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NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

ADJUDICATORY SESSION 77-51

on

ALAB-420

Place - Washington, D. C.

Date - Thursday, 15 December 1977

Pages 1 - 40

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ADJUDICATORY SESSION 77-51

on

ALAB-420

Thursday, 15 December 1977

1717 H. Street, N.W.  
Room 1130  
Washington, D.C.

Whereupon, the Commissioner's met, pursuant to notice, at 9:30 a.m., Acting Director Gilinsky, presiding.

PRESENT:

COMMISSIONER GILINSKY  
COMMISSIONER PETER BRADFORD  
COMMISSIONER RICHARD KENNEDY

JAMES KELLEY, Esq., Deputy General Counsel  
RUTH BELL, Esq., Office of the General Counsel

P R O C E E D I N G S

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CHAIRMAN GILINSKY: Ruth, are you going to lead us through ALABL-420.

MS. BELL: I will try my best.

CHAIRMAN GILINSKY: Okay; a review of ALAB-420.

MS. BELL: We are here to discuss a review of ALAB-420.

I will start briefly by just going very briefly through the normal antitrust review process of the Commission, and then the facts of this case.

Normally, when an application for a Construction Permit is received, the antitrust review takes place at that time. The matter is referred to the Attorney General for his views and examination of the application.

And within 180 days, which is the statutory period, the Attorney General responds to this request. This response is published in the Federal Register with a general call for anyone who has some sort of complaint or statement about it, to respond to the Federal Register notice.

In this particular application, the application for the CP was received in 1973. The application was routinely referred to the Attorney General and in November --

COMMISSIONER KENNEDY: After review by our own anti-trust staff?

MS. BELL: I believe so.

In November 1973, the Attorney General recommended that

1 no hearing was necessary in view of the fact that the appli-  
2 cant was considering granting access to this facility to  
3 certain entities.

4 COMMISSIONER KENNEDY: Does our staff make a recommenda-  
5 tion to the Attorney General?

6 MS. BELL: I think the Attorney General makes a recom-  
7 mendation to our staff. And our staff, in this matter, then  
8 apparently engaged in negotiations with the applicant. And  
9 as a result of that, a certain number of commitments were  
10 made with respect to certain coops and munis, that the licen-  
11 see would offer each of these the opportunity to purchase a  
12 reasonable ownership share.

13 And there is a letter in the files, February '74, in  
14 which it reviews briefly the recommendation to the Department  
15 of Justice:

16 "The antitrust hearing was not necessary in view  
17 of the consideration of the granting of access to  
18 this facility to certain entities."

19 And this states the various conditions that the appli-  
20 cant, the staff and he entities agreed to.

21 MR. KELLEY: These certain entities did not include the  
22 people who are before it now; is that correct?

23 MS. BELL: That is correct. These are other entities.

24 COMMISSIONER: Are you going to explain why the differ-  
25 ence?

1 MS. BELL: The record before us, I don't believe,  
2 reflects why the difference. Certain entities apparently did  
3 request access or participation and as a result of these neg-  
4 otiations, they worked out some conditions which resulted in  
5 an agreement between the various parties.

6 COMMISSIONER KENNEDY: The entities now before us,  
7 however, did not so request and therefore were not included?

8 MS. BELL: Are different and did not request at  
9 that time; that's right.

10 COMMISSIONER KENNEDY: The question, then, of  
11 course, is why didn't they? And isn't it alleged that they  
12 were misled?

13 MS. BELL: They allege that they were misled.

14 In August of 1976, another groups of munis, and  
15 others collectively known here as the Florida Cities, re-  
16 quested leave to intervene out of time and requested a hear-  
17 ing.

18 This was referred to a Licensing Board, and a  
19 Licensing Board issued a decision allowing, granting the pet-  
20 ition and setting forth -- granting the petition for relief  
21 to intervene and setting the matter down for hearing.

22 This was appealed to the Appeal Board, which af-  
23 firmed the decision, and then a petition was filed with the  
24 Commission requesting review of the Appeal Board decision.

25 COMMISSIONER KENNEDY: The petition was by the

1 applicant.

2 MS. BELL: The applicant requested review of that  
3 decision.

4 The questions that the Commissioners asked were  
5 laid out in its order of, I think, October 19, 1977. The  
6 questions were whether in view of -- I should say; after the  
7 Licensing Board decision but before the Appeal Board decision  
8 was rendered, this decision -- this Commission decided the  
9 South Texas matter in which for the first time, it discussed  
10 late intervention petitions in the context of a petition that  
11 was filed after the request -- after the CP was issued but  
12 before issuance of an OL.

13 And although the issues raised by this petition  
14 were not squarely addressed there, the Commission alluded to  
15 certain policies of early review and early consideration of  
16 antitrust matters in the context of our licensing proceedings,  
17 and stated that generally the antitrust review of this Com-  
18 mission was limited to the two-step licensing process.

19 MR. KELLEY: And that the second review would be  
20 less detailed than its first.

21 MS. BELL: And that the second review had to do  
22 with significant changes, rather than a full-blown, broad-  
23 based antitrust examination.

24 Two, we requested briefing, then on -- as a result  
25 of the applicant's petition for review, we requested briefing

1 on two matters.

2 One had to do with late consideration of antitrust  
3 claims. We stated that we expected these parties to address  
4 whether the determination of the Appeal Board that acceptance  
5 of the Orlando petition did not constitute an abuse of dis-  
6 cretion, was consistent with the standards alluded in the  
7 South Texas decision for late consideration of antitrust  
8 claims.

9 Secondly, we requested briefing on whether it was  
10 correct to allow participation by all petitioners in view of  
11 the fact that if the Orlando -- let me backtrack a little bit.

12 A number of petitioners requested a late hearing  
13 here. One of these petitioners, Orlando, made a case before  
14 the Licensing Board, which the Licensing Board accepted and  
15 the Appeal Board accepted, that the reason they had not inter-  
16 vened earlier and requested a hearing, was that they had been  
17 basically misled to believe that they would be granted access  
18 to future units or facilities planned by this applicant.

19 They stated that when they determined that they  
20 were not going to be granted such access, they then requested  
21 this late --

22 COMMISSIONER KENNEDY: They were not part of the  
23 original discussion and understandings reached with the  
24 Justice Department?

25 MS. BELL: No. They are not reflected in the

1 license conditions that were written at that time. License  
2 conditions were granted with respect to certain people and  
3 they are not among the people who are there listed.

4 The question was whether --

5 COMMISSIONER KENNEDY: The question, then, is --  
6 I am trying to educate myself -- the question really is:  
7 Whether their allegation is fact or not?

8 MR. KELLEY: The points needs to be made: They  
9 came in and they filed affidavits saying we were misled, that  
10 actually statements were made by Florida Power and Light  
11 that they would be let in later, and Florida Power and Light  
12 did not controvert those affidavits.

13 So that the Appeal Board, when it came to the re-  
14 cord, said: Well we have to take these as true. Assuming  
15 that all these facts are true --

16 COMMISSIONER KENNEDY: Because it had not been con-  
17 troverted.

18 MR. KELLEY: Right, what will follow --

19 COMMISSIONER KENNEDY: Was there a reason for  
20 Florida at the time, procedurally, to controvert it? Or could  
21 it be that they just simply didn't feel it was even necessary  
22 to do so?

23 MR. KELLEY: They could have controverted it.  
24 They made it quite clear, I think, before the Appeal Board --  
25 and this is reflected in the Appeal Board opinion. The

1 Appeal Board said to counsel before them: Why didn't you just  
2 controvert these affidavits. And the answer was that we made  
3 a tactical litigation judgment that we didn't have to and  
4 we were better off not doing it.

5 COMMISSIONER KENNEDY: I see.

6 MR. KELLEY: So they thought about it and decided  
7 not to.

8 COMMISSIONER KENNEDY: So one could say the ques-  
9 tion of fact is still open.

10 MR. KELLEY: The world is different in one respect  
11 than the one that was before the Appeal Board. You might  
12 comment on that development, Ruth.

13 MS. BELL: Well, I should say that -- before I  
14 say this, it is a well accepted fact that uncontroverted  
15 affidavits are usually taken as true. The other party norma-  
16 ally has --

17 COMMISSIONER: That is sort of a rule; not a fact.

18 MS. BELL: Pardon me?

19 COMMISSIONER KENNEDY: That is a rule, not a fact.

20 MS. BELL: Well, it tends to be a rule and there are  
21 cases that support that. If the party had opportunity to come  
22 in and controvert them and did not do so, that the only leg-  
23 itimate, or the most reasonable interpretation of the hearing  
24 board at that stage is that the affidavit should be taken as  
25 true.

1 Are you referring to the attempt to file --

2 MR. KELLEY: The late filing.

3 MS. BELL: After the applicant filed a request for  
4 review with the Commission, they then filed a pleading to  
5 which they appended affidavits for the first time, contro-  
6 verting or allegedly controverting, the earlier affidavits  
7 filed before the Licensing Board.

8 Now, under the normal rules of procedure of the  
9 Commission, the SERT rules provide that only the request for  
10 review is accepted and no papers thereafter, from the person  
11 requesting review. So in a sense, it was an unauthorized  
12 pleading and we haven't disposed either way of that matter.

13 They did apparently though attempt to lodge these  
14 affidavits with us.

15 MR. KELLEY: To fill it out a little bit, counsel  
16 for Florida Power and Light took umbrage to some statements  
17 in the reply by Florida Cities.

18 Florida Cities had made some statements in their  
19 reply pleadings to the effect that Florida Power and Light  
20 was somehow abusing the process of the Commission. So the  
21 procedural label on the paper that filed the affidavits,  
22 was a motion to strike those portions of the pleading that  
23 they took exception to.

24 So one could argue that a motion to strike is a  
25 different beast than an unauthorized reply to a reply.

1 I think my reaction is that you could go either way  
2 on that. You could accept these, and one procedural outcome  
3 that we suggested on paper says: Now that these affidavits  
4 have been lodged, and if you choose to accept them, you could  
5 remand this case for a hearing on the question of whether the  
6 petitioners here were misled and go ahead and litigate that  
7 issue, that narrow, factual question.

8 And if you found that they were not reasonable in  
9 their expectations, then you could say good cause hasn't been  
10 shown and that would be the end of it.

11 On the other hand, if a hearing on this issue  
12 showed that they were misled and were reasonable in expecting  
13 they would be let in later in another project, then that might  
14 be considered good cause and a hearing could follow from that.

15 But the world is different in that respect. We  
16 at least have before us these affidavits now, and it is up  
17 to the Commission what is to be done.

18 COMMISSIONER KENNEDY: Which aside from the proced-  
19 ural question, lays open the question of the facts.

20 MR. KELLEY: Yes.

21 COMMISSIONER KENNEDY: What has the Justice Depart-  
22 ment said about that, if anything?

23 MS. BELL: The Justice Department has not referred  
24 to that. I don't think there is any reference to that in  
25 the paper.

1 MR. KELLEY: But we didn't call for briefing on  
2 what should the Commission do with these late affidavits.  
3 And as I recall the papers, nobody addressed it.

4 MS. BELL: That's correct.

5 MR. KELLEY: And indeed, I don't believe that  
6 Florida Power and Light makes a great deal out of those affi-  
7 davits. Their argument, one argument at least, is that the  
8 Commission in judging whether good cause has been shown for  
9 a late filing, ought to confine itself to papers in the  
10 antitrust record. And this would lead to disregarding, not  
11 only their affidavit but the other side's affidavit.

12 You just wouldn't look at dealings outside the  
13 antitrust record in deciding this question.

14 COMMISSIONER BRADFORD: Now that is more or less  
15 what would happen in any case at the hearing; the affidavit  
16 whether even taken as true, doesn't establish on its face a  
17 violation of the antitrust laws.

18 MR. KELLEY: The violations of the antitrust laws  
19 are not before the house at all, and have not been reached  
20 by the Licensing Board.

21 And as a matter of fact, the Appeal Board decision  
22 under review explicitly states that they are not intimating  
23 any view on the antitrust violation. The Appeal Board says  
24 that they are well pleaded. If what they say is true, there  
25 may be a Sherman Act violation. But in terms of deciding that

1 there has been an antitrust violation, nobody has decided  
2 that and there hasn't been any evidence proffered on that.  
3 And that is not before us.

4 It is purely a procedural matter that is before  
5 the Commission, not a substantive antitrust issue.

6 MS. BELL: And the affidavits only go to the question  
7 of whether the cities or Orlando was misled, arguably misled,  
8 into believing that if they did not intervene in this proceed-  
9 ing and did not press request for participation in the  
10 planned facility, they would be granted some portion of future  
11 planned facilities.

12 COMMISSIONER BRADFORD: Under the structure of  
13 10 CFR 2.174, as the Commission construed it in the West  
14 Valley situation, Orlando, arguably, has made a showing of  
15 good cause and the other petitioners clearly, they haven't  
16 even tried.

17 MS. BELL: No.

18 COMMISSIONER BRADFORD: Is that fair to say?

19 MS. BELL: Before the Licensing Board, they were  
20 a number of plans. One of them was this argument that Orlando  
21 had been misled.

22 Second of all, there was an argument that in 1973

23 COMMISSIONER KENNEDY: Excuse me, Ruth.

24 MS. BELL: Yes.

25 COMMISSIONER KENNEDY: And again, I am just trying

1 to be sure I have it clear.

2 MS. BELL: Yes.

3 COMMISSIONER KENNEDY: Whereas it was alleged that  
4 Orlando was misled, it did not follow, or did it, that if  
5 Orlando was misled, so were the other Florida cities?

6 MR. KELLEY: No. What follows -- there is a state-  
7 ment in the Appeal Board's footnote 13, as I recall, to the  
8 effect that if Orlando gets in, the others can follow. But it  
9 wasn't because they were also misled.

10 The reasoning that the Appeal Board adopted was  
11 that if you let Orlando in, you are going to have an antitrust  
12 hearing with certain parameters, and the parameters of that  
13 hearing will not be significantly affected by letting every-  
14 body else in, so you might just as well.

15 But not -- I believe there are some arguments in  
16 the brief of the cities to the effect that there is reason  
17 to believe Orlando wasn't the only one, but that is not really  
18 -- that is not the way the Appeal Board -- that is not their  
19 theory of the case. Their theory was the scope of the hearing  
20 and the conclusion that it wouldn't be affected.

21 And I think that that is a subject that we might  
22 profitably discuss.

23 COMMISSIONER BRADFORD: That is where I was headed.  
24 At least as far as the Appeal Board is concerned, though, the  
25 posture is that Orlando has shown good cause and the others

1 have not?

2 MR. KELLEY: They simply didn't reach whether the  
3 others had or not.

4 The Licensing Board said that the energy crisis  
5 in '73 was in one posture, and it was worse in '76, and the  
6 argument was made that we didn't think we needed it in '73  
7 and we did in '76, and the Licensing Board accepted that  
8 as good cause for other cities.

9 Right?

10 MS. BELL: That is correct.

11 MR. KELLEY: The Appeal Board just simply didn't  
12 address that, again, on their theory that if you let one in,  
13 it is the same hearing, anyway.

14 COMMISSIONER BRADFORD: But the way the Commission  
15 has construed 2.714, you don't to have shown good cause if  
16 you then can -- if you then qualify under the four sub-  
17 criteria?

18 MR. KELLEY: Yes. If you show good cause, you are  
19 in. If you fail to show good cause, you might still make it  
20 in, but you have to be pretty well under the four criteria.

21 It is a balancing kind of a test. But they did  
22 hold there you didn't necessarily have to show good cause.  
23 But you don't show good cause, then the later you are, the  
24 stronger your case has to be.

25 And necessarily with that kind of a test, you have

1 a lot of discretion with the Licensing Board.

2 COMMISSIONER BRADFORD: But as to the other peti-  
3 tioners, other than Orlando, if you look at those four sub-  
4 criteria, are there any of them that would rule the other  
5 ones out? Do they have other means by which their interest  
6 may be protected? They can go the Justice Department route.

7 MR. KELLEY: They can go to the courts

8 COMMISSIONER KENNEDY: They can't go to the Justice  
9 Department.

10 COMMISSIONER BRADFORD: Excuse me. I meant to say  
11 the courts, yes.

12 MR. KELLEY: They can go and ask.

13 MS. BELL: The Justice Department is free to  
14 prosecute violations of the Sherman Act, independent of this.

15 COMMISSIONER BRADFORD: But everything that the  
16 Appeals Board has said about that route with regard to  
17 Orlando, presumably applies just as much to the others?

18 MS. BELL: You mean in the sense of other possible  
19 means of --

20 COMMISSIONER BRADFORD: Yes.

21 MS. BELL: Redress.

22 COMMISSIONER BRADFORD: Yes.

23 MR. KELLEY: There is another point that I think  
24 should be made. A civil antitrust suit whether by the cities  
25 themselves or whether the cities could induce the Justice

1 Department to sue on their behalf, does present a somewhat  
2 different case, at least in theory, because our antitrust  
3 jurisdiction extends to situations that are found to be in-  
4 consistent with the antitrust laws, including their policies,  
5 the theory being that we have a broader -- we are supposed --  
6 we could theoretically catch the sort of incipient antitrust  
7 violation that a court might not grant relief on, so that it  
8 is at least in theory not correct to equate court relief with  
9 what might be done before the Commission in its licensing  
10 conditioning role.

11 I suppose another comment occurs to me. We did not  
12 call for briefs on whether the other parties had made good  
13 cause. The Appeal Board didn't even look at it. I think that  
14 conceivably, if that became an important issue that the  
15 other parties show good cause -- it isn't to say the record  
16 is before you and you could reach it, but there is some dis-  
17 cussion of the good cause of the other parties in some of the  
18 briefs, but we didn't ask for it.

19 COMMISSIONER BRADFORD: What I am really after at  
20 the moment is putting it in the framework that assuming that  
21 it doesn't make any real difference if they are permitted to  
22 participate -- and I guess I am using the criteria set forth  
23 in the rule, to try and assess what kinds of difference it  
24 makes one way or the other.

25 MS. BELL: Well, there is debate among the parties

1 on that. They argue, the applicant argues that the scope of  
2 the hearing would be considerably wider if all the parties,  
3 all the petitioners, were allowed to participate.

4 COMMISSIONER KENNEDY: Does he describe the nature  
5 of this widening scope?

6 MS. BELL: Does the applicant?

7 COMMISSIONER KENNEDY: I know he argues this, but,  
8 how does he contend with, what does he --

9 MS. BELL: The parties stand in various kinds of  
10 positions in terms of their proximity to the facility, their  
11 distance, their --

12 COMMISSIONER KENNEDY: How does that widen the  
13 scope of the inquiry?

14 MR. KELLEY: Maybe it would be helpful to talk  
15 about the normal scheme and then contrast it to what might  
16 possibly take place in this situation.

17 And correct me if I am wrong, Ruth, but I think  
18 that if you take the normal case where there is an antitrust  
19 review and there is a hearing; let's pose that two or three  
20 municipals come in and ask for a hearing and they become  
21 parties and they present their respective cases.

22 It is unlike civil antitrust litigation. If those  
23 same parties went to court and sued Florida Power and Light,  
24 they would present their own cases, get whatever relief they  
25 were going to get and that would be it.

1           Here you have a different situation because you  
2 have got both the Attorney General and our antitrust staff  
3 presenting, if you will, the big picture and endeavoring to  
4 present the interests of everybody that is affected by this  
5 licensing; not just those people who intervene.

6           So that putting to one side the lateness factor,  
7 you at least theoretically look at all the antitrust implica-  
8 tions of granting a license for St. Lucie 2. That's the  
9 theory.

10           I think the staff quite candidly says that it is  
11 unrealistic to expect that they really would come in and pre-  
12 sent in full the same case that a participating private party  
13 would, because he has got a somewhat different, narrower  
14 economic interest in getting participation and in presenting  
15 his case.

16           So that it is a mix. On the one hand, you have  
17 got this -- the Appeal Board says: If we let one guy in; let  
18 them all in. It is the same case. Theoretically, I think  
19 that is true.

20           COMMISSIONER KENNEDY: Yes.

21           MR. KELLEY: As a practical matter, when you let  
22 everybody in, if they all show up with a different lawyer,  
23 if they all want to make their own case -- and what Florida  
24 Power and Light did to me last year and the year before; it  
25 does get to be a bigger hearing.

1                   COMMISSIONER KENNEDY: A bigger hearing; is that  
2 the definition of scope? That is what I am trying to get at.  
3 The issues are going to be the same issues.

4                   MR. KELLEY: Theoretically again, I think that is  
5 true, but if the issue is: Does Florida Power and Light have  
6 monopoly power in the peninsula of Florida -- although that  
7 broadly stated may be the issue with various sub-issues, if  
8 you have got a lot of private parties in addition to the staff  
9 and the Justice Department litigating it, in realistic terms  
10 the scope gets broader the more folks come in, it would seem  
11 to me.

12                   MR. KENNEKE: Jim, doesn't this undermine the  
13 South Texas effort to stabilize the process by saying you  
14 only consider, the Commission only considers it at two spec-  
15 ific stages. In effect, what you would be doing is granting  
16 them a way -- the other cities, assuming Orlando -- put them  
17 aside for a minute -- assuming they had no case, you are  
18 granting them another avenue to get in, other than the two  
19 stages when the Commission has said in South Texas they have  
20 got to show a significant change in the circumstances.

21                   MR. KELLEY: We are not out of stage one here.  
22 These things were filed before the CP issued. So it is a con-  
23 ceptually different situation. They are late; that is true.  
24 And we suggest in this memo that there may be ways in which  
25 one can restrict either hearing or relief so as to encourage

1 people to come in on time. But you can't just cite South  
2 Texas and say case dismissed.

3 CHAIRMAN GILINSKY: What do you see as the rele-  
4 vance of that case?

5 MR. KELLEY: Well, there is support in the legisla-  
6 tive history that is quoted in the South Texas opinion to the  
7 effect that utilities who set out to build these expensive  
8 facilities and commit these large sums of money, do have an  
9 interest in a relatively early and certain a resolution of  
10 who is going to own it. There is a quote from Holifield  
11 expressing his concern about getting this wrapped up early.

12 And that is quoted in South Texas for the pro-  
13 position that there we are just going to do it at the licens-  
14 ing stage, the two licensing stages, and that the earlier  
15 stage is the fuller one where matters are, if possible, to be  
16 resolved so that the utility can then move on.

17 Here, although, as I say it is conceptually dif-  
18 ferent because these petitioners did come in before the CP  
19 proceeding was over with, they are two and a half years  
20 late. And the argument is made by Florida Power and Light  
21 that they have gone that much further down the road. And they  
22 have spent a lot of money, and here they have thought for the  
23 last two and a half years that it was going to be all theirs.  
24 And they have made decisions accordingly and to allow a full-  
25 blown hearing at this stage will disrupt their plans.

1 That is the --

2 COMMISSIONER KENNEDY: But it was stipulated by  
3 all parties that it will not interfere with construction?

4 MR. KELLEY: That's true. And an important point  
5 in the Staff's view was that we are not talking about critical  
6 delay in building this facility, because everybody has agreed  
7 that construction can move on. So letting cities in would not  
8 be an exception to South Texas.

9 COMMISSIONER KENNEDY: You could let cities in  
10 consistent with the South Texas decision.

11 MR. KELLEY: Yes.

12 The argument is made by the utility that the  
13 spirit of South Texas, if you will, is offended by this late  
14 proceeding, and I think there is some merit in that point.  
15 And then it becomes a question of what the Commission might  
16 do to accommodate both policies.

17 COMMISSIONER KENNEDY: That comes back to the fact-  
18 ual issue that we were talking about earlier.

19 MR. KELLEY: Yes.

20 COMMISSIONER KENNEDY: If it is a fact that Orlando  
21 was misled, then that is new significant information, which  
22 would have affected or could have affected the nature of the  
23 hearing that was held in the first instance. And therefore,  
24 a rehearing, a reopening of the hearing would not be in the  
25 least inconsistent with South Texas.

1           The question is the facts.

2           MS. BELL: The South Texas decision did recognize  
3 situations like that, where parties had been misled and did  
4 not pursue their rights because of that reason.

5           There is also an argument that can be made, I  
6 have seen the applicant make it; relating the more relaxed  
7 antitrust standard to the requirement for early review, be-  
8 cause later on, of course, like any other company in the  
9 United States, they are open to litigation in the district  
10 court under the stricter Sherman Act standard.

11           COMMISSIONER KENNEDY: Excuse me, Ruth. I can't  
12 hear you.

13           MS. BELL: I am sorry.

14           The argument has something to do with the relation-  
15 ship between the more relaxed standard; that is, the situation  
16 inconsistent rather than in actual violation of the antitrust  
17 laws, and the requirement that parties who seek to take ad-  
18 vantage of this more relaxed standard, come in early and make  
19 their needs known very early.

20           And you can make an argument out of the legislative  
21 history and the statutes on that basis.

22           MR. KELLEY: But in terms of judging the relative  
23 equities of the parties, I think that what you were suggest-  
24 ing, that if they were misled, tying that in with South  
25 Texas -- we gave an example on the South Texas opinion about

1 it, if a party gains a license by fraud or concealment, then  
2 he has got no basis for complaining about a late hearing.

3 Here you have got a finding that one, they were in  
4 fact misled and two, they were reasonable in so being, in  
5 being so misled.

6 You don't have the third finding that Florida  
7 Power and Light did it on purpose. That is not a finding  
8 that the Appeal Board made. I suppose that if you had a case  
9 where the utility deliberately misled, then he has got no  
10 equities at all.

11 COMMISSIONER KENNEDY: Well, now let's go to the  
12 equities or whatever. If what this is all about is to assure  
13 that this government sponsored and supported technology is  
14 not used in a way to adversely affect the fortunes of smaller  
15 utilities which can't afford to employ it, if that is what  
16 it is all about then you know, the niceties of deciding whether  
17 somebody was misled unintentionally or unintentionally --  
18 that is one issue. But if he was misled at all, it would  
19 seem to me to argue that at least he ought to have his case  
20 heard, going back to the point of the case in the first place,  
21 which is to prevent a situation from arising in which this  
22 government sponsored and supported technology is not used by  
23 utilities which can afford, to the disadvantage of those which  
24 can't.

25 MS. BELL: I think that is a very strong policy

1 enunciated by the Act.

2 COMMISSIONER KENNEDY: It seems to me that is the  
3 kind of issue we ought to be addressing. That is the kind of  
4 issue that maybe the Commission ought to be looking at here.

5 MS. BELL: That is the strong policy that the  
6 cities point to in their briefs. And I think there is support  
7 for that in the statute and in the history. And the applicant  
8 argues that the other competing policy is the early decision  
9 policy.

10 COMMISSIONER KENNEDY: That is a procedural ques-  
11 tion with which I am wholly in accord.

12 COMMISSIONER BRADFORD: Well, the Appeals Board  
13 said of the Licensing Board, that it wouldn't reverse their  
14 decision, showing that they had abused their discretions,  
15 and that is the standard to be applied to reviews in that  
16 situation.

17 Is the same constraint true of us? First of all,  
18 is there any legal reason why it is true. And secondly, as  
19 a practical matter, is there any reason for us to use any  
20 other standard?

21 MR. KELLEY: Well, you are bound by the rule;  
22 2.714 is the rule on the books and it does apply to a late  
23 intervention petition. It seems to me that whenever you have  
24 got a rule that has that many balancing factors in it, you  
25 are talking about discretionary judgment.

1           COMMISSIONER BRADFORD: There is considerable  
2 discretion within 2.714.

3           MR. KELLEY: Right.

4           COMMISSIONER BRADFORD: The Appeal Board said --  
5 by standard, I didn't mean that rule. I meant the abuse of  
6 discretion standard as a basis for overturning the lower  
7 board's action.

8           MR. KELLEY: Well, the Commission has said earlier  
9 in West Valley, that that was the test. I would suppose that  
10 as a legal matter, the whole record is before you in these  
11 cases, generally speaking, and you can de novo review some-  
12 thing.

13           You didn't announce the review in those terms.  
14 You asked for briefs on some rather specific points without  
15 suggesting that you were going to look at the whole record  
16 and rejudge from scratch whether an abuse of discretion had  
17 occurred.

18           I think that one thing that is properly before  
19 the Commission now -- and briefs were asked for on this --  
20 given that it is a discretionary judgment and you review for  
21 abuse, should you factor in or should the board factor in  
22 to its discretionary judgment the policies that were announced  
23 in South Texas, which are to encourage early and certain  
24 resolution of antitrust issues.

25           And that would be -- it seems to be another factor

1 on the scale that a Licensing Board would apply.

2 COMMISSIONER BRADFORD: But if South Texas had  
3 been decided three or four years earlier, what difference  
4 would it have made in this case? Again, taking the affidavits  
5 as true, there isn't much that Florida Cities would have done  
6 differently, if they had been aware of the Commission's  
7 policy in South Texas.

8 MR. KELLEY: Well, indulging in what is sometimes  
9 the fiction that people out there, you know, the utilities  
10 lawyer could say: Well, it is a good cause thing and I can  
11 always get in late. But this is an antitrust case. The  
12 Commission has a policy for early resolution, so even though  
13 we had this nice letter from the utility, we had better get  
14 in there early and let our voice be heard, otherwise the  
15 Commission may say that our policy of early resolution; dis-  
16 favors this application.

17 COMMISSIONER KENNEDY: I have the impression that  
18 utility lawyers are acutely aware of those kinds of issuances  
19 from the Commission.

20 MR. KELLEY: The nuclear bar lawyers, yes, I think  
21 that is right.

22 COMMISSIONER KENNEDY: That is an extensive bar.

23 COMMISSIONER BRADFORD: If I understand the  
24 affidavit correctly, to have done that would have cost them  
25 their alleged assurance of participation in the other units.

1 COMMISSIONER BRADFORD: Again, if the affidavit  
2 is taken as true, that would be the case.

3 COMMISSIONER KENNEDY: We interrupted you a half  
4 an hour ago.

5 MS. BELL: Well, I think we have covered the points  
6 I wanted to make. I was just going to go through the factual  
7 history here and the questions before the Commission. And  
8 as I understood what we were doing today, we were just going  
9 to discuss a little bit the positions of the parties and  
10 possible outcomes for the Commission.

11 We stated in the paper we sent up various possible  
12 outcomes the Commission could reach.

13 COMMISSIONER KENNEDY: You mentioned a range of  
14 possible outcomes, including on one side a full-blown hearing.

15 MS. BELL: That's right.

16 COMMISSIONER KENNEDY: Conducted by whom; by the  
17 Commission?

18 MS. BELL: Well, were the Commission to go ahead  
19 and approve ALAB-420 or confirm it, there would be a full-  
20 blown hearing before a Licensing Board.

21 COMMISSIONER KENNEDY: Before a Licensing Board?

22 MS. BELL: Before a Licensing Board.

23 COMMISSIONER KENNEDY: Not the Commission?

24 MS. BELL: Oh, no; which would be, I imagine, like  
25 any other full-blown antitrust hearing that is being conducted

1 before Licensing Board within the Commission.

2 MR. KELLEY: What we tried to do, I guess, is  
3 state extremes, our notion of what options the Commission has.  
4 And that would be the position most favorable to the inter-  
5 venors, would be a full-blown hearing.

6 I suppose at the other end of the spectrum --

7 COMMISSIONER KENNEDY: Can I ask how that would  
8 work? In the present circumstances, given the range of  
9 uncertainties which we have discussed this morning, both  
10 factual and interpretative, if we simply call for a full-blown  
11 hearing by a Licensing Board, under what guidance would the  
12 Board be proceeding? South Texas, essentially?

13 MR. KELLEY: The next question is: How much, if  
14 any, guidance, do you want to give the board with regard to  
15 the significance, if any, it should attach to the fact that  
16 this is a late hearing? And that is something that we ex-  
17 plore, not fully, but suggest in the paper that we sent to  
18 you.

19 COMMISSIONER BRADFORD: But again, if the affidavit  
20 is taken as true, and we in some way limit it to relief  
21 available, at least for Orlando, in effect we would be on  
22 one other assumption, that the statements in the affidavit  
23 do in fact add up to something close to fraud, we would then  
24 be directly allowing Florida Power and Light to have profited  
25 from that set of circumstances, by limiting the relief

1 available. This is just as to Orlando, now, leaving the  
2 others out.

3 MR. KELLEY: Okay; just focusing on Orlando; it  
4 seems to me it is a question of how you read the affidavit.  
5 Even if you say: Okay; we are going to take this as true,  
6 you can then attach different degrees of significance to it,  
7 and I am not going to attempt to do that now, but one could --  
8 the argument is made by the utility that in this business  
9 world, they were not reasonable in relying, even assuming  
10 those representations were made, they should have protected  
11 their interest more fully than they did. And that becomes a  
12 judgmental question, it seems to me with the Commission;  
13 you are going to yourselves assess the significance you would  
14 attach --

15 COMMISSIONER KENNEDY: Is that alleged to controvert  
16 the allegation?

17 MR. KELLEY: I am sorry?

18 COMMISSIONER KENNEDY: Is that kind of reasoning  
19 alleged to controvert the allegation of misrepresentation?

20 MR. KELLEY: I am a little uncertain as to --

21 COMMISSIONER KENNEDY: Is that what Florida Power  
22 is saying is a basic controverting of the allegation that  
23 the others were misled.

24 MR. KELLEY: No. Their controversion, if I may  
25 invent a word, is in the form of these late affidavits. The

1 argument made earlier was: Well, even if we did say that,  
2 nobody should be so naive as to accept such a thing, and they  
3 should have done something else.

4 COMMISSIONER BRADFORD: Given our long history  
5 of dealing with municipalities in Florida, they should never  
6 accept this sort of argument.

7 (Laughter.)

8 COMMISSIONER KENNEDY: How does that work in  
9 rate hearings?

10 (Laughter.)

11 MR. KELLEY: Maybe it would be useful to try to  
12 state options. It seems to me that the Commission by essent-  
13 ially affirming the Appeal Board, you let a hearing go forward.

14 At the other extreme, the argument is made -- I  
15 am not saying it is an extreme; let me say it is the position  
16 most favorable to Florida Power and Light -- would be to ac-  
17 cept the argument that you really shouldn't look at matters  
18 outside what they call the antitrust record, and what ever  
19 we may have said in a meeting three years ago should be  
20 irrelevant.

21 It seems to me that that is a little hard to  
22 accept. I think we would have some trouble with that, and  
23 I think that might be appealed.

24 There is, short of that, the option of accepting  
25 for filing the late affidavits. This would be a very narrow

1 disposition of the case. Say: affidavits accepted; remanded  
2 to the board for a hearing on the truth of whether they were  
3 misled or not. If they were misled, have a hearing and if  
4 not, not.

5 That wouldn't establish any particular precedent  
6 and wouldn't give any guidance. That would be a way to dis-  
7 pose of the case; on narrow grounds.

8 We suggested in the memo a possible middle course,  
9 whereby you might give some guidance to the boards and also  
10 attach some significance to the factor of lateness. There is  
11 a great deal of balancing that goes on in the area of not  
12 merely whether people have good cause for being late but also  
13 questions like antitrust.

14 And it seems to us worth considering; that the  
15 Commission might on the one hand direct a hearing on this  
16 case but provide guidance to the Licensing Board in the form  
17 of recognizing some discretionary authority to either limit  
18 the scope of a hearing or following hearing, limit the kind  
19 of relief that might be granted on the basis, in part, of  
20 the delay in the municipalities or intervenors, generally,  
21 coming in and asserting their rights.

22 As a concrete example, Florida Power and Light  
23 is essentially saying we need all of this facility for our  
24 own needs, and the municipalities are coming in saying that  
25 they want a piece. The exact percentages aren't specified,

1 but they say they want a piece of it.

2 The Florida Power and Light argument essentially  
3 is that this disrupts our planning process because we were  
4 counting on all --

5 COMMISSIONER KENNEDY: They want a piece in terms  
6 of purchase of power or purchase of plant?

7 MR. KELLEY: I don't know that that is specified.  
8 It seems to me -- do you have that pleading?

9 MS. BELL: Yes.

10 COMMISSIONER KENNEDY: Let's check that, whether  
11 they have asked for a right to buy or whether they want to  
12 buy the plant.

13 MS. BELL: They want a fair share entitlement in  
14 group participation, or in combination with others, or through  
15 unit power purchasing.

16 There are 10 elements of relief that they are re-  
17 questing, including coordinated planning and development, so  
18 on and so forth. So they want entitlement in the plant,  
19 basically; the first piece of relief and I guess the most  
20 important piece of relief.

21 MR. KELLEY: But the suggestion that we are making  
22 somewhat tentatively is that if you had a situation where  
23 you went to a late hearing and when a group of municipalities  
24 or small utilities or whatever, say they might want 30 per-  
25 cent of the plant output, and if they had been in on time,

1 maybe the Board would give them 30 percent. And possibly one  
2 could compromise. The utility is saying we need it all.  
3 Give them something, but some smaller piece as a penalty for  
4 arriving late. That is not something that the Commission  
5 could do sitting up here, but simply saying to the Board,  
6 one can factor in lateness both in terms of scope of hearing  
7 and the kind of relief you grant after hearing. That seems  
8 to me to offer some incentive for coming in on time.

9 MS. BELL: And, of course, also --

10 COMMISSIONER KENNEDY: But to even give that kind  
11 of guidance, Jim -- I have been thinking that through since  
12 I saw the suggestion, a little bit -- I have reached no con-  
13 clusions, except to say that I find it very hard to concept-  
14 ualize that without some appreciation of the facts, of the  
15 factual situation which would arise from such guidance.

16 Suppose that you did give such guidance? What,  
17 then, would it do to Florida Power and Light on the one hand  
18 and its customer service area? What effect is this going to  
19 have? I don't have any idea.

20 So I could conceivably be giving guidance to a  
21 board which could lead a board to do things which would be,  
22 if I looked at the conclusion they would then reach, could  
23 be irrational. I don't think that would happen but it is  
24 possible, since I don't know what the effect of my guidance  
25 would be, as it was applied.

1 MS. BELL: Well, ultimately, the Commission does  
2 review decision of Licensing Boards and of the Appeal Board,  
3 if that is what you are asking. So if they misintepret,  
4 misunderstand the guidance you are giving them, then --

5 COMMISSIONER KENNEDY: No; it would not be  
6 misunderstanding it. It would be applying it. They under-  
7 stood the guidancè all right, and then they applied it. But  
8 when they applied it, they would be applying it in a particu-  
9 lar factual situation vis-a-vis the utilities, their customer  
10 service areas, demand for power and all the rest, none of  
11 which I am aware of.

12 MR. KELLEY: Where does that leave you?

13 COMMISSIONER KENNEDY: It leaves me wondering?  
14 How do we get the kind of understanding of the factual sit-  
15 uation that would make guidance specific enough on the one  
16 hand to be useful and general enough to be precedential as  
17 well.

18 CHAIRMAN GILINKSY: Well, we are going to have to  
19 give some guidance to the general counsel.

20 COMMISSIONER BRADFORD: The only kind of guidance  
21 that I would very comfortable with on the basis of what we  
22 have before us now would be basically procedural. I could  
23 see saying something to the effect that the good cause shown  
24 by the other non-Orlando petitioners is not as strong as  
25 that shown by Orlando on the record that we have, and that the

1 board should keep that in mind in terms of its willingness  
2 to broaden issues or make the proceeding more complex on the  
3 basis of contentions from those utilities. That kind of  
4 procedural guidance I would be comfortable with.

5 I don't think I would feel that we would want to,  
6 for example, say: Well, of the 10 bases for relief asked,  
7 don't consider the ones with even numbers on them.

8 COMMISSIONER KENNEDY: Not only would I --  
9 how one could go even as far as counsel was suggesting; that  
10 is, you could say: Well, you can be a little -- you can re-  
11 strict the relief you want to grant. I don't know what that  
12 means. If they did, they would say: Okay. We think, all  
13 right, instead of 30 percent, we will give them 22 percent.

14 But I don't know what that means. I have no idea  
15 what the effect would be, nor do I understand at this point  
16 where the equities would lie in such a circumstance, going  
17 back to the basic premise on which the whole procedure rests.

18 CHAIRMAN GILINKSY: It sounds like you want to  
19 bring it up here.

20 COMMISSIONER KENNEDY: I am not prepared to say  
21 that.

22 CHAIRMAN GILINSKY: We are going to have to wind  
23 up pretty soon. I think we ought to give Jim some kind of  
24 guidance as to what he ought to be doing between now and  
25 our next meeting.

1 Do you have any areas you particularly want to have  
2 explored.

3 COMMISSIONER KENNEDY: What would be the effect of  
4 bringing the question here before the Commission?

5 MR. KELLEY: First, it would be the

6 COMMISSIONER KENNEDY: First, the factual question  
7 would have to be resolved. That, I assume, should be done  
8 by a board, the factual question about the affidavits:

9 Were they misled or weren't they?

10 Now, if that were resolved, including the late  
11 affidavits --

12 COMMISSIONER BRADFORD: If you don't include them,  
13 there is no factual question.

14 COMMISSIONER KENNEDY: That's right.

15 First, resolve the factual question: Were they or  
16 weren't they misled?

17 Now, having done that, if they weren't there is  
18 no question it seems to me. But if there is substantial evi-  
19 dence that in fact they were or a board concludes that yes  
20 they were, then suppose the question were returned to the  
21 Commission and the Commission were to hold a hearing; what  
22 would the effect be? I am not exactly clear on how it would  
23 work and what kinds of problems would arise.

24 MR. KELLEY: If the Commission were to hold a hear-  
25 ing on the antitrust, the merits of the antitrust claim?

1 COMMISSIONER KENNEDY: Yes.

2 MR. KELLEY: That I don't think is feasible,  
3 frankly. I just don't --

4 COMMISSIONER KENNEDY: That's what I wanted to  
5 know.

6 CHAIRMAN GILINSKY: Does that answer satisfy you,  
7 or do you want him to explore it further.

8 COMMISSIONER KENNEDY: Not altogether. I guess I  
9 would like to know why.

10 MS. BELL: Well, an antitrust hearing tends typ-  
11 ically to be a very time consuming and complicated --

12 COMMISSIONER KENNEDY: That answers my question.

13 MS. BELL: Okay.

14 (Laughter.)

15 MR. KELLEY: It can go on for months.

16 MS. BELL: Yes.

17 COMMISSIONER KENNEDY: That answers the question.

18 But we could, then, consider in a hearing, the  
19 procedural questions.

20 CHAIRMAN GILINSKY: In a hearing before the Com-  
21 mission?

22 COMMISSIONER KENNEDY: Yes.

23 MS. BELL: You mean on the affidavit question?

24 COMMISSIONER KENNEDY: No, no. If the affidavit  
25 question were answered in the affirmative: Yes; they were

1 misled. Yes; the evidence says they were misled; then the  
2 question of late filing, of all the other procedural issues  
3 that we have been talking about this morning still need  
4 resolution.

5 MR. KELLEY: When you say hearing, are you suggest-  
6 ing that the Commission have an oral argument --

7 COMMISSIONER KENNEDY: Yes.

8 MR. KELLEY: -- and then ask questions of counsel --

9 COMMISSIONER KENNEDY: Yes.

10 MR. KELLEY: -- what would happen; suppose we cut  
11 you back to 20 percent, does that make any sense?

12 COMMISSIONER KENNEDY: Yes.

13 MR. KELLEY: Okay.

14 I guess my feeling had been that I didn't see it  
15 as an oral case, but that may be wrong.

16 CHAIRMAN GILINSKY: We are going to have it wind  
17 up here, because we have got some people waiting for another  
18 meeting.

19 COMMISSIONER KENNEDY: Why don't you explore that?

20 CHAIRMAN GILINSKY: What I was going to suggest  
21 is that you explore the course that Commissioner Kennedy  
22 outlined and also prepare something along the lines of  
23 either suggesting that we should basically, as I understand  
24 it, affirm the Appeal Board with some guidance, pointing out  
25 that there are things to be taken into account here.

1           COMMISSIONER BRADFORD: Let me just raise one other  
2 quick point in connection with that. I don't remember -- I  
3 may never have even seen it -- how much of the share of the  
4 plant these various groups are asking for.

5           COMMISSIONER KENNEDY: We don't know.

6           COMMISSIONER BRADFORD: Okay.

7           I would like to know whether that could reach a  
8 scale at which it would reopen questions, for example, under  
9 the financial qualifications. If the total were 30 percent,  
10 I take it under the concerns we have been discussing in  
11 Seabrook, you then would have to take a look at these utili-  
12 ties as owners of 30 percent of the facility.

13          CHAIRMAN GILINSKY: That's another example of  
14 everything being connected to everything else.

15          COMMISSIONER BRADFORD: Yes, it is.

16          It may not be. Typically, municipalities in  
17 cases I am familiar with, ask for very small pieces, and --

18          COMMISSIONER KENNEDY: It would have to be done  
19 anyway under the rules; am I correct? It would have to be  
20 done. If these utilities were afforded an opportunity for dir-  
21 ect participation in the financing of the plant; that is,  
22 in ownership share, financial qualification would have to  
23 be established. The board would have to establish it, under  
24 the rules.

25          COMMISSIONER BRADFORD: If it gets down to the

1 level of what ever it was where the board held, at Millstone,  
2 that even though Vermont-Yankee -- even though one of the  
3 Vermont utilities wasn't financially qualified, it was so  
4 small that it didn't matter. If the share we are talking  
5 about here is below that number, then --

6 COMMISSIONER KENNEDY: But the board would have to  
7 at least assert that.

8 CHAIRMAN GILINKSY: Well, at any rate, we will  
9 explore these two courses and prepare something, and we will  
10 have another meeting and decide it at that point.

11 So we will in our next agenda session, I guess,  
12 pick a time for a meeting; some time in the near future.

13 Thank you.

14 MR. KELLEY: Thank you very much.

15 (Whereupon, at 10:35 a.m., the Commission meeting  
16 in the above-entitled matter was adjourned.)  
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