PDR

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

57 ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Ivan W. Smith, Chairman
Michael A. Duggan
Robert M. Lazo

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY)
)
(St. Lucie Plant, Unit No. 2))

Docket No. 50-389A

April 24, 1981

MEMORANDUM AND ORDER

In this antitrust proceeding three of the four parties -- the Department of Justice, the NRC Staff and the Applicant -- have, subject to the approval of the Board, resolved their differences in a settlement agreement. The agreement would impose on the Applicant a set of license conditions for St. Lucie Unit No. 2. Among many other things, these conditions would require the Applicant to negotiate with named entities, certain Florida municipal power systems, to reach agreements for their participation in the plant. Some of the Florida cities would thereby gain an opportunity to participate in St. Lucie Unit No. 2; some would not. For their part, the Department and NRC Staff have agreed to support the licensing of St. Lucie Unit No. 2 upon the stipulated license conditions. The three parties have further agreed that the license conditions shall become immediately effective, but without prejudice to the Board's authority to impose different or additional conditions after a hearing.

In effect, the settlement would require the Applicant to open St. Lucie Unit No. 2 for participation by some municipalities on defined terms while allowing dissatisfied municipalities -- even those who may become participants in St. Lucie Unit No. 2 -- to continue litigating in the hope that the Board will, after antitrust litigation, impose license conditions more advantageous to them. Tr. 6-21.[1/] The Board has before it now a Joint Motion of the three parties, submitted September 12, 1980, for approval of their settlement agreement.

There is no outright opposition to the proposed settlement, but the intervening Florida cities have asked the Board to condition its approval of the settlement upon the Applicant's granting certain additional concessions. See letter dated February 4, 1981, Robert A. Jablon, Esq. to the Board. They do not, however, ask the Board to reject the settlement if their concerns are not satisfied. Indeed, at a prehearing conference the Florida Cities clearly took the position that, if we reject their request for conditional approval of the settlement, then we should go ahead and give the settlement our unconditional approval. E.g., Tr. 38-39, 80.

The Commission encourages compromise and settlement in its contested proceedings. See, e.g., 10 CFR 2.759. This does not mean that a board

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1/ The reporter mistakenly numbered the transcript of the February 2, 1981 prehearing conference as pages 1 through 149. The pagination should have been pages 376 through 524. For convenience, however, we will refer to the incorrect references in the February 2 transcript and adjust the numbering in a later order.

must approve in rubber-stamp fashion any proposed settlement that parties may lay before it. At minimum, we must read a proposed settlement in light of the congressional policy expressed in Section 105c of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2135(c)(5). Obviously, we should not give our blessing to a settlement which would tend to defeat that policy. Therefore, in considering the motion before us, we look to see whether immediate implementation of the proposed license conditions would "create or maintain a situation inconsistent with antitrust laws".

No party has called to our attention any way in which the immediate implementation of the license conditions would create or maintain a situation inconsistent with the antitrust laws.[2/] The Department of Justice and the NRC Staff, having executed the settlement Stipulation, are in the position of affirmatively representing to the Board that under the conditions specified in the settlement, the licensing of St. Lucie Unit No. 2 "will not create or maintain a situation inconsistent with the antitrust laws". Stipulation, paragraph 2.

At the prehearing conference, we pressed counsel for Florida Cities to identify his clients' antitrust concerns, if any, in regard to the immediate

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2/ An antitrust petition for leave to intervene, dated April 7, 1981, in the St. Lucie 2 operating license proceeding has been filed by Parsons and Whitmore, Inc., alleging that Section X of the settlement agreement would have anticompetitive effects. The petition seems to aver that the settlement agreement does not go far enough to prevent or eliminate a situation inconsistent with the antitrust laws. We do not read the petition to state that the agreement itself creates or maintains a situation inconsistent. Since the adequacy of the settlement to cure an alleged situation is not before us now and will be open to litigation in this proceeding, we have not inquired into the merits of the Parsons and Whitmore claim.

implementation question. He replied, in effect, that Florida Cities sees two situations inconsistent with the antitrust laws. One is the failure of the agreement to provide for participation by municipalities outside the Applicant's service area. This is the "market division" issue. E.g., Tr. 120. The other is the failure of the agreement to extend to all participants the terms granted to two cities, Orlando and Fort Pierce. These cities settled with Applicant outside this proceeding and gave antitrust releases. This is the "discrimination" issue. See Tr. 93, 130.

The market division issue is not new. The alleged facts which give rise to the issue largely, if not entirely, antedate the settlement we are considering. The issue has been litigated in the federal courts. Gainesville Utilities Department v. Florida Power & Light Co., 573 F.2d 292 (5th Cir. 1978), cert. denied, 439 U. S. 966 (1978). The immediate implementation of the settlement agreement would not, in our view, aggravate or maintain any antitrust problem of this sort that may exist. Florida Cities appears to concede this point (Tr. 120-31) and in any event does not ask the Board to consider the market division issue in ruling on the Joint Motion. Tr. 131. Of course, the issue may be pursued by Florida Cities in a hearing and, depending on the record developed from a hearing, the issue may lead to modifications in the license conditions for the plant.

Unlike the market division issue, the discrimination issue has a nexus to the proposed settlement, since the gist of the Cities' claim here is that under the settlement the Applicant will treat them differently than

it agreed to trust Orlando and Fort Pierce. But again, the Cities at this time desire merely to preserve this alleged antitrust issue for possible litigation in later phases of the proceeding. They have stated in plain language that they do not ask the Board to demand relief from this alleged discrimination as a condition for immediate implementation of the settlement. Tr. 131.

We ourselves have examined the discrimination issue on the papers presented. We cannot identify any competitive situation among the municipal participants which could be affected by differing participation terms. Even assuming a real or potential competitive relationship among the municipals, it does not appear on the face of the limited information available to us that the favored terms extended to Orlando and Fort Pierce can readily be translated into an advantage likely to be injurious to competition. Therefore we are willing to approve a settlement now with differing terms to the participants but leave open the discrimination issue for an evidentiary hearing.

After carefully considering the proposed license conditions in their entirety, we perceive nothing in them which would lead us to block their immediate implementation on antitrust grounds. To the contrary, on the basis of the limited record before us, it appears that immediate implementation would actually promote antitrust policy by providing for at least some additional participation in St. Lucie Unit No. 2 by smaller utilities. The Cities themselves seem to recognize such a "benefit" in the settlement. Tr. 121.

In ruling on the Joint Motion, we have no need to decide whether the settlement should, as the Cities contend, go farther in extending rights of participation -- by including utilities outside the Applicant's service area and liberalizing the conditions of participation. The Cities will have ample opportunity in this proceeding through evidence and argument to persuade the Board that the license conditions do not go far enough in dealing with an asserted situation inconsistent with the antitrust laws. Today we are concerned only with the question whether immediate implementation of the license conditions, subject to the Board's authority to impose changes after a hearing, would have a negative antitrust effect. We conclude that it would not.

Florida Cities argues that we should not limit our inquiry here to a determination of whether the immediate implementation of the settlement would have an adverse antitrust impact. They contend that, in addition, we should seek the elimination of certain license conditions which, they say, are offensive to "public interest" from non-antitrust standpoints. The Cities' position raises a substantial question about the scope of the Board's authority, and we are not certain as to what power, if any, we have to condition our approval of this settlement upon matters of purely commercial significance with no established nexus to antitrust considerations. Nevertheless, we have looked into the four areas of immediate concern to the Cities (see Jablon letter) to determine whether we could find on the basis of the existing record that the settlement agreement is, in effect, an affront to the public interest.

The areas in which the Cities seek action by the Board relate to (1) the license conditions regarding the liability of the Applicant to other participants, (2) the license conditions concerning the Applicant's managerial control of the plant, and (3) the lack of any license conditions for "reliability exchange" and "sell-back". In addition, the Cities desire assurance -- though not necessarily by license condition -- (4) that the Applicant intends to provide adequate "back-up" for St. Lucie Unit No. 2 participants.

The Liability Provisions. The license conditions provide that the Applicant will negotiate in good faith with neighboring entities which desire to participate in St. Lucie Unit No. 2 and that if the negotiating parties fail to agree on the terms of a participation agreement, then their dispute as to contract terms will be submitted to arbitration. The license provisions would require the arbitrator

> to determine reasonable terms for the disputed provisions of the participation agreement, giving due regard to the context of participation agreements negotiated among comparable parties in the electric utility industry and the particular business situation confronting [the Applicant] and the entities requesting arbitration, and shall resolve all disputes in accordance with this section and the terms of the agreement to arbitrate; * * *

Section VII(a)(1).

There follows immediately after this language a proviso which limits the arbitrator's discretion to rewrite agreement terms relating to the Applicant's liability. It says:

> provided, however, that the provisions proposed by [the Applicant] as to its liability to the other participants, and as to sharing the cost of discharging uninsured third party liability,*/ in connection with the design, construction, operation, maintenance and decommissioning of St. Lucie, Unit No. 2 shall be approved by the arbitrator unless he determines that the provision proposed by [the Applicant] constitutes an unreasonable proposal which renders meaningless [the Applicant's] offer of participation in St. Lucie, Unit No. 2.
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> */ Any such liability provision shall not be intended to relieve [the Applicant] or any other owner of the plant from any liability which it may have to any third party under any Federal, state or other law, nor shall such provision provide the basis for any defense by [the Applicant], or any other owner of the plant, or any impediment to or delay in any payment, cost, expense or obligation arising from a claim of liability to a third party made against the [Applicant] or any other owner of the plant. To the extent that such provision concerns liability to third parties, such provision shall relate solely to subrogation rights as between [the Applicant] and participants.

The question is whether this license condition on liability is, on the basis of the very limited record before us, unconscionable from a public interest standpoint. The Board is of course aware that in the context of contract law, courts often give special scrutiny to provisions limiting liability. Although we do not have before us the exact text of the participation agreement terms that the Applicant will propose on the subject of liability, the Applicant has submitted to the Board a copy of its St. Lucie Unit No. 2 participation agreement with Orlando Utilities Commission and stated its intention to offer, to the other utilities listed in the settlement agreement, participation agreements that are (to the extent here pertinent) substantially identical to the Orlando participation

agreement. Response of Florida Power & Light Company to Florida Cities' Answer to Joint Motion, p. 17. This we interpret as a representation to the Board that the liability provisions offered pursuant to the proposed license conditions will be substantially identical to those in the Orlando participation agreement. The Orlando provisions make the Applicant responsible to its co-owners for losses resulting from willful action, but exculpate the Applicant for losses resulting from negligence, including gross negligence. St. Lucie Unit No. 2 Participation Agreement between Florida Power & Light Company and the Orlando Utilities Commission, dated June 6, 1980, Section 23, p. 104. This is not, as the Cities have argued, a provision with a significant threat to the public health and safety. Much more important in assuring safety is the Commission's overall regulatory program and the Applicant's own substantial -- indeed dominant -- financial stake in the St. Lucie Unit No. 2 enterprise. The liability provisions would appear to have mainly commercial significance, and in a commercial context they would appear to be not unreasonable on their face.

The Control Provision. The control provision of the license conditions, Section VII(i), states:

> [The Applicant] may retain complete control and act for the other participants with respect to the design, engineering, construction, operation and maintenance of St. Lucie, Unit No. 2, and make all decisions relevant thereto insofar as they deal with the relationship between the [Applicant] and the other participants, including (but not limited to) decisions regarding adherence to NRC health, safety and environmental regulations, changes in construction schedule, modification or cancellation of the unit and operation at such time and such capacity levels as it deems proper, all without the

> consent of any participant. Consistent with the foregoing, the participation agreement shall provide for an advisory committee as a vehicle for communication and consultation among all of the owners, and except where the public interest requires immediate unilateral action [the Applicant] shall promptly inform participants of actions which may materially affect them.

The Cities argue that a contract term of this sort would give the Applicant the discretion to make economic decisions involving the plant entirely on the basis of its own self-interest. Indeed, the license provisions would appear to give the Applicant wide latitude in this regard. Nevertheless, we consider it neither shocking nor offensive to public policy that the Applicant, as the owner of, say, a 75 percent interest in the facility, should have a dominant role in economic decision making.

"Reliability" and "Sell-back". The Florida Cities are unhappy because the license conditions make no provision for so-called "reliability exchange" and "sell-back". Reliability exchange is a term which refers to the sort of insurance arrangement under which a St. Lucie participant's risk would be distributed by agreement with the Applicant, among two or more of the Applicant's facilities rather than being confined to St. Lucie Unit No. 2. A sell-back provision would benefit a participant by permitting the participant to buy surplus capacity from the Applicant and, at its option, subsequently sell excess capacity back to the Applicant at a profit. These apparently desirable contract features have been made available by the Applicant to Orlando and Fort Pierce -- two utilities which, as previously stated, have given the Applicant antitrust releases. The Applicant's position is that it is under no obligation to extend to nonsettling litigants the same

benefits won by litigants who have resolved their differences with the Applicant. The Applicant states, with some persuasiveness, that "to hold that no consideration can be offered to a party in settlement which is not simultaneously made available to similarly situated parties which do not settle is to preclude the possibility of individual settlements." Answer of Florida Power & Light Co. to Cities' Reply Concerning Joint Motion, pp. 9-10.

Back-Up. The Applicant's fourth area of concern relates to the back-up that the Applicant will provide for its St. Lucie Unit No. 2 participants. In this instance, the Cities do not have a present objection, and do not yet seek affirmative action by this Board, but rather wish to receive assurance in some form that the Applicant will provide adequate back-up arrangements. They have asked us to direct the Applicant to provide information as to what it will propose in this area. Jablon letter. The Cities have made no proffer to us as to the specific circumstances, if any, under which we might find the settlement agreement contrary to the public interest because of this back-up question.

After considering the specific non-antitrust matters objected to by the Cities, we are satisfied that none of them is, as the Cities contend, so offensive to public policy as to cry out for some action on our part. They are, quite simply, debatable commercial matters as to which the parties to the settlement have not provided solutions as advantageous to the Cities as the Cities would like. The Board is also mindful that the license conditions before us are the result of the give and take of negotiation. In

this context it may be unrealistic to focus on the "fairness" of any single provision without an understanding of the fairness of the settlement as a whole. In other words, the negotiators probably have made trade-offs which are not reflected in the present record. To open up the record for an evidentiary exploration of these matters would involve the kind of delay that, in the Cities' words, would make this settlement into a nonsettlement. Tr. 83. This the Cities themselves have urged us not to do. Ibid. In any event, to the extent that the Cities may wish to contend in subsequent phases of this proceeding that any of these four matters has a bearing on antitrust issues, they will have an opportunity to litigate such contentions and seek appropriate remedial action by the Board.

Finally, we see no actual prejudice to the Cities from immediate implementation of the license conditions. The only possible injury suggested by them is that some of the conditions may impede financing. Tr. 65. However, the Cities' argument in this regard amounts to little more than speculation (see Tr. 60), particularly in view of the successful financing already arranged by Orlando.

For all of the foregoing reasons, the settlement agreement is approved and the license conditions are effective immediately.

The initiative now rests with Florida Cities to proceed with any litigation in this proceeding they believe necessary to cure the situation

inconsistent with the antitrust laws alleged by them to be created or maintained by the activities under the St. Lucie Unit 2 license. Florida Cities shall file any motion for further relief in this proceeding within thirty days of the date of this order.

THE ATOMIC SAFETY AND LICENSING BOARD

Michael A. Duggan By I.W.S.
Michael A. Duggan
ADMINISTRATIVE JUDGE

Robert M. Lazo By I.W.S.
Robert M. Lazo
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 24, 1981