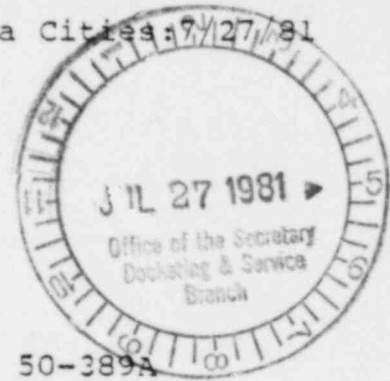


Florida Cities: 7/27/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)

FLORIDA POWER & LIGHT COMPANY)

(St. Lucie Nuclear Power Plant,)
Unit No. 2))

Docket No. 50-389A

July 27, 1981

FLORIDA CITIES' ANSWER TO
"MOTION OF FLORIDA POWER & LIGHT COMPANY FOR
DECLARATORY ORDER, OR IN THE ALTERNATIVE,
TO DISMISS THE FLORIDA CITIES FROM THE PROCEEDING"



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New Smyrna Beach, the Sebring Utilities
Commission, and the Cities of Alachua,
Bartow, Fort Meade, Key West, Lake Helen,
Mount Dora, Newberry, St. Cloud and
Tallahassee, Florida, and the Florida
Municipal Utilities Agency

July 27, 1981

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TO DISMISS THE FLORIDA CITIES FROM THE PROCEEDING"

On June 2, Florida Power & Light Company ("FPL" or "Company") requested that Florida Cities enter into a stipulation in this docket "that the operating license for St. Lucie Unit No. 2 and any and all amendments thereto may issue at any time notwithstanding the pendency and status of antitrust review proceedings with respect to St. Lucie Unit No. 2." 1/ When Florida Cities failed to agree, FPL moved for an order "that the Cities are estopped from objecting to issuance of an operating license for St. Lucie Unit No. 2 ..." or "dismissing the Cities from this proceeding unless they desist from interposing any such objection." 2/ FPL claims that when Florida Cities sought late

1/ The proposed stipulation is part of Attachment A to the Company's July 16, 1981 Motion.

2/ "Motion of Florida Power & Light Company For Declaratory Order, Or In The Alternative To Dismiss The Florida Cities From The Proceeding" (July 16, 1981, pp. 19-20). For convenience, this Motion is cited "FPL Motion, p. ____".

intervention in this construction proceeding, they waived rights to object "to issuance of the operating license on the ground of the pendency of this proceeding." FPL Motion, p. 5.

FPL has requested that the Cities now agree to a stipulation that will give it absolute assurance that it can operate the unit, regardless of the status of antitrust review. Florida Cities have stated that they are unwilling to enter into the stipulation as proposed by FPL, but would consider such stipulation if they could be assured either of expeditious procedures so that antitrust review would be complete before the plant operates or of interim relief agreed to between the parties. 1/ Such latter agreement would mitigate the harm to Cities from FPL's operation of St. Lucie Unit No. 2 without adequate protection of Cities from antitrust abuse. 2/

1/ Letter from Robert A. Jablon and Alan J. Roth to J.A. Bouknight, Jr., June 11, 1981 (Attachment B to FPL Motion).

2/ Under the interim license conditions, FPL has agreed to the sale to some of Florida Cities of approximately 38 megawatts of St. Lucie Unit No. 2 and certain other relief. While the Cities have agreed to share some of that capacity among themselves, including to Cities in Florida Power Corporation's retail service area, relief is restricted to Cities in or near FPL's retail service area. FPL adheres to a policy of refusing to deal in various aspects of power supply with entities outside its retail service area. In referring to interim relief, Florida Cities would request mutually agreed upon power sales to meet "base load" and related transmission. If agreed to, the commencement of operation of St. Lucie Unit No. 2 would be less in furtherance of restricting markets along retail service area lines, although Cities would not obtain the advantages of additional ownership or other access of St. Lucie or other nuclear units.

Florida Cities do not seek to amend the order granting their intervention in this proceeding, or conditions to that order, or the stipulation that they made during oral argument February 1, 1977 to the Petitions Board at Tr. 4-11. 1/ Nor do they seek to limit any other commitment that they may be deemed to have made. Thus, if it is determined Florida Cities' waiver is of the scope contended by FPL, the Cities will be bound. However, the Cities deny that they waived their right to a conclusion of the antitrust review before any grant of an operating license, and they simply refuse to enter into a new -- and they believe broader -- stipulation at FPL's request, which they believe may be adverse to their interests unless they obtain protections from FPL against delay.

Assuming that this Board finds that it has jurisdiction, Florida Cities do not object to the Board's interpreting the scope of their previous waiver. However, all that appears to be at issue is an assertion by FPL that it is now entitled to a declaratory order by this Board concerning the scope of Florida Cities' previous commitments. Florida Cities respond on the assumption that this Board will determine that it should reach the merits of the scope of the waiver.

1/ For convenient reference, these transcript pages are attached.

I. FLORIDA CITIES' WAIVER DID NOT EXTEND TO THE OPERATING LICENSE FOR ST. LUCIE UNIT NO. 2.

In seeking late intervention in this docket, counsel for Florida Cities stated "if intervention is granted, the Florida Cities would accept as a condition of any intervention an order that the construction may go forward." 1/ FPL interprets Florida Cities' waiver to cover the operating license. Florida Cities disagree. Assuming a declaratory order should be granted, the sole question before the Board is how the waiver, which admittedly was made, should be interpreted.

A. The Orders Granting Florida Cities' Intervention In The St. Lucie Unit 2 Construction Permit Proceeding Establish The Conditions Of Intervention.

Florida Cities were granted late intervention in this proceeding in recognition that they had agreed that there should be no delay of the construction of St. Lucie Unit No. 2 while antitrust review takes place. These orders do not establish that as a condition of intervention the Cities must "desist from interposing any such objection ... to issuance of an operating license for St. Lucie Unit No. 2 on the ground of the pendency of this proceeding." FPL Motion, p. 19.

1/ Transcript of oral argument February 1, 1977, p. 5. Subsequent references to this transcript are cited Tr. _____, lines _____. See Attachment A.

While FPL quotes Florida Cities' pleadings (out of context, Florida Cities believe), with one exception the Company studiously avoids reliance on the orders that establish the conditions of Florida Cities' intervention.

In granting the Cities late intervention, the Petitions Board plainly interpreted the Cities' commitment as waiving rights with regard to the construction permit (LBP-77-23, 5 NRC 789, 800-801, affirmed, ALAB-420, 6 NRC 8, 23, affirmed, CLI-78-12, 7 NRC 939). The Petitions Board stated:

"... Ordinarily, if this Board were to order an antitrust hearing, the construction permit could not issue until that hearing is completed." Lousiana Power & Light Co. (Waterford Steam Electric Generation Station, Unit 3), 6 AEC 48, 50, n.2 (February 28, 1973); 6 AEC 619, 621-22 (September 28, 1973); Duke Power Co. (Catwaba Nuclear Station, Units 1 and 2), 7 AEC 307, 309 (April 8, 1974); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331, 340 (April 14, 1976). However, in Waterford, Ibid., the Commission held that, with the agreement of all of the parties involved, preclicensing antitrust review would not be required. Throughout the Joint Petition, and Petitioners' Reply, references are made to the fact that Florida Cities do not seek to delay the issuance of the St. Lucie 2 construction permit. E.g., p. 43 Joint Petition, p. 61 Reply. In addition, the board in oral arguments inquired exhaustively as to petitioners' statement that no delay in the construction permit is requested nor expected. The response was unqualified (Tr. 5-12). Petitioners agree that the construction permit would issue (Tr. 11). Likewise the NRC Staff, which does not favor the antitrust hearing in the first instance, agrees that the ordering

of an antitrust hearing in this proceeding should not serve to delay the issuing of a construction permit (Tr. 17-18).

Because of the lateness of the petition we regard the agreement to permit the construction permit to issue before the completion of an antitrust hearing to be a material aspect of the considerations underlying this Order." (emphasis supplied)

No condition was placed on Florida Cities that they waive rights as to the operating license as well as the construction permit. Indeed, since Florida Cities and others would have had an independent right to intervene at the operating license stage, assuming they met statutory requirements, it is difficult to perceive the basis upon which such stipulation could have been reasonably requested. See Atomic Energy Act, §105c, 42 U.S.C. §2135c. The Commission itself affirmed the Petitions Board's order in all relevant aspects (supra, 7 NRC 939) without imposing the limitation that FPL now claims existed. FPL has no basis now to seek to expand the conditions upon which Florida Cities were granted intervention.

In its pleading, FPL cites the Appeal Board decision for the proposition that the Board was concerned with delay in operation of St. Lucie Unit No. 2. However, at the very page of the decision, which is relied upon by FPL (FPL Motion, pp. 11-12, citing ALAB-420, supra, 6 NRC at 23), the Appeal Board directly refers to "the municipalities' agreement to allow issuance of the St. Lucie 2 construction permit (see p. 13, supra) ..." and at

the back reference (p. 13) the Appeal Board refers solely to the construction permit:

"The third was the agreement of Orlando and the other intervenors to allowing the St. Lucie 2 construction permit to issue before their antitrust contentions were heard, thereby eliminating any need to hold up construction of that plant pending resolution of those contentions." (emphasis supplied in quotations, footnote omitted)

The only condition placed upon intervention by the Commission concerns construction.

B. Florida Cities' Waiver Expressly Refers To The Construction Permit.

In order to establish that an independent waiver provides grounds for "estoppel" of the Cities, FPL references quotations from three pleadings of the Cities. However, FPL does not quote the transcript where the actual waiver was made. As stated, this was during oral argument before the Petitions Board on February 1, 1977. At that time counsel for Florida Cities stated:

"... And I state here that the Florida Cities believe it is certainly a reasonable condition of our intervention, do not oppose and, indeed, affirmatively seek a condition to our intervention that the construction permit may issue ..." (Tr. 6)

"CHAIRMAN SMITH: For now, at least, you affirmatively agree that, in the event an antitrust hearing on St. Lucie 2 is ordered, that it will not impact upon the issuance of a construct permit?

MR. JABLON: Yes, your Honor." (Tr., p. 7)

Mr. Bouknight, counsel for FPL, requested clarification whether the waiver was irrevocable and whether the Cities were inserting a requirement of interim relief as a condition for such waiver. Counsel for Florida Cities responded (Tr., pp. 8-9):

MR. JABLON: Well, with regard to the latter point, on the issuance of the construction permit, I would think it would be irrevocable.

....

We have made or attempted to make a good-faith waiver. We so do so. I can see no reason why the Board cannot attach that as a condition.

My remarks here are being recorded. Yes, I do mean it as irrevocable. I mean it as a commitment as counsel of the Florida Cities that the construction permit in St. Lucie 2 should go forward."

....

[N]or do I mean to suggest that, should you deny the [interim] relief we seek, that the construction will should not go forward."

Indeed, counsel for FPL himself appeared to understand that waiver went to construction:

"MR. BOUKNIGHT: I think, if I understood him correctly, he said that it was unconditional. ..."

...

We are talking -- and, of course, you know it is our position that this petition shouldn't be granted in any event. But if we were to be in a position where we were

constructing the power plant on the basis of this kind of an agreement, then Florida Power & Light Company would have several hundred people out in the field engaging in construction activities and a great deal of money involved. And we simply couldn't face a claim of changed circumstances a few months down the line as a basis for changing this agreement." (Tr., p. 10)

Counsel for Florida Cities again responded at the request of the Board Chairman:

"On behalf of the Florida Cities, I state, first, that we are not opposed to conditioning our intervention unqualifiedly upon our agreement that the construction shall issue; second, that we commit ourselves not to seek -- well, we have, have your Honor, absolutely no intention whatsoever, unqualifiedly, to seek a cessation of construction, and indeed, it would be against our interests to do so."

.... We seek interim and permanent relief. We do not seek delay in the construction, and we are willing to abide by that as a condition of our obtaining the intervention we seek."
(Tr., p. 11)

At page 12, counsel for the NRC Staff similarly referred to satisfaction with Florida Cities' position "with respect to later trying to delay the construction permit."

The above discussion which is set forth at full in the appendix makes it plain that the waiver was to the construction permit.

FPL quotes page 14 of Florida Cities' Joint Petition To Intervene (FPL Motion, pp. 8-9, 11 and their Reply Brief (FPL Motion, p. 9) where Florida Cities state:

"... Cities do not seek a delay in actual construction or operation of the Turkey Point No. 3 and No. 4 or St. Lucie No. 1 and 2 nuclear units."

In the quoted reference at page 14 of their Joint Petition 1/ Florida Cities expressly referred to Turkey Point Nos. 3 and 4, which were in operation and St. Lucie No. 1, which was planned for operation. The Cities were seeking intervention and relief relating to all units. Thus they state they do not seek a delay in "actual construction or operation of the units." The waiver by Cities was defined in oral argument and in the Commission's order. However, the reference relied upon by FPL itself does not help its cause. 2/

FPL's quotation from Florida Cities' Reply Brief 3/ is even more truncated and out of context. At page 9 of its Motion, FPL quotes part of a footnote by Florida Cities. As the text and footnote make clear, Florida Cities were responding to allegations by FPL that in seeking access to FPL's operating

1/ "Joint Petition of Florida Cities For Leave To Intervene Out Of Time; Petition To Intervene; And Request For Hearing," Florida Power & Light Company (St. Lucie Plant, Unit Nos. 1 and 2), Florida Power & Light Company (Turkey Point Plant, Unit Nos. 3 and 4), Docket Nos. 50-335A et al. (August 9, 1976).

2/ In language not quoted by FPL, Florida Cities were also seeking interim relief to "prevent use of existing generation as part of an anticompetitive scheme, pending the outcome of proceedings." Such language, which is contained in the original paragraph but is omitted from the portion quoted by FPL in its Motion, puts in context the reference to "operation" of the plants. The reference to interim relief comes immediately after the language quoted by FPL.

3/ "Reply Of Florida Cities To Responses Of Florida Power & Light Company And Nuclear Regulatory Commission Staff" (October 19, 1976).

nuclear units, "an adverse impact upon FPL's ability to obtain needed capital" could result. See Reply Brief, pp. 16-18 and references therein. In this context, Florida Cities stated that "FPL has been totally nonspecific about the harms it fears," but that they would be prepared "at the threshold of this case, to enter into all appropriate stipulations, procedural and substantive, necessary to eliminate any real adverse impact on FPL." Thus, Florida Cities offered to enter into certain stipulations based upon FPL's assertions of harm, but FPL never responded. Therefore, there were no such stipulations. In the specific footnote quoted by FPL, Florida Cities begin:

"If Florida Cities were to receive a direct ownership share in the existing nuclear units, FPL's investment would be well protected ..."
(emphasis added)

They go on in the first sentence of paragraph 2,

"Florida Cities have offered to stipulate issues, in order to eliminate uncertainty."

FPL did not quote or refer to this sentence.

FPL argues that Florida Cities agreed to a waiver in relation to the operation of St. Lucie Unit No. 2. In fact, however, the Cities offered to enter into stipulations in conjunction with their request for access to the operating units, but FPL never took up the offer. No such stipulation was made.

Finally, at p. 11, FPL quotes Florida Cities' Brief to the Commission that a grant of intervention "will not delay construction or operation" of St. Lucie Unit 2. Of course, this

language intended no new waiver, but was an argument and prediction that the grant of intervention would not delay a unit scheduled for operation years into the future, when the Cities were waiving rights with regard to construction.

C. The Board Should Not Infer A Waiver Unless It Was Clearly Made.

If it should be found (contrary to the Cities' position) that they have waived rights in relation to the operation of the unit, they have no intention of seeking to undo what they have done. 1/ Their difference with FPL is factual. They do not believe that they have made the waiver that FPL claims.

1/ Under some circumstances case law would refuse to credit a waiver that frustrates statutory policies. For example, in Brooklyn Bank v. O'Neil, 324 U.S. 697, 704 (1945), the Supreme Court went so far as to hold

"... a statutory right conferred upon a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.... Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which is was designed to effectuate." (citations and footnote omitted)

Cities do not make any claim here that they should be released from any waiver that they have made. However, in view of the strong antitrust remedial policies of §105, and the policies underlying O'Neil, supra, the Cities should not be estopped on any basis other than a waiver made by the Cities (See Toledo Edison Co., supra, 3 NRC 331, and ambiguities should be interpreted in favor of the Cities. See text, infra).

Moreover, courts have been disinclined to infer that rights have been waived absent clear evidence of waiver. See United States v. Stout, 415 F.2d 1190 (4th Cir. 1969), no waiver of right to conscientious objection to be inferred from broad or ambiguous language signed by objector. The language of Cities' waiver is specific and refers only to construction. "Courts should indulge every reasonable presumption against waiver." Barker v. Wingo, 407 U.S. 514, 525 (1972), quoting Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937) (waiver of right to trial by jury not shown).

In short, the Commission orders and the waiver of Florida Cities with regard to the construction permit provide no grounds for creating or inferring a waiver of Florida Cities' rights with regard to the operating license.

II. POLICY GROUNDS DO NOT SUPPORT GRANTING THE RELIEF SOUGHT BY FPL, IN THE ABSENCE OF A WAIVER RELATIVE TO THE OPERATING LICENSE.

Using strong language, FPL castigates the Cities for disavowing commitments and for seeking delay of St. Lucie Unit No. 2. As stated in the introduction and Section I of this pleading, Florida Cities have not broken any commitments. FPL may now desire a stipulation never entered into, but that does not justify the relief sought.

FPL stresses that there is a public interest in timely operation of St. Lucie Unit No. 2. Florida Cities agree. As FPL recognizes in its pleading, many of the Cities are potential

co-owners of the unit and, no less than FPL, they have an interest in its timely operation. See FPL Motion, pages 4, 13. However, the Cities also have an interest in resolving antitrust matters and, indeed, in not having St. Lucie Unit No. 2 go into operation without adequate license conditions to protect against the unit's being used in an anticompetitive manner. Thus, in the letter from Robert A. Jablon and Alan J. Roth to J.A. Bouknight Jr., dated June 11, 1981 (Attachment B to FPL Motion), the Cities state:

"The Cities share your concern that St. Lucie 2 should be able to operate on schedule. Some or all of them will be owners of that unit and some Cities purchase power from FPL. Indeed, they are gravely concerned that the antitrust review is taking so long. The problem should have been resolved by settlement, but the fact is that FPL has not been willing to offer sufficient capacity from St. Lucie 2 and other relief that the Cities believe would have justified settlement. Further, since FPL has made capacity available to some Cities but not to others, the Cities are faced with the Hobson's choice of sharing nuclear capacity among themselves, thereby cutting the amount of St. Lucie 2 capacity available to any one system, or of not sharing, in which case some intervenors would receive no capacity. If the Cities were to agree to the unconditioned waiver that you propose, the plant could go into operation with many Cities getting no share or minimal capacity and all Cities getting what they deem insufficient antitrust relief. FPL may then have little or no interest in speed in the antitrust review. In any event, the plant would operate without the antitrust review contemplated by the Atomic Energy Act.

The solution to all these problems, it would appear, would be for all parties to stipulate to expeditious procedures. The Cities have long been disturbed by the prospect that protracted litigation would

force a sacrifice of their rights. Certainly, if the Cities have valid claims, relief should be decided soon. The Cities agree that operation of the plant should not be delayed. Taking into account these considerations, we would be prepared to recommend to our clients that they sign your proposed stipulation, providing that a hearing schedule and procedures were agreed to that permit antitrust resolution by the Board before the operating license becomes effective and that there would be no stay of Board ordered license conditions, pending any review.

If the above is not acceptable, we would be prepared to recommend the waiver that you propose, if FPL agrees to interim relief to lessen the adverse impact on Cities from the operation of the plant before antitrust review is concluded. However, absent some constraint, an incentive could be created to unduly prolonged litigation.

I suggest an early meeting to resolve these matters."

Florida Cities have not stated and are not stating that they will object to the operation of St. Lucie Unit No. 2 on schedule. Nor has FPL committed when the plant will operate in fact. The only thing that the Cities state at this time is that they are unwilling to extend the scope of past waivers without assurance either that antitrust review can be completed by the time of operation or that appropriate interim relief can be agreed upon.

FPL asserts, p. 18, n.1, that the Cities would not be hurt by its requested waiver since the Board can control the scheduling of proceeding. However, it suggests the necessity for "extensive discovery" and "extensive evidentiary hearings." FPL Motion, p. 7. The sad fact is that often the best defense to antitrust claims is delay, and FPL suggests that hearings will be lengthy.

As the Appeal Board has recognized in Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331 (1976), and as the Commission and various appeal and licensing boards have recognized generally, the Atomic Energy Act seeks to accomodate both interests of licensees or potential licensees in economic operation of units and the further interests of competing entities and the public that these units not be used anticompetitively. However, FPL would recognize only the former concerns. The statutory scheme of the Atomic Energy Act is such that it establishes a staged review process, Power Reactor Development Co. v. International Union of Electrical Radio and Machine Workers, AFL-CIO, 367 U.S. 397 (1961), which encompasses strict antitrust review. Atomic Energy Act, §105, 42 U.S.C. §2135. Toledo Edison Company, supra, 3 NRC 331. In seeking to relate any additional waiver to assurance that antitrust issues will in fact be resolved at the time of plant operation or that there is opportunity for additional limited interim relief, Florida Cities seek no more than the accomodation of interests that is envisioned by the statutory structure. If it be thought that the Company is being placed in an unfair position, to paraphrase the Appeal Board in this case, whatever merit the Company's argument may have in other circumstances, it has been the Company's own actions which are the reason its antitrust responsibilities were not settled earlier. Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 24 (1977).

FPL's invective aside, Florida Cities' fears are far from groundless. As the Board is aware, Florida Power & Light has been found guilty of violating the antitrust laws and the Company continues to refuse to deal over a broad spectrum with many of the Cities in the Florida Cities group. The Chief Executive Officer of FPL has disavowed the correctness of some of those decisions and has disavowed knowledge of others (see Attachment B), and one highly placed official has suggested that when its antitrust proceedings are over, the Company will again consider acquisition of municipals (Attachment C).

Under such circumstances, Florida Cities should not be forced to waive rights under the Act without obtaining adequate protection.

CONCLUSION

For the foregoing reasons, FPL's Motion should be denied.

Respectfully submitted,

Robert A. Jablon

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Alan J. Roth
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Utilities, the Lake Worth Utilities
Authority, the Utilities Commission of New
Smyrna Beach, the Sebring Utilities
Commission, and the Cities of Alachua,
Bartow, Fort Meade, Key West, Lake Helen,
Mount Dora, Newberry, St. Cloud and
Tallahassee, Florida, and the Florida
Municipal Utilities Agency

July 27, 1981

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ATTACHMENT A

Excerpt from Transcript of Oral Argument Before
the Nuclear Regulatory Commission Atomic Safety
and Licensing Board, February 1, 1977 (pp. 1-13)

NUCLEAR REGULATORY COMMISSION

ORAL ARGUMENT

IN THE MATTER OF:

ORAL ARGUMENT IN THE MATTER OF:

FLORIDA POWER & LIGHT COMPANY

(St. Lucie Plant, Unit Nos. 1 and 2)

(Turkey Point Plant, Units 1 and 4)

Docket Nos. 50-389A, 50-335A,
50-250A, 50-251A

Place Bethesda, Maryland

Date Tuesday, 1 February 1977

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NUCLEAR REGULATORY COMMISSION

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ORAL ARGUMENT IN THE MATTER OF: :
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FLORIDA POWER & LIGHT COMPANY : Docket Nos. 50-389A
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(Turkey Point Plant, Units :
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3 and 4) :
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Fifth Floor Hearing Room
East/West Towers
4350 East/West Highway
Bethesda, Maryland

Tuesday, 1 February 1977

Oral Argument in the above-entitled matter was convened,
pursuant to notice, at 9:30 a.m.

BEFORE:

VAN SMITH, Chairman
Atomic Safety and Licensing Board

JOHN FRYSIK, Member

DANIEL M. HEAD, Member

APPEARANCES:

ROBERT A. JABLON, Spiegel & McDiarmid, 2600 Virginia
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of Intervenor, Florida Cities.

J. A. BOUKNIGHT, JR., Lowenstein, Newman, Reis &
Axelrad, 1025 Connecticut Avenue, N. W., Washington,
D. C., Suite 1214; and

APPEARANCES: (continued)

JOHN E. MATHEWS, JR., Mathews, Osborne, Ehrlich,
McNatt, Gobelman and Cobb, 1530 American Heritage
Life Building, Jacksonville, Florida 32202; on
behalf of Applicant.

LEE DEWEY and MICHAEL JONES, Office of the Executive
Legal Director, Nuclear Regulatory Commission,
Bethesda, Maryland; on of the Nuclear Regulatory
Staff.

ALSO PRESENT:

WILLIAM H. CHANDLER, Post Office Drawer O,
Gainesville, Florida 32601;
JOHN H. HASWELL, 3671 N. W. 37th Street,
Gainesville, Florida 32605; and
TRACY DANES

P R O C E E D I N G S

CHAIRMAN SMITH: Mr. Dewey, you have co-counsel with you?

MR. DEWEY: Yes, sir, I do. With me today is Mr. Michael Jones of the Nuclear Regulatory Commission Staff.

CHAIRMAN SMITH: Mr. Jones.

MR. JONES: Good morning.

MR. BOUKNIGHT: Mr. Chairman, with us today and seated at the counsel table to my left and behind me is Tracy Danese, vice president of Florida Power & Light Company. He is not appearing as counsel, but he is here.

MR. DANESE: Good morning.

CHAIRMAN SMITH: Mr. Jablon, do you have any new faces?

MR. JABLON: No, your Honor.

CHAIRMAN SMITH: Inasmuch as this is the first argument in this case, I guess we are all new to this proceeding. We will have oral arguments this morning.

I guess we should also acknowledge the presence of Mr. Chandler, who is not strictly a party to this oral argument, if "party" is the correct word, but he is an invited guest and is present.

And do you have someone with you, Mr. Chandler?

MR. CHANDLER: I have Mr. Haswell of my office, who is also here, I guess you might say, as an invited guest.

1 CHAIRMAN SMITH: We will hear arguments this
2 morning in two basic categories. The first will be the
3 petition to intervene filed by the Florida Cities in the
4 St. Lucie No. 2 unit, in which our interest will be the
5 extent that section 2.714, volume 4, intervention, is
6 complied with or not complied with.

7 Then our second consideration will be the
8 petitions for intervention and antitrust hearing with respect
9 to St. Lucie No. 1 and the Turkey Point units, which we will
10 probably be referring to as the old units or operating units
11 this morning. And in that respect, the Board will wish to
12 be advised or may have questions on the Commission's juris-
13 diction and authority to conduct any antitrust review with
14 respect to the old plants; and, assuming such authority exists,
15 the authority, if any, of this Board to order an antitrust
16 hearing, as compared to the remedies under section 2.206 and
17 2.202 of the Commission's rules.

18 Beginning -- first, before we begin with oral
19 arguments, are there any preliminary statements or announce-
20 ments that the whole matter has been settled and we may go
21 home?

22 Without any preliminary matters, we will ask Mr.
23 Jablon if you will address yourself, please, to the portions
24 of your petition for leave to intervene and your responses
25 which purport to assure that no delay would be occasioned by

1 a granting of the petition to intervene in the St. Lucie
2 No. 2.

3 Would you be specific and point to the exact
4 portions of your papers from which the Board may learn this?

5 MR. JABLON: Yes, your Honor.

6 Well, first of all, with regard to the delay point,
7 I will get the page references in a second.

8 In your order setting forth the oral arguments, the
9 Board asked the question about the construction permit. We
10 had written a letter to the company, and we had stated in our
11 pleadings that, if intervention is granted, the Florida Cities
12 would accept as a condition of any intervention an order
13 that the construction may go forward.

14 We did not express it in those terms. What we
15 stated explicitly was that we were willing to stipulate,
16 and if it hasn't been clearly so, stipulate here that insofar
17 as the Florida Cities are concerned, we very explicitly waive
18 any claim that we might have that the construction permit
19 should not issue, subject to the condition, of course, that
20 any order that you might subsequently issue on the matter
21 would be effective. I refer specifically to page 42 of my
22 petition to intervene.

23 CHAIRMAN SMITH: You address yourself to this at
24 page 26, 39, 42, 43, and 61 of your response.

25 MR. JABLON: You're ahead of me, your Honor.

1 CHAIRMAN SMITH: There may be other places. You
2 refer to page 6 of your petition as the area where you talk
3 about stipulation, but I think that may be in error, because
4 page 6 in the petition does not address itself —

5 MR. JABLON: It may be in error, and I don't want
6 to waste the Board's time in finding the specific page
7 references. But, in any event, I note I quoted explicitly
8 in my reply brief, I believe, the letter which I had sent.
9 And I state here that the Florida Cities believe that it is
10 certainly a reasonable condition of our intervention, do not
11 oppose and, indeed, affirmatively seek a condition to our
12 intervention that the construction permit may issue.

13 And I state this with regard to the affirmative
14 part of it, because, as we construe the statute, looking at
15 all the plans for a second, a distinction must be made between
16 prelicensing review, which is dealt with in sections 104 and
17 105 -- I guess 103, 104, and 105 -- and postlicensing
18 review.

19 And, at least in a sense, the equities with regard
20 to St. Lucie are colored by the same considerations. That
21 is, I believe under the standard case law before the NRC at
22 West Valley, et al., we are entitled to late intervention
23 in any event. But I recognize that there are some equities
24 going to the company on this matter.

25 I don't see why the company should be in a worse

1 position with regard to St. Lucie 2 than they would be with
2 regard to Turkey Point 1 and 2 or St. Lucie 1. I believe
3 that the cities raise very serious antitrust claims that
4 nuclear power in the totality of the plants should not be used
5 as a method of monopolization forcing concentration.

6 But, on the other hand, because we are bringing
7 that contention to the Board and, I believe, have a right to
8 be heard, I do not perceive a reason why construction cannot
9 go forward. And the Atomic Energy Act certainly gives your
10 Honors sufficient authority to condition -- I can find the
11 section reference, but it is misplaced in my notes --

12 CHAIRMAN SMITH: For now, at least, you affirma-
13 tively agree that, in the event an antitrust hearing on St.
14 Lucie 2 is ordered, that it will not impact upon the issuance
15 of a construction permit?

16 MR. JABLON: Yes, your Honor.

17 CHAIRMAN SMITH: You also agree that the Board,
18 that the Commission and the Board and the Nuclear Regulatory
19 Commission Staff does have the right to accept unanimous
20 agreement of the parties to that effect?

21 MR. JABLON: Yes, your Honor.

22 CHAIRMAN SMITH: This, I understand, is your
23 understanding, too, Mr. Bouknight. You say as much on page
24 9 of your answer to the petition to intervene.

25 MR. BOUKNIGHT: Yes, sir. That's the way that I

1 read the Waterford case and Catawba case.

2 Now, I do have a couple of questions.

3 My first question is whether Mr. Jablon's agreement
4 is unconditional. That is, he made references to interim
5 relief in his two pleadings; they are now being put aside.

6 And, second, I think the question of whether his
7 consent is irrevocable is very important. I notice you used
8 just a moment ago the words "for now." You can see what kind
9 of problem --

10 CHAIRMAN SMITH: I would like to have that put
11 back to me. "For now," I recall using it, yes.

12 MR. JABLON: Just as a point of statutory reference,
13 I was referring to section 183, which allows condition of
14 licenses.

15 Let's see. The two questions were on interim
16 relief and whether the waiver was irrevocable.

17 Well, with regard to the latter point, on the
18 issuance of the construction permit, I would think it would
19 be irrevocable. I suppose the mind can conjure up, if the
20 president of Florida Power & Light shot the mayors of all my
21 cities, maybe some farfetched things might be triggered.

22 We have made or attempted to make a good-faith
23 waiver. We so do so. I can see no reason why the Board
24 cannot attach that as a condition.

25 My remarks here are being recorded. Yes, I do

1 mean it as irrevocable. I mean it as a commitment as counsel
2 of the Florida Cities that the construction permit in St.
3 Lucie 2 should go forward.

4 CHAIRMAN SMITH: Would you address yourself --

5 MR. JABLON: Now, on the interim relief, I believe
6 the Commission does have authority to issue interim relief
7 to preserve the status quo. If we are granted intervention,
8 we plan to file a motion to that effect.

9 However, I want to make it explicitly clear that
10 any permanent or temporary relief that we may seek, while
11 it may be technically a condition to the license -- and the
12 statutory language makes clear that you can attach conditions
13 to the license -- by that, I do not mean to suggest that
14 no matter what we ask for, or no matter what your Honors
15 may order, that the construction permit shall not go forward,
16 nor do I mean to suggest that, should you deny the relief we
17 seek, that the construction still should not go forward.

18 CHAIRMAN SMITH: And that your acquiescence to
19 that is not in any way conditioned?

20 MR. JABLON: Yes, your Honor.

21 CHAIRMAN SMITH: Your acquiescence to the
22 issuance --

23 MR. JABLON: Yes, your Honor.

24 Well, I mean I do plan to file a motion, but that
25 is not conditional, in the sense that if we lose I'm not saying

1 that, therefore, the construction permit cannot go forward.
2 The answer to your Honor's question is, yes; yes, it is not
3 conditional.

4 CHAIRMAN SMITH: Mr. Bouknight?

5 MR. BOUKNIGHT: I think, if I understood him
6 correctly, he said that it was unconditional. The irrevoc-
7 ability question, I thought I detected a shift in the
8 direction in which he was moving during his remarks. I think
9 it is very important that we be talking about an agreement
10 that is irrevocable, without any qualification whatsoever.

11 We are talking -- and, of course, you know it is
12 our position that this petition shouldn't be granted in any
13 event. But if we were to be in a position where we were
14 constructing the power plant on the basis of this kind of an
15 agreement, then Florida Power & Light Company would have
16 several hundred people out in the field engaging in
17 construction activities and a great deal of money involved.
18 And we simply couldn't face a claim of changed circumstances
19 a few months down the line as a basis for changing this
20 agreement.

21 CHAIRMAN SMITH: I certainly can understand the
22 importance of your concern to Florida Power & Light. And
23 because it is so important, I am permitting you to push Mr.
24 Jablon beyond which normal courtesy would permit, because I
25 think he has used very strong language in his assurances.

1 However, it is an important matter, and if Mr.
2 Jablon would please respond to Mr. Bouknight's concern. --

3 MR. JABLON: On behalf of the Florida Cities,
4 I state, first, that we are not opposed to conditioning
5 our intervention unqualifiedly upon our agreement that the
6 construction permit shall issue; second, that we commit
7 ourselves not to seek -- well, we have, your Honor, absolutely
8 no intention whatsoever, unqualifiedly, to seek a cessation
9 of construction, and, indeed, it would be against our
10 interests to do so.

11 As a practical matter, we are hurting. We
12 are hurting by not having access to this power, and we hurt
13 ourselves if we delay the plant. In any event, I again
14 repeat in the strongest and most affirmative language I can
15 that we seek intervention here. We seek interim and permanent
16 relief. We do not seek delay in the construction, and we
17 are willing to abide by that as a condition of our obtaining
18 the intervention we seek.

19 CHAIRMAN SMITH: Would it be fair to state, in
20 addition, that, with respect to the interim relief that you
21 reserve the right to seek, that you waive any right to cause
22 a delay or cessation of the construction of the plant?

23 MR. JABLON: Yes, your Honor.

24 CHAIRMAN SMITH: That seems to be satisfactory,
25 Mr. Bouknight.

1 MR. BOUKNIGHT: I think that answers the question;
2 yes, sir.

3 CHAIRMAN SMITH: Mr. Dewey?

4 MR. DEWEY: Your Honor, Mr. Jablon's statements,
5 I originally was not sure, but I think we are now satisfied
6 with his position with respect to later trying to delay the
7 construction permit. We agree with the Applicant and
8 Intervenor that, in the event that all parties agree
9 that the construction permit may be issued, then, in fact, it
10 may be issued.

11 This was, I believe, stated by the Commission
12 itself in the Waterford decision. That was in footnote 2
13 in 6 AEC 48 at page 49. I believe it is rather clear to me,
14 at least, that that was the holding. So, in the event that
15 the Staff, the Applicant, and the Intervenor agree that the
16 construction permit can be issued, then we believe that it
17 can be.

18 At this stage, I have not been specifically
19 authorized by my superiors to state that the construction
20 permit could issue in this particular instance, although I
21 personally believe that, if it came down to that, we would do
22 that. But I have not got that clearance at this point; but
23 I have no reason to believe that we wouldn't get it.

24 CHAIRMAN SMITH: I won't call upon you, Mr.
25 Chandler, unless you indicate there is a point you wish to

1 make.

2 MR. CHANDLER: No, sir. I have no comments.

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ATTACHMENT B

Excerpt from Deposition of Marshall McDonald in
Gainesville Regional Utilities, et al. v. Florida
Power & Light Company, U. S. District Court for the
Southern District of Florida, No. 79-5101-CIV-JLK,
Tuesday, May 12, 1981 (pp. 99-102)

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF FLORIDA

3 THE CITY OF GAINESVILLE AND THE GAINESVILLE-
4 ALACHUA COUNTY REGIONAL UTILITIES BOARD, THE
5 LAKE WORTH UTILITIES AUTHORITY, THE UTILITIES
6 COMMISSION OF NEW SMYRNA BEACH, THE SEBRING
7 UTILITIES COMMISSION, THE CITIES OF ALACHUA,
8 BARTOW, FORT MEADE, HOMESTEAD, KISSIMMEE,
9 MOUNT DORA, NEWBERRY, SAINT CLOUD, STARKE and
10 TALLAHASSEE, FLORIDA,

11 Plaintiffs,

12 vs.

13 FLORIDA POWER AND LIGHT,

14 Defendant.

15 CASE NO. 79-5101-Civ-JLK

16 9250 West Flagler Street
17 Miami, Florida
18 Tuesday, May 12, 1981

19 DEPOSITION OF MARSHALL McDONALD

20 taken before GAIL ABRAMSON, Court Reporter and Notary
21 Public in and for the State of Florida at Large, pursuant
22 to Notice of Taking Deposition filed in the above-styled
23 cause.

Q Do you know if the company has ever considered destroying or discarding--

A Who's the company?

Q FP&L.

A Who's the company?

Q Anyone else in the company.

A I have no way of knowing what everyone else in the company might have considered at any point in time about any subject.

Q Okay, do you know if counsel for the company ever discussed with any company officials the possibility of disposing, destroying, or otherwise getting rid of documents?

A I am not aware of that.

Q Are you familiar with the findings of the Fifth Circuit Court in the Gainesville case in 1978?

A Yes.

MR. GRIBBON: You mean the whole opinion?

MR. GUTTMAN: I'm going to ask him a specific--

Q (By Mr. Guttman) You read the case, I'm sure?

A I read the case.

Q The Fifth Circuit in that case found that the evidence compelled the finding that FP&L was part of a conspiracy, so you are aware of that; correct?

You are not nodding, but I take that--

A I'm glaring.

3
1 MR. GRIBBON: What the Fifth Circuit held, we
2 can't do anything about.

3 MR. GUTTMAN: I am not going to beat up the witness
4 in light of that holding and he is not going to beat me
5 up either.

6 Q (By Mr. Guttman) In light of that finding, what
7 specific action, if any, have you taken to insure FP&L's
8 compliance with the antitrust laws?

9 A I'm not aware that we have ever been guilty of
10 infringing any antitrust laws.

11 Q In your view, the Fifth Circuit holding in 1978
12 was not a finding that FP&L had infringed on any antitrust
13 laws?

14 A In my opinion, the views of the Fifth Circuit were
15 incorrect.

16 The views of the jury who actually saw the evidence,
17 observed the witnesses, was correct.

18 Q Preserving your dispute with the Fifth Circuit, in
19 light of their holding, what specific action, if any, have
20 you taken to insure FP&L's compliance with the antitrust
21 laws?

22 A I'm not aware that we have not been complying with
23 the antitrust laws.

24 Q Have you ever, as head of FP&L, taken any action or
25 engaged in discussions to insure that the company stays in

1 compliance with the antitrust laws, if that is the premise?

2 A Yes, sir. I have never agreed that there is any
3 obligation to share the output of our nuclear plants, but
4 since there is a theory that there is one, at the time that
5 we did not accept a participation in the South Dade Plant,
6 I directed Mr. Gardner and Mr. Danese to offer to the rest
7 of the State all that I could speculate that this other
8 position might encompass which was our ability to find a
9 site for a plant, license that site and construct the plant
10 and to offer these services at a reasonable service fee to
11 the other electrical systems in the State.

12 Q In addition to the Central Florida project, if we
13 can refer to it by that name, what other action have you
14 taken to insure or preserve your compliance with the ant-
15 trust laws?

16 A I have had no target to aim for because I do not
17 believe that we have infringed on any antitrust laws.

18 Q Does FP&L have any program or similar type of
19 activity under different names by which it instructs its
20 employees as to what the antitrust laws are and what
21 obligation the company might have?

22 A I don't think so.

23 Q Now, this also may be a cause for a glare, but this
24 is--please, for the record, at footnote 14 at the Gainesville
25 decision which you may recall, the officials of the power

companies deny the existence of a territorial agreement.

Then the court goes on to say, "Where such testimony is in conflict with contemporaneous documents, we can give it little weight."

Do you recall reading that?

A I'm sure I read it. I don't recall it.

Q Do you recall Opinion No. 57, the Federal Power Commission? It was a decision in the case where the company sought to revise its tariff.

Do you recall any opinion-- do you recall in 1977 the company sought to limit eligibility under its tariff? Do you recall that?

A I seem to recall there was something like that, Mr. Guttman, but I don't know. I don't recall any specifics about it.

Q If there was something like that, would you have been apprised of it or required to approve it?

A No.

MR. GRIBBON: Approve the decision?

MR. GUTTMAN: Approve the filing. I was referring to the filing.

THE WITNESS: To approve the filing?

Q (By Mr. Guttman) Yes, the decision to file.

A No, I wouldn't have had to approve that.

Q Who would have had the authority to approve it?

ATTACHMENT C

Excerpts from Vero Beach City Commission Meeting,
January 23, 1980 with Remarks by P. J. Gardner

: Mr. Gardner I only have one question. What is the liklihood, in your opinion, that FP&L will reactivate its offer to purchase Vero Beach power? The plant, the system?

Gardner : Well, John and I were talking about that a little bit before.

: I warned him somebody might ask him that question.

Gardner : I don't think there's much liklihood of the reactivation of the arrangement that we had in 1976 and 7 in that same form. I think that there is at least a glimmer of possibility that other arrangements might be worked out if . . . depending on what y'all's objectives were and what your desire were. I'm saying that depending on what you really wanting to accomplish is . . . I think that the . . . in addition to the antitrust problems there was some vulnerability to the arrangement that we had before. I'm just speaking of my own personal assessment of that. The problem two standpoints. One is the substitution of private capital and its costs for municipals capital may have cost. And the other was a merger of the rates of the two systems. If we could find acceptable ways around those problems, it may be possible to . . . and if Vero Beach's desires simply to not have the concerns of managing a system, I think it may be possible to put some arrangements together. I have not given it a great deal of thought only a cursory thought, but if you want to explore it, we'd be happy to do so.

: Bob, what I thought I heard you say earlier was that every since our aborted day with Justice, Dave and I were there, so was Tom, everybody, that you have in fact been taking care of those so-called 10 conditions that they said would be something you'd have to agree to in order for them to withdraw from the FERC proceeding. Now if what I'm hearing you say is that you have or are dealing with those ten conditions then the next question is if we went back to FERC tomorrow with a similar arrangement by mutual agreement, would Justice stay out of it?

Gardner : I don't know. We have'nt really talked to them directly about that question yet.

: Well, I wouldn't think that this would be the time to be talking to them about it.

Gardner : Well, that's mainly the reason we haven't talked to them.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket No. 50-389A
)
(St. Lucie Nuclear Power Plant,) July 27, 1981
Unit No. 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "FLORIDA CITIES' ANSWER TO 'MOTION OF FLORIDA POWER & LIGHT COMPANY FOR DECLARATORY ORDER, OR IN THE ALTERNATIVE TO DISMISS THE FLORIDA CITIES FROM THE PROCEEDING'" was served upon the following persons by hand deliver (*) or by deposit in the U. S. Mail, first class, postage prepaid this 27th day of July 1981.

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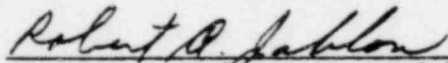
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