FPL: 10/13/81

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket No. 50-389A
	)	
(St. Lucie Plant, Unit No. 2)	)	October 13, 1981

REPLY MEMORANDUM OF FLORIDA POWER & LIGHT COMPANY

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DATED: October 13, 1981

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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REPLY MEMORANDUM OF FLORIDA POWER & LIGHT COMPANY

The Board's September 18, 1981, Order suggested that FPL organize its response to the Cities' September 14, 1981, Memorandum in a manner which joins the issues raised by the Cities' motion.*/ FPL has endeavored to do so in two respects. The first section of this memorandum contains a brief summary of the legal and factual matters in issue. Second, the Cities attached to their Supplemental Memorandum a list of 125 documents (or, in some instances, groups of documents) which they contend are admissible and establish certain propositions beyond genuine dispute. In Appendix A to this Reply Memorandum, we identify the general propositions that the Cities contend are established by the materials, and, in each instance: (1) state FPL's objections to admission of documents offered in support of the proposition, and (2) provide the basis for FPL's position that the documents do not establish the proposition.

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*/ Counsel for FPL received today a copy of Appendix T, an Order of the United States District Court for the Southern District of Florida which, inter alia, grants FPL's motion for summary judgment of the nuclear access claim advanced by the City of Tallahassee under Sections 1 and 2 of the Sherman Act. The Order holds that FPL has no legal obligation to share its nuclear facilities with Cities and that essentially the same factual showing on which the Cities base their motion for summary disposition in this proceeding did not, even when Cities' submission was construed liberally in their favor, raise any genuine issue of material fact relevant to FPL's motion for summary judgment. After study of the Order, FPL may request leave to file a further memorandum addressing the impact of the Court's Order on the issues before this Board.

Section II of this Reply Memorandum addresses the arguments advanced by the Cities regarding the application of collateral estoppel in this proceeding.

At the outset, however, it is necessary to dispel the suggestion advanced by the Cities that the settlement license conditions agreed to by FPL, the Department of Justice, and the NRC Staff represent a concession by FPL of a situation inconsistent with the antitrust laws with respect to the Cities identified in the license conditions. The Cities go on to argue that, in light of this supposed concession, the only question is whether these conditions constitute "an adequate remedy" for these Cities. (Cities' Reply (Sept. 28, 1981), p.2).

That is disingenuous. FPL denies the existence of any situation inconsistent with the antitrust laws and does not view the existing conditions as remedial in any respect. The significance of those conditions is that they fix firm parameters for FPL's activities during the term of the license for St. Lucie Unit No. 2.*/ The focus of this review is on FPL's activities under the license. Any action taken by the NRC will take the form of injunctive conditions directed at FPL's future activities, as contrasted with the situation in a civil antitrust suit, where damages for past conduct are in issue. Therefore, it makes no sense at all for the NRC to conduct a lengthy hearing to determine, for example, whether FPL has improperly refused to provide transmission service at some

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*/ The conditions are not mere assurances by FPL, but legal obligations that will be enforced by the NRC.

time in the past, where the NRC already has firm assurance that such service will be provided during the term of the license. There is no basis for finding a nexus between such past conduct and activities under the license, and, even if such a nexus could be found as a technical matter, this agency should not devote its resources, and require the parties to devote their resources, to an exercise that has no practical purpose, given the existing conditions.*/

It is for these reasons, not because of a concession on any issue, that FPL contends that allegations concerning conduct which is forbidden by the existing license conditions are irrelevant.

I. Summary of Legal and Factual Matters in Issue

In its Response dated August 7, 1981, FPL identified three arguments on which the Cities appeared to predicate their motion for summary disposition: (1) the claim that FPL and the entities that have been offered ownership shares in St. Lucie Unit No. 2 pursuant to the settlement license conditions are engaging in an illegal group boycott against Cities not listed in those license conditions, (2) the claim

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*/ Full discovery and hearings on these allegations would consume time as well as resources. Cities' position that the license conditions should have no impact on the scope of further proceedings is difficult to reconcile with their professed desire to simplify the proceeding, yet fully consistent with their strategy of attempting to extort further concessions from FPL by threatening to delay issuance of the operating license, a strategy that will not succeed.

of a territorial conspiracy between FPL and Florida Power Corporation, and (3) the claim that FPL has monopolized some markets in some manner.

The group boycott argument was not pursued by the Cities in their argument before the Board*/ and Cities' motion now appears to be predicated on points (2) and (3) only.

A. The Conspiracy Claim

Cities argue that the Board should find that activities under the license for St. Lucie Unit No. 2 will create or maintain a situation inconsistent with Section 1 of the Sherman Act if it gives collateral estoppel to findings made by the Court in Gainesville Utilities Dept. v. Florida Power & Light Co., 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978). FPL believes, for reasons given in its Response and during argument, that these findings cannot be given collateral estoppel effect. However, assuming arguendo that collateral estoppel applies, summary disposition cannot be granted.

(1) The finding made by the Court involves events which occurred in 1966 and before. There is no legal or evidentiary basis for a determination that the conspiracy continued after that date, and it is established as a matter of law that any conspiracy ended no later than 1971 -- ten years ago.**/ The

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*/ FPL's position with respect to that argument is found at pp.6-8 of FPL's Response (August 7, 1981).

**/ United States v. Florida Power Corp. [1971] Trade Cases (CCH) ¶73,637 (M.D. Fla.).

Cities do not appear to contend otherwise.*/ Florida Power Corporation has for a number of years offered service under its wholesale tariff to municipal systems located within FPL's service territory, ahtough no municipal system has taken such service (see correspondence in Appendix __). Thus, there is no basis for any conclusion that any activity in which FPL will engage under the license is pursuant to any conspiracy with Florida Power Corporation.

(2) Action taken unilaterally by FPL must be tested under Section 2 of the Sherman Act. The finding in Gainesville of

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*/ The following are statements made to this effect by Cities:

> Facts concerning past conduct of Florida Power Corporation may be relevant to establish a "situation inconsistent." Cities do not allege any current violations of antitrust law or policy by Florida Power, nor does counsel for Cities have any reason for believing that such conduct is taking place. Florida Power has affirmatively agreed to actions that would avoid anticompetitive situations. E.g., see license conditions to Florida Power Corp. (Crystal River Unit No. 3), NRC Docket No. 50-302A; Florida Power Corp., FPC Electric Tariff.

Joint Petition of Florida Cities (April 14, 1976), p.31 n.2, Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636A.

See also Id. at 53:

> Cities do not allege any present conduct by Florida Power Corporation in violation of the antitrust laws.

Finally:

> Cities do not allege that Florida Power Corporation is involved in antitrust violations. Florida Power Corporation has settled any cases involving such allegations and has affirmatively agreed to actions that would avoid anticompetitive situations. E.g., see license conditions agreed to in Florida Power Corp. (Crystal River Unit No. 3), NRC Docket No. 50-302A; Florida Power Corp., FPC Electric Tariff.

Joint Petition of Florida Cities (August 6, 1976), pp.68-69 n.1, Florida Power & Light Co. (St. Lucie Plant, Units 1 and 2, Turkey Point Plant, Units 3 and 4), NRC Docket Nos. 50-355A, 50-389A, 50-250A, 50-251A.

a Section 1 violation cannot establish the illegality of unilateral action by FPL under Section 2, or its inconsistency with the antitrust laws. Indeed, Gainesville itself affirmed the finding in FPL's favor on the Section 2 charge made in that case. The economic, financial, and engineering reasons for FPL's unilateral business decisions are set out in affidavits submitted to the Board*/ and, for purposes of summary disposition, the content of those affidavits must be accepted by the Board.

(3) There is no finding in the Gainesville decision and no evidence in the record that any City was ever injured by the conspiracy found by the Court, much less that any such injury could bear any nexus to activities under the license for St. Lucie Unit No. 2.

(4) The suggestion that FPL's current practice with regard to wholesale sales indicates that the effect of the conspiracy found by the Fifth Circuit is continuing is rebutted by the sworn testimony as to the reason for FPL's current practice. It is also rebutted by the fact that FPL's practice is in accord with the general practice in the electric utility industry.

* * *

Cities, in their Supplemental Memorandum, attempt to argue that FPL's nuclear plants bear some relationship to

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*/ Bivans Affidavit ¶¶14-22, 36; Gardner Affidavit ¶¶5-17; Howard Affidavit ¶¶4-7 [Appendices B, C and E to FPL's Response (August 7, 1981)].

cooperative activity among FPL and other large utilties in Florida. They contend that, in building and operating its nuclear facilities, FPL has benefited both from participation in cooperative studies of nuclear power in the 1950s and early 1960s and from its interconnections and coordination activities with other utilities. Cities do not explain how these contentions relate to any legal theory of inconsistency with the antitrust laws. However, their claim appears to be that FPL's nuclear plants should be regarded as joint ventures between FPL and others, and that any failure on FPL's part to offer participation to some or all of the Cities should be scrutinized under Section 1 of the Sherman Act as a "group boycott" or exclusion of certain competitors from a joint venture.*/

That claim can be disposed of easily enough. First, it is undisputed that FPL (a) bore the entire cost of constructing its nuclear units and that no other utility contributed at all to these construction costs,**/ (b) FPL planned the units for use on its own system to serve its customers, and (c) the plants have been used exclusively for this purpose.

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*/ See, e.g., United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912); Associated Press Ass'n v. United States, 326 U.S. 1 (1945).

**/ The only exception is the sale by FPL of ownership shares of St. Lucie Unit No. 2 to the entities named in the settlement license conditions. Cities' "group boycott" claim with respect to these transfers of ownership appears to have been abandoned. Moreover, the fact is that, as a result of the license conditions, all of the Cities have had an opportunity to participate as owners in St. Lucie No. 2.

This is plainly enough to show that FPL's nuclear units are not joint ventures in any sense.

Second, there is sworn testimony in the record that: (a) the cooperative study activities cited by the Cities had no connection with, and provided no benefit with respect to, any nuclear plant actually constructed by FPL,*/ (b) FPL's nuclear plants were in no sense the product of joint planning,**/ and (c) interconnections and coordination arrangements between FPL and other utilities played no role in FPL's decisions to construct its nuclear units.***/ This testimony must be accepted as true for purposes of ruling on the Cities' motion for summary disposition, and, at the very least, it raises genuine issues of fact with respect to every element of the Cities' apparent second argument based upon Section 1 of the Sherman Act.

B. The Monopolization Claim

Cities have yet to come forward with any coherent theory to support a monopolization claim. They refer to Opinion No. 57 and to a mass of documents, but they have made no effort to define relevant geographic and product markets, determine market shares, establish FPL's power over price or to exclude

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*/ Kinsman Deposition (April 30, 1981), pp.53-56; Kinsman Deposition (May 1, 1981), pp.228-31; Gardner Deposition (April 10, 1981), pp.60-62, 73-74 [Appendix F to FPL's Response (August 7, 1981), pp.809-11, 136-39, 7-11].

**/ Bivans Affidavit ¶¶11-14; Gardner Affidavit ¶¶7-8 [Appendices B and C to FPL's Response (August 7, 1981)].

***/ Id.

competitors, identify competition between FPL and the Cities in any relevant market, or demonstrate how such competition is unreasonably affected by any of the conduct of which they complain. In fact, they have not come forward with any affidavit by any expert economist or person with other expert knowledge which deals with any of these issues. A number of matters are clear, however, and preclude summary disposition.

(1) The Cities have acknowledged that, for purposes of summary disposition, they are unable to establish any separate market for nuclear power. (Tr. (August 18, 1981), p.1386). There is no basis on which FPL can be said to have monopoly power in any peninsular Florida market.

(2) The Cities' theory that they need not show monopoly power in any market that encompasses them is wrong as a matter of law.*/ It is also unsupported factually because there has been no showing of any competitive problems for the Cities arising from any monopoly position of FPL in some other market.

(3) The Cities' claim is predicated on the view that FPL has some obligation to help them compete. FPL believes that, to the extent that it is found to be in competition with the Cities, it is entitled to compete with the Cities and to reap the benefits of its size, efficiency and superior management. (FPL's Response (August 7, 1981), pp.30-49). However, even if the Cities' views were to be accepted, the nature of and reasons for FPL's actions and the effect of those actions in

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*/ See FPL's Memorandum (Sept. 14, 1981), pp.5-9.

some relevant market must be determined before a claim of monopolization can be sustained.

(4) There are disputed facts as to whether FPL is in competition with the Cities, the nature of any such competition, and the effect of FPL's alleged conduct on competition in any relevant market. The Cities have not presented any factual or economic evidence which would suffice to carry their burden on these questions. Moreover, in every instance where the Cities have alleged refusals to deal on FPL's part, there are genuine factual disputes as to whether FPL was faced with legitimate requests to deal and as to whether it in fact refused to deal. These issues are set forth in considerable detail in FPL's Response (August 7, 1981), pp.106-22 and Appendix A. FPL's Response also describes the further discovery that is required before these issues can be joined fully. (FPL's Response (August 7, 1981), pp.122-30).

(5) In every instance where FPL's dealing practices are challenged, FPL has submitted sworn testimony that its practices are grounded upon legitimate business considerations, such as increased costs, reduced efficiency, and impairment of financial integrity for FPL. (See p.6 n.*, supra). This evidence must be accepted at face value for purposes of ruling on the Cities' Motion, and it precludes any finding that FPL's conduct was or is unreasonably restrictive of competition.

* * *

Cities devote several pages of their Supplemental Memorandum to arguing that FPL's wholesale power tariff provisions,

which make service available in the territory served by FPL, do not accord with any settled industry "custom."*/ The question is not relevant. If the Cities are to establish that FPL's unwillingness to extend wholesale service to outside Cities is an act of monopolization they must show (a) that FPL has monopoly power in a market which includes the outside Cities, and (b) that FPL's practice is unreasonably restrictive of competition and not grounded on legitimate business considerations. They have shown none of these elements, and FPL has tendered sworn evidence that its actions are grounded upon legitimate business considerations. Nonetheless, Cities are wrong as a matter of fact. It is rare, if it occurs at all, for an electric utility to offer wholesale service outside of its service territory, as the attached affidavit of Martin Fullenbaum demonstrates [Appendix B].

Cities also complain that the delineation between "inside" and "outside" cities made in the license conditions is irrational. The inside cities listed in the license conditions consist of each relatively small municipal system which is adjacent to FPL's system either by virtue of being connected with FPL or abutting FPL's distribution system (or the distribution system of a rural electric cooperative or portion thereof which is supplied at wholesale by FPL), together with the City of Gainesville. Gainesville was included because of the

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*/ Cities' Supplemental Memorandum (Sept. 14, 1981), pp.14-16.

government parties' contention that Gainesville had requested and wrongfully been denied direct connection with FPL -- a contention which FPL denies. Although this delineation resulted from the give and take of settlement -- particularly as to Gainesville and a few cities which abut FPL's distribution system only in the sense that an unpopulated area (such as a river or marshland) lies between the two systems -- it is eminently rational and has been applied consistently.

II. Collateral Estoppel Issues

Much has already been written and said as to whether collateral estoppel may apply against FPL with respect to the Gainesville decision and FERC Opinion Nos. 57 and 517. A few more words may, however, be appropriate.

A. Gainesville

All of the Cities' recent filings have simply ignored the representations in their Motion (May 27, 1981), pp.69, 79, to the effect that they were aware at the time of "FPL/FPC's long-standing anticompetitive practices and policies" and that Gainesville was litigating the Gainesville case as the champion of the other Cities, who were following the litigation closely. (See FPL's Response, (August 7, 1981), pp.84-86). These representations establish that the Cities were "sideline sitters" not entitled to invoke collateral estoppel.

Cities now assert that their participation as parties in the Gainesville case would have complicated it and, for this reason, collateral estoppel may properly be invoked in their

favor. The Cities have not, however, come forward with any proof that their desire to avoid complicating the Gainesville lawsuit -- as opposed to the desire to avoid the risk of an adverse result*/ -- was the reason for their failure to become parties to the litigation.**/ Moreover, the fact is that undue complication of litigation did not prevent the Cities from joining together in their 1979 litigation against FPL (Lake Worth Utilities Authority v. FPL, No. 79-5101-Civ-JLK (S.D. Fla.)), and there is nothing to suggest that a similar joinder could not have been effected in 1968. The Cities' failure to join in that litigation and to bear the risk of an adverse decision precludes their effort to benefit from it by way of collateral estoppel.

B. Opinion No. 57

One of the grounds argued by FPL in opposition to the Cities' contention that collateral estoppel should be invoked against FPL with respect to Opinion No. 57 is that the burden of proof in the Opinion No. 57 proceeding was on FPL whereas the burden here is on the Cities.***/

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*/ Cities candidly acknowledge that "from the 1968 perspective the plaintiffs could not have been sure of proving a market division . . . ." (Cities' Reply (Sept. 28, 1981), p.21).

**/ Similarly, Cities have come forward with nothing to suggest that their failure to join the Gainesville case was due to the financial burdens of litigation.

***/ Notwithstanding Cities' most recent arguments (Cities' Supplemental Memorandum (Sept. 14, 1981), pp.2-5), FPL has shown (FPL's Response (August 7, 1981), pp.91-93; Tr. (footnote continued)

The cases cited by the Cities support FPL's contention that this shift in the burden of proof precludes application of collateral estoppel. This is the holding in Lappin v. National Container Corp., 37 N.Y.S.2d 800 (Sup. Ct. 1942). Lappin was an action for damages by the estate of a decedent for personal injuries suffered by the decedent. In a prior action for wrongful death, defendants had failed to prove contributory negligence. In the second action, the plaintiff sought to preclude relitigation of the contributory negligence issue. The New York court held:

> In the wrongful death action, the burden of establishing contributory negligence is upon the defendants . . . . The plaintiff in an action for injuries sustained prior to death must prove freedom from contributory negligence . . . . The burden of proof differing in the two actions, the first determination manifestly is not res judicata.

37 N.Y.S.2d at 804.**/ Since the same standard of proof (i.e., preponderance of the evidence) was applicable to the two civil

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(footnote continued)
(August 17, 1981), pp.1185-1193) that Cities have the burden of proof in this proceeding.

FPL also contends that Opinion No. 57 may not be accorded collateral estoppel effect because this proceeding involves a different legal standard than that employed by FERC and because FPL did not have a full and fair opportunity to litigate in the Opinion No. 57 proceeding. See FPL's Response (August 7, 1981), pp.89-91, 93-98.

**/ Although the opinion uses the term "res judicata," collateral estoppel was obviously involved because the two causes of action and claims were not identical. As Professor Moore notes, "[c]ourts and writers have used the term 'res judicata' to refer generally to the doctrine of judicial finality, including collateral estoppel." 1B Moore's Federal Practice ¶0.441[2].

actions, it is evident that the shift in the burden of proof precluded application of collateral estoppel. United States Fire Insurance Co. v. Adirondack Power & Light Corp., 201 N.Y.S. 643 (App. Div. 1923), is to the same effect. The court there refused to apply collateral estoppel because of a shift in the burden of proof on contributory negligence issues. These cases are illustrative of the rule adopted in the Restatement 2d Judgment §68.1 (Tent. Draft No. 1, 1973). (See FPL's Memorandum (Sept. 14, 1981), pp. 14-16.)*/

Moreover, even if collateral estoppel were held to apply, FERC Opinion No. 57 could not support a finding of inconsistency with the antitrust laws. The antitrust considerations before the FERC concerned the competitive effects of certain wholesale tariff provisions that were not approved by the FERC and never took effect. Cases arising under the Federal Power Act make clear that the effect of the proposed action is the sole

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*/ The Cities' criticism of the Restatement is untenable for the Restatement would bar collateral estoppel based on a shift in the burden of proof only where the burden of proof was on the party which lost the first case and is on that party's adversary in the second case, the situation presented here.

Cities' reliance on In re Estate of Nye, 299 N.E.2d 854 (Ind. App. 1973), is misplaced. The result in that case is explained by the Court's statement that the shift in the burden of proof was a "procedural anomaly," a matter of form not substance; as the Court explained, in substance the contest before it related to a Florida will, as to which the burden of proof would have rested on the same parties who had the burden in the prior Florida litigation. 299 N.E.2d at 865.

In Telaro v. Telaro, 306 N.Y.S.2d 920 (1967), also relied on by the Cities, there was no discussion of the issue presented here.

focus of an antitrust inquiry by the FERC.*/ In Opinion No. 57 the FERC did not purport to make findings about FPL's past conduct.**/ Had it done so, those findings would not have been essential to its decision and, therefore, could have no preclusive effect here. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, n.5 (1979).

C. Opinion No. 517

Cities do not dispute the legal principles urged by FPL in arguing that collateral estoppel may not be applied with respect to Opinion No. 517, namely, that collateral estoppel may be applied only to matters that are essential to a judgment and that, where a decision resting on alternative grounds is appealed, collateral estoppel may apply only to those matters expressly considered and confirmed by the appellate court. (See FPL's Memorandum (Sept. 14, 1981), pp.19-23). The dispute between the parties is whether the matters as to which Cities are seeking collateral estoppel effect -- portions of the Federal Power Commission's opinion dealing with the benefits to FPL of its participation in the Florida Operating Committee and portions of the Hearing Examiner's opinion relating to

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*/ Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758-59 (1973) (emphasis supplied); Conway Corp. v. FPC, 510 F.2d 1264, 1270 (D.C. Cir. 1975), aff'd, 426 U.S. 271 (1976); Missouri Power & Light Co., Opinion No. 31, 16 Fed. Power Serv. 5-265, 5-272 - 5-274 (1978), rehearing denied, Opinion No. 31-A, 17 Fed. Power Serv. 5-823 (1979).

**/ Florida Power & Light Co., Opinion No. 57, 32 PUR 4th 313, 315 (1979).

Clewiston -- were essential to the Supreme Court's decision in Florida Power & Light Co. v. FPC, 404 U.S. 453 (1972). A negative answer is required for the reasons stated in FPL's Memorandum (Sept. 14, 1981), pp.16-23.

FPL also contends that the Cities' failure to intervene in the Opinion No. 517 proceeding, although they easily could have done so, precludes application of collateral estoppel. (FPL's Memorandum (Sept. 14, 1981, p.23). The Cities' response (Cities' Reply (Sept. 28, 1981), pp.35-36) purports to invoke the doctrine of stare decisis. However, Cities do not explain how that doctrine can serve to justify Cities' failure to intervene in the Opinion No. 517 proceeding. That doctrine relates to use of a decision as precedent and does not bar further litigation, the issues presented here.

Respectfully submitted,

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October 13, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply Memorandum of Florida Power & Light Company" were served upon the following persons by hand delivery(*) or by deposit in the U.S. Mail, first class, postage prepaid this 13th day of October, 1981.

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DATED: October 13, 1981

APPENDIX A

APPENDIX A

FPL'S RESPONSE TO THE CITIES' SUBMITTAL
AND CHARACTERIZATION OF DOCUMENTS

In its Order of September 18, 1981, the Board instructed the Cities to indicate in their Supplemental Memorandum the evidentiary basis for their argument that certain of their contentions are undisputed here. The Cities, in response, attached to their Supplemental Memorandum a list, arranged in no relevant order, of 125 documents (or in some instances groups of documents) which they contend are admissible and "determine" certain propositions. In this Appendix we show that these materials do not "determine" or in many instances even support the propositions asserted by the Cities, that each of those propositions has been controverted by evidence submitted by FPL (a significant portion of which consists of the testimony of the Cities' own present and former officals), and that the materials on which the Cities rely are, in most instances, not admissible in evidence.

In its September 18, 1981 Order the Board suggested that FPL attempt to join issue with the Cities' contentions to the fullest extent possible. We have organized this Appendix in a manner which attempts to do so. In Section I we have identified each of the general propositions that the Cities contend are established by the materials they submitted, and have categorized them as Contentions "A" through "H". Below we examine each of these contentions in turn. As to each

we first examine the "evidentiary basis" cited by the Cities and show that the material inferences the Cities would draw from the proferred materials are in each case impermissible. We then turn to the evidence FPL has presented on the contention, and show that as to each, the Cities' assertions are squarely in dispute.

In Section II we address the admissibility of the documents offered by the Cities. We show that, for most of the proffered documents the Cities have failed to satisfy the evidentiary criteria upon which they purport to base their submittal of these documents. In short, Cities' Motion is deficient on evidentiary as well as substantive grounds.

A few general observations are in order. First, it is difficult to perceive the relationship that some of the propositions advanced by the Cities could have to any coherent legal theory of inconsistency with the antitrust laws. However, we have set forth our views on the legal issues elsewhere, and in this appendix relegate ourselves to identifying the Cities' contentions and meeting them factually. Second, many of Cities contentions deal with alleged conduct 15 or 20 years in the past concerning disputed issues already covered by the license conditions currently in effect. Thus, much of the Cities' argument concerns disputed conduct which is simply not relevant to the licensing of St. Lucie Unit No. 2 under the existing license conditions. Third, Cities' reliance on their lawyers' argument as to inferences from document in preference to offering testimony or affidavits of those having first-hand knowledge of the facts, does not square with the assertion that certain

"facts" are "determined."*/ Fourth, it is FPL's belief that the existence of a genuine dispute as to each of Cities' contentions cannot be reasonably denied. Finally, no effort is made by the Cities to deal with the evidence they proffer on a city-by-city basis. Their assumption apparently is that evidence as to one city benefits all of them. There is no basis for this assumption, and it must be rejected.

Below we have tried, where appropriate, to outline some of the evidence which demonstrates these disputes.**/ We have not in so doing endeavored to extract from the record each piece of evidence or testimony which refutes the Cities' contentions, nor would this be appropriate here. Moreover, it should be noted that as the discovery process is still in progress, the evidentiary record and exploration of the facts at the present time is incomplete.

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*/ Cities do not once cite, in any of their summary disposition papers here, deposition testimony from current and former city officials taken in the Miami case. As of the date of Cities' Motion (May 27, 1981), FPL has taken 32 days of testimony from 19 past and present City officials.

**/ Cities in the Appendix to their Supplemental Memorandum (Sept. 14, 1981) assign a number to documents placed before the Board in the Appendices to Cities' Motion (May 27, 1981). In this section, FPL has adopted Cities' form of reference to these papers. Thus, where FPL references a document generally, the form is "Document No. __." Where a specific page is referenced, the pagination of that document in the Appendix to Cities' Motion (May 27, 1981) is used: e.g., "Document No. 11 at B103."

A few documents relied on by Cities were submitted with their Supplemental Memorandum (Sept. 14, 1981). FPL refers to those documents by the page number of the document itself.

I. FPL'S REPLY TO EVIDENCE OFFERED BY CITIES IN SUPPORT OF THEIR ASSERTION THAT CERTAIN CONTENTIONS ARE DETERMINED BEYOND GENUINE DISPUTE BY CERTAIN DOCUMENTS

Cities' Contention A

[1] Through the Florida Operating Committee (FOC), FPL engaged in joint planning and "pooling" activities.

[2] These activities and FPL's study of nuclear activities with Tampa Electric Company (TECO) and Florida Power Corporation benefitted FPL and, specifically, served as the basis for FPL's own investment in generation (including nuclear generation) and transmission facilities.

[3] The Cities were excluded from these activities.

The "Evidentiary Basis" for Cities' Contention A[1]

The Cities apparently rely on Document Nos. 11, 12, 13, 14, 15, 16, 20, 103, 104 and 122 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 12, 13, 14, 16, 20 and 104.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible. Document No. 11, prepared in 1961, reflects no more than speculation on the part of one FPL official as to the possibilities for coordination in the future. The document is not probative of whether FPL actually engaged in joint planning and coordination, nor of whether any such activities served as a basis for planning of FPL generation in the 1960s.

Document Nos. 12, 13, 14, 15, 16 and 103 show no more than that FPL participated in studies with other utilities. These documents are not probative as to what, if any, joint planning and coordination activities FPL engaged in as a result of the studies.

Document No. 20 is evidence of neither joint planning nor coordination. The document reflects no more than a vague expression of FPL's willingness to assist a neighboring utility, by providing back-up, if necessary, in order to permit that utility to serve a large industrial customer.

Document No. 104 is a nascent, unexecuted contract among FPL and other systems. Cities do not assert that the contract was ever finalized or implemented, and thus the document is not probative of what FPL and other systems actually did. Furthermore, the clear purpose of this draft contract was to rationalize planning efforts of individual systems. Nothing in the document suggests that there was joint planning of generation.

Document No. 122 is on its face inconsistent with Cities position. The document states that although the FOC member companies recognize the need to coordinate operating matters, ". . . each Florida supplier operates his own system in the most economical manner consistent with its individual requirements and policies. . . ." (Document No. 122 at II-3-33). The document also states that "[t]he [FOC] members have no authority to enter into contractual agreements, to commit their organization to construction of facilities, nor to establish practices which are not in accord with individual organization policy." (Id.) The document specifically states that "[t]here are no pooling contracts or commitments among [the FOC] systems." (Id.)

A Genuine Issue Exists Concerning Cities' Contention A[1]

Even if the Cities had submitted admissible evidence tending to support their contention A[1], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention.

The affidavit of Ernest L. Bivans, an FPL Vice President, flatly contradicts Cities' Contention A[1]. In his affidavit Mr. Bivans describes the limited nature of FOC activity. The FOC concentrated on (1) the regulation of line power flows and frequency control; (2) operating reserve sharing; and (3) the prevention of cascading system disturbances. (Bivans Affidavit ¶¶9-11 [Appendix B to FPL's Response (August 7, 1981)]). As Mr. Bivans stated:

> A planning subcommittee was appointed to study the transmission plans of the member utilities and to identify potential weaknesses. In order to test the transmission systems in hypothetical studies, it was necessary to factor into the studies generation plans of the individual interconnected systems. These studies always took the individual generation plans of the members as given, took account of planned transmission additions and then studied the effect of postulated events on the reliability of the interconnected transmission system. The FOC never engaged in joint planning of generation.

(Id. ¶11). Moreover, Mr. Bivans makes clear that the FOC's planning activities cannot be considered "joint" in any meaningful sense:

> "Joint" as used in the planning subcommittee reports refers to the fact that the FOC members cooperated in providing individual system data, personnel, and in sharing the costs of studies to determine whether individual transmission plans

> would be adequate for and compatible with interconnected operations. Transmission planning was "joint" only in the sense that studies were performed, based on the individual systems' generating plans, to consider possible transmission configurations to accommodate this planned generation The results were not binding on any system, and simply served as a useful beginning point for transmission planning by the individual systems.

(Id. ¶11). Cities' contention A[J] is further disputed by the deposition testimony of Robert H. Fite, a former president of FPL, in the Cities' treble damage action against FPL. Mr. Fite testified that FPL did not rely upon its interconnections with other systems to postpone bringing generating units on line, and that FPL did not want other systems to rely upon interconnections with FPL as a basis for postponing units. (Fite Deposition (May 6, 1981), pp. 128-29 [Appendix F to FPL's Response (August 7, 1981), pp.879-80]).

The "Evidentiary Basis" for Cities' Contention A[2]

The Cities apparently rely on Document Nos. 2, 6, 7, 9, 21, 24, 26, 31, 74(7), 75, 76, 81, 106, 107, 108, 109 and 112 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 6, 26, 31, 76, 81 and 108.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible. Document No. 2 indicates that in 1955 FPL and other utilities considered building a nuclear plant with Government assistance, but that the proposal was abandoned due to uncertainty over its cost. The document does not show that the 1955 activity had any relation to FPL's decision to construct its Turkey Point nuclear units in 1965, St. Lucie 1 in 1969 or St. Lucie 2 in 1972. Nor does the document show that the 1955 activity furnished FPL with any expertise that was of assistance in constructing its nuclear units.

Document Nos. 6, 7 and 76 appear to indicate that in 1961 FPL agreed to participate in a committee with representatives of two other utility companies to study various types of reactors. The documents do not indicate that any such studies ever took place, that FPL benefitted from any participation in the committee it may have had or that any such FPL participation served as a basis for its investment in its nuclear units.

Document No. 9 indicates that in 1959 FPL was monitoring

developments in the area of nuclear power. The document is devoid of any implication that FPL's monitoring was conducted in conjunction with other utilities.

Cities interpret Document No. 21 to suggest that FPL received licenses to construct its Turkey Point units only because of the 1955 and 1961 nuclear activities referred to above. This is a complete misreading of the document. The activities were mentioned only as general background material; the specifics of the activities and how they related to FPL qualifications were not even discussed. Instead, the document described in detail FPL's in place nuclear training program, which included courses and lab work, participation in the start-up of another nuclear plant, and on-site training. (Document at C40). This extensive training program was clearly the technical expertise relied upon by FPL in seeking its Turkey Point licenses.

Document No. 24 merely shows that for three years in the early 1970s FPL received and delivered power to other systems at the time of FPL's peak demand. Nothing in the document indicates that FPL relied upon such transactions as a basis for planning the development of its generation.

Document No. 26 is a 1974 report concerning the potential benefits of what the document, which postdates FPL's decisions to construct its nuclear facilities, terms a "Florida Electric Power Pool." This report was prepared by a task force and submitted to the Technical Advisory Group of the FCG, which did not adopt it. (Bivans Affidavit ¶¶28-30 [Appendix B to FPL's Response

(August 7, 1981)]). The document does not show that the pool described in the report was ever implemented, or that FPL benefitted in any way as a result of the report. Nor is there any indication in the document that this report affected in any manner FPL's investment in generation or transmission facilities. As pointed out by Mr. Bivans in his affidavit and the documents attached thereto, the analysis contained in this 1974 report was clearly an inadequate basis for any action on the part of any utility. More detailed studies which followed this report showed that the joint planning and operation described in the 1974 report was not desirable. FPL, as well as some of the Cities who have intervened here, have endorsed the findings that essentially rejected the 1974 report's conclusions. (Bivans Affidavit ¶¶28-29, 31, 35 [Appendix B to FPL's Response (August 7, 1981)]).

Document No. 31 is a Florida Coordinating Group (FCG) Electric Power Broker Report for a period in 1979. The document is not probative of whether FPL relied upon economy energy transactions, such as those made possible by the Power Broker, as a basis for planning the development of its generation and transmission system. Indeed, it would not be practical for any utility to rely on economy transactions, which, by definition, are non-firm, in its generation planning.

Document No. 74(7), an excerpt from the deposition testimony of George Kinsman, a former FPL Vice President, refers to the practice in the 1960s of utilities assisting one another by supplying power in times of emergency. This testimony does not suggest in any way that FPL relied upon the

availability of such emergency assistance in planning its generation and transmission system.

Document No. 75 indicates that FPL and other entities agreed in 1956 to consider the development of a demonstration nuclear unit in conjunction with the Atomic Energy Commission's (AEC) Power Reactor Development Program. In fact, such a demonstration plant was never constructed. More important, the document fails to demonstrate that the proposal had any relation to the subsequent development of FPL's nuclear units nor that it provided FPL with any expertise that was of assistance in constructing its nuclear units.

Document No. 81 concerns certain dealings between Florida Power Corporation and the Seminole Electric Cooperative and a national conference of rural electric cooperatives. The document has no apparent relevance to FPL's investment in its generation and transmission facilities, nor to FPL's development of its nuclear units.

Document No. 106 indicates that FPL's interconnections contributed to the reliability of its system. The document does not even suggest, however, that FPL relied upon these interconnections in planning the development of its generation and transmission facilities.

Document No. 107 evidences a request by FPL to Florida Power Corporation for cooperation in constructing a trans-

mission line between their respective systems for the purpose of improving the reliability of FPL's service to a particular area. Document No. 108 evidences a request by Florida Power Corporation to FPL for cooperation in establishing an interconnection between the systems for the purpose of improving the reliability of Florida Power Corporation's service to a particular area. Thus, the documents reveal cooperative efforts between utilities in an interconnected system to improve the reliability of the facilities already in place. The documents do not suggest that such transactions served as a basis for planning the development of FPL's generation and transmission systems. Document No. 107 also refers to FPL's willingness to provide emergency power; however, it does not even suggest that the prospect of making such emergency sales was a basis for the development of FPL's generation and transmission systems.

Document No. 109 discusses the Power Broker and FPL's future generation expansion plans. Nothing in the document even suggests that FPL has relied upon the Power Broker as a basis for its own investment in generation and transmission.

Cities' use of Document No. 112 is disingenuous in light of the contention. That FPL, in 1979, is planning to purchase power from a TECO coal unit, hardly constitutes evidence that FPL's early arrangements with other utilities has had any effect on FPL's decisions to build its nuclear units.

A Genuine Issue Exists Concerning Cities' Contention A[2]

Even if the Cities had submitted admissible evidence tending to support their contention A[2], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. Mr. Bivans states in his affidavit that FPL's interconnections with other utilities did not serve as the basis for FPL's investment in generation facilities:

> I believe that the fact that FPL has several interconnections with other utilities was never a significant consideration in selecting the size or type of FPL generating units. To the best of my knowledge, the existence of interconnections was not a factor in the decisions to construct the Turkey Point and St. Lucie nuclear units or in selection of the size of these units, and I believe those units would have been constructed in the absence of any interconnections. In making decisions to build these plants, we did not rely on the actions or commitments of any other utility, and we made no commitments to any other utility. I, as an engineer intimately involved in FPL's generation planning process, did not consider the existence of interconnections as a major factor when formulating recommendations as to generation expansion, and interconnections were never explicitly considered in our planning. I regarded the predominant value of the interconnections as providing increased reliability of service in sections of the area served by FPL where the load was large relative to FPL's generating capacity located in that area. . . . We did not, at the time our four nuclear units were planned, regard the interconnections

> as permitting FPL to build bigger or fewer generating units; we regarded them as providing FPL with greater flexibility in locating its generating units within its area of service.

(Bivans Affidavit ¶14 [Appendix B to FPL's Response (August 7, 1981)]). Mr. Bivans also states that FPL has always planned and constructed its transmission system in order to maintain adequate capacity and to provide a sufficient margin of reliability to serve its own customers. (Id. ¶25).

With respect to the Cities' contention that FPL relied on activities with other utilities in constructing its nuclear units, Mr. Gardner states in his affidavit that FPL made the decision to commit substantial resources to nuclear generating units without the assistance of any other utility. (Gardner Affidavit ¶8 [Appendix C to FPL's Response (August 7, 1981)]).

The Cities infer from Document Nos. 6, 7 and 76 that FPL relied upon the work of a committee established in 1961 by FPL, Florida Power Corporation and Tampa Electric Company in constructing its nuclear facilities. However, Mr. Kinsman testified on deposition that the committee never performed any specific studies on any specific reactors. He further testified that the committee's function was merely to follow what was going on generally in the nuclear industry and not to perform its own research (Kinsman Deposition (April 30, 1981), pp.54-55 [Appendix F to FPL's Response (August 7, 1981), pp.810-811]).

The "Evidentiary Basis" for Cities' Contention A[3]

The Cities apparently rely on Document Nos. 52, 68, 74(1), 74(4), 74(6), 75 and 83 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 52, 68 and 83.

Furthermore, FPL submits that inferences the Cities would draw from these documents are impermissible, as follows:

Document No 52 does not show that FPL excluded Cities from coordination activities. Quite to the contrary, the document evidences a proposed coordination arrangement among municipal electric systems which FPL was not invited to join. It is clear from the document that Cities did not wish to engage in coordination with investor-owned utilities such as FPL. For example, T.W. Bostwick, the Chairman of the Cities' Interconnection Committee, states in the document that

> I think the committee should also weigh the advantages that can be gained by the smaller municipalities tying to the larger municipalities, such as Jacksonville, Orlando or Lakeland, inasmuch as the larger ones are already tied with the power companies and there would be no necessity then for the smaller municipals to chance the domination of their system by a direct interconnection with a private company.

(Document at D227). Furthermore, Bostwick identified the expected source of hard-core resistance to the Cities' coordination efforts as "[s]ome of our own municipal officials and utility operators," not the private companies. (Id. at D226).

Document No. 68 provides no support for the contention that FPL acted to block coordination. The document, which is a letter written by the President of Florida Power Corporation commenting on the activities of a municipal consultant in furtherance of public power, does not illuminate FPL's mental state, and indicates at most that Florida Power Corporation was interested in these efforts.

The Cities contend that Document No. 74(1), the testimony of former FPL Vice President George Kinsman, proves that FPL was sharing information with other private utilities to the exclusion of the Cities. If anything, however, the document supports a contrary inference; it shows that Mr. Kinsman recalled no such information sharing agreement.

Document No. 75 is a 1956 contract entered into by FPL, Florida Power Corporation, Tampa Electric Company, Babcock & Wilcox and Allis-Chalmers to consider the development of a demonstration reactor in conjunction with the Atomic Energy Commission's Power Reactor Development Program, and the deposition testimony of George Kinsman, a former FPL Vice President, about the contract. The Cities would infer from the fact that they were not signatories to the contract that they were "excluded" from beneficial coordination activities. In fact, the reactor was never built. Moreover, Mr. Kinsman testified that the contract was "a result of the efforts of

Babcock & Wilcox Company to sell [FPL, Florida Power Corporation and Tampa Electric] a nuclear power plant." (Kinsman Deposition (April 30, 1981), p.23 [Appendix F to FPL's Response (August 7, 1981), p.793]). It was for this reason that the Cities were not invited to sign the contract. Furthermore, Mr. Kinsman testified that in the period 1955-60 he was not aware of any utility in Florida other than FPL, Florida Power Corporation and Tampa Electric that had publicly stated an interest in constructing a nuclear power plant. (Id. at 24 [Appendix F of FPL's Response (August 7, 1981), at 794]).

Similarly in Document No. 74(4), Mr. Kinsman testified that if a vendor from the nuclear industry called upon FPL trying to sell a piece of equipment, he made sure that the vendor also called on the other utilities in Florida, municipal and private, that he believed were interested in nuclear power. Mr. Kinsman testified that the reason he did not refer the manufacturer to Cities was because he did not know that they were interested in nuclear power. (Kinsman Deposition (April 30, 1981), pp.56-57 [Appendix C]).

Document Nos. 74(6) and 83 reveal that a meeting, involving FPL, Florida Power Corporation, Tampa Electric and Appalachian Coals, Inc., was convened by Appalachian for the purpose of attempting to persuade the three utilities to purchase coal. The documents do not show that Appalachian invited Cities to the meeting, and they do not establish that FPL took any action to prevent the Cities from dealing with Appalachian.

A Genuine Issue Exists Concerning Cities' Contention A[3]

Even if Cities had submitted admissible evidence tending to support their contention A[3], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. Mr. Bivans' affidavit controverts that FPL has denied the Cities access to coordination. (Bivans Affidavit ¶¶7-13 [Appendix B to FPL's Response (August 7, 1981)]). Specifically, Mr. Bivans' affidavit indicates that there was no instance in which a utility sought to join the FOC and was denied membership, and that he is not aware of any discussion concerning limiting membership in the FOC. He also states that he is not aware of any discussions between FPL and any other FOC member about any member's policies regarding interconnections with other utilities. (Id. ¶13). Moreover, there is no evidence to suggest that Cities who did not operate transmission systems and were not interconnected with other utilities at multiple points would have derived any benefit from participation in the coordination activities of the FOC, which focused on transmission reliability. (Id. at ¶¶11-13).

FPL has submitted evidence supporting the proposition that before the price and availability of gas and oil changed substantially in the 1970s, there was no incentive for the Cities to engage in transactions designed to take advantage of the difference in energy costs among Florida systems. (Id. ¶26). Indeed, a 1970 study by the Cities' engineering consultant advised the Fort Pierce

Utilities Authority to build its own generation to meet its load growth rather than to deal with FPL or other systems. [Appendix B to FPL's Response (August 7, 1981), Attachment B].

Finally, with regard to Cities' alleged exclusion from the development of FPL's nuclear facilities, Mr. Gardner states in his affidavit that, except with respect to communication concerning FPL's undertakings in the license conditions for St. Lucie No. 2, none of the Cities indicated to FPL any interest in acquiring a share of FPL's operating nuclear plants or St. Lucie 2 until 1976. (Gardner Affidavit ¶16 [Appendix C to FPL's Response (August 7, 1981)]).

Cities' Contention B

[1] FPL was not an innovator or risk-taker with regard to nuclear generation.

[2] FPL did not solely bear the risks associated with the construction of its nuclear units.

The "Evidentiary Basis" for Cities' Contention B[1]

The Cities apparently rely on Document Nos. 2, 8, 9, 10, 74(2), 74(3) and 74(4) to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document No. 10.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible. Contrary to the Cities' contention, Document No. 2 shows that FPL was an innovator and risk-taker with regard to nuclear generation. The Cities focus on FPL's 1955 decision, reflected in the document, not to construct a nuclear plant in conjunction with other utilities. However, the Cities ignore a later portion of the document indicating that in 1965 FPL announced its plan to build nuclear units larger than any others then in operation. Those units, Turkey Point Units 3 and 4, were constructed and are presently in operation.

Document No. 8 shows no more than that one FPL official had some reservations concerning the value of a proposed nuclear power study. The document does not indicate that FPL ultimately decided not to participate in the study. Under these

circumstances, the document is inconclusive and without any probative value.

Document No. 9 reflects FPL's view in 1959 that nuclear generation was not then commercially competitive with alternate forms of generation. The document does not address the Cities' contention that FPL was not an innovator or risk-taker with respect to its nuclear facilities.

Document No. 10 indicates that FPL was not the only utility that decided to build nuclear generating units in 1966-67. Nothing in the document supports the Cities' contention. In fact, the thrust of Document No. 10 is that nuclear technology was still new and largely untested in 1966-67.

Document Nos. 74(2), 74(3) and 74(4) are excerpts from the deposition testimony of George Kinsman, a former FPL Vice President. Collectively, this testimony indicates that in 1960 FPL decided not to participate with Tampa Electric Company in a proposed nuclear project: that in 1961 FPL, Tampa Electric and Florida Power Corporation formed a nuclear committee to monitor developments in the nuclear industry; and that one of the ways the utilities kept abreast of developments was by meeting with the manufacturers of nuclear facilities. This testimony is irrelevant to the Cities' claim that FPL was not a nuclear innovator or risk-taker.

A Genuine Issue Exists Concerning Cities' Contention B[1]

Even if the Cities had submitted admissible evidence tending to support their contention B[1], summary disposition could not be granted because evidence submitted by FPL has created a genuine issue of fact with respect to the contention. Specifically, through the affidavit of Robert Gardner, an FPL vice president, FPL has shown that its nuclear activities involved innovation and substantial risks. Mr. Gardner states as follows:

> 7. FPL first began considering nuclear generating units in the mid-1960's as an alternative form of new electric generating capacity to meet the constantly growing electrical needs of our customers. At that time, FPL's generating needs were met solely from oil and gas-fired generating units. As of that time, all licenses that had been issued by the Atomic Energy Commission (AEC) were for research and development because there had not been sufficient experience to establish that such units would be of practical commercial value. Only a few nuclear units were then operating, and the units being planned by FPL were larger than any then being operated in the United States. In addition, FPL recognizes that the construction and operation of such units presented substantial economic and regulatory risks.
>
> a. Economic - The economic viability of the nuclear units depended upon the cost of generation from such units relative to the cost of other forms of generation which we could have used to meet the growing load. The alternatives were oil, gas or coal-fired generating units. The costs of oil, gas and coal-fired units were known. The costs of building nuclear plants were uncertain but were expected to be higher. The savings anticipated from nuclear units were to be derived from substantially lower fuel costs. The future behavior of

> fuel costs was similarly uncertain. Oil, gas and coal prices were at that time relatively low. We believed that during the 40-year life of the plant, nuclear fuel costs would be less expensive than fossil fuel. There was a risk that unexpectedly high nuclear plant and fuel costs combined with low oil, coal and gas costs could result in the nuclear plant being uneconomic relative to other alternatives.
>
> b. Regulatory - There were public concerns about the safety and environmental effects of nuclear units. Nuclear units, as opposed to fossil units, required governmental licensing both at the construction and operating stages. The licensing process was considerably more complex and lengthy than for fossil plants. As part of the licensing process, it was necessary to demonstrate to the AEC's satisfaction FPL's technical and financial qualifications to construct and operate the nuclear plant. There was a risk that new safety and environmental concerns would surface which would result in delay and increased cost. There was a risk that intervention in the licensing process by individuals or groups opposed to nuclear power could delay the licensing process, and thereby delay the nuclear plant and increase its cost. There was a risk that licensing decisions could be subject to lengthy and uncertain litigation with similar results.

(Gardner Affidavit ¶7 [Appendix C to FPL's Response (August 7, 1981)]). Mr. Gardner states that with these risks in mind, FPL nonetheless decided in 1965 to commit substantial resources to construct nuclear generating units. (Id. ¶8).

The "Evidentiary Basis" for Cities' Contention B[2]

The Cities apparently rely on Document Nos. 2, 9 and 58 to establish this contention.

FPL submits that material inferences the Cities would draw from these documents are not permissible. Document No. 2, contrary to Cities' contention, does not in any manner undermine FPL's assertion that no other utility shared in the risks associated with its decision to construct its Turkey Point nuclear units. The document recounts some of the difficulties that FPL experienced in constructing the units. It indicates, however, that FPL succeeded in resolving those problems without the assistance or participation of any other utility.

Document No. 9 shows only that in 1959 FPL believed that nuclear power was not yet commercially competitive. The document is simply irrelevant to the Cities' contention that FPL did not bear all the risks of constructing its nuclear generating units.

Document No. 58, an excerpt from the 1964 National Power Survey, discusses in general terms certain benefits that may be derived from emergency reserve sharing. The document was not prepared by anyone connected with a party to this proceeding and does not mention FPL or any system in Florida. Accordingly, the document can hardly be said to support the Cities' contention that FPL did not bear all the risks

associated with its nuclear generating units.

A Genuine Issue Exists Concerning Cities' Contention B[2]

Evidence submitted by FPL has created a genuine dispute with respect to the contention. Mr. Gardner states in his affidavit that FPL decided in 1965 to commit substantial resources to construct nuclear generating units, without assistance from or participation by any other utility. (Gardner Affidavit ¶8 [Appendix C to FPL's Response (August 7, 1981)]). Furthermore, Mr. Bivans states in his affidavit that the existence of interconnections was not a factor in the decisions to construct the Turkey Point and St. Lucie nuclear units, nor in the determination of the size of those units. (Bivans Affidavit ¶14 [Appendix B to FPL's Response (August 7, 1981)]). Mr. Bivans also states that, in making the decisions to build its nuclear plants, FPL did not rely on the actions or commitments of any other utility. (Id.)

Cities' Contention C

[1] From the early 1960s, the Cities were interested in gaining access to "economies of scale" and "coordination," including by participating in nuclear power projects.

[2] The Cities were willing to take the risks associated with the "early" application of nuclear technology.

[3] The Cities require "coordination" in order to make nuclear investments.

[4] FPL was aware of the Cities' interest in gaining access to "economies of scale" and "coordination," including by participating in nuclear power projects.

The "Evidentiary Basis" for Cities' Contention C[1]

The Cities apparently rely on Document Nos. 45, 48, 49, 52, 54, 63, 64, 65, 66, 67, 71, 72, 78 and 80 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 45, 48, 49, 52, 54, 63, 64, 65 66, 67, 71, 72 and 80.

Furthermore, FPL submits that material inferences the Cities would draw are impermissible. Document No. 45 is a report by a municipal consultant analyzing the potential benefits of a Florida municipal power pool. In the first place, the document does not even suggest that municipals should "coordinate" with private utilities, such as FPL. Second, the document does not permit the inference that the Cities were interested in municipal coordination: although the document was presented at a meeting of the Florida Municipal Utilities Association, there is no indication of the reception it received. Much the same can be said of Document No. 48, the "Yankee Dixie Coordinated Plan," which

exhorts "all utilities . . . to join the Association . . . [so that] the economic benefits will extend into the heart of the great Middle West and a true interconnected EHV overlay will reach from New England to Florida." (Document No. 48 at D169). There is no evidence that the document ever came to the attention of the Cities. Even if it did, the document is completely silent on the Cities' reaction to the proposal.

Document No. 49, another report by a municipal consultant, extols the efforts of "twelve cities" to obtain lower wholesale rates from Florida Power Corporation. While some negotiations with Florida Power Corporation for rate reductions were carried out by several Cities jointly, many were solely between Florida Power Corporation and individual City purchasers. (Document at D209-12, 213-15). In any event, the Cities' mutual efforts to obtain lower energy prices from Florida Power Corporation through negotiation and litigation is a far cry from evidence probative of their interest in coordination.

The Cities say that Document No. 52 shows the Cities' interest in coordination but, in fact, the document shows the opposite. It specifically recognizes that "some of our own municipal officials and utility operators probably are going to form a hard core resistance against any effort to interconnect in any manner which would diminish the ability of the town to protect itself in emergencies.' (Document at D226).

Document No. 54 is a letter from a Gainesville official to a Tallahassee official relating information regarding the progress of Gainesville's case against Florida Power Corporation and FPL. In the letter, Gainesville expresses "hope that no other Cities will sign retail territorial agreements . . . as this might weaken our position." This hardly supports the Cities' contention that they were interested early on in coordination.

Document No. 63 consists of the minutes of a 1967 meeting of the municipals. The document demonstrates no City interest in participation in nuclear power projects nor in conventional joint generation of power. Instead, the focus of the several Cities present was on interconnection. (Document at E4, E7). These proposed ties were all tentative and there is nothing to indicate that the Cities proceeded with their plans. This fact demonstrates the gossamer quality of the Cities' "interest" in coordination.

Document No. 64 also refutes, rather than supports, the contention the Cities argue for. There a Tallahassee official is quoted as denying

> emphatically that [the municipal consultant was given] the authorization to expand his study to cover all these points [including 'cost and advisability of entering into various pooling agreements; and potential plans for a Florida municipal power pool.'] . . . Mr. Strickland states that [the consultant] would not have the charge to go into . . . considering alternate plans of power supply, such as through the Florida municipal power pool or the Yankee-Dixie Project.

(Document at E8). Accordingly, this document is not probative of the Cities' alleged interest in coordination. Indeed, Document No. 66 states that the report "was done without the knowledge of the [City] Commission," (Document at E23), casting further doubt on whether or not responsible officials of Tallahassee--as opposed to the city's advisors--had any intent at all in coordination.

Document No. 65 is a proposal for the feasibility study referred to in Document No. 64. The proposal was designed "to meet the City's short-range and long-range load requirements in the most feasible manner," primarily through construction of a steam-electric generating unit. (Document at E10). If, as Document No. 64 indicates, the consultant exceeded the scope of his authorization in considering interconnections and regional power pools, this portion of the study is hardly probative of Tallahassee's interest in such arrangements.

Document Nos. 67, 71 and 72 relate to negotiations between Tallahassee and Florida Power Corporation concerning proposed interchange arrangements; they have no bearing on that City's alleged desire for access to coordination and pooling of the kind now argued for by the Cities.

Document No. 78 reports that in the mid-1950s the Atomic Energy Commission received proposals from several cooperatives and municipalities to build a small-sized nuclear power plant. None of the Cities made such proposals. If anything, this tends to negate their Contention C[1]. Document No. 80 is a newspaper

article reflecting Key West's preliminary interest in building a small test reactor. There is no evidence that Key West ever followed up on this interest. In any event, neither this document nor Document No. 78 show any consideration of joint ownership of nuclear facilities. These documents therefore have no relevance to the Cities' contention that they desired access to economies of scale through participation in large joint projects.

A Genuine Issue Exists Concerning Cities' Contention C[1]

Even if the Cities had submitted admissible evidence tending to support their Contention C[1], summary judgment could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention.

Mr. Bathen's reports proposing formation of a municipal power pool, referred to in the Cities' Document Nos. 45, 49, 64 and 65, apparently did not persuade the Cities that benefits would be obtainable through coordination, since several City officials testified that no further action was taken in furtherance of such a pool. (See e.g., Howe Deposition (Sept. 18, 1980), p.132 [Appendix D] where the City Manager of Ft. Meade testified "I can't recall any specific action" taken since 1971 "to try to make this city pool come into being"; Dykes Deposition (July 30, 1980), pp.56-57 [Appendix E], where the Assistant City Manager of Tallahassee testified that he could not remember the Bathen paper and felt that Tallahassee had not been "as informed as we ought to be about the various options" to engage in sophisticated power planning).

The Cities also expressed little interest in the possibilities of coordination available to them through participation in the FOC. The evidence clearly establishes that such participation was not foreclosed. Mr. Bivans has testified that:

> Prior to the FOC's incorporation into the FCG, I am not aware of any instance where a utility sought to join the FOC and was denied membership, nor am I aware of any discussion concerning limiting membership in the FOC. To the best of my knowledge, there never were any discussions, either within the FOC or otherwise, between FPL and any other FOC member about any member's policies regarding interconnections with other utilities.

(Bivans Affidavit ¶13 [Appendix B to FPL's Response (August 7, 1981)]).

It should be noted that Orlando and Jacksonville, two of the Cities mentioned in Document No. 63 as demonstrating a belief that the private utilities would not allow them to participate in their coordination activities, were members of the FOC by 1967, the date of the document. (Id. at ¶8). Tallahassee and Lakeland, also referred to in Document No. 63, had joined by 1971. (Id.) Moreover,

> "In 1972, the FOC invited representatives of all Florida electric utilities, whether they owned generation or not, to meet and discuss the formation of a new organization for coordination and cooperation of electric utilities. As a result of this meeting in July 1972, the Florida Electric Power Coordinating Group was formed, comprised of 40 utilities in Florida."

(Id. ¶27).

As far as the Cities' alleged interest in participating in nuclear power projects is concerned, as recently as 1976 they demonstrated their lack of serious commitment to the idea. In the spring of that year, FPL proposed to all the Cities involved in this proceeding, and to other utilities in Florida, that they participate in a joint nuclear venture in central Florida. FPL agreed to manage this "Central Florida Project" so that the Cities could, if serious in their demands for nuclear access, participate without increasing the costs to FPL's ratepayers, for whose needs all of FPL's existing nuclear ventures had been planned and financed. (Danese Affidavit, ¶¶9-31 [Appendix D to FPL's Response (August 7, 1981)]). The Intervenor Cities collectively refused to deal with FPL in this project.

And, with respect to FPL's St. Lucie Unit 2, and excepting the negotiations with Homestead and New Smyrna Beach following FPL's offer of participation pursuant to license conditions in 1974,

> [n]either Tallahassee nor any other plaintiff in this litigation indicated to FPL any interest whatever in acquiring a share of FPL's operating nuclear plants or of St. Lucie No. 2 until 1976. When these expressions of possible interest were received by FPL, one of FPL's nuclear units had been in operation for four years, a second for three years, the third unit was about to begin commercial operation and a three year plus planning and licensing effort was virtually complete, and construction was about to begin.

(Gardner Affidavit ¶16 [Appendix C to FPL's Response (August 7, 1981)]). The reason for the Cities' apparent

disinterest is clear:

> Until the price and availability of gas and oil changed substantially in the 1970's fuel costs for all electric utility systems in Florida were low enough and the differentials between various fuels were so small that, when transaction costs and transmission losses were taken into account, there was no incentive for transactions designed to take advantage of differences in energy costs among Florida systems. This is a view which I believe was shared by municipal systems in Florida. For instance, in 1970, R. W. Beck and Associates prepared a study in which they advised the Fort Pierce Utilities Authority that building generation to meet that system's load growth would be a more economic alternative then purchasing power. (Attachment B). Thus there was little demand for the use of FPL's transmission system to accommodate transactions between other utilities during this period.

(Bivans Affidavit ¶16 [Appendix B to FPL's Response (August 7, 1981)]).

The Gardner, Danese and Bivans Affidavits make clear that, at the very least, a genuine issue for trial exists as to whether the Cities have been interested in coordination or in access to large-scale nuclear operations.

The "Evidentiary Basis" for Cities' Contention C[2]

The Cities apparently rely on Document [illegible]d 80 to establish this contention. As indicated in Section II FPL objects to the admissibility of both of these documents.

These two documents relate only to Vero Beach and Key West; nothing cited by the Cities relates to any other city in Florida. Furthermore, FPL submits that material inferences the Cities would draw from these documents even as to Vero Beach and Key West are impermissible. Document No. 79 notes that a Vero Beach city councilman urged the city "to take every step possible to obtain a U.S. government financed atomic reactor plant." The document does not permit the inference that the Cities were willing to take the risks associated with building nuclear plants, because it specifically indicates that Vero Beach's interest in nuclear power was limited to a government-financed plant, the economic risks of which obviously would be borne by someone else. Moreover, the Vero Beach plans never came to fruition; if anything, then this document indicates that at least one City was not willing to undertake the risks of nuclear ownership.

Much the same may be said of Document No. 80, a press release concerning the investigation a Key West City Commissioner made of the possibility of building an atomic reactor in Key West. The document states that the Commissioner's interest was sparked "when he discovered the federal government was searching for locations for building experimental plants in the United States." One of the attractions was the federal financing of the nuclear plant, which "would greatly

relieve the pressures of the necessity of borrowing money to expand our electric system at the expense of local users." Accordingly, the document hardly can be said to support the Cities' contention that they were willing to assume the risks of building nuclear plants.

A Genuine Issue Exists Concerning Cities' Contention C[2]

Even if Cities had submitted admissible evidence tending to support their Contention C[2], summary judgment could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the Contention. The Cities have never, individually or collectively, committed any resources to construct nuclear generating facilities, in spite of the urgings of their consultant Robert Bathen, as early as 1964. (See pp.37-38, infra). Instead, they chose to rely on FPL's assumption of the risks, seeking to acquire shares of FPL's nuclear units at a time when:

> FPL had already devoted hundreds of millions of dollars to the construction and operation of these facilities, and had borne the substantial risk that the facilities would not prove economically feasible. By then it was apparent that FPL's nuclear units were of substantial benefit to FPL and its customers. Had FPL then determined to transfer an interest in these operating nuclear units to Tallahassee and the other plaintiffs, the result would have been a transfer of economic benefits from FPL and its customers to the customers of those utilities which had not undertaken the risks borne by FPL.

(Gardner Affidavit ¶16 [Appendix C to FPL's Response (August 7, 1981)]).

As noted in the discussion at p.32, supra, the Cities in 1976 spurned a clear opportunity to participate in a jointly owned nuclear plant. See also the material at pp.7-8, infra.

The "Evidentiary Basis" for Cities' Contention C[3]

The Cities apparently rely on Document Nos. 4 and 36 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document No. 36.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible. Document No. 4 consists of expenditure requisitions for FPL's Turkey Point Plant, authorizing "a 760,000 Kw gross capability pressurized water nuclear reactor and turbine generator" based on an expected "deficit in Miami area generation." This document may show that FPL's load was sufficient to justify the building of large nuclear units. It is entirely silent, however, as to the Cities' contention that they required coordination in order to make nuclear investments.

Document No. 36 indicates that in 1961, the Atomic Energy Commission (AEC) determined not to fund construction of small nuclear units based on its perception that such units were not sufficiently economical. The Cities are not referred to anywhere in the document. Accordingly, the document has no bearing at all on the proposition the Cities say it supports--the proposition that the Cities need to coordinate in order to make participation in nuclear generation "practical" for them.

A Genuine Issue Exists Concerning Cities' Contention C[3]

Even if Cities had submitted admissible evidence tending to support their Contention C[3], summary disposition could not

be granted because evidence submitted by FPL has created a genuine dispute with respect to the Contention. Cities' own Document No. 3 shows numerous nuclear plants with substantially less capability than FPL's Turkey Point Unit No. 4. (Document at B13-B29). This would certainly seem to controvert the Cities' assertion that their smallness makes non-coordinated generation prohibitive. Obviously, units with far less capacity than any of FPL's units have been constructed and are in operation.

In any event Cities have come forward with no evidence tending to show that coordination with FPL is a prerequisite to their participation in nuclear investments. In a recent Florida Municipal Power Agency (FMPA) report, consultants for FMPA included municipally-owned nuclear units among feasible alternatives for meeting FMPA members' (including Cities') projected loads. (See preliminary Power Supply Study for the FMPA (February, 1979) at IV-7, Table VIII-3 and X-5 [Appendix F]).

As early as 1964, Mr. Bathen, a municipal consultant, urged the Cities to undertake their own joint nuclear generation studies, rather than to rely on the efforts of the private utilities.

> Almost every commercial utility organization in the United States has such an Atomic Study Committee. I would not attempt to predict when atomic power plants could be playing an important part in your power generation program. However, it appears that the role of atomic power seems best suited to large generating facilities. The commercial utilities can now effectively integrate into their future generation programs such unit sizes of 150 to 500 megawatts as soon as their studies indicate that this is their cheapest alternative power supply source. You should be in the same position and the time to initiate such studies is now, for this is a fast-moving field and extremely technical in nature. The municipal and

> cooperative systems in the State of Florida should not let themselves by default get into the position whereby, at some future date, perhaps not too far off, an accusing finger can be pointed saying that "you have not kept up with the times."

(Bathen, Benefits of Power Pooling and its Significance to Members of the Florida Municipal Utilities Association, (April 1-3, 1964), pp.18-19 [Appendix G]). Apparently the Cities did not follow the advice of Mr. Bathen. Their failure to institute timely feasibility studies explains their present inability to support their contention that coordination is a prerequisite to their participation in nuclear power.

The "Evidentiary Basis" for Cities' Contention C[4]

The Cities apparently rely on Document Nos. 5, 17, 18, 19, 37, 41, 46, 47, 50, 51, 53, 70, 77, 79, 90, 98 and 105 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 5, 17, 18, 19, 37, 41, 46, 53, 70, 77, 79 and 90.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible. Document Nos. 5 and 77, which discuss the Atomic Energy Commission's consideration of sponsoring construction of a small demonstration reactor, do not refer to any City in Florida except Ft. Pierce, which is not a party here. If these documents were notice to FPL of anything, it was that the Cities were not interested in participation in a nuclear project, even when their participation would be federally financed.

Document No. 17 records FPL's recognition of the economies of scale inherent in mass production. (Document at B442). Nothing in the document shows that the Cities were interested in gaining access to such economies or that FPL believed them to have such an interest.

The Cities say that Document No. 18 shows that FPL was aware of the Cities' "interest" in nuclear access early on. To the extent that the document is legible and comprehensible, it appears to refer to FPL's negotiations with the Department of Justice in 1973 in connection with this proceeding, negotiations which resulted in offers of ownership shares in St. Lucie Unit No. 2 to the Cities and seven REA cooperatives.

Document No. 19 is a speech by a member of Congress, and has no evidentiary value whatsoever. The document nowhere refers to specific public electric systems in Florida, nor to them as a group. Nor does the document give any indication that the author had any first-hand knowledge of the interests of the Cities in various power supply alternatives. Accordingly, the document could not have been notice to FPL of Cities' "interest" in nuclear power, as the Cities now contend.

Document No. 37 includes one Homestead official's informal inquiry as to whether FPL would sell wholesale power "once Turkey Point was completed." (Document at D8). Since the document was written in January of 1966, before licenses for the nuclear units had even been sought, it clearly refers to the soon-to-be completed Turkey Point oil units. Tne document therefore does not demonstrate FPL's awareness of Cities' interest in access to nuclear facilities nor even to conventional plants, since the inquiry concerned purchases of power, rather than sharing ownership.

Document No. 41 analyzes the comparative advantages of municipal and investor-owned utilities. While it may show FPL's perception of its own superior efficiencies, it does not evidence that FPL had any awareness of an interest on the part of individual Cities or the Cities as a group in co-ordination or nuclear access.

Document No. 46 is a Florida Power Corporation letter commenting on a municipal consultant's report concerning the potential for a Florida municipal power pool. The document explains, "all of this is being sent to you so that you can be alerted to the fact that a concerted effort is being made by Spiegel and Bathen in the furtherance of public power." (Document at D155). Whatever light this document may shed on the intentions of the attorney and consultant referred to, it does not bring home to FPL any interest on the part of the Cities--as opposed to their advisors--in a power pool. Much the same may be said of Document Nos. 47 and 50. These documents refer to a proposed municipal cooperative bill and the idea of a Florida municipal power pool. Again, they give no indication of whether any of the Cities supported the proposals, and so the documents can not be said to have put FPL on notice that the Cities did desire to achieve them.

Document No. 51 cites a newspaper report of a proposal by twelve cities outside FPL's retail service area to build their own power production system. The document does not indicate any desire on the part of these Cities to coordinate with FPL or the FOC; accordingly, any knowledge on the part of FPL of the proposal can have no relevance here.

Document No. 53 labels the interest of a New Smyrna Beach official in building a small nuclear plant a "wild idea."

The only inference to be drawn from this document is that FPL doub' the seriousness of that City's interest in obtaining ..ess to nuclear power.

Document No. 70 consists of correspondence between Florida Power Corporation and Gainesville regarding the latter's "offer to participate by way of ownership and operation of the nuclear facility at our [Florida Power Corporation's] Crystal River Plant." (Document at E38). There is no indication that FPL was aware of this correspondence; accordingly the document cannot be considered to put FPL on notice of the interest of Gainesville--much less any other City--in obtaining nuclear access.

Document No. 79 is a press clipping that refers to consideration Vero Beach gave to making a proposal "to obtain a U.S. government financed atomic reactor plant." The Cities say that this document shows that FPL was on notice of the Cities' interest in obtaining nuclear access. In fact, Vero Beach never made the proposal. (See Document Nos. 5 and 7). Accordingly, if FPL was on notice of anything, it was that the Cities were not serious in following up on obtaining nuclear access.

Document No. 90, a magazine editorial, states that one of the reasons for voter rejection of a municipal takeover of an FPL franchise was the possibility that the advent of nuclear power might render a small plant obsolete. By no stretch of the imagination is this document probative of any desire on the Cities' part to participate in nuclear power or to acquire a nuclear reactor.

In Document No. 98, FPL includes among a list of hypothetical strategies for "inter-utility relations" the "municipals/co-operative strategy." This is defined as a situation in which public electric systems in Florida would "have statewide generation planning, multiple-unit sharing, and full coordination." (Document at I72). Since this hypothesis is, at most, a conception of an employee of FPL, rather than of Cities, it proves nothing of Cities' intent or desire nor does it suggest any action taken by FPL as a result of the hypothesis.

Document No. 105 was written in 1976 and thus sheds no light on the situation prior thereto, when FPL was making the planning decisions which resulted in its present capacity. In this document, FPL posits an advantage to the smaller owned utilities in "entering into jointly-owned projects," (Document at I113), and records "ERDA's [Energy Research and Development Administration] contention that very large power parks may be a more desirable alternative than numerous dispersed generation sites," (Id.) but does not state any specific City expressions of interest in these projects. The document was prepared in the same time frame that the Cities rejected FPL's offer to manage a large nuclear project to be owned jointly by the Cities (see p.32, supra).

A Genuine Issue Exists Concerning Cities' Contention C[3]

Even if the Cities had submitted admissible evidence tending to support their Contention C[4], summary disposition could not be granted because evidence submitted by FPL has created a genuine issue with respect to the contention. The contention that FPL was aware of the Cities intent in gaining access to "coordination" is squarely disputed by Mr. Bivans: "prior to the FOC's incorporation into the FCG, I am not aware of any instance where a utility sought to join the FOC and was denied membership, nor am I aware of any discussion concerning limiting membership in the FOC." (Bivans Affidavit ¶13 [Appendix B to FPL's Response (August 7, 1981)]). This lack of communicated interest was apparently based on the fact that before the price of oil rose dramatically in the 1970s, inexpensive and readily available fossil fuel removed any incentive for the Cities to seek coordination. (Id. ¶26).

As far as FPL's alleged awareness of the Cities' desires to participate in nuclear power projects is concerned, FPL has submitted substantial evidence proving that no such interest was communicated to the company until long after the planning of its nuclear facilities had been completed. Mr. Gardner has testified that no City

> indicated to FPL any interest whatever in acquiring a share of FPL's operating plant or of St. Lucie No. 2

> until 1976 with the exception of expressions of interest by Homestead and New Smyrna Beach in response to an offer of participation extended to them in 1974. When these expressions of possible interest were received by FPL, one of FPL's nuclear units had been in operation for four years, a second for three years, the third unit was about to begin commercial operation, and a three-year-plus planning and licensing effort was virtually complete, and construction was about to begin. At that time, FPL had already devoted hundreds of millions of dollars to the construction and operation of these facilities, and had borne the substantial risk that the facilities would not prove economically feasible. By then it was apparent that FPL's nuclear units were of substantial benefit to FPL and its customers.

(Gardner Affidavit ¶16 [Appendix C to FPL's Response (August 7, 1981) (as corrected by Gardner Supplemental Affidavit attached thereto.)]). Furthermore, as recently as 1976 the Cities expressed a notable lack of interest in an FPL-proposed joint venture to construct a nuclear facility in Central Florida. (Danese Affidavit ¶26 [Appendix D to FPL's Response (August 7, 1981)]).

Moreover, Cities admit that, even after they commenced the litigation, they have never communicated to FPL more than a desire to have "the opportunity to consider" participation in any nuclear project.*/

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*/ See Cities' Reply Memorandum in Support of Their Motion to Dismiss or for Summary Judgement to Florida Power & Light Company's Amended Counterdam, Lake Worth Utilities Authority v. FPL, No. 79-5101-Civ-JLK (S.D. Fla), p.29.

Considering the high public visibility of nuclear power, a technology which has been known in at least a general sense to every city official in Florida for at least 20 years, it is revealing that the Cities can muster nothing more than a few documents which evidence casual, passing mention of nuclear participation as a power supply alternative. The complete absence of any cooperative planning by the Cities (notwithstanding Mr. Bathen's urgings as early as 1964), the absence of any evidence of formal or serious inquiries directed to FPL and the reaction of the Cities to FPL's 1976 joint venture proposal establish, beyond reasonable doubt, the absence of any serious interest by Cities in participation in the development of nuclear power.

Cities' Contention D

[1] There is a peninsular-wide market for "coordination" and "pooling."

[2] There is a peninsular-wide market for "bulk power supply" transactions.

The "Evidentiary Basis" for Cities' Contention D[1]

The Cities apparently rely on Document Nos. 11, 12, 13, 15, 16, 26 and 122 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 12, 13, 16 and 26.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

Document No. 11, an excerpt from a report given by FPL's president in 1961, refers to a "state-wide electric system . . . shown in the map now on the screen." (Document at B103). It is impossible to take seriously the Cities' claim that a reference to a map of electric facilities in Florida in 1961, obviously made for convenience sake, is probative of a geographic market for "coordination" over twenty years later. Document No. 12 is even older. Though it treats "the entire State east of Apalachicola River" as a single unit for purposes of the report (Document at B106), the document marks for additional study the possibility of a tie between North Florida and the Southern Company. (Document at B112). Since the Southern Company operates outside of peninsular Florida, the document itself refutes the Cities' contention of a peninsular-wide market. The same may be said of Document

No. 13, which records that in addition to the solicitation of generation plans from several Florida based utilities, "contacts were also made with the engineering personnel of the Southern Services for coordination of interstate ties." (Document at B222). Moreover, none of these documents shows any competition for the buying or selling of electricity in any market, or any competition to buy or sell any coordination services.

Document No. 15 reveals that a proposed study of coordination was to include several Florida utilities. The document does not define the geographic area in which long range power supply options were to be analyzed. Moreover, it in no way shows competition for the buying or selling of any coordination services in a geographic area. It is therefore clearly not probative of a peninsular-wide market. Document No. 16, which also describes a study undertaken by several utilities based in Florida, indicates that a general objective of the study was to provide a "State Transmission Design." (Document at B395). There is nothing in this document that relates to any market.

Document No. 26 records the results of a study undertaken to assess the potential "savings which might be realized by formal pool operation of all systems in Peninsular Florida." (Document at C191). However, no formal pooling of the sort discussed in the document has ever been implemented. It is difficult to see how a mere study, the recommendations of

which have never been implemented, can rise to the level of a determinative definition of geographic market. In any event, the study makes no attempt to evaluate the optimum geographical limits on the proposed pool. Nor does it imply competition for the buying or selling of services among utilities in this geographic area. Such a document clearly can not replace the factual analysis of relevant markets that the antitrust laws require.

Document No. 122, which is an excerpt from the 1970 National Power Survey, refers to coordination among the "Florida Group," composed of FPL, Florida Power Corporation, TECO, Jacksonville and Orlando. The document also refers to coordination between Florida Power Corporation and the Southern System companies, which are located outside of Florida. The Survey merely described the activities of the FOC; it made no attempt to undertake a factual analysis of the parameters of a "coordination" market. Finally, this document does nothing to establish competition to buy and sell coordination services in peninsular Florida, something that must be shown to establish a coordination market for antitrust purposes.

A Genuine Issue Exists Concerning Cities' Contention D[1]

The Cities have not come forth with evidence sufficient to establish a market; accordingly, there is nothing for FPL to rebut. The Cities have furnished no economic proof to support their theory of a peninsular-wide market. All they

have done is introduce documents showing that certain transactions have occurred, or showing that utilities studied the possibility of engaging in certain transactions. From this evidence, the Cities claim that the Board must infer the existence of a peninsular-wide market for coordination and pooling.

FPL has introduced evidence of transactions that are inconsistent with the Cities' proposed market. The record is replete with testimony affirming the municipal systems' ability to purchase power from or ownership shares of generating units located outside Florida. (See, e.g., Edwards Deposition (January 14, 1981), pp.50-52, 93-94 (Starke); Kleman Deposition (May 28, 1981), pp.28, 36-49, 53 (Tallahassee); Smith Deposition (October 27, 1980), pp.63-64 (Kissimmee) [Appendix F to FPL's Response (August 7, 1981), pp.23, 30-45, 102-03, 152-56]). In fact, the FMPA is presently considering purchase, on behalf of all Florida Cities, of capacity shares of Georgia Power Company's Vogtle nuclear units. (Caldwell Deposition (May 21, 1981), pp.217-24 (Newberry); Dake Deposition (August 5, 1980), pp.71-76 (Mt. Dora); Farmer Deposition (August 5, 1980), pp. 246-47 (Mt. Dora); Dykes Deposition (July 21, 1980), pp.119-23 (Tallahassee); Kleman Deposition (May 28, 1980), pp.28, 36-49, 53 (Tallahassee); Morgan Deposition (July 21, 1980), pp.27-32, 118-23 (Tallahassee); Edwards Deposition (January 14, 1981), pp.50-52, 93-94 (Starke); Howe Deposition (September 18, 1980), pp.134-35 (Ft. Meade); Peters Deposition (April 23, 1981),

pp. 121-24, 143-45 (Homestead); Smith Deposition (October 27, 1980), pp. 63-64 (Kissimmee) [Appendix F to FPL's Response (August 7, 1981), pp. 31-45, 59-70, 84-89, 102-03, 118-20, 122-24, 129-30, 152-54, 159-66, 170-71, 173-77]). Especially inconsistent with this contention is the fact that the City of Tallahassee is considering, in addition to purchasing shares in Georgia's Vogtle units, constructing a transmission line connecting the City with the Georgia Power Company. Kleman Deposition (May 28, 1981), pp.122-24 [Appendix F to FPL's Response (August 7, 1981), p.46-47]). In addition, several of the very documents upon which the Cities rely belie their claim that a peninsular-wide market in coordination exists. (See, e.g., Document Nos. 12 and 13).

Finally, even if the Cities had proven a peninsular-wide coordination market, it would not substantially advance their case since the Cities have failed to prove that FPL possesses monopoly power in any such market.

The "Evidentiary Basis" for Cities' Contention D [2]

The Cities apparently rely on Document Nos. 44, 84 95, 98, 99, 100 and 111 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 84, 95 and 99.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible, as follows:

Document No. 44 consists of a memorandum concerning FPL's formulation of a policy with regard to waste disposal generating facilities. Contrary to the Cities' assertion, the document does not declare FPL's intention to engage in generation of power from solid waste "throughout Florida." And, even if FPL had such a purpose, it would be irrelevant to the geographic definition of the bulk power market. The amount of energy expected to be supplied by waste disposal facilities was apparently "a small fraction of our power needs," an amount clearly too insignificant to have any bearing on any "bulk power" market. (Document at D123). Moreover, the document does not indicate that any of the waste-generated power would enter the bulk-power market; from all that appears in the document, the power could all be sold at retail.

Document No. 84 identifies possible customers, located within peninsular Florida, for firm interchange power generated

by FPL. In preparing the document, FPL was clearly concerned with where it could sell bulk power, rather than wher the Cities could purchase bulk power. The latter is the essential element of an antitrust market analysis. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, (decided June 30, 1981), slip op. at 53. ("We must focus on that market area, within the overall market, to which the smaller utilities . . . can practically turn for suppliers.")

Document No. 95 indicates that Haines City perceived its bulk power purchase options as limited to the service area of Florida Power Corporation. (Document at I52). Thus the document would certainly seem to refute the Cities' claim of a peninsular-wide market.

In Document No. 98 the focus again is on where FPL sells power instead of on where the Cities can buy. What is more, the document indicates that even such a seller's market for bulk power would be more extensive than peninsular Florida: with regard to bulk power supply, the document repeatedly refers to the "state electric system."

In Document No. 99, FPL registers its opposition to federal assistance for the proposed construction of Seminole's generating plant, seen as a needless "duplication of facilities." (Document at I73). It is most difficult to discern any relevance between this document and the Cities' proposed market definition. If anything, the document tends to establish that bulk power was purchased locally, rather than furnished from utilities located in remote parts of the state. In any case, the relevance of this document is at

most historical. The Cities cannot reasonably contend that a 30 year old report sheds light on the parameters of a bulk power market today; the nature of the utility business has changed too substantially during this period to permit any reliance on this document. Document No. 100 is also an "ancient document." However, since it refers to plans submitted by the Southeastern Power Administration to supply Florida electric customers, if the document proves anything, it tends to prove that out-of-state generation was a factor in bulk power purchases.

Document No. 111 records a consent agreement between TECO and Florida Power Corporation barring enforcement of territorial or market limitations on the sale of bulk power for resale. The court decree does not undertake to define relevant markets. Furthermore, the omission of any geographical limitation on the effect of the order weighs against the Cities' argument that a market for bulk power should be limited to peninsular Florida.

A Genuine Issue Exists Concerning Cities' Contention D[2]

The Cities have not come forward with evidence sufficient to establish a market; accordingly there is nothing for FPL to rebut. The Cities have furnished no economic proof to support their theory of a peninsular-wide market. All they have done is introduce documents showing that certain transactions have occurred, or showing that utilities studied the

possibility of engaging in certain transactions. From this evidence, the Cities claim that the Board must infer the existence of a peninsular-wide market for bulk power supply.

FPL has introduced evidence into the record that contradicts the Cities' proposed market. Mr. Fullenbaum's affidavit demonstrates that it is the general practice of utilities not to provide wholesale power outside of their respective service areas. (Fullenbaum Affidavit p. 4. [Appendix B]).

On the other hand, FPL has also introduced evidence showing that municipal utilities in Florida are free to purchase power from sources located outside of Florida. (E.g., Edwards Deposition (Jan. 14, 1981), pp. 50-52, 93-94 (Starke); Kleman Deposition (May 28, 1981), pp.28, 36-49, 53 (Tallahassee); Smith Deposition (Oct. 27, 1980), pp.63-64 (Kissimmee) [Appendix F to FPL's Response (August 7, 1981), pp.23, 31-45, 102-03, 152-56]).

Finally, even if Cities had proven a peninsular-wide bulk power market, it would not substantially advance their case since Cities have failed to prove that FPL possesses monopoly power in any such market.

Cities' Contention E

[1] FPL and the Cities are in "competition."

[2] FPL and the Cities compete in the "bulk power market."

[3] FPL and the Cities engage in "yardstick competition."

[4] FPL and the Cities engage in "franchise competition."

[5] FPL and the Cities compete to obtain new industrial loads.

[6] FPL believes itself to be in competition with the Cities.

The "Evidentiary Basis" for Cities' Contention E[1]

The Cities apparently rely on Document Nos. 51, 56 and 69 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document No. 51.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible, as follows:

Document No. 51 consists of an illegible note attached to a newspaper clipping. The article, entitled "Firm [Florida Power Corporation] Sees Big Loss," reports a proposal by twelve Cities outside FPL's retail service area to build their own power production system. Even if FPL showed interest in this event, there is simply nothing in this document to translate FPL's general tracking of developments in the industry into a recognition of the existence of competition. Document No. 56 recites the broad category "Competition--The Florida

Electric System" among a "Proposed List of Major Problem Areas" to be studied by a Senior Management Council. (Document at D256). The document shows that these so-called problem areas are merely initial suggestions, and one of the tasks awaiting the Council is to revise and develop the list. (Document at D254). A suggestion that FPL should conduct a study of "competition" is far from a determination that competition of the sort the antitrust laws are concerned with exists. Document No. 69, the minutes of a Homestead City Council meeting, does not refer to competition of any sort with FPL. It merely records the Mayor's impression that the City was "at this moment in an extremely good bargaining position with Florida Power & Light Company with respect to an agreement about the service area and wholesale power." (Document at E34). The document makes it apparent that any relationship between Homestead and FPL was that of supplier and purchaser, not competitors.

A Genuine Issue Exists Concerning Cities' Contention E[1]

Even if the Cities had submitted admissible evidence tending to support their Contention E[1], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. The existence of competition between the Cities and FPL has been directly contradicted by, among others, officials of several of the Cities mentioned in Document No. 51, proferred

by Cities as proof of competition. (See, e.g., Howe Deposition (Sept. 18, 1980), pp.151-52 [Appendix F to FPL's Response (August 7, 1981), pp.131-32], in which the City Manager of Ft. Meade stated that the City did not sell wholesale power and that he could not recall a single instance when Fort Meade and FPL were in competition to attract a particular industrial entity; (Caldwell Deposition (May 18, 1981), p.31 [Appendix F to FPL's Response (August 7, 1981) P.187], in which the Director of Utilities in Newberry testified that that City and FPL do not compete in the sale of retail and wholesale power; Farmer Deposition (August 4, 1980, pp.195-96; see also Id. (August 5, 1980) at 206-07 [Appendix F to FPL's Response (August 7, 1981), pp.167-69], in which the City Manager of Mt. Dora admitted that Mt. Dora and FPL do not compete "in the provision of electric services to any customer or class of customers."); Kleman Deposition (May 28, 1980), p.33 [Appendix F to FPL's Response (August 7, 1981) p.28], in which the City Manager of Tallahassee testified "I don't know of a specific situation where we were in competition with an area that FPL serves" and that any competition for sales of excess capacity was theoretical only. (Id. at 27.)). This direct testimony from Cities themselves surely raises a viable issue of fact as to the existence of competition with FPL.

The "Evidentiary Basis" for Cities' Contention E[2]

The Cities apparently rely on Document Nos. 84 and 98 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document No. 84.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

In Document No. 84, FPL lists systems "capable of offering significant competition to [FPL] during the 1980-85 period" (Document at I3). Only one of the complainant Cities, namely Tallahassee, is included. Even if it were assumed that the document concerns competition relevant to the issues now before the Board, the document indicates that FPL did not consider any City other than Tallahassee to be even a potential competitor. Nor does the document describe Tallahassee as an actual competitor in the sale of bulk power; it merely states that the City has the capacity to become one, based on its high reserve margins. (Document at I11.)

In Document No. 98, FPL hypothesizes concerning the wisdom of repealing the laws giving municipals and cooperatives tax advantages, "thus making competition more equal." (Document at I72). In this context, the term "competition" may be interpreted to denote no more than that FPL and other systems are engaged in the same industry, even though the municipals and cooperatives enjoy a financing and tax advantage. The context does not necessarily lead to the inference of a rivalry for either customers or geographic areas, as the Cities imply.

A Genuine Issue Exists Concerning Cities' Contention E[2]

Even if the Cities had submitted admissible evidence tending to support their Contention E[2], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the Contention. Contrary to the Cities' broad claim of competition in the bulk power market, depositions of particular City officials indicate the absence of such competition. Mr. Howe, Ft. Meade City Manager, has testified that the City never attempted to sell power at wholesale to another utility. (Howe Deposition (Sept. 18, 1980), pp.151-52 [Appendix F to FPL's Response (August 7, 1981), pp.131-32]). Mr. David, Director of Utilities in Kissimmee, also could not recall an instance of either wholesale or retail competition with FPL. (David Deposition (Oct. 28, 1980), pp.30-32 [Appendix F to FPL's Response (August 7, 1981), pp.94-96]). (See also Caldwell Deposition (May 18, 1981), p.31 [Appendix F to FPL's Response (August 7, 1981), p.187]). Finally, Tallahassee's City Manager testified that he is unaware of any actual instance of competition between Tallahassee and FPL. (Kleman Deposition (May 28, 1980), pp.30-36 [Appendix F to FPL's Response (August 7, 1981), pp.25-31]).

The "Evidentiary Basis" for Cities' Contention E[3]

The Cities apparently rely on Document Nos. 39, 96 and 97 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document No. 97.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are generally impermissible, as follows:

In Document No. 39, an advertisement directed to the residents of Vero Beach, FPL claims that its "rates have traditionally been among the lowest in Florida." (Document at D12). Such a comparison, even if relevant to the claims made by the Cities, must be between the company and "another distribution entity in the same area." Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, (decided June 30, 1981), slip op. at 66. Here, in contrast, FPL is in no sense attempting to measure its rates against any particular competitor for the Vero Beach retail service, not even a potential competitor. As Vero Beach was actively seeking to withdraw from the electric utility business, FPL can hardly be deemed to have competed with it.

Document Nos. 96 and 97 include a series of advertisements directed towards voters in an area already served by FPL. The advertisement speaks in general terms of FPL's low rates. FPL does not compare its rates with "another distribution entity in the same area" that could conceivably be considered a competitive threat to FPL. Indeed, FPL does

not compare its performance with any other particular utility. Under these circumstances, document Nos. 96 and 97 do not evidence yardstick competition.

A Genuine Issue Exists Concerning Cities Contention E[3]

Even if the Cities had submitted admissible evidence tending to support their Contention E[3], summary judgment could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the Contention. The testimony of numerous City officials establishes that they are not in retail competition of any sort with FPL. A Kissimmee City official agreed that, to his knowledge, "the City [has never] competed with any other utility for the privilege of providing electricity to people residing in a particular area." (David Deposition (October 28, 1980), pp.30-31 [Appendix F to FPL's Response (August 7, 1981), pp.94-95]). Mr. Farmer, an official of Mt. Dora, responded "no" to the question, "does Mt. Dora compete with FPL in the provision of electric services to any customers or class of customers?" Farmer Deposition (August 5, 1980), p.206 [Appendix F to FPL's Response (August 7, 1981), p.167]). He also testified that he was unaware of any industrial or residential customers lost to Mt. Dora because of FPL's rates or services. (Id. at 167A). A Tallahassee official asserted that "I don't know of a specific situation where we were in competition with an area that FPL serves." (Kleman Deposition (May 28, 1980), p.33 [Appendix F to FPL's Response (August 7, 1981), p.280]). Mr. Howe, of Ft. Meade, replied

that "I don't have a specific customer or incident at all" when asked of an instance in which the city "tr[ied] to attract an industrial customer who was also considering locating in the FP&L service area." (Howe Deposition (September 18, 1980), p.151 [Appendix F to FPL's Response (August 7, 1981), p.131]). And as for Newberry, Mr. Caldwell responded "no" to the question "Do you know of any instance where you and FP&L have been in competition for a specific customer?" (Caldwell Deposition (May 18, 1981), pp.31-32 [Appendix F to FPL's Response (August 7, 1981), p.187]). The substance of this testimony clearly refutes Cities' Contention E[3]. The Cities' own officials have recognized that there is simply no retail competition of any sort between the Cities and FPL.

The "Evidentiary Basis" for Cities' Contention E[4]

The Cities apparently rely on Document Nos. 17, 33, 34, 38, 39, 61, 63, 67, 68, 86, 87, 88, 90, 95, 96, 97 and 98 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 17, 33, 34, 63, 67, 68, 86, 87, 88, 90, 95 and 97.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible, as follows:

Document No. 17 is a skeleton outline for an internal FPL discussion relating to the possibility of acquiring the Homestead electric system. The outline was apparently never completed, and FPL in fact did not make a proposal to acquire the Homestead system. Thus, the document (and document no. 38, which indicates that in 1967 the disposition of its electric system was one of the power supply alternatives under consideration by Homestead) does not prove the existence of franchise competition. Document No. 33, a report to Vero Beach by its accountant, evaluates FPL's offer to acquire the system in 1976. FPL submitted its acquisition proposal in response to a request from Vero Beach that FPL acquire its electric facilities. FPL submits that an acquisition proposal submitted at the insistence of the municipal system does not establish franchise competition. For precisely the same reasons, Document Nos. 34, 39 and 61, which also concern FPL's acquisition proposal to Vero Beach, do not evidence franchise competition.

Document No. 38 merely mentions the possibility of sale or lease of Homestead's electric facilities. The document shows no rivalry between Homestead and FPL for the right to serve customers and the Cities do not indicate how this document might relate to "franchise competition."

While Document No. 63 indicates that Green Cove Springs apparently requested that FPL consider acquiring its system, there is no evidence that FPL was interested or that there was any competition to serve the Greene Cove Springs area. Certainly an unsolicited offer to sell does not establish the existence of competition. Document No. 67 relates to a series of negotiations between Tallahassee and Florida Power Corporation. During these discussions, an official of Florida Power Corp. stated that "while we give lip service to the thought of coordination and interconnections, we tend to terrify the municipals by threatening to take them over in any way at our disposal." (Document at E28.) Since the "we" in this statement refers to Florida Power Corp rather than to FPL, the document is irrelevant on the issue of franchise competition between FPL and the Cities.

In Document No. 68, the President of Florida Power Corp. expresses his opinion that public power advocates "are going to make every effort to contact all communities whose franchise might be expiring within the next few years." (Document at E30). This document simply does not register FPL's opinion on this matter. It certainly demonstrates nothing of what actually occurred when the franchises expired "within the next few years," and therefore furnishes no proof that FPL engaged in franchise competition

Document Nos. 86 and 87 show that FPL expressly declined to attempt an acquisition of the Sebring electric system, in response to an unsolicited request from a citizen of that city. This tends to refute Cities' claim of franchise competition. The same is true of Document No. 88, which shows that FPL expressed its disinclination to acquire a municipal system located in an area where FPL did not have any existing facilities.

Document No. 90 concerns an election in Lake City twenty-five years ago in which the voters rejected a proposal to take over FPL's facilities and operate a municipal electric system. This ancient document simply bears no relevance to the issue of whether FPL and the Cities engage in franchise competition today.

In Document No. 95, Haines City expresses its opinion that FPL would not be interested in supplying it with power, but does not indicate any interest on FPL's part in acquiring a franchise to serve Haines City. The document has no relevance to this contention.

Document Nos. 96 and 97 include a series of advertisements directed towards voters in Daytona Beach, an area already served by FPL at a time when the City was considering whether to continue to study the feasibility of establishing a municipal electric system. The document does not in any way suggest that there exists competition between FPL and Cities for one another's customers.

A Genuine Issue Exists Concerning Cities' Contention E[4]

Even if the Cities had submitted admissible evidence tending to support their contention E[4], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. In the past 23 years, FPL has tendered proposals to acquire only two municipal electric systems, New Smyrna Beach in 1974, and Vero Beach in 1976. FPL has submitted evidence showing that in both instances the acquisition proposals were initiated at the urging of the city government, and neither system was acquired. Thus, no area has changed electric suppliers between FPL and Cities since the 1950s. (See Letter dated May 31, 1973, from R. W. Buck of the New Smyrna Beach City Commission to Robert L. Pringle, Jr. [Appendix F to FPL's Response (August 7, 1981), p.1144]; Letter dated August 28, 1974, from John V. Little of the City of Vero Beach to Ralph G. Mulholland [Appendix F to FPL's Response (August 7, 1981), p.1143]). Since neither of these proposals was contested by the City vendee, they tend to refute, rather than establish, the existence of franchise competition.

The "Evidentiary Basis" for Cities' Contention E[5]

The Cities apparently rely on Document Nos. 17 and 57 to establish this contention. As indicated in Section II, FPL objects to the admissibility of both of these documents.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible, as follows:

Document No. 17 includes an assertion, allegedly by an FPL employee for internal consideration, that the Homestead "area would be more [attractive] to new business and industry with FPL power capabilities." (Document at B443). Even if this statement shows that it was FPL's opinion that it had advantages in rates and services which might make its electric service more attractive than the city's to industrial customers, it does not show that FPL sought to actively apply these advantages by seeking to acquire Homestead customers or to attract potential customers that might be contemplating service from Homestead. Indeed, the document speaks of the possible attraction of customers new to the south Florida area rather than any shift in existing customer alignments.

The same holds true for Document No. 57, which records FPL's efforts to "actively solicit new industry for our service area." The program of expansion displayed in the document clearly does not involve competition with the Cities, since it seeks to attract out-of-state and foreign firms to the Florida market generally so as to build the economic base of the entire state.

A Genuine Issue Exists Concerning Cities' Contention E[5]

Even if the Cities had submitted admissible evidence tending to support their contention E[5], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. Deposition testimony of City officials negates the existence of competition for industrial customers between FPL and municipal utilities. The City Manager of Ft. Meade, for example, has stated that he could not recall a single instance when that city was in competition with FPL to attract a particular industrial entity. (Howe Deposition (September , 1980), pp.151-52 [Appendix F to FPL's Response (August 7, 1981), pp.131-32]). The City Manager of Tallahassee has admitted that he knew of no occasion when Tallahassee and FPL had been in competition to attract a particular industrial customer. (Kleman Deposition (May 28, 1980), pp.30-36 [Appendix F to FPL's Response (August 7, 1981), pp.25-31]). (See also Caldwell Deposition (May 18, 1981), pp.31-32, 162-63 [Appendix F to FPL's Response (August 7, 1981), pp.187-88, 192-93] (Newberry and FPL do not compete in the sale of power); Farmer Deposition (August 4, 1980), pp.195-06; see also id. (August 5, 1980), pp.206-07 [Appendix F to FPL's Response (August 7, 1981), pp.167-69 (Mt. Dora and FPL do not compete for any class of customers); David Deposition (October 28, 1980), pp.30-32 [Appendix F to FPL's Response (August 7, 1981), pp.94-96] (Kissimmee and FPL do not compete either at wholesale or retail)).

The "Evidentiary Basis" for Cities' Contention E[6]

The Cities apparently rely on Document Nos. 27, 28, 44, 46, 47, 50, 56, 99 and 100 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 46 and 99.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible, as follows:

Document No. 27 is an excerpt from the affidavit of an Orlando Utilities Commission official stating that FPL has indicated concern about municipal utilities strengthening their competitive position. The affiant does not elaborate on what he means by "competitive position," and there is no indication that he is referring to rivalry for customers. The affiant himself asserts that "the fear of competition expressed by FP&L is unfounded." (Document at C305).

In Document No. 28, Mr. Bivans of FPL, while refusing to commit the Company to formal pooling which "would probably result in higher costs for electric power to the customers of FPL" (Document at C309), expressed his encouragement to "the other utilities to form a second pool which would be approximately equal in size to FPL," and promised "that FPL would work out arrangements where possible, for those municipal systems in its territory that would be isolated from the proposed pool, to join and participate." (Document at C309). Mr. Bivans' position in this document was one which favored increased co-

coordination, but did not mention or even allude to any competition between FPL and Cities.

Document No. 44 consists of an analysis of the benefits available to FPL from participation in a solid waste generation plant to be located in Dade County. The report seems to imply that there may be some potential for competition of an undefined sort which does not presently exist. However, it does not indicate that FPL felt that municipals were "potential competitors" in the sense that the term is used in the Appeal Board in Farley. Alabama Power Co., (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646 (decided June 30, 1981), slip. op. at 60, 66.

Document No. 46 contains a forecast that the cost of power produced by a municipal power pool would probably exceed the cost of power produced by the existing "Florida Power Pool." The document also notes the "continuing financial and operating problems" experienced by the municipal utilities. (Document at D157). There is simply no basis for the Cities' assertion that such general comparisons of the Cities' operating problems vis-a-vis FPL's experience can be considered recognition by FPL that it is in "competition" with the Cities.

Document No. 47 concerns a proposal for a municipal power pool, a subject of general interest to other utilities in Florida. FPL's interest in such a proposal hardly justifies the inference that FPL believed itself to be in competition with the Cities. Document No. 50 speculates as to what might happen if certain legislation were to pass, and therefore is not indicative of the situation that actually existed at the time the document was written.

Document No. 56 includes among "a proposed list of major problem areas" to be studied by an FPL Senior Management Council the broad category "competition -- the Florida Electric System." (Document at D256). The document is no more than a tentative list of topics deemed by an FPL employee to be worthy of further inquiry, and it does not suggest that FPL believed that it was in competition with the Cities or any other entity.

Document Nos. 99 and 100 demonstrate FPL's opposition to the use of federal funds to subsidize the construction of generation. Neither document supports the Cities' claim that FPL's position was based on fear of competition. Indeed, the company noted that the "plans being submitted [to allocate funds to the Seminole cooperative] . . . do not appear to affect FPL or its customers directly . . . ." (Document No. 100). The apparent basis for the concern expressed by FPL in these documents is its status as a taxpayer.

A Genuine Issue Exists Concerning Cities' Contention E[6]

The Cities' evidentiary showing as to FPL's state of mind consists entirely of ambiguous documents from which the Cities contend the Board must draw the inference that FPL believed itself to be in competition with the Cities. As FPL has shown, it contests the inferences which the Cities seek to draw from each such document. This factual dispute is incapable of resolution solely on the basis of the documents; the issue may only be

resolved by means of an evidentiary hearing. In fact, Cities' own submission (Document No. 28) takes direct issue with Document No. 27, the only evidence that even refers to FPL's alleged belief in the existence of competition. Mr. Bivans characterizes this aspect of Document No. 27 as "totally incorrect." (Document No. 28 at C309).

Cities' Contention F

FPL and Florida Power Corp. agreed to divide wholesale territories in Florida and not compete with each other across a territorial boundary between them.

The "Evidentiary Basis" for Cities' Contention F

The Cities apparently rely on Document Nos. 53, 81, 86, 87, 88, 91, 92, 93, 94, 95 and 104 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 53, 81, 86, 87, 88, 91, 92, 95, and 104.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

Document No. 53 is a wholly gratuitous document, apparently prepared by someone affiliated with New Smyrna Beach, that includes an unattributed statement to the effect that "Florida Power Corp. does wholesale power but FP&L will not let them in this [New Smyrna Beach] territory." (Document at D237). FPL submits that such unexplained, self-serving statements are not entitled to any weight. Document No. 81 is a letter from Florida Power Corp. to the Seminole Electric Cooperative in which Florida Power Corp. declines to provide standby power and transmission service based on apparently legitimate business concerns. The document, which does not even mention FPL, gives no hint that a market division was a ground for Florida Power Corporation's refusal to enter into the transaction.

In Document Nos. 86, 87 and 88, FPL responded to unsolicited requests for service by expressing its disinterest in acquiring additional customers in an area where it did "not have facilities to serve them." (Document 88 at I41). In referring the requests

to the attention of Florida Power Corp., which was equipped to take on additional business in these sectors, FPL was acting in the best interests of its customers and the persons requesting service. Accordingly, there is no basis for inferring that FPL's conduct was pursuant to a territorial divison agreement with Florida Power Corp.

Document Nos. 91, 92 and 93 record Florida Power Corp.'s lack of interest in supplying wholesale power to a city being served at retail by FPL which was considering municipal ownership. Document 92 indicates that Florida Power did not accept the proposed wholesale arrangement because it did not have any facilities in the area. Similarly, in Document No. 94, FPL simply declined to supply power to a municipality located beyond the limits of its service area, i.e., where it lacks facilities with which to provide service. No market division is asserted or implied, and the apparent legitimacy of the reasons for FPL's and Florida Power's conduct makes the inference of a territorial division impermissible.

Document No. 95 is a fact-finding report to the Haines City Commission discussing the establishment of a municipal distribution system. The document does not indicate that Haines City ever requested wholesale power from FPL. Haines City was apparently discouraged by the "Winter Garden Struggle" referred to in the document. (Document at I54). The Cities imply that the struggle had to do with FPL's alleged refusal to supply Winter Garden with firm wholesale power, which, they assert, prevented the City from terminating its franchise with Florida Power Corp. (See Document No. 94). However, the document itself describes the struggle as arising out of "ill feelings in the

community," resulting from "strong opinion both for and against a survey. (Id.) This completely refutes Cities' intimations that Haines City thought that there might have been an FPL-Florida Power Corp. market division.

Document No. 104 is a draft of an interconnection agreement which is unsigned and unexecuted. In this nascent state it can have no probative value with regard to Contention F.

A Genuine Issue Exists Concerning Cities' Contention F

Even if the Cities had submitted admissible evidence tending to support their Contention F, summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. Ben Fuqua, a former FPL vice president, has testified that there was never a wholesale territorial agreement between FPL and Florida Power Corp. (Fuqua Deposition (September 22, 1981), pp. 77-78 [Appendix H]; Testimony of Fuqua, Gainesville Utilities Dept. v. FPL, No. 68-305 (MD. Fla. July 14, 1975), pp. 38, 69, 72 [Appendix I]; Fuqua Deposition, Gainesville Utilities Dept. v. FPL, No. 68-305 (M.D. Fla. Dec. 5, 1972), p. 6 [Appendix J]; Fuqua Deposition, Gainesville Utilities Dept. v. FPL, No. 68-3-5 (M.D. Fla. Sept. 27, 1972), pp. 26, 39 [Appendix K]). Robert Fite, a former FPL president has also denied the existence of a wholesale territorial agreement. (Testimony of Fite, Gainesville Utilities Dept. v. FPL, No. 68-305 (M.D. Fla. July 21, 1975), p. 74 [Appendix L]; Fite Deposition, Gainesville Utilities Dept. v. FPL, No. 68-305 (M.D. Fla. December 4, 1972), p. 83 [Appendix M]). This testimony

directly contraverts Cities' contention and therefore precludes summary judgment.

In addition to this direct testimony, FPL has submitted considerable evidence which refutes the Cities' claim that FPL's disinclination to sell wholesale power outside its service area was motivated by any division of territories. On the contrary, the record clearly shows that FPL has been legitimately concerned with the anticipated adverse impact of such sales on its ratepayers and stockholders. Mr. Bivans has testified that during the 1950's and 60's, even though FPL was constructing its units in the largest commercially proven sizes,

> [f]rom the time I joined FPL until the early 1970's, load on FPL's system grew at an extremely rapid rate, and it was a difficult task to install generation and other facilities rapidly enough to keep pace with this growth . . . FPL was reluctant to take on responsibility for any loads other than its service area, particularly areas which were already being adequately served by others.

(Bivans Affidavit ¶¶14-15 [Appendix B to FPL's Response (August 7, 1981)]). Mr. Howard, who is responsible for all of FPL's banking and financing activities, has testified that "the addition of wholesale loads to FPL's system would increase the costs borne by all other customers." (Supplemental Affidavit of Joe L. Howard, ¶2 [Attachment C to FPL's Memorandum (Sept. 14, 1981)]). The basis for this conclusion is the fact that

> It will be necessary to construct additional new facilities in order to supply the increased loads and maintain planned reserve margins. Mr. Bivans estimated that

> coal-fueled generating facilities constructed for service between 1988 and 1995 would cost $760 per Kw in 1980 dollars, a cost much higher than FPL's embedded cost of generating plant now or as projected at that time. In addition to the higher cost of new facilities, I projected that the capital required for their construction will cost considerably more than FPL's embedded cost of capital. These effects, again, will increase the cost of electricity to the consumer .

(Id. ¶5.) The actual increase in rates could be as high as $2500 per customer over the 15 year period between 1981 and 1995. (Id.)

Mr. Howard has also calculated that an increased wholesale load would require new construction expenditures which would have to be financed "with new issues of common stock . . . marketed at less than book value. This dilutes the value of the investment of FPL's existing shareholders." (Affidavit of Joe L. Howard ¶6 [Appendix E to FPL's Response (August 7, 1981)].

Mr. Bivans, who is responsible for FPL's system planning, has also concluded that "the addition of substantial new wholesale loads would increase the average cost of providing service to FPL's existing customers." (Bivans Affidavit ¶19 [Appendix B to FPL's Response (August 7, 1981)]). This is due to three basic factors. First, "the addition of substantial new loads increases the amount of oil which FPL must burn, which through the fuel adjustment, increases the average system fuel cost included in the rates of all firm customers serviced by FPL." (Id. ¶16). Second, "the cost per Kw of

adding new capacity is much greater than the average cost per Kw of book investment in existing capacity." (Id. ¶17). Third, the "average embedded cost [upon which rates are based] rises each time that a generating unit which costs, per kilowatt of capacity, more than FPL's pre-existing average embedded cost is added to the system. This increases the per unit cost of electricity to FPL's customers." (Id. ¶18).

It is clear that Florida Power Corporation unilaterally determines its policies with respect to the sale of wholesale power, and that it does not recognize any service area boundary. Indeed, service under its tariff is available in FPL's service territory. (See letter from L. Scott to R. Skinner (March 30, 1976), [Appendix N]).

The evidence makes it apparent that FPL's reluctance to expand its wholesale sales to non-adjacent areas has been based upon sound and responsible business judgment. Moreover, the business concerns behind FPL's reluctance apparently are not unique to FPL. As the attached Affidavit of Martin Fullenbaum indicates, it is very unusual for an electric utility in this country to sell wholesale power to utilities that are not adjacent to the selling utility's electric service facilities. [Appendix B]. In such circumstances, a genuine issue for trial exists with respect to this issue.

Cities' Contention G

[1] FPL has refused requests by the Cities for nuclear access.

[2] FPL has refused to wheel, to provide transmission service pursuant to a tariff and to allow the Cities to invest in "the peninsular Florida transmission grid."

[3] FPL has refused to sell power at wholesale and proposed to limit the applicability of its wholesale tariff.

[4] FPL has blocked the Cities' access to "coordination."

[5] FPL has refused to "pool."

[6] FPL's refusals to deal have been anti-competitively motivated, i.e., motivated by a desire to extend its retail service area and to deter "competition" by the Cities.

The "Evidentiary Basis" for Cities' Contention G[1]

The Cities apparently rely on Document Nos. 32 and 37 to establish this contention. As indicated in the Appendix, FPL objects to the admissibility of Document No. 37.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

Document No. 32 is an extract from testimony of a Vero Beach citizen given at a FERC hearing relating to FPL's proposal to acquire the Vero Beach electric system. The Cities rely on the document to show that FPL denied Vero Beach access to nuclear power, but the witness testified to no more than that nuclear power had not been offered to the city. (Document at C402). This document does not establish that Vero Beach ever sought nuclear participation and was refused. Moreover, the witness testified that even if an offer had been

made, "in the context of this situation" there would be "a lot of [technical] difficulty" with purchasing a share. (Id.) Thus, the document is equivocal as to whether Vero Beach even desired nuclear access.

Document No. 37 reflects an inquiry by Homestead as to whether FPL would sell power "once Turkey Point was completed." (Document at D8). The Cities read the inquiry as a request by Homestead for nuclear participation, because they assume that the Turkey Point units referred to are FPL's nuclear units. The assumption is unfounded. The document was written in January 1966, before licenses for the Turkey Point nuclear units had even been sought. (Appendix F to FPL's Response (August 7, 1981), p.1196). The only inference that can be drawn from the document is that Homestead was seeking to purchase wholesale power once FPL's oil-fired units at Turkey Point, soon-to-be completed as of the date of the document, were on line. The document is therefore completely irrelevant to the issue of nuclear access.

A Genuine Issue Exists Concerning Cities' Contention G[1]

Even if Cities had submitted admissible evidence tending to support their contention G[1], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. First, in accordance with the St. Lucie 2 license conditions already in effect, FPL has offered all neighboring entities and neighboring distribution systems, including many of the Cities, ownership participation in St. Lucie 2. Settlement License Conditions,

Section VII. FPL has also agreed to offer those same systems the opportunity to participate in all nuclear units for which FPL files a construction permit application with the NRC prior to January 1, 1990. Settlement License Conditions, Section VIII.

In 1974, Homestead and New Smyrna Beach representatives expressed to the Atomic Energy Commission Staff, but not to FPL, an interest in participating in St. Lucie Unit 2. At that time, FPL agreed to license conditions which provided access to both Homestead and New Smyrna Beach. (Letter dated April 26, 1974, from Ben H. Fuqua to R. W. Buck, City Manager [Appendix F to FPL's Response (August 7, 1981), p.1120]).

As for the Other Cities, Mr. Gardner states in his affidavit:

> Neither Tallahassee nor any other plaintiff in this litigation indicated to FPL any interest whatever in acquiring a share of FPL's operating nuclear plant or of St. Lucie No. 2 until 1976. When these expressions of possible interest were received by FPL, one of FPL's nuclear units had been in operation for four years, a second for three years, the third unit was about to begin commercial operation, and a three-year-plus planning and licensing effort was virtually complete, and construction was about to begin. At that time FPL had already devoted hundreds of millions of dollars to the construction and operation of these facilities, and had borne the substantial risk that the facilities would not prove economically feasible. By then it was apparent that FPL's nuclear units were of substantial benefit to FPL and its customers. Had FPL then determined to transfer an interest in these operating nuclear units to Tallahassee and the other plaintiffs, the result would have been a transfer of economic benefits from FPL and its customers to the customers of those utilities which had not undertaken the risks borne by FPL.

(Gardner Affidavit ¶16 [Appendix C to FPL's Response (August 7, 1981)]).

Mr. Danese states in his affidavit that in 1976 FPL was prepared to participate in a joint venture to construct a nuclear facility in central Florida. (Danese Affidavit ¶9 [Appendix D to FPL's Response (August 7, 1981)]). FPL drafted and submitted to the Cities a siting study proposal and a draft agreement to cover the costs of the study. (Id. ¶¶17-18). Only two expressions of interest in participating in the site study were received. (Id. ¶26). Because of the disruption of the deliberations by the Cities, FPL was prevented from moving forward with the project, although FPL indicated its receptivity to continue discussions. (Id.)

Cities admit in their pleadings that none of them has ever made an offer to acquire any FPL nuclear capacity. They state that they have asked for no more than "an opportunity to consider" participation. (See Cities Reply Memorandum in Support of their Motion to Dismiss or For Summary Judgement to Florida Power & Light Company's Amended Counterclaim, Lake Worth Utilities Authority v. FPL, Civil Action No. 79-5101-CIV-CLK (S.D. Fla), p. 29). Deposition testimony establishes that no City has ever given serious consideration to the possibility of making an offer for nuclear capacity which could have committed that City in any way. (Howe Deposition (September 17, 1980), p. 37 [Appendix O]; Kleman Deposition (May 28, 1981), pp. 78-80 [Appendix P]). Assuming arguendo that FPL had some obligation to deal with the Cities with

respect to nuclear power, this clearly establishes a triable issue as to whether FPL has ever been presented with a request that would have triggered such an obligation.

Finally, while the Cities allege here in general terms that they have been denied nuclear access, FPL has submitted evidence showing that at least one city -- Tallahassee -- recently decided against accepting an opportunity to participate in St. Lucie 2 (Resolution No. 81-R-1107 of the City Commission of Tallahassee (June 23, 1981) [Appendix F to FPL's Response (August 7, 1981), p. 3]). In these circumstances, a genuine issue exists as to whether any City ever sought nuclear participation from FPL in a timely fashion, and further, whether even today, the Cities' requests for such participation are bona fide.

The "Evidentiary Basis" for Cities' Contention G[2]

The Cities apparently rely on Document Nos. 33, 50, 59, 110, 113 and 114 to establish this contention. As indicated in Section II of this Appendix, FPL objects to the admissibility of Document No. 33.

Furthermore, FPL submits that inferences the Cities would draw from these documents are impermissible.

Document No. 33, prepared for the City of Vero Beach by its accountant, merely states that "wheeling will add additional costs to incoming power. No current wheeling options are available." This does not suggest that FPL refused a request to wheel, as Cities would have this Board believe. The quoted statement simply reflects the accountant's opinion that there was no bulk power available from other utilities for wheeling to Vero Beach through FPL's system at rates which would render practical such a transaction when the costs of wheeling were considered. This interpretation -- rather than the one contended for by the Cities -- is supported by the testimony in the Vero Beach proceeding (FERC Docket No. E-9574) of Thomas L. Jones, the Ernst & Ernst accountant who prepared the report. [Tr. 517-18, Appendix Q].

Document No. 50 contains a discussion of a proposed municipal electric cocperative bill providing for mandatory wheeling by private companies at the instance of the Florida Public Service Com ission (FPSC). The document reflects FPL's opposition to the FPSC's imposition of the terms of such wheeling arrangements, which FPL contrasts with "negotiated agreements between public

and private utilities, those under which FPL presently wheels power. (Document at D224). Thus, there is no basis for the inference, contended for by the Cities, that FPL was generally opposed to wheeling for municipalities under freely negotiated contracts.

Document No. 59 states FPL's "policy to separately assess the impact of, and prepare a rate for, each specified transmission service solely to enable it to protect the integrity of its system and to devise rates which will enable it to recover the full costs of providing the specific service." (Document at D321). Nothing whatever in this document indicates that FPL has refused to wheel power when the terms have allowed FPL a compensatory rate, including a proper return on its investment, and have not compromised FPL's ability to plan and operate its system. (Document at D322). This position is reaffirmed in Document No. 110 at I145. This document does not indicate any FPL objection to execution of transmission agreements on an independent basis, but registers FPL's claims that it is entitled to injunctive relief and damages as a result of the collusive methods employed by Cities in their efforts to secure a joint transmission rate, characterizing these activities as part of a conspiracy to fix transmission rates. Id.

In Document Nos. 113 and 114 the FERC accepted for filing bilateral interchange agreements between FPL and several utilities. (Document No. 113 at 2). These applications preceded the Commission's denial of FPL's petition for rehearing of a FERC

order requiring FPL to file a single tariff for interchange transmission services rather than individual rate schedules. (Document No. 113 at 1). Furthermore, it should be noted that FPL has since filed an interchange transmission service tariff with the FERC. FPL's appeal from the order directing that it file such a tariff is now pending before the Fifth Circuit Court of Appeals.

A Genuine Issue Exists Concerning Cities' Contention G[2]

Even if the Cities had submitted admissible evidence tending to support their contention G[2], summary judgment could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. Mr. Bivans has stated that FPL is willing to provide transmission service in circumstances where the potential buyers and sellers are identified, the duration of the transaction is specified, it can be determined that capacity to accommodate the transaction will be available and the rate is compensatory. (Bivans Affidavit ¶23 [Appendix B to FPL's Response (August 7, 1981)]).

Mr. Bivans has also stated that

> since FPL, in 1975, responded affirmatively to the request by New Smyrna Beach to transmit its share of Crystal River Unit No. 3, I am not aware of any instance in which our review of a request has delayed execution of a transmission service agreement, resulted in denial of a request for transmission arrangements, or resulted in FPL's proposing to any system a rate different in design from that embodied in its previous transmission service agreements.

(Bivans Affidavit ¶24 [Appendix B to FPL's Response (August 7, 1981)]).

The Cities have presented no evidence from which it could be inferred that FPL has refused to wheel power in any specific instance in which it has received a legitimate request that it do so. FPL requests that the Board take judicial notice that FPL has filed with the FPSC rate schedules that provide transmission or service for every utility with which FPL is interconnected. These undisputed facts dispose of the Cities' contention.

With respect to Cities' demand for other transmission arrangements, such as the filing of a generally applicable transmission tariff or participation in a joint investment in transmission facilities, (Cities' Motion (May 27, 1981), at 117), FPL has shown that each of these would involve either noncompensatory use of FPL's facilities or would deprive FPL of control of facilities vital to reliable customer service. See Testimony of Robert J. Gardner, FERC Docket No. ER78-19 (Phase I) Tr. 483-95 [Appendix F to FPL's Response (August 7, 1981), pp.273-289]; Testimony of Ernest Bivans, Id., pp.848-49 [Appendix F to FPL's Response (August 7, 1981), pp.1091-92]; Testimony of Robert J. Gardner, FERC Docket No. ER78-19 (Phase II), Tr. 431-43, 449-62 [Appendix F to FPL's Response (August 7, 1981), pp.1093-1119].

The "Evidentiary Basis" for Cities' Contention G[3]

The Cities apparently rely on Document Nos. 34, 53, 73, 94, 101, 102, 115, 116, 117, 118 and 119 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 34, 53, 73 and 118.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

Document No. 34 reflects the opinion of an unknown writer that FPL would not sell power at wholesale to Vero Beach. Since the document does not set forth any factual basis for the opinion, it is entitled to no weight.

In Document No. 53 an unnamed City Manager is quoted as saying "FPL has no spare power, could not and will not sell wholesale power." (Document at D237). The document records no request made of FPL for power. Moreover, nothing in the document indicates that FPL would have refused to sell wholesale power if such power was available -- the proposition contended for by the Cities.

Document No. 73 records FPL's sales of wholesale power to Homestead during the period 1968 and 1972. Power was apparently sold by FPL to the City in almost every month during that period. (Document at E76). This hardly reflects a policy on the part of FPL to refuse to deal in wholesale power. The Cities seem to imply that FPL was charging Homestead more for electricity than its rural electric cooperative customers were paying. However, the coops were largely full requirements

customers of FPL, while Homestead generated most of its own electricity requirements at that time. There is nothing inherently unreasonable or discriminatory in making such distinctions among customers. In fact, the FERC found reasonable FPL's rates SR and PR, which make a similar distinction:

> Establishment of separate full and partial wholesale requirements rates is common practice. We have in fact recognized the differences in the costs of serving full and partial requirements customers, not to mention different types of partial requirements customers.

Florida Power and Light Co., Opinion No. 57, 32 PUR 4th 313, 338 (1979).

Document No. 94 reflects FPL's reluctance to enter into firm wholesale power contracts which might interfere with its ability to adequately serve its existing customers. This obviously justified reluctance does not permit the inference that FPL refused to sell wholesale power to municipalities as needed and where consistent with FPL's existing obligations. The Cities' reliance on Document No. 101 is misplaced for much the same reasons. That document reflects FPL's agreement to construct a tie and other new facilities to ensure an adequate supply of wholesale power to New Smyrna Beach -- hardly the agreement of a party refusing to deal in wholesale power.

Document No. 102 consists of excerpts from the deposition of Richard Fullerton, a former FPL official, reflecting Mr. Fullerton's understanding that, in the early 1960s, there were certain restrictions on FPL's willingness to sell wholesale

power. Even if Mr. Fullerton's understanding was correct, it concerns a time in the distant past and has no relation to matters presently pending before the Board. Nothing in the record indicates that any sort of resale restriction now exists or has existed for many years. Under these circumstances, Document No. 102 is simply irrelevant.

Document Nos. 115-118 relate to FERC proceedings concerning a proposal by FPL, never implemented, to modify the availability provisions of its wholesale tariff. They are all clearly irrelevant. Document No. 117 is an order directing FPL to show cause why FERC should not find the company in violation of the Federal Power Act and its tariff; it neither records FPL's response nor the outcome of the proceeding. Document No. 118 consists of recommendations of the FERC staff, not findings based on adjudication. Since the show cause order directed FPL to respond to the Staff Report, the Staff Report can hardly be considered conclusive of anything. Document Nos. 115 and 116 merely demonstrate the termination of related proceedings deemed resolved after Opinion No. 57 was issued. In Document No. 119, Robert Gardner, who is presently an FPL Senior Vice President, states that FPL is "willing to file a wholesale power rate for power at the bus bar," thus undermining the Cities' contention that FPL refuses to sell wholesale power.

A Genuine Issue Exists Concerning Cities' Contention G[3]

Even if the Cities had submitted admissible evidence tending to support their contention G[3], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. Mr. Fite, a former President of FPL, testified on deposition that FPL adopted a policy in the early 1960s of selling wholesale power to municipal systems. (Fite Deposition (May 29, 1981), at 37-38 [Appendix F to FPL's Response (August 7, 1981), pp.877-78]). Under the St. Lucie 2 license conditions which FPL has voluntarily entered into, FPL is obligated to sell firm wholesale power to neighboring entities and neighboring distribution systems. The record is replete with past instances of FPL wholesale power sales to various Cities. (See, e.g., FPL 1956 FPC Form 1, at 72 [Appendix F to FPL's Response (August 7, 1981), p.1033], showing FPL sales to New Smyrna Beach as early as 1956; FPL Information Requested by the Attorney General for Antitrust Review (July 17, 1975), at 17-20 [Appendix F to FPL's Response (August 7, 1981), p.1036], proving that, since 1961, FPL has furnished wholesale power to New Smyrna Beach on a continuous basis; and Peters Deposition (April 22, 1981), pp.19-20 [Appendix S], where Homestead's Director of Utilities testified that power was purchased from FPL on a "firm basis," and that there never was a day when Homestead didn't get all the wholesale power it wanted from FPL).

As far as FPL's proposal to limit the applicability of its wholesale tariff is concerned, the company voluntarily

forebore from implementing the availability limitations pending FERC's decision on the proposal. (See, e.g., Cities Document No. 115, a FERC Order Terminating Proceeding, in which FERC noted that 'throughout the course of proceedings in the related dockets, Homestead [the city challenging the FPL proposal] has continued to purchase wholesale power and energy from FPL under the PR Rate Schedule . . . . In its Application for Rehearing of Opinion No. 57, FP&L has informed us that it no longer contests Homestead's right to service under its tariff.') Since the proposed tariff was based on FPL's reluctance to assume long-term firm wholesale commitments at the expense of its existing customers, it is evidence not of a general unwillingness to deal in wholesale power but rather of a sense of responsibility to FPL's ratepayers.

The significant adverse impact on FPL's customers and stockholders expected to result from the addition of substantial wholesale loads has been quantified by Mr. Howard. (Supplemental Affidavit of Joe L. Howard [Attachment C to Memorandum of FPL on Matters Relating to August 17 and 18, 1981, Conference of Council (September 14, 1981)]). Nevertheless,

> FPL today stands willing to provide full or partial requirements wholesale service to all neighboring entities or neighboring distribution systems as defined in the license conditions for St. Lucie Unit No. 2.

(Bivans Affidavit ¶19 [Appendix B to FPL's Response (August 7, 1981)]).

"The "E. dentiary Basis" for Cities' Contention G[4]

The Cities apparently rely on Document Nos. 27, 28 30, 69, 99, 100, 103 and 105 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document No. 99.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

Document No. 27, the affidavit of an Orlando Utilities Commission official, states that "a joint venture would be necessary for Orlando to participate in nuclear capacity." (Document at C300). Cities choose not to mention that FPL offered, and Orlando has in fact purchased, an ownership share in St. Lucie 2.

Document No. 28 hardly permits the inference that FPL excludes the Cities from coordination. In the document, Mr. Bivans states that "we are now, and have been operating as a pool for several years [through interconnections with several Cities, among others], and each and every member of this interconnected group is now and has been enjoying the benefits therefrom." (Document at C308). It is true that the document reflects FPL's unwillingness to engage in more formal pooling and centralized dispatch, but the grounds for FPL's decision are entirely legitimate--FPL's perception that "pool operations with centralized dispatch of power, while possibly benefitting the smaller, less efficient utilities, would probably result

in higher costs for electric power to the customers of FPL." (Document at C309). Document No. 28 therefore indicates FPL's willingness to coordinate with the Cities to the fullest extent compatible with the interests of its customers and shareholders. This conclusion, rather than the Cities' contention, is supported by Document No. 30 as well, in which Mr. Bivans states that, had a completed study shown benefits to FPL of formal pooling and centralized dispatch, the company would have considered participation.

Document Nos. 103 and 105 are to the same effect. Document No. 103 states that FPL was a willing participant in FCG joint studies, to which the Cities were party, and notes the existence of bilateral interchange contracts between FPL and the municipalities with which it is interconnected. The document also refers to FPL's participation, along with the Cities, in the Florida power broker. (Document at I88). Document No. 105 notes FPL's leadership role in conducting studies with other utilities in its operation "as part of an interconnected system." (Document at I118). The document also restates FPL's opposition to membership in a formal pool since "we . . . see no benefits to us." (Document at I124). This document proves no more than FPL's disinterest in so-called formal pooling; it does not demonstrate an intention on the part of FPL to exclude Cities from coordination on their own or from less formal coordination with FPL.

Document No. 69, minutes of a Homestead City Council meeting, records a Homestead official's belief that "we would have an agreement [with FPL] on the service area by Monday but we still have the problem of tie-in and rates to be settled." (Document at E35). The Cities would have the Board infer from the document that FPL had refused to coordinate with Homestead. In fact, all the document shows is that the parties determined to resolve their territorial dispute -- and thus enable themselves to gauge their future power requirements -- prior to determining what interconnection and other power supply arrangements to make.

Document No. 99 is thirty years old and is merely a discussion of a power plant that a rural electric co-op was allegedly considering. Thus, it is simply not relevant to the contention that FPL has blocked the Cities' access to coordination.

Document No. 100, a fragment of a letter from FPL's President to a U.S. Senator, expresses FPL's opposition to an "allocation of [federal] funds either to Seminole . . . or to Southeastern Power Administration . . . [because] the companies in Florida can and will take care of customer requirements in Florida without the necessity of using any tax dollars." The document does not reflect any attempt by FPL to block the Cities or anyone else from engaging in coordination.

A Genuine Issue Exists Concerning Cities' Contention G[4]

Even if the Cities had submitted admissible evidence tending to support their Contention G[4], summary disposition could not be granted because evidence submitted by FPL has created a genuine issue with respect to the contention.

Mr. Bivans indicates in his affidavit that there was no instance in which a utility sought to join the FOC and was denied membership. (Bivans Affidavit ¶13 [Appendix B to FPL's Response (August 7, 1981)]). Mr. Bivans states his belief that until the price and availability of oil and gas changed dramatically in the 1970s, Cities had no incentive for transactions designed to take advantage of differences in energy costs among Florida systems. (Id. ¶26). For example, in 1970 R.W. Beck and Associates, the Cities' engineering consultant, prepared a study and advised the Fort Pierce Utilities Authority that building generation to meet load growth would be more economical than purchasing power. (Id. and Appendix B, attachment B). Mr. Bivans states that there was little demand for the use of FPL's transmission system to accommodate transactions between other utilities during that period. Bivans Affidavit ¶28 [Appendix B to FPL's Response (August 7, 1981)].

The Cities have participated in studies planned and conducted by task forces of the FCG during the 1970s. (Id. ¶¶28-35, and particularly attachments C and D thereto). FPL has vigorously supported the Power Broker,

in which some Cities participate. The Power Broker is a system for matching, on an hourly basis, availability of economy energy with the need for economy energy in a way that maximizes fuel savings. (Id. ¶33). In spite of the Cities' professed desire for greater coordination, several cities have either been extremely tardy in implementing or have simply neglected to implement, the necessary contracts to partcipate in the Broker. (Id. ¶34).

The Cities also participated with FPL and other systems in a Central Dispatch Study, the results of which were published on May 14, 1981. (Id. ¶35 and Attachment D). The report concludes that central dispatch offers no substantial advantage over enhancement of the Power Broker. A number of the Cities endorsed that conclusion. (Id. ¶35).

FPL has interconnections with seven generating municipal electric systems, and has offered interconnections to the other generating municipal system adjacent to its service area, Starke, as well as Gainesville. (Id. ¶36). FPL is prepared to interconnect with any "neighboring entity" in accordance with the license condition. (Id.)

The "Evidentiary Basis" for Cities' Contention G[5]

The Cities apparently rely on Document Nos. 26 and 29 to establish this contention. As indicated in Section II, FPL objects to the admissibility of each of these documents.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible.

Document No. 26 is a report on power pooling by a five man committee of engineers from various Florida utilities, including one from FPL, prepared at the behest of the Florida Operating Committee (FOC). The report summarily analyzed the various "pooling" arrangements in the United States. The report also included the results of study models which roughly compared current Florida utility operating and planning practices with the hypothetical operation and planning of Florida's electric generation as if Florida were served by a single utility. The central dispatch, i.e., "single system" operation simulation showed that some individual Florida systems might experience economic losses over current practices (Document at C294-95), but the report opined that overall fuel savings could be achieved with such operation. However, the report declined to quantify the possible benefits "due to the complex nature of the subject and the absence of funds for extensive studies." (Document at C188).

The report contains no recommendation that Florida utilities implement such comprehensive, single-system pooling.

Moreover, it gives no indication that the other utilities in Florida, including Cities, wanted to adopt the single-system operation and planning described in the report. As Mr. Bivans points out in his affidavit, the Technical Advisory Group (TAG) of the Florida Coordinating Group, felt that this report might warrant further study of the single-system planning and dispatch concepts, but that most TAG members (which included representatives of Cities intervening here) perceived substantial deficiencies in the report, and believed that the report did not lend itself to the conclusion that economies would be necessarily realized through "single-system" planning or operation of Florida generation. (Bivans Affidavit ¶¶28-29 [Appendix B to FPL's Response (August 7, 1981)].

Document No. 29 discusses interchange contracts then under negotiation with Florida Power Corp. and TECO. The document also states that FPL was moving to "secure uniform bilateral interchange contracts as a deterrent towards formal pooling." The document neither refers to FPL's policy vis-a-vis the Cities nor states any improper motive for preferring bilateral contracts over "formal pooling." As described above, at pp.94-95, supra, the one formal pooling arrangement that had been proposed was one that FPL believed would result in higher costs for its customers. Moreover, the document refers to FPL's practice and preference then (and now)

to achieve economies of coordination with all Florida generating utilities, including Cities, through such bilateral interchange arrangements rather than through a comprehensive contract to plan and operate all Florida generation as if Florida were a single utility. (see Bivans Affidavit ¶¶20, 33-34 [Appendix B to FPL's Response (August 7, 1981]). Accordingly, the reference to FPL's efforts to secure such bilateral arrangements from Cities and others (which were later successful) is evidence that FPL has sought to coordinate on a non-discriminatory basis, and contradicts the inference Cities would have the Board draw.

Genuine Issue Exists Concerning Cities' Contention G[5]

Even if the Cities had submitted admissible evidence tending to support their contention G[5], summary disposition could not be granted because evidence submitted by FPL has created a genuine issue with respect to the contention. FPL is cautious about committing itself to membership in a "formal" or "fully integrated" pool for an entirely legitimate reason -- because it is concerned that the costs of establishing and operating such a pool outweigh the benefits, and that the associated loss of managerial authority would impair the reliability and efficiency of FPL's system. As Mr. Bivans explains in his affidavit, although FPL has been willing to consider a "formal" pool in Florida, it has harbored concerns, based on the information available to it, about participating in the "formal" pool

envisioned by some members of the FOC pooling task force:

> [S]ome of the task force representatives were advocating a pool organization that would require each utility to give up to a central committee or group the authority to make many planning and operating decisions. Their plan included central dispatch and single-system planning which would cause the generation of Florida to be planned and dispatched without regard to ownership. I was concerned by this, as I believe that such an arrangement offered no benefits and substantial disadvantages to FPL, for the following reasons:
>
> (1) FPL was large enough and had sufficient management capability to permit it to install th largest generating units prevalent in the electric utility industry and to make management and operating decisions more effectively, I thought, than any committee. Thus, in my judgment, surrender of our management autonomy to a central committee would not have been in the interests of FPL's ratepayers and shareholders. Moreover, FPL cannot delegate the ultimate responsibility owed ratepayers and shareholders;
>
> (2) The costs associated with creating and staffing a central organization, purchasing and maintaining the equipment necessary for central dispatch of all Florida utilities, and the problems of accounting and assigning cost responsibilities within the pool could be very substantial; and
>
> (3) Those advocating such a pool were not acting on the basis of any reliable study indicating the potential for overall savings.

Id. ¶30.

Mr. Bivans had made the following criticisms of the pooling report, Cities' Document No. 26, performed by the

Pooling Task Force:

> I perceived certain obvious deficiencies in the report, including:
>
> (1) No consideration was given the impact of transmission losses on costs or dispatch schedules;
>
> (2) Fuel costs were based on very simple assumptions, and no account was taken of transportation cost of fuel to the plant, whether by barge, truck, or pipeline;
>
> (3) No assessment was made of the economic impact of pooling arrangements on individual utilities, including the impact on individual customers' bills;
>
> (4) No estimate was made of the cost of dispatching equipment, administration, and other costs of central dispatch operation;
>
> (5) It was assumed that economical dispatch and effective coordination of planning could only be achieved in the setting of a comprehensive or "formal" pool, whereby each participating utility contracts away considerable autonomy over the planning and operation of its individual system to the pool;
>
> (6) The economic dispatch simulation considered only a very small sample (43 out of 8760 hours) of annual operation.
>
> I believe most of these perceptions were shared by TAG members representing other utilities.

Id. ¶29.

Although Cities allege that FPL has refused to pool, Mr. Bivans states in his affidavit that FPL has "vigorously

supported" the Power Broker concept in Florida, which was first implemented in March 1978, and now includes most generating Florida utilities, including intervening Cities. (Bivans Affidavit ¶¶33-34 [Appendix B to FPL's Response (August 7, 1981)]). In fact, the DOE has described the Power Broker as:

> . . . one of the best things that's happened in terms of power coordination anywhere in the country. Those folks down there are getting the benefits of economic dispatch for a fraction of the cost that the pools and the holding companies have invested in their systems.

"Power Brokering Saved Florida $10-Million-Poor Man's Economic Dispatch", Electrical Week, Jan. 29, 1979, at 2 [Appendix F to FPL's Response (August 7, 1981), pp.290-91]).

Moreover, FPL has submitted evidence showing that, except for posturings in litigation, Cities do not favor formal, fully integrated pooling. In fact, Cities have not even pursued all opportunities to achieve the economies of pooling that are now available. Mr. Bivans notes:

> [t]hat several cities, all of them outside of FPL's service territory, have either been extremely tardy or have simply neglected to implement the necessary contracts to transact under the Broker. For example, during most of the Broker's existence, Tallahassee didn't even participate in the Broker most of the time even to the extent of communicating cost information--an action analogous to paying for telephone service and then leaving the phone off the hook. Gainesville did not execute certain necessary contracts with FPL until June, 1980, notwithstanding FPL's having offered these contracts to Gainesville long before that time. Such failures to participate fully deprive all Broker participants of opportunities to maximize fuel savings.

(Bivans Affidavit ¶34 [Appendix B to FPL's Response (August 7, 1981)]).

FPL has also shown that the Technical Advisory Group of the Florida Electric Power Coordinating Group has completed a study for the purpose of determining whether central dispatch, i.e., single-system operation of generation in Florida, would result in greater savings to participating systems than are attainable through the Power Broker. This Central Dispatch Study was published on May 14, 1981, and it concludes that no substantial advantage under central dispatch was demonstrated. (Bivans Affidavit ¶35 [Appendix B to FPL's Response (August 7, 1981)]). Mr. Bivans states:

> Systems participating in the study had the opportunity to include their individual reactions to the study results in the final published report. Most, including Gainesville, Lake Worth, Sebring and Orlando, concluded that enhancement of the Power Broker, not central dispatch, offered the most opportunity for operating economies in Florida. Tallahassee, in fact, noted that the study showed actual losses for Orlando under central dispatch, and commented that: '[a] utility cannot be expected to participate in any undertaking at the expense of its customers simply to benefit the customers of other utilities.'

Id., (Attachment D, p. 180).

In summary, FPL has submitted evidence proving that it is currently engaged in a pooling arrangement with Cities; that sound reasons exist for questioning the desirability of entering a formal, "single-system" pool; that a number of Cities have indicated that they prefer existing bilateral coordination to a more formal centralized pooling arrangement; and that some Cities, such as Tallahassee, have chosen not to take advantage of opportunities that are presently available.

The "Evidentiary Basis" for Cities' Contention G[6]

The Cities apparently rely on Document Nos. 17, 33, 34, 38, 39, 44, 53, 85, 96, 98, 105, and 106 to establish this contention. As indicated in Section II, FPL objects to the admissibility of Document Nos. 17, 33, 34 and 53.

Furthermore, FPL submits that material inferences the Cities would draw from these documents are impermissible, as follows:

Cities assert that Document No. 17 shows that FPL has used its "nuclear power" to try to extend its service area. In fact, the language cited by the Cities in support of this contention, relating to "more reliable service" expected "with FPL's new Turkey Point Plant" is a reference to FPL's new oil-fired unit at Turkey Point, not its nuclear units there. This is clear because the document was written in 1967, 5 years before the first of FPL's Turkey Point nuclear units was operable. Accordingly, the document shows nothing about use by FPL of its "nuclear power."

Documents 33, 34 and 39 indicate that in 1976 FPL made a proposal to acquire the Vero Beach electric system at the request of the City of Vero Beach. The documents do not support the inference that FPL refused to deal with Vero Beach. Indeed, the only basis upon which Cities could conceivably draw such an inference is the statement at C404 that there were no available

wheeling options. However, as FPL has already shown, that statement does not indicate that FPL refused a request by Vero Beach for wheeling. (See p.85, supra).

Document 96 consists of several advertisements concerning 1) the possible establishment of a municipal electric system in Daytona Beach, and 2) FPL's proposed acquisition of the municipal electric system in Vero Beach. Again, it is not anticompetitive for FPL to respond to City requests for an FPL proposal to purchase a city's electric system, or to seek to renew its existing franchises, and Cities make no showing that such actions are inherently anticompetitive.

In Document No. 38, FPL expresses its willingness to cooperate with Homestead by making an interconnection and holding available emergency power supplies for the City pending completion of the City's consideration of its future power supply arrangements. Far from indicating a refusal to deal or an anticompetitive intent, the document reflects FPL's willingness to supply Homestead with power.

Document No. 44 simply records FPL's willingness to participate in a solid waste generation plant in Dade County. Cities point to nothing in the document evincing an intention on the part of FPL to "monopolize power supply alternatives in order to deter competition from the Cities," as the Cities contend without explanation.

Document No. 53 reflects the City's understanding that FPL

would not sell wholesale power to New Smyrna Beach when it had no power available. There is nothing in the document to suggest that FPL's evaluation of its power availability was less than candid, or that any request was made of FPL, and declining to sell power that one does not have can hardly be indicative of an anticompetitive intent.

The Cities contend that FPL's presentation to the Commissioners of New Smyrna Beach concerning the acquisition of that system, Document No. 85, "proves" use by FPL of its "dominance" in nuclear power to extend its retail service area. But, as in the case of Vero Beach, FPL was requested by New Smyrna Beach to make a proposal to acquire the municipal electric system. In such circumstances, the Cities' contention is untenable.

Document No. 98 is an outline which appears to present alternative future scenarios for FPL's relations with other utilities. FPL's recitation of the obvious fact that the Cities cannot use the Atomic Energy Act to participate in coal-fired generation hardly permits any inference of anti-competitive intent, especially since the document also lists alternative modes of FPL-municipal cooperation in generation projects (Id. at I65).

Cities suggest that Document No. 105 shows that FPL was willing to forego innovations leading to greater efficiencies through pooling. The document nowhere suggests that FPL

wanted to avoid anything that would help its customers or stockholders; on the contrary, it shows FPL's concern that pooling alternatives being pressed by others would harm FPL's customers. (See Bivans Affidavit ¶30 [Appendix B to FPL's Response (August 7, 1981)]). This was a legitimate business concern and thus not evidence of any anticompetitive intent.

Document 106 recites Mr. McDonald's belief that FPL was seeking to purchase power from other utilities in 1973. Cities do not suggest how such purchases might relate to "pooling", or show any resistance to pooling by FPL. FPL is thus unable to discern how this document might show an anticompetitive desire by FPL to avoid what the Cities call "pooling."

A Genuine Issue Exists Concerning Cities' Contention G[6]

Even if Cities had submitted admissible evidence tending to support their contention G[6], summary disposition could not be granted because evidence submitted by FPL has created a genuine dispute with respect to the contention. In responding to Cities' Contentions G[1] - G[5], FPL has recounted the evidence in the record that rebuts the Cities' allegations of refusals to deal. FPL submits that the same evidence proves that its decisions and actions through the years have had the entirely legitimate objective of providing reliable electric service at the lowest possible cost, rather than the anticompetitive motivation the Cities allege. Thus, there is a genuine issue of fact with regard to FPL's intent; it must be resolved at hearing.

Cities' Contention H

[1] Florida Power Corp. has refused to deal in nuclear power.

[2] Florida Power Corp. has refused to wheel.

[3] Florida Power Corp. has refused to sell power at wholesale.

[4] Florida Power Corp. has refused to interconnect on reasonable terms and conditions.

[5] Florida Power Corp. has blocked the Cities' access to co-ordination.

The "Evidentiary Basis" for Cities' Contention H[1]

The Cities apparently rely on Document No. 70 to establish this contention. As indicated in Section II, this document is not admissible.

In any event, the material inferences the Cities would draw from this document are impermissible. Cities contend that Document No. 70 indicates (1) a "refusal to deal in nuclear power" by Florida Power Corp. and shows (2) that FPL was "aware of Cities' interest in nuclear power." The document does not establish the first of these propositions and contradicts the second.

Document No. 70 is a letter by Mr. Perez of Florida Power Corp. informing Gainesville that its expression of interest in participating in Florida Power Corporation's Crystal River 3 unit was "untimely." The letter does not indicate that Florida Power Corp. would have unreasonably refused a timely request; indeed, as noted below, Florida Power Corp. later did offer participation in the unit to Gainesville when circumstances made this feasible. Nothing in the document indicates that FPL was "aware" of Gainesville's interest in Crystal River Unit 3.

Indeed, since Gainesville, by contrast, expressed no interest in any of FPL's nuclear units at the time, the documents would serve to underscore Gainesville's lack of interest in those units.

Not only does Document 70 fail to support Cities' contention as to conduct by Florida Power Corporation, Cities have failed to come forward with any evidence that Florida Power Corporation's actions, however they may be characterized, can be attributed to FPL. For that proposition Cities rely solely on the decision of the Fifth Circuit in the Gainesville case. However, that proposition would not follow even if the Gainesville decision were accorded collateral estoppel effect here, a ruling that FPL has shown would constitute error as a matter of law. The Gainesville decision made no finding of "conspiracy" or fact as to this contention.

A Genuine Issue Exists Concerning Cities' Contention H[1]

Even if the Cities had submitted admissible evidence tending to support this contention, summary disposition could not be granted for at least three reasons. First, there exists a material issue of fact with respect to the contention whether Florida Power Corporation's actions can be attributed to FPL. Also Florida Power Corporation subsequently offered to Gainesville (and others) a share of the Crystal River 3 unit. (See Letter from M.F. Hebb to R. Roundtree, (April 3, 1975), [Appendix R]). Gainesville thus received an opportunity to participate in the unit and declined to do so.

Second, FPL has not had the opportunity to take discovery on Cities' contentions regarding conduct by Florida Power Corporation. Thus, summary disposition is inappropriate because the facts have not been explored through discovery. George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d Cir. 1977). See Littlejohn v. Shell Oil Co., 483 F.2d 1140 (en banc), cert. denied, 414 U.S. 416 (1973); Penn Galvanizing Co. v. Lukens Steel Co., 59 FRD 74, 80 (E.D. Pa. 1973).

Finally, the contention is extraneous to the question at issue here, i.e., whether the licensing of FPL's St. Lucie Unit No. 2 under the current license conditions will create or maintain a situation inconsistent with the antitrust laws. In fact, Gainesville has accepted those license conditions as satisfactory, and the conditions include an opportunity for Gainesville to participate in St. Lucie Unit No. 2.

The "Evidentiary Basis" for Cities' Contention H[2]

The Cities apparently rely on Document Nos. 62 and 81 to establish this contention. As indicated in Section II FPL objects to the admissibility of those Documents.

Furthermore, FPL submits that the inferences the Cities would draw from these documents are impermissible, as follows:

Document No. 62 not only fails to indicate that Florida Power Corporation refused to wheel for Tallahassee in 1966 but instead informs (Document at E2) that "[r]elative to a wheeling arrangement, the City stated that it was once interested in this item but had virtually abandoned any further interest." The document contradicts the Cities' characterization of it.

Document No. 81 also does not support Cities' contention. It consists of a 1955 letter from Florida Power Corporation to the Seminole Electric Cooperative. The context of the letter is not clear; it apparently follows earlier negotiations between Florida Power Corporation and Seminole regarding an experimental 40 MW nuclear unit of indeterminate technology under consideration by Seminole. The document indicates that Florida Power Corporation and Seminole negotiated concerning this experimental reactor but could not agree upon mutually beneficial terms (e.g., "there would be no serious problem involved in the mechanics of our [FPCorp.] wheeling the energy"). Beyond this, no inference can fairly be drawn. The document does not establish a refusal to negotiate or wheel. Rather, it would appear that Florida Power Corporation was in fact willing to proceed upon terms that would be beneficial to both parties.

Not only do these documents fail to support this contention, as to the conduct of Florida Power Corporation, but as with contention H[1], there is no evidence that Florida Power Corporation's actions, however they may be characterized, can be attributed to FPL.

A Genuine Issue Exists Concerning Cities' Contention H[2]

Even if the Cities had submitted admissible evidence tending to support their contention H[2], summary disposition could not be granted because there exists a genuine dispute as to this contention. FPL has not had the opportunity to take discovery on Cities' contentions regarding conduct by Florida Power Corporation. If those contentions were deemed relevant to the licensing of St. Lucie Unit No. 2, and FPL believes they are not, summary disposition would be inappropriate because the facts have not been explored through discovery.

The "Evidentiary Basis" for Cities' Contention H[3]

The Cities apparently rely on Document Nos. 63 and 81 to establish this contention. As indicated in Section II FPL objects to the admissibility of these Documents.

Moreover, FPL submits that inferences the Cities would draw are impermissible.

Document No. 63 consists of minutes of an FMUA Power Supply Committee meeting in June of 1967. The document not only does not indicate that Florida Power Corporation refused to deal in wholesale power, it notes (Document at E5) that Florida Power Corporation did make such sales. The document merely reflects complaints about Florida Power Corporation's rates.

There is no mention of wholesale [i.e., requirements or partial] power in Document No. 81, which, as noted above, relates to Florida Power Corporation's 1955 negotiations with Seminole Co-op. Nor is there any evidence Seminole Co-op ever requested such power.

In short, the "evidence" on which Cities base this contention consists of one document which expressly contradicts it, and another, which does not relate to it. And as with the prior contentions in part H, Cities have come forward with no basis upon which Florida Power Corporation's conduct, however it may be characterized, can be attributed to FPL.

A Genuine Issue Exists Concerning Cities' Contention H[3]

Even if the Cities had submitted admissible evidence tending to support this contention H[3], summary disposition could not be granted because there exists a genuine dispute

as to this contention. FPL has not had the opportunity to take discovery on Cities' contentions regarding conduct by Florida Power Corporation. Even if those contentions were deemed material here, and FPL believes they are not, summary disposition is inappropriate because the facts have not been explored through discovery.

The "Evidentiary Basis" for Cities' Contention H[4]

The Cities apparently rely on Document Nos. 66, 71 and 72 to establish this contention. As indicated in Section II, FPL objects to the admissibility of these documents.

Furthermore, FPL submits that the material inferences the Cities would draw from these documents are impermissible.

Each of these documents reflects discussions in the course of 1966-67 negotiations between Florida Power Corporation and Tallahassee concerning establishment of an interchange agreement. Cities apparently contend that Florida Power Corporation refused to interconnect with Tallahassee until a territorial agreement had been finalized. This contention is unsupported by the documents.

Document No. 66 is the latest in time of the three documents relating to the negotiations cited by the Cities. That document does not reflect that Florida Power Corporation refused to interconnect absent a territorial agreement. Rather it indicates both (1) that Tallahassee and Florida Power Corporation were in agreement as to their service area boundaries and both desired a territorial agreement; and (2) that the question of the timing of the interconnection agreement vis-a-vis the territorial agreement would be referred to the Corporation legal department for further action. What later transpired is not reflected in the documents -- all of which reflect a willingness on Florida Power's part to interconnect.

Not only do the documents fail to establish Cities' contention as to the conduct of Florida Power Corporation, again the Cities have come forward with no basis for attributing Florida Power's conduct to FPL. The Gainesville decision in fact expressly held that FPL and Florida did not have an agreement that neither would interconnect with Gainesville unless that city entered into a territorial agreement.

A Genuine Issue Exists Concerning Cities' Contention H[4]

Even if the Cities had submitted admissible evidence tending to support their contention H[4], summary disposition could not be granted because there exists a genuine dispute as to this contention. FPL has not had the opportunity to take discovery on Cities' contentions regarding conduct by Florida Power Corporation. Even if those contentions were deemed material here, and FPL believes they are not, summary disposition is inappropriate because the facts have not been explored through discovery.

The "Evidentiary Basis" for Cities' Contention H[5]

The Cities apparently rely on Document Nos. 62, 64, 77, 67 and 72 to establish this contention, i.e., that Florida Power Corporation denied Cities access to coordination. As indicated in Section II, FPL objects to the admissibility of those documents.

Furthermore, FPL submits that inferences the Cities would draw are impermissible. Each of these documents reflect discussions between Florida Power Corporation and Tallahassee. They show neither that Florida Power Corporation refused to coordinate with Tallahassee nor that FPL was involved in or even aware of dealings between Florida Power and Tallahassee.

Document No. 66, as noted above, concerns negotiations between Tallahassee and Florida Power Corporation regarding an interchange agreement and does not appear to relate to "coordination" as Cities use the term. The same is true of Document No. 72. Document No. 67 also principally reflects such interchange negotiations. These documents do not show that Florida Power Corporation "blocked" Tallahassee's access to coordination. Indeed, Document No. 67 reflects a willingness by Florida Power Corporation to coordinate with Tallahassee so as to facilitate the city's "use of larger generators." (Document at E28). The document states moreover that Mr. Hopkins, Tallahassee's city manager and negotiating representative, was "satisfied with the progress being made" in the interchange negotiations between the two systems. (Id.)

Likewise, Cities' characterization of Document No. 64 cannot withstand an objective reading. Cities contend this document "proves" that Florida Power Corporation prevented Tallahassee from studying pooling. Cities rely on a newspaper clipping attached to the document showing that R. W. Beck & Associates claimed to the press in April of 1967 that they had been retained by Tallahassee to study formation of a municipal power pool. However, Document No. 64 reveals that according to Mr. Strickland, Tallahassee's Chief Engineer, the newspaper report was untrue, and that R. W. Beck "would not have [had] the charge" to make such a study. On the face of the document Tallahassee had evidently already unilaterally decided not to undertake such a study.

Contrary to Cities, Document No. 62 does not support the inference that Tallahassee was excluded by Florida Power Corporation (or by FPL) from the Florida Operating Committee. According to the document, Mr. Bathen, a consultant with R. W. Beck & Associates, indicated an interest by Tallahassee in a "Florida pool." Employees of Florida Power Corporation correctly explained that the Florida Operating Committee was not a power "pool." Nothing in the document indicates (1) that Tallahassee communicated a request to join the Florida Operating Committee, (2) that such a request, if one ever existed, was communicated to FPL, or (3) that FPL was ever aware of the meeting described in the document.

Finally, not only do the documents fail to support Cities' contention as to conduct by Florida Power Corporation, Cities have, as with their other contentions, failed to show any basis for attributing conduct by Florida Power, however it may be characterized, to FPL.

A Genuine Issue Exists Concerning Cities' Contention H[5]

Even if the Cities had submitted admissible evidence tending to support their contention H[5], summary disposition could not be granted because there exists a genuine dispute as to this contention. FPL has not had the opportunity to take discovery on Cities' contentions regarding conduct by Florida Power Corporation. Even if those contentions were deemed material here, and FPL believes they are not, summary disposition is inappropriate because the facts have not been explored through discovery.

Indeed, even without such discovery, the evidence before the Board controverts this contention. The only pertinent testimony of record shows that every request FPL ever received for FOC admission was accepted. (Bivans Affidavit, ¶13). There is no evidence that municipal status was a bar to FOC admission, and there is undisputed evidence to the contrary. Jacksonville and Orlando were already members of the FOC in 1966. Cities' contention H[5] necessarily assumes that these two municipals combined to "block" a third. What Cities have failed to advise the Board is that Tallahassee was in fact accepted as an FOC member in 1970, when it requested admission. (Bivans Affidavit, ¶9).

II. FPL's Objections to the Admissibility of Documents Relied Upon by the Cities

Attached to the Cities' Supplemental Memorandum (filed on September 14, 1981) is a table purporting to explain why each document relied upon by the Cities in support of its Motion is admissible under the Federal Rules of Evidence.*/ FPL objects to the admissibility of many of these documents, for the reasons stated below. In addition, FPL notes that the Cities have not established the authenticity of any of the documents upon which they rely, despite the clear requirement of authentication in Rule 901 of the Federal Rules of Evidence.

Document No. 5

The Cities assert that Document No. 5 is admissible to show "notice" to FPL, but the Cities have not established a foundation for the admissibility of the document on that basis. Specifically, the Cities have not shown that anyone at FPL in a position to make or influence FPL policy with respect to matters set forth in the document ever saw the document.

Nor is Document No. 5 admissible under Rule 803(16) to show the truth of the matters asserted, as the Cities contend. The document consists of newspaper clippings and a press release. Statements in such documents are generally recognized to constitute inadmissible hearsay. See, e.g., Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).

Document No. 6

The Cities rely on Fed. R. Ev. 801(d)(2)(B), 801(d)(2)(C), 801(d)(2)(D) and 801(d)(2)(E) for the admissibility of Document No. 6, but the Cities have not shown that a foundation for the applicability of any of these exclusions from the hearsay rule exists. As a general matter, the Cities have made no effort to show that the declarant had personal

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*/ FPL agrees with the Cities that the admissibility of documents presented to the Board should be tested against the Federal Rules of Evidence. The Commission's governing regulations provide that in proceedings such as this one, the Board is to consider only "relevant material and reliable evidence" (10 C.F.R. §2.743(c)), and in determining what evidence is "reliable," Boards have applied the Federal Rules of Evidence. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48 (1979).

knowledge of the matter set forth in the document, and, specifically,

> -- so far as Rule 801(d)(2)(B) is concerned, the Cities have not shown that FPL manifested its adoption or belief in the truth of the matters asserted in the document;
>
> -- so far as Rule 801(d)(2)(C) is concerned, the Cities have not shown that FPL authorized the author of the document to make statements for FPL on the subject of the document;
>
> -- so far as Rule 801(d)(2)(D) is concerned, the Cities have not shown that the author of the document was an agent of FPL with respect to the matters set forth in the document; and
>
> -- so far as Rule 801(d)(2)(E) is concerned, the Cities have not shown either that FPL and Florida Power Corporation ("FPCorp.") were engaged in a conspiracy or that the statements in the document were in furtherance of an FPL-FPCorp. conspiracy.

Nor is Fed. R. Ev. 803(24) authority for the admissibility of the document, in light of the Cities' total failure to make any of the showings specified in that Rule. The Cities' simple assertion, without explanation, that a document has "guarantees of trustworthiness" is insufficient to show the document's admissibility.

Document No. 8

Fed. R. Ev. 801(d)(2)(D) is not authority for the admissibility of this document, because the Cities have not established a foundation for application of the Rule. Specifically the Cities have not shown that the author of the document, a former president of FPCorp., was an agent of FPL with respect to the matters set forth in the document.

Document No. 10

The Cities have not established a foundation for the admissibility of this document under Fed. R. Ev. 803(24), upon which they rely. They have provided the Board with no basis for concluding that the document has "circumstantial guarantees of trustworthiness," nor any basis for making the three findings that are prerequisites for invocation of the Rule. Fed. R. Ev. 803(18) describes the limited circumstances in which "learned treatises" may be admitted into evidence despite the hearsay rule. Other than in these circumstances -- which are not

present here -- learned treatises are not admissible as substantive evidence. See [4] Weinstein's Evidence (1979 ed. ¶ 803(18)[02] at p. 803-257.

Document No. 12

Neither Fed. R. Ev. 801(d)(2)(C) nor Fed. R. Ev. 801(d)(2)(D) is authority for the admissibility of this document, because the Cities have not laid the necessary foundation. Specifically, they have not shown that the statements, which are contained in a report prepared by a planning committee of the Florida Operating Committee ("FOC"), were made by a person with authority to speak on behalf of FPL on the subject or by an agent of FPL as to a matter within the scope of his agency. That FPL employees served on the committee does not make the committee's report -- which was never adopted by either the FOC or FPL -- a statement on behalf of FPL.

Document No. 13

Fed. R. Ev. 801(d)(2)(D) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. Specifically, the Cities have not shown that the author of the document, a former FPCorp. official, was an agent of FPL with respect to the matters set forth in the document.

Document No. 14

Fed. R. Ev. 801(d)(2)(C) does not authorize admitting this document, because the Cities have not laid the necessary foundation. Specifically, the document was prepared by the FOC and there has been no showing that, in preparing the document, the FOC was authorized to speak for FPL with respect to the matters set forth in the document.

Fed. R. Ev. 803(16) is equally unavailing for the Cities. For one thing, the authenticity of Document no. 14 has not been shown, despite the Rule's requirement of authentication. For another, there has been no showing that the declarant had personal knowledge of the matters set forth, as is also required by Rule 803(16). See [4] Weinstein's Evidence (1979 ed.), ¶ 803(16)[2] at p. 803-244.

Document No. 16

Fed. R. Ev. 801(d)(2)(D) does not authorize admitting this document, because the Cities have not laid the necessary foundation. See FPL's objections to the admissibility of Documents Nos. 12 and 14.

Document No. 17

Fed. R. Ev. 801(d)(2)(D) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 18

Fed. R. Ev. 801(d)(2)(D) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6. Furthermore, FPL objects to the admissibility of this document on the basis that the document reflects FPL's consideration of settlement talks with the Department of Justice concerning this matter.

Document No. 19

FPL does not object to admitting the document to show "notice," but FPL does object to use of the document to show the truth of the matters asserted. For such a purpose, the document constitutes inadmissible hearsay.

Documents Nos. 20(1), (2), (3) and (5)

Fed. R. Ev. 801(d)(2)(B) is not authority for the admissibility of these documents, because the Cities have not laid the necessary foundation. Specifically, the Cities have not shown that Mr. Smith, a former FPL official, had "made up his mind about the truth or falsity" of the statements in the documents, as is required to show admissibility under the Rule. See Nat'l Bank of North America v. Cinco Industries, Inc., 610 F.2d 89 (2d Cir. 1979).

Document No. 25

The Cities concede that this document is not admissible.

Document No. 26

Neither Fed. R. Ev. 801(d)(2)(C) nor Fed. R. Ev. 801(d)(2)(D) authorizes admitting this document, because the Cities have not laid the necessary foundation. See FPL's objections to the admissibility of Documents Nos. 12 and 14.

Document No. 29

The document is inadmissible in view of Fed. R. Ev. 805, which provides that "hearsay included within hearsay" is

admissible only if each part of the combined statement comes within an exception to the hearsay rule. Here whether or not Mr. Coe's memorandum itself would be admissible under Fed. R. Ev. 801(d)(2)(D), his description of what Mr. McDonald said is inadmissible hearsay.

Document No. 31

Fed. R. Ev. 803(6) does not authorize admitting this document, because the Cities have not laid the necessary foundation. Specifically, the Cities have not offered the testimony of the custodian of the document or another qualified witness to establish when and why the document was prepared, whether the document was kept in the course of a regularly conducted business, and whether it was the regular practice of the business to prepare such a document -- all as required by Rule 803(6).

Document No. 33

Fed. R. Ev. 801(d)(2)(A) does not authorize admitting this document, a report prepared by a consultant to a city, because the document can hardly be said to constitute FPL's own statement. Nor does the attachment of the document as an exhibit to FPL's application to FERC manifest FPL's belief of the truth of matters asserted in the document, as is required for admissibility under Fed. R. Ev. 801(d)(2)(B). FPL submitted the document to FERC to show that Vero Beach had studied the impact of acquisition on its ratepayers and taxpayers, not to adopt as true the statements in the document. Fed. R. Ev. 803(8) is not authority for the admissibility of this document either, because the Cities have not laid the necessary foundation. Specifically, the Cities have not shown that the document sets forth (A) the activities of a public agency, (B) matters as to which a public agency had a duty to report or (C) fact findings made pursuant to an official investigation -- the three categories of information made admissible by Rule 803(8).

Document No. 34

Fed. R. Ev. 803(8) is not authority for the admissibility of this document for the reasons stated in FPL's objection to the admissibility of Document No. 33. Indeed, the Cities have not even been able to identify who authored the document.

Document No. 36

Fed. R. Ev. 803(16) is not authority for the admissibility of this document, because the authenticity of the document has not been established, as is required by the Rule.

Document No. 37

Fed. R. Ev. 801(d)(2)(D) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 41

Fed. R. Ev. 801(d)(2)(D) does not authorize admitting this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 43

The Cities concede that this document is not admissible.

Document No. 45

FPL does not object to admitting the document to show "notice," but FPL does object to use of the document to show the truth of the matters asserted. For such a purpose, the document constitutes inadmissible hearsay.

Document No. 46

Fed. R. Ev. 801(d)(2)(E) is not authority for the admissibility of the document, because the Cities have not laid the necessary foundation. Specifically, the Cities have not shown that FPCorp. and FPL were part of a conspiracy or that statements in the document were made in furtherance of an FPCorp.-FPL conspiracy.

Alternatively, the Cities assert that the document is admissible to show "notice." FPL does not object to admitting the document for this purpose, but FPL does object to use of the document to show the truth of the matters asserted. For such a purpose, the document constitutes inadmissible hearsay.

Documents Nos. 48 and 49

Fed. R. Ev. 803(24) is not authority for the admissibility of these documents in light of the Cities' total failure to satisfy any of the foundation requirements set forth in that Rule.

Document No. 51

Fed. R. Ev. 801(d)(2)(D) does not authorize admitting this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 52

Fed. R. Ev. 803(24) is not authority for the admissibility of these documents in light of the Cities' total failure to satisfy any of the foundation requirements set forth in that Rule. Document No. 52 consists of certain FMUA materials. FMUA is a party in this proceeding, and no reason appears why it should be excused from the requirements that a party offering its own document establish both its authenticity and a basis for concluding that the statements in the document are other than inadmissible hearsay.

Document No. 53

Fed. R. Ev. 801(d)(2)(D) does not authorize admitting this document, because Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6. Furthermore, the assertions relied upon by the Cities are inadmissible as "hearsay within hearsay," under Fed. R. Ev. 805.

Document No. 54

Fed. R. Ev. 803(24) is not authority for the admissibility of this document, in light of the Cities' failure to satisfy any of the foundation requirements set forth in the Rule. See also FPL's objection to the admissibility of Document No. 52.

Document No. 57(5)

Fed. R. Ev. 801(d)(2)(B) does not authorize the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Documents Nos. 20(1), (2), (3) and (5).

Document No. 60

Fed. R. Ev. 801(d)(2)(C) does not authorize admitting this document, because the Cities have not laid the necessary foundation. Specifically, there has been no showing that in making the statements in the document -- an advertisement by the Edison Electric Institute -- the declarant was authorized to speak for FPL.

Document No. 62

Fed. R. Ev. 801(d)(2)(E) does not authorize admitting this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 46.

Document No. 63

Fed. R. Ev. 803(24) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 52.

Document No. 64

The Cities rely on Fed. R. Ev. 801(d)(2)(E) to show the admissibility of Document No. 64(1), but that reliance is misplaced in the absence of extrinsic admissible evidence that FPCorp. and FPL were co-conspirators and that the statements in the document were made in furtherance of an FPCorp.-FPL conspiracy. Neither Document No. 64(1) nor Document 64(2) is admissible under Fed. R. Ev. 803(24), because the Cities have made no showing that there are guarantees of trustworthiness surrounding the documents of the kind required by the Rule. Finally, FPL notes that Document No. 64(2) is a newspaper clipping, and that such documents are generally held to constitute inadmissible hearsay. See FPL's objection to the admissibility of Document No. 5.

Document No. 65

Fed. R. Ev. 803(24) does not authorize admitting this document, because the Cities have not laid the necessary foundation. See also FPL's objection to the admissibility of Document No. 52.

Document No. 66

Fed. R. Ev. 801(d)(2)(E) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 46. The Cities' unexplained reference to Fed. R. Ev. 803(24) as an additional basis for the admissibility of the document is puzzling and without apparent basis.

Document No. 67

See FPL's objection to the admissibility of Document No. 66.

Document No. 68

Fed. R. Ev. 801(d)(2)(E) is not authority for the admissibility of Document Nos. 68 (1 and 2) because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 46. Fed. R. Ev. 801(d)(2)(B) does not authorize the admissibility of document No. 68(3) because the Cities have not shown that FPL manifested its belief in the truth of the matters asserted in the document.

Document No. 70

The Cities' reliance on Fed. R. Ev. 801(d)(2)(E) is misplaced because the Cities have not shown the existence of an FPCorp.-FPL conspiracy or that statements in this document were made in furtherance of such a conspiracy. The Cities' reliance on Fed. R. Ev. 801(d)(2)(B) is puzzling; there is no indication that FPL manifested its belief in the truth of the matters set forth in the document. Finally, the Cities' unexplained reference to Fed. R. Ev. 803(24) adds nothing to their argument for the admissibility of the document.

Document No. 71

See FPL's objection to the admissibility of Document No. 70.

Document No. 72

See FPL's objection to the admissibility of Document No. 70.

Document No. 73

Fed. R. Ev. 801(d)(2)(D) does not authorize admitting the document because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6. Nor have the Cities laid a foundation for the document's admissibility as an FPL business record under Fed. R. Ev. 803(6). See FPL's objection to the admissibility of Document No. 31.

Document No. 76

There is no evidence in the record (and FPL denies) that the Tampa Electric Company was an agent of or co-conspirator with FPL. Accordingly, the Cities have not laid the foundation required for this document to be admitted under either Fed. R. Ev. 801(d)(2)(C) or 801(d)(2)(E).

Document No. 77

The Cities say that this document shows "FPL awareness," but the Cities have not established a foundation for the admissibility of the document on even this limited basis. Specifically, the Cities have not shown that anyone at FPL in a position to make or influence FPL policy with respect to matters set forth in the document ever saw the document.

Document No. 79

The Cities say that Document No. 79(1) is admissible under Fed. R. Ev. 801(d)(2)(D), but they have not established a foundation for the admissibility of the document on this basis. See FPL's objection to the admissiblity of Document No. 6. The Cities say that Documents Nos. 79(1) and 79(2) are admissible as "ancient" documents pursuant to Fed. R. Ev. 803(16), but as they have failed to show the authenticity of the documents and that the declarants had personal knowledge of the matters set forth, Fed. R. Ev. 803(16) is inapposite. Finally, the Cities rely on the document to show FPL "awareness." Because the Cities have not shown that anyone at FPL in a position to make or influence FPL policy with respect to the matters set forth in the document ever saw the document, Document No. 79 is inadmissible for this purpose.

Document No. 80

See FPL's objection to the admissibility of Document No. 5.

Document No. 81

The Cities' reliance on Fed. R. Ev. 801(d)(2)(E) is misplaced for the reasons stated in FPL's objection to the admissibility of Document No. 46. The defects in the Cities' reliance on Fed. R. Ev. 803(8) are the same as those stated in FPL's objection to the admissibility of Document No. 33. Finally, the Cities' reliance on Fed. R. Ev. 803(16) is unavailing because the authenticity of the document and the personal knowledge of the declarant have not been established, as the Rule requires.

Document No. 83

The Cities' reliance on Fed. R. Ev. 801(d)(2)(B) and 801(d)(2)(D) is misplaced for the reasons stated in FPL's objection to the admissiblity of Document No. 6. Fed. R. Ev. 803(16) is not authority for the admissibility of the document, because the Cities have not established the authenticity of the document and the personal knowledge of the declarant, as required by the Rule.

Document No. 84

Fed. R. Ev. 801(d)(2)(C) is not authority for the admissibility of the document, because the Cities have not established the necessary foundation. See FPL's objection to the admissibility of Document No. 6. The Cities note that the document was admitted into evidence in a proceeding before the Federal Energy Regulatory Commission, but that circumstance does not cure the defects in the Cities' argument for admissibility.

Document Nos. 86 and 87

Fed. R. Ev. 801(d)(2)(B) is not authority for the admissibility of Item 1, because the Cities have not established the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 88

Fed. R. Ev. 801(d)(2)(B) is not authority for the admissibility of Item 4, because the Cities have not established the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 90

Document No. 90 is inadmissible under Fed. R. Ev. 801(d)(2)(D) and 805. Specifically, the statement relied on by the Cities is not that of Mr. Fite, FPL's former president, but rather that of the Public Service Magazine, not an agent of FPL. Furthermore, there is no apparent basis for the Cities' reliance on Fed. R. Ev. 803(24) to show the admissibility of the document.

Documents Nos. 91 and 92

The Cities have not laid a foundation for the admissibility of these documents under Fed. R. Ev. 801(d)(2)(B). See FPL's objections to the admissibility of Documents Nos. 20(1), (2), (3) and (5). The Cities' reliance on Rule 803(16) is misplaced because the Cities have not established the authenticity of the documents and the personal knowledge of the declarants. In view of these deficiencies, the documents' admission in another proceeding is no support for their admission here.

Document No. 95

The Cities' reliance on Fed. R. Ev. 803(8) is misplaced because the document does not come within any of the

categories described in that Rule. See FPL's objection to the admissibility of Document No. 33. Nor is there any apparent basis for the Cities' assertion that the document is admissible under Fed. R. Ev. 803(24).

Document No. 97

Neither Fed. R. Ev. 801(d)(2)(C) nor Fed. R. Ev. 801(d)(2)(D) authorizes the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 99

Fed. R. Ev. 801(d)(2)(D) does not authorize the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 6.

Document No. 104

Fed. R. Ev. 801(d)(2)(E) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 46. Nor is Fed. R. Ev. 803(16) authority for the admissibility of the document, because the Cities have not established that the document is authentic, as is required by the Rule.

Document No. 108

Fed. R. Ev. 801(a)(2)(E) is not authority for the admissibility of this document, because the Cities have not laid the necessary foundation. See FPL's objection to the admissibility of Document No. 46.

Document No. 118

This Document, a staff report never adopted by the FERC, does not come within any of the categories of documents made admissible by Fed. R. Ev. 803(8). See Control Competents, Inc. v. Valtek, Inc., 609 F.28 763 (5th Cir. 1980).

Document No. 121

Fed. R. Ev. 803(24) is not authority for the admissibility of this document, because the Cities have not established that the document has any "guarantees of trustworthiness," as required by the Rule.

Document No. 125

Fed. R. Ev. 803(24) is not authority for the admissibility of these documents merely because FERC relied on the documents. The admissibility of each document must be established individually. This the Cities have not done.

Pages 412 and 413 from Detroit Edison Company's 1978 Form 1; settlement agreement in Detroit Edison Company, FERC Docket No. ER80-100; and tariff sheet relating to sale by Detroit Edison Company to Michigan Municipal Corporation Power Pool [attached as Appendix B to Cities' Supplemental Memorandum dated September 14, 1981]

These materials constitute inadmissible hearsay, and the Cities have proffered no basis for their admissibility.

Florida Electric Power Coordination Group Agreement [included in Appendix F to Cities' Supplemental Memorandum dated September 14, 1981].

This document constitutes inadmissible hearsay, and the Cities have proffered no basis for their admissibility.

APPENDIX B