I do not
18 recall whether there has been any effort to direct the
19 Director of Nuclear Reactor Regulation; I do not think there
20 has in any of these decisions that have run their course.

21 CHAIRMAN BLOCH: You think it is merely an order
22 on whether or not the antitrust charges that were raised by
23 intervenors were valid? Because if that is the nature of
24 the order, then it seems to me that you may be correct that
25 the proponent of the order are the intervenors. But if the

1 nature of the order was in the nature of a directive to the
2 Director of Nuclear Regulation, it seems to me that at least
3 technically on the rules that it is possible that the other
4 action of our brothers on the appeal panel could be wrong.

5 MR. BOUKNIGHT: Well, I think that the former is
6 the case. And the occasions on which -- I know that I have
7 had to work my way through this wrangle on at least one
8 occasion, and I am trying to remember what it was.

9 Well, I remember when the Cities first filed in
10 this proceeding, requesting approval of their late petition,
11 that they suggested that it was necessary for some finding
12 to be made before the construction permit could issue. And
13 this Licensing Board held the contrary. They granted the
14 late petition, but they did so on grounds of 2.714 rather
15 than on any ground that a finding was necessary, and that
16 therefore a hearing would be held.

17 CHAIRMAN BLOCH: Okay. So that certainly in this
18 proceeding, where the construction permit has issued, and
19 this is a proceeding in the construction phase of the
20 licensing process, we could not authorize the issuance of
21 the construction permit --

22 MR. BOUKNIGHT: That's correct.

23 CHAIRMAN BLOCH: -- we would have to make a direct
24 finding on the antitrust laws and the burden has shifted.

25 MR. BOUKNIGHT: Yes, sir.

1 JUDGE LAZO: But, Mr. Bouknight, would we not then
2 want to design some conditions that would be attached to the
3 construction permit even though the construction permit has
4 already issued?

5 MR. BOUKNIGHT: You could do that, Judge Lazo, but
6 at that point the proponent of an order requesting that that
7 be done is clearly the Cities'. The company has a
8 construction permit. That construction permit has been
9 issued subject to the action that this Board may later
10 take. But what this proceeding is about is that the Cities
11 are requesting that you apply some conditions to that, and
12 they are the proponent of that order as I see it.

13 CHAIRMAN BLOCH: Is this, incidentally, an
14 unintended procedural corollary of the fact that they
15 decided to permit the construction permit to issue in the
16 first place? If it had not issued --

17 MR. BOUKNIGHT: I do not think so. What this
18 comes out of is the idea that affirmative findings are not
19 required by anybody within the Commission on antitrust
20 issues before a license may issue. I think that is the
21 grounding of those Licensing Boards' views and my view that
22 this is different from the health and safety side.

23 CHAIRMAN BLOCH: And that is true even after the
24 Justice Department has filed its statement that there are
25 antitrust problems, there still may not be any reason for

1 affirmative findings?

2 MR. BOUKNIGHT: That's right. Not for affirmative
3 findings. There has to be a hearing, says the legislative
4 history on what the Department of Justice has said. But
5 when the Department pulls out, as they did ultimately in the
6 Duke case, and then the intervenors pulled out in the Duke
7 case, then that Licensing Board -- and in the Georgia case,
8 the same thing happened. Both of those Licensing Boards
9 concluded that they did not have to make any findings in
10 order for everybody to go home.

11 CHAIRMAN BLOCH: Now may we have Mr. Dym back,
12 please.

13 MR. DYM: Yes, sir. May I have a moment, please?

14 (Pause.)

15 MR. DYM: Let me add one thing to what Mr.
16 Bouknight said, and that is, in the posture we find
17 ourselves now, we are not seeking anything from the Board.
18 We have a construction permit to which conditions have
19 attached. We are perfectly satisfied with those. So we are
20 not affirmatively here asking the Board to do anything for
21 us. The Cities are asking the Board to do something for
22 them.

23 JUDGE DUGGAN: Those conditions were not reached
24 with Cities, though; were they?

25 MR. DYM: No, they are not. They were not.

1 JUDGE DUGGAN: So that is partial conditions until
2 such time as we see whether any more are needed?

3 MR. DYM: That's correct. But we are saying that
4 we see no need for any more. We are perfectly satisfied
5 with the situation as it exists now. It is the Cities who
6 are dissatisfied, and they are pressing the Board to do
7 something further. We are not.

8 CHAIRMAN BLOCH: I take it, incidentally, that
9 that also would apply if Cities wanted the operation of the
10 reactor to be held up; they would have to have us issue an
11 affirmative order to that effect, wouldn't they?

12 MR. DYM: I am not sure that I -- well, I am not
13 sure I know what the situation is with respect to an
14 operating license.

15 CHAIRMAN BLOCH: I was just trying -- no, this is
16 a construction proceeding.

17 MR. DYM: Right.

18 CHAIRMAN BLOCH: And I was just trying to follow
19 through the logic of what you were saying. That is, if we
20 do nothing, you said, the reactor just opens.

21 MR. DYM: I think so.

22 MR. BOUKNIGHT: The question of whether the
23 license can be issued while this proceeding is pending is, I
24 think, a question that is up to the Director, at least
25 directly. And the question is: Will he wait? Will he feel

1 that he must wait in light of the statute, because this
2 proceeding is still going on?

3 CHAIRMAN BLOCH: This gets a little circular. It
4 sounds like the same issue I thought we just finished
5 discussing.

6 MR. DYM: It does get a little circular.

7 CHAIRMAN BLOCH: So then he may need an order from
8 us that he can issue the operating license.

9 MR. BOUKNIGHT: He may conclude that he needs an
10 order from you saying that this -- that he needs evidence
11 that this proceeding has been terminated. That could be an
12 order from you simply saying, "Now that all the parties have
13 withdrawn, the case is terminated."

14 CHAIRMAN BLOCH: All right, now, really I am
15 confused about who is seeking an order.

16 (Laughter.)

17 MR. BOUKNIGHT: We are not seeking an order. We
18 are seeking from the --

19 CHAIRMAN BLOCH: You may be. You may seek an
20 order from us to the Director that he may issue the license.

21 MR. BOUKNIGHT: No, sir, we will never seek that.
22 We will seek from you --

23 CHAIRMAN BLOCH: A memorandum that "he may."

24 (Laughter.)

25 MR. BOUKNIGHT: We were careful in what we did ask

1 you about, because we tried to think that question through.
2 We think that the most that we could ask of this Board is an
3 order estopping these Cities from objecting to that kind of
4 an action in which event we believe the Director would issue
5 the operating license just as he issued the construction
6 permit. The same circumstances.

7 CHAIRMAN BLOCH: And in the estoppel motion you
8 would have a burden.

9 MR. BOUKNIGHT: On the estoppel motion we are
10 definitely the mover.

11 MR. DYM: I do not think there is any reasonable
12 dispute on the proposition that the Cities have the burden
13 of proof on the issue of inconsistency with the antitrust
14 laws. The converse of that issue was the issue that FERC
15 looked at, and in that proceeding FP&L had the burden of
16 proof. And what we submit is under controlling law that
17 shift precludes collateral estoppel effect in Opinion 57.

18 CHAIRMAN BLOCH: Okay. Now, I have one other
19 question which is related to this issue. Before I let you
20 conclude your way, I am concerned that in the Parson &
21 Wittimor. portion of this proceeding you persuaded us to do
22 something which I thought was correct; that is, you
23 persuaded us that in the PURPA area the FERC really was a
24 better authority than we are to decide antitrust issues.
25 And I wonder whether I was not at the same time persuaded

1 that when it comes to utility rates and regulation that
2 their knowledge of Florida Power & Light over the years,
3 particularly the Staff's knowledge of Florida Power & Light,
4 does not make it also smarter for us to say that no matter
5 how long we take at this, even if we take many more months
6 than they did hearing the same issues, that their wisdom is
7 greater than ours.

8 MR. DYM: Well, I do not think that was our
9 position in the Parson & Wittimore situation. I think we
10 did say that PURPA issues which were matters of first --

11 CHAIRMAN BLOCH: Antitrust issues related to PURPA
12 issues.

13 MR. DYM: I do not --

14 CHAIRMAN BLOCH: Because they were asserting that
15 there was a situation inconsistent with the antitrust laws.
16 That was the only thing they could assert here. They were a
17 little confused and at sometimes said some things about
18 direct PURPA issues. But I think the only thing the Board
19 was interested in, as indicated by the order, was the
20 inconsistent with the antitrust laws allegations. And I
21 think you persuaded us that on those we should consider FERC
22 to be a better authority than we are on those antitrust
23 issues.

24 MR. DYM: I thought the situation was that the
25 antitrust issues did not arise unless Parsons & Wittimore

1 was able to establish its status under PURPA. And it is on
2 that issue that we urge that FERC be deferred to.

3 CHAIRMAN BLOCH: I think we went beyond that and
4 addressed directly this other issue of the situation
5 inconsistent in relationship to PURPA and the desirability
6 of FERC deciding that because it would so greatly affect the
7 substance of the way PURPA was administered.

8 It was the relationship of the antitrust laws to
9 PURPA, just as this is the relationship of the antitrust
10 laws to the entire scheme of regulation of utilities. And
11 really only a portion of it is the relationship -- a lot of
12 the issues being raised here are related to that rather than
13 just the effect of this new nuclear plant.

14 MR. DYM: Well, if you are pressing me to
15 acknowledge that FERC has more expertise than this Board
16 does on antitrust issues --

17 CHAIRMAN BLOCH: No, not on antitrust issues, but
18 on antitrust issues related to power companies and their
19 rates and wheeling and all of those issues which are the
20 daily bread of the FERC. I mean that is what they do
21 everyday. We do it as a sidelight.

22 MR. DYM: I understand that. But I think what we
23 are entitled to, no matter whether it is a sidelight or the
24 principal part of your occupation, to have a fair shot at
25 litigating those issues before you. And what I am trying to

1 urge is that, for a number of reasons including the lack of
2 a fair opportunity to litigate before FEPC, which I will
3 come to, but the FEPC decision, whatever their expertise
4 vis-a-vis this Board may be, is simply not entitled to
5 collateral estoppel effect.

6 CHAIRMAN BLOCH: Incidentally, do you have any
7 case in which the sole reason for refusing to apply
8 collateral estoppel was based on a shift in the burden of
9 proof?

10 MR. DYM: On page 92 of our brief, the first cases
11 stand for the proposition that it is well established that
12 where the first case, the criminal case --

13 CHAIRMAN BLOCH: No, that's not the question I
14 asked.

15 MR. DYM: Well, if you look at the case of Young &
16 Company versus Shea, down at the bottom of the page, the
17 civil case, and the holding of the case is stated in the
18 description of it.

19 CHAIRMAN BLOCH: No, that's not a shift in the
20 burden of proof. It's a change in the standard of the
21 burden of proof.

22 MR. DYM: Well, I would suggest that we have an a
23 fortiori case. What I am saying is that the Longshoremen
24 had the burden of proof in both proceedings. He had a
25 heavier burden in the civil case. And the court said that

1 does not preclude him from instituting an administrative
2 case. So merely a difference in the degree of burden of
3 proof precludes collateral estoppel. Here we have a
4 complete 180-degree shift.

5 CHAIRMAN BLOCH: Okay. Now, do we have any cases
6 on the complete 180-degree shift that do not involve a
7 change in the standard of proof?

8 MR. DYM: As I stand here, I just do not know. I
9 think we have --

10 CHAIRMAN BLOCH: I would appreciate it from either
11 party a filing if they find a case that answers that direct
12 question, whether there should be collateral estoppel when
13 the only difference is a change in the direction of the
14 burden of proof as opposed to the standard. I mean one
15 reason it concerns me is because so far I have decided many
16 cases. It has not been a lot of years, but I have been in a
17 couple of agencies. I have never felt that the sole
18 determinative factor was burden of proof. And I would feel
19 more comfortable if I had a judge who had faced those kinds
20 of issues say that is enough of an issue to sway me as to
21 whether or not to apply collateral estoppel.

22 MR. DYM: Or not to apply it.

23 CHAIRMAN BLOCH: To apply it or not to apply it.

24 MR. DYM: Yes. Well, I will try to find that
25 case, but I am suggesting that analytically this is a --

1 CHAIRMAN BLOCH: I see the possibility --

2 MR. DYM: -- this is a stronger case than the
3 typical one that arises between criminal and civil cases
4 where the Government loses a criminal case and it has got a
5 substantial -- a heavier burden of proof, then is permitted
6 to proceed civilly because its burden of proof is less.
7 Now, those cases would stand for the proposition that if our
8 burden of proof, if we had a burden of proof here and it
9 were less than our burden of proof before FEPC, collateral
10 estoppel could not be applied.

11 A fortiori, where we have no burden of proof here,
12 collateral estoppel can be applied. I will try to find a
13 case, but I think analytically that is correct.

14 CHAIRMAN BLOCH: All right. I guess what I am
15 saying is that there could be a greater difference between a
16 shift from a criminal to a civil standard or a shift from a
17 tort standard to the agency standard could be a greater
18 difference than the shift on who has the burden, the
19 ultimate burden of proof, not the burden of going forward,
20 but the ultimate burden of proof, because the only time the
21 ultimate burden matters is when there is an exact equipois
22 of the evidence.

23 MR. DYM: Well, I think we are dealing here with
24 both aspects of the burden of proof in the sense that the
25 burden of going forward was before FP&L and FERC, and it

1 simply did nothing, it could not get anything. And
2 according to FERC the burden of persuasion was on FP&L.
3 Here I suggest that both burdens are on the Cities. So it
4 does not -- I will try to respond to your inquiry and see if
5 I can find a case that deals with the shift.

6 But what I am suggesting is that I think the
7 principle applies a fortiori from the cases that we have
8 cited.

9 CHAIRMAN BLOCH: I understand the argument. Now,
10 would you like to proceed?

11 MR. DYM: The third reason that we think Opinion
12 Number 57 should not be given collateral estoppel effect in
13 this proceeding is because FP&L did not have a full and fair
14 opportunity to litigate before FERC in Opinion Number 57.
15 Again, I do not think there is any dispute as to the
16 standard that applies. In a sense, I think even Cities
17 would acknowledge that under controlling law there has to be
18 a finding that we did have a full and fair opportunity to
19 litigate in order for collateral estoppel to apply.

20 So the question really is, looking at the
21 circumstances of Opinion Number 57, did FP&L have a full and
22 fair opportunity to litigate the antitrust or
23 anticompetitive issues that the Cities are advancing in this
24 proceeding?

25 JUDGE DUGGAN: Did you object to that finding in

1 that particular hearing on the basis that you had not had a
2 full and fair hearing?

3 MR. DYM: I think Mr. Bouknight explained that we
4 did take an appeal from the FERC decision.

5 CHAIRMAN BLOCH: Was that a ground you filed with
6 the Commission for reconsideration?

7 MR. DYM: We did apply to the Commission for
8 reconsideration, indicated in that petition that we were
9 prepared to accept the conclusion of serving the smaller
10 utilities within our service area.

11 And we expressed some concern about other things,
12 and FERC said, "Come back to us later with a specific
13 proposal." But even with that, we did take an appeal
14 following the negotiations with the Department of Justice
15 where FP&L agreed to assume the obligations that were
16 imposed upon it. That appeal was dropped.

17 CHAIRMAN BLOCH: Was it in 57(a) that they
18 indicated there were some 20 to 30 other dockets pending in
19 which they were suggesting that there be more rapid progress
20 as a result of the 57?

21 MR. DYM: I do not have that in front of me. I
22 just do not remember.

23 CHAIRMAN BLOCH: Well, maybe Mr. Jablon can
24 comment on that when it is his turn.

25 JUDGE DUGGAN: Just to be very precise on it, you

1 did not appeal on the basis that you had not had a fair
2 hearing; did you?

3 MR. DYM: Well, what I am saying is I do not think
4 we ever filed a brief. What I am saying is that the
5 proceeding was obviated. I mean the merits of the
6 proceeding was obviated by reason of the settlement with the
7 Department of Justice.

8 JUDGE DUGGAN: So there was no appeal taken?

9 MR. DYM: An appeal was taken. It was dropped.

10 JUDGE DUGGAN: Okay. And in that appeal did you
11 appeal on the basis that the time constraints had obviated a
12 fair and full hearing?

13 CHAIRMAN BLOCH: You had not gotten to that point?

14 MR. DYM: It had not gotten to that stage.

15 CHAIRMAN BLOCH: You noticed the appeal, but did
16 not brief it?

17 MR. DYM: I think that is correct. That is
18 correct.

19 JUDGE DUGGAN: Could I ask you one more question?
20 This is going back just a little bit, but under the civil
21 side in regular antitrust cases, we have a case where the
22 Government wins a suit -- and I use "win" directly -- and
23 then a private party brings in a suit also. And the public
24 policy is that the statute of limitations be tolled until a
25 year after the Government proceeding. And this is U.S.

1 Department. Then in the civil suit public policy is that
2 the private litigant is not required to reprove the
3 antitrust crime that occurred. It may be used as prima
4 facie.

5 MR. DYM: That's correct.

6 JUDGE DUGGAN: Which again gives the defendant the
7 opportunity of rebutting it. And I have researched it a
8 little bit, and I have never found an instance where that
9 occurred. Do you see any parallels between the public
10 policy in the prima facie case and the public policy in
11 tolling the statute of limitations that might be applicable
12 here?

13 MR. DYM: I do not, in this sense: First of all,
14 I do not think that it is accurate to characterize the
15 tolling of the statute and the prima facie effect as public
16 policy here. There are statutory provisions that lay out --

17 JUDGE DUGGAN: Did not Congress put those in there
18 for a certain purpose?

19 MR. DYM: Oh, yes.

20 JUDGE DUGGAN: Okay.

21 MR. DYM: But they are statutory provisions that
22 say that in the case of prima facie effect that a private
23 litigant can take advantage by use of prima --

24 JUDGE DUGGAN: Which has been true since the
25 statute ran.

1 MR. DYM: I think that's right. Two things:
2 First of all, the Cities here are asking for more than that;
3 they are asking that we be absolutely precluded. And
4 secondly, absent that statute, I am not aware of any other
5 situation where prima facie effect is accorded in that way.

6 JUDGE DUGGAN: I was suggesting those. Again, I
7 do not know of other statutes myself, but there is clear
8 indication of the congressional intent in this antitrust
9 area.

10 MR. DYM: Well, there is clear indication of
11 congressional intent for a private action that follows a
12 Government action. I am not sure we have that situation.

13 JUDGE DUGGAN: We do have private litigants
14 following the exodus of the Government and the Staff.

15 MR. DYM: That is true, but we do not have a
16 finding made against FP&L in a case brought by the
17 Government.

18 JUDGE DUGGAN: We do have findings brought in
19 other courts.

20 MR. DYM: By a private litigant. And I am
21 suggesting that had the other Cities wanted to file their
22 own lawsuit following the Gainesville case, that Gainesville
23 decision would not have been accorded prima facie effect,
24 because it is simply not covered by the statute to which you
25 refer, because the Gainesville case was a case brought by a

1 private litigant, not by the Government.

2 JUDGE DUGGAN: In other words, other litigants had
3 no real urgency to file a case; did they?

4 MR. DYM: No. I am suggesting that they had -- I
5 am not sure what you mean by "no urgency."

6 JUDGE DUGGAN: Okay. You --

7 MR. DYM: They were free not to file.

8 JUDGE DUGGAN: -- you mentioned that it would not
9 be prima facie, and, therefore, they did not have to file at
10 that point in time and they could have waited until later
11 like they did in this situation.

12 MR. DYM: Sure, they could have waited later, but
13 the question is: What effect does that waiting have on this
14 proceeding? That is the question to which I tried to
15 address myself. And that is the issue. Clearly, they could
16 have waited. They clearly did wait. But the issue is what
17 is the legal significance of that waiting?

18 JUDGE DUGGAN: I thought you were arguing that
19 they were precluded from using this doctrine because they
20 waited. And you just got done saying --

21 MR. DYM: That is exactly what my argument is,
22 that they are precluded --

23 JUDGE DUGGAN: And you just got done saying that
24 they could have at any time.

25 MR. DYM: I am saying they could have filed a

1 lawsuit at any time. What I saying that is the fact that
2 they waited bars them from having collateral estoppel effect
3 given to the Gainesville case in this proceeding and bars
4 them from having prima facie effect given to them in this
5 case in this proceeding.

6 JUDGE DUGGAN: That is your argument.

7 MR. DYM: They can litigate to the fullest extent
8 that they want, but they should litigate.

9 JUDGE DUGGAN: And if they are not able to use the
10 collateral estoppel doctrine, then what judicial economy is
11 served by having them relitigating old matters?

12 MR. DYM: What judicial economy is served?

13 JUDGE DUGGAN: Yes.

14 MR. DYM: I am not sure that any judicial --

15 JUDGE DUGGAN: One of the arguments for collateral
16 estoppel is to enable a certain judicial economy to occur.

17 MR. DYM: Considerations of judicial economy
18 played a role in the Supreme Court's determination of what
19 the standard should be. And hat the Supreme Court said is
20 in order to induce plaintiffs to join together and not to
21 let one of them go ahead with the others sitting back and
22 bringing their own lawsuits if that one loses, collateral
23 estoppel effect should not be accorded in that situation.
24 That is the reason for the Supreme Court's stated standard.
25 And what I have tried to suggest is that that standard and

1 that reason applies in this case.

2 JUDGE DUGGAN: Is that not in a different
3 situation where the subsequent litigants want to reintroduce
4 the evidence?

5 MR. DYM: No. I think it is precisely the same
6 situation.

7 CHAIRMAN BLOCH: Continue.

8 MR. DYM: Now, on the question of opportunity to
9 litigate, there are really two facets to it, and both derive
10 from the schedule that was imposed by FERC. FERC entered an
11 order in December of '77 saying they wanted to have that
12 proceeding terminated in five months. And that meant that
13 during that five-month period there was supposed to be
14 discovery, an evidentiary hearing, proposed findings,
15 exceptions, and a decision by FERC, for a case that FERC
16 described as one raising section 2 issues.

17 It turned out that all of the events that I
18 mentioned except the FERC decision in fact took place during
19 those five months.

20 JUDGE DUGGAN: Did you object to that schedule?

21 MR. DYM: Did we object to the schedule?

22 JUDGE DUGGAN: Yes, the five-month deadline.

23 MR. DYM: There was nothing we could do about it.
24 I am not sure there was anything we could do about it. FERC
25 entered an order in December saying this is the schedule.

1 CHAIRMAN BLOCH: You could not have filed a motion
2 before FERC saying you were being deprived of due process?

3 MR. DYM: I guess we could have. I do not think
4 we did.

5 CHAIRMAN BLOCH: Did you make such a motion before
6 the administrative law judge?

7 MR. DYM: I do not think we did. I am not the one
8 who handled that case, and neither is Mr. Bouknight. I can
9 try to ascertain specific answers to those questions, and I
10 will do so.

11 JUDGE DUGGAN: It is kind of central to your
12 argument right now; is it not?

13 MR. DYM: No, I do not think it is. Whatever FP&L
14 did or did not do to try to relieve itself of the time
15 constraints, the fact is that those time constraints
16 existed. As a result of those time constraints, evidence
17 was admitted that should not have been admitted, and there
18 was not an opportunity for FP&L to engage in discovery and
19 to put on an adequate case.

20 Now, on the question of admissibility, what
21 happened during the hearing, which began 2-1/2 months after
22 the order was entered, we have quoted in our brief at page
23 96 some of the evidentiary rulings of the administrative law
24 judge, in which he says, in essence, "I do not know what
25 this document is. I do not know what it means. We should

1 have someone in to identify it. But I am going to let it in
2 anyway because we do not have time to subpoena a witness."

3 Now, was that a fair opportunity to litigate?

4 CHAIRMAN BLOCH: Did he rely on it? I mean there
5 are many times in administrative proceedings where a judge
6 allows something in because he would rather not have to rule
7 on it. The record gets very large. That does not mean you
8 are necessarily prejudi-

9 MR. DYM: FERC did. The administrative law judge
10 did.

11 CHAIRMAN BLOCH: That particular document?

12 MR. DYM: I cannot represent that this particular
13 document -- well, there are a number of documents that I am
14 referring to here. I do know that what we were talking
15 about were documents that were introduced through the Cities
16 expert witness, Mr. Bathen.

17 CHAIRMAN BLOCH: I mean is it not ordinarily the
18 rule in an administrative case that error would exist from
19 the admission of a document if it was relied on, not just
20 the admission of it into the record when a judge is hearing
21 the case? I mean the rules were developed to shield juries;
22 were they not? I would not have thought that the admission
23 of a document under the statement by the ALJ that he did not
24 even know who wrote it would suggest to you that he was
25 going to give much weight to it.

1 MR. DYM: But FERC relied on the testimony of
2 Bathen and the exhibits that came in that way.

3 CHAIRMAN BLOCH: And you are saying you cannot
4 tell from the opinion whether FERC relied on documents which
5 were not properly attributed?

6 MR. DYM: I guess what I am suggesting at this
7 point is that what the administrative law judge had to say
8 and what we quoted in our brief is illustrative of the
9 problem that was faced by FP&L in that proceeding as a
10 result of the time constraints.

11 JUDGE DUGGAN: Is this any different from an
12 ordinary trial with a civil judge without a jury?

13 MR. DYM: It certainly is. I do not think that --

14 JUDGE DUGGAN: I would have to disagree with you,
15 because I have been an expert in a few of those, and the
16 judge generally says, "I do not know what it is worth. I
17 will let it in and we will determine the weight later."
18 This is normal procedure.

19 MR. DYM: Some judges do that, and some judges do
20 not. I do not think it is normal procedure to, in a case
21 without a jury, for an administrative law judge to say,
22 "Well, let us put everything in and we will worry about it
23 later."

24 CHAIRMAN BLOCH: Because you rely very heavily on
25 what the administrative law judge had to say about his

1 record, and it was based on his feelings about that record
2 that he refused to make antitrust findings.

3 MR. DYM: That's correct.

4 CHAIRMAN BLOCH: I take it the Commission felt
5 quite differently about the same record.

6 MR. DYM: I am not sure that that is true. When
7 you look at what -- sure, the Commission had a long -- it
8 was a long opinion; they said a lot of things. But there
9 were some disclaimers right at the beginning of that opinion
10 which I think reflected a recognition of the fact that the
11 way the proceeding was handled did not really permit an
12 analysis of -- well, did not permit a determination as to
13 whether violations of law occurred. They said that.

14 Now, I am also struck by the fact that the
15 Commission went out of its way to say -- let me just quote
16 this. They say that -- and this is at page 315 again --
17 "The fairly elaborate account of FP&L's past conduct in its
18 marketplace is not intended by this Commission to be a
19 determination of factual disputes which may be the subject
20 of litigation in other forums."

21 Now, why would they have said that? What they
22 were saying is, "Look, we have made some factual findings.
23 Those factual issues may arise in some other forums, but
24 there really should be a trial de novo on those issues."
25 And I think the reason they said it, although I mean I have

1 not cross examined or examined the Commission, but the only
2 explanation that suggests itself is that the Commission
3 itself recognized that the time constraints that they
4 imposed on FP&L really would have made it unfair for FP&L to
5 be bound by the --

6 CHAIRMAN BLOCH: Particularly, they say, in a
7 treble-damage action or something of that sort. But they
8 were willing to allow you to be bound in the entire rate
9 regulation docket; were they not?

10 MR. DYM: Well, we were bound for --

11 CHAIRMAN BLOCH: It was only the other forums that
12 they were concerned about. You were bound by them and you
13 accepted it.

14 MR. DYM: We accepted the substance of the order
15 that was directed to us. But we did not think -- they used
16 the language that they do not intend -- that the Commission
17 does not intend its factual determination to be the
18 determination of factual disputes which may be the subject
19 of litigation in other forums. Now, this is another forum.

20 CHAIRMAN BLOCH: Of course, the reason that
21 something like that gets stuck in is that the person writing
22 it, the Office of Opinions and Review, knows that there are
23 five Commissioners, and he wants to attract an extra vote if
24 he can. Right? I mean it is very hard to know what to make
25 of a statement of that kind; is it not?

1 MR. DYM: Well, it seems to me it is significant
2 that the very body whose opinion the Cities are trying to
3 hang around FP&L's neck said, "We do not have that
4 intention." It does seem to me to be significant, no matter
5 what the reason for putting that in there. It is in there.
6 And what the Commission said is, in effect, "If the issues
7 that we have resolved arise in other forums, they should be
8 determined on a de novo basis." And I suggest that one
9 reason for that certainly is the fact that the proceedings
10 that led to Opinion Number 57 were held in such a fashion as
11 to preclude FP&L from having a fair shot at those issues.

12 CHAIRMAN BLOCH: But it is strange, because the
13 impact on FP&L probably amounted to millions of dollars just
14 because it is binding on FERC. And they are saying, "Look,
15 we are willing to take millions of dollars away from the
16 company, but we do not want it to be binding elsewhere."
17 And that is just a strange kind of judicial decision.

18 MR. DYM: Well, I think it is strange, except when
19 one takes into account the fact, as I say, that the opinion
20 itself followed what was by any standard an extraordinarily
21 short time to --

22 CHAIRMAN BLOCH: Was not part of the reason that
23 that was possible is that the Staff in particular had
24 extensive knowledge of Florida Power & Light and filed
25 extremely extensive documents that were not just gotten in

1 the course of that proceeding'

2 MR. DYM: But there had been prior discovery
3 against Florida Power & Light; that is correct. The
4 question is what --

5 CHAIRMAN BLOCH: And Florida Power & Light had had
6 no opportunities to obtain information in its defense from
7 prior proceedings?

8 MR. DYM: Not to the same extent, certainly.

9 CHAIRMAN BLOCH: But they had some opportunities?
10 Not enough to satisfy themselves now?

11 MR. DYM: Clearly not. I mean --

12 CHAIRMAN BLOCH: What other proceedings were there
13 from which evidence was presented --

14 MR. DYM: Well, there was the Vero Beach
15 proceeding before FERC. I think that is the only one I am
16 -- I guess there was another proceeding before FERC --

17 CHAIRMAN BLOCH: Not just before FERC. Was there
18 any court litigation in which you had obtained documents
19 that were then presented before FERC?

20 MR. DYM: I do not believe so. I do not believe
21 so. I think the only court litigation I am aware of would
22 have been the Gainesville case itself.

23 CHAIRMAN BLOCH: Okay. And this proceeding --

24 MR. DYM: And the Miami --

25 MR. DYM: That was filed -- that was filed by the

1 Cities afterwards. But the Miami case is -- that is --
2 that is a section 2 case brought by Cities both inside and
3 outside FP&L service area. We have been engaged in
4 extensive discovery for almost two years now with hundreds
5 of thousands of documents being exchanged. It was literally
6 impossible, literally impossible, to have that type of
7 proceeding or that type of discovery before FERC in the time
8 period that they allowed. I do not know of a section 2 case.

9 CHAIRMAN BLOCH: So I take it that forum has not
10 had to address the collateral estoppel effect of Gainesville?

11 MR. DYM: It has not. It has not. But I do not
12 know of a section 2 case that has ever been litigated where
13 a -- the case is tried 2-1/2 months after the complaint is
14 filed. That's -- and that is this case.

15 CHAIRMAN BLOCH: Well, of course, that was not a
16 section 2 case. FERC applies a different standard in
17 section 2.

18 MR. DYM: FERC -- FERC said that it was applying
19 concepts underlying section 2.

20 But basically, that is what -- that is what I have
21 to say on Gainesville in Opinion Number 57 and the reasons
22 that I have advanced in our paper and our argument. And we
23 urge that this is not a discretionary matter for this
24 Board. We urge that this Board would be committing
25 reversible error should it accord collateral estoppel effect

1 or indeed prima facie effect to either the Gainesville case
2 or Opinion Number 57.

3 Thank you very much.

4 CHAIRMAN BLOCH: Thank you.

5 MR. BOUKNIGHT: May I make one comment on your
6 Parsons & Wittimore question? I do not want the Board to
7 think that we are urging something different there than we
8 are urging today.

9 The issue in Parsons & Wittimore was whether late
10 intervention ought to be granted. And one question was
11 whether there is some other forum in which Parsons &
12 Wittimore can get relief. And what I believe we told you
13 during our argument on that is that FERC takes the position
14 that it can consider the same antitrust issues and that the
15 issue central to what Parsons & Wittimore wanted arose under
16 PURPA. This is not a late intervention case; this is a
17 situation where some folks went to FERC, as the preceding
18 argument has shown. They prevailed there, and now they are
19 back here asking for something else.

20 CHAIRMAN BLOCH: The argument I was referring to
21 was I think you actually persuaded me that it was a superior
22 forum over there because of their knowledge of PURPA. And
23 it was that aspect of the argument only that interested me.

24 MR. BOUKNIGHT: I would say that as to the
25 question of first impression, how the antitrust laws apply

1 when one is or is not a qualifying small power production
2 facility, that would be my view.

3 CHAIRMAN BLOCH: Mr. Jablon, I am going to
4 strictly limit you to five minutes. Is that enough,
5 assuming we do not interrupt with extensive questions?

6 MR. JABLON: I think so.

7 On the question of the burden of proof, I would
8 simply point out that I think the question interrelates with
9 the standard. Section 105, which is your basic statutory
10 charter, gives the Commission the obligation to make a
11 finding, so that whoever has the burden of proof in the
12 proceeding, the Commission itself has a responsibility which
13 I think would be somewhat neutral.

14 What the Appeal Board said on it in Midland,
15 ALAB-452, on page 65 and 66 of the SLP opinion, "Be that as
16 it may, the quantum of proof needed to prevail in
17 proceedings under section 105(c) were specifically fixed by
18 the framers of that section themselves." And then I am
19 skipping some to page 66, and they say -- and they adopt a
20 reasonable-probability test. If you take a look at FERC,
21 Gulf States 411 U.S. 747 at 760 says, "Consideration of
22 antitrust and anticompetitive issues by the Commission
23 moreover serves the first important function of establishing
24 a first line of defense against those competitive practices
25 that might later be the subject of antitrust proceedings."

1 And Scenic Hudson admonished the Federal Energy Regulatory
2 Commission that they could not sit back but that the
3 Commission has an affirmative role.

4 The whole point I am making is it is far less
5 significant no matter who technically has the burden of
6 proof, and I think the Appeal Board in Midland looked at
7 that that way, than what the standard and responsibility of
8 the agency is.

9 Both the Federal Energy Regulatory Commission and
10 this Board has an obligation to consider antitrust matters,
11 and there is no indication in Opinion 57 that they did not
12 do so fully.

13 The Licensing Board decisions in Midland on burden
14 of proof, they ruled against what would be our position. On
15 the other hand, in Davis Besse they seemed to go back and
16 forth and say, "Well, in each issue it depends." And I
17 think the issue is pretty neutral. Ultimately, Judge Lucas
18 in the District Court gave collateral estoppel effect,
19 citing Blondertong, to a Federal Energy Regulatory
20 Commission decision when plainly the burden of proof
21 shifted. I presume but do not know that Southern Cal Edison
22 would have raised whatever argument they could --

23 CHAIRMAN BLOCH: Which case are you citing for
24 that?

25 . JABLON: Southern Cal Edison, and it is -- I

1 am quoting page 4 of the SLP opinion, which is Attachment 5
2 to our motion to establish procedures. And that gave
3 collateral estoppel to a FERC decision.

4 CHAIRMAN BLOCH: It is Attachment 5 to the motion
5 to establish, and it is what page?

6 MR. JABLON: Page 5, Your Honor.

7 CHAIRMAN BLOCH: Attachment 5, page 5.

8 MR. JABLON: Yes. Now, on the mutuality question,
9 I rely on Florida Power & Light's cases as cited in their
10 pleading. In fact, they gave affirmative collateral
11 estoppel in those cases. I rely on their cases.

12 On the -- in our answer to the Board's question,
13 the Board's questions, we attempted to go down chapter and
14 verse, quoting very specifically findings of the Federal
15 Energy Regulatory Commission. For example -- and I just use
16 this as an example -- Opinion Number 57 found that proposed
17 tariff restrictions of FPL "would eliminate the only
18 practical source of baseload power or energy to competing
19 utilities within the markets dominated by the company."

20 If you go down Opinion 57 one by one and look at
21 those findings, I do not think that Florida Power & Light
22 can make the case and they have not made a case that the
23 record supporting those individual findings were unfair, nor
24 have they told you what they would raise here contrary.

25 With regard to the question of the full and fair

1 burden, the fact of the matter is if Florida Power & Light
2 felt Opinion 57 was unfair, they could have appealed it.

3 In fact, they followed through with their appeal
4 on their transmission cases on jurisdictional grounds to the
5 Fifth Circuit. Plainly, they made a calculated decision
6 both in settling with the Government and deciding to lose
7 their appeal that they would dig themselves in deeper if
8 they did not appeal. In any event, they had the opportunity
9 to appeal the decision. They did not.

10 With regard to Florida Power & Light's arguments
11 that the Cities should have joined in the Gainesville case,
12 I know of no court decision encouraging parties who would
13 not litigate otherwise to join in specific litigation. The
14 Florida Cities come here years later under a specific
15 statutory right afforded in accordance with policies
16 established by Congress.

17 With regard to Florida Power & Light's claim that
18 documents were admitted in FERC underlying FERC Opinion
19 Number 57 that should not have with regard to their claim
20 that they did not have adequate discovery, with regard to
21 that whole panoply of claims, I again reiterate: First,
22 they did not appeal; second, they had rights of discovery in
23 that proceeding. Whether and to what extent they exercised
24 it was their business.

25 Third, the documents they are referring to,

1 attached by Mr. Bathen, they had an opportunity to cross
2 examine Mr. Bathen. Some of the documents they liked least
3 were the documents penned by Mr. Gardner, who is a vice
4 president of the company. He took the stand; he testified;
5 he was cross examined.

6 Examples of those documents -- and those are the
7 documents which the company likes least -- are documents
8 where the company, in a sense, recognized the Cities'
9 competitive needs, recognized that the Cities wanted access
10 to statewide pooling, et cetera, and declined to do it
11 because of what they perceived as a competitive threat.
12 These documents were cross examined. The witness who wrote
13 them was there. But in any event, they had full appellate
14 rights. They had full rights to protest. They had rights
15 to ask for an application for rehearing. When they asked
16 for an application for a hearing, what the Commission said
17 very specifically is that, "We find the company has violated
18 sections 205 and 206 of the Act, particularly because of the
19 anticompetitive effects."

20 With regard to the company's statement that the
21 Commission disclaimed being intending to bind other forums,
22 I submit that there is a very direct explanation for that.
23 The Commission was reversed in the California case when the
24 Supreme Court felt that the Commission had attempted to
25 preclude an issue to forestall an antitrust review. That is

1 why the sentence was there. There was also the direct
2 recognition of their responsibilities and obligation under
3 the Act and under Gulf States.

4 Mr. Guttman did try Docket Number ER-78-19. He
5 can go into chapter and verse of the procedures. But I rest
6 on the -- if you wanted to hear it and what opportunities
7 Florida Power & Light had and what they did not have.

8 But I rest on the proposition certainly if there
9 were any question about whether FP&L knew the seriousness of
10 the situation, the Commission, contemporaneously with the
11 order issued in Opinion Number 57, started an investigation
12 whether to forward to the Department of Justice on a
13 criminal complaint whether Florida Power & Light's wholesale
14 policies gave rise to a criminal violation, whether it
15 should be forwarded. In this situation, any notion that
16 Florida Power & Light did not have full incentive to
17 litigate is untenable.

18 MR. DYM: May I interrupt a moment?

19 CHAIRMAN BLOCH: I will give a specific chance for
20 Florida Power & Light to respond to that. I think we have
21 had enough argument on collateral estoppel effect in these
22 cases. But Mr. Dym wants to respond.

23 MR. DYM: I wonder if it would be appropriate for
24 Mr. Jablon to inform the Board of the results of the
25 reference to which he referred.

1 CHAIRMAN BLOCH: I take it there was no reference
2 for criminal prosecution.

3 MR. JABLON: First of all, that was page 4, not
4 page 5, I was referring to. That was the Cities of Anaheim.

5 Yes, I would be happy to. There was a Staff
6 investigation as to whether Florida Power & Light had
7 violated its tariff by refusing to sell to Fort Pierce.
8 There was a Staff report which was issued contemporaneously
9 with Opinion 57.

10 The Staff report, which we submit to you is
11 evidentiary in that you can rely on in summary disposition,
12 found that FP&L had in fact not sold. The Staff report said
13 that they would have recommended a forwarding of the report
14 in criminal prosecution by the Commission to the Department
15 of Justice had not Florida Power & Light started service to
16 Fort Pierce during the proceedings.

17 The Commission determine -- or the Commission
18 issued an order. The order said they were inclined to
19 accept the Staff report and asked comments, asked parties to
20 comment.

21 In the interim, they decided Opinion Number 57,
22 which ruled against Florida Power & Light although on the
23 underlying grounds as to whether they had an obligation to
24 serve they then issued an order that since Florida Power &
25 Light accepted an order that they would serve, that the

1 issue was moot.

2 I have cited all of those orders in our answer to
3 the Board question, and I have attached them. But what I
4 glean from them is two things: First, Florida Power & Light
5 started serving during the pendency of that criminal
6 investigation; second, they had a -- it demonstrates the
7 incentive to -- the incentive on Florida Power & Light to
8 litigate fully.

9 MR. DYM: I did not think when I ceded some time
10 to Mr. Jablon that that is what he would respond. I thought
11 that what he would say is that there was no reference. The
12 Staff investigation or whatever the conclusions were when
13 they were adopted by the Commission. That is the end of it.

14 CHAIRMAN BLOCH: That is one of the problems with
15 asking a cross-examination question without knowing the
16 answer.

17 MR. DYM: I knew the answer, but I did not think I
18 would get the filibuster I got.

19 CHAIRMAN BLOCH: At this time I would like to
20 recess until 9:30 in the morning. We have not made as rapid
21 progress today as I had hoped we would make. I hope we will
22 be able to do that better tomorrow. In particular, in the
23 last argument, Mr. Jablon committed himself to five
24 minutes. He took ten. I am going to hold people to their
25 commitments tomorrow. And we are going to talk only about

1 the agenda items.

2 It looks like we probably can start tomorrow
3 discussing FERC opinion 517, since it seems to me that in
4 the course of this argument today -- we can discuss it
5 tomorrow if someone disagrees about this -- we seemed to
6 have discussed not only whether or not Gainesville and FERC
7 Opinion 57 and 57A should be applied as collateral estoppel,
8 but we have also extensively gone into the substance of
9 those cases.

10 So I am hoping that we can start out with at least
11 the second part of Issue Number 1 tomorrow, and then we can
12 proceed as rapidly as possible and as concisely as possible
13 through the remainder of the agenda.

14 Thank you for your assistance today. The meeting
15 is adjourned.

16 (Whereupon, at 4:34 p.m., the conference was
17 adjourned, to reconvene at 9:30 a.m. on Tuesday, August 18,
18 1981.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
ASLB

in the matter of: Florida Power & Light Company (St. Lucie Plant, Unit 2)

Date of Proceeding: August 17, 1981

Docket Number: 50-389A

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Mary C. Simons

Official Reporter (Typed)

Mary C Simons

Official Reporter (Signature)

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Alfred H. Ward

Official Reporter (Typed)

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Official Reporter (Signature)