UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

SUPPLEMENTAL BRIEF OF FLORIDA CITIES

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June 29, 1977

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(corrected copy per Errata Sheet of June 30, 1977)

TABLE OF AUTHORITIES

REPORTS

This Supplemental Brief is filed on behalf of Florida Cities 1/ pursuant to the Appeal Board's Orders of June 16, 1977 and June 21, 1977.

In light of the Appeal Board's order in Houston Lighting and Power Company (South Texas Project, Units 1 and 2); ALAB-381 (March 18, 1977), there are two questions for decision: (1) whether the Trial Board convened in these dockets correctly determined that it was foreclosed from considering Florida Cities' antitrust review request on its merits due to lack of internally delegated authority and (2) the impact of the Commission's South Texas decision. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), Docket Nos. 50-498A and 50-499A, CLI-77-13, 5 NRC ___ (June 15, 1977).

Florida Cities disagree with some of the statements in the Commission's South Texas decision. 2/ To the extent the Commission holds that once a construction permit has been issued, changed circumstances must be shown to obtain further antitrust review or that such further review is limited to consideration of changed circumstances, Florida Cities emphatically disagree. They further disagree with the Commission's analysis limiting the plain words of §186 of the Atomic Energy Act, 42 U.S.C. §2236, and the Statesville decision, Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir., 1969), and with any inferences that the

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1/ "Florida Cities" consist of the Fort Pierce Utilities Authority of the City of Fort Pierce, the Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Lake Worth Utilities Authority, the Utilities Commission of the City of New Smyrna Beach, the Orlando Utilities Commission, the Sebring Utilities Commission, and the Cities of Alachua, Bartow, Daytona Beach, Fort Meade, Key West, Mount Dora, Newberry, Quincy, St. Cloud and Tallahassee, Florida and the Florida Municipal Utilities Association.

2/ Houston Lighting and Power Company (South Texas Project, Units No. 1 & 2), Docket Nos. 50-498A, 50-499A, CLI-77-13, 5 NRC ___ (June 15, 1977).

Commission can limit or legally avoid its responsibilities to assure that licensees act compatibly with the antitrust laws. However, for purposes of this pleading Cities assume the Commission's decision's total correctness.

In view of the exhaustive pleadings filed below on the merits, Florida Cities merely refer to factors on the merits that may be deemed relevant in light of the Commission's South Texas decision. As is stated in the "Notice of Appeal and Appellant Brief of Florida Cities," filed April 29, 1977, pages 2-3, the Licensing Board dismissed Florida Cities' petition on procedural grounds for want of jurisdiction. 1/

Therefore, should the Appeal Board reach the merits Florida Cities rely upon the record below. 2/

I. THE TRIAL BOARD ERRED IN DETERMINING THAT IT DOES NOT HAVE AUTHORITY TO RULE; WHILE THE COMMISSION'S HOUSTON LIGHTING AND POWER COMPANY DECISION DOES NOT DETERMINE THE MATTER, IT CREATES NO BAR TO THE AUTHORITY OF THE TRIAL BOARD.

As Florida Cities read the Commission's decision in Houston Lighting and Power Company, supra, it does not purport to determine the internal jurisdiction within the Commission over Florida Cities' petition. The fact that the Commission declined to review this Board's

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1/ However, in the related St. Lucie Plant, Unit No. 2, Docket 50-389A, Florida Power & Light Company, Docket No. 50-389A, et al. (April 5, 1977, p. 29 of slip op.), the Licensing Board found grounds for granting intervention. See also Florida Power & Light Company, Docket No. P-636-A, where Florida Cities' right to a hearing (for a newly filed construction permit application) is uncontested.

2/ Florida Cities also respectfully refer the Board to their "Brief Amicus Curiae of Florida Cities," filed with the Commission in the South Texas dockets, 50-498A et al. (May 11, 1977), which they request be incorporated by reference.

decision in ALAB-381 might otherwise be taken as limiting the Licensing Board's authority 1/; however, the Commission states:

> "In declining to review ALAB-381, of course, we are not to be taken as having agreed with everything that the Appeal Board had said in that opinion." Commission Decision, p. 8.

A reading of this cautionary statement in conjunction with its review of the underlying merits strongly suggests the Trial Board's authority to rule on the matter. 2/

On page 26 of its South Texas decision, the Commission explicitly reserves "the issue pending" in these dockets. The Commission denied Florida Cities' "Motion for Commission Clarification of Procedures" (March 29, 1977), 3/ noting (p. 3), "such an appeal is pending before the Appeal Board." Memorandum and Order (June 22, 1977). 4/ From these actions Florida Cities can conclude only that to the extent the Commission focused upon the

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1/ Assuming this is the case, it still leaves open the issues raised by I, II and IV of the "Notice of Appeal and Appellate Brief of Florida Cities."

2/ Indeed, the Commission suggests that there is doubt on the division of responsibilities and that rulemaking may be appropriate. South Texas, supra, pp. 26-27. Non-action until such rulemaking would be inappropriate for a petition filed last summer.

3/ See also "Motion for Leave to Respond and Response of Florida Cities to Florida Power & Light Company and Staff Answers to Florida Cities' Motion for Commission Clarification of Procedures" (April 18, 1977).

4/ The matter has also been submitted by Florida Cities to the Director of Reactor Regulation for ruling.

procedural questions here, it determined to allow for the normal functioning of Commission processes with subsequent opportunity for Commission review. There is a desirability when serious problems involving important public interest matters are presented to governmental agencies having jurisdiction that every effort should be made to resolve them.

The above factors are reinforced by Florida Cities' reading of the Commission decision on its merits. Taken in its entirety, in South Texas the Commission rejects Florida Cities' and others' claims that the Commission has a general, continuing responsibility to assure that its licensees do not use its licenses contrary to antitrust law and policy. Thus, the Commission appears to apply a significant changed circumstances test to post-construction permit antitrust hearings. As has been stated, the Commission leaves open the question of its authority "where 'significant changes' occur after an operating license is issued," Decision, p. 26, but one can imply that, assuming there is any authority, the test would be similar.

On the other hand, the Commission recognizes that §186 has some antitrust applicability. It cites "post-licensing enforcement proceedings in the event of violation of a specific antitrust licensing condition" (as is directly recognized by statute), and also lists falsification of antitrust review information, obtaining a license by fraud or concealment and license modifications as probably also being covered. Decision, pp. 12-13, 26.

The underlying key to the Commission's decision appears to be its judgment that §105 provides for a specific antitrust review authority that should not be subordinated to more general review sections. E.g., Decision, pp. 14-15; p. 12. The Commission

appears to also find unfairness to the applicant or investors in causing them to "be required to run the antitrust review gauntlet twice." Decision, p. 31. Thus, the Commission concludes that where there has been antitrust review at the construction permit phase, subsequent review should be limited.

On the other hand, the Commission's precise holding in South Texas, after the construction permit phase, was that there should be allowance for procedures to initiate subsequent review. In reaching this determination, the Commission was well aware that there had been no previous antitrust hearing. Indeed, it appears to attempt to distinguish some of its previous discussion, stating at p. 31:

> "Although these judicially developed doctrines [res judicata, laches] are not fully applicable in administrative proceedings, particularly where, as here, there was no adjudicatory proceeding at the construction permit stage, the considerations of fairness to parties and conservation of resources embodied in them are relevant here [in justifying antitrust review]." (Emphasis supplied).

As in South Texas, in this case there has been no prior antitrust hearing; in fact, there has never even been an antitrust review of the plants in this case. Therefore, for reasons discussed in the next section, the factors militating against the proverbial two bites at the apple are not present.

Thus, Florida Cities submit that the specific result in the South Texas case directly supports Florida Cities' distinction of the South Texas Appeal Board decision that antitrust review procedures should not be short-circuited for §104 licenses where there was never antitrust consideration. Moreover, if there is to be some antitrust consideration of the St. Lucie Unit No. 2 nuclear plant, especially since relief may encompass these

would dictate granting review in all dockets. 1/

II. THE TRIAL BOARD HAD RESPONSIBILITY TO GRANT ANTITRUST REVIEW IN THESE DOCKETS.

This case is before the Appeal Board on procedural grounds.

As Florida Cities stated in the preceding section, in South Texas the Commission balances two polarized principles. First, it finds that §186, 42 U.S.C. §2236, should not engulf the more specific antitrust review provisions of §105, 42 U.S.C. §2135, and that licensees should not be subject to continuing antitrust review. On the other hand, it recognizes that §186 cannot be deemed inapplicable to antitrust matters. 2/ In attempting to reconcile the polarizing principles, the Commission focused on the requirement that for there to be antitrust review after the construction permit review, significant changes justifying such second review must be demonstrated; although this limitation was qualified by the correct

1/ Florida Cities have claimed that the antitrust abuses of Florida Power & Light Company are system-wide (i.e., that Florida Power & Light company is using the nuclear energy generated from its nuclear licensed units in combination--operating and planned--to limit their competitive opportunities). On this basis, Florida Cities have claimed that a license condition of St. Lucie Unit No. 2 (or the South Dade unit at issue in Docket No. P-636-A, but suspended) should be system-wide. Duquesne Light Company (Beaver Valley Power Station, Unit No. 2), ALAB-208, 7 AEC 959, 969 (1974). However, absent granting intervention in these dockets, Florida Power & Light Company might argue that the ability of the Commission to take corrective action was limited either directly or by inference. Therefore, Florida Cities have sought relief by a conditioning of the Turkey Point and St. Lucie 1 units directly.

Elsewhere, Florida Power & Light Company has suggested that Florida Cities' appropriate remedy is to file a District Court antitrust action or an action before the Federal Power Commission or, indeed, anywhere but here. Florida Cities perceive a number of difficulties with this position, including that other fora would most likely take the position that the Nuclear Regulatory Commission has primary jurisdiction over antitrust claims centering around the use of licensed nuclear units (See Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973)), and that FP&L would undoubtedly seek to use any decision here in its favor as determinative of other actions. Moreover, the statutory responsibility lies here. It runs contrary to responsible governmental decision-making or judicial procedure to encourage multiple litigation and multiple fora.

2/ Footnote on following page.

recognition that:

> "[T]he antitrust implications of a 'significant change' may indeed arise from its relationship to unchanged features of the proposal." Decision, p. 32.

The Commission's determination is explicitly referenced to equitable principles. Decision, pp. 31-32. The reverse side of the coin is where there has been no antitrust review in the first place, considerations weigh in favor of antitrust review.

Thus, the Commission determines that for Section 103 licenses, equitable considerations limit the justification for a statutory interpretation supporting multiple in-depth antitrust review. However, the propriety of antitrust review in the present case (based on Sections 1, 3, 104, 161, 186, etc. of the Act) is supported by the fact that the licenses which Florida Cities wish to have conditioned were issued under Section 104 of the Act, rather than Section 103. 1/

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Decision, pp. 3-4. There is no basis on the face of Section 186 for differentiating between its grants of authority relating to policing fraud and concealment or the violation of specific license conditions and its grant relating to the general enforcement of the provisions of the Act. Thus, the Commission rightly leaves open the possibility that Section 186 may have "limited application" (related to the "significant changes" restriction of Section 105(c)(2)) to the issues presented in this proceeding. Decision at 26.

1/ It should be noted that holding an antitrust review after the issuance of the operating license will not subvert the main purposes behind Section 105(c)(2). The "Grandfather Clause" case, Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331, 345 (1976), makes it clear that Congress hoped to avoid delay in construction and operation of nuclear plants in order to best meet the public's need for electric power, not primarily for the protection of investors. Once a plant is constructed, then, there is no need to restrict the Commission's authority under §186 to hold needed antitrust hearings, although relief should be fashioned to avoid unnecessary harm to capital markets for financing nuclear units and to take into account reasonable investor reliances.

Because the South Texas license was issued under Section 103, and had thus undergone Section 105(c)(1) antitrust scrutiny, the limited availability and scope of post-construction permit antitrust review posited by the Commission in South Texas might be justified by equitable principles of repose (see Decision at 31) and by the practical consideration that further review would normally not be necessary in the absence of changed circumstances. Such notions are inapplicable to Section 104 licenses, because they have not undergone antitrust scrutiny. In addition, Sections 161 and 186 can be seen as tools for assuring that Section 104(b)'s requirement is actually fulfilled that "the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter." As will be discussed below, significant changes in the licensee's activities and in the economic importance of access to older plants since the issuance of the licenses in these dockets and since the passage of the 1970 amendments make a re-evaluation of what "minimum" conditions are necessary under the Act warranted at this time.

A holding that post-licensing antitrust review is proper is also consistent with the South Texas decision because the provisions of Section 105 which deal with activities under NRC licenses cannot be said to be as comprehensive as the pre-licensing procedures of Section 105(c); thus, subsections 105(a) and (b) need not be construed as the exclusive remedies available to the Commission when post-licensing antitrust claims are made by grievants. While providing the Commission with some procedure to follow after operating licenses are granted, subsections 105(a) and (b) do not restrict the right to initiate further antitrust review.

Unlike the licenses in South Texas, the licenses here at issue were issued under §104. Thus, there will be no Commission review,

ever, unless Cities' request for such review is granted.

Without attempting to repeat the argument stated in the preceding subsection, Florida Cities stress that the underpinnings of the Commission's interpretation that such Section 186 does not allow for "continuing" antitrust review is the adequacy of the Section 105 licensing procedures. The Commission points out the opportunity for prelicensing review at the construction permit stage and, in addition, that NRC review at the operating permit stage is limited to changed circumstances. Citing the legislative history to the 1970 amendments, the Commission concludes:

> "It is difficult to reconcile these [above-quoted] statements on the part of the active supporters of prelicensing review, with the view that Congress was considering placing a general antitrust policing authority in the Commission." Decision, pp. 19-20.

The Commission's expressly stated holding is

> ". . . once an initial, full antitrust review has been performed, only 'significant changes' warrant reopening." Decision, p. 24.

Of course, the specific holding is that in view of a finding of changed circumstances, Central Power & Light Company is entitled to operating license stage antitrust review.

It is not contradictory for the Commission to "subordinate" Section 186 to Section 105 in the context of the South Texas case while leaving open the issue of post-licensing antitrust hearings. 1/ The dispute in South Texas arose prior to the

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1/ Section 105(a) of the Act specifies that the Commission "may suspend, revoke or take such other action as it may deem necessary with respect to any license issued by the Commission under the provisions of this chapter" when a licensee is found by a court

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operating license stage of the plant in question. Thus, the Commission felt obliged to follow the "intricate procedure" spelled out in Section 105(c) of the Act. Because Congress had wrought a "carefully perfected compromise" (Decision at 17) in enacting pre-licensing procedures contained in the 1970 Amendments, the Commission held that the more general powers granted in Sections 161 and 186 of the Act were inapplicable during the pre-licensing stage. Thus, its decision to grant anti-trust review was based upon the "subsequent change" test of Section 105(c)(2).

Section 105(c)(2)'s detailed limitation as to when a post-construction permit hearing may be held need not bar a finding here that antitrust review is available after the issuance of an operating license. Subsection (c)(2) deals only with the pre-licensing stage; no other subsection of Section 105 or of the Act purports to limit specifically when antitrust review may

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to be in violation of the antitrust laws. Court precedent should lead this Appeal Board to reject any contention that Section 105(a) prohibits the Commission from modifying or revoking a license in the absence of such a court finding. Prior to amendments enacted in 1960, Section 311 of the Federal Communication Act stated that the FCC could refuse a license to any person who had been finally adjudged guilty of anticompetitive activity relating to radio communication. When faced with the contention that this provision put considerations relating to competition outside the FCC's concern before an applicant or licensee had actually been convicted of monopoly, the Supreme Court disagreed. It stated:

> "A licensee charged with practices in contravention of [the public interest] standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted."

National Broadcasting Company v. United States, 319 U.S. 190, 222-23 (1943); and see Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

be initiated by the Commission. Therefore, the general powers to enforce the Act's provisions granted in Sections 186 and 161 need not be curtailed. In fact, the courts have refused to give a narrow reading to an agency's antitrust mandate in the absence of explicit statutory provisions narrowing that mandate and expressly creating a regulatory gap. Conway Corp. v. FPC, 510 F.2d 1264, 1272, (D.C. Cir. 1976), affirmed, 426 U.S. 271 (1976).

The 1970 amendments came after the original applications for the licenses here at issue, so that there never was an antitrust review. This factor distinguishes the Commission's expressed holding on its face that once "initial, full antitrust review" is held, subsequent review is warranted only by significant changes. Decision p. 24. The plants here at issue have the same relative status as the Statesville units. Cities of Statesville v. AEC, 441 F.2d 962 (D.C. Cir., 1969). Even if the Commission had no antitrust powers under Section 186 and related sections to affect licenses where the 1970 amendment procedures were (or could have been) followed (i.e., Section 103 Licenses), this hardly determines that there can be no authority on the part of the Commission to review the status of Section 104 licenses.

It is incontestable that Section 186, 42 U.S.C. §2236, explicitly states that:

> "any license may be revoked . . . because of conditions revealed by such application . . . which would warrant the Commission to refuse to grant license on an original application, or for failure to construct or operate a facility in accordance with the terms . . . or license . . . or for violation of, or failure to observe any of the terms and provisions of this chapter or any regulation of the Commission."

It is further incontestable that Section 186, 42 U.S.C. §2237, allows for subsequent "amendment, revision or modification" of all NRC licenses, and that Section 183 provides that all licensees shall be subject to continuing control by the Commission.

The Congressional declaration of policy, the Congressional findings and the purpose of the chapter set forth in Sections 1-3 of the Atomic Energy Act, §§42 U.S.C. §§2011-2013, which control the interpretation of the entire Act, provide for a pro-competitive policy and "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." Section 3(d).

Against this backdrop, in Statesville the District of Columbia Circuit affirmed the Commission's determination that certain licenses proposed for the generation of electric power were for experimental facilities, and therefore did not need antitrust review. However, had the court stopped there, it appears clear that its decision would have been directly contrary to the language and purposes of the Atomic Energy Act. Therefore, in determining that antitrust review was not necessary for such non-commercial licenses, the court rightfully felt it had an obligation to warn the Commission that it had a "most serious duty" to evaluate the anticipated antitrust impact of the units once they had demonstrated commercial practicability, concluding:

> "Finally, under Section 186(a), 42 U.S.C. §2236(a) (1964), the Commission has the power to revoke any type of license it has issued when there is a 'violation of, or failure to observe any of the terms and provisions' of the Act. This section invests the Commission with a continuing 'police' power over the activity of its licensees and it provides it with the ability to take remedial action if a license is being used to restrain trade." 441 F.2d at p. 974.

While, admittedly, the Statesville analysis may be subject to limitation with regard to units where there has already been antitrust review (unlike the Statesville units or the units at issue here), the statement cited above was absolutely essential to a holding that temporarily freed the Commission from necessary review of the anticompetitive impact of potentially commercially operable units subject to its jurisdiction. And, indeed, the Commission's South Texas analysis in many ways is totally consistent with Statesville insofar as both decisions recognize the opportunity for an antitrust review in conjunction with nuclear licensing. The question mainly addressed in South Texas was the scope of subsequent review after there had been initial review.

Moreover, with regard to pre-1970 units, the timing is important. The 1970 amendments enunciated a Congressional concern both to assure antitrust review of nuclear units and to allow for their construction. Essentially, Congress simply did not accept the proposition that nuclear plants were not "commercial" and that they did not need antitrust review. However, in attempting to assure stricter antitrust control, there is no basis to conclude that Congress immunized the FP&L licenses from whatever subsequent review procedures might

otherwise have been available under the statute. Granted, Congress did not focus upon what subsequent review was in fact available. However, there can be no doubt that Congress was aware of Statesville. 1/ Congress did not choose to "undo" the Court's conclusion as to the relationship of the Act's antitrust policy to Section 186. Such a failure to modify Section 186 so as to negate any authority thereunder to reopen antitrust issues for existing licenses should be read as acceptance of the analysis made by the court. See e.g., Cammarano v. United States, 358 U.S. 498, 510 (1959); Massachusetts Mutual Life Insurance Co. v. U.S., 288 U.S. 269 (1933); Muniz v. Hoffman, 422 U.S. 452 (1974). Florida Cities would be very much surprised, for example, to find in FP&L's files a legal memorandum written prior to Florida Cities' petition, suggesting that the Company could ignore the clear Statesville language subjecting it to subsequent antitrust review on grounds that the D.C. Circuit's decision was "dictum".

In short, the 1970 amendments provided new, strict procedures for nuclear license applications that would be filed in the future, and South Texas determined that this structure of antitrust

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1/ See Hearings Before the Joint Committee on Atomic Energy, 91st Congress, 1st Sess., "Prelicensing Antitrust Review of Nuclear Power Plants", Part I, Appendix 5 at 193-253; and see Davis-Besse, supra, 3 NRC at 337-38.

review for such licenses precluded going through the same process subsequently without clear cause. However, the 1970 amendments did not retroactively narrow the applicability of Sections 104 and 186 from what they otherwise would have been. Certainly, this cannot be implied.

Moreover, even if the South Texas decision by implication applies a changed circumstances test to Section 104 license review under Section 104 or 186, if that test is met, antitrust review must be available. Otherwise, the Commission would write Section 186 from the Act, insofar as most antitrust jurisdiction is concerned. 1/

III. FLORIDA CITIES MEET THE THRESHOLD SOUTH TEXAS TESTS FOR ORDERING A HEARING.

Assuming that Florida Cities have correctly interpreted the Commission's test, they submit that they have met it. Without attempting to belabor the point, as is set forth in their petition and affidavit, they submit as follows:

1. FP&L has a virtual nuclear monopoly. Its generation from the plants at issue provides a direct means of limiting competition in Florida.

1/ The 1970 amendments did allow a short time for petitions to review certain facilities, where intervention had been previously sought. This provision protected the status of intervenors such as those in Statesville. Section 105(c)(3). However, this section would not have protected the petitioners here. Indeed, under the state constitution, Florida Cities could not have jointly owned units with Florida Power & Light Company at that time. Moreover, there is no showing that the above-cited limited opportunity was designed to limit Section 186 rights.

2. External, virtually unforeseen events have limited gas and oil availability in Florida or have limited that availability to exceedingly high prices. These events have made FP&L's nuclear monopoly more valuable.

3. FP&L has sought to take advantage of its nuclear monopoly in relation to unforeseen and cataclysmic changes in fuels markets by actively seeking to acquire one independent generating system that has been in existence since 1922. The Company has given indications that, if successful, it would seek further expansion.

4. FP&L has recently refused to agree to nuclear participation or power pooling consistent with confirmed legal principles. E.g., Gainesville Utilities Department v. Florida Power Corporation, 402 U.S. 515 (1971); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). Thus, FP&L uses its economic power stemming from its size and control of facilities to add to the burden of external changes in fuel markets as they affect smaller systems.1/

5. Changes in the Florida State Constitution since the 1970 amendments make cooperative generation ventures possible. However, FP&L has attempted to convince the legislature not to pass municipal authority legislation,

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1/ For example, if FP&L acquired independent systems, presumably its large "base load" units(including those at issue here) would operate to supply "base load" generation to the customers of the systems acquired; FP&L would operate the existing generation of such systems to provide intermediate or peaking capacity. Modern pooling arrangements could virtually assure the same result with advantage to the FP&L system. But FP&L refuses, apparently preferring that the customers of the affected systems should vote to sell their systems.

which would allow municipals to finance joint ventures less expensively (or in some cases which would allow such financing at all). Thus, FP&L refuses to make available nuclear capacity, presumably on the grounds that such sales are unnecessary, 1/ and at the same time, it prevents or limits municipals' ability to obtain economic alternatives. 2/

In summary, the alleged factual situation is that the nuclear units involved themselves provide the direct means for carrying out alleged anticompetitive actions by FP&L; the changing fuel situation including loss of gas for generation has made the impact of FP&L's anticompetitive conduct with regard to Florida Cities of far greater significance than could have been foreseen; FP&L has been taking advantage of the Cities to force further monopolization; FP&L is currently refusing to deal and acting in other ways that further limit competitive opportunities of Florida Cities and their ratepayers. These allegations are directly related to the use of the nuclear units. They involve significantly changed circumstances (e.g., relating to gas and oil availability and cost for generation, legislation, new anticompetitive actions, including acquisitions, new refusals to deal, including in nuclear power itself). Further, the conduct complained of is central to the concerns of the antitrust laws. One can hardly think of more focused and

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1/ FP&L never contested Florida Cities' petition in this docket, the St. Lucie docket in 50-389A, or the South Dade dockets, in P-636-A, choosing to argue its case on procedural grounds. Therefore, it has not had to state the basis for its opposition to individual contentions or to state a position concerning them.

2/ Footnote on following page.

immediate antitrust concerns of the Commission than to avoid acquisitions through misuse of monopoly power, especially where the use of nuclear plants themselves erode competition.

Florida Cities conclude that the granting of their petition here is totally consistent with South Texas, which allowed for an antitrust review under claims no less compelling after the date for the construction permit hearing had passed. Indeed, if there is to be any practical antitrust review under Section 186 and related sections, Florida Cities submit that the

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The affidavit of Osee R. Fagan, Esquire, states:

> "Representatives of both Florida Power and Light (FP&L) and Gulf Power Corporation (Gulf) were vehement in their opposition to FMUA sponsored proposals to allow municipals to jointly finance such projects through creation of joint financing authorities designed to minimize costs and expenses and improved the saleability of bonds. Each readily admitted that his company did not want to permit municipals to be able to improve their competitive position in the electric industry."

Since they filed their intervention petition last summer, FP&L has postponed its plans to construct the South Dade nuclear units in Docket No. P-636-A. Thus, unless access is granted to St. Lucie Unit 2 (and the units here at issue) FP&L's ability to use its nuclear monopoly will be "locked-in." If given the opportunity to do so, Florida Cities would further contend that since the close of the record, FP&L's actions in allegedly offering cooperation in construction of a central Florida unit, while refusing to commit even in principle on matters of vital concern to Florida Cities, such as the provisions for providing nuclear fuel for the unit, legislation to allow financing, power pooling and transmission, constitute further evidence of anticompetitive purpose and design by FP&L. Florida Cities respectfully request permission to supplement the record by submitting the correspondence concerning such conduct and a supplemental affidavit. Some of the events leading to the ultimate impasse over the Central Florida unit (up until the time of filing the petition) are contained in the supplemental affidavit of Harry C. Luff, Jr.

above allegations provide the direct need. 1/

Finally, Florida Cities point out that the Houston Lighting and Power Company decision did not pass upon all claims made by Florida Cities. One of the "triggers" for invoking §186, apart from significant changes, would be a "misuse" of a license. Houston does imply, however, that more is needed than the type of antitrust violation that might routinely be handled by antitrust enforcement agencies. Here the sales (and refusals to sell) of nuclear energy and resultant possible takeovers are at issue. The language of §183, 42 U.S.C. §2233, sets forth that all licenses are subject to "all of the other provisions of this chapter, now and hereafter in effect and to all valid rules and regulations of the Commission." Surely this intended to refer to sections 1-3, 42 U.S.C. §2011-2033, of the Act and to the specific obligation in §105(a), 42 U.S.C. §2135(a), that licensees are not relieved from the operation of the antitrust laws. Moreover, the language of §186, 42 U.S.C. §2236, itself allows for revocation of licenses where a license could not be initially granted.

While under Houston a petitioner might also have to make a substantial claim that the "misuse" relates to the units and not to more abstract antitrust violations; this does not erase the necessary (and statutory) presumption that NRC licenses will be used lawfully. If a nuclear license is used to further or extend monopoly, such license must be deemed ineffective. See Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661 (1944); Morton Salt Co. v. Suppiger, 314 U.S. 488 (1942).

1/ As we have stated in previous pleadings, Florida Cities have never meant to imply that FP&L is not entitled to a full hearing on its claims, whatever they may be. They recognize further that FP&L may be able to put forth considerations involving economics, planning, legitimate reliances, financing or other factors, which may affect the form of relief. However, they strongly contend that just as their allegations

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The presumption is of course that all licensees -- indeed all citizens -- are bound to obey the law. FCC v. WOKO, 329 U.S. 223 (1946). 1/

Thus, Florida Cities submit that §186 is so written to give the Commission an ability to protect the integrity of its own licenses. Assuming that South Texas might limit mere reference to general antitrust violations, where the use of nuclear licenses by FP&L is directly violative of antitrust law, some Commission action is required. Under such tests, Florida Cities believe they are entitled to relief. Moreover, the test itself appears to be consistent with the South Texas decision (although broader than its holding) insofar as that decision enunciated concern over the conduct of licensees (e.g., violations of licenses, misstatements, etc.).

In short implicit in the grant of a license is the principle that an applicant will act in conformity with the law. When applicants misuse licenses, as Florida Cities allege is the case here, they forfeit whatever rights they may have had vis-a-vis the public.

(1/ con't. from preceding page) must be taken as such, FP&L's defenses also represent averments and cannot be given credence without hearing.

1/ The corollary proposition is that administrative agencies having any discretionary authority are bound to exercise their judgments in light of existing national law and policy. Office of Communica- of the United Church of Christ v. FCC, 425 F.2d 543 (1969); Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942); and see Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973). This is especially so where one subject to the authority of an administrative agency is obtaining valuable public rights. FPC v. Idaho Power Co., 344 U.S. 17 (1952); Idaho v. FPC, 346 F.2d 956 (9th Cir., 1965). An applicant has no vested interest in being able to violate the law.

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CERTIFICATE OF SERVICE

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