

8/28/78

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
FLORIDA POWER & LIGHT COMPANY
(St. Lucie Plant, Unit Nos. 1
and 2)

Docket No. 50-335A
50-389A

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Plant, Unit Nos. 3
and 4)

Docket No. 50-250A
50-251A

ANSWER OF THE DEPARTMENT OF JUSTICE TO
FLORIDA POWER & LIGHT COMPANY'S MOTION
FOR RECALL OF ORDER IN LIGHT OF
CHANGED CIRCUMSTANCES

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The Department of Justice (Department) submits this response to Florida Power and Light Company's Motion for Recall of Order in Light of Changed Circumstances and urges this Commission to deny the Motion on the grounds that it is without merit and is moot. The Department further urges the Commission to initiate a proceeding pursuant to Section 105a of the Atomic Energy Act, as amended (Act) (42 U.S.C. 2135a) for the reasons stated herein and in the Response of the Department of Justice, filed August 25, 1978.

On July 27, 1978 the Commission issued an Order requesting the parties in the above-captioned proceeding to express their views on certain questions regarding the initiation of a proceeding under Section 105a of the

Act, in view of the decision of the United States Court of Appeals for the Fifth Circuit in Gainesville Utilities Department v. Florida Power & Light Company (Gainesville) 573 F. 2d 292 (1978). The Department filed its response to that Order on August 25, 1978. On August 14, 1978 the Court of Appeals issued a stay of its mandate in Gainesville. Based on that stay, on August 18, 1978 Florida Power & Light Company (FP&L) filed a Motion for Recall of Order in Light of Changed Circumstances (Recall Motion).

FP&L, relying on the stay of the mandate issued by the Fifth Circuit Court of Appeals, urges this Commission to take an action which would in all likelihood lead to a delay in the 105a proceeding, the 105c proceeding presently pending before an NRC Licensing Board or both. The stay of the Gainesville decision will be in effect only until September 13, 1978 or until the Supreme Court disposes of FP&L's request for review. The chance of the Supreme Court granting such review is miniscule as very few petitions for writs of certiorari are granted. The likely consequence of waiting several months for the certiorari petition would be that this Commission will be faced with the prospect of either initiating a separate 105a proceeding or consolidating such proceeding with the ongoing 105c proceeding. As more fully explained in The Response of the Department of Justice filed August 25, 1978, either of these courses of action could

lead to delays in finally determining FP&L's antitrust liability and removing the cloud that now exists over the Company's Nuclear Regulatory Commission licenses and permit.

The wiser course of action would be for this Commission to initiate a 105a proceeding now which can run concurrently with the 105c proceeding. If, in the future, some event occurs which makes it inappropriate to continue that 105a proceeding the Commission can stay or sever that proceeding. Under these circumstances, FP&L will not be prejudiced in any way; since the issues in both proceedings are similar, at worst FP&L will only have to engage in a minimal amount of additional discovery in litigating the 105a proceeding. All parties can prepare for both hearings concurrently by conducting simultaneous or combined discovery. Most importantly, there will be no delay in finally adjudicating FP&L's liability.

Lastly, the Department would note that since the parties have already filed their responses to the Commission's July 27, 1978 Order, FP&L's Recall Motion should be denied as being moot.

In view of the above and the reasons stated in the Response of the Department of Justice filed August 25, 1978 the Department urges this Commission to deny FP&L's Recall

Motion, to initiate a 105a proceeding now and to consolidate said proceeding with the 105c proceeding that has been ordered with respect to FP&L's St. Lucie No. 2 nuclear unit.

Respectfully submitted,

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August 28, 1978

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Certificate of Service

I hereby certify that copies of ANSWER OF THE DEPARTMENT OF JUSTICE TO FLORIDA POWER & LIGHT COMPANY'S MOTION FOR RECALL OF ORDER IN LIGHT OF CHANGED CIRCUMSTANCES have been served upon all of the parties listed on the attachment hereto by hand or by deposit in the United States mail, first class of airmail, this 28th day of August, 1978.

Melvin G. Berger

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NUCLEAR REGULATORY COMMISSION

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