UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
Florida Power & Light Co.	)	NRC Docket No. 50-389A
(St. Lucie II)	)	

FLORIDA CITIES' RESPONSE TO APPLICANTS' OBJECTIONS TO INTERROGATORIES AND MOTION FOR A PROTECTIVE ORDER

Florida Cities 1/ hereby respond to "Applicant's Objections to Discovery Requests and Motion for a Protective Order" filed by Florida Power & Light Company ("FP&L"), the Applicant in the above-captioned proceeding on December 13, 1978. FP&L objected to certain interrogatories and document requests contained in the "First Joint Request of the NRC Staff and Intervenors" ("Joint Request") and the "Florida Cities' Initial Interrogatories and Request for Production of Documents" ("Cities' Request"), each filed on October 31, 1978. FP&L stated three categories of objections. It objected to (a) the length of the time period for which discovery is sought; (b) requests relating to FP&L's legislative activities; and (c) a number of requests which FP&L alleges to be overbroad, irrelevant and/or burdensome. In addition, it proposes a broad protective order.

1/ The members of the Florida Cities group 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, Fort Meade, Key West, Mount Dora, Newberry, St. Cloud and Tallahassee, Florida and the Florida Municipal Utilities Association.

In summary form, Cities' response is as follows:

(1) FP&L's objections to specific interrogatories are based on an erroneously limited view of the scope of discovery, the erroneous assumption that the sheer assertion of "burden," "irrelevance," or "overbreadth," is adequate to justify objections, and, especially in the case of requests related to its gas supply, determined blindess to important issues.

(2) FP&L's claim that discovery into legislative activities must be precluded was thoroughly considered and rejected by the South Dade Board in its rulings on similar discovery. FP&L's present pleading merely increase the number of objections without providing any basis for a different decision.

(3) FP&L's pleading fails to make a prima facie case for a protective order that would give FP&L carte blanche to limit disclosure. Even if a prima facie case were made, the terms of the order show it to be contrary to the public interest. The order would (a) effectively deprive Cities of an engineering expert whose assistance, as FP&L well knows, is essential to Cities' participation here and (b) further and unnecessarily increase the costs Cities must bear as they litigate their rights against FP&L. Finally, while FP&L now seeks to broadly limit disclosure, it does not refer to the fact that in other proceedings it has publicly released a large number of documents -- without making the claims it now makes. Moreover, in many instances these documents were, with FP&L's full knowledge, made available to the engineering expert FP&L would now disqualify.

FP&L does not begin to suggest how documents it has previously made public differ from those which it now claims need to protect. Nor does it suggest that the prior release has caused it any undue damage. In sum, when placed in context, FP&L's requested protective order is not merely frivolous, but constitutes apparent harassment.

(4) FP&L claims that the discovery periods proposed by Cities are unreasonably long. The basis for the dates is not, as FP&L suggests, Cities' unreasonableness, 1/ but the evidence (including a Court finding that FP&L conspired to violate the antitrust laws) that FP&L has unreasonably engaged in a pattern of anticompetitive conduct that spans many years. Cities, nonetheless will accept a 1965 cut-off date under appropriate conditions, as described herein.

I. FP&L'S OBJECTIONS TO CITIES' INTERROGATORIES

FP&L's objections to Cities' interrogatories are responded to in detail below in the order in which they appear in Section "III" of FP&L's objections.

FP&L's primary grounds for objection are "overbreadth," "irrelevance," and "burden." It not only uses these words with great liberality, 2/ but cites no precedent to indicate that it

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1/ Cities assure FP&L (and the Board) that they do not relish performing discovery tasks either -- and, of course, Cities' discovery will require the production of documents from multiple entities.

2/ Cities assure FP&L that they find FP&L's requests to be every bit as "overbroad," "burdensome," and "irrelevant" as FP&L claims Cities' to be. Nevertheless, Cities kept objections to a minimum on the assumption that the requestors acted in good faith to minimize undue burden, and in recognition of the rule that discovery is to be liberal and, unfortunately, will inevitably involve burden and the production of some documents of little redeeming social value.

appreciates the meaning given to them in antitrust discovery.

While Cities discuss particular objections below, many of them are readily dismissed when held to the light of accepted standards for discovery. Cities note these standards here, for application to each request.

First, modern discovery rules provide "that in civil cases, utmost liberality, in respect to allowing discovery, should prevail in favor of each party as against the other." Morgan Smith Automobile Products, Inc. v. General Motors, 54 F.R.D. 19, 20 (E.D.Penn. 1971). Moreover, requests that might seem "excessive" in some circumstances are not unreasonable in antitrust litigation, where complex fact situations require unusually broad discovery. See, e.g., Banana Service Co. v. United Fruits Co., 15 F.R.D. 106, 108 (D.Mass. 1953); Maritime Service Corp. v. Movies En Route, 60 F.R.D. 587, 589 (S.D.N.Y. 1973); Consumers Power Co. (Midland Plant, Units 1 and 2), 6 AEC 322, at footnote 17 (ASLB 1973). See generally, 4 Moore's Federal Practice at 26-140-141.

Second, the "relevance" requirement in the context of discovery is not synonymous with the "relevance" requirement at trial, and is to be broadly construed. As Rule 26(b)(1) provides, the "relevance" test relates to the subject matter at issue. The rule expressly does not require that documents sought be admissible at trial. Moreover, the "subject matter is broader than the precise issues presented in the pleadings." Broadway and Ninety Sixth Street Realty Co. v. Loew's, 21 F.R.D. 347, 352 (S.D.N.Y. 1958). Finally, the rejection of a request requires a strong showing of irrelevance:

> "In order to obtain discovery, all that need be shown is that the material requested is generally relevant to a matter in issue. See 10 C.F.R. §2.720. ... the relevance standard is satisfied unless the "evidence sought can have no possible bearing on the issues." 1/

Third, where requests are relevant, burden is generally not a valid objection. As Professor Moore explains, "(T)he fact that to answer interrogatories might be burdensome or expensive is not a valid objection, if the information is relevant and material." 2/ (Of course, as Moore notes, courts may act to reduce unnecessary burden or to require the requestor to do some of the work. Cities' responses to particular claims of burden, infra, propose to do this.)

Finally, objections to requests must be specific. As Professor Moore explains, 3/ "(A) general objection that interrogatories are onerous and burdensome and require the party to make research and compile data raises no issue. The objection must make a specific showing of reasons why the interrogatory should not be answered."

Had the discovery standards stated above been applied in advance to FP&L's objections, it is respectfully suggested, their number would have been materially reduced.

1/ Commonwealth Edison Co., (Zion Station, Units 1 and 2); 7 AEC 457, 468 (ASLB 1974)

2/ 4 A Moore's Federal Practice at §33.20.

3/ Id.

CITIES' REQUEST NO. 7

FP&L objects, on grounds of relevance, to that part of Request No. 7 which seek materials related to FP&L's filings in six FERC dockets. FP&L does not note the subject of these very recent filings, which readily establishes their relevance to this proceeding. In each case FP&L's filing sought to unlawfully preclude or limit wholesale sales to a municipal system or systems. These actions are directly relevant to Cities' allegations that FP&L has continually and unlawfully refused to deal with Cities.

FP&L's late 1977 filings in Docket Nos. ER78-19 and ER78-81 sought (a) to revise FP&L's outstanding wholesale tariff (which made service generally available) to restrict service to a limited number of named entities (b) to abandon existing wholesale service to the City of Homestead. 1/

In the period prior to the filing in Docket No. ER78-19, FP&L had refused the Ft. Pierce Utilities Authority's continued requests for service under the outstanding wholesale tariff. In ordering a hearing in Docket No. ER78-19, the Commission simultaneously ordered a Staff investigation of FP&L's alleged refusal to serve Ft. Pierce. The Staff investigation concluded 2/ that FP&L had refused to serve Ft. Pierce in violation of both its own tariff and the Federal Power Act. On June 12, 1978 the Commission stated

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1/ The case is currently pending before the FERC, which, in its Sunshine Meetings, has indicated that it will reject FP&L's proposed service limitations as unlawful.

2/ "Staff Investigation Report," Florida Cities v. Florida Power & Light Company, Docket No. EL78-4, April 7, 1978.

its inclination "to adopt and affirm the Staff's conclusion in all respects," and asked for comments on why it should not do so. 1/

Docket Nos. ER78-282 and ER78-342 arose when, during the midst of hearings in Docket Nos. ER78-19 et al., FP&L acceded to Ft. Pierce's request for wholesale service. In doing so, however, FP&L simultaneously proposed that service to Ft. Pierce be terminated on June 1, 1978. In Docket No. ER78-282 the Commission rejected FP&L's proposed June 1, 1978 termination date. FP&L's filing in Docket No. ER78-342 again requested the authority to terminate service to Ft. Pierce on June 1, 1978. 2/ Docket Nos. ER78-395 and ER78-400 concern FP&L's simultaneous requests for permission to recommence tariff service to Homestead on May 23, 1978, but to terminate it on June 1, 1978.

In sum, as Cities have argued in the FERC proceedings, each of the filings represents an unlawful refusal to deal in violation of FP&L's own tariff, the Federal Power Act, and the antitrust laws. Information on the basis for these actions, including FP&L's motivation, are clearly relevant to Cities' claims here of predatory conduct and monopolistic intent.

1/ "Order to Show Cause," Florida Cities, supra, June 12, 1978. Comments have been filed by both FP&L and the Florida Cities (whose identity overlaps Cities here), and the Commission has not yet taken further action.

2/ Action in that docket has been suspended pending the Commission's ruling in Docket No. ER78-19 et al.

Finally, Cities must comment on FP&L's claim that the decision-related documents sought are privileged. To the extent that this is the case, as FP&L notes, the parties have agreed that particular documents may be withheld. However, Cities would presume that the request would yield documents (e.g., communications in the absence of attorneys, factual materials) that are not privileged. In any case, Cities must specifically note that the claim of privilege may not be appropriate here.

As Wigmore explains, attorney-client privilege may not be available where advice is sought in regard to future wrongdoings. 8 Wigmore on Evidence 3d Ed (1940) §2298.

The FERC Staff report in Docket No. EL78-4, supra, at 29-30 considered the possibility that evidence of criminal behavior might be cause for referral of FP&L's activities to the Department of Justice for possible criminal prosecution. In recommending against referral, Staff stated (Id. at 30):

> Staff believes that at this time such a high degree of culpability [to justify referral] cannot be deduced from the evidence gathered in this investigation. However, should FPL attempt to discontinue service or refuse to provide service under SR-1 contrary to the express terms of the tariff after the Commission releases this report, it is recommended that a referral be made since at that point, FPL would have been on clear notice that failure to serve under SR-1 is an illegality.

The filings in Docket Nos. E78-395 and ER78-400 were made after the release of the Staff report, and in Cities' view, may represent unlawful actions taken in knowledge of unlawfulness. Cities do not press the point at this time, but rather state,

since FP&L specifically raised the topic, that they may claim that attorney-client privilege may not be appropriate here.

CITIES' REQUEST NOS. 14, 24, 26 AND 34

FP&L objects to these requests "because their subject matter is not limited to facts and issues relevant to this proceeding."

Request No. 14 seeks documents relating to the Company's efforts to elicit support for its views in state and municipal elections. This request clearly seeks to elicit relevant information. 1/ As discussed in Section II, infra, FP&L's attempts to further its position and/or limit Cities' opportunities by legislative activities is in issue in this proceeding. As alleged in Cities' prior pleadings, FP&L's anticompetitive conduct includes, inter alia, attempts to acquire municipal electric systems. Finally, FP&L's retail monopoly is based on the maintenance of its numerous municipal franchises. Thus, FP&L's efforts to influence elections are likely to be closely tied to the maintenance and furtherance of its competitive interests.

FP&L states that the request is "overbroad" because it contains "no limitation on subject matter at all." Cities are puzzled by this statement, which is offered without further explanation.

If FP&L is suggesting that it makes political efforts on matters relating only remotely to its competitive interests --e.g., it takes stands on matters such as abortion, gun control, etc. --

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1/ In Section II Cities discuss FP&L's objection that discovery of legislative activities is precluded.

then such materials need not be provided. On the other hand, if FP&L is merely suggesting that it engages heavily in politics in order to protect its franchises and/or acquire new load, then FP&L's activities are both relevant and of substantial interest. 1/ In either case, the burden is on FP&L, as the objecting party, to demonstrate that material sought is irrelevant. It has not done so.

Request No. 24 seeks the identification of any grants or contracts FP&L has received from state or federal agencies. Request No. 26 seeks identification of the contractors used by FP&L in nuclear development. As FP&L grudgingly acknowledges, this data is relevant to FP&L's defense that Cities have unique access to government bounty.

The requests seek information that should be (relatively) readily available, and FP&L does not demonstrate burden. In view of their relevance, FP&L's claim that the requests "are not so narrowly focused" must be dismissed as a makeweight.

FP&L states that Request No. 34 is "broad beyond reason." That request seeks information regarding FP&L's applications to public bodies for specified categories of favorable actions -- e.g., subsidies, licenses, permits, exemptions, waivers. FP&L proposes to respond to Request No. 34 with a broad description of the kinds of government action it regularly seeks and "reasonably detailed descriptions of transactions (such as pollution control financings) that resulted in a sharing by Applicant of the bene-

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1/ Again, Cities discuss in Section II the underlying question of the right to discovery of political activity.

fits of a tax exemption or capital subsidy available to a governmental body."

Cities do not object to FP&L's proffer insofar as it relates to components 1-3 of Request No. 34, but must press their request for a full response to components 4-6 which relate to tax rulings and legislation, and regulatory legislation relating to electric utilities. Cities note that in ruling on the South Dade discovery requests the Board there overruled FP&L's objections to Items "5" and "6." 1/ FP&L can be expected to put in issue the respects in which FP&L and intervenors' operations are facilitated by legal rights and/or obligations conferred by government. Any intervenors' advantage relating to tax treatment may be offset by advantages obtained by FP&L through its own actions. Moreover, FP&L's actions may have sought (and produced) benefits to the Company that are actual detriments to Cities. It is well known, for example, that environmental regulations may impact differently on operations of differing scale. FP&L may have sought, and obtained, regulations whose consequences may be severely detrimental to utilities that are not of FP&L's size.

CITIES' REQUEST NOS. 17, 18, 21, 23, 57(c) AND 57(d)

FP&L objects to those requests on the basis of "overbreadth and burden."

Request No. 17 seeks documents from the files of those

1/ The instant Request No. 34 is identical to Request No. 26 in that proceeding. The Board's overruling of FP&L was qualified by a request that the parties negotiate concerning tax subsidization of utilities.

"responsible" for (a) competitive aspects of FP&L's relationship with other electric utilities, (b) interconnection, and (c) coordination. FP&L does not dispute the relevance of the request. It merely states that many persons may be "responsible" for these areas, and, therefore, many files must be searched.

As stated earlier, where relevance is undisputed, general assertions of burden are unavailing. 1/ (As FP&L fails to note, numerous of its requests of Cities will require searches of the files of virtually all Cities' employees.) 2/

FP&L proposes that, to lessen the burden, it be permitted to limit the search to employees who "have the power to plan or make policy...." Cities are agreeable to reducing burden by limiting the search of low-level employees, 3/ but FP&L's proposed limitation is unacceptable for two reasons. First, managers who have substantial responsibility for implementing policy -- but do not make it -- would be excluded by FP&L. Second, counsel for Cities has the impression 4/ that FP&L's definition of policymakers would be exceedingly narrow.

1/ Cities suspect FP&L overstates its burden. First, the bulk of FP&L's business is retail sales, and many individuals who work in that area would not be likely subjects of a search. Second, at the lower levels of FP&L's pyramid, which contain the greatest number of personnel, the volume and number of personal files is likely to be smaller than at the top.

2/ See FP&L's broad definition of "City," which includes "all employees."

3/ Although, as noted they are not likely to have many files.

4/ From examination of high FP&L officials in other proceedings, where responsibility for "policy" was often disclaimed.

Both of the above problems were clearly illustrated in Consumers Power Co., (Midland Plant, Units 1 and 2) December 30, 1957, ALAB-452, slip opinion at 294-299. In Consumers, crucial admissions were contained in a speech (on acquisition policy) by a Consumers employee. As the decision states, the company sought to discount the admission by depicting the employee as "a middle-level salesman" who is not charged with formulating company policy and whose remarks therefore neither represented company policy nor bound the company..." Id., at 290.

In rejecting Consumers' efforts to have the speech discounted, the Board found that, "although Mr. Paul does not make company policy, it is his job in the company to be aware of current policy and "to transmit [the] policy of the Company to others in the Company. . . . Mr. Paul played an important and highly visible role in Consumers' dealings with the small utilities." Consumers, ALAB-452 at 295.

Similarly, here, any narrowing of Request No. 17 must provide for those who, while not "officers" or "policy makers," have supervisory roles in the implementation of policy within FP&L and/or perform important roles in the implementation of FP&L's policy towards others.

Request No. 18 identifies three high level FP&L officials and seeks to know, inter alia, of "any . . . involvement" they may have had with regard to Cities, FP&L's nuclear units, and FP&L's power supply policy. To Cities' knowledge, the three individuals singled out have had primary or substantial responsibility for

FP&L's dealings with Cities, and the information sought is on subjects central to this proceeding. The request is therefore both narrowly drawn and highly relevant.

FP&L does not challenge the legitimacy of the request, but states that it should be sought by deposition. Cities are prepared to seek data by the least burdensome means, but do not understand how a deposition is preferable to an interrogatory here. If the deponent is to be responsive to the questions posed, he will require at least the same preparation as is required for the interrogatories. On the other hand, if the interrogatory is responded to, the questioning at deposition should be more focused and efficient.

Finally, Cities note that its request does not necessarily require FP&L to "list, on a daily or even hourly basis," the activities of the individuals. Cities would presume that the basic activities of these individuals, e.g., meetings, would often be reflected in documents -- e.g., calendars or daybooks. To the extent that documents are responsive, they may be provided and FP&L need not prepare lists.

As Cities have previously told FP&L, Request No. 21 is limited to the categories of high-level communications referred to in the introductory paragraph. (Thus, there is no apparent dispute as to this request.)

Request No. 23 concerns the FP&L official (Mr. Robert Gardner) who, according to FP&L, is primarily concerned with FP&L's relations with its municipal competitors. The request asks

that FP&L provide all documents prepared by or for him relating to competition. FP&L's objection that it must read each document "line by line" makes a mountain of a modest and narrowly drawn request. FP&L will be required to read no more (nor less) of Mr. Gardner's documents than of any other documents it must examine in response to discovery. If FP&L does not wish to examine each document "line by line," it may simply provide Cities with all documents prepared by or for Mr. Gardner, and leave the "line-by-line" examination to Cities. 1/

Request Nos. 57(c) and 57(d), concern FP&L's gas supply. The requests seek to identify persons with knowledge of developments that, as detailed infra, are of great relevance here. Interrogatories seeking to identify witnesses are expressly provided for by Federal Rule 26(b). See 4 Moore's Federal Practice §26.57. As stated, the requests are entirely proper.

Nonetheless, Cities are agreeable to reducing FP&L's burden by modifying Request No. 57(d) to generally comport with FP&L's suggestion that FP&L state "when and how it first learned of the FGT-Amoco (Amoco Production Company) agreement." Cities provide a revised 57(d) in the footnote below. 2/

1/ Ironically, Cities couched the request precisely in expectation that it would reduce FP&L's burden. A request for all documents prepared by or for Mr. Gardner would, given his primary responsibility for competition, be relevant in its own right.

2/ "Please (1) state the date on which the Company obtained initial knowledge of any facet of the agreement between FGT and Amoco Production Company reflected in the March 22, 1967 letter between FGT and Amoco;

(2) describe the circumstances in which such knowledge was obtained; including the individuals involved and the substance of any communication;

(3) provide copies of all related documents and identify any nondocumentary source(s) for Company's responses."

In view of the importance of the issue, 1/ and the possibility that documentary evidence may be limited or destroyed, 2/ Cities press Request No. 57(c). That request is narrowly circumscribed to fourteen individuals who were top Company officials (e.g., President, Vice President, Director) during the relevant time period, and seeks to determine whether they had knowledge of relevant events, and, therefore, would be suitable for deposition. FP&L's objections on grounds of relevance are discussed infra. Insofar as FP&L objects on the grounds that it is a burden to interview 14 officials, it is again mistaken in assuming that mere claim of burden is a sufficient objection to a relevant request. (In addition, Cities note that many of FP&L's requests require Cities to engage in detailed interviews of a far greater number of officials.)

CITIES' REQUEST NOS. 27, 35q AND 64

FP&L objects to these requests "on the basis of their complete irrelevance to the issues before the Board in this proceeding." Again, either FP&L misconstrues the "relevance" requirement or Cities do not comprehend FP&L's difficulties.

Each of the three requests relates to the operations of FP&L's nuclear units -- the raison d'etre of this proceeding.

Request No. 27 seeks copies of the Company's uranium enrichment contracts. As Cities understand it, enriched uranium is pro-

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1/ As discussed infra.

2/ If only because the key development (a March 22, 1967 letter) at issue took place eleven years ago.

vided by the government at a price below typical market price. 1/ Enrichment contracts are relevant to FP&L's defense that Cities alone have unique access to government bounty, and to Cities' claim that nuclear power is a publicly funded enterprise that must be shared by the public that funds it.

Request No. 35q seeks documents relating to an FP&L contract for uranium produced as a by-product of phosphate processing. Cities contend that FP&L's monopoly power stems from, inter alia, dominant access to low cost fuel in Florida. The terms of FP&L's uranium supply are of relevance to this claim. 2/

Request No. 64 calls for information on damage to, and repair of, FP&L's nuclear units and on waste storage. This data is relevant in at least three specific ways. First, FP&L has claimed elsewhere, 3/ and may argue here, that uncertainties regarding its nuclear units limit its ability to sell power to municipal systems. Cities wish to prepare for this claim. Second, Cities will claim that FP&L has resisted Cities' efforts at coordination,

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1/ See e.g., Nader and Abbots, The Menace of Atomic Energy (1977), 226-227.

2/ Cities note that the particular contract sought would be of special relevance because the uranium would appear to come from Florida (a major phosphate center).

3/ E.g., in Florida Power & Light Company, FERC Docket No. ER78-19 et al. (proposed revision of FP&L tariff to limit wholesale service).

including, for example, offers to FP&L of Cities' excess capacity. FP&L, for its part, may defend by stating that Cities' offer nothing of value to it. The degree of availability to FP&L of its nuclear units would be relevant to the resolution of this issue. Finally, FP&L may claim that nuclear power does not provide it with a cost advantage. Data on repair costs is relevant to this claim.

JOINT REQUESTS NOS. 79-82
AND CITIES' REQUEST NOS. 57-59 AND 72-73

The above requests 1/ relate to FP&L's natural gas supply from Amoco Production Company ("Amoco"). 2/ FP&L's objection to the requests appears to rest on the claim that they relate to issues not "within the scope of this proceeding." 3/ FP&L's claim is wrong.

Cities claim, inter alia, that FP&L has attempted to monopolize the most economic base load generation in Florida.

In addition to FP&L's monopoly power over nuclear-fueled generation, FP&L possesses unique long-term access to a very large amount of extremely low-priced natural gas. It receives the bulk of this gas from Amoco under a long-term warranty contract. As

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1/ Cities note that FP&L does not object to Request No. 60, which seeks to know whether FP&L has destroyed any documents related to the arrangments discussed above. In the absence of specific objection, Cities presume that FP&L has elected to comply with the request. Should FP&L hereafter seek objection, Cities respectfully reserve their right to reply.

2/ A subsidiary of Standard Oil of Indiana.

3/ FP&L also states that they "appear to pertain very specifically" to two FERC related proceedings, which are discussed above. That facts may bear relevance to multiple proceedings is not grounds for objection to discovery.

stated in recent orders of the FERC, 1/ facts presently available indicate that (a) FP&L may have achieved its privileged access to gas supply through the use of unlawful means; in any case, (b) FP&L achieved its access at the direct expense of certain of the Cities' access to their own lawful gas entitlements.

1. The Amoco warranty contracts with FP&L and FGT

The Florida Gas Transmission Company ("FGT") is effectively the sole transporter of natural gas into the state of Florida. The daily delivery capacity of the FGT pipeline approximates 725,000 Mcf. FP&L is by far the largest recipient of gas delivered by FGT. FP&L receives its gas under (a) a 90,000 Mcf per day contract with Sun Oil Company 2/ and (b) a 200,000 Mcf/day contract with Amoco. The latter contract bears a term of 20 years, or until 1.425 trillion cubic feet of gas is delivered. In both cases the gas is purchased by FP&L directly from producers in the field and transported by FGT under transportation contracts ("T" contracts). The Sun Oil arrangement (T-1) was negotiated in the late 1950's at the time of the inception of the FGT pipeline. The Amoco contract ("T-3") was certificated by the FPC on March 1, 1967, and deliveries began on June 9, 1968.

A number of the Florida Cities, like FP&L, have historically

1/ Discussed in more detail, infra.

2/ The Sun contract is to expire in 1979. Although as stated above, the Sun contract is not subject to curtailment under the FGT curtailment plan, it is Cities' understanding that recent deliveries have been below the stated contract quantity (90,000 Mcf per day).

relied on gas for electric generation. These include five cities which buy directly from FGT under interruptible contracts, 1/ and others 2/ which buy from distribution companies.

FGT's curtailment plan has provided that direct interruptible customers be curtailed first. On the other hand, the FGT curtailment plan does not provide for curtailment of "T" gas. In the aftermath of the Oil Embargo, as curtailments on the FGT system steepened, the five Cities were sharply curtailed and sustained dramatic fuel cost increases because of the increased cost of oil -- the only fuel alternative available.

Prior to FP&L's 1967 entrance into its contract with Amoco, FGT had negotiated its own warranty contract with Amoco. Under the FGT/Amoco contract, Amoco was to provide 584 billion cubic feet of gas over a twenty-year period. This contract was certificated by the Federal Power Commission in 1964 and became the largest single source of supply for FGT's own customers. The FGT/Amoco contract has at least two terms of relevance here. First, as a warranty contract it obligates Amoco to provide a fixed amount of gas (i.e., 584 billion cubic feet) 3/. Second, as certificated, it provides for a daily contract quantity of 80,000 Mcf. The contract further provides that (a) FGT may take as

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1/ Tallahassee, Gainesville, Ft. Pierce, Sebring and Orlando. Each of these Cities (as well as certain others) has entered into a settlement agreement with both FGT and Amoco which encompasses any claims against either Amoco or FGT related to the March 22, 1967 letter. In the discussion above Cities therefore do not suggest any claim against Amoco or FGT. The settlements between the first four Cities and FGT and Amoco specifically reserve Cities' rights to take action against FP&L.

2/ Lake Worth and New Smyrna Beach.

3/ As opposed, that is, to the (more typical) requirement that gas be provided from certain specified properties -- without warranty as to the total to be provided.

little as 64,000 Mcf per day without incurring a "take or pay" charge, and (b) FGT is entitled to demand up to 100,000 Mcf per day.

2. The March 22, 1967 letter and its consequences

At or about the time of the oil embargo, FGT began to curtail deliveries to its own customers (i.e., not "transportation" customers) under claim of gas shortage. (The deliveries to FP&L were not curtailed by FGT.) As the gas shortage on the FGT system heightened, deliveries under the FGT/Amoco warranty contract dropped well below the amount contractually provided for 1/ dropping to as low as 15,000 Mcf per day in 1975.

In the spring of 1975, during a FERC proceeding related to the proposed abandonment of part of FGT's pipeline, 2/ it was revealed that deliveries under the Amoco/FGT contract had been dropping pursuant to a March 22, 1967 letter agreement (attached hereto as Appendix A) between Amoco and FGT. This letter was not initially filed with the FERC, and until the FERC proceeding, had never been made public.

Florida Cities believe that through discovery they can demonstrate (1) that the quid pro quo for the March 22, 1967 letter which deprived them of gas was Amoco's agreement to proceed

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1/ Thus, the following average daily deliveries (in Mcf):

1971 - 98,895
1972 - 56,113
1973 - 53,786
1974 - 45,874
1975 - 15,000

2/ The proceeding was Florida Gas Transmission Company, Docket No. CP74-192.

with its contract with FP&L and/or (2) that FP&L was sufficiently aware of the events or consequences to be culpable in law. In essence, as the FERC orders cited below indicate, the March 22, 1967 letter was to modify the daily delivery obligations under the Amoco/FGT warranty contract but not the FP&L/Amoco warranty contract.

As the issue is further discussed in the FERC Orders, FGT (a) agreed to take more gas from Amoco in a period (the late 1960's) when FGT did not need the extra gas for its customers (b) in exchange for FGT's agreement to take less Amoco gas in a period starting in the 1970's. As a result of its near term increase in gas takes, FGT (according to FERC Staff) was forced to sell off gas to another pipeline (Transco). As a result of the agreement to reduce takes in the longer term, FGT (according to FERC Staff) took less Amoco gas than contractually entitled to during a period of gas shortage. As stated previously, five of the Cities here were among the customers consequently curtailed by FGT beginning in 1973. Thus, as Cities would show, they would have been among the initial and direct beneficiaries of any additional gas that Amoco was obligated to deliver to FGT under the original approved contract, but not under the letter agreement of March 22, 1967.

In view of the evidence developed in Florida Gas Transmission, FERC Docket No. CP75-192, the FERC has recently ordered its enforcement staff to investigate the circumstances surrounding the

March 22, 1967 letter. 1/ The FERC relied on Staff's claim that circumstances surrounding the March 22, 1967 letter indicated that FGT and Amoco had violated the Natural Gas Act. As summarized by the Commission Staff found that:

> In 1965, FGT entered into the 20 year warranty contract with the predecessor of Amoco for 584.4 Bcf, including 80,000 Mcf daily contract quantity, 100,000 Mcf maximum day deliveries (125% of daily contract quantity), 64,000 Mcf minimum day deliveries (yearly minimum of 80% of daily contract quantity taken for the year with a five year make-up period), and 48,000 Mcf/d monthly take-or-pay obligation (60% of daily contract quantity times number of days in the month). Nevertheless by 1974, Amoco was only supplying on the average 47,000 Mcf/d, and by December 1975, this was down to 15,000 Mcf/d. Behind this reduction in deliveries to FGT are the following events: In 1967, the predecessor of Amoco was cancelling its 1965 gas contract with FPL which underlies FGT's T-3 transportation service certificate application. In certificating T-3 service and related facilities the FPC (Florida Gas Transmission Company, Opinion No. 516, 37 FPC 424, 446-447 (1967)) directed FGT to first certify that this underlying gas supply contract was still in effect. In order to have Amoco's predecessor reinstate this contract with the FPL, FGT had to unilaterally agree to accept deliveries under its own warranty contract in excess of its 64,000 Mcf/d minimum delivery obligation as "banked", that is to be considered in the future toward satisfying Amoco's 80,000 Mcf average day delivery obligation. FGT's agreement came in the form of the March 22, 1967, letter, (Exh. 65) which followed its March 22, 1967, telegram (Exh. 184) to Amoco outlining these changes, which in turn was a response to Amoco's March 21,

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1/ Florida Gas Transmission Company et al., Docket No. IN78-2.

1967 telegram to FGT detailing the delivery modifications (Exh. 183). This unilateral document was not filed with the Commission, and Amoco deliveries in excess of 64,000 Mcf/d and up to 135,000 Mcf/d allegedly forced FGT to sell 78 Bcf to Transco to avoid prepayment obligation to Amoco.

As the Commission summarized, in ordering an investigation of FGT, Amoco, and FP&L 1/:

> In 1964, FGT entered into a 20-year warranty contract with Amoco for 584.4 billion cubic feet of natural gas. It is alleged by Commission Staff that in order to have Amoco fulfill a gas supply contract with Florida Power and Light Company, FGT in 1967 agreed to take deliveries of gas in excess of the average daily amounts specified in the contract and to "bank" them -- that is, to consider them in the future toward satisfying Amoco's obligation.
>
> As a result of high deliveries of gas from about 1967 to 1969 under this arrangement, Amoco, in 1974 and 1975, was supplying FGT well below the minimum daily amount specified in the contract. In addition, the higher deliveries allegedly forced FGT to sell 78 billion cubic feet of gas to Transcontinental Gas Pipe Line Corporation to avoid prepayment obligations.
>
> * * * *
>
> The Commission also directed the office to look into the significance of contractual obligations between FGT, Amoco, and Florida Power and Light with regard to the amendment of the 1964 warranty contract.

1/ "FERC Rejects Florida Gas Settlement; Sets Investigation Into Possible Gas Act Violations," FERC News Release, August 21, 1978. (emphasis added)

In sum, Cities seek documents related to the Amoco contracts in order to obtain evidence that FP&L had knowledge of and/or actively participated in developments which enhanced its access to natural gas at the expense of those Cities that relied on natural gas.

3. The importance of FP&L's contract with Amoco

Cities contend, inter alia, that FP&L has monopolized 1/ the lowest cost and most economic baseload generation in Florida.

At present, the most economic baseload generation consists of (a) operating nuclear units and (b) natural gas fired units.

Cities' access to natural gas has been, as stated, subject to severe curtailment. Their access to nuclear power is currently limited to fractional shares of Florida Power Corporation's CR-3 unit. In brief, Cities rely primarily on high-priced oil. FP&L, by contrast, has benefited from a generation mix that permits reliance on alternatives that are cheaper than oil. In 1977 it generated 33% of its power on uranium and 19% on natural gas. 2/ In 1976, the average cost of this generation, 3/ in mills per kwh, was 18.54 for residual oil, 7.25 for natural gas and 2.05 for nuclear fuel. Thus, to the extent that FP&L can replace oil with gas or uranium it achieves substantial savings. 4/

1/ Or attempted to monopolize.

2/ Florida Power & Light Company, 1977 Annual Report, at 13.

3/ According to FP&L's 1976 Form 10-K report to the SEC, at 3.

4/ According to FP&L's 1977 Annual Report at page 10:

> "Since FPL first began nuclear generation, fuel savings to our customers [from the replacement of oil] have amounted to more than $690 million, almost equal to the capital investment of building the three units now in service."

In short, in a time of dramatically rising fuel costs, FP&L's dominant access to relatively cheap nuclear fuel and natural gas for generation has provided it with an overwhelming dominance of baseload generation and low cost generation fuel. In the face of such advantage, even a "truly excellent municipal system," (as the Presiding Law Judge in Florida Power & Light Company, FERC Docket No. E-9574, called the Vero Beach municipal system) 1/ may come to believe that there is no recourse other than the sale of its system to FP&L. In seeking to sell its system Vero Beach stated that it had no access to nuclear generation and, as a direct interruptible customer of FGT, it projected future gas supplies at "virtually zero." 2/ As the Judge found, post-embargo fuel oil price increases stimulated the City's desire to sell its system to FP&L. 3/

4. FERC proceedings

FP&L states that the issue of the Amoco/FP&L contract is being considered in Florida Gas Transmission Company, FERC Docket No. IN78-2 and Sebring Utilities Commission v. FPC, Fifth Circuit No. 77-2972. The short response to FP&L's reference to these proceedings is that the assertion that a matter is under consideration elsewhere does not constitute valid objection to an otherwise relevant discovery request. The longer answer is that

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1/ As the Judge, in his February 6, 1978 interim decision stated, at page 4, the "evidence has established that Vero Beach has a truly outstanding electric system with outstanding growth potential."

2/ Testimony of City Manager John Little, Florida Power & Light Company, FERC Docket No. E-9574, Tr. 375.

3/ Id., at 4-5.

(a) FP&L has vigorously contended that the FERC lacks jurisdiction to consider the Amoco/FP&L issue, and (b) the FERC has nonetheless found sufficient basis to commission an investigation to consider the matter. Thus, the proceedings referred to demonstrate the need for the instant request.

Sebring Utilities Commission v. FERC, supra, is an appeal from a FERC order that, inter alia, held that the Commission has no jurisdiction to even consider the curtailment of "transportation gas." In that proceeding FP&L contends that the Commission has no jurisdiction to curtail FP&L's gas.

Docket No. IN78-2 is the Commission ordered investigation that stems from Commission rejection of a proposed settlement of the proceeding 1/ in which the facts relating to the March 22, 1967 letter were initially made public.

On the basis of Staff's allegations, there the Commission directed its enforcement Staff to investigate, inter alia, the Amoco/FP&L contract: 2/

> Staff, in its comments in opposition to the settlement, alleged that Florida Gas Transmission Co. (FGT) and Amoco Production Co. (Amoco) violated the Natrual Gas Act. In particular, during the hearings in Docket No. CP74-192, the issue was raised as to whether FGT and others may have violated section 7 of the Natural Gas Act as a result of their agreement to a material amendment of a 1964 warranty sales contract undertaken without authorization from the Federal

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1/ Florida Gas Transmission Company, Docket No. CP74-192.

2/ Docket No. IN78-2, August 21, 1978, "Order Directing Private Investigation and Designating Officers to Conduct the Investigation," emphasis added.

> Power Commission. FGT and Amoco have since operated pursuant to that agreement and in apparent derogation of the original warranty sales contract and certificate.
>
> Also apparent from the record in Docket No. CP74-192 the significance of certain contractual obligations between FGT and Amoco with Florida Power & Light (FP&L) in the above-mentioned contract amendment. Accordingly, FP&L shall also be subject to investigation in these matters.

In sum, the proceedings referred to support Cities' claim for discovery here.

They indicate that FP&L's privileged access to one of the two low cost alternatives to oil (natural gas) was obtained at the expense of, inter alia, gas-using municipal systems. Cities seek to discover evidence that FP&L's had knowledge of, or participated in, the development of an arrangement that has provided FP&L with substantial benefits at the expense of its competitors.

CITIES'S REQUEST NOS. 65 AND 66

Requests Nos. 65 and 66 seek documents related to FP&L's consideration of two of Cities' requests for power supply alternatives from FP&L. FP&L objects to these requests by (a) claiming their "irrelevance"; (b) stating that they relate to settlement offers and are therefore not discoverable. They are relevant and settlement related material may well be admissible.

FP&L's claim of "irrelevance" is incomprehensible. The requests seek information relating to FP&L's position on issues that are at the center of this proceeding -- i.e., FP&L's potential provision of power supply alternatives to Cities. Indeed, in

characterizing the requests as settlement related, FP&L expressly acknowledges that they concern central issues here.

FP&L's attempt to avoid the requests by referring to them as settlement related, on the other hand, completely misses the point. True enough, as FP&L states, 1/ settlement offers are generally not admissible in evidence. It does not follow a for-tiori, as FP&L asserts, that "what a party does in considering an offer of settlement would not be admissible evidence (FP&L pleading, at 24). On the contrary, Rule 408 of the Federal Rules of Evidence, upon which FP&L relies, expressly provides that, "(T)his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Moreover, even if settlement related information were not admissible, FP&L's point is not well taken -- for the established rule is that the test for relevancy in discovery is usefulness in case preparation, and not admissibility at trial. See, e.g., Smith v. Schlesinger, 513 F.2d 462, 472-73 (D.C. Cir. 1975)

FP&L's difficulty lies in a failure to recognize the limited nature of the principle it forwards. While settlement offers are generally not admissible because they do not necessarily reflect

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1/ Citing Rule 408 of the Federal Rules of Evidence.

on the merits, but are made to obtain "peace," insofar as settlement related materials constitute admissions of facts, they are admissible. Ironically, while FP&L relies on 4 Wigmore Evidence §1061, pages 28-29 (3d ed. 1940), it neglected to cite the immediately preceding pages, where the distinction is well explained. 1/

> Whether an offer to settle a claim by a partial or complete payment, amounts to an admission of the truth of the facts on which the claim is based, and is therefore receivable in evidence, is a question which has given rise to prolonged discussion and to varied but often unsatisfactory attempts at explanation.
>
> The solution is a simple one in its principle, though elusive and indefinite in its application; it is merely this, that a concession which is hypothetical or conditional only can never be interpreted as an assertion representing the party's actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it.

As Wigmore further explains, (Id., at 28-29 emphasis added):

> The true reason for excluding an offer of compromise is that it does not ordinarily proceed from or imply a specific belief that the adversary's claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is pre-

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1/ Wigmore Id., pages 26-27, emphasis added. As McCormick summarizes, "The generally accepted doctrine has been that an admission of fact in the course of negotiations is not privileged unless it is hypothetical -- "we admit for the sake of discussion only" -- or, unless it is expressly stated to be "without prejudice," or unless it is inseparably connected with the offer," so that it cannot be correctly understood without reading the two together." McCormick on Evidence, 2d Ed (1972), at 663-664.

> ferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong doing: . . . .
>
> By this theory, the offer is excluded because, as a matter of interpretation or inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication.
>
> Conversely, if an express admission is in terms made, it is receivable, even though it forms part of an offer to compromise; and this much has long been well understood: . . .
>
> So it is apparent that the occasion of the utterance is not decisive; that is, it may or may not have been accompanied by a reservation or an injunction of secrecy; and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement, whether it is explicit and absolute.

The distinction is readily illustrated with regard to the requests at issue here. Request No. 65, for example, seeks all documents relating to Cities' requests for (a) access to FP&L's nuclear units (b) wholesale power from FP&L (c) the formation of a statewide power pool, and (d) access to FP&L's transmission grid.

With regard to at least Items "b," "c," and "d" FP&L has contended, 1/ and will likely contend here, that FP&L's coopera-

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1/ See, e.g., Florida Power & Light Company, FERC Docket No. ER78-19 et al., (FP&L contends that its denial of wholesale power is required by capacity shortage): Florida Power & Light Company, FERC Docket No. ER77-175 (FP&L contends that increased transmission access raises technical problems); and Appendix A to Cities' October 31, 1978 data request here. (FP&L memorandum suggesting pooling requested by Cities would be detrimental to FP&L.)

tion would pose technical difficulties and/or be detrimental to FP&L. These contentions raise issues of fact. A priori, it would seem likely that FP&L's consideration of Cities' proposals would require consideration of the facts. For example, FP&L's response to Cities' request to join in statewide pooling could be expected to be based on consideration (e.g., analyses) of the costs and benefits of pooling to FP&L. It is such factual considerations that Cities' requests seek. 1/ As Wigmore explains, they may constitute admissions that are admissible regardless of a settlement related context.

In sum, FP&L cannot seek to hide behind the spectre of "settlement negotiations" to evade discovery of relevant material relating to the facts at issue here. 2/ To the extent that docu-

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1/ Alternatively, FP&L may not have sought to consider the factual circumstances at all as a predicate to its response. If so, this conduct would constitute a fact in itself of relevance to the bona fides of FP&L's repeated claims that pooling would, as a matter of fact, be detrimental to FP&L.

2/ Compare Broadway and Ninety-Sixth Street Realty Company v. Loew's Inc., 21 F.R.D. 347, 358-359 (S.D.N.Y. 1958) where the Court, rejecting plaintiff's resistance to discovery of settlement negotiations leading to the dropping of actions against alleged co-conspirators, explained that

> "(S)uch inquiries may produce important evidence as to the nature and effect of the conspiracy charged, as well as on the question of damages. . . . Moreover, the inquiries may relate both to the agreement of settlement itself and all the terms and conditions thereof and also to the negotiations which led to the settlement. For admissions made in the course of such negotiations are not necessarily excluded from evidence if they are explicit and absolute. West v. Smith, 101 U.S. 263, 273, 25 L.Ed. 809; White v. Old Dominion S.S.Co., 102 N.Y. 660, 6 N.E. 289; Bradley v. McDonald, 218 N.W. 351, 113 N.E. 940; Mannella v. City of Pittsburgh, 334 Pa. 396, A.2d 70; IV Wigmore on Evidence (3d ed.) §1061.

ments sought are inadmissible at trial, that determination is not related to the grant of the discovery request. To the extent that the documents sought involve attorney/client (or other) privilege, FP&L may raise this privilege in the case of particular documents.

II. THE BOARD HAS PREVIOUSLY CONSIDERED AND REJECTED FP&L'S ATTEMPTS TO RESIST DISCOVERY OF LEGISLATIVE ACTIVITIES

FP&L objects to the production of documents relating to its legislative activities. FP&L's objection to such requests has previously been thoroughly considered by the Board in Florida Power & Light Company (South Dade Nuclear Units), Docket No. P-636A. 1/ The requests to which FP&L now objects have, as detailed below, been considered by the Board in that proceeding or acquiesced in by FP&L in South Dade. FP&L's present objections provide no new legal or factual basis to cause the Board to reconsider its prior judgment in the related proceeding.

A. The Requests At Issue Have Been Ruled On By The Board Or Acquiesced In By FP&L

FP&L objects to Joint Request No. 58 and to Cities' Request Nos. 14, 20A, 21(e) 21(f), 29(h), and 34.

Joint Request No. 58 is a revision of Joint Request No. 60 in the South Dade discovery. In South Dade the Board overruled FP&L's objection "to the extent that it depends upon Noerr-Pennington." 2/ but provided that the request should be refiled to reduce overbreadth. The instant Request No. 58 is a revision of the old No. 60, calculated to eliminate any overbreadth problem.

Cities' Request No. 14 is essentially identical to Cities' Request No. 16 in the South Dade discovery. FP&L did not find the

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1/ See "Second Prehearing Conference Order," February 22, 1977, at 2-4.

2/ Second Order, Id., at 4.

request objectionable in South Dade.

Cities' Request No. 20A was, as served on October 31, 1978, identical to Cities' Request "20(g)" in South Dade. Nonetheless, when FP&L objected here, Cities recast the request to mirror FP&L's own present Request No. 176. In short, FP&L has not objected to Request No. 20A as initially worded and can hardly object to it as reworded at FP&L's behest.

Request No. 21(e) was specifically ruled on by the Board in South Dade, 1/ and its breadth has been redefined to comport with the Board's ruling.

Request No. 29(h) is identical to "21e," except that the information is sought only insofar as it relates to information provided to the Board of Directors. Cities note that, by inadvertence, the wording of "29h" was not modified to comply with the South Dade Board's narrowing of the breadth of "21e." Cities hereby state a willingness to substitute the language of "21e" for "29h."

Request No. 21(f) is identical to Request No. 21(f) in the South Dade discovery, where FP&L did not object to it.

In South Dade, FP&L objected only to subparts "5" and "6" of the request, as modified. The Board specifically overruled FP&L's objections. 2/

In sum, while FP&L now objects to at least twice as many items as it objected to in the South Dade discovery, FP&L's objections are to matters that the Board has ruled on or that it has previously agreed to. FP&L provides no explanation as to why pre-

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1/ It bore the same number in that proceeding

2/ Except to the extent that Item "5" related to the Board's request that the parties negotiate concerning tax subsidization.

viously acceptable requests have since become unacceptable. Nor, as discussed below, does it provide any reason for the Board to revise its prior underlying determination that -- with the appropriate breadth -- requests for discovery of legislative activities must be complied with.

B. The Board Has Thoroughly Considered And Rejected FP&L's Contention That Legislative Activities Are Immune From Discovery

FP&L again raises the two grounds for objections to discovery of legislative activity that it raised in its South Dade objections -- (a) since legislative activities "cannot be the basis of a finding of inconsistency with the antitrust laws, such materials are not relevant nor reasonably calculated to lead to the discovery of admissible evidence" 1/ and (b) production would have a "chilling effect" on FP&L's First Amendment rights. The Board previously held FP&L's contentions to be legally insufficient. The only new development cited by FP&L is First National Bank of Boston v. Bellotti, ___ U.S. ___, 98 S.Ct. 1407 (1978). As stated below, that decision provides no cause to alter the Board's prior holding.

1. FP&L's Noerr-Pennington argument

FP&L's first ground for objection, as stated, is a non sequitur and provides no basis for denying the requests. Even assuming that the statement were entirely accurate, the fact that a cause of action may not follow from legislative activities would not immunize these activities from discovery.

1/ FP&L pleading at 10.

FP&L misconstrues the Noerr-Pennington 1/ rule. According to FP&L, these cases stand for the proposition that, "documents relating to Applicant's concern for legislative affairs and publication of its views on such views cannot form the basis of a violation of the antitrust laws. Accordingly, such documents are not relevant evidence themselves and cannot lead to the discovery of relevant evidence, which means that efforts to obtain them fail to meet even the minimum standard for discovery." 2/

In fact, while the two cases held that in some circumstances efforts to limit legislative actions without more may not constitute an antitrust cause of action, it did not hold that these efforts were privileged. Indeed, UMW states specifically that, if probative, such evidence may be admitted at trial to show the purpose and character of the particular transactions under scrutiny (381 U.S. at 670, n. 3). Moreover, a host of cases have defined and limited the Noerr-Pennington doctrine, depending upon the type of government involvement, the underlying legality of the political activities involved, and other factors. See, e.g., Sacramento Coco-Cola Bottling Co. v. Chauffeurs Local 150, 440 F.2d 1096, 1098-1099 (CA9, 1971) cert. denied, 404 U.S. 826 (1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25,

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1/ See United Mine Workers v. Pennington, 381 U.S. 657 (1965) and Eastern Railroad Press Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).

2/ FP&L pleading at 11.

31-34 (1st Cir. 1970) cert. denied, 400 U.S. 850 (1970); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971) cert. denied, 404 U.S. 1047 (1972). Moreover, the Noerr-Pennington doctrine itself recognized the possibility that the exercise of political right by a corporation may constitute a "mere sham" to violate antitrust laws. Eastern R.R. Presidents Conference v. Noerr, 365 U.S. at 144; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

At this stage, absent possession of the documents, one cannot state whether FP&L's political activities taken alone would constitute antitrust violations. FP&L admits to both extensive and successful efforts. The purpose of discovery is to seek potential evidence regarding whether FP&L's activities have passed permissible limits. To the extent it can be shown FP&L sought to limit Florida Cities' competitive opportunities, such evidence would clearly be admissible to establish the "sham" nature of the legislative activities or further support an independent anticompetitive course of conduct. NLRB v. Virginia Electric Co., 314 U.S. 469 (1941).

FP&L, in seeking to justify previously aired objections, contends that where discovery has been allowed, it has been in order to determine whether legislative activities were "sham." FP&L states that there is no allegation of a "sham" here.

FP&L's suggestion that its "sham" argument is a new one is incorrect. Its "sham requirement" argument was both thoroughly

briefed by the parties and rejected by the Board in South Dade. 1/

As Cities explained when FP&L last raised its "sham" defense, FP&L fails to note that in those NRC proceedings where discovery has been denied, the sole stated reason has been lack of demonstrated relevance -- i.e., there is no indication that legislative related documents and information are, as a matter of law, immune from discovery.

Here, the relevance of FP&L's legislative efforts is implied by the terms of its own pleadings. The Applicant contends that its actions have not deprived Cities of access to nuclear power because Cities are able to plan and construct their own nuclear facilities. Cities' ability to do so, however, has been limited by the absence of appropriate enabling legislation. To the extent that FP&L's opposition to such legislation has prevented its passage, FP&L has acted to limit Cities' opportunity to construct alternative facilities.

Finally, FP&L's suggestion that the "sham" argument cannot be the basis for discovery here because "sham" was not pleaded is simply incorrect. As a general proposition, the scope of discovery is not limited by preliminary pleadings. See, e.g., Broadway and Ninety-Sixth Street Realty Company, supra at 352. As the South Dade Board explained in rejecting the same arguments in South Dade, discovery is necessary to determine whether in fact, FP&L's activities are entitled to protection. (Board Order, at 3-4).

1/ See Applicant's South Dade Objections, October 8, 1976, at 11-13; and Board Order, at 3.

2. FP&L's "chilling effect" argument

FP&L's contention that discovery must be denied because of its "chilling effects" is another rehash of an old argument that was rejected in South Dade.

Discovery by its very nature may have a "chilling effect" -- i.e., discovery seeks important information that might well have been developed without any intention of publication. And Florida Cities can well understand that FP&L's activities might not withstand the light of day.

The basic flaw in FP&L's argument is its equation of a right to present its views with a right of non-disclosure. As discussed below, its persistence in this failure is evidenced by its invocation of First National Bank supra, as a relevant new development. 1/ FP&L is a public corporation, created by the state, granted monopoly privilege by the state, and regulated by the state. True, it may have a right to seek legislation it favors, but that gives it no right of confidentiality. Indeed, the public policies in the case of franchised monopolies are all the other way.

Here, FP&L seeks valuable rights in a proceeding before a Federal agency. Apart from generalities not recognized in law, FP&L does not even state a specific interest in non-disclosure.

1/ While FP&L claims an alleged right to non-disclosure, such claim is negated by various regulations whose validity is not questioned (e.g., reporting requirements of the SEC and FPC, lobbying disclosure and registration requirements, etc.).

Compare United States v. Nixon, 418 U.S. 683 at 706. 1/

FP&L's proffer of the First National Bank decision shows that it still misses the point. In that case the Supreme Court struck down a state criminal statute that sought to limit the scope of corporate comment on political issues. The Court held that the statute was unlawful because it impaired expression that the First Amendment was intended to protect.

FP&L would, again, leap from the premise that it may present its views to the false conclusion that it has a general right of non-disclosure.

The case had absolutely nothing to do with the relationship between the First Amendment and the antitrust laws. (Moreover, the Court carefully explained that it was not even ruling on "whether and to what extent corporations have First Amendment Rights." 2/) There is no basis for suggesting that the decision modifies the balancing test that the court has sought to work out in the Noerr-Pennington line of cases. Indeed, on the very day in which First National Bank was handed down, the Court again rejected the attempt to use the First Amendment as a magic wand to dispel antitrust regulation. In National Society of Professional Engineers v. U.S., 98 S.Ct. 1355 (1978) the Court struck down the

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1/ The claim of the President of the United States to avoid discovery of confidential conversations with his close advisors was not recognized in United States v. Nixon, supra, 703, 705-716 (1974).

2/ Id., at 1415. As Justice Stevens explained, "(T)he Constitution often protects interests broader than those of the party seeking their vindication." Id.

engineering society's attempt to prohibit competitive bidding through "ethical" standard setting, and rejected the claim that its decision would abridge First Amendment rights. 1/

In conclusion, Florida Cities have presented two affidavits (Harry C. Luff, Jr., Ossee R. Fagan, Esq.) concerning, inter alia, FP&L's actions to prevent legislation to allow Cities to more readily finance generation. Florida Cities anticipate that FP&L will claim it need not deal in nuclear capacity and attendant benefits because Florida Cities can achieve equivalent power supply or power supply arrangements. To the extent it is shown that FP&L has acted in a legislative context to limit Florida Cities' abilities to achieve such benefits, it cannot at the same time defend on the basis of the existence of such alternatives. Discovery into such matters is relevant. These activities are illustrative, and Cities cannot know the total picture before discovery. The requests are proper, they are relevant and should be ordered.

1/ As the Court explained, at 1368, footnote omitted:

> Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. 26/ The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." Giboney v. Empire Store & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834.

III. FP&L'S REQUEST FOR A PROTECTIVE ORDER IS FRIVOLOUS AND CONSTITUTES APPARENT HARRASSMENT.

FP&L requests the Board to provide a broad protective order that gives it carte blanche permission to designate information as confidential and thereby (a) preclude the revelation of the information to Cities engineering expert in this case, and (b) preclude its use in other fora by Cities.

On the face of FP&L's pleading, FP&L's request might appear as merely an overly broad and unsupported request that fails to meet the minimal test for protective orders established by law. FP&L's proposal would directly impair the Cities' ability to litigate their rights. The terms of the proposal would (a) limit Cities access to necessary engineering expertise (Mr. Robert Bathen) upon which, as FP&L well knows, Cities significantly rely in this proceeding, and (b) significantly and unduly increase the costs that Cities must bear if they seek vindication of their rights from FP&L. Cities would hope that FP&L's instant proposal is merely frivolous and contrary to the public interest, rather than a deliberate attempt to prevent effective litigation of Cities' claims. FP&L has, in other proceedings, publicly disclosed thousands of documents. FP&L now does not even refer to this disclosure, much less venture to distinguish the documents disclosed from those it now seeks to protect. 1/ Moreover, FP&L

1/ Cities respectfully suggest that it would be impossible to distinguish (in terms relevant to FP&L's present argument) the types of documents it has knowingly released from those it now seeks to protect. In order to avoid burdening the record, Cities do not now lodge examples of such documents, but would supply them upon request.

has knowingly disclosed them for the unrestricted use by, among others, Mr. Bathen and members of the Cities' group and in doing so neither sought the protective order now sought, nor suggested that there is any basis, as now claimed, for such order. Such conduct by FP&L not only is a clear waiver in law, but it raises questions concerning the seriousness of FP&L's claimed need for protection.

A. FP&L's Open-Ended Request For Limiting Disclosure Fails To Meet The Threshold Tests Required For Serious Consideration

It is well established that a party seeking a protective order must (a) state with specificity what information requires protection (b) show that the information is of the type that qualifies for protection and (c) demonstrate that significant harm is likely to result if protection is not granted. If and when these tests are met, then it still must be shown that the public interest in disclosure does not outweigh the need for protection.

Here, (a) FP&L has not specified the information it wishes to protect, but proposes that the Board grant it carte blanche to limit disclosure 1/; (b) FP&L has not shown that any documents requested are of the type that are entitled to protection, especially in the case of a regulated entity; and (c) FP&L has not demonstrated that significant harm may befall it from disclosure.

1. The legal standard

Rule 26(c) of the Federal Rules of Civil Procedure 2/

1/ See FP&L's proposed protective order, page 2, item "2."

2/ Rule 26 is identical to Rule 2.740(c) of the Commission's rules, except that subsection "6" of the latter is further referenced to sections 2.744 and 2.790. The latter two sections,

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("FRCP") states that "good cause" must be shown to justify a protective order. As has been held, "the fact that sensitive information is involved in litigation gives a party neither an absolute nor automatic right to have the discovery process hindered." 1/ While FP&L claims that it wishes to limit the production of information because the recipient is a competitor, the courts have recognized that, in an antitrust case, a competitors' business records, "are not only not immune from disclosure, but they are precisely the source of the most relevant evidence." Fletcher v. Young, 16 FRD 507, 509 (S.D.N.Y. 1954)

Federal Rule 26(c)(7) provides for a court order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." In construing this provision, the courts have required the proponent of the order to (a) specify the particularly objectionable requests and (b) demonstrate the harm from a public response. As stated in Johnson Foils v. Huyck Corp., 61 F.R.D. 405 (N.D.N.Y. 1973) at 409-410:

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however, relate to (a) production of NRC records and documents (2.744) (b) public inspection of documents, including those supplied by private parties, on file with the NRC (2.790). It has been held that neither of these sections is determinative in cases, like this one, where the issue is a discovery request of a private party. See Kansas City Gas & Electric; Kansas City Power & Light Co. (Wolf Creek Unit No. 1), 3 NRC 408, 416 (ASLB 1976).

1/ Johnson Foils v. Huyck, Inc., 61 FRD 405, 409 (N.D.N.Y. 1973), citing International Nickel Co. v. Ford Motor Co., 15 FRD 392, 294 (S.D.N.Y. 1954)

> Any protective order inhibiting liberal discovery must issue only upon a specific showing that the information in question is of the nature that its disclosure should be restricted and that the party disclosing will indeed be harmed by disclosure. Essex Wine Corp. v. Eastern Electric Sales Co., 48 FRD 308 (E.D.Pa. 1969); Technical Tape Corp. v. Minnesota Mining and Manufacturing Corp., 18 FRD 318 (S.D.N.Y. 1955)

Similarly, as stated in Vogue Instrument Corp. v. Lem Instrument Corp., 41 FRD 346, 347 (S.D.N.Y. 1967):

> ". . . the burden is upon the defendant to come forward with additional facts demonstrating that the records are indeed of a trade secret nature and that disclosure would cause them harm."

This Commission has strictly construed the burden on the proponent of a protective order. In Kansas City Gas & Electric Co., et al., Docket No. STN 50-482 (Wolf Creek Number 1), the Licensing Board and the Licensing Appeals Board considered a request by Westinghouse for a protective order to govern the pricing provisions of a fuel supply contract.

The Appeals Board, relying on earlier Commission precedent, held that the party seeking to restrict disclosure must show that, "not only is the information of the type customarily held in confidence by its originator but also there is a 'rational basis' for so treating it." Kansas City Gas & Electric et al., (Wolf Creek Unit 1), 3 NRC 408, 417 (ALAB 1976) The Board explained that by "rational basis" it meant a demonstration "that significant commercial injury might be sustained" from disclosure. Id., at 418. The Board took pains to reject the Applicants' proffer that

"rational basis" meant only that the procedures used for classification be reasonable and reasonably applied. It explained, at footnote 13,

> The applicants suggest that, by "rational basis," the ECCS Hearing Board and the Commission may have had in mind only that the "procedures under which the information is classified proprietary be laid out, that they be reasonable, and that they be applied in a reasonable manner" (App. Tr 20). We reject the suggestion. To us, "rational basis" plainly refers to the substantive underpinnings of the classification and not just to the procedures employed in making it; i.e., even if those procedures are beyond reproach, the classification nonetheless may be entirely without justification and, therefore, without a "rational basis."
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> In this connection, compare United States v. International Business Machines Corp., 67 F.R.D. 40, 46 (S.D.N.Y. 1957). There, the court construed Federal Rule 26(c)(7) -- the judicial counterpart to 10 CFR 2.740(c)(6) -- as requiring a showing that the public disclosure of the allegedly confidential commercial information would "work a clearly defined and very serious injury to the * * * business" of the applicant for the protective order.

The Kansas City Board established a twofold test for judgment of protective orders. First, it must be shown "that significant commercial injury," might be sustained by public release. If a showing of "rational basis" is made, it is then necessary to determine whether countervailing considerations merit public disclosure. Id. at 418.

2. FP&L's failure to meet the minimal tests.

FP&L's request for protective order does not meet the minimal standards necessary to achieve serious consideration.

First, instead of specifying particular categories of documents which require protection, FP&L's draft order provides FP&L with carte blanche authority to make determinations on an ad hoc basis. Second, where FP&L does note particular requests, the requests cited do not call for traditionally protected data -- e.g., "trademark," "research and development" or "proprietary" process. On the contrary, the requests it refers to concern matters that are the common evidentiary stuff of public regulatory proceedings (e.g., cost data, fuel data, customer data). Indeed, as discussed below, such data is of the type disclosed by FP&L itself in discovery in regulatory proceedings. Finally, FP&L does not demonstrate how it would be damaged by the publication of any of the data referred to. Since, as discussed infra, FP&L has often released the type of data it now would seek to protect, its failure to specify damages that would stem from release is telling.

In sum, FP&L's proposed order must be rejected at the threshold for failure to make a prima facie case. Even if such case should be made, however, the public interest here, as discussed below, compels rejection of FP&L's proposal.

B. FP&L's Proposed Order Would Severely Impair Cities' Ability To Litigate Their Rights Effectively And Its Rejection Is Required By The Public Interest

As stated above, if FP&L had demonstrated the need for its order, the Board would be required to weigh this need against the public interest in disclosure. Here, there is a compelling public interest basis for the rejection of FP&L's proposal. The proposal

would not only increase the costs of litigation, but would limit the ability of Cities here (and, by precedential implication, smaller competitors or intervenors in general) to seek vindication of their rights.

FP&L here complains that discovery may provide its competitors with unfair competitive advantage. In response it proposes a broad protective order which, inter alia, (a) would deny documents to Robert E. Bathen, Cities' engineering expert in this proceeding and (b) preclude Cities from using documents obtained here in other proceedings.

As scholarly commentators have come to recognize 1/ "(P)redation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition." As Professor Bork further explains, 2/ entrenched monopolies can, with relatively minimal expenditures, resist the efforts of small competitors to seek redress by imposing severe litigation costs.

The terms of FP&L's proposal here illustrate the principle which Professor Bork refers to.

1. FP&L would deprive Cities of expertise it knows to be essential

FP&L makes a point of stating that its proposed protective order would deny documents to Robert E. Bathen. 3/ As FP&L is keenly aware, Mr. Bathen is not only a Cities engineering expert for this proceeding, but, as a longstanding engineering consultant

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1/ Bork, The Antitrust Paradox (1978), at 347.

2/ Id., Chapter 18.

3/ See footnote at page 29.

for a number of the Cities, has intimate and unique familiarity with the operations of the power business in the state of Florida. In the past year alone, for example, Mr. Bathen has provided substantial testimony on behalf of members of the Cities group in two proceedings related to FP&L's provision of transmission services and wholesale service. 1/ In addition, Mr. Bathen was scheduled to serve as Staff's witness in another FP&L related proceeding 2/ and would be a witness in pending proceedings related to FP&L rates 3/ and a series of interchange contracts entered into by FP&L and others. 4/ Moreover, in each instance, Mr. Bathen's testimony was, or will be, based on access to thousands of documents provided by FP&L. In providing these documents -- which FP&L does not even refer to, much less seek to distinguish from those it seeks to protect here -- FP&L did not seek to limit Mr. Bathen's access, much less show that limitation was needed.

The number of independent experts that are familiar with both the Cities' and FP&L's systems is extremely limited. If Mr. Bathen (and his firm) were replaceable, it would only be at a very substantial cost in the time and money needed to develop the

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1/ Florida Power & Light Company, FERC Docket No. ER77-175 and Florida Power & Light Company, FERC Docket No. ER78-19 et al.

2/ Florida Power & Light Company, FERC Docket No. E-9574. This docket concerned FP&L's proposed acquisition of the Vero Beach municipal system. FP&L withdrew its proposed acquisition prior to Mr. Bathen's appearance.

3/ Florida Power & Light Company, FERC Docket Nos. ER78-19, et al.

4/ Tampa Electric Company, et al., Docket Nos. ER77-549 et al.

expertise which Mr. Bather brings to his work. In sum, Cities respectfully submit that, as FP&L is undoubtedly aware, any limitation on Mr. Bathen's participation here would be detrimental to Cities' participation.

2. FP&L would further increase litigation costs without basis

In addition to limiting Mr. Bathen's access, FP&L seeks to preclude Cities from using discovery in other proceedings. 1/ It suggests in passing 2/ that such protection is "routinely" afforded. In fact, protection from use of documents in other proceedings is only available upon clear showing of intended abuse of discovery. As stated in Johnson Foils, supra, at 410 (emphasis added):

> . . . unless it can be shown that the discovering party is exploiting the instant litigation solely to assist in other litigation before a foreign forum, federal courts do allow full use of the information in other forums. See Essex Wire Corp. v. Eastern Electric Sales, supra, 48 F.R.D. at 310; Beard v. New York Cent. R. R. Co., 20 F.R.D. 607, 610 (N.D.Ohio, E.D.1957); compare, Williams v. Johnson & Johnson, 50 F.R.D. 31, 33 (S.D.N.Y. 1970); Olympic Refining Co. v. Carter, supra. Indeed, there must be some evidence of bad faith in the institution of the suit on the part of the discovering party before a court will act to limit the discovery process. Deering Milliken Research Corp. v. Lessona Corp., 27 F.R.D. 440, 441 (E.D.N.Y. 1961); Sagorsky v. Malyon, 12 F.R.D. 486, 487 (S.D.N.Y. 1952); see also, Brown v. Bullock, 29 F.R.D. 184 (S.D. N.Y. 1961); generally, Wright & Miller, Fed.Prac. & Pro.: Civ. §2040

1/ FP&L proposed Protective Order, item 10.

2/ At the top of page 27.

The courts have recognized that the use of documents in multiple proceedings may reduce costs and expedite justice. In rejecting an order to limit the use of discovery to one proceeding (where several related proceedings were pending) the Court explained in Williams v. Johnson & Johnson, 50 F.R.D. 31, 32 (S.D.N.Y. 1970):

> In this situation, it is at least theoretically advantageous to the attorneys for the plaintiffs in the various suits to share the fruits of discovery. They thus reduce the time and money which must be expended to prepare for trial and are probably able to provide more effective, speedy and efficient representation to their clients. See Rheingold, The MER/29 Story -- An Instance of Successful Mass Disaster Litigation, 56 Cal.L.Rev. 116 (1968). If this approach leads to the consolidation of cases, it will save judicial time and effort as well. On its face, such collaboration comes squarely within the aims laid out in the first and fundamental rule of the Federal Rules of Civil Procedure: "These rules * * * shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 1, FED.R.Civ.P. Thus, there is no merit to the all-encompassing contention that the fruits of discovery in one case are to be used in that case only.

As all parties are well aware, Cities (including individual Cities) are engaged in numerous proceedings with FP&L. FP&L may have unlimited funds to litigate these proceedings. Indeed, its annual reports show that it spends millions of dollars each year on its cadre of law firms alone. 1/ Cities' funds are

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1/ FP&L's 1977 Form 1 report to the FERC identifies at least $5,000,000 in legal fees for 1977 (above and beyond in-house counsel.)

limited. A requirement that discovery in one proceeding be sequestered from other proceedings would both result in unnecessarily costly procedural redundancy and impose further unnecessary costs that would limit Cities' ability to participate effectively.

C. The Context Of FP&L's Motion Shows It To Be So Lacking Of Merit As To Constitute Apparent Harrassment

The context of FP&L's request demonstrates that it is frivolous on the merits and strengthens the implication that it is calculated primarily to harass. This context includes (a) FP&L's refusal to grant Cities minimal protection of Cities' documents; (b) the fact that as a regulated entity, FP&L must typically disclose information of the type it would now protect (c) the fact that it has previously disclosed such information to Cities and Mr. Bathen, without claiming (or showing) need for the protection now sought and (d) evidence that FP&L has previously sought to limit Mr. Bathen's ability to do business.

1. FP&L's position here reflects self-interest and not principle

FP&L here purports to stand behind the principle that competitors should not be required to disclose sensitive business information to one another. In the recent past, however, FP&L has successfully contended that, under the Florida Sunshine Law, it is entitled to all information (including litigation-related privileged information) possessed by Cities. FP&L nonetheless resisted Cities' request for a protective order. 1/ It did so with full

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1/ See FP&L, "Opposition of Florida Power & Light Company to Florida Cities' Motion For Protective Order," Florida Power & Light Company, Docket Nos. P-636(A) and 50-389-A, October 5, 1977.

knowledge that, as a memorandum of Mr. Robert Gardner, FP&L's Vice President put it, "Sunshine Laws hamper management actions (municipal)." 1/

2. As a regulated entity, FP&L must publicly justify costs and activities.

Arguments for protection that might become a non-regulated entity, ill serve a regulated one.

FP&L states that it needs protection against the disclosure of "sensitive operating and financial information." (FP&L pleading, at 28). "Sensitive" operating and financial information however, is often the essence of public regulatory proceedings, such as rate cases. FP&L asserts, without specific reference, that it must protect "information which is not required to be made public by any of the state or federal agencies with regulatory jurisdiction over the company." Again, Cities do not know what information FP&L refers to. At best, FP&L may be stating the obvious -- that only a limited amount of information is routinely required, i.e., pursuant to periodic reporting requirements. Of course, as particular cases may arise, agencies may "require" the public production of further data. 2/

1/ See document attached as Appendix B, which Mr. Gardner prepared. (The document appears as an exhibit in Florida Power & Light Company, Docket No. ER78-19 et al.)

2/ FP&L's fleeting reference to items for which protection is in order hardly advances its case. FP&L singles out, for example, (a) "estimating and escalation factors used by the Company with respect to its physical facilities and operating expense;" (b) "copies of important Company contracts with key suppliers and contractors" (c) "information about the Company's existing industrial customers and efforts to acquire new ones."

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3. FP&L has waived any right to make the claims it now makes.

As stated, FP&L and Cities have been engaged in many pieces of litigation. In much of this litigation (a) Cities have

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As to the first request, cost data and estimates are commonly provided in rate proceedings. Earlier this year, for example, in response to intervenor's requests in Florida Power & Light Company, Docket No. ER78-19 et al., FP&L provided studies and documents comparing coal and nuclear power costs on the basis of a variety of estimates and escalation assumptions. FP&L did not seek to limit disclosure of such documents, and, as FP&L knows, they were available to Mr. Bathen, who testified in that proceeding. (Of course, documents previously provided by FP&L need not be provided again).

As to the second request, (a) FP&L has often produced documents and testified concerning the terms of fuel contracts, (see e.g., testimony of FP&L Vice President E.A. Adomat, FP&L's most recent retail case before the state commission; Florida Power & Light Company, Docket No. 760727-EU.)

(b) Fuel price and supply data is commonly required by regulatory agencies. For example, FP&L is required to report current fuel data periodically to the FERC, which has publicly disclosed the data (Form 423).

(c) If, as FP&L states, the contracts are with "key suppliers," their significance to this proceeding cannot be disputed;

(d) of the two fuel-related requests cited, one (No. 27) relates to uranium enrichment contracts. As Cities understand it, the supplier in this instance is the United States government. FP&L does not explain how the terms of a public contract may qualify as secret business information that should not be subject to public disclosure.

As to the third request, Cities note that the Company has not only provided documents related to industrial load attraction in the recent past, but (a) such documents were offered as exhibits by, among others, Mr. Bathen without objection by FP&L on the grounds made here (see Florida Power & Light Company, FERC Docket Nos. ER78-19 et al., Phase I, Exhibit ___ REB-AA) and (b) the information is essential to public FERC hearings on price squeeze allegations, pursuant to the decision in FPC v. Conway Corporation, 426 U.S. 271 (1976).

been provided information of the type which FP&L now claims to be sensitive (b) such information has been made available to Mr. Bathen 1/ and (c) FP&L has never claimed, much less justified, the need for a protective order.

In recent discovery in FERC Docket No. ER78-19 et al., for example, FP&L provided Cities and Mr. Bathen with many documents. Mr. Bathen's prepared testimony, filed in February of this year, included numerous FP&L discovery documents as exhibits, which were accepted into evidence. 2/ The subject matter of these documents included, inter alia, (a) FP&L's notes on negotiations with Cities (b) FP&L's sales and pricing data (c) FP&L's internal growth forecasts (d) FP&L's marketing plans and (e) financial analysis. FP&L did not then seek to restrict Mr. Bathen's use of the documents or claim that his access to them could be damaging. Cities respectfully suggest that FP&L cannot distinguish (and it does not try to) the sensitivity of the documents which Mr. Bathen had access to in that docket (and others) from those it now wishes to protect.

Cities suspect that if there is a significant difference between the instant requests and those which FP&L has complied with in other proceedings it lies not in sensitivity of the subject

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1/ While FP&L has not previously sought to limit Mr. Bathen's work by a protective order, Cities must note that this is apparently not the first instance in which it has sought to limit his business. As indicated in Attachment C, during the course of FP&L's campaign to renew its Daytona Beach franchise, counsel for FP&L urged the Daytona City Council not to employ Mr. Bathen to consider that City's alternatives.

2/ As Exhibits 39 and 40 in that proceeding.

matter, but in the fact that in the interim since the prior requests FP&L has become increasingly aware of Mr. Bathen's expert abilities and the damaging nature of its own documents.

Courts have continually rejected efforts at disqualification that reflect calculation rather than principle. For example, in rejecting efforts to disqualify a judge for bias, it has often been held that timeliness is of the essence. 1/ As Judge Aldrich explained in In Re United Shoe Machinery Corp., 276 F.2d 77, 79 (1st Cir. 1960):

> The requirement of timeliness is of fundamental importance . . . One of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives. As was said in State ex. rel. Shuffeldt v. Armijo, 1935 39 N.M. 502, at page 506 (1935), 50 P.2d 582, at page 855,
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> "A litigant cannot experiment with the judge presiding over the case."
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> * * *
>
> "We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge."

Here, FP&L, after open acquiesence in disclosure that it does not here refer to or distinguish, has apparently decided that it does not find Mr. Bathen's professional expertise to be to its advantage, and wishes to disqualify him.

1/ A similar rule governs disqualification of administrative officials. See, 5 USCA 557.

Cities have developed a reliance interest in Mr. Bathen's continued service. FP&L's belated proposal to negate this interest, even if it could be justified, must be rejected for lack of timeliness.

In conclusion, Cities must suggest that the terms of FP&L's proposed order are not only contrary to the public interest, but, as evidenced by FP&L's prior conduct, appear to be without legitimate merit in conception.

D. The Precedent Cited By FP&L Does Not Help Its Case

The lack of merit in FP&L's presentation is further evidenced by the legal precedent marshalled on its behalf.

FP&L's pleading cites a number of cases in support of its proposed order. On inspection, these cases are not merely readily distinguishable, but undermine FP&L's proposal.

First, the cases relied on by FP&L involve discovery of entities that were non-parties 1/ and/or entities that are not subject to regulation. As a matter of fairness nonparties may be accommodated where parties are not. As discussed supra, regulated entities may be required to publicly divulge information that might be protected in other contexts. The cases cited do not provide any precedent for protecting information in a regulatory context. In United States v. National Steel Corp., 26 F.R.D. 603 (D.C.Tex. 1960), for example, the right to limit disclosure of net income was granted. Net income, however, may often be subject to disclosure by a regulated entity. Similarly, Covey Oil v. Continental

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1/ Consumers Power Company (Midland Plant, Units 1 and 2), 6 AEC 322 (ASLB 1973); Cowey Oil Company v. Continental Oil Company, 340 F.2d 993 (10th Cir. 1965) cert. denied, 380 U.S. 964.

Oil Company, 340 F.2d 993 (10th Cir. 1965) cert. denied, 380 U.S. 1965, concerned disclosure of price information which, as discussed above, is often central to rate cases.

Second, the cases do not provide any instance of a grant of the carte blanche right to limit disclosure sought by FP&L here.

Third, the cases cited provide absolutely no basis for a limitation on disclosure that would, as here, severely limit the ability of a party to prepare its case. On the contrary, they evince a recognition that the ability of a party to prepare its cases must be protected. For example, in Consumers Power, supra, it was provided that the protective order could be modified upon showing "that such disclosure is absolutely necessary to the applicants' preparation of its defense in this proceeding." Consumers, supra, at 329. (Indeed, Tosa Chrysler Plymouth v. Chrysler Motors Corp., 55 F.R.D. 41 (D.C. Wisc.), also cited by FP&L, involved the modification of an unduly restrictive order.)

Finally, FP&L cites Part II Section 2.50 of the Manual for Complex Litigation for the proposition that the type of order it seeks here is recommended for antitrust cases. Cities have examined that section and it does not refer to protective orders. (Rather, it concerns document depositories.)

E. FP&L's Definition Of "Independence" Is Both Unduly Self-serving And Inappropriate.

As detailed above since FP&L does not make a prima facie case for its broad order and the context of the order further shows it to be without merit, its request must be rejected. Nonetheless, Cities are constrained to comment on FP&L's assertion that Mr. Bathen is not an "independent expert."

FP&L cites neither precedent nor generally accepted definition for the term "independent expert." Rather, it simply asserts that Mr. Bathen does not fall within its definition of independence. As is obvious, determinations of "independence" will depend upon the person making the determination. The definition FP&L proposes is inappropriate and blatantly self-serving.

First, FP&L would argue that expert witnesses having experience and knowledge concerning business relations are disqualified from giving expert testimony because of their knowledge. In essence, FP&L seeks to insulate litigation from business dealings, thereby making litigation a game.

Second, FP&L employs a self-serving definition of independence. According to the Oxford Universal Dictionary, (3d Ed.) "independent" means, inter alia, "(N)ot dependent on another for support or supplies." If this proceeding is true to form it can be expected that FP&L will employ outside experts who (a) will receive substantial fees from FP&L, and likely have an interest in obtaining further business from FP&L and (b) will likely have been employed elsewhere by FP&L and/or other private utilities in efforts to resist claims made on behalf of publicly-owned utilities. Moreover, they might well use information obtained from Cities in other fora to oppose the ends sought by Cities here. 1/

1/ For example, outside economic experts employed by FP&L may testify in any number of fora that competition in the electric business is limited and/or nonexistent, and therefore, that large utilities such as FP&L should have few if any obligations under the antitrust laws.

In Cities' view, such experts would (a) not be independent and (b) might use Cities' information elsewhere to the detriment of Cities. In short, fairness would dictate that FP&L's experts would also be precluded from access to any documents which Cities deem confidential. Cities will not hold their breath in anticipation of FP&L's agreement on this point.

The point should be obvious. The definition of "independence" is controversial. While it is appropriate to question a witness' independence at trial, the sole purpose of FP&L's present invocation of the term appears to be the elimination of Mr. Bathen from the proceeding. 1/

IV. FP&L'S PROPOSED 1972 CUT-OFF DATE IS UNJUSTIFIED

FP&L objects to the length of the period for which documents are to be provided. It states that the 1950 cut-off date (sought by Cities for requests relating to Applicant's course of conduct) will impose a time-consuming burden on the Company, and that, in any case it would be impossible to reconstruct events that far back. FP&L therefore urges the Board to establish a general cut-

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1/ Or alternatively, the prevention of the Cities' use of Mr. Bathen's skills in negotiation. Finally, Cities note that if the definition of "independence" must be belabored, Mr. Bathen and all outside (hired by contract) experts would qualify as "independent" under well-accepted legal and linguistic principles. As Oxford's Universal states, "independent" means "(N)ot depending upon the authority of another; not in position of subordination; self-governing, free." As a certified member of a recognized profession (engineering) Mr. Bathen has an allegiance to principles that are not subordinated to the particular organizations he may work for. As a member of an outside engineering firm, Mr. Bathen is neither in the formal chain of authority of client organizations nor necesarily subject to the personnel rules that govern full-time employees. (In recognition of the distinction between full-time employees and contractors, Federal law recognizes "independent contractors" such as Mr. Bathen's firm, as a distinct class of public employees.)

off date of 1972.

As explained in Cities' Objections to Applicant's request (as in Cities' prior pleadings), the pattern of anticompetitive conduct at issue in this proceeding has historical roots that clearly pre-date the cut-off date sought by FP&L, and there is little question that the planning on which FP&L's current monopoly of nuclear facilities is based predates 1972. Therefore, any modification of the cut-off date proposed by Cities must provide, as stated at pages 10-11 of Cities' objections, that the restriction on Cities' ability to develop evidence cannot operate to deprive them of their rights to relief.

A. FP&L's Proposed Cut-off Date Has No Legal Basis

As stated supra, the scope of discovery is extremely broad in antitrust cases. This proviso applies to the time period.

In Caldwell-Clements, Inc. v. McGraw Hill Publishing Corp., 12 FRD 531 (S.D.N.Y. 1952), for example, the Court held that a discovery period that extended over 40 years and predated plaintiff's existence was relevant. It explained, at 536, that:

> Defendant's suggested time limit of 1935 is perhaps based on the fact that plaintiff came into being at about that time. Information antedating plaintiff's existence, however, is relevant in this type of action and can very well be admissible at the trial. Bausch Machine Tool Co. v. Aluminum Co. of America, 2 Cir., 72 F.2d 236, 239, certiorari denied, 293 U.S. 589, 55 S.Ct. 104, 79 L.Ed. 683, made it clear that evidence of transactions occurring long before the injury complained of and of the history of an organization is admissible upon the trial of monopolization cases. 1/

1/ See also Burroughs v. Warner Bros. Pictures, 12 FRD 491 (D.Mass, 1952).

As stated in Quonset Real Estate Corp. v. Paramount Film Dist. Corp., 50 FRD 240 (S.D.N.Y. 1970), liberality is particularly in order where intent is at issue, (e.g., a claim of intent to monopolize) and the allegations cite a course of conduct over a period of many years.

Here, Cities complain, inter alia, that FP&L's present denial of access to nuclear power is part of FP&L's longstanding efforts to (a) refuse or unlawfully limit direct dealings with Cities and (b) simultaneously block Cities' access to economic alternatives to such dealings.

It can no longer be disputed that FP&L's anticompetitive conduct towards municipal systems dates from well prior to FP&L's cut-off date. The Fifth Circuit's recent holding 1/ that FP&L was part of a conspiracy to violate the Sherman Act relied on evidence dating well into the 1950's. Cities did not select 1950 as the cut-off date (for conduct related documents) to be unreasonable. They selected it, of necessity, because of the evidence that FP&L's anticompetitive behavior is rooted at least as deep as that period.

It may be expected that FP&L will defend against Cities' allegations by seeking to portray individual instances of anticompetitive conduct as an isolated and innocent circumstance. Cities require discovery in order to demonstrate that each instance is actually part of a longstanding pattern.

1/ City of Gainesville v. Florida Power and Light Company, 573 F.2d 292 (5th Cir. 1978), cert. denied, November 13, 1978.

Alternatively, FP&L may seek to prove the lawfulness of its conduct by seeking to show that requests for service or assistance have not been continually made upon it.

In Consumers Power, 1/ for example, it was contended a refusal to wheel could not be found in the absence of "formal requests" for wheeling. As the Board held, no formal request need be found where smaller systems understood they would be fruitless. Similarly, Cities require broad discovery to show the long history of anticompetitive dealing that underlies Cities' efforts to deal with FP&L.

Finally, a longer time period is necessary because of the very nature of the utility business. There is a long lead time in planning and constructing facilities and current circumstances may not be adequately comprehended in the absence of necessary history.

To cite an example, in 1958 FP&L conditioned the sale of emergency power to New Smyrna Beach on, among other things, New Smyrna Beach's assurance that it would not install new generation; this condition, of course, facilitated a possible sale of the system. (Petition to Intervene, page 62). In 1965, New Smyrna Beach lost a significant portion of its service territory to FP&L. Id. Until recently, New Smyrna Beach could not achieve a parallel interconnection. 2/ Id. Given the fact that the installation of

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1/ Consumers Power Company (Midland Plant Units 1 and 2), ALAB-452, December 30, 1977, slip opinion, 301-305.

2/ A recent settlement does provide for such interconnection, although it was finally negotiated after a vote by the electorate not to accept an FP&L offer to buy the system.

generation (or failure to do so) can have impacts years in the future, FP&L's restrictions in the 1950's clearly could have impacts on competition to the current day. Failure to allow discovery concerning FP&L's actions from the Company can thus limit Cities' abilities to understand, let alone present to the Board in an evidentiary record, the basis for FP&L's conduct, which on its face appears to be directly violative of antitrust policy. Indeed, Cities find it difficult to comprehend how FP&L could claim discovery should be cut-off on matters that form the basis for its petition to intervene.

B. Cities Will Accept A General 1965 Cut-off Date, If FP&L Agrees Not To Claim Cities Have An Affirmative Burden To Prove Facts Before That Time To Obtain Their Requested Relief Or That It Will Not Raise Defenses To Cities' Claims That Depend Upon Facts Before That Date.

Florida Cities contend that some form of access to FP&L's existing and planned generation is necessary to cure the situation inconsistent with the antitrust laws created and maintained by use of FP&L's nuclear monopoly. FP&L states (Objections, page 8):

> "Section 105c of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2135(c), requires that the Board's findings in a proceeding of this nature relate either to an existing or a prospective situation inconsistent with the antitrust laws which would be maintained or created by activities under the license. */ Whether a situation inconsistent with some provision of the antitrust laws might have existed twenty, thirty or even five years ago is not an issue in this proceeding. When requests reach back more than a quarter of a century, their relevance simply cannot be assumed."

Yet, FP&L also has contended that Florida Cities should have requested access to its nuclear units previously to obtain relief.

See generally, "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," In the Matter of Florida Power & Light Company (St. Lucie Plant Unit No. 2) (St. Lucie Plant Unit No. 1) (Turkey Point Plant Units No. 3 and 4), FPC No. 50-389-A, 50-335-A, 50-250-A, 50-251-A, September 1, 1976. While Florida Cities would agree that if they prove a "situation inconsistent" current facts should apply, obviously if FP&L will defend against relief on grounds that Florida Cities should have sought access to existing plants at an earlier time (as opposed to a defense that there is no situation inconsistent or that such relief is not now necessary), then Florida Cities must be able to show FP&L's policies at that time and the surrounding economic circumstances that would have led them not to seek access.

Similarly, FP&L might claim that to get relief Florida Cities must demonstrate a situation inconsistent before 1965.

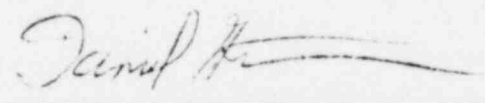
However, if FP&L (a) does not plan to claim affirmatively that Florida Cities have a burden of proving facts before 1965 to obtain relief, (b) agrees not to raise defenses based upon or dependent upon occurrences before 1965 and (c) admits to the facts stated in the Gainesville decision, then, even at considerable risk of limiting their ability to prove a "situation inconsistent," Florida Cities would agree to a general discovery date of 1965. 1/

1/ Of course, certain particular questions such as each plan for nuclear power or control of gas have a clear current impact, but may depend upon actions or proofs before 1965. FP&L appears to concede that any date should be subject to exception upon reasonable showing. FP&L Objections, footnote at page 9.

Florida Cities perceive real advantages to all parties from such stipulation and limitation on discovery. If one were possible, Florida Cities would be prepared to discuss the matter further. However, absent such agreement (or Board ruling), they do not see how at this stage of the proceedings they can take steps to limit their ability to prove their claims, without obtaining the protection that Applicant would not defend based upon facts whose proof lies in the discovery documents Florida Cities would not possess.

WHEREFORE, in view of the foregoing, Cities respectfully request that (a) FP&L's objections to interrogatories be denied as stated herein; and (b) FP&L's Motion for a Protective Order be denied.

Respectfully submitted,



Daniel Guttman

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

December 22, 1978

Law offices of:
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

ORIDA GAS TRANSMISSION COMPANY

APPENDIX A

GENERAL OFFICES • ORLANDO AND ORANGE AVENUES • P.O. BOX 44 • WINTER PARK, FLORIDA • [illegible] • TELEPHONE [illegible]

March 22, 1967

Mr. E. A. Danfro
Pan American Petroleum Corporation
Post Office Box 50879
New Orleans, Louisiana 70150

Dear Mr. Danfro:

This is in response to your inquiry regarding rates of take under which we are willing to accept gas under that certain contract with you and Austral dated November 20, 1964.

Our position is as follows:

(1) Beginning on the date our facilities contemplated in FPC Docket No. CP65-393 are complete and we begin the transportation of gas to Florida Power & Light Company, as provided in said docket, we will be willing to accept volumes of gas at a maximum rate of 123,000 Mcfd under the terms of the November 20, 1964 contract. We are willing to continue to accept gas at said rate for a period of time thereafter (estimated to be approximately twenty-eight months) until certain "under-production" in fields delivering gas to the fulfillment of said contract has been brought into balance. The term "under-production" shall mean the under-produced allowable assigned the producing property involved since July 1, 1966 and which may be legally produced at some future date. The term "balance" shall mean that time when the under-production has been reduced to zero.

(2) We are agreeable that all volumes of gas taken under (1), above, in excess of 64,000 Mcfd, computed on a monthly average basis, will be considered "banked." We are further agreeable that volumes of gas that have been taken since the

beginning of deliveries under said contract, namely July 1, 1966, to the present and volumes that will be taken from the present until the beginning of the time period in (1) in excess of 64,000 Mcfd, also computed on a monthly average basis, will be considered "banked."

(3) After the under-production has been brought into balance, we are willing to accept gas at a minimum rate of 64,000 Mcfd.

(4) It is our understanding that you will maintain deliveries at or above 64,000 Mcfd for so long as prudent operation and deliverability of connected wells will permit, but that you may deliver less than 64,000 Mcfd under said contract. Delivery at rates less than 64,000 Mcfd is agreeable with us to the extent, but only to the extent, that the total accumulated volume of delivery under 64,000 Mcfd is not greater at any point in time than the volume banked in accordance with (2), above.

(5) It is our further understanding that upon our request you will furnish us your most realistic estimate of the volumes that you will make available for our purchase for future annual periods by months to facilitate our long-range dispatching and will fully cooperate as may be reasonable in furnishing information as to your long-range plans relative to connection of additional sources of supply and other like matters having a bearing on the actual volumes of gas that you will make available on a daily basis.

(6) Notwithstanding any of the above items, we are continuing to look to Pan American under its corporate warranty to furnish a total volume of 524,400,000 Mcf of gas under the terms of said contract of November 20, 1964.

(7) Nothing in the foregoing shall be construed as in any way affecting your obligation to deliver the daily quantities established in the contract with Florida Power & Light dated March 12, 1965.

Yours very truly,

FLORIDA GAS TRANSMISSION COMPANY

H. L. Wilhite
Senior Vice President

APPENDIX B
PTS 7/30/75

Ex. ____ (GT-1) P.

220981

MUNICIPALS AND CO-OPERATIVES

Situation Analysis

- Too small to individually add economical generation.
- Rely on oil and gas for fuel.
- Fuel costs rising - supply in jeopardy.
- Wage rates lower; exempt from Federal minimum wage; optionally exempt from Social Security.
- Size limits access to customer service efficiencies afforded by large utilities using automated systems.
- Cannot support planning, project, procurement, nuclear organizations.
- No tax obligations but municipals contribut to city operation costs.
- Low cost financing.
- Legal and procedural limitations on financing (municipals).
- Sunshine laws hamper management actions (municipals).
- Co-Ops have easiest financing, least management restructions.

Florida
CLIPPING SERVICE
P.O. BOX 10278
TAMPA, FLORIDA 33609

Daytona Beach News
5-23,24 54,52

APR-27-76
Editorials

The City Can't Afford To Compromise On FPL Study

THERE ARE REPORTS that Florida Power & Light Company has conducted its own study and has determined it would be feasible for the City of Daytona Beach to take over the distribution of power within the city.

FPL officials naturally couldn't be expected to confirm the reports. But this could explain why FPL representatives have been lobbying city officials to exclude R. W. Beck & Associates from consideration to do a feasibility study.

A screening committee has recommended five firms for consideration and the City Manager's office rated Beck & Associates "best qualified for city purposes."

SOME COMMISSIONERS have indicated they might compromise and vote to select one of the other firms because FPL is adamantly opposed to the Beck firm.

The firm has represented other cities in Florida and has wrangled with FPL and Florida Power Corporation on some occasions.

If the interests of the city's taxpayers are paramount, as they should be, what's wrong with hiring a firm that has a good track record of protecting public interests against powerful utility companies?

THREE OF THE FIVE firms are scheduled for interviews and appear to be especially well qualified.

The Beck firm has made numerous feasibility studies in the public power area during the last five years. Black & Veatch and a third firm, Ford, Bacon & Davis, have made numerous studies, as well, during the last five years.

But Black & Veatch has done work during the last five years for Florida Power Corporation, which has a "mutual aid agreement" with FPL in which both utilities exchange information and otherwise cooperate. Ford, Bacon & Davis didn't indicate in its proposal whether it has made any feasibility studies during the last five years.

THE COST of the proposed study is another important consideration.

The Beck firm has said it could do the study for $60,000 if it gets cooperation from FPL — cooperation that was pledged by utility officials when the city first discussed the possibility of doing a study.

Black & Veatch has estimated the cost could range anywhere from $65,000 up to $150,000. The top figure would be $42,000 more than the city staff has estimated as the maximum the city should spend.

The Ford firm has estimated a cost of $63,000.

SOME WEIGHT should be given to the comments from the City Manager's office in summarizing the qualifications of the firms.

The staff concluded the Ford firm is "very capable" and appears to have the qualifications to "complete satisfactorily a study which would meet our requirements."

Black & Veatch was rated very simply as "an outstanding and well-qualified firm."

But the top rating went to the Beck firm, which the staff said is "supremely qualified in the area of valuation and acquisition studies relating to municipal systems." The staff concluded the firm has "substantial direct experience as it relates to our request" and "for city purposes, they are the best qualified."

When the time comes to hire one of these firms, the City Commission should recognize that FPL is in an adversary position. There should be no compromise.

Daytona Beach Evening News

[illegible]

MEMBER OF THE ASSOCIATED PRESS

[illegible]

Editorials

Why Is FPL Opposing Firm Qualified To Do Study?

THE DAYTONA BEACH City Commission is preparing to make what could be the most important decision affecting the city and its taxpayers for many years to come.

The commission is now screening proposals from consultants who are prepared to make a study to determine whether it's feasible for the city to go into the electrical power distribution business.

Equally important is the expertise needed to assist city officials in negotiating a new franchise with Florida Power & Light Company if the commission decides not to take over the distribution of power in the city.

* * *

COMMISSIONERS and city staff have been lobbied by FPL representatives not to consider one of the consulting firms.

The firm — R. W. Beck and Associates — is eminently qualified to do the study and give the commission the expert assistance it needs to negotiate a good franchise.

The national firm, which has offices in Central Florida, is thoroughly familiar with investor owned and municipal utility operations in Florida.

* * *

THE FIRM has proposed a study which would cost anywhere from [illegible] to [illegible], depending on the degree of cooperation from FPL.

FPL officials have said the utility would cooperate with the city in any study that is to be made. Therefore, the cost should be held to the minimum figure which is half of the [illegible] estimated by the city staff as the maximum cost for the proposed expert study.

The scope of the study as proposed by the firm would include "historical and projected operation of the properties under the terms and conditions of franchise to FPL including rates to customers, return to city government, the effect of the recent Florida Public Service Commission ruling regarding flow through to customers of electric franchise payments, property taxes paid, and other benefits of franchised operations."

* * *

THIS INFORMATION would be essential if the commission decides to [illegible]

Moreover, the firm has proposed [illegible]

the services of its expert consultants to meet with the commission and city staff and FPL representatives for "discussions and negotiations which the city might decide were desirable, including franchise renewal negotiations that the city may want to undertake before deciding whether municipal ownership is feasible or desirable."

* * *

FPL NOW can offer nothing to the city for allowing the utility to continue doing business here.

The utility now deducts property taxes and license and occupational fees from the franchise payments it makes to the city. And the franchise payments are charged to customers within the city.

The commission has a dual obligation when it makes a decision next year. It must determine whether it's feasible for the city to take over power distribution in the city. And if this isn't feasible the commission has the responsibility of negotiating a franchise with FPL that is in the best interests of the city and its taxpayers.

The commission, therefore, needs to hire a consultant prepared to assist city [illegible] both ways. And if FPL is ad[illegible]dly opposed to Beck & Associates, it would suggest that the firm is highly qualified to protect the city's interests and should be considered at the top of the list of prospective consultants.

DAYTONA BEACH
MORNING JOURNAL
TUESDAY, APRIL 27, 1976

FPL Walkout Threat Voiced
Over Consultant Choice

By BOB DESIDERIO
News-Journal Staff Writer

A.F. Beck & Associates, Orlando, and two other consulting firms wishing to make an electric takeover feasibility study for the city will be invited to submit proposals here May 12, the City Commission decided Monday.

The commission voted unanimously to hear the three firms despite a threat by Kermit Coble, lawyer for Florida Power and Light Co., that FPL won't cooperate in the study if R.W. Beck is selected.

"Mr. Beck is fighting us in two or three other places," emphasized Coble adding: "He is well known to be biased."

Coble handed out several unidentified clippings of "articles" concerning the firms participation in a New York power group pushing for public power.

Coble balanced his attack, conceding: "They are a good company, don't misunderstand me, and they are qualified to make [the] study."

However, he immediately quoted from another clipping which allegedly reported that someone felt the firm hadn't come up with a report for an unidentified client. "I hate to say this," added Coble.

"Any of the other 14 (original list of prospective consultants) we could cooperate with and do business (with). We would. This is it! This is your decision and that's all we've got to say," concluded Coble.

"No Mayor," said Commissioner Ruskin Hancock, "I don't think certain people here should make up our minds (about) what we're going to hear."

"We should interview them and if we find them biased we'll throw them out," added Hancock.

Commissioner Bud Davis noted that being invited and being selected are two different things. "If Beck appears to be biased, then you can throw him out."

City Atty. John Chew said disqualification of one of the three firms would force the commission to select a replacement. He noted that state law requires the city to line up three firms with which to negotiate.

Mayor Larry Kelly then asked Charles E. Burkett, executive president of Russell & Axon, "How do you feel about problems encountered in doing the study?"

Burkett, acting in an advisory capacity only, declined to discuss another consultant's integrity. However, he noted: "It's tough for a firm to come here and make a study when you've got a problem to begin with, but I am sure that they've run into this before in many places.

"I think they're all capable organizations, and I am sure that if you sign a contract with them, they're going to perform accordingly."

"I think simple justice requires that we invite them in here and hear their side of it," declared City Manager Russell Smith.

"I told Mr. Coble if he weren't on the other side, I would like to have him on my side," said Kelly, adding goodnaturedly: "I like the best."

The other two firms invited are Black & Veatch, Kansas City, Mo., and Ford, Bacon & Davis, New York City.

The Mayor instructed Smith to include in the invitations a request that the three firms "come prepared to address themselves to franchise negotiations," as an alternative if the study indicates taking over FPL's distribution facilities in the city isn't feasible. The company's 30 year franchise expires Oct. 22, 1977.

The consultant presentations will start at 9 a.m., May 12 in the Police Administration Building Annex.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing FLORIDA CITIES' RESPONSE TO APPLICANTS' OBJECTIONS TO INTERROGATORIES AND MOTION FOR A PROTECTIVE ORDER has been served on the following persons by hand delivery* or depositing copies in the United States mail, first class postage prepaid, on December 22, 1978:

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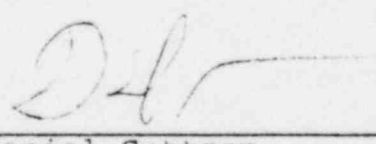
Washington, D.C. 20555



Daniel Guttman

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

SUPPORTING ORDER FOR MODIFICATION OF LICENSE

RELATED TO ERROR IN WESTINGHOUSE ECCS EVALUATION MODEL

Introduction

Westinghouse was informed on March 21, 1978 by one of their licensees that an error had been discovered in their ECCS Evaluation Model. This error was common to both the blowdown and heatup codes. Westinghouse determined by analyses that the fuel rod heat balance equation in the LOCTA IV & SATAN VI codes was in error and that the LOCA analyses previously submitted by their customers were incorrect and predicted peak clad temperatures (PCT's) which were too low. Westinghouse determined that only half of the volumetric heat generation due to metal-water reaction was used in calculating the cladding temperatures. Thus an unreviewed safety question existed since preliminary estimates indicated that some plants would not meet the 2200°F limit of 10 CFR 50.46 at the calculated maximum overall peaking factor limit. Westinghouse notified their customers and NRC on March 23, 1978 while the utilities notified NRC through the regional Offices of Inspection and Enforcement.

Promptly upon notification by Westinghouse, the NRC staff assessed the immediate safety significance of this information. We noted certain points that indicated no immedate action was required to assure safe operation of the plants. First, most plants operate at a peaking factor significantly below the maximum peaking factor used for safety calculations. By making safety computations at factors higher than actual operating levels, the facility has a wide range of flexibility, without the need for hour to hour recomputations of core status. The difference between the actual peaking factors and the maximum calculated peaking factors, for most plants, would offset the penalty resulting from the correction of the error. Second, for most reactors there are

a number of very plant-specific parameters which bear upon aspects of the ECCS performance calculations. Utilities do not generally take credit for these plant-specific parameters preferring to provide a simpler computation which conservatively disregards these individually small credits. Third, the error in the Westinghouse computations relates to the zirconium-water reaction heat source. This is an aspect of Appendix K, which is generally recognized to be very conservative. New experimental data indicate that the methods required by Appendix K appreciably over estimate the heat source. Thus, while the error in fact entails a deviation from a specific requirement of Appendix K, it does not entail a matter of immediate safety significance.

Westinghouse continued to evaluate the impact of the error on previous plant specific LOCA analyses and performed scoping calculations, sensitivity studies and some plant-specific reanalyses. In addition, Westinghouse investigated several modifications to the previously approved methods which if approved by the NRC staff would offset some of the immediate impact of the error on Technical Specification limits and on the plants operating flexibility.

On March 29, 1978, Westinghouse and several of their customers met with members of the NRC staff in Bethesda. Westinghouse described in detail the origin of the error, explained how it affected the LOCA analyses, and how the error had been corrected and characterized its affect on current plant specific analyses. In order to avoid reduction in the overall peaking factor (F_Q), Westinghouse presented a description of three proposed ECCS-LOCA evaluation model modifications which would contribute a compensating reduction of PCT. They were characterized as follows:

1. Revised FLECHT 15 x 15 Heat Transfer Correlation

   This new reflood heat transfer correlation which had been recently developed and submitted by Westinghouse in Reference (1) was proposed as a replacement for the currently approved FLECHT correlation. To determine the benefit, the proposed correlation was incorporated into the LOCTA IV heatup code and was found to result in improved heat transfer during the reflood portion of the LOCA.

2. Revised Zircaloy Emissivity

Based on recent EPRI data (Reference 2), Westinghouse proposed to modify the presently approved equation for Zircaloy cladding emissivity to a constant value of 0.9. The higher emissivity (previously below 0.8) provides increased radiative heat transfer from the hot fuel pin during the steam cooling period of reflood.

3. Post-CHF Heat Transfer

Westinghouse proposed to replace their present post-CHF transition boiling heat transfer correlation with the Dougall-Rohsenow film boiling correlation (Reference 3) which they stated was included in Appendix K to 10 CFR Part 50 as an acceptable post-CHF correlation.

These three model modifications were classified as generic, applicable to all plant analyses. Subsequently, as discussed below, these changes were rejected by the NRC staff as providing generic benefit. However, a portion of the credit proposed by Westinghouse was approved by the NRC staff for certain specific plants, which had provided specific calculations with the new 15 x 15 correlation. During the period March 29 to April 18, 1978, Westinghouse provided us with additional sensitivity analyses and plant specific analysis in which they evaluated the effects of some changes to plant-specific inputs in the LOCA analyses. These were as follows:

1. Assumed Plant Power Level

A reduction of the plant power level assumed in the SATAN VI blowdown analyses from 102% of the Engineered Safeguards Design Power (ESDR) level to 102% of rated power was proposed. Previously, analyses had been performed at approximately 4.5% over the rated power. This change was worth aproximately 0.01 in F_Q, and is refered to as ΔF_{ESDR} in Table 1.

2. COCO Code Input

A modification to the COCO code input (Reference 3) to more realistically model the painted containment walls was proposed. Since the paint on containment walls provides additional resistance to heat loss into the walls, the COCO code calculates an increase in containment back pressure, which results in a

benefit to the calculated peak cladding temperature of 0 to 40°F, during the reflooding transient. The magnitude of the benefit is dependent on the type of plant and the heat transfer properties of the paint, and results in up to 0.03 benefit in F_Q, and is referred to as ΔF_{CP} in Table 1.

3. Initial Fuel Pellet Temperature

A modification of the initial fuel pellet temperature from the design basis to the actual as-built pellet temperatures was proposed. In the present LOCA calculations, Westinghouse has assumed margins in the initial pellet temperature. The margin available is plant-specific and ranges from 28°F to 55°F. Use of the actual pellet temperature rather than the assumed value results in a reduction in pellet temperature (stored energy) at the end of blowdown, as calculated by the SATAN code, of approximately 1/3 of the initial pellet temperature margin. Westinghouse has provided sensitivity analyses which indicate that a 37°F reduction in fuel pellet temperature at end of blowdown is worth approximately 0.1 in F_Q. This is referred to as ΔF_{PT} in Table 1.

4. Accumulator Water Volume Consideration

Westinghouse has evaluated the effect on ECCS performance of reducing the accumulator water volume, and has determined that for those plants for which the downcomer is refilled before the accumulators are emptied, there is a benefit in PCT. The sensitivity studies have indicated that this benefit in F_Q is plant-specific. This is referred to as ΔF_{ACV} in Table 1.

5. Steam Generator Tube Plugging Consideration

In previous analyses, Westinghouse has assumed values of steam generator tube plugging which were greater than the actual plant-specific degree of plugging. Sensitivity analyses submitted in Reference 4 were used to evaluate the benefit available by realistically representing the plant-specific data. For the plants affected, the benefit in PCT ranged from 7 to 66°F which was conservatively worth from 0.007 to 0.66 in F_Q. This is referred to as ΔF_{SG} in Table 1.

Discussion and Evaluation

The information provided by Westinghouse was separated into two categories; the generic evaluation model modifications and the plant-specific sensitivity studies and reanalyses. The NRC staff reviewed the peaking factor limits proposed by Westinghouse to verify their conservatism.

The metal-water reaction heat generation error in the Westinghouse ECCS evaluation model was evaluated by us to determine an appropriate interim penalty. Westinghouse provided two preliminary separate effects calculations which indicated that a maximum penalty of from 0.14 to 0.17 was appropriate to compensate for the model error. The staff conservatively rounded this penalty up to 0.20.(Reference 5)

Westinghouse also proposed several compensating generic changes in their evaluation model to offset any necessary reductions in peaking factor due to the error. These changes were assessed by us as follows:(Reference 5)

1. No credit would be given at this time for the changes in the post-CHF heat transfer correlation and new Zircaloy emissivity data.

2. Partial credit (70%) would be given at this time for the use of the new 15 x 15 FLECHT correlation only for plants which had provided a specific calculation demonstrating that such credit was appropriate.

Based on this review we developed recommended interim peaking factor limits for all the operating plants and decided that any other plant-specific interim factors (benefits) not related to the generic review should be considered separately. In addition, the staff reviewed plant-specific reanalyses for DC Cook Unit Nos. 1 and 2, Zion Unit Nos. 1 and 2 and Turkey Point Unit No. 3 which had corrected the error in metal-water reaction. In these analyses the Dougall-Rohsenow and Zircaloy emissivity credits were not considered, while the new 15 x 15 FLECHT correlation was included. We concluded that these reanalyses could serve as a basis for conservatively determining interim peaking factor limits for these plants.

For most of the operating plants our generic review resulted in a lower allowable peaking factor than Westinghouse had proposed. However, in one case, Westinghouse had proposed more limiting peaking factors in order to prevent clad temperatures at the rupture node from exceeding 2200°F. We concluded that it would be properly conservative to use the minimum of these values.

Based on plant-specific sensitivity studies, performed by Westinghouse, the licensees have submitted requests for interim plant-specific benefits. We reviewed these sensitivity studies and recommended that appropriate credits be accepted. The results of these analyses are shown in Table 1.

We informed each licensee by telephone on April 3, 1978, that they should administratively reduce the plant's peaking factor limit from the limit contained in the Technical Specifications to the interim peaking factor limit contained in the right hand column of Table 1. In those cases where the limit in Table 1 is 2.32, this represents no change from the Technical Specifications limit. The peaking factor limit of 2.32 is generally supported and approved for Westinghouse reactors employing constant axial offset control operating procedures (Reference 6).

For the reactors having an interim peaking factor limit of 2.31, we requested no further justification of the limit. This is because the generic analysis supporting the limit of 2.32 approaches the limit only at beginning of the first cycle. Since the affected reactors have operated past this point, it is clear that the maximum attainable peaking factor will be less than 2.32. While this margin has not been quantified, we are convinced it is substantially greater than the 0.01 for which we are requiring no additional justification from the plants with an interim limit of 2.31.

For the reactors with an interim limit less than 2.31 we requested that the licensee furnish administratively imposed procedures to replace Technical Specifications either:

1. To provide a plant specific constant axial offset control analysis of 18 cases of load following which would ensure that the interim limit would not be exceeded in normal operation of the power plant, or, at its option, if such analysis were unobtainable, inappropriate or insufficient,

2. To institute procedures for axial power distribution monitoring of the interim limit using a system designed for this purpose. If such systems do not exist manual procedures could be used as indicated in our Standard Technical Specifications 3/4 2.6 and ancillary Specifications.

We requested the licensees to confirm by letter that they have adopted the above interim LOCA analyses, interim peaking factor limits and administrative procedures by April 10, 1978, if their reactors were operating, and by April 17, 1978, if the reactors were not operating.

Conclusion

We conclude that when final revised calculations for the facility are submitted using the revised and corrected model, they will demonstrate that with the peaking factors set forth herein, operation will conform to the criteria of 10 CFR 50.46(b). Such revised calculations fully conforming to 10 CFR 50.46 are to be provided for the facility as soon as possible.

As discussed herein, the peaking factor limits specified in the particular Orders or Exemptions issued for the affected facilities, with operating surveillance requirements, as applicable, specified in Orders or Exemptions for particular plants, will assure that the ECCS will conform to the performance requirements of 10 CFR 50.46(b). Accordingly, limits on calculated peak clad temperature, maximum cladding oxidation, maximum hydrogen generation, coolable geometry and long term cooling provide reasonable assurance that the public health and safety will not be endangered.

Date: December 20, 1978

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
631 PARK AVENUE
KING OF PRUSSIA, PENNSYLVANIA 19406

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NOV 7 1978

Docket No. 50-271

Vermont Yankee Nuclear Power Corporation
ATTN: Mr. Robert H. Groce
Licensing Engineer
20 Turnpike Road
Westborough, Massachusetts 01581

Gentlemen:

Subject: Inspection 50-271/78-23

This refers to the inspection conducted by Mr. R. Feil of this office on October 9-13, 1978, at Vermont Yankee Nuclear Power Station, Vernon, Vermont, of activities authorized by NRC License No. DPR-28 and to the discussions of our findings held by Mr. Feil with Mr. W. Conway of your staff at the conclusion of the inspection.

Areas examined during this inspection are described in the Office of Inspection and Enforcement Inspection Report which is enclosed with this letter. Within these areas, the inspection consisted of selective examinations of procedures and representative records, interviews with personnel, and observations by the inspector.

Within the scope of this inspection, no items of noncompliance were observed.

In accordance with Section 2.790 of the NRC's "Rules of Practice," Part 2, Title 10, Code of Federal Regulations, a copy of this letter and the enclosed inspection report will be placed in the NRC's Public Document Room. If this report contains any information that you (or your contractor) believe to be proprietary, it is necessary that you make a written application within 20 days to this office to withhold such information from public disclosure. Any such application must be accompanied by an affidavit executed by the owner of the information, which identifies the document or part sought to be withheld, and which contains a statement of reasons which addresses with specificity the items which will be considered by the Commission as listed in subparagraph (b)(4) of Section 2.790. The information sought to be withheld shall be incorporated as far as possible into a separate part of the affidavit. If we do not hear from you in this regard within the specified period, the report will be placed in the Public Document Room.

No reply to this letter is required; however, should you have any questions concerning this inspection, we will be pleased to discuss them with you.

Sincerely,

Robert T. Carlson, Chief
Reactor Construction and Engineering
Support Branch

Enclosure: Office of Inspection and Enforcement Inspection Report
Number 50-271/78-23

cc w/encl:
W. F. Conway, Plant Superintendent
S. D. Karpyak, Manager, Administrative and Technical Liason
A. Z. Roisman, Natural Resources Defense Council (Without Report)

U.S. NUCLEAR REGULATORY COMMISSION
OFFICE OF INSPECTION AND ENFORCEMENT

Region I

Report No. 50-271/78-23

Docket No. 50-271

License No. DPR-28 Priority - Category C

Licensee: Vermont Yankee Nuclear Power Corporation
20 Turnpike Road
Westborough, Massachusetts 01581

Facility Name: Vermont Yankee Nuclear Power Station

Inspection at: Vernon, Vermont

Inspection conducted: October 9-13, 1978

Inspec ors: R. A. Feil — 11-6-78
R. A. Feil, Reactor Inspector — date signed

_____ — _____ date signed

_____ — _____ date signed

Approved by: for S. D. Ebneter, Acting Chief, Engineering Support Section #1, RC&ES Branch — November 7, 1978 date signed

Inspection Summary:

Inspection on October 9-13, 1978 (Report No. 50-271/78-23)
Areas Inspected: Routine, unannounced inspection by a regional based inspector of unresolved items and facility modifications to LPCI valves; UPS battery replacement, RWCU flow switch and spent fuel rack. This included review of associated procedures and records of installation and testing. The inspection involved 31 inspector hours on site by one NRC regional based inspector.
Results: No items of noncompliance were identified.

DETAILS

1. Persons Contacted

*Mr. W. Conway, Plant Superintendent
*Mr. W. Murphy, Assistant Plant Superintendent
Mr. J. Pelletier, Maintenance Supervisor

The inspector also interviewed other technical personnel during the course of the inspection.

*denotes those present at exit interview

2. Licensee Action on Previous Inspection Findings

(Closed) Unresolved Item (271/78-03-01) Lack of Cognizant Engineer Initials on Drawings. Drawing No. A-21514-C, Revision A, Leveling Foot Assembly and Drawing No. D-20598-D, Revision F, Grid Top Casting, 7 x 10 were verified to have the cognizant engineer's initial placed on the required drawing for the respective revision.

(Closed) Unresolved Item (271/78-03-06) Lack of Alarm Procedure for high temperature in the fuel pool. A separate annunciator window on CRP 9-4 has been established to provide annunciation to control room personnel if there is an increase in fuel pool temperature above the alarm point of 120° F. The addition of the annunciator alarm has been incorporated into the approprite operating procedures.

3. Low Pressure Coolant Injection (LPCI) Valves V 10-25A and B Redundant Automatic Opening Logic

The inspector reviewed the Plant Design Change Request and available records for the installation of redundant automatic open logic for LPCI injection valves V 10-25A and B.

The change involved installation of redundant contacts in the auto open logic for the inboard LPCI injection valves. The change ensures that both valves receive an automatic "open" signal in the event of a LOCA assuming a single failure in either logic chain. The existing relays that provide the redundant automatic open signal for the outboard LPCI Injection valves V 10-27A and B provided the necessary spare contacts to make the change.

The PDCR was reviewed and a determination made that the proposed change did not involve an unreviewed safety question as defined by 10 CFR 50.59(b).

No items of noncompliance were identified.

4. Uninterrupted Power Supply (UPS) Battery Replacement

The inspector reviewed the Engineering Design Change Request (EDCR) and available records for the UPS Battery replacement.

The battery banks had a history of poor specific gravity and cell voltage readings. An overcharge for the batteries, which was proposed by the manufacturer, resulted in excessive terminal post overheating and corrosion. Cleaning all connections resulted in acceptable overcharge tests. The licensee proposed changing to a new design battery to preclude the above problems. In addition to the new cells other equipment was installed: cell spacers, intercell connectors, interstep connectors and flame arrestors.

The EDCR was reviewed and a determination made that the proposed change did not involve an unreviewed safety question as defined by 10 CFR 50.59(b).

No items of noncompliance were identified.

5. Elimination of Reactor Water Clean Up (RWCU) Flow Switch

The inspector reviewed the PDCR for the removal of the RWCU flow switch and replacement with a spool piece. Material certificates, material receipt, welding, NDE and testing records were reviewed.

The modification was necessitated because of recurring leakage problems associated with the low flow switch. Two flow switches were removed and replaced with a welded spool piece. The modification eliminated a personnel safety hazard in the form of high radiation due to leakage associated with the flow switches. RWCU pumps are now tripped on low flow by the RWCU demineralizer flow signal, or if both demineralizers are not functioning and the RWCU bypass valve is closed, the pumps will not operate.

The PDCR was reviewed and a determination made that the proposed changes did not involve an unreviewed safety question as defined by 10 CFR 50.59(b).

No items of noncompliance were identified.

6. Spent Fuel Pool Rack Installation

The inspector reviewed the installation records of the new spent fuel pool racks for Phase 1. Inspection Report 50-271/78-03 covered other aspects of the modification. Records show that the racks were installed in accordance with written procedures. The procedures were completed and then evaluated by the cognizant individual responsible for the installation of the spent fuel racks. The PORC reviewed the completed procedure documentation. No anomalies were found.

No items of noncompliance were identified.

7. Exit Interview

The inspector met with the licensee's representatives at the conclusion of the inspection on October 13, 1978.

The inspector summarized the scope and findings of the inspection. The representatives acknowledged the inspector's findings.