

Florida Cities: 7/2/81

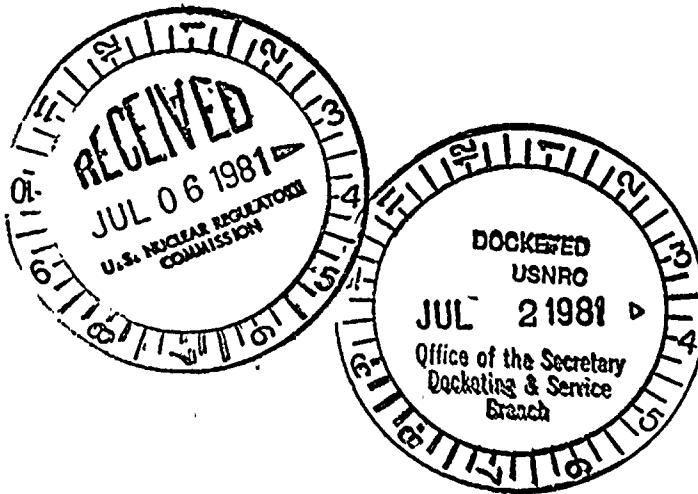
BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In The Matter Of

Florida Power & Light Company) Docket No. 50-389-OL
(St. Lucie Plant, Unit No. 2)) Date: 7/2/81

BRIEF OF FLORIDA CITIES
IN SUPPORT OF THEIR APPEAL FROM DENIAL OF
THEIR INTERVENTION PETITION AND REQUEST FOR
CONSOLIDATION AND FOR OTHER RELIEF



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Meade, Homestead, Key West,
Kissimmee, Mount Dora,
Newberry, St. Cloud, Starke,
and Tallahassee, Florida.

July 2, 1981

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WINDS

Each City is requesting antitrust relief in Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-389A construction permit proceeding, either through its own intervention or that of intervenor Florida Municipal Utilities Association, a membership organization. Florida Cities now request antitrust review in connection with the operating license.

In their April 7 operating license intervention petition, the Cities made plain their belief that they could raise all issues and obtain all relief in the construction permit antitrust proceedings that they could in an operating license proceeding. They filed their operating license intervention petition only to protect against any assertion that, if they had failed to do so, they would in some way be entitled to reduced substantive or procedural relief. Thus, their petition to intervene states (pp. 1-3):

". . . Insofar as the conditions applied to the construction permit should at least encompass the life of the unit, the relief obtained in the construction permit proceedings may obviate the need for similar proceedings in connection with the operating license. In any case, insofar as Cities are parties to this docket, they presume that they are parties to further proceedings relating to the operating license applications.

In sum, Florida Cities intervene solely as a protective matter. They have been granted intervention in the St. Lucie Unit 2 construction permit proceeding: Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-77-23, 5 NRC 789 [1977], affirmed, ALAB-420, 6 NRC 8 and 6 NRC 221, affirmed, CLI-78-12, 7 NRC 939. Assuming that they prove their case, Florida Cities are entitled to relief under §105 of the Atomic Energy Act, 42

U.S.C. §2135. Since their allegation and the relief sought under the construction permit and operating license are parallel, a separate proceeding should be unnecessary. See Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 & 2), ALAB-381, 5 NRC 582 (1977); Duquesne Light Company (Beaver Valley power Station, Unit No. 2), ALAB-208, 7 AEC 959 (1974). However, in the event that a contention could be made that they waive rights by failing to intervene separately in the operating license proceeding, they file this Petition and request appropriate relief.

(Petition to Intervene, pp. 1-3, footnotes omitted)

Although it is uncertain whether FPL would agree that all rights available to Florida Cities under the operating license proceeding will be available in the context of the construction permit antitrust review, in the "Answer of Florida Power & Light Company to the Florida Cities' Petition to Intervene and Request for Consolidation", dated May 26, 1981, FPL states:

"It is an established principle of NRC practice that antitrust conditions attached to a construction permit remain in effect after the issuance of an operating license. In every case in which antitrust license conditions have been attached to a construction permit, the NRC has extended those license conditions upon the issuance of an operating license for the time span of the license. The Cities allege no basis for suspecting that the Commission would not do the same here.

Accordingly, the Cities' Petition is moot by its own terms. Their intervention is predicated upon the defense of an established tenet of NRC practice which FPL does not contest. On this basis alone, the Cities' Petition should be denied."

(FPL Answer, pp. 4-5).

On June 3, the Atomic Safety and Licensing Board issued an Order Relative to Petitions to Intervene Concerning Antitrust Matters, denying Florida Cities intervention. The Order also denied intervention to Parsons & Whittemore, Inc. ("P&W")

and its subsidiary, Resources Recovery (Dade County), Inc. ("RRD"). The Order was based solely upon the Board's belief that it has no jurisdiction to rule on antitrust matters. The Board states (Order, p. 4):

"We do not reach the merits of the petitions since we have determined that we lack the jurisdiction to consider the petitions in this proceeding. Both petitions are denied." 1/

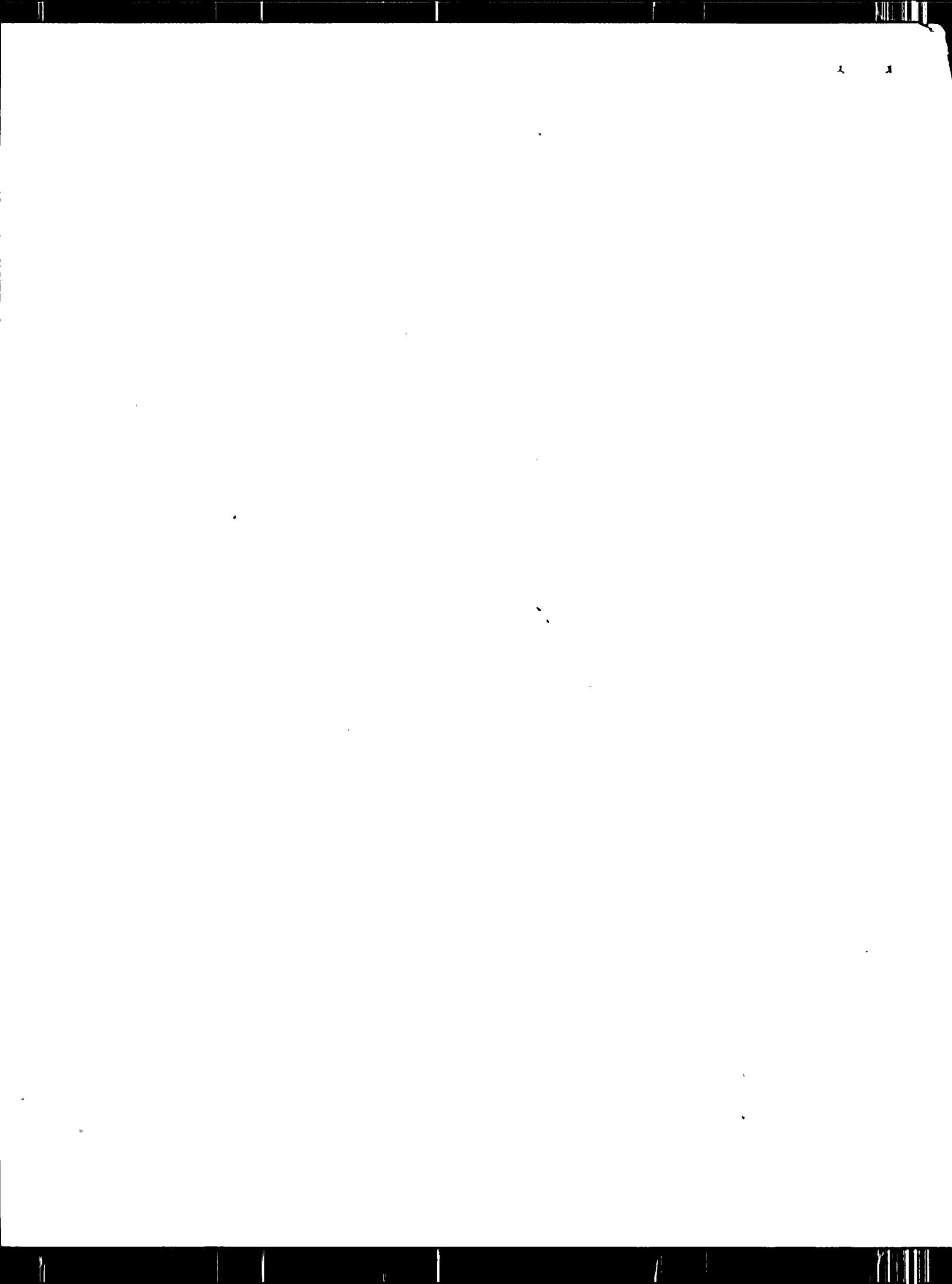
I. THE BOARD HAS AUTHORITY TO RULE ON FLORIDA CITIES PETITION TO INTERVENE.

Florida Cities' petition to intervene in connection with the operating license met the Commission's standards. Section 105(c), 42 U.S.C. §2135(c) of the Atomic Energy Act plainly contemplates the opportunity for operating license antitrust review. The Federal Register notice concerning interventions invited all potentially affected parties to seek available statutory relief. For the Board to hold that it has no authority to review Florida Cities' intervention petition on the merits without stating who does was an exercise of "procedural gymnastics" such as was condemned in Cities of Statesville v. AEC, 441 F.2d 962, 976, n.11 (D. C. Cir. en banc, 1969).

The Board cites Marble Hill 2/ as determining that it has no antitrust jurisdiction. Marble Hill discusses whether a

1/ The above Order was not served on Florida Cities. Florida Cities did receive a copy of the Order on June 22, 1981 and filed a Notice of Appeal on June 23, 1981. Leave to appeal was granted by Order of this Board dated June 26, 1981.

2/ In the Matter of Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).



licensing board should hear antitrust and safety issues at the same time where separate opportunity for antitrust hearings had been noticed; the case does not provide a basis for determining that the Board could not have granted Florida Cities' intervention petition. In granting intervention, the Board could have also determined that safety and antitrust issues should be decided separately and referred its order providing for such separation to the Commission. 1/ In fact, Florida Cities' intervention petition specifically requested consolidation of antitrust issues with the St. Lucie Unit 2 construction permit hearing. In any event, Florida Cities' intervention petition should be ruled upon based upon its merits. 2/ As is discussed below, however, Florida Cities would not object to affirmance of the Licensing Board on grounds of prematurity or mootness.

A. Prematurity.

In its Answer to Florida Cities Petition to Intervene, FPL has suggested that Florida Cities intervention petition is premature (pp. 8-13). Florida Cities have an obvious interest

1/ In Marble Hill, supra, at p. 171 the Appeal Board notes that a licensing board, where authorized, may combine antitrust and other issues. Here, the initial delegations to the Board appeared to cover all issues relating to the operating license. 46 F.R. 15831. Indeed, parties were invited to state their interest and right to relief in the proceeding without limitation. 10 CFR §2.714 of the regulations referred to in the notice covers intervention in all NRC proceedings, including antitrust. Chapter 1 under which the license would be issued requires a finding that the facility will be operated in conformity with the total provisions of the Act. E.g., 10 CFR §50.57.

2/ Parsons & Whittemore has briefed the issue of the Board's authority more extensively. In order to avoid needless duplication, Florida Cities adopt P&W's argument on this point without rebriefing.



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Florida Cities 1/ appeal from the Atomic Safety and Licensing Board's Order of June 3, 1981 (Appendix A) in which that Board denied them intervention in the Florida Power & Light Co. (St. Lucie Plant, Unit No. 2) operating license proceeding.

By Federal Register Notice of March 9, 1981, 2/ the Nuclear Regulatory Commission ("NRC") noticed the application of Florida Power & Light Comany ("FPL") for a license to operate the St. Lucie Nuclear Plant, Unit No. 2 ("St. Lucie 2"). The notice stated that "any person whose interest may be affected by this proceeding may file a petition for leave to intervene." Id.

On April 7, 1981, a group of Cities ("Florida Cities"), appellants here, filed a "Petition to Intervene and Request for Consolidation". 2/

1/ Appellants are the Gainesville Regional Utilities, the Lake Worth Utilities Authority, the Utilities Commission of New Smyrna Beach, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Homestead, Key West, Kissimmee, Mount Dora, Newberry, St. Cloud, Starke, and Tallahassee, Florida. Except for the City Electric System of the City of Key West, which was inadvertently omitted from that petition, each of these Cities had petitioned to intervene in the operating license proceeding.

2/ 46 F.R. 15831.

in resolution of antitrust matters before operation of the St. Lucie Plant, Unit No. 2, especially since many of their members will be part owners. However, Florida Cities also have an interest that the operation of St. Lucie 2 not add to FPL's economic power unless conditions are ordered that protect them against being victims of antitrust abuse. Cf. Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 NRC 582 (1977), advancing the time of operating license antitrust review.

Should the Appeal Board determine that additional procedural steps must be taken before petitions requesting operating license antitrust review are appropriate or that such petitions cannot be heard before completion of construction permit antitrust review, then Florida Cities simply request that such ruling be made so that they cannot later be deemed to have waived rights. In either case, procedures must be adopted that permit early resolution of antitrust matters. If the Appeal Board does not have authority to rule on this issue, Florida Cities request referral of their petition as may be appropriate.

B. Mootness.

In the judgment of counsel, the Licensing Board established to rule in Docket No. 50-389A on antitrust matters has authority to grant antitrust relief under the same standards and procedures that would apply in an operating license antitrust proceeding. 1/ As they have stated, Florida Cities have sought

1/ As FPL has recognized (p.3, supra), construction permit license conditions are routinely applied to operating licenses. See Arkansas Power & Light Company, ALAB-94, 6 NRC 25 (1973); Indiana & Michigan Electric Co. and Indiana & Michigan Power Co., LBP-73-3, 6 NRC 80 (1972).

intervention in the operating license proceeding to forestall the possibility that they could be entitled to less antitrust relief, had they failed to do so. However, should this Board affirm that under the circumstances of this case, where a construction permit antitrust review is ongoing, nothing would be added by operating license antitrust review, then Florida Cities antitrust intervention petition is moot and they would not object to dismissal on those grounds. 1/

CONCLUSION

Florida Cities do not address the merits of their entitlement to relief. However, they feel constrained to stress that additional antitrust license conditions are plainly in order. Indeed, since Florida Cities first applied for antitrust relief in connection with the construction permit 2/ the United States Court of Appeals for the Fifth Circuit has specifically found that FPL violated the Sherman Act by conspiring to divide wholesale sales territory with Florida Power Corporation:

". . . We hold that the evidence compels a finding that FPL was part of a conspiracy with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida."

Gainesville Utilities Dept. v. Florida Power & Light Company, 573 F.2d 292 (1978), cert. denied, 439 U.S. 966. In Opinion Nos. 57

1/ The parties could so stipulate.

2/ "Joint Petition of Florida Cities for Leave to Intervene Out of Time; Petition to Intervene; and Request for Hearing", Florida Power & Light Company (St. Lucie Plant, Unit Nos. 1 and 2; Turkey Point Plant, Unit Nos. 3 and 4), Docket Nos. 50-335A, and 50-389A, et al. (August 6, 1976); "Joint Petition of Florida Cities for Leave to Intervene and Request for Conference and Hearing", Florida Power & Light Co. (South Dade Plant), Docket No. P-636-A (April 14, 1976).

and 57-A, the Federal Energy Regulatory Commission (formerly the Federal Power Commission) extensively reviewed and specifically found that the Company had engaged in "anticompetitive conduct" and, indeed, found that FPL's proposed restrictive wholesale power provisions in that docket, which would have limited the sale of wholesale power and coordination, were themselves "anticompetitive". Re: Florida Power & Light Company, 32 PUR 4th 313, 339, 340 (1979). (Appendix B) Whatever their virtues, recently agreed to settlement license conditions in Docket No. 50-389A between FPL and the Governmental parties are limited to entities in and near FPL's retail service area, thereby perpetuating the territorial division found illegal in Gainesville, supra. (Appendix C)

As recently as May 12, 1981, Marshall McDonald, Chief Executive Officer of Florida Power & Light Company, disclaimed taking corrective steps to assure antitrust compliance (Deposition testimony in Gainesville Regional Utilities, et. al. v. Florida Power & Light Company, Docket No. 79-5101-CIV-JLK, pp. 98-104, quotation at p. 100):

"I'm not aware that we have ever been guilty of infringing any antitrust laws . . . In my opinion, the views of the Fifth Circuit were incorrect." (Appendix D)

Thus, there is every reason to believe that Commission scrutiny is necessary to prevent nuclear generated electricity being used by FPL "to create or maintain a situation inconsistent with the antitrust laws" absent appropriate license conditions.

WHEREFORE, Florida Cities respectfully request:

1. That the Appeal Board reverse the Licensing Board and (a) order that Florida Cities Petition to Intervene and

Request for Consolidation be granted or (b) remand for a ruling on the merits by the Licensing Board;

2. Alternatively, that the Licensing Board be affirmed on the specific grounds (a) that antitrust intervention petitions are premature or (b) that the issue is moot because, absent a waiver, the operating license cannot be issued until completion of the antitrust review in the construction permit proceeding, and because, unless waived, Florida Cities may raise all issues and obtain all relief in the construction permit proceeding that they could obtain in the operating license proceeding;

3. Alternatively, if the Appeal Board rules that it lacks jurisdiction, it should forward Cities petition and this pleading to the appropriate officials of the Nuclear Regulatory Commission for a ruling.

Respectfully submitted,

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July 2, 1981

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INDEX OF APPENDICES

- APPENDIX A "Order Relative to Petitions to Intervene Concerning Antitrust Matters" issued by the Atomic Safety and Licensing Board June 4, 1981
- APPENDIX B Federal Energy Regulatory Commission Opinion Nos. 57 and 57-A dated August 3, 1979 and October 4, 1979
- APPENDIX C St. Lucie Plant, Unit No. 2 Proposed License Conditions
- APPENDIX D Excerpts from May 12, 1981 Deposition of Marshall McDonald, Florida Power & Light Company, in Gainesville Regional Utilities, et al. v. Florida Power & Light Company, Docket No. 79-5101-CIV-JLK

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