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AUTH. NAME: JABLON, R.A. AUTHORITY AFFILIATION: Spiegel, G.
RECIP. NAME: GODY, A.T. RECIPIENT AFFILIATION: Office of Nuclear Reactor Regulation (Post 941001)

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SUBJECT: Responds to 950103 ltr of JA bouknight, responding to 941205 ltr.

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1350 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-4798

TELEPHONE (202) 879-4000
TELECOPIER (202) 393-2866

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MARK S. HEGEDUS
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* CAROLYN P. CARMODY
* WENDY S. LADER
* MEMBER MD BAR ONLY
* MEMBER NY BAR ONLY

OF COUNSEL
RENA I. STEINZOR

PHILIP E. CLAPP
GOVERNMENT AFFAIRS DIRECTOR
NOT A MEMBER OF THE BAR

50-398A

January 30, 1995

VIA HAND DELIVERY

Mr. Anthony T. Gody
Chief, Inspection Program Branch
Directorate for Inspection and Support Programs
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Re: Florida Power & Light Company (St. Lucie Plant,
Unit No. 2), Docket No. 50-389A, Operating License
No. NPF-16

Dear Mr. Gody:

This letter responds to the January 3, 1995, letter of J.A. Bouknight, Jr., attorney for Florida Power & Light Company, which responded to our December 5, 1994 letter. Our December 5, 1994, letter provided a report on relevant events subsequent to the "Petition of Florida Municipal Power Agency for Declaration and Enforcement of Antitrust Licensing Conditions and to Impose Requirements by Order." (July 2, 1993).

In addition to making a number of inaccurate but irrelevant statements, Mr. Bouknight's letter contends that the Federal Energy Regulatory Commission is acting on the matters raised by FMPA's Petition for Enforcement, and that action by the NRC on FMPA's Petition would interfere with the FERC's jurisdiction and encourage inappropriate forum shopping by FMPA. Contrary to Mr. Bouknight's contentions, enforcements action by the NRC remains necessary and appropriate to put a stop to FPL's

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continuing forum evasion and to give effect to the license conditions.

As reported in our December 5, 1994 letter to you, in July, 1994, FPL filed a proposed service agreement for network transmission service in response to a FERC order requiring it to do so under Sections 211 and 212 of the Federal Power Act, 16 U.S.C. §§ 824(j) and (k). FMPA has not initiated network transmission service under FPL's proposal because FPL's filing did not comply with the terms and conditions ordered by the FERC (not because FMPA is dissatisfied with the FERC's order). FMPA does not ask this Commission, however, to decide whether FPL's network filing complies with the FERC's order under §§ 211 and 212. FMPA simply asks that this Commission require FPL to file a network transmission tariff under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824(d) and (e), as FPL promised to do in the St. Lucie Antitrust License Conditions, but has refused to do for more than five years.

FMPA grants that it is an interested party. However, FPL's accusation that FMPA is engaging in "incessant forum-shopping" is particularly outrageous. FPL committed to the NRC that it would sell network transmission upon request and it argued to both the District Court and FERC against their jurisdiction to grant FMPA relief, claiming that the NRC has exclusive jurisdiction to enforce its license conditions. Borrowing from Joseph Welch, one is impelled to ask, has FPL no sense of shame?

FPL's claim with respect to forum shopping turns the facts of this case upside down. FPL agreed in Section X of the Antitrust Conditions to "immediately file" proposed terms and conditions for transmission services if it could not agree with a prospective transmission buyer. When FMPA requested network transmission service, FPL refused to file a proposed tariff for network service. 1/ As is set forth in the "Answer of Florida Municipal Power Agency to Florida Power & Light Company's Response in Opposition to Petition for Enforcement Action (September 24, 1993, pages 8-10), FMPA originally sought enforcement of its rights to network transmission in Florida state court. FPL removed the case to Federal District Court and

1/ In its December 5, 1994, letter, FMPA set forth that FERC had issued a final, non-appealable order in Florida Power & Light Company, FERC Docket Nos. TX93-4-000 and EL93-51-000. FERC holds that network transmission is in the public interest and that there are no reliability or technical impediments to FPL's selling network transmission to FMPA. FPL does not dispute these facts. Therefore, there is no impediment or conflict in jurisdiction to the NRC's enforcing its transmission license condition.



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then filed an unsuccessful motion to dismiss, claiming that the Court lacked jurisdiction because of this Commission's alleged exclusive jurisdiction to enforce the antitrust license conditions. FPL subsequently asserted in District Court that because transmission rates are involved, the FERC has exclusive jurisdiction, an argument that was partially accepted by the District Court and is the subject of an appeal of the Eleventh Circuit in Florida Municipal Power Agency v. Florida Power & Light Company, Docket No. 94-3230. 2/ Before the FERC, however, FPL argued that the FERC lacks jurisdiction under Federal Power Act Section 205 to order FPL to file a network transmission rate and that the FERC should not consider FMPA's Section 211 application on the grounds of FPL's newly expressed willingness to provide service. When the FERC ordered FPL to provide for network transmission under Section 211 using a load ratio pricing methodology providing for credits for FMPA and member owned transmission, FPL filed for a rate without providing for such credits. Finally, in its transmission rate case filing, after staff and FMPA filed network tariff proposals, FPL filed a possible network tariff in rebuttal, but stated:

We must stress, however, that the sole purpose of this model is to rebut testimony and exhibits filed by other parties. The network tariff is not a Section 205 filing under which FPL is today offering to provide network service. In that regard, the model is in no way intended to restrict FPL's rights to consider subsequent Commission orders on comparability and make necessary revisions at such time that FPL actually files a network tariff.

Joint prepared rebuttal testimony on transmission and comparability issues of Karabet Adjemian, W.C. Locke, Jr., and William R. Schoneck, Jr., Florida Power & Light Company, FERC Docket Nos. ER93-465-000 et al. December 16, 1994.

Thus, FPL still is refusing to file a network transmission agreement under § 205 of the Federal Power Act, and it has not withdrawn prior arguments that the standards applicable under §§ 205 and 206 are different from those applicable under §§ 211 and 212. FMPA has not been engaged in forum shopping; rather, FMPA has invoked the concurrent jurisdiction of various fora in order to combat FPL's continuing strategy of making conflicting jurisdictional arguments to avoid or delay compliance with FPL's transmission obligations. FPL has

2/ The Department of Justice is supporting FMPA's position on the court's jurisdiction with respect to FPL's "filed rate" doctrine arguments.

violated its license condition. The NRC has jurisdiction and should grant relief.

FMPA does not request that this Commission set or rule upon the appropriate level or methodology of determining transmission rates, but this Commission can and should rule that FPL was required under the License Conditions to file a transmission service agreement under Section 205 of the Federal Power Act and order it to do so. If FPL wants to say that whatever it has filed under Sections 211-212 is also being filed under Section 205 in compliance with the License Conditions, it is free to do so, although FMPA (and others) would be free to argue the inadequacy of its filing. FPL, however, should not be permitted to continue to evade its obligations under the Antitrust Conditions or to hold out the possibility of an escape clause based on alleged distinctions between §§ 205-206 and §§ 211-212. If FPL had "immediately filed" its proposed terms for network transmission when FMPA requested such service, as FPL promised to do in the Antitrust Conditions, the FERC would have had before it years ago the very issues which FPL now says are "rate disputes." Action by this Commission is necessary and appropriate to put an end to FPL's game of hide-and-seek.

Respectfully submitted,



Robert A. Gablon
Bonnie S. Blair
Attorneys for Florida Municipal
Power Agency

RAJ/BSB/kms

cc: Joseph Rutberg, Esq.
William M. Lambe, Esq.
J.A. Bouknight, Jr., Esq.

