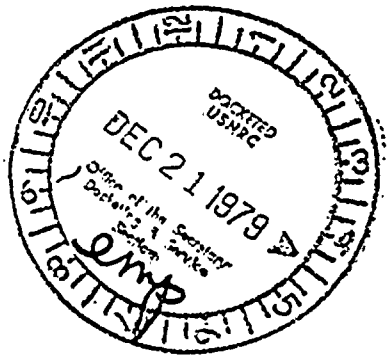
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford

FLORIDA POWER & LIGHT COMPANY (St. Lucie Plant, Units 1 and 2)	Docket Nos. 50-335A 50-389A
FLORIDA POWER & LIGHT COMPANY (Turkey Point Plant, Units 3 and 4)	Docket Nos. 50-250A 50-251A

ORDER

The Commission has requested and received the views of the Florida Power & Light Company, the Florida Cities,[1/] the Department of Justice, the NRC, and other interested parties, as to the implications for the Commission's anti-trust responsibilities of the Fifth Circuit's decision in Gainesville Utilities Department v. Florida Power & Light Company, 573 F. 2d 292 (1978). In particular, the Commission requested views as to the legal necessity and the desirability of initiating a proceeding under Section 105a of the Atomic

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1/ The Florida Cities are a group of 16 Florida municipalities and municipal utility commissions which have been participating jointly in Commission proceedings. Gainesville is one of them.

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Energy Act of 1954, as amended, 42 U.S.C. 2135(a); the timing of any such proceeding; and the possibility of consolidating any such proceeding with the ongoing Section 105c proceeding related to the St. Lucie 2 plant. For the reasons outlined below, we decide not to institute a Section 105a proceeding at this time.

Section 105a provides that:

> In the event a licensee is found by a court of competent jurisdiction ... to have violated any of the provisions of [certain antitrust laws] in the conduct of the licensed activity, the Commission may suspend, revoke, or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

It may be useful, at the outset, to discuss briefly the purpose of Section 105a. On this point the legislative history is unequivocal. In hearing before the Joint Committee on Atomic Energy, on June 2, 1954, the following discussion of Section 105a took place between Representative Holified and AEC General Counsel William Mitchell:

> Representative Holifield. The section provides that the Commission may suspend, revoke, or take such other action as it may deem necessary after the court finding of monopoly.
>
> I point out that this is "after," after the court finding of monopoly....I point out that it is permissive and not mandatory upon the Commission to take that type of action.
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> Mr. Mitchell. Yes, sir; that is right. I think our feeling would be that in the case of a finding of violation of law by a court, normally the court itself would take whatever action would be appropriate, but this provides for additional authority in the Commission.

The decision of the Court of Appeals in Gainesville held as a matter of law that Florida Power & Light had

conspired with the Florida Power Company to divide the wholesale power market in the state. The context of the court's decision is significant. It took place on review of a district court decision which held that there had been no conspiracy to divide the power market in Florida. The appellate court, in reversing that decision, found as a matter of law that the evidence before the district court demonstrated the existence of a conspiracy. It was left to the district court on remand, however, to determine whether the conspiracy was a substantial cause of Gainesville's inability to obtain an interconnection with Florida Power & Light, and if so, to assess the measure of damages and to formulate whatever remedy might be appropriate. Trial has not yet begun in that remanded proceeding.

Ordinarily, the first finding of a violation of the antitrust laws would be made by a district court, and its decision would lay out the factual predicate for its findings, the measure of damages suffered, and the court's remedy. At that point, the Commission would have the opportunity, through Section 105a of the Atomic Energy Act, to formulate whatever additional remedies might be necessary in order to effectuate the clear Congressional purpose that licensed nuclear activities be fully consistent with the antitrust laws. In this, the unusual case, the initial finding of a violation was made by the Court of Appeals, leaving other issues to the district court. To initiate a Section 105a proceeding at this

time would therefore be to create the possibility of reversing the normal order in which relief is granted first by the court and only afterwards, if warranted, by the Commission.

In addition, it is not clear from the decision of the Court of Appeals whether the violations of law took place "in the conduct of the licensed activity." Nor are the filings of the parties dispositive of this issue. While an unambiguous demonstration of a connection between violations of law and NRC-licensed activities is not in our view a necessary precondition to the institution of a Section 105a proceeding (whether and to what extent that connection existed could be explored with precision by the licensing board in that proceeding), we are conscious that the factual record developed in the remanded district court decision may well illuminate this issue.

Our decision to exercise our discretion not to initiate proceedings at this time is thus based on two grounds. First, by awaiting the decision of the district court and the remedies it may provide, the Commission will be in a position to determine whether any additional Commission action may be needed to fulfill the antitrust purposes of the Atomic Energy Act.[2/] Until the district court acts, that Commission determination

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2/ In the event that the Commission determines that Section 105a proceedings should be instituted against both parties to the conspiracy found by the Court of Appeals, a single consolidated proceeding would clearly be the most efficient means of considering the nature and effects of that conspiracy. At such time that the Commission revisits the question of whether to institute proceedings against Florida Power & Light, it can appropriately consider whether proceedings against Florida Power are in order. Until the district court has acted, however, institution of proceedings against either licensee would be premature.

clearly cannot be made. Secondly, the district court may help clarify whether the threshold test triggering application of the statute has in fact been met.[3/]

Our action today is without prejudice to the filing of future petitions seeking the institution of Section 105a proceedings in this matter.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 21st day of December, 1979.

3/ We need not decide today whether, under other circumstances, a Section 105a proceeding could be instituted on the basis of a record as slender as that before us with respect to the connection between the violation of the antitrust laws and the licensed activity. We exercise our discretion to await a possibly fuller record on this point.

DISSENTING VIEWS OF COMMISSIONER BRADFORD

The Commission decision today revisits the occasional agency practice of straining law and fact in order to avoid the responsibilities that Congress has charged us with. It is true that the Report of the President's Commission on the Accident at Three Mile Island has advocated a review of transfers of statutory jurisdiction to "remove any unnecessary responsibilities that are not germane to safety."[1/] However, until such a review has been conducted and Congress has acted, it does not become us to seek the same result by legal sleight-of-hand.

The Commission's antitrust jurisdiction is an unusual one and results in substantial part from a compromise between those who favored publicly-owned development of nuclear power and the proponents of privately-owned nuclear power plants. In accepting private ownership, the Congress gave the Atomic Energy Commission its unique antitrust jurisdiction to assure that nuclear power would not be developed in an anti-competitive manner, specifically that municipal and other small systems would not be disadvantaged in their access to nuclear power. It is that Congressional compromise that this NRC decision works to undermine.

Until today, Section 105(a) was one of the more clearly written sections of the Atomic Energy Act. It required a finding by "a court of competent jurisdiction" that a licensee had "violated any of the provisions of [certain antitrust laws] in the conduct of the licensed activity" to trigger Commission concern as to the necessary remedy. One would not have thought that the Commission's discretion in fashioning a remedy was tantamount to a license to ignore the finding altogether. Let us observe closely the three-part rationalization employed to reach this peculiar result.

1/ President's Commission Report, at p. 63.

I. LEGISLATIVE HISTORY

The legislative history of Section 105(a) of the Atomic Energy Act is said to be "unequivocal" based on a single exchange between one Congressman and the General Counsel of the Atomic Energy Commission. Since this passage drifts free in the Commission opinion, it is not clear what it is there to prove so unequivocally, but one must assume that it was thought to be supportive of what follows and deal with it accordingly.

First, legislative history cannot be unequivocally established out of the mouth of a single Congressman. The rest of the Congressional debate and the public versus private power controversy as it affected nuclear energy point in rather a different direction and are ignored.

Second, Mr. Mitchell, the AEC General Counsel, apparently neither prepared nor offered the language which was finally enacted as Section 105(a), so he is scarcely a compelling authority as to what the intent of Congress was. For a colloquy like this to be meaningful, it should include the sponsor.

Third, taken as meaning something, the colloquy says only that the Atomic Energy Commission's General Counsel thought that, following a finding that a conspiracy existed, "normally the court itself would take whatever action would be appropriate." In a circumstance in which it was likely that the court's remedy would not reach abuses involving the licensed activity, Mr. Mitchell's words suggest that separate Commission action would be in order. That is the case here.

II. COMPETENT JURISDICTION

Here again it is hard to be sure just what the Commission is saying. It does not for obvious reasons say that the Appellate Court is not a court of competent jurisdiction. However, much is made of the "context" of the Court's unequivocal (here that word does apply) finding that Florida Power and Light and Florida Power Corporation had conspired in violation of Section 1 of the Sherman Antitrust Act to divide the Florida wholesale power market. Ordinarily, the Commission says, the Court's finding and its remedy would be simultaneously available, and the Commission could decide whether a further remedy were necessary. This is true, but is not relevant to this case.

In this case, there is little possibility that the District Court will fashion a remedy having directly to do with NRC licensed activities. For one thing, Florida Power Corporation is not even a party to the court case; for another, the issues before the court are the cause of and the damages from the denial of an interconnection, an issue very unlikely to lead the court into nuclear power plants. If licensed activities are part of the conspiracy, an NRC-fashioned remedy under Section 105(a) is going to be necessary unless the matter is dealt with in individual licensing proceedings under Section 105(c) or is otherwise resolved.

III. LICENSED ACTIVITY

The Commission opinion on this point is hard to treat with respect. The Court found that the companies had a conspiracy as of 1968 to divide

the wholesale power market in Florida. All of the nuclear power plants which today make up more than 15% of the conspirators' generating capacity were then well past the planning stage at which ownership and energy purchases would have been initially considered and divided. Consequently, a substantial part of the wholesale power market being conspired about is in fact an NRC licensed activity. In order to conclude that NRC licensed activity may not be involved in the conspiracy, the Commission must make some unlikely inference of the type:

1) That the conspiracy and its effects ceased before nuclear power became part of the Florida wholesale power market, or

2) That the conspiracy involved interconnections and never extended to nuclear generating stations.[2/]

Neither of these conclusions can validly be made without instituting a proceeding, which is precisely why a proceeding is necessary if we are to live up to the duty placed on us by Section 105(a) to ascertain whether or not NRC action is necessary to remedy antitrust violations or situations inconsistent with the antitrust laws in the context of NRC licensed activities. As I have said previously, I cannot understand the majority's faith that the District Court, confronted as it is with different parties and different issues, "may well illuminate this issue." In the unlikely event that it does, we can make use of the illumination; if it does not, we would not have wasted the many months that will elapse before we have the decision of the District Court.

2/ The conspiracy clearly included interconnections involving specific generating facilities. See the discussion of the Indian River Plant, Gainesville v. Florida Power and Light Co., 573 F.2d 292, at 298 (1978).

IV. OUR ANTITRUST RESPONSIBILITIES

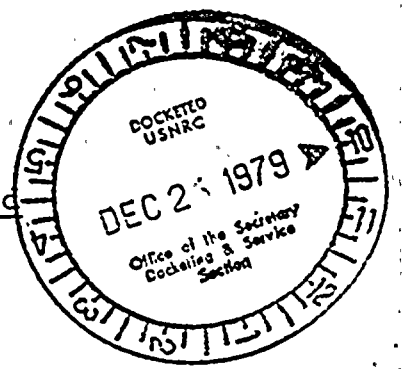
It seems to me that this Commission virtually insults the efforts of the parties to whom we propounded questions. All of them except the licensee urged consideration of the sort that the Commission now denies.

As the staff notes in its Memorandum, it is not necessary to open a full Section 105(a) proceeding at this time. Instead, the Commission could refer the issues raised in the Gainesville decision to the Licensing Board presiding over the antitrust review of St. Lucie 2 and Turkey Point 3 and 4. Although Florida Power Corporation is not a party to that proceeding, the issue of licensed activity would at least be examined directly. If the Board rendered a positive finding, we could then institute a Section 105(a) proceeding involving all parties. This approach would not impose any serious burden on the NRC or the parties.

If it is the NRC's feeling that its antitrust responsibilities detract from its ability to protect the public from radiation, it should go to Congress and say so. In the meantime, it wastes time and money to put the parties through hoops to end up with a dismissal that reads like a half-stifled yawn.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



Elizabeth S. Bowers, Chairman
Dr. Oscar H. Paris, Member
Dr. Emmeth A. Luebke, Member

In the Matter of	)	Docket Nos. 50-250-SP
	)	50-251-SP
FLORIDA POWER & LIGHT COMPANY	)	(Proposed Amendments to
	)	Facility Operating License
(Turkey Point Nuclear Generating Units 3 and 4)	)	to Permit Steam Generator Repairs)

ORDER RELATING TO LICENSEE'S MOTION FOR EXTENSION OF TIME

On December 17, 1979, Licensee filed a document entitled "Licensee's Responses and Objections to Interrogatories to, and Request for the Production of Documents from Licensee, Florida Power and Light Company". In a response filed the same day, the Intervenor requested that the Board compel Licensee to answer certain interrogatories to which Licensee had objected.

On December 21, 1979, Licensee filed a motion advising that it wished to respond to Intervenor's December 17 filing and requesting an extension of time in which to respond, to January 14, 1979. Licensee said that it planned to withdraw some of its objections, but its determination of which objections to withdraw would require recommendations from technical personnel who would not be available during the upcoming holiday season. Licensee represented that counsel for Intervenor stated that he had no objection to the extension of time, and counsel for the NRC Staff likewise has stated that he does not object.

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For good cause shown, and there having been no objections, Licensee's motion is granted.

IT IS SO ORDERED

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Oscar H. Paris, Member
FOR: Elizabeth S. Bowers, Chairman

Dated in Bethesda, Maryland,
this 21st day of December, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER AND LIGHT COMPANY	)	Docket No.(s) 50-250SP
	)	50-251SP
(Turkey Point, Units 3 and 4)	)	
	)	
	)	
	)	
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
26th day of DEC 1979.

Peggy K. Downing
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER AND LIGHT COMPANY	)	Docket No.(s) 50-250SP
	)	50-251SP
(Turkey Point, Units 3 and 4)	)	
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Nuclear Generating Units 3 and 4)	Docket Nos. 50-250-SP 50-251-SP (Proposed Amendments to Facility Operating License to Permit Steam Generator Repairs)

ORDER RELATIVE TO DISCOVERY AND SCHEDULING

By order dated August 3, 1979, the Board admitted Mark P. Oncavage as an Intervenor in this proceeding. The order recognized the Petitioner's interest may be affected by the proceeding and accepted some of his contentions. Both the Intervenor and the NRC Staff suggested that the parties meet to consider the possibility of reaching agreement or entering into a stipulation. The parties were also urged to meet as promptly as possible and to also try to agree on a realistic discovery schedule.

The parties met on August 30, 1979, but were unable to reach an agreement on other contentions (contentions revised as of August 30, 1979), and FPL and the Staff had reservations on some of the references in some of the admitted contentions. The parties agreed they would submit their respective positions to the Board on September 14, 1979. FPL and the Intervenor agreed to a tight discovery schedule with the evidentiary hearing commencing on December 4, 1979. The Staff believed it premature to set dates for the prefiled testimony and the hearing. (Letter from FPL and motion to adopt schedule, both dated September 4, 1979).

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On September 17 and 18, 1979, the Board received the statements of the parties concerning the contentions. On September 17, 1979, the Staff responded to FPL's motion to adopt the proposed schedule. The Staff recited why it could not agree to the schedule.

By Order of September 25, 1979, the Board ruled on all contentions, rewording many which were then acceptable and rejecting some. 1/ The Order also set forth a discovery schedule with a hearing date of January 8, 1980. The schedule also provided that discovery requests should be submitted no later than October 22, 1979. Responses to discovery requests were required to be filed by November 30, 1979.

On October 27, 1979, the Intervenor filed a discovery request on FPL. The Licensee protested on October 31, 1979, that it was out-of-time, voluminous and that it would be treated as a "nullity".

The Board's Order of November 5, 1979, recites the action to be taken by the Intervenor and FPL flowing from a conference call on November 2, 1979. The Order required FPL to file a Memorandum relative to its objection to the untimely discovery request and to state which interrogatories it objected to, if any, by November 7, 1979. The Intervenor was asked to respond to these documents

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1/ The Board believes it is appropriate to enlarge on its rejection of Contention 11(c). The Intervenor challenged the $1,000 per man-rem contained in 10 CFR Part 50, Appendix I. Part 20 regulates radiation protection standards for workers and the mandatory value set forth in Part 50 Appendix I does not apply. See Northern States Power Company (Prairie Island Nuclear Generating Plants, Units 1 and 2) and Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Station), ALAB-455, 7 NRC 41 (1978).

by November 13, 1979, but counsel for the Intervenor would not agree to this date, since he could not know in advance the extent of the effort. The Intervenor was directed to either respond or to establish good cause for a time extension by that date. The requested documents were received from FPL

The memorandum on the late filing of the discovery request stressed that good cause for the filing had not been established and that no attempt was made to seek an extension of time from the Board. The second document is FPL's response to each interrogatory. The vast majority of the voluminous requests were rejected for the reasons stated but some were not objected to without waiving the objection to the entire discovery request on late filing.

On November 13, 1979, the Board received from the Intervenor a motion for an extension of time to respond--ten days from receipt of the Board's order ruling on the motion--on the bases that counsel and the Intervenor lack familiarity with the subject matter and counsel is serving pro bono and has therefore time limitations in contrast to the resources of FPL. The document also opposed FPL's "attempt to preclude" the Intervenor's interrogatories and stated, if reasonable time is not granted, counsel requests leave to withdraw on the basis that the proceeding will be meaningless unless there is sufficient time for preparation.

This Board was led to believe from the initial agreement reached by the parties on discovery that it would proceed in a fairly routine manner. In our order of September 25, 1979, we urged the parties to make every effort to resolve differences, should they occur, and to take expeditious actions. While we are

most reluctant to accept a late filing for which no time extension was requested from the Board, we have considered the arguments of FPL and the Intervenor on this matter and have determined that sufficient justification has been presented by the Intervenor to rule that the document is acceptable. 2/ We also are aware that counsel for the Intervenor now recognizes the necessity of requesting additional time from the Board if there is a real problem in meeting a due date. We again remind all parties of their obligation in this respect.

This proceeding has developed quite differently from what we had a right to anticipate from the discovery schedule proposed by the parties on September 4, 1979--which incidentally was incomplete because it related only to those contentions accepted by the Board Order of August 3, 1979.

We now agree with the Staff that it is inappropriate to set dates for the filing of prepared testimony and for the hearing. Those dates are cancelled. We are also cancelling November 30, 1979, as the last day to respond to discovery requests but set 30 days from the date of this order for the response date for discovery requests not in dispute. 3/

2/ The Staff declined to take a position since the matter was between FPL and the Intervenor. On October 29, 1979, the Appeal Board accepted an untimely brief, albeit reluctantly, from an Intervenor under similar circumstances. See Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 9 NRC __ (1979).

3/ The cancellation of these dates has removed the urgency which previously existed for FPL to file its objections to the voluminous interrogatories. The Board will respond favorably if FPL wishes to supplement its response in a reasonable time.

We now have before us a motion from the Intervenor for a time extension. We await the parties' response to that motion in accordance with 10 CFR §2.730.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Elizabeth S. Bowers

Elizabeth S. Bowers, Chairman

Dated at Bethesda, Maryland
this 15th day of November 1979.