

SECRET
USNR

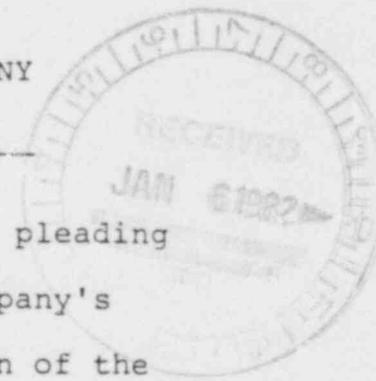
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'82 JAN -5 P4:26

In the Matter of)	
)	
FLORIDA POWER & LIGHT COMPANY)	Docket Nos. 50-389A
)	50-335A
(St. Lucie Plant, Unit Nos. 1 & 2),)	50-250A
Turkey Point Plant, Unit Nos. 3 & 4))	50-251A

OFFICE OF SECRETARY
NUCLEAR REGULATORY COMMISSION

REJOINDER OF FLORIDA POWER & LIGHT COMPANY
TO FLORIDA CITIES' ANSWER TO
MOTION TO LODGE



On December 17, 1981, Florida Cities filed a pleading styled as a "Answer" to Florida Power & Light Company's December 2, 1981 Motion to Lodge a recent decision of the Fifth Circuit.^{*/} Cities' pleading, however, is largely devoted not to FPL's Motion, which is unopposed, but to the presentation of argument, and at some length, on two contentions not addressed in FPL's Motion. Cities' pleading argues: (1) that whether or not the court decision in Gainesville Utilities Dept. v. Florida Power & Light Co., standing alone, warrants institution of a new antitrust proceeding by the Commission under Section 105a, when that decision is "combined" with FERC Opinion No. 57, such warrant exists; and (2) assuming the Commission determined to institute such a proceeding, it could be consolidated with the on-going Section 105c antitrust proceeding in light of the recent partial decision in that matter by the Licensing Board. Because these arguments are demonstrably wrong,

^{*/} That decision was Florida Power & Light Company v. Federal Energy Regulatory Commission, No. 80-5259, Nov. 6, 1981.

DS08
s
1/1

and because they were not addressed in FPL's Motion, FPL respectfully requests leave to respond to the Cities' "Answer" as set forth below.

1. The Commission under Section 105a acts on findings of "a court of competent jurisdiction" and is limited to proceeding on the terms of the court's findings. Cities would have it that, if those findings are insufficient, the deficiency can be supplied by characterizing administrative decisions. The statute is to the contrary. Cities' argument embodies the view that a court finding acts under Section 105a as some kind of a triggering mechanism for a general post-licensing antitrust review, in which the Commission may couple a court's findings with a hodge-podge of other charges and determine whether it wishes to commence an antitrust proceeding. This would not only contravene the statute but would result in the sort of post-licensing antitrust review which the Commission has already twice held is outside of its statutory power.^{*/}

As FPL has pointed out in other pleadings,^{**/} the Commission's jurisdiction under Section 105a exists only where there

^{*/} Houston Lighting & Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303 (1977); Florida Power & Light Co. (Saint Lucie Unit No. 1, Turkey Point Unit Nos. 3 and 4), ALAB-428, 6 NRC 221, review denied, CLI-77-26, 6 NRC 538 (1977) aff'd sub nom. Ft. Pierce Utilities Authority v. NRC, 606 F.2d 986 (D.C. Cir), cert denied, 444 U.S. 842 (1979).

^{**/} Memorandum by Florida Power & Light Co., pp. 6-11 (August 25, 1978); Response of Florida Power & Light Co., pp. 4-11 (Sept. 16, 1981).

are court findings of violation of the antitrust laws "in the conduct of the licensed activity." The Gainesville case has nothing whatever to do with the conduct of any activity authorized by an NRC license. Thus there is no basis in law (or in fact) for the commencement of a Section 105a proceeding.

Throughout their "Answer," Cities urge the Commission "to exercise its discretion," based on FERC Opinion No. 57, to institute antitrust proceedings under Section 105a. We have pointed out above that Cities ignore completely the absence of the statutorily required jurisdictional pre-requisites, which cannot flow from that Opinion. But moreover, the Cities have not provided any creditable reason why the Commission should dedicate the resources necessary to institute such a proceeding given the fact that a comprehensive antitrust review proceeding is now on-going in Docket No. 50-389A regarding FPL's St. Lucie Unit No. 2 -- a proceeding whose results will be effective for the life of the unit, anticipated to be over 30 years. In fact, Cities have levelled all of their contentions regarding FERC Opinion No. 57 in that Docket, for what they are worth,^{*/} and have indeed sought to rely on

^{*/} The Fifth Circuit decision lodged by FPL points out that Opinion No. 57 did not "amount to a finding of any specific anticompetitive activity" by FPL much less an antitrust violation. Slip Op. at 12,820. Since Section 105a proceedings by statute must be based on antitrust violations, and as the Court has ruled that Opinion No. 57 found neither violation nor anticompetitive conduct, that Opinion provides neither legal nor rational support to Cities here.

(footnote continued)

that Opinion rather than attempt to prove any of their allegations. Institution of a Section 105a antitrust proceeding here plainly would be unwarranted, as the NRC Staff and the Justice Department have recognized.

2. Finally, Cities' "Answer" suggests that "in view of the procedural status" of the on-going construction permit antitrust proceeding, Docket No. 50-389A, if the Commission does determine to institute a Section 105a antitrust proceeding, it could readily be consolidated with the 105c proceeding. This suggestion is both disingenuous and incorrect. Cities fail to advise the Commission that they have asserted the position that so long as the 105c proceeding is pending, the Commission may not authorize an operating license for FPL's St. Lucie Unit No. 2 without Cities' consent. Cities have repeatedly indicated that they will seek to delay the plant by this means. If anything is clear from the number of motions, answers, and supplemental motions that have been filed in this matter, at least under the Cities' view of the scope of a Section 105a proceeding, such a proceeding would involve the

(footnote continued)

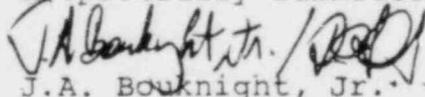
Cities' misunderstanding of the Fifth Circuit's decision is evident in their statement that it results in the "absence or limitation of a FERC remedy" as to transmission to redress anticompetitive conduct. "Answer" at 3. The Court expressly found it need not reach the question of the compass of FERC's remedial powers because such powers plainly did not exist "in the absence of findings of specific anticompetitive activities or antitrust violations." Slip Op. at 12,821. The Court found FPL had engaged in neither.

Commission in an intricate and complex inquiry into events more than fifteen years past.

The Cities note that the Licensing Board has decided to render a partial summary decision (although it has indicated it will consider objections to that decision). Even in the unlikely event the Licensing Board were to reject all of the objections to its decision, it is uncertain that the proceeding, even as circumscribed by the Board, can fairly be completed in time to accommodate fuel loading in October, 1982. Cities' suggestion that the Commission "consolidate" the on-going 105c proceeding with another under Section 105a would needlessly proliferate the Commission's proceedings in a manner which accords the Cities tactical leverage and which could delay operation of St. Lucie Unit No. 2.

For these reasons, and the reasons previously briefed to the Commission, there is no legal or logical basis for the Commission instituting proceedings under Section 105a in this matter.

Respectfully submitted,



J.A. Bouknight, Jr.

Douglas G. Green

Lowenstein, Newman, Reis & Axelrad

1025 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 862-8400

Herbert Dym

Covington & Burling

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20044

(202) 662-5520

Attorneys for Florida Power &
Light Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNR

Before the Commission

'82 JAN -5 P4:26

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 50-389A
) 50-335A
(St. Lucie Plant, Unit Nos. 1 & 2),) 50-250A
Turkey Point Plant, Unit Nos. 3 & 4) 50-251A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Rejoinder of Florida Power & Light Company to Florida Cities' Answer to Motion to Lodge" was served on the following persons by hand delivery (*) or by deposit in the U.S. Mail, first class, postage prepaid, this 5th day of January, 1982.

*Chairman Nunzio Palladino
Office of the Commissioners
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Peter B. Block, Esquire
Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Commissioner John F. Ahearne
Office of the Commissioners
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

*Commissioner Victor Gilinsky
Office of the Commissioners
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Michael A. Duggan, Esquire
College of Business Administration
University of Texas
Austin, Texas 78712

*Commissioner Thomas M. Roberts
Office of the Commissioners
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

*Commissioner Peter A. Bradford
Office of the Commissioners
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chase R. Stephens, Supervisor
Docketing and Service Station
Office of the Secretary of the
Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Office of the General Counsel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Benjamin H. Vogler, Esquire
Ann P. Hodgdon, Esquire
Counsel for NRC Staff
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

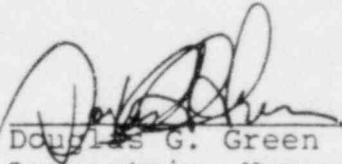
Samuel J. Chilk, Secretary
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Janet Urban, Esquire
U.S. Department of Justice
P. O. Box 14141
Washington, D.C. 20044

Donald A. Kaplan, Esquire
Robert Fabrikant, Esquire
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

A. Toalston, Chief
Utility Finance Branch
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

*Robert A. Jablon, Esquire
Alan J. Roth, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037



Douglas G. Green
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Florida Power & Light
Company