FPL: 10/30/81

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 30, 1981

SUPPLEMENTAL MEMORANDUM OF FLORIDA POWER & LIGHT COMPANY

This Supplemental Memorandum is submitted pursuant to the Board's Memorandum and Order of October 22, 1981. We first discuss the impact on this proceeding of the Order entered on October 9, 1981, in the antitrust action brought by many of the Cities in the United States District Court for the Southern District of Florida.[1] In that Order, Judge King granted summary judgment for FPL on plaintiff Tallahassee's claim that FPL unlawfully denied it access to FPL's nuclear facilities. Thereafter, we will address the relevance of GAF Corp. v. Eastman Kodak Co., 1981 Trade Cas. ¶ 64,205 (S.D.N.Y. Aug. 3, 1981).

I.

FPL submits that Judge King's decision should have a decisive impact on this proceeding in two respects. First, based on that decision, the Board should determine that the Cities are collaterally estopped from asserting that any lack of access to FPL's nuclear facilities evidences a "situatio...

[1] Lake Worth Utilities Authority, et al. v. FPL, No. 79-5101-Civ-JLK.

[2] A copy of Judge King's decision is Appendix T to the Reply Memorandum of Florida Power & Light Company in this proceeding, dated October 13, 1981.

inconsistent with the antitrust laws." Alternatively, the Board should determine that the Gainesville decision and FERC Opinion No. 57 are entitled to no collateral estoppel effect insofar as they address antitrust issues that have now been resolved in FPL's favor by Judge King.

A. The Cities Are Collaterally Estopped From Arguing That Any Lack of Access to FPL's Nuclear Units Is "Inconsistent With the Antitrust Laws"

In deciding FPL's summary judgment motion, Judge King was faced with a record virtually identical to the record now before the Board.[1] After examining that record, Judge King concluded that it was insufficient to create a triable issue of fact under Sections 1 and 2 of the Sherman Act. As he stated, "[t]here has been no showing of a contract, combination or conspiracy in restraint of trade, that defendant possessed monopoly power, or, even assuming that defendant had monopoly power, that defendant acquired or maintained its nuclear facilities through other than business acumen." Decision, at 12.

Underlying this conclusion was a full analysis of the shortcomings in the Cities' factual and legal contentions. As Judge King determined:

> 1. By selling nuclear-generated power to certain Cities under the settlement license conditions approved in this proceeding, FPL has not entered into a combination or conspiracy in restraint of trade. Id., 6-7.

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[1] The Cities filed with the district court a 136 page "Answer" which contains a lengthy Statement of Facts. The Cities themselves have acknowledged that this Statement is virtually identical to the factual presentation in their Motion in this proceeding. See Motion, at 24 n.1. Accompanying the Cities' Answer was an Appendix containing the vast majority of the documentary materials that the Cities have submitted to this Board.

2. The relevant market for purposes of analyzing the Cities' antitrust claims consists not of nuclear-generated electricity, but electricity generated from all sources. Id. 7-8.

3. FPL does not possess monopoly power in the relevant market as thus defined. Id., 8.

4. FPL's acquisition of its nuclear units was the result of unilateral action, not joint effort. Id., 8-9.

5. FPL alone assumed the risks inherent in the construction and operation of its nuclear facilities and those risks were substantial. Ibid.

6. FPL's decision to invest in nuclear power reflected "sound business judgment" on FPL's part. Id., 9.

7. Under judicial decisions construing Section 2 of the Sherman Act, a firm does not violate the antitrust laws merely by realizing the advantages attributable to its large size or business acumen. This principle applies to the construction of nuclear facilities; the Atomic Energy Act does not foreclose individual electric utilities from building and operating nuclear facilities for the sole purpose of serving their own customers. Id., at 9-10.

8. Insofar as FPL has been unwilling to share its nuclear facilities with the Cities, it is because of its desire to use those facilities to meet the needs of its own customers; there is no evidence that FPL has sought to prevent the Cities from generating their own nuclear power or from obtaining such power from other sources. Id., 10-11.

9. There is no evidence that the Cities have been unable to obtain adequate alternative energy sources or to enter into nuclear generation activities of their own. Id., 11.

10. There is no evidence that FPL's nuclear facilities constitute "bottleneck resources", to which the Cities must have access in order to continue operating their electric systems. Id., 11.

In Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 561 (1977), the

Appeal Board held that "as a general matter, a judicial decision is entitled to precisely the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding." Applied here, this principle bars the Cities from relitigating before this Board the antitrust issues that were resolved against them by Judge King.

The courts have recognized five preconditions for the application of collateral estoppel: (1) the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior action; (2) there must have been a final determination of the issues on which collateral estoppel is sought; (3) those issues must have been essential to the prior outcome; (4) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issues in question; and 5) the issues decided in the prior litigation must be identical to those sought to be estopped in the later proceeding. Each of these criteria has been satisfied here.

Identity of Parties. While nominally limited to plaintiff Tallahassee, the analysis underlying Judge King's decision applies equally to all of the plaintiffs in the Miami litigation; for this reason, FPL's summary judgment motion was opposed by plaintiffs as a group. Moreover, plaintiffs in the Miami litigation have been represented by the same counsel who represents the Cities here. Accordingly, any collateral estoppel effect attributable to Judge King's decision can properly be applied to all of the Cities.

Finality. To qualify as "final" for collateral estoppel purposes, a decision need not constitute a final judgment under 28 U.S.C. § 1291. Rather, it is merely necessary that the decision be "adequately deliberated and firm" rather than "provisional and subject to change." Restatement (Second) of Judgments (Tent. Draft No. 1, March 28, 1973) § 41, Comment g. See also Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 87-90 (2d. Cir. 1961); Sherman v. Jacobson, 247 F. Supp. 261, 270 (S.D.N.Y. 1965).

By entering summary judgment for FPL, Judge King's decision constitutes a definitive ruling on the Cities' nuclear access claim. Accordingly, the decision finally puts to rest the factual and legal issues which that claim presents.

The Necessary and Essential Requirement. In determining whether the Cities' nuclear access claim could withstand summary judgment, Judge King was required to review the evidence filed by the Cities in light of the legal standards applicable under Sections 1 and 2 of the Sherman Act. Judge King's conclusions on the factual and legal issues raised by the Cities and FPL were therefore "necessary and essential" to the entry of summary judgment.

The Requirement of a Full and Fair Opportunity to Litigate. In opposing FPL's summary judgment motion, the Cities filed memoranda totaling over 200 pages in length. These memoranda included a detailed recitation of the facts that, in the Cities' view, supported their nuclear access claim. They also described fully the findings of the Fifth Circuit in Gainesville and FERC in Opinion No. 57. Voluminous evidentiary materials --

virtually identical to those included in the Cities' submission to this Board -- were filed with the Court to support the Cities' factual assertions. At the conclusion of briefing, Judge King heard oral argument by counsel. It is thus clear that summary judgment was entered in favor of FPL only after all relevant legal and factual issues had been fully aired and the Cities had received every opportunity to present their position.

Identity of Issues. In proceedings under Section 105c of the Atomic Energy Act, the central issue is whether, under the proposed license conditions, a situation would be created or maintained that is inconsistent with the "'policies clearly underlying' the antitrust laws." Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC 265, 273 (1979) (Citation omitted). Although the Appeal Board has stated that this standard does not require a finding that an actual violation of the antitrust laws has occurred, the NRC has recognized that it has no independent authority to declare antitrust policy, but is bound by antitrust principles established by the courts:

> ". . . [I]n the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry." Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1316 (1977).

Judge King's entry of summary judgment for FPL was not based on a narrow holding that the Cities had failed to present evidence of an "actual violation" of the antitrust laws. Rather, Judge King affirmatively found that, in constructing and operating its nuclear facilities, FPL had engaged

in conduct that the antitrust laws condone and even encourage. As he stated, "defendant's acquisition of nuclear generating facilities was simply the result of sound business judgment" and, by demanding access to those facilities, the Cities were "seeking the fruits of another's labors without justification." Decision, at 12. Under these circumstances, the Judge concluded, "[f]airness and the law dictate that defendant should be able to reap what it has sown." Ibid.

Judge King thus determined that the Cities' nuclear access claim was incompatible not merely with the letter of the Sherman Act but with the Act's basic policies. This is the precise issue now before this Board under Section 105c. It would be both irrational and inequitable to allow the Cities to relitigate this issue here after a United States District Court has reviewed substantially the same record and concluded that FPL's conduct has been fully compatible with antitrust policy.[1]

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[1] These factors differentiate the present case from Houston Lighting & Power Co. (South Texas Project, Units 1 and 2) LBP-79-27, 10 NRC 563 (1979), where a Licensing Board declined to give collateral estoppel effect to certain findings made by a district court in an action brought under Section 1 of the Sherman Act. The Board there stressed its view that the district court had found only that no violation of Section 1 had been proven, a finding that could not be equated with a determination that the defendant's conduct was consistent with basic antitrust policy within the meaning of Section 105c. In addition, the South Texas Board noted that it would be unproductive to apply collateral estoppel against certain intervenors who had participated in the district court case, but not against the NRC staff and the Justice Department, who were not parties to the district court litigation. This problem does not exist here, because the staff and the Department are not seeking additional antitrust relief.

B. Judge King's Decision in Any Event Precludes the Board From Giving Collateral Estoppel Effect to the Gainesville Decision and to Opinion No. 57

It is well-established that collateral estoppel is inappropriate if "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue." Restatement (Second) of Judgments (Tent. Draft No. 2, April 15, 1975) § 88(4). See also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979). This principle establishes that, even if Judge King's decision is not entitled to collateral estoppel effect, summary disposition of this proceeding against FPL would not be permissible.

The Board could resolve this proceeding on a summary basis against FPL only by deciding that the Fifth Circuit's Gainesville decision and FERC Opinion No. 57 conclusively establish the existence of a "situation inconsistent with the antitrust laws." Yet, faced with these "precedents" as well as with extensive other evidence of FPL's conduct, Judge King reached precisely the opposite conclusion -- that FPL's actions in building and operating its nuclear units have not been anti-competitive in any respect.

In prior memoranda, FPL has demonstrated that neither the Gainesville decision nor Opinion No. 57 qualifies for collateral estoppel effect under well-established principles. Even if the Board were to decide otherwise, however, the conflict between these decisions and Judge King's opinion would make the application of collateral estoppel impermissible.

II.

In its Order of October 22, 1981, the Board suggested that the parties may wish to address the possible relevance of GAF Corp. v. Eastman Kodak Co., 1981 Trade Cas. ¶ 64,205 (S.D. N.Y. Aug. 3, 1981). Presumably the Board directed the parties' attention to this case because it discusses the requirements for applying offensive collateral estoppel, and applies that doctrine in favor of GAF with respect to findings made by the jury and affirmed by the Second Circuit in another case brought against Kodak by another plaintiff, Berkey. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

The Court in GAF recognized that, under Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), application of offensive collateral estoppel would be impermissible if GAF could easily have joined in the Berkey case. 1981 Trade Cas. ¶ 64,205 at p. 73,748. In applying the Parklane standard, the GAF Court emphasized that GAF filed its own lawsuit against Kodak some three months after the Berkey suit had been filed and that the very issue of whether the GAF and Berkey cases should be tried together had been considered by the trial court, which had ordered a prior and separate trial of the Berkey case. Id. at pp. 73,746, 73,751. Accordingly, it was clear tht GAF could not easily have joined in the Berkey case. Id. at p. 73,751.

In marked contrast is the situation presented by the Gainesville case. The Cities which now seek to accord collateral estoppel affect to Gainesville did not file their own

lateral estoppel affect to Gainesville did not file their own lawsuit against FPL alleging the antitrust violations charged by Gainesville and subsequently found by the Fifth Circuit. Nor did they seek to participate in the Gainesville case. Instead, they sat back and let one of their then number, Gainesville, litigate for them. As we have shown in prior memoranda, their after-the-fact rationalizations for their inaction -- which were not present in GAF -- are unavailing, and collateral estoppel may not be applied with respect to the Gainesville decision.

Respectfully submitted,

J. A. Bouknight, Jr.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-8400

Herbert Dym
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5520

Attorneys for Florida Power & Light Company

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Supplemental Memorandum of Florida Power & Light Company" were served on the following persons by hand delivery (*) or by deposit in the U.S. Mail, first class, postage prepaid this 30th day of October, 1981.

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

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

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

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

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

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

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

Argil L. Toalston
Acting Chief
Antitrust and Economic Analysis
Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Janet Urban, Esquire
U.S. Department of Justice
P. O. Box 14141
Washington, D.C. 20044

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

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

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

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

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

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

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

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

(202) 862-8400

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