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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

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May 26, 1995

Robert A. Jablon, Esq.
Spiegel & McDiarmid
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798

Dear Mr. Jablon:

In your petition of July 2, 1993, you filed a motion on behalf of the Florida Municipal Power Agency (FMPA) requesting, pursuant to 10 CFR 2.206, that the U.S. Nuclear Regulatory Commission (NRC) take certain enforcement actions against the Florida Power & Light Company (FPL) for allegedly violating certain antitrust license conditions applicable to Unit 2 of the St. Lucie Plant.

My decision (DD-95-10) denying your request regarding the issues raised in your petition is enclosed (Enclosure 1). In denying your request for enforcement actions against FPL, I have relied on, among other things, the testimony and findings in a parallel proceeding at the Federal Energy Regulatory Commission (FERC)--primarily, FERC order dated May 11, 1994 (67 F.E.R.C. P61,167; 1994)--requiring FPL to provide network transmission service to FMPA.

A copy of the enclosed Director's Decision has been referred to the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c). For your information, I am also enclosing the letter to Florida Power and Light Company (Enclosure 2) and the Federal Register notice (Enclosure 3).

Sincerely,

W. Russell

William T. Russell, Director
Office of Nuclear Reactor Regulation

Docket No. 50-389A (2.206)

Enclosures:
1. Director's Decision (DD-95-10)
2. Letter to FPL
3. Federal Register Notice

cc: LABouknight, Esq.

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DD-95-10

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION

William T. Russell, Director

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389A
	)	10 CFR § 2.206
(St. Lucie Plant, Unit 2)	)	
	)	

DIRECTOR'S DECISION UNDER 10 CFR § 2.206

I. INTRODUCTION

The Florida Municipal Power Agency (FMPA), in a petition dated July 2, 1993, requested the Executive Director for Operations of the Nuclear Regulatory Commission (NRC or Commission) to take enforcement action against the Florida Power & Light Company (FPL) for allegedly violating the antitrust license conditions applicable to the captioned nuclear unit. The petition was referred to the Director, Office of Nuclear Reactor Regulation, for response.

FMPA requested that the NRC 1) declare that FPL is obligated to provide network transmission among geographically separated sections of FMPA without imposing multiple charges for transmission among multiple delivery points; 2) issue a Notice of Violation of that obligation; 3) impose a requirement by order directing FPL to file with the Federal Energy Regulatory Commission (FERC) a rate schedule that provides for transmission in a manner that complies with the antitrust conditions which are a part of the St. Lucie

Plant, Unit 2 (St. Lucie); 4) take other such action as may be proper, including proposed imposition of civil monetary penalties; and 5) publish notice of the petition including when the NRC expects to decide whether to take action in response to the petition.

FMPA specifically alleged that the antitrust license conditions for St. Lucie require FPL to provide transmission of power over its system among the various sections of FMPA's system on a network basis without imposing multiple charges for transmission among multiple FMPA receipt and delivery points. FMPA alleged that FPL has refused to provide such network transmission and as a result, is in violation of the St. Lucie antitrust license conditions.

FMPA's § 2.206 petition centers on FPL's alleged continued refusal to provide network transmission service over its system. The issue of whether FPL is required to provide network transmission either under the St. Lucie antitrust license conditions or as a result of a filed request for transmission service before the FERC, was resolved by the issuance of a final order by the FERC in a related proceeding on May 11, 1994. The FERC order directs FPL to provide network transmission service to FMPA. Consequently, the issues that were raised by FMPA in its § 2.206 petition that pertain to issues under the NRC's jurisdictional purview, i.e., whether FPL was required to offer FMPA network transmission service, have been resolved. The unresolved issues pertaining to FMPA's request for network transmission service are rate-related issues, and are currently being negotiated by FMPA and FPL under a FERC order. For these reasons, I am denying FMPA's § 2.206 request for an enforcement action against FPL.

II. BACKGROUND

During the antitrust review of St. Lucie conducted by the Atomic Energy Commission (AEC, predecessor of the NRC) staff and the staff of the Department of Justice (DOJ or Department), the Department, by letter dated November 14, 1973, advised the AEC staff that FPL appeared to be engaged in activity that was inconsistent with the antitrust laws, i.e., principally refusing to 1) wheel, 2) interconnect with other power entities, and 3) grant access to the St. Lucie nuclear facility. During settlement discussions between FPL, AEC staff and DOJ staff, FPL was asked to clarify what its corporate policies were on access to its transmission facilities as well as participation in St. Lucie. By letter dated February 25, 1974, the AEC staff forwarded a set of license conditions to FPL that, if agreed upon by FPL, would obviate the need for an antitrust hearing in the St. Lucie construction permit antitrust review. The license conditions required FPL to offer several cooperative and municipal electric power systems various coordination services as well as the opportunity to purchase ownership in St. Lucie. On February 26, 1974, FPL agreed to adopt the proposed set of license conditions. However, several years thereafter, a group of Florida municipalities was permitted to intervene. Eventually, a settlement agreement reached in 1980 resulted in a 1981 license amendment adding antitrust license conditions to the St. Lucie construction permit. Subsequently, pursuant to § 105c of the Atomic Energy Act of 1954, as amended, the staff conducted an operating license review of FPL's competitive activities which was completed in September of 1982. The staff found no significant changes in FPL's activities since the completion of the construction permit review.

Subsequent to the issuance of the St. Lucie amendment adding the antitrust license conditions in 1981, FMPA alleged that FPL, on several occasions, refused to provide transmission services over its network among the various sections of FMPA without imposing multiple charges for transmission among multiple FMPA receipt and delivery points.[1] FMPA characterized this type of service as "network transmission service" as opposed to point-to-point transmission service. In 1982, FPL entered into settlement agreements with various Florida municipalities (the predecessor to FMPA[2]) and, according to FMPA, the settlement agreements refined and built upon the St. Lucie antitrust license conditions. In 1989, FMPA and FPL began negotiating for transmission network service. The negotiations were unsuccessful and in December 1991, FMPA filed suit against FPL in (Florida) state court alleging breach of contract. FPL removed the case to federal court, Middle District of Florida, in January 1992. FMPA alleged that FPL refused to supply network transmission service, per the transmission agreements negotiated as a result of the NRC licensing proceeding, and sought injunctive relief and damages.

On July 2, 1993, FMPA filed a complaint with the FERC in an outstanding electric rate case involving FPL (EL93-51-000). FMPA asked the FERC to find that certain access limitations of existing transmission service agreements between FMPA and FPL were unjust, discriminatory and unreasonable under the

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[1]Specifically, license condition No. X(a) that requires FPL to "transmit power. . . (2) between two or among more than two neighboring entities, or sections of a neighboring entity's system which are geographically separated. . . ."

[2]Several cities combined in 1978 to form FMPA, a joint action agency. Under Florida law, The Joint Power Act, entities have the right to join with other electric utilities in order to jointly finance, acquire, construct, manage, operate or own an electric power project. These rights were extended to local governmental entities with the enactment of The Interlocal Cooperation Act in 1978.

Federal Power Act. The complaint asked the FERC to direct FPL to provide network transmission service.[3] FMPA also filed a petition before the NRC on July 2, 1993, alleging that FPL was in violation of its St. Lucie antitrust license conditions requiring FPL to provide network transmission service and requested that the NRC enforce the St. Lucie antitrust license conditions and require FPL to offer network transmission service to FMPA.

On October 28, 1993, FERC issued a proposed order in the FMPA network transmission case (65 FERC ¶ 61,125) granting FMPA's request to order FPL to provide network transmission service. The FERC found that by ordering network transmission, the public interest would be served, fully consistent with its mandate under the Federal Power Act. As a result of the FERC proposed order, on December 16, 1993, the U.S. District Court for the Middle District of Florida issued a "Memorandum Decision and Order" in which the Court stated that the FERC's proposed order resolved the issues presented in the District Court. As a result, FMPA's request for damages was denied based upon the "filed rate doctrine" which empowers the FERC to rule on wholesale rate matters. The Court dismissed the case.

During a 60-day negotiating period set by the FERC following the proposed order, FMPA and FP&L were unable to reach an agreement on the terms and conditions for a filed network transmission rate schedule. In the first quarter of 1994,

> both parties filed briefs and supporting materials setting forth their respective positions. On May 11, 1994, the FERC issued a "Final Order" in Docket No. TX93-4-000, 67 FERC ¶61,167 (May 11, 1994), reh'g

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[3]FMPA defines network transmission service as "a transmission arrangement that would enable [FMPA] to distribute a given quantity of transmission network usage among various delivery points, without paying multiple monthly or yearly transmission charges." FMPA complaint before the FERC at p. 25.

> pending. In the Final Order, the FERC approved FPL's proposed load ratio approach to the pricing of network transmission with the crucial additional requirement, proposed by FMPA, that FMPA receive credit for transmission facilities owned by FMPA or its members that will be used, along with FPL transmission facilities, to integrate FMPA's loads and resources. 67 FERC at pages 61,481-2. Both FPL and FMPA sought rehearing of certain aspects of the Final Order, and those requests for rehearing remain pending.[4]

The FERC's Final Order, dated May 11, 1994 (67 FERC ¶ 61,167), directed FPL to offer network transmission service along with the necessary rates, terms and conditions required to make this service a power supply option for FMPA.

III. DISCUSSION

Institutional and competitive pressures have been building over the past decade within the electric bulk power services market to open up the life-line of the industry, i.e., transmission, by lowering existing entry barriers to transmission access that would allow a more efficient distribution of scarce resources and ultimately, cheaper power to those in need and willing to pay for an efficient power supply. With the passage of the Energy Policy Act of 1992 (EPAct), the institutional reorganization which has been gathering momentum in the electric power industry for several years, developed an inertia unseen in the industry in this country since the emergence of large vertically integrated electric holding companies in the 1920's and 1930's. After much public debate leading up to passage of EPAct, the feature included in the act that has been most influential in reshaping the character of the

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[4]Letter dated December 5, 1994, from Robert A. Jablon and Bonnie S. Blair of Spiegel & McDiarmid to Anthony T. Gody, Chief, Inspection Program Branch, Office of Nuclear Reactor Regulation at page two. [FMPA Letter]

electric utility industry is Section 211. Section 211 empowers the FERC to order transmission access to promote competition where to do so would be in the public interest--this public policy change represents a dramatic change from the competition-neutral policy intended by the Public Utilities Regulatory Policies Act of 1978 (PURPA). Smaller, transmission dependent power systems have long argued that PURPA has not gone far enough in opening up the tightly knit nature of large generation and transmission systems and have lobbied Congress for several years to amend PURPA and empower the FERC to order transmission access or "wheeling." The staff believes the formation of FMPA and the goals imposed upon this joint action agency by its members mirror the changes that have taken place and continue to take place in the electric bulk power market during the past 10-15 years.

Since the late 1970's, several cities in Florida have sought greater access to FPL's transmission grid. Typically, these cities own their electric distribution systems and in some instances, generate a portion of their own power supply requirements. In order to seek out the most cost efficient source of power supply, these cities need meaningful access to transmission facilities, i.e., usually the local, large, fully-integrated electric utility system serving in the relevant geographic area--in this instance, FPL.

During the construction permit review of the St. Lucie facility, the antitrust staffs of the Department of Justice and the Atomic Energy Commission identified instances where FPL's market dominance in generation and transmission in the state of Florida was allegedly used to restrict the competitive options of smaller power systems in the state. FPL did not offer the cities and their successor organization, FMPA, the type of transmission access that would allow FMPA to successfully compete for sales or purchases of wholesale

power in the state of Florida or other potential markets in neighboring states.[5] The staff identified this market conduct by FPL during the licensing review of the St. Lucie facility. Subsequently, the Department of Justice and NRC staffs recommended that a set of license conditions, designed to prevent FPL from abusing its market dominance, be made a part of the St. Lucie operating license.

The Florida municipalities, in the 1970's and early 1980's, and FMPA since the early 1980's, have sought a type of transmission access, termed "network transmission service," that would, according to FMPA, provide for a more level playing field in the Florida bulk power services market. FMPA's quest for competitive power supply options should not be inhibited by power systems that have considerable market power and abuse their market power in a manner that diminishes economic efficiency in the market place. I agree with FMPA's assessment that its planned integrated dispatch operation (IDO)

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[5]"Applicant's control over the transmission network in its area has given it the power to grant or deny access to coordination--and thereby access to the benefits of large-scale, low-cost, base-load nuclear generation--to neighboring smaller systems. There have been some allegations that Applicant may have used this power to deny coordinating benefits to smaller systems or to take the predominant share of the benefits of such coordination as has been entered into." Department of Justice Letter [hereinafter, "Advice Letter"] dated November 14, 1973, from Bruce B. Wilson, Acting Assistant Attorney General, Department of Justice to Howard K. Shapar, Assistant General Counsel, Atomic Energy Commission, pp. 3-4. The Advice Letter continued, "Our antitrust review led us to the following conclusions: (1) Applicant is the dominant electric utility in Florida and because of its ownership of transmission, has the power to grant or deny other systems in its area the access to coordination--and thus the nuclear power--needed to compete in bulk power supply and retail distribution markets; (2) there is some indication Applicant's dominance may have been enhanced through conduct inhibiting the competitive opportunities of the smaller systems in its area; and (3) construction and operation of St. Lucie No. 2, and the sale of power therefrom to meet Applicant's load growth and compete with the smaller systems in its area could create or maintain a situation inconsistent with the antitrust laws if access to nuclear generation were denied those smaller systems." Advice Letter, pp. 6-7.

project, or a project similar to it, "represents the logical next step in FMPA's development" as a competing bulk power entity in the state of Florida represents a plausible next step in its development as a power supply system. As the petition states:

> Integrating and coordinating its resources has been an important long-term FMPA goal. FMPA has previously sought to establish a Florida-wide power pool and, failing that, a FMPA-FPL power pool, but those efforts were rebuffed by FPL. The IDO project would establish an integrated dispatch and operations pool of certain FMPA members, thereby permitting substantially more economic and efficient use of their existing resources and planning for more economic future resources.[6]

The antitrust license conditions developed in the St. Lucie proceeding were intended to resolve the alleged anitcompetitive situation that would be maintained if an unconditioned license for St. Lucie, Unit 2 had been issued without conditions. The license conditions were designed to promote the efficient allocation of energy resources in the state of Florida and perhaps service areas in adjoining states. The staff concluded that the manner in which FPL charged multiple transmission fees for transfer of blocks of power over its transmission system was potentially anticompetitive, and consequently, helped design license conditions that would preclude FPL from abusing its market power in the Florida bulk power services market.

There are similarities between the instant matter and a merger case reviewed by the staff in the early 1990's, although the letter did not involve a request for an enforcement action. A brief comparison of the two matters should provide additional insight into how I reached my decision herein. In the early 1990's, the staff reviewed the competitive implications of the merger between Public Service Company of New Hampshire (Seabrook Nuclear

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[6]FMPA Section 2.206 Petition to the NRC staff dated July 2, 1993, p. 8.

Station licensee) and Northeast Utilities (i.e., the NU/PSNH merger). The merger was also reviewed for competitive implications by the FERC pursuant to Section 203 of the Federal Power Act and the Securities and Exchange Commission (SEC) pursuant to Section 10(b)(1) of the Public Utilities Holding Company Act.

As in the instant case, the NU/PSNH merger was reviewed for competitive implications by different regulatory agencies with different standards of review and areas of regulatory oversight. In its review of the NU/PSNH merger, the staff followed the hearings conducted by the FERC very closely and made its no "significant change" finding based largely upon the testimony and resultant premerger conditions imposed on the merging parties by the FERC. The staff determined that the potential anticompetitive implications of the NU/PSNH merger were adequately mitigated by the FERC conditions. The SEC, which was required to determine whether the merger would lead toward undue concentration of control over public utility companies and thereby be detrimental to the public interest, initially approved the merger but in a subsequent order indicated the pertinent competitive issues were under the jurisdiction of the FERC and therefore made its final approval contingent upon FERC also approving the merger.

Intervenors at the SEC appealed the SEC decision to the Court of Appeals for the District of Columbia Circuit claiming that the SEC had abdicated its antitrust responsibility by deferring its ultimate decision to the FERC. The Court ruled that the SEC did not abdicate its statutory duty to find on the competitive issues attendant to the proposed acquisition because the SEC indicated in its order that the intervenors had the opportunity to "rescind or

further condition its [the merger's] approval" before the SEC if they disagreed with the ultimate FERC ruling. The Court indicated that the SEC, in order to assure coordination of their orders in a parallel review, conditioned its approval of the acquisition upon the FERC's final order approving the merger. The Court stated that,

> Although the SEC may not rely upon the FERC's concurrent jurisdiction over an acquisition as a reason to shirk its own statutory mandate to determine the anticompetitive effect of that transaction, see, e.g., Municipal Elec. Ass'n, 413 F.2d at 1059-60, it does not follow that the SEC must pretend that it is the only agency addressing the issue when it is not; that would only lead it to conduct a wasteful, duplicative proceeding. Rather, when the SEC and another regulatory agency both have jurisdiction over a particular transaction, the SEC may "watchfully defer[]" to the proceedings held before--and the result reached by--that other agency. Wisconsin's Environmental Decade v. SEC, 882 F.2d 523, 527 (D.C.Cir.1989).[7]

The NRC staff, prior to the Court of Appeals' decision, indicated that it was aware of the FERC proceeding and the FERC decision; however, the NRC did not defer to the FERC decision.

The staff continues to employ the concept of "watchful deference" espoused by the Court and has determined that the FERC Order in the rate case involving FMPA and FPL addressed and adequately responded to the concerns contained in FMPA's Section 2.206 petition to the NRC. The FERC ordered FPL to provide FMPA network transmission service in its order dated May 11, 1994--FMPA's primary concern expressed in its Section 2.206 petition. FMPA continues to argue that it is not taking network transmission service from FPL. It is apparent from the ongoing discussions between FPL and FMPA and the continuing rate case proceeding at the FERC that there are issues outstanding between the two parties that need to be resolved before FMPA begins taking

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[7] City of Holyoke Gas & Electric Department, et al. v. SEC, 972, F.2d 358, 363 (D.C. Circuit 1992)

network transmission service from FPL. However, it is also apparent that the remaining outstanding issues are rate-related issues within the jurisdiction of the FERC, not the NRC.

IV. CONCLUSION

I have concluded that FERC's Order requiring FPL to provide network transmission service to FMPA and the subsequent ongoing rate proceeding before the FERC, adequately address and resolve the concerns raised in FMPA's Section 2.206 petition and request for action by the NRC. As a result of the foregoing, I have determined that no proceeding should be instituted and no further regulatory action by the NRC is required.

Dated at Rockville, Maryland, this 26th day of May 1995.

William T. Russell

William T. Russell, Director
Office of Nuclear Reactor Regulation

U.S. NUCLEAR REGULATORY COMMISSION

DOCKET NO. 50-389A

FLORIDA POWER & LIGHT COMPANY

ST. LUCIE PLANT, UNIT 2

ISSUANCE OF DIRECTOR'S DECISION UNDER 10 CFR § 2.206

(DD-95-10)

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission (NRC), has issued the Director's Decision concerning the petition dated July 2, 1993, filed by Robert A. Jablon, Esq., et al., on behalf of the Florida Municipal Power Agency (petitioner). The petitioner requested that the NRC take certain enforcement actions against the Florida Power & Light Company (FPL) for allegedly violating the antitrust license conditions applicable to Unit 2 of the St. Lucie plant.

After consideration and careful review of the facts available to the staff and the decision reached in a parallel proceeding involving the same parties and similar issues before the Federal Energy Regulatory Commission (FERC), the Director has determined that the issues raised by the petitioner that could be remedied by the NRC have been addressed and resolved in the FERC proceeding(s) so as to require no further action by the NRC. As a result, no proceeding in response to the petition will be instituted. The reasons for this decision are explained in the "Director's Decision under 10 CFR § 2.206" (DD-95-10), which is published below.

A copy of the Director's Decision has been filed with the Secretary of the Commission for Commission review in accordance with 10 CFR 2.206(c). The Decision will become the final action of the Commission 25 days after issuance, unless the Commission on its own motion institutes review of the Decision within that time as provided in 10 CFR 2.206(c).

Copies of the Petition, dated July 2, 1993, and the Notice of Receipt of Petition for Director's Decision under 10 CFR 2.206 that was published in the Federal Register on September 23, 1993 (58 FR 47919), and other documents related to this Petition are available in the NRC Public Document Room, the Gelman Building, 2120 L Street, N.W. (Lower Level), Washington, DC 20555 and Local Public Document Room at the Indian River Community College, 3209 Virginia Avenue, Ft. Pierce, FL 33450.

Dated at Rockville, Maryland, this 26th day of May 1995.

FOR THE NUCLEAR REGULATORY COMMISSION

W. Russell

William T. Russell, Director
Office of Nuclear Reactor Regulation

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

EDO Principal Correspondence Control

ACTION

8-3093

FROM:

DUE: ~~07/30/93~~

EDO CONTROL: 0009102
DOC DT: 07/02/93
FINAL REPLY:

DAVID E. POMPER, SPIEGEL & McDIARMID
ATTORNEY FOR FLORIDA MUNICIPAL POWER AGENCY

TO:

EXECUTIVE DIRECTOR

FOR SIGNATURE OF: ** GRN **

CRC NO:

DESC:

2.206 PETITION OF FLORIDA MUNICIPAL POWER AGENCY TO ENFORCE THE ANTITRUST CONDITIONS ATTACHED TO FLORIDA POWER & LIGHT CO.'S ST. LUCIE PLANT UNIT 2 NUCLEAR LICENSE

DATE: 07/06/93

ROUTING:

W/O VOLUMES I & II
TAYLOR
SNIEZEK
THOMPSON
BLAHA
MURLEY, NRR
LIEBERMAN, OE
EBNETER, RII

ASSIGNED TO: OGC CONTACT: SCINTO

SPECIAL INSTRUCTIONS OR REMARKS:

NRR RECEIVED: AUGUST 5, 1993
NRR ACTION: PMAS:GODY

NRR ROUTING:
MURLEY/MIRAGLIA
RUSSELL
PARTLOW
CRUTCHFIELD
NRR MAIL ROOM

ACTION

DUE TO NRR DIRECTOR'S OFFICE

BY August 25, 93

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