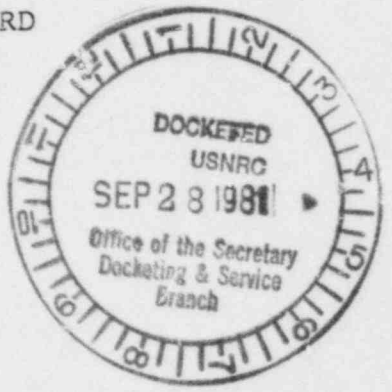
Florida Cities: 9/28/81

BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

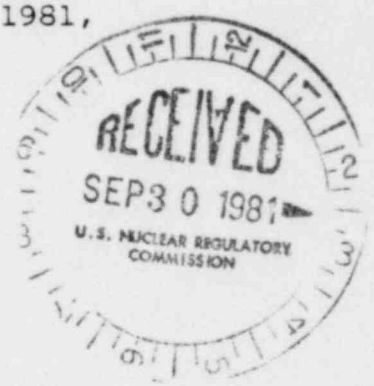
Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo
Ivan W. Smith, Alternate



FLORIDA POWER & LIGHT COMPANY	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	September 28, 1981

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



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September 28, 1981

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Cities: 9/28/81

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Pursuant to the Board's order of September 18, 1981, Florida Cities hereby file their reply to FPL's further arguments concerning "outside" Cities and collateral estoppel, the two matters covered in "Memorandum of Florida Power & Light Company On Matters Relating To August 17 and 18, 1981, Conference Of Counsel" ("FPL's September 14 Memorandum").

Also, following up Cities' interim report on the interest of other FMUA members (Cities' September 14, 1981 Supplemental Memorandum, pages 19-20), spokesmen for Vero Beach and Leesburg

have told Cities' counsel that the governing boards of those two Cities have affirmed their active interest in relief in this proceeding.

ARGUMENT

I. FPL'S UNWILLINGNESS TO DEAL WITH "OUTSIDE" CITIES IN PENINSULAR FLORIDA ON THE SAME COMPENSATORY PRICING BASIS THAT IT DEALS WITH OTHERS IS ANTICOMPETITIVE, NOT SOUND BUSINESS.

A. Introduction Concerning "In And Near" Cities.

FPL argues (FPL's September 14, 1981 Memorandum) against any obligation to deal with "outside" Cities and against Florida Cities' assertion of collateral estoppel. We answer those two arguments below, but pause here to observe that FPL has presented nothing further against the "in and near" Cities. Even without collateral estoppel, the case is overwhelming in favor of the "in and near" Cities; as to them, the Board should summarily find that FPL has created and maintained a situation inconsistent with the antitrust laws.

FPL has previously contended (FPL's August 7, 1981 Response, page 4), however, that the "in and near" Cities' claims "based on assertions of past refusals by FPL to deal are irrelevant to this proceeding" because the settlement license conditions provide for dealings with the "in and near" Cities. FPL utterly begs the question whether the license conditions are an adequate remedy in light of FPL's historic refusals to deal. If FPL has acted

inconsistent with the antitrust laws (the first question), then an unconditional license would maintain the situation inconsistent; the issue then becomes, whether the settlement conditions go far enough to cure the situation inconsistent (the second question). At least the "in and near" Cities are entitled to summary disposition in their favor on the first question.

B. FPL's Refusals To Deal With "Outside" Cities, Except Perhaps At Prices Based On Replacement Cost, Are Irreconcilable With FPL's Dealings With "In And Near" Cities At Average Cost Or Unit Cost And Are Irreconcilable With FPL's Takeover Programs, Retail Expansion Programs, Etc. For Sales At Average Cost.

FPL contends (FPL's September 14, 1981 Memorandum, pages 2-5) that it has a sound business reason for refusing to sell firm power to the outside Cities: regulation would force the sales at sub-marginal prices, requiring established customers to cover the cost of replacement and burdening shareholders with the dilution associated with replacement equity financing at below book value. FPL would make the same argument against its obligation to offer sales of unit power and unit participation at the unit's cost, instead of replacement cost. FPL's argument is irreconcilable with -- and is refuted by -- its retail expansion programs, its wholesale dealings with some systems, and a myriad of other considerations.

1. Takeover programs. Over the past twenty-five years, FPL has made many attempts to acquire municipal systems by purchase or lease. Those efforts occurred during times of

inflation. The takeover of a retail system should have the same cost-imposing effects, if any, 1/ as selling to a new wholesale customer, except where FPL was already meeting the retail system's bulk power needs or where the takeover afforded special economies (in which case one wonders why the economical muncipal system would sell out or, therefore, why FPL would waste its time trying to acquire a specially economical municipal system). The following is a summary of FPL's takeover attempts over the last three decades.

The FERC has reviewed the detailed evidence of FPL's acquisition efforts since 1958. Florida Power & Light Company, Opinion No. 57, 32 PUR 4th 313, 327-330 (August 3, 1979), appeal dismissed, Florida Power & Light Company v. FERC, D.C. Cir. No. 79-2414 (April 25, 1980); slip opinion, pages 20-24. FPL attempted to acquire by purchase or lease the municipal systems

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1/ Cities do not concede FPL's contention that the load growth from new wholesale sales would necessarily be cost aggravating. (Cities' asked FPL for the workpapers to Attachment C to FPL's September 14, 1981 Memorandum, but FPL has refused. The request and the refusal are attached as Appendix D.) Indeed, a FPL spokesman has stated that additional load can be beneficial to FPL in the context of a takeover of a municipal system (Cities' May 27, 1981 Motion, pages 86-87). To the extent the amount of the alleged cost effect is crucial in any context in this proceeding, Cities seek a hearing on the issue. There is no need for a hearing, however, on the obvious proposition that a small amount of relief would have a small cost effect at worst. In other words, the question of cost effect should be a matter of degree related to the amount of relief and cannot be a complete exoneration of a situation inconsistent with the antitrust laws. See also point 5, below.

of Lake Worth in 1958 and 1968, New Smyrna Beach 1/ in 1958-1959, 1965, 1970, 1973, 1974 and 1975, Ft. Pierce in 1965 and 1976, Homestead in 1976, and Vero Beach in 1957, 1958, 1959 and 1976 forward. Other evidence shows takeover efforts not recited in Opinion No. 57. In 1954, 1957, and 1965 FPL attempted to lease or buy the Clewiston system. Florida Power & Light Company, Opinion No. 517, 37 FPC 544, 572-573 (1967), reversed, 430 F.2d 1377 (5th Cir. 1970), reversed, Florida Power & Light Company v. FPC, 404 U.S. 453 (1972). In 1967 FPL made another attempt to acquire Homestead (Cities' September 14, 1981 Supplemental Memorandum, page 21 and Appendix D). 2/

FPL insists that "in the last twenty-three years, FPL has tendered proposals to acquire only two municipal electric systems, New Smyrna Beach in 1974, and Vero Beach in 1976; .. both were initiated at the urging of the city government, and both systems were not acquired." (FPL's September 14, 1981 Memorandum, Attachment A.) FPL's reference to twenty-three years would cut off the acquisition efforts related to Clewiston and the 1958 acquisition effort related to Lake Worth. FPL's reference to only two "proposals" is plainly wrong. FPL has admitted three proposals to New Smyrna Beach, let alone others,

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1/ FPL in fact acquired the Edgewater section of New Smyrna's system in 1965.

2/ If a trial is ordered, we are prepared to show additional FPL efforts relating to Homestead, Vero Beach, Starke, and Key West.

according to FPL's July 14, 1975 filing in the NRC's South Dade proceeding (in answer to question 18 in the Attorney General's request for information): "In 1965, 1970 and 1974, at the request of the City of New Smyrna Beach, applicant made a proposal for the lease or purchase of the New Smyrna Beach electric system. The matter was dropped in 1965 and 1970. In 1974, the proposal was defeated in a referendum held January 28, 1975." In addition, the May 11, 1959 FPL Board of Directors minutes record, in pertinent part, that FPL also made a 1959 proposal to New Smyrna Beach:

> Mr. Fite [FPL President Robert Fite] reported that a proposal (subject to subsequent approval by this Board) to lease the electric plant and distribution system at New Smyrna Beach had been made to the City of New Smyrna Beach by Mr. A.B. Wright, Vice President, in a letter dated April 27, 1959. After discussion and upon recommendation by Mr. Fite, the Board unanimously approved the proposal as embodied in Mr. Wright's letter.

FPL's further contention that its proposals were initiated by municipal requests is wrong in some cases and misleading in others, because FPL induced municipal initiations by refusing to deal with the Cities. On that important issue the FERC found, 32 PUR 4th at 330, slip opinion at 24,

> In summary, the record documents twenty years' worth of franchise competition between FP&L and the municipal utilities located within its service territory. At various times FP&L has promoted acquisition or willingly received municipal proposals. Most, if not all, of those incidents occurred when the municipal systems were arranging new bulk power supplies from the options of self-generation, wholesale purchase from FP&L, and retail purchase from FP&L after franchise

> disposition. The company has not succeeded in many acquisitions, because the municipal candidates solved their supply problems by adding generation. However, the record strongly indicates that self-generation is becoming less and less attractive to the point where FP&L's witness Gerber has described small scale generation as anachronism. Since FP&L controls the remaining two options, 37/ we conclude that its wholesale monopoly power can only increase, and, thereafter, its retail power as well. See, Borough of Ellwood City v Pennsylvania Power Co. (DC Pa 1979) 462 FSupp 1343, 1346.

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

2. Retail sales promotion. FPL seeks to attract large new industrial customers and to add other retail loads (Cities' May 27, 1981 Motion, page 87 and Appendix pages D259-D264). 1/ Former FPL President Fite frankly admitted that he could not reconcile FPL's promotion of industrial sales -- or its wholesale to cooperatives -- with its refusals to sell wholesale power to municipals (September 18, 1981 deposition, pages 615-616):

> A Let me say this. The policy was not to sell wholesale. I couldn't see any defendable reason for saying that we won't sell wholesale to a city when we would turn around and sell wholesale -- not exactly wholesale -- we would sell to a big industrial company, and to the coops we would sell wholesale for resale. It just didn't seem defensible. That's the reason I wanted to change it. And that's all there is to it.

1/ FPL begins its 1980 Annual Report with a heading: "Our Growing Business" (page 1). The Company states it added more than 100,000 new customers in 1980 (page 4). While it does state the desirability of shifting "customer usage from peaks to off peak hours" and reduction of energy consumption (id., page 7), it notes 1980 increased energy sales as a "positive."

New large industrial loads should have the same cost-imposing effects, if any, as new wholesale customers. Load factor considerations may affect costs, and some industrial customers have high load factors. However, wholesale rates can be designed to take account of those load factor considerations, or FPL may offer high-load factor wholesale tariffs.

3. Retail franchise retentions. FPL fights to retain its retail franchises. Opinion No. 57, 32 PUR 4th at 330-331, 339; slip opinion at 24-26, 38-39. Relinqushing a franchise or two might reduce FPL's marginal cost burden, if its argument holds, but FPL does not want to relinquish its franchises. 1/ That, too, seems irreconcilable with FPL's pricing arguments against taking on new wholesale customers.

4. Yarstick competition, foot in the door. FPL publicizes rate comparisons of systems in Florida, including "outside" Cities, to show that FPL rates are (if they are) lower than the rates of municipal systems and others. FPL publicizes those comparisions to convince Cities such as Vero Beach to sell its system to FPL and Daytona Beach to renew FPL's franchise and to convince FPL's retail customers that it does a better job for them (Cities' May 27, 1981 Motion, pages 70-72 and Appendix I, 55-59). By refusing to deal with municipal systems, including

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1/ We can envision a new retail system paying FPL the book cost of the facilities. That is apparently more than the market value of the shareholders' stock, market prices now being below book.

"outside" Cities, and by discouraging or defeating pooling efforts among those systems, FPL believes that it can make the Cities look worse and make itself look better, so that FPL can maintain and enhance its retail monopoly within its territory. Former FPL Vice President Benjamin Fuqua recently repeated why FPL does not want to deal with municipal systems (September 22-23, 1981 deposition, pages 19-22, 119-133, 194-202, 260-262, and 273-276, attached as Appendix A). 1/

> A Well, it's a foot in the door, sir. You wholesale this one, then the next one wants you to wholesale. Then they want to get in the retail business themselves. And you may have a franchiser there. (Deposition page 21, lines 3-6)
>
> ....
>
> Q And you assume that New Smyrna Beach or Tallahassee would take over FP&L -- what were you thinking of?
>
> A They might undertake it.
>
> Q And you were concerned about that as a possibility?
>
> A Yes, sir. Obviously.
>
> Q How would a Tallahassee or New Smyrna Beach go ahead and take over FPL?
>
> A Well, we have discussed that in my testimony already, the various proposals such as the Yankee Dixie and others, and efforts to tie them together, get federal subsidies and grants. That's all.

1/ The Yankee Dixie project proposal, referred to by Mr. Fuqua, recommended that municipal and cooperatively-owned electric utility systems coordinate their generation and transmission development throughout the Eastern United States. That generation and transmission could have helped municipal systems in peninsular Florida, including "outside" Cities, to compete with FPL in the bulk power market and for retail sales.

My testimony is replete with answers to that particular item. (Deposition page 195, line 12 through 196, line 4)

5. Retail monopolization, not legitimate business.

Putting aside the avoidance of alleged harm to shareholders (discussed below), FPL's refusals to deal are for the purpose of keeping its retail customers. Those refusals help FPL keep down its retail rates and help keep municipal system rates higher than they might be. That and FPL's takeover efforts, retail sales promotion, yardstick competition, and franchise retention programs (as discussed above) help FPL to maintain and enhance its retail monopoly.

FPL argues that its refusals to deal with "outside" Cities make business sense because FPL is unable to sell to those Cities at marginal-cost prices. Marginal-cost pricing considerations that make sense in an unregulated and more competitive market are no excuse for FPL here, because regulation would transfer to the rate payers the benefits of marginal cost pricing. FPL could not keep the benefits of any extra profits which an unregulated firm might enjoy from marginal-cost pricing. FPL's Chairman of the Board McDonald conceded or insisted that, overall, regulation would constrain FPL's revenues to a reasonable profit on its incurred costs (McDonald September 3, 1981 deposition, page 498, attached as Appendix B). 1/ Thus FPL cannot be asserting the

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1/ There is room for marginal-cost pricing considerations in utility rate design, and regulators are giving consideration to marginal-cost in that context. However, overall the utility's revenue requirements and allowances are held to expenses plus profit on embedded investment.

marginal cost principle for normal business reasons. FPL is really saying that it does not want to make more sales in the wholesale power market, where there may be more competition, and that FPL wants instead to confine its sales to its retail territory the better to monopolize it.

FPL's desire to maintain and enhance its monopoly provides no excuse for its refusals to deal. See Otter Tail Power Company v. United States, 410 U.S. 366, 380 (1973), rejecting Otter Tail's excuse "that, without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill." Charging relatively higher wholesale rates than retail rates with the purpose or effect of maintaining or enhancing retail utility monopoly violates the antitrust laws. See City of Mishawaka, Indiana v. Indiana & Michigan Electric Company, 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978). Offers to sell at above the normal regulated rate are impractical and, as the FERC observed in evaluating FPL's pricing contention, Opinion No. 57, 32 PUR 4th at 339, slip opinion at 38,

> Such offers to sell at impractical prices and terms have been construed as unlawful refusals to deal, when done to further monopoly power. Eastman Kodak v. Southern Photo Materials Co., 273 U.S. 359 (1927).

6. Dealings with some Cities. FPL is willing to sell some wholesale power to certain "in and near" Cities, though apparently not all of them (see Cities' September 14, 1981 Supplemental Memorandum, pages 14-16). FPL's willingness followed an FERC order requiring FPL to make nondiscriminatary

sales within its "territory." The FERC's order rejects arguments like those FPL attempts here. Opinion No. 57, 32 PUR 4th at 339-340, slip opinion at 38-40. FPL acquiesced in the FERC's order, by dismissing its appeal. If FPL's purported business justification did not convince FPL to press its appeal, FPL should not be allowed to rely on that justification now to discriminate against others in the peninsular Florida bulk power market.

FPL is not really offering firm wholesale sales at marginal-cost rates to "outside" Cities (FPL's September 14, 1981 Memorandum, page 2, notes 3 and 4 and related text; but see Tr. 1118, lines 17-21); FPL is using its obligation to charge regulated rates as an excuse for refusing to deal. That disability to discriminate cannot excuse FPL because the discrimination would itself be unlawful. It would of course be unlawful under the Federal Power Act for FPL to discriminate. More directly, it would be unlawful under the antitrust laws. In the pending antitrust suit against FPL, the District Court determined that sales of electricity were sales of a commodity for purposes of the Robinson-Patman Act. City of Gainesville et al. v. Florida Power & Light Co., No. 79-5101-CIV-JLK (S.D. Fla. April 18, 1980): "The pertinent provisions of the Robinson-Patman and Clayton Acts prohbit price discrimination and other anticompetitive practices dealing with 'commodities' ... electricity is a commodity under the Acts." (Slip opinion at page 31.) FPL's sales of electricity are in interstate commerce. Florida Power & Light Company v. FPC, 404 U.S. 453 (1972). Therefore, FPL's

sales are subject to the Robinson-Patman Act, which would prohibit FPL from charging higher prices to ouside Cities than to "in and near" Cities, there being no cost-of-serving difference between them. See United States v. Borden, 370 U.S. 460 (1962), disallowing price discrimination based on improper sub-grouping; Borden could not charge higher milk prices to independents as such, though it cost Borden more to deal with independents on average than with chain stores, because it did not cost Borden more with regard to many of the independents.

FPL has acquiesced in this NRC proceeding to offer some systems (here including Gainesville, which FPL counts as outside its wholesale sales territory) the right to participate in St. Lucie Unit No. 2 at unit cost, not replacement cost. If FPL's purported pricing justifications did not relieve it or dissuade it from dealing with the named Cities at unit cost, then its pricing consideration cannot be a legitimate excuse for refusing to deal with other Cities. So far as we know, the NRC has never trimmed an otherwise-justified requirement that the applicant offer participation in its unit, even though (according to FPL's argument) the applicant's refusal would have a business justification related to price.

7. Injury to competition in the bulk power market. The Fifth Circuit characterized the wholesale bulk power market as concentrated mainly in FPL and Florida Power Corporation, but

found that there is competition or potential competition in that peninsular Florida market. Gainesville Utilities Dept. v. Florida Power & Light Company, 573 F.2d 292, 302-303 (5th Cir.), cert. denied, 439 U.S. 966 (1978). If the outside Cities are disabled by FPL refusals from dealing with FPL in firm wholesale sales or unit participation, then their ability to compete in the wholesale power market is surely injured. Opinion No. 57, 32 PUR 4th at 339-340, slip opinion at 38-40. We have previously shown that Cities are competitors or potential competitors in the peninsular Florida bulk power market (Cities' May 27, 1981 Motion, pages 73-74). See also point 4 above. When a monopolist uses or threatens refusals to deal with competitors in a related market in order to gain a competitive advantage in the monopoly market or the related market, it violates the antitrust laws. See United States v. Griffith, 334 U.S. 100 (1948), discussed in Argument IC below.

8. Maintenance of a market division. The division of the wholesale power market in Florida was serious and effective as well as unlawful. Gainesville, supra. Although Florida Power Corp. withdrew from the conspiracy in the early 1970's, FPL has continued to refuse to deal with "outside" Cities in firm wholesale power or unit participation. Cities within Florida Power Corp.'s territory have thus been forced to continue to rely on Florida Power or their own resources. In effect, though the market division cracked and even leaked, it has not crumbled.

By FPL's refusals to deal with outside Cities in many important ways, it has been able to preserve markets that it had established or solidified through the market division. (It took Gainesville until 1981 to win the relief it sought from FPL.) The proper remedy for FPL's maintenance of the fruits of its market division is a Board condition requiring FPL to deal with "outside" Cities.

The license conditions allow the "in and near" Cities to share their participation in St. Lucie Unit No. 2 with the "outside" Cities, but cutting that baby in half affords no proper relief on either side of the line. To cure the situation inconsistent, FPL should be required to deal with the "outside" Cities on the same basis that it deals with the "in and near" Cities.

9. FPL's shareholders. If FPL's actions have been inconsistent with the antitrust laws, Florida Cities do not see why FPL should escape any relief obligation on the grounds that its shareholders may be injured. See Otter Tail Power Company, supra, 410 U.S. at 380. FPL argues that shareholders would be injured if it must make wholesale sales to new customers and restore the necessary capacity for established customers by financing with new stock at prices below book. On that trail, FPL still has not shown when such financing would need to occur and can hardly predict that stock prices will then be below book. Anyway, the fact that FPL's stock now sells below book does not

relieve FPL from responsibility to deal or from the remedy for anticompetitive refusals to deal. The FERC acknowledged FPL's argument about FPL's stock selling below book, Opinion No. 57, 32 FUR 4th at 338, slip opinion at 36, but nevertheless ordered a remedy based on FPL's anticompetitive refusals to deal, at 339-340, slip opinion at 38-40.

Furthermore, an FPL offer of participation in generating facilities (or transmission) to the "outside" Cities should help relieve, rather than harm FPL's shareholders. That is, FPL's sale of more generating megawattage (or of transmission participation) would reduce FPL's own financing requirement and either directly relieve the need for equity financing or preserve FPL's borrowing capability and defer the need for other equity financing. Of course, according to FPL's argument, the Company would still need to invest in higher cost generating facilities in the future; but the Company cannot say that stock prices will then still be below book. 1/

* * *

In conclusion, FPL's purported business justification for refusing to deal on the basis of pricing considerations simply begs the question of whether FPL has been acting anticompetitively. Under regulation, FPL could not keep the extra profits from marginal-based prices (it would have to give one class of

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1/ So long as the stock prices are equal to or above book, the higher future investment should actually help shareholders.

customer or the other or all classes the benefit of those extra profits). When it uses its theory to help it maintain and enhance its retail monopoly and impede its competitors, FPL's purported justification becomes part of the abuse and not an excuse.

C. FPL's Refusals To Deal With "Outside" Cities In The Peninsular Florida Bulk Power Market Are Anticompetitive Because The Refusals Injure Competition There And Because The Refusals Have The Purpose And Effect Of Maintaining And Expanding FPL's Retail Monopoly.

FPL scorns Florida Cities' reliance on United States v. Griffith, 334 U.S. 100 (1948) and South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), cert denied, 385 U.S. 934 (1966). Here, again, is how those cases justify summary disposition for the "outside" Cities, assuming that FPL has monopoly power within its retail territory but not throughout peninsular Florida. 1/

1/ The Cities are entitled to summary disposition on other bases. For one, FPL's refusals to deal with the "outside" Cities maintain a situation inconsistent with the antitrust laws, where FPL helped establish and solidify its monopoly through an illegal market division, Gainesville, supra, and FPL has perpetuated the fruits of that market division by continuing to refuse to deal. (Cities' May 27, 1981 Motion, Argument IA; Argument IB8, supra.) Furthermore, the settlement agreement ... this case helps FPL to continue its refusals to deal and thus refreshes the market division (Cities' May 27, 1981 Motion, Argument IB). If not granted summary disposition concerning the situation inconsistent with the antitrust laws, Cities would also attempt to prove at trial that FPL has monopoly power and has exercised monopoly power in the peninsular Florida bulk power market. Compare, e.g., Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122 (2d Cir. 1981), holding that defendant's having a fifty percent market share or even less does not preclude a finding of market power. Cities also reserve their rights, if denied summary disposition, to prove a nuclear product market and FPL's monopolization of it.

In Griffith, the theatre owner owned the only movie house in some towns and competed in others. He used his monopoly power in the single theatre towns to help win first run contracts, restricting his competitors resources, thereby putting them at a disadvantage, and sometimes driving them out of business. This case parallels Griffith in determinative ways. FPL can maintain and enhance its retail monopoly by restricting resources, here bulk power resources that FPL itself owns. It can thereby, for example, help defeat any effort by Tallahassee to provide Daytona Beach's bulk power needs. Even aside from FPL's maintaining and enhancing its retail monopoly, FPL's refusals to deal give it an advantage against competitors in those facets of the bulk power market where FPL does attempt to deal, including economy sales and other interchange transactions. Furthermore, FPL's refusals to deal with the "outside" Cities perpetuate the effects of the previously established market division. See Argument IB8, supra.

The South Carolina Milk Producers case carries Florida Cities' argument one step further. In that case grocery store owners conspired to monopolize the sale of various grocery products, including milk, by selling the milk at a loss (as a loss leader). 1/ Here, FPL has monopolized the bulk power and

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1/ Conspiracy to monopolize was assumed for purposes of defendants' motion to dismiss the antitrust complaint.

retail markets within the perimeter of its retail territory, by refusing to deal in bulk power resources. In South Carolina Milk Producers the raw milk producer was entitled to maintain an antitrust action against the conspiring grocery store owners, even though the raw milk producer did not compete with the grocery store owners, if "the plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby .." 560 F.2d at 418. Here, the "outside" Cities should be entitled to relief from FPL, even if the Cities are found to be limited competitors of FPL, because FPL's monopolizations within its retail territory have seriously restrained competition in the peninsular market and the "outside" Cities have been injured thereby.

II. FPL'S ARGUMENTS AGAINST COLLATERAL ESTOPPEL ARE WRONG.

A. Regarding Gainesville, Florida Cities Were Not Sideline-Sitters And Are Not Otherwise Ineligible For Collateral Estoppel. Even Absent Collateral Estoppel, Florida Cities Are Entitled To Summary Disposition On The Market Division Issue.

Florida Cities contend (Cities' May 27, 1981 Motion, pages 10-17) that FPL is estopped from relitigating the issue, resolved by the Fifth Circuit, that FPL engaged in an unlawful conspiracy "to divide the wholesale power market in Florida." Gainesville Utilities Dept. v. Florida Power & Light Company, 573 F.2d 292, 294 (5th Cir.) cert denied, 439 U.S. 966 (1978). FPL persists (FPL September 14, 1981 Memorandum, pages 12-13) on the basis of its unsupported allegation that Cities could easily have joined in the 1968 Gainesville suit and are therefore ineligible for collateral estoppel here, citing Parklane Hosiery Company v. Shore, 439 U.S. 322, 331 (1979). On the contrary, Florida Cities are (as explained below) like the plaintiffs in Parklane, who were afforded collateral estoppel. Even without collateral estoppel, Florida Cities are entitled to summary disposition on the issue, because FPL has not suggested any evidence that would cast doubt on the compelling evidence proving a market division.

Gainesville's 1968 complaint (Attachment C) alleged, in essence, that FPL and Florida Power Corp. had unlawfully refused to interconnect with Gainesville and that the refusals were aided and aggravated by a conspiracy to divide the market. Other

Cities were also wrongfully refused interconnections and, admittedly, they want to prove that market division. However, their joinder in the Gainesville case would have complicated that antitrust suit and substantially lengthened it. For example, other Cities had claims that FPL or Florida Power Corp. wrongfully refused to sell the Cities wholesale power. The Cities would have been obligated to assert those other claims or lose them, if they had joined the Gainesville suit. Furthermore, from the 1968 perspective the plaintiffs could not have been sure of proving a market division; they would have needed to press and prove their monopolization claims, which in turn would have required additional proof, thereby complicating that case.

In Parklane the Supreme Court affirmed the plaintiff's right to collateral estoppel where joinder in the prior suit would have complicated it. There, the Supreme Court quoted (439 U.S. at 332, note 17) from SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (2d Cir. 1972): "the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues." In Everest the Second Circuit affirmed the denial of a motion by private parties to join in an SEC action. The Court observed that the private parties' claim was based on the same alleged fraud as the SEC action, that there were other considerations "favoring intervention," and that district courts had the discretion to allow joinder in appropriate cases, but that the cost of the litigation would be greatly increased for the SEC by

the proposed joinder in that case because of additional issues. 475 F.2d at 1239-1240. Now, after years of frustration, the Cities have themselves agreed to join together in an antitrust action, Lake Worth Utilities Authority et al. v. Florida Power & Light Company, United States District for the Southern District of Florida, No. 79-5101-CIV-JLK. However, in 1968 the Court could well have decided against any joinder in Gainesville's unilateral and comparatively narrower antitrust suit.

Post-Parklane decisions have sensibly interpreted the ease-of-joinder test as a practical litigation question, not a technical question of procedural possibilities under the Federal Rules. These cases ask whether the asserters of collateral estoppel had been sideline-sitters, waiting to see the outcome of the prior case. In Carr v. District of Columbia, 646 F.2d 599, 605-606 (D.C. Cir. 1980), the plaintiff sued to set aside a prior judgment on the grounds that the District of Columbia had no authority to impose conditions on "original alley closings." Subsequent to the initiation of the set-aside action, other parties sued independently on that issue and won. Carr then asserted collateral estoppel against the Government on the ground that it had lost on the issue in the suit by the other parties. The D.C. Circuit affirmed the application of collateral estoppel in favor of the plaintiff on the grounds that (whether or not the plaintiff could technically have joined in the other suit) it had to maintain the separate set-aside action and therefore was not a "wait and see" plaintiff.

Likewise, in Starker v. United States, 602 F.2d 1341 (9th Cir. 1979), the plaintiff sued for a tax refund on the ground that his exchange of property for federal timberland was not a taxable transaction. In a separate suit by the plaintiff's son, a related transaction under the same contract was held not a taxable transaction. The Ninth Circuit concluded that the plaintiff was entitled to collateral estoppel on the issue decided against the Government in the son's suit; the plaintiff's case involved additional issues, so he could not be characterized as a "wait and see" plaintiff, 602 F.2d at 1349-1350:

> The Court's "general rule", that a plaintiff who could "easily have joined" a first suit cannot assert collateral estoppel in a second, raises more troublesome questions. It is unclear from Parklane Hosiery what type of "ease" is relevant. In the present case, Fed.R.Civ.P. 20 may have technically authorized T. J. Starker's joinder in his son and daughter-in-law's refund suit. The father's suit differs from that of his son in so many respects, however, that there are numerous possible explanations why T. J. Starker -- or for that matter, Bruce and Elizabeth Starker -- might have wanted the lawsuits tried separately. 6/ We decline to speculate on motivation. This is not a case in which a litigant adopted a "wait-and-see"

6/ As noted in our discussion of the facts of Starker I and Starker II, supra, the first case involved three direct transfers from Crown and numerous other direct transfers from another corporation to the taxpayers, whereas the second involves nine direct transfers from Crown, three indirect transfers from Crown, and none from any other corporation. The case at bar also presents the question of the proper treatment of the "growth factor" added to T. J. Starker's account; his son and daughter-in-law received no such credit.

> attitude for the obvious purpose of eluding the binding force of an initial resolution of a simple issue. Thus, we exercise our discretion in favor of T. J. Starker and hold that the government can be estoped as against him because of the final resolution of Bruce and Elizabeth Starker's suit.

The Cities cannot be characterized as "wait and see" plaintiffs here. FPL's application in this proceeding was not filed until the 1970's, and antitrust review was not available until after the 1970 amendments of the Atomic Energy Act. Atomic Act of 1954, §105, 42 U.S.C. §2135 (1970), as amended by Pub.L.No. 91-560 §6, 84 Stat. 1473 (1970). Cities could not have held off joining in the Gainesville suit, initiated in 1968, in order to wait and see how it might affect their subsequently enacted rights in a future proceeding before this Commission. Of course, the additional antitrust claims associated with the other Cities present additional practical reasons for their not joining in Gainesville's comparatively narrow 1968 antitrust complaint. 1/

FPL invokes Young v. United States, No. 79 Civ. 3430 (S.D.N.Y. June 23, 1981) [FPL September 14, Memorandum, page 3 and Attachment D], but that case has no bearing here. In that

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1/ Furthermore, FPL and Power Corp. opposed the Cities hiring legal and engineering advisors, and the utilities treated any such potential hiring as a further impedance to dealings between the utilities and the Cities (Cities' May 27, 1981 Motion, pages 80-84). That constitutes another practical reason why the Cities did not litigate and helps prove that Cities were not playing a cunning litigation game of "wait and see." The Cities were struggling to convince the utilities to do business with them.

case the New York plaintiff sued for damages alleged to have resulted from a swine flu vaccination. The plaintiff moved for partial summary judgment on the ground that the defendant should be estopped by an Iowa decision which determined that the government had given inadequate notice of the risks of the vaccine. The New York courts refused to apply collateral estoppel, for several reasons. First, the Iowa decision had determined inadequate government warning of risks under a national standard or, alternatively, an Iowa standard; but the New York court indicated that a local standard (there New York) may govern, so that the government should not be estopped from showing that it gave adequate warning under the New York standard or under the national standard if a national standard applies. Second, numerous other decisions were in favor of the government on the warning issue; the New York court concluded that it would be unfair to estop the government by the one anti-government decision on the issue, where the New York plaintiff had not joined in the Iowa suit against the government. Third, the New York court noted that granting estoppel for the plaintiff in this kind of case would encourage "wait and see" attitudes. That concern was peculiarly apt in the swine flu litigation, where plaintiffs across the land might outwait pro-government decisions until they could take advantage of some pro-plaintiff decision if collateral estoppel were then available. 1/

1/ Still, Florida Cities are skeptical that the New York plaintiff could easily have joined in the distant Iowa

FOOTNOTE CONTINUED ON NEXT PAGE

Finally, even if the Florida Cities are somehow ineligible to assert collateral estoppel with regard to the Gainesville decision, Florida Cities are still entitled to a summary determination that there has been a market division according to the same facts that were compelling to the Fifth Circuit. In the face of Florida Cities' Motion For Summary Disposition, it was up to FPL to come forward with facts and analysis to disprove Florida Cities' supported allegations of a market division; but FPL still has not suggested any fact that would put in doubt the compelling evidence of a market division. In Liberty Leasing Company v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir. 1967), the plaintiff answered defendant's motion for summary judgment with a deposition containing only general assertions and legal conclusions. The Fifth Circuit held that

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

litigation. The sounder reason for the decision in the Young v. United States case may be that it would be inequitable to estop a defendant who had won equivalent cases on the same issue. See Parklane, 439 U.S. at 330: "allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." Starker v. United States, 602 F.2d at 1349: "such unfairness [rendering offensive collateral estoppel inapplicable] could arise if .. the judgment in the first action was inconsistent with a previous decision in the defendant's favor .." That real equitable consideration is different from the spurious equity claimed by FPL (FPL September 14, 1981 Memorandum, page 12, footnote 1) that Cities should be disqualified from offensive collateral estoppel on the market division issue because FPL may not stop the Cities by the judgment against Gainesville's monopolization claim in Gainesville. FPL is simply trying to resurrect the discredited mutuality doctrine. See Parklane, 439 U.S. at 326-328.

> "... mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment."

FPL invokes In re Yarn Processing Patent Validity Litigation, 472 F.Supp. 174 (S.D. Fla. 1979). (FPL's September 14, 1981 Memorandum, page 13; FPL August 7, 1981 Response, page 84). As we understand that complicated case, a patent holder had sued alleged infringers in a multi-district litigation; but the patent was held unenforceable because of misuse. The further question remained whether the misuse had been purged, so that the patent holder might still maintain his suit. Some of the defendants sought a trial and judgment that the plaintiff had not purged the misuse of the patent. However, other defendants declined to join in the trial and, furthermore, declined to be bound by the result of the trial. Venue considerations prevented the trial court from ordering those other defendants to join in the trial. At this juncture the trial court ordered that the other defendants, which declined to join in the trial of the purgation issue and declined to be bound by the result of that trial, would be precluded from asserting collateral estoppel against the plaintiff in the event that the plaintiff lost at the trial on the purgation issue. Plainly, the sideline defendants were playing "wait and see": "the court is presented with the possibility that others are holding back, apparently, with the hope of later amending their answers to include the collateral estoppel defense on remand." 472 F.Supp. at 177. That "wait and see" consideration simply does not apply to the Florida Cities in this case, for the reasons discussed above.

B. Regarding FERC Opinion No. 57, Collateral Estoppel Is Not Precluded In This Case By Any Shift In The Burden Of Persuasion.

Florida Cities seek to estop FPL from relitigating the matters decided by Florida Power & Light Company, Opinion No. 57, 32 PUR 4th 313 (August 3, 1979), appeal dismissed, Florida Power & Light Company v. FERC, D.C. Cir. No. 79-2414 (April 25, 1980). See Cities' May 27, 1981 Motion, pages 10-17 and Cities' August 7, 1981 Response, pages 18-24. FPL persists (FPL's September 14, 1981 Memorandum, pages 14-16) in arguing that it is not subject to estoppel with regard to Opinion No. 57 because the burden of persuasion has shifted from FPL in the FERC decision to the Cities in this proceeding. Cities rely on their previously submitted analysis (Cities' September 14, 1981 Supplemental Memorandum, pages 1-13) as adequate to answer FPL's arguments in this regard. Two additional comments may be in order, however.

First, Florida Cities did not anticipate FPL's reliance on Lentin v. Commissioner of Internal Revenue, 226 F.2d 695, 699 (7th Cir. 1955). The case is inapposite. The Price Administrator had successfully sued Lentin. An issue decided in that pricing case recurred in a tax case, and the Tax Court estopped Lentin from relitigating the issue. On appeal, Lentin contended that he should not have been estopped because he had the burden of persuasion in the pricing case, but the burden of persuasion allegedly shifted to the Commissioner for Internal Revenue in the tax case. However, the Court of Appeals had no occasion to decide whether a shift in the burden of persuasion

would preclude collateral estoppel, because the Court of Appeals found that there was no shift. The Court's complete discussion of the issue is as follows:

> The petitioner here argues at length that the doctrine of collateral estoppel cannot be applied where the burden of proof in two actions is on different parties. The petitioner says that in the OPA case he had the burden of proof to show that he was not guilty of willful violations of the OPA regulations, but that in the case before the Tax Court the burden of proof shifted to the Commissioner. We cannot agree that there was such a shift in the burden of proof. In the case before the Tax Court the petitioner was claiming a deduction and the burden was upon him to prove facts which would entitle him to the deduction. (citations omitted)

Second, FPL again argues that because a reduction in the degree of proof precludes collateral estoppel, then a shift in the burden of persuasion from one party to the other should a fortiori preclude collateral estoppel. FPL is wrong. With regard to the degree of proof, the evidence may be insufficient for proof beyond a reasonable doubt in the first case, but may be preponderant and therefore sufficient in the second case. For example, the government may be unable to convict the defendant in a criminal case, but may have sufficient evidence to win damages from the defendant in the second case. That consideration has no logical application in the context of a shifting burden from one side in the first case to the adverse side in the second case. Assuming adequate incentive and opportunity for the losing party to have litigated the first case, the shift to the other party would have no practical effect except where the evidence in the

first case was evenly balanced, a consideration which has no relation to any reduction in the degree of proof and which has no bearing here for reasons previously explained by the Cities (Cities' September 14, 1981 Supplemental Memorandum, pages 5-8).

C. Regarding FPC Opinion No. 517, Florida Cities Rely On Determinative Findings That Were Affirmed; FPL Should Therefore Be Estopped By Those Determinations.

1. The FPC's findings on the benefits of coordination were neither reversed nor abeyed on appeal.

The FPC determined years ago that FPL benefits significantly from its coordination with other utilities. Florida Power & Light Company, Opinion No. 517, 37 FPC 544 (1967), reversed, 430 F.2d 1377 (5th Cir. 1970), reversed, Florida Power & Light Company v. FPC, 404 U.S. 453 (1972). Florida Cities rely on those findings (Cities' May 27, 1981 Motion, pages 22, 34, and 92; Cities August 7, 1981 Response, pages 6, 14; Cities' September 14, 1981 Supplemental Memorandum, page 23). Indeed, Florida Cities seek to estop FPL from relitigating the FPC's determination that FPL benefits from coordination (Cities' August 7, 1981 Response, pages 10, 60; see also Cities' May 27, 1981 Motion, pages 11-15). FPL contends that it is not estopped in that regard (FPL's September 14, 1981 Memorandum, pages 16-21), because the FPC's findings on the benefits of coordination were allegedly tied to the "electromagnetic unity" theory of interstate flow and jurisdiction, which the Supreme Court put

aside, 1/ and were unnecessary to the "commingling" theory of interstate flow and jurisdiction, which the Supreme Court affirmed. FPL gives no explanation for its erroneous contention that the FPC findings on the benefits of coordination were tied to the electromagnetic theory. 2/ In fact, as we explain below, the FPC's findings on the benefits of coordination were responsive to an affirmative defense by FPL that it should not be subject to the FPC's jurisdiction even if there were an interstate flow of electricity (under any theory). Furthermore, in affirming the FPC's jurisdiction over FPL, the Supreme Court expressly acknowledged the facts of coordination and recited as true some of the benefits of coordination found by the FPC, which establish "the focal issue in this case." 404 U.S. at 456-458. 3/ Thus, there is no logical or factual basis for FPL's avoiding collateral estoppel on this issue.

1/ "We do not find it necessary to approve or disapprove the Federal Power Commission's analysis based on unity of electromagnetic response." 404 U.S. at 462-463.

2/ The electromagnetic theory would help establish utility interdependence and the benefits of coordination (see FPL's September 14, 1981 Memorandum, page 21, note 1); but that theory is not and was not necessary to establish the benefits of coordination, as explained in the text of this argument.

3/ The Supreme Court had previously noted some of the benefits of coordination and interconnection for the members of the Florida Operating Committee in Gainesville v. Florida Power Corporation, 402 U.S. 515, 518-521 (1971).

The ultimate issue in the FPC proceeding was whether FPL had engaged in interstate commerce and was therefore subject to the Commission's jurisdiction. The key question was whether electricity flowed in interstate commerce to and from FPL. The presiding examiner and the FPC, which affirmed him, found that there was interstate commerce in electricity according to the electromagnetic unity theory and alternatively according to a commingling theory. FPL disputed both theories, but in addition FPL argued that any interstate flow of electricity was incidental or adventitious because FPL had "planned its system to be self-sufficient, and .. it possesses sufficient generating capacity of its own to meet its load without any dependence" on others. 37 FPC at 551. The FPC rejected this affirmative defense, holding that FPL did not in fact operate independently and instead benefitted substantially from pooling and coordination. 37 FPC at 551-552. The complete FPC finding on the issue is as follows:

> Consideration has been given to FPL's assertion that because of the unique peninsular nature of its service area it planned its system to be self-sufficient, and that it possesses sufficient generating capacity of its own to meet its loads without any dependence upon the spinning reserves or emergency power of other Florida or out-of-state systems. We do not find this assertion persuasive. The fact that FPL could operate as a self-sufficient utility is not controlling because FPL simply does not operate its system in that manner. The record in this proceeding makes it plain that FPL receives substantial benefits from its participation in the Florida Pool in the coordination of spinning reserves, the arrangement of plant maintenance schedules,

> and the assurance of reliability of frequency control and from both the Florida Pool and ISG in the form of automatic assistance in the case of emergencies. As we stated in our opinion in Indiana & Michigan Electric Company, supra, it is the system's actual mode of operation, not how the system could operate, that is important. Moreover, the particular operating pattern actually used by FPL is consistent with sound operating practices and with the principles enunciated in the Commission's National Power Survey issued in December 1964 in which all segments of the electric power industry participated fully and cooperatively.

2. The FPC's findings concerning FPL's refusals to deal with Clewiston were essential to the FPC's decision; FPL should be estopped from relitigating those findings.

The FPC's presiding examiner found that FPL had refused to deal with Clewiston and had proposed to take over the Clewiston system by leasing it. 37 FPC at 572-573. Florida Cities rely on those findings (Cities' May 27, 1981 Motion, pages 48-56) and they seek to estop FPL from relitigating those findings. FPL contends (FPL's September 14, 1981 Memorandum, pages 21-23) that the findings concerning Clewiston were not an essential part of the decision partly because Clewiston's complaints were settled before the Commission's decision. FPL is mistaken; the findings concerning Clewiston were essential, for the following reasons.

In the FPC proceeding FPL had argued that, even if it might be subject to the FPC's jurisdiction, the Commission should wait to assert jurisdiction until it had a real problem to solve such as a complaint by a potential wholesale customer. 37 FPC at 553. In response to that consideration, the presiding examiner made

the findings concerning Clewiston, to help demonstrate the propriety of asserting jurisdiction immediately: "A finding of jurisdiction herein would enable the Commission to take action with respect to similar problems if they should arise and if such a step should be found appropriate." 37 FPC at 573. The Commission expressly affirmed and adopted the decision of the presiding examiner: "The decision of the Presiding Examiner, as supplemented above, is adopted as the decision of the Commission." 37 FPC at 556.

Further, the Commission generalized on the issue as follows, 37 FPC at 553-554:

> The suggestion by counsel for FPL during the oral argument that we should wait to consider assuming jurisdiction until there is an actual complaint by a wholesale customer, either existing or potential, misconceives the broad statutory design which Congress had in mind in enacting Parts II and III of the Federal Power Act. Congress sought not only to give this Commission exclusive jurisdiction over wholesale sales in interstate commerce, but, in addition, to supplement local regulations at the federal level in such areas as accounting, interlocking directorates, mergers and consolidations, and the promotion of interconnection and coordination of the nation's facilities for the generation, transmission and sale of electric energy. None of these latter objectives depend upon the extent of wholesale sales or the percentage of interstate transmission in any particular case. The independent importance of these regulatory activities was spelled out in detail by the Commission, in light of the Act's legislative history, almost 20 years ago in the Connecticut Light and Power case, supra. FPL has presented no argument which would now persuade us to a contrary conclusion.

FPL apparently did not press its argument that the Commission should exercise its discretion (assuming it had any) to delay or abnegate jurisdiction under the circumstances. The Supreme Court affirmed the Commission and "remanded for reinstatement of the order of the Federal Power Commission" asserting jurisdiction. 404 U.S. at 469. The Supreme Court did not provide for any further consideration of possible delay or abnegation of jurisdiction. The findings which supported the immediate assertion of jurisdiction, including the Clewiston findings, thus form an essential part of the Commission's decision as affirmed on appeal. FPL's apparent decision not to press the issue should not deprive those findings of collateral estoppel effect.

3. Intervention in the FPC proceeding is not a prerequisite to Cities asserting collateral estoppel here.

None of the Florida Cities in this proceeding intervened in the FPC proceeding that led to Opinion No. 517. FPL contends (FPL's September 14, 1981 Memorandum, page 23) that the Florida Cities could easily intervened in that FPC proceeding and, having failed to do so, they are precluded by the Parklane doctrine from asserting collateral estoppel here. FPL is mistaken. Parklane denies collateral estoppel to "wait and see" plaintiffs; the purpose of Parklane is to reduce inequities and minimize the proliferation of litigation. Those considerations are wholly inapplicable here, because as a matter of stare decisis Florida Cities are in fact bound and estopped by the jurisdictional

determination in Opinion No. 517, whether or not they intervened and whatever the jurisdictional decision. 1/ Their failure to intervene would not proliferate any jurisdictional litigation.

1/ We put aside the possibility of substantial changes in fact and circumstance which would entitle the Cities or FPL to renew the jurisdictional question.

CONCLUSION

For the foregoing reasons and the reasons stated in Cities' May 27, 1981 Motion, their August 7, 1981 Response, and their September 14, 1981 Supplemental Memorandum and in Cities' oral argument of August 17 and 18, 1981, the Florida Cities urge the Board to grant their motion.

Respectfully submitted,

Robert A. Jablon
Alan J. Roth
Daniel Guttman
Marta A. Manildi

By Alan J. Roth

Attorneys for the Lake Worth Utilities Authority, the Utilities Commission of New Smyrna Beach, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Ft. Meade, Homestead, Key West, Kissimmee, Mt. Dora, Newberry, St. Cloud, Starke and Tallahassee, Florida, and the Florida Municipal Utilities Agency

September 28, 1981

Law offices of:
Spiegel & McDiarmid
2600 Virginia Avenue N.W.
Washington, D.C. 20037

BEFORE THE
UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo
Ivan W. Smith, Alternate

Florida Power & Light Company (St. Lucie Plant, Unit No. 2)	)	Docket No. 50-389A September 28, 1981

INDEX OF DOCUMENTS APPENDED TO

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

Appendix A

Excerpts from the deposition of Benjamin Fuqua, former FPL Vice President, taken September 22 and 23, 1981, in Lake Worth Utilities Authority et al. v. Florida Power & Light Company, Case No. 79-5101-CIV-JLK, re: municipal electric systems.

Appendix B

Excerpt from the deposition of Marshall McDonald, FPL Chairman of the Board, taken September 2, 1981 in Gainesville Regional Utilities et al. v. Florida Power & Light Company, S.D. Fla. Case No. 79-5101-CIV-JLK re: regulation of utility profit.

Appendix C

Complaint filed August 13, 1968 in Gainesville Utilities Dept. and City of Gainesville v. Florida Power Corporation and Florida Power & Light Company, M.D. Fla., Civil Action No. 68-305.

Appendix D

Letter from Alan J. Roth to J.A. Bouknight, requesting workpapers, September 22, 1981.

Letter from J.A. Bouknight to Alan J. Roth, refusing workpapers, September 25, 1981.

APPENDIX A

Excerpts from the deposition of Benjamin Fuqua, former FPL Vice President, t... September 22 and 23, 1981, in Lake Worth Utilities Authority et al. v. Florida Power & Light Company, Case No. 79-5101-CIV-JLK, re: municipal electric systems.

Transcript of Proceedings

U. S. DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

- -X

LAKE WORTH UTILITIES AUTHORITY, et al.,

Plaintiffs,

vs. : Case No. 79-5101-Civ.-JLK

FLORIDA POWER & LIGHT COMPANY,

Defendant.

- -X

DEPOSITION OF BENJAMIN FUQUA

Washington, D. C.

Tuesday, 22 September 1981

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2 BRTgdv

Southeastern Electric Exchange?

A Well, there again I think I have attended a few meetings, but I can't specify when.

Q Do you recall were you a member of any committees of the Southeastern Electric Exchange?

A Not so far as I recall.

Q During the 1950s, that is when you came to the company, was Florida Power & Light providing any service to the rural electric cooperatives, do you recall?

A Yes. Yes, they were.

Q Can you tell me, do you recall what kind of service they were providing?

A Wholesale.

Q And when you use the term "wholesale," can you explain what you mean?

A Well, energy for resale.

Q At that time, during the 1950s, were you providing any service to the municipal systems in Florida?

A To the best of my recollection the only entity we were supplying to, municipalities, was in the case of New Smyrna Beach and Homestead where we were serving, as a matter of being a good neighbor and helping out because

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those places did not have capacity. We didn't want to wholesale to them but we provided them with energy so they wouldn't black out and in reporting it we reported it as emergency energy, not wholesale.

Q Why didn't you want to wholesale to them?

A Well, one of the impelling reasons was we didn't have the capacity. Every night we would go to the peak and we wouldn't know whether we were going through the roof or not.

The other one was that we wanted to continue as an integrated public utility and we didn't want just to be a wholesale outfit.

Q Could you explain how would serving Homestead or New Smyrna Beach have impaired your ability to continue as an integrated public utility?

A Well, the municipal people, of course, believes that only the government can do anything at all, or at least very well. And we took the opposite view, that we wanted to continue as a privately-owned company created out of private capital and not out of tax dollars and be an arm of the government. That's our ideology.

Q I understand what you are saying but I'm not sure

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I understnd how serving wholesale to Homestead and New Smyrna Beach would have affected —

A Well, it's a foot in the door, sir. You wholesale this one, then the next one wants you to wholesale. Then they want to get in the retail business themselves. And you may have a franchiser there.

We don't agree with that point.

Q Why don't you agree with that point of view?

A I have already explained it to you, sir. As clearly as I can.

Q Okay. What was the reason that you wholesaled to the REA co-ops, then?

A Well, we felt that truly they represented a different situation. They were created to bring electric energy to areas that couldn't be economically served, rural areas, if you will, and that they were entitled to some special consideration because of that.

Q Yes.

A Of course what happened, as you know, is that they have grown and grown and grown. Now they serve as much commercial and industrial — more than they do residential. It's the same thing as I just described in connection with

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the municipalities.

Q Do you recall a provision in your contract with the REAs about their ability to resell to municipal systems?

A To municipals?

BRTreb

Q Why did you want to acquire the New Smyrna system in 1958?

A Why did we want to?

Q Right.

A Well, there again we have got a situation that is a cancerous sore. They didn't have any facilities of their own. They were leaning on us. And it just made good business sense to go ahead and try to incorporate them in our system. This could be done on a reasonable economic basis. But it never occurred. It didn't work out.

Q Do you recall making a proposal to acquire the system shortly after this memo in 1958 or '59?

A I don't recall it but it might have been done. I don't think I did, personally, submit any proposal.

Q Once again in the case of New Smyrna Beach, why would you have been interested in acquiring them but not serving them wholesale?

A Well, you get back to the same thing that I have testified on before. We didn't choose to wholesale at that time because we wanted to stay a retail company and we figured that the old foot in the door — get some arm of the government to handle it saying that nobody can do anything

2 BRTreb

but some arm of the government, a totalitarian thing. And we didn't agree with that.

Q How would New Smyrna Beach be an arm — would you explain a little bit more how would New Smyrna Beach be a foot in the door and an arm of the government?

A Well, if you could get all your boys collected together, arm all up and lobby up here in Washington and Tallahassee and make it so that all of them were under some form of — some arm of the government, their facilities all created out of tax dollars, rather than investor funds, then that is what I am talking about.

Q Well, first of all let me ask you, did you consider New Smyrna Beach and Homestead and Fort Pierce, the municipal systems, to be an arm of the government? I understand —

A Of their government, certainly they are. They are owned by a governmental agency. The city is a governmental agency.

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Q I understand that. But did you consider them to be an arm of the government in Washington, for example?

A Well, I thought it, you know, they have this thing called Yankee Dixie they were going to connect up everybody and his brother.

All of these proposals of those who support public ownership and government control, they are always looking for ways to tie everything together. You see? And knock out the investor-owned companies. They say that we are trying to knock them out. They are trying to knock us out harder than we are them. You see?

It's the difference of ideology. It's been going on for a long time. You know all about it. I'm not telling you anything.

Q What was Yankee Dixie? You just referred to Yankee Dixie.

A Well, that was a scheme -- the government would have -- use coal from Appalachia and all up and down from here to breakfast, I don't know, New York to Key West. They were going to have one great transmission grid and have mammoth coal mines, and they would overrun everybody, sort of like the TVA did, you know.

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Q Did you follow that idea? That proposal of Yankee Dixie?

A Did I follow it?

Q Yes. See what was happening with it?

A Well, I think it finally fell of its own weight. But that was a proposal taken seriously by the municipal and governmental ownership people at the time.

Q Was it taken seriously by municipals in Florida, do you know?

A I think so. I believe so. That's my belief.

Q Why would that have been a bad idea, in your view, obviously?

A Well, I have just gone over it.

MR. BOUKNIGHT: I object to his having to go over it.

BY MR. GUTTMAN:

Q Simply because government would be taking over an activity —

A That we already had. Yes, sir. They will gobble you up if they can, yes, sir.

Q Was FP&L concerned about Yankee Dixie?

A Yes, sir. Or any other governmental threat to

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your operation.

Q Were there others that you recall besides Yankee Dixie?

A Other what?

Q Governmental threats, as you have just used the term.

A Well, I suppose the scheme that Seminole had, and which are probably in the works now. They want to have generation here and coal plants there: want to chop off a piece of your nuclear facility and so on. Right now.

Q Is that a threat to FP&L in your view?

A Yes, sir, it very definitely could be.

Q Why is that?

A Because they want to run — because of the governmental situation, where the government wants to take you.

Q But is Seminole — are cooperatives governmental agencies?

A Yes, sir. Yes, sir. By all means. They even get 2 percent money down to this hour for those co-ops.

Q Interesting.

A And when we are paying 18. Certainly they are an

BRTgdv

arm of the government. They were created by the government.

They weren't meant to do what they do today. They'll be here serving Washington next, I imagine.

Q Did you believe that the service that was being provided by the municipal system was qualitatively inferior to that provided by FP&L?

A I made no such charge, no, sir.

Q So it was a question of who owned it. Was it a question of the quality of the ownership or just who —

MR. BOUKNIGHT: Objection to the form of the question. I don't understand it.

THE WITNESS: It's a two-pronged question.

BY MR. GUTTMAN:

Q My question is, was the objection that FP&L had to the ownership? Or was there a question of quality as well?

MR. BOUKNIGHT: Again, I don't understand that question. If you do, you may try to answer it.

BY MR. GUTTMAN:

Q Did you have any reason to believe that municipal systems in Florida could not serve at rates as low as those that FP&L was offering?

BRTgdv

A No. I didn't have that. When you make up those rate comparisons, bear in mind that the municipals and the REAs, neither one of them are under any form of regulation as far as I know. Perhaps these last years the municipals have had to file something on rate structure, whatever that is. Maybe you've got a definition of it.

But I don't claim that they are inferior in quality. I think you could probably contend that a place like New Smyrna was because they didn't have anything to speak of to keep going there. That would be inferior, I'd say.

They had no reliability except what we provided them with. And there's a lot of other cases.

These cases are not isolated. We didn't want to be jurisdictional under the Federal Power Commission. It was a reason that you didn't like to talk about wholesaling because, you know, you'd come under the umbrella of the Federal Power Commission.

But we did serve a lot of people when they got in trouble, cities other than New Smyrna and Homestead. A lot of them. When they were in trouble, we would come to their assistance.

And we would report it as emergency power. And that's

BRTgdv

what we reported New Smyrna and Homestead all those years.

But I couldn't sit up there any longer when we had been bailing them out for ten years with uninterrupted service, almost, in the case of New Smyrna, and 75 percent of the time in Homestead. I couldn't sit there and claim that was not wholesaling because it was.

Q Did you tell that to the Federal Power Commission?

A They told me that.

Q Did you tell them that when they had that case about whether or not you were jurisdictional?

A No, the case was tried on transmission and not on wholesale.

Q Just to clear that up, are you saying that you were concerned if you sold wholesale to municipal systems then you would be doing something that might subject you to the jurisdictin of the Federal Power Commission?

A Yes. I think it would have strengthened their hand, probably. Although the lawsuit, or the case that finally went to the Supreme Court of the United States where we lost by one vote — we were trying it on transmission. The Jossle theory — that's electromagnetic interlocking.

BRTgdv

And if a lightbulb of 40 watts is turned on in Atlanta, Georgia, it would have some effect on the generators at Turkey Point, a thousand miles south. Even though it can't be measured the theory says that it would be there. Therefore, since that occurs across a state line, you are jurisdiction. That was the argument of the Jossel theory.

Q That's the staff with you are referring to?

A Yes, Dr. Jossel.

Q Was Florida Power Corporation connected with Georgia at that time?

A Yes, sir, they owned Georgia Power & Light Company which serves lower Georgia. I think their headquarters were at Valdosta, Georgia.

Q Do you recall in the early '60s or mid '60s when this case was going on, did Jacksonville tell you it was interested in building an interconnection to Georgia?

A Oh, I'm sure they did.

Q Were you supportive? Did you say that was a good idea, do you recall?

A Well, at that time when we were trying to escape jurisdiction, of course, what we contended was that the Federal Power Commission had never approved any transmission

2 BRTgdv

across state lines and we were careful to operate in Florida, and insulate ourselves by Florida Power Corporation or Jacksonville, whoever was hooking in to Georgia.

Q Do you recall telling Jacksonville in the 1960s, in the mid '60s during the period when the jurisdiction question was at issue, that you didn't think that you would support — you would desire them to go build a line to Georgia?

A I don't know whether we said that to them or not, before the final decision in the jurisdictional case. But we, for a period of years, undertook to escape the Federal Power Commission jurisdiction on the grounds that we were an intrastate company. We didn't operate outside the state of Florida at all.

And that more power came in from Georgia than went out, down here, anyway.

I think they do have a tie now, though. I believe one exists at this time. But I can't testify to that because I don't know it for sure.

Q Did, when you were involved with the legislature in Tallahassee, were there proposals to tax the municipal electric systems in Florida, do you recall?

2 BRTgdv

A No, sir. Not that I recall.

Well, let me think a minute. I believe that — I believe that a man named Tom Adams, he was a state senator from Green Cove Springs, Florida, did introduce some legislation undertaken to tax municipal operations when they were outside of the county of domicile.

In that instance, Green Cove Springs was served by Jacksonville, which is municipal. Green Cove Springs is in Clay County. It's not municipal. And Mr. Adams sought to tax that part of the property.

But it failed — no, it didn't fail. It passed but it was knocked out by the court because they never could decide what a proprietary capacity was versus a municipal or governmental capacity.

We claimed it was a proprietary at that point.

Q You say, "we claimed"?

A Florida Power & Light claimed that when you get down to Green Cove Springs, just as Senator Adams did, that's a proprietary operation at that point.

Q Did you take a position on that legislation? Did FP&L take a position?

A Sure we did.

2 BRTgdv

Q What was the position?

A That it was good legislation, and they ought to be taxed when they get outside of their county.

Q Why? Why did you think it was good —

A Why shouldn't they be taxed?

Q What difference would it make to Florida Power & Light whether they were taxed or not?

A It's the same thing of trying to arrest the march forward of the mighty government.

Q Were you afraid they would come into the territory you were serving?

A Well, they might have, or done anything else if you could hook up enough of them. Jacksonville could sit there tax free and crank up enough to go all the way to the end of Florida, all the way to Cape Sable.

Q Were you afraid that Jacksonville would do that?

A I had it in my mind, yes, sir, I did.

Q Were other FP&L officials concerned that was a possible —

A I think they shared my viewpoint on these matters pretty much.

Q Do you remember the "stay put" bill?

BRTgdv

A Yes, sir, I remember.

Q Can you tell me what that was about?

A Well, the "stay put" bill provided that if you — let's say Florida Power & Light is operating in a territory surrounding a city and that city is municipal, it reaches out and annexes the part that belongs to Florida Power & Light. It's now within the city.

And then the city would claim, "Well, you have taken all this property over by annexation, you've got to get out."

This legislation says, "No, you don't. You can stay put where you are and continue to serve and expand in that area." That's the "stay put" bill.

Q Did that actually become a law, do you know?

A Yes, sir to my recollection it did.

Q Was FP&L supporting that bill?

A Yes, sir.

Q And for what reason again?

A So they wouldn't take our property away from us. Isn't that a good reason?

Q Can I ask you — I'll say yes. But can I ask you a dumb question about that?

Why were you concerned that they would take your property

2 BRTgdv

away from you if you offered better service and lower rates? Why should you have had a concern?

A Because that's what they did — historically. Today — I'd say we, Florida Power & Light, have some property left in the city of Jacksonville and they are going to run us out sooner or later. See, we have been there all these years.

What they did there, they went different from what usually occurs. In these consolidations of cities and counties, the dominant governmental entity that usually survives is the county. But in the case of Jacksonville, it was the city.

So the boundaries of Duval County, which is abolished, is now the boundary of the city of Jacksonville. It's the largest city in the world.

And we are in there. And we have tried to stay.

We have a franchise at a place called Baldwin. But they are going to run us out. Yes, sir, they will run us out.

Q Is there anything FP&L can do too prevent itself —

A I doubt it.

Q What about offering service at lower rates?

BRTgdv

A Than Jacksonville?

Q Yes.

A They won't let us serve in there. Wouldn't have a prayer. You know that.

Q Did FP&L compare its rates with the municipal systems in the state?

A Oh, there are always rate comparisons being made. Arguments pro and con. Usually the rate comparison is on thousand kilowatt hours, which is, or was, a sort of an average residential consumption.

Q Yes.

A And on that basis, you can prove different things. Rates on some — or others — but Florida Power & Light Company's rates, I think, are competitive. But, of course, you've got a lot of other rates besides that. That isn't a true yardstick. You got commercial accounts and you've got industrial, and you've got municipal — street lights, flat rates and so forth.

MR. BOUKNIGHT: Let's take a few minutes.

(Recess.)

Transcript of Proceedings

U. S. DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

LAKE WORTH UTILITIES AUTHORITY, et al., Plaintiffs,	
vs.	Case No. 79-5101-Civ.-JLK
FLORIDA POWER & LIGHT COMPANY, Defendant.	

DEPOSITION OF BENJAMIN FUQUA (CONTINUED)

Washington, D. C.

Wednesday, 23 September 1981

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2 BRTgdv

Q I see you've got your answer there: is that correct?

A Yes, sir. Apparently so.

Q Okay. The first question I have is that the cover memo, July 9, your cover memo says you've given Mr. McDonald five possible catastrophic threats. But the next page is apparently number 3. Do you know whether that was the only one you gave him or whether there were four others?

A I don't know.

MR. GUTTMAN: Lon, we would like to request if there were four others, whatever is missing —

MR. BOUKNIGHT: What I'd suggest that you do is that you can request at the end of the deposition — if you'd write me a letter so we don't have to dig it out of the transcript?

BY MR. GUTTMAN:

Q Do you recall discussing your answer or the answers of others with the senior menagement group or the officials in that group?

A No, sir, I do not.

Q Have you had a chance to look at your answer there?

BRTgdv

A Yes, sir, I have glanced through it.

Q Could you take a look at 3B.

A Yes, sir.

Q You state there that you believe that FP&L should undertake to "resist the encroachments of tax dollar-created public power entities."

Did that include municipal systems?

A Yes. Sure.

Q So when you say "government takeover" in the heading, that included municipal systems?

A It could.

Q And you assume that New Smyrna Beach or Tallahassee would take over FP&L -- what were you thinking of?

A They might undertake it.

Q And you were concerned about that as a possibility?

A Yes, sir. Obviously.

Q How would a Tallahassee or New Smyrna Beach go ahead and take over FP&L?

A Well, we have discussed that in my testimony already, the various proposals such as the Yankee Dixie and

BRTgdv

others, and efforts to tie them together, get federal subsidies and grants. That's all.

My testimony is replete with answers to that particular item.

Q When you say, in item 3B that you should undertake to resist this in a balanced and reasonable way what kind of method would you have used to resist?

A Well, I think if you read on through you probably will find the answer right here in the memorandum.

Q Okay. Looking at 3C then, the next one, it says, one specific area to watch is the antitrust field and the demands made for ownership and sharing, wheeling, and coordination.

Was it your opinion that these demands were made in Florida?

A Well, I believe I testified that two cities, New Smyrna and Homestead, and Seminole, were involved. That has been testified to time and time again.

Q Is that to say that those were concerned — that those systems were interested in ownership sharing, wheeling, and coordination?

A So far as I know they were.

2 BRTgdv

Q Okay. At the time of this memo, in 1974, do you know, was FP&L voluntarily providing ownership sharing, wheeling, and coordination to those systems and any others?

MR. BOUKNIGHT: Objection, Mr. Guttman, I think that's vague beyond the point of being answerable.

BY MR. GUTTMAN:

Q Can you tell me what you mean by ownership sharing?

A Well, ownership sharing, I presume, would be to alot, or sell, or however you go about it, a share in the capacity of a nuclear power plant.

Q And what about coordination? What was meant by coordination?

A That I don't know.

Q Do you know why you would have used the term?

A No. I don't recall why I did.

Q Down at the item E it says, "Have plans to resist takeover in the courts."

Do you recall having the opportunity to discuss such plans in the senior management group?

A I have no recollection of it.

Q Could you look at the next page?

3 BRIgdv

A Yes, sir.

Q Look at item G: "Takeover may be total or partial."

Do you recall, I guess just before you left, Dade County was considering getting into the solid waste generation business? Do you recall that?

A I have a vague recollection of it. About the time I retired.

Q Were you concerned that that might be a way in which Dade County could enter the electric operating field?

A I don't think so, no, sir. Not the waste part: that it would use waste as a fuel.

Q You say, "If Dade County entered the operating field it would be a near disaster, as it would be a foot in the door or entering wedge."

Can you explain what you meant?

A That speaks for itself. It would be, in my opinion, a disaster for this investor-owned, taxpaying company, to be destroyed and taken over by an arm of the government. I think that's a disaster.

Q But if it were not the entire company but just part of Dade County, why would that be a disaster?

2 BRTgdv

A Well, it would fragment it and a large portion of the company's business was done in Dade County. It was a metropolitan government; the largest political entity except the state itself.

Q Are you aware, and if you are not aware I won't ask further questions, of the company's position in the last five or six years that it does not have the capacity to serve some of the municipal systems that have been asking for service? It lacks the power capability? It doesn't want new customers insofar as they are municipal systems?

A I don't truly understand what you are asking.

BRIrcb

Q My question is this: Is it your understanding that the company, FP&L, is looking for service? That it is eagerly searching for anyone to service at this time?

MR. BOUKNIGHT: Are you asking about six years after he is retired —

MR. GUTTMAN: Do you understand the question?

THE WITNESS: I have no idea.

BY MR. GUTTMAN:

Q Suppose metropolitan Dade County wanted to buy power from Tallahassee, New Smyrna Beach, or some municipal system. Would that have the same effect? Would that be a near disaster as well?

MR. BOUKNIGHT: I object to that on the ground that question is not understandable.

BY MR. GUTTMAN:

Q Well, would you have been concerned if one of the municipal systems wanted to sell power to metropolitan Dade County and Dade County would have bought that for resale, would that have been a concern for you?

MR. BOUKNIGHT: Are you assuming here that Dade County has once established itself as an electric system, acquired FP&L's facilities or are you suggesting that Dade

2 BRTreb

County might want to have its office served by the City of Tallahassee?

BY MR. GUTTMAN:

Q Suppose Dade County started meeting with some other systems in the state, municipal systems, about the possibility of their supplying Dade County instead of FP&L. Would that have been of concern to you?

MR. BOUKNIGHT: I have the same objection. I can't understand that.

MR. GUTTMAN: Answer the question, please.

MR. BOUKNIGHT: If you can understand it you can answer.

THE WITNESS: Well, I really don't understand it -- would it be a concern? I suppose it would be a concern. I testified time and time again in regard to the proposition that FP&L wants to continue as an investor-owned, taxpaying company. And anything that would tend to destroy that would be of concern, I think.

BY MR. GUTTMAN:

Q And any taking over of your customers by a municipal system would be something that would tend to destroy that in your mind?

BRTreb

A It would. It would chip away, I suppose. The foot in the door again.

Q Would you take a look at the memo before that? Mr. Autrey's response which is right before yours.

A Yes, sir.

Q Take a look at his answer 1 and 2.

A Yes, sir.

Q Do you agree with his statement 1, that the Federal Government requiring you to wholesale and wheel power would be a possible catastropic threat?

MR. BOUKNIGHT: I object to the characterization of that, Mr. Guttman.

MR. GUTTMAN: I am just reading from the heading.

MR. BOUKNIGHT: You can read the heading and then you can read statement number 1, and that does not get you to the point that Mr. Autrey said what you just paraphrased him saying.

BY MR. GUTTMAN:

Q Did you share the concerns that Mr. Autrey states in item 1 there?

MR. BOUKNIGHT: I object to that on the grounds that I think you first need to lay a foundation that he

2 BRTreb

Q Could you look at LLW 2-27-75, page 3 of 4?

A LLW?

Q Look at the entire LLW, 2-27-75, "Major provisions of the wholesale tariff."

A All right. Major provisions. Yes.

Q Do you recall Mr. Lloyd Williams in the rate department?

A Yes, sir. I recall him.

Q Do you know if he was LLW? Is that his initials?

A Yes.

Q This series of pages appears to be a presentation of the provisions of the wholesale tariff and associated potential problems. Will you look at page 3 which has the heading "potential problems"?

A Yes.

Q Can you tell me if you viewed those items identified, as potential problems with wholesale tariff service?

A I don't recall whether I viewed them as potential problems or not.

Q Will you take a look at item 4? Was that a potential problem that you saw with wholesale service to

1 BRTreb

municipal systems?

A Well, I would say that we would seek to renew our franchises, yes, sir.

Q Why would you seek to renew your franchises?

A Because we wanted to stay in business.

Q Well, item 4, under that item, the franchise would continue to buy from FP&L at wholesale — would FP&L stay in business if it served former franchises at wholesale?

A I don't know that — you are making the statement that they would perform wholesale. I didn't testify to that.

Q My question is would — did you view it as a problem that a system — that a franchise would not renew, and then would purchase from you at wholesale?

MR. BOUKNIGHT: I object. You have asked him that question and he has answered it to the best of his ability.

MR. GUTTMAN: I understand his answer. But his answer, I think, was that you wanted to keep the business that you had, is that correct?

Yes —

MR. BOUKNIGHT: I object to that. His answer — whatever is in the record will stand for itself.

4 BRTreb

MR. GUTTMAN: Okay.

MR. BOUKNIGHT: What you are trying to do is you are trying to put somebody else's words in the witness' mouth. He has told you that all he can say about this is what he had said.

BY MR. GUTTMAN:

Q In your view, do you recall what difference did it make to FP&L if it sold to Miami Beach at wholesale as opposed to retail?

A I stated over and over again that we wanted to be a retail company, not a wholesaling organization.

Q For the reason that if you sold wholesale to one system that would be a foot in the door to public —

A Sure it is. They would fall like dominoes as you went along, one after the other. We didn't want that.

Q Okay. So you would serve to Miami Beach but you wanted to serve them at retail and would not serve them at wholesale. Is that correct?

MR. BOUKNIGHT: I object to that. I don't think it makes any sense.

THE WITNESS: I can't answer the question and you are now trying to put words in my mouth and there is no

1 BRTreb

is a long memo, an analysis —

A Strategic planning department?

Q Right. I just ask you initially do you recall having seen this document?

A No, sir. I don't recall it. I don't know what date it is even.

Q Can you take a look at page 6?

A All right. Page 6.

Q Under the heading, "Joint projects?"

A Yes, sir.

Q Was FP&L concerned that joint projects could be forced upon FP&L by regulatory requirements?

A I don't know if they were or not. Whoever is the author of this statement apparently thought that they may be forced to do so.

Q Can you take a look — looking at C, "Wholesaling - SR rate." Take a look at that paragraph.

A Well, I think that SR rate is the sale for resale rate; wholesale rate. Yes.

Q The document says that the rate at which FP&L wholesales can affect FP&L's ability to compete with competitive systems. Do you agree with that?

3 BRTreb

A Well, we will have to have — yes, we will have to have a proper competitive rate. Yes, sir.

Q Why would you have to have a competitive rate?

A To stay in business and fight off the enemy, the government.

Q And when you say big government, including —

A Including any arm of the government.

Q Including municipal systems?

A Certainly.

Q When you say "government" you included municial systems?

A Yes.

Q What makes a rate competitive in your mind, as someone who was in charge of the rate department for a period of time at least?

A Well, it is a rate that certainly would impel a customer to sign a power contract with a company rather than putting in their own facilities. That would be one reason.

If you price it too high then they will put in their own generation. And if the Federal Power Commission prescribes a rate too low, then we would be forced to charge that rate under that regulation, whereas, the municipal boys are under

3 BRTreb

no regulation at all. They can do as they please.

Q But if you are forced to charge a rate that is too low and they charge a higher rate, won't you get the business because you are charging a lower rate?

MR. BOUKNIGHT: Objection to the form of the question. I don't know what business you are talking about.

THE WITNESS: Yes, I don't either.

BY MR. GUTTMAN:

Q Were you concerned that the potential customers might go to the municipal boys instead of FP&L if you don't charge a competitive rate?

MR. BOUKNIGHT: I have the same objection to the vagueness of that question.

THE WITNESS: Can be too high. Can be too low. We are regulated. They are not. I can go either way.

Then you have over here the industrial plant that may want to go in business too, unless you have rates that, shall we say, are competitive.

BY MR. GUTTMAN:

Q They may want to go in business generating their own power?

A That is right.

2 BRTreb

Q May they also want to go into business in competition with the municipals?

MR. BOUKNIGHT: I object to the vagueness.

THE WITNESS: I suppose they could.

(Whereupon, at 11:50, the taking of the deposition was recessed, to reconvene at 1:15 p.m., this same day.)

APPENDIX B

Excerpt from the deposition of Marshall McDonald, FPL Chairman of the Board, taken September 2, 1981 in Gainesville Regional Utilities et al. v. Florida Power & Light Company, S.D. Fla. Case No. 79-5101-CIV-JLK re: regulation of utility profit.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO. 79-5101-CIV-JLK

GAINESVILLE REGIONAL UTILITIES, THE LAKE WORTH UTILITIES AUTHORITY, THE UTILITIES COMMISSION OF NEW SMYRNA BEACH, THE SEBRING UTILITIES COMMISSION, AND THE CITIES OF ALACHUA, BARTOW, FORT MEADE, HOMESTEAD, KISSIMMEE, MOUNT DORA, NEWBERRY, ST. CLOUD, STARKE, AND TALLAHASSEE, FLORIDA,

Plaintiffs,

vs.

FLORIDA POWER & LIGHT COMPANY,

Defendant.

_____/

9250 W. Flagler Street
Miami, Florida
Thursday, September 3, 1981
9:30 a.m.

DEPOSITION OF MARSHALL McDONALD

Taken before ELAINE GASS, Court Reporter and Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above-styled cause.

* * *

A. I hope so.

Q. Why do you hope so?

A. Because the rate-payers are the only ones who would benefit.

Q. Well, if the company becomes more efficient and successful through the research and development, would the stockholders benefit as well?

A. No.

Q. Even if it became more profitable as a result?

A. No.

Q. Why not?

A. Because any profit would be taken away by the regulatory authorities. There's no way the stockholders can benefit, in my opinion.

Q. Alternatively, if the company was not able to keep up with innovation and lost business, would the stockholders be hurt?

A. Yes.

Q. Carry it to the extreme, which is?

A. That the company goes out of business.

Q. And then everybody is hurt?

A. That is my assumption.

Q. I'm showing Mr. McDonald Gardner Exhibit Number 36, a cover letter containing a document dated

APPENDIX C

Complaint filed August 13, 1968 in Gainesville Utilities Dept. and City of Gainesville v. Florida Power Corporation and Florida Power & Light Company, M.D. Fla., Civil Action No. 68-305.