UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

FLORIDA CITIES' ANSWER IN OPPOSITION TO FLORIDA POWER & LIGHT'S MOTION FOR DEFERRAL OF CONSIDERATION OF MOTION FOR SUMMARY DISPOSITION

FPL, by motion filed on June 12, 1981, seeks to defer consideration of Cities' "Motion to Establish Procedures, for a Declaration That a Situation Inconsistent With the Antitrust Laws Presently Exists and for Related Relief." This Commission has authority to grant summary judgment, or partial summary judgment under 10 C.F.R. §2.749. FPL attempts to justify deferral of consideration of Cities' motion for summary disposition of the critical issues in this docket on the basis of representations in its pleadings that a) it has not had sufficient opportunity to discover the facts and b) the issues in this case have not been clearly enough defined so that consideration of the motion would be useful.

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FPL's motion must be denied. As discussed below, the claims FPL makes in its pleadings are not factually supported and are insufficient as a matter of law to justify deferring response to Cities' motion. Indeed, after five years of litigation, it is clear that further discovery is not needed to respond to Cities'

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motion; that the issues are defined; and that consideration of Cities' motion now is desirable to move this proceeding to a more just and rapid conclusion, a result claimed to be desired by all parties to this docket.

In their May 27, 1981 Motion to Establish Procedures, Florida Cities set forth undisputed facts showing that a "situation inconsistent with the antitrust laws" exists. These facts show that FPL has refused to deal with some Cities in Florida Power Corporation's territory in violation of Sections 1 and 2 of the Sherman Act, and that FPL's more general refusals to deal with all Cities are inconsistent with the standards of Otter Tail and Midland. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Consumers Power Company (Midland Units 1 and 2), ALAB-452, 6 NRC 892 (1977). Moreover, Cities show that the settlement between Florida Power & Light, the Department of Justice and the Nuclear Regulatory Commission on its face permits FPL to continue this pattern of discrimination and illegal refusals to deal.

In support of their Motion, Cities' relied on recent findings by the Fifth Circuit in Gaineville Utilities Dept. v. Florida Power & Light Company, 573 F.2d 292, cert. denied, 439 U.S. 966 (1978) and the Federal Energy Regulatory Commission, Florida Power & Light Company, Opinion No. 57, 57-A, 32 PUR 4th 313, August 3, 1979, and October 4, 1979, which found that FPL had engaged in anticompetitive conduct and which are binding here pursuant to the doctrines of res adjudicata and collateral

estoppel; 1/ Cities further supported their motion with excerpts from sworn deposition testimony, deposition exhibits, pleadings submitted by FPL, and other documents 2/ discovered from FPL which constitute admissions on various issues involved in this docket. 3/

FP&L may believe itself able to present factual or legal contentions showing why summary disposition is inappropriate. However, defenses must be stated and not assumed.

1/ Florida Cities have explained in their Motion of May 27, 1981, at pages 12-14 the legal basis for collateral estoppel here.

2/ These documents are of the sort the Fifth Circuit in the Gainesville case found dispositive as a matter of law in holding that FPL had violated the antitrust laws. Gainesville Utilities Dept. v. Florida Power & Light Co., supra, 573 F.2d at ----.

3/ FPL argues that the Cities have admitted that the filing is not sufficient to establish that genuine issues of fact do not exist because Cities filed similar material with the District Court in Miami in response to FPL's Motion for summary judgment on Cities' nuclear claims. Two points: First, FPL neglects to mention that Cities specifically reserved the right to seek summary judgment on their nuclear claims at a later date. Second, FPL seems to forget that the standards for finding a violation of the Sherman Act and a "situation inconsistent with the antitrust laws" differ; hence the manner of presentation of a motion for summary disposition may well differ from forum to forum.

FPL further suggests that it is appropriate for this Board to defer consideration of Cities' motion until the District Court rules on FPL's motion. FPL there moved for summary judgment on the alleged grounds of FPL nuclear innovation and the alleged tardiness of Tallahassee's demand for access to FPL's nuclear units. As to nuclear innovation (not yet raised by FPL before the NRC): FPL shows no reason for the NRC to defer. As to the alleged tardiness of Tallahassee: The NRC has already granted that City and others intervention in this proceeding; they are not out of time here.

It is well settled law that where a summary judgment motion is filed, a general denial will not suffice. Opposing parties are obligated to present support demonstrating that a genuine issue of fact exists; "a party opposing the motion may not rest upon the mere allegations or denials of his answer." 10 C.F.R. §2.749. This Commission has noted that the opposing party's facts must be "material, substantial, not fanciful or merely suspicious." Gulf States Utility Company (River Bend Station Units 1 and 2), 1 NRC 246, 248; one cannot avoid summary judgment on the mere hope that at trial movant's evidence may be discredited, id at 48. See also, Power Authority of the State of New York, 9 NRC 339 (1979); South Carolina Electric & Gas Co. 9 NRC 471, 477 (1979). Indeed, courts have specifically held that a party may not avoid properly answering a motion for summary judgment by making general assertions as to a need for further discovery; instead if a party seeks deferral:

> ... the opposing party should present his affidavit showing that the knowledge or control of the facts is exclusively or largely with the moving party and describe his attempts to obtain those facts. The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to the discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures.

6 Moore's Federal Practice ¶ 56.24 at 1432. 1/

If FPL wishes a continuance to conduct discovery, it is thus FPL's burden to demonstrate what purpose, if any, discovery would accomplish, given the evidence profferred, Willmar Poultry Co. v. Morton Norwich Products, Inc. 520 F.2d 289, 297 (8th Cir. 1975). This FPL has not done.

The facts here present a particularly strong case for requiring a substantive factual response from FPL, rather than categorically deferring consideration of summary disposition. FPL claims that it does not understand the issues and that Cities have failed to present a concise statement of facts not genuinely in dispute. But FPL in its own pleading demonstrates that the issues have been properly drawn. The Company states:

> "Item 1 in the list of undisputed "facts" profferred by the Cities is illustrative. It includes the following: "FPL has an effective monopoly control over [nuclear facilities in Peninsular Florida] which it has used to advantage itself in competition." That statement appears to rest on the assumptions that (1) nuclear generation is the relevant product market, (2) "Peninsular Florida" is the relevant geographic market, (3) FPL has monopoly power in the alleged market, and (4) FPL is engaged in some kind of undefined competition with Cities in some unspecified market. FPL contests each of these propositions.

Motion of FPL, p.3, n.*.

1/ Of course, Moore's is interpreting Rule 56(f) of the Federal Rules of Civil Procedure. However, this Commission has specifically held that the principles governing summary judgment in Federal practice are appropriate for use in determining motions for summary judgment under 10 C.F.R. §2.749. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), 7 AEC 877, 878.

This is in apparent response to Item 1 of Attachment 1 to Florida Cities' Motion to Establish Procedures ("Material Facts Not Genuinely In Dispute"), where Florida Cities state:

> "1. FPL controls three out of the four operating nuclear plants in Peninsular Florida and is constructing its fourth. FPL has an effective monopoly control over such facilities there, which it has used to advantage itself in competition. Except as provided under settlement license conditions in this case, FPL refuses to grant Florida Cities access to these facilities."

In Cities' view, and as stated in their motion for summary disposition, there can be no genuine factual dispute that there is a bulk power market in peninsular Florida, that FPL has a monopoly of nuclear power there (owning three of four, soon to be four out of five plants there), that nuclear power is an important product in that market, and that FPL has refused to deal in nuclear power with Cities not in or near its retail territory.

Therefore Cities can well wonder: Is FPL denying control over its nuclear units? Does it truly seek to contest these points? Florida Cities have documented that FPL <u>itself</u> has cited its nuclear and certain other advantages <u>in seeking acquisitions</u> of municipally owned utilities. If FPL denies such use of its monopoly control of nuclear facilities to advantage itself in competition, it should present facts which appear to refute the evidence from its own files. If FPL has a basis for arguing that it is not in competition with Cities or has not used such facilities for competitive advantage, it should present

facts which appear to refute the evidence from FPL's own files. As has been set forth in Florida Cities' Motion to Establish Procedures, at the time Florida Power & Light was planning its nuclear generation, the Federal Power Commission specifically found that it was part of a "Florida pool", Florida Power & Light Company, 37 FPC 544, 551-552 (1967), reversed, 430 F.2d 1377 (5th Cir. 1970), reversed affirming the Commission, Florida Power & Light Co. v. FPC, 404 U.S. 453 (1972). Such coordination is demonstrated by Company filings, documents and deposition testimony. In Opinion No. 57, the Federal Energy Regulatory Commission found the obvious: that FPL has monopoly power over a large retail service area. Florida Power & Light Company, Opinion No. 57, supra, 32 PUR 4th at 323-325. If FPL denies the existence of a coordination market in Peninsular Florida or its extensive retail service monopoly in eastern and southern Florida, it is not too much to ask that it set forth the factual basis for such denial. And clearly, as a matter of law, if FPL contends that discovery of the Cities is necessary to unearth material which FPL requires in order to respond to the Cities' Motion, and which is in Cities' exclusive control, it should be required to file an appropriate pleading before this Commission hears a motion for continuance. After years of general documentary discovery, numerous depositions and experience with its own operations, FPL should not be heard to make a bare unsupported claim to require more discovery of Cities in order to rebut facts from FPL's files concerning its own market areas,

ownership of nuclear facilities in Peninsular Florida, or its own actions in competition. Compare Motion of FPL, p. 3, fn. *. Resolution of these critical issues can quickly lead to resolution of this case.

On the other hand, if, as its motion seems to suggest, FPL believes some factual contentions are no longer relevant to this proceeding in the wake of the settlement license conditions which were attached to the construction permit pursuant to the Board's Order of April 24, 1981, its position on this motion is at odds with its efforts to re-open discovery in this docket. 1/ If FPL truly believes some facts are no longer at issue, then FPL no longer needs to request documents responsive to a shotgun request for materials from the year 1950 to present, and further dicovery and case presentation can be simplified. If it agrees with the facts, but disagrees with the legal implications, those issues are ripe for decision. In any event, FPL should not be entitled to avoid, after five years of litigation, stating what its position is.

One final note is in order. FPL claims a need to know the specific additional relief sought by the Cities, while FPL resists any additional relief. The request is disengenuous. As the Company well knows, Florida Cities have communicated to FPL in settlement discussions, correspondence and otherwise, their

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1/ FPL has moved to re-open discovery in this docket. By separate pleading submitted to the Commission on this date, Cities respond to FPL's discovery motion.

positions and the relief that they seek. Indeed, it must be apparent that the major issue dividing FPL and the Cities (apart from the question whether a situation inconsistent with the antitrust laws exists at all), is the extent of FPL's obligation, if any, to provide nuclear access to certain excluded systems. If the Board, were to hold that FPL has such an obligation, this case would be substantially advanced toward conclusion. Similarly, if the Commission were to hold that FPL has an obligation to deal with cities in wholesale power services and the like, disputes about license conditions relating to such wholesale power could probably be speedily resolved.

Respectfully submitted,

Robert A. Jablon

Robert A. Jablon

Attorney for Florida Cities

June 22, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing FLORIDA CITIES' ANSWER IN OPPOSITION TO FLORIDA POWER & LIGHT'S MOTION FOR DEFERRAL OF CONSIDERATION OF MOTION FOR SUMMARY DISPOSITION 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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