UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Florida Power & Light Company	)	Docket No. 50-389A
(St. Lucie Plant Unit No. 2)	)	Docket No. 50-335A
(St. Lucie Plant Unit No. 1)	)	Docket Nos. 50-250A
(Turkey Point Plant Units No. 3 and 4)	)	50-251A

9/1/76

RESPONSE OF FLORIDA POWER AND LIGHT COMPANY IN OPPOSITION TO: JOINT PETITION OF FLORIDA CITIES FOR LEAVE TO INTERVENE OUT OF TIME; PETITION TO INTERVENE; AND REQUEST FOR HEARING

On August 6, 1976, the Florida Municipal Utilities Association (FMUA) and twenty Florida municipalities (collectively, "Petitioners") submitted a Joint Petition (the "Petition") requesting that: (i) the Petitioners be granted "late intervention" in Docket No. 50-389A and an antitrust hearing be commenced therein in connection with issuance of a construction permit; and (ii) proceedings be commenced to determine whether the operating licenses issued by the Commission pursuant to Section 104b of the Atomic Energy Act of 1954 as amended (the "Act") for Turkey Point Units No. 3 and 4 and St. Lucie Unit No. 1 [1/] should be "revoked or modified" on

1/ Operating Licenses No. DPR-31, DPR-41, and DPR-67, issued in Docket Nos. 50-250, 50-251 and 50-335, respectively.

antitrust grounds.[2/]

Florida Power and Light Company (FPL) is the applicant for a construction permit for St. Lucie Unit No. 2 and the holder of operating licenses for Turkey Point Units No. 3 and 4 and St. Lucie Unit No. 1, and submits this Response in such capacity.

The request for an antitrust hearing with respect to St. Lucie Unit No. 2 is late by more than two and one half years, and no substantial showing of good cause for this lateness appears in the Petition. Moreover, to begin an antitrust hearing at this late date would result in substantial prejudice to FPL, which has proceeded with the development of the project in reliance on the antitrust review completed more than two years ago, and would almost inevitably delay significantly the issuance of the construction permit.

There is no legal basis for commencing any proceedings respecting the three operating units in response to this Petition. In the first place, the Commission's regulations contain no

---

2/ Petition, p. 3. For purposes of convenience, FPL is responding to the Joint Petition in a single document. Since it is the position of FPL that the Joint Petition should be denied in every respect, it is not necessary to raise any argument as to the propriety of the Joint Petition's attempted de facto consolidation of various licenses and applications, but no such argument is hereby waived.

provisions for entertaining, other than in the manner specified in Section 2.206, any request for proceedings to modify or revoke licenses. However, the Petitioners' argument is flawed substantively as well as procedurally. The three operating licenses in question were issued under Section 104b of the Act; consequently, they are not subject to antitrust review except in very limited circumstances not here pertinent.

We should note, moreover, that the equitable and practical circumstances which surround this Petition overshadow the purely legal issues. This Petition imposes a cloud on the validity of operating licenses which represent a significant percentage of FPL's assets and casts doubt upon FPL's ability to construct St. Lucie Unit No. 2 in the planned time frame. Even though the Petition wholly lacks merits, the very fact that it is pending could have an adverse impact upon FPL's ability to obtain needed capital on favorable terms by the sale of securities to the investing public. No action by FPL or dramatic external event can be identified as prompting this novel and far-reaching filing by the Petitioners at this particular time. The only discernable parallel is to the antitrust hearing in Docket No. P-636A, in which prehearing procedures are now in progress, and where FPL has signalled its intention to defend vigorously against the unwarranted allegations brought by the FMUA and a group of municipalities which largely overlaps with the Petitioners here. The submission of

pleadings which may have the effect of impairing the financial strength of an electric utility, in the expectation of strengthening the filing parties' bargaining leverage in other contexts, represents a deplorable abuse of this Commission's processes.

For the foregoing reasons, as supported in detail below, it is the position of FPL that the Petition should be summarily denied in all respects.

I. PROCEDURAL BACKGROUND

A. The Operating Plants

On March 25, 1966, FPL applied for licenses to construct and operate Units 3 and 4 at the Turkey Point plant.[3/] The application requested licenses pursuant to Section 104b of the Act. On April 29, 1967, the Commission[4/] issued construction permits for the Turkey Point facilities.[5/] On July 19, 1972, the Commission

---

3/ Docket Nos. 50-250 and 50-251.

4/ The Nuclear Regulatory Commission succeeded to the licensing responsibilities of the Atomic Energy Commission pursuant to 42 U.S.C. 5841, enacted October 11, 1974. Throughout this Response the term "Commission" refers without differentiation to the Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission.

5/ 3 AEC 195.

issued an operating license for Turkey Point Unit No. 3[6] and, thereafter, on April 10, 1973, an operating license was issued for Turkey Point Unit No. 4.[7] All such licenses were issued pursuant to Section 104b of the Act, and no antitrust review pursuant to Section 105c was requested by any person or conducted by the Commission in connection with any of the licenses described above.

The application for licenses for Unit No. 1 of the St. Lucie plant, submitted on January 29, 1969, also requested licenses pursuant to Section 104b.[8] A construction permit was issued by the Commission on July 1, 1970,[9] followed by issuance of an operating license on March 1, 1976.[10] Both such licenses were issued pursuant to Section 104b, and no antitrust review pursuant to Section 105c was requested by any person or conducted by the Commission in connection with either license.

At no stage of the licensing or operation of any of these three plants was any request for a hearing on antitrust matters received from any member of the public until this Petition was submitted on August 6, 1976.

6/ Operating License No. DPR-31, Docket No. 50-250.

7/ Operating License No. DPR-41, Docket No. 50-251.

8/ Docket No. 50-335.

9/ 4 AEC 373.

10/ Operating License No. DPR-67, Docket No. 50-335.

B. St. Lucie Unit No. 2

The application for a construction permit for St. Lucie Unit No. 2 was docketed on September 4, 1973. In accordance with the Act as amended in 1970,[11] the application requested licenses under Section 103 of the Act. Accordingly, the Commission embarked on an antitrust review pursuant to Section 105c of the Act. The application was transmitted to the Attorney General of the United States for his review and advice. On November 14, 1973, the Attorney General advised the Commission that "[i]n view of the consideration Applicant is now giving to the question of access by other entities to the nuclear generation, and the probability that participation in St. Lucie Unit No. 2 will be made available to certain of these entities [footnote omitted], the Department does not at this time recommend an antitrust hearing."[12] Instead, the Attorney General recommended that the Commission "abide the outcome" of FPL's further consideration of certain matters, primarily regarding offering of an opportunity to participate in St. Lucie Unit No. 2 (together with necessary support services) to certain entities which had indicated an interest in participation.[13]

11/ Public Law 91-560 (84 Stat. 1472) (1970).

12/ 38 Fed. Reg. 26483-26484. The complete advice letter is attached as Attachment A.

13/ Id.

On November 21, 1973, the Commission published a Notice of Receipt of Attorney General's Advice and Time for Filing of Petitions to Intervene on Antitrust Matters, specifying December 28, 1973, as the final day for filing of intervention petitions.[14/] No such petitions were filed by any of the Petitioners or any other person.

Subsequently, FPL and the Staff of the Commission agreed upon certain license conditions which the Commission's Director of Licensing found "would satisfy the staff with regard to the antitrust issues that have been raised in connection with this application and the position of the Department of Justice as expressed in its letter of November 14, 1973, and accordingly obviate an antitrust hearing."[15/] As a result FPL was advised that the agreed upon "conditions will be included in any license issued in connection with the above application."[16/]

Thereafter, FPL wrote to the City of New Smyrna Beach, the only Petitioner named in the license conditions, transmitting a copy of the license conditions, stating FPL's willingness to offer participation to New Smyrna Beach and suggesting a meeting to discuss the matter further.

14/ Id.

15/ The letter of February 25, 1974, from the Commission's Director of Licensing together with the attached license conditions are attached hereto (Attachment B). FPL indicated its acceptance of those conditions by letter to the Director of Licensing of February 26, 1974 (Attachment C). Hereafter, these license conditions will be referred to as "the St. Lucie Unit No. 2 license conditions" or "the license conditions."

16/ Id., Attachment B.

From the time of docketing of the application for St. Lucie Unit No. 2, throughout the antitrust review process described above, and continuously through the present date, correspondence received by FPL from New Smyrna Beach indicates that New Smyrna Beach was actively advised and represented by Robert A. Jablon, Esquire of Spiegel and McDiarmid, the attorney for the Petitioners.

In the meanwhile the St. Lucie Unit No. 2 application has progressed through a contested hearing on environmental and site suitability matters[17/] and through evidentiary hearings on radiological health and safety matters. Work is now in progress pursuant to a limited work authorization issued by the Commission on March 17, 1975. Upon the completion of such further proceedings as may be required before the Atomic Safety and Licensing Board, including proceedings necessary to comply with the decision of the Appeal Board in ALAB-335, that Licensing Board will be in a position to authorize issuance of a construction permit.[18/] At present FPL is hopeful that a construction permit will be issued near the end of 1976.

If an antitrust hearing were to be convened in connection with the construction permit proceeding, it is clear that the Commission would not issue a construction permit for the facility

---

17/ See Partial Initial Decision, Florida Power & Light Company (St. Lucie Plant, Unit 2), LBP-75-5, 1 NRC 101 (1975), affirmed in part and remanded in part, ALAB-335, NRCI-76/6, 330 (June 29, 1976).

18/ FPL is unable to predict at this time whether any further proceedings will be required as a result of the steps described by the Statement of Policy issued by the Commission on August 13, 1976.

until an effective decision had been rendered on the antitrust issues,[19] except upon unanimous agreement by the parties to the antitrust proceeding. The Petitioners state that "they do not seek a delay in actual construction" of St. Lucie Unit No. 2, thus implying that they would enter into such an agreement.[20] However, the Petitioners' disclaimer of intent to delay construction is also couched with references to a "temporary [construction] permit"[21] and is carefully conditioned upon some form of "interim relief" which they characterize as "in the nature of a preliminary injunction."[22]

Thus there is no realistic possibility of construction being permitted to proceed during an antitrust hearing as a result of an agreement among the parties. Moreover, it is by no means certain that FPL's management would invest hundreds of millions of dollars in construction prior to final issuance of a construction permit.

Accordingly, it must be assumed that convening of an antitrust hearing at this date would significantly delay issuance of a construction permit, and therefore of construction of the facility.

19/ Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3) 6 AEC 48, 50, n.2 (February 23, 1973); 6 AEC 619, 621-22 (September 28, 1973); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), 7 AEC 307, 309 (April 8, 1974); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, NRCI-76/4, 331, 340 (April 14, 1976).

20/ Petition, pp. 14, 39.

21/ Id., p. 39, n.1.

22/ Id., pp. 14, 84-85.

II. THE REQUEST FOR A HEARING ON THE OPERATING LICENSES FOR TURKEY POINT UNITS NOS. 3 AND 4 AND ST. LUCIE UNIT NO. 1 SHOULD BE DENIED

Petitioners acknowledge that the operating licenses for Turkey Point Units Nos. 3 and 4 and St. Lucie Unit No. 1 (the "existing licenses") were issued under Section 104b of the Act, and seek review of these licenses "to determine whether the Commission has 'impose[d] the minimum amount of . . . regulations and terms of license as will permit the Commission to fulfill its obligations under [the Atomic Energy Act],'" pursuant to such section (Petition, p. 2). They state that they seek a hearing under the provisions of Sections 104, 185, 186, 197 and 188[23/] of the Act as to whether these licenses should be revoked or modified to remedy the effects of FPL's alleged anticompetitive activities.[24/]

It should first be noted that the tardy requests as to the existing licenses should be denied because they do not comply with any procedure available under the Act or regulations. Nothing in the sections of the Act cited by Petitioners authorizes any person to request an antitrust hearing with respect to an outstanding license. The Petitioners do not cite any Commission regulation

---

23/ At page 46, however, they cite Sections 183, 185, 186 and 187 of the Act, and not Section 188. It is difficult to understand how Section 188, "Continued Operation of Facilities", could possibly relate to the subject matter of the Petition.

24/ Petition, pp. 2-3

which authorizes the filing of such a request,[25/] and, in fact, no such regulation exists. The one established means for suggesting that a proceeding should be initiated to revoke or modify a license is by filing of an appropriate request with the Director of Nuclear Reactor Regulation under Section 2.206(a). Clearly, the Petition does not purport to have been submitted under the provisions of this regulation. Thus, there simply is no procedural basis for entertaining the Petition as it relates to the existing licenses.

However, the Petition is flawed substantively as well as procedurally, because there is no statutory basis for the Commission to conduct the requested antitrust review of the existing licenses or to revoke or modify them on the antitrust grounds alleged by Petitioners.

It is difficult to attempt to rebut Petitioners' legal theory as to the jurisdictional basis for their hearing request, since they never set it forth explicitly. However, there appear to be two threads to their argument.

First, Petitioners appear to contend that the antitrust review provision of Section 105c are somehow applicable. In this regard, they state that "[t]o a large extent the Commission's obligation to provide for appropriate antitrust review for these units is analagous to its obligation as to St. Lucie Unit No. 2"

25/ Petitioners' references to Sections 50.54 and 50.100 only reflect that licenses are subject to revocation, suspension or modification, "in accordance with the procedures provided by the act and regulations" (Section 50.54(e)); nothing therein provides for the initiation of a hearing simply by the filing of a request therefor.

and attempt to incorporate their St. Lucie Unit No. 2 argument into their argument about the existing licenses.[26/] In addition, by pointing to the language changes in Section 104b made by Congress in 1970[27/] and by their repeated underscoring of the "now or thereafter" language of Section 183,[28/] the Petitioners apparently contend that the 1970 amendments to the Act were intended to subject Section 104b licenses to the antitrust review requirements of Section 105c. Finally, Section 186, which defines the Commission's power to revoke licenses, and which is cited throughout the pertinent section of the Petition, provides for revocation for reasons "which would warrant the Commission to refuse to grant a license on an initial application." Thus, Petitioners' argument appears to be grounded on the contention that the pre-licensing review provisions of Section 105 would apply to the issuance of any of the existing licenses, were the Commission initially considering any such issuance at this time.

The second thread of the argument appears to be that one or more of Sections 183, 185, 186 and 186 of the Act authorize the Commission, independently of Section 105c, to conduct a proceeding to determine whether a licensee is in compliance with the anti-trust laws, and to modify or revoke a license if it is not.

26/ Petition, p. 44

27/ Petition, p. 45

28/ Petition, p. 46-47.

There is no merit whatsoever to either of these arguments.

A. The Antitrust Review Provisions of Section 105c Do Not Apply to the Existing Licenses

It is clear beyond question that, prior to the 1970 amendment to the Act, the antitrust provisions of Section 105c were not applicable to licenses issued under Section 104b.[29/] Indeed, the Petitioners do not appear to challenge this proposition. The question that they appear to raise is whether, as a result of the 1970 amendments, there is some basis for applying the antitrust provisions of Section 105c to licenses issued under Section 104b. An examination of the legislation itself and of the accompanying legislative history leaves no doubt that Congress did not intend such a result, except in one specifically defined area not pertinent here.[30/]

Prior to 1970 the Act provided that the Commission could license power reactors under Section 104b (for research and development and demonstration purposes) or, after it made a finding of "practical value," under Section 103 (for commercial purposes). Since the Commission had not made such a finding by 1970, all power reactor licenses to that date were issued under Section 104b. No antitrust review pursuant to Section 105c was conducted by the Commission in connection with the issuance of any of these Section 104b licenses.

29/ See Cities of Statesville et al. v. AEC, 441 F.2d 962 (D.C. Cir. 1969).

30/ Section 105c(3).

This procedure was challenged by the petitioners in the Statesville case and upheld in every respect by the Court, which concluded that "Section 105c is patently restricted to Section 103 licensing" and, therefore, is not applicable to Section 104b licenses.[31/]

In part as a result of the controversy reflected by the Statesville case, Congress conducted lengthy hearings[32/] and, acting in late 1970, amended the Act in significant respects. In the 1970 amendments to the Act, Congress abolished the requirement that the Commission make a finding of "practical value" and provided that "any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to Section 103."[33/] However, Congress provided in Section 102b that if construction or operation of facilities with "industrial or commercial" purposes had been authorized under Section 104b prior to the 1970 amendments, any license hereafter issued "shall be issued under subsection 104b." The Joint Committee, in explaining the purpose of this provision, stated that:

> ". . . it would impose an unnecessary hardship on subsection 104b licensees to compel

---

31/ 441 F.2d at 973.

32/ Hearings Before the Joint Committee on Atomic Energy on Prelicensing Antitrust Review of Nuclear Power Plants, 91st Cong., Parts 1 and 2 (November 18-20, 1969 and April 14-16, 1970) (hereinafter "Joint Committee Hearings").

33/ Section 102a.

> them to convert their permits to section 103 licenses; the matter of potential anti-trust review of certain subsection 104 licenses is specifically dealt with in Section 6 of the bill, and is discussed below, and it appears to the committee that no useful purpose could be served by compelling any conversion to Section 103."[34/]

The provisions for antitrust review by the Commission are set forth in Section 105c and apply, with one exception, only to applications for construction permits and operating licenses filed under Section 103. The one exception is contained in Section 105c(3) which provides that if a construction permit had been issued under Section 104b prior to 1970, persons who intervened or who sought to intervene in the construction permit proceeding "to obtain a determination of antitrust considerations or to advance a jurisdiction basis for such determination" would have the right to request, within a specified time, an antitrust review of the operating license application. The purpose of this section was to give persons who had sought and had been denied antitrust review of Section 104b construction permit applications the opportunity to raise these issues in connection with the applications for operating licenses.[35/]

Thus it is clear that Congress carefully considered the question of antitrust review in connection with issuance of operating licenses

---

34/ Report of Joint Committee on Atomic Energy, H.R. No. 91-1470, 91st Congress, 2nd Session (September 24, 1970) (hereinafter "Joint Committee Report") pp. 26-27.

35/ Id., p. 30.

for plants for which construction permits were issued under Section 104b, and concluded, with one explicit and limited exception, that no such antitrust review should be required.

In the face of this explicit legislation and legislative history to the contrary, Petitioners appear to contend that Section 105c is applicable to FPL's existing licenses. Their basis appears to be the modifications made to Section 104b by the 1970 amendments. Prior to the 1970 amendment, Section 104b read:

> "In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulation and terms of license as will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will be compatible with the regulations and terms of license which would apply in the event that a commercial license were later to be issued pursuant to Section 2133 of this Title for that type of facility. . . ."

It was modified in 1970 to read in pertinent part:

> "In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulation and terms of license as will permit the Commission to fulfill its obligations under this chapter."

Apparently, the Petitioners contend that this deletion from Section 104b of all of the language following "to fulfill its obligations under this chapter" was intended to expand the scope of the remaining requirement. This perceived change in the meaning of Section 104b appears to be the reason for Petitioners' emphasis on the portion of Section 183 which makes all licenses subject to

"all of the other provisions of the chapter, now or hereafter in effect. . . ."[36/]

The only logical extension of this argument is that by deleting certain words from Section 104b Congress intended to overrule the Statesville case and to apply the antitrust review provisions of Section 105c to all licenses whether issued under Section 103 or Section 104b. This position is nonsensical in view of the legislative history described above and, if adopted, would make Section 105c(3), one of the most carefully considered and drafted provisions of the 1970 amendments, completely superflous. Moreover, Congress stated explicitly its reasons for deleting the language in question: "In revising the text of subsection 104b, the committee has retained the present requirement . . . but deleted the balance of the text because subsection 104b licenses would no longer be convertible to Section 103 licenses under the bill. . . ."[37/]

As a result of a thoughtful decision by Congress, the antitrust review provisions of Section 105c do not apply to FPL's existing license, issued pursuant to Section 104b. Accordingly, no request for an antitrust hearing in the nature of a Section 105c proceeding can be granted. Moreover, any effort to modify or change the existing licenses by invoking indirectly the antitrust provisions of Section 105c must fail.

36/ Petition, pp. 46-47, emphasis by Petitioners. The Petitioners also appear to rely upon the change in Section 104b in support of the argument that one or more of Sections 183, 185, 186 and 187 permit the Commission to undertake an antitrust proceeding independent of Section 105c, i.e., to determine whether FPL is controverting the "overall purposes" of the Act (Petition, p. 45). We address this argument in a subsequent section of this Response.

37/ Joint Committee Report, p. 28.

B. There Is No Basis For Granting The Relief Requested by Petitioners Independent of Section 105c.

The Commission's antitrust responsibilities other than as specified in Section 105c are clearly spelled out in Sections 105a and 105b.

Section 105a authorizes the Commission to "suspend, revoke or take such other action as it may deem necessary" with respect to a license when the licensee has been found by a court to have violated the antitrust laws "in the conduct of the licensed activity." It is clear, however, that the Commission's authority under Section 105a, as Petitioners recognize, becomes operative only after the licensee has been found by a court to have violated the antitrust laws.[38/] Thus, Section 105a provides no basis for the grant of the present Petition.

Section 105b provides only that the Commission shall report to the Attorney General any information it may have with respect to licensed plants "which appears to violate or to tend toward the violation of any of the foregoing [Antitrust] Acts, or to restrict free competition in private enterprise." Thus, it also provides no basis for the grant of the present Petition.

The Petitioners seek to invoke, generally through the provisions of one or more of Sections 183, 185, 186 and 187, and more specifically through reference to the amended language of Section 104b,

---

38/ One of the Petitioners, the City of Gainesville brought a civil antitrust action against FPL. However, after a trial on the merits and a jury verdict favorable to FPL, judgement was entered for FPL by the United States District for the Middle District of Florida (No. 68-305 Civ.). Gainesville has taken an appeal from the judgment.

some expression of overriding policy in the Act which would justify the commencement of antitrust proceedings without reference to any particular jurisdictional provision of the Act. In this regard the Petitioners refer to Section 1 of the Act which states that one of the policies underlying the act is to "strengthen free competition in private enterprise."

However, these same arguments were considered and rejected in the Statesville case. The court charactertized and disposed of the argument as follows:

> "[W]e note that the petitioners...base their contentions...on a broad public policy argument that can be seen running through many the administrative law decisions of this court and other courts [footnote omitted]. They say, correctly, that the [Act] contains specific caveats urging the Commission to act in the public interest by promoting 'free competition in private enterprise'....[They] also assert that section 105(a) of the Act...makes it clear that antitrust laws are applicable to everything contained in that chapter. Also, under section 105(a) the Commission is empowered to suspend or revoke licenses in cases where courts of competent jurisdiction have found antitrust violations. What petitioners fail to see is that, in reading the legislative history of this Act, one can find many examples of the draftors' intent to limit antitrust considerations to specific portions of the statute while expanding the health and national security considerations of the Act as a whole." 39/

39/ 441 F. 2d at 972.

The court pointed out that the Commission is not precluded from "keeping an administrative eye on anticompetitive effect of the use of these facilities once they are constructed under Section 104(b), "but that its proper recourse is "to report to the Attorney General any information" about such anticompetitive effects pursuant to Section 105b. 40/

Thus, there is no basis whatsoever for commencing any proceeding, within or without the ambit of Section 105, to consider whether the existing Section 104b licenses should be modified or revoked on grounds of alleged anticompetitive activity.

III. THE LATE PETITION FOR AN ANTITRUST HEARING ON THE CONSTRUCTION PERMIT APPLICATION FOR ST. LUCIE UNIT NO. 2 SHOULD BE DENIED

A. The Board Must Consider The Late Petition To Intervene in St. Lucie Unit No. 2 In the Context Of The Statutory Scheme Set Forth In Section 105c

We will set forth in detail in the succeeding portion of this Response why this untimely Petition should be denied for failure to satisfy the pertinent requirements of Section 2.714(a).

Since Section 2.714(a) has come into play more often in

40/ Id., at 973-4.

instances involving late petitions in the Commission's environmental or health and safety proceedings, however, we believe it would be useful to the Board first to point up the distinctive framework of statutes and regulations that governs the initiation and conduct of pre-licensing antitrust review by the Commission. As we will show, both Congress and the Commission have taken special care to assure that any potential antitrust issues are identified at an early stage of the licensing process and resolved in timely fashion. This special care is reflected in the explicit provisions of Section 105c of the Act, the legislative history of those provisions and the Commission's implementing rules and regulations.

1. The Provisions of Section 105c.

The intent of Congress to provide for an early review and opportunity for hearing in connection with antitrust aspects of an application for a construction permit is made clear in the provisions of Section 105c. Although the Act is silent as to the timing of review of environmental or health and safety aspects of an application, Section 105c mandates that prompt action be taken by the Commission and the Attorney General with respect to the necessary pre-licensing antitrust review.

Thus, Section 105c(1) requires that the Commission "shall promptly transmit to the Attorney General" a copy of the construction permit application, and that the Attorney General shall render his advice within a reasonable time, "but in no event to exceed 180 days after receiving a copy" of the application. Accordingly, the statute mandates that the antitrust review begin promptly upon receipt of the application and places a strict time limit of six months upon the Attorney General in rendering his advice. As we will show below, these were carefully conceived and deliberate mandates.

Thereafter, Section 105c(5) requires that "[p]romptly upon receipt of the Attorney General's advice, the Commission shall publish the advice in the Federal Register." Publication in the Federal Register by the Commission of the Attorney General's advice is the mechanism which triggers the period for filing of petitions to intervene and requests to hold an antitrust hearing. Again, this highlights the Congressional intent that antitrust hearings, if any are required, be commenced at an early stage.

2. Congressional Intent in Providing For Early Antitrust Review

The legislative history of Section 105c leaves no doubt

that Congress was acutely aware of the need to avoid delays in the issuance of construction permits arising from the requirements for prelicensing antitrust review. Although Congress did not expressly authorize the Commission to issue a construction permit prior to completion of the antitrust review and hearing, nevertheless, Congress did attempt to minimize this problem in the provisions of Section 105c by providing for early antitrust review and opportunity for hearing. Congress expected that the antitrust proceeding would be conducted apart from the radiological health and safety review on a schedule that would not delay the issuance of any construction permit. This expectation is reflected in the report of the Joint Committee when Section 105c was amended:

> "The committee expects and will urge the Commission to make every reasonable effort to deal with the potential antitrust feature under subsection 105c. of the bill fully but expeditiously. Clearly a separate board or boards should be utilized in the implementation of paragraphs (5) and (6) of subsection 105c. The committee anticipates that all the functions contemplated by these paragraphs would be carried out before the radiological health and safety review and determination process is completed, so that the entire licensing procedure is not further extended in time by

reason of the added antitrust review function." 41/

The Commission clearly understood and agreed to implement this intent. In answering written questions submitted by the Joint Committee the Commission expressed the view that "we would expect that in most cases the prelicensing antitrust review would not extend the licensing process." It discussed the "separate hearing on antitrust issues well in advance of our usual health and safety hearings" as a potentially effective mechanism to achieve this objective. 42/

When Representative Holifield introduced the 1970 amendments on the floor of the House, he reiterated this point:

41/ Joint Committee Report, pp. 15-16 (emphasis added). See also, for example, the exchanges between Representatives Hosmer and Holifield and Mr. Hennessey, the Commission's General Counsel, at Joint Committee Hearings, Part 1, pp. 90, 94; the further expressions of concern over possible delay by members of the Joint Committee (Rep. Holifield, Id., p. 91; Rep. Hosmer, Id., Part 2, p. 485); the testimony of representatives of industry evidencing concern about possible delay (e.g., Carl Horn, Jr., testifying on behalf of the Edison Electric Institute, Id., Part 2, p. 328; J. Harris Ward, Chm. of the Board, Commonwealth Edison Co., Id., Part 2, p. 383).

42/ Id., p. 98.

> "We believe a separate board can be utilized by the Commission in connection with such antitrust considerations. This feature of the total licensing process should be completed by the Commission before the radiological health and safety matters are concluded in the licensing procedure." 43/

Moreover, he left no doubt that the concern for timely consideration of antitrust issues applied equally to issues raised by persons other than the Attorney General:

> "In the latter regard [other persons raising antitrust issues], the committee intends that in any event, the Commission's rules and regulations will set a fixed period in which such issues may be raised. It is hoped that,this period will coincide with and not extend beyond the specified period in which the Attorney General's advice may be rendered. The bill contemplates that all aspects of the antitrust considerations constituting part of the Commission's total licensing procedure, including the ultimate findings of the Commission,would be dealt with in such a way as not to impose an additional delaying factor." 44/

In establishing an early mandatory prelicensing antitrust review, Congress was concerned, not only with the prospect of potential licensing delay, but also with providing the utility with an antitrust decision at an early stage, before the utility committed massive funds toward the construction of the

---

43/ 116 Congressional Record, p. 34309

44/ 116 Congressional Record, p. 34309.

proposed facility.

In an October 15, 1969 speech that was made part of the record of the first day of legislative hearings (November 18, 1969), the Director of Policy Planning, Antitrust Division, Department of Justice, had noted that one of the basic reasons for the application of antitrust policies at the time facilities are licensed is that such procedure

> ". . .enables companies to be advised at an early stage in the planning of projects concerning any inconsistency between their plans and competitive policies. Thus, we should be able to minimize the number of times plans are thrown into uncertainty after significant time and resources have been committed to them". 45/

The General Counsel of the Commission, Mr. Hennessey, testified to the same effect, that:

> "By bringing the Attorney General into our proceedings before a license is issued, conditions which would tend to create or maintain a situation inconsistent with the antitrust laws were the plant to be built can be identified and resolved. Thus, it should be easier to make the necessary changes before commitments by the applicant are made". 46/

Mr. Walker B. Comegys, Acting Assistant Attorney General, Antitrust Division, Department of Justice, expressed similar views in the course of his testimony. He noted that:

45/ Joint Committee Hearings, Part 1, p. 7.

46/ Id., page 72.

> "the AEC prelicensing review may be useful in resolving antitrust problems before they seriously disrupt planning, construction and use of new facilities." 47/

He emphasized that facing antitrust questions

> "clearly at the outset of the licensing proceeding, and obtaining the Attorney General's advice on the issue, can permit an early and orderly resolution of problems before much money and time has been spent." 48/

Indeed, Chairman Holifield began the Joint Committee Hearings on this very note, saying in his opening statement:

> "I have also tried to make it clear that no utility that is intent on serving the public interest need fear any proposal I have made.
>
> "preconstruction antitrust review will enable the utilities to know at an early stage in their planning whether their plans violate the antitrust statutes." 49/

3. The Commission's Rules and Regulations

The objectives reflected in the statute and its legislative history have also been clearly reflected in the Commission's implementing regulations.

47/ Id., page 120.

48/ Id., p. 121.

49/ Id., p. 319.

One of the principal mechanisms to assure a timely and orderly antitrust review has been the adoption of provisions in Section 50.33a of the regulations requiring early submittal of antitrust information. Such information must now be submitted at least 9 months, but not more than 36 months, prior to the date that any other part of the construction permit application is filed. As explained by the Commission, such early submittal of antitrust information was required because of the significant shortening of time for safety and environmental reviews anticipated by the Commission. As stated by the Commission:

> "The early filing of antitrust information should permit the Attorney General and the Commission to complete the antitrust review process, including antitrust hearings where necessary, concurrently with other licensing reviews." 50/

Similarly, Section 2.102 of the regulations specifies a time schedule for each step of the antitrust review, through the final date for submittal of petitions for leave to intervene. Appendix A to Part 2, which sets forth the general policy and procedures that the Commission expects to be followed in the conduct of licensing proceedings, expressly states the Commission's intent that its proceedings be conducted expeditiously.

50/ 39 Federal Register, p. 14613 (April 25, 1974).

According to Section X(e) of Appendix A, which specifically relates to antitrust proceedings:

> "If a hearing on antitrust aspects of the application is requested, or is recommended by the Attorney General, it will generally be held separately from the hearing on matters of radiological health and safety and common defense and security described in Sections I-VIII of this Appendix. The notice of hearing will fix a time for the hearing, which will be as soon as practicable after the receipt of the Attorney General's advice and compliance with Section 189a of the Act and other provisions of this part." (emphasis added)

4. Consideration of Statutory Scheme.

The carefully structured statutory and regulatory framework reflected in provisions of Section 105c, the legislative history and the Commission's rules and regulations must be carefully weighed by the Board in ruling on Petitioners' extremely tardy Petition. Taking the statutory scheme into consideration, the Board should not grant the Petition absent some demonstrated overriding reasons to do so in accordance with the requirements of Section 2.714(a). This is particularly true since granting the Petition will cause substantial delay in the issuance of a construction permit for St. Lucie Unit No. 2 or will cause FPL to expend massive sums of funds in advance of knowing whether the construction permit will be subject to further antitrust conditions.

B. The Nontimely Petition Does Not Satisfy the "Substantial Showing of Good Cause" Requirements of Section 2.714(a)

Section 2.714(a) of the Commission's Rules of Practice provides in pertinent part as follows:

> ".... Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request that the petitioner has made a substantial showing of good cause for failure to file on time, and with particular reference to the following factors. . . .
>
> (1) The availability of other means whereby the petitioner's interest will be protected.
>
> (2) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(3) The extent to which the petitioner's interest will be represented by existing parties.

(4) The extent to which the petitioner's participation will broaden the issues or delay the proceeding."

In interpreting the general requirements of this section in instances where a late petition has been filed in an on-going proceeding, the Commission has held that "the purpose of Section 2.714(a) is to establish appropriate tests for disposition of untimely petitions in which the reasons for the tardiness as well as the four listed factors should be considered. . . . "[51/] In other words, "the appropriate disposition of untimely petitions depends upon both (1) the sufficiency of the justification, if any, offered for the tardiness and (2) the assessment of four factors set forth in the Rules."[52/]

The Commission's determination in West Valley, however, was made in the context of a proceeding where a hearing was being held and would continue whether or not the late petition was granted. The NRC Staff has recently argued in an instance involving a late petition for an antitrust hearing that "the four criteria contemplate an on-going proceeding" and "it does not appear that applying the four factors in [that] proceeding would be of any

51/ Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975)

52/ Virginia Electric and Power Company (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 396 (1975)

assistance."[53/] From the wording of the four factors listed in Section 2.714(a) it would appear, at best, unclear that the authors intended them to be applied in an instance where there did not exist an on-going proceeding.[54/] In Marble Hill the Licensing Board did apply the first factor but concluded "that the second, third and fourth factors obtain only where there is an on-going antitrust proceeding, and thus do not apply herein."[55/]

As we will demonstrate, Petitioners have failed to satisfy the requirements of Section 2.714(a) regardless of whether the

---

53/ NRC Staff's "Answer to Motion for Leave to File Untimely Petition to Intervene and Request for Hearing" in Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2, Dockets Nos. 50-546-A, 50-547-A)(April 7, 1976) (page 5). The NRC Staff pointed out that "Since the Attorney General did not recommend a hearing, intervenors did not request a hearing in a timely manner, and the Staff did not otherwise recommend a hearing, the antitrust aspects of the construction permit application have been completed." Thus in Marble Hill, as in the instant case, no antitrust hearing would be held unless the late petition was granted.

54/ Thus, the reference to "other means" implies that an existing means, namely an on-going hearing, exists; assisting "in developing a sound record" implies that a hearing record is being developed; "existing parties" implies that there is a hearing with parties; and, obviously, broadening "issues" and delaying a "proceeding" implies the existence of issues and a proceeding.

55/ Public Service Company of Indiana,Inc. (Marble Hill Nuclear Generating Plant, Units 1 and 2), LBP-76-25, NRCI-76/6,847,856 (June 15, 1976)

four factors listed therein are to be considered. They have utterly failed to satisfy their "substantial burden in justifying their tardiness."[56/] And, even if the four factors are considered, they do not weigh in favor of granting the Petition but instead mandate its denial.

1. The Tardiness in Filing Is Not Justified

As the Commission noted in describing the purpose of Section 2.714(a) in West Valley:

> "Obviously, an important policy consideration underlying the rule is the public interest in the timely and orderly conduct of our proceedings. As the Commission has recognized, 'fairness to all parties. . .and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays.' 10 CFR Part 2, Appendix A. Late petitioners properly have a substantial burden in justifying their tardiness. And the burden of justifying intervention on the basis of the other factors in the rule is considerably greater where the latecomer has no good excuse."[57/]

The usual "substantial burden in justifying their tardiness" that late petitioners bear under Section 2.714(a) is even heavier under the particular circumstances of this proceeding.

In the first place, it should be axiomatic that the longer the period of tardiness involved, the greater should be the

---

56/ See West Valley, supra, at 275.

57/ Id., at 275.

justification; and, in this case, the period of tardiness is unbelievably lengthy, over 2-1/2 years. Petitioners were apparently extremely slow even to realize that they had an anti-trust concern which they believed warranted a hearing as to St. Lucie Unit No. 2. The first such indication came in a pleading in another proceeding before the Commission filed by entities substantially identical to these Petitioners on April 14, 1976, more than 2-1/4 years after the time for intervention had expired.[58/] And, even thereafter, Petitioners still required more than four additional months until the present Petition was filed.[59/] The characterization by another Licensing Board of a petitioner's delay in filing a late petition appears equally apt here; it represents "at best, a casual attitude toward pursuing its interest with respect to a most serious matter."[60/] Actually the period of tardiness here involved reflects more than "a casual attitude," it demonstrates

---

58/ Joint Petition of Florida Cities for Leave to Intervene and Request for Conference and Hearing, Docket No. P-636A (South Dade Plant), pp. 9-14 (April 14, 1976).

59/ Petitioners, of course, allege no good cause at all for this additional four month delay. Even this four month period alone exceeds other periods of lateness that have been held to bar granting of a petition. For example, the petition of the City of Cleveland for an antitrust hearing with respect to Beaver Valley, Unit 2 was denied in an instance involving a filing late by approximately 60 days. Duquesne Light Company, et al, (Beaver Valley, Unit 2) 7 AEC 282 (1974), request for reconsideration denied, 7 AEC 705 (1974) aff'd; ALAB-208, 7 AEC 959 (1974); aff'd; CLI-74-25, 7 AEC 955 (1974).

60/ Beaver Valley, 7 AEC at 284.

a serious attempt to "make a mockery of procedural rules and create chaos in the licensing and hearing process."[61/]

In addition, Petitioners' nontimely petition flies in the face of the carefully conceived statutory and regulatory scheme for timely consideration of antitrust issues in licensing proceedings that we have described at length above. The Commission has recognized that the burden under Section 2.714(a) can vary depending upon the particular circumstances involved. For example, in an instance where the late petitioner had shown only a shaky claim to standing, the Appeal Board noted that "given the at best marginal basis for the asserted right, we can demand much more of [petitioner] in terms of a showing either (1) that its not having filed the petition on time was due to circumstances beyond its control or (2) that the four factors. . . . weigh heavily in [petitioner's] favor."[62/] Similarly, whatever "substantial burden" a late petitioner faces in a Commission proceeding pertaining to radiological or environmental issues, the Commission can "demand much more" when the grant of the late petition would so clearly serve to frustrate the statutory intent with respect to timely review of antitrust issues.

Having established the exceptionally heavy burden that these

61/ See Beaver Valley, 7 AEC at 707.

62/ Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, NRCI-75/10 631, 646 (1975). (emphasis added)

Petitioners must bear in justifying the lateness of their Petition,[63] we now turn to the Petition itself to ascertain how they have sought to meet such burden. As best we can determine, such attempt is made solely in the somewhat unfocused and unclear discussion of "good cause" contained on pages 16-24 of the Petition. Apparently, Petitioners there seek to establish that they have a valid excuse for filing a petition more than 2-1/2 years late--that excuse being based upon events alleged to have occurred after the opportunity for intervention expired on December 28, 1973. We will proceed

---

63/ It is interesting to note that counsel to Petitioners - though experienced in NRC proceedings - neither discusses burden under Section 2.714(a) in the Petition nor even mentions the leading NRC decisions that provide guidance as to the application of Section 2.714(a) to late petitions. We do note that pages 31-36 of the Petition contain a rambling discussion presumably supporting the notion that changed circumstances "legally warrant" the grant of Petitioners late petition. However, we fail to perceive the relevance of such discussion. If Petitioners are arguing that intervening events can, in appropriate instances, constitute an element of "substantial showing of good cause" within the context of Section 2.714(a), their erudition is unnecessary. If they mean that "changed circumstances" can provide a legal basis for a late petition outside of the framework of Section 2.714(a) their discussion is both obscure and wasted, since the Commission is governed by such rule. We will briefly respond, however, to one portion of their argument, namely that "Congress certainly did not intend that intervention to raise anticompetitive issues should be foreclosed. . . . merely by passage of time beyond the date initially set forth for the filing of petitions to intervene." (p. 33). There is, of course, absolutely no basis for Petitioners' implication that Congress intended that the Commission's procedural rules pertaining to late filings be ignored. The evidence to the contrary is overwhelming, particulary in the emphasis given by Congress to the importance of timely and orderly resolution of antitrust issues. The Joint Committee Report specifically states that if the Attorney General does not recommend a hearing "but if antitrust issues are raised by another in a manner according to the Commission's rules and regulations, the Commission would be obliged to give such consideration thereto as may be required by the Administrative Procedure Act and the Commission's rules or regulations." Joint Committee Report, pp. 30-31 (emphasis added).

to discuss each of these allegations.

2. The Claims of Changed Circumstances Are Not Substantial and Do Not Provide Good Cause for the Lateness of the Petition

The claimed changed circumstances appear to fall into three categories: disputes regarding implementation of the license conditions agreed upon by FPL and the Commission; allegations of refusals to deal and related conduct on the part of FPL; and, the energy crisis.

a. Implementation of the License Conditions

The St. Lucie Unit No. 2 license conditions provide for FPL to afford to certain entities, including only one of the Petitioners, New Smyrna Beach, the opportunity to participate in the ownership of St. Lucie Unit No. 2, and for FPL to make arrangements for the delivery of the output of the portion owned by New Smyrna Beach to that city. The Petition states that FPL and New Smyrna Beach have not yet agreed on the final terms of the arrangements.[64/] The

---

64/ It is apparent from the Petition that the disagreement is hardly of a fundamental nature. The license conditions refer to a "reasonable ownership share" and to "delivery of [the] participant's share. . .on terms which are reasonable. . ." As the Petition itself indicates, the only areas of disagreement concern the percentage of ownership which is "reasonable" and the formulation of a rate for transmission service. (Petition, p. 16, e.g. "[T]he Company has committed itself in general terms to transmit power for New Smyrna Beach from its St. Lucie Unit No. 2 entitlement share. . .") As the letter of April 15, 1976, from counsel for New Smyrna Beach (Attachment D) indicates, the idspute over the proposed ownership has narrowed to a disagreement over approximately one megawatt of capacity. Of course, any rate for transmission service will be subject to filing with, and regulation by, the Federal Power Commission. 16 U.S.C. Section 824 et seq.

Petitioners apparently contend that this failure to reach agreement is a "change in circumstances" which provides good cause for the lateness of the Petition, because New Smyrna Beach refrained from filing a timely petition in reliance on the protection provided by the license conditions.[65/]

In the event that FPL and New Smyrna Beach are ultimately unable to agree on the details of implementation of the license conditions, New Smyrna Beach's appropriate remedy will be to seek enforcement of the conditions, a remedy readily available under Sections 2.200, et seq. of the Commission's regulations. In no way has the enforceability of the license conditions been impaired in the more than two and a half years which have intervened since New Smyrna Beach's decision not to file a timely petition. The very same conditions on which New Smyrna Beach claims it relied will be incorporated into the construction permit for St. Lucie Unit No. 2 and will be enforceable against FPL. Thus there has been no change in circumstances in this respect.

Moreover, to treat disagreements over the terms of enforcement of license conditions as changed circumstances providing good cause for the late commencement of an antitrust hearing would create havoc with the antitrust review procedures which have evolved in practice before the Commission. In many instances (including St. Lucie Unit

65/ The actual license conditions had not been formulated at the time of publication of the Attorney General's advice letter, but were finalized between the Applicant and the NRC Staff in February 1974 (see p. 7, supra). However, the advice letter described the substance of the conditions in contemplation of their finalization by the Staff.

No. 2) applicants have agreed to license conditions contemporaneously with the Attorney General's review of an application. Obviously, the purpose of agreeing to the imposition of license conditions is to avoid an antitrust hearing, with, among other things, the attendant risk of delay in issuance of the construction permit. However, if disagreements over the implementation of such conditions, occurring prior to issuance of the construction permit, are likely to result in an antitrust hearing being convened on the eve of issuance of the construction permit, an agreement as to license conditions would be worse than meaningless.[66/]

b. Conduct by FPL

The second category of allegations of changed circumstances relates to what the Petitioners call "FPL's intensified anticompetitive activities" (Petition, p. 23). These allegations appear to be summarized in the second full paragraph on page 21, where the Petitioners refer to: "the attempted acquisition of competing utility systems; refusals to enter into an integrated statewide power pool; active opposition to legislation which would allow joint ventures by smaller systems; and other practices. . ."

66/ On page 17 of the Petition, reference is made to a disagreement between FPL and Seminole Electric Corporative, Inc. regarding implementation of one provision of the St. Lucie Unit No. 2 license conditions. There is no accompanying explanation of why this allegation appears in a pleading to which neither Seminole nor any of its members is party. The Petitioners have no basis for alleging any facts regarding discussions which have been, and are, taking place between FPL and Seminole and no interest whatsoever in asserting Seminole's rights under the license conditions.

These allegations parallel the contents of a Petition filed by almost all of the same entities in NRC Docket No. P-636A. This Board is, of course, aware that FPL has taken sharp issue with these allegations on the merits in that proceeding, and that FPL has asserted that many of the allegations are simply untrue.

However, the issue here does not concern the merit or legal sufficiency of the charges of improper conduct on FPL's part, but concerns only whether the Petitioners have alleged changes in FPL's conduct which are significant enough to justify the granting of a Petition which is late by more than two and one half years. The Petition itself precludes such a finding. Petitioners' description of "The Situation Inconsistent" (Petition, pp. 54-85) makes abundantly clear that Petitioners contend that the alleged conduct described on page 21 is consistent with, and merely a part of, a course of conduct which they contend persisted for years prior to December 1973.[67/]

The allegation that FPL has "attempted acquisition of competing utility systems" (p. 21) appears to relate primarily to the City of Vero Beach, which has requested and received from FPL a proposal for the purchase of the City's electric utility facilities. It is noteworthy that the City of Vero Beach itself is not among the Petitioners,

---

67/ Obviously, FPL takes vigorous issue with the entire discussion which begins on page 54, and denies that it has ever been or is now responsible for a situation inconsistent with the antitrust laws.

and is not a party to Docket No. P-636A. It is difficult to perceive just how these bi-lateral dealings between FPL and Vero Beach constitute significant "changed circumstances" justifying this late Petition by other, uninvolved municipalities. However in any event, the litany of accusations appearing on pages 62-66 of the Petition, under the heading "Past Acquisition Attempts", negates any argument of changed circumstances based on the possibility that FPL may acquire the electric facilities of a municipality.

Likewise, no significant supervening event can be found among the allegations of "refusals" by FPL. It is alleged that FPL has "refused to enter into an integrated statewide pool." (p. 21). It is not alleged that any "integrated statewide pool" was either existing on imminent in December of 1973, or that FPL's position with respect to any such pool has changed at any time.[68/] Presumably, the other "refusals" to which the statement on page 21 refers are those discussed in the section of the Petition which begins on page 70. Petitioners do not point to any of those allegations as establishing changed circumstances which would provide good cause for the lateness of the filing, and indeed they could not fairly do so.

68/ To the contrary, see footnote 2 on page 72 of the Petition.

As regards the allegation of "opposition to legislation which would allow joint ventures by smaller systems" (p. 21), it is clear from Mr. Fagan's affidivait in Docket No. P-636A (which the Petition purports to incorporate) that prior to November 1974 municipal participation in joint ownership of generating facilities was constitutionally prohibited in Florida. Mr. Fagan's affidavit (p. 2) indicates that "some legislation authorizing joint ownership" was passed at the 1975 Session of the State legislature.[69/] Apparently, the Petitioners would have preferred that such legislation should have contained broader provisions. Obviously, the Petitioners' failure to obtain State legislation in the exact form desired is not the kind of changed circumstances which provides good cause for the late filing of the instant Petition, which, in any event, is submitted more than one year after the close of the 1975 session of the Florida legislature.[70/]

69/ Thus it is apparent that, to the extent that circumstances have changed since 1973, the changes have significantly favored the Petitioners.

70/ Moreover, it is clear that the views expressed by FPL to legislative bodies, and their committees, cannot provide the basis for a finding of inconsistency with the antitrust laws. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657(1965).

Presumably the "other practices" referenced on page 21 concern such matters as the charge that Orlando was "misled" to believe that it would be invited to participate as an owner of the South Dade Project (p. 19), the reference to transmission of power from Florida Power Corporation's Crystal River Unit No. 3 to the City of New Smyrna Beach (p. 17), and the argument, in footnote 2 on page 20, that FPL is "implicit[ly]" committed to sharing of further nuclear capacity. As regards the Orlando and "implicit commitment" matters, Orlando and twenty-one other entities are currently participating in an antitrust hearing in Docket No. P-636A where the question of any "rights" to participate in the ownership of FPL's South Dade plant is in issue. There is no logical basis for treating a dispute which has arisen, and will be resolved, in connection with a new application as a "changed circumstance" which justifies extremely untimely petitions with respect to a previous application.

The matter of transmission of power from the Crystal River Plant to New Smyrna Beach merits but brief comment. As the Petition reveals, as much by omission as by representation, FPL has agreed to provide the transmission service requested by New Smyrna Beach. The only matter on which agreement has not been reached concerns the rate to be charged for the service, a matter subject to regulation by the Federal Power Commission.

Finally, Mr. Bathen's "Supplemental Affidavit" refers to an alleged "price squeeze." We are unable, however, to locate any related reference in the portion of the Petition itself which

deals with "good cause" for the late filing. In any event, the matter can be treated briefly. The only Petitioner which purchases power at wholesale from FPL is New Smyrna Beach. Initially, New Smyrna Beach raised the subject of "price squeeze" in a pleading submitted to the Federal Power Commission on September 14, 1973.[71/] Subsequently, in 1975, New Smyrna Beach raised the issue in another FPC rate case involving FPL's wholesale rates -- Docket No. ER76-211. On December 23, 1975, FPL and New Smyrna Beach entered into a Settlement Agreement[72/] in which New Smyrna Beach agreed to withdraw "its petitions and protests in FPC Dockets No. E-8008 and ER 76-211 insofar as they relate to allegations concerning . . . price squeeze or other anticompetitive issues" and "not to raise before the Federal Power Commission (or successor agency or body having similar power) allegations concerning...price squeeze or other anticompetitive issues...based upon facts occurring prior to the date of this Settlement Agreement." Thus, the price squeeze issue arose before the time for filing timely petitions to intervene in the St. Lucie Unit No. 2 docket had expired, the issue has subsequently been resolved (at least at the FPC) between FPL and New Smyrna Beach, the only Petitioner concerned, and it can scarcely be considered a significant intervening event.

71/ FPC Docket No. E-8008.

72/ Filed with the FPC in Dockets No. E-8008 and ER 76-211, on February 24, 1976.

c. The Energy Crisis

The Petitioners contend that one significant event which has occurred since 1973 is, to quote from page 21 of the Petition,:

> [P]artially as a result of the OPEC oil boycott and subsequent OPEC related oil price increases, prices for all fossil fuels have skyrocketed and a severe shortage or potentially severe shortage of some fossil fuels has developed."

In essence the Petitioners contend that, in August 1976, they have, for the first time, appreciated the significance of the energy crisis which has gripped the nation for the past several years. This contention fails utterly upon even a cursory examination of the chronology of the energy crisis.

Although the potential for certain fossil fuel shortages was not obscure before that date, the outbreak of war in the Middle East on October 6, 1973, signaled the beginning of the severe "energy crisis" in the United States. It appears that the curtailment of supply to the United States by the Arab nations began on October 17, 1973.[73/] From that date events moved swiftly. The New York Times for October 20, 1973, reported Libya's declaration of an oil boycott against the United States and its announcement of an increase in the price of oil from $4.90 a barrel to nearly $9.00.[74/] On

---

73/ Attachment E, New York Times, October 18, 1973.

74/ Attachment E.

October 21, 1973 the Times reported that Saudi Arabia and four other producing nations had joined the boycott against the United States.[75] On November 7, 1973, President Nixon delivered a televised address to the nation on the "energy crisis", [76] in which, among other actions, he proposed a nationwide 50 miles per hour speed limit.

In December of 1973, when presumably the Petitioners weighed the possibility of filing a timely petition in the St. Lucie Unit No. 2 proceeding, emergency energy conservation measures were in effect throughout the United States and Project Independence was a current news topic.[77] It would hardly have been possible for any American to be unaware of the substantial implications of the energy crisis.

Of course, these increases by the producing nations soon found their way into the prices paid by electric utilities for their oil. For example, the price paid by FPL at its Port Everglades plant increased from less than 80 cents/mmBtu (below $5.00 per barrel) in early September 1973 to 180.3 cents/mmBtu ($11.14 per barrel) in late January 1974.[78] In fact, FPL's most recent Form 423 filing with the FPC for April 1976, shows a cost about equal to the January 1974 cost, -- 187.4 cents/mmBtu ($10,89) per barrel.[79] It strains credibility for any electric utility participating in this market to claim that it did not appreciate the operation of these forces

---

75/ Attachment E.

76/ Attachment E, New York Times, November 8, 1973.

77/ See generally the New York Times, December, 1973.

78/ Although the largest increment of increase occurred in early January 1974, steady increases occurred throughout the final months of 1973. See FPL filings with FPC on Form 423 for each month.

79/ Id.

in December of 1973. Moreover, it would not have been possible for an oil-purchasing utility to avoid feeling the full impact in the early months of 1974--two and one half years before the Petition was filed.

Although the portion of the Petition which pertains to "good cause" for the late filing (pp. 16-24) does not specifically discuss curtailments in the supply of natural gas, the natural gas situation is a major theme of the Petition's section entitled "The Situation Inconsistent." (p. 54 et seq.). However, the Petitioners cannot credibly claim that reduction of the supply of natural gas to interruptible customers is a "changed circumstance" which justifies their late filing. As early as April 1971, the Federal Power Commission (FPC) issued a "Statement of General Policy" indicating that one measure which would be considered to alleviate the growing shortage of natural gas is "the curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available".[80/]

On May 29, 1972--more than 22 months before the Petition was filed--eight Florida municipalities, including four of the Petitioners, submitted, through the same counsel who subscribed the Petition, a brief to the FPC in opposition to a request for extraordinary relief sumbitted by another customer of the common supplier, Florida Gas Transmission Company.[81/] The brief illuminates the Petitioners'

80/ FPC Order No. 431 (April 15, 1971).

81/ Initial Brief of Cities to Presiding Law Judge, Docket No. RP74-50-1 et al, May 29, 1974. The title page and the page of the brief from which we quote are attached as Attachment F.

understanding at that time of the status of their natural gas supply, and of the significance of the energy crisis generally. For example, on page 24, the municipalities acknowledge their understanding that by 1975 their gas supply would be curtailed to a small percentage of the contracted quantity. The discussion on page 25 of the brief indicates the municipalities' full appreciation of the impact of the energy crisis on electric utilities. Finally, harking back to a settlement agreement approved by the FPC on May 18, 1973, the municipalities admonished the party applying for extraordinary relief by pointing out that "Applicants claims for special relief are based upon no facts which could not have been known or anticipated at the time of the settlement and the [FPC's] order."[82/]

Thus, it is obvious from the discussion in pages 37 to 48 of this Response that the Petitioners' make-shift allegations do not, either individually or collectively, identify any intervening events or changed circumstances that could conceivably justify a delay in over 2-1/2 years in the filing of this Petition. The Petitioners have described no cause for lateness at all, let alone the "substantial showing of good cause" referred to in Section 2.714(a).

3. Assessment of the Four Factors in Section 2.714(a) Weigh Against the Petition

When the Commission in West Valley determined that the four factors listed in Section 2.714(a) should be taken into account even

---

82/ Id., p. 10.

in cases of inexcusable tardiness, it acknowledged concern that its interpretation of the rule "may have the effect of reading the 'good cause' requirement out of the rule." Therefore it emphasized that:

> "To obviate that result, we stress that favorable findings on some or even all of the other factors in the rule need not in a given case outweigh the effect of inexecusable tardiness. Conversely, a showing of good cause for a late filing may nevertheless result in a denial of intervention where assessment of the other factors weighs against the petition."[83/]

And, as we have previously noted, the Commission also emphasized that "the burden of justifying intervention on the basis of the other factors in the rule is considerably greater where the late-comer has no good excuse."[84/]

Application of the four factors in this proceeding[85/] reinforces the decision that this inexcusably late Petition should not be granted.

As to the first factor, it is clear that other means do exist to protect Petitioners' interest. In fact Petitioners do not even dispute this point and, instead, argue that "other means to vindicate Cities' interest may exist, but these point to the equities of granting late intervention here."[86/] In view of Petitioners' admission, we need not belabor this point but we do wish to note

---

83/ West Valley, 1 NRC at 275.

84/ Id.

85/ See pages 31-33, supra, as to whether the four factors are applicable in instances that do not involve an on-going proceeding.

86/ Petition, pp. 37-38.

briefly the extensive means available to Petitioners both outside of and within the framework of NRC proceedings.

Outside of NRC proceedings,[87/] Petitioners' remedies are as ample and varied as their imagination in framing complaints. If they have any disagreements as to transmission rates or wholesale rates, they have a readily available forum before the FPC. To the extent they wish to raise questions as to "unfair methods of competition," the FTC is readily available to Petitioners. Moreover, if they wish to assert in another forum that FPL has violated the antitrust laws they can institute a proceeding in Federal court or they can attempt to convince the Department of Justice to initiate an action.

Moreover, other means are available to Petitioners within the NRC. To the extent that Petitioners complain that FPL has not complied with the antitrust conditions in the St. Lucie Unit No. 2 construction permit, New Smyrna Beach will have ample opportunity to enforce such conditions, in a show cause proceeding, if necessary. On the other hand, to the extent that Petitioners' complaints relate to activities under licenses for future nuclear facilities of FPL, their forum within NRC proceedings is not only ample but is already being exercised. A group of municipalities

---

87/ In Jamesport, the petitioner's opportunity to present its view on an environemntal question before the New York State Board on Electric Generation was determined to provide a satisfactory forum in which the petitioner could protect its interests and a late petition was denied. ALAB-292, NRCI-75/10 at 648.

almost identical to Petitioners has raised, and had admitted in that in that proceeding all of the antitrust contentions raised herein.[88]

One final note as to the first factor is that, even if ample other means did not exist, such consideration could not conceivably tip the balance in favor of Petitioners. In circumstances involving a lesser period of tardiness, the Licensing Board in Marble Hill, after finding that there were apparently no other means whereby the petitioner could protect its interest and that the other three factors did not apply, concluded nevertheless that the petitioner's "extreme tardiness is inexcusable and that intervention should not be granted."[89] Such action was, of course, consistent with the Commission's guidance in West Valley that even favorable findings on one or more factors need not outweigh the effect of inexcusable tardiness.

The second and third factors - assistance in "developing a sound record" and representation by "existing parties" - can readily be disposed of together. These are the two factors which most obviously contemplate the existence of an on-going proceeding and which therefore, in the absence of such a proceeding, are irrelevant or should be given no weight.

The fourth factor - broadening the issues or delaying the proceeding - weighs most heavily against Petitioners. Perhaps tongue-in-cheek, they argue that since a proceeding "has not yet been initiated to consider St. Lucie Unit

88/ These municipalities have also requested in that docket that relief be granted to include, inter alia, participation in FPL's Turkey Point and St. Lucie facilities. FPL has taken the position that it would not be proper or appropriate for such relief to be granted in that docket. The Licensing Board there has not yet decided the question.

89/ NRCI-76/6 at 856.

No. 2, granting intervention cannot delay such proceeding." This absurd argument would mean that this paramount fourth factor would never be considered against a tardy petitioner in those instances where his lateness is most damaging -- namely, where no on-going hearing is being held because all of the pertinent issues have been fully resolved by the interested parties in the absence of any timely petition. Moreover, it would be in those very instances that the most time would have been wasted - and thus the petitioner's delay most harmful - because no other petitioner will have asked for a hearing and therefore no pre-hearing conferences, discovery and other time-consuming procedural steps will have taken place during the late petitioner's absence. 90/

Recognizing the levity of their argument, Petitioners' more serious argument appears to be that there will be no delay because they do not seek a delay in construction. Although they do not state a precisely clear proposal, they will apparently generously agree to the issuance of a "temporary permit," (e.g., p. 39, n. 1) coupled somehow with the grant of "interim relief," in the nature of "a preliminary injunction," which will be requested separately (e.g., pp. 14, 84-85).

90/ In an attempt to mitigate the harmful effects of delay, when a late-filed petition is granted, the petitioner "may be required to take the proceeding as it finds it." West Valley, INRC at 276. This is, of course, impossible when there is no on-going proceeding.

It is clear that the granting of the Petition will cause the most grievous delay. The Commission has held that when an antitrust proceeding is convened, a construction permit cannot be granted without the agreement of all of the parties. 91/ Thus, if the tardy Petition were granted at this 11th hour, a construction permit for St. Lucie Unit No. 2 could not be granted unless Petitioners' agreement were obtained. Obviously Petitioners' leverage in any bargaining under these circumstances would be unconscionable. Of course, Petitioners protest that they do not seek to delay construction, but these are empty words when FPL is faced with the possibility of unspecified conditions in a "temporary permit" and an ominous "preliminary injunction" for which a request has not yet even been filed.

Even if the conditions of a "temporary permit" were known and if there were no threat of a "preliminary injunction," there would still be an important "delay" here involved that would mandate denial of the Petition. As described above in the discussion of the statute and its legislative history, the thrust of the Congressional intent was to assure that antitrust issues were identified at an early stage and resolved in timely fashion so that an applicant would know exactly what antitrust conditions, if any, would be imposed prior to making the extensive financial commitments required

---

91/ See note 19, supra.

for construction of a nuclear plant. At best what Petitioners are suggesting is that they will not cause delay because they will permit construction to start, and that FPL should go ahead and invest its money without knowing what portion of the resulting plant it will own and without knowing what antitrust related conditions may ultimately be imposed prior to its being permitted to operate the plant.

Thus, if the Petition were granted, and if, as is extremely improbable, some agreement were reached among the parties, FPL would be able to avoid a delay in construction only if it agreed to another equally significant delay -- a delay in its obtaining assurance that there are no outstanding antitrust questions relating to St. Lucie Unit No. 2. In essence, FPL would be asked to waive a most important substantive right -- the right to obtain such assurance prior to investment of extensive funds.

Under these circumstances, Petitioners cannot conceivably be credited for not causing delay. 92/ If the Petition is

---

92/ It is interesting to note that in North Anna, a petitioner filing a late petition a few weeks before the scheduled start of an environmental hearing alleged there would be no delay since it would take the proceeding as it finds it. The applicant, however, argued there would be no delay only if the applicant waived important procedural rights against the petitioner, including discovery. The Appeal Board decided that: "It is scarcely equitable to give [petitioner] credit for not causing delay when that result could be achieved only because the circumstances would coerce other parties into waiving substantial rights." 2 NRC at 400.

granted there will be serious, lengthy delays either in the commencement of construction, in obtaining assurance as to the absence of antitrust questions, or in both. Regardless of any other factors, 93/ this factor alone dictates denial of the Petition.

Thus, none of the four factors weighs in favor of granting this late Petition; they are either irrelevant or strongly reinforce a decision that this inexcusably late Petition should be denied.

C. NRC Is Not Required Under These Circumstances To Make Affirmative Findings Under Section 105(c)(5)

In pages 24-30 of the Petition, Petitioners argue that the Act requires that late intervention be granted because of the NRC's "special responsibility" for antitrust review under the Act. Although again Petitioners' theory is not precisely stated, their argument appears to be advanced as a means of circumventing the provisions of Section 2.714(a)

93/ As stated by the Appeal Board in Jamesport, "Undeniably, the delay factor is a particularly significant one; indeed -- barring the most compelling contervailing considerations -- an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules." 2 NRC at 651. This statement would obviously apply even more strongly if the delay were not simply in a hearing schedule (which might be made up), but in the commencement of construction or in the ultimate resolution of the issues.

pertaining to untimely petitions. Namely, even if Petitioners have not satisfied the requirements of Section 2.714(a), the Commission should still grant the Petition because it must resolve antitrust questions raised by Petitioners in order to make the Section 105(c) findings that the proposed activities are not inconsistent with the antitrust laws.

It is not necessary to explore Petitioners' arguments in any great detail because they are based upon a single wholly mistaken premise. Notwithstanding Petitioners' allegation that "the Commission is statutorily obligated to make an antitrust finding prior to issuing a construction permit,"[94/] Section 105(c)(5) does not require such a finding prior to issuance of a construction permit for St. Lucie Unit No. 2

The last sentence of Section 105(c)(5) makes quite clear that only when a hearing has been held with respect to antitrust matters is the NRC required to make "a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." This is emphasized by the section-by-section analysis in the 1970 Joint Committee Report which specifically states:

94/ Petition, p. 25.

> "This finding by the Commission is required only in those cases where the Attorney General advises there may be adverse antitrust aspects or antitrust issues are raised by another in a manner according with the Commission's rules and regulations." 95/

Thus, we are not aware of any instance where the Commission (including the NRC Staff, Licensing Boards and Appeal Boards) has made such a finding in the absence of an antitrust hearing. Quite to the contrary, we believe that such finding is consistently absent in any construction permit issued without the holding of an antitrust hearing. Commission practice in this respect is reflected in Regulatory Guide 9.1, "Regulatory Staff Position on Anti-Trust Matters," which states:

> "With regard to those applications for which antitrust hearing is required, the Atomic Energy Commission, with the advice of the Department of Justice, is directed to 'make a finding as to whether activities under the license would create or maintain a situation inconsistent with the antitrust laws. . .'" 96/ (Emphasis added.)

95/ Joint Committee Report, pp. 30-31.

96/ Reg. Guide 9.1, Section A, p. 1 (December, 1973). See also, Penn et al, "The U.S. Nuclear Regulatory Commission's Antitrust Review of Nuclear Power Plants: The Conditioning of Licenses," NR-AIC-001, (May 1976), in which the authors state "In those cases in which a hearing is held, the Commission must make a finding as to whether the granting of a license 'would create or maintain a situation inconsistent with the antitrust laws.'" (Emphasis added) (p. 5).

Accordingly, the statute itself, its legislative history and consistent agency interpretation and implementation thereof demonstrate Petitioners' mistaken characterization of the Commission's obligations under Section 105(c)(5).

Since the Commission is not required to make an affirmative finding under Section 105(c)(5) as to St. Lucie Unit No. 2, the Petitioners' attempt to place a gloss on such non-existent obligation through references to legal precedents in instances where on organic statute or NEPA did require an agency to make certain findings is wholly irrelevant and need not be responded to.[97/]

IV. OTHER MATTERS

Apparently in the nature of suggesting some relief in the alternative to granting the interventions and hearing requested by the Petition, the Petitioners appear to suggest that: (i) if the request for an antitrust hearing on the application for a construction permit for St. Lucie Unit No. 2 is denied, an antitrust hearing concerning issuance of the operating license for that facility should commence immediately;[98/] and (ii) if the Petitioners' request for a hearing as to any unit is denied, the Commission should transmit the Petition to the Federal Trade Commission and request that that agency conduct an investigation of FPL.[99/]

97/ Our silence should not imply, however, any acquiescence in Petitioners' discussion of those irrelevant legal precedents. We simply do not wish to lengthen an already necessarily lengthy Response.

98/ Petition, p. 39,n. 1.

99/ Id., p. 48.

Neither suggestion has any basis in law or reason, and both can be treated briefly.

The suggestion regarding an operating license antitrust hearing on the St. Lucie Unit No. 2 application, being tendered prior to issuance of a construction permit, is premature by several years.[100/] Moreover, it is based upon the completely erroneous premise that an antitrust review "will be mandatory" in connection with the operating license.[101/] Presumably this statement is derived both from the Petitioners' erroneous impression that the findings on antitrust matters specified in Section 105(c)(5) must be made by the Commission before issuing any license whether or not an antitrust hearing was required,[102/] and from the Petitioners' conviction that they have made a showing of "[s]ignificant changes in the license's activities" since the Attorney General's construction permit review.[103/] Of course, FPL completely rejects this latter contention for reasons described on pp. 37 - 46 , supra. However, there is no need to argue here the substantive questions which might be involved at some future time in the Commission's determinations under Section 105(c)(2). The prematurity of the request is dispositive of any question now pending before this Board.

The suggestion that the Commission transmit the Petition to

100/ See Section 50.34(b) of the Commission's regulations.

101/ Petition, pp. 31,39.

102/ This argument is addressed at pp. 56 - 58, supra.

103/ Section 105(c)(2), quoted at page 31 of the Petition.

the FTC and request that it conduct an investigation of FPL is distinguishable only by its novelty. The Act contains no provision for consultation by the Commission with the FTC or for reporting of information to the FTC.

However, the Act contains detailed provisions--Section 105b--for reporting information relating to antitrust inconsistencies to the Attorney General, and of course provides for advice from the Attorney General with respect to each new license application. Apparently, the Petitioners have become disenchanted with the Attorney General. He did not see fit to recommend an antitrust hearing with respect to FPL's South Dade application, and he has not chosen to participate in the hearing which has been convened in that docket. Moreover, FMUA officials have made public statements to the press in Florida expressing anger that the Attorney General, after analyzing for several weeks complaints that have recently been submitted to him by the Petitioners, has not concluded that any action against FPL is warranted. We suggest that the problems that Petitioners have had with the Attorney General are a telling indication of the lack of merit of their accusations against FPL.

FPL is not aware of any legal or other constraints which prevent the Petitioners from contacting the FTC on their own. However, there is no basis in the Act or the Commission's regulations for the Commission's taking the action suggested in the Petitions. Moreover, there is no apparent reason for the Commission's lending

its prestige to the Petitioners' efforts to forum shop and attract additional publicity to their baseless charges against FPL.

V. THE MERITS OF PETITIONERS" CONTENTIONS

As is stated on page 50 of the Petition "the substantive contentions raised in [the Petition] and in Docket No. P-636A are virtually identical." As this Board knows, FPL has taken the position in the South Dade proceeding that these contentions are wholly without merit. That is FPL's position as to the instant Petition as well. However, in that proceeding, where petitions were submitted in a timely fashion, FPL has readily agreed to meet the charges on their merits, and intends to demonstrate on that record their complete lack of factual substance. To go through the exercise of identifying technical faults in these same contentions in this context would be an artificial exercise, wasteful of the time of the Board and the parties. The compelling reasons for denying this Petition in its entirety have been stated in the foregoing sections of this response.

VI. CONCLUSION

As we have demonstrated above, with respect to their late Petition for an antitrust hearing in Docket 50-389A, Petitioners have utterly failed to satisfy the "substantial showing of good cause" requirements of Section 2.714(a). They have not satisfied the "substantial burden" they must bear in justifying an unbelievably

lengthy tardiness of over 2-1/2 years; in fact they have not even sought to explain, let alone justify, their casual attitude in delaying for over 4 months the filing of a petition they first threatened in April, 1976. To the extent that the four equitable factors mentioned in Section 2.714(a) are to be applied in an instance such as the instant case--which does not involve an on-going proceeding--such factors reinforce a decision to deny the Petition.

As we have demonstrated above, Petitioners' novel request for a post-licensing antitrust review of FPL's existing Section 104b operating licenses for Turkey Point Units Nos. 3 and 4 and St. Lucie Unit No. 1 is grossly defective both procedurally and substantively.

In a slightly different context, the Appeal Board has referred to "the need to preserve the integrity of the hearing process by discouraging the unjustifiably late filings of intervention petitions."[104/] In another proceeding where a late petition was filed "but three weeks before the hearing was scheduled to commence," the Appeal Board stated: "Thus Petitioner's procrastination made it inevitable that its entitlement to intervene could not be finally resolved until just before the hearing began, if then. Simple fairness to all parties in these proceedings mandates that such practices not be condoned."[105/]

The instant Petition threatens the integrity not only of the hearing process but of the carefully structured antitrust review

---

104/ Jamesport, ALAB-292, supra, 2 NRC at 659 (concurring opinion of Mr. Salzman).

105/ North Anna, ALAB-289, supra, 2 NRC at 400.

framework set forth in the Act and the Commission's regulations. If a petitioner filing 2-1/2 years late can benefit from his own procrastination and obtain significant leverage over the applicant who has relied on a decision reached years earlier, then the entire statutory and regulatory scheme for early antitrust review is meaningless. If a cloud can be cast on operating licenses constituting a significant portion of a licensee's assets which were properly issued without a prelicensing antitrust review by the simple expedient of filing a request for a hearing, then the entire statutory and regulatory scheme distinguishing between Section 103 and Section 104b licenses is meaningless.

Simple fairness to not only FPL but to all other applicants and licensees who would be subject to the abuse of process reflected in the instant Petition "mandates that such practices not be condoned."

FPL respectfully requests that the instant Petition be summarily denied in all respects.

Respectfully submitted,

J. A. Bouknight, Jr.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036
(202) 833-8371

John E. Mathews, Jr.
Mathews, Osborne, Ehrlich, McNatt,
Gobelman & Cobb
1500 American Heritage Life Building
Jacksonville, Florida 32202
(904) 354-0624

Counsel for Florida Power & Light Company

Date: September 1, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER AND LIGHT COMPANY	)	Docket No. 50-389A
(St. Lucie Plant Unit No. 2)	)	Docket No. 50-335A
(St. LUcie Plant Unit No. 1)	)	Docket Nos. 50-250A
(Turkey Point Plant Units No. 3 and 4)	)	50-251A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the following:

Response of Florida Power And Light Company In Opposition To: Joint Petition Of Florida Cities For Leave To Intervene Out of Time; Petition To Intervene; and Request For Hearing

has been served on the persons shown on the attached list by hand delivery or deposit in the United States mail, properly stamped and addressed on September 1, 1976.

By: J. A. Bartlett, Jr.

Counsel for Florida Power & Light Company

Robert A. Jablon
Daniel J. Guttman
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Lee Scott Dewey
Counsel for the Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

David A. Leckie
Antitrust Division
Department of Justice
P.O. Box 7513
Washington, D.C. 20044

Docketing and Service Station
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(Original and 20 copies)

Secretary
U.S. Nuclear Regulatory
Commission
Washington,D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington,D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

ATTACHMENT A

ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Department of Justice
Washington, D.C. 20530

NOV 14 1973

Howard K. Shapar, Esquire
Assistant General Counsel
Licensing and Regulation
U. S. Atomic Energy Commission
Washington, D. C. 20545

Re: Florida Power & Light Company
St. Lucie Plant, Unit No. 2
AEC Docket No. 50-389A
Department of Justice File 60-415-45

Dear Mr. Shapar:

You have requested our advice pursuant to the provisions of Section 105 of the Atomic Energy Act of 1954, as amended by P. L. 91-560, in regard to the above-captioned application.

Florida Power & Light Company ("Applicant") has applied for a construction permit for its St. Lucie Plant, Unit No. 2, an 810-megawatt nuclear steam generating unit to be located on Hutchinson Island off Florida's east coast. Operation of the facility is presently scheduled for September, 1979.

The Applicant

Applicant is by far the largest electric utility in the State of Florida; it serves approximately half of the statewide electric load. Headquartered in Miami, its area of operation includes most of southern Florida and extends up the east coast to the Georgia border. As of the end of 1972, it provided retail electric power to 574 communities with over 1,500,000 customers. Its total energy sales for 1972 were 28,927,808 megawatt hours. Applicant's summer 1972 peak load was 6,011 megawatts; its dependable generating capacity at that time was 6,585 megawatts--over 70 percent of the generation in the area. Its system of generating stations is integrated by over 3,400 miles of high-voltage transmission lines, approximately 90 percent of the high-voltage transmission in the area--including the 230-kilowatt main transmission grid for southern Florida and the east coast.

Applicant calls itself "the nation's fastest growing electric utility." Florida's rapid growth has been concentrated in the area in which it serves; and for the past several years, the Applicant has added more new customers than any other electric utility in the United States. Applicant's projected peak load for 1980 is 14,475 megawatts--over twice its 1972 load--and generating capacity is planned to increase more than 10,000 megawatts to meet that load.

Applicant's system is directly interconnected and coordinated to some degree with most of the other electric generating systems in Florida: Florida Power Corporation, Tampa Electric Company, and the municipal systems of Jacksonville, Orlando, Fort Pierce, Vero Beach and Lake Worth. Applicant coordinates operations with still other systems through the activities of the Florida Operating Committee. Some of these coordinating arrangements have been entered into only recently.

Applicant supplies electric power in bulk at wholesale to seven rural electric cooperative distribution systems: Lee County, Clay, Glades, Okefenoke, Peace River, Suwanee Valley, and Florida Keys. With the exception of Florida Keys, which has some generation of its own, these cooperatives are exclusively distribution systems and purchase all of their bulk power requirements. 1/ Applicant also supplies bulk power to supplement the generation of two small municipal systems, Homestead and New Smyrna Beach.

Competition

There is substantial and vigorous actual and potential competition among electric utilities in Florida in both bulk power supply and retail distribution markets. Florida law does not require electric utilities to restrict their service areas. The Florida Public Service Commission has approved certain voluntary territorial agreements between Applicant and neighboring systems. 2/

1/ Applicant supplies the total requirements of Lee County, most of the requirements of Clay, Florida Keys, and Glades, and a portion of the requirements of Okefenoke, Peace River and Suwanee Valley.

2/ Some territorial agreements involving the Applicant apparently have taken the form of oral understandings and have never been submitted to the Commission.

Even where these territorial agreements exist, neighboring smaller systems do compete with Applicant at retail. They still compete to attract new loads who can choose to locate either in their service areas or in Applicant's. They still compete to extend service in developing areas on the fringes of their systems. Finally, they compete to stay in business; if their costs and retail rates become too high, their customers may force them to sell out to the Applicant.

There is also competition in bulk power supply, where territorial agreements cannot lawfully operate. The smaller systems have two basic competitive alternatives; either they produce their own bulk power supply, or they buy their bulk power requirements from the Applicant.

Antitrust Implications of This License Application

The Department regards Applicant's ownership of the main high-voltage transmission network in southern and east coast Florida as a significant factor in this antitrust review of the St. Lucie Unit No. 2 license application.

...As we have advised you previously,3/ there are substantial economies of scale in the business of generation and bulk supply of electric power. Nuclear power, which is expected to be the cheapest kind of base-load electric power available to meet future load growth, may be produced economically only from large generating units--units with a capacity of 500 megawatts or more. Most electric generating systems cannot install and market power from such large units on their own. They can employ large units--and achieve the economies of scale necessary to compete effectively in today's electric power markets--only through coordination with other generating systems. High-voltage transmission is the necessary medium for such coordination.

Applicant's control over the transmission network in its area has given it the power to grant or deny access to coordination--and thereby access to the benefits of large-scale,

---

3/ E.g., letter of advice of June 28, 1971, regarding Consumers Power Company (Midland Units 1 and 2), AEC Docket Nos. 50-329A and 50-330A.

low-cost, base-load nuclear generation--to neighboring smaller systems. There have been some allegations that Applicant may have used this power to deny coordinating benefits to smaller systems or to take the predominant share of the benefits of such coordination as has been entered into. The principal allegations of this nature are (1) that Applicant insisted upon retail territorial allocation agreements as a prerequisite to entering into interconnections and bulk power supply transactions with other systems; (2) that Applicant once refused interconnection arrangements to Gainesville in adherence to wholesale territorial allocation with Florida Power Corporation; 4/ and (3) that on one occasion in the 1960's, Applicant refused to make available to a rural electric cooperative the coordinating arrangements necessary to "firm up" its own isolated generation.

Applicant's control over regional transmission and over access to necessary coordinating arrangements for small systems is illustrated by the current problems of two municipal systems, Homestead and New Smyrna Beach. Both have generation of their own and have endeavored to remain in the business of producing their own bulk power supply and to expand their generating facilities to compete for new and growing loads. 5/ Applicant has interconnected with these two municipal systems for the sale of wholesale bulk power. 6/ The nature of the interconnection and the terms under which the power is sold appear to be designed for systems without any generation or systems planning to cease self-generation, rather than for systems seeking to coordinate with others.

4/ During the course of our antitrust review, the municipal distribution system of Jacksonville Beach (which presently obtains its full bulk power requirements from the Jacksonville municipal system) advised us of a pending request to Applicant (which has transmission lines close by) to consider an interconnection with it for the sale of bulk power. Applicant's ultimate response to this request should indicate its current policy with regard to selling wholesale bulk power to a retail distribution system seeking an alternative source of bulk power supply.

5/ Homestead now has barely sufficient generation to meet its load requirements, and it lacks reserves. New Smyrna Beach's generation is sufficient to serve approximately half of its load.

6/ There is some evidence that Applicant earlier had a policy of refusing to sell power at wholesale to municipal systems.

We are advised that Homestead and New Smyrna Beach are negotiating with the Applicant for parallel interconnections at transmission voltage and appropriate coordinating arrangements. Since the instant application was filed, Homestead and New Smyrna Beach have sought ownership participation in or unit power purchases from St. Lucie Unit No. 2 as a means of satisfying their future power supply needs in coordination with their own generation. Homestead and New Smyrna Beach also have asked the Applicant to agree to provide transmission services ("wheeling") to accommodate future power transactions with other systems as another means of satisfying their power supply expansion needs.

The following example indicates how wheeling might be used. We are advised that the Jacksonville electric system proposes to construct two 1,150-megawatt nuclear units and has inquired of other Florida systems, including Homestead and New Smyrna Beach, whether they would be interested in participating in those units or purchasing unit power surplus to Jacksonville's needs. Applicant, which already has a high-voltage interconnection with Jacksonville, could transmit this nuclear power to Homestead and New Smyrna Beach. Applicant has not yet offered, however, to provide such transmission services to Homestead or New Smyrna Beach.

We have noted above that seven rural electric cooperative systems purchase some or all of their bulk power requirements from the Applicant. Six of these systems, 7/ and six other distribution cooperatives who do not obtain any power from Applicant, are members of Seminole Electric Cooperative, Inc., a corporation formed to act for its members in solving their power supply problems. Seminole has at various times in the past conducted studies to determine the feasibility of alternative means of power supply for its members. It appears that the possibility of self-generation by these cooperatives as an alternative to purchased power has had the effect of keeping wholesale purchase rates relatively low, and therefore the cooperatives have continued to purchase their power requirements from the Applicant and other large generating systems.

Recently, both Applicant and Florida Power Corporation have filed wholesale rate increases with the Federal Power Commission; and, as a result, Seminole is again exploring

---

7/ The exception is Florida Keys.

power supply alternatives to meet the growing loads of its members. One alternative for the cooperatives would be to acquire a share of, or purchase unit power from, Applicant's St. Lucie Unit No. 2 (in conjunction with appropriate provisions for power delivery, reserve sharing, and other forms of coordination). A second alternative would be to obtain nuclear power from Jacksonville or other systems which may contemplate installing nuclear generation, with provision for delivery of that power over Applicant's high-voltage transmission system to those cooperatives with which it is interconnected. Since the filing of this license application, Seminole has advised the Applicant of its interest in participating in St. Lucie Unit No. 2 and in other forms of coordination to achieve a feasible long-range power supply program.

Applicant has recently installed its first two nuclear generating units, Turkey Point Nos. 3 and 4, each with a capability of 728 megawatts. A third nuclear unit, St. Lucie Unit No. 1, with 810 megawatts of capacity, is projected to enter service in September, 1975. Unit No. 2, the subject of the present license application, and also 810 megawatts in size, is scheduled for operation in September, 1979. When Unit No. 2 comes on line, Applicant will have over 3,000 megawatts of large-scale, low-cost, base-load nuclear generating capacity. The marketing of power produced by this substantial block of nuclear generation clearly could impair the competitive viability of the other systems in Applicant's area if they are unable to exercise a similar opportunity to obtain their power from nuclear generation.

If systems such as Homestead and New Smyrna Beach are denied both access to nuclear generating units like Applicant's St. Lucie No. 2 and access to other systems' nuclear generation through the use of Applicant's transmission system, they will not be able to take advantage of nuclear generation to meet growing loads as bulk power suppliers. Likewise, without similar access to nuclear generation, the feasibility of Seminole's members entering the bulk power supply business as an alternative to full-requirements wholesale purchase appears greatly diminished.

Conclusion

Our antitrust review led us to the following conclusions: (1) Applicant is the dominant electric utility in Florida and because of its ownership of transmission, has the power to

grant or deny other systems in its area the access to coordination--and thus the nuclear power--needed to compete in bulk power supply and retail distribution markets; (2) there is some indication Applicant's dominance may have been enhanced through conduct inhibiting the competitive opportunities of the smaller systems in its area; and (3) construction and operation of St. Lucie No. 2, and the sale of power therefrom to meet Applicant's load growth and compete with the smaller systems in its area could create or maintain a situation inconsistent with the antitrust laws if access to nuclear generation were denied those smaller systems.

We related our concern over these matters to representatives of the Applicant. While denying construction and operation of St. Lucie Unit No. 2 could have the effect we feared, they advised us that Applicant would nevertheless seriously consider offering participation in St. Lucie Unit No. 2 (with the transmission services, reserve sharing, and other coordination necessary to support such participation) to the three utilities who, prior to our rendering this advice, have given Applicant notice of their interest in such participation to meet a portion of their future power supply requirements--i.e., Homestead, New Smyrna Beach and Seminole Electric Cooperative. Further, because of the status of Applicant's transmission network as the key to coordination by these systems with others, the Department requested Applicant also to consider adopting a policy to facilitate their efforts to obtain access to other economical power sources. It was indicated that the Applicant's final position on these matters will be determined within the next 90 days; this would appear to leave sufficient time to formulate such license conditions as may be appropriate.

In view of the consideration Applicant is now giving to the question of access by other entities to nuclear generation, and the probability that participation in St. Lucie Unit No. 2 will be made available to certain of these entities, 8/ the Department does not at this time recommend an antitrust hearing. Considering that issuance of the construction permit

---

8/ In this connection we note also that Applicant will almost certainly apply to the Commission for licenses to construct and operate additional nuclear generation units. Further questions concerning the opportunities of its neighboring systems (including systems other than Homestead, New Smyrna Beach, and Seminole) for access to the benefits of nuclear generation may be ripe for resolution in the antitrust review of such license applications.

for St. Lucie Unit No. 2 is not contemplated until early in 1975, we believe it reasonable to ask the Commission to abide the outcome of Applicant's 90-day consideration prior to ultimately deciding whether or not to hold an antitrust hearing. The Department would, of course, be pleased to advise the Commission further on this question or other relevant questions, in the light of whatever offers Applicant may make and other intervening developments.

Sincerely yours,

Bruce B. Wilson

BRUCE B. WILSON
Acting Assistant Attorney General
Antitrust Division

Attachment B

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

AEC Docket No. 50-389A

FEB 25 1974

Mr. Ben H. Fuqua
Senior Vice President
Florida Power & Light Company
Post Office Box 3100
Miami, Florida 33101

Dear Mr. Fuqua:

By letter of November 14, 1973, the Department of Justice recommended that an antitrust hearing was not necessary in connection with the Florida Power & Light Company application for St. Lucie Unit 2 in view of the consideration of the granting of access to this facility to certain entities.

In view of your expressed intent to provide reasonable access to the St. Lucie Unit with the necessary ancillary arrangements, the fact that no antitrust issues have been raised by another in a manner according with the Commission's Rules of Practice, and that no finding has been made that an antitrust hearing is otherwise required, it is our position that the attached conditions would satisfy the staff with regard to the antitrust issues that have been raised in connection with this application and the position of the Department of Justice as expressed in its letter of November 14, 1973, and accordingly obviate an antitrust hearing.

Accordingly, the attached conditions will be included in any license issued in connection with the above application.

Sincerely,

(Signed) John F. O'Leary

John F. O'Leary
Director of Licensing

Enclosure:
Subject commitments

cc: Lon Bouknight, Esq.

COMMITMENTS FOR FLORIDA POWER & LIGHT
ST. LUCIE UNIT 2

1. With regard to Clay County Electric Cooperative, Inc., Florida Keys Electric Cooperative, Inc., Glades Electric Cooperative, Inc., Lee County Electric Cooperative, Inc., Okefenokee Rural Electric Membership Cooperative, Inc., Peace River Electric Cooperative, Inc., and Suwannee Valley Electric Cooperative, Inc.[1/] and the municipalities of New Smyrna Beach and Homestead:

a. Licensee will offer each the opportunity to purchase, at licensee's costs, a reasonable ownership share (hereafter, "Participant's Share") of the St. Lucie Plant, Unit No. 2 (the Unit).

"Licensee's costs" will include all costs associated with development, construction and operation of the Unit, determined in accordance with the Federal Power Commission's Uniform System of Accounts.

"Purchase" means payment, within a reasonable time, of participant's share of licensee's costs incurred through date of acceptance of the offer, and, thereafter, regular payments of the participant's share of all costs incurred during development, construction and operation of the Unit.

1/ Two or more of the referred-to coops may determine to aggregate their entitlements from the St. Lucie Unit #2 through a single representative. In such event, the licensee shall allocate the delivery of said entitlements as designated by the representative to one or more existing or mutually agreeable Florida Power & Light Co. delivery points on the combined system provided that such delivery is technically feasible.

b. Participant will notify licensee of its acceptance to participate in St. Lucie 2 within a reasonable time after receipt of the offer.

c. Licensee may retain complete control and act for the other participants with respect to the design, engineering, construction, operation and maintenance of St. Lucie Unit 2, and may make all decisions relevant thereto, in so far as they deal with the relationship between the licensee and the other participants, including, but not limited to, decisions regarding adherence to AEC health, safety and environmental regulations, changes in construction schedule, modification or cancellation of the project, and operation at such time and at such capacity levels as it deems proper, all without the consent of any participant.

2. Licensee shall facilitate the delivery of each participant's share of the output of the Unit to that participant, on terms which are reasonable and will fully compensate it for the use of its facilities, to the extent that subject arrangements reasonably can be accommodated from a functional and technical standpoint.

3. Licensee shall not refuse to operate in parallel to the extent that it is technically feasible to do so with the participants and shall provide emergency and maintenance power to participants as required when such power is or can be made available without jeopardizing

power supply to licensee's customers or its other power supply commitments. A separate rate schedule(s) shall be established for such emergency and maintenance power exchanges.

4. At a time when licensee plans for the next nuclear generating unit to be constructed after St. Lucie No. 2 has reached the stage of serious planning, but before firm decisions have been made as to the size and desired completion date of the proposed nuclear unit, licensee will notify all non-affiliated utility systems with peak loads smaller than licensee's which serve either at wholesale or at retail adjacent to areas served by applicant that licensee plans to construct such nuclear unit.

5. It is recognized that the foregoing conditions are to be implemented in a manner consistent with the provisions of the Federal Power Act and all rates, charges or practices in connection therewith are to be subject to the approval of regulatory agencies having jurisdiction over them.

Attachment C

FLORIDA POWER & LIGHT COMPANY

HAND DELIVERED

February 26, 1974

Mr. John F. O'Leary
Director
Directorate of Licensing
United States Atomic Energy Commission
Washington, D.C.

Re: Florida Power and Light Company
St. Lucie, Unit No. 2, AEC
Docket No. 50-389A

Dear Mr. O'Leary:

The license conditions attached to your letter of February 25th are acceptable to Florida Power and Light Company as a resolution of all antitrust matters with regard to this Docket. Accordingly, Florida Power and Light Company agrees to inclusion of these conditions in the licenses issued in this Docket.

Acceptance of these license conditions is for the purpose of avoiding an antitrust hearing in the proceeding, and is not to be construed as an admission that any situation inconsistent with the antitrust laws would be created or maintained by activities under an unconditioned license, or that Florida Power and Light Company is otherwise in violation of any of the antitrust laws.

Sincerely,

Ben H. Fuqua
Senior Vice President

Attachment D

LAW OFFICES
SPIEGEL & McDIARMID
2600 VIRGINIA AVENUE, N.W.
WASHINGTON, D.C. 20037
TELEPHONE (202) 333-4500

GEORGE SPIEGEL
ROBERT C. McDIARMID
SANDRA J. STREBEL
ROBERT A. JABLON
JAMES N. HORWOOD

ALAN J. ROTH
OF COUNSEL

DANIEL I. DAVIDSON
FRANCES E. FRANCIS
THOMAS N. McHUGH, JR.
PETER K. MATT
DANIEL J. GUTTMAN

JAMES CARL POLLOCK

APR 16 1976

LOWENSTEIN, NEWMAN, REIS & AXELRAD

April 15, 1976

J. A. Bouknight, Jr., Esq.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: FP&L, St. Lucie Unit II,
NRC 50-389A

Dear Lon:

The purpose of this letter is to respond on behalf of the Utilities Commission of New Smyrna Beach to your offer of 2 mw of St. Lucie Unit II as representing a "reasonable ownership share." See Tracy Danese's letter to John R. Kelly, January 22, 1976.

Subject to the Utilities Commission's arranging for reasonable financing and subject to its reaching necessary legal agreement, operating and transmission agreements with you, the Commission accepts your offer of 2 mw. It will, of course, make all efforts to consummate necessary agreements. I look forward to working with you towards that end.

The Utilities Commission cannot, however, waive its rights to seek a reasonable ownership share from St. Lucie Unit II. As you know, since the Company's January 22, 1976, letter, I have had many conversations with you to attempt to resolve the matter. The Utilities Commission has given very serious attention to your 2 mw limitation, but it simply cannot reconcile that limitation against the principle that, in light of present circumstances, the Utilities Commission should have an opportunity to acquire at least equal nuclear capacity to that which will be possessed by FP&L. Thus we cannot concede that the above acceptance of your 2 mw offer would resolve the difficulties which exist between us.

The Utilities Commission is also disturbed that your proposed transmission rate applicable to Crystal River III (and presumably to St. Lucie) makes no allowance for a joint rate with Florida Power Corporation or for proper functional allocations necessary to allocate costs fairly between the Utilities Commission and FP&L's other services. In addition, an analysis shows your rate proposal to overstate allocable transmission costs. The high level of your proposed transmission charges are especially discouraging in light of your unwillingness to allow general transmission rights to New Smyrna Beach or to make provision for participation through capital investment in your transmission facilities as was proposed by John Kelly in his November 13, 1974, letter to Ralph Mulholland.

As you recall, NSB initially proposed the purchase of 30 mw from St. Lucie No. 2 under a "sell back" arrangement similar to the Company's proposal in paragraph 2 of its March 30, 1976 letter. Letter of Tracy Danese to those requesting participation in the proposed South Dade nuclear units. After long negotiations at the suggestion of Tracy Danese, I agreed to recommend to the Utilities Commission acceptance of a 3.08 mw share in the hopes that this would facilitate final settlement, even though, as you recall, I and other New Smyrna Beach negotiators vigorously disagreed that this 3.08 mw represented a fair share. See my letter to Harry A. Poth, Esq., 11/25/75.

While any agreement must be subject to the Utilities Commission's approval, in view of my past offers I shall undertake again to recommend settlement by the Utilities Commission and their withdrawal from any St. Lucie litigation, if you will agree to the 3.08 mw share originally proposed by one of your negotiators and to a mutually acceptable transmission rate or formula. If you cannot agree, the Utilities Commission reaffirms that it desires to purchase 2 mw from St. Lucie II and suggests that a meeting be called between the Department of Justice and the NRC regulatory staff to assist in this matter.

I understand from our telephone conversation of two weeks ago that Ralph Mulholland had been planning to telephone Bob Bathen concerning the transmission rate. Subject to your approval, I shall request Bob Bathen to call Ralph Mulholland in the hopes that both matters can be resolved. With good will on both sides, especially in light of what I believe

to be the mutual respect between Ralph Mulholland and Bob Bathen; agreement should be possible. However, if that is unavailing, I suggest either a meeting between us or resolution by the Nuclear Regulatory Commission.

Sincerely,

Robert A. Jablon (by KMM)

Robert A. Jablon

SOVIET SEEKS A CAIRO PEACE MOVE; MAJOR TANK BATTLES RAGE IN SINAI; ARABS CUT OIL EXPORTS 5% A MONTH

Attachment E

U.S. CHIEF TARGET

Reduction Is Smaller Than Expected—Effect Uncertain

By RICHARD EDER
Special to The New York Times

BEIRUT, Lebanon, Oct. 17—The Arab oil-producing nations proclaimed tonight a monthly cut in exports of oil, with the burden to fall on the United States and other nations considered to be unfriendly to the Arab cause.

The long-awaited formal decision to use oil as a weapon in the Middle East conflict was announced at the end of an eight-hour meeting in Kuwait of ministers from 11 countries.

The monthly export reduction was set at 5 per cent off each previous month's sale, starting with the level of sales in September. The measure was at once more modest, more flexible and vaguer than had generally been predicted.

A Significant Shift

"It was about as mild a step as they could have taken," said one oil expert who had talked to the participants. At the same time, to have finally come to the use of oil as a weapon, as had been threatened for years, marks a significant revolution in Middle Eastern affairs.

The cuts would continue, month by month, until Israel evacuated the territories occupied in the 1967 war, made provision to respect Arab rights.

France May be Exempt

There was no specific mention of any country on the "unfriendly" list other than the United States. This was one of many flexible aspects of the decision. It allows the Arab states to grade customers in order of their support of the Arab cause. The participants promised to insure that the 5 per cent monthly export cut would not reduce sales to "friendly" countries, but again they did not say which countries these were.

Observers at the meeting assumed that France, for example, would not be subject to reductions. West Germany, presumably, might be. Japan, whose position was described by one participant as that of "odious neutrality," might experience some difficulties. It was hard to say what treatment would be given to Britain, which has also

Continued on Page 18, Column 6

ARAB NATIONS CUT OIL EXPORTS BY 5%

Continued From Page 1, Col. 5

tried to be neutral.

The 5 per cent cutback would be computed against the previous month's exports. The cut is less than it would be if this 5 per cent were computed from some single point. Thus, after six months the actual reduction would be 23 per cent instead of 30, and at the end of a year, 43 per cent instead of 60.

The 11 countries involved in the decision, not all of which are oil-producing countries, were Abu Dhabi, Algeria, Bahrain, Dubai, Egypt, Kuwait, Iraq, Libya, Qatar, Saudi Arabia and Syria.

The Arab cutback in output is expected to tighten an already tight American oil situation but not to bring major rationing. The rise in oil prices will have an impact on Britain's balance of payments and her efforts to curb inflation. Articles and a chart appear on Page 71.

Egypt and Saudi Arabia, opposing more militant proposals, are reported to have insisted on avoiding measures that would put relations with the United States beyond "the point of no return," a phrase used by the Egyptian President, Anwar el-Sadat, in his speech yesterday.

Reduction Is Modest

Tonight's decision appears to take account of this view. The dimensions of the cut were considerably more modest than the kind of all-out action called for by countries such as Syria and Iraq.

The United States uses some 17 million barrels of crude oil and refined products each day, and some 6.4 million barrels of this are imported. From the Arab countries the United States takes a total of crude and heating oil estimated variously at 1.5 million to 1.9 million barrels a day.

This week the United States released figures purporting to show that Americans would not be seriously affected even by major cuts in Arab oil production.

William E. Simon, chairman of President Nixon's oil policy committee, said that the United States could decrease its consumption of oil by as much as three million barrels a day if it made the necessary effort.

Cutoff in Oil to U.S. Ordered by Libya

By WILLIAM D. SMITH

Libya fired a double-barrel blast of her "oil weapon" yesterday by ordering a cutoff of all shipments of crude oil and petroleum products to the United States and almost doubling prices for other importers.

The announcements shocked an already stunned and confused oil industry.

[In London, Abu Dhabi, one of the major Arab oil producers, was reported to be negotiating for a multimillion dollar loan, ostensibly for industrial development. There was speculation, however, that the funds would be used for the Arab war effort. Page 14.]

Libya supplied about 142,000

Continued on Page 57, Column 4

THE NEW YORK TIMES, SATURDAY, OCTOBER 20, 1973

Cutoff in Oil for U.S. Ordered by Libya

Continued From Page 1, Col. 1

barrels a day of crude oil directly to the United States and indirectly 100,000 barrels of petroleum products out of a total United States consumption of about 17.4 million barrels.

This is about 1.4 per cent of total American consumption, 10 per cent of all Arab exports to the United States and 3.8 per cent of all imports by this country.

The importance of the Libyan crude is that it has a low sulphur content and is blended with considerably larger amounts of other crude oil to make heating oil conform to environmental standards in many East Coast cities.

New York could be particularly affected by the action because the Consolidated Edison Company imports a large part of its oil from Bahama refineries, which use Libyan oil to make other oils acceptable under the city's clean-air regulations.

There is a question of whether Libya will consider shipments to the Bahamas and elsewhere in the Caribbean in the same category as shipments to the United States.

An oil company executive commented: "If the Libyans are serious about the oil weapon, they will embargo the Caribbean. If it is just another exercise in Arab rhetoric, they won't."

The Libyans raised the price of oil from $4.90 to $8.925 a barrel. The action follows a sharp increase announced Wednesday by Persian Gulf producers, including Iran, which is not Arab. Venezuela also announced yesterday that she would readjust her oil tax based on the Persian Gulf advance, which amounted to 70 per cent.

The breakdown of the new Libyan price of $8.925 a barrel was a $6.979 posted price, a $1.336 premium for low sulphur, a transportation premium of .458 cents because the oil is closer to consumer centers than the Persian Gulf and a .152-cent premium because the Suez Canal is closed.

The increase is likely to have the greatest impact in Europe, which gets most of Libya's total production of 2.2 million barrels a day. The resultant rise in prices of oil products will spur already rampant inflation.

John Lichtblau, head of the Petroleum Industry Research Council, commented: "Although all the details are not in, what the producing countries appear to have done is to have raised the price of running a factory, heating a home and powering a car around the world by an unprecedented degree."

Tuition Fees Rise

The price at the wellhead for domestic oil in the United States ranges between $4 a barrel for "old" oil and slightly more than $5 for newly discovered oil under the nation's present Phase 4 guidelines.

In accordance with Arab production cutbacks announced Wednesday, the Persian Gulf state of Qatar said yesterday it would cut production by 10 per cent and take additional steps to halt supplies to the United States and other countries that support Israel.

Qatar, which had an average production of 482,000 barrels a day in 1972, supplied only about 6,000 barrels a day to the United States.

Qatar followed the example of the area's oil giant, Saudi Arabia, which on Thursday announced that she was cutting back her production of 8.5 million barrels a day by 10 per cent. The United States gets directly more than 200,000 barrels a day from Saudi Arabia.

On Wednesday, 10 Arab oil-producing states announced a minimum 5 per cent cutback in production with an additional 5 per cent drop in output each month until Israel evacuates all the territories occupied in 1967.

Arab Aims Unclear

As yet it is unclear to both oil industry executives and United States Government officials as to whether the Arabs intend an across-the-board cutback of production that would affect all consuming countries equally or whether the cutback would affect only the United States.

In Japan, which imports 90 per cent of her oil, Arab diplomats told the Foreign Minister, Masayoshi Ohira, that Japan would not be "inconvenienced" by the Arab actions.

Nonetheless, the Japanese Government yesterday asked the 24-member Organization for Economic Cooperation and Development to negotiate with the oil producers on both the price rises and production cutbacks.

In Seoul, South Korean officials said they were considering rationing plans.

Washington sources said yesterday that the Administration would not consider the situation serious until at least one million barrels a day of supply had been cut off.

4 More Arab Governments Bar Oil Supplies for U.S.

By RICHARD EDER
Special to The New York Times

BEIRUT, Lebanon, Oct. 21—Four Persian Gulf oil producers — Kuwait, Qatar, Bahrain and Dubai — today announced a total embargo of oil to the United States.

The announcements made the cutoff of Arab oil to the United States theoretically complete. Of the 17 million barrels of crude and heating oil and refinery products used by the United States each day, approximately 6 per cent has been imported from the Arab states.

At the same time, the Netherlands, which has been accused by the Arabs of being pro-Israel, was the object of reprisals today. Iraq announced the nationalization of Dutch oil holdings in the country. Previously Iraq had nationalized American holdings.

Not even the Arab producers themselves believe that the use of the oil weapon against the United States will have much immediate effect, although if maintained for a long period it could present serious problems. There is, for example, no simple way to prevent oil sold to European countries from finding its way to the United States.

Today's moves completed a second phase of Arab governments' decision to use oil to put pressure on the United States to abandon or reduce its support of Israel.

Last Wednesday, meeting in Kuwait, the Arabs announced that each nation would cut oil production by 5 per cent each month. These escalating cuts would continue, it was declared, until Israel evacuated the lands taken in 1967 and made restoration to the Palestinian ref-

Continued on Page 20, Column 7

Four More Arab Governments Cut Off Supplies of Oil to U.S.

Continued From Page 1, Col. 7

ugees. This over-all squeeze on oil consumers was to be applied flexibly. Countries that gave "concrete assitance" to the Arab cause, it was announced, would not suffer cuts. Countries considered unfriendly — the United States in particular —would be made to bear the effects of the progressive curtailment.

The formula was purposely unclear and flexible. It was designed not simply to punish countries for supporting the Arabs insufficiently, but also to encourage them to change their policies. Countries that adopted a stiffer line toward Israel could find themselves placed in a more favored category.

At the same time, the use of the over-all reduction in production, especially as it escalated each month, would make it less and less likely that the European countries, for instance, would allow oil sold to them to be sent to the United States.

The Kuwait meeting was followed by announcements of more United States military aid to Israel and President Nixon's request for a $2.2-billion appropriation to pay for it. This seems to have set in motion the second phase of the oil squeeze.

Several states, among them Saudi Arabia and Qatar, announced that the first production cut would be 10 per cent rather than 5 per cent. In the case of Saudi Arabia, whose production dwarfs that of the others, the 10 per cent cut would replace the first two monthly 5 per cent reductions.

The results would be roughly the same, but the initial bite would be much harder.

Then over the last three days, the oil states began successively announcing a total embargo on oil to the United States. By tonight these included Saudi Arabia, Libya, Kuwait, Abu Dhabi, Qatar, Algeria, Bahrain and Dubai.

The total embargo on the United States could mean that the other form of pressure, the production cut, will begin to be felt in Europe and Japan somewhat later than it otherwise would have done. This is because the United States took close to 10 per cent of the Arab output.

Transcript of President's Address on the Energy Situation

Following is a transcript of President Nixon's broadcast address on energy from Washington last night, as recorded by The New York Times.

Good evening. I want to talk to you tonight about a serious national problem. A problem we must all face together in the months and years ahead.

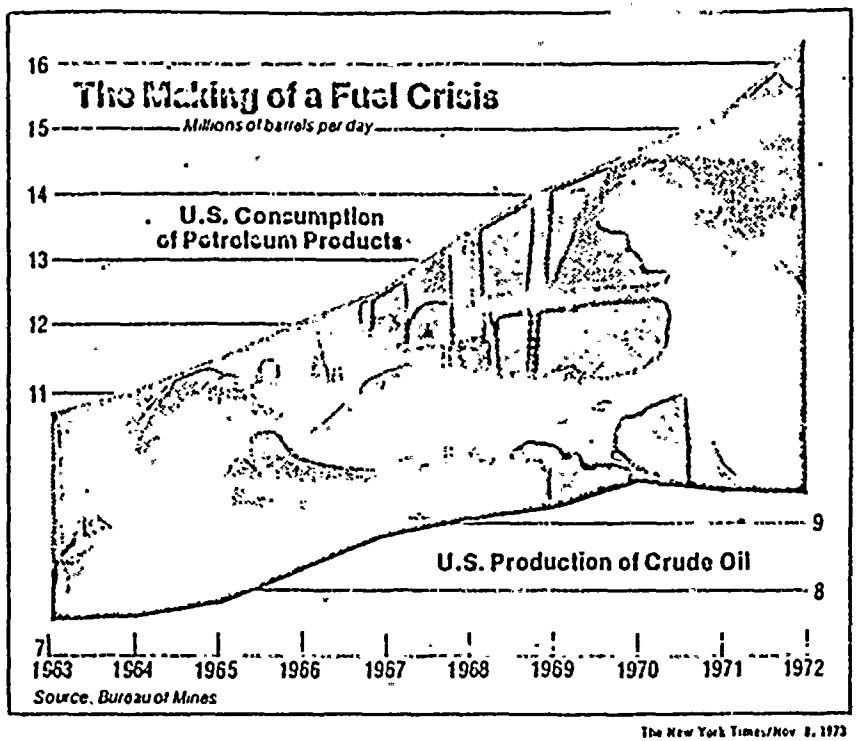
As America has grown and prospered in recent years, our energy demands have begun to exceed available supplies. In recent months we have taken many actions to increase supplies and to reduce consumption. But even with our best efforts we knew that a period of temporary shortages was inevitable.

Unfortunately, our expectations for this winter have now been sharply altered by the recent conflict in the Middle East. Because of that war, most of the Middle Eastern oil producers have reduced over-all production and cut off their shipments of oil to the United States.

By the end of this month, more than two million barrels a day of oil we expected to import into the United States will no longer be available.

10 Per Cent Short

We must therefore face up to a very stark fact. We are heading toward the most acute shortages of energy since World War II. Our supply of petroleum this winter will be at least 10 per cent short of our anticipated demands and it could fall short by as much as 17 per cent. Now even before war broke out in the Middle East these prospective shortages were the subject of intensive discussions among members of my Administration, leaders of the Congress, Governors, Mayors and other groups.



The New York Times/Nov. 8, 1973

From these discussions has emerged a broad agreement that we as a nation must now set upon a new course. In the short run, this course means that we must use less energy — that means less heat, less electricity, less gasoline. In the long run, it means that we must develop new sources of energy which will give us the capacity to meet our needs without relying on any foreign nation.

The immediate shortage will affect the lives of each and every one of us. In our factories, our cars, our homes, our offices we will have to use less fuel than we are accustomed to using.

Some school and factory schedules may be realigned. And some jet airplane flights will be canceled.

This does not mean that we're going to run out of gasoline, or that air travel will stop, or that we will freeze in our homes or offices anyplace in America.

The fuel crisis need not mean genuine suffering for any American.

But it will require some sacrifice by all Americans.

Muscle Not Damaged

We must be sure that our most vital needs are met first and that our least important activities are the first to be cut back, and we must be sure that while the fat from our economy is being trimmed the muscle is not seriously damaged.

To help us carry out that responsibility I am tonight announcing the following steps:

First, I am directing that industries and utilities which use coal, which is our most abundant resource, be prevented from converting from coal to oil. Efforts will also be made to convert power plants from the use of coal—of oil to the use of coal.

Second, we are allocating reduced quantities of fuel for aircraft. Now this is going to lead to a cutback of more than 10 per cent of the number of flights and some rescheduling of arrival and departure times.

Third, there will be reductions of approximately 15 per cent in the supply of heating oil for homes and offices and other establishments. To be sure that there is enough oil to go around for the entire winter all over the country it will be essential for all of us to live and work in lower temperatures.

68 Degrees

We must ask everyone to lower the thermostat in your home by at least six degrees so that we can achieve a national daytime average of 68 degrees. Incidentally my doctor tells me that in a temperature of 66 to 68 degrees you're really more healthy than when it's 75 to 78, if that's any comfort.

In offices, factories and commercial establishments we must ask that you achieve the equivalent of a 10-degree reduction by either lowering the thermostat or curtailing working hours.

Fourth, I am ordering additional reductions in the consumption of energy by the Federal Government. We have already taken steps to reduce the Government's consumption by 7 per cent. The cuts must now go deeper and must be made by every agency and every department in the Government. I am directing that the daytime temperatures in Federal offices be reduced immediately to a level of between 65 and 68 degrees, and that means; in this room, too, as well as in every other room in the White House.

In addition, I am ordering that all vehicles owned by the Federal Government, and there are over a half a million of them, travel no faster than 50 miles per hour except in emergencies.

This is a step which I have also asked Governors, Mayors and local officials to take immediately with regard to vehicles under their authority.

Fifth, I'm asking the Atomic Energy Commission to speed up the licensing and construction of nuclear plants. We must seek to reduce the time required to bring nuclear plants on line, nuclear plants that can produce power.

To bring them on line from 10 years to 6 years—reduce that time lag.

Sixth, I'm asking that Governors and Mayors reinforce these actions by taking appropriate steps at the state and local level.

We've already learned, for example from the State of Oregon, that considerable amounts of energy can be saved simply by curbing unnecessary lighting, and slightly altering the school year.

Stagger Working Hours

I am recommending that other communities follow this example. And also seek ways to stagger working hours, to encourage greater use of mass transit and car pools.

How many times have you gone along the highway or the freeway, wherever the case may be, and seen hundreds and hundreds of cars with only one individual in that car. This we must all cooperate to change.

Consistent with safety and economic considerations, I am also asking Governors to take steps to reduce highway speed limits to 50 miles per hour.

This action alone if it is adopted on a nationwide basis could save over 200,000 barrels of oil a day—just reducing the speed limit to 50 miles per hour.

Now all of these actions will result in substantial savings of energy. More than that, most of these are actions that we can take right now without further delay. The key to their success lies, however, not just here in Washington but in every home in every community across this country.

If each of us joins in this effort, joins with the spirit and the determination that have always graced the American character, then half the battle will already be won.

Additional Steps

But we should recognize that even these steps as essential as they are may not be enough. We must be prepared to take additional steps and for that purpose additional authorities must be provided by the Congress.

I have also directed my chief adviser for energy policy, Governor Love, and other Administration officials to work closely with the Congress in developing an Emergency Energy Act.

I met with the leaders of Congress this morning and I asked that they act on this legislation on a priority basis. It is imperative that this legislation be on my desk for a signature before the Congress recesses this December.

Because of the hard work that's already been done on this bill by Senators Jackson and Fannin and others, I am confident that we can meet that goal. And I will have the bill on this desk and will be able to sign it.

This proposed legislation would enable the executive branch to meet the energy emergency in several important ways.

First, it would authorize an immediate return to daylight saving time on a year-round basis.

Second, it would provide the necessary authority to relax environmental regulations on a temporary case by case basis, thus permitting an appropriate balancing of our environmental interests, which all of us share, with our energy requirements which, of course, are indispensable.

Third, it would grant authority to impose special energy conservation measures, such as restrictions on the working hours for shopping centers and other commercial establishments.

And, fourth, it would approve and fund increased exploration, development and production from our naval petroleum reserves. Now, these reserves are rich sources of oil. From one of them alone, Elk Hills, in California, we could produce more than 160,000 barrels of oil a day within two months.

Fifth, it would provide the Federal Government with authority to reduce highway speed limits throughout the nation and finally, it would expand the power of the Government's regulatory agencies to adjust the schedules of planes, ships and other carriers.

If shortages persist despite all of these actions and despite inevitable increases in the price of energy products it may then become necessary—may become necessary — to take even stronger measures. It is only prudent that we be ready to cut the consumption of oil products such as gasoline by rationing or by a fair system of taxation and consequently I have directed that, contingency plans, if this becomes necessary, be prepared for that purpose.

Now some of you may wonder whether we're turning back the clock to another age. Gas rationing. Oil shortages. Reduced speed limits. They all sound like a way of life we left behind with Glenn Miller in the war of the forties. Well in fact part of our current problem also stems from war, the war in the Middle East. But our deeper energy problems come not from war but from peace and from abundance. We are running out of energy today because our economy has grown enormously and because in prosperity what were once considered luxuries are now considered necessities.

Consume 30 Per Cent

How many of you can remember when it was very unusual to have a home air-conditioned? And yet this is very common in almost all parts of the nation. As a result, the average American will consume as much energy in the next seven days as most other people in the world will consume in an entire year.

We have only 6 per cent of the world's people in America, but we consume over 30 per cent of all the energy in the world. Now our growing demands have bumped up against the limits of available supply.

And until we provide new sources of energy for tomorrow, we must be prepared to tighten our belts today.

Let me turn now to our long-range plans.

While a resolution of the immediate crisis is our highest priority, we must act now to prevent a recurrence of such a crisis in the future.

This is a matter of bipartisan concern. It's going to require a bipartisan response.

Two years ago, in the first energy message any President has ever sent to the Congress, I called attention to our urgent energy problem. Last April, this year, I reaffirmed to the Congress the magnitude of that problem, and I called for action on seven major legislative initiatives.

Again in June, I called for action. I have done so frequently since then.

But thus far, not one major energy bill that I have asked for has been enacted. I realize that the Congress has been distracted in this period by other matters, but the time has now come for the Congress to get on with this urgent business, providing the legislation that will meet not only the current crisis but also the long-range challenge that we face.

Our failure to act now on our long-term energy problems could seriously endanger the capacity of our farms and of our factories to employ Americans at record-breaking rates. Nearly 86-million people are now at work in this country and to provide the highest standard of living we or any other nation has ever known in history. It could reduce the capacity of our farmers to provide the food we need; it could jeopardize our entire transportation system; it could seriously weaken the ability of America to continue to give the leadership which only we can provide to keep the peace that we have won at such great cost of thousands of our finest young Americans.

That is why it is time to act now on vital energy legislation that will affect our daily lives, not just this year, but for years to come. We must have the legislation now which will authorize construction of the Alaska pipeline.

Legislation which is not burdened with irrelevant and unnecessary provisions. We must have legislative authority to encourage production of our vast quantities of natural gas, one of the cleanest and best sources of energy.

We must have the legal ability to set reasonable standards for the surface mining of coal, and we must have the organizational structures to meet and administer our energy programs.

And therefore tonight, as I did this morning in meeting with the Congressional leaders, I again urged the Congress to give its attention to the initiatives I recommended six months ago to meet these needs that I have described.

Resources Listed

Finally, I have stressed repeatedly the necessity of increasing our energy research and development efforts. Last June, I announced a five-year $10-billion program to develop better ways of using energy and to explore and develop new energy sources.

Last month, I announced plans for an immediate acceleration of that program.

We can take heart in the fact that we in the United States have half the world's known coal reserves. We have huge untapped sources of natural gas. We have the most advanced nuclear technology known to man. We have oil in our continental shelves. We have oil shale out in the western part of the United States.

And we have some of the finest technical and scientific minds in the world. In short, we have all the resources we need to meet the great challenge before us.

Now, we must demonstrate the will to meet that challenge.

In World War II America was faced with the necessity

of rapidly developing an atomic capability. The circumstances were great. Responding to that challenge this nation brought together its finest scientific skills and its finest administrative skills in what was known as the Manhattan Project. With all the needed resources at its command, with the highest priority assigned to its efforts, the Manhattan Project gave us the atomic capacity that helped to end the war in the Pacific and to bring peace to the world.

Twenty years later, responding to a different challenge, we focused our scientific and technological genius on the frontiers of space. We pledged to put a man on the moon before 1970, and on July 20, 1969, Neil Armstrong made that historic giant leap for mankind when he stepped on the moon.

The lessons of the Apollo project and of the earlier Manhattan Project are the same lessons that are taught by the whole of American history. Whenever the American people are faced with a clear goal and they're challenged to meet it, we can do extraordinary things.

Today the challenge is to regain the strength we had earlier in this century — the strength of self-sufficiency.

Service of Peace

Our ability to meet our own energy needs is directly limited to our continued ability to act decisively and independently, at home and abroad, in the service of peace —not only for America, but for all nations in the world.

I have ordered funding of this effort to achieve self-sufficiency far in excess of the funds that were expended in the Manhattan Project. But money is only one of the ingredients essential to the success of such a project.

We must also have a unified commitment to that goal. We must have unified direction of the effort to accomplish it

Because of the urgent need for an organization that would provide focused leadership for this effort, I am asking the Congress to consider my proposal for an Energy Research and Development Administration, separate from any other organizational initiatives.

And to enact this legislation in the present session of the Congress.

Let us unite in committing the resources of this nation to a major new endeavor. An endeavor that in this bicentennial era we can appropriately call Project Independence.

Let us set as our national goal, in the spirit of Apollo and with the determination of the Manhattan Project, that by the end of this decade, we will have developed the potential to meet our own energy needs without depending on any foreign enemy—foreign energy sources.

Some Hardship

Let us pledge that by 1980 under Project Independence we shall be able to meet America's energy needs from America's own energy resources.

In speaking to you tonight in terms as direct as these my concern has been to lay before you the full facts of the nation's energy shortage. It is important that each of us understands what the situation is, and how the efforts we together can take to help to meet it are essential to our total effort.

No people in the world perform more nobly than the American people when called upon to unite in the service of their country. I am supremely confident that while the days and weeks ahead may be a time of some hardship for many of us they will also be a time of renewed commitment and concentration to the national interests.

We have an energy crisis, but there is no crisis of the American spirit. Let us go forward then doing what needs to be done, proud of what we have accomplished together in the past, and confident of what we can accomplish together in the future.

Let us find in this time of national necessity a renewed awareness of our capacities as a people, a deeper sense of our responsibilities as a nation, and an increased understandin gthat the measure and the meaning of America has always been determined by the devotion which each of us brings to our duty as citizens of America.

I should like to close with a personal note. It is just one year ago that I was re-elected as President of the United States of America. During this past year we have made great progress in achieving the goals that I have set forth in my re-election campaign. We have ended the longest war in America's history. All of our prisoners of war have been returned home.

And for the first time in 25 years no young Americans are being drafted into the Armed Services.

Deplorable Watergate

We have made progress toward our goal of a real prosperity without war. The rate of unemployment is down to 4.5 per cent which is the lowest unemployment in peacetime that we've had in 16 years. And we are finally beginning to make progress in our fight against the rise in the cost of living.

These are substantial achievements in this year 1973.

But I would be less than candid if I were not to admit, that this has not been an easy year in some other respects as all of you are quite aware.

As a result of the deplorable Watergate matter, great numbers of Americans have had doubts raised as to the integrity of the President of the United States. I've even noted that some publications have called on me to resign the office of President of the United States.

Tonight I would like to give my answer to those who have suggested that I resign.

I have no intention whatever of walking away from the job I was elected to do.

As long as I am physically able, I am going to continue to work 10 to 18 hours a day for the cause of a real peace abroad, and for the cause of prosperity, without inflation and without war, at home

And in the months ahead, I shall do everything that I can to see that any doubts as to the integrity of the man who occupies the highest office in this land—to remove those doubts where they exist.

And I am confident that in those months ahead, the American people will come to realize that I have not violated the trust that they placed in me when they elected me as President of the United States in the past.

And I pledge to you tonight that I shall always do everything that I can to be worthy of that trust in the future.

Thank you and good night

ATTACHMENT F

BEFORE THE
FEDERAL POWER COMMISSION

Florida Gas Transmission Company (Basic Magnesia, Incorporated) et al.	)))	Docket No. RP74-50-1 et al.

INITIAL BRIEF OF CITIES TO PRESIDING LAW JUDGE

Robert A. Jablon
Attorney for
the Fort Pierce Utility Authority of the City of Fort Pierce, Gainesville-Alachua County Regional Electric, Water and Sewer Utilities, Homestead, Kissimmee, Lakeland, Sebring Utilities Commission, Starke and Tallahassee, Florida

May 29, 1974

Law Offices of:
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

The reason for imposing strict standards is implied in the applications themselves. These are applications for "extraordinary" relief. Since there is a limited amount of gas available, in derogation of contract and certificate rights, granting these applications has the direct result of taking gas from other customers. Granite City Steel Co. v FPC, 320 Fed 711 (CADC, 1963), compare Cascade Natural Gas Corporation v El Paso Natural Gas Corporation, 386 US 129 (1967).

Fairness demands that the general standards set as a result of the FGT tariffs - and the settlement agreement - be followed to the extent possible. These priorities have a historic basis; They have been sanctioned by settlement. It is of moment that the applicants for special relief neither contested the settlement agreement nor appealed from the Commission's Order approving the settlement, both of which occurred last year. See Statement for citations. The settlement agreement is at Florida Gas Transmission Corporation, RP66-4 et al, 3/95-121 (May 18, 1973). This takes on practical significance when the importance of planning is recognized. For example, if parties know of a lack of long range availability of fuel, they can plan for alternative supplies, make appropriate equipment changes, adjust pricing, and afford notice to customers. However, freely granting applications for special relief negates and even counteracts such planning, forcing parties to make abrupt changes often in adverse market situations. It is precisely for such reasons that parties have a right to rely on tariff provisions, settlement agreements and generalized regulations. See e.g., Texas Eastern Transmission Co., v. FPC, 306 F2d, 345 (CA5, 1962).

Applicants' claims for special relief are based upon no facts which could not have been known or anticipated at the time of the settlement and Commission's order. Moreover, applicants for special relief, Cities - as well as others who would be affected by transferringgas to applicants - have the same type of preferred interruptible contract While perhaps contractual agreements cannot be said to be inviolate in an absolute sense, contractual agreements do constitute a means to provide for commercial planning and an ordering of affairs. For this reason, the Commission has been admonished many times that its regulatory authority is to be exercised within the context of private agreements. Eg., United Gas Pipe Line Co. v Mahele Gas Service Corp., 350 US 332 (1956); Borough of Lansdale, Pennsylvania, v FPC, CADC 73-1031 et al (March 15, 1974).

IV. THE CONTINUED AVAILABILITY OF NATURAL GAS TO THE CITIES IS OF VITAL PUBLIC INTEREST

As was stated by Cities' witness Phillips, head of an informal organization of the Cities to aid in making available fuel supply, the Cities are not seeking either special favors or special treatment as a result of this proceeding. (5/966:7-16) However, they do recognize their obligation to their citizens and ratepayers.

Granting these four applications for special relief alone would reduce the amount of gas available to other preferred interruptible customers by an additional 6.5 percent above already projected curtailments in 1974. In 1974 the applicants for special relief would receive 82.5 percent of their annual contractual amounts, but the other members of the preferred interruptible class would receive 48.2 percent; in 1975 the applicants for special relief would continue to receive 82.5 percent (i.e., their requests), while the rest of the class would receive 19.6 percent. (6/1073: 21-1075:1) (Exhibit 46).

As natural gas may become less available the impact of granting special exemptions so that certain customers receive the full amounts of their claimed needs on a guaranteed basis becomes more and more significant.

In this situation the Commission must weigh the importance of gas and of the needs of other customers. As an illustration, we set forth how important natural gas is to the Cities, although we have no doubt that natural gas is also of great importance to other members of the preferred interruptible class who have not participated in this litigation.

At the outset, the importance of electricity to society must be stressed. It provides the means for almost all basic production or nearly every product produced in the United States and for all health and welfare needs. Indeed, electricity underlies the entire structure of modern life. Absence of electricity, inevitably means loss of vital services, such as police protection, fire protection, health services, water supply, street lighting and traffic control and humancomfort needs (5/917:19-918:3; 918: 19-920: 2; 6/1096:6-1097:3). This is especially true in Florida where electricity serves many of the uses normally served by direct fuel use elsewhere.*/ (Exhibit 50).

---

*/ The economics of direct fuel use in Florida are much less favorable than elsewhere in the United States because of the disproportionate amount of air conditioning and reduced amounts of space heating. On colder days, like elsewhere in the country heating is an absolute necessity. However, in Florida it often pays to utilize the same type of equipment for heating which is used for air-conditioning--and therefore heat by electricity--rather than to install furnace or other equipment to use direct fuels. (6/1084:6-13)

We state the importance of electricity, because perhaps it is so obvious and supply has been assured for such a long period of time in most areas of the country that it is taken for granted. However, if the question is availability of fuel or supply, electricity production must rank of primary importance. Indeed, because of the necessity of continued supply, as a condition of granting any special relief, should electric service be threatened, a condition should be applied to the granting of the applications that such relief would then discontinue.

To the extent that claims for special relief are predicated upon general fuel shortage, the utilities would be faced with the same difficulties of obtaining alternative supplies and a superior claim to relief.

The same factors that make electricity a vital service make it socially essential that electric rates not be allowed to become excessive. Indeed, this Commission is well aware of the problems of large electric rate increases. Because a use of electricity is pervasive, the impacts of increased costs affect our entire economy and everybody in it. No segment is immune. The very poor or the elderly, who often congregate in Florida on reduced incomes, would be especially hard hit by drastic electricity price increases.*/ (5/931:14-932:5).

The rise of electricity prices and its implications are alarming. Even without the natural gas shortage, oil prices have increased often more than three-fold and for spot purchases more than six fold. The need to meet environmental standards is likely to mean oil at $22 a barrel rather than recent $3 prices. (5/925:6-929:53; 6/1092:8-1094:22).

This means that even without considering environmental impacts, spot prices or further inflation, substituting oil for natural gas by the utilities can easily double electric bills; considering environmental restraints and spot purchase prices, the increase can be well over 300 percent.**/ (6/1092:8-1095:22) Exhibit 51, 52.

---

*/ The fertilizer and phosphate food manufacturers stress the importance of their products and we do not disagree. However, likewise, people on low incomes can be restricted in the food that they can afford to purchase because of mounting electricity bills.

**/ The arithmetic is demonstrated in witness Bathen's Exhibits 51 through 52 . Today, fuel costs can account for fifty percent of electric bills. Substituting 53 cents mcf natural gas with its oil equivalent of $1.50 to $3.00 can and has resulted in a doubling to a tripling of electricity costs.

In viewing these figures, it must be borne in mind that fertilizer or feed additives are a small proportion of grain or meat prices, but that fuel cost increases have an immediate and direct impact on the bills of electric users.

The result of increases in fuel cost in Florida would tend to be much more severe than elsewhere in the country because of the lack of availability for the most part of coal resources and, again, because of the greater dependency upon electricity. Florida is a State whose economy has been built on air-conditioning, which is largely electric. Exhibit 50 (6/1081:9-1084:18).

Finally, Cities' competitive situation should be taken into account. If through its orders, the Commission will take direct action to grant special exemptions reducing available gas to Cities still further, it must recognize that this can have serious economic impacts on them. They are surrounded by and are in competition with major utilities. The continued existence of Cities as independent generating entities is of general advantage. The Commission and courts have often recognized the importance of maintaining competition, where possible, in the electric industry. For it can be demonstrated that where there are comparable services from smaller and larger utilities available, this tends to have a general cost reducing impact and improved efficiency on the larger investor owned utility as well as advantages to Cities. (6/1097:7-13, 1119:21-1121:21).

For historic and still existing reasons, Cities are more gas reliant than the major investor owned utilities, Florida Power and Light, Florida Power and Tampa Electric Company. Those utilities have had greater potential or actual access to nuclear power and coal in contrast to Cities. Furthermore, Florida Power and Florida Power and Light have been able to obtain independent natural gas contracts from producers, which are transported by Florida Gas. (6/1081:5-1083:6/1097:13-18; 929:11-931:7) Exhibit 49. Transfers of available natural gas from Cities could have a devastating effect on the competitive situation, the economics of Cities and the rates their citizens must pay for electricity.*/ Air quality factors further mitigate against an abrupt transferal of gas. 5/997:19-998:3, 6/1097:21-1098. Exhibit 56).

---

*/Apart from the human impacts of such potential price increases, they can affect the location of industry and the well-being of an area. (5/932:13-22, 933: 20-934:7).

It should be noted that, especially for the smaller systems, the necessity of abruptly transferring fuel supply can result in a lack of available alternate oil supplies. In this situation, it is by no means certain that the existing interties (or underlying interchange contracts) would be sufficient to maintain adequate electric supply.*/ (6/1083:9-17).

Finally, we note that in certain contexts, use of gas for generation has been criticized. We would merely point out that such criticism has no place here. Such criticism has always had as its premise the availability of economic substitute fuels. Whatever its validity, the sudden increase in oil prices combined with its uncertain availability can no longer justify an assumption of priority to other uses. Moreover, because of their competitive situation in their location in Florida, other altnerative fuels are not available. Servicing human needs--and the economics of Florida--demands availability of natural gas for generation.**/

V. GAS SHOULD NOT BE TAKEN FROM CITIES WITHOUT ADEQUATE COMPENSATION.

Assume that the Presiding Law Judge and Commission decide to grant one or more of the applications for special relief, for example, the Gardinier feed stock gas. Gardinier has claimed that it must have natural gas for feedstock because of the inherent unsuitability of alternate fuels. In other words, it claims it needs the gas to supply its product. It makes no economic claim that it

---

*/ Indeed, the economics of the Florida Gas Transmission Company pipeline was predicated upon such use. (6/1071:2-1072:4).

To the extent and use arguments are predicated upon higher efficiencies of direct fuel use, they are inapplicable in Florida. Moreover, in terms of total enery conservation, as between gas and oil, the argument becomes irrelevant. It should be pointed out that, if it is assumed that electricity uses more fuel that comparably direct use (which is by no means certain due to the need to exhaust gas and oil through chimneys or otherwise), the impact of using the more expensive fuel per BTU for electric generation is to greatly increase electricity costs. Since electric use will undoubtedly continue, such policy cannot be supported. (5/996:10-997:4).

**/ While various of the applicants for special relief have averted to their "higher priority" position allegedly under other possible curtailment programs, smaller cities such as Starke and Sebring would also be a higher priority. These systems are generating a vital product and would have all the problems the Commission referred to in obtaining alternate supplies of any smaller user of natural gas.