UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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

TO: Atomic Safety and Licensing Board

REPLY OF FLORIDA CITIES TO
RESPONSES OF FLORIDA POWER AND LIGHT COMPANY AND
NUCLEAR REGULATORY COMMISSION STAFF

Robert A. Jablon

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

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

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Florida Cities 1/ appreciate the opportunity to reply to the "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," 1 September 1976 (cited hereafter as "FP&L Response").

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

Florida Cities have filed a petition in the above-captioned dockets seeking access to nuclear capacity and energy generated from the St. Lucie No. 1 and No. 2 and the Turkey Point No. 3 and No. 4 nuclear units and other attendant relief. For the convenience of the Board and the other parties, their main contentions are briefly summarized below. These contentions are fully detailed in their 6 August 1976 Petition to Intervene 1/ and the affidavits filed in support thereof. In Part II, their principal statutory arguments are outlined within the context of Florida Power & Light Company's (hereafter alternatively referred to as "FP&L" or "the Company") Response and certain hortatory statements by Florida Power & Light Company are addressed.

A more detailed response to FP&L and Nuclear Regulatory Commission Staff (hereafter referred to alternatively as "Staff") contentions comprises Part III.

1/ "Joint Petition of Florida Cities for Leave to Intervene Out of Time; Petition to Intervene; and Request for Hearing," filed with the Nuclear Regulatory Commission on 6 August 1976.

I. SUMMARY OF ARGUMENT

A. Contrary to Antitrust Law and Policy, Florida Power & Light Company's Use of Its Virtual Nuclear Monopoly to Deprive Florida Cities of Nuclear Access, in Conjunction with Its other Exclusionary Conduct, Severely Limits Florida Cities' Power Supply Alternatives and Unnecessarily Increases Their Costs

It is undisputed that Florida Power & Light Company presently has a nuclear monopoly in peninsular Florida. The Company will continue to possess a virtual nuclear monopoly such that FP&L's refusal to deal in nuclear capacity to any significant extent greatly increases the cost of power supply to Florida Cities.

The impact of barring Florida Cities from nuclear access must be viewed in conjunction with the trebled cost of oil since the OPEC embargo and its aftermath and Florida Cities' greatly reduced access to natural gas. Smaller peninsular Florida utilities have limited economic access to coal and hydroelectric power. Thus, failure to allow Florida Cities access to nuclear power severely limits their economic alternatives and, in some instances, may threaten their continued existence as independent utilities.

The situation must be viewed, in addition, against FP&L's actions--or inactions--in taking advantage of the economic imbalance thus created. Not only does FP&L control access to nuclear power, but, by virtue of its size and

economic dominance, FP&L limits Florida Cities' access to low cost power supply. It refuses to agree to make its transmission facilities generally available, or to an integrated power pool. The result is that cities, already faced with vastly increased fuel costs, are deprived of the ability to operate their generation in conjunction with other generation on the most economic basis.

Because of its size, FP&L has the advantages of sophisticated internal coordination as well as external coordination arrangements. 1/

Indeed, FP&L can enjoy nuclear technology and efficient generation only because of its existing monopoly position. FP&L cannot lawfully use that position to limit

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1/ Power pooling allows utilities to "share" generation reserves, limiting the need for expensive excess capacity and allowing for sales or "exchanges" of energy in order to utilize the most efficient units at any one time available to the combined systems. By integrating generation resources, the lowest cost generation on the combined systems will operate to serve total load. Preventing access to full pooling for any system increases the cost of power produced by forcing use of a less economic source of generation.

It is Florida Cities' position that under the principles of the antitrust laws and utility practice, their citizens and ratepayers, as well as FP&L's customers, are entitled to low cost power supply and that FP&L cannot lawfully block that access. At the very forefront of Congressional concern was that systems such as FP&L not be able to limit access to low cost power supply for other systems through their ability to control access to nuclear generation.

its competitors by refusing to deal. See Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1971). FP&L accepts the benefits of monopoly control, but refuses to accept the corollary obligation to deal on a fair basis. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Aluminum Co. of America, 148 F.2d 416 (2d., Cir., 1945).

As it exists in Florida, absent FP&L's participation in an integrated power pool, the structure of the electric power industry limits the access of smaller systems to multiple sources of power supply. However, since the Company can coordinate its units "internally," as well as enjoying external coordination, it already has access to those alternatives which it denies to others. Certainly Congress would not have intended nuclear power to be the direct means of forcing concentration in the industry. See, Kansas Gas & Electric Co. and Kansas City Power & Light Co. ("Wolf Creek"), NRCI 75/6, pp. 564-565.

In the Vero Beach, Florida, Press-Journal (5 Sept. 1976), just before a vote to authorize the Vero Beach City Council to sell the City's municipal electric system, FP&L's Senior Vice President wrote a letter "to every Vero Beach resident. . ." stating:

> ". . . [I]f you approve the sale . . .
>
> "If our rate request is eventually granted by the Public Service Commission, the electric bills of

> all Florida Power & Light customers will rise. But you will pay significantly less when Florida Power & Light Company provides you electric service than if Vero Beach continued to operate the electric system."
>
> . . . .
>
> "We expect to have a new nuclear generating unit at St. Lucie in service in the near future. This should bring annual fuel savings of more than $100 million that will be passed directly to our cusomers through a reduction in the fuel adjustment, which has been reflected above." Emphasis in original.

Thus, the Company was urging voters to approve a sale, despite a proposed FP&L rate increase, because its rates would be cheaper--as a result of its nuclear generating capacity. 1/

1/ FP&L suggests (FP&L Response, p. 39 n. 66, pp. 40-41), that it is somehow inappropriate for Florida Cities to raise facts concerning transactions to which they are not directly party, including--amazingly--the Company's dealings with the City of Vero Beach, Florida, and Seminole Rural Electric Cooperative, Inc. But see, e.g., City of Pittsburgh v. FPC, 237 F.2d 741 (D.C.Cir., 1956); Associated Industries v. Ickes, 134 F.2d 964 (2d Cir., 1943). Of course, in acquisitions situations, the parties to a transaction must all be satisfied, or one party may be considered to have been coerced. However, especially in antitrust situations, there is a public interest in free competition to be considered beyond the interests of the parties.

To the extent FP&L further monopolizes service territory and further extends its already dominant position, alternative sources of power supply and opportunities for power transactions are further reduced. Thus FP&L's conduct in attempting to acquire Vero Beach or restrict Seminole has a direct impact on Florida Cities.

Demonstration of anticompetitive conduct by FP&L against Seminole demonstrates a pattern or motive. Further, FP&L's possible acquisition of Vero Beach--resulting from the Company's nuclear monopoly and restriction of alternatives to its competitors--amply illustrates the ultimate effect on all cities of its limitation of available alternatives.

The relief requested by Florida Cities is mandated essentially because, within the context of present circumstances, FP&L has been using its nuclear capacity to limit competitive opportunities available to smaller systems to the point of possible elimination of competition, while at the same time blocking access of smaller systems both to nuclear capacity itself and to efficient use of power supply. It is difficult to perceive a more clear threat to "free competition." Atomic Energy Act, Section 1, 42 U.S.C. §2011. Moreover, that the South Dade nuclear units are not scheduled until the 1980's and then at a significantly higher cost than FP&L's St. Lucie and Turkey Point units makes presently requested relief more important.

For the above-stated reasons, in their petition to intervene of 6 August 1976, Florida Cities sought Nuclear Regulatory Commission relief. They state multiple theories under which relief could be granted. However, their overall contention is that this Commission has a responsibility under the Act to insure that its licensees not misuse the authority granted them to act directly contrary to the purposes of the Act.

II. PRINCIPAL STATUTORY ARGUMENTS

A. The Atomic Energy Act Expressly Provides for Cancellation or Modification of Existing Licenses or Permits

Florida Power & Light Company admits (e.g., FP&L Response, p. 31, p. 36, n. 36) that granting intervention in Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-389A, is discretionary. In Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636-A, intervention was granted based upon the same substantive allegations. 1/ Given the above-outlined contentions and the determination that similar contentions to those raised here warrant hearing, there can be no basis for the Commission's exercising its discretion to deny Florida Cities an opportunity to be heard. E.g., Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir., 1965), cert. denied sub nom. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

With regard to St. Lucie Unit No. 1 and Turkey Point Units No. 3 and No. 4, FP&L argues simply (FP&L Response, p. 13): "The Antitrust Review Provisions of Section 105c Do Not Apply to the Existing Licenses." Citing Cities of Statesville v. AEC, 441 F.2d 962 (D.C.Cir., 1969), it

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1/ FP&L does not respond to questions of sufficiency of the underlying arguments.

states further (Ibid.):

> "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."

Finally, based on Statesville, supra, FP&L argues that there can be no relief granted independently of Section 105 of the Act.

It must be stressed that FP&L does not argue the merits of Florida Cities' petition. The Company argues in effect that no matter how egregious a use of existing licenses or permits might be, no matter how contrary to the authority of the Act, this Commission has no direct authority to do anything about it. Certainly a statutory limitation must be clearly shown to support the conclusion that an agency must ignore use of its own licenses or permits contrary to the purposes of the Act under which they are granted. 1/

1/ To the contrary, courts have long interpreted the powers of administrative agencies to be consistent with the overall design and purposes of their statutes. E.g., FPC v. Louisiana Power & Light Co., 406 U.S. 621, 631-636, 638-643 (1972); Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968). Moreover, in exercising their functions, agencies without express antitrust mandates have been told repeatedly that they must be alert to antitrust law and policy. E.g., Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968); Denver & Rio Grande Western R.R. Co. v. United States, 387 U.S. 485 (1967); Municipal Electric Association of Massachusetts v. SEC, 413 F.2d 1052, 419 F.2d 757 (D.C.Cir., 1969); Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C.Cir., 1968). As the Supreme Court said in another context (dealing with the application of the National Labor

(cont'd)

(1/ cont'd) Relations Act in a situation involving criminal violation of the law):

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942).

See also, Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C.Cir., 1967), in which the D.C. Circuit stated, referring to the Federal Power Act:

> "The Act is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is one that entrusts a broad subject-matter to administration by the Commission, subject to Congressional oversight, in the light of new and evolving problems and doctrines."

It strains credulity to believe that the Nuclear Regulatory Commission, expressly entrusted with the oversight of nuclear licenses and a specific antitrust mandate, has no authority once a license has been issued. Compare FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

FP&L reaches its conclusion by setting up a straw man and largely ignoring Florida Cities' primary arguments. Florida Cities do not argue that the statutory authority to modify, rescind or otherwise condition Section 104 licenses (under which St. Lucie Unit No. 1 and Turkey Point Units No. 3 and No. 4 are operating) comes under Section 105. They do argue that Section 105 does not provide the only means of ever considering competitive problems under the Act. The issue, therefore, is whether Section 105 is meant to be exclusive so as to give so-called "research and development"
to be free of any obligation to comport with antitrust policy.

FP&L relies on Statesville, supra, for its conclusion that there can be no subsequent opening of antitrust proceedings for "research and development" licenses. But in Statesville, supra, the Court (through its various opinions) ruled that antitrust issues need not be considered at the time of construction, because in accord with the statutory scheme, such issues would be considered when the license became commercial (i.e., at the time the operating permit issued). The case is squarely against FP&L.

FP&L then argues that the 1970 amendments cut off all possible antitrust review. (FP&L Response, pp. 14-15). However, the 1970 amendments only cut off a Section 105

hearing for "research and development" licenses. Research and development licensees could construct and operate their plants without antitrust review. However, Congress hardly freed such licensees from any existing obligations they might have under Section 104 or elsewhere.

But Sections 185 through 188 of the Act, 42 U.S.C. §§2235-2238, specifically provide for modifications of licenses. For example, Section 187, 42 U.S.C. §2237, states:

> "The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments of this chapter or by reason of rules and regulations issued in accordance with the terms of this chapter."

Language more explicitly avoiding a vesting of rights to licensees can hardly be imagined.

Section 50.54(e) of the Nuclear Regulatory Commission Rules and Regulations under the Act states:

> "The license shall be subject to revocation, suspension, modification, or amendment for cause as provided in the act and regulations, in accordance with the procedures provided by the act and regulations."

Section 1, 42 U.S.C. §2011, sets forth the statutory purpose of the Act. It seems clear that, by statutory terms, the license can and must be modified if it is used contrary to that statutory purpose (i.e., contrary to the policy of the antitrust laws). Indeed, any other interpretation would allow licensees to use rights granted by the government (and

publicly-funded technology) as tools for wrong-doing. 1/

Perhaps, recognizing a weakness in its statutory argument, FP&L infers from their legal history that the purpose of the 1970 amendments was to guarantee to FP&L and other investor-owned utilities an investment certainty. E.g., FP&L Response, pp. 25-27. This may be the reason that FP&L argues at such length that Florida Cities' mere request for relief can "cast" a "cloud" on operating licenses, making them meaningless. FP&L Response, p. 63. Thus, as is clear from reading the Act, as well as the 1970 Joint

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1/ Similarly, Section 183, 42 U.S.C. §2233(d), provides:

> "Every license issued under this chapter shall be subject to the right of recapture or control reserved by section 2138 of this title, and to all of the other provisions of this chapter, now or hereafter in effect and to all valid rules and regulations of the Commission."

Section 186, 42 U.S.C. §2236(a) states:

> "Any license may be revoked . . . for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission."

Obviously, the "terms of this chapter" include that Act's stated statutory purpose. Indeed, Section 186 states that a license may be revoked because of ". . . conditions revealed . . . which would warrant the Commission to refuse to grant a license on an original application . . ." 42 U.S.C. §2236(a). Even assuming that this refers to the standards of Section 104, rather than current standards (although this is far from certain in view of the concern of the authors that licenses be granted subject to current--i.e., Section 105--standards), a "minimum amount of regulation" to insure compliance with the standards of the Act would still be required. 42 U.S.C. §2134(a).

Committee Report 1/, the 1970 amendments have two principal purposes: to assure fair antitrust review and to allow for timely construction and operation of nuclear power plants. By eliminating Section 105 review for "research and development" licenses, Congress assured that construction and operation of plants could go forward on a timely basis.

Congress provided that nuclear units authorized under existing licenses could be constructed and operated without further antitrust delay. This would be equitable in light of already committed resources. However, there is nothing in the 1970 amendments or in the legislative history of the amendments to suggest that because it would be desirable for already licensed plants to be built and operated, licensees should therefore enjoy a greater right to utilize federally granted licenses contrary to the antitrust laws than they would have had before. Such interpretation is consistent with Statesville, supra, and with the Congressional intent that nuclear power not be used to further anticompetitive purposes, but that construction and operation of nuclear plants should be allowed to go forward.

In this context, the Joint Committee states (Joint

1/ Report by the Joint Committee on Atomic Energy [To accompany H.R. 18679], 24 September 1970, 91st Cong., 2d Sess, H.R. No. 91-1470 (hereafter referred to as "Joint Committee Report").

Committee Report, p. 13):

> "If the Commission makes a finding of 'practical value,' serious legal problems would probably come into play. These could include such matters as the convertibility of subsection 104 b. licenses to section 103 licenses, and, of course, the interpretation and effect of the provisions of subsection 105 c. The accompanying delays and expense could be extremely onerous. It must be borne in mind that the licensing process is already being extended and sorely strained these days, and costly delays are being experienced, due to the sudden impact of the National Environmental Policy Act of 1969 (Public Law 91-190) and the Water Quality Improvement Act of 1970 (Public Law 91-224); thus far the attempted implementation of these acts seems to be creating more delays due to legal questions of interpretation and implementation than to environmental considerations as such."

The statutory purpose of the amendments as thus expressed would be thwarted if licensees were forced to delay construction and operation of Section 104 plants until completion of an antitrust review.

The legislative history suggests that Congress considered the construction of nuclear plants without costly delay to be in the public interest; there is no suggestion that Congress intended that FP&L should be granted permission for an unlimited period to utilize its existing licenses contrary to antitrust principles without any possibility for subsequent Commission review. This seems especially so in view of Congress' overriding intent that competitive considerations be recognized. Joint Committee Report, p. 15. In short, Congress "grandfathered" Section 104 licenses to serve public purposes; the 1970 amendments do not comprise

an FP&L relief act, relieving the Company of subsequent agency review.

B. Florida Cities Do Not Seek a Delay in Construction and Operation of the Units

Throughout its Response, FP&L accuses Florida Cities of abusing this Commission's processes (e.g., FP&L Response, p. 4), of possibly creating "an adverse impact upon FPL's ability to obtain needed capital on favorable terms by the sale of securities to the investing public" (FP&L Response, p. 3), and of otherwise acting improperly. Such accusations are easy to make, but difficult to defend.

Florida Cities are public bodies. They have seriously petitioned this Commission for relief from perceived harms. In view of the serious consideration given by the Board to Florida Cities' petition in Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636-A, FP&L's claims of frivolity here seem misplaced.

Moreover, FP&L has been totally nonspecific about the harms it fears, despite Florida Cities' request for particulars in their 27 September 1976 "Joint Motion of Florida Cities for Leave to Reply to Answers to Petition to Intervene and Request for Clarification." In their Joint Petition, Florida Cities reiterate that they (p. 6):

> ". . . are prepared, at the threshold of this case, to enter into all appropriate stipulations, procedural and substantive, necessary to eliminate any real adverse impact on FP&L."

Considering that they are the ones in the instant case being deprived of access to nuclear power, Florida Cities find it strange that FP&L, a regulated utility, here claims that its ability to finance is threatened. 1/

1/ If Florida Cities were to receive a direct ownership share in the existing nuclear units, FP&L's investment would be well protected since Florida Cities would provide capital directly. Alternatively, Florida Cities do not preclude other forms of relief, such as unit power purchases, in forms that would equally protect FP&L's ability to earn a fair return on investment. Nor do they preclude FP&L's raising claims against certain forms of relief, if the Company can show that such relief would in fact threaten its ability to finance.

Florida Cities have offered to stipulate issues, in order to eliminate uncertainty. To be absolutely clear, they do not seek delay of construction or operation of the units and would not seek to tie the question of FP&L's ability to continue construction or operation of the units to FP&L's agreeing to interim conditions (although Florida Cities do assume that FP&L would comply with a Board order granting interim relief. FP&L seems, therefore, to be protected against whatever harms it may fear. Florida Cities do not seek to hereby delay construction and operation of the subject units.

Florida Cities are also willing to enter into settlement of any or all controversies with FP&L. They recognize that FP&L need not attempt to settle any claims. However, by the same token, FP&L cannot appropriately insist upon a full hearing, as is their right, and claim that Florida Cities are responsible for harms to its wellbeing that the Company refuses to even particularize. Ultimately, Florida Cities are claiming an entitlement to participation in nuclear power, which FP&L resists. Florida Cities ought to be able to raise such claims without being accused of harassment.

As a consequence of its position as a regulated retail monopoly, FP&L is assured rates sufficient to raise capital. Hope Natural Gas Co. v. FPC, 196 F.2d 803, Bluefield Water Works and Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923). While, admittedly, low cost nuclear capacity is valuable, FP&L cannot be seriously claiming a right to monopolize

(cont'd)

Florida Cities have, in the foregoing, attempted to summarize their basic contentions and arguments. The sections following address FP&L and Staff's arguments in more specific detail.

III. FP&L AND STAFF'S ARGUMENTS ADDRESSED IN DETAIL

A. The Commission and the Licensing Board Have the Authority and the Responsibility to Grant Intervention and Initiate the Requested Antitrust Hearing

FP&L terms Cities' Petition "novel and far-reaching" (FP&L Response, at 3). The petition is founded upon the basic policies of the Atomic Energy Act ("Act") and invokes the undoubted powers of the Commission to police anti-

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(1/ cont'd) such nuclear capacity for the reason that FP&L will be better off if relief is not granted.

Finally, FP&L implies that it may chose not to construct St. Lucie Unit No. 2 if a hearing is ordered, but carefully does not state so explicitly. Whether this is meant to influence the Board, Florida Cities do not know. However, assuming a stipulation guaranteeing FP&L full payment for any capacity ordered transferred, or guaranteeing appropriate rates for power sold, FP&L appears to state that it would choose to forego benefits of low cost nuclear power for itself and its customers because, pursuant to Board order, it might not be able to exercise a monopoly over those benefits.

One can hardly imagine a statement more at odds with the principles underlying the antitrust laws and its obligations as a public utility to achieve all necessary economies. Midwestern Gas Transmission Co. v. FPC, 388 F.2d 444 (7th Cir., 1968), cert. denied, 392 U.S. 928 (1968). See also Textile Workers v. Darlington Co., 380 U.S. 263 (1964).

competitive situations caused or maintained by activities under licenses which it has granted or may grant. In creating the Licensing Board the Commission has delegated to it the initial task of fulfilling many of its regulatory duties, pursuant to Section 191 of the Act 42 U.S.C. Sec. 2241(a). The Board and the Commission, have the authority and the concomitant responsibility to grant Cities intervention and commence antitrust proceedings in the relevant dockets.

By isolating individual provisions of the Act from each other and from the overriding statutory policy in favor of competition, FP&L is attempting to force the Commission's antitrust powers into inflexible and uncoordinated compartments and thereby negate the Commission's authority to consider valid claims. FP&L hopes to establish that the Commission has less power and duty to deal effectively with anticompetitive situations than other federal agencies whose organic acts merely contain broad "public interest" mandates 1/, rather than the explicit policy goal enunciated in the Atomic Energy Act to "strengthen free competition." Section 1, 42 U.S. §2011.

1/ See Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973), and Denver & Rio Grande Railroad Co. v. United States, 387 U.S. 485 (1967), which held that the broad "public interest" standard of Section 204 of the Federal Power Act, 16 U.S.C. §824c, and Section 20a of the Interstate Commerce Act imposed upon the Federal Power Commission and the Interstate Commerce Commission, respectively, the duty to assess the antitrust consequences of their actions.

B. The Commission and the Licensing Board Have the Authority to Grant Late Intervention and Initiate an Antitrust Hearing in the St. Lucie Unit No. 2 Construction Permit Proceeding

As stated supra, the Board has undoubted authority to grant Florida Cities intervention and initiate an antitrust hearing in the St. Lucie Unit No. 2 construction permit proceeding. Section 2.714(a) of the Commission's Rules of Practice, 10 CFR §2.714, makes it clear that the Commission or the Board may grant a petition to intervene when "a substantial showing of good cause for failure to file on time" has been made.

FP&L does not contest that the Commission has the discretionary power to grant intervention. (FP&L Response, p. 2). The Company even admits (FP&L Response, p. 36, n. 63) that intervening events can justify late intervention. The only substantial dispute surrounding St. Lucie Unit No. 2 is whether Florida Cities have demonstrated the requisite "good cause" under Section 2.714(a). The policies and standards which should underlie the Board's "good cause" evaluation are discussed below.

C. The Commission Has the Authority to Initiate an Antitrust Hearing on the Activities Under the Existing Operating Licenses and Under the Facts of this Case Cannot Appropriately Refuse to Initiate Such a Proceeding

FP&L asserts (FP&L Response, p. 11):

"[T]here 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."

The Company even suggests (p. 19) that there is no overriding policy in the Act which would justify the initiation of antitrust proceedings.

FP&L contends that the Commission, no matter how outrageously a licensee may violate the antitrust laws, may not move to revoke or modify its license (until a court finds that the licensed activities violate a relevant statute).

As is stated supra, FP&L cites Cities of Statesville v. AEC, 441 F.2d 962 (D.C.Cir., 1969), in support of this position. However, at the same page as a passage quoted by FP&L (FP&L Response, p. 20), the court in Statesville made it clear that the Commission may act to restrain a licensee whose activities under an NRC license are anticompetitive. After pointing out that the Commission has a "most serious duty" to evaluate the anticipatory antitrust impact of a plant which has demonstrated commercial practicability, the court concludes:

> "Finally, under section 186(a), 42 U.S.C. sec. 2236(a) (1964), the Commission has the power to revoke any type of license it has issued when there is a 'violation of, or failure to observe any of the terms and provisions' of the Act. This section invests the Commission with a continuing 'police' power over the activity of its licensees and provides it with the ability to take remedial action if a license is being used to restrain trade." 441 F.2d at 974.

It should be obvious that such a continuing police power exists. Only such an interpretation would give "content to the national objectives of [the Act] and to the Commission's jurisdiction to accomplish them." United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 403 (1965), interpreting the Natural Gas Act). Accord, Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, NRCI 76/4, 331, 343-344 (14 April 1976). Any other interpretation would read the pro-competitive policy declared in Section 1(b) of the Atomic Energy Act, 42 U.S.C. §2011, out of the statute insofar as Section 183(c), 42 U.S.C. §2233(d), subjects each license issued by the Commission to "all of the other provisions of this chapter." Any other interpretation would mean that the Commission must issue licenses at its peril, and at the peril of the consuming public, unable to act if the licensee subsequently uses the grant of public authority given it contrary to the purposes of the Act.

Florida Cities have invoked the very section cited in Statesville, supra, as the source of the Commission's continuing police power over anticompetitive activities of its licensees. Section 186 of the Act grants the Commission the general power to revoke a license for conditions which would warrant its refusal to grant a license on an original application or for failure to observe any of the terms and provisions of the Act, or of any regulation of the Commission. Cities have also invoked

Section 187 of the Act, which grants the Commission power to modify or condition any license. If the Commission can initiate proceedings to investigate the anticompetitive activities of its licensees, Florida Cities can file a petition asking it to do so.

Both Staff (Answer, p. 12) and FP&L (Response, p. 3) state that Section 2.206 of the Commission's Rules of Practice, 10 CFR §2.206, provides the mechanism to request that a proceeding be instituted to consider revoking or modifying a license. The factual and legal issues involve application of antitrust principles. Indeed, had they not sought review in accordance with antitrust procedures, Florida Cities might have expected claims that they had invoked the wrong internal review procedure.

Florida Cities have set forth what they deem the appropriate legal standards in light of a serious and immediate problem and request Commission relief as may be appropriate.

If it is necessary that the Section 2.206 mechanism be separately and specifically invoked, and assuming they have not done so by filing their 6 August 1976 Joint Petition, Florida Cities seek relief under that Section. They shall serve a copy of their original Petition and this Reply upon the Director of Nuclear Regulation, but to avoid confusion shall ask that action be held in abeyance until this Board

acts. 1/

Florida Cities seek an agency determination whether a proceeding should be instituted pursuant to Section 2.202 to modify, suspend, or revoke FP&L's operating licenses for the St. Lucie Plant, Unit No. 1 and the Turkey Point Plant, Units No. 3 and 4. Cities will cooperate fully with the Board in fulfilling the procedural pre-requisites to receiving a decision on the merits of its request that proceedings be instituted to determine whether FP&L's activities under said licenses are consistent with its statutory antitrust duties. To the extent FP&L implies (Response, p. 11, n. 25) that the NRC's regulations are not explicit, this Board's delegated authority is sufficient to fill in such gaps. There is a clear statutory basis providing a continuing obligation on the part of licensees to comport with the Act and the regulations under it. Section 183, 42 U.S.C. §2233; Sections 185-188, 42 U.S.C. §§2235-2238. The Commission recognizes such obligations in §50.54 and §50.100 of the regulations, inter alia.

Pursuant to Commission Rule of Practice 2.206(b), 10 C.F.R. Section 2.206(b), the appropriate Commission official must either institute the requested proceeding or advise the person who made the request of the reasons for not instituting

1/ Should additional copies be necessary, Florida Cities will provide them.

the proceeding. Since Section 181 of the Act, 42 U.S.C. §2231, provides that the "provisions of the Administrative Procedure Act shall apply to all agency action taken under this chapter," any such refusal would be subject to judicial review for abuse of discretion. See Section 2(ii)(c) and Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §§551, 702, 703. And see Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C.Cir., 1971; order denying suspension of registration of pesticides is subject to judicial review; agency ordered to issue notices that commence formal administrative proceedings to determine whether registration should be cancelled.) The limits of the Commission's discretion as to instituting a modification hearing after receiving claims of anticompetitive activities are certainly unclear at this point. But, as is explained below, judicial authority indicates that an agency entrusted with antitrust review duties has but limited discretion in deciding whether or when to consider the antitrust ramifications of its actions.

Other regulatory agencies have been judicially chastised for seeking to avoid or delay full consideration of the anticompetitive consequences of their actions. For example, Denver & Rio Grande Western Railroad Co. v. United States, 387 U.S. 485 (1967); Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973); FPC v. Conway Corp., 510 F.2d 1264 (D.C.Cir., 1975), aff'd, ___ U.S. ___, 96 S.Ct. 1999 (1976). The Supreme Court

has said that where an agency summarily disposes of proffered antitrust contentions, the reviewing court must "closely scrutinize its action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws." Denver & Rio Grande Western Railroad Co. v. United States, 387 U.S. at 498.

One reason for such close scrutiny is the regulatory agency's role as a "first line of defense" against competitive practices that might later be the subject of judicial antitrust proceedings. Gulf States, supra, 411 U.S. at 760. Another is judicial realization that anticompetitive conduct can have immediate and unremediable impact on small municipal electric systems, which must struggle to preserve their independence, attract new customers, retain current customers and justify their existence to their citizens and consumers. See the appellate court's discussion in Conway Corp. v. FPC, 510 F.2d at 1268. The judicial notion that agency expertise should be applied first to the problems and solutions relating to the anticompetitive activities of regulated entities also leads them to insist that agencies not lightly deny a hearing to one pressing antitrust claims. The practical and policy considerations which led the Supreme Court to hold that the Civil Aeronautics Board has primary jurisdiction over antitrust claims which involve the granting, qualifying, denying, modifying or revoking of air

carrier certificates are illuminating. See Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963). In Pan Am, the Court suggests that such matters are the "precise ingredients" of the agency's licensing authority and can be treated more comprehensively and holistically by the agency than by a court. 371 U.S. at 305. The "aggrieved" party should not, therefore, be turned away from the more appropriate forum without strong justification by the agency.

The above factors limiting agency discretion to deny an antitrust hearing are especially appropriate in the context of the Nuclear Regulatory Commission. Unlike the Interstate Commerce Commission and the Federal Power Commission, the NRC has been given an express antitrust mandate in its organic act. After noting that even agencies which are not acting under expressly stated statutory antitrust obligations must "take full account of those laws and their underlying policies before acting," the Appeal Board in Kansas Gas & Electric Co. and Kansas City Power & Light Co. (Wolf Creek Generating Station, Unit 1), 1 NRC 559, 568 (ALAB-279, 1975), pointed out that:

> ". . .[W]here Congress has explicitly mandated the type of conduct to be screened for anticompetitive effects, attempts to limit the scope of that obligation by giving a narrow or articifical meaning to the statutory terms have been rejected. E.g., Volkswagenwerk v. FMC, 390 U.S. 261 (1968)."

Since Congress has specifically entrusted the Commission with antitrust obligations, it should be most reluctant to turn away a petitioner which claims that a situation inconsistent with the antitrust laws exists.

Likewise, the specific mention of the Federal Trade Commission Act 1/ in Section 105(a) of the Atomic Energy Act demonstrates the Congressional intention that the Commission keep an administrative eye not only on full blown anticompetitive conduct, but also upon acts which might lead to restraints of trade if not stopped in their incipiency, practices which constitute unfair methods of competition, or acts which violate the spirit of the Sherman and Clayton Acts. 2/ The whole tenor of Section 105 is to direct the Commission to play a prophylactic role in fulfilling its antitrust duties. Such a preventive function cannot be properly fulfilled by refusing to act upon good faith contentions that activities under a license are having substantial anticompetitive consequences. Forcing a petitioner to go first to court with antitrust claims significantly increases the probability that substantial or unremediable damage may occur before a court, and then much later the Commission under Section 105(a), will act on meritorious claims.

1/ 15 U.S.C. §§41-51.

2/ See Union Electric Co. (Callaway Plant, Units 1 and 2), 1 NRC 438, 441-442 (Licensing Board, 1975); Report of the Joint Committee on Atomic Energy, H.R. No. 91-1470, 91st Cong., 2d Sess. (24 Sept. 1970), at 14.

The D. C. Circuit Court of Appeals has very recently reminded the NRC that it should not delay consideration of important issues. 1/ The Commission sought to defer consideration of the environmental effects of the waste produced by a nuclear reactor in deciding whether to build the reactor because those effects would be considered when a plant is proposed to deal with them. Because the National Environmental Policy Act was meant to be prophylactic in effect, breaking the cycle of such incremental decision-making, the court ordered that the environmental effects be thoroughly examined in the instant licensing proceeding. The Commission's prophylactic role as an antitrust regulator should also prohibit it from ignoring colorable claims of antitrust violations.

D. The Commission Has Ample Authority and Procedural Flexibility to Grant Intervention and to Initiate a Proceeding to Modify or Revoke the Existing Licenses; Such Authority Implies a Duty to Act to Further Statutory Policies

FP&L attempts to fabricate regulatory gaps which would confer immunity-by-default upon monopolistic licenses. But, when Congress has given an agency regulatory authority over antitrust matters, the legislative intent to achieve a regulatory gap should not be presumed unless expressly presented. 2/

1/ Natural Resources Defense Council, Inc. v. NRC, No. 74-1385 (D.C.Cir., 21 July 1976).

2/ Conway Corp. v. FPC, supra. And see Wolf Creek, supra, 1 NRC at 568, where the Appeal Board states that an agency acting under an express antitrust mandate may not give a narrow scope to its antitrust obligations.

As the Supreme Court said in United Gas, supra, a statute should be interpreted to give content to the Act's purposes and to the agency's jurisdiction to accomplish them. Just as a regulatory statute must not be "hamstrung" by technical concepts of local or common law 1/, an agency given a regulatory task must have the flexibility needed to "mold its procedures to the exigencies of the particular case." 2/

The general reluctance to find regulatory gaps is especially appropriate when applied to the Atomic Energy Act, since Section 186 of the Act explicitly allows revocation of any license because of "conditions revealed" which would "warrant the Commission to refuse to grant a license on an original application". Section 105(c)(6) gives the Commission the authority to "refuse to issue a license" based on finding that the activities under the license would create or maintain conditions inconsistent with the antitrust laws". Congress did not exclude the regulatory powers of Section 105 from the scope of Section 186. It must therefore be assumed that the legislature expected the Commission to exercise the "continued police power" over anticompetitive activities of licenses foreseen by the Statesville

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1/ United Gas Improvement Co. v. Continental Oil Co., supra, 381 U.S. at 400.

2/ Gulf States, supra, 411 U.S. at 762.

court. Cities of Statesville v. AEC, supra, 441 F.2d at 974. Congress envisioned that the Commission would continuously supervise its licensees' activities as they relate to health and safety, defense, and antitrust matters. When it becomes aware of activities under a proposed or existing license which may be in restraint of trade, it has full authority to act.

As was discussed above, this authority to prevent or stop restraints of trade which are caused or maintained by activities under an NRC license implies a responsibility to act effectively when confronted with antitrust claims. The Commission must consider the possible consequences of its failure to consider antitrust contentions fully, as well as any justifications which might exist for deferring action on the matter or refusing to act.1/ Neither Staff nor FP&L have discussed the possible consequences of a refusal to act by the Commission. Without gauging the present and potential harm to Florida Cities from FP&L's anti-competitive practices, the Commission cannot properly decide whether to hold an antitrust hearing as part of the St. Lucie Unit No. 2 construction permit proceedings or in a proceeding to modify the existing operating licenses. Cities respectfully contend that it would be an abuse of the Commission's discretion, under the criteria and duties outlined in the Gulf States decision, to refuse to order the requested antitrust proceeding or grant Florida Cities intervention.

1/ Gulf States, supra, 411 U.S. at 763.

E. The Right to Repose on Antitrust Matters Postulated by FP&L Is Unwarranted

To a large extent, FP&L bases its opposition to Florida Cities' request for an antitrust hearing with respect to St. Lucie Unit No. 2 upon a vague right to repose, which apparently FP&L believes should insulate it from attack by Florida Cities and the Commission. FP&L posits (Response, p. 2) a reliance interest based upon the Section 105 antitrust review conducted by the Attorney General and the Commission in late 1973. The Company asserts a "substantive right" to the assurance that there are no outstanding antitrust questions relating to St. Lucie Unit No. 2 (Response, p. 54). While Cities can imagine many reasons why FP&L would seek such assurance, neither general antitrust or administrative law nor the Atomic Energy Act grant such an absolute right to be left alone.

Analogies with general antitrust law are contrary to the position espoused by FP&L. Neither a Justice Department business review letter nor a Federal Trade Commission advisory opinion immunizes a practice from subsequent attach by the Government or by private individuals. The agency giving such clearances reserves a free hand for the future 1/, just as the Attorney General, in giving advice to the Commission pursuant to Section 105 merely gives his present opinion. In United

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1/ See Areeda, Antitrust Analysis (2d Ed., 1974).

States v. New Orleans Chapter, Associated General Contractors of America, Inc., 238 F.Supp. 273 (E.D.La., 1965), rev'd per curiam, 382 U.S. 17 (1965), the Supreme Court summarily reversed a district court which had held that the government was estopped from prosecuting under the Sherman Act because there had been no change in the antitrust laws in the decade since the Justice Department had examined the activities of the association and acquiesced in the use of the questioned bid system. Even winning a prior government suit does not immunize a company from attacks on the same practices. 1/ As Professor Areeda has said (Areeda, supra, §175 at 100):

> "Continuation of conduct attacked in a prior antitrust suit is generally held to give rise to a new cause of action. Thus defendant's victory in a Government suit does not preclude a later proceeding on the same theory for defendant's later repetition of the very conduct held lawful in the prior suit. ...This judicial willingness to reexamine matters formerly litigated rests on the premise that defendant should not be able to use a former judgment as a means of gaining immunity from a change in in the law, or of assuring a permanent advantage over his competitors." [Emphasis added.]

Surely FP&L cannot rely upon notions of collateral estoppel or res judicata to bolster its claim to repose. Collateral

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1/ See FTC v. Raladam Co., 316 U.S. 149 (1942). If victory in prolonged litigation with the Justice Department or the FTC gives a company no "license" to continue its practice free from future governmental or private antitrust attack, it is ludicrous for FP&L to assert such immunity prior to any kind of adjudication on the anticompetitive aspects of its use of nuclear power. The Commission cannot be straightjacketed by a rule that gives finality to its informal review procedures.

estoppel, of course, only applies to litigated determinations. Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). There has been no adjudication here by the Commission and the doctrine has no application to nonjudicial administrative action 1/, nor is it applicable when a statute gives an agency the authority to reopen or modify its decress or orders. Sprague v. Woll, 122 F.2d 128 (7th Cir., 1944), cert. denied, 314 U.S. 699. See Davis, Administrative Law Treatise, §18.12 (1958 Edition). Collatoral estoppel need not bar reopening of even an adjudicated matter if the earlier agency decision had unknown significance or has been given new significance. See United States v. Stone & Downer, 274 U.S. 220 (1926).

FP&L can only fall back upon the Atomic Energy Act itself as a foundation for its claimed right to be left alone. But, the Act offers little solace for the monopolist hoping to avoid all but the initial Section 105(c) antitrust scrutiny. Numerous sections of the Act make it clear that an applicant or licensee can never attain complete assurance that all antitrust issues concerning a particular plant (or its whole system) have been resolved.

1/ Davis, Administrative Law Treatise, §18.12, at 626 (1958 Edition).

First, Section 105(a) warns the applicant or licensee that no scrutiny by the Commission can immunize it from the operation of the nation's antitrust laws. Private persons, the Federal Trade Commission or the Justice Department can all upset the repose of a utility by claiming that activities under its NRC license violate the very antitrust laws which are considered by the Commission in its Sec. 105 review. Thus, a utility may find itself in litigation with parties at any time. The "cloud", which FP&L contends (at 3 of its Response) has been placed over the validity of its licenses by Cities' Petition, seems far less ominous than uncertainties that a utility may be subjected to under the scheme of Section 105(a).

Section 105(c)(2) also cautions the license applicant that the initial antitrust review offers no permanent shelter from the storm. For the procedures of paragraph (1) of Section 105(c) are specifically said to apply to both an application for a construction permit and an application for an operating license. The proviso may sometimes spare an applicant an antitrust hearing at the operating license stage, but it authorizes (and thereby obligates) the Commission to be alert to "significant changes" and to claims that such changes have occurred. There is no guarantee that a second Commission review and a first or second hearing may not be helf long after the initial review. Other provisions in the Act convey that even existing licenses are subject to anti-trust scrutiny by the Commission. As has been stated, Section 183 makes it clear that all licenses are issued subject to "all of the

other provisions of this chapter, now or hereafter in effect and to all valid rules and regulations of the Commission." Thus, no licensee has vested right to continue constructing or operating a nuclear power plant under the original terms of its license. 1/ Further, Section 186 allows the Commission to revoke a license "because of conditions . . . which would warrant the Commission to refuse to grant a license on an original application . . . or for failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission." Likewise, Section 187 grants the Commission the authority to modify a license. As recognized by the court in Statesville 2/, these provisions authorize the Commission to exercise a continuing "police power" over restraints of trade perpetrated by its licensees. 3/ This continuing police power is obviously inconsistent with FP&L's claim that the Commission has no active antitrust role after the initial

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1/ FP&L has itself applied for numerous license moficiations. Such modifications (which the Commission has the undoubted power to issue with appropriate conditions) belie claims of finality which would bar subsequent conditioning of existing licenses.

2/ Cities of Statesville v. AEC, supra, 441 F.2d at 974.

3/ Florida Cities' argument in their Petition that antitrust review was proper under Section 104(b) would be in conjunction with Sections 183, 186 and 187, which affect all licenses.

Section 105 review. 1/

Finally, even if FP&L claims that it has done nothing which violates either the letter or the spirit of the antitrust laws since the original antitrust review of the St. Lucie Unit No. 2 application, it cannot base its claim to repose upon the fact that it is not responsible for the energy crisis and mounting fuel costs facing Florida Cities. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), and Ovitron Corp. v. General Motors, 295 F.Supp. 373 (S.D.N.Y., 1969) make it clear that even monopoly power acquired passively, "innocently," or as a result of historical accident can form the basis of an antitrust violation, if that power is utilized in an exclusionary manner.

Thus, general antitrust law and the Atomic Energy Act anticipate that FP&L and any licensee or applicant may have to

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1/ Section 105(c)(6) of the Act, 42 U.S.C. §2135(c)(6), also appears to anticipate that the Commission will make antitrust determinations subsequent to the issuance of a license. For that provision deals with the Commission's decision to "issue or continue" a license after the conclusion that a "situation inconsistent" exists and authorizes the Commission to "issue or continue a license," or to "rescind a license or amend it." (Emphasis added). It does not seem likely that Congress included such terms as "continue," "rescind," and "amend" merely to cover instances involving subsections (c)(3) and (c)(8). After making findings under Section 105(c)(3), the Commission would be issuing a new operating license, since a subsection (c)(3) facility by definition only has a construction permit. Thus, the Commission could not continue, rescind, or amend such operating licenses. Likewise, the terms in (c)(6) which authorize the alteration of an existing license could not refer merely to subsection (c)(8), for such an interpretation would make the provision in (c)(8) totally unnecessary. It would be inappropriate for the Commission to interpret Section 105(c)(6) so as to make a portion of the carefully drafted 1970 amendments superfluous.

run an antitrust gauntlet far more demanding than the original antitrust review under Section 105, 42 U.S.C. §2135. FP&L's claimed right to be left alone has no foundation in the Atomic Energy Act.

While FP&L argues strenuously that merely granting a hearing on Florida Cities' claims will upset its rights of repose, at the same time it argues against holding a hearing on St. Lucie Unit No. 2 as "premature," where under the circumstances here involved a hearing must be held later when FP&L applies for an operating license. (FP&L Response, pp. 58-59). But FP&L's underlying policy arguments rest on its claimed need for certainty. It would be most unfair to wait for the last minute to hold a hearing on the operating license, where claims are now ripe for decision and when FP&L will be arguing--presumably--its right to operate St. Lucie Unit No. 2 to the exclusion of Florida Cities' rights when the operating license is applied for. FP&L's opposition to a hearing concerning St. Lucie Unit No. 2 now belies its contention that its interest is in resolution of claims and finality rather than in seeking to avoid resolution of claims on their merits.

Not only is FP&L willing to wait to resolve issues concerning St. Lucie Unit No. 2, but, as stated earlier, it argues against a Commission hearing, claiming that Florida Cities' appropriate remedy is to file an antitrust suit.

(FP&L Response, p. 18). However, such action could take years, while FP&L continues to abuse NRC granted licenses. And in response to such a suit, FP&L would presumably argue the need for a Section 105(a) hearing, thereby delaying relief further. 1/ Where it serves to delay resolution of substantive issues, FP&L no longer worries about repose.

While the Act allows hearings on antitrust matters whenever necessary to fulfill the Commission's regulatory responsibilities, the focus of Section 105 makes it plain that it is preferable to institute such proceedings prior to the issuance of the construction permit. A hearing at this stage is the applicant's best assurance that antitrust issues surrounding a particular plant have been resolved. Postponing a hearing until the operating license stage, when such delay is not necessary, only prolongs the effects of any "cloud" which the claims may place over the facility.

In summary, the statutorily imposed lack of repose after a license is issued precludes the use of purported reliance interests as the basis for a refusal to commence hearings on the competitive effects of existing licenses.

1/ As the Supreme Court said in another context: "If the [Plaintiff] . . . becomes exhausted, instead of the remedies, the issues of public policy are never reached . . ." NLRB v. Shipbuilding Local 22, 391 U.S. 418, 425 (1968).

Such lack of repose, coupled with the built-in antitrust uncertainties prior to receipt of the operating license, makes it even less persuasive for an applicant to claim reliance interests during the licensing process. Moreover, FP&L has not even particularized its claims of financial injury, and cannot otherwise prevail by invoking an unwarranted and vague right to be left alone.

F. The Purposes to Be Served by Granting Florida Cities Intervention and an Antitrust Hearing on the St. Lucie Unit No. 2 Application, Coupled with Significant Changes Since the Issuance of the Attorney General's Advice Letter, Make it Proper for the Board to Use Its Broad Discretion to Grant the Relief Requested in Florida Cities' Joint Petition

The bulk of Florida Power & Light Company's Response is addressed to the argument that Florida Cities' petition to intervene in St. Lucie Unit No. 2 proceedings should be denied since it is filed out of time. Florida Cities recognize that their right to obtain intervention and the institution of an antitrust hearing in the construction permit proceeding for FP&L's St. Lucie Unit No. 2 became discretionary when the date for filing intervention petitions pursuant to Section 2.714(a) of the Commission's Rule of Practice passed. 1/ But Florida Cities submit (and FP&L concedes, at

1/ Easton Utilities Commission v. AEC, 424 F.2d 847 (D.C. Cir., 1970).

page 2 of its Response) that the Licensing Board has ample authority to permit such intervention; statutory purposes and policies, as well as practical considerations, make it appropriate and, indeed, mandatory for the Board to grant the relief requested in Florida Cities' Joint Petition, under the circumstances presented.

1. General considerations under Section 2.714(a) of the Commission's Rules of Practice

Matter of Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), 1 NRC 273, 275 (1975), stands for the proposition that intervention decisions must be made with a focus on the policies underlying Section 2.714 of the Commission's Rules of Practice, by inquiring into the purposes which may be served or hindered by accepting an untimely petition and with an awareness that the rule was written to give the licensing boards "broad discretion in the circumstances of individual cases." Numerous cases have echoed the theme that Section 2.714 grants the boards broad discretion in deciding untimely petitions to intervene. 1/ Such discretion

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1/ Matter of Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339 (NRCI 76/7, 20), Docket Nos. STN 50-546 and 50-547 (27 July 1976); Matter of Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975); Matter of Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-342, Docket Nos. 50-338, 50-339, Slip Opinion (31 August 1976); Matter of Houston Lighting and Power Company (South Texas Project, Units 1 and 2), Docket Nos. 50-498A and 50-499A, Slip Opinion, at 9 (Licensing Board, 9 September 1976).

when coupled with the many factors and policies which must be considered, means that "good cause" for late intervention must be determined on the basis of the merits of the particular case, with the dispostions in other cases which are not closely parallel offering little guidance. 1/

The Appeal Board in Jamesport 2/, gives a useful summary of the formal requirements of Section 2.714:

> ". . . In deciding the 'good cause' question, the Board is not to confine itself to a consideration of whether the petitioner has advanced an adequate excuse for being late. Even if the lateness is entirely unjustified, the Board must nonetheless look at four factors spelled out in Section 2.714(a):
>
> > '(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 petitioner's interest will be represented by existing parties.
> > '(4) The extent to which the petitioner's participation will braoden the issues or delay the proceeding.'
>
> "In addition to those four factors, which come into play only in circumstances where the intervention petition is untimely, Section 2.714(a) refers to three other factors which are detailed in Section 2.714(d) and are to be considered in passing upon all intervention petitions--whether or not tardy:
>
> > '(1) The nature of the petitioner's right

1/ Matter of Duquesne Light Company (Beaver Valley Power Station, Unit 2), 7 AEC 959, 967, n. 7 (ALAB, 1974).

2/ Supra, 2 NRC at 635.

under the Act to be made a party to the proceeding.

'(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

'(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.'"

These factors must be weighed in the context of the statutory purposes to be served by granting or denying the late intervention 1/, with tardiness balanced against any countervailing considerations. 2/

Florida Cities submit, as discussed below, that Staff and FP&L have incorrectly weighed Florida Cities' justifications for late intervention as well as the four factors listed in Section 2.714(a). They have also totally failed to address the policies underlying the rule and the interests which Florida Cities are attempting to protect through intervention.

The basic policy behind Section 2.714 is the belief that persons vitally affected by administrative action must have the opportunity to be heard before an agency acts. This is a major premise underlying the Administrative Procedure Act,

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1/ West Valley, supra, 1 NRC at 275. And see Matter of Virginia Electric & Power Co (North Anna Power Station, Units 1 and 2), NRC Docket Nos. 50-338A and 50-339A (ALAB-342; 31 August 1976), Slip Opinion at 56 (Opinion of D. R. Buck dissenting to Appeal Board's failure to deny intervention).

2/ See Matter of Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), 2 NRC 395, 396 (ALAB-289 (1975).

5 U.S.C. §§551, et seq., to which the actions of the Nuclear Regulatory Commission are subject pursuant to Section 181 of the Atomic Energy Act, 42 U.S.C. §2231. Therefore, a right to intervene has been extended to those parties whose interests are protected by the Act. This right should not be lightly denied when the interest asserted is one given special protection by the Act.

Section 2.714(a) specifically directs the Board to consider the factors set out in Section 2.714(d), yet neither Staff nor FP&L discuss the nature of the interests raised by Florida Cities, or the possible ill effects that the issuance of a construction permit without antitrust conditions protecting their interests might have upon Florida Cities. It should be obvious, as the Appeal Board stated in Jamesport, supra, that "a late petition is entitled to some greater measure of solicitude if its sponsors have a clearly cognizable interest." 2 NRC at 645.

Florida Cities have asserted the right to be free from anticompetitive effects resulting from FP&L's activities under any future licenses issued for the Company's St. Lucie Unit No. 2. Much of the discussion above makes it clear that this right is firmly grounded in the explicit policies of the Atomic Energy Act. Florida Cities claim an interest given special protection under the Act; they are precisely the type of entities which Congress hoped to protect under Section

105. Moreover, they have alleged that licenses issued absent conditions to protect them from potential restraints of trade may have dire anticompetitive impacts, including even their ceasing to exist as independent entities.

Conway Corp. v. FPC, 510 F.2d 1264 (D.C.Cir., 1975), aff'd, ___ U.S. ___, 44 U.S. Law Week 4777 (June 7, 1976), makes clear the need for the quick resolution of such claims. Neither Staff nor FP&L could properly weigh Cities' lateness or the four factors in Section 2.714(a) without taking these important interests and consequences into account.

They have also failed to consider Cities' late petition in the context of the purposes behind the deadline for timely intervention petitions. Neither Congress nor the Commission wanted intervention rights to cause significant delays in the construction or operation of proposed plants. Since Florida Cities do not seek to halt construction, this purpose for discouraging late interventions is not relevant to Florida Cities' request.

The other significant reason for limiting the time in which parties may exercise their right to intervene is the fear that late intervention will cause confusion and be unfair to the applicant. North Anna, supra, 2 NRC at 400. But this consideration is most relevant just before a hearing is scheduled to begin or during an ongoing proceeding, where a late intervention may catch the applicant off guard and unprepared to

meet an intervener's contentions. Such an applicant might have to give up important rights (such as that of full discovery) in order to avoid undue delay and expense. But such worries over confusion and unfairness are not present in this case. FP&L will have ample time, as deemed by the Board, to prepare to meet Florida Cities' allegations. In fact, it should already be preparing to meet nearly identical claims in Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636-A.

Florida Cities submit that consideration of the four factors outlined in Section 2.714(a) must be made in light of the policies of the Act and of Section 2.714. Because Florida Cities raise interests that are specially protected by the Atomic Energy Act; because a denial of the requested relief will significantly exacerbate the injuries caused to Florida Cities by FP&L's anticompetitive conduct; and because initiation of the requested hearing will not be procedurally unfair to FP&L, the Board should be most reluctant to deny intervention or to refuse to order an antitrust hearing on Florida Power & Light Company's application for a construction permit for its St. Lucie Unit No. 2.

G. Florida Cities Have Shown Good Cause for Filing at this Time

Florida Cities respectfully submit that good cause has been shown for their late filing. Both Staff and FP&L conclude that Florida Cities have not made appropriate justification. Staff and FP&L's major contentions in this regard will be discussed here briefly.

Neither Staff nor FP&L indicate in any way when Florida Cities might have filed so as to have been late, but not too late, after the period prescribed for interventions under Section 2.714 of the Commission's rules and regulations had elapsed. The passing of a filing deadline under the rules is most significant when an antitrust hearing is scheduled for the near future. The requirement for timeliness becomes, as noted above, a mechanism for protecting the applicant and the Board from the confusion and complication caused by the procrastinating intervener. That element of surprise or unfairness is not present in this case.

At pages 45, et seq., of its Response, FP&L denies that the energy crisis was an intervening event which justified Florida Cities' lateness. FP&L certainly does not contest that the effect of that crisis increases the importance to Florida Cities of access to fuel supply sources, such as nuclear generation, more economical than oil; or that a nuclear monopoly is a far more significant weapon, now that other

moderately priced sources of power are not available to Florida Cities, with which to undermine the viability of FP&L's competitors; or that the anticompetitive effect of FP&L's refusal to deal in nuclear power was amplified by the energy crisis. FP&L does seem to be saying that Florida Cities should have known long ago that the crisis would have drastic ramifications, over a prolonged period with no relief on the horizon.

However, had Florida Cities filed one year ago--or two years ago--alleging that the energy crisis was a significant intervening event, FP&L would surely have claimed that the consequences of the energy crisis were not yet clear. Were Florida Cities to delay until the operating license stage, FP&L would surely claim that they should have sought intervention sooner.

The fact is that FP&L's attempts to maintain its nuclear monopoly create great competitive disadvantage to Florida Cities in light of the current fuels situation. The impact is present and continuing. While Florida Cities were not unaware of the possibility of fuel shortage or gas curtailments in 1974, they were receiving and had reason to predict gas deliveries at far greater levels than have in fact occurred. The extent of the impact of the energy crisis and FP&L's future actions were not clear in 1974.

Had Florida Cities found themselves then in their present circumstances, they would of course have sought relief then. 1/

FP&L asserts that the disagreement between the Seminole Electric Cooperative, Inc., and FP&L is not relevant to the question whether the Board should initiate an antitrust hearing at Florida Cities' behest. (FP&L Response, p. 39, n. 66). Yet it certainly would be proper at such a hearing for Florida Cities to show that FP&L was engaging in a course of conduct inconsistent with the nation's antitrust

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1/ FP&L appends to its response a portion of a brief signed by the undersigned counsel on behalf of some of the petitioners herein. Exhibits entered in that case (Florida Gas Transmission Co. (Basic Magnesia, Incorporated, et al.), FPC Docket Nos. RP74-50-1, et al.) on behalf of Florida Gas Transmission Company ("FGT"), the interstate pipeline serving Florida, show that in 1974 gas deliveries to direct sale customers were curtailed approximately 50% and that deliveries to resale customers (via distributors) were being made in approximately full contract quantities. Projections for 1976 show that direct preferred customers would receive about 25% of their contract entitlements, with resale customers being only minimally curtailed. At that time a number of direct industrial customers were contesting their reduced deliveries. The severity of subsequent curtailments was not predicted. Ex. 48, RP74-50-1, et al. To avoid burdening this record, Florida Cities have not appended Exhibit 48, but shall supply it to the Board or the parties upon request.

laws. 1/ It is the very multifaceted nature of FP&L's anticompetitive activities which make it imperative that Florida Cities and other small utilities receive protection from this Commission. 2/ Moreover, FP&L's relations with Seminole and New Smyrna Beach, which entities have received commitments from FP&L that will condition the terms of any license issued for the construction of St. Lucie Unit No. 2, certainly are relevant as illuminating FP&L's attitude. The United States Department of Justice decided not to recommend an antitrust hearing on the St. Lucie Unit No. 2 application based on FP&L's apparent attitude of cooperation. (Advice Letter of 14 Nov. 1973, p. 7). Evidence of a now stubborn, uncooperative FP&L should be entirely relevant to the decision to now hold an antitrust hearing. FP&L's inability to reach

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1/ A party acting as a "private attorney general" can raise issues not personal to it. See Associated Industries, Inc. v. Ickes, 134 F.2d 694, 705 (2d Cir., 1943), vacated as moot, 320 U.S. 707 (1943); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 619 (2d Cir., 1965), cert. denied sub nom. Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

2/ Similarly, despite FP&L's protestations to the contrary, Florida Cities should be allowed to allege that FP&L's attempt to take over the Vero Beach electric system is inconsistent with the antitrust laws. See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927; refusal to deal with independent dealer after dealer refused to sell out is an unfair practice). Florida Cities have a vital interest in the acquisition of any municipal system in Florida, since such acquisition leaves other municipal utilities with fewer options for coordinated activities and strengthens FP&L's monopolist position.. If Florida Cities allege a scheme by FP&L to acquire neighboring systems, evidence of actual offers and purchases are obviously relevant. See Section I, p. 6, n. 1, supra.

agreement with systems to whom it has already made formal commitments surely provides a basis for the inference that utilities without such commitments can expect FP&L to continue to deny them access to nuclear facilities.

Both Staff (Answer, p. 6) and FP&L (FP&L Response, p. 38) state that FP&L's alleged failure to adhere to license conditions can be addressed after issuance of the construction permit. This position is inconsistent with FP&L's insistence that all antitrust issues surrounding its plants be resolved as soon as possible.

Both Staff (Answer, p. 6) and FP&L (FP&L Response, p. 43) brush off Orlando's claim that FP&L misled the City into inaction at a time when intervention in Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-389A, would have been timely (by promising the City a share of FP&L's proposed South Dade project) by stating that Orlando will have an opportunity to dispute such claims in the course of the antitrust hearings set in Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636-A. FP&L and Staff ignore the fact that Orlando failed to intervene because it was promised a negotiated share of the South Dade project, not because it would be permitted to litigate for a share of South Dade. Orlando's situation is further illustrative of FP&L's conduct and the reasons for Orlando's failure to intervene timely.

Finally, FP&L insists (FP&L Response, p. 44) that Florida Cities can no longer raise New Smyrna Beach's price squeeze allegations. However, the fact that New Smyrna Beach was forced to forego a price squeeze claim at the Federal Power Commission in exchange for necessary interconnection rights can have no effect on the Nuclear Regulatory Commission's authority and responsibility to act on a price squeeze created or maintained by activities under an NRC license--particularly under an agreement that explicitly leaves open resolution of claims before the NRC. New Smyrna Beach's agreement to not raise the issue at the Federal Power Commission is not an agreement releasing FP&L from all claims concerning price squeeze.

For the reasons stated above, the intervening events described in Florida Cities' Joint Petition are significant and relevant. In their totality, those events and conditions constitute "good cause" for granting Florida Cities' Joint Petition.

H. An Evaluation of the Four Factors in Section 2.714(a) of the Commission's Rules of Practice Demonstrates the Propriety of Granting Intervention

Even if a party seeking intervention has not shown good cause for delay, the Board may grant intervention based upon its evaluation of the four factors listed in Section 2.714(a) of the Commission's Rules and Regulations. 1/ The Board must

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1/ West Valley, supra, 1 NRC at 275; Jamesport, supra, 2 NRC at 635.

weigh those factors even when the petitioner's procrastination is entirely unjustified. 1/ Florida Cities contend that the Board, within its broad discretion, may properly find that intervention is justified because good cause for untimeliness has been shown, because the four factors weigh in favor of granting intervention and ordering a hearing, or because the intervening events cited by Florida Cities, together with those four factors, make it proper to grant the requested relief.

The consideration of the four factors listed in Section 2.714(a) is, in essence, an "inquiry into the purposes which may be served, or hindered, by accepting an untimely petition." West Valley, supra, 1 NRC at 275. Thus, they should be evaluated with an awareness of the Commission's responsibilities under the Act both as to antitrust issues and the statutory interests which the petitioner claims will be jeopardized should intervention be denied, as well as of the public interest in the timely and orderly conduct of the agency's proceedings. 2/ Thus, the Commission has held that a tardy

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1/ Jamesport, supra, 2 NRC at 635.

2/ The public interest in the timely and orderly conduct of proceedings (cited by the Commission in West Valley, supra, at 275) will not be jeopardized by granting Florida Cities' request. As discussed above, intervention will not serve to complicate or confuse an imminent or ongoing proceeding. The Board can expedite an antitrust hearing without causing disorder. Moreover, delays in resolution of the safety issues surrounding St. Lucie Unit No. 2 will apparently enable the Board to hold an antitrust hearing (perhaps consolidated with the South Dade hearing) that will not delay FP&L's construction permit. As discussed below, Florida Cities do not seek to delay issuance of the permit until their antitrust claims have been resolved.

petitioner need not "win" on each of the four factors in order to obtain intervention and a hearing. 1/

The first factor set out in Section 2.714(a) is "The availability of other means whereby the petitioner's interest will be protected." Staff (Answer, p. 8) and FP&L (FP&L Response, pp. 49-50) conclude that the availability of other fora in which Florida Cities may raise antitrust issues weighs against granting intervention here. Florida Cities disagree. Any consideration of "other means" must compare the effectiveness and speed of the alternatives. The Appeal Board made that clear in the recent North Anna decision 2/, in which it noted that the proceeding in which the petitioner wished to participate provided "the best, if not the only, effective means available" to protect the interests asserted. As the appellate court noted in Conway 3/, a small utility system raising antitrust claims is especially in need of quick resolution of its contentions. It is obvious that fora other than the Commission will not assure Florida Cities the quickest relief available, nor the most comprehensive. Moreover, it

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1/ See West Valley, supra, 1 NRC at 276, where the Commission's evaluation of the second factor (development of a sound record) was "inconclusive."

2/ Supra, (ALAB-342; 31 August 1976), at 18.

3/ Supra, 510 F.2d at 1272.

is this Commission that is responsible for nuclear licensing. Indeed, were Florida Cities to have sought relief elsewhere FP&L could have been expected to claim "primary jurisdiction" in the Nuclear Regulatory Commission. The existence of such potential means to raise antitrust issues should not disadvantage Florida Cities, whereas the fact that the Commission offers the most effective forum for raising issues central to the Atomic Energy Act should weigh in Florida Cities' favor. 1/

Staff argues that Florida Cities' opportunity to raise antitrust claims in the South Dade proceedings obviates any need for a hearing concerning FP&L's application for a construction permit for St. Lucie Unit No. 2. If Florida Cities' requests for intervention in St. Lucie and for other relief are to be denied because of the availability of the South Dade forum, they must have the assurance that access to

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1/ Note that this case is not al all comparable to the Jamesport case, supra, 2 NRC 631, 648, where the petitioner was actually a party in an ongoing proceeding before a state siting board which was exploring in depth essentially all of the same issues and had authority to withhold site approval as requested by the petitioner.

And see Matter of Houston Light & Power Co. (South Texas Project, Units No. 1 and No. 2), NRC Docket No.s 50-498A and 50-499A, Licensing Board (9 Sept. 1976), where the petitioner was actually litigating many of its antitrust claims in various proceedings before the Federal Power Commission, Securities and Exchange Commission and a U.S. District Court. The Board, however, noted (at p. 6) that "No other means are available in this proceeding to resolve antitrust questions, since no issue of this kind has been raised before." Florida Cities are in a more favorable position than the South Texas petitioner, since they are not litigating their antitrust claims in other fora and they also have no other means in the instant proceeding to have those claims heard.

the South Dade and other existing units will be determined under the doctrine expounded in Duquesne Light Co. (Beaver Valley Power Station, Unit No. 2), ALAB-208, 7 AEC 959, 969 (1974), on the same terms and under the same legal standards as would have been allowable had intervention been granted. Florida Cities must be assured that participation in the less costly plants will not be precluded, assuming entitlement thereto is shown on the merits, because the Board claims no right to attach conditions relating to the older plants to a license issued for the South Dade units. For these reasons, as discussed below, Florida Cities request that a consolidated antitrust hearing be held. Only then can there be no doubt that an order in Cities' favor may properly reach any or all of FP&L's nuclear plants. Without such assurances, relief available in the South Dade proceeding is not necessarily adequate 1/ and it would be unfair to conclude, based on the availability of the South Dade proceeding, that other means exist whereby Florida Cities' interests will be protected. Moreover, should the Board rule against Florida Cities on the

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1/ As Staff notes (Answer, p. 8), Florida Cities must also be assured that Key West and St. Cloud will be allowed to intervene in the South Dade proceeding, so that the interests raised in the instant petition may be protected.

grounds that there exists an adequate remedy in the South Dade proceeding (or stay proceedings pending the outcome of litigation there), the Board should rule that, should Florida Cities prevail on the merits in the South Dade proceeding, the issues need not be retried in these dockets. However, Florida Cities respectfully submit that the parallel nature of their claims here and in the South Dade proceeding suggests granting intervention and consolidation to avoid possible subsequent procedural difficulties, rather than dismissal.

The second and third factors listed in Section 2.714(a) are:

> "(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 petitioner's interest will be represented by existing parties."

Staff does not discuss these factors. FP&L insists (FP&L Response, p. 51) that the second and third factors "obviously contemplate the existence of an ongoing proceeding and which therefore, in the absence of such a proceeding, are irrelevant or should be given no weight." This is an example of FP&L's propensity to interpret the rules, and the Act, so as to give the narrowest scope to the Commission's authority and the rights of aggrieved persons. FP&L is plainly wrong in its assertion. In a case where the Attorney General had not recommended a hearing and no requests for one had been

made until shortly after the allotted time period had elapsed, the Board would consider whether the petitioners could help develop a record that would assist the Board in carrying out its antitrust responsibilities and whether any or all of the petitioners would be represented adequately by existing parties or other interveners in any such hearing. 1/ These same considerations should be made in this case.

Florida Cities obviously have the interest and knowledge to significantly contribute to determining whether a situation inconsistent with the antitrust laws might be created or maintained by activities under a license granted to FP&L. And, confronted with the fact of a vastly changed fuels market and the allegations of continued anticompetitive practices by FP&L, the Commission and the Board have the responsibility to take another look at the antitrust ramifications of issuing an unconditioned license for the construction of St. Lucie Unit No. 2.

FP&L claims (FP&L Response, p. 58, n. 97) that cases

1/ See the South Texas case, supra, at 5-6. Although the construction permit had already been issued and no hearing was contemplated (the operating license stage being "several years" away), the Licensing Board found that the second and third factors, while somewhat awkward to apply, weighed in favor of intervention. It stated that, if there were to be an antitrust inquiry, petitioner's participation would be necessary to develop a sound record, and that it's interests would not be represented by existing parties, since none had raised antitrust issues. Certainly both of these points also favor Florida Cities' request.

establishing the requirement that agencies make decisions based upon "informed judgment" and a "full record" are irrelevant. 1/ Given the facts, FP&L would prefer that the Commission act without benefit of such a record, but neither FP&L's desires nor mere administrative convenience can outweigh the public interest, as enunciated by Congress, in the enhancement of competition in the field of nuclear generated power. In Scenic Hudson 2/, the court did not confine itself to the narrow context of the particular problem facing it when it asserted that the agency must act on a complete record, since "the right of the public must receive active and affirmative protection at the hand of . . ." an agency which claims to represent the public interest. 354 F.2d at 620. If the Board refuses to reopen the antitrust issues in the St. Lucie Unit No. 2 case, it will be reduced to the role of a mere ". . . umpire blandly calling balls and strikes." Ibid. More aptly, the Board will be acting the part of a referee ignoring punches landed below the belt or a policeman watching

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1/ It is hard to see how FP&L can characterize a case such as Udall v. FPC, 387 U.S. 428 (1967), as irrelevant. The statute involved required the Federal Power Commission to refer a hydroelectric project to Congress when, in the agency's judgment, the project could be best developed by the Federal government. The Commission, finding insufficient evidence of federal superiority, issued a license to the applicant. The Secretary of Interior sought to reopen the hearing to present evidence of federal superiority in development of the project. The FPC refused to reopen. Emphasizing the agency's obligation to make a decision based on an informed judgment, the Supreme Court ordered the FPC to reopen the hearing on the neglected issue of federal development

2/ Scenic Hudson Preservation Conference v. FPC, supra.

a mugging from his squad car.

Because Florida Cities can help to develop a sound record on a matter vital to the Board in its antitrust role, the second factor weighs heavily in their favor. Since Florida Cites are obviously not represented by other parties to this case, the third factor also weighs heavily in Florida Cities' favor.

The fourth factor listed in Section 2.714(a) is "The extent to which the petitioner's participation will broaden the issues or delay the proceeding." FP&L contends that this is the factor weighing most heavily against Florida Cities' petition. Florida Cities strongly disagree. Even where thorough consideration of a matter will prolong a proceeding, intervention should be granted if the significance of the "late" issue outweighs the delay; the administrative response to such a situation should be to resolve the issue as rapidly as may safely be done. 1/ But where instituting a hearing will not delay the issuance of a construction permit, the public interests protected by the fourth factor are not jeopardized. This is such a case.

The fourth factor was found to weigh in favor of the petitioner in the recent South Texas case. 2/. There a

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1/ See North Anna, supra, at 21 (Decision of 31 August 1976).

2/ Supra, at 5-6 of Order.

construction permit had already been issued, and it would be several years until the operating license stage, so the Licensing Board found that there would be no delay, even though the issues would obviously be broadened. The question of any cloud being cast on the construction permit was obviated, said the Board, by expediting the operating license proceeding ". . . for the express purpose of facilitating a prompt determination of antitrust matters." South Texas, supra, (Order, at 6).

In the present case, although the construction permit has not yet been issued, Florida Cities have expressly stated their position (Joint Petition, p. 14) that construction should not be delayed because of a St. Lucie Unit No. 2 antitrust hearing. FP&L misconstrues Florida Cities' position in stating (FP&L Response, pp. 52-53) that they would block construction unless interim relief were granted. Florida Cities believe that interim relief preventing the use of existing nuclear generation as part of an anticompetitive scheme is warranted, and will request such relief should the Board grant them intervention. But their agreement not to delay construction pending the resolution of their antitrust claims is in no way conditioned upon the granting of such interim relief. This should allay FP&L's fears since its legitimate concern that construction not be delayed would be thus satisfied. FP&L cannot reasonably expect more so long as

good faith antitrust claims against it are outstanding. FP&L cannot ask that its possession and use of nuclear power be immune from the requirements of the antitrust laws. Thus, Florida Cities will not seek to block construction, but will continue to press their legitimate antitrust claims against FP&L.

This position means that a comprehensive antitrust hearing can be held by the Board without delaying construction, and the fourth factor does not weigh against granting Florida Cities' petition. 1/ As was shown in South Texas, supra, the proper way to treat a utility's fear that a "cloud" is being bast over its assets, is to expedite the antitrust hearing so as to facilitate a speedy resolution of the matters in dispute.. The fourth factor therefore actually weighs in favor of intervention and a hearing, since such action will hasten the resolution of all antitrust claims of Florida Cities against FP&L.

In addition to points raised above concerning FP&L's

1/ It should also be noted that recent environmental impact cases make it quite probable that the antitrust hearing could be held before other proceedings involved in issuance of FP&L's construction permit are completed. See Natural Resources Defense Council v. NRC, Case No. 74-1385 (D.C.Cir., 21 July 1976). This makes FP&L's argument as to delay even less persuasive as a reason to deny an antitrust hearing. See "Legal Fallout Lethal: Recent Court Decisions Threaten Nuclear Power." Barron's, p. 3 (4 October 1976).

vague contentions that the very filing of Florida Cities' petition somehow injures its financial position (FP&L Response, p. 3), it should be noted that FP&L has in no way specified the injury which has or might be caused by the ever-present cloud allegedly emanating from Florida Cities' Joint Petition. Florida Cities take FP&L's accusations quite seriously, as evidenced in their 24 September 1976 Motion for Leave to Reply and Request for Clarification, where they state (p. 6):

> ". . . FP&L cites no specific facts or evidence to support its contentions, making it difficult for Cities to respond. Prompt clarification would aid Cities in replying to FP&L's Response and would assist the Board in evaluating FP&L's allegations.
>
> "Petitioners are prepared, at the threshold of this case, to enter into all appropriate stipulations, procedural and substantive, necessary to eliminate any real adverse impact on FP&L. Accordingly, Petitioners hereby request a statement of particulars from FP&L concerning this matter, so that the parties and Commission Staff can take prompt steps. If FP&L takes the view that nothing would suffice except withdrawal of Cities' Petition to Intervene, it should also state its views as to how the Commission can preserve Cities' right to make their instant good faith argument in favor of intervention and antitrust hearings without substantially affecting FP&L's ability to finance on favorable terms."

FP&L has not responded to Florida Cities' request for clarification.

I. Should the Commission Determine for any Reason Not to Grant any Part of the Relief Requested in Florida Cities' Petition, it Would Be Appropriate for It to Refer the Antitrust Claims Against FP&L to the Federal Trade Commission for Further Investigation

Cities believe that the Commission and the Board have ample power to grant intervention and a hearing in the St. Lucie 2 construction permit proceedings and to initiate antitrust hearings to the existing operating licenses held by FP&L. Cities further believe that the Commission's antitrust responsibilities make it incumbent upon it to grant the relief requested. If, however, for any reason, the Commission or the Board conclude that any part of the relief requested would be inappropriate, Cities feel that the significant, antitrust claims against FP&L should be referred by the Commission to the Federal Trade Commission.

FP&L seems to imply (Response pp. 60-61) that Florida Cities are forum shopping in suggesting that, should the Board find a want of authority, it should seek the advice of the FTC. In view of the latter's jurisdiction under the Federal Trade Commission Act, cited in § 105a, 42 U.S.C. 2135a, Florida Cities can find no basis for such charges. Florida Cities merely contend that the serious nature of FP&L's actions warrant responsible governmental response.

FP&L correctly states that the Florida Cities have sought an investigation of FP&L's conduct. This was done by a letter from Osee R. Fagan, Esq., to Honorable Edward H. Levi dated July 15, 1976. 1/ Florida Cities assume the matter is still under investigation, but have no direct knowledge of the status of it. 2/ However, especially in light of "advice letters" suggesting that an anticompetitive situation may exist, there appears no basis for concluding that the Department of Justice has given FP&L a clean bill of health. Moreover, Florida Cities can only surmise that the Department would be most surprised if any time it did not take action on a particular matter, this created an inference of no law violation.

At pages 59-61 of its Response, FP&L mainfests disdain for Cities' suggestion that the Commission refer the matter to the FTC. But Cities submit that such referral would be quite appropriate. When an agency has been presented with claims of injury caused by one of its licensees or an applicant for a grant of the public domain, and that injury is to interests protected by the

1/ Florida Cities will supply a copy of the letter to the Board and parties, if requested.

2/ FP&L states (Response, p. 60) "FMUA officials have made public statements . . . " Florida Cities do not know what statements are referred to; context of such statements, if made; or the basis for the underlying conclusion.

gency's organic act, the claimant should expect administrative action, if its claims are meritorious. When, however, the agency concludes (for reasons other than its assessment of the merits) that the requested relief would be inappropriate, it should nonetheless promote the policies of its organic act. Referral to another agency with the authority to investigate the claims made and give appropriate relief is one such alternative.

Referral in the instance of the present case is especially fitting. Congress has already signalled the propriety of the Commission "lending its prestige"1/ to significant claims of anticompetitive activities relating to nuclear power by mandating referrals to the Attorney General, in Section 105(b) of the Act, whenever it appears to the Commission that information in its possession demonstrates a violation of, or the tendency to violate, the relevant antitrust laws. The Commission has made such a referral to the Attorney General concerning the activities of FP&L. Only seven months ago, in its Advice Letter of March 2, 1976, the Justice Department made it clear that it had serious doubts about the nature and consequences of FP&L's activities. Rather than recommend an antitrust hearing at that time, it advised the Commission to consider subsequent events before deciding on whether to hold an antitrust hearing in the South Dade proceedings.

1/ See FP&L's Response, pp. 59-60.

Thus, the Justice Department has recently reviewed many of the claims made by Cities and had grave doubts about the propriety of FP&L's activities. The Department apparently believed that the Commission should use its discretion in deciding upon further investigation of FP&L's anticompetitive practices. Returning the whole matter to the Justice Department, then, does not seem to be the best alternative, if the Commission would like more guidance or feels that action by the Commission itself would be inappropriate. But, an "outside consultation" with the Federal Trade Commission seems optimal:

1) The FTC has recently, in accord with express congressional concern, shown much interest in the status of competition within the various segments of the nation's energy industry.1/

2) The Atomic Energy Act2/ and its legislative history 3/ plainly show that Congress meant the two Commissions to be concerned with the same types of anticompetitive and unfair practices.

3) No other agency has such comprehensive authority to enforce the antitrust laws mentioned in Section 105(a) of the Act. 4/ Along with NRC, it has the exclusive authority to enforce

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1/ This concern was emphasized by Owen Johnson, Director, Bureau of Competition, Federal Trade Commission, in unpublished remarks to the Federal Bar Association's 1976 Energy Law Conference, September 28, 1976.
2/ See Section 105(a) of the Act.
3/ See Joint CommitteeReport, supra, at 14.
4/ Those acts include the Federal Trade Commission Act, 15 U.S.C. §§41-51; The Clayton Act, 15 U.S.C. §§12-27, and the Sherman Act, 15 U.S.C. §§1-7.

Section 5 of the Federal Trade Commission Act.1/ (This means that it may police "unfair methods of competition" as well as practices which cause substantial injury to consumers or competitors, even when such activities fall without the traditional antitrust laws overseen by the Justice Department.) It may enforce Sections 2, 3, 7 and 8 of the Clayton Act, pursuant to Section 11(a) of that Act. And it may attack violations of the Sherman Act through its enforcement of Section 5 of the FTCA, as well as fill gaps in both the Sherman and Clayton Acts. 2/

If, therefore, the Commission feels that there are some gaps in its own organic act which make direct action on Cities' requests inappropriate, it is proper indeed to refer Cities' claims to the Federal Trade Commission, an agency with complementary duties to play an active, prophylactic role in preventing antitrust violations and unfair, anticompetitive practices. 3/

1/ Holloway v. Bristol Meyers Corp., 485 F.2d 986 (D.C.Cir., 1973).

2/ Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir., 1962).

3/ To the extent that FP&L implies the Justice Department should also review the facts, Florida Cities agree. Should the Board determine a referral to that agency as well as the FTC is appropriate and warranted, Florida Cities would fully cooperate. This agency, of course, has ultimate decisional authority.

IV. A CONSOLIDATED HEARING INVOLVING ALL OF FLORIDA CITIES' ANTITRUST CLAIMS WOULD BEST PROVIDE THE EXPEDITED RESOLUTION OF ANTITRUST ISSUES SOUGHT BY BOTH FLORIDA CITIES AND FLORIDA POWER & LIGHT COMPANY

If the Commission concludes that Cities are entitled to an antitrust hearing and intervention in the St. Lucie Unit No. 2 construction permit proceedings and/or a proceeding to modify, suspend or revoke FP&L's existing licenses, it should order the consolidation of such hearings with the upcoming antitrust hearing on FP&L's South Dade construction permit. Such consolidation will provide the "orderly procedure" sought by the Supreme Court in the California case.1/ For it would avoid the waste of time and money that would be caused by repetitious hearings on the same basic legal and factual issues. And, as to the construction permit, would avoid the "unscrambling" 2/ that would be required if Cities prevail on the merits after the permit is issued, rather than in the same proceeding which issues the permit.

Section 2.402(b) allows for consolidation of hearings to consider "common issues" when such action would be "conducive to the proper dispatch of [the Commission's] business and to the ends of justice." In the South Texas case, 3/ the Staff feared that a post-issuance hearing into a licensee's anticompetitive practices could cast a "cloud" on its construction permit. The Board responded that the best way to allay such fears is to expedite the desired antitrust hearing. 4/ The same reasoning applies to investigations

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1/ California v. FPC, 369 U. S. 482 (1962).
2/ Ibid, at 488.
3/ Supra, at 6.
4/ Ibid.

of practices under existing operating licenses. Thus, expedition through consolidation with the upcoming South Dade proceedings would best allay Staff's and FP&L's "cloud" fears. In fact, since the question of system-wide relief will be considered in the South Dade proceeding (as recognized by the Staff at page 6 of its Answer and by FP&L at page 51 of its Response), the legal issues dealt with in that hearing will not be significantly broadened by consolidation with a hearing under Section 2.202 of the Commission's Rules of Practice to modify the existing licenses; and the Commission would be able to dissipate any cloud allegedly cast upon the existing licenses in the South Dade proceedings immediately by resolving all claims in one consolidated proceeding.

Cities also seek consolidation as a self-protection measure. Only consolidation will remove any doubts that Cities will be able to receive all the antitrust relief to which it may be entitled after only one comprehensive hearing. Otherwise, Cities face the possibility of having to litigate identical legal and factual issues in multiple fora and over a prolonged period of time. Since consolidation would fulfill the desire of FP&L, Cities and the Staff for the quickest possible resolution of Cities' antitrust claims, and since the Commission has the power to order such consolidation in the name of speed and justice, Cities respectfully request that such consolidation be ordered.

CONCLUSION

For the foregoing reasons, Florida Cities' Petition of 6 August 1976 should be granted and these dockets should be consolidated with Florida Power & Light Co. (South Dade Plant), NRC Docket No. P-636-A.

Respectfully submitted,

Robert A. Jablon

Robert A. Jablon
Attorney for the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Bushnell, Chattahoochee, Daytona Beach, Fort Meade, Key West, Leesburg, Mount Dora, Newberry, Quincy, St. Cloud, Tallahassee and Williston, Florida, and the Florida Municipal Utilities Association

Law Offices of:

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

202-333-4500

15 October 1976

ATTACHMENT
"Reply of Florida Cities to Responses of Florida Power and Light Company and Nuclear Regulatory Commission Staff"

Sun., Sept. 5, 1976, Vero Beach, Fla., PRESS-JOURNAL

FLORIDA POWER & LIGHT COMPANY

An open letter to every Vero Beach resident from Florida Power & Light Company's Ralph Mulholland.

September 4, 1976

Dear Vero Beach Resident:

On September 3, 1976, Florida Power & Light Company informed the Public Service Commission of our intention to file for rate relief. When you first heard or read that Florida Power & Light Company was asking for rate relief, two questions probably popped right into your mind:

What will this do to my electric bill if we vote to sell our electric system to Florida Power & Light Company?

Why does this come *now*, at the last minute, before the referendum?

I'd like to ease your mind on both these points with quick answers.

First, there will be no effect on your electric bill at all for quite a while. It generally takes months for the Public Service Commission to study and act on a rate request. We will be well into 1977 before a final decision is made.

Meanwhile, if you approve the sale in Tuesday's vote and it is concluded in the near future, you will begin enjoying Florida Power & Light Company's present rates—which are, as you know, considerably lower than what you now pay.

If our rate request is eventually granted by the Public Service Commission, the electric bills of *all* Florida Power & Light customers will rise. *But you will still pay significantly less* when Florida Power & Light Company provides you electric service than if Vero Beach continued to operate the electric system.

As for the timing: Friday, September 3, was the earliest possible day we could prepare all the details and paperwork for the Public Service Commission. In fact, we didn't expect to be ready until the end of September.

We wanted *you* to have all the facts before you vote, so a lot of people at Florida Power & Light Company worked overtime to speed things up. Getting the news a few days before the vote may not be ideal... but it sure beats getting the news *after* the vote.

Now, I'd like to give you more of the details because you're entitled to a full, frank explanation. To give you an idea how the vote and our rate request might affect your electric bills, here are some figures based on a residential customer in Vero Beach who uses 1000 kilowatt hours per month. First, we made a comparison using the average monthy bills this customer would have paid over the first eight months of 1976.

AT PRESENT RATES

VERO BEACH	FLORIDA POWER & LIGHT
$47.58	$38.40

Vero Beach rates are 24% higher than Florida Power & Light Company.

Now suppose during 1977 the Public Service Commission approves Florida Power & Light Company's request for rate relief in full. Compare the average bill based on that with what this same customer would pay if Vero Beach continued to operate the electric system. To make this comparison realistic, we must add to the Vero Beach rate the 12.7% increase which its accounting firm; Ernst & Ernst, informed the City would be necessary:

AFTER RATE INCREASES

VERO BEACH	FLORIDA POWER & LIGHT
$53.60	$46.60

This still indicates Vero Beach rates to be 15% higher than Florida Power & Light Company.

All these figures include local utility taxes, fuel adjustment and franchise fees.

We expect to have a new nuclear generating unit at St. Lucie in service in the near future. This should bring annual fuel savings of more than $100 million that will be passed directly to our customers through a reduction in the fuel adjustment, which has been reflected above.

So there you have it: even with Florida Power & Light Company's full rate relief request approved, you will still realize a considerable saving.

Why does all this come just now, with the referendum only a few days away? All through the negotiations with Vero Beach we have been completely frank about the possibility of a rate increase:

We pointed out that Florida Power & Light Company faces the same tremendous cost pressures that are squeezing every electric utility in Florida. Florida Power & Light Company is paying the inflated costs of 1976 with income from a 1974 rate structure.

Florida Power & Light Company rates have traditionally been among the lowest in Florida. We are confident that in the long run, when the other Florida electric utilities adjust to meet rising costs, you'll find Florida Power & Light Company rates near the bottom of the list.

It's true that we didn't suddenly decide on the morning of September 3 to ask for rate relief. All year we've said publicly that we were seriously concerned about rising costs and the possibility of a rate request has often been considered.

When we couldn't postpone the inevitable any longer, we started preparing the facts and figures we need to support our request. It's a big and complicated job and, as I said before, it looked like we couldn't be ready until the end of September.

This worried me a lot because I knew your referendum was coming on September 7. I asked our people to really put the pressure on—to work nights and weekends if necessary to get our request to the Public Service Commission ready *before* September 7. They did a great job.

Within a few minutes after we filed our request with the Public Service Commission, I was able to pass the information on to your City officials and your local news media.

To sum it all up, we did everything we could to give you the news before the referendum. Even if Florida Power & Light's full request is granted, you'll still pay less for Florida Power & Light service than you'd pay if Vero Beach continued to operate the electric system.

We sincerely believe the proposed sale will be a good thing—good for Vero Beach electric customers, and good for the City itself. If it is approved, we pledge to deliver you reliable electric service at the lowest possible cost. We hope you will give us the opportunity to keep this promise.

Sincerely,
FLORIDA POWER & LIGHT COMPANY

R.G. Mulholland

R.G. Mulholland
Senior Vice President

This message was paid for by the stockholders of Florida Power & Light Company.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Reply of Florida Cities to Responses of Florida Power and Light Company and Nuclear Regulatory Commission Staff to be served upon the following persons:

Ivan W. Smith, Esquire
Chairman, Atomic Safety and Licensing Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

John M. Frysiak, Esquire
Atomic Safety and Licensing Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel M. Head, Esquire
Atomic Safety and Licensing Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Tracy Danese, Esquire
Vice President for Public Affairs
Florida Power & Light Company
P.O. Box 013100
Miami, Florida 33101

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

David A. Leckie, Esquire
Antitrust Division
Department of Justice
1101 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

John E. Mathews, Jr., Esquire
Mathews, Osborne, Ehrlich, McNatt, Gobelman & Cobb
1500 American Heritage Life Building
Jacksonville, Florida 32202

Lee Scott Dewey, Esquire
Office of Executive Legal Director
Nuclear Regulatory Commission
Washington, D.C. 20555

Chief, Docketing and Service Section
Office of the Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Dated at Washington, D.C., this 15th day of October, 1976.

Robert A. Jablon
Robert A. Jablon