

UNITED STATES OF AMERICA  
BEFORE THE  
NUCLEAR REGULATORY COMMISSION

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

4/18/77

MOTION FOR LEAVE TO RESPOND AND  
RESPONSE OF FLORIDA CITIES TO FLORIDA POWER & LIGHT  
COMPANY AND STAFF ANSWERS TO FLORIDA CITIES' MOTION  
FOR COMMISSION CLARIFICATION OF PROCEDURES

Florida Cities 1/ have raised claims that under Sections 104 and 185-188 of the Atomic Energy Act, 42 U.S.C. §§2134, 2235-2238, certain construction permits and/or operating licenses granted to Florida Power & Light Company ("FP&L") should be revoked, modified, or conditioned.. Because of the controversy concerning the appropriate procedure by which their rights to intervention and hearing should be determined, on March 29, 1977, Florida Cities filed with the Commission a "Motion for Commission Clarification of Procedures." Amazingly, FP&L and the Nuclear Regulatory Commission Staff

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1/ Florida Cities include 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, Daytona Beach, Fort Meade, Key West, Mount Dora, Newberry, Quincy, St. Cloud and Tallahassee, Florida, and the Florida Municipal Utilities Association.

have opposed this motion--in their very opposition, underscoring the confusion over procedures which Cities seek clarified.

In its Response, filed April 8, 1977, FP&L states that requests to initiate proceedings to modify a license should be submitted to the Director of Nuclear Regulation pursuant to 10 CFR §2.206. At page 4 of its Response, however, the Company claims ". . . that the Commission does not have statutory authority to modify the licenses for the Operating Plants as requested by the Cities." Finally, FP&L states that it would not mind a ruling by the Commission on legal issues prior to any action by the Director of Nuclear Reactor Regulation, provided the Company has an opportunity for briefing.

Staff, in its Answer filed April 11, 1977, is more consistent, stating simply that the "mode of relief" requested by Florida Cities is not available under the Commission's Rules of Practice, but that Cities may request action by the Director of Nuclear Reactor Regulation pursuant to 10 CFR §2.206, or may appeal the Petition Board's April 5, 1977 Memorandum and Order pursuant to 10 CFR §2.714(a).

In the face of such uncertainty, Florida Cities cannot perceive how all parties to this proceeding would not benefit if the Commission (or the Commission's delegate) ruled concerning the proper procedure by which Cities' rights to intervention and hearing should be determined. If permission is necessary, Florida Cities hereby seek leave to

respond to Florida Power & Light Company and to the Commission Staff, and respond as follows.

The sequence of events to date in this proceeding has largely been set forth in Florida Cities' Motion of March 29, 1977. On August 6, 1976, Cities filed a petition with the Commission seeking antitrust relief with respect to FP&L's operating nuclear generating plants and St. Lucie Plant, Unit No. 2, for which the construction permit has not yet issued. 1/ Florida Cities claimed, among other things, that the Company's operating plants form part of a nuclear monopoly that is being used to force independent systems out of business. The Petition was filed at 1717 H Street, N.W., Washington, D.C., 20555, in accordance with normal Commission procedures. Cities did not specify what procedure the Commission should adopt to rule upon it. However, on August 13, 1976, an Atomic Safety and Licensing Board was established, by the Commission or by its delegates, to rule on the Petition.

In its Answer dated September 17, 1976, and thereafter,

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1/ Involved are FP&L's St. Lucie Plant, Unit No. 1, and Turkey Point Plant, Units No. 3 and No. 4. Since an Atomic Safety and Licensing Board has ruled favorably to Cities' position on St. Lucie Plant Unit No. 2, and since all parties concede that that Board has jurisdiction to decide the matter, issues concerning this unit are irrelevant as to the present motion before the Commission. "Memorandum and Order Granting Joint Petition for Leave to Intervene Out of Time and Request for Antitrust Hearing," Florida Power & Light Co. (St. Lucie Plant Unit No. 2), Docket No. 50-389A (April 5, 1977).

the Commission Staff took the position that procedures specified in Section 2.206 of the Commission's Rules of Practice were appropriate under the circumstances and that the Atomic Safety and Licensing Board established to rule on the Petition was without jurisdiction to do so. 1/ FP&L agreed, but in its Response sought to more generally establish that there are no Commission procedures under which Cities' Petition could be granted. 2/

Florida Cities sought, and were granted, leave to respond to FP&L and Staff. In their Reply, Cities specifically requested relief under Section 2.206 of the Commission's Rules of Practice 3/, and subsequently filed copies of their August Petition with the Director of Nuclear Reactor Regulation. In order to avoid internal conflict in the Nuclear Regulatory Commission and duplicative proceedings, Cities did not then request that the Director of Nuclear Reactor Regulation initiate separate but simultaneous proceedings concerning their Petition, but stated, "Florida Cities are, of course, prepared to cooperate

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1/ "Answer of the NRC Staff to the Petition to Intervene Out of Time and Request for Hearing by Certain Florida Cities," Florida Power & Light Co. (St. Lucie Plant Unit No. 1, et al.), NRC Docket Nos. 50-335A, et al., (September 17, 1976).

2/ "Response of Florida Power & Light Company in Opposition to: Joint Petition of Florida Cities for Leave to Intervene Out of Time; Petition to Intervene; and Request for Hearing," Florida Power & Light Co. (St. Lucie Plant, Unit No. 1, et al.), NRC Docket Nos. 50-335A, et al., (September 1, 1976).

3/ "Reply of Florida Cities to Responses of Florida Power & Light Company and Nuclear Regulatory Commission Staff," Florida Power & Light Co. (St. Lucie Plant, Unit No. 1, et al.), NRC Docket Nos. 50-335A, et al. (October 19, 1976), especially pages 23-24.

procedurally in any way necessary to facilitate consideration of this matter." Letter to Director, Nuclear Reactor Regulation, on behalf of Florida Cities (October 29, 1976).

Subsequently, in Houston Lighting and Power Company (South Texas Project, Unit Nos. 1 & 2), Docket Nos. 50-498A and 50-499A, an Atomic Safety and Licensing Appeal Board ruled that an Atomic Safety and Licensing Board does not have jurisdiction to rule on petitions to intervene in proceedings in which construction permits have been granted. Decision, issued March 18, 1977. On April 5, 1977, as noted above, the Atomic Safety and Licensing Board established to consider the instant petition granted Florida Cities intervention in Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-335A, based upon Cities' antitrust claims and other relevant matters, but, pursuant to Houston Lighting and Power Co., supra, held that it had no jurisdiction to consider Florida Cities' Petition as to the operating units.

Florida Cities thus find themselves in the position of having filed papers with the Commission seeking relief. The Commission, on its own initiative, apparently delegated to a trial board the question whether Cities' petition for intervention and hearing should be granted, which board subsequently determined that it is without authority to rule on the question. The Commission Staff maintains--and FP&L appears to agree insofar as it is willing to allow the Commission

authority to consider the matter at all--that the Director of Nuclear Reactor Regulation is the appropriate authority within the Nuclear Regulatory Commission to consider Florida Cities' Petition. As Cities have stated in their March 29 Motion, as well as in previous pleadings, the issues raised in Florida Cities' Petition are predominantly of an antitrust nature, and as such more clearly within the expertise of a trial board than within the limited antitrust experience of the Director of Nuclear Reactor Regulation. The Director of Nuclear Reactor Regulation appears to agree. 1/ Florida Cities are, nonetheless, by letter of this date now requesting the Director's office to take action on their Petition, so as to avoid delay should it ultimately be determined that his office is indeed the appropriate one to rule.

In the meantime, it appears to Florida Cities that all involved are seeking to avoid a determination of this purely

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1/ In a telephone call on November 3, 1976, between Mr. Edward Ford of the Director of Nuclear Reactor Regulation's office and Robert A. Jablon, Mr. Ford stated that he presumed that all antitrust matters are handled in the Office of the Executive Legal Director, Mr. Howard K. Shapar. Mr. Jablon explained that the papers were being filed with the Director of Nuclear Reactor Regulation personally in view of Staff and FP&L's briefs. Following this explanation, Mr. Ford stated that he understood Cities' reasons for filing with him, but that his initial reaction to this filing was that it was something he would expect "from a rookie."

procedural question. 1/ Cities underscore that they are not herein seeking substantive relief, but only the Commission's advice as to how Cities' contentions might be raised and considered on the merits. 2/

WHEREFORE, Florida Cities respectfully suggest that both due process and common sense require that procedures be clarified by which Cities' petition for intervention and hearing can be ruled upon.

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1/ The four apparent possibilities for determining the matter are (1) determination of the right to intervene by an Atomic Safety and Licensing Board (i.e., Licensing Board panel); there is apparent advantage in a ruling by the Board that has heard the matter; (2) determination by an Atomic Safety and Licensing Appeal Board; (3) determination by the Director of Nuclear Reactor Regulation; and (4) determination by the Commission. If there is a different procedure that would be appropriate, Florida Cities request that the Commission so rule. The Commission may obviously establish ad hoc requirements in this case of first impression, or confirm existing ones.

2/ The issues raised are not frivolous and can not go unheard for want of an appropriate forum. Florida Cities note that their contentions were sufficient to warrant a hearing and grant of intervention for units over which the Trial Board felt it had jurisdiction.

Respectfully submitted,

*Robert A. Jablon*

Robert A. Jablon

*David A. Giacalone*

David A. Giacalone

Attorneys 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, Daytona Beach, Fort Meade, Key West, Mount Dora, Newberry, Quincy, St. Cloud and Tallahassee, Florida, and the Florida Municipal Utilities Association

Law Offices of:

Spiegel & McDiarmid  
2600 Virginia Avenue, N.W.  
Washington, D.C. 20036

202-333-4500



CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Motion for Leave to Respond and Response of Florida Cities to Florida Power & Light Company and Staff Answers to Florida Cities' Motion for Commission Clarification of Procedures to be served, by deposit in the United States mail, upon the following persons:

William C. Wise, Esquire  
Robert Weinberg, Esquire  
Suite 200  
1019 19th Street, N.W.  
Washington, D.C. 20036

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

Robert H. Culp, Esquire  
Lowenstein, Newman, Reis &  
Axelrad  
1025 Connecticut Avenue, N.W.  
Washington, D.C. 20036

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

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

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

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

Ivan W. Smith, Esquire  
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

Dated at Washington, D.C., this 18th day of April, 1977.

  
Robert A. Jablon