UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

9/5/78

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

RESPONSE OF THE DEPARTMENT OF JUSTICE

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September 5, 1978

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RESPONSE OF THE DEPARTMENT OF JUSTICE

The Department of Justice (Department) submits this response to the Memorandum of Florida Power & Light Company (FP&L), filed August 25, 1978 and urges this Commission to initiate a proceeding pursuant to Section 105a of the Atomic Energy Act, as amended (Act) (42 U.S.C. 2135a) at this time and to consolidate such proceeding with the Section 105c proceeding on Florida Power & Light Company's application for its St. Lucie No. 2 unit.

BACKGROUND

By Order dated July 28, 1978, this Commission requested the views of interested parties on certain questions regarding the initiation of a proceeding under Section 105a of the Act in view of the decision of the United States Court of Appeals for the Fifth Circuit im Gainesville

Utilities Department v. Florida Power & Light Company, 573 F.2d 292 (1978) ("Gainesville"). Pursuant to the Commission's Order interested parties submitted their initial responses on August 25, 1978. 1/ Leave was granted for the filing of replies, if such replies were received by September 5, 1975. In filing this reply the Department reiterates the position stated in its filings of August 25 and 28, 1978, and urges this Commission to initiate a 105a proceeding now and consolidate said proceeding with the 105c proceeding that has been ordered with respect to FP&L's St. Lucie No. 2 Nuclear Unit.

DISCUSSION

The Memorandum of Florida Power & Light Company points out the numerous findings that must be made in a 105a proceeding. However, rather than demonstrating the difficulties which would attend immediate initiation and consolidation, FP&L's arguments illustrate why initiation of a proceeding now is the only realistic approach for determining what action, if any, is appropriate under 105a in view of Gainesville.

1/ FP&L also filed a Motion for Recall of Order in Light of Changed Circumstances on August 15, 1978. The Department filed its response to that Motion on August 28, 1978.

FP&L's argument that institution of a 105a proceeding at this time is inappropriate is based on four premises: 1) an unsubstantiated and unverified recitation of the facts surrounding the Gainesville decision, 2) interpretation of Section 105a and the legislative history thereof, 3) an alleged lack of nexus between the licensed activity and Gainesville, and 4) a highly questionable interpretation of conspiracy under Section 1 of the Sherman Act.

At pages 2-6 of FP&L's Memorandum the Company briefly recapitulates the procedural history of Gainesville by characterizing the issues before the Fifth Circuit, commenting on the District Court's charge to the jury and otherwise supplying details of the litigation. However, many of these procedural matters cannot be gleaned from the Fifth Circuit's opinion and can only be established by reviewing portions of the record which are not now before this Commission.

FP&L's arguments on the three other premises have been intertwined in order to reach the desired conclusion. Thus, FP&L has contended that the last antitrust violation found by the Fifth Circuit occurred on October 24, 1966 when FP&L refused to deal with Gainesville because of the existence of a territorial agreement between FP&L and Florida Power Corp. This "finding" leads FP&L to conclude that it was impossible to have violated the antitrust laws in the conduct of NRC

licensed activities (as required by 105a) because the Company did not obtain NRC licenses until April 27, 1967. Since no overt act in furtherance of the illegal agreement took place after the NRC issued licenses to FP&L, the Company concludes that the requisite nexus between the antitrust violation and the NRC licensed activities is absent. (FP&L Memorandum at 6-11).

There is little legislative history to support FP&L's interpretation of Section 105a (FP&L Memorandum at 6). However, even if we assume that FP&L's reading of Section 105a is correct the Company's argument still fails because FP&L's assumption that its antitrust violation ended on October 24, 1966 is incorrect as a matter of law. Once a conspiracy is shown to exist, it is presumed to continue. United States v. Stromberg, 268 F.2d 256, 263 (2d Cir. 1957); United States v. Perlstein, 126 F.2d 789, 798 (3rd Cir. 1942). Further, a conspiracy is not presumed to have ended simply because an important overt act in furtherance of it is accomplished. United States v. Kissel, 218 U.S. 601, 609 (1910); United States v. Hyde, 225 U.S. 347, 368 (1912). As explained in the antitrust case of United States v. Swift, 186 Fed. 1002, 1013 (N.D. Ill. 1911):

> A conspiracy agreement to accomplish an unlawful object is, in its very nature, a continuing arrangement between the conspirators, the duration of which will depend upon the nature of the object which they propose to accomplish. . . . So long as the parties contemplate further action, if necessary to the attainment of their ultimate object, the agreement or confederation still exists. This further action may consist alone in accepting the benefits of an agreement previously made. (Emphasis added).

In sum, FP&L's characterization of the Gainesville record and arguments on nexus clearly involve questions of fact that will have to be decided on the basis of evidence which is not now before this Commission. Its interpretation of Section 105a, as FP&L admits, has very scant legislative support (FP&L Memorandum at 6). Finally, FP&L ignores well settled principles of the law of conspiracy. Thus, FP&L is asking this Commission to adopt each of the Company's factual and legal arguments without the benefit of a factual record or the views of a Licensing and Appeal Board on the legal issues. At bottom, FP&L is urging this Commission to hold its own 105a proceeding now based only on the pleadings before it and to decide, without the benefit of a factual record or a preliminary decision that it is not appropriate to modify the Company's existing NRC licenses. Such a request should be rejected.

The only appropriate way to handle this case, which is one of first impression, is to initiate a proceeding before a Licensing Board and allow all parties to make legal arguments and factual presentations in support of their positions. Only in that way can the Commission be assured that it will be making its first decision under 105a with a complete record before it. The most efficient way to develop that record and consider those arguments is in the parallel and related 105c proceeding. Should FP&L prevail on the issues it raises neither proceeding will be seriously prejudiced by the improper joinder and much in the way of time and resources would be conserved.

CONCLUSION

In view of the above and the August 25 and 28, 1978 filings of the Department it is submitted that this Commission should initate a 105a proceeding now and consolidate that proceeding with the 105c proceeding that has been ordered with respect to FP&L's St. Lucie No. 2 nuclear unit.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of RESPONSE OF THE DEPARTMENT OF JUSTICE have been served upon all of the parties listed on the attachment hereto by hand or by deposit in the United States mail, first class of airmail, this 5th day of September, 1978.

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