3/27/79

March 27, 1979

Dr. John Kuhlman
University of Missouri-Columbia
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Re: Florida Power & Light Company,
St. Lucie Plant, Unit No. 2,
NRC Docket No. 50-389A

Dear Dr. Kuhlman:

Enclosed please find additional fact materials regarding your preparation for testifying in the above-captioned matter. If there is any other material which you believe would prove useful in your research, please feel free to contact me.

Best regards.

Sincerely,

David J. Evans
Counsel for NRC Staff

Enclosures:
1. 1979 Florida Electric Power Coordinating Group Directory
2. 1978 Ten Year Plan, State of Florida (FCG)
3. FCG Central Dispatch Study
4. FCG Operating Committee Summary of Economy Interchange Transactions Savings (for 1978)
5. Methods of Brokering Economy Interchange
6. Power Broker Example (for January 6, 1978)
7. 1978 Economy Interchange Transactions Savings
8. FCG Peninsula Florida Generation Expansion Planning Study 1976-1990 (V.I)
9. FCG Peninsula Florida Generation Expansion Plannint Study 1976-1990 (V.II)
10. FCG Power Broker Study (August 9, 9978)

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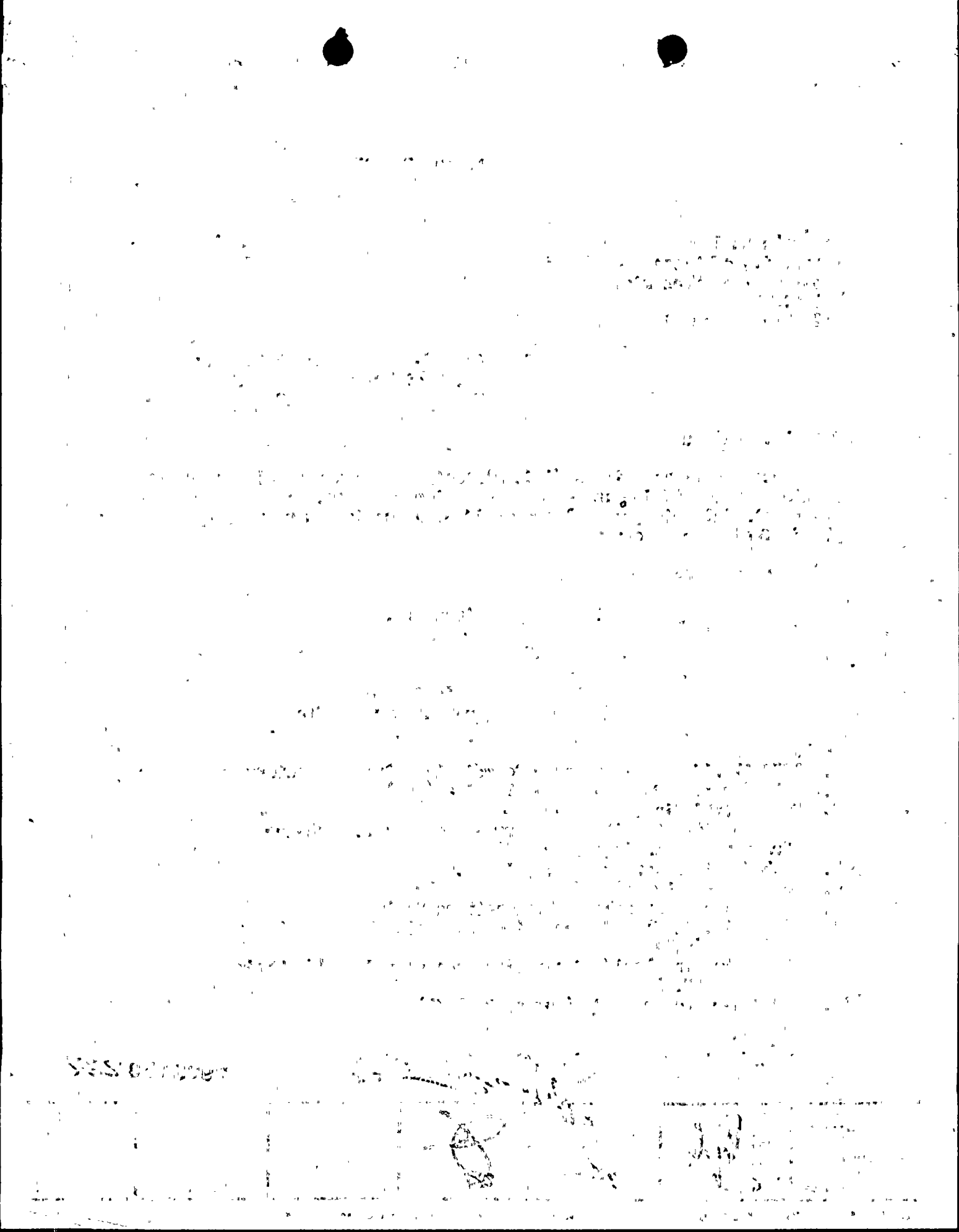

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S RESPONSE TO MEMORANDA ON DISCOVERY OF FLORIDA CITIES AND GOVERNMENT PARTIES

Florida Power & Light Company (the "Applicant" or "Company") submits this memorandum in response to the memoranda on discovery filed by the Department of Justice and the Nuclear Regulatory Commission staff (the "Joint Response") and by intervenor Florida Cities (the "Cities' Response").

I. The Justifications Offered for Discovery Pre-Dating 1965 Are Inadequate

Applicant recognizes the principles set forth by the Board (at pp. 12-13 of its Memorandum and Order on Discovery) concerning the appropriateness of some discovery concerning the pre-1965 period. However, Applicant submits that the justifications submitted in the Joint Response and the Cities' Response for requests pre-dating 1965 bear no relation to these principles and, accordingly, that the requests should be limited to the post-1965 period.

Joint Requests Nos. 56, 76

In essence, all the government parties can say in support of Joint Request 56(a) */ and 76 is that Applicant may have refused to sell wholesale power or establish delivery points sometime in the past and that information concerning such events should be discoverable. But the whole point of limiting discovery in a prospective-looking proceeding such as this one is to focus attention on the existing and prospective competitive situation and provide parties with some protection against unreasonable and unlimited search burdens.

That the Company has been accused of refusing to sell wholesale power to Clewiston in 1952, for example, does not "readily" show whether the Company possesses market power today, nor whether it has misused any market power it has in a recent, relevant period. Joint Response, pp. 3-4. Similarly, the effect on present day conditions of any insistence by the Company in the 1950's on "high voltage interconnections that might be more expensive to install than installation of lower voltage interconnections" (Joint Response, p. 5) is less than obvious. There is simply no reason for the Board to assume -- and the Joint Response provides no basis for the Board to do other than assume -- that any failures to sell wholesale power or establish delivery points that occurred as

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*/ Joint Request 56(b) concerns Applicant's current policy with respect to wholesale sales. As Applicant understands it, it would be obliged to answer this question no matter what cut-off date for discovery the Board sets with respect to Joint Request 56(a).

long as 27 years ago either shaped the existing competitive situation or had effects that would likely carry through to shape the prospective competitive situation. In such circumstances, the burden on Applicant of conducting a search of its records back to 1950 in order to respond to these requests is not justifiable, and the requests should be denied.*/

The Cities make several additional arguments about the relevance of Joint Requests Nos. 56 and 76. Again they suffer from the flaw of not explaining why discovery with respect to a period of more than a quarter of a century is required. It bears emphasis that that is the issue before the Board -- not whether discovery concerning Applicant's present policy regarding wholesale sales should be allowed.

The Cities' first point is that "since nuclear generated energy comprises a significant portion of wholesale power sales, such refusals deprive smaller systems of access to nuclear generated energy." Cities' Response, p.7. But, any wholesale power the Company might have sold in the 1950's contained no component of nuclear generation; the Company's first nuclear unit did not become operational until 1973. The Cities' second justification is that refusals to sell wholesale power might have "forced" smaller systems to construct potentially uneconomic generation. For the Board to allow discovery going back to 1950 with respect to wholesale sales on this theory would require Applicant to engage in discovery and present to the Board evidence

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*/ In purporting to justify Joint Request No. 76 (Joint Response, pp. 4-6) the government parties appear to assert that anything a large, privately owned utility did in the past in response to a request for an interconnection, other than to accept the exact terms proposed, is evidence of anticompetitive conduct. Neither discovery nor the hearing on the merits in this proceeding should proceed on that basis.

concerning the reasons why eighteen municipal systems constructed or did not construct particular generating facilities during the twenty-eight year period from 1950 to 1978. In such circumstances this proceeding surely would become unmanageable. The Cities' third and fourth concerns -- that the Company's alleged refusals to sell wholesale power may have furthered its alleged acquisition attempts and territorial divisions -- already have been satisfied, inasmuch as the Board granted Joint Requests Nos. 29 and 30 for the pre-1965 period. These deal, respectively, with territorial allocation agreements and acquisitions. To come at this information indirectly, by Joint Requests Nos. 56 and 76, would merely complicate the proceeding and increase Applicant's search burdens. Finally, if the Cities can find no evidence of "classic tie-in practices" by Applicant in the period since 1965 (Cities' Response, pp. 7-8), they should not be afforded unlimited license to search for them in an earlier period, when no carry-over effect in the current period has even been suggested.

Cities' Requests Nos. 39, 40 and 42

The Cities' justification for these requests suffers from the same defect -- in no way does it explain why pre-1964 information elicited in response to these requests would aid the Board in evaluating either the existing or prospective competitive situation. These requests do not appear likely to lead to information about the structure of the existing relevant market. Thus, to justify the greater search burdens that they would entail,

Cities should be able at least to show that it is likely that the pre-1965 anticompetitive practices they allege have had a continuing impact. But this the Cities do not and cannot say, given the limited subject matter of the requests. Furthermore, Cities' Requests Nos. 39, 40 and 42 merely duplicate the inquiry made by Joint Requests No. 56 and 76. If the former are impermissible as to the pre-1965 period, the latter are also.

* * *

Finally, Applicant respectfully requests the Board to rule on the period of time as to which it is required to respond to Cities' Requests Nos. 20 and 21. Cities' Request No. 20 seeks information going back to 1950, and Cities' Request No. 21 seeks information going back to 1955. Applicant objected to both requests on the basis of the period of time covered (Applicant's Objections, p.3), but the Board apparently did not rule on these objections. */ Applicant submits that 1965 would be an appropriate cut-off date for these requests.

II. Discovery Concerning Natural Gas Should Be Limited To Matters Properly At Issue In This Proceeding

Mindful of the principles articulated by the Board in its Memorandum and Order on Discovery, Applicant has withdrawn its objections to Joint Requests Nos. 79-82, which generally

*/ The Board denied objections on the grounds of overbreadth and First Amendment privilege that Applicant raised to Cities' Request No. 21.

deal with Applicant's natural gas supplies. It has done so despite its concern that inquiry into the so-called T-3 contract and secret agreement of March 22, 1967 will lead the Board and parties far beyond the issues which ought to be of importance here. */

Applicant submits that any information concerning its natural gas supplies and how they were obtained of conceivable relevance to issues properly before the Board, as articulated by the Board in its Memorandum, will be produced in response to Joint Requests Nos. 79-82. It submits that the additional materials sought by the Cities in their Requests Nos. 57-59 and 72-73 are, at best, duplicative and, at worst, an effort to utilize the discovery process in this proceeding to obtain information for use before other federal agencies.

Cities' Requests No. 57

Even assuming the truth and relevance of the Cities' numerous allegations concerning the natural gas supplies of Applicant and the Cities, which Applicant vigorously disputes,

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*/Applicant does not contend that these matters are off-limits simply because proceedings concerning them are pending before FERC or a Court of Appeals. Applicant submits, however, that issues properly before those bodies have no place in this proceeding merely because they involve allegations that violations of the Natural Gas Act by others may have occurred.

The Cities' Response leaves no doubt that the purpose of the Cities' interrogatories on natural gas is to inquire into whether "FP&L was involved in (or at least knew of) illegality [i.e., a violation of the Natural Gas Act] concerning these arrangements" (Cities' Response, p. 6). But the Natural Gas Act is not one of the laws set forth in § 105a of the Atomic Energy Act. The question here must be whether conduct of Applicant was somehow inconsistent with the antitrust laws in a manner affecting the existing or prospective competitive condition.

Fn. cont'd

the burden of providing the level of detail called for by Cities Requests' 57(a) and (b) is an entirely independent basis for denying the requests. In a proceeding such as this, which has as its focus existing or prospective competitive conditions, the general topic of gas availability may, as the Board suggested, be a part of the background to be considered. The precise topic of how these supplies were obtained, including all "meetings, telephone contacts or other communication" concerning the "making, negotiation, agreement, approval or modification" of gas supply contracts (Cities' Request No. 57(a)), is not. But even if the Board were to conclude that the Cities had a legitimate need in this proceeding for information, it could allow the Cities to obtain it more easily and directly by deposing the individuals whom Applicant will be required to name in response to Joint Request No. 79(b). */ Accordingly, these requests should be denied.

There is a more fundamental flaw to Cities' Request No. 57(c). If Applicant responds to Cities' Request No. 57(d) as Cities propose to modify it, the additional information sought

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Fn. cont'd

Moreover, the intervenors' ramblings and allegations should not be allowed to give a false impression. After protracted investigations, no one except certain of the intervenors ever has suggested that the Company was involved in any way in violations of the Natural Gas Act or any related wrongdoing. The intervenors' repetition of their charges should not serve to dignify them.

*/ Joint Request No. 79(b) requires Applicant to

> "Name all persons who had any responsibility relating to the making, negotiation, agreement, approval, continuation or modification (proposed, actual or potential) of the Company's gas transportation agreements including related production with either Florida Gas Transmission Company or Amoco Production Company (or any predecessors, successors, affiliates, assigns or related companies). State the responsibility over such matters for each person named."

by their Request No. 57(c) would be useful to Cities, if at all, only in an attempt to inquire into the possible liability of the named individual for violations of the Natural Gas Act. It is the knowledge and action of the Company which is the proper subject of discovery in this proceeding. Cities' Request No. 57(d) will provide any necessary data; Cities' Request No. 57(c) should be denied.

Cities' Request No. 58

Cities' Request No. 58 seeks a massive amount of information -- all documents since 1965 concerning the Company's daily scheduling and use of natural gas under enumerated agreements, including amounts, rates and fluctuations of deliveries. The only proferred justification for this inquiry is that the Company "should have gained constructive knowledge of [the terms of the March 22, 1967 letter] through the daily mechanics of gas delivery." Cities' Response, p. 5. But such a justification goes only to the Cities' theory that the Company may have violated the Natural Gas Act; it has nothing to do with the existing or future market in Florida for natural gas. */

Cities' Request No. 59

All that Cities have to say in support of this request is that "it makes clear that Cities seek all documents related

*/ Moreover, Applicant does not understand how deliveries to it would lead to constructive knowledge of the March 22, 1967 letter or any other agreement.

to the March 22, 1967 letter." Cities' Response, p.5. That is hardly a justification.

Applicant contends that the request is overbroad. The Cities have not explained the need for any information sought by this request over and above the information to be provided in response to Joint Requests 79-82 and Cities' Request No. 57(d) as Cities propose to reframe it. Accordingly, Applicant's objection should be sustained.

Cities' Request Nos. 72-73

The Cities have not provided any justification of these requests in response to the Board's order, although they appear to press them. Cities' Response, p.2. Applicant submits that all relevant material on this dubiously relevant subject will be produced in response to Joint Requests Nos. 79-82, and that Cities' Requests Nos. 72 and 73, adding nothing, should be struck. */

III. The Modifications of Discovery Requests That Cities Propose Are Inadequate To Cure Their Defects

Cities' Request No. 14

Applicant renews its objection to Cities' Request No. 14 as the Cities propose to restate it. Even assuming that discovery

*/ Applicant will bear a heavy burden in complying with the discovery requests propounded to it. The Cities are signatories to the Joint Requests and ought to bear some responsibility for phrasing any additional requests they make in a meaningful and non-duplicative way. If Cities' Requests seek additional information, that should be plainly shown; if not, they should be withdrawn.

of such political materials is permissible at all, which Applicant respectfully disputes, the "revised" Cities' Request No. 14 still shows no attempt to limit the inquiry to issues properly before the Board. While Applicant would be prepared to provide, pursuant to the Board's order, documents relating to presentation of its views in elections dealing with the grant or renewal of municipal franchises to it, it submits that requiring information with respect to its views in any state election or any election in a community in which there is a municipal electric system is plainly overbroad. */

Cities' Request No. 18

The Company objected to Request No. 18 on the basis of overbreadth and burden and suggested that the Cities could obtain the information they apparently sought by deposition. In sustaining Applicant's objection, the Board directed the Cities to utilize depositions. If the Cities do so, there would be no need for Applicant to answer Cities' Request No. 18. Accordingly, Applicant submits that the Cities should proceed as directed by the Board, and that Cities' Request No. 18 should be denied.

*/ In South Dade, the Board held that a request pertaining to legislation "possibly effecting competition between electric utilities and the State of Florida" was overbroad because "it could embrace all of Applicant's considerations and activities with respect to legislation." Florida Power & Light Company (South Dade Nuclear Units), Docket p-636A, Second Prehearing Conference Order (February 23, 1977), p.4. The same defect exists here.

Cities' Request No. 20A

Applicant contends that the Board correctly decided its objection to Cities' Request No. 20A and that the request for reconsideration should not be allowed. If the Board adheres to its ruling, Applicant would agree to withdraw its Request No. 176.

Cities' Request No. 64

The manner in which Cities propose to "limit" their Request No. 64 is totally insufficient to meet Applicant's objection and the Board's concern that the request "could produce much irrelevant data." Memorandum and Order on Discovery, p.36. All that Cities have done is to explain what damages are referred to in the interrogatory -- which the Company already knew -- and "limit" the request on outages and off-line time to best current projections -- which is the only information the Company would have had available anyway. Applicant's objection and, Applicant believes, the Board's concern, were with the fact that the request seeks considerable amounts of information in addition to capacity and availability factors and cost data associated with operation of the Company's nuclear power plants. The Cities' reformulation of its request does nothing to meet these problems, and therefore Cities' Request No. 64 should be denied.

IV. Denial of Cities' Requests Nos. 24, 26 and 34 Does Not Mandate Denial of Applicant's Requests Nos. 173-175

The Cities interpret the Board's Memorandum and Order on Discovery as rejecting "as a possible defense, a contention

that Cities' receive certain benefits as government entities." Cities' Response, p. 13.*/ In Applicant's view, the Board's order dealt with discovery rather than the law of this case, and should not be construed otherwise. Moreover whatever the Cities may mean by their "defense" terminology, it is clear that licensing boards have refused to ignore the competitive attributes of municipal systems, at least in fashioning relief in proceedings such as this under § 105c of the Atomic Energy Act. See, e.g., Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), 5 NRC 1482, 1497 (1977) (appeal pending).**/

In any event, denial of Cities' Requests Nos. 24, 26 and 34 provides no basis for denying Applicant's Requests Nos. 173-175, which generally relate to efforts by the intervenors to tie electric service to other municipal services. These requests are relevant to the questions of market definition, the amount and nature of retail competition present in the relevant market or markets, and Applicant's power in the relevant market or markets. If the Cities in fact follow the policy of conditioning the provision of essential municipal services on a customer's agreement to take electric service as well, retail

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*/ Applicant disputes that any "tie-ins" practiced by the Cities "would be related to the status of municipalities as entities vested with public authority to operate utility systems" (Cities' Response, p. 14) and therefore have the same character as the Cities' ability to engage in tax-exempt financing. The legitimacy of any such practices should not be assumed.

**/ "The Board has concluded that a consideration of AEC's tax and other advantages is irrelevant for all purposes under the facts of the instant case .... By the same token, there is no good reason to fashion a remedy deliberately designed to extend and multiply such preexisting advantages to a situation not expressly contemplated by Congress."

electric competition may be effectively foreclosed in the areas in which such a policy prevails. The Cities' ability to require customers to purchase their electricity from a particular supplier, whether or not related to the Cities' municipal status, and the facts surrounding exercise of this ability are relevant to issues in this proceeding; accordingly, Applicant's Requests No. 173-175 should be allowed.

Conclusion

For the foregoing reasons, Applicant respectfully submits that the Board should

(1) deny Joint Requests Nos. 56 and 76 and Cities' Requests Nos. 39, 40 and 42 to the extent that they seek information pre-dating 1965;

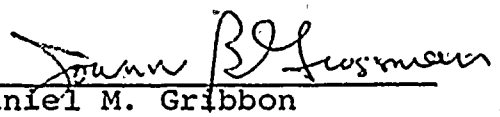
(2) set 1965 as the cut-off date for Cities' Requests No. 20 and 21;

(3) deny Cities' Requests No. 57-59 and 72-73;

(4) deny Cities' Requests 14, 18 and 64 as proposed to be revised by the Cities, and affirm its ruling denying Cities' Request No. 20A; and

(5) overrule the Cities' objection to Applicant's Requests Nos. 173-175.

Respectfully submitted,



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March 12, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the following: Applicant's Response to Memoranda on Discovery of Florida Cities and Government Parties have been served on the persons shown on the attached list by hand delivery * or deposit in the United States mail, properly stamped and addressed on March 12, 1979.

Joanne B. Grossman

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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

CITIES' RESPONSE TO APPLICANT'S MEMORANDUM CONCERNING DISCOVERY

Pursuant to the pleading schedule provided for in the Board's Memorandum and Order on Discovery, 1/ Florida Cities, 2/ intervenors in the above-captioned proceeding, hereby respond to "Applicant's Memorandum Concerning Discovery," 3/ specifically, that portion seeking clarification of cut-off dates. 4/

FP&L asks the Board to clarify the cut-off date for its discovery requests of Cities, and specifies items in its requests for which pre-1965 discovery is sought. Parity in discovery

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1/ February 9, 1979.

2/ Florida Cities include the Florida Municipal Utilities Association, the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commisison of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Key West, Lake Helen, Mount Dora, Newberry, St. Cloud, and Tallahassee, Florida.

3/ Dated March 2, 1979.

4/ Cities note that they assume that FP&L, in listing items for which a pre-1965 cut-off date is sought, did not request a change in the ground rules. For example, FP&L requests a discovery back to 1955 on request number 40. Cities assume that the cut-off date for this request is 1970, as provided for by the Memorandum of Understanding.

rights is, as Cities have previously stated, obviously appropriate.

Cities' examination of the requests for which a pre-1965 cut-off date is sought, however, indicates that they would entail undue burden that goes well beyond parity to the requirement that Cities engage in detailed reconstruction of daily events of the 1950-65 period. While Cities will undertake such efforts where documents are available or FP&L's requests are clearly relevant and important, there must be a limit beyond which FP&L should either narrow its requests or assume some burden. As the Board has held in denying Cities' discovery, 1/ in order to minimize undue burden, in certain circumstances information should be sought by narrowing questions and/or by using depositions instead of interrogatories. In this context, Cities note that the bulk of the pre-1965 discovery of the Applicant granted by the Board calls for the production of documents -- as opposed that is, to the research required to prepare responses to interrogatories. By contrast, much of the pre-1965 discovery sought by FP&L consists of interrogatories requiring detailed research and writing into a potentially great number of events of that period. Cities propose that (a) Cities will provide documents responsive to FP&L's requests; (b) insofar as FP&L's interrogatories seek clearly rele-

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1/ See, e.g., Board rulings on Cities' Request No. 18, at 31 of the Board's discovery order, (depositions to be employed to reduce burden); Cities' Request No. 64, at 36 of the Board's discovery order (narrowing of requests provided for). In addition, see FP&L's resistance to Cities' Request No. 57(d) (requiring multiple interviews), and Cities' agreement to reduce burden by recasting the recast (at pages 15-16 of Cities' December 22, 1978 response to FP&L's objections.)

vant and important information, as discussed below, Cities will seek to respond; (c) insofar as FP&L's requests seek exhaustive research with little potential benefit, FP&L should be required to either narrow the requests or seek the information itself by deposition.

FP&L's overly burdensome requests include the following:

1. Request No. 79. This request would have Cities provide, for the 1955-65 period, detailed information on every "communication" with any other utility "regarding the purchase, sale or exchange of bulk power." Cities, as stated above, will make available all documents responsive to the request. In addition, Cities will endeavor to respond to those interrogatories which focus on admittedly relevant "communications" on power sales. (For example, request numbers 67-72A, which seek detailed information on 1955-65 requests for wholesale power.)

In order to provide a complete response to request number 79, Cities would (a) have to locate many individuals connected with each system in the 1955-65 period (b) reconstruct their activities on what, in some cases, might be a day-to-day basis. 1/ Whether or not such research is technically possible, its burden is great and its likelihood of producing additional significant evidence (beyond that provided by other overlapping requests) is not evi-

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1/ Again, where documents would permit such a reconstruction, Cities will make the documents available. However, in many cases, there is little or no documentation at the level of detail sought by FP&L.

dent. To be clear, Cities do not wish to deny FP&L relevant evidence. However, given the burden involved, FP&L should either refine its data request or seek the information by deposition.

2. Request No. 84. This request seeks details on all communications regarding joint planning, development, ownership, or use. Again (a) Cities will provide all relevant documents (b) Cities will endeavor to research focused interrogatories on the topic (see, e.g., request numbers 90-91, 373-374). If FP&L seeks further information (for the pre-1965 period) it should narrow its request or use less burdensome means.

3. Request No. 162. This request seeks, inter alia, the identity of all retail sales for which competition has existed. As stated, the request would require the identification of each individual residential customer for which competition existed. Insofar as the information is provided in documents, Cities will make it available. If FP&L wishes further information, it should either demonstrate its relevance or seek it by other means.

4. Request No. 60. Request number 60 seeks details of all purchases and sales of power from 1955 to date. Insofar as information on power exchanges exists in documentary form, Cities will make it available. In some cases, however, there may be no documentary record of specific exchanges. While Cities' counsel would, in good faith, identify any such exchanges discovered in the course of interviews, a complete effort to produce the information in the detail sought by FP&L would likely require costly

and exhaustive research for which there is little evident justification.

WHEREFORE, in the view of the foregoing, Cities respectfully request that Cities' response to Applicant's Request Nos. 60, 79, 84 and 162 be limited, for the pre-1965 period, to the production of relevant documents.

Respectfully submitted,

Daniel Guttman

Attorney for the Florida Municipal Utilities Association, the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commisison of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Key West, Lake Helen, Mount Dora, Newberry, St. Cloud, and Tallahassee, Florida

March 12, 1979

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing CITIES' RESPONSE TO APPLICANT'S MEMORANDUM CONCERNING DISCOVERY has been served on the following persons by hand delivery* or depositing copies in the United States mail, first class postage prepaid, on March 12, 1979:

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

3/2/79

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

JOINT RESPONSE OF THE DEPARTMENT OF JUSTICE AND THE NUCLEAR REGULATORY COMMISSION STAFF TO LICENSING BOARD'S FEBRUARY 9, 1979 ORDER

Pursuant to the Atomic Safety and Licensing Board's ("Licensing Board") Memorandum and Order on Discovery ("Memorandum") dated February 9, 1979, in the above-styled proceeding, the Department of Justice ("Department") and the Nuclear Regulatory Commission Staff ("Staff") submits this Joint Response.

In its Memorandum, the Licensing Board ruled upon various objections made by Florida Power & Light Company ("FP&L") to discovery requests contained in the First Joint Request of the NRC Regulatory Staff, United States Department of Justice and Intervenors for Interrogatories and for Production of Documents by Applicant ("First Joint Request"). In addition, the Licensing Board deferred ruling on a number of discovery requests contained in the First Joint Request and invited the requesting parties to submit explanations or modifications of these particular requests by March 2, 1979.1/

1/ Intervenors, Florida Cities, are filing a separate response to the Memorandum.

The Licensing Board stated that "[t]he relevance of the information requested in Joint Requests 56 and 76 to the general post-1964 discovery period is not obvious." (Memorandum at 15). The Board then deferred ruling on these requests and gave the requesting parties an opportunity to explain their relevance. Joint Request 56a seeks information, from 1950 to the present, relating to FP&L's policy or position regarding limitations on wholesale customer loads contained in any rate schedule or other agreement with such customers. Joint Request 56b seeks information relating to FP&L's present policy of selling wholesale power. The Department and the Staff contend that Joint Requests 56a and 56b are highly relevant to the issues before this Licensing Board.

With respect to Joint Request 56a there is a substantial amount of evidence indicating that FP&L has, since the early 1950's, imposed anticompetitive terms on the sale of wholesale power. For example, FP&L's RC wholesale schedule for service to rural electric cooperatives, which was effective in the 1950's and early 60's, prohibited FP&L and its cooperative customers from serving retail customers of one another, prohibited the cooperatives from reselling the power purchased from FP&L to municipal electric systems or entities that might resell that power at retail, restricted use of that power to the State of Florida and contained a pricing provision

which provided for price increases tied to the increases in certain commodity indexes and not to the cost of service. Furthermore, the 1959 FP&L wholesale contract with the Lee County Cooperative may have prohibited the cooperative from terminating service from FP&L if the reason for such termination was to obtain power from another electric utility. 2/ It has also been alleged there is also evidence that on numerous occasions between 1952 and 1965 FP&L refused to sell wholesale power to Clewiston unless Clewiston agreed to hold a referendum on the sale of the municipal electric system to FP&L. 3/ Similarly, in 1958 FP&L apparently would not agree to sell wholesale firm power to New Smyrna Beach unless the city agreed not to order any additional generating capacity and to initiate legislation that would make it easier for FP&L to acquire that system. 4/

As can be readily seen, restrictions on the sale of wholesale power which have been imposed by FP&L are probative of whether FP&L possesses and has misused its

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2/ See wholesale contract between FP&L and Lee County Cooperative dated May 1, 1959.

3/ See Testimony of Mr. Dan McCarthy, FPC Docket E-7210

4/ See September 25, 1958 document on New Smyrna Beach Electrical System. There may be other instances when FP&L has conditioned the sale of wholesale power on anticompetitive terms. Without complete discovery on this matter it will be impossible to identify such instances.

market power. Since the type of information being sought by Joint Request 56a is of vital importance to the contested issues in this proceeding, discovery dating back to 1950 is clearly appropriate. See Memorandum at 15.

Joint Request 56b, seeks information relating to FP&L's present policy on wholesale sales. Today, FP&L appears to have adopted the position that it will not sell competitively priced wholesale firm power to any system that is not presently a customer. 5/ Since FP&L has had a long history of refusing to sell such power to requesting systems 6/ the present position is tantamount to a continuation of FP&L's refusals to deal. Since such conduct by a firm which possesses market power is highly relevant to the issues in this proceeding, Joint Request 56b is clearly appropriate.

Joint Request 76 seeks information relating to FP&L's post 1950 policy and position regarding establishing points of delivery for the sale of wholesale, emergency or other bulk power electric service. Establishing a delivery point is the first, and essential step in initiating an electrical tie between two systems. In the absence of a delivery point

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5/ See Florida Power & Light Co., FERC Docket No. 78-19.

6/ It has been alleged and evidence in other proceedings involving FP&L strongly suggests that FP&L has, in the past, refused to sell wholesale firm power to Clewiston, Homestead, Starke, Winter Garden, Vero Beach, Ft. Pierce, and New Smyrna Beach. See, e.g., Florida Power & Light Co., FERC Docket No. 78-19.

there would be no interconnection and it would be physically impossible for FP&L to deal with the other system. Thus, if FP&L has refused to establish delivery points it has effectively refused to engage in any electric power transactions with the entity that requested the establishment of such a point. Similarly, if FP&L has attached conditions to establishing of delivery points, these conditions may well prevent or inhibit the other entity from competing with FP&L.

The information sought by Joint Request 76 is relevant for the further reason that FP&L has sufficient bargaining power to insist on high voltage interconnections that might be much more expensive to install than the installation of a lower voltage interconnections. Conversely, FP&L has sufficient bargaining power to refuse arbitrarily to interconnect at a higher voltage than desired by a small utility that wishes to have a low voltage interconnection in order to minimize transmission costs.

Joint Request 76 also seeks information as to whether FP&L may have insisted on limiting the number of delivery points at which it was willing to interconnect with small utilities. Such an abuse of market power by FP&L might have unnecessarily required smaller utilities to build expensive transmission facilities. Conversely, in order to increase the cost of power to its wholesale customers, FP&L may have needlessly required the use of multiple delivery points

when one delivery point was adequate. Since either of the above situations would be highly probative of whether or not a situation inconsistent with the antitrust laws exists in Florida, the information sought by Joint Request 76 is clearly relevant to the issues in this proceeding.

Finally, the Licensing Board has invited the parties to comment upon Joint Requests 79-82. As required by the Licensing Board, the Staff, the Department and the Applicant have discussed these items. All three parties accept the principles set forth on pages 32-35 of the Memorandum on Discovery.

Applicant has authorized the undersigned to state that it is prepared to withdraw its objections to items 79-82 of the Joint Request on the understanding that the Staff and the Department share its view that while matters which are relevant to issues in this proceeding should not be excluded from discovery in this proceeding simply because they also relate to issues pending before another forum, matters not otherwise relevant to issues in this proceeding should not be subject to discovery in this proceeding merely because they relate to issues arising under the Natural Gas Act. These three parties also share the view that discovery in this proceeding should not be undertaken for the principal

purpose of obtaining material to be used in another forum. In view of this agreement, FP&L's objection to Joint Requests 79-82 should be considered as being withdrawn.

For the reasons stated above, the Department and the Staff urge this Licensing Board to overrule all objections to Joint Request 56, 76.

Respectfully submitted,

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March 2, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Certificate of Service

I hereby certify that copies of JOINT RESPONSE OF THE DEPARTMENT OF JUSTICE AND THE NUCLEAR REGULATORY COMMISSION STAFF TO LICENSING BOARD'S FEBRUARY 9, 1979 ORDER have been served upon all of the parties listed on the attachment hereto by hand or by deposit in the United States mail, first class or airmail, this 2nd day of March, 1979.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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UNITED STATES OF AMERICA
BEFORE THE
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In the Matter of	)	
Florida Power & Light Compant	)	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2	)	

RESPONSE OF FLORIDA CITIES
TO BOARD MEMORANDUM AND ORDER ON DISCOVERY

Pursuant to the Rulings at pages 52-54 of the February 9, 1979 "Memorandum and Order on Discovery", Florida Cities, 1/ intervenors in the above-captioned proceeding, hereby (a) provide explanation or modified requests with respect to Joint Request Nos. 56 and 72 and Cities Request Nos. 14, 39, 40, 57-59, 64 and 72-73 (b) request clarification of the Board's ruling on Cities Request No. 18 and (c) request that, in view of the Board's ruling on the "government bounty" requests, Applicant's Request Nos. 173-175 be deleted.

Requests Related to FP&L's Gas Supply

Joint Request Nos. 79-82 and Cities Request Nos. 57-59 2/ and 72-73 relate to FP&L's gas supply. The Board found that the subject matter of these requests is "clearly relevant" to the proceeding, but urged the parties to negotiate concerning the scope of the requests. Pursuant to this suggestion, Cities have conferred with the parties. It is Cities understanding that FP&L will not press its objections to the Joint Requests, but will con-

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1/ Florida Cities include the Florida Municipal Utilities Association, the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Key West, Lake Helen, Mount Dora, Newberry, St. Cloud, and Tallahassee, Florida.

2/ FP&L did not object to Cities request No. 60, which also relates to gas supply.

tinue to object to Cities requests. Cities respectfully reaffirm their requests and take this opportunity to respond to concerns raised by the Board. As summarized below, the grant of their gas-related requests should not impose undue burden on FP&L or imply a "large" litigation on gas markets. Insofar as Cities requests seek documents, FP&L's objections should be mooted by the fact that the documents should also be provided under the Joint Requests. Insofar as they seek further information, the information sought is relevant and production at this stage is likely to enhance the efficiency of the proceeding.

In noting that the requests "are broader than we prefer, particularly Cities requests . . ." the Board (a) states its concern that there not be a "large" litigation about the Florida natural gas market and (b) suggests that a national policy against the use of natural gas for boiler fuel might moot the relevance of FP&L's gas supply to this proceeding. Cities respectfully suggest that the answer to these concerns provides further support for the propriety of Cities requests.

Cities do not anticipate a "large" litigation on the Florida natural gas market. Cities seek to show that FP&L had knowledge of and/or actively participated in developments which enhanced its access to natural gas at the expense of those Cities that relied on natural gas. In short, Cities do not anticipate a broad inquiry into natural gas supply in Florida, but, rather, focus on the development of one particular supply arrangement --- i.e., FP&L's supply from Amoco. The basic facts relating to FP&L's advantage (in the "natural gas market"), Cities suggest, are both readily available and not subject to substantial

dispute. 1/ (For example, there should be little dispute about the total natural gas transported into Florida in any year, the amounts delivered to FP&L and each gas-using city, the prices paid, and the percentage of total fuel supply that gas comprises for each utility.) From such information, expert witnesses can, as the Board suggests, present "simplified proof" on the economic importance of gas. As detailed in Cities' Response to FP&L's objections, 2/ Cities will show that FP&L possesses a substantial competitive advantage through access to a large long-term supply of low cost natural gas.

When applied to Florida, the Board's concern about the relative importance of natural gas as boiler fuel highlights the importance of Cities claim. As the Board correctly notes, it has been, at least until most recently, Federal policy to give low priority to the use of natural gas as a boiler fuel for the generation of electricity. FP&L, however, has been effectively exempted from this policy. While the majority of the gas using members of the Cities group have experienced severe curtailments during recent gas shortages, FP&L's gas supply --- including the FP&L/Amoco warranty contract --- has been exempted from the operation of Federally ordered curtailment plans. 3/

As to the future, the FP&L/Amoco contract should provide FP&L

1/ Although, of course, their interpretation may be.

2/ At pages 18-26.

3/ As explained in Cities' prior pleading, the basis for the exemption is the FERC's claim that it lacks the jurisdiction to order curtailment of gas purchased directly from producers. As noted, the FERC's position is current under appeal in the Fifth Circuit.

with substantial amounts of gas through at least the mid-1980's. By contrast, FP&L has itself most recently contended that the Powerplant and Industrial Fuel Use Act of 1978 "probably has made it impossible" for gas using Cities "ever to use substantial quantities of natural gas in their powerplants". 1/ Thus, FP&L contends that the present disparity in access to gas is likely to continue into the future.

Finally, Cities must comment on the distinction between those

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1/ The assertion was made by FP&L in response to the Fifth Circuit's request for comment on the effect of 1978 energy legislation on the pending appeal of the FERC's jurisdiction to curtail FP&L's gas supplies. Petitioners in that case include six of the Cities group here. As FP&L told the Court, Section 301 of Powerplant and Industrial Fuel Use Act

> "primarily is intended to prevent powerplants from burning natural gas in greater proportion than they burned during the test year which fell during the calendar years 1974 through 1976. During this test period, Petitioners' powerplants were heavily curtailed. Consequently, even if, as a result of this proceeding, Petitioners were allocated aditional quantities of gas, it probably would do them little, if any, good because they would be prohibited from using it." */

*/ FP&L is not affected in a similar manner because its gas supply was not curtailed during the test period.

In sum, FP&L claims that the new energy legislation has locked. recent disparities in gas deliveries into the future. It is Cities claim that to the extent that they exist, these disparities were created by unlawful activity on FP&L's part although Florida Cities hope to get at short-term exemption from application of the Act.

The quotation in the text appears at page 7, and the quotation above appears at pages 3-4, of "Memorandum of Florida Power & Light Company in Reply to Petitioners' Statement on the Effect of the Natural Gas Policy Act of 1978 on the 'Transportation Gas Issue'", Sebring Utilities Commission, et al., Petitioners v. Federal Energy Regulatory Commission, Respondent, 5th Cir. Nos. 79-2911, et al., January 9, 1979.

requests to which FP&L will apparently respond (the Joint Requests) and those it apparently will not respond to (Cities). In essence, insofar as FP&L possesses documents related to Cities gas supply allegations, 1/ these documents should be encompassed by the Joint Requests. In view of the importance with which they view the issue, Cities requests supplement the Joint Request by providing further specificity. For example, Cities Request No. 58 specifically seeks documents relating to the scheduling of gas deliveries by FP&L since 1965. This information is sought based on Cities' understanding that, even assuming the absence of direct knowledge of the March 22, 1967 letter, FP&L should have gained constructive knowledge of its terms through the daily mechanics of gas delivery. Similarly, Request No. 58 makes clear that Cities seek all documents related to the March 22, 1967 letter.

In at least two important respects, however, Cities seek relevant information which may not be forthcoming under the terms of the Joint Request. First, while the Joint Request is limited to documents, 2/ it is conceivable that important developments may have left no existing documentary evidence. Cities Request No. 57 a-b, therefore, seeks knowledge of development that may have left no documentary record.

Second, Request No. 57 c-d 3/ seek to narrow the controversy by requesting FP&L to state the date at which it gained knowledge

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1/ As described in Cities Response to FP&L's Objections.

2/ Except that Joint Request No. 79(b) asks for the identity of officials responsible for the arrangement at issue.

3/ Cities have proposed the modification of requests 57(d) to reduce burden to FP&L. See Cities' Response to FP&L's Objections, at 15.

of the March 22, 1967 arrangements and the manner in which the knowledge was gained. A response to this request would, at minimum, permit a more efficient use of subsequent depositions.

In sum, Cities' natural gas related requests seek relevant and important information that would expedite the proceeding and not expand it, and should not cause undue burden. Their requests are very specifically directed to what knowledge FP&L had involving a specific gas contract and related agreement which created a gas preference for FP&L and limited gas available to the Cities. Under this contract and related agreement, FP&L obtained an assured low price gas supply of great magnitude. There is substantial basis for believing that FP&L was involved in (or at least knew of) illegality concerning these arrangements. However, limitations of discovery as to the knowledge of FP&L officials of these agreements could create a substantial evidentiary gap. Because of the importance of this matter, the FERC orders indicating FP&L's possible involvement (see Cities' Response to FP&L Objections, supra) in illegality and the need to determine the extent of FP&L's involvement, Florida Cities respectfully request granting their requests as written with regard to these matters.

Explanations of Basis for Pre-1965 Cut-Off Date

The Board has requested clarification with regard to the dates proposed to be covered by Joint Request questions 41, 56 and 76, 1/ and Cities' Requests Nos. 8, 39, 40 and 42. Order, page 15.

1/ Although its order can be read to cover post-1964 documents, Florida Cities assume the Board intends justification for pre-1965 documents. In any event, the above discussion is applicable to the entire period at issue. With regard to Cities Request No. 8, Cities do not press their requests for documents for the 1960-64 period.

Joint Request Numbers 56 and 76 concern wholesale power availability and pricing for sales to utilities, including requests for information relating to limitations on resale and points of delivery for the sale of wholesale, emergency and other bulk power.

Florida Cities believe that FP&L's refusals to deal in wholesale power constitute one of its clearest violations of antitrust law and policy. The time periods requested are justified by the importance of this issue. FP&L's refusals to deal and policies of discriminatory dealing in wholesale power are not peripheral, but rather go to the core of this case. 1/ First, since nuclear generated energy comprises a significant portion of wholesale power sales, such refusals deprive smaller systems of access to nuclear generated energy. Second, they force smaller systems to construct potentially uneconomic generation. Third, FP&L's acquisition attempts are furthered when smaller systems are deprived of access to wholesale power (and economies of sale represented by wholesale power sales). Fourth, such refusals to deal in wholesale power have aided the maintenance of wholesale territorial divisions. See Florida Power & Light Company v. Gainesville Utilities Department, 573 F.2d 292 (5th Circuit, 1978), cert. den., ___ U.S. ___ (1978). Fifth, FP&L's refusals to deal in wholesale power (i.e., the sale of generation plus transmission services separate from distribution services) when contrasted to its promotional policies for the sale of electricity

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1/ The allegations and references are for purposes of justifying Florida Cities discovery request. They recognize that at this stage of the proceeding they are not to be considered for determining the ultimate merits.

at retail (i.e., the sale of generation and transmission plus distribution services) represent a classic tie-in practice. 1/

Finally, Apart from their affirmative case, Florida Cities anticipate that FP&L will argue defensively either that Florida Cities should have developed alternatives to nuclear power or that the Company's present policy of restricting wholesale power sales is reasonable in light of current economic or power supply factors. Pre-1964 discovery can demonstrate that FP&L's policies with regard to wholesale power are long standing and anticompetitively motivated.

In referring to limitations on wholesale customer loads in question 56 and those relating to establishment of points of deli-

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1/ The relationship between refusals to deal or discriminatory dealings in wholesale power and antitrust law is discussed in the recent City of Mishawaka v. American Electric Power Company, Inc., CA S74-72 et al., (January 30, 1979). At pages 18-19 of the District Court decision, the Court states:

> "The antitrust laws require that a monopolist avoid exclusionary conduct that is not inevitable. In this case, the general antitrust obligations complemented by a similar duty arising from Section 205(b) of the Federal Power Act, which prohibits undue discrimination between wholesale rates and state-regulated rates."

At page 23, 24 the Judge states (after quoting an Administrative Law Judge of the Federal Energy Regulatory Commission):

> "The Administrative Law Judge concluded that these activities [restricting wholesale service] were in violation of defendants' traditional utility obligation to serve all customers on a non-discriminatory basis. . . and ordered AEP to treat all classes of customers fairly and equitably, and to cease and desist from any actions that single out any class of customers for the purpose of indicating that its continuity of service may be in jeopardy. . . "

very for the sale of emergency power in question 76, Florida Cities believe that they can establish (1) that FP&L had a policy of restricting resale to municipalities by rural electric cooperatives (who could buy wholesale power); 1/ and (2) that FP&L refused to interconnect with smaller systems in order to sell wholesale as opposed to emergency power. 2/ Other limitations as to amounts of wholesale power available could impact on competition for loads and service area. The references in the previous footnotes and in Gainesville Utilities Department v. Florida Power & Light Company, supra, illustrate that for purposes of discovery, these allegations are well founded and there is reason to believe that discovery will lead to probative and relevant evidence.

Florida Cities respectfully submit that discovery for the entire period is further required to establish in general the limited terms on which FP&L would deal with municipalities and its motivations. For example, when FP&L would not even sell wholesale

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1/ In depositions in the Gainesville case, supra, FP&L's Mr. Richard C. Fullerton provided one reason for the Company's policy of prohibiting cooperatives from selling to municipal systems during the 1960's:

> "And we were not ourselves wholesaling to municipalities, so why should we sell to somebody else and let him wholesale it. I mean that is as good a reason as I can think of if you want me to think one up." Deposition, page 83.

Florida Cities do not know how far back FP&L's restrictive dealing policy covered. However, it can be presumed to have existed at least as far back as the early 1950's. See Florida Power & Light Company, 37 FPC 544, 560, 572-573 (1967), quoted at pages 65-66 of "Joint Petition of Florida Cities for Leave to Intervene Out of Time; Petition to Intervene; and Request for Hearing (August 9, 1976).

2/ See generally Florida Cities' Joint Petition, pp. 62-67, 75-78.

power, there was no hope that the Company would enter into more sophisticated arrangements, such as joint generation planning. Consumers Power Company (Midland Units 1 and 2), ___NRC___ (pages 391-394 of Slip Opinion).

The above explanation also supports Florida Cities' requests 39, 40 and 42. In view of allegations of price squeeze and restrictive rates, terms and conditions appli cable to wholesale service to municipal customers, question 39 requesting changes in rate schedules, etc., would demonstrate limitations on service. To the extent that rate changes disadvantaged Florida Cities, or any of them, competitively, but had small effect on overall Company's revenues, information concerning the impacts on the Company of such rate changes could negate arguments that changes were justified to further legitimate economic purposes. 1/

Question 40 relates to sales of power at wholesale to five specific cities where Florida Cities believe their may be specific evidence of such refusals to deal or disciminatory dealings. The Fort Pierce Utilities Authority and Homestead have specifically complained to the Federal Energy Regulatory Commission concerning FP&L's refusals to deal in wholesale power in Florida Power & Light Company, FERC Docket Nos. ER78-19 et al.

Question 42 requests information with regard to FP&L's policies concerning the pricing of retail industrial power. Such documentation is relevant to price squeeze allegations. It is further relevant to establish that FP&L has refused to deal in wholesale power on the same terms and conditions that it sells

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1/ Florida Cities do not, of course, concede that defenses concerning legitimate business purposes for anticompetitive practices directed against them would be valid, but merely wish to protect themselves against such claims being raised.

power at retail, among other things, negating any possible justifications for such refusals to deal. 1/

Cities Request No. 14

The Board found Cities' Request No. 14 overbroad, but permitted its modification. Pursuant to the Board's ruling, Cities propose to modify the request to (a) withdraw the request for expenditure records; (b) alter the time period from 1960 to 1965 and (c) narrow the request to seek information relating to (1) state elections and (2) municipal elections in municipalities (a) where there is a municipal electric system or (b) where issues have been raised concerning the grant or renewal of a franchise to FP&L.

Cities Request Clarification of the Board Ruling on Cities Request No. 18

The Board denied Cities Request No. 18 on grounds that it is overbroad. Cities note that FP&L objected only to a portion of the request. 2/ Cities therefore respectfully request that the Board clarify its order to provide that FP&L comply with the portion of the request to which it did not object.

Cities Request No. 20A

Cities respectfully request the Board to reconsider its rejection of Cities Request No. 20A, and, if the prior holding is affirmed, to grant Cities parity by deleting FP&L Request No. 176.

Request No. 20A seeks information related to FP&L's promotion

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1/ Florida Cities note the contrast between FP&L's claim in FERC Docket No. ER78-19 et al. that restrictions on wholesale power sales are necessary, and its simultaneous promotion of industrial load growth at retail.

2/ As FP&L states, at page 21 of its Objections, it "objects to Cities Request No. 18 to the extent it seeks information concerning "any . . . involvement . . ."

of purchases from FP&L, and in particular, information relating to FP&L's promotion of purchases from FP&L as opposed to from other utilities. The Board states that the promotion of service is fundamental to competition and denies the request on the grounds that it "cannot determine how discovery of applicants pro-competitive activities can reasonably be expected to lead to the discovery of evidence supporting Intervenor's antitrust thesis of this case." (Order, at 28) Cities do not fundamentally disagree with the Board's characterization of the information sought, but respectfully suggest that the characterization underscores the need for discovery.

First, Cities anticipate that FP&L will claim that there is little or no competition in the electric utility business, 1/ and, therefore, that claims of anticompetitive practice are groundless. Discovery of FP&L's competitive activities would, of course, rebut this defense.

Second, it is well established that practices that are otherwise acceptable may constitute unlawful behavior when conducted by a monopolist or one attempting to monopolize. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F.Supp 295 (D. Mass1953) aff'd per curiam, 347 U.S. 521 (1954). Cities will contend, inter alia, that FP&L possesses a monopoly in retail service. In this context its continued attempts to expand this monopoly by the acquisition of municipal systems constitutes an

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1/ For example, in its April 7, 1978 Brief in Florida Power & Light Company, FERC Docket No. ER78-19, et al., (which concerned FP&L's proposal to limit wholesale service), FP&L sought to deny the existence of competition in bulk power supply, competition for franchises, and competition for new industrial loads.

unlawful promotion of service. In short, the "competitive" activities inquired into through Request No. 20A may well include unlawful behavior. By the same token, FP&L may be expected to cast itself in the role of the lawful monopolist who has monopoly thrust upon it. Thus, it may claim that it did not initiate acquisition efforts or seek franchise renewals -- but merely responded to requests for service. Request No. 20A would seek documents responsive to this defense.

Finally, Cities note that Request No. 20A is virtually identical to Applicant's Request No. 176 of Cities. Should the Board affirm its denial of Request No. 20A, therefore, Cities respectfully request that, to achieve an equitable parity, FP&L Request No. 176 also be deleted.

Cities Request No. 64

The Board found that Cities Request No. 64 could produce relevant information, but urged its narrowing to reduce burden. Cities propose to further refine the request by (a) explaining that the reported damages to the Turkey Point Units referred to are damages to the steam tubing generator bundles (b) limiting the request for information on outages and off-line time to best current projections.

Cities Request the Deletion of Applicant's Request Nos. 173-175

The Board Order, at 38-41, denies Cities' requests relating to "benefits received from the government." In so doing it rejects, as a potential defense, a contention that Cities receive certain benefits as government entities.

Applicant's Request Nos. 173-175 essentially seek to learn of any tie-ins between electric service and other utility services.

As Cities understand it, FP&L does not seek information to claim that Cities have engaged in tie-ins prohibited by antitrust laws, 1/ but, rather, to show that the provision of multiple utility services may enhance the market power of an electric utility. To the extent that such effect might be alleged, however, its existence would be related to the status of municipalities as entities vested with public authority to operate utility systems. In light of the Board's general denial of Cities requests for information on FP&L's "government bounty", Cities respectfully request that FP&L Request Nos. 173-175 also be denied.

WHEREFORE, Cities respectfully request that the Board take action as further stated herein.

Respectfully submitted,

Daniel Guttman

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March 2, 1979

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1/ While such a claim might have theoretical basis as a counterclaim in a Court antitrust case, it is not relevant, where, as here, the issue is the conduct of a prospective licensee.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONSE OF FLORIDA CITIES TO BOARD MEMORANDUM AND ORDER IN DISCOVERY has been served on the following persons by hand delivery* or depositing copies in the United States mail, first class postage prepaid, on March 2, 1979:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S MEMORANDUM CONCERNING DISCOVERY

Florida Power & Light Company (the "Applicant" or "Company") submits this memorandum pursuant to the Board's Memorandum and Order on Discovery dated February 9, 1979.

The Company Disputes Many of the Cities' Assertions of Fact

The Company disputes many of the assertions of fact contained in the intervenor Cities' Response to Applicant's Objections to Interrogatories and Motion for a Protective Order (filed December 22, 1978). The Cities' purported justification for their Request No. 7, to which the Board directed its attention in this regard, is but one example of the jumble of allegations the Cities have made which the Company believes are misleading and entirely unfounded. In addition, the Company disputes the relevance of many of the assertions contained in the Cities' pleading.

The Board has stated that the Cities' allegations were not accepted for any purpose except to determine whether a request might reasonably be expected to lead to admissible

evidence. (Memorandum and Order, pp. 29-30.) In light of this and the other considerations cited by the Board, the Company believes that no useful purpose would be served by litigating its pervasive factual disputes with the Cities at this time and in this context. Accordingly, the Company does not move the Board to reconsider any of its rulings on discovery, even though some of them may have been influenced by allegations that the Company believes are untrue and will be disproven during the course of this proceeding.

The Board Should Clarify the Cutoff Date for Applicant's Discovery Requests to the Cities

Upon Applicant's objections to the time periods spanned by a number of the Joint Requests and Cities' Requests, the Board set 1965 as the general cutoff date for discovery. The Board did allow a number of specific requests that reached back before 1965, principally where it believed the requests related to the basic structure of the industry in the relevant market. (Memorandum and Order, p. 12.) In addition, the Board allowed certain requests where it appeared that responsive data could easily be produced. (Id., p. 13.)

The Cities did not interpose objections to any of Applicant's discovery requests on the basis of the period of time covered. Moreover, the Board has stated,

> "In the trial of this litigation the parties relying upon evidence, either defensively or in their respective cases in chief, which predates the 1965 cutoff date, must be prepared to allow the other parties to follow the evidentiary trail." (Memorandum and Order, pp. 8-9.)

Accordingly, Applicant moves the Board to clarify that the general 1965 cutoff date does not relieve the Cities of their obligation to respond to discovery requests concerning periods prior to 1965 that deal with the same general subjects as to which the Board allowed pre-1965 discovery of the Applicant. Set forth in the Appendix is a table containing a list of those general subjects, the interrogatories and document requests of the Applicant that deal with such subjects, references to comparable Joint Requests or Cities' Requests allowed by the Board to extend back before 1965, and the exact time period authorized by the Board with respect to each general subject. Applicant submits that the same cutoff dates should apply to all discovery requests dealing with similar subjects, no matter which party propounded them.

Discovery Concerning Natural Gas in This Proceeding

The Staff, the Department of Justice and the Applicant have discussed Joint Requests Nos. 79-82, which generally deal with Applicant's natural gas supplies. All three parties accept the principles set forth on pages 32 to 35 of the Board's Memorandum and Order on Discovery.

Applicant withdraws its objections to Joint Requests Nos. 79-82 on the understanding that the Staff and the Department of Justice share its view that while matters which are relevant to issues in this proceeding should not be excluded from discovery in this proceeding simply because they also relate to issues

pending before another forum, matters not otherwise relevant to issues in this proceeding should not be subject to discovery in this proceeding merely because they relate to issues arising under the Natural Gas Act. These three parties also share the view that discovery in this proceeding should not be undertaken for the principal purpose of obtaining material to be used in another forum.

* * *

Applicant is unwilling to withdraw its objections to Cities' Requests Nos. 57-59 and 72-73, which also purport to deal with Applicant's natural gas supplies. Applicant believes that all information of conceivable relevance to issues properly before the Board on this general topic will be produced in response to Joint Requests No. 79-82. It submits that the additional materials sought by the Cities in Requests Nos. 57-59 and 72-73 should not be discoverable here merely because they relate to possible violations of the Natural Gas Act -- which is their obvious focus -- and that the Cities' apparent effort to utilize the NRC discovery process to obtain information for use before other federal agencies should not be countenanced.

* * *

The Cities are attempting to make the inadequacy of their existing natural gas supplies an issue in this proceeding (Cities' Response to Applicant's Objections, dated December 22, 1978, pp. 18-28). They have alleged that the

Company contributed to their present difficulties, intentionally or at least under circumstances in which the Company should have known the consequences that would befall the Cities.

To the contrary, the Company contends that the Cities' current shortages of natural gas are due entirely to their own lack of foresight. At the time the Company negotiated long-term guaranteed gas supply contracts, the Cities opted for cheaper, interruptable gas supply contracts.

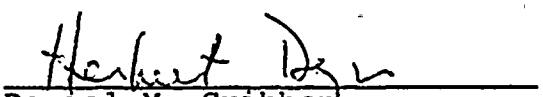
The Company understands that the studies and negotiations which led to execution of the Cities' interruptable gas contracts occurred during the mid-1950's and early 1960's. Accordingly, if this matter is to become an issue in the proceeding, the Cities should be required to respond to Applicant's Requests Nos. 136, 142, 142A, 142B, 142C, 142D, 142E and 313-314, which concern the Cities' gas contracts, for a period that begins earlier than the general 1965 cutoff date. Applicant submits that a 1950 cutoff as to these discovery requests would be appropriate.

Conclusion

For the foregoing reasons, Applicant submits that the Board should 1) establish cutoff dates for Applicant's requests to the Cities that are comparable to the cutoff dates it ruled should govern requests directed to the Applicant;

2) sustain Applicant's objections to Cities' Requests Nos. 57-59 and 72-73; and 3) set a 1950 cutoff date for Applicant's requests to the Cities concerning their natural gas supplies.

Respectfully submitted,



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March 2, 1979

APPENDIX

Comparable Pre-1965 Time Periods For Discovery Requests

General Subject	Applicant's Requests Nos.	Comparable Requests Allowed By Board	Time Period
Territorial Allocations	196-206, 218 392, 418.	JR 29, CR 12, 10, 16, 31	1950 */
Franchise Acquisitions	168, 176, 185-193, 397	JR 30, 48	1950 **/
Development Nuclear Capacity; Participation in Nuclear Units	101-104, 112, 121	JR 26, CR 22	1955 ***/
Coordination; Pooling; Bulk Power Supply	13, 35, 36A, 79-80, 82-4, 90-1, 373-4, 398, 419	JR 8, 24, 25, 33, 39, 41, CR 9	1955 ****/
Wholesale Policy; Competition	60, 67-72A, 162-4, 173-4, 194, 388-9, 407, 409-12	CR 5, 6	1955
Easily Available Information; Peak Load Projections	30, 40-1 346	JR 2, 12	1955 *****/

*/ 1955 for Cities' Request Nos. 10 and 31.

**/ 1955 for Joint Request No. 48.

***/ 1960 for Cities' Request No. 22.

****/1960 for JR 39.

*****/ 1960 for JR 12.

UNITED STATES OF AMERICA
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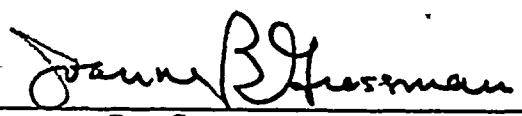
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the following: Applicant's Memorandum Concerning Discovery have been served on the persons shown on the attached list by hand delivery * or deposit in the United States mail, properly stamped and addressed on March 2, 1979.



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