

NRC PUBLIC DOCUMENT ROOM

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
--	----------------------------	--------------------

JOINT RESPONSE OF THE DEPARTMENT OF JUSTICE
AND THE NUCLEAR REGULATORY COMMISSION STAFF TO
LICENSING BOARD'S FEBRUARY 9, 1979 ORDER

Pursuant to the Atomic Safety and Licensing Board's ("Licensing Board") Memorandum and Order on Discovery ("Memorandum") dated February 9, 1979, in the above-styled proceeding, the Department of Justice ("Department") and the Nuclear Regulatory Commission Staff ("Staff") submits this Joint Response.

In its Memorandum, the Licensing Board ruled upon various objections made by Florida Power & Light Company ("FP&L") to discovery requests contained in the First Joint Request of the NRC Regulatory Staff, United States Department of Justice and Intervenors for Interrogatories and for Production of Documents by Applicant ("First Joint Request"). In addition, the Licensing Board deferred ruling on a number of discovery requests contained in the First Joint Request and invited the requesting parties to submit explanations or modifications of these particular requests by March 2, 1979.^{1/}

^{1/} Intervenors, Florida Cities, are filing a separate response to the Memorandum.

The Licensing Board stated that "[t]he relevance of the information requested in Joint Requests 56 and 76 to the general post-1964 discovery period is not obvious." (Memorandum at 15). The Board then deferred ruling on these requests and gave the requesting parties an opportunity to explain their relevance. Joint Request 56a seeks information, from 1950 to the present, relating to FP&L's policy or position regarding limitations on wholesale customer loads contained in any rate schedule or other agreement with such customers. Joint Request 56b seeks information relating to FP&L's present policy of selling wholesale power. The Department and the Staff contend that Joint Requests 56a and 56b are highly relevant to the issues before this Licensing Board.

With respect to Joint Request 56a there is a substantial amount of evidence indicating that FP&L has, since the early 1950's, imposed anticompetitive terms on the sale of wholesale power. For example, FP&L's RC wholesale schedule for service to rural electric cooperatives, which was effective in the 1950's and early 60's, prohibited FP&L and its cooperative customers from serving retail customers of one another, prohibited the cooperatives from reselling the power purchased from FP&L to municipal electric systems or entities that might resell that power at retail, restricted use of that power to the State of Florida and contained a pricing provision

which provided for price increases tied to the increases in certain commodity indexes and not to the cost of service. Furthermore, the 1959 FP&L wholesale contract with the Lee County Cooperative may have prohibited the cooperative from terminating service from FP&L if the reason for such termination was to obtain power from another electric utility. 2/ It has also been alleged there is also evidence that on numerous occasions between 1952 and 1965 FP&L refused to sell wholesale power to Clewiston unless Clewiston agreed to hold a referendum on the sale of the municipal electric system to FP&L. 3/ Similarly, in 1958 FP&L apparently would not agree to sell wholesale firm power to New Smyrna Beach unless the city agreed not to order any additional generating capacity and to initiate legislation that would make it easier for FP&L to acquire that system. 4/

As can be readily seen, restrictions on the sale of wholesale power which have been imposed by FP&L are probative of whether FP&L possesses and has misused its

2/ See wholesale contract between FP&L and Lee County Cooperative dated May 1, 1959.

3/ See Testimony of Mr. Dan McCarthy, FPC Docket E-7210

4/ See September 25, 1958 document on New Smyrna Beach Electrical System. There may be other instances when FP&L has conditioned the sale of wholesale power on anticompetitive terms. Without complete discovery on this matter it will be impossible to identify such instances.

market power. Since the type of information being sought by Joint Request 56a is of vital importance to the contested issues in this proceeding, discovery dating back to 1950 is clearly appropriate. See Memorandum at 15.

Joint Request 56b, seeks information relating to FP&L's present policy on wholesale sales. Today, FP&L appears to have adopted the position that it will not sell competitively priced wholesale firm power to any system that is not presently a customer. 5/ Since FP&L has had a long history of refusing to sell such power to requesting systems 6/ the present position is tantamount to a continuation of FP&L's refusals to deal. Since such conduct by a firm which possesses market power is highly relevant to the issues in this proceeding, Joint Request 56b is clearly appropriate.

Joint Request 76 seeks information relating to FP&L's post 1950 policy and position regarding establishing points of delivery for the sale of wholesale, emergency or other bulk power electric service. Establishing a delivery point is the first, and essential step in initiating an electrical tie between two systems. In the absence of a delivery point

5/ See Florida Power & Light Co., FERC Docket No. 78-19.

6/ It has been alleged and evidence in other proceedings involving FP&L strongly suggests that FP&L has, in the past, refused to sell wholesale firm power to Clewiston, Homestead, Starke, Winter Garden, Vero Beach, Ft. Pierce, and New Smyrna Beach. See, e.g., Florida Power & Light Co., FERC Docket No. 78-19.

there would be no interconnection and it would be physically impossible for FP&L to deal with the other system. Thus, if FP&L has refused to establish delivery points it has effectively refused to engage in any electric power transactions with the entity that requested the establishment of such a point. Similarly, if FP&L has attached conditions to establishing of delivery points, these conditions may well prevent or inhibit the other entity from competing with FP&L.

The information sought by Joint Request 76 is relevant for the further reason that FP&L has sufficient bargaining power to insist on high voltage interconnections that might be much more expensive to install than the installation of a lower voltage interconnections. Conversely, FP&L has sufficient bargaining power to refuse arbitrarily to interconnect at a higher voltage than desired by a small utility that wishes to have a low voltage interconnection in order to minimize transmission costs.

Joint Request 76 also seeks information as to whether FP&L may have insisted on limiting the number of delivery points at which it was willing to interconnect with small utilities. Such an abuse of market power by FP&L might have unnecessarily required smaller utilities to build expensive transmission facilities. Conversely, in order to increase the cost of power to its wholesale customers, FP&L may have needlessly required the use of multiple delivery points

when one delivery point was adequate. Since either of the above situations would be highly probative of whether or not a situation inconsistent with the antitrust laws exists in Florida, the information sought by Joint Request 76 is clearly relevant to the issues in this proceeding.

Finally, the Licensing Board has invited the parties to comment upon Joint Requests 79-82. As required by the Licensing Board, the Staff, the Department and the Applicant have discussed these items. All three parties accept the principles set forth on pages 32-35 of the Memorandum on Discovery.

Applicant has authorized the undersigned to state that it is prepared to withdraw its objections to items 79-82 of the Joint Request on the understanding that the Staff and the Department share its view that while matters which are relevant to issues in this proceeding should not be excluded from discovery in this proceeding simply because they also relate to issues pending before another forum, matters not otherwise relevant to issues in this proceeding should not be subject to discovery in this proceeding merely because they relate to issues arising under the Natural Gas Act. These three parties also share the view that discovery in this proceeding should not be undertaken for the principal

purpose of obtaining material to be used in another forum. In view of this agreement, FP&L's objection to Joint Requests 79-82 should be considered as being withdrawn.

For the reasons stated above, the Department and the Staff urge this Licensing Board to overrule all objections to Joint Request 56, 76.

Respectfully submitted,

Melvin G. Berger *me*
Melvin G. Berger

Mildred L. Calhoun
Mildred L. Calhoun

Attorneys, Energy Section
Antitrust Division
Department of Justice

Lee Scott Dewey
Lee Scott Dewey
Attorney
Nuclear Regulatory Commission

Frederic D. Chananía *me*
Frederic D. Chananía
Attorney
Nuclear Regulatory Commission

March 2, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Certificate of Service

I hereby certify that copies of JOINT RESPONSE OF THE DEPARTMENT OF JUSTICE AND THE NUCLEAR REGULATORY COMMISSION STAFF TO LICENSING BOARD'S FEBRUARY 9, 1979 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 2nd day of March, 1979.

Mildred L. Calhoun
Mildred L. Calhoun
Attorney
Department of Justice
Antitrust Division

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY)
(St. Lucie Plant, Unit No. 2))

Docket No. 50-389A

Ivan W. Smith, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Tracy Danese, Esq.
Vice President for Public
Affairs
Florida Power & Light Co.
Miami, Florida 33101

Valentine B. Deale
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

John E. Mathews, Jr. Esq.
Jack W. Shaw, Jr., Esq.
Mathews, Osborne, Ehrich,
McNatt, Gobelman & Cobb
1500 American Heritage Life
Building
Jacksonville, Florida 32202

Robert M. Lazo, Esq.
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert E. Bathen
R. W. Beck & Associates
Post Office Box 6817
Orlando, Florida 32803

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

Dr. John W. Wilson
Wilson & Associates
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Joseph Rutberg, Esq.
Lee Scott Dewey, Esq.
Frederick D. Chanania, Esq.
David J. Evans, Esq.
Office of Executive Legal
Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel M. Gribbon, Esq.
Herbert Dym, Esq.
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20036

J.A. Bouknight, Jr., Esq.
E. Gregory Baines, Esq.
Lowenstein, Neuman, Reis
& Axelrad
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Robert A. Jablon, Esq.
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

Jerome Saltzman
Chief, Antitrust & Indemnity
Group
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555