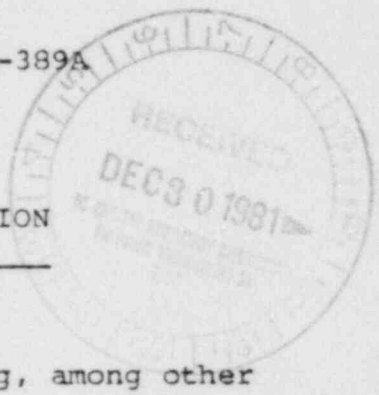
BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Florida Power & Light Co.	)	NRC Docket No. 50-389A
	)	
(St. Lucie Plant, Unit No. 2)		



RESPONSE IN OPPOSITION TO APPLICANT'S MOTION FOR MODIFICATION OF PROCEDURAL SCHEDULE

On December 22, 1981, FPL filed a motion seeking, among other things, to modify the procedural schedule in this docket to delay submission of trial plans to the Board. Additionally, FPL's motion requests that discovery be re-opened on all matters as to which objections are filed. Cities oppose this motion, and respectfully urge the Board to maintain the procedural schedule as adopted in its Memorandum and Order of December 11, 1981.

The effect of the Board's Order 1/ would be to require the parties to delineate their cases by identifying the names and qualifications of witnesses, presenting outlines of witnesses' testimony, and identifying documentary evidence -- on a schedule

1/ The Board's December 11, 1981 Memorandum and Order required Cities to file a brief on objections, proposed license conditions, a trial plan, and if desired, an alternative trial plan on January 13, 1982. FPL was also ordered to file a brief on objections by January 13, 1982, and was further required to submit a response to Cities' proposed license conditions, a trial plan and if desired, an alternative trial plan. A hearing was scheduled to convene on February 9, 1982. The Board limited discovery to issues determined by its order, or by subsequent order, to legitimate issues in the case ("Memorandum and Order", pp. 51-52).

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which would help insure that the case is resolved before St. Lucie Unit No. 2 is scheduled to go into operation. The effect of FPL's proposed procedural schedule, however, would be to delay preparation and presentation of even an outline of the parties' cases, and to subject the Cities to unnecessary discovery burdens.

FPL would re-open discovery, without any apparent limitation, beginning January 13; at hearing on February 9, the scope of further discovery would be discussed; and 20 days after the Board's Order on objections FPL would obtain a glimpse of Cities' trial plans for the first time. Discovery would then apparently commence as to matters in the trial plan, until 60 days after Cities file their trial plan. While not stated, presumably FPL intends that the Cities would then be entitled to some discovery, if necessary. Assuming the Board deliberates two weeks before rendering a decision on objections, this procedural schedule would require three tiers of discovery extending into June.

Given the status of this case, it is imperative that proposals for procedural delays be carefully scrutinized. The public's interest in avoiding delay in operation of the plant, and its interest in avoiding operation of a plant which would maintain a situation inconsistent with antitrust laws, are best served by avoiding delays in this proceeding. FPL's proposed schedule seeks unwarranted delay, notably unsupported by reasons in FPL's brief.

FPL argues that (a) neither party can reasonably submit a trial plan until after objections are ruled upon by the Board, (b) the schedule would not permit FPL sufficient time

to complete the discovery it needs, based on Cities' trial plan, and (c) the schedule might force FPL into an evidentiary hearing before the Board rules on objections. Further, FPL seeks to re-open discovery on all matters as to which objections are filed. Cities address each of these contentions below.

1. Trial plans can be filed before the Board rules on objections.

FPL's objections to the Board's schedule for filing trial plans amounts to no more than a complaint that the trial plans might have to be changed after the Board rules on objections. What FPL ignores is the fact that the Board has issued a long and thoughtful opinion based on extensive briefs and documentary evidence, as well as prior decisions of courts and agencies. The Board is therefore correct in adopting a procedural schedule which assumes that the Order will not be reversed or revised wholesale. Moreover, the Order provides that each party may file alternative trial plans, assuming that its objections are granted by the Board. 1/

1/ FPL also objects to filing alternative plans, but it appears that FPL's objection is based on a misunderstanding of the Board's Order, and not on any real substantive concern. FPL Motion, p. 3. Contrary to FPL's assertion that it would be required to develop a plan for "the many possible scenarios" (Motion, p. 4), the Board's Order merely permits FPL to state its plans for proving its own objections, if granted. FPL presumably knows its own objections, and the evidence it would rely on to prove them.

Given the long history of litigation between FPL and the Cities, it is inconceivable that FPL does not now have some idea of what its position would be at hearing, and unlikely that any order of the Board would create substantial issues ignored by the parties during discovery and pleadings in this proceeding. Finally, there is nothing in the Board's Order which would preclude modification of the filed trial plans, should subsequent rulings alter the scope of the issues remaining for hearing. Therefore, there is no reason to delay the filing of trial plans until after the Board rules on objections.

2. FPL's request for 60 days of discovery in response to Cities' trial plan is unwarranted.

The simple answer to FPL's claim that it needs 60 days for discovery before responding to Cities' trial plan is that FPL has not seen Cities trial plan, it cannot know how much additional discovery is necessary in order for it to develop its own trial plan, and therefore it is at best premature to request this discovery now.

Beyond this answer, however, is the fact FPL has already had the benefit of abundant discovery. FPL's request ignores the following:

- the fact that this case is now five years old and the parties have had ample opportunity to explore each other's positions and to develop, at least preliminarily, counter-positions.

- the fact that massive discovery has taken place in connection not only with licensing litigation before the NRC, but also litigation before the FERC and Federal district court. Cities have made available hundreds of thousands of pages of documents in response to FPL's

request for doucments. Cities have produced documents to the Company for all but two Cities and for the FMUA. With the exception of Vero Beach, Key West, Leesburg, and the FMUA, Cities have responded to interrogatories substantially similar to those propounded in this case in connection with the Lake Worth Utilities Authority v. Florida Power & Light Co., No. 79-5101-CIV-JLK. FPL has deposed officials in Starke, Homestead, Ft. Meade, Lake Worth, Alachua, Mt. Dora, Sebring, St. Cloud, Kissimmee, Bartow, Newberry, and Tallahassee. 1/ In addition, the Company has received an enormous number of discovery documents from Cities' consultants, including Smith & Gillespie and R. W. Beck and Associates.

- the fact that the parties were able to prepare substantial briefs on motions for summary judgment before this forum, and before the district court in Miami.

This Board should not credit any suggestion that discovery has thus far been so slight as to make it impossible to file trial plans. Indeed, given the scope of discovery which has already taken place Cities believe further discovery of the Cities, or their general consultants, or of FMUA is likely to be unnecessary for any phase of this proceeding.

3. Discovery should not be re-opened on matters as to which objections are filed.

FPL's request to re-open discovery on all matters as to which objections are filed should also be denied. We note the following:

1/ FPL apparently intends to seek further depositions in some of these Cities. Discovery should only be allowed as necessary to resolve the issues in the proceeding. Given the amount of discovery which has taken place, Cities believe additional document discovery or more depositions would not provide FPL with exculpatory evidence and would be, at best, cumulative as to those issues which remain outstanding. Discovery is not justified by the hope that something may turn up. The burden is on FPL at this point to show what discovery it needs and why.

1. FPL initially filed a 135-page request for documents and answers to interrogatories. It is Cities' experience that responding to these requests required Cities to examine the majority of a city's files, including examination and production of almost all city files relating to utility matters and to City finances (including drafts of budgets, workpapers, etc). Merely examining the files can take from two to three weeks in a City; production on such a massive scale requires an additional one to two weeks; and other discovery-related matters (including listing documents withheld as privileged) several more weeks, if a production responsive to all of FPL's requests is required. 1/ In Leesburg, some additional search time, full production and post-production work would be required; in Vero Beach and at the FMUA, a complete search, full production and post-production work would be required. It is likely that any information produced as a result of this effort, relevant to the remaining issues in this NRC proceeding, would not be significantly different from that already provided to FPL.

1/ Cities have indicated that they can search and produce the FMUA in two weeks' notice.

2. FPL has given no indication that it intends to narrow its discovery request. 1/ Indeed, granting FPL's motion to re-open discovery would give the Company "carte blanche" to file whatever objections it deems necessary to require response to its original document request, no matter how ephemeral those objections. Cities would then be required to go to the expense of preparing for discovery which is unncessary and which may never take place.

3. The only reason FPL gives for re-opening discovery is that "this will reduce the possibility of any delay if the Board grants objections that otherwise would require discovery..." As indicated above, preparation and production associated with a response to FPL's full request could require several weeks. If the Board grants no objections (or grants only objections which would require little or no discovery 2/) Cities would expect the need for discovery in the Cities would be eliminated, or

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1/ In this regard, Cities note that FPL states incorrectly that Cities have refused to permit full discovery in Leesburg. What FPL means is that Cities, following the directive of the Memorandum and Order, are unwilling to respond to FPL's full 135-page request and accordingly have determined not to go forward with certain depositions, and with document production in Leesburg, Vero Beach, and at the offices of the Florida Municipal Utilities Associations. Cities are of course willing to comply with any discovery request allowable under the Board's Order and to this end have offered to meet with FPL to discuss which of its requests for documents are still relevant under that order or are otherwise required in this proceeding. FPL, however, has not responded positively to this offer, and it is clear that FPL's pleadings do not offer to narrow its discovery requests at all in light of the Board's Order. Thus, any delay in discovery as to remaining issues, is traceable to the Company's own actions.

2/ Implicit in FPL's statement quoted above is the fact that some objections, if granted, will not require further discovery.

strictly limited such that search and production could proceed far more quickly, at less expense for both parties. Thus, it is quite likely that waiting for a Board order on objections will speed, rather than delay, proceedings.

Assuming FPL is truly concerned with delay, the following procedure would seem to be appropriate. On January 13, when it files its objections, FPL should indicate which objections, if granted, would give rise to further discovery, and which, if granted, will not. FPL should then indicate which of its previously filed document requests and interrogatories must be answered to complete necessary discovery. FPL should also indicate which interrogatories and document requests must be answered to complete discovery with regard to matters not resolved by the Board's Order. 1/ At hearing on February 9, the parties could present arguments on the scope of further discovery. Thus, on February 9, the parties would have a clear idea as to the exact nature of all outstanding discovery, and would be prepared to proceed rapidly to its conclusion following the Board's Order on objections; with trial plans filed, the parties would be ready to proceed to hearing immediately upon completion of discovery (if any is required). Discovery is a process to aid trial -- not an end in itself.

1/ FPL, of course, could either reference its initial interrogatories and document requests or frame new ones.

4. FPL's concerns regarding evidentiary hearings are unfounded.

FPL seems to believe that the Board's Order may require an evidentiary hearing on February 9, 1982. Cities do not credit this reading of the Order, and see no basis for any argument that the Order somehow denies FPL its procedural rights. If, however, FPL is seeking a ruling that under no circumstances should any hearing be held prior to rulings on objections, Cities must disagree with the Company's positon. Such a ruling would be inappropriate at this point. Having already ruled that a situation inconsistent with the antitrust laws exists, the Board would be justified in taking whatever action it deems appropriate, based upon the record before it or in response to motions, at any time. This would include, but not be limited to rulings scheduling evidentiary hearings to coincide with consideration of objections (if the Board should determine that that is the most efficent way to proceed); splitting the issues and proceeding to hearing; or summarily disposing of more issues in the proceeding. The exact course or courses to be followed will become clearer as the parties delineate their cses, and as it becomes clear to the Board how the issues raised through the objections procedure are linked to remaining issues. Granting FPL's motion is not necessary to protect the Company and it may limit desirable procedural flexibility.

For the foregoing reasons, Cities request that FPL's motion be denied.

Respectfully submitted,

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By _____

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December 29, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing was served upon the following persons by hand delivery (*) or by deposit in the U. S. Mail, first class, postage prepaid this 29th day of December 1981:

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