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SUBJECT: Brief, in forming of pleading, in opposition to FLI Cities' brief in support of appeal from denial of intervention, ASLB 810603 order should be upheld, Certificate of Svc encl.

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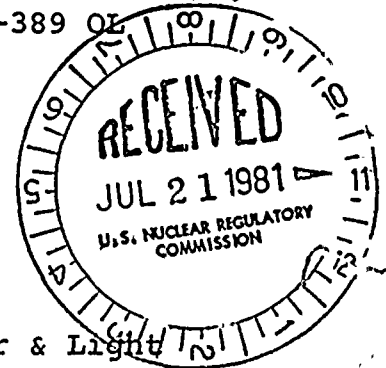
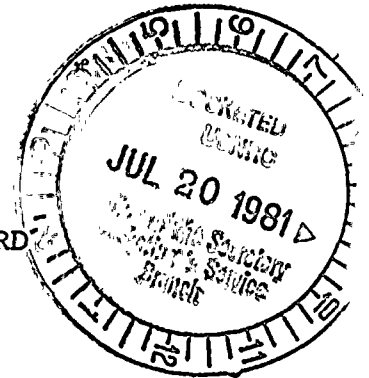
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

Docket No. 50-389 OF

BRIEF OF FLORIDA POWER & LIGHT
COMPANY IN OPPOSITION
TO BRIEF OF FLORIDA CITIES



Pursuant to 10 CFR § 2.714a(a), Florida Power & Light Company (FPL) hereby submits its brief in opposition to the "Brief of Florida Cities in Support of Their Appeal from Denial of Their Intervention Petition and Request for Consolidation and for Other Relief" (Cities Brief).^{1/}

Many of the facts involved in this proceeding are set forth in the Licensing Board's June 3, 1981 "Order Relative to Petitions to Intervene Concerning Antitrust Matters" and in the brief which FPL submitted on June 25, 1981, in opposition to Parsons & Whittemore's appeal from that order. To the extent feasible we attempt to avoid repetition here.

^{1/} At p. 1, n. 1, Cities Brief enumerates the appellant entities, including Key West, which it somewhat casually notes "was inadvertently omitted" from the petition to intervene. FPL does not concede that the omission can be cured merely by including the omitted entity among an enumeration of appellants.

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Florida Cities filed their "Petition to Intervene and Request for Consolidation" (Intervention Petition) in this operating license proceeding "only insofar as they [the proceedings] may relate to antitrust concerns."^{2/} More specifically, Florida Cities are parties to a pending construction permit antitrust proceeding, Florida Power & Light Company (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-389A. They filed their petition in the operating license proceeding for the sole purpose of protecting themselves against any assertion that, if they had failed to do so, "they would be in some way entitled to reduced substantive or procedural relief" (Cities Brief, p. 2; see also Intervention Petition, pp. 2-3) in the construction permit antitrust proceeding. (Intervention Petition, p. 22). They requested that that proceeding and the operating license proceeding be consolidated and "such further relief as may be appropriate." In its "Order Relative to Petitions to Intervene Concerning Antitrust Matters," dated June 3, 1981, at p. 4, the Licensing Board denied the Cities' petition as well as that of Parsons & Whittemore, holding "we lack the jurisdiction to consider the petitions in this proceeding."^{3/}

2/ . Response by Florida Cities to NRC Staff Answer, May 7, 1981, p. 2 (underscoring in original).

3/ The Intervention Petition was heavily weighted with allegations of antitrust misbehavior by FPL, and FPL's Answer to the Intervention Petition contained responsive material. "Answer of Florida Power & Light Co. to the Florida Cities' Petition to Intervene and Request for [Footnote continued]"

Hereinafter, we first address the question whether the Licensing Board erred in its ruling; and, second, the propriety of certain "alternative" action which Cities' Brief suggests that the Appeal Board take.

I. The Licensing Board Was Correct in Holding That It Lacked Jurisdiction To Consider The Petition to Intervene.

The Licensing Board based its determination that it lacked jurisdiction to grant the intervention petitions upon Public Servicing Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) (ALAB 316, 3 NRC 167 (1976)). Cities contend that:

Marble Hill discusses whether a 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.

Cities Brief, pp. 4-5. The plain language of Marble Hill is to the contrary. The express holding of the Appeal Board was that:

In sum, for the Licensing Board to have admitted the Association's antitrust contentions in this proceeding would not only have exceeded its jurisdiction, but would have been inconsistent with the reasons that originally led Congress to allow

3/ [Footnote continued from previous page] Consolidation," May 26, 1981 (FPL's Answer). Some of the allegations are repeated in Cities Brief here. However, since the Licensing Board expressly decided the matter on jurisdictional grounds and did "not reach the merits of the petitions . . ." we do not repeat that material here.

creation of separate boards for the resolution of antitrust issues.

3 NRC at 173.

Nor is the conclusion altered by the fact that what is here sought is an operating license antitrust proceeding rather than a construction permit antitrust proceeding. To the contrary, an operating license antitrust proceeding may be instituted only after the Commission has made a preliminary determination which it has neither made in this proceeding nor delegated to the Licensing Board to make.

Section 105c(2) of the Atomic Energy Act (42 USC § 2135(c)(2)) makes it clear that antitrust procedures shall not apply to operating license proceedings "unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to . . ." the construction permit antitrust review. The Commission has not made such a "significant changes" determination here. Neither has the Director of Nuclear Reactor Regulations to whom the Commission has delegated the authority to make the "significant changes" determination with respect to reactors. 10 CFR § 2.102(d); South Carolina Electrical and Gas Company, et al., CLI-80-28, 11 NRC 817, 821, n. 8. Such a determination could not be made since the construction permit antitrust proceeding -- begun at the Cities' request in a petition filed thirty-one months late -- is still pending and the antitrust review has

therefore not yet been completed. South Carolina Electric and Gas Company, 11 NRC at 823. Absent a finding of significant changes, Section 105c(2) precludes the consideration of antitrust issues at the operating license stage. Ibid; Houston Lighting and Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1312 (1977); 10 CFR § 2.102(d)(2). Consequently, it would be manifestly inconsistent with Section 105c(2) to conclude that the Licensing Board, nevertheless, had authority to initiate antitrust proceedings.

Since the Licensing Board had no jurisdiction to institute an antitrust proceeding, it follows that it had no jurisdiction to consolidate such a proceeding with the existing construction permit antitrust proceeding. Whether the introduction of antitrust issues results from permitting the Cities to intervene in this proceeding or consolidating this proceeding with the construction permit antitrust review is immaterial. In either instance, the effect would be to review antitrust issues in conjunction with an application for an operating license without first making the significant changes determination required by Section 105c(2). The Cities' petition simply ignores this clear statutory requirement.

Consolidation would also render meaningless the distinction in the statute between the scope of construction permit and operating license antitrust reviews. Section 105c(2)

provides that any antitrust review conducted at the operating license stage shall be limited in scope to significant changes that have occurred in the licensee's activities or proposed activities since the completion of the construction permit antitrust review. South Carolina Electric and Gas Company, 11 NRC at 823; South Texas, 5 NRC at 1312. Consolidating the two proceedings would eliminate any distinction between the scope of the construction permit and operating license reviews contrary to the clear intent of the statute.

II. No Alternative Relief Is Appropriate.

In view of the foregoing, it would be wholly inappropriate for the Appeal Board to grant Florida Cities' first requested form of relief and order that the Petition for Intervention and Request for Consolidation be granted or that the matter be remanded for a ruling by the Licensing Board on the merits of Cities' antitrust claims. (Cities' Brief, pp. 8-9). Apparently in recognition of the likelihood these preferred forms of relief may be denied, Cities requests one of three other alternative forms of relief. These are discussed below.

First, Cities suggest "that the Licensing Board be affirmed on the specific grounds (a) that antitrust intervention petitions are premature" (Cities' Brief, p. 9). In this connection, Cities refer to pages 8-13 of FPL's Answer which

makes the argument, in substance repeated in Part I of this brief, that an operating license antitrust proceeding cannot be held because the "significant changes" determination required by Section 105c(2) of the Atomic Energy Act has not been made. (Cities Brief, pp. 5-6). Cities stated that:

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.

Cities Brief, p. 6. We read the foregoing as constituting agreement with the argument made in Point I, above, and do not take issue with Cities' request. However, we cannot see what bearing such a ruling would have on the question whether Cities have in the past waived or hereafter may waive unspecified rights.^{4/}

Second, Cities suggest that the Appeal Board might affirm the Licensing Board

on the specific grounds . . . (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,

^{4/} In addition, Cities appear to request this Board to refer the petition elsewhere within the NRC in order to permit the adoption of procedures "that permit early resolution of antitrust matters." (Cities' Brief, p. 5). We discuss that suggestion, infra, at page 9.

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.

Cities Brief, p. 9.

Phrased differently, Cities are stating that they would not object to affirmance of the Licensing Board on grounds of "mootness" if they can obtain declaratory relief from the Appeal Board with respect to two matters which, we submit, are inappropriate subjects for such relief in this forum.^{5/} The question whether the operating license may hereafter issue even if the construction permit antitrust proceedings (Docket No. 50-389A) have not been completed is one which has recently arisen in those proceedings and raises, among other things, the question whether the grant of Cities' late intervention^{6/} depended upon their express assurance that the grant would not delay operation as well as construction of St. Lucie Unit No. 2.^{7/} Without a record on the question, this Board would have no basis for ruling upon the question. Similarly, without now

^{5/} We do not question the authority of licensing and appeal boards to grant declaratory relief in appropriate circumstances. Kansas Gas and Electric Company, et al. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1, 4 (1977).

^{6/} Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), LBP-77-23, 5 NRC 789, 800-01 (1977) affirmed ALAB-420, 6 NRC 9, 13, 23 (1977), affirmed, CLI-78-12, 7 NRC 939, 943 (1978).

^{7/} Motion of Florida Power & Light Company for Declaratory Order, or in the Alternative to Dismiss the Florida Cities From the Proceeding, Docket No. 50-389A, dated July 16, 1981.

knowing what issues may hereafter be raised or relief requested in the construction permit proceeding it would be wholly inappropriate for this Board to rule as requested by Florida Cities. Any such ruling would, moreover, intrude upon the role of the Licensing Board in Docket No. 50-389A.

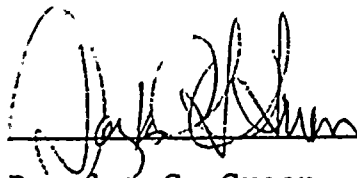
Third, Cities request that if this Board "rules that it lacks jurisdiction, it should forward Cities' petition and this pleading to the appropriate officials of the Nuclear Regulatory Commission for a ruling." (Cities Brief, p. 9). It is not clear what "ruling" is requested, i.e., whether it is for the initiation of operating license antitrust proceedings or the alternative forms of relief requested above. The diffuse nature of the request and the potential it has for extending already protracted antitrust proceedings suggest that no such referral or other action by the Appeal Board is appropriate. This is particularly so since, as the Commission has emphasized, authority to institute operating license antitrust proceedings -- the initial relief requested by Cities -- has been vested in the Director of Nuclear Reactor Regulation, not in the Licensing or Appeal Boards.

III. Conclusion

On June 16, 1981, the Licensing Board entered an order dismissing this proceeding because of the dismissal or withdrawal

of all petitions to intervene. On June 18, 1981, this Board, noting that an appeal from the dismissal of Parsons & Whittemore's intervention petition was pending (Florida Cities had not yet appealed), issued an order stating that the dismissal of the proceeding "shall not be accorded finality until such time as the appeal is determined." For the reasons given above and in its brief in opposition to the appeal of Parsons & Whittemore, FPL submits that the June 3, 1981 Licensing Board order should be upheld, Cities' requests for alternative relief should be denied, and the June 16, 1981 order of the Licensing Board dismissing the operating license proceeding should be accorded finality.

Respectfully submitted,



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DATED: July 17, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Brief of Florida Power & Light Company In Opposition to Brief of Florida Cities," dated July 17, 1981, were served upon the following persons by hand delivery* or by deposit in the U.S. Mail, first class, postage prepaid, this 17th day of July, 1981.

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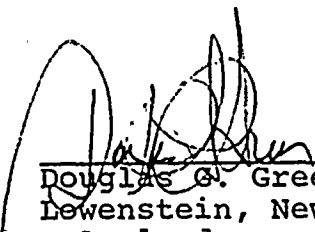
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