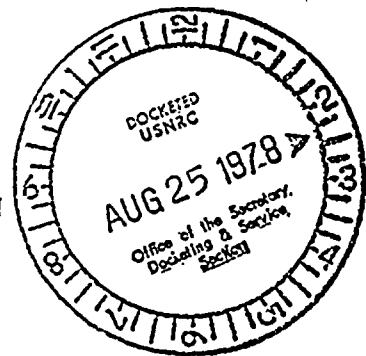


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

8/25/78



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

RESPONSE OF THE
DEPARTMENT OF JUSTICE

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August 25, 1978

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RESPONSE OF THE
DEPARTMENT OF JUSTICE

In response to the Commission's July 28, 1978 Order in the above-styled matter, the Department of Justice urges this Commission to initiate a proceeding pursuant to Section 105a of the Atomic Energy Act, as amended ("Act") (42 U.S.C. 2135a) at this time and to consolidate such proceeding with the Section 105c proceeding on Florida Power & Light Company's application for its St. Lucie No. 2 plant.

BACKGROUND

On May 22, 1978 the United States Court of Appeal for the Fifth Circuit issued its decision in Gainesville Utilities Department v. Florida Power & Light Company (Gainesville) Civil No. 76-1542. In that decision the court reversed and remanded a decision of the United States District Court for the Middle District of Florida, holding that the evidence before the District Court compelled a finding that Florida Power & Light Company

(FP&L) conspired to divide the market for electric service in violation of Section 1 of the Sherman Act. The remand, however, was limited to a determination of the relief that would be granted. By Order dated July 28, 1978 this Commission noted that the defendant in Gainesville is an NRC licensee, holding operating licenses for St. Lucie Plant, Unit No. 1, and Turkey Point Plant, Unit Nos. 3 and 4, and a construction permit for St. Lucie Plant, Unit No. 2. Since Section 105a of the Act, grants to the Commission discretion to act in situations where a court of competent jurisdiction has found a licensee to have violated the antitrust laws in the conduct of the licensed activity, the Commission requested that the Department of Justice (Department), as well as other named parties, express its views on certain questions regarding the initiation of a proceeding under Section 105a. In this response to the Commission's questions, the Department urges the Commission to initiate a proceeding under Section 105a at this time and to consolidate said proceeding with the proceeding ordered by the Commission in its Memorandum and Order dated June 22, 1978 in Florida Power & Light Company (St. Lucie Plant, Unit No. 2), NRC Docket No. 50-389A, pursuant to Section 105c of the Act. Our response to the specific questions posed follows.

1. Should the Commission initiate a 105a proceeding at this time, or should it await the completion of the remanded aspects of the Gainesville case?

We believe that the Commission should initiate a 105a proceeding at this time.

Section 105a of the Atomic Energy Act, as amended, provides that:

In the event a licensee is found by a court of competent jurisdiction . . . in an original action in that court . . . to have violated any of the provisions of [certain antitrust laws] in the conduct of the licensed activity, the Commission may suspend, revoke, or take such action as it may deem necessary with respect to any license issued by the Commission under the provisions of this Act.

Since this Commission can "take such action it deems necessary" in response to a court finding of an antitrust violation it is clear that whatever relief a court grants in response to such violation neither binds nor bars this Commission from taking whatever action it deems appropriate. No matter what relief may ultimately be granted by the district court this Commission would still have a separate and distinct obligation under 105a to determine whether, in view of the violations that have been found, issued licenses or permits should be suspended, revoked or modified in any manner. In view of this it is not necessary for this Commission to await the outcome of Gainesville on remand before commencing a 105a proceeding.

There are several reasons why the Commission should exercise its discretion and institute a proceeding at once. First, initiation of a 105a proceeding now would be consistent with this Commission's policy of resolving antitrust questions as early as possible, Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), 5 NRC 1303 (1977).

Second, while it may be true that certain findings that will be made by the district court on remand may be helpful to this Commission in determining the proper course of action it should take under 105a the disadvantages of waiting for a final district court decision are substantially outweighed by the benefits that would be derived by initiating a proceeding now and consolidating it with the 105c proceeding. Those benefits are more fully discussed in the Department's response to question number 2 below.

2. Should any 105a proceeding be consolidated with the current 105c antitrust hearing on the St. Lucie 2 plant, and are the possible efficiencies gained in consolidation reason to convene the 105a inquiry now?

The Department believes that the 105a proceeding should be consolidated with the current 105c antitrust proceeding and that possible efficiencies gained as a result of consolidation constitute, as well, good reason to convene the 105a inquiry now.

The current 105c antitrust proceeding will be of a scope similar in nature to the three full-scale antitrust proceedings which have already been decided by NRC Licensing Boards. As such, this hearing will deal with the full range of FP&L activity alleged to be anticompetitive. Undoubtedly, the market division conduct found by the Fifth Circuit will constitute an element in the consideration of whether there exists a situation inconsistent with the

antitrust laws. Such a full and complete record of FP&L structure and conduct which would be developed by virtue of the 105c proceeding should substantially assist the Licensing Board in making the factual determinations which are required in a 105a proceeding 1/ and for deciding what relief, if any, would be appropriate.

Furthermore, the consolidation of the 105a proceeding with the 105c proceedings would result in judicial economy. Since the factual matters at issue in a 105a proceeding would be encompassed by a 105c proceeding, it would be a great waste of Commission resources as well as the resources of the parties to the proceeding to hold duplicative hearings. In addition, the substantial identity of parties in both proceedings and the need to participate in and prepare for the 105c proceeding may delay the 105a hearing and prolong the period of uncertainty with respect to FP&L's overall liability under Section 105.

Thus, it must be concluded that in order to provide as full and complete a record as possible for the Commission to decide what action, if any, is necessary under

1/ The central factual issue which must be decided in such a proceeding is whether the violation of law has occurred in the conduct of the licensed activity. Although there has been no definitive statement of the 105a "nexus" requirement, a showing of nexus under 105a would undoubtedly be similar in nature to the nexus showing which has been required in a 105c proceeding. Consumers Power Company (Midland Plant, Units 1 and 2) ALAB-452, 6 NRC 892, 1094-98 (1977).

Section 105a in view of Gainesville and to avoid unnecessary duplication, if a 105a proceeding is convened it should be consolidated with the 105c proceeding.

3. If initiation of a 105a proceeding is not appropriate at this time, when should the Commission consider initiating such an inquiry?

If this Commission decides not to initiate a 105a proceeding at this time then such a proceeding should be initiated as early as possible in order to dispel the cloud that now exists over FP&L's licenses and permits. For example, if a 105a proceeding is not initiated now because the Commission holds that there exists some impediment thereto, then the Department would urge this Commission to initiate such a proceeding as soon as that impediment is removed.

CONCLUSION

In view of the above, the Department submits that this Commission initiate a 105a proceeding now and consolidate that 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 25, 1978

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Certificate of Service

I hereby certify that copies of RESPONSE OF THE DEPARTMENT OF JUSTICE 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 or airmail, this 25th day of August, 1978.

Melvin G. Berger

Melvin G. Berger
Attorney
Department of Justice
Antitrust Division

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NUCLEAR REGULATORY COMMISSION

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