UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of FLORIDA POWER & LIGHT COMPANY (St. Lucie Plant, Unit No. 2)	)	Docket No. 50-389A

RESPONSE OF DEPARTMENT OF JUSTICE TO APPLICANT'S OBJECTIONS TO DISCOVERY REQUESTS AND MOTION FOR A PROTECTIVE ORDER

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Pursuant to the Atomic Safety and Licensing Board's Memorandum and Order dated November 14, 1978, the Department of Justice ("Department") hereby responds to Applicant's Objections to Discovery Requests and Motion for a Protective Order ("Applicant's Objections").

BACKGROUND

On October 31, 1978, Applicant, Florida Power & Light Company ("FP&L"), was served with the First Joint Request of the NRC Regulatory Staff, United States Department of Justice and Intervenors for Interrogatories and for Production of Documents ("Joint Request"). On that same day FP&L and Florida Cities, Intervenors, 1/ served each other with Interrogatories and Document Requests. 2/ Pursuant to this Licensing

1/ "Florida Cities" refers to the Florida Municipal Utilities Association and all of the Cities named as Intervenors in this proceeding.

2/ No discovery was sought from the Department or NRC Staff.

Board's Memorandum and Order of November 14, 1978, as modified, FP&L and Florida Cities filed objections to the discovery requests on December 11, 1978. In accordance with the above cited Memorandum and Order, which required that responses to objections to discovery requests be filed by December 22, 1978, the Department hereby files its response to Applicant's Objections.

APPLICANT'S OBJECTIONS TO THE JOINT REQUESTS

In its December 11, 1978, pleading FP&L made three broad objections to producing certain information requested in the Joint Request and moved for a protective order to limit access to certain information which it claimed is confidential. First, FP&L objected to producing information relating to events occurring prior to 1972, the year in which FP&L first gave consideration to the construction of the St. Lucie No. 2 Plant. Second, FP&L objected to Joint Request No. 58 because it relates to legislative activities which it contended are protected from discovery. Finally, FP&L objected to Joint Request Nos. 79-82 on the grounds that these requests were overbroad, that they sought irrelevant material and would impose a substantial search burden.

In this Response the Department will demonstrate that FP&L's objections should be overruled and its Motion for a Protective Order denied.

I. FP&L'S OBJECTIONS ON THE BASIS THAT THE TIME PERIODS COVERED ARE OVERBROAD AND THAT THE RESPONSES WOULD BE IRRELEVANT AND IMPOSE SUBSTANTIAL SEARCH BURDENS SHOULD BE OVERRULED

Applicant has objected to producing information for time periods prior to 1972 on three grounds: (1) the time period involved is overbroad; (2) the responses would be irrelevant; and (3) a substantial burden would be imposed on FP&L. (Applicants Objections at 3-9). Because the first two objections are interrelated, the Department will discuss both objections together.

A. The Structure of the Industry and Applicant's Conduct Prior to 1972 Are Relevant to this Proceeding and the Requests for Information Pertaining Thereto are Not Overbroad

Initially FP&L urges this Licensing Board to set a discovery cut-off date of January 1, 1972 because 1972 was the year in which FP&L first gave consideration to the construction of the St. Lucie No. 2 Unit. (Applicant's Objections at 3-4). Applicant purports to rely on the statutory language of Section 105c of the Atomic Energy Act, 3/ which does not permit the NRC to conduct a full scale antitrust inquiry, but limits the jurisdiction of the NRC to determining whether the activities under NRC licenses would create or maintain a situation inconsistent with the antitrust laws. FP&L argues that pre-1972 evidence is irrelevant because FP&L could not have even contemplated activities

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3/ 42 U.S.C. 2135(c).

under an NRC license for St. Lucie No. 2. prior to 1972; therefore, according to FP&L, the requisite nexus between the activities under the license and the situation inconsistent with the antitrust laws is absent. FP&L is understandably unable to cite any authority in support of this proposition because all of the relevant authority is to the contrary.

The Appeal Board in In the Matter of Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 568 (1975) stated that in directing the NRC to determine under Section 105c whether activities of an applicant under a license would "maintain" a situation inconsistent with the antitrust laws, Congress assumed that a situation inconsistent with the antitrust laws could exist prior to the commencement of an applicant's licensed activities. Indeed, only by assuming the existence of a situation inconsistent with the antitrust laws that pre-dated the licensed activities is it possible to give meaning to the word "maintain" in Section 105c. Thus, it is necessary to examine FP&L's conduct prior to 1972, the time when FP&L began to engage in licensed activity, to determine if a situation inconsistent with the antitrust laws was in existence that would be "maintained" by the licensed activities.

Furthermore, in each of the three Section 105c cases litigated in the NRC the respective Boards examined conduct of the applicants that predated by many years each applicant's

consideration of constructing the nuclear units which were the subject of the respective proceedings. Thus, evidence dating back to 1960 was relied on by the NRC Appeal Board even though the Applicant did not apply for an NRC license until 1969, In the Matter of Consumers Power Company, (Midland Plant, Units 1 and 2), 6 NRC 892 (1977); evidence dating back to the 1940's was utilized in reviewing an application filed in 1969, In the Matter of Alabama Power Company, (Joseph M. Farley Nuclear Units 1 & 2) 5 NRC 894 (1977); and evidence as early as 1962 was utilized in reviewing applications filed in 1969, 1973 and 1974, In the Matter of the Toledo Edison Company, (Davis-Besse Nuclear Power Station, Units 1,2 & 3, Perry Nuclear Power Plant, Units 1 and 2), 5 NRC 133 (1977). In addition another Licensing Board, in a proceeding that parallels the present one, involving an application filed in 1975 allowed discovery back to January 1, 1965. Second Prehearing Conference Order, In the Matter of Florida Power & Light Company, (South Dade Nuclear Units) (February 23, 1977).

The approach taken by the NRC Boards is consistent with decisions of the federal courts, which have unanimously recognized that in complex antitrust litigation it may be necessary to require a level and breadth of discovery that is substantially greater than in other types of litigation. See, e.g., Banana Service Co. v. United Fruit Co., 15 F.R.D. 106, 108 (D.

Mass. 1953). As pointed out in more detail in Statement of Florida Cities' Objections To Applicant's Interrogatories to Intervenor Florida Cities and Requests for Production of Documents at pp 9-10, the court in Caldwell-Clements, Inc. v. McGraw Hill Publishing Co., 12 F.R.D. 531, 536 (S.D.N.Y. 1952) held that a discovery period dating back 42 years, to a period that predated plaintiff's very existence, was appropriate. Likewise, in Federal Trade Commission v. Cement Institute, 333 U.S. 638 (1948) the Court held that in a case initiated by the FTC in 1937 it was permissible to obtain discovery back to 1902 in order to show the purpose and character of present day transactions even though the combination that was being attacked was not formed until 1929.

In sum, as it is only with the benefit of historical perspective that the present conduct of firms with market power can be meaningfully evaluated, this Board should overrule the Company's objection and allow the discovery dates in the Joint Request to stand.

If this Board should reject any of the proposed discovery dates contained in the Joint Request and instead require a showing of good cause to obtain discovery prior to a date set by the Board, the Department requests that the Board adopt the procedure utilized in In the Matter of Florida Power & Light Company, (South Dade Plant), NRC Docket No. P-636A,

("South Dade") and allow parties three weeks from the date of issuance of the Board's ruling to make the required showing.

B. FP&L Has Failed to Demonstrate That It Would be Burdened If It Were Required To Respond to the Joint Request

FP&L's blanket claim of burdensomeness must also be rejected by this Licensing Board. The standard for evaluating a claim of burdensomeness was set forth by the Appeal Board in In the Matter of Consumers Power Company, (Midland Plant, Units 1 and 2), ALAB-122, 6 AEC 322, 325 n.14 (Midland I) (1973):

> We think that it is the manifest obligation of persons against whom discovery is sought to refrain from asserting a blanket claim of burdensomeness which neither is nor can be substantiated. In the future, a licensing board confronted with an all-encompassing indiscriminate claim of burden will be justified in rejecting the claim in its entirety upon a finding of lack of merit with respect to at least one of the discovery items. Further, the board need not consider whether a response to a particular item would be burdensome unless, with respect to that item, specific reasons for the claim are assigned. (Emphasis supplied).

Initially it should be noted that FP&L has not assigned specific reasons for claiming that it would be burdened by the requests that require the production of information for the time period prior to 1972. Further, it is abundantly clear that FP&L would not be burdened by many of the requests contained in the Joint Request, such as No. 2, which seeks copies of annual reports to stockholders, or Joint Request No. 6, which seeks copies of interoffice telephone directories. 4/

4/ There are many other requests in the Joint Request which clearly can be satisfied without imposing any burden on FP&L. See, for example, Joint Request Nos. 3, 4, 35, 40, 48 and 85.

In addition, FP&L admits that it has already performed a substantial amount of work in partially responding to the South Dade discovery requests. (Applicant's Objections at 4-5). Since many of the requests in the Joint Request are identical in time frame and substance to requests made in the South Dade proceeding it is implausible for FP&L to advance a blanket claim that it would be burdened in responding to the Joint Request. In view of FP&L's failure to supply specific reasons for its burdensomeness objection and given the fact that compliance with many of requests contained in the Joint Request has already been made or can readily be made, the Midland I criteria, which govern such objections, require this Licensing Board to overrule FP&L's objection in its entirety. 5/

II. APPLICANT'S OBJECTION THAT ITS LEGISLATIVE ACTIVITIES ARE PROTECTED FROM DISCOVERY SHOULD BE OVERRULED

The Applicant objects to Joint Request No. 58 on the grounds that it contravenes the Noerr-Pennington doctrine 6/ because it seeks production of documents relating to Applicant's constitutional right to petition legislative

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5/ If FP&L genuinely believes that it would be burdensome for it to comply with the Joint Request, the Department is willing to search FP&L files to cull out responsive documents. FP&L would only need to assist the Department in determining which files should be searched. In order to preserve FP&L's claim(s) of privilege, the Department would agree that FP&L would not be deemed to have waived any such objection by virtue of its having allowed the Department to search its files.

6/ This doctrine is derived from two Supreme Court decisions: United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).

executive, administrative and judicial officials and tribunals. Applicant's attempt to resist discovery of documents requested by Joint Request No. 58 by relying upon the Noerr-Pennington doctrine is without merit and should be rejected by the Board.

A. The Evidence of Legislative Activity Sought By the Joint Request is Not Necessarily Inadmissible

In Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) (Noerr), the Supreme Court held that mere attempts to influence either legislators in the passage of laws or Government executives in the enforcement of laws if engaged in jointly by competitors do not in themselves violate the Sherman Act. In United Mine Workers v. Pennington, 381 U.S. 657 (1965) (Pennington), the Court held that similar joint efforts to influence public officials do not violate the antitrust laws either standing alone or as part of a broader scheme. Neither of these cases dealt with the question at issue here of whether information relating to legislative activities was discoverable or admissible. Indeed, courts have carved out three areas where evidence of legislative activities is itself admissible evidence.

The first area is the "sham" exception recognized in Noerr. Conduct ostensibly directed toward influencing governmental action constitutes a mere "sham" where the overriding purpose is to interfere with the business relationships

of a competitor. Applicant contends that there is no allegation of sham in this case and that discovery of legislative activities should be deferred until a prima facie showing of sham has been made. (Applicant's Objections at 14-15). In the South Dade proceeding, however, the Board indicated that the discovery period is not the appropriate stage in the proceeding to determine if a company's activities fall within this, or indeed any, exception to the rule. "[I]t will not be possible until after discovery for the Board to determine whether the activities in question are entitled to the constitutional protection recognized by the Noerr-Pennington cases, or whether they may fall within sham or other possible exceptions to the doctrine." Second Prehearing Conference Order, In the Matter of Florida Power & Light Company; (South Dade Nuclear Units) (February 23, 1977) at 3-4. (Emphasis added). See also: Dollar Rent a Car System, Inc. v. Hertz Corp., 434 F.Supp 513, (N.D.Cal. 1977); Central States Forwarding Corp. v. B & P Motor Express, 1977-1 Trade Cas.¶ 61,461 (W.D.Pa. 1977); U.S. Dental Institute v. American Ass'n of Orthodentists, 1975 Trade Cas., ¶60,369 (N.D. Ill. 1975).

A second exception to the Noerr-Pennington doctrine are attempts to influence government acting in a proprietary capacity as a buyer or seller of goods or services. Evidence tending to prove the anticompetitive nature of such attempts as contributing to a situation inconsistent with the anti-trust laws are admissible into evidence. In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc. 424 F.

2d 25 (1st Cir. 1970), cert. denied, 400 U.S. 850, the Court held that the defendant's effort to sell its products to public bodies by using anticompetitive practices was not protected activity within the scope of the Noerr-Pennington doctrine. The Court found that such conduct "hardly rose to the dignity of an effort to influence the passage or enforcement of laws," and construed "enforcement of laws" to mean "some significant policy decision in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter." Id. at 32.

This interpretation was adopted in In the Matter of Alabama Power Company, where the Licensing Board, relying on Whitten, held that the Noerr-Pennington doctrine "has little or no applicability when applied to proprietary, or commercial affairs of a governmental body, where the public as customer or supplier is presumed to act in a manner consistent with maximizing competition." Order Granting in Part and Denying in Part Motion to Compel Production, In the Matter of Alabama Power Company, (Joseph M. Farley Nuclear Units 1 & 2) (November 1, 1973), at 2. Similarly, the Licensing Appeal Board has held in another case that as an attempt to lease a muncipal electric system was an effort to influence a government business decision, it was therefore not entitled to protection. In the Matter of Consumers Power Company, (Midland Plants, Units 1 & 2) 6 NRC 892, 1033 n.520 (1977).

The third exception to the Noerr-Pennington doctrine relates to evidence of attempts to influence governmental action that tends to show the purpose and character of other conduct contributing to a situation inconsistent with the antitrust laws. In Pennington the Court stated:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.

381 U.S. at 670 n.3.

Thus, evidence which relates to protected anticompetitive conduct under the Noerr-Pennington doctrine may nontheless be introduced to establish the purpose and character of other non-protected anticompetitive conduct. The case law under Noerr-Pennington is replete with applications of the purpose and character exception. For example, in Ramsey v. United Mine Workers, 65 F. Supp. 388 (E.D. Tenn. 1967), which grew out of precisely the same facts as Pennington and in which a virtually identical argument was presented, the district court specifically noted that evidence of the union's overture to the Secretary of Labor and the Tennessee Valley Authority was "competent" to show the purpose and character

of prior or subsequent conduct. See, e.g., Household Goods Carriers Bureau v. Terrell, 452 F.2d 152, 158-59 (5th Cir. 1971); Hayes v. United Fireworks Mfg. Co., 420 F.2d 836, 840-41 (9th Cir. 1969); Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295, 296-97 n.2 (N.D. Cal. 1971); George Benz and Sons v. Twin City Milk Producers Association, 299 F. Supp. 679, 682-683 (D. Minn. 1969); Hackensack Water Co. v. Village of Nyack, 289 F. Supp. 671, 686, n.2 (S.D.N.Y. 1968); and United States v. Johns Manville Corp., 259 F. Supp. 440, 452-53 (E.D.Pa. 1966).

B. The Information Sought is Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Even if the information sought is not admissible under one of the exceptions delineated above, it is nonetheless discoverable because it could lead to the discovery of admissible evidence. The Commission's Rules defining the scope of discovery provide that information is discoverable "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. § 2.740(b)(1). Neither Noerr nor Pennington suggested that information relating to legislative activities is not discoverable if it could lead to the discovery of admissible evidence. Rather than relating to the discoverability of information, those cases and their progeny simply enlighten as to the admissibility of certain types of information.

The Licensing Board in South Dade recognized that information pertaining to legislative conduct could produce relevant evidence of the purpose and character of the Applicant's activities and could also aid in establishing the appropriate relevant geographic and product markets. As the Licensing Board stated in overruling the Applicant's Noerr-Pennington objections, "the interrogatories objected to on the basis of Noerr-Pennington seem to be designed to lead to the discovery of admissible evidence, even if the legislative conduct thus demonstrated may not be the basis of a finding of a violation of the antitrust laws." Second Prehearing Conference Order, In the Matter of Florida Power and Light Company,(South Dade Nuclear Units) (February 22, 1977) at 3.

C. Production of the Requested Documents Will Not Have Any Significant Chilling Effect on Applicant's First Amendment Rights

The Applicant contends that it should not be required to produce the requested documents because of the possible "chilling effect" such production might have on the exercise of its First Amendment rights arguing that it will be discouraged from engaging in future legislative activities. FP&L is understandably unable to specify the supposedly adverse consequences which it fears will flow from the disclosure of the requested information. In any event,

Noerr and Pennington protect only valid exercises of First Amendment rights of petition. Where there has been abuse or corruption of the administrative, executive, legislative or judicial processes, the First Amendment provides no immunity from antitrust or other legal liability. Thus, in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972), the Supreme Court stressed that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."

Mere discovery of the information sought in the Joint Request would neither punish, enjoin nor otherwise indirectly restrict FP&L's exercising its First Amendment rights. If discovery is granted and the material produced is later sought to be introduced into evidence, FP&L will have adequate opportunity to object to its admissibility on the grounds that the evidence is not probative or is unduly prejudicial. Thus, any chilling effect will arise only if the Licensing Board accepts the challenged documents into eviden e and determines that FP&L's purported political activity was merely a sham or that the documents demonstrate that the purpose or character of other actions was inconsistent with the antitrust laws.

Finally, even if discovery of these political activities would somehow produce a "chilling effect," this

in and of itself would not prohibit discovery or the later admission of this material into evidence. As noted in NAACP v. Alabama, 357 U.S. 499 (1958), an asserted chilling effect upon First Amendment rights must be balanced against the state's interest in having the information revealed. Thus, discovery may be compelled even in the face of a chilling effect if there is a legitimate, justifiable interest that outweighs the potential for chilling the exercise of First Amendments rights.

The chilling effect, if any, on FP&L as a result of being compelled to produce documents requested in the Joint Request will be negligible. Despite FP&L's blanket assertion that discovery will have a chilling effect on its future willingness to speak out and participate in legislative and administrative decision making processes it has not specified how this will result. Certainly, if the information requested establishes that FP&L has engaged in legitimate attempts to influence governmental decisions, that evidence will be inadmissible to establish a situation inconsistent with the antitrust laws. As long as FP&L engages in legitimate exercises of its First Amendment rights its activities will be fully protected and at most, only a minimal chilling effect will result.

The negligible impact upon FP&L is far outweighed by the need for discovery that has been demonstrated by the Department. The requested information may be admissible in the present preceeding under one of the exceptions

discussed above. Even if the information sought is not admissible it may lead to the discovery of admissible evidence. Thus, the information is relevant to and probative of the issues and matters in controversy in this proceeding. Indeed, this information is particularly appropriate in this proceeding because FP&L, in the conduct of its business, has intimate daily non-legislative contact with governmental entities. Since the demonstrated need for the requested material for outweighs the negligible chilling effect that FP&L has demonstrated, FP&L's objection should be overruled.

III. FP&L's OBJECTION TO JOINT REQUEST NOS. 79-82 SHOULD BE OVERRULED

FP&L's objection to Joint Request Nos. 79-82 as being overly broad and extending to subjects which are not relevant to this proceeding should be overruled. These requests are designed to elicit information which may be used to determine if FP&L conspired with or acted jointly with the Florida Gas Transmission Company and/or Amoco Production Company to deny gas supplies necessary for generating electric power to electric utilities in Florida with which FP&L competes. If such a conspiracy were proven, it would be highly probative of a situation inconsistent with the antitrust laws. The fact that FP&L claims that the Joint Request Nos. 79-82 pertain specifically to proceedings pending before administrative and judicial bodies 7/ is

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7/ FP&L has objected to producing certain documents on the ground that those documents relate to proceedings pending before the United States Fifth Circuit Court of Appeals the Federal Energy Regulatory Commission (Applicant's Objections at 25-26).

totally irrelevant. The NRC has its own statutory responsibility to determine independently the existence of a conspiracy inconsistent with the antitrust laws.

Further, the fact that the requested materials relate to pending litigation would strongly suggest that most, if not all, of the requested materials have already been produced in response to discovery requests in the respective proceedings. Therefore, there would be little burden on FP&L to comply with Joint Request Nos. 79-82.

In view of the uncontested relevance to this proceeding of the information being sought by Joint Request Nos. 79-82 and the apparent minimal burden that would be placed on FP&L, the objection should be overruled.

IV. FP&L's MOTION FOR PROTECTIVE ORDER SHOULD BE DENIED AT THIS TIME OR IF GRANTED THE LICENSING BOARD SHOULD MODIFY CERTAIN PROVISIONS OF FP&L's PROPOSED PROTECTIVE ORDER

Along with its objections to the Joint Request, FP&L has moved this Licensing Board to issue a protective order to drastically limit access to documents and information which FP&L alleges is confidential. This motion should be denied because FP&L has not made the requisite showing to justify the issuance of such an order. Furthermore, even if it is assumed that the requisite showing has been made, the protective order proposed by FP&L could unduly burden the other parties to this proceeding, interfere with pretrial preparation, and might impede the Department in the performance of its law enforcement responsibilities.

Rule 2.740(c) of the Commission's Rules of Practice (10 C.F.R. § 2.740(c)) authorize Licensing Boards to take various kinds of action to protect the confidentiality of certain trade secrets, research, development or business information. However, one seeking to have restrictions placed upon the disclosure of information relevant to an issue in adjudication is required to show that: 1) the information sought is the type customarily held in confidence by the originator; 2) "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; 3) the information has in fact been kept in confidence; and 4) it is not found in public sources. In the Mater of Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 416-17 (Wolf Creek) (1976). Once this showing has been made, the Licensing Board, in determining whether to place the requested restrictions on information, must balance the injury to the producing party resulting from unrestricted use of produced materials against the extent to which restrictions on access to information would adversely effect the ability of the discovering party to make meaningful use of such information for the purposes for which its discovery was sought and allowed. In the Matter of Consumers Power Company, (Midland Plant, Units 1 and 2), ALAB-122 6 A.E.C. 322 (1973) (Midland II).

In the present proceeding FP&L has merely made a broad assertion that responses to certain requests would include information which FP&L does not want publicized (Applicant's Objections at 28). However, no specific details are presented in support of those contentions. In effect, this Board is being asked to issue a blanket protective order since FP&L has not limited its request to specific documents or information. It is clear, therefore, that FP&L has not satisfied the requirements for the issuance of a protective order as set forth in Wolf Creek. This request should therefore be rejected.

Nonetheless, even if this Board finds that FP&L has made the requisite showing for the issuance of a protective order, this Board should reject certain provisions of FP&L's proposed protective order (Applicant's Objections, Attachment I). Section 4 of Applicant's proposed protective order sets forth a cumbersome procedure which is to be followed in the event that materials which contain confidential information are to be filed with the Board. Specifically, section 4 would require briefs which refer in any way to documents which fall under the protective order to be handled in the prescribed manner. Thus, a brief which states "FP&L competes with Intervenors for industrial customers" and cites documents which are covered by the protective order in support of that assertion, would have to be processed in accordance with section 4, even though the brief itself, if made public, would in no way disclose

confidential information. Even if there are valid reasons for not publically disclosing the contents of certain of the materials listed in section 4, briefs which may contain short summaries of the content of documents and which do not disclose the details of the information contained therein should not be treated in accordance with section 4. 8/

The Department also objects to section 6 of the proposed protective order, which would require the Department to give advanced notice of seven business days before it could show independent experts documents covered by the protective order. This provision would prevent the Department from supplying one of its independent experts with information covered by the protective order that is needed to conduct an investigation, perform a study, give advice on the impact of certain of FP&L's activities, assist in the taking of depositions or in the preparation of cross examination or even prepare testimony for filing in this case without facing a nine day delay (seven business days plus two weekend days). Such an interference with the relationship between counsel and the independent experts, which is essential to the conduct of complex and highly technical antitrust litigation, would deprive the Department of making meaningful use of the protected information.

8/ The Department is not suggesting that sections of briefs that quote from materials covered by the protective order need not be processed in accordance with section 4. We suggest only that briefs which give a very general outline of the contents of a document should be excluded from section 4.

It is a well recognized practice in the NRC to permit disclosure of information under a protective order to independent expert witnesses. Midland II at 328-29 and cases cited therein. To impose a cumbersome procedure which is likely to have an adverse impact on the ability of the parties to prepare their case in a timely manner could effectively deprive those parties of the needed expert assistance. At most, this Board should require that the names and qualifications of proposed independent experts be submitted in advance to the Board so it can determine whether they are bona fide experts. Thereafter, it should be permissible to supply these experts with all documents covered by the protective order without prior consultation with FP&L or this Board. Parties making a bona fide effort to present evidence to this Board to assist it in reaching the truth should not be hampered with cumbersome notice provisions which would serve no useful purpose and would simply delay the proceeding and hamper their efforts to develop a full record.

Lastly, the Department objects to section 10 of the proposed protective order because it could interfere with legitimate law enforcement activities of the Department. Documents which are produced under a protective order may

well disclose the presence of unlawful activities on the part of FP&L or others. If such information is disclosed it is the responsibility of the Department to ensure that the proper authorities (especially other Department officers) are notified. Department employees can not simply pretend to have not seen obvious evidence of violations of other statutes. Section 10, therefore, is objectionable.

CONCLUSION

For the reasons stated above the Department urges this Licensing Board to overrule all of FP&L's objections to the Joint Request and to deny FP&L's Motion for a Protective Order.

Respectfully submitted,

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December 22, 1978

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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Certificate of Service

I hereby certify that copies of RESPONSE OF DEPARTMENT OF JUSTICE TO APPLICANT'S OBJECTIONS TO DISCOVERY REQUESTS AND MOTION FOR A PROTECTIVE ORDER have been served upon all of the parties listed on the attachment hereto by hand or by deposit in the United States mail, first class or airmail, this 22nd day of December, 1978.

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Department of Justice

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NUCLEAR REGULATORY COMMISSION

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