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7/5/77
July 5, 1977

Mr. Edson G. Case
Acting Director
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

50-335A
50-250A
50-251A

RE: Florida Power & Light Company (Turkey Point Plant, Units Nos. 3 and 4), Operating License Nos. DPR-31 and DPR-41 (St. Lucie Plant, Unit No. 1) Operating License No. DPR-67

Dear Mr. Case:

On May 16, 1977, you issued a notice of receipt of a request for order to show cause, submitted by the Florida Municipal Utilities Association and a group of Florida municipalities (collectively, "Cities") on April 18, 1977. The Cities request that you issue an order requiring Florida Power & Light Company (FPL), the holder of the licenses referenced in the caption above, to show cause why those licenses "should not be revoked, amended, or modified, due to alleged anticompetitive conduct and conditions under those licenses." 1/ The published notice stated that: "In accordance with the procedures specified in 10 CFR §2.206 appropriate action will be taken on this request within a reasonable time." 2/

1/ 42 Fed. Reg. 27071 (May 26, 1977).

2/ Id.

Although no provision is made in the Commission's regulations for responding to a request for issuance of an order to show cause, FPL wishes to inform you of its position on certain fundamental legal issues presented by the request, and respectfully asks that you consider this letter before acting on the Cities' request. 3/

The Cities request that three licenses previously issued under Section 104b of the Atomic Energy Act of 1954, as amended (the Act) be revoked or modified "due to alleged anticompetitive conduct and conditions under those licenses." 4/ Of course, none of these licenses contains antitrust conditions, and no issue of enforcing the terms of a license is presented. Consequently, the Cities' request presumes that the Commission has continuing authority under the Act to police the activities of its licensees with regard to the antitrust laws, and presumes, moreover, that such authority extends to licenses issued under Section 104b of the Act. Both of these premises are wrong. They are wholly at odds with the regulatory system deliberately enacted in 1970 in light of Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir. 1969). Therefore, there is no statutory basis for the Commission's revoking or modifying FPL's licenses on the antitrust grounds stated by the Cities.

3/ In accordance with the procedures specified in 10 CFR Part 2, Subpart B, the Director shall either institute the requested proceeding or advise the Cities that no proceeding will be instituted. However, prior to instituting a proceeding, the Director is required to serve upon the licensee a notice of violation which "concisely states the alleged violation", and the licensee is entitled to respond to the notice of violation and to have its response considered before any proceeding is instituted. For the reasons stated hereafter, FPL believes that there is no legal basis for instituting any proceeding and, therefore, that the request should be denied forthwith. However, in the event that the Director concludes that he can and should act affirmatively upon the request, FPL requests that the procedures specified in 10 CFR §2.201 be followed in every respect. In particular, FPL would be entitled to notice of the acts which are alleged by the Director to have violated "any provision of of the Act or [the NRC's regulations] or the conditions of the license," along with an opportunity to respond thereto prior to issuance of any order to show cause.

4/ Notice of May 16, 1977, 42 Fed. Reg. 27071 (May 26, 1977).

In Houston Lighting & Power Company, et al. (South Texas Project, Unit Nos. 1 & 2), CLI-77 , NRC (June 15, 1977), the Commission found that the Act does not vest the NRC with continuing authority to police the activities of its licensees with regard to the antitrust laws:

> "Some of the parties' arguments would assign us a broad and ongoing antitrust enforcement role; they envision that we would have a continuing policing responsibility over the activities of licensees throughout the lives of operating licenses. As we shall show, we believe that the Congress envisioned a narrower role for this agency, with the responsibility for initiating antitrust review focused at the two-stop licensing process." (Slip Opinion at 9).

However, the present situation does not involve merely the question of continuing antitrust enforcement jurisdiction over licenses which were subject to prelicensing antitrust review under Section 105c of the Act, it involves application of the continuing antitrust enforcement jurisdiction theory to licenses which were issued under Section 104b and therefore were not subject to the review provisions of Section 105c. Even if there may be (as FPL does not concede) circumstances in which antitrust review may be initiated where "' significant changes'" occur after an operating license is issued, a question not before and therefore not decided by the Commission in South Texas, 5/ it is not logically possible to apply such a theory to a license issued under Section 104b.

It is clear from the South Texas decision that whatever antitrust authority the NRC has is grounded upon Section 105. The Commission said:

> "We find the specificity and completeness of Section 105 striking. The section is comprehensive; it addresses each occasion on which allegations of anticompetitive behavior in the commercial nuclear power industry may be raised, and provides a procedure to be followed in each instance." (Id., p. 14).

5/ Id., p. 26.

Section 105c creates a licensing antitrust review regime. However,

> "[I]t [cannot] reasonably be argued that Congress did not foresee that antitrust allegations might be raised outside the license review context. Subsequent allegations that licenses are being used in such a way as to violate the antitrust laws are to be referred to the Department of Justice for investigation and possible enforcement action, and if violations are found by a court, the Commission is given express statutory authority to take such license-related remedial action as is necessary." (Id., p. 15).

It is plain that the licensing antitrust review regime of Section 105c does not apply to licenses issued under Section 104b. The Commission so held prior to the 1970 amendments to the Act and was sustained by the courts. Statesville, supra. Congress, acting in 1970 with the Statesville decision before it, deliberately decided not to apply the antitrust review provisions of Section 105c to operating license proceedings where the construction permit had been issued under Section 104b. 6/

Accordingly, none of the provisions of Section 105c, including the "change in circumstances" provision of Section 105c(2), is applicable to these Section 104b licenses. The result, as the Commission found in South Texas, is:

> "With respect to 104(b) licenses, the Commission could only suspend, revoke, or take other action with respect to a license as it deemed necessary after a court finding of monopoly." (Slip Opinion, p. 17, footnote 10).

6/ See Section 102b of the Act. Also see H.R. Rep. No. 91-1470 (identical to S. Rep. No. 92-1247), 91st Cong. 2nd Sess. 26-28. Congress elected to apply the antitrust review provisions of Section 105c to certain operating license proceedings where the construction permit had been issued under Section 104b, but the present facilities were not included in this group. See Section 105c(8) of the Act.

The quoted language speaks to the holding in the Statesville case. However, the point is underscored by the deliberate action of Congress in deciding, after the Statesville decision was issued, not to apply Section 105c to the instant operating licenses.

The Cities, in the papers which are before you, do not really advance contrary legal arguments of substance. Indeed, the principal legal arguments which they have advanced are negated by the South Texas decision. The consistent theme which the Cities emphasize is that it would be inconsistent with the public interest for the Commission to ignore their claims of antitrust injury. As is clear from the pleadings which FPL has filed with the Licensing and Appeal Boards, FPL vigorously denies that its actions are in any respect inconsistent with the antitrust laws, and submits that the Cities' contentions are without merit. However, the legal answer to the Cities' "public interest" argument is also found in the South Texas decision. There, explaining that the NRC's role in enforcing the antitrust laws is a limited one, the Commission said:

> "But in the post-licensing posture, this Commission's capacity to act is not unique. There is no longer any question of lock[ing] the barn door before the horse is stolen. ... Statement of Senator Pastore, III Legislative History of the Atomic Energy Act of 1954, at 3197 (1955). When nuclear power plants have been constructed and are operating, anticompetitive behavior can be remedied only by modifying or conditioning existing behavior. Whatever form of remedy the agency can offer is not appreciably different from that which may be fashioned by the traditional antitrust forums. In this posture, we recognize, as did the Congress, that there are more suitable forums for antitrust enforcement." (Slip Opinion, pp. 22-23).

The South Texas decision should dispel finally any view that the NRC has a responsibility to bend its enabling statute to entertain all antitrust complaints against users of nuclear energy. Rejection of this request will not deprive the Cities of a remedy for any meritorious antitrust complaint they may have; it will simply require them to assert their claim in a traditional antitrust forum. That the Cities have so assidiously avoided doing so says a great deal about the merits of their allegations as measured by the standards of the antitrust laws.

For the legal reasons set forth above the Director should decline to initiate any proceedings on the Cities' request, and FPL respectfully requests that he do so.

Sincerely,

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cc attached service list

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the following:

Letter to the Director, Nuclear Reactor Regulation dated 7/5/77.

have been served on the persons shown on the attached list by hand delivery or deposit in the United States Mail, properly stamped and addressed on July 5, 1977.

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