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)	)	Florida Cities: 1/14/82

FLORIDA CITIES'
PROPOSED LICENSE CONDITIONS TO EFFECTUATE
THE BOARD'S DECEMBER 11, 1981 ORDER

I. The Following Changes Would Effectuate The Board's December 11, 1981 Order.

A. (1) Substitute for License Condition I(a) in the "Definitions":

"Applicable Area" means Peninsular Florida, which is the entire state of Florida east of the Apalachicola River.

(2) Modify License Condition I(c)(1) and I(d) to add the words "directly or indirectly" after the clause "technically feasible of interconnection with those of the Company" and add the words "in Peninsular Florida" after "facilities".

Explanation: The Board has ruled, at p. 48: "FPL should not be permitted to deny firm wholesale service (or any other form of available service) to any entity based soley on its geographical location." The settlement license conditions define "applicable area", "neighboring entity" and "neighboring distribution system" in ways that permit FPL to deny service based solely on geography. The definition of Peninsular Florida comes from Document 12, quoted at the Board's Memorandum and Order at p. 40. The proposed changes would make the relief under the license conditions available to all applicable electric systems in Peninsular Florida.

Additions to I(c) and I(d), which define a "neighboring entity" and a "neighboring distribution system" would include utilities in Peninsular Florida which may be connected to Florida Power & Light Company, as a result of interconnections with other systems. FPL now interchanges power through such "indirect" interconnections. The changes permit power transactions, coordination, etc. with FPL not "based solely on its geographical location".

The settlement license conditions define "neighboring entity" and "neighboring disribution systems" in general terms. Florida Cities have not presented evidence that would justify making relief necessary or desirable as to Florida Power Corporation or Tampa Electric Company, Florida's two other major investor-owned utilities, and those systems have not intervened. There is evidence that such utilities have had opportunities available to them from which Florida Cities have been excluded. Under the circumstances, Florida Cities would not object to adding the following sentence to the definitions of "neighboring entity" and "neighboring distribution system": "Florida Power Corporation and Tampa Electric Company are excluded from this definition."

Counsel for Florida Cities do not represent entities other than those on whose behalf they sign this pleading. Certain systems which would otherwise be included in the definition of "neighboring entity" or "neighboring distribution system" have never been represented by counsel for Florida Cities. The Orlando Utilities Commission, the Fort Pierce Utilities Authority and the City of Gainesville have settled. Counsel for Florida

Cities do not seek relief for systems which they do not represent. They are barred from seeking relief for systems which have settled. Under the circumstances, they would support limitations of relief, if proposed by Florida Power & Light, to comply with settlements, and would not oppose other limitations to exclude relief for systems which they do not represent. However, to avoid proposing discriminatory relief they have drafted the definitions in general terms.

Many of Florida Cities can more effectively take advantage of relief or can only take advantage of some aspects of relief through use of a municipal power supply agency. Neighboring entities and neighboring distribution systems include governmental agencies or authorities and, therefore, the Florida Municipal Power Agency ("FMPA"). If Florida Power & Light disagrees with this understanding of the license conditions, it should so state, since FMPA will in fact own, on behalf of the Cities, the St. Lucie Unit 2 plant capacity made available to the Cities.

As stated on p. 42 of Florida Cities Response to Board Questions, Florida Cities interpret the definition of "costs" which are defined as "all appropriate costs" to be actual booked costs as recognized and affected by utility regulation. This appears to be the intent of the Board. See Memorandum and Order at p. 50. However, FPL should so state, if this understanding is contrary to its interpretation of the license conditions. If these above understandings are not correct, License Conditions I(c), (d) and (e) should be modified accordingly.

B. (1) Substitute the following condition for License Condition IX(a) ("Wholesale Firm Power Sales):

"Subject to the limitations contained in paragraphs (c) and (d), Company, upon timely request, shall sell firm wholesale power on a full or partial requirements basis to any neighboring entity or neighboring distribution system in the applicable area up to the amount of that system's retail load. Any sales made under this subsection may be decreased by the sum at any one time of power made available to such neighboring entity or neigboring distribution system as a result of participation in (or purchase of unit power from) one of Company's generating units. However, neighboring entity or neighboring distribution system shall be entitled to all energy associated with the maximum billing demand and with that system or entity's wholesale power entitlement. Rates, terms and conditions for such wholesale firm power sales, except as provided for herein, shall be pursuant to and in accordance with §§ 205 and 206 of the Federal Power Act.

"FPL may not deny service to neighboring entities or neighboring distribution systems in the applicable area. With regard to entities and systems outside the service area shown on the map which is Appendix A (or any other area in the State of Florida in which, in the future, the Company will engage in generation, transmission or distribution of electric power; provided, however, that an area shall not be deemed to be included as such other area in the state solely because the Company acquires an ownership interest of less than 50% in a generating facility located in such area), the obligation shall be limited to the extent the Federal Energy Regulatory Commission makes a finding

that compelling public interests justify such limitation and that FPL has selected the least anticompetitive method of obtaining legitimate planning or other objectives justifying such limitation.

"FPL may require reasonable notice periods when total neighboring entity and neighboring distribution system requests would result in substantial increases in wholesale firm power sales when compared with Company loads. However, such notice requirements shall be waived if a neighboring entity or neighboring distribution system requests additional wholesale firm power sales to serve one or more large customers and Company has capacity to serve such loads or where the increase for the individual neighboring entity or neighboring distribution sytem is not significant.

"Provisions as to rates, terms and conditions proposed by the Company shall not create a price squeeze with respect to the Cities' ability to compete with Company in retail and wholesale firm power markets."

(2) Delete Section IX(d).

Explanation: The above proposed license conditions depart slightly from the Board's ruling at pp. 50-51. Florida Cities believe that the proposed license condition IX, as modified above, would reasonably effectuate the Board's conclusions, and would grant the relief permitted under this Order. Overall, departures or additions favor FPL. See Order on Summary Disposition, p. 51.

The above changes to IX(a) of the license conditions accomplish the following purposes: (1) They make firm wholesale power available as of right to all Cities. The language within the parentheses in the second proposed paragraph comes from the settlement license conditions, Section I(a), which has been agreed to by FPL.

Rates, terms and conditions for wholesale sales are to be determined in accordance with the Federal Power Act. However, as is reflective of current law, 1/ it would be unfair for FPL to impose rates, terms and conditions which would create a "price squeeze". 2/ FPL is permitted to request reasonable notice requirements where the load increases would be substantial under the standards of the Federal Power Act.

1/ City of Mishawaka, Ind. v. AEP Co., 616 F.2d 976, 982 (7th Cir. 1980) (holding it unlawful for a utility to file rate without first weighing the possible price-squeeze effects); City of Mishawaka, Ind. v. Ind. & Mich. Elec. Co., 560 F.2d 1314, 1323 (7th Cir. 1977), 436 U.S. 922 (1978) stating in dictum that a federal court may order the filing of a new tariff if a price squeeze is found to exist); Conway Corporation v. Federal Power Commission, 510 F.2d 1264 (D.C. Cir. 1975), aff'd 426 U.S. 271 (1976).

2/ The "price squeeze" concept was developed by Judge Hand in United States v. Aluminum Company of America, 148 F.2d 416, 436, 438 (2d Cir. 1945). It refers to a situation where a vertically integrated seller of a product or service used in making an end product prices the first product or service at a sufficiently high level that its purchaser-competitor cannot sell the end product successfully in competition with its supplier. For example, Alcoa both used aluminum ingots to manufacture aluminum siding and sold ingots to other firms. The difference between Alcoa's price for aluminum ingots and for aluminum siding was slight so that competitors could not profitably manufacture aluminum siding for sale in competition with Alcoa. Conway holds that in its wholesale rate regulation, the Federal Energy Regulatory Commission must take into account allegations of "price squeeze" in determining a "just and reasonable" regulated rate under §205 of the Federal Power Act. Mishawaka holds that a regulated utility must consider the price squeeze potential of its filings before the Federal Energy Regulatory Commission.

However, FPL may not use such notice requirements to prevent the Cities from competing for large customers where increased loads would not have a significant impact. Other changes to the settlement license conditions avoid illegal resale restrictions that may be implied in the settlement license conditions. See Florida Cities Response to Board Questions, p. 47. Florida Cities believe that IX(d) is anticompetitive on its face and should be deleted.

C. Add the following License Condition: "Nondiscriminatory Access to Transmission and Pooling Arrangements":

"Company shall sponsor the membership of any neighboring entity or neighboring distribution system in any pooling, interconnection, transmission or coordinating arrangements, including power supply arrangements, to which Company is presently a party, or to which, during the term of this license, the Company becomes a party, if the neighboring entity or neighboring distribution system requests; provided, however, that the neighboring entity or neighboring distribution system satisfies membership qualifications. Such qualifications shall be reasonable and not unduly discriminatory. To the extent that Company enters into any pooling, transmission, interchange or coordination arrangements, including power supply arrangements, during the term of this license, it shall use its best efforts to include provisions therein to permit requesting neighboring entities or neighboring distribution systems the opportunity to participate in the same arrangement or same type of arrangement on an equalized reserves basis that is reasonable and not unduly discriminatory. Company

shall not enter into any joint generation or transmission projects without offering participation on a non-discriminatory basis to neighboring entities or neighboring distribution systems. Company shall recognize transmission investments of neighboring entities and neighboring distribution systems to the same extent that it recognizes transmission investments made by itself or any other utility in its transactions with other utilities, in accordance with License Condition X(b)."

Explanation: The Board finds (Summary Disposition, p. 46): "FPL enjoys competitive advantages which flow from its joint activities with other utilities". Under applicable case law, including NRC precedent, FPL ought not to discriminate against Cities in granting access to economic generation sources, transmission or coordination opportunities. The above proposed license clause is written so that if FPL "goes it alone", it need not (under this clause) include Cities in any arrangement. However, if FPL enters into joint generation or transmission projects, it must grant Cities' access on a non-discriminatory basis. The equalized reserves requirement is consistent with Consumers Power Company (Midland Plant, Units 1 and 2), 6 NRC 892, 1065-1079 (ALAB-452, December 30, 1977) and Gainesville Utilities v. Florida Power Corp., 402 U.S. 515, 521, 528 (1972).

II. Proposed License Conditions That May Require Hearings

A. Add to Section II(a) ("Interconnections") the following sentence:

"The cost of interconnection facilities with another system shall be shared in a manner which takes into account the various

transactions for which the interconnection facility is to be utilized."

Explanation: In order to transact business, interconnected electric systems must pay for interconnection facilities. In its dealings with municipal utilities, FPL has refused to share costs of interconnections. The above language does not apply a specific standard for cost sharing, but recognizes that there should be such sharing in accordance with the Midland Appeal Board decision (6 NRC at 1050) and general industry standards. This clause should be ripe for summary disposition.

B. Change heading of Settlement License Condition V to "Economy Energy and Coordination". Add after the first sentence:

"Licensee shall sell to, purchase from or exchange with any neighboring entity other firm or non-firm capacity or energy which the supplying system deems to be surplus, when such transactions would serve to reduce the overall costs of bulk power supply without a loss to either party. Licensee shall enter into pooling, economic dispatch, generation coordination and joint planning on an equalized reserves basis with neighboring entities on a reciprocal basis, if such entities or systems so request, if such transactions are technically feasible and if such transactions would not create a net economic detriment to Company (not including loss of revenues from loss of sales of power which it otherwise might have obtained). Such bulk power transactions shall be on terms and conditions consistent with good utility practice under regulatory standards."

Explanation: The clause rightly expands or clarifies coordination obligations. The need for, and lack of detriment to a

large company in requiring equalized reserves has been determined in Midland, supra at 1076-1079. It may be ripe for summary disposition.

C. (1) Modify Settlement License Condition VII(a), as follows:

"Company will afford to the neighboring entities and neighboring distribution systems listed below the opportunity to participate in St. Lucie Unit No. 2 in the percentage shares listed below:

Alachua	.0702
Bartow	.46185
Clewiston	.19387
Ft. Meade	.08454
Ft. Pierce	1.02793
Fernandina Beach Division of Florida Public Utilities Company	.45410
Gainesville	2.09359
Green Cove Springs	.13011
Homestead	.44499
Jacksonville Beach	.64538
Key West	.74946
Kissimmee	.58678
Lake Helen	.03121
Lake Worth	.89520
Leesburg	.56471
Mt. Dora	.16259
Moore Haven	.03382
Newberry	.02993
New Smyrna Beach	.40336

Orlando	6.08951
Sebring	.46185
St. Cloud	.32531
Starke	.11970
Tallahassee	3.04464
Vero Beach	1.03963
Florida Keys Cooperative	.79371

"Participation will be offered either through the purchase of the percentage shares listed above or, at the Cities' option, through an equivalent unit power purchase entitlement. Unit power shall be defined as power from St. Lucie Unit No. 2 purchased at FPL's actual booked costs of such power. The Company shall make such offer within 90 days of the issuance of this Order adopting these license condition changes. If the neighboring entity or neighboring distribution system chooses to purchase unit power at this time, it shall notify the Company within 90 days of the issuance of this Order that it intends to exercise this option. If the neighboring entity or neighboring distribution system intends to purchase unit power either on a date after the commencement of commercial operation or for a period of years less than the life of St. Lucie Unit No. 2, it shall notify the Company of this choice. An entity may choose to purchase unit power in the future, but only upon giving the Company five (5) years advance notice. In the event that there is disagreement as to the appropriate cost or associated terms and conditions in connection with a unit power purchase, the customer may request sale of such unit power to commence in accordance with these license conditions and the Company shall

file for rates, terms and conditions of such sale with the Federal Energy Regulatory Commission, or successor agency, under §205 of the Federal Power Act. The customer shall pay rates charged by the Company under terms to be set by the Company, but any amounts collected that may be found to have been excessive under the Federal Power Act shall be refunded with interest; likewise, terms and conditions found to be unjust, unreasonable or otherwise not in accordance with the Federal Power Act shall be modified in accordance with the order of the Federal Energy Regulatory Commission or its successor. Alternatively, at the request of the neighboring entity or neighboring distribution system the Company shall file appropriate rates, terms and conditions for such service with the Federal Energy Regulatory Commission, or successor agency, but the customer may delay taking power until after the Commission finally determines the appropriate rates, terms and conditions for such sale or may determine not to take such power. Nothing herein shall prevent the parties from contracting for other rates, terms and conditions for service.

"In the event that any entity described in this paragraph has been previously offered an opportunity to participate in the ownership of St. Lucie Unit No. 2, the percentage participation that must be offered by the Company to such entity under this paragraph need not be greater than the percentages listed above, including previous offerings by the Company. However, in the event that any entity described in this paragraph has transferred

its ownership interest of St. Lucie Unit 2 to the Florida Municipal Power Agency and the Florida Municipal Power Agency is unable to finance its participation under the usual commercial terms for this type of transaction, then the Florida Municipal Power Agency or such entity (including any qualified assignee) shall have the right to purchase unit power or seek other means of financing an ownership share at its option, apart from any other rights that it may have under these or previously ordered license conditions. Such right to seek alternative financing, however, shall expire two years from the date of the issuance of these amended license conditions.

"It is intended that this additional license condition constitutes a re-offering in accordance with its terms, but adherence by the parties to Settlement License Condition VII, as modified herein, will be prima facie reasonable."

(2) Delete from License Condition VII(e)(1) the following language:

"provided, however, that the provisions proposed by the Company as to its liability to the other participants, and as to the sharing of costs discharging uninsured third party liability, */ in connection with the design, construction, operation, maintenance and decommissioning of St. Lucie Unit No. 2 shall be approved by the arbitrator unless he determines that the provision proposed by the Company constitutes an unreasonable proposal which renders meaningless the Company's offer of participation in St. Lucie Unit No. 2."

(3) Change License Condition VII(i) to add at the beginning: "In accordance with good utility practice and on behalf of all participants on a non-discriminatory basis,". Add at the end of

the paragraph: "If Company takes voluntary actions detrimental to the interests of other parties, in the design, engineering, construction, operation and maintenance of St. Lucie Unit No. 2, including actions regarding changes in construction schedules, modification or cancellation of the unit, then it shall compensate them for any loss or harm suffered as a result of such decisions."

Explanation:

(1) The Board has found that "inside and adjacent cities should be permitted to purchase a portion of St. Lucie Unit 2 or to buy unit power from it in order to share some of the attendant cost advantages and to offset some of the disadvantages suffered by the cities as a result of the situation inconsistent with the antitrust laws." 1/ Summary Disposition at p. 48. This provision gives such right. Where a system elects to buy unit power, now or in the future, rates, terms and conditions are to be set by the Federal Energy Regulatory Commission, allowing the Company full recovery of costs. At p. 44 of Florida Cities Response to Board Questions, Florida Cities stated that they had in the past objected to the terms and procedures involving participation, but that the opportunity for participation under the settlement license conditions would provide a practical test of those conditions. In ordering the license conditions, the Board

1/ Accordingly, whether or not the License Conditions are modified to grant outside Cities access to St. Lucie Unit No. 2, the conditions should now be modified to establish or clarify that access includes the right either to own a share or to buy unit power.

recognized that the settlement license conditions were subject to change in the event that a "situation inconsistent" were found by the Board. Because they were subject to later revision, the Board found that the Cities who could seek protective conditions later, would not be hurt by their implementation. Memorandum and Order, April 24, 1981, pp. 1, 6, 12-13.

The Florida Cities have appointed the Florida Municipal Power Agency as their agent to contract with FPL and seek financing of their participation shares. The Florida Municipal Power Agency has requested the sponsorship of state legislation to aid its ability to finance St. Lucie plant. Cities hope that FPL will support such legislation. In the event that such legislation does not pass and FMPA cannot finance the St. Lucie Unit 2 participation shares, there should be a reoffering on a basis that would permit Florida Cities to benefit from participation in St. Lucie Unit No. 2.

(2 and 3) To the extent that the Company claims the right to retain complete control of the unit, it should be subject to a standard of good utility practice. In some situations there could be a divergence of interests between the Company and others. FPL should not be entitled to take operational actions for its own benefit without compensating co-owners for the harm to them. There is no justification for permitting FPL to have complete control over the unit, yet excusing the Company from all liability as a result of its actions. While Cities are flexible as to the specific language for improving the conditions, they believe that the present terms of the license conditions as to

control and liability reflect the bargaining power inherent in the Company's nuclear monopoly. These issues were left open pending a determination whether a "situation inconsistent" exists. Memorandum and Order, April 24, 1981. They can now be decided.

D. Add the following provision:

"Company shall offer to neighboring entities and neighboring distribution systems participation in each of its operating nuclear units on the basis of either unit power purchased at FPL's actual booked costs or through direct ownership at Company's actual booked costs, at the Company's option. Each neighboring entity or neighboring distribution system shall have a right to such access on a load ratio equivalent share with Florida Power & Light Company. FPL shall not discriminate as among neighboring entities and neighboring distribution systems with regard to the terms of participation.

E. Eliminate the "provided" clause after "January 1, 1990" in Settlement License Condition VIII.

Explanation: Future units should be sized in accordance with needs. FPL should not be allowed to perpetuate its nuclear advantage into the future. The offending language implies that there should be a ceiling for future nuclear participation so that Cities cannot obtain more nuclear capacity, as a percentage of peak load, than FPL. Interestingly, the restrictions imposed by FPL admit the importance it places on nuclear capacity, and the strictures placed on the Cities obtaining more nuclear capacity than FPL admit an anticompetitive design.

F. Add the following Section: "Base Load Power Sales":

"Company shall offer to neighboring entities and neighboring distribution systems _____megawatts of base load power. The power shall be offered on a reserved or unreserved basis at each entity's option. The power shall be made available on an annual contract basis for at least ten years, although a neighboring entity or neighboring distribution system may designate shorter periods, and priced at the average capacity and fuel cost plus appropriate variable operation and maintenance costs from all units actually scheduled to supply base load requirements on the FPL system. including firm annual base load sales. At an entity's or system's request, the power shall be priced at FPL's bus bar."

Explanation: Cities' power supply needs are principally for "base load" power. Such power would be sold either reserved or unreserved, on an annual contract basis at the average capacity cost for the units planned to meet base load requirements on the FPL system for such year, including firm annual base load sales. Energy will be priced at the average fuel cost plus appropriate variable operation and maintenance costs for all units scheduled to supply base load requirements on the FPL system, including such firm annual base load power sales. The amount will be subject to hearing and depend on the amount of other relief. Assuming that transmission will be provided separately, pursuant to License Condition X as modified herein, power is priced at bus bar to avoid paying double transmission charges. FPL has

testified that it will price power at bus bar 1/ (but it objects to use of joint transmission rates).

G. (1) Modify Settlement License Condition X(a) as follows:

"The Company shall transmit power (1) between or among Company or other power sources and neighboring entities or neighboring distribution systems with which Company is connected, directly or indirectly, ..."

Eliminate the clause: "(5) a reasonable magnitude, time and duration for the transactions is specified prior to the commencement of the transmission."

(2) Modify License Condition X(b) to read as follows:

> "(b) Company's provision of transmission service under this section shall be on the basis which compensates the Company for its costs reasonably allocable to the service. Company shall file tariffs providing for such transmission service with the Federal Energy Regulatory Commission or its successor agency, including transmission to and from Georgia. Company shall also file a transmission tariff providing for regional or joint service and shall agree to provide transmission on a reciprocal basis without charge to neighboring entities or neighboring distribution systems (including when joint agencies act on their behalf) when and to the extent that such neighboring entities or neighboring distribution systems invest or contribute in the State or Company transmission grid. Nothing in this license shall be construed to require Company to wheel power and energy to or from a retail customer. However, a co-generator or municipally or governmentally owned source of generation shall not be deemed a retail customer."

(3) Modify License Condition X(d) to change "not decline to cooperate in transmitting power produced" to "shall transmit power produced in accordance with paragraph (b)", supra. Add at

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1/ See testimony of Robert Garnder, Florida Power & Light Co., FERC Docket No. ER78-19, et al.

the end of the last sentence, "but shall afford them reciprocal nondiscriminatory transmission rights in accordance with paragraph (b)."

Explanation:

(1) The change to Section IX(a) assures transmission availability from power sources other than the Company to various entities. As written, the license conditions could be interpreted to exclude transmission from independent generation sources, thereby rein forcing the "situation inconsistent". This change was ordered in Louisiana Power & Light Co. (Waterford Steam Generating Station, Unit No. 3), 8 AEC 718, 731-734 (LBP-74-78, October 24, 1974), and for that reason is ripe for summary disposition in accordance with that decision.

The notice clause reinforces Company restrictions on transmission, making it more difficult for neighboring entities to obtain service and giving the Company added leverage. The Company should file a tariff with the Federal Energy Regulatory Commission and be governed by it. While the Court of Appeals for the former Fifth Circuit has reversed the Federal Energy Regulatory Commission's recent order that FPL file a transmission tariff, it has stated that the remedy is available in antitrust proceedings and, in some circumstances, in FERC proceedings. See, Florida Power & Light Co. v. FERC, 22 FPS 6-270, 277 (former 5th Cir. 1981).

(2) The basic "situation inconsistent" involves monopolization through blocking Florida Cities from alternative generation sources, including refusals by FPL to deal outside its retail

area of service. The Company's refusal to agree to a joint or regional transmission rate or to give Cities credit for transmission investments can only have an anticompetitive purpose or effect. FPL should not be able to preempt transmission to or from, new potential markets in Georgia. The final sentence proposed here would avoid wheeling restrictions that could kill beneficial projects which may compete with FPL generation, such as generation from waste disposal plants, and would avoid the Company's monopolizing generation output from such plants.

(3) FPL should not be able to bottleneck transmission to Georgia. If Cities make transmission investments, they should obtain fair access to the Florida grid.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served on the following by deposit in the United States mail, first class, postage prepaid, this 14th day of January, 1982.

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