Florida Cities: 6/22/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
Florida Power & Light Light Company	)	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	)	Dated: 6/22/81

ANSWER OF FLORIDA CITIES
IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR RESUMPTION OF DISCOVERY, ABSENT CONDITIONS

Florida Power & Light has requested that the Board order resumption of discovery in this docket 1/; Cities oppose this motion, pending the Board's establishment of a procedural schedule. 2/ For reasons discussed below, resumption of

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1/ The Board officially suspended discovery on November 6, 1979. However, because the parties were at that time in the process of responding to very similar document requests as part of the discovery process in an antitrust suit filed against FPL by the Cities in federal court, each chose to respond to the NRC document requests as well as the district court requests. Cities likewise produced documents responsive to the NRC request during production of R.W. Beck & Associates. Both FPL and the Cities have responded to interrogatories in the district court case; Cities expect that the answers to interrogatories propounded in this docket will be largely referenced to their answers in the district court case. In addition to this parallel discovery, responsive documents were produced in Key West in August 1980; at that time FPL had the opportunity, which it declined, to discovery Lake Helen and FMUA. A full discussion of the status of discovery is provided in Attachment 2 to Cities' "Motion to Establish Procedures, For a Declaration That A Situation Inconsistent With the Antitrust Laws Presently Exists and For Related Relief" (May 27, 1981).

D508 S 1/1 ADD: J. Rutberg A.L. Toalston

2/ In their "Motion to Establish Procedures, for a Declaration That a Situation Inconsistent with the Antitrust Laws Presently Exists and for Related Relief" (May 27, 1981), Florida Cities set forth recommended standards for future procedures. FPL does not refer to this motion.

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discovery in the manner requested by FPL can only lead to further delay in resolution of the disputes in this case. Cities respectfully submit that this docket will proceed most expeditiously if: a) the Board orders the parties to complete the First Wave of discovery under a strict timetable and b) schedules a pre-trial conference at which matters pertaining to any additional discovery would be discussed.

As is evident on the face of FPL's motion, the Company is asking the Board to make a decision affecting two entirely different phases of discovery.

First, the Company is asking that discovery be resumed so that answers to interrogatories and production of documents pursuant to requests already served on the parties may be completed. That is, the question is not "when shall discovery begin?" -- as FPL must recognize, response to the first wave is substantially complete (of the named parties, only Lake Helen and FMUA have not been produced for FPL). Further, plaintiffs in the district court case have responded to broad document requests and interrogatories that would subsume nearly all requests here: These include non-intervenors Homestead, Kissimmee and Starke. The question is "what shall be the timing for completing response?" We are informed that Lake Helen has voted to sell its utility systems to Florida Power Corporation, so that discovery of Lake Helen may be moot.

As a general matter, Cities do not object to resumption of this phase of discovery. However, Cities submit that the

motion to complete discovery must be considered in light of other motions now before this Board. Thus, FPL has submitted a motion seeking deferral of response to Cities' motion for summary disposition of this docket in part because it believes that the issues involved in this docket are unclear, and indeed, that some issues need no longer be contested in the wake of the settlement license conditions attached to the construction permit pursuant to the Board's Order of April 24, 1981. "Motion of Florida Power & Light Company For Deferral of Consideration of Motion for Summary Disposition" (June 12, 1981). Cities do not agree with FPL's contentions. See "Florida Cities Answer in Opposition to Florida Power & Light's Motion for Deferral of Consideration of Motion for Summary Disposition" (June 22, 1981). However, even if the Board were to find for FPL, it should delay resumption of discovery pending meeting of counsel to limit the issues, and to eliminate interrogatories and document requests which are directed toward facts no longer at issue. To do otherwise would subject the parties to unnecessary expense and delay.

Of greater significance is the second aspect of FPL's motion. FPL, despite arguing that it seeks no delay in these proceedings, apparently would seek new (and unlimited) discovery in this docket under authority of a Board order to resume discovery. Thus, for the first time, after five years of litigation and two orders by this Board concerning discovery, FPL now claims it is entitled to discover all the members of

FMUA. 1/ Motion of FPL at 1, fn. Obviously, were FPL to request a discovery of new entities that is as broad as its first discovery requests, resolution of this proceeding would be long delayed. And, if unlimited discovery were allowed, the expense of this proceeding could easily become oppressive. But aside from the potential cost, the crux of the problem is this: If discovery is simply resumed, without limits, FPL can seek discovery of one non-intervening city in July; decide that it needs to discover experts in August; decide that it needs depositions of another city in September, of another in October, and on endlessly, with Cities responding to each request, motion by motion. Such piecemeal, uncontrolled discovery is a prescription for delay. Given the potential hazards of simply authorizing unlimited discovery, Cities believe the interests of all parties would best be served by scheduling a pretrial conference pursuant to 10 C.F.R. §2.751a in order to set a final date by which discovery requests must be made; to discuss the scope and need for further discovery; 2/ and to discuss other

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1/ FMUA has been a party to this suit since its inception in 1976. By its own motion, FPL admits that it has been aware since at least 1978 that the interests of certain member Cities of FMUA who wish to participate in the FPL plants, but who have not intervened directly in this proceeding, are being protected by FMUA's participation. Yet not until June of 1981 has FPL mentioned discovery of such entities.

2/ The Board clearly has authority to limit discovery under 10 C.F.R. §2.740(b), see, e.g., Northern Indiana Public Service Company (Bailly Generating Station, Nuclear - 1), 8 AEC 901, 919 (1974). Moreover, case law suggests discovery may be closed, even where one party seeks further discovery. Eli Lilly & Co. v. Generix Drug Sales, 460 F.2d 1096, 1105 (5th Cir. 1972); see also Federal Deposit Insurance Corp. v. ABTS, 412 F.S. 302 (S.C.D.C. 1976). Cities believe limitations will be appropriate here.

pretrial matters, including establishment of a trial date. Cities believe such conference should be held no later than 30 days after the ruling on this motion.

Such a pretrial conference is in accord with the authorities. Thus, the Manual for Complex Litigation recommends that after the response to the initial wave of discovery has begun, the judge should:

> fix time for completion of first wave of discovery and establish a schedule for discovery requests designed to secure the production of documents, evidence and information which will be required for completion of discovery on the merits.

2 Moore's Federal Practice 2.00. 1/

Such a conference is especially needed here to expedite matters. The Antitrust Commission Report recommends that the courts "establish a maximum of 24 months for the completion of pretrial, not as a norm and extendable only in truly extraordinary cases." 80 F.R.D. at 516 (emphasis added). In United States v. American Telephone & Telegraph, D.D.C. No. 74-1968 (June 22, 1979), trial was scheduled to begin approximately two years after the commencement of discovery, though that case was undoubtedly bigger than this case in all respects. This case has now gone on for five years. It is time

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1/ The Manual further recommends a third conference after submission of requests for additional discovery. Given the years partie have had to discover each other, Cities submit that the scope of further discovery can be explored in the pretrial conference they are requesting by this motion.

to set a schedule for resolution; it is not the time to grant an open-ended request to resume discovery.

Respectfully submitted,

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June 22, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ANSWER OF FLORIDA CITIES IN OPPOSITION TO FLORIDA POWER & LIGHT COMPANY'S MOTION FOR RESUMPTION OF DISCOVERY, ABSENT CONDITIONS have been served on the following by hand delivery (*) or by deposit in the U. S. Mail, first class, postage prepaid, this 22nd day of June, 1981.

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