

5/30/80

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

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|---------------------------------------|---|
| THE CITY OF GAINESVILLE AND THE |) |
| GAINESVILLE-ALACHUA COUNTY REGIONAL |) |
| UTILITIES BOARD, THE LAKE WORTH |) |
| UTILITIES AUTHORITY, THE UTILITIES |) |
| COMMISSION OF NEW SMYRNA BEACH, THE |) |
| SEBRING UTILITIES COMMISSION, THE |) |
| CITIES OF ALACHUA, BARTOW, FT. MEADE, |) |
| HOMESTEAD, KISSIMEE, MOUNT DORA, |) |
| NEWBERRY, ST. CLOUD, STARKE, and |) |
| TALLAHASSEE, FLORIDA, |) |
| |) |
| Plaintiffs, |) |
| |) |
| v. |) |
| |) |
| FLORIDA POWER & LIGHT COMPANY, |) |
| |) |
| Defendant |) |

Civil Action No.
79-5101-Civ-JLK

MEMORANDUM OF FLORIDA POWER & LIGHT COMPANY
CONCERNING THE SCHEDULE FOR FURTHER
PROCEEDINGS IN THIS ACTION

Defendant Florida Power & Light Company ("FPL" or the "Company") submits this Memorandum in response to Plaintiffs' Motion for a Preliminary Pretrial Conference.

Although FPL has no matters to bring before the Court that would require a status conference at this time, FPL does not oppose the scheduling of a status conference in this action at the Court's convenience if the Court considers it appropriate.*/ FPL does oppose plaintiffs' suggestion that the trial in this action be set for October of this year. The reasons FPL believes an October trial deadline cannot be met and would not be desirable are described below.

*/ Plaintiffs have suggested a conference during the week of June 9, and counsel for FPL would be able to attend a conference held during that week.

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1. The suggestion for a trial this fall must be considered in the context of this litigation. Plaintiffs seek to put at issue in this action the propriety under the antitrust laws of virtually every aspect of the conduct of FPL's electric utility business over the past 30 years. In brief, 14 individual plaintiffs allege that anti-competitive conduct by FPL is responsible for their present difficulties in providing electric service to their customers at low cost. FPL denies that it has engaged in anti-competitive conduct or that it has any responsibility to assure that plaintiffs -- its self-styled competitors -- are able to provide inexpensive electric service to their customers.

Unless some or all of the claims at issue in this action can be resolved by motion, the trial in this action will be enormously complex. Such a trial would require an examination of the circumstances surrounding not only FPL's decisions over the past 30 years to develop nuclear generating facilities, to arrange for long-term natural gas supplies and to otherwise develop an efficient and modern electric utility business. It also would require exploration of the separate decisions of each of the 14 plaintiffs to install (or not to install) particular generating facilities, to enter into particular fuel supply arrangements (and not others), and to develop (or refrain from developing) cooperative arrangements with other electric utilities.*

2. FPL has moved promptly to investigate the factual bases for plaintiffs' claims and to explore whether dispositive legal defenses exist with respect to any of the plaintiffs and any of the claims. FPL filed its First Request

*/ This is not a class action. The electric utility business of each of the plaintiffs is unique, and the power supply decisions made by each plaintiff over the relevant period will have to be evaluated in their unique contexts. In essence, there are 14 separate antitrust actions before the Court.

for Production of Documents and First Set of Interrogatories on November 26, 1979, within a month of the filing of the Complaint.^{*/} Shortly thereafter, FPL filed a Motion to Dismiss Portions of the Complaint, as an initial effort to clarify the legal matters properly at issue in this proceeding.

Because plaintiffs were unwilling or unable to produce the documents responsive to FPL's request for inspection and copying in Miami, FPL sent teams of lawyers, paralegals and professional employees of the Company to each of the 15 Cities to inspect and physically copy the documents being produced by each of the plaintiffs.^{**/} That effort extended over six weeks and required the participation of two attorneys (617 man-hours), two paralegals (540 man-hours) and nine professional employees of the Company (1,502 man-hours), and 2,360 hours of clerical time. Over 150,000 pages of documents were duplicated. At plaintiffs' request, FPL provided plaintiffs' counsel with copies of 141,636 pages of the documents that FPL copied.

Plaintiffs served their Initial Interrogatories and Request for Production of Documents on January 8, 1980. FPL thereupon undertook a comprehensive search of its own files. (This search was conducted at the same time that Company teams were reviewing documents in each of the Cities.) Two lawyers (384 man-hours), 28 Company professionals (4,868 man-hours) and four paralegals (688 man-hours) were assigned to the Company search during the period January 25, 1980 to March 26, 1980. All together, 243,000 pages of documents were copied and

^{*/} FPL's first set of discovery materials was focused exclusively on issues of liability. No discovery with respect to the enormous damages plaintiffs apparently claim, at least in the press, has occurred.

^{**/} Ft. Pierce withdrew as a plaintiff after the inspection of its documents by FPL personnel.

made available to plaintiffs and an additional 75,000 pages remained to be copied as of May 17, 1980.^{*/}

3. The tasks that remain in order to prepare for trial are numerous and will require the substantial efforts of lawyers and paralegals. FPL has expended 34 man-years of professional time on discovery matters since this action was commenced, surely evidence that the case has been handled on an expedited basis. A substantial portion of this effort has been performed by persons with no legal training. In comparison, the tasks that must be undertaken from here on in order to ready the case for trial cannot be accomplished except by lawyers and paralegals.

In response to initial discovery requests, the parties have produced almost 500,000 pages of documentary material.^{**/} There have also been extensive answers to a first set of interrogatories. At this stage of the case, the tasks to be performed by legal personnel include

- review of this mass of documentary materials;
- resolution of issues raised by the responses to current discovery;
- preparation of and responses to additional discovery requests (interrogatories,^{***/} requests for admissions, and Rule 34 requests)

^{*/} Plaintiffs have noted on several occasions that they and FPL are not "strangers" in litigation. As a result of the history of litigation, plaintiffs have had access to voluminous materials produced by FPL in regulatory proceedings. Nevertheless, the discovery requests filed by plaintiffs in this action were comprehensive and required the Company to undertake a "top to bottom" search of files extending back over 30 years.

^{**/} Plaintiffs' list of documents for which they have asserted privilege is 280 pages long. FPL will be providing to plaintiffs a list of documents it contends are privileged, and will seek a protective order before it produces highly confidential material that plaintiffs are seeking.

^{***/} The parties have informally agreed, subject to the Court's approval, to waive the limitations of General Rule 10.I.1 of this Court with respect to interrogatories.

- directed to liability issues, and initial discovery requests directed to damage questions;
- consultation with engineering and economic experts;*/
- deposing City officials and third parties with knowledge of the matters at issue;**/
- analysis of the information yielded by this discovery.

FPL intends to pursue these matters expeditiously, as it has done thus far. Nevertheless, FPL does not believe that, working diligently, it can complete the job of trial preparation by fall.

4. FPL requires this discovery in order to prepare for trial, because FPL has not had any previous opportunity for discovery from plaintiffs. Although there has been litigation between FPL and various of the plaintiffs before, FPL never has had the opportunity for comprehensive discovery from any of the plaintiffs (other than Gainesville) before this action. In comparison, plaintiffs have had access to massive productions of documents made by FPL in regulatory proceedings, and plaintiffs' counsel have had the opportunity to cross-examine FPL's top officials in a number of these proceedings.

Accordingly, as plaintiffs' counsel must realize, the scheduling of a premature trial date would confer a substantial advantage on plaintiffs. The interests of justice would not be served by requiring one party to present its case at trial thus disadvantaged.

*/ FPL anticipates that extensive engineering and economic analyses will be required in this case.

**/ It is not possible to predict the number of depositions that will be taken. However, on the basis of FPL's analysis of the documents produced by the largest plaintiff, Tallahassee, to date, FPL intends to take the deposition of at least 10 officials of that plaintiff. We anticipate that this series of depositions will be taken in July.

5. FPL anticipates that the discovery efforts presently underway will allow for a further sorting out of the claims in this action by additional motions addressed to some of the issues and some of the plaintiffs. FPL believes that certain, perhaps most, of the claims of the plaintiffs will not survive properly supported motions for summary judgment. The discovery efforts already underway, which are described above, are designed to provide the factual basis for such motions. FPL anticipates that the first motion could be filed by this fall. Proceeding by motion will reserve for trial only those claims, if any, that require trial -- claims as to which there is genuine dispute of material fact. The procedures for stipulation of agreed-upon facts and specification of disputed issues employed by the District Court in the government's antitrust action against American Telephone & Telegraph Company are an example of the means that have been employed in a complex case:

"to produce agreement on and thereby to eliminate from the trial itself all those matters about which there is not or should not be any genuine disagreement and thereby reduce the scope and duration of the trial, and . . . to provide for an orderly progression of the remainder of the case to a definite, relatively early trial date. (footnote omitted)" United States v. American Telephone & Telegraph Co., D.D.C. No. 74-1968 (June 22, 1979) (slip opinion, p. 9) (attached).*/

See also United States v. American Telephone & Telegraph Co., 461 F. Supp. 1314, 1345-1346 (D.D.C. 1978); Manual for Complex Litigation, § 3.60.

6. FPL recognizes that this litigation has been and will be costly for all the parties. Plaintiffs took on the costs of a complex antitrust action when they filed an all-encompassing complaint to commence this action. Consumers of electricity, whether sold by FPL or the plaintiffs, bear

*/ A copy of the Court's unreported opinion is attached. The stipulation and specification procedures are discussed at pp. 3-17.

the expenses of this litigation, just as they bear the benefits and burdens of power supply decisions made by plaintiffs and FPL.*

A trial in this action in the fall, before all documents have been reviewed and analyzed, before all witnesses have been interviewed and deposed, and before claims can be disposed of on motion, will be more expensive and time-consuming for the Court and a jury -- as well as for the litigants -- than the course that FPL is already proceeding along and which it recommends to the Court.

Thus far the parties have moved expeditiously. The trial date suggested by plaintiffs is, given the magnitude and complexity of this case, simply unrealistic.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were mailed, postage prepaid, to ERVIN, VARN, JACOBS, ODOM & KITCHEN, P.O. Box 1170, Tallahassee, Florida 32303 and to SPIEGEL & McDIARMID, 2600 Virginia Avenue, N.W., Washington, D.C. 20037 on May 30, 1980.

Alvin B. Davis
Alvin B. Davis

*/ FPL's public utility obligation to minimize the rates that its customers must pay for electricity is an important element in this case, because the effect of FPL's agreement to plaintiffs' demands would be to provide plaintiffs' customers with a free ride at the expense of FPL's customers.