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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light) Docket No. E-9574

ANSWER OF CITIZEN INTERVENORS
TO NOTICE OF WITHDRAWAL

On March 31, 1978, Florida Power & Light Company ("FP&L") filed a "Notice of Withdrawal" of its application in the above-captioned proceeding. Pursuant to Rule 1.9(g) of the Commission's Rules of Practice and Procedure, Messrs. John Dawson and Eugene Lyon ("Citizens"), intervenors in the above-captioned proceeding, hereby respond to FP&L's requested withdrawal. Citizens do not object to the proposed withdrawal, provided, however, that it is appropriately conditioned to protect the public interest, including the interests of the citizens of Vero Beach, as stated further below.

I. THE COMMISSION CANNOT LEAVE THE CITIZENS OF VERO BEACH WITHOUT RECOURSE.

Though FP&L has evacuated Vero Beach, it has left behind "footprints on the sands of Time." Longfellow, A Psalm of Life. As recorded in Judge McGowan's interim decision 1/, in withdrawing its proposal to purchase the Vero Beach electric system, FP&L has left behind a City that saw the sale of its electric system as the only alternative to increasingly high electric rates.

It has been Citizens' position that the City does, in fact, have "alternatives" to sale. The alternatives may have been inadequately examined by the City. More importantly, there is evidence that FP&L may have limited Vero Beach's access to economic alternatives, even while seeking to acquire the system.

Citizens, through the prepared testimony of Whitfield Russell 2/, sought to provide a preliminary analysis of alternatives (to sale) which Vero Beach might have considered. This testimony was to be heard in Phase III, which has been

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1/ February 6, 1978

2/ Filed August 5, 1977.

continually deferred 1/, and, if FP&L's requested withdrawal is granted, may never take place. Phase III would also have considered evidence relating to FP&L's efforts to block Vero Beach's access to alternatives. 2/

If, because of a flat grant of FP&L's requested withdrawal, the proceeding is terminated prior to Phase III, the City and its citizens, would, in effect, be cut adrift in the face of evidence that the City may not be adequately provided for, and further evidence that FP&L may have blocked, and may still block, access to economic alternatives. The public interest would not be served by this development. As a precondition to withdrawal, therefore, the Commission should provide the City with information that may permit it to steer its future course, and should require that FP&L specifically provide the City with alternatives, as may be required by FP&L's legal obligations and the public interest.

II. THE EVIDENCE BEFORE THIS COMMISSION SHOWS THAT FP&L HAS LIMITED, AND LIMITS, VERO BEACH'S ACCESS TO ECONOMIC ALTERNATIVES TO SALE.

Full consideration of the alternative (to sale) available to Vero Beach and the alleged role of FP&L in limiting alternatives was deferred until Phase III of Docket No. E-9574. The record in Phases I-II and in Florida Power & Light Company, Docket Nos. ER78-19 and ER78-81 (Phase I), however, provide strong evidence that FP&L's actions have limited the alternatives available to the City of Vero Beach. In summary, the evidence before the Commission shows that FP&L may have denied and/or unreasonably limited, the following alternatives:

1. Wholesale power under FP&L's currently effective (SR-1) wholesale tariff. On March 17, 1978 in cross-examination in Docket Nos. ER78-19 and ER78-81, FP&L Vice President Robert Gardner testified that FP&L would not make wholesale power available to Vero Beach under the current (SR-1) tar-

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1/ At FP&L's request.

2/ See, e.g., prepared testimony of Dr. Gordon Taylor, filed August 5, 1977.

iff. 1/ Neither the record in that proceeding nor the record here contains evidence that, prior to the vote to sell the system, FP&L affirmatively indicated that SR-1 was available. 2/

FP&L's refusal to provide Vero Beach with SR-1 service is contrary to the express terms of the SR-1 tariff. That tariff provides generally for service to utilities in FP&L's service territory. FP&L has not suggested 3/ that the tariff terms do not provide for service to Vero Beach, and has indicated a recognition that they do. 4/

Vero Beach currently relies on its own generation for firm power. As the Phase I-II record shows, following the 1973 oil embargo the City's generation was increasingly limited to (relatively high-priced) fuel oil. FP&L, by contrast, owns three of the four currently operating nuclear units in Florida, and its two large natural gas contracts 5/ have not been subject to curtailment under Florida Gas Transmission Company's ("FGT") curtailment plan. Vero Beach, by contrast, has no access to nuclear power and is a member of the customer class (direct preferred inter-

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1/ Tr. 605 contains the following exchange with FP&L Vice President, Mr. Gardner:

Q: Is it your - would you extend SR-1 service to Vero Beach today under the present tariff?

A: No. But let me explain. What I said was that I do not consider SR-1 an appropriate tariff for a generation [sic] that is fully self-sufficient. But should Vero Beach want to discuss firm power supplies we would be happy to negotiate an individual contract with Vero Beach...."

Citizens note that the refusal of FP&L to serve Ft. Pierce, Vero Beach's neighboring municipal system, under the SR-1 tariff is under consideration by the Commission in Docket Nos. EL78-4 and ER78-19.

2/ Thus, the following statement by Mr. Gardner, at Tr. 605 (of Docket Nos. ER-78-19; ER78-81):

> "But in response to whether they were specifically told they would have SR-1, I would doubt it, because again I don't think it would be appropriate."

3/ In the record in Docket Nos. E-9574; ER78-19/ER78-81.

4/ See, e.g., Docket Nos. ER78-18 and ER78-81; Tr. 1716-1717 attached as Appendix A.

5/ A 90,000 Mcf per day contract expiring in 1979 and a 200,000 Mcf per day contract expiring in 1988.

ruptible) that is first to be curtailed on the FGT system. 1/

Vero Beach could gain access to the benefits of FP&L's lower cost base-load generation through the purchase of firm wholesale power from FP&L. A preliminary analysis of the savings that could accrue to Vero Beach from purchase of wholesale power is contained in the testimony filed by Whitfield Russell, on behalf of Citizens, in Phase III. Mr. Russell's analysis, based on then current SR-1 rates, indicated that the City could save hundreds of thousands of dollars annually through purchases under the wholesale rate. 2/

2. Wholesale power under FP&L's proposed SR-2 and PR rates and tariff. On October 14, 1977 FP&L filed (a) new wholesale rates and (b) a proposed revision to its currently effective SR-1 tariff. The proposed tariff revision would preclude Vero Beach from obtaining wholesale service from FP&L. The lawfulness of the proposed restriction on availability is now before the Presiding Law Judge in Florida Power & Light Co., Docket Nos. ER78-19 and ER78-81 (Phase I). In that Docket, FP&L contends that the tariff restrictions are necessary because of alleged capacity and service problems. Even if FP&L had the problems alleged, it cannot assert them as bar to wholesale service to Vero Beach. In the interim decision in Docket No. E-9574, the Presiding Law Judge specifically found that the acquisition of the Vero Beach load (and related service) would have no adverse effect on FP&L. FP&L, in testimony in Docket Nos. ER78-19 and ER78-81 expressed its agreement with this finding. (Tr. 580)

As specifically explained by FP&L, in Docket No. ER78-19, FP&L's alleged capacity shortage would not have precluded service to the Vero Beach load (if it had been acquired). This is so because Vero Beach has more than adequate capacity of its own, and could replace any capacity taken from FP&L. 3/ In the absence of a sale there does not appear to be any physical reason why the same principle should

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1/ The potential revision of the plan is being considered in Lehigh Portland Cement Co. v. FGT, Docket No. RP75-79.

2/ The precise magnitude of the savings would depend on the amount of (relatively low cost) natural gas available to the City and, of course, the actual wholesale rate in effect at the time service is taken.

3/ See, e.g., Docket No. ER78-19, Tr. 811-813. There, Mr. E. Bivans, FP&L's Vice President for system planning, testified that FP&L could have served Vero Beach on January 19, 1977. On that day, FP&L experienced an unexpected alltime peak, and was forced into an emergency load reduction. If FP&L had owned Vero Beach on that date, Mr. Bivans explained, it could have served the Vero Beach load because Vero Beach's generation could have been employed. (Tr. 811-812)

not apply. In other words, FP&L has, through its proposed tariff revision, stated that it will not provide Vero Beach the same service at wholesale that it would provide at retail 1/. In view of FP&L's agreement, indeed, its assertion 2/, in Docket No. E-9574, that the latter would be beneficial to FP&L and Vero Beach, it must be estopped from denying the former.

3. Wheeling. FP&L's transmission system is the bottleneck that Vero Beach must pass through 3/, if it is to obtain access to economic power supply alternatives that might be available from systems other than FP&L. As stated in FP&L's own application in Docket No. E-9574, in the period immediately prior to the City's vote to sell the system, wheeling was not available to Vero Beach. 4/ A full inquiry into the reason for the unavailability of wheeling was deferred until Phase III. As detailed in the Phase III prepared testimony of Dr. Gordon Taylor, evidence indicates that FP&L actively sought to deter the City's pursuit of wheeled power. (Taylor testimony, pages 72-73) FP&L's response to the City's request for wheeling was, as Dr. Taylor stated, a "stalling tactic" that "is as effective as an outright refusal to wheel." (Id.)

1/ In Docket No. E-9574, FP&L proposed to serve the Vero Beach load (after acquisition) through longterm firm service based on average system costs. The wholesale tariff provides for service on the same basis. In proposing to restrict the availability of wholesale service (in Docket No. ER78-19) FP&L is specifically stating that it no longer will serve new municipal load (e.g., Vero Beach) at a rate based on average system costs. It proposes, instead, to serve these systems through interchange schedules. As FP&L states, however, interchange (a) is generally the highest price service made available by FP&L (Tr. 522) (b) may be "arbitrarily" withheld by FP&L (Tr. 1387) (c) is less firm than wholesale or retail service (Tr. 528) and (d) provides a maximum service term (1-3 years) that according to FP&L's expert economist "is not adequate for any system to plan."(Tr. 1144)

2/ As stated by FP&L at page 21 of its December, 1977 Reply Brief in Docket No. E-9574, "The record shows that, if the acquisition is approved, there will be no adverse rate impact on FP&L's customers. In negotiating the purchase, Mr. Howard testified that the Company was not willing to pay a price the effect of which would cause an increase in FP&L's existing rates. While the Vero Beach operation initially would show earnings below other Company operations, an adjustment in FP&L retail rates is not necessary. Indeed, Mr. Howard noted that the positive growth in the Vero Beach area would reduce the impact of regulatory lag and have a downward pressure on rate increases in the future (Tr. 1206). This same growth is expected to result in a positive contribution to earnings, following initial earnings slightly below the level of other Company operations (Id.)."

3/ Vero Beach is also interconnected with Ft. Pierce. Ft. Pierce, however, is also surrounded by FP&L's service territory and transmission bottleneck.

(FOOTNOTE 4 ON NEXT PAGE)

Citizens understand that, in the interim since the Phase I-II hearing, FP&L may have offered limited wheeling arrangements to Vero Beach in regard to particular transactions. However, as Dr. Taylor's prepared testimony in Phase III here (at pages 73-76) and in Florida Power & Light Company, Docket No. ER77-175 explains, this service is an inadequate substitute for a necessary general transmission tariff. 1/

4. Schedule D interchange power. Schedule "D" of the Vero Beach/FP&L interchange arrangement provides for the negotiation of (limited term) firm power sales. As detailed in the record in Docket Nos. ER78-19 and ER78-81, until February 10, 1978 FP&L had never offered municipal systems a price for Schedule D power. The price currently proposed by FP&L is, however, based on FP&L's fuel oil replacement cost. 2/ As FP&L acknowledged, interchange service generally represents the highest-priced service on FP&L's system. 3/ Thus, interchange service is not an adequate substitute for the type of firm, long-term service based on average system costs that is available under the wholesale tariff.

Even so, cross-examination in Docket Nos. ER78-19 and ER78-81, indicates that FP&L's proposed Schedule D service -- which would terminate in 1980 -- will not meet the City's need for firm purchase power in 1981. (Tr. 310-312) 4/

4/ See FP&L Application, Exhibit N, Schedule VI-2, Condition B. The Exhibit is a report prepared by an accounting firm for Vero Beach. The final section contains a brief listing of alternatives that might, or might not be, available to the City. The report stated that "(N)o current wheeling options are available." The testimony on behalf of the accounting firm indicated that this was the belief shared by City officials. (Tr. 517)

1/ Citizens note that Florida Power Corporation, the state's second largest utility (after FP&L) has had a general transmission tariff on file with the Commission for some time.

2/ Docket Nos. ER78-19 and ER78-81. See Exhibit 16 (FP&L's February 10, 1978 offer) and, generally Tr. 520-528.

3/ Id., Tr. 522.

4/ FP&L's February 10, 1978 Schedule D proposal related to the period 1978-1980. FP&L states that, beyond that proposal, it makes no Schedule D commitments. (See, e.g., FP&L's Initial Brief, Docket Nos. ER78-19 and ER78-81, page 18) As FP&L states on Brief, the provision of Schedule D service by FP&L, "when it is able to do so, does not entail any long-term obligation to continue firm service after the term of the sale has expired."

FP&L, again, apparently would not offer Vero Beach a type of service at wholesale that, as testified to in Docket E-9574, it sought to offer at retail.

5. Centralized economic dispatching and related economic benefit. As testified to in Docket No. E-9574 (Phase I and II) some increased reliability and economy can be gained through the integrated operations of the Vero Beach and FP&L facilities. Testimony showed that this integration does not require a corporate merger (Tr. 1362) and that the costs (to FP&L) of centralized dispatching do not appear to be substantial. (Tr. 316) There is no obvious reason why, in the absence of a merger, these benefits must be foregone.

6. Nuclear power. FP&L currently has a virtual monopoly on nuclear power in Florida. 1/ FP&L has refused repeated requests by numerous Florida municipal systems to voluntarily provide participation in these units. By precluding Vero Beach from wholesale power (based on average system fuel costs) and limiting it to Schedule D power (based on oil costs), FP&L is effectively denying Vero Beach access to the benefits of its monopoly on nuclear power. In testimony presented in Docket No. E-9574, by a Vero Beach citizen, it was stated that FP&L had not offered Vero Beach access to its nuclear units. 2/ This testimony was not challenged by FP&L in Docket No. E-9574.

1/ In addition to FP&L's three operating and one planned unit, the only other nuclear unit in Florida is Florida Power Corporation's Crystal River No. 3 Unit.

2/ Thus, the following exchange between Commission Staff Counsel and Jerome F. Kramer, a Vero Beach attorney:

Q: What about the possibility of purchasing some ownership in a nuclear unit, if the company allowed that?

A: Well, that is a very "ify" question. It is not just whether the company would allow it. I think there are a lot of other factors you have to take into account. I doubt that that is even an alternative that is even available to this community.

Q: Why is that?

A: It has not been offered to them, for one thing.

Docket No. E-9574, September 28, 1977 hearing at Vero Beach, Tr. 376.

III. A GRANT OF WITHDRAWAL SHOULD BE CONDITIONED ON A SHOWING THAT FP&L WILL MAKE ECONOMIC ALTERNATIVES AVAILABLE, AS REQUIRED BY FP&L'S LEGAL OBLIGATIONS AND THE PUBLIC INTEREST.

As a predicate to withdrawal, FP&L should be required to inform the Commission of the availability, vel non, of the alternatives discussed above. Specifically, it should state:

(1) Whether or not wholesale service is available under the currently effective (SR-1) tariff.

(2) Whether or not wholesale service would be available under the proposed (SR-2 and PR) tariff.

(3) Whether or not, and on what terms, wheeling is available.

(4) Whether or not FP&L will provide, under the interchange schedules or otherwise, firm power offers that (a) are priced at average system costs and (b) will provide firm power for the period beyond 1980.

(5) Whether or not, and if not, why not, mutual benefits (e.g., greater economy and reliability) of systems integration shall be offered in the absence of a sale.

(6) Whether FP&L will offer Vero Beach access to its operating and planned nuclear units, and on what terms.

Citizens respectfully suggest that, upon receipt of responses to the above questions, the Commission should provide for further comments and/or proceedings, as may be appropriate, to determine whether FP&L's provision of alternatives is consistent with its legal obligations and the public interest.

The Commission has broad authority to provide for appropriate conditions where, as here, a utility seeks favorable action, which authority encompasses an obligation to see that the public interest is adequately protected. See, e.g., Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1966); cert. denied sub nom Consolidated Edison Co. of New York, Inc., v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966) Niagara Mohawk Power Co. v. FPC, 379 F.2d 153 (D.C. Cir. 1967). It is respectfully suggested that a grant of FP&L's "Notice" that does not protect the interests of the citizens of

Vero Beach would be inequitable and contrary to the public interest.

CONCLUSION

WHEREFORE, in view of the foregoing, it is respectfully requested that, (a) as a predicate to action on FP&L's request for withdrawal, the Commission determine what, if any, alternatives (to sale) FP&L now makes available to Vero Beach (b) condition any grant of withdrawal upon FP&L's provision of such alternatives as may be required by FP&L's legal obligations and the public interest.

Respectfully submitted,

Daniel Guttman

Robert Harley Bear

April 17, 1978

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Volume No. 10 APPENDIX A

OFFICIAL STENOGRAPHERS' REPORT

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

SUBJECT

In the Matter of:

FLORIDA POWER & LIGHT COMPANY

DOCKET NOS. ER78-19
ER78-81

Held at Washington, D. C.

Friday, March 24, 1978

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is their choice.

BY MR. GUTTMAN:

Q If they found it were at a lower price they wouldn't be able to get it, would they?

A Not PR, as the filed tariff.

PRESIDING JUDGE: Mr. Williams, is your answer the same if the Commission does not approve these proposed tariffs, under the tariff that is currently in effect would Homestead be able to buy PR?

A Yes, sir, as would Jacksonville, Orlando -- I guess all the other municipal systems we are interconnected with.

BY MR. GUTTMAN:

Q Is Jacksonville in FPL's service territory?

A No, but they are an interchange customer, same as Homestead.

Q Doesn't the existing SR-1 tariff, the one in effect until June 1, limit availability to customers within FPLs service territory?

A Jacksonville is just as within our territory as much as Homestead. If you say Homestead is, why exclude Jacksonvil Our lines surround Jacksonville.

Q So the SR-1 tariff would provide for service to Ft. Pierce then?

A That was not my interpreation. His Honor asked if th Commission were to not allow the tariff availability clause as

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now filed, and pending before this Commission, and would revert to the old availability tariff, then my response was it would be, that Homestead would be the SR or PR rate schedule -- would be available to Homestead as it would be to Jacksonville, Orlando, Ft. Pierce, New -- not New Smyrna Beach. The other full generating system. New Smyrna Beach already has it.

Q To summarize, if the tariff approved by the Commission -- if your proposal here is rejected and the Commission said you have got to stick with your current availability clause, then your testimony would be you would be required to serve Ft. Pierce, Jacksonville and those other utilities you mentioned?

A I think that would have been the Commission's interpretation of it.

Q Can FP&L assure this Commission that it will provide Homestead with firm service at or below the rates embodied in the proposed wholesale tariff as this Commission may approve it?

A I don't think FP&L can make an assurance on service to any customer, retail, wholesale or interchange.

Q You say they can't make assurances. I think it was the testimony of yourself or other company officials that you seek to provide firm service to your wholesale --

A There is a lot of difference between seek and assure. We would seek to provide the best reliable service we can.

Q Is it your testimony that FP&L will seek to provide Homestead with firm service at or below the rates embodied in

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VERIFICATION

DISTRICT OF COLUMBIA, SS:

Daniel Guttman, being first duly sworn, deposes and says that he is an attorney for Mr. John Dawson and Dr. Eugene Lyon, and that as such, he has signed the foregoing ANSWER OF CITIZEN INTERVENORS TO NOTICE OF WITHDRAWAL for and on behalf of said parties; that he has read said ANSWER and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

Daniel Guttman

Subscribed and sworn to
before me this 17th day
of April, 1978.

My Commission Expires September 30, 1978

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be serve the foregoing documents upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of §1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C. this 17th day of April, 1978.

Daniel Guttman