UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

MEMORANDUM AND ORDER ON DISCOVERY

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MEMORANDUM AND ORDER ON DISCOVERY

The Board has before it the parties' discovery requests, motions and related papers.[1/] All adversary

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1/ These papers are: (1) First Joint Request of the NRC's Regulatory Staff, United States Department of Justice and Intervenors For Interrogatories and for Production of Documents by Applicant dated October 31, 1978 ("Joint Request"); (2) Florida Cities' Initial Interrogatories and Request for Production of Documents by Applicant dated October 31, 1978 ("Florida Cities' Request"); (3) Applicant's Interrogatories to Intervenor Florida Cities and Requests for Production of Documents dated October 31, 1978; (4) Memorandum of Understanding dated December 11, 1978 by all parties to clarify discovery requests ("Memorandum of Understanding"); (5) Applicant's Objections to Discovery Requests and Motion for a Protective Order dated December 11, 1978 ("Applicant's Objections" or "Applicant's Motion"); (6) Statement of Florida Cities' Objections to Applicant's Interrogatories to Intervenor Florida Cities and Requests for Production of Documents dated December 11, 1978 ("Florida Cities' Objections"); (7) NRC Staff's Response to Applicant's Objections to Discovery Requests and Motion for a Protective Order dated December 22, 1978 ("Staff's Response"); (8) Response of Department of Justice to Applicant's Objections to Discovery Requests and Motion for a Protective Order dated December 22, 1978 (Department's Response); and (9) Florida Cities' Response to Applicant's Objections to Interrogatories and Motion for a Protective Order dated December 22, 1978 ("Florida Cities' Response").

parties seek discovery of the Applicant, Florida Power and Light Company. The Applicant objects in part and seeks a protective order. Applicant does not now request discovery of the NRC Staff nor the Department of Justice, but has filed discovery requests to the Intervenor Florida Cities to which Florida Cities objects in part.

I. APPLICANT'S OBJECTIONS AND MOTION FOR PROTECTIVE ORDER

Applicant objects to (a) the time period covered by the requests; (b) discovery requests concerning its legislative activities, raising a Noerr-Pennington doctrine objection to these requests; and (c) to requests which it asserts would impose substantial and unreasonable search burdens. In addition the Applicant requests a protective order pertaining to the use of confidential and proprietary information or trade secrets.

A. Relevant Time Period For General Discovery

Applicant objects in general to requests that seek information for time periods prior to January 1, 1972 because 1972 is the year that Florida Power and Light Company first gave consideration to the St. Lucie Unit No. 2 plant. Applicant would not bar all requests for earlier

data but would require that each such request be made by separate motion demonstrating relevance and good cause. Applicant's Objections, p.3.

Even though Section 105(c) of the Atomic Energy Act requires a determination as to whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws, Applicant argues, as we understand it, that a situation existing even a short time prior to 1972 would be irrelevant. Applicant's Objections, p.6.

Applicant's reasoning for urging a 1972 cutoff date is faulty on its face. Its nomination for the relevant period would not be realistic unless the antitrust situation under analysis would be one that sprang full blown into existence without antecedence in 1972. In the Wolf Creek antitrust proceeding the Appeal Board, in discussing the relationship between the alleged "situation inconsistent" and the activities under the proposed license, stated the obvious when it noted that "maintain" under Section 105(c) may refer to a preexisting situation.[2/] While here the Applicant is referring to the year the facility was first considered, not licensed, the reasoning is the same. The relevant

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2/ In the Matter of Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 568, 569 (1975).

period for discovery must be determined by the circumstances of the alleged situation inconsistent with the antitrust laws, not the planning of the nuclear facility.

The Board believes that the Applicant presents a better argument to preserve the January 1, 1965 date established by the Board in the South Dade proceeding.[3/] Many items in the Joint Request and the Cities' Request predate the 1965 cutoff date. In our order below we also impose a version of the 1965 cutoff date.

In their Joint Request, the parties adverse to Applicant have selected January 1, 1965 as their general cutoff date for documents unless an earlier date is specified. Joint Request, p.6. The Staff, in defending the Joint Request, discusses why those requests demanding information from before 1965 are appropriate. This is a separate consideration which we take up later. In connection with these arguments, and in challenging Applicant's 1972 cutoff proposal, the Staff argues that, although it voluntarily employed a general cutoff date of 1965, this Board is without authority to impose this date or any date upon the parties. e.g., Staff Response, pp.15, 16.

3/ Florida Power and Light Company (South Dade Nuclear Units) Docket No. P-636A, Second Prehearing Conference Order dated February 22, 1977. The Board in the South Date proceeding also provided that information could be discovered from prior to the 1965 cutoff date if it relates substantially to events or situations after that date.

The Staff argues that under the Commission's discovery rules, 10 CFR §2.740(b)(1), the standard for discovery is any matter not privileged which is relevant to the subject matter involved in the proceeding. The Staff argues that these are broad and liberal discovery rules as are the Federal Rules of Civil Procedure, Rule 26(b), upon which the Commission's Rule is modeled. The Staff states further that there are no Commission decisions limiting the definition of "relevancy" to a time period and that, when relevancy has been shown, discovery must follow. The Staff further points out that in accordance with §2.740(b), any limitation by the presiding officer must be in accordance with that section. Staff Response, pp. 2-5.

We agree with almost all of the Staff's arguments but not its conclusion. Indeed Commission's discovery rules are liberal. The basic test for limiting discovery is one of relevancy to the subject matter involved in the proceeding whether it be admissible at the hearing or not. We agree that we are without authority to ignore the Commission's discovery regulations if, for example as the Staff suggests, the Manual For Complex Litigation would seem to lead us to do so. Staff Response, p.16.

The Staff argues that the imposition of a cutoff date would improperly shift to the party seeking discovery some burden it did not already carry. Apparently this would be a demonstration of relevancy. Staff Response, e.g., p.15. The Staff believes that a cutoff date would improperly relieve the party opposing discovery of a burden imposed upon it by the Commission's discovery rules, apparently the need to demonstrate an unjustified and burdensome search. Id. These two considerations are mismatched; they don't meet. The Commission's rules require that, at the threshhold, discovery requests be relevant to the subject matter of the proceeding.[4/] The responsibility to seek a protective order does not arise unless relevancy is shown.

It is possible that the Staff does not fully appreciate why discovery cutoff dates are set. The Board in South Dade could not and did not impose a cutoff date for the purpose of adding a procedural time limitation to §2.740 nor does this Board in our ruling below. The cutoff date is for the purpose of making a preliminary ruling about relevancy for discovery. This authority is not challenged by any party. The "cutoff" date is a misnomer. It doesn't actually cut off

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4/ This includes information reasonably calculated to lead to the discovery of admissible evidence. 10 CFR §2.740 (b)(1).

discovery. It is only a date after which, in the dimension of time, relevancy may be assumed for discovery purposes. Requests for information from before that date must show that the information requested is relevant in time to the situation to be created or maintained by the licensed activities. If the information sought is relevant, and not otherwise barred, it may be discovered no matter how old upon a reasonable showing. This is entirely consistent with §2.740(b) and Rule 26(b) which in turn are consistent with the Manual For Complex Litigation, Part I Section 4.30.

With respect to the question of a cutoff date for discovery and those Joint Requests which predate 1972, the Department of Justice, opposing a cutoff date, reminds us that "... [I]t is only with the benefit of historical significance that the present conduct of firms with market power can be meaningfully evaluated...." The Department cites cases demonstrating that the level and breadth of discovery in antitrust cases exceeds that required in other types of litigation and cases where evidence predated litigation by as much as 42 years.[5/] Department's Response 5-7. The Department requests an opportunity to show good cause to discover data from prior to any cutoff date established by the Board.

5/ Banana Service Co. v. United Fruit Co., 15 F.R.D. 106, 108 (D. Mass. 1953). Federal Trade Commission v. Cement Institute 333 U.S. 638 (1948). Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 12 F.R.D. 531, 536 (S.D.N.Y. 1952). These cases are also cited by Florida Cities.

In its response Florida Cities argues against Florida Power and Light Company's proposed 1972 cutoff date (p. 59) but offers to accept a general 1965 cutoff date if an agreement can be reached wherein (a) Applicant 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 set forth in City of Gainesville v. Florida Power & Light Company, 573 F.2d 292 (5th Cir. 1978), cert. denied, ____ U.S. _____, 47 U.S.L.W. 3329 (November 14, 1978).

The parties adverse to Applicant allege that the Gainesville case, involving allegations of a conspiracy to allocate markets, has important relevance to the issues in our proceeding.

The Board believes that it is very unlikely that the Applicant will agree to all three of Florida Cities conditions, particularly the one involving Gainesville. While the parties are encouraged to agree wherever possible we will not interrupt this proceeding for that particular purpose.

However Florida Cities makes an important point. In the trial of this litigation the parties relying upon evidence, either defensively or in their respective cases in chief, which predates the 1965 cutoff date, must be prepared

to allow the other parties to follow the evidentiary trail. Responses to discovery requests should be made with this in mind.

The Board rules that January 1, 1965 shall be the general cutoff date for discovery. We have selected this date for several reasons. It is relatively efficient. It was used in the South Dade discovery, and, as the Applicant observes, much work has already been invested in file searches under a 1965 cutoff. Applicant's Objections, pp. 5,6.

1965 is approximately 10 years prior to the beginning of this litigation, bearing in mind that Florida Cities attempted to include St. Lucie-2 in its South Dade intervention. Ten years appears to have been successfully employed as a general time period limitation in other antitrust litigations. The Manual for Complex Litigation, Part I, Sec. 4.30, cited by Applicant in support of its position, comments upon the ten-year cutoff period used by Judge Holtzoff in United States v. Maryland and Virginia Milk Producers Association, 20 F.R.D. 441 (D.D.C. 1957).

This was an injunction case which, as here, involved allegations of restraint of trade and attempts to monopolize.[6/]

Other cases cited by Applicant are consistent with a ten-year discovery period. In Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 30 F.R.D. 156 (S.D.N.Y. 1958) the Court imposed an absolute ten-year discovery limitation while in United States v. Grinnell, 30 F.R.D. 358 (D.R.I. 1962) a ten-year period for general discovery was deemed adequate.

Another factor we have considered in extablishing a 1965 cutoff date instead of a later one as urged by Applicant is that the Court of Appeals in Gainesville referred frequently to episodes occurring in 1965 (573 F.2d at 295, 299, 301) as well as to incidents transpiring before that

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6/ Judge Holtzoff's reasoning cited by the Manual for Complex Litigation is particularly relevant to the proceeding before us where the Judge noted: "... one device (to shorten these proceedings) is to reduce the period to be covered by the evidence to a reasonable length. Bearing in mind that the ultimate question in a civil suit for an injunction is whether at the time of the trial acts are being committed or threatened they should be enjoined for the future." 20 F.R.D. at 443. In this proceeding, unlike a private action for damages, we must look at the situation which exists at the time of licensing and is likely to exist in the future even though we refer to historical information to understand the situation.

date. e.g., 573 F.2d. at 297. Finally, it must be noted that the Board, in ruling on a relevant period for discovery, is called upon to determine this controversy at this point without much information; certainly we know far less about the case than the parties do. We must therefore rely somewhat upon our subjective judgment as to an appropriate cutoff date. January 1, 1965 seems about right. This, however, brings to the fore the concern raised by the Staff, that is, the Board, in setting a discovery cutoff date, may thereby be setting a limit on the presentation of evidence at the hearing. Staff Response p. 16. This is not our intent. While it may be desirable to set time periods for some purposes for the hearing, this will not be determined until a later stage of the proceeding.[7/]

7/ Even though the Court in Austin Theatre, supra set a narrow time period for discovery it recognized that proof would not be limited to that period. 30 F.R.D. 157.

B. Specific Discovery Requests Pre-dating 1965

In ruling upon discovery requests predating 1965, the Board has been liberal, consistent with the Commission's discovery rules and the broad requirements of antitrust litigation.[8/] The standard is that there be a reasonable possibility of relevancy - not a showing of relevancy plus good cause. Certain requests would be obviously appropriate, for example where an agreement entered into prior to 1965 extends to a period after 1965. Not so obvious, but still appropriate, would be events which occurred before 1965 but had effect after that period.

Recognizing that the forces that shape an industry may continue for decades, we have been particularly liberal in granting pre-1965 discovery of information pertaining to the basic structure of the industry in the relevant market. This also is consistent with the example cited by Applicant in the Manual For Complex Litigation, Part I., Sec. 4.30. The Court in Maryland and Virginia Milk Producers, supra, stressing the need for a short discovery period, nevertheless permitted "a much longer time" than ten years for discovery

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8/ "It is well known that the preparation and proof of anti-trust cases requires the study and investigation of a multitude of facts and documents." Banana Service Co. 15 F.R.D. at 108.

where the allegation concerned acquisitions challenged under Section 7 of the Clayton Act.[9/]

In Grinnell, supra, the Court permitted an exception to the ten-years' discovery period to permit discovery of an agreement between competitors entered into 55 years before. 30 F.R.D. 358,360. And in the Gainesville, decision, supra the Circuit Court began its analysis with the situation as it existed during World War II. 573 F. 2d 294.

Below as we have ruled upon the discovery request challenges based upon time period, we have denied the objection where, on the face of the request, the relevancy to the post-1964 period is probable. Where relevance is not clear we have deferred ruling for further explanation. Where data are easily produced, such as the annual reports requested in Joint Request No. 2, we have leaned toward denying the objection. This is because there is no inherent requirement for a cutoff date in discovery.

9/ 20 F.R.D., 443. The length of the "much longer time" is not revealed in the reported decision.

1. Joint Request Predating 1965

Joint Requests numbered 24, 25, 29, 30, 33, 41, 56 and 76 seek information from as early as 1950. Joint Requests numbered 2, 8, 26 and 48 go back as far as 1955. Joint Requests numbered 12 and 39 are as early as 1960. The Applicant objects to each of these Requests solely on the basis of remoteness in time to the relevant period.

Joint Requests 2, 8, 12, 26, 39 and 48 request information from 1955 or 1960. They seem to be reasonably designed to lead to the discovery of admissible evidence and, for this reason, the objections are denied. However, the Board does not understand the meaning of the phrase, "Where the response to (b) is affirmative," in Joint Request 48(c). Since Applicant has objected to Joint Request 48 solely on the basis of time relevance, apparently this request is clear to the parties. Applicant may request a clarification if it is required.

Joint Requests 24, 25, and 33 request information back to 1950. For the purpose of keeping the scope of the proceeding reasonably bounded, the Board will grant these requests only back to 1955. For the same reason the Board will grant Joint Request 41 only for information created since January 1, 1960. However the parties seeking discovery may file an explanation as to why the information sought in Joint Request 41 prior to 1960 is warranted.

Joint Requests 29 and 30 seek information since 1950 concerning territorial allocation agreements and acquisitions. Because of the obvious importance of this information to the structure of the industry in the relevant market, the Board grants the request without curtailment, i.e., the information must be produced from 1950.

The relevance of the information requested in Joint Requests 56 and 76 to the general post-1964 discovery period is not obvious. Therefore the Board defers ruling upon Joint Requests 56 and 76 until the parties seeking discovery file further information explaining the relevance of these requests.

2. Florida Cities' Requests Predating 1965

Cities' Requests numbered 5, 6, 12, 16, 17 and 20 extend back to 1950. Cities' Requests numbered 9, 10, 14, 21, 24, 31 and 40 go back to 1955. Cities Requests 8, 11(a), 22, 39 and 42 go back to 1960. Florida Cities' Requests 14, 17, 20A, 21 and 24 also pre-date 1965 but are objected to by the Applicant on other bases, and we rule upon those separately below.

Florida Cities' Requests 9, 10, 22 and 31 request information from 1955 or 1960. They seem reasonably capable of leading to the discovery of admissible evidence

and the requests are granted as stated. Florida Cities' Request 11.a. requests all information prior to 1960 concerning the development of nuclear generating capacity in Florida. The request should be bounded. Therefore the Board grants the request but it shall be limited to information created since 1955.

Florida Cities' Requests 5 and 6 request information dating back to 1950, but, to limit the scope of the proceeding, the Board grants the requests for only since 1955. However Cities' Requests 12 and 16 which also request information since 1950 are granted as stated because the requested information pertains to allegations concerning the horizontal division of markets.

The Board defers ruling on Cities' Requests 8, 39, 40 and 42 until Florida Cities files further justification.

C. Discovery of Legislative Activities

Applicant objects to Joint Request 58 and Cities' Requests 14, 20A, 21(e), 21(f), 29(h) and 34 which refer to Applicant's legislative activities. Applicant asserts that, under Eastern Railroad Pres. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965), CP&L's activities designed to influence legislation cannot be the basis for a finding of an inconsistency with the antitrust laws. These cases are the foundation for the legal principle referred to as the Noerr-Pennington doctrine. According to Applicant, under the doctrine, the material requested cannot be relevant nor even reasonably calculated to lead to the discovery of admissible evidence and is therefore immune from discovery.

Similar requests, objections and arguments on the same issues were before the Board in South Dade. The Applicant also presents an argument concerning the "chilling effect" on the exercise of First Amendment rights which could flow from permitting discovery of its legislative activities, and cites new case law concerning the status of corporations under the First Amendment. Having considered the new

arguments raised by Applicants, and having evaluated the entire First Amendment issue, this Board, as did the Board in South Dade, concludes that there is no absolute immunity from discovery bestowed upon FP&L's legislative activities by the Noerr-Pennington doctrine.

No party denies Applicant's argument that Noerr-Pennington will operate to immunize those legitimately petitioning the government, or exercising other First Amendment rights, from liability under the antitrust laws, even where the challenged activities were conducted for purposes condemned by the antitrust laws. This was the holding in Noerr and restated in Pennington.[10/]

Applicant touches upon the pertinent considerations in its brief in support of its objections, but its analysis is too simple; no liability, therefore no relevance, therefore no potential evidence, therefore no discovery. Applicant's Objections, p. 11. As noted above, under Rule 26(b) and specifically under the NRC discovery rules, "It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 CFR §2.740(b)(1). The challenged discovery

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10/ See also California Transport v. Trucking Unlimited, 404 U.S. 508, 510-11.(1972).

requests are, in general, designed to perform at least this minimum function. The Noerr-Pennington cases go to the substantive protection of the First Amendment; nothing in them immunizes litigants from discovery. For this reason alone appropriate discovery into Applicant's legislative activities must be permitted.

But the parties adverse to Applicant go much farther. They point out that the information sought to be discovered may well be directly admissible as evidence, despite the undisputed Noerr-Pennington protections. We agree.

In Pennington, the Court stated that even where the conduct (to eliminate competition) was not illegal because of the First Amendment:

> 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. [Citations omitted]"

381 U.S. at 670, n.3.

Other cases recognize exceptions to the Noerr-Pennington doctrine. Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971)

cert. denied. 404 U.S. 1047 (1972) involved a situation where filing of false information with a State agency was held not to be an actual attempt to influence government policy. The Court stated:

> Basic to Noerr is a belief that regulation of competition by the political process is legitimate and not proscribed by the Sherman Act, an enactment which is itself a political decision. For the political process to be effective there must be freedom of access, regardless of motive, to ensure the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." [Citations omitted] Where these political considerations are absent the Noerr doctrine is inapplicable. [Citation omitted] The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens. We think that the doctrine should not be extended unless the factors upon which Noerr rested are present and require the same result.

438 F.2d at 1296, 1297.

In Sacramento Coca-Cola Bot. Co. v. Chauffeurs, etc. Loc. 150, 440 F.2d. 1096 (9th Cir. 1971) the Court refused to extend Noerr-Pennington to a type of communication between the people and the government where the communication includes threats and other coercive measures.

Another form of exception to Noerr-Pennington was recognized in George R. Whitten Jr. Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33, 34 (First Cir. 1970) where the immunity did not extend to efforts to influence public officials where the government was functioning in its proprietary capacity as a prospective purchaser in a commercial transaction.

The Noerr case itself recognized that "sham" efforts to influence government, (meaning asserted efforts which were not really efforts, compared to real efforts employing sham methods), would not be protected. The Court stated:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here.

365 U.S. 144

The Court reaffirmed the "mere sham" exception in administrative and judicial processes in Otter Tail Power Co. v. United States, 410 U.S. 365, 380 (1973) and 417 U.S. 901 (1974).

The foregoing cases establish beyond serious dispute that legislative activities are at least discoverable, and may fall within one or more exceptions to Noerr-Pennington.

Applicant begrudgingly recognizes this, at least with respect to the "sham" exception, but states that there has been no allegation of "sham" and that its adversaries must first make a prima facie showing that a "sham" exception may exist. Applicant's Objections, pp. 14, 15. We think that, at the discovery phase, Applicant has improperly shifted the burden. We don't know yet how or if the Applicant will assert the Noerr-Pennington doctrine at the hearing or whether any exception will apply. The parties cannot produce prima facie evidence of a sham exception, or proprietory function exception, or other exception until after discovery, which we must permit where appropriate.

The foregoing cases deal with exceptions to Noerr-Pennington, not exceptions to the First Amendment. Applicant asserts that permitting discovery in this case may have a "chilling effect" in its willingness to participate in legislative and administrative decision-making processes. Applicant's Objections, pp. 11-12. This is an important point worthy of careful consideration. In support, Applicant cites a line of cases where discovery itself may be the instrumentality in denying First Amendment rights or in defeating a strong public interest in protecting confidential statements:

> The prospect of such a chilling effect upon the exercise of constitutionally protected rights has been sufficient reason to deny discovery and disclosure of records in other areas of law. See NAACP v. Alabama, 357 U.S. 449, 460-62 (1958) (Supreme Court denies Alabama's efforts to obtain NAACP's membership lists, as disclosure would abridge the members' First Amendment rights); Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) (although there is no absolute privilege for journalists, their First Amendment rights are entitled to protection and disclosure of confidential news source will not be ordered where such matters are not at the heart of the moving party's case); cf. Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249, op. adhered to, 51 F.R.D. 187 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973) (minutes and reports of defendant hospital's staff meetings concerning death of plaintiff's decedent not subject to discovery in malpractice action without showing of exceptional necessity, in view of strong public interest in encouraging such meetings, which are designed to evaluate clinical work and improve care).

Applicant's Objections, p. 12.

In each of the "chilling effect" cases a balancing was made, just as we must do here. In NAACP the balance was between the State's need for the information, which was found to be insufficient, compared with the threat to the members' rights to associate freely and other Constitutionally protected activities. 357 U.S. 460-462

compared with 357 U.S. 463-465. In Baker there was a balancing of public policy in favor of the free availability of news compared with need for the information. There the court observed that, in making the balancing, courts must rely on both judicial precedent and a well-informed judgment as to the proper federal public policy to be followed in each case. 470 F.2d at 781. Bredice v. Hospital is factually remote from this case, but in any event, does not stand for an absolute bar to discovery, even in the face of such extreme justification for withholding information.

Applicant merely asserts, but does not explain, a "chilling effect." It is possible that an exhaustive disclosure of FP&L's legislative activities may have some such effect. Against this we must balance the public interest in a complete record, and, while we are at it, take into account the fact that Florida Cities also has First Amendment rights to petition its government. These rights could be frustrated if such discovery were to be barred. We do not believe that, in this case, FP&L, a large power utility, will be significantly thwarted in

influencing its government simply by revealing how it has done so in the past.

Applicant requests that we consider that, since the discovery rulings in South Dade, the Supreme Court has determined that corporations, offering their views on proposed legislation, do so under the aegis of the First Amendment. First National Bank of Boston v. Bellotti. ____ U.S. _____ (1978), 55 L. Ed. 2d 707, 46 U.S. L.W. (April 25, 1978). See Applicant's Objections, pp. 10, 14. The Corporation/First Amendment dispute between Applicant and Florida Cities has aspects of a feud between strawmen. It had its genesis when Florida Cities, responding to Applicant's discovery objections in South Dade, seemed to impute to Applicant an argument that FP&L asserts a right of confidentiality because of its form of business organization. Cities stated that this was not so and, "Indeed, the public policies in the cases of franchised monopolies are all the other way."11/

11/ Florida Cities' Response to Applicant's Objections tc Interrogatories (in South Dade) dated October 15, 1976, p.13. Perhaps we have misread Cities' argument here. Maybe it only asserted that corporate status, monopoly privileges and state regulation diminishes the Applicant's defenses against disclosure.

Apparently in anticipation that Florida Cities would raise the same argument here, Applicant cites Bellotti, Florida Cities did, in fact, raise almost the same argument in its response to Applicant's Objections in this proceeding. Florida Cities' Response, p. 38.

Bellotti is not novel. It does not reach whether corporations have a full measure of rights under the First Amendment, but "... whether the corporate identity of the speaker deprives its proposed speech of what otherwise would be its clear entitlement to protection." 55 L. Ed. 2d at 718. It is a factual determination. The debate is not important to our consideration. We did not understand Applicant ever to assert special status as a corporation, nor do we penalize Applicant because of its corporate identity, the scheme of its regulation, or for any other reason.

Therefore the Board denies Applicant's general objections based upon Noerr-Pennington. This is the only objection raised to Joint Request 58 and Florida Cities' Request 29(h). The Board has reviewed these requests and believes them to be consistent with the Commission's discovery rules and our opinion above. Accordingly they are granted.

Applicant objects to Cities Request 14 on three grounds; Noerr-Pennington, relevance to subject matter and time covered by the request. We sustain the objection on the basis that it exceeds relevance to the potential issues covered in this proceeding. In the event Florida Cities elects to repeat the request curing that defect, we would expect the request to be limited to the time period since January 1, 1965. Moreover, were it not for the sustained objection based on relevance, we would have denied that portion of Cities' Request demanding records of expenditures for advertisements and other communications because this information can lead only to the amount of presumably protected speech, and not the subject matter of the speech. We cannot see how the amount of money spent for communication in elections can fall outside Noerr-Pennington.

Cities' Request 20A[12/] demands information about efforts by FP&L to persuade customers to buy electricity from it rather than from competing utilities.[13/] The parties have, in our view, mistakenly debated this request under Noerr-Pennington. This is not a Noerr-Pennington consideration.

12/ Supersedes Cities' Request 20 a. through g. Request 20A appears in the Memorandum of Understanding.

13/ We assume the reference to reducing or modifying electric consumption refers to conservation. We see no relevance whatever to this point.

Noerr-Pennington says that: 1) A person can influence opinion and legislation under the First Amendment; 2) even though the activity would otherwise violate antitrust laws; 3) with certain exceptions pertaining to public interest and non-applicability. Other cases we have discussed hold that because of a competing public interest, certain First Amendment rights must be balanced. Here there is no balancing. Persuading consumers to buy a firm's products or service is fundamental to competition. Communications to prospective customers concerning the merits of a product, instead of restraints on trade, is the very method of competition encouraged by the antitrust laws. Communications inducing customers to buy do not require the protection of Noerr-Pennington, because there is no competing public interest to be balanced. Nor can we determine how discovery of Applicant's pro-competitive activities can reasonably be expected to lead to the discovery of evidence supporting Intervenor's antitrust theories of this case. Objection to Cities' Request 20A is sustained.

Cities' Request 21 (e) and (f) are appropriate with respect to Noerr-Pennington, but whether the reach of Request 21 is too broad is discussed below. Applicant also objects to Florida Cities' Request 34 a.-g. on the basis of Noerr-Pennington and on the basis of relevance and overbreadth. Objections, p.19. Below we deny the request because it is irrelevant to the issues of this proceeding.

D. Objections Based Upon Overbreadth and Relevance

Florida Cities' Request 7 demands information about FP&L's filings in certain Federal Energy Regulatory Commission proceedings. Applicant objects on the basis of irrelevance, duplication,[14] "fishing," and possible abuse of this Commission's discovery processes. Applicant's Objections 17, 18. Florida Cities responds with many assertions of fact which, if true, would indicate relevance within the broad range of NRC discovery rules. Cities' Response pp. 6, 7. Applicant has requested an opportunity to address Cities' factual allegations in Cities' general Response to Applicant's Objections.[15]

We assume that some of the factual allegations worrying counsel for Applicant are those made in response to objections to Cities' Request 7. The Board in its order below permits Applicant to respond. Applicant should consider the following in its response; however:

1. We do not accept Cities' factual allegations for any purpose except to determine whether

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14/ One of the discovery requests asserted by Applicant to be duplicative is Cities' Request 20, which, at Applicant's urging, the Board has denied. We don't see this as a material consideration however.

15/ Letter dated January 17, 1978 from Bouknight to Smith.

the FERC filing reasonably may be expected to lead to admissible evidence here.

2. We are not inclined to believe that filings with another agency are exempt from consideration here.
3. We cannot determine whether the other requests cited by Applicant will be duplicative.
4. This seems to be an area where agreement should be possible.

Therefore the Board defers ruling on Cities' Request 7.

Applicant objects to Cities' Request 17, arguing that the request should be limited to the files of policy makers. We agree with Florida Cities in that those charged with the responsibility of implementing or defining policy may also possess relevant data, but Cities' Request as drafted could include many relatively unimportant persons. The level of personnel covered by the request should be limited. We suggest that the parties negotiate a limitation on this search consistent with the Board's comments. In the event agreement is not possible, the Board grants the request with respect to all those who plan or make policy. With respect to those who implement or define policy, the request is limited to supervisory employees who manage the activities

of at least five non-clerical personnel. In addition, the time for production shall be limited to the period since January 1, 1955.

Applicant states that the burden of complying with Cities' Request 18 could be reduced if Cities employed depositions instead. Cities is willing to approach the subject in the least burdensome manner, but does not agree that depositions would reduce the burden. Cities' Response p. 14. The Board believes that Request 18 is very broad. It has the potential of producing much information of little value. If depositions were used, Cities could determine early if a particular line of inquiry would be worth pursuing. While depositions may place a greater burden upon Cities, this is an appropriate allocation. Cities' Request 18 is denied on that basis.

Request 21, as stated, is very broad. However an understanding as to the level of information to be produced seems to have been arrived at. Even though the request seemingly would require production of all letters and memoranda to or from Company officers relating to a very wide range of information, Applicant calls the request one for "high-level" communications (Objections, p. 21) and Cities agrees that production should be limited to "high-level" communications.

Cities' Response, p. 14. It seems that the definition of "high-level" will be left to Applicant. With this understanding, Cities' Request 21 is granted. The production of documents shall include minutes of the meetings of the Board of Directors and Executive Committee of FP&L and documents prepared in advance of and for such meetings, as set forth as examples in the request.

Applicant objects to Cities' Request 23 which refers generally to documents relating to "competition" and "antitrust environment" in Mr. Gardner's files. Objections, p. 22. While we do not accept Applicant's complaint which implies that competition between FP&L and municipal electric systems is beyond any conceivable bearing to this litigation, and reject that argument, some restraint is required. The request is granted only insofar as it refers to competition with FP&L. This would exclude competition among FP&L's suppliers and among customers, except to the extent that those suppliers or customers also compete with FP&L in power supply.

Cities' Requests Nos. 57-59 and 72-73 and Joint Requests 79-82 seek information concerning FP&L's natural gas supplies. Applicant objects, stating that the requests are overly broad and that they extend to subjects not relevant to this proceeding. Applicant suggests that because the requests

pertain to proceedings before the FERC and a pending Court case, the discovery process in this proceeding would be lengthened and complicated, but would not lead to evidence which could affect the outcome of the NRC case.

As to the latter point, Applicant does not explain nor do we see how the pendency of the cases before the FERC and the Fifth Circuit will have any effect upon the length and complicity of discovery in our proceeding. If anything, organizing the material for use in the other cases will simplify production here. If Applicant's argument is that the pendency of the cases in Court and the FERC somehow immunizes its activities from otherwise appropriate scrutiny by the NRC, we reject that argument. As the Staff points out, this is not a question of primary jurisdiction. Staff Response, p. 27.

The subject matter of the requests is clearly relevant to our proceeding. The Board takes official notice of certain facts for the limited purpose of discovery. Natural gas is an important boiler fuel for base-load generation of electricity in Florida because coal is not widely available. Electricity produced by natural gas is indistinguishable from electricity generated with uranium. If a situation inconsistent with the antitrust laws exists with respect to one or more relevant markets pertaining to the generation,

transmission and distribution of electricity, an analysis of the alleged inconsistent situation may require an inquiry into the availability of natural gas and into Applicant's market conduct with respect to that commodity. Therefore the Board believes that the general subject matter covered by the requests is appropriate. Joint Requests 54 and 55 and Cities' Requests 11 and 61 do not seem to have the capacity to supply the information required by the discovering parties.

But whether the requests are overly broad is another matter. They are broader than we would prefer, particularly Cities' Requests, and we think that they are broader than necessary. The parties are thoroughly grounded in the background facts and appear to have expertise in the subject matter. Therefore the Board is sending them back to the negotiating table to reconsider the requests and objections in light of our views on relevance and the comments below.

First, unless we are strongly persuaded as to the need, we will not permit a large monopoly or attempt-to-monopolize litigation about the Florida natural gas market. We hope to see simplified proof depending substantially upon economic analysis by expert witnesses.[16/]

16/ We do not intend to imply here that evidence of the purpose and character of Applicant's market activities is not germane solely because it may relate to natural gas.

Second, as we stated above, inquiry into the history of the relevant market is important, but only to the extent that it explains the present and the future. The relief within our power to grant would be prospective. We are concerned with an alleged situation which will be created or maintained and continuing to exist during the licensed activities. We therefore request the parties to consider the effect of the national policy giving relatively low priority to the use of natural gas as a boiler fuel for the generation of electricity. See 18 CFR 2.78 (a)(1). The point is, an elaborate showing of FP&L's activities with respect to the supply of natural gas may not be justified if, in the period covered by the activities licensed by the NRC, gas is not available as boiler fuel.

Therefore we request the parties to seek some agreement on the issue and to resubmit discovery requests and objections thereto if necessary.

Cities' Requests 27, 35q and 64 are objected to on the basis of "their complete irrelevance" to the proceeding. Applicant's Objections, p. 23.

Cities' Request 27 requests copies of FP&L's uranium enrichment contracts and 35q pertains to uranium fuel costs. We grant these requests. They are relevant because of their

economic significance considering Cities' allegations of monopoly. However we do not grant Cities' Request 27 on the theory of "government bounty" urged by the Intervenor as we discuss below.

While Cities' Request 64 could produce some relevant information about the capacity factors, availability and costs of operating Applicant's nuclear power plants, it also could produce much irrelevant data. We deny the request on the basis that it can be narrowed and refined to provide the requested information with greater certainty and less burden. For example, we do not see how FP&L can state when its nuclear units will be off line for repairs during their entire expected operating lives.

The Board sustains Applicant's objections to Cities' Requests 65 and 66. These requests demand all documents pertaining to settlement negotiations in this case and in the South Dade proceeding. We are persuaded by Applicant's arguments. Objections pp. 23-25.

Rule 408 of the Federal Rules of Evidence provides that offers of settlement and conduct and statements made in the course of settlement negotiations are not admissible to prove the validity of a claim. Cities reference to the clarifying language of Rule 408 does help

its position.[17/] A party is free to discover evidence by other means and its adversary may not defend against it simply by asserting that it happened to be evidence that was revealed in the course of settlement negotiations. One purpose of this provision is obvious; a party may not seize upon settlement negotiations as a device to defuse damning evidence against it. But the clarification does not justify an unrestrained excursion into Applicant's settlement documents.

Here Cities is not seeking documents which may also happen to be related to settlement talks, it is directly seeking settlement papers.

In making this determination the Board is also guided by the policy stated in 10 CFR §2.759. This rule encourages settling contested proceedings and requires all parties and boards to try to carry out the settlement policy. Requiring

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17/ "This 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." Rule 408.

a party to produce its settlement documents because they are settlement documents would be inconsistent with this policy.

E. Benefits Received from Government

Applicant objects to Cities' Requests 24, 26, 27 and 34, among others, on the basis of relevance and, in the case of Request 34, on the basis of breadth. Cities argue that the requests are relevant because they seek information concerning various benefits received by Applicant from government sources. This, according to Cities, will rebut Applicant's anticipated defense that the intervening cities have unique access to "government bounty."[18/] With respect to its Request 27, Cities apparently hopes to demonstrate as a part of its case in chief that "... nuclear power is a publicly funded enterprise that must be shared by the public that funds it." Cities' Response pp. 16-17. Thus we have two faces of the "government bounty" theory of antitrust analysis of nuclear energy.

Turning first to public funding of nuclear power, the Atomic Energy Commission in its Waterford II antitrust order, noted:

18/ See Applicant's Objections, pp. 18-19 and 23 and Cities' Response, pp. 10 and 16-17.

> ...[T]he requirement in section 105 for prelicensing antitrust review reflects a basic Congressional concern over access to power produced by nuclear facilities. The Commission's antitrust responsibilities represent inter alia a Congressional recognition that the nuclear industry originated as a Government monopoly and is in great measure the product of public funds. It was the intent of Congress that the original public control should not be permitted to develop into a private monopoly via the AEC licensing process, and that access to nuclear facilities be as widespread as possible.

Louisiana Power and Light Company, (Waterford Steam Electric Generating Station, Unit 3) D. 50-382A, CLI-73-25, 6 AEC 619, 620 (1973). See also Wolf Creek, supra, 1 NRC 559, 565.

There is, however, a difference between the Congressional "concern" underlying Section 105, and the standards to be applied in carrying out the Congressional intent. In Waterford II, supra, the Commission emphasized that despite public funding, the standard to be applied is the statutory consideration of whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws and it recognized that Section 105 has inherent boundaries. 6 AEC at 620. Nothing in Waterford II, or in any part of the legislative history with which we are familiar, added the element of public subsidy of nuclear power to those elements constituting the antitrust laws. Nor do we believe that it

is possible or appropriate to quantify in the context of an individual antitrust hearing the extent to which Applicant's particular nuclear facilities are the result of public funding.

As we understand the other facet of the "government bounty" theory, Cities anticipates that Applicant will raise a defense that the consideration given to municipal electric utilities in an antitrust proceeding under Section 105 should take into account the fact that municipal utilities receive certain tax and financing advantages from the government. Thus, the theory imputed to Applicant goes, their competitive position vis-a-vis investor-owned utilities is enhanced, which enhancement must be discounted in some manner. Cities wish to meet this defense by showing that FP&L too receives benefits from the government.

This Board, as did the South Dade Board, doubts that the theory is valid.

First we are not aware of any antitrust theory or policy under the laws referred to in Section 105(a) which holds that a competitor may not enjoy the competitive advantages legitimately held by it. Indeed the reverse is the case. Competitors are expected to reflect their natural advantages in competing. That is how the efficient allocation of

national resources is assured. We do not see that lawful advantages received from the government by either private or public utilities differ under antitrust theory in any way from, say, a favorable lease from the landlord, or a favorable contract for the purchase of raw materials.

Second, what authority, under any theory, would the NRC have to nullify the benefits granted by Congress to either Cities or Applicant in other programs? For example, assume that Congress, in the public interest, provides benefits to investor-owned utilities for use in water or air pollution control, as suggested by Cities' Request 34.c. Would the NRC have the authority to wipe out these benefits and the Congressional purpose by penalizing the beneficiary in antitrust analysis or relief? We think not.

Finally, it would not be possible to identify, quantify, and properly allocate the effect of all the government bounties.

For these reasons Cities' Requests 24, 26 and 34 are denied. The parties are, of course, free to negotiate a simplified showing for the purpose of preserving their records. Also, any party may attempt to persuade the Board as to the error of its conclusions by addressing our concerns but we would expect legal authorities to be cited.

F. Protective Order

Applicant has proposed a form of protective order which it asserts is necessary to protect information from public disclosure and non-related use.[19/] All other parties oppose the proposed protective order.[20/] The Rules of Practice permit the use of a protective order covering the general subject matter of Applicant's proposed order. 10 CFR §2.740 (c)(6).

The parties opposing the order argue that the proposal would improperly shift the burden from the party seeking the protection to the party opposing it, grant Applicant the carte blanche right to blanket protection, grant protection to data which normally would not be considered confidential, interfere with the preparation of the parties' respective cases, and result in unnecessarily cumbersome prehearing procedures. The opposing parties have not drafted any proposed order, although each recognizes that some form of protection may be required.

With proper modification and the elimination of some ambiguities, an order in the form proposed by Applicant is

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19/ Applicant's Objections. p. 27 et seq. and Attachment III.

20/ Staff Response, p. 28 et seq., Department's Response, p.18 et seq. and Florida Cities' Response p. 41 et seq.

justified. The Board has issued such an order as an attachment hereto.

The parties opposed to the protective order have, with some justification, viewed it as a protective order for the entire proceeding. As we have issued it, the order is primarily for the discovery phases of the proceeding.

Much of the debate in opposition to a protective order concerns the nature of the materials to be protected. The opposing parties argue that the producing party should be required to file a specific motion describing the particular material to be covered. The Board agrees that only within the context of the actual information can we make a valid specific ruling. What the opposing parties fail to recognize, however, is that there should be some organized method approved by the Board, wherein the party seeking protection may raise the issue before the confidentiality it seeks to protect is destroyed. This is the purpose of Applicant's proposal and our order.

The basic approach employed by Applicant is similar to the form of protective order set forth in the Manual for Complex Litigation except in some respects it is less

cumbersome.[21/] In the Manual, the court keeps custody of the documents designated as "confidential" by the producing party, while under the Applicant's approach, which we adopt, counsel for the requesting party is entrusted with the designated material.

In all three versions of the protective order, (Manual, Applicant's and Board's) the ultimate decision as to the protection of confidentiality is to be made by the presiding officer. Contrary to the arguments, Applicant is not given a blanket protective order.

Below we discuss the issues in accordance with the numbering system of Applicant's proposed order.

Paragraph 4 has been modified to make it clear that references may be made to protected data in a manner which will not destroy their confidentiality. It is left to the professional judgment of counsel how this would be accomplished. The Board prefers that materials submitted to the Board would be made public where possible. For example, if a brief contains confidential material, it should be organized in such a manner that only the confidential portion is protected, perhaps as a supplement.

21/ Manual, Part 2; Appendix of Materials; 2.00, Part I-First Wave of Discovery, E. Preliminary Document Production. Counsel for Cities could not find this section. We had difficulty too. See Wests 1977 edition, pp. 243-247 or Moores Federal Practice, 1978, Vol. 1, Part 2, pp. 293-297.

The parties opposing the protective order oppose paragraphs 5 and 6 by stating that the procedure is cumbersome, ambiguous, and can operate to deny counsel needed assistance in the preparation of their cases. True, the procedure is cumbersome, but as we noted above, the opposing parties have not advanced a better method considering the needs of the case. The Department suggests that the purpose of Paragraph 6 would be satisfied by submitting the names of the "independent experts," to the Board in advance to determine if they are bona fide. The Manual for Complex Litigation would simply make the "confidential information" available to the attorneys and persons assisting those attorneys. The difference between the simplified procedure suggested by the Manual (and used in other court proceedings) is that the Manual anticipates a court order supported by the contempt powers of a U.S. District Court. Here we have limited discipline authority over attorneys who file notices of appearance under 10 CFR §2.713, and little effective authority over lay persons who are not parties. We can understand Applicant's concerns that confidential information may find its way into the hands of persons who will not abide by the spirit of the Commission's protective order procedures. We do not find

the general provisions of Paragraphs 5 and 6 to be unduly cumbersome or restrictive, especially considering the fact that, as the protective order now makes clear, the order will be only temporary except for that specific material which has been determined by the Board to warrant protection or agreed to by the parties.

Other concerns raised by the parties can be better addressed in the context of the actual "confidential" material. For example, the Staff asserts that Paragraph 6 would prevent the Staff from showing a document to a fact witness. It is very unlikely that a protective order addressed to specific documents would have such an effect. In any event, as the opposing parties point out, some of these considerations cannot be decided in a vacuum.

No party will be deprived of necessary and appropriate assistance in trial preparation by the protective order. Although the order will provide for an opportunity for the designating party to object to access by certain persons, the order gives no rights to a designating party not otherwise possessed by it. Applicant, by a footnote in its motion opines that Mr. Bathen would not be an "independent

expert" permitted access under Paragraph 6. But saying it doesn't make it so.[22/] The right to assistance in the preparation of litigation is a very important element of due process and the right to effective counsel. A party objecting to the use of any particular expert by its adversary has a difficult burden, which, again, is a consideration better left to a concrete situation.

The requesting parties may wish to consider submitting the names of their independent experts to the producing parties in advance so that informal discussions may begin.

The Board's order contains clarifications to Paragraphs 5 and 6 to remove ambiguities. Full-time employees of the NRC and Department have been added to Paragraph 5. The potential for delay has been eliminated from Paragraph 6.

Paragraph 10 of the proposed order has been eliminated from the Board order. The party seeking to prohibit the use in other proceedings of discovered material will be required to demonstrate to the Board why such restriction is justified and how the Board could enforce such a restriction in other fora either during this proceeding or after it is terminated.

22/ Motion, n. p. 29. Contrary to Cities' lengthy arguments, Applicant made no motion concerning Mr. Bathen and there is nothing before this Board concerning his status.

While the Board has retained the language "for good cause shown" as it appears in paragraph 11, now Board order paragraph 10, this requirement does not relieve a designating party of the burden of establishing its right to protection pursuant to the provisions of paragraph 12 of the Board order.

The Board has modified the provisions of proposed paragraph 13, now paragraph 12, to eliminate the potential for delay and to remove any doubts about the burden of justifying protection for specified materials. Briefs in support of protection of data shall address the considerations set forth by the Appeal Board in Kansas Gas and Electric Company, (Wolf Creek Nuclear Generating Station, Unit No. 1) ALAB-327, 3 NRC 408, 416-17 (1976). The parties shall also address the significance of the Commission's opinion in its Order of June 21, 1978 requiring that the proceeding encompass all significant antitrust implications of the license, not merely the complaints of the intervening private parties. CLI-78-12, 7 NRC 939, 949.

II. CITIES' OBJECTIONS TO APPLICANT'S REQUESTS

Applicant's Requests to Cities Nos. 116-117, 144-145, 149-150 and 154-155 seek replies concerning Cities' "understanding" of how the investment in capacity and operating cost per kilowatt varies with unit size in each category of fuel. Cities concedes the relevance of the request and agrees to provide documents responsive to the questions. However, Cities seeks to be relieved of the need to interview the affected city officials, offering instead to submit the "understanding" of the joined intervenors' engineering experts. Cities speculates that the answers may not be helpful, that some cities may not have an understanding and states that, according to the Applicant's requirements, the request would require that hundreds of city officials be interviewed.

Applicant, in reply, declines to accept the understanding of the Cities' engineering experts and insists that the understanding be that of each intervening city. Even though Applicant has defined "City" as including all its officials, officers and any other agents and consultants,[23/] its discovery request, as explained by

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23/ Applicant's Request, p.2.

its reply, reasonably seeks the understanding of 18 municipal parties, not hundreds of city officials.[24/]

Applicant is entitled to know the litigative position, if any, of each intervenor. It is also entitled to have any understanding held by a city separate from this litigation. If the understanding happens to be the same as the engineering experts, or if a city has no understanding, or has an understanding identical to other cities, it does not appear that such answers are unacceptable to Applicant.[25/]

The identity and number of city officials to be interviewed must for now be left to the best judgment of Cities' counsel depending upon the circumstances. The Board would see no value in an opinion poll of every conceivable city agent or advisor who may possess an "understanding," but who has no authority to act upon it. It is not possible for the Board to indicate which city officials might harbor the official "understanding" of a municipal corporation. Cities is directed to comply with the discovery request based upon its knowledge of the facts. Its answer shall describe how it determined the particular "understanding" of each intervening city. If Applicant is dissatisfied with the answers, it may seek further relief.

24/ Reply, p.3.

25/ Request, p.3, General Instruction, paragraph 1.

Applicant's Request 185 seeks detailed information concerning consideration by any City Intervenor to the establishment of a municipal power system in any municipality where none exists. Cities again offers to provide the responsive documents but requests that it be relieved of the requirement to interview the affected city officials. Cities states that the information requested is not relevant because the issues of the proceeding relate only to the conduct of FP&L. Applicant in reply correctly points out the relevance of the request. We do not believe the request must be as burdensome as feared by Cities. Which city officials and how many of them must be interviewed will depend largely upon the organization of the municipality, but it doesn't seem that very many persons would be likely repositories of the requested information. In any event, even if the request is burdensome, this is a burden assumed by counsel when it set out to represent 18 intervening parties in this proceeding. The Board directs Cities to honor the request.

Cities requests the right to object to interrogatories concerning legislative activities unless parity with Applicant is realized. The Board's rulings on Noerr-Pennington above moot most of Cities' concerns. However we noted that, in Applicant's Request 238 (c) and (d),

information concerning lobbying budget and expenditures is demanded. No objection is now before the Board, but on page 27, supra, the Board declined to enforce a request to Applicant seeking the amount of money spent in First Amendment activities. Perhaps Cities and Applicant can agree on this point without submitting the matter to the Board again in light of our rulings.

III. OTHER MATTERS AND ORDER

1. In its Memorandum and Order of October 21, 1978 the Board directed counsel for Florida Cities to submit to the Board a proposed form of order, approved by all parties, disposing of all pending motions for the addition or deletion of individual cities to this proceeding. See also Tr. 264. Cities is in default. All pending motions concerning adding or deleting city intervenors are denied. Cities may, however, renew such motions, with a proposed form of order approved by the parties, within the time period provided below.

2. The requesting parties may submit explanations or modified requests with respect to Joint Requests 41, 56, 76 and 79-82. Florida Cities may submit explanations or modified requests with respect to Cities' Requests 8, 14, 39, 40, 42, 57-59, 64, and 72-73.

3. Pursuant to the request of January 17, 1979, counsel for Applicant may submit a brief limited to addressing assertions of fact contained in Florida Cities' Response and move for appropriate relief, but only where it appears that the Board has made important incorrect discovery ruling in reliance upon Cities' factual assertions. Unless Applicant addresses Cities' Request 7, it is granted. Cities' request dated January 23, 1979 to respond to Applicant is denied.

4. The Board recognizes that the discovery rulings made herein may have an important effect upon the direction and scope of this litigation. As we noted above, our knowledge of the markets and background facts is less than any party. If it appears that important rulings have been based upon an inadequate understanding of the issues in the proceeding, any party may move for modifications. In lieu of such a motion, or in addition to it, any party, with a showing of good cause, may move for a prehearing conference to consider motions for important modifications of the Board's discovery rulings. Any such motion or combination of motions with supporting briefs shall not exceed 15 pages. Answers to such motion shall not exceed 15 pages.

5. Any party may move for routine corrections of this order.

6. Papers authorized above shall be filed within 21 days after service of this order. Answers or objections to filings authorized by paragraphs 2 and 4 may be filed within ten (10) days after service of the respective filing.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Dated at Bethesda, Maryland
this 9th day of February, 1979.

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