UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

8/25/78

Florida Power & Light Company (St. Lucie Plant, Unit No. 1)	)	Docket No. 50-335A
Florida Power & Light Company (Turkey Point Plant, Units No. 3 and No. 4)	)	Docket Nos. 50-250A 50-251A

FLORIDA CITIES' RESPONSE TO THE COMMISSION'S JULY 28, 1978 ORDER

In view of the Fifth Circuit's holding in Gainesville Utilities v. Florida Power & Light Company, 573 F.2d 292 (1978), that Florida Power & Light Company ("FP&L" or "P&L") has violated the antitrust laws, the Commission has requested party responses concerning (1) the type of remedial procedures that should be adopted and (2) the timing of such proceedings. At pages 2-12, Florida Cities[1/] state why 105(a) procedures should be commenced now. At pages 12-17, they discuss the procedures they recommend. These recommendations are summarized at pages 12-13. At pages 17-18, they specifically address the question of consolidation, although this issue is also discussed at pages 12-15.

1/ Florida Cities include the Ft. Pierce Utilities Authority of the City of Ft. Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, the Cities of Alachua, Bartow, Fort Meade, Key West, Lake Helen, Mount Dora, Newberry, St. Cloud and Tallahassee, Florida, and the Florida Municipal Utilities Association.

I. SHOULD THE COMMISSION INITIATE A 105(a) PROCEEDING AT THIS TIME, OR SHOULD IT AWAIT THE COMPLETION OF THE REMANDED ASPECTS OF THE GAINESVILLE CASE?

For the reasons set forth below, Florida Cities believe that the Commission should initiate a 105(a) proceeding now:

The Fifth Circuit states:

> "... We hold that the evidence compels a finding that P&L was part of a conspiracy4/ with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida."
>
> "4/ Section 1 of the Sherman Act makes every 'conspiracy in restraint of trade or commerce' illegal (15 U.S.C.A. §1)...." 573 F.2d at 294.1/

It should be stressed that the Court found actual law violation, not an "inconsistency with" the antitrust laws or a "tendency to" violate them.

1/ After thoroughly reviewing the evidence, the Court states (573 F.2d at 299):

> "A horizontal market division in most industries is clearly a per se violation of the Sherman Act."

Noting that the Florida Public Service Commission "did not approve any territorial arrangement between P&L and Florida Power relating to the Gainesville area," and that courts had in any event made clear that government regulation of a heavily concentrated industry doesn't exempt it from antitrust regulation, the Court ruled that "the same per se standard" should apply in this case. 573 F.2d at 299-300.

The Fifth Circuit concluded (573 F.2d at 303):

> "In a concentrated market, therefore, we believe a court should carefully scrutinize firms to see if their conduct or any communication among them supports or requires a finding of conspiracy. . . . In this case, the incriminating correspondence between the two largest electric power companies in Florida warrants such a finding." (footnote omitted)

FP&L may argue on remand that its illegal conduct was not a "significant factor" in denying Gainesville an interconnection, or that damages are minimal. 573 F.2d at 304. However, FP&L sought and was denied rehearing.[1/] The holding that the evidence "compels" a finding of antitrust violation negates argument that NRC action under §105(a) of the Act should await further district court proceedings.[2/]

It is of course possible, although we believe unlikely, that the Supreme Court would both choose to review the Gainesville decision and reverse it. However, even if FP&L were successful in overturning the decision, it is questionable whether a reversal would be legally significant to the NRC's §105(a) obligations, absent a reversal of the court's finding of law violation. Moreover, Gainesville is in harmony with existing law, is fully supported, and does not raise issues of sufficient importance to warrant Supreme Court review.

In choosing whether to institute proceedings now or to await exhaustion of all possible appeals, the Commission is to be guided by the purposes of its enabling statute and the dictates of fundamental fairness. Here, these factors call for immediate hearing.

(1) The law violation found by the Fifth Circuit is of a fundamental nature. In dividing territory, "... P&L was part of a

1/ The Court's rehearing order is attached.

2/ In the district court, Gainesville seeks only damages for injury resulting from FP&L's law violations and a discontinuance of the territorial agreement as it pertains to Gainesville, not the broader prospective relief sought herein by Florida Cities.

conspiracy with Florida Power Corporation (Florida Power) to divide the wholesale power market in Florida." 573 F.2d at 294; footnote omitted. The effect of such conspiracy was to deny all municipals in Florida Power Corporation's "territory" access to power from FP&L's licensed nuclear units and other power supply sources. Similarly, municipals in FP&L's "territory" could not buy from Florida Power Corporation, thereby limiting their power supply options.

(2) Evidence quoted by the Fifth Circuit shows a refusal to sell wholesale power to municipals within Florida Power's "territory." 573 F.2d at 298. Further, FP&L's proposed new electric rate tariff at the Federal Energy Regulatory Commission, which the Commission may officially notice, sets forth (1) FP&L's refusal to sell total requirements wholesale power to new customers; (2) FP&L's refusal to sell wholesale power to systems having generation, except to replace "insufficient capacity;" and (3) FP&L's refusal to permit a "full service interchange power agreement" for systems purchasing wholesale power. Under the terms of the tariff, as proposed, FP&L would refuse to sell wholesale power under terms and conditions standard to wholesale power agreements to nearly every municipal system in Florida.[1/] Florida Cities respectfully incor-

1/ FP&L's proposed tariff has been made effective by the Federal Energy Regulatory Commission, subject to that Commission's review. The issue of the legality of such tariff is presently before that Commission in Florida Power & Light Company, FERC Docket No. ER78-19 et al. The proposed tariff, and related documents, were submitted in NRC Docket Nos. 50-335A et al as part of Florida Cities' "Motion to Lodge Documents," as corrected, filed October 26, 1977, but were rejected by an NRC Order dated December 9, 1977. Regardless of the legality or acceptability of the proposed tariff under the Federal Power Act, Florida Cities submit that it constitutes a clear violation of the antitrust laws and an attempt to limit the "widespread utilization" of the economic benefits of atomic energy contrary to the purposes of the Atomic Energy Act. Atomic Energy Act, §1-3, 43 U.S.C. §2011-2013. Quotation from §3(d), 42 U.S.C. §2013(d).

porate and resubmit their Motion to Lodge Documents by reference.

(3) The wholesale territorial agreements held illegal by the Fifth Circuit provides the basis for allegations in Florida Cities' petitions to intervene before the NRC concerning situations claimed to be inconsistent with the antitrust laws. The licensing boards convened to consider these allegations found that they warranted antitrust hearing and review. In Florida Power & Light Company (South Dade Plant), Docket No. P-636-A, at pages 31-37 of their petition to intervene, Florida Cities specifically alleged the existence of territorial agreements between FP&L and Florida Power Corporation, as relevant to a §105(c) hearing, 42 U.S.C. §2135(c).[1/] In seeking §186 review of the Turkey Point and St. Lucie No. 1 units and late intervention in St. Lucie Unit No. 2 under §105(c), Florida Cities raised similar allegations.[2/] Citing these very pages, the licensing board panel assigned to review the sufficiency of Florida Cities' Joint Petition found "that the allegations concerning territorial agreements between the Applicant and the Florida Power Corporation...are each acceptable contentions satisfying the requirements of 2.714." "Memorandum and Order Grant-

1/ "Joint Petition of Florida Cities for Leave to Intervene; Request for Conference and Hearing" (April 14, 1976). Since the relief requested related directly to Florida Power & Light Company (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-389A, Florida Cities requested that their petition be lodged in that docket as well. Letter of Robert A. Jablon, attorney for Florida Cities, to Secretary, United States Nuclear Regulatory Commission (April 14, 1976).

2/ Florida Power & Light Company (St. Lucie Plant, Units No. 1 and 2, Turkey Point Plant, Units No 3 and 4), Docket Nos. 50-335A, et al, "Joint Petition of Florida Cities for Leave to Intervene Out of Time; Petition to Intervene; and Request for Hearing" (August 6, 1976, pp. 67-70).

ing Joint Petition for Leave to Intervene Out of Time and Request for Antitrust Hearing," Florida Power & Light Company, Docket Nos. 50-389A and 50-335A et al, supra 5 NRC 790, 793.[1/]

(4) These allegations concerning FP&L's anticompetitive activities are not isolated. In connection with Florida Cities' late intervention in Florida Power & Light Company (St. Lucie Plant, Unit No. 2), Docket No. 50-389A, the Department of Justice states:

> "In the present case, there is little doubt that sufficient allegations have been made against FP&L to constitute a situation inconsistent with the antitrust laws that would be created or maintained by the licensed activities, if they are proven. FP&L has allegedly denied access to nuclear units to virtually all publicly-owned competing electric systems, generally refused to wheel, refused specific wheeling requests, attempted to induce other systems to refuse to wheel, placed unlawful restrictions in wholesale power contracts, refused to sell wholesale power on over a half a dozen occasions, preconditioned the sale of wholesale power on anticompetitive terms, subjected competitors to a price squeeze, engaged in illegal territorial agreements and otherwise denied competitors access to coordinated operation and development in an attempt to acquire those competing systems. Furthermore, the Licensing and Appeal Boards had before them a substantial amount of documentary evidence which demonstrated that most of the above-noted allegations have a substantial basis in fact and are not frivolous." "Response of the Department of Justice" (November 11, 1977, at pages 10-11).

FP&L has unlawfully monopolized nuclear power. It has denied Florida Cities the benefits of such power and it has further acted

1/ In Florida Power & Light Company (South Dade Plant), Docket No. P-636-A, "Prehearing Conference Order No. 1" (July 29, 1976, slip opinion, pages 3-6), the licensing board denied FP&L's motion to "strike from this proceeding all allegations that it conpired with Florida Power Corporation in violation of §1 of the Sherman Act."

both to limit Florida Cities' abilities to develop alternative power supply sources and to otherwise limit the efficiency of Florida Cities' operations, all with the intent of injuring them competitively and, indeed, possibly forcing them from business. Through establishing territorial divisions over wholesale power markets, FP&L has furthered such purposes and has acted in a way that would prevent municipals from jointly building generating plants that could have allowed them economies of scale similar to those enjoyed by FP&L.

(5) The Atomic Energy Act has a declared purpose of fostering "widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent" consistent with national security, health and safety. Atomic Energy Act §1, 42 U.S.C. §2011; emphasis supplied. Accord, §2-3, 42 U.S.C. §2012-2013. It has the further purpose of assuring that licensees do not use governmentally-developed nuclear power anti-competitively. Atomic Energy Act, §1, 42 U.S.C. §2011(b), §105, 42 U.S.C. §2135.

> "In its Waterford decisions, the Commission explained the reasons underlying its involvement in antitrust matters. 'The requirement in Section 105 of the Atomic Energy Act for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities.' Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 AEC 48-49 (1973) (Waterford 1). The antitrust responsibilities placed on the Commission are 'a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that original public control should not be

> permitted to develop into a private monopoly via the AEC license process, and that access to nuclear facilities be as widespread as possible.' Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 620 (1973) (Waterford II)." Kansas Gas & Electric Company and Kansas City Power & Light Company (Wolf Creek Generating Station, Unit 1), 1 NRC 559, 564-565 (1975).

In permitting late intervention in St. Lucie Plant Unit 2, the Commission again recognized these policies "reflected in §105(c)":

> "... that a government-developed monopoly like nuclear power electricity generation not be utilized in ways which contravene the policies contained in the various antitrust acts. Section 105(c) is a mechanism to allow the smaller utilities, municipals and cooperatives access to the licensing process to pursue their interests in the event that larger utility applicants might use a government license to create or maintain an anticompetitive market position." Memorandum and Order (June 22, 1978, slip opinion, pp. 9-10).

(6) In addition to the above enumerated items, policies in favor of expeditous consideration of antitrust matters support the ordering of an immediate hearing.[1/]

While the matters here at issue cannot be resolved before plant construction, there is still strong public interest in early resolution of these matters once they have been raised, to permit power supply and investment planning.

(7) Relief in antitrust cases is intended to eliminate the evils resulting from anticompetitive conduct, to prevent such future

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1/ Such factors have been vigorously pressed by FP&L in opposing antitrust review of its St. Lucie Unit No. 2. See "Memorandum and Order," supra, page 9. See generally Florida Power & Light Company (St. Lucie Plant, Unit No. 2) "Brief of Florida Power & Light Company," Docket No. 50-389A, in which FP&L argued strenuously the need for early resolution of antitrust matters.

conduct and to deprive wrongdoers of the unlawful fruits of their acts.[1/] Delay only makes the remedy more difficult and permits continued wrongdoing by FP&L.

Balancing the above factors, every equity points towards the Commission acting now in recognition of the Fifth Circuit's finding. Absent Supreme Court review, the Fifth Circuit's determination is final. It hardly need be pointed out that the Supreme Court hears relatively few of the many cases in which review is sought. The evidence and law which is summarized in Judge Brown's decision creates what we believe to be a near certainty that even if review were granted, affirmance would be likely.

Even if interim relief is granted, actual NRC relief will not be immediate. Unless there is a settlement, relief will come after further consideration by the licensing board and after possible appeals within the NRC. In any event, if due to actual Supreme Court action which might be taken, or otherwise, delay in implementing NRC ordered relief should be found to be appropriate, such relief can then be deferred or limited.

In the exercise of its authority, the NRC is not constrained to delay its hearing processes after a licensee has been found by a court to have violated the law because of the mere possibility that

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1/ "We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act." United States v. Grinnell Corp., 384 U.S. 563, 577 (1966). Accord, United States v. Griffith, 334 U.S. 100, 109-110 (1948): "We remit to the district court not only that problem [of determining the effect on competitors and on the growth of the Griffith Circuit of the monopoly power of appellees] but also the fashioning of a decree which will undo as near as may be the wrongs that were done to prevent their occurrence in the future."

that court finding may be overturned.

In view of the often time-consuming nature of the administrative process,[1/] it would be plainly inequitable to delay a hearing concerning §105(a) relief, when the only cost to FP&L from such hearing would be the cost involved in the hearing itself, but delaying the hearing process pending the outcome of Supreme Court review would substantially protract the continuing injury from which Florida Cities seek relief. The cost of denying delay to FP&L is that it must participate in a hearing; the cost to Florida Cities and to the public is FP&L's continued enjoyment of the fruits of illegal activity during the NRC hearing process after all possibility of judicial review is exhausted. As the Supreme Court has stated in NLRB v. Marine Workers, 391 U.S. 418, 425 (1968): "If the [plaintiff] becomes exhausted, instead of the remedies, the issues of public policy are never reached...." In any event, harm to FP&L from early resolution of these matters is strictly illusory (except for the possibility that it may be forced to cease its illegal actions, or give up the benefits it receives as a result of such conduct, ahead of its preferred schedule). As is implicit in the Commission's July 28th order, a hearing is to be held concerning many of the same issues in St. Lucie 2. By seeking delay, FP&L can only increase the expense of the hearing process.

1/ Florida Cities first sought antitrust review concerning FP&L's alleged illegal activities in their petition to intervene filed on April 14, 1976 in Florida Power & Light Company (South Dade Plant), Docket No. P-636-A. Their petition to intervene in the instant dockets was formally filed August 6, 1976. See pages 5-6, supra.

The law is clear that even if hearings turn out to be a nullity, a litigant cannot complain merely because of the expense of a hearing called to determine rights. As the Supreme Court said in a related context:

> "Obviously, the rule requiring exhaustion of administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." Myers v. Bethlehem Corp., 303 U.S. 41, 51-52 (1938); footnote omitted.

But, what cost can there be to FP&L from subjecting it to a hearing, when a hearing has already been ordered on similar issues?

The Commission has ample authority under §105(a) to order a hearing now. And apart from §106(a), §161, 42 U.S.C. §2201, provides broad administrative authority to order its own procedures.[1/] Moreover, while in South Texas[2/] the Commission has held, incorrectly in Florida Cities' view, that it has limited antitrust authority under §186, 42 U.S.C. §2236, a judicial finding of law violation provides ample grounds for "triggering" the Commission's authority under that Section.

1/ Sections similar to §161 have been determined to give administrative agencies broad discretion over the control of their procedures. E.g., Niagara Mohawk Power Corp. v. FPC, 379 F.2d 152, 158 (1967), and cases cited in note 18 thereof.

2/ Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13 5 NRC 1303 (1977), petition for review dismissed sub nom. Central Power & Light Company v. NRC, D.C. Cir. No. 77-1464 (1978).

Further delay would be especially inequitable here. As the Fifth Circuit noted in commencing its decision:

> "After ten years of litigation and one trip to the Supreme Court in a related case, we finally reach the merits in this private antitrust suit." Gainesville Utilities Department v. Florida Power & Light Company, supra, 573 F.2d at 293; footnote deleted.

What is involved in the present case is misuse of a governmentally-granted license. To quote the D.C. Circuit in Niagara Mohawk Power Corporation v. FPC, 379 F.2d 153, 159 (1967);

> "Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives. This source of discretion is available not only where an agency has the explicit power to impose penalties (see cases cited, note 20), but also where the agency's order, though having aspects of determination of individual fault, is a denial to a wrongdoer of participation in a Government program generally extended to businessmen, for the purpose of maintaining the fairness, equity and efficiency of the program. Here the case is stronger, for petitioner seeks a license or privilege. While that license may not be unreasonably or unlawfully withheld, it certainly need not be extended to an applicant not ready to redress his default by discharging the duty he should by rights have assumed without nudging." Footnotes omitted; emphasis added.

II. SHOULD ANY 105(a) PROCEEDING BE CONSOLIDATED WITH THE CURRENT 105(c) ANTITRUST HEARING ON THE ST. LUCIE 2 PLANT?

Florida Cities suggest and respectfully request the following procedures: (a) Consolidation of a §105(a) investigation with the current §105(c) antitrust hearing relating to St. Lucie Unit No. 2; (b) Authorization of the St. Lucie 2 licensing board to consider a

request for show cause proceedings granting interim relief, pending final resolution of procedures.

In view of the finding that FP&L has violated the antitrust laws, the Commission has the obligation to fashion appropriate relief. Since liability has been determined, normally the appropriate Commission procedure would be to order a show cause proceeding why specified relief should not be granted. As has been discussed above, where a court has found actual law violation, procedures that might delay relief cannot be tolerated. Unlike in prelicensing review, licensed nuclear units in actual operation are being used to violate the law.

Congress envisioned that relief could vary depending upon the type of violation found.[1/] In the case of a serious law violation, as is found here, relief could include divestiture of the unit and transfer of title to a utility or utilities committed to upholding the antitrust laws, as opposed to one whose conduct gives little grounds for hope that it will comport with antitrust law or policy.[2/] Schine Theatres v. United States, 334 U.S. 110, 128 (1948); United States v. Grinnell Corp., 384 U.S. 563, 580 (1966).

1/ E.g., 100 Cong. Rec. 11741 (July 27, 1954) Hickenlooper concerning §105(a) of the Act: "... the Commission could go so far as to completely revoke the license. That provision was put in as a protection in the future against violations which might arise as a result of the licensing provision...."

2/ Florida Power Corporation has publicly announced a policy to follow the antitrust laws.

> "The latest remedy cases indicate two modifications of early judicial pronouncements, one practical, the other theoretical. On the practical side they show that courts are less likely than formerly to be impressed by evidence which tends to establish that defendants who have violated the Sherman Act in the past will not do so in the future. On the theoretical side, a rule has been formulated which, when applied, will serve to deprive defendants of the fruits of their wrongdoing. This, no doubt, is an outgrowth of an awareness that strong measures are required to restrain a tendency to recidivism." United States v. Aluminum Co. of America, 91 F Supp. 333, 343 (SDNY, 1950).

Florida Cities have requested the NRC to confirm their rights to acquire entitlements through direct ownership in Turkey Point Units 3 and 4 and St. Lucie Unit 1, as well as access to nuclear generated power through the purchase of power; rights to participate in the establishment of a state-wide integrated power pool; and access to the state-wide transmission grid, among other things. The Commission has ordered a hearing in St. Lucie Unit 2 to consider these requests for relief. The requested relief in this 105(a) proceeding, if ordered, will raise virtually identical claims for relief.[1/]

The St. Lucie 2 hearing will undoubtedly bring out surrounding circumstances relating to FP&L's illegal conduct more fully than a limited show cause proceeding, including circumstances that FP&L would seek to raise to justify more limited relief. The resulting record would be more complete than a show cause proceeding. There-

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1/ See pages 5-6, supra, discussing the identical nature of the issues raised here in their petition to intervene in Docket Nos. P-636-A, 50-389A and 50-335A et al, and those ruled upon by the Fifth Circuit.

fore, assuming that consolidation would not unduly delay relief, and bearing in mind that this is the first 105(a) proceeding, consolidation with St. Lucie 2 would be recommended. Such consolidation would assure a full record on all issues, avoid duplicative litigation and save costs to both the Nuclear Regulatory Commission and the parties.

Such consolidation would be recommended, however, only on the assumption that the licensing board is given the authority to consider the possibility of limited interim relief. Any order allowing such interim relief would, of course, be subject to any factual or legal showing by FP&L why relief should not be ordered and to review by the appeal board (and the Commission, if discretionary review is sought and granted).[1/]

Interim relief could be limited to that which could be implemented on a temporary basis and that which is directly related to FP&L's antitrust violations and this Commission's statutory con-

1/ Florida Cities recognize that broad relief of a permanent nature, such as a divestiture, may call for additional hearing procedures than would be required in connection with more limited relief. However, there is no reason why, an actual law violation having been found, FP&L should not now be ordered to sell unit power from the operating plants, possibly subject to a condition that Florida Cities sell back equivalent amounts of non-nuclear capacity to FP&L, and make available transmission services, based upon a state-wide transmission tariff to be filed with the Federal Energy Regulatory Commission. See Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). If such limited interim relief were ordered, FP&L would have the same amount of capacity available as it does now, but Florida Cities would get some access to the ecnomic benefits of nuclear power, albeit on a limited, less valuable basis than direct ownership. Since under unit power sales, FP&L would earn a full equity return, such relief would do either no harm or minimal harm to its corporate interests. The territorial agreement complained of blocked Florida Cities from low-cost power supply access throughout Florida. Making such unit power sales and state-wide transmission available could partially -- but only partially -- redress the resultant harm.

cerns, leaving any complex issues for fuller hearing and briefing.

Florida Cities point out that an agency's ordering of temporary relief is in the best tradition of regulatory practice seeking to assure fair and equitable treatment. As the Supreme Court stated in FPC v. Tennessee Gas Company, 371 U.S. 145, 154-155 (1962):

> "Moreover, the use of the interim order technique is in keeping with the purpose of the Act 'to protect consumers against exploitation at the hands of natural gas companies....' and 'to underwrite just and reasonable rates to the consumers of natural gas....' Faced with the finding that the rate return was excessive, the Commission acted properly within its statutory power in issuing the interim order of reduction and refund, since the purpose of the Act is 'to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges....'... To do otherwise would have permitted Tennessee Gas to collect the illegal rate for an additional 18 months at a cost of over $16,500,000 to consumers. It is, therefore, the duty of the Commission to look at 'the backdrop of the practical consequences...and the purposes of the Act,' in exercising its discretion under §16 to issue interim orders and, where refunds are found due, to direct their payment at the earliest moment consistent with due process. In so doing under the circumstances here the Commission's ultimate action in directing the severance and in entering the interim order was not only entirely appropriate but in the best tradition of effective administrative practice."1/ emphasis added.

1/ Throughout the above quotation, citations and footnotes are omitted. Section 16 of the Natural Gas Act is analogous to §161, 42 U.S.C. §2201 of the Atomic Energy Act. Producer gas regulation cases are especially apposite. Conscious that delays incident to sales at an unregulated price pending Commission relief could set patterns that were difficult, if not impossible, to correct, in Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, the Supreme Court encouraged the development by the Commission of procedures to remedy the situation on an interim basis. The exercise of such authority was affirmed in cases such as FPC v. Hunt, 376 U.S. 515 (1964) and United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965). See also Niagara Mohawk Power Co. v. FPC, 379 F.2d 153 (1967), emphasizing regulatory commission's broad remedial authority.

The procedures recommended are especially appropriate in this case. Permitting continued antitrust violations, long after the violations have been found, merely reinforces such illegality and rewards the wrongdoer with continued benefits. The emphasis of the NRC on prelicensing antitrust review has been to prevent antitrust abuse at its incipient stages and to thus avoid the necessity of correcting illegal conduct. These same factors stress the need for corrective action, once an antitrust violation has been found.[1/]

III. ARE THE POSSIBLE EFFICIENCIES GAINED IN CONSOLIDATION REASON TO CONVENE THE 105(a) INQUIRY NOW?

Florida Cities have answered this question in the context of the preceding questions. Without attempting to belabor the point, the response is clearly yes. In St. Lucie 2, Florida Cities have raised contentions that were before the District Court. Requested relief in the St. Lucie 2 proceeding and §105(a) hearing will overlap. While there would be differences in context and some different legal issues between the proceedings, it would be plainly duplicative of time, money and effort to establish two separate antitrust review processes. Further, if the 105(a) proceeding were

1/ Florida Cities disagree with the Commission's view that its post-licensing antitrust review function under §186 of the Act is limited. 42 U.S.C. §2236; Ft. Pierce Authority of the City of Ft. Pierce v. NRC, C.A.D.C. Docket No. 77-1925 et al. However, in arguing to the Court of Appeals that it has limited §186 authority, the Commission has stressed the "completeness" of the remedies available under §105, including the Commission authority under §105(a). E.g., Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), CLI-77-13, 5 NRC 1303, 1309-1313 (1977), petition for review dismissed Central Power & Light Co. v. NRC, C.A.D.C. Nos. 77-1464 et al. Moreover, even under its more limited view of its antitrust role, where actual antitrust violations have been found, the Commission is bound to provide effective, speedy relief.

deferred, discovery, trial, exhibits, or briefing might have to be redone on largely identical issues. Any proceeding entails background knowledge. Establishing different panels, or procedures, would inevitably be limiting, when the 105(a) proceeding were held.

Florida Cities cannot envision the possible gains from duplicative hearing or review procedures relating to the same issue.

CONCLUSION

For the foregoing reasons, Florida Cities respectfully request that the Commission initiate a 105(a) proceeding at this time; that such proceeding be consolidated with the present 105(c) St. Lucie 2 proceeding, and that the licensing board be granted authority, if such authorization is required, to order interim procedures or relief relating to the 105(a) proceeding, as may be found to be appropriate.

Respectfully submitted,

Robert A. Jablon

Robert A. Jablon

Attorney for the Ft. Pierce Utilities Authority of the City of Ft. Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Utilities Commission of the City of New Smyrna Beach, the Orlando Utilities Commission, the Lake Worth Utilities Authority, the Sebring Utilities Commission, the Cities of Alachua, Bartow, Fort Meade, Key West, Lake Helen, Mount Dora, Newberry, St. Cloud and Tallahassee, Florida, and the Florida Municipal Utilities Association.

August 28, 1978

Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

GAINESVILLE UTILITIES DEPARTMENT and City of Gainesville, Florida, Plaintiffs-Appellants,

v.

FLORIDA POWER AND LIGHT COMPANY, Defendant-Appellee.

No. 76–1542.

United States Court of Appeals, Fifth Circuit.

July 28, 1978.

Appeal from the United States District Court for the Middle District of Florida; Gerald B. Tjoflat, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 22, 1978, 5 Cir., 573 F.2d 292).

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and MEHRTENS*, District Judge.

PER CURIAM:

The opinion of the panel, appearing at 573 F.2d 292, is amended by deleting in the third paragraph on page 302 the fourth sentence and part of the fifth sentence prior to the quotation and substituting the following: "That the ambiguous reply was a mere subterfuge is demonstrated by the explanation given by Alan Wright of P & L in an internal memorandum to Fite:"

The petition for rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is DENIED.

* Senior District Judge of the Southern District of Florida sitting by designation.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Florida Cities' Response to the Commission July 28, 1978 Order have been served, by deposit in the U.S. Mail, first class postage prepaid, or by hand delivery as indicated by an asterisk, upon the following persons.

Chairman Joseph M. Hendrie
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Dated at Washington, D.C., this 28th day of August, 1978.

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