UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the 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

REPLY MEMORANDUM FOR FLORIDA POWER & LIGHT COMPANY

Pursuant to the Commission's Order of July 27, 1978, Florida Power & Light Company (FPL) replies to the memoranda filed by the NRC Regulatory Staff (Staff), the Antitrust Division of the Department of Justice (Division) and a group of Florida Cities (Cities).

All of the other parties simply assume that a jurisdictional basis exists for initiating proceedings under Section 105a of the Atomic Energy Act. In fact, there is no such basis. The violation found by the Fifth Circuit in its Gainesville opinion [1] did not involve the conduct of activities licensed by this Commission. Indeed, none of the incidents on which the Fifth Circuit relied occurred during the term of any license issued to FPL by this Commission.

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[1] Gainesville Utilities Dept. v. Florida Power & Light Co., 573 F.2d 292 (5th Cir. 1978).

Moreover, even if a jurisdictional basis for Commission action could somehow be assumed, it would not be appropriate for the Commission to act at this time. The Fifth Circuit has stayed issuance of its mandate, and Supreme Court review of the decision will be sought. [2/] Even if the Fifth Circuit's decision stands, further proceedings in the U.S. District Court would be required, and those proceedings involve questions, such as the duration of the alleged violation, which might be determinative of any claim of jurisdiction by this Commission pursuant to Section 105a.

FPL responds to certain additional arguments advanced in memoranda submitted by one or more of the parties in the sections which follow.

A. There Is Confusion, Particularly on the Part of the Cities, between the Commission's Authority under Section 105a and its Separate Responsibilities under Section 105c.

The Cities' make no effort to differentiate between the Commission's authority to act under Section 105a and its separate responsibility regarding the conduct of the antitrust hearing which has been ordered in Florida Power & Light Company (St. Lucie Plant, Unit No. 2), Docket No. 50-389A. The Cities apparently contend that, by consolidating proceedings under both Sections 105a and 105c, the Commission can hold one proceeding of almost limitless breadth -- a proceeding in which the authority to act without a further finding

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[2/] As FPL pointed out in its Motion for Recall of Order, filed on August 18, the findings contained in the Fifth Circuit's opinion are not effective until the court's mandate issues. See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976).

of antitrust violation provided by Section 105a can be coupled with Section 105c's broad fact-finding authority, while the limitations found in each separate provision may be discarded.

This formless view of the law is wrong. Under Section 105a, the Commission is limited to the terms of the court finding of violation. It cannot couple the court's finding with its own findings on unrelated charges such as those sprinkled throughout the Cities' pleadings. 3/ The Commission's authority under Section 105a is to take any additional remedial action that it deems necessary with respect to a violation in the conduct of licensed activities which a court has found. The Commission acts on the basis of court findings, not allegations of antitrust violations presented separately to the Commission. 4/ Contrary to the Cities' view, a court finding of some kind of violation does not serve as a triggering mechanism for the kind of general post-licensing antitrust review which the Commission has held is outside of its statutory powers. See South Texas; 5/ also see

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3/ In no respect does the Court finding differentiate between FPL and Florida Power Corporation. It is curious that the Commission has issued an order and parties have filed pleadings suggesting the possibility of proceedings against FPL under Section 105a, but no such suggestions have been made as to Florida Power Corporation, which also holds a license issued by the NRC. The answer, of course, is that neither the Cities nor the Division are concerned with the narrow and stale violation found by the Court. The Cities in particular simply seek a means for opening another front of attack against FPL in which to raise issues unrelated to the Court finding.

4/ The failure to distinguish between the Fifth Circuit's finding and the Cities' unsubstantiated allegations which are now before the Licensing Board in Docket No. 50-389A pervades the Cities' pleadings. Perhaps the most flagrant example is in the discussion of relief, on pp. 8-9 of the Cities' pleading. The discussion is couched in terms of relief in a monopolization case. In fact, the Gainesville Court found for FPL on the monopolization issues involved. 573 F.2d at 303. No charge of monopolization has ever been sustained against FPL.

5/ Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2) CLI-77-13, 5 NRC 1303 (1977).

Florida Power & Light Company (St. Lucie Plant, Unit No. 1, Turkey Point Plant, Unit Nos. 3 and 4), ALAB-428, 6 NRC 221 (1977). 6/

Section 105c is at the opposite end of the pole from Section 105a. It requires the Commission to look at the entire "situation" and determine, after a full hearing, whether "activities under the license would create or maintain a situation inconsistent with the antitrust laws". While allegations such as those involved in the Gainesville case may well be relevant in a proceeding under Section 105c, it is clear that the NRC will not be bound by the findings of the court. 7/ Moreover, even after antitrust allegations have been considered, the Commission must, in a 105c proceeding, find a substantial nexus between those allegations and activities under the proposed license as a prerequisite to any action. Louisiana Power & Light Company (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619 (1973):

In summary, the Commission's authority to act under each of Sections 105a and 105c has a distinct basis in law and policy. The two sections cannot be blended synergistically to create some new and different kind of antitrust authority in the NRC. The questions

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6/ Petitions for review pending in U.S. Court of Appeals for the District of Columbia Circuit, sub nom, City of Ft. Pierce, et al. v. NRC, Nos. 77-1925, 77-2101.

7/ See Prehearing Order Number One in Florida Power & Light Company (South Dade Plant, Units 1 and 2), Docket No. P-636A, which involved FPL's effort to have the findings of the District Court in the Gainesville case accepted by the NRC as determinative of those issues. The Licensing Board denied FPL's motion on multiple grounds.

before the Commission in this matter concern only whether the specific finding of violation in the Gainesville decision provides a basis for proceeding under Section 105a, and, if so, how and when the Commission should proceed. Other antitrust issues which are now being heard, pursuant to Section 105c, in Docket No. 50-389A, are not involved in these determinations; these issued will be decided on their merits in that proceeding. 8/

B. The Proposal for "Interim Relief" Is Contrary to Law

The Cities propose that the Commission convene a proceeding under Section 105a, consolidate it with proceedings under Section 105c in Docket No. 50-389A, and authorize the Licensing Board to grant some form of interim relief. The Cities do not specify the section or sections of the Atomic Energy Act on which they base their interim relief request. 9/

It is unlikely that the Cities would ground these "interim relief" suggestions on Section 105a. The procedures for modifying a license prior to a hearing on the modification are set forth in 10 CFR §2.204, which permits the Commission to make such an order effective immediately where the "public health, safety, or interest so requires". Assuming that that the Commission could overcome what

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8/ FPL vigorously denies the allegations that it is responsible for a situation inconsistent with the antitrust laws which have been asserted in the St. Lucie Unit No. 2 proceeding, and is confident that it will prevail on the merits there.

9/ The only citation to the Act which appears in the relevant portion of the Cities' pleading is to Section 161, 42 U.S.C. §2201, which is entitled "General Provisions."

FPL contends are insurmountable hurdles and find both that the Gainesville decision provides a jurisdictional basis for action under Section 105a, and that such basis exists prior to the issuance of the court's mandate, it would be necessary, in order to take "interim" action, to conclude that the public interest requires such an extraordinary response to conduct which all parties concede has not been pursued for many years.[10/] After all that, any conditions ordered by the Commission, particularly before the procedures of 10 CFR Part 2, Subpart B have been completed, would necessarily have to be directly related to the violation found by the court. Clearly, the Cities do not contemplate a simple injunction against future divisions of territory between FPL and Florida Power Corporation.

What the Cities really want is to have at least some of the relief which they have requested in Docket No. 50-389A imposed before there is a hearing on the merits in that proceeding. The suggestion is contrary to law. The Commission's authority to impose conditions in a Section 105c proceeding is found in Sections 105c(5) and 105c (6), which are specific as to the prerequisites for such conditions. Section 105c(5) provides that where an antitrust hearing is convened:

> The Commission shall give due consideration to the advice received from the Attorney General and to such evidence as may be provided during the proceeding in connection with such subject matter, and shall make a finding as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws .... (Emphasis supplied)

[10/] To the knowledge of FPL's counsel, orders under 10 CFR §2.204 have been made effective immediately in NRC practice only where serious questions of public safety have been involved.

Section 105c(6) follows and provides:

> (6) In the event the Commission's finding under paragraph (5) is in the affirmative, the Commission shall [consider certain factors]. On the basis of its findings, the Commission shall have the authority ... to issue a license with such conditions as it deems appropriate. (Emphasis supplied)

The Commission is required to hold a hearing before making findings and to make findings before imposing conditions, a scheme which is wholly inconsistent with the idea of "interim relief." 11/

The Cities' cite FPC v. Tennessee Gas Company, 371 U.S. 145 (1962), as supporting their request for interim relief. However, the error in the Cities' reading of the case is apparent from the first sentence of Mr. Justice Clark's opinion:

> This case involves the authority of the Federal Power Commission after hearing to order an interim rate reduction ... where a portion of a previously filed rate is found unjustified but the remainder of the proceeding is deferred. 371 U.S. at 146 (Emphasis added)

It has never been suggested that the FPC (or its successor, the FERC) could modify rates in the interim prior to the hearing and findings required in both Section 205 of the Federal Power Act 12/ and Section 4 of the Natural Gas Act. 13/

11/ The Joint Committee Report on the 1970 amendments show that Congress specifically contemplated that licenses would only be conditioned under 105c:

> On the basis of all its findings -- the finding under paragraph (5) [of 105c] and its findings under paragraph (6) -- the Commission would have authority to "issue or continue a license as applied for, to refuse to issue a license, to rescind a license or amend it, and to issue a license with such conditions as it deems appropriate". Joint Comm. on Atomic Energy, 91st Cong., 2d Sess., H.R. Rep. No. 1470, at 31.

12/ 16 U.S.C. §824d

13/ 15 U.S.C. §717c. "The first prerequisite to an order by the Commission is that it shall be preceded by a hearing and findings." F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575, 583 (1942).

The cases cited in the footnote on page 16 of the Cities' Response are completely inapposite. Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378 (1959), holds that the FPC must satisfy itself of the reasonableness of the proposed sales price before issuing a permanent certificate of convenience and necessity for new interstate natural gas sales. If anything, Atlantic Refining, which reverses the FPC for acting on the basis of an inadequate record, cuts against the Cities' argument, even more so because it involves a statute [14/] which does not explicitely require findings on rate issues as a prerequisite to FPC action. FPC v. Hunt, 376 U.S. 515 (1964), holds that the FPC can condition a temporary certificate for the sale of natural gas to require maintenance of the initial sales price pending action on the permanent certificate. United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965), involves, in addition to some issues present in the Hunt case, the Commission's authority to order refunds of charges collected under a certificate, where the order authorizing the certificate has been vacated on judicial review.

Section 105c requires, as explicitly as any statute on the books, that Commission action be supported by findings entered on the basis of a hearing. The Cities cite no authority which in any way supports the view that such statutory requirements may be disregarded.

Finally, let there be no mistake about the kind of interim relief which the Cities have in mind. Two possible interim conditions are suggested in the footnote on page 15 of the Cities'

[14/] Section 7 of the Natural Gas Act, 15 U.S.C. §717f (1970).

pleading. Both would have serious and irreparable impact on FPL, and particularly on FPL's retail and wholesale customers. Moreover, neither proposal has anything at all to do with the violation found in the Gainesville decision.

The first suggestion is that FPL sell unit power from its operating nuclear plants to the Cities. At issue are plants which FPL planned before 1970 and built at the Company's and its customers' own risk No request by any of the Cities to purchase power from or otherwise participate in any of these plants was received until late 1976, after all of the plants had proven their economic feasibility and reliability in operation. The Cities' proposal, not at all atypical of both their requests for relief and what they characterize as requests to deal in the marketplace, is that FPL sell them the output of this most economical capacity on FPL's system at cost in exchange for their selling FPL the output of their highest cost capacity at cost. FPL demurs for the reason that the transaction would directly and materially increase the cost of electricity to its own customers.

The second suggestion for interim relief involves filing of a "state-wide transmission tariff." The suggestion leaves the incorrect impression that FPL is not providing transmission service to all who desire it, and it neglects to explain the impact of the term "statewide," as the Cities use it. The fact, contrary to the Cities' implication, is that FPL has offered to provide transmission service between every system with which it is interconnected and every other system in Florida, and such service is now being provided in every case where it has been requested. FPL has agreed to provide service subject to subsequent FERC determinations as to appropriate

rates and terms of service. The disputes between FPL and the Cities are two. First, may FPL provide the service on a contract basis, or must it file a generally applicable tariff? Filing of a tariff equates to undertaking an obligation as a common carrier, an obligation which the Federal Power Act does not require any utility to undertake. Second, while FPL has proposed to base its transmission rates on its own fully-allocated costs, the Cities have proposed that FPL and other companies in Florida be required to file a joint transmission rate, which would be fixed at a level equal to the average of the costs of the three companies. Under the Cities' proposal, where two companies provide transmission service to accomodate a particular transaction, only one charge would be paid to be divided between the two companies, each of which would recover approximately one half of its fully allocated costs. This scheme is what is implied by the seemingly innocuous term "state-wide" used on page 15 of the Cities' pleading.

The foregoing demonstrates the wisdom of the drafters of Section 105c. It would be contrary to both law and logic to consider the question of relief before FPL has been heard and the merits of the antitrust allegations have been determined. Contrary to what the Cities would have the Commission believe, the basic disputes which remain between FPL and the Cities do not involve credible allegations that FPL has refused to deal with the Cities on

a basis which has the potential for mutual advantage. Instead, the basic issues involve demands which would demonstrably increase FPL's cost of serving its wholesale and retail customers. The Commission cannot under the statute, and should not even if it could, direct such transfers of money from one group of customers to another prior to a full hearing and findings pursuant to Section 105c.

C. There Is No Reason for the Commission to Proceed Under Section 105a, Assuming a Jurisdictional Basis, until the Proceedings in Court Have Run their Course

FPL's Memorandum of August 25 sets forth the considerations which weigh heavily in favor of the Commission's awaiting the outcome of further proceedings in court, even if, contrary to FPL's arguments, the Commission concludes that the Gainesville opinion provides a jurisdictional basis for action under Section 105a. The Division and the Cities both urge that the Commission initiate proceedings immediately, in each case for reasons which, upon examination, are unpersuasive.

The first argument, made by both the Department and the Cities, is that "initiation of a 105a proceeding now would be consistent with this Commission's policy of resolving antitrust questions as early as possible," citing South Texas, supra. Department Response, p. 3. Surely, this is advanced with tongue in cheek. The Commission in South Texas was dealing with questions of prelicensing antitrust review under Section 105c, where the statute and its legislative history reflect an intent that the antitrust review be completed at an early stage of the licensing process, before irretrievable financial

and planning commitments have been made. The questions before the Commission now involve three operating nuclear plants which have already been planned, financed and built and which are now producing power on FPL's system. The other plant involved in this proceeding is already subject to an antitrust hearing in which the issues involved in the Gainesville case along with other issues will be considered. 15/ Thus, as the Staff notes, "there is no urgency" for the Commission to institute proceedings under Section 105a at this time. Staff Response, p. 4-5.

The Cities also manage to imply, although they carefully avoid saying, that there is a need to act immediately to remedy an existing violation. 16/ To set the record straight, the Fifth Circuit's finding of a violation involved actions which took place before and during 1966; the Cities themselves conceded that there was no existing conspiracy as of two years ago; and, the Cities could not plausibly claim that any conspiracy existed after Gainesville's settlement with Florida Power Corporation, which took place in 1973. 17/ Again, the Cities are unable to differentiate between the narrow finding of violation in the Fifth Circuit's opinion and

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15/ The antitrust hearing was ordered in Docket No. 50-389A on the basis of a petition which was late by thirty-one months. Both the Cities and the Division argued for convening the hearing, and neither was then able to perceive any significant policy in favor of early resolution of antitrust questions, even though the question there involved the very kind of prelicensing antitrust review of which the Commission spoke in South Texas.

16/ See, for example, Cities' Response, top of p. 9, p. 12. The rhetoric about "misuse" of a license granted by this Commission is particularly out of place where what is at issue is a finding that a violation occurred at a time when FPL had not even been authorized to construct, much less operate, a nuclear generation facility.

17/ See FPL's memorandum of August 25, 1978, p. 10, and citations in n.4, p. 10, of that memorandum.

the Cities' broad allegations which have yet to stand the test of a hearing on the merits.

The Staff suggests that, while there is no need to institute a separate proceeding under Section 105a, it might be appropriate to treat the questions raised under Section 105a as issues in Docket No. 50-389A. Beginning with the proposition that there is good cause for doubting that a Section 105a proceeding will be required at all, any economies which might result from this procedure would be outweighed by the prejudicial effect of instituting proceedings under Section 105a.

It would be unfortunate indeed for the Commission, acting in haste to achieve such economies as might attend consolidation with the hearing in Docket No. 50-389A., to initiate a Section 105a proceeding which otherwise would never be ordered at all. FPL has no desire to delay unduly any Commission proceeding or to cause the Commission to conduct repetitive proceedings. If the Commission stays its hand at this stage with respect to Section 105a, the proceeding in Docket No. 50-389A will go forward, and probably will not be substantially different in evidentiary scope from the consolidated proceeding suggested by some of the parties. If the Commission subsequently decides to initiate proceedings under Section 105a, FPL will not object to incorporating into the record of the Section 105a proceeding such portions of the record of the Section 105c proceeding as are found to be relevant to the issues in the Section 105a proceeding.

CONCLUSION

For the reasons stated in FPL's Memorandum of August 25, 1978, and this Reply Memorandum, FPL respectfully urges that the Commission conclude that no proceedings under Section 105a are appropriate in this case, and alternatively, urges that any action by the Commission await the completion of review of the Fifth Circuit's decision by the United States Supreme Court and of proceedings by the District Court on remand, if any are required.

Respectfully Submitted,

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Dated: September 5, 1978

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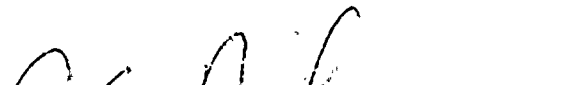
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the following:

REPLY MEMORANDUM FOR FLORIDA POWER & LIGHT COMPANY

have 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 5, 1978.

By: 

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