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SUBJECT: Response to intervenor, FL Cities 801009 answer to NRC, DOJ & util 800912 Joint motion re CP application. Proposed license conditions should be effective immediately. Imposition will not damage intervenor. Certificate of Svc encl.

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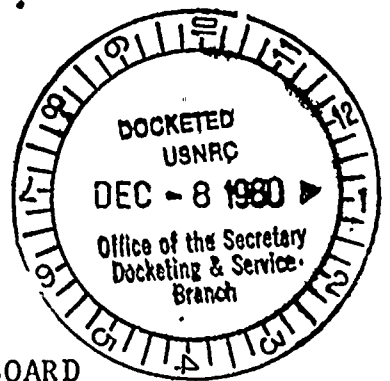
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
FLORIDA POWER & LIGHT COMPANY  
(St. Lucie Plant, Unit No. 2)

Docket No. 50-389A

RESPONSE OF THE DEPARTMENT OF JUSTICE TO THE  
FLORIDA CITIES' ANSWER TO THE JOINT MOTION

On September 12, 1980, the Department of Justice ("Department"), the Nuclear Regulatory Commission Staff ("Staff") and Florida Power & Light Company ("FPL") filed a Joint Motion informing the Atomic Safety and Licensing Board ("Licensing Board") that they had reached a full and complete settlement of the differences between them. The Joint Motion requested the Licensing Board to enter an order (1) attaching an agreed upon set of license conditions, in their entirety, to the construction permit for St. Lucie Unit No. 2, thus making them effective immediately, without prejudice to the Board's authority to impose different or additional license conditions after a hearing, and (2) directing the Intervenor Cities to set forth in writing, with specificity, any objections that they may have to any of the license conditions and the legal and factual basis for each such objection. On October 9, 1980, the

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Florida Cities ("Cities") filed their Answer to the Joint Motion ("Answer"). The Cities agreed to immediate effectiveness of the license conditions provided that certain specified provisions contained therein were modified. On October 20, 1980, the Licensing Board filed a Memorandum and Order permitting the Department, the Staff, and EPL to respond to the Florida Cities' Answer to the Joint Motion. Pursuant to that Order, the Department submits the following response to the Florida Cities' Answer to Joint Motion.

#### INTRODUCTION

The proposed license conditions are in the public interest, and the Cities will not be harmed if the proposed license conditions are made effective immediately. In this Response, the Department will discuss why the conditions should be made effective immediately, clarify those portions of the conditions which the Cities have mischaracterized and discuss the Cities' contentions that certain provisions in the conditions will cause them harm if made effective immediately.

#### A. THE PROPOSED LICENSE CONDITIONS SHOULD BE MADE EFFECTIVE IMMEDIATELY

In Duke Power Company (Catawba Nuclear Station, Units 1 & 2) LBP-74-47, 7 AEC 1158, 1159 (1974) ("Catawba") the Licensing Board stated that the standard for determining whether settlement license conditions should immediately attach to a nuclear plant license was whether the conditions were in the "public interest" and whether the intervenors would be



"improperly prejudiced or disadvantaged" by attachment of the conditions. Catawba at 1159. In that case the Licensing Board found that the intervenors had not shown how they would be disadvantaged and that the settlement conditions should be attached. Likewise, in this proceeding the Cities have not shown that immediate implementation of the proposed license conditions is not in the public interest or that it will "improperly prejudice or disadvantage" them.

The conditions confer upon beneficiary systems immediately the right to make use of increased power supply options. That benefit should not be delayed until all the issues in this proceeding are resolved, which could take several years. Power supply planning on the part of the systems which would benefit under the conditions and on the part of FPL will be made easier if the systems know that certain options are available now rather than that they may be available some time in the future. Removing uncertainties from power supply planning can only benefit an electric utility and its customers, who ultimately bear the burden of incorrect planning decisions. Equally important, the cities which are entitled to purchase a portion of St. Lucie No. 2 can now begin to acquire that portion and share in the benefits (and, fairly, the risks) of nuclear ownership.

B. THE FLORIDA CITIES HAVE MISCHARACTERIZED CERTAIN PROVISIONS OF THE PROPOSED LICENSE CONDITIONS

Florida Cities have stated that if the license conditions are made effective immediately "subsequent orders might broaden or enhance relief but would not narrow or limit relief to less than that provided in the parties' proposed license conditions" (Answer at page 1). While the parties to the settlement have agreed that they will not request the Board to alter the license conditions and do not anticipate that the benefits obtained through them will be lessened, the determination of whether those conditions are appropriate lies with the Licensing Board and ultimately the Nuclear Regulatory Commission ("Commission").

The Cities assert that while they had some input into the negotiating process, they were only permitted to comment "after the deal was essentially struck". (Answer at p. 2). The Department is unaware of any requirement that it must consult with all parties to a proceeding in the course of reaching a settlement with some of those parties, nor do the Cities cite any authority to that effect. Nonetheless, the Department notes that while the Cities were not involved in the negotiating sessions between the Department, the Staff and FPL, 1/ their comments were solicited both during the

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1/ The Cities and FPL have engaged in independent negotiations.



negotiations and after preliminary agreement on a first draft of the conditions. 2/ On May 15, 1979 the Department and the Staff wrote to Intervenors requesting that they summarize their factual and legal contentions concerning certain issues. On July 6, 1979 Intervenors responded with a memorandum of approximately 40 pages containing over 45 documentary attachments. This was supplemented by Intervenors on July 31, 1979. On August 27, 1980, the Department and Staff met with Intervenors. At that meeting Intervenors provided the Department and Staff with additional written memoranda and documentary support. In December 1979, Intervenors were given a copy of the December 17, 1979 Draft of the proposed license conditions. On December 20, 1979, the Department and Staff met with Intervenors to hear their objections to the proposed conditions. On February 29, 1980, Intervenors sent the Department and the Staff written comments on the draft license conditions. On June 19, 1980, Intervenors, at their request, met with the Assistant Attorney General in charge of the Antitrust Division to present their views on the draft license conditions. On September 15, 1980, after having considered the voluminous input of the Intervenors, and after having made suggested changes where appropriate, the Department entered into a settlement with FPL and the Staff. Intervenors cannot

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2/ Some changes were made in the agreed upon first draft of the conditions on the basis of comments by Intervenor Cities.

fairly complain that their input on the settlement was not sought or considered. Even assuming, however, the government agencies did not consult with the Florida Cities to their satisfaction, this should not bear on whether the license conditions were in the public interest or whether Florida Cities would be prejudiced if the license conditions were made effective immediately. The Board should assess the license conditions on their merits, and not on the basis of whether or to what extent Florida Cities' views were considered by the governmental parties during the negotiation process.

Florida Cities are concerned that license condition IX permits FPL to refuse to sell wholesale firm power to new generating systems. (Answer at p. 10). This is not true. License condition IX requires FPL to sell wholesale power to neighboring entities and neighboring distribution systems, whether those systems are currently in existence or come into existence at some time in the future. FPL's obligation to serve extends to new generating systems.

At several places in their Answer, Florida Cities express concern that the license conditions set up causes of action for FPL against the Cities, but do not set up causes of action for the Cities against FPL. (See e.g. Answer at pp. 11, 12, and 18). The license conditions do not set up "new" causes of action by FPL against the cities. They simply preserve those

legal right which FPL already enjoys. 3/ This is appropriate since the conditions, once they are effective, will be legally binding upon FPL making that Company subject to an enforcement action, including the imposition of a civil penalty, should it violate the conditions. The cities do not suffer from corresponding liabilities and thus there was no need to preserve their already existing legal rights -- those rights exist with or without the license conditions. Further, although it was not considered necessary, Section VII does preserve legal rights against the Company by entities which have a right of access to St. Lucie Unit No. 2. Pursuant to provision VII(c) (proposed conditions at p. 11), the Company, after receiving a ten percent down payment from an entity which wishes to participate in St. Lucie Unit No. 2, will agree in writing

to negotiate in good faith as to the terms of a participation agreement with the entities which provides written commitments and payments described above. Such written agreement shall also provide that in the event that the company fails to execute the participation agreement reached between the company and such entity as provided in paragraph (d) below, each such entity shall have the right to initiate an enforcement action before the NRC, and to initiate an action against the company in an appropriate court and/or agency for any relief that may otherwise be available to such entity under law. (emphasis supplied)

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3/ The conditions do have the effect of creating legal rights to the extent that such rights arise out of the contracts which are described in the conditions. Such contract rights would arise whether or not the anticipated contracts are described in the conditions.

Moreover, Section VII(e)(2) (proposed conditions at p. 17), establishes a cause of action by an entity against FPL if the Company does not execute the agreed upon participation agreement.

C. THE FLORIDA CITIES HAVE MADE NO SHOWING THAT IMMEDIATE EFFECTIVENESS OF THE LICENSE CONDITIONS WILL CAUSE THEM HARM

The Cities have listed three provisions in the proposed conditions which they say will cause them damage if the conditions are made effective immediately.

The Cities assert that the provisions in Section VII which permit FPL to deny an entitled entity the right to participate in St. Lucie Unit No. 2 if the entity does not take certain actions within certain specified time periods is unfair and would, if effective immediately, preclude some of the cities from participating in St. Lucie Unit No. 2. The Cities allege that "various actions that the agency must take must be done sequentially and there is not sufficient time to validate bonds and close according to the schedule provided in Condition VII." The Department would note that the time schedule contained in the proposed conditions was contained in the December 17, 1979 Draft conditions which were submitted to the Intervenor and that the Intervenor told the Department at the December 20, 1979 meeting that the time schedule was acceptable. We are, therefore, surprised that Intervenor now allege that the time schedule is inappropriate. Nevertheless,

we have been informed by FPL that it will discuss problems concerning the time schedule with the Florida Municipal Power Association in an attempt to resolve those problems.

Florida Cities strongly object to Section VII(i) of the proposed conditions, which permits FPL to retain complete control with respect to the design, engineering, construction, operation, and maintenance of St. Lucie Unit No. 2, and Section VII(e)(i) which permits FPL, with some restrictions, to author the liability clause to be contained in any participation agreement. The Cities appear to argue that immediate effectiveness of conditions VII(i) and VII(e)(i) will cause the Cities serious harm in two ways: first, those conditions are so unreasonable that cities will be inhibited from participating in St. Lucie Unit No. 2 and, second, even if a city chooses to participate in the nuclear unit, the conditions are so unreasonable that it will be unable to obtain financing.

The parties to the settlement agree that if a city chooses not to participate in the plant because it believes that the above described provisions are so onerous that they preclude participation, and it is able to convince the Licensing Board to alter or remove those provisions, it will have the opportunity, after a final decision in its favor, to participate in the plant. However, it is not inequitable to require a city to be bound by its decision not to participate

in St. Lucie Unit No. 2 if, after a hearing, it is unable to convince the Licensing Board that the provisions it objects to should be removed or altered.

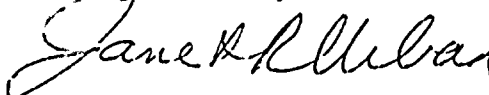
Finally, as to the control provision, the Company has made an additional commitment (attached as Attachment A) which addresses the situation where a city enters into a participation agreement containing the control provision, and such control provision is later found by the NRC to be unacceptable. FPL has agreed that if it enters into a new participation agreement, as a result of a final order of the NRC, it will offer any entity that has previously entered into a participation agreement the right to substitute the new control provision for the original control provision, provided that the Company may, at its option, amend other provisions of the old participation agreement to reflect the terms and conditions contained in that new participation agreement. The commitment also notes that it is not intended to alter any authority the NRC may have independent of any agreement of the parties.

#### CONCLUSION

The Department asserts that immediate effectiveness of the proposed conditions is in the public interest and that the Florida Cities have made no showing that immediate effectiveness will cause them harm. We therefore urge that those conditions be attached to the construction permit of

St. Lucie Unit No. 2 thereby making them effective immediately without prejudice to the Licensing Board's authority to impose different or additional conditions after a hearing.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Janet R. Urban".

Janet R. Urban  
Attorney  
Energy Section  
Antitrust Division  
U.S. Department of Justice

## Attachment A

### Additional FP&L Commitment

If in the future Company enters into a new participation agreement or an amendment to a participation agreement previously entered into pursuant to Section VII of the proposed license conditions ("new participation agreement") which contains contractual provisions which conflict with the principles of Section VII, paragraph (i) of the proposed conditions submitted to the Licensing Board on September 12, 1980, and such provisions are included in such new participation agreement as a result of a final order of the NRC which is no longer subject to appeal and which (a) modifies or deletes paragraph (i) and (b) requires that such contractual provisions be included in such new agreement, Company, upon request of the other party to a participation agreement previously entered into pursuant to Section VII ("prior participation agreement"), will consent to amend such prior participation agreement to substitute such provisions of such new agreement for the conflicting provisions in such prior participation agreement; provided that Company may, at its option, incorporate in such amendment all other substantive terms of such new agreement which differ from the terms of the





prior Participation Agreement, including but not limited to provisions for conveyance of an ownership interest which is less as a percentage of such party's 1977 peak electric load than was originally conveyed in such prior Participation Agreement (in which event Company may include provisions for reconveyance of the excess to Company). This provision is not intended to affect any authority which the NRC may possess independent of this paragraph or to limit the right of any party to take any legal position on the extent of such authority.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
FLORIDA POWER & LIGHT COMPANY  
(St. Lucie Plant, Unit No., 2)

Docket No. 50-389A

CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF THE DEPARTMENT OF JUSTICE TO THE FLORIDA CITIES' ANSWER TO THE JOINT MOTION in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or by messenger this 3rd day of December 1980.

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