FPL: 9/14/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	)	September 14, 1981

MEMORANDUM OF FLORIDA POWER & LIGHT COMPANY
ON MATTERS RELATING TO AUGUST 17 AND 18, 1981,
CONFERENCE OF COUNSEL

At the conference of counsel held on August 17 and 18, 1981, the Board requested that the parties address certain matters raised during the conference by memorandum to be submitted by September 14, 1981. This Memorandum is submitted in compliance with that directive. The Board asked FPL to address questions which basically fall into two categories: (1) FPL's dealings with "outside" cities, and (2) collateral estoppel; we respond to those questions in Parts I and II below.*/

With respect to its dealings with "outside" cities, in addition to responding to the matters requested by the Board, FPL requests leave to address briefly two related matters which arose during the course of the conference, so as, in one case, to avoid the possibility of any misunderstanding of FPL's position and, in another case, to address an argument made by Cities at the conference which appeared to supplement, or at least to clarify, arguments made in their Motion.

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*/ Attachment A is an errata sheet confirming a correction to FPL's August 7, 1981, filing which was noted at Tr. 1108.

I. Dealings With "Outside" Cities

A. Summary of FPL's Position and Practices

There is no agreement or understanding of any kind between FPL and any other entity, within or without the State of Florida, as to whether FPL or any other entity will or will not engage in commercial dealings with any other electric utility.*/ So far as wholesale sales are concerned, FPL is required under the terms of its tariff on file with the FERC to provide service at wholesale to municipal systems located in the territory served by FPL.**/ The rates contained in this wholesale power tariff are based on FPL's average embedded costs of plant and capital and on its average system cost of fuel at any time.***/ The marginal costs of plant, capital and fuel substantially exceed FPL's average costs, on which the tariff rates are based.****/ Accordingly, if substantial

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*/ It is noteworthy that the settlement license conditions require FPL to transmit power "between any neighboring entity or neighboring distribution system(s) and any other electric utility outside the applicable area." (Section X(4))

**/ Florida Power & Light Co., Opinion No. 57, 32 PUR 4th 313 (1979), appeal dismissed sub nom, Florida Power & Light Co. v. FERC, D.C. Cir. No. 79-2414 (April 25, 1980). At the Board's request, a copy of the wholesale rate schedules included in that tariff is submitted herewith, as an attachment to the Supplemental Affidavit of Robert J. Gardner, Attachment B.

***/ Id. at 322.

****/ Bivans Affidavit, ¶¶ 16-19; Howard Affidavit, ¶¶ 5-7, Appendices B and E to Response of Florida Power & Light Co. to Cities' Motion to Establish Procedures, for a Declaration that a Situation Inconsistent with the Antitrust Laws Presently Exists and for Related Relief (August 7, 1981) [hereinafter cited as Bivans Affidavit ¶ __, Howard Affidavit ¶ __, and FPL's Response, pp. ___, respectively].

new loads are to be served under its wholesale tariff, FPL's average costs, and thus its rates to all classes of customers, will increase.

The Board requested during the conference that FPL provide further information as to the magnitude of these effects. The attached Supplemental Affidavit of Joe L. Howard, FPL's chief financial officer, reveals that, where the additional loads are of the magnitude of 500 Mw, the additional costs imposed on FPL's other customers could well amount to billions of dollars over a fifteen-year period.*/ Moreover, as Mr. Howard has noted, there would be an additional adverse impact on FPL's shareholders, because financing of additional facilities by the issuance of new shares of common stock at a price below book value would erode the value of the shares now outstanding.**/

Obviously, FPL does not desire to harm its customers and shareholders by extending wholesale service under the FERC tariff to utilities located outside its service area. In dealing with such utilities, FPL is guided by only one consideration: Does a proposed transaction make good business sense? If so, FPL is prepared to deal with anyone, as is evidenced by its active participation in Florida's power broker arrangement with utilities throughout Florida and its purchases of coal power from the Southern Company. On the other hand, FPL seeks to avoid transactions which would raise the costs of serving its customers, impair its ability to finance its current con-

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*/ Supplemental Howard Affidavit, p. 3, ¶¶ 6-7, Attachment C.

**/ Howard Affidavit, ¶ 6.

struction program, or require it to issue additional securities on a basis which dilutes the value of the investments of existing shareholders.*/ FPL is concerned with being made whole, not with any technical definition of "marginal" or "incremental" costs.

The Cities' position apparently is that FPL is obligated to deal at a loss to its customers and/or shareholders, in order to assist the "outside" cities in reducing their costs.**/ Even if FPL were found to have monopoly power in a relevant market which includes the "outside" cities,***/ and even if such cities were competitors of FPL,****/ this proposition is

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*/ As an example, it might well not be beneficial for FPL to enter into a contract to build a new generating facility and sell the output of that facility at a rate based on the construction cost of that facility (including a return on investment), if FPL were unable to finance construction of the facility, or able to finance it only by diluting the value of its outstanding shares of common stock. It is, however, unlikely that FPL would be asked to enter into such a contract because a municipal utility which reconciles itself to paying the costs associated with a new generating facility would vastly prefer to finance that facility itself and take advantage of the tax and capital subsidies available to municipal systems, than to pay the fixed charges incurred by FPL.

**/ We note, however, that there is nothing before the Board as to the magnitude of the asserted benefits to the "outside" cities of wholesale power purchases from FPL in light of other power supply options available to these Cities.

***/ As FPL has shown (FPL's Response, pp. 55-61), such a finding is precluded as a matter of law and, in any event, may not be made on the present record.

****/ Again, as FPL has shown (FPL's Response, pp. 27-30), there is no basis for any such conclusion.

contrary to existing case law as well as to the policies underlying the antitrust laws. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the case relied on by Cities, itself emphasizes the right of any enterprise, involving one with monopoly power, to "protect itself against loss by operating with superior service, lower costs, and improved efficiency." 410 U.S. at 380. As confirmed by the more recent Kodak, Calcomp, and Du Pont cases,*/ such "lower costs" need not be shared with asserted competitors.

B. Cities' Market Arguments

During the course of argument on August 17 and 18, Cities appeared to modify significantly, at least for purposes of summary disposition, the arguments on which they ground their claim that FPL is responsible for a situation inconsistent with Section 2 of the Sherman Act. FPL requests leave to address briefly the arguments stated by the Cities at the conference of counsel, with the objective that the issues as so modified or clarified should be joined by the parties for consideration by the Board.

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*/ Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727 (9th Cir. 1979); and In the Matter of E.I. du Pont de Nemours & Co., FTC Docket No. 9108 (October 20, 1980).

Arguments in the parties' briefs and oral presentations concentrated on the status of the "outside" cities, which are not within the applicable area defined in the license conditions that are now in effect. Cities appeared to assert that those "outside" cities are in one or more peninsular Florida product markets in which FPL has monopoly power, and that FPL's unwillingness to offer them directly the opportunity to acquire ownership shares of St. Lucie Unit No. 2 or to expand the applicability of its wholesale tariff to include them constitute acts of monopolization which are inconsistent with Section 2 of the Sherman Act. FPL challenged the market definitions suggested (albeit vaguely) by the Cities, and argued that, in any event, its relatively low market share and inability to control prices or exclude competition in any peninsular Florida markets for wholesale power and coordination services prevent the Cities from prevailing on their Section 2 argument.*/

During the course of oral argument, Cities appeared to have abandoned, at least for purposes of summary disposition, any effort to establish that FPL has monopoly power in any market that extends beyond FPL's service area; they now ground their Section 2 argument upon the theory that, if FPL is presumed to possess monopoly power in a retail market for

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*/ FPL Response, pp. 15-26, 54-61.

electricity which coincides with its service area, its refusals to offer nuclear participation and wholesale power to Cities outside of that service area must be deemed acts of monpolization.*/ That proposition is nonsense on its face, and neither of the cases on which Cities rely -- United States v. Griffith, 334 U.S. 110 (1948), and South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.) cert denied, 385 U.S. 934 (1966) -- assists the Cities' arguments.

Griffith involved the use of monopoly power in certain markets to achieve monopoly power in other markets. It is not in the least clear how Cities seek to apply Griffith to the present case, where there is not even an allegation, much less any proof, that FPL seeks to use its asserted retail monopoly in its service area to acquire a monopoly or to gain a competitive advantage in other areas of Florida, or that FPL's actions have had any such effect.

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*/ Cities base their claim that FPL has monopoly power in such a retail market on FERC Opinion No. 57, which they contend should be given conclusive effect in this proceeding. FPL believes that, as a matter of law, no such effect can be accorded the FERC's opinion.

FPL also contends that, even if it is found to have monopoly power, its positions on nuclear participation and wholesale power represent legitimate business conduct and not acts of monopolization. (FPL's Response, pp. 62-79).

South Carolina Milk Producers involved a suit by milk producers against a supermarket chain and other alleged conspirators, where the claim was that the defendants had conspired to sell milk at unreasonably low prices by using it as a loss leader in their supermarkets. The district court granted defendants' motion for summary judgment on the ground of lack of standing to sue. The Fourth Circuit reversed, holding that plaintiffs should be permitted to attempt to prove that they were damaged by reason of defendants' alleged violations of the antitrust laws. Again, it is not clear what the Milk Producers case has to do with this case. Milk Producers is a conspiracy case in which relevant market concepts played no role. There was no issue of misuse of monopoly power, and indeed, no allegation that any defendant possessed monopoly power. In any event, plaintiffs and defendants were selling the same commodity in the same geographic area, albeit to a different group of customers.

Moreover, the Cities have failed to show (1) how a monopoly over retail service in its service area affords FPL leverage in some bulk power market in some other geographical area, (2) how a decision not to enter the latter market as a seller constitutes an attempt to gain a competitive advantage in that market, or (3) how any City

outside of FPL's service area has been competitively disadvantaged by any action of FPL.*/ Griffith merely highlights these deficiencies in proof, while South Carolina Milk Producers is irrelevant to the issues here -- which involve the substantive law of single-firm monopolization, not standing to bring a conspiracy case.

C. FPL's Service Area

During the course of argument on August 17 and 18, the Board inquired as to how FPL defines the "territory served by the Company," which is the area in which service under its wholesale power tariff is available to municipal electric systems. The Board further inquired as to the legal basis of FPL's obligation to serve all retail customers in this territory. Also in the context of discussion of the service area concept,

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*/ The Second Circuit recently held that a firm with monopoly power cannot be held liable under either Section 2 of the Sherman Act of Section 5 of the Federal Trade Commission Act for action, grounded on its monopoly power, which affects competition in a market in which the monopolist itself is not engaged. Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920 (2d. Cir. 1980).

FPL was asked to agree to the use of certain portions of the incomplete deposition of Robert J. Gardner, a Senior Vice President of FPL, and was granted leave to file an affidavit supplementing Mr. Gardner's deposition testimony.

The attached affidavit by Mr. Gardner (Attachment B) explains the interpretation given by FPL to the phrase "territory served by the Company," which appears in FPL's wholesale power tariff. In essence, the territory served by FPL is defined by the location of its facilities, which in turn reflects the general area in which FPL supplies electricity at retail.

As for FPL's public utility obligations under Florida law, it is clear from both the Florida Public Service Commission's enabling legislation and the rules it has adopted thereunder that FPL has an obligation to serve all persons requesting retail service within areas that it serves. Fla. Stat. § 366.03, provides that "[e]ach public utility shall furnish to each person applying therefor reasonably sufficient, adequate and efficient service. . . ." See also Fla. Stat § 366.05(1). The FPSC's Rule 26-6.35 provides that "[t]he generating capacity of the utility's plant, supplemented by the electric power regularly available from other sources, must be sufficiently large to meet all reasonable demands for service . . . ."

It is also clear that the public policy of the State of Florida is to avoid the uneconomic duplication of facilities. Fla. Stat. § 366.04(3). The Florida Public Service Commission has the authority to regulate, and approve or disapprove, retail territorial agreements between utilities. Fla. Stat. § 366.04 (2)(d); City Gas Co. v. Peoples Gas System, Inc., 182 So. 2d 429 (Fla. 1965). Moreover, in the absence of any territorial agreement, the Public Service Commission is empowered "to resolve any territorial dispute involving service areas . . .." Fla. Stat. § 366.04(2)(e).

In sum, under Florida law FPL must meet all demands for retail service within FPL's service area, and Florida has established a regulatory scheme to resolve any questions that may arise as to the territory encompassed within FPL's retail service area.

II. Collateral Estoppel Questions

During the conference FPL agreed to provide the Board further briefing on two points of collateral estoppel law concerning the Gainesville and Opinion No. 57 decisions,*/ and was asked to address Cities' belated contention that FPC Opinion No. 517, should be given collateral estoppel effect in this proceeding.**/ In the first two sections below we address the

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*/ Tr. 1197, 1374.

**/ Florida Power & Light Co., 37 FPC 544 (1967), rev'd sub nom, Florida Power & Light Co. v. FPC, 430 F.2d 1377 (5th Cir. 1970), aff'd on certain grounds, 404 U.S. 453 (1972). See Tr. 1240-42.

points of law regarding Gainesville and Opinion No. 57; in a concluding section we demonstrate that collateral estoppel is inapplicable to FPC Opinion No. 517 as a matter of law.

A. The Gainesville Decision

FPL's contention is that offensive collateral estoppel is impermissible with respect to the Gainesville decision in light of the standard adopted by the Supreme Court in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979), that "the general rule should be that in cases where a plaintiff could easily have joined in the earlier action. . ., a trial judge should not allow the use of offensive collateral estoppel."*/ We have shown (FPL's Response, pp. 84-86) that this standard precludes offensive collateral estoppel as to Gainesville.

We are aware of no case in which the Supreme Court's formulation in Parklane was not followed. In those cases in which offensive collateral estoppel has been permitted, there have been affirmative determinations that the plaintiffs

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*/ FPL also contends (FPL's Response, pp. 86-87) that offensive collateral estoppel may not be employed because it would be inequitable and unfair to do so in that the Cities would not be barred from relitigating issues decided favorably to FPL in Gainesville while they would be able to take advantage of matters decided adversely to FPL.

met the Supreme Court's standard. E.g., Carr v. District of Columbia, 646 F.2d 599, 606 (D.C. Cir. 1980):

> [Plaintiffs] were not sideline sitters while others carried the ball. They did not adopt the "wait-and-see" attitude the Supreme Court had in mind when it declared the "general rule" that a plaintiff who "could easily have joined" a prior action may not offensively invoke issue preclusion.

Moreover, in at least two cases, courts have refused to apply offensive collateral estoppel in light of the Parklane decision. In Young v. United States, No. 79 Civ. 3430 (S.D.N.Y. June 23, 1981),*/ the court determined that the Government should not be barred from relitigating an issue that was resolved against it in a prior case; the plaintiff in Young had not been a party to that earlier action. One of the grounds of the decision was that "the use of collateral estoppel in cases like this would encourage other plaintiffs to adopt a 'wait and see' attitude," the concern expressed by the Supreme Court in Parklane. The other case is In re Yarn Processing Patent Validity Litigation, 472 F. Supp. 174 (S.D. Fla. 1979), which is discussed at p. 84 of FPL's Response. The court there refused to permit parties who refrained from participating in litigation to invoke collateral estoppel.**/ This is the precise situation here.

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*/ A copy of the slip opinion is Attachment D hereto.

**/ Yarn Processing involved defensive collateral estoppel, not its offensive use. It applies a fortiori here, since in the absence of mutuality of estoppel courts are more willing to permit collateral estoppel to be used defensively than to permit offensive collateral estoppel. See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329-30 (1971); Parklane, 439 U.S. at 650-52.

B. Opinion No. 57

One of the grounds urged by FPL in support of its position that collateral estoppel effect may not be given to Opinion No. 57 is that FPL had the burden of proof in the Opinion No. 57 proceeding whereas that burden is on the Cities in this proceeding. (FPL's Response, pp. 91-93). Under well-established law, collateral estoppel could not be applied even if FPL merely had a lesser burden of proof in this proceeding than before FERC; a fortiori collateral estoppel may not be applied where no burden is imposed on FPL.

This issue of the applicability of collateral estoppel when there has been a shift in the burden of proof was considered in Lentin v. Commissioner of Internal Revenue, 226 F.2d 695, 699 (7th Cir. 1955), in which a taxpayer argued that "the doctrine of collateral estoppel cannot be applied where the burden of proof in two actions is on different parties." The court did not dispute this proposition, but determined that collateral estoppel applied because, in fact, there had been no shift in the burden of proof.

This issue of a shift in the burden of proof is dealt with in the Restatement (2d) of Judgments, § 68.1 (Tent. Draft No. 1, 1973), which reads:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties

> is not precluded in the following circumstances:
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> * * *
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> (d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action . . . ." (emphasis added).*/

The Restatement commentary on the section is as follows:

> To apply issue preclusion in the cases described in Clause (d) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed. While there may be many occasions when such a holding would be correct, there are many others in which the allocation and weight of the burden of proof are critical in determining who should prevail. Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied. (This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event.)

In essence, the Restatement recognizes that a shift in the burden of proof changes the nature of the burden and, as a consequence, may be determinative on the ultimate issue in a case. Thus, a shift in the burden, just as a change in the standard of proof, precludes collateral

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*/ This section was quoted approvingly in In re Four Season Security Laws Litigation, 370 F.Supp. 219, 233 (W.D. Okla. 1974). The section is repeated without change in Restatement (2d) of Judgments, § 68.1 (Tent. Draft No. 4, 1977).

estoppel. The basic authority relied upon is the law that has been developed which permits the Government to relitigate in a civil case an issue on which it did not prevail in a previous criminal proceeding. (See FPL's Response, p. 92.)*/

C. FPC Opinion No. 517

The proceeding which resulted in Opinion No. 517 was initiated by the FPC on February 26, 1965 "to determine whether [FPL] is a public utility subject to regulation under the Federal Power Act." Order Initiating Investigation and Hearing, Florida Power & Light Co., 33 FPC 328 (1965). Section 201 of the Federal Power Act grants the Commission (then the FPC, now the FERC) jurisdiction over "the transmission [and wholesale sale] of electric energy in interstate commerce"**/ and defines energy transmitted in interstate commerce as energy "transmitted from a State and consumed at any point outside thereof . . ."***/ The proceeding thus turned on

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*/ The Reporter's Note to the Restatement draft identifies one case, Harding v. Carr, 79 R.I. 32, 83 A.2d 79 (1951), "to the effect that a shift in the burden of proof is irrelevant to the application of issue preclusion," but states that "the reasoning of the dissent in the case is believed to be more persuasive." The case does not even address, much less attempt to distinguish, authority precluding collateral estoppel because of differences in the nature of the burden of proof.

**/ 16 U.S.C. § 824(b).

***/ 16 U.S.C. § 824(c).

the question of whether any energy produced, transmitted or sold by FPL crossed state boundaries.*/

Both the FPC and its hearing examiner concluded that FPL generates electric energy that is transmitted in interstate commerce and therefore held the Company subject to the Commission's jurisdiction. Florida Power & Light Co., Opinion No. 517, 37 FPC 544 (1967); Initial Decision of Presiding Officer in Investigation to Determine Jurisdiction, Florida Power & Light Co., 37 FPC 560 (1966). As the Supreme Court noted, when the matter reached that tribunal, the FPC and its examiner based this conclusion on two alternate, independent grounds. The first was termed the "electromagnetic unity response of interconnected electrical systems". 404 U.S. at 450; 37 FPC at 549. Under this theory, the synchronous response to load changes among FPL and the generating systems with which it was directly and indirectly interconnected was deemed sufficient to indicate the interstate transmission of electricity. 404 U.S. at 461. 37 FPC at 549, 567-68. The alternate ground upon which the FPC predicated its decision concerned the flow of power within the "Turner bus,"**/

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*/ Under the definitional provisions of Section 201 of the Federal Power Act, the jurisdictional determination is "to follow the flow of electric energy," FPC v. Florida Power & Light Co., 404 U.S. 453, 455 (1972) quoting Connecticut Light & Power Co. v. FPC, 324 U.S. 515, 529 (1945).

**/ A bus is ordinarily a set of three bars which conduct electric energy used as a junction between incoming supplies of energy or as a point of division for supplying different loads. Incoming circuits lead to the bus and outgoing circuits extend from it. 37 FPC at 568 n.2.

the point of connection between the systems of FPL and Florida Power Corporation. The Commission found that, within that bus, FPL energy commingled with interstate energy flowing from Georgia through Florida Power's system, and that by reason of this commingling the interstate transmission of energy, and the resultant jurisdictional status, could be demonstrated. 404 U.S. at 461-62, 37 FPC at 551, 570.

The Fifth Circuit reversed the FPC's decision on both grounds finding the electromagnetic unity of response theory unsound,*/ and finding the "commingling within the bus" theory legally invalid. Florida Power & Light Co. v. FPC, 430 F.2d 1377 (5th Cir. 1970).

The matter then reached the Supreme Court. There the Fifth Circuit's rejection of the FPC's analysis based on electromagnetic unity of response was left undisturbed. 404 U.S. at 462-63. However, the Court reversed the Fifth Circuit upon the record of the other of the FPC's two alternative grounds -- the theory of commingling within the bus. Id. On that finding alone, the Supreme Court reinstated the FPC's holding of jurisdictional status. In short, then, the only portion of Opinion No. 517 sustained on appeal was that relating to the "commingling"

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*/ The Court found that the theory, and the Commission's analysis, were incapable of revealing with any substantial degree of certainty what does occur. 430 F.2d at 1383.

of energy in the Turner bus.

The Cities now contend that FPL is collaterally estopped from here litigating "findings" made in Opinion No. 517. Specifically, Cities point to two items. First, they cite to that portion of the Commission's opinion which commented upon FPL's interconnection and emergency coordination of spinning reserves with other utilities via the Florida Operating Committee. Second, Cities point to findings of the hearing examiner that relate to FPL's alleged historical dealings in the 1950's and early 1960's with the City of Clewiston. Cities' collateral estoppel contentions are without merit on both of these scores as a matter of law.

1. The Portions of Opinion No. 517 Relied Upon by Cities Are Not Part Of the Only Ground of the Commission's Decision Upheld By the Supreme Court

At the outset, Cities' contentions must be rejected here because they contravene one of the first principles of collateral estoppel. It is fundamental that the matters as to which preclusion is sought must be an essential and necessary basis for the judgment from which estoppel is asserted.*/ Here, Cities

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*/ "It is basic to the law of collateral estoppel that a finding in one proceeding cannot bind tribunals in subsequent cases unless the finding acted as a basis for final judgment in the first." United States v. School District of Ferndale, 577 F.2d 1339, 1349 (6th Cir. 1978); accord, Moore's Federal Practice ¶ 0.443[5] at 3919; Parklane Hosiery v. Shore, supra., 439 U.S. at 336 n.5; see also infra, p. 22.

rely upon portions of the administrative opinions below which were not part of the only ground of FPC's decision upheld by the Supreme Court. It is impermissible to apply collateral estoppel in such circumstances.

Where, as here, a judgment specifically based on alternate grounds is appealed, only those grounds expressly considered and affirmed by the appellate court can be used to effect collateral estoppel. Stebbins v. Keystone Insurance Co., 481 F.2d 501, 507 n.13 (D.C. Cir. 1973); Martin v. Henley, 452 F.2d 295, 300 (9th Cir. 1971); International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858, 862 (4th Cir. 1951); Moran Towing and Transportation Co. v. Navigazione Libera Triestina, S.A., 92 F.2d 37, 40 (2d Cir. 1937); St. Joseph Union Depot Co. v. Chicago, R.I. & P. Ry. Co., 89 F. 648, 653 (8th Cir. 1898); Restatement of the Law of Judgments § 69, Comment b on Subsection (i)(1942); 1b Moore's Federal Practice ¶ 0.443[5] n. 10. See also Alleghany County v. Maryland Casualty Co., 146 F.2d 633 (3rd Cir. 1944), cert denied, 327 U.S. 855 (1945).

For example, Martin v Henley, supra, considered the estoppel effect of a bankruptcy order denying a stay on two grounds: (1) unclean hands; and (2) a determination that the debt was not dischargeable. On appeal, the reviewing court did not rule on the nondischargeability determination. With respect to the collateral estoppel effect of the initial

order, the court in Martin v. Henley said:

> If a court of first instance (the referee, here) bases his judgment on alternative grounds, and the reviewing court affirms the judgment on only one of the two grounds, refusing to consider the other, the second ground is no longer conclusively established.

452 F.2d at 300.

Cities' contentions fly in the face of these established principles. As noted above, the only ground of the FPC's decision upheld by the Supreme Court was its analysis of the "commingling" of electrons within the Turner bus. But that portion of Opinion No. 517 which contains statements about FPL's participation in the Florida Operating Committee does not relate to the "commingling" question - it relates to arguments raised by FPL vis-a-vis the FPC's electromagnetic unity of response theory.*/ The analysis underlying that theory was rejected by the Fifth Circuit and was not resurrected by the Supreme Court, much less accepted as a basis for its decision.

Similarly, the hearing examiner's writings on Clewiston's

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*/ For example, the Briefs in the Supreme Court make it plain that the parties viewed the commingling of flows in the bus as a separate issue from the question of FPL's capability to operate without emergency interconnections: the latter question was presented to the Court (and to the FPC) as part of the electromagnetic unity question. For example, the FPC's Brief covers the subject under the heading: "The Interdependence of FPL and the Other ISG Utilities As a Basis for Jurisdiction -- the 'Electromagnetic Unity' Theory." Brief for the Federal Power Commission, FPC v. Florida Power & Light Co., 404 U.S. 453 (1972), Attachment E, hereto, pp. 7-11. To the same affect, see Brief for the Respondents Florida Power & Light Co., FPC v. Florida Power & Light Co., 404 U.S. 453 (1972), Attachment F hereto; pp. 26-31.

allegations were not a basis of that final Supreme Court decision in any respect, and were immaterial to the bus bar flow analysis on which that decision is predicated. The portions of the administrative decisions relied upon by Cities were simply not a part, much less an essential part, of the final judgment in the proceeding. As a consequence, Cities' collateral estoppel contentions are inherently without basis.

So far as the "findings" regarding Clewiston are concerned, there are two additional reasons why they may not be accorded collateral estoppel effect. First, the Clewiston discussion is found only in the hearing examiner's decision and not in the FPC opinion. It cannot, therefore, be said that the Clewiston discussion was essential to the Commission's decision (much less that of the Supreme Court), and collateral estoppel is impermissible. See, e.g., Parklane Hosiery v. Shore, supra., 439 U.S. at 326, n.5. Second, the separate proceeding convened by the FPC to consider Clewiston's complaints was settled before the jurisdictional case was decided by the FPC. Clewiston had advised the Commission that its settlement (with Glades Co-op and United States Sugar Corporation) "effects substantially the objectives which it sought through its Application for Interconnection and Complaint." Order Terminating Proceedings, Clewiston v. Florida Power & Light Co., 36 FPC 17, 18 (1966). Accordingly, FPL had no incentive to litigate the matter before the Commission or in

the appellate courts, nor was there any reason for the Commission or the courts to consider the Clewiston matter. In circumstances where the party against whom collateral estoppel is urged lacked incentive to litigate the issue in the first forum, principles of fairness preclude application of collateral estoppel. See Parklane Hosiery v. Shore, supra., 404 U.S. at 330.

2. Cities Failed to Intervene

There is another fundamental barrier to Cities' collateral estoppel contentions regarding Opinion No. 517: Cities could have intervened in that proceeding (as the City of Clewiston did) but elected not to do so. As we have set forth in our August 7 filing (FPL's Response, pp. 80-86) and have amplified above, the law requires a party asserting offensive collateral estoppel to establish that he could not have easily joined in the action as to which estoppel is asserted. Cities have not made and cannot legitimately make such a showing here.

Conclusion

For the reasons set forth in FPL's Response of August 7, 1981, supplemented above, and stated in the conference before

the Board, Cities' Motion should be denied.

Respectfully submitted,

J.A. Bouknight, Jr.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Herbert Dym
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044

Attorneys for Florida Power &
Light Company

DATED: September 14, 1981

UNITED STATES OF AMERICA
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(St. Lucie Plant, Unit No. 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Memorandum Of Florida Power & Light Company On Matters Relating To August 17 and 18, 1981, Conference of Counsel" was served upon the following persons by hand delivery* or by deposit in the U.S. Mail, first class, postage prepaid this 14th day of September, 1981.

Peter B. Bloch, Esquire
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert M. Lazo, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael A. Duggan, Esquire
College of Business Administration
University of Texas
Austin, Texas 78712

Ivan W. Smith, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Station
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

Robert E. Bathen
Fred Saffer
R.W. Beck & Associates
P.O. Box 6817
Orlando, Florida 32803

Robert A. Jablon, Esquire
Alan J. Roth, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

William C. Wise, Esquire
Suite 500
1200 18th Street, N.W.
Washington, D.C. 20036

William H. Chandler, Esquire
Chandler, O'Neal, Avera, Gray
& Stripling
Post Office Drawer 0
Gainesville, Florida 32602

Janet Urban, Esquire
P.O. Box 14141
Washington, D.C. 20044

Donald A. Kaplan, Esquire
Robert Fabrikant, Esquire
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

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

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

J.A. Bouknight, Jr.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

(202) 862-8400

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ATTACHMENT A

ERRATA SHEET