

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '81 DEC 22 P4:17

| | | |
|-------------------------------|---|--------------------|
| In the Matter of |) | |
| |) | |
| Florida Power & Light Company |) | Docket No. 50-389A |
| |) | |
| (St. Lucie Plant, Unit No. 2) |) | December 22, 1981 |

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

MOTION FOR MODIFICATION
OF PROCEDURAL SCHEDULE

Florida Power & Light Company ("FPL") respectfully requests the Board to modify the procedural schedule adopted in its Memorandum and Order of December 11, 1981. That schedule calls for the concurrent filing of objections to the Memorandum and Order and of trial plans, with an argument on relief and a possible argument on objections and evidentiary hearing, all to commence on February 9. FPL urges that this schedule be modified and/or clarified in two respects.

First, FPL requests the Board to modify the schedule so that trial plans would not be filed (and an evidentiary hearing based on those trial plans would not take place) until after there has been a "serious consideration" of and a ruling on the parties' objections. Such objections could still be submitted on the dates specified in the Memorandum and Order and argued on February 9 or some other date at the Board's convenience.

Second, the procedural schedule would require FPL to file its trial plan (and apparently proceed to hearing) without a meaningful opportunity for discovery regarding the case or testimony

to be presented by Cities, and within an extraordinarily abbreviated time frame. FPL requests the Board to modify the schedule so that the parties will be accorded an adequate opportunity for discovery and for trial preparation before being required to file trial plans or commence hearings.

I.

The Board's Memorandum and Order embodies a tentative determination that, in certain specified respects, a situation inconsistent with the antitrust laws exists. This determination is obviously of great importance in defining the issues that remain to be resolved in this proceeding and in considering the subject of relief. The Board itself has recognized that it "reached many conclusions" in the course of its decision and that these conclusions were based on an analysis of a "complex and somewhat disorganized record." (Memorandum and Order, 50-51).

Because of the broad implications of its decision, the Board determined that "it is appropriate for the parties to obtain serious consideration for objections they may have to this decision." (Id., 50-51). The Board thus adopted a procedure calling for objections to be filed on January 13, 1982, and reply briefs to be filed on January 22, 1982. The purpose of this procedure is to permit the parties to "persuade us to alter our decision," which, the Board stated, is "not . . . our last word on [the Cities'] motion." (Id., 2).

FPL endorses this procedure and seeks no modification in the dates specified for filing objections and replies. However, the

Board has also provided for the filing of trial plans before the parties' objections have been ruled upon. Under the Board's Memorandum and Order, the Cities would file their trial plan along with their objections on January 13, 1982 and FPL would then respond, presumably prior to the date set for trial, by submitting a trial plan of its own. (Id., 51-52). The Board's Memorandum and Order further contemplates that the parties would each file alternative trial plans, one of which would be based on the assumption that all objections will be rejected and the other of which would be based on the assumption that one or more objections will be granted. (Id., 51-52).

FPL urges that the filing of trial plans be deferred until after the parties have received the Board's "last word" with respect to summary disposition. In this event, the filing of trial plans would be based on a definitive statement by the Board of the issues that it has resolved by summary disposition and those that, in its view, remain for resolution after an evidentiary hearing. Such an approach would be more efficient and useful than the approach incorporated in the Board's Order.

Because of the range of issues tentatively decided by the Board, a wide variety of objections could potentially be filed by the parties. Depending on how the Board rules on these objections, the issues remaining for consideration at a hearing could vary substantially. As a result, very different types of witnesses and documentary evidence might be relevant during the remaining phases of this proceeding.

The procedure presently contemplated by the Board would place the parties in the difficult position of anticipating the different rulings that the Board might make on their objections and then developing a trial plan which fits all of the many possible scenarios.^{*/} For this reason, the trial plans prepared by the parties will be most useful for all concerned if the Board first provides definitive guidance on the scope of further proceedings. Based on such guidance, the parties could then accurately identify the evidence and witnesses that will be of most value to the Board during further proceedings.^{**/}

FPL wishes to emphasize the importance of the objections permitted by the Board in clarifying the scope of further proceedings. A number of complex issues arose late in the briefing of the Cities' motion that will require further scrutiny during the objections process. For example, FPL intends to direct the

^{*/} Moreover, the Board obviously is not limited merely to accepting or rejecting objections as stated by the parties. It is reasonable to expect that the Board may modify its decision in a way which the parties do not anticipate and which influences the proof they would seek to put on.

^{**/} FPL is not certain from the Memorandum and Order whether the Board may contemplate commencing evidentiary hearings prior to ruling upon objections. FPL respectfully submits that such an approach would be most unproductive. Any post or mid-hearing ruling granting or denying certain objections would threaten to disrupt the proceeding, by injecting new issues which would impinge upon or relate to testimony already received and examined or by resolving issues in the midst of being tried. Moreover, if the Board endeavors to rule on summary disposition objections after the commencement of trial hearings, it would be very difficult not to be influenced by the testimony it has heard. For these reasons it is clearly essential, for the most expeditious and economical resolution of this proceeding, that the Board rule upon objections prior to the commencement of hearing.

Board's attention to certain aspects of the recent decisions in Florida Cities v. Florida Power & Light Co., (S.D. Fla. October 13, 1981) and Florida Power & Light Company v. Federal Energy Regulatory Commission (5th Cir. No. 80-5259, November 6, 1981). These decisions were rendered subsequent to oral argument in this proceeding and could not be fully addressed or considered in prior submissions. (The latter is not even mentioned in the Memorandum and Order of December 11, 1981.) The objections process will be most productive, therefore, if the submission of trial plans can be held in abeyance until these and other issues have been resolved.

II.

As noted above, under the procedural schedule as it now stands, the Cities are to file proposed license conditions and their trial plan on January 13, 1982. FPL is to respond with its trial plan at an unspecified date, perhaps January 22, but presumably prior to February 9, 1982. These trial plans are to include "the names and qualifications of witnesses, an outline of their testimony, and identification of documentary evidence." Id. at 51. Additionally, the parties are to file "alternative trial plans," assuming their objections are granted. The Memorandum and Order indicates that the proceedings scheduled for February 9 may encompass an "evidentiary hearing on remaining issues." Id., at 52.

In short, this schedule would require FPL, within ten days to three and a half weeks, to state and prepare its primary

"trial plan" -- without the opportunity for discovery or inquiry concerning the case or testimony of Cities (and without a ruling from the Board as to the scope of the issues remaining in the proceeding).^{*/} This schedule would deprive FPL of an adequate and fair opportunity to present its case to the Board and would contravene basic principles of administrative due process.

Before filing its "trial plan," FPL is entitled to both adequate notice and discovery. Here, this must include particularization of and an opportunity to discover evidence relevant to Cities' contentions on the issues remaining for decision, and the right to depose fully Cities' fact and expert witnesses on these issues (none of whom have previously been identified). The procedural schedule must allow an adequate time for completing these tasks. The issues involved here are complex and important, and cannot be fairly or fully presented to the Board without discovery and careful preparation.

We are not certain whether the Board intends actually to proceed with an evidentiary hearing on February 9 or rather to discuss the nature of further proceedings that are necessary before such a hearing can be held. If the Board contemplates the latter procedure, however, this still

^{*/} It would further require FPL to file its "alternative trial plans," assuming its objections are granted and there is a trial on the merits, without the opportunity to complete the discovery on the merits which relates to those objections.

puts the cart before the horse, since it is tantamount to requiring the parties first to file their trial cases and then conduct discovery. Discovery is necessary before meaningful trial plans, with witness identifications and testimony summaries, can be filed.

This problem is equally, if not more, acute with respect to the submission of alternative trial plans. Under the Memorandum and Order these plans would set forth the parties' case on the merits on issues as to which objections have been filed. Yet FPL simply cannot fairly be expected to present its trial plan at this juncture were all or part of this case to proceed on the merits. First, Cities have not stated in any coherent fashion what their contentions would be if, rather than relying on collateral estoppel, they were forced to prove their case. A respondent party cannot be required to state its trial plan for defense before it is apprised of the allegations it is supposed to defend against. Secondly, discovery on the merits is far from complete. The Cities have not yet answered FPL's interrogatories; no discovery has been undertaken concerning Vero Beach, Leesburg and FMUA; and deposition and some document discovery in the other Cities remains. In these circumstances, the submission of alternative trial plans with designation of witnesses, testimony summaries, and filing documents, is simply impossible.

FPL strongly believes that, once the Board rules on the parties' objections, a meaningful pretrial procedure should be established which assures an adequate opportunity for discovery on the issues remaining to be decided. Accordingly, FPL requests that the procedural schedule in the Board's Memorandum and Order be modified and/or clarified, to provide as follows:

- (a) As scheduled, on January 13, 1982, the parties shall file their objections, and the Cities shall file their proposed license conditions. Replies also shall be filed as scheduled on January 22, 1982;
- (b) On February 9, 1982, or other date specified by the Board, there will be a hearing. That hearing will address the following subjects: (1) argument on objections; (2) the scope of further discovery; and (3) the scope and scheduling of an evidentiary hearing;
- (c) Trial plans shall not be submitted until after the Board rules on objections. Cities shall submit their trial plan within twenty days of the Board's ruling on objections. FPL shall submit its trial plan within sixty days thereafter, with discovery to remain open in the interim;
- (d) Discovery shall be re-opened on all matters as to which objections are filed.*/

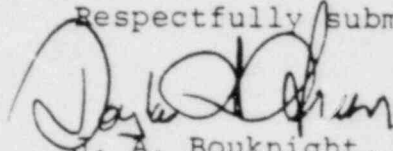
This modified procedure suggested by FPL will not result in any significant short-term delay, and in the long term

*/ This will reduce the possibility of any delay if the Board grants objections that otherwise would require discovery blocked by the Memorandum and Order. Indeed, Cities have already refused to permit full discovery in the City of Leesburg on the basis of the Memorandum and Order, and FPL expects other discovery relevant to a hearing, if some of FPL's objections are granted, to be circumscribed as well on the same basis.

should actually hasten final decision by leading to a sharply focused, fully prepared hearing.

FPL asks the Board to require that a response to this motion be filed not later than December 29, 1981.

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.
P. O. Box 7566
Washington, D.C. 20044
(202) 602-5520

Attorneys for Florida Power &
Light Company

DATED: December 22, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'81 DEC 22 P4:17

In the Matter of)
)
Florida Power & Light Company)
)
(St. Lucie Plant, Unit No. 2))

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
Docket No. 50-389A

CERTIFICATE OF SERVICE

I hereby certify that copies of Motion For Modification Of Procedural Schedule were served upon the following persons by hand delivery (*) or by deposit in the U.S. Mail, first class, postage prepaid this 22nd day of December, 1981.

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

*Alan S. Rosenthal, Esquire
Atomic Safety and Licensing
Appeal Board Panel
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

*Christine N. Kohl, Esquire
Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

1/Michael A. Duggan, Esquire
College of Business Administra-
tion
University of Texas
Austin, Texas 78712

*Stephen F. Eilperin, Esquire
Atomic Safety and Licensing
Appeal Board Panel
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

*Docketing and Service Station
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board
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

1/ Via Federal Express

Thomas Gurney, Sr., Esquire
203 North Magnolia Avenue
Orlando, Florida 32802

Robert E. Bathen
Fred Saffer
R.W. Beck & Associates
P.O. Box 6817
Orlando, Florida 32803

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

William C. Wise, Esquire
Suite 500
1200 18th Street, N.W.
Washington, D.C. 20036

Janet Urban, Esquire
P.O. Box 14141
Washington, D.C. 20044

William H. Chandler, Esquire
Chandler, O'Neal, Avera, Gray &
Stripling
Post Office Drawer O
Gainesville, Florida 32602

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

Reubin O.D. Askew
Greenberg, Traurig, Askew,
Hoffman, Lipoff, Quentel
& Wolff, P.A.
1401 Brickell Avenue
Miami, Florida 33131

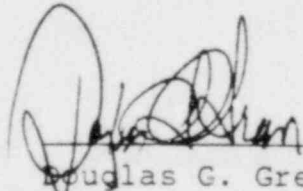
Robert R. Nordhaus
Van Ness, Feldman, Sutcliffe,
Curtis & Levenberg
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, D.C. 20007

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

Charles R.P. Brown, Esquire
Brown, Paxton and Williams
301 South 6th Street
P.O. Box 1418
Fort Pierce, Florida 33450

George R. Kucik, Esquire
Ellen E. Sward, Esquire
James H. Hulme, Esquire
Arent, Fox, Kintner, Plotkin &
Kahn
1815 H Street, N.W.
Washington, D.C. 20006

*Argil L. Toalston
Acting Chief
Antitrust and Economic Analysis
Section
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555



Douglas G. Green