March 29, 1982

William Wise, Esq.
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1200 18th Street, N.W.
Washington, D.C. 20036

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

Dear Bill:

This will confirm our telephone conversations concerning your client, Seminole Electric Cooperative Inc. and the captioned matter. As I advised, this matter was terminated on March 24, 1982. For your information, I am enclosing a copy of the Licensing Board's Memorandum and Order of March 24, 1982, terminating the proceeding.

Sincerely,

Benjamin H. Vogler
Deputy Antitrust Counsel

Enclosure: As stated

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo

In the Matter of Docket Nos. 50-389A

FLORIDA POWER & LIGHT COMPANY

(St. Lucie Plant, Unit No. 2) March 24, 1982

MEMORANDUM AND ORDER
(Concerning Motions to Dismiss, Terminate and Vacate)

APPEARANCES

J.A. Bouknight, Esq. and Herbert Dym, Esq. for Florida Power & Light Company.

Robert A. Jablon, Esq., Alan J. Roth, Esq., Daniel Guttman, Esq. and Marta Manildi for Florida Cities, intervenors.

Ann Hodgdon, Esq. and Benjamin Vogler, Esq. for the Nuclear Regulatory Commission Staff.

Lynn Bregman, Esq. for Parsons & Whittemore, Inc., et al., amicus curiae.

Florida Power & Light Company (FPL) has entered into a comprehensive settlement agreement with Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Fort Meade, Homestead, Key West, Kissimmee, Leesburg, Mount Dora, Newberry, St. Cloud, Starke, Tallahassee and Vero Beach, Florida, and the Florida Municipal Utilities Association (Cities). Pursuant to that agreement, on March 10, 1982, FPL and Cities filed a Joint Motion to Withdraw Interventions, Dismiss and Terminate Pro-

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ceedings, and Vacate Memorandum and Order. On the same day, Cities also filed a Withdrawal of Request for Hearing.

These motions are opposed by Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (collectively RRD) as amicus curiae (letter of March 15, 1982), a status to which RRD was admitted by Board order, affirmed in a footnote of an appeals board decision. LBP-81-19, 14 NRC 87, 96 (1981); compare LBP-81-28, 14 NRC 333, 346 (1981)(invitation withdrawn); but see ALAB-665, slip op. at 21 (footnote 19, paragraph 2)(RRD has been granted amicus status).

I DISMISSAL

FPL and Cities argue that their Settlement Agreement should be accepted as a basis for dismissing this case. They state, correctly, that an antitrust proceeding is not required by statute and occurs only if a party has intervened or the Attorney General of the United States advises that a proceeding is required, under Section 105c(5) of the Atomic Energy Act. Consequently, an antitrust proceeding is in the nature of an operating license proceeding and it ordinarily is appropriate to terminate such a proceeding when all admitted intervenors have withdrawn. In the Matter of Georgia Power Company (Edwin I. Hatch Nuclear Power Plant, Unit No. 2), LBP-74-52, 8 AEC 107 (1974); see also In the Matter of Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Plant, Units 1 & 2), LBP-73-15, 6 AEC 375, 377 (1973).

In its letter as amicus RRD does not oppose the argument presented to us about the nature of our jurisdiction, and that unopposed argument appears to us to be correct. We therefore conclude that our jurisdiction depends on the presence in the proceeding of either the Attorney General of the United

States or of an intervenor. Since RRD has been denied status as an intervenor and since the Attorney General withdrew pursuant to a prior settlement agreement (see our Memorandum and Order, April 24, 1981, unpublished), there seem to be no parties before us and we seem to lack jurisdiction. (See Section II of this decision, formally dismissing two parties that are not part of the settlement agreement but that sought to withdraw from this case earlier.)

Despite our apparent lack of jurisdiction, we have reviewed the settlement documents to see whether there is any lack of fairness. See 10 CFR §2.759 (encouraging fair and reasonable settlements). A reason we undertook that review was that the Atomic Energy Act anticipates that we will apply the purposes of the antitrust laws, and courts acting pursuant to those laws have jurisdiction to approve or disapprove proposed settlement agreements under the Tunney Act (the Antitrust Procedures and Penalties Act of 1974). See U.S. v. American Telephone and Telegraph Co., et al., U.S. District Court, District of Columbia, Case No. 74-1698 (D.D.C.) 1982-1 Trade Cases ¶64,465 (January 12, 1982) at 72,610-611. However, that act has only suggestive autnority here, and our review of the settlement agreement failed to disclose any egregious unfairness; hence, we have decided not to pursue further, on our own motion, the question of whether the proposed settlement is in the public interest. Compare Clayton Act, 15 U.S.C. §5.(b). In this case, consideration by us of whether the settlement is in the public interest seems particularly unnecessary both because there was an earlier settlement approved in this case after notice of the agreement was given to the public and because the settlement before us also is before a federal district court, which will approve or disapprove of the settlement pursuant to principles which differ little from those we would apply. (Were the court

to reject the settlement, we might then need to reconsider our decision to dismiss the proceeding.)

We are not impressed by RRD's argument that our prior decisions provide it with a right to contest the remedies to be made available in this case and that our own decisions therefore stand in the way of accepting this settlement. First, we note that the Appeal Board affirmed our finding that RRD has failed to show that its complaint has a nexus to this proceeding. ALAB-665, slip op. at 17-18. The principal deficiency in its case is that it failed to show that the activities for which a license is sought would "play an active role in creating or maintaining the anticompetitive situation." Id. at 16.

We reject RRD's complaint that "the Board's grant to Parsons & Whittemore of status to participate at the remedial stage of the proceedings as amicus curiae could have served no useful purpose." First, our grant of amicus status gave RRD the opportunity to demonstrate that we should not accept the settlement placed before us in this case. Second, the grant of amicus status anticipated a continuing contest over the appropriate relief to be granted in this case; and amicus status would under those circumstances have provided an opportunity for RRD to attempt to affect the Board's decision to its advantage. That RRD has been unable to use its amicus status to advance its underlying interests does not demonstrate that the initial grant "could have served no useful purpose."

For these reasons, the motion to dismiss is granted.

II EARLIER MOTIONS TO WITHDRAW

The Orlando Utilities Commission moved to withdraw from this pro-

ceeding on June 20, 1980 and the Gainesville Utilities Department moved to withdraw on August 4, 1981. Since there are no reasons to refuse these motions, they are granted.

III MOTION TO VACATE

FPL and Cities have requested that our Memorandum and Order Concerning Florida Cities' Motion for Summary Disposition on the Merits, dated December 11, 1981 (LBP-81-58) should be vacated. They argue by analogy to established federal practice that when an appeal becomes moot it is appropriate to vacate the trial court's decision. United States v. Munsingwear, 340 U.S. 36, 39 (1950)

We accept this argument as valid. Moreover, our decision of December 11, 1981, was tentative, being left open by us for further objection by the parties. Given the preliminary nature of that opinion and the agreement of the parties not to contest it, that opinion ought to be vacated. It is our duty to adjudicate disputes and not to stand in the way of settlements by refusing a reasonable request to vacate our order.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 24th day of March, 1982,

ORDERED

(1) The motions to withdraw from this proceeding filed on June 20, 1980, by the Orlando Utilities Commission and on August 4, 1981, by the Gainesville Utilities Department, are granted.

(2) Our Memorandum and Order of December 11, 1981, (LBP-81-58) is vacated.

(3) This proceeding is dismissed.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD

Peter B. Bloch

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

Michael A. Duggan / by Peter B. Bloch

Michael A. Duggan
ADMINISTRATIVE JUDGE

Robert M. Lazo

Robert M. Lazo
ADMINISTRATIVE JUDGE

Bethesda, Maryland