UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Florida Power & Light Company) Docket No. 50-389A
(St. Lucie Plant, Unit No. 2))

TO: Atomic Safety and Licensing Board Panel

STATEMENT OF FLORIDA CITIES' OBJECTIONS
TO APPLICANT'S INTERROGATORIES
TO INTERVENOR FLORIDA CITIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to the Board's Memorandum and Order of November 13, 1978, Florida Cities 1/ hereby submit their objections to Applicant Florida Power & Light Company's interrogatories and requests for production of documents filed on October 31, 1978 in the above-captioned proceeding. 2/

Florida Cities recognize that discovery rights should be construed liberally. Although many of Florida Power & Light Company's ("FP&L") requests are plainly burdensome and unlikely to lead to probative evidence, Florida Cities have limited their objections.

Florida Cities are concerned that discovery requests of all

1/ Florida Cities, intervenors herein, consist of the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Lake Helen, Mount Dora, Fort Meade, Key West, Newberry, St. Cloud, Tallahassee, Florida, and the Florida Municipal Utilities Association. Key West and St. Cloud's petition to intervene is still pending.

2/ As noted in the letter of November 11, 1978, addressed to the Board by NRC Staff Counsel on behalf of all the parties, the parties have reached some agreements and understandings concerning discovery, including some specific modifications of interrogatories as initially filed.

parties be treated equally. While they are prepared to provide certain categories of documents which they consider to be of dubious relevance and/or potentially subject to claim of privilege, they reserve the right to object to such requests should FP&L be allowed to withhold similar categories of documents. In addition, while Cities do not here seek deferral of any requests, 1/ they reserve the right to do so should FP&L seek deferral.

I. CITIES REQUEST THE BOARD TO DEFINE REQUESTS 116-117, 144-145, 149-150, and 154-155 TO LIMIT EXCESSIVE AND UNWARRANTED BURDEN.

Requests 116-117, 144-145, 149-150, and 154-155 are a series of requests that seek Cities' "understanding" of economies of scale in power plant construction and operation. Cities recognize that the concept of economies of scale is relevant to this proceeding, and Cities are prepared to respond to legitimate inquiry. Cities request that the Board rule that FP&L's requests would be satisfied by the following:

1) Cities will provide FP&L with all documents possessed by each city which are responsive to FP&L's questions. 2/

2) Cities will prepare a written response which addresses the questions as posed. The response will be prepared by the engineering experts that Cities plan to rely on in this proceeding. It will reflect their best general understanding, but no specific study will be undertaken to answer the questions.

1/ Other than those whose deferral has been provided for by agreement of the parties.

2/ As provided for by FP&L request nos. 118, 146, 151 and 156.

Request numbers 116-117 state as follows:

116. For the individual nuclear generating unit sizes, state your understanding of the general relationship between the investment cost per kilowatt of capacity for the various size units (e.g., the investment cost per kilowatt of an 800 megawatt unit is 1.1. times that of a 600 megawatt unit and 0.9 times that of an 1,100 megawatt unit):

(a) 200 megawatts
(b) 400 megawatts
(c) 600 megawatts
(d) 800 megawatts
(e) 1,000 megawatts
(f) 1,200 megawatts

117. For the following individual nuclear generating unit sizes, state your understanding of the general relationship between the operating costs per kilowatt of capacity for the various size units:

(a) 200 megawatts
(b) 400 megawatts
(c) 500 megawatts
(d) 800 megawatts
(e) 1,000 megawatts
(f) 1,200 megawatts

The further requests are worded identically, except that the information is sought in the case of natural gas, coal, and oil-fired generation.

Counsel for Cities anticipate that it is unlikely that particular Cities have formally addressed the questions of economies of scale as FP&L has posed them. As posed, the questions imply assumptions that are likely to be unrealistic. For example, since commercially operable nuclear plants are in the 500 Mw+ range, consideration of the operating characteristics of a 200 Mw unit would be academic. On the other hand, there may have been no good reason for a small city with limited financial resources and peak loads under 100 Mw to consider a 1,000 Mw unit. Of course, individual Cities will have conducted power supply studies and

prepared and adopted plans which make judgments about economies of scale as they may be relevant to the opportunities available to each city. Where such studies or plans exist, Cities are prepared to make them (and related documents) available to FP&L.

As Cities understand it, FP&L proposes that each city do more than this. As FP&L has defined the term "city," the term includes "all officials, officers, employees, attorneys, contractors, agents, representatives and consultants of such entity." (FP&L Requests, Definition No. 3) To the extent that FP&L's questions have not been formally and directly addressed by any city, particular individuals will undoubtedly have a wide variety of "understandings" based on varying degrees of knowledge. FP&L would apparently have Cities interview every City official and employee in order to determine a city's "understanding."

If the costs and burden of the undertaking are immediately apparent, its value is not apparent at all. Even if interviews were limited to "policy" officials, the number of interviews could be in the hundreds. 1/ The result would not merely be a collection of opinions, but one responsive to unrealistic hypothetical questions on a subject upon which those polled would, if the questions were realistic, seek expert advice in the first place.

1/ For example, if "policy officials" alone were interviewed, information would be sought at least from city councilmen, top public utility officials and members of the utility council. Since FP&L has not even limited the question to reflect current understanding, it would be necessary to interview all those who occupied these positions at any time during the designated time period. Assuming a five person city council, a five person utility board, three policymaking utility officials, and a ten year time period, the number of interviews required would likely be in the range of 20-30 per city.

As stated above, Cities are prepared to provide FP&L with a statement prepared by the experts whom the City officials have chosen to call on in this case. In addition, where a City has considered plans which require assumptions about economies of scale, Cities will provide related documents.

Cities submit that their proposed response would go well beyond what they are obligated to provide under the Federal Rules of Civil Procedure. As Professor Moore states "(Q)uestions based on hypothetical facts clearly calling for an opinion have been deemed improper." 1/ Nonetheless, Cities are prepared to have their experts attempt to respond to FP&L's questions. As Professor Moore further notes, it has been held that deponents who are not experts may not be examined on matters of expert opinion. 2/ FP&L's questions clearly relate to matters that require expert opinion. Nonetheless, to the extent that there are documents responsive to FP&L's questions, Cities would provide them -- even where the documents reflect lay judgment. If, after receiving these responses, FP&L is still unsatisfied, it may seek further

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1/ Moore's Federal Practice 26-161, citing Tobacco & Allied Stocks, Inc. v. Transamerica Corp. (D Del 1954), 16 FRD 537; United States v. Renault, Inc. (SDNY 1960) 27 FRD 23; Beirne v. Fitch Sanitorium, Inc., 20 FRD 93; but cf. Coxe v. Pitney (ED Pa 1961) 26 FRD 562.

2/ Id., citing Macrina v. Smith (ED Pa 1955) 18 FRD 254; Lowe v. Greyhound Corp. (D Mass 1938) 25 F Supp 653; Landry v. O'Hara Vessels, Inc. (D Mass 1939) 26 F Supp 423.

data. 1/ At present, however, Cities can see no basis for performing a costly opinion poll whose results would not appear to advance the proceeding or provide information of materiality.

II. CITIES OBJECT TO THE SCOPE OF REQUEST NO. 185 ON GROUNDS OF RELEVANCE AND BURDEN.

FP&L's Interrogatory No. 185 states:

185. (a) Describe in detail the consideration which any City has given during the designated period to establishment of a municipally-owned electic system in any municipality which does not at this time own or operate its own electric system. (b) Describe any studies or evaluations which have been performed by or for any City, or are in the possession or control of the City, with respect to establishing a municipally-owned electric system. (c) Identify each step of legislative, legal, executive, administrative or governing board consideration, recommendation and action that has been taken to date in connection with the possibility of establishing a municipally-owned electric system in a municipality which does not at this time own or operate its own electric system. (d) Provide copies of all documents relating to the answers to this interrogatory.

The relevance of request No. 185 is not immediately apparent to Cities. While FP&L's potential acquisition of municipal systems and its attempts to maintain its franchises are of relevance to this proceeding, there is no suggestion that any municipality has sought to acquire another system, nor, if there were, would the possibility be relevant in a proceeding where the issues relate to FP&L's conduct. Nonetheless, Cities are prepared to provide all documents responsive to the request. 2/ As stated, however, the request poses the same further and undue burden discussed in I, supra. On its face the request would require

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1/ Of course, Cities would reserve the right to oppose further requests.

2/ Subject, of course, to potential claims of privilege.

Cities to interview hundreds of officials 1/ in order to respond to 185(a) and 185(c). In Cities' view, the costs of this effort outweigh its usefulness to FP&L, if there is any. To the extent that any significant considerations have, in fact, been given, they should likely be reflected in documents -- which Cities would provide. If FP&L has reason to believe that significant considerations may not have left a documentary record, it might refine its request -- for example, to seek information regarding particular named officials or particular factual circumstances. In sum, Cities request that the Board a) limit the requirements of Request No. 185 to the production of responsive documents; b) provide that FP&L may seek further information upon appropriate showing. 2/

III. THE BOARD MUST ASSURE PARITY OF TREATMENT IN REGARD TO EVIDENCE FOR WHICH CLAIM OF PRIVILEGE MIGHT BE ASSERTED.

A number of Florida Power & Light Company's interrogatories to Florida Cities seek information relating to any effort made on Florida Cities' behalf regarding the introduction, consideration, or enactment of legislation, or would otherwise require information which FP&L might claim as privileged if such information were requested of it. Florida Cities do not object to interroga-

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1/ I.e., all past and present policymaking officials.

2/ Again, Cities reserve the right to oppose any further request.

tories which fall within this category. 1/ However, Florida Cities' interrogatories propounded to FP&L should be treated comparably. Therefore, Florida Cities reserve the right to object to requests relating to legislation should any objections by FP&L to similar interrogatories be sustained by the Board. It would be manifestly unfair to allow a claim of privilege by FP&L, but to force disclosure by Florida Cities.

IV. THE BOARD MUST ASSURE PARITY OF TREATMENT IN REGARD TO REQUESTS FOR WHICH RESPONSES MAY BE DEFERRED

Florida Cities understand that FP&L may seek the right to defer response to certain requests. To the extent that FP&L seeks deferral, Cities respectfully reserve the right to request deferral where comparable requests have been made of them.

V. THE PERIOD FOR WHICH DOCUMENTS ARE TO BE PROVIDED

Florida Power & Light Company has requested that, unless specifically contraindicated, documents should be provided for the period beginning January 1, 1950. FP&L, however, states that it "will contend that, except where the Licensing Board approves specific exceptions, the period designated for discovery should be much shorter." 2/

It is Cities' proposal that a) documents related to conduct

1/ Interrogatories within this category include No. 234-No. 238, No. 269-No. 275, and No. 293(b).

2/ October 31, 1978 letter of J.A. Bouknight, Jr. to Robert A. Jablon (transmitting interrogatories).

should be provided for the period 1950-present; 1/ b) unless otherwise specified, documents related to routine utility operations 2/ should be provided for the period 1972-present.

The courts have often recognized that antitrust litigation, because of the inherent complexity of the operations of the litigants and the terms of the litigation, require a level and breadth of discovery that may be beyond that which is normally appropriate elsewhere. See., e.g., Banana Service Co. v. United Fruit Co., 15 FRD 106, 108 (D. Mass 1953). In Caldwell-Clements, Inc. v. McGraw Hill Publishing Co., 12 FRD 531 (SDNY 1952), for example, the court provided a discovery period that predated plaintiffs very existence by a term approximating that for which Cities seek discovery herein. In holding, in 1952, that a discovery period dating from 1910 was appropriate, the Court explained at 536:

> Defendant's suggested time limit of 1935 is perhaps based on the fact that plaintiff came into being at about that time. Information antedating plaintiff's existence, however, is relevant in this type of action and can very well be admissible at the trial. Bausch Machine Tool Co. v. Aluminum Co. of America 2 Cir., 72 F.2d 236, 239, certiorari denied 293 U.S. 589, 55 S. Ct. 104, 79 L.Ed. 683, made it clear that evidence of transactions occurring long before the injury complained of and of the history of an organization is admissible upon the trial of monopolization cases. 1/

1/ See also Burroughs v. Warner Bros. Pictures, 12 FRD 491 (D. Mass, 1952).

1/ Unless a more limited period has been proposed in a particular request.

2/ E.g., financial data, operating data, cost of service studies, maps.

In this case, the time period is not urged simply to provide relevant background, but because of documentary evidence that the pattern of anticompetitive behavior of which Cities here compalin does in fact date back well into the 1950's. As Cities will show, FP&L's instant refusal to provide Cities access to its nuclear units is part of a longstanding pattern of behavior by which FP&L has a) sought to refuse or otherwise unlawfully condition direct dealings with Cities, and b) simultaneously sought to limit Cities' access to economic alternatives to the power supply alternatives which FP&L itself enjoys. In Gainesville v. Florida Power & Light Co., 573 F.2d 292 (5th Cir. 1978), cert. denied November 13, 1978, for example, the Fifth Circuit held that FP&L violated the Sherman Act in conspiring with Florida Power Corporation to divide the wholesale power market in Florida. In detailing the conspiracy, Judge Brown relied on documentary evidence dating back to 1954 (573 F.2d at 298).

Florida Cities would argue that the present refusals of FP&L to deal in nuclear power and its virtual nuclear monopoly, exacerbated by its present refusals to agree to an integrated power pool, general filed transmission rate and other relief increase Florida Cities' power supply costs "inconsistent with the antitrust laws" and that such factors mandate the relief sought. The adoption (or imposition) of a more recent cut-off date should be accompanied by a recognition that Florida Cities do not thereby waive any rights. Specifically, should a more recent cut-off date than that set in both Applicant's and intervenors' interrogatories be adopted, its adoption would have to be accompanied by agreement

(either in the form of a stipulation among the parties or a Board order) providing that FP&L cannot raise as a defense to Florida Cities' claims the contention either that Florida Cities must affirmatively prove that a situation inconsistent with the antitrust laws existed prior to the cut-off date deemed appropriate in order to obtain relief, or that the failure to prove such claim constitutes a defense. 1/

WHEREFORE, in view of the foregoing, Cities respectfully request that a) the Board limit the scope of FP&L request nos. 116-117, 144-145, 149-150, 154-155 and 185 as stated herein; b) provide for the designated time period for discovery stated herein; and c) assure parity of treatment for FP&L and Cities.

Respectfully submitted,

Daniel Guttman

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December 11, 1978

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1/ Obviously, Florida Cities would have to prove an affirmative "situation inconsistent" in order to obtain relief.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing STATEMENT OF FLORIDA CITIES' OBJECTIONS TO APPLICANT'S INTERROGATORIES TO INTERVENOR FLORIDA CITIES AND REQUESTS FOR PRODJCTION OF DOCUMENTS has been served on the following persons by hand delivery* or depositing copies in the United States mail, first class postage prepaid, on December 11, 1978:

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