

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

8/18/78

FLORIDA POWER & LIGHT COMPANY
(St. Lucie Plant, Units Nos. 1
and 2)

Docket No. 50-335A
50-389A

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

Docket No. 50-250A
50-251A

MOTION FOR RECALL OF ORDER
IN LIGHT OF CHANGED CIRCUMSTANCES

On July 27, 1978, the Commission issued an Order addressing a number of questions to Florida Power & Light Company (FPL) and to other parties related to the initiation of a proceeding under Section 105a of the Atomic Energy Act, as amended, 42 U.S.C. 2135(a). The Order stated that it was being issued because of a recent decision of the Fifth Circuit, Gainesville Utilities Department and City of Gainesville, Florida v. Florida Power & Light Company, Civil No. 76-1542, holding that evidence in the trial below compelled a finding that FPL had violated Section 1 of the Sherman Act. The Order propounded a number of questions concerning whether a Section 105a proceeding should be initiated, its timing and procedures to be followed.

Section 105a is triggered only if a licensee "is found by a court of competent jurisdiction . . . to have violated . . ." any of the provisions of the antitrust laws which it specifies. However, on August 14, 1978, and subsequent to the issuance of

the Commission's Order, the Fifth Circuit stayed its mandate until September 13, 1978, in order to permit FPL to file a petition for a writ of certiorari in the Supreme Court. A copy of the stay is attached. FPL will file such a petition, and, pursuant to FRAP, Rule 41(b), the stay will then "continue until final disposition by the Supreme Court."

It is of course hornbook law that

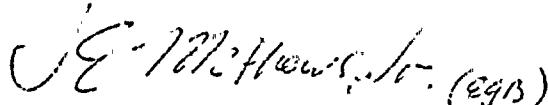
"A court acts only through its mandate. Bailey v. Henslee, 309 F.2d 840, 844 (8th Cir. 1962). When a mandate is stayed, a decision has no binding effect, save as the stay might be conditioned . . ."

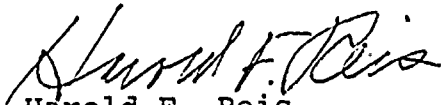
Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976).

Accordingly, there is not now in effect a finding by a court of competent jurisdiction of a violation of the anti-trust laws by FPL, and there is no basis for any action under Section 105a at this time.

For the foregoing reasons FPL moves that the Commission's Order of July 27, 1978, be recalled without prejudice to such further action as the Commission may take pending "final disposition by the Supreme Court."

Respectfully submitted,


John E. Mathews, Jr.
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Counsel for Florida Power & Light Company

Dated: August 18, 1978

Attachment

Attachment

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WANSWORTH
CLERK

OFFICE OF THE CLERK

August 14, 1978

500 CANAL STREET
NEW ORLEANS, LA. 70112

Mr. John E. Mathews, Jr.,
Attorney at Law
1500 American Heritage Life Bldg.
Jacksonville, FL 32202

Re: 76-1542 - Gainesville Utilities Dept. and City
of Gainesville, Florida v. Florida Power
and Light Co.

MANDATE GRANTED TO AND EXHAUSTING September 13, 1978

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is false with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under Revised Rule 41(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (SCM 2608).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WANSWORTH, Clerk

By

Kenneth B. Davis
Deputy Clerk

ENC. (LETTER ONLY)

cc: Mr. Oscar R. Pagan
Mr. John P. McKenna

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 50-335A
(St. Lucie Plant, Units No. 1)	50-389A
and No. 2))	
)	
Florida Power & Light Company)	Docket Nos. 50-250A
(Turkey Point Plant, Units)	50-251A
No. 3 and No. 4))	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the following:

MOTION FOR RECALL OF ORDER
IN LIGHT OF CHANGED CIRCUMSTANCES

have been served on the persons shown on the attached list
by hand delivery or deposit in the United States Mail, prop-
erly stamped and addressed on August 18, 1978.

By:

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*Hand Delivered