

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

ANSWER OF NRC STAFF TO FLORIDA CITIES
WITHDRAWAL OF REQUEST FOR SECTION 105a HEARING



Benjamin H. Vogler
Deputy Antitrust Counsel

Dated: March 31, 1982

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On March 10, 1982, Intervenor Florida Cities (Cities) filed a petition seeking to withdraw their request that the Commission institute a proceeding under Section 105a^{1/} of the Atomic Energy Act, as amended, against the Applicant, Florida Power & Light Company (FPL). The Staff does not oppose this request.

Cities request for a Section 105a proceeding was filed before the Commission on August 28, 1978, on the basis of the decision in Gainesville Utilities Department v. Florida Power & Light Company, 573 F.2d 292, (5th Cir. 1978), cert. denied, 439 U.S. 966 (1978). In Gainesville, the Court of Appeals for the Fifth Circuit concluded that "the facts and inferences point ... strongly and overwhelmingly [to] the

^{1/} Section 105a of the Atomic Energy Act, as amended, 42 U.S.C. 2135a, provides in part that:

In the event a licensee is found by a court of competent jurisdiction ... in an original action in that court ... to have violated any of the provisions of [certain antitrust laws] in the conduct of the licensed activity, the Commission may suspend, revoke, or take such action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

existence of a conspiracy [between FPL and Florida Power Corporation] to divide the market...." The Court of Appeals reversed the trial court's refusal to grant Gainesville's motion for a judgment n.o.v. on this question and remanded the matter for further consideration.^{2/}

After receiving briefs from all interested parties regarding the institution of a Section 105a proceeding, the Commission, on December 21, 1979, declined to institute such a proceeding^{3/} and Cities then petitioned the United States Court of Appeals for the District of Columbia Circuit for a review of the Commission's Order. The appeal is presently pending before the Court of Appeals.

Cities now advise that they have reached an agreement and have settled their differences with FPL. Pursuant to the Cities settlement agreement with FPL, Cities seek to withdraw their request for a Section 105a proceeding against FPL. Cities also advise that all parties to the request for review of the Commission's Order of December 21, 1979 pending in the United States Court of Appeals for the District of Columbia have filed a stipulation for Dismissal with Prejudice with the Court.

Staff notes that the United States Department of Justice, in a pleading filed before the Commission on May 28, 1981, withdrew its

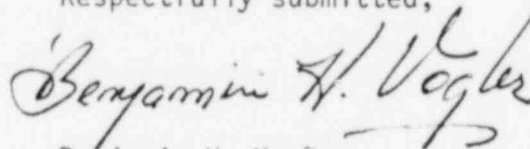
^{2/} 573 F.2d at 299.

^{3/} In declining to initiate a proceeding pursuant to Section 105a of the Atomic Energy Act of 1954, the Commission stated that it did so without prejudice to the filing of future petitions seeking such action. CLI-79-12, 10 NRC 767, 773 (1979).

request for a Section 105a^{4/} proceeding on the basis of the settlement agreement that had been reached with FPL and the NRC Staff.^{5/} The Staff, in a Memorandum dated June 12, 1981, advised the Commission that in its opinion the settlement agreement between FPL, the Department of Justice and the Staff and the incorporation of the settlement antitrust license conditions by the Licensing Board into the St. Lucie Plant, Unit 2 construction permit on April 24, 1981, eliminates any need for a Section 105a proceeding against FPL.

In view of the foregoing the Staff does not oppose Cities' petition for withdrawal of its request for a Section 105a hearing against FPL.

Respectfully submitted,



Benjamin H. Vogler
Deputy Antitrust Counsel

Dated at Bethesda, Maryland
this 31st day of March, 1982

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- 4/ On August 25, 1978, in response to a Commission request for comments concerning the impact of the Gainesville decision upon the Commission's obligation under Section 105(a), the Department of Justice requested that the Commission institute a Section 105a proceeding.
- 5/ On September 12, 1980, the Department of Justice, FPL and the Staff filed a joint motion with the presiding Atomic Safety and Licensing Board requesting that a set of antitrust license conditions agreed to among these parties as the result of a settlement of their differences be incorporated immediately in the St. Lucie Plant, Unit No. 2 construction permit. Since Cities was not a party to either the stipulation or the joint motion and a hearing might still occur, the moving parties indicated that the granting of the joint motion was without prejudice to the Board's authority to impose different or additional condition after a hearing.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF NRC STAFF TO FLORIDA CITIES WITHDRAWAL OF REQUEST FOR SECTION 105a HEARING" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 31st day of March, 1982:

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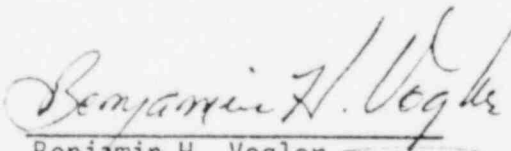
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