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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light )  
Company )

Docket No. E-9574

STAFF COMMENTS ON FP&L'S  
NOTICE OF WITHDRAWAL

On March 31, 1978, Florida Power & Light Company (FP&L) filed a "Notice of Withdrawal" in Docket No. E-9574, seeking Commission approval of its request to withdraw the Company's application for authorization to acquire the electric system assets of the City of Vero Beach, Florida.

The Company correctly states in its notice that opposition to its proposed acquisition has been raised by the Commission Staff, the Department of Justice and the Citizen Intervenors. Since we have sought denial of the application, no purpose would be served in opposing its withdrawal. The Staff is concerned, however, that the Commission be made aware of the context in which FP&L's sudden withdrawal has taken place. We have further concerns as well.

It is critical for the Commission to recognize that approval of FP&L's Notice of Withdrawal will not fully resolve the fundamental anticompetitive problems underlying our opposition to the acquisition. Nor will it resolve the power supply problems currently facing the City of Vero Beach. The Staff comments follow below.

I. Probable Motive For Withdrawal

FP&L's decision to withdraw its application to acquire the Vero Beach electric system must be placed in context. In view of the considerable Staff resources expended in conducting an investigation as well as the unusual circumstances and the peculiar timing of FP&L's Notice of Withdrawal, Staff feels compelled to outline briefly the procedural history of this case and to offer our views on this important matter.

A. Procedural History

FP&L first filed its application to acquire the Vero Beach electric system on November 26, 1976. Pursuant to notice issued by the Federal Power Commission, petitions to intervene were filed by the City of Vero Beach, Florida and by three citizens (one of whom later withdrew) from the Vero Beach area.

Subsequently, these petitions to intervene were granted 1/ and a prehearing conference date of March 1, 1977, was established. Prior to this prehearing conference the Staff submitted certain discovery requests to the Company. The Staff also began its investigation of FP&L's dealings with other municipal electric systems by conducting interviews with numerous representatives of those systems and their respective local governments, as well as other knowledgeable, potential witnesses. 2/

In addition, documents were obtained from Staff members of the Nuclear Regulatory Commission responsible for antitrust review of FP&L's nuclear license application. The Staff also was granted access to documents made available to the Justice Department as part of its then pending inquiry into the proposed acquisition. 3/

Further data requests were submitted to the Company and predictably were met with vigorous opposition. Virtually all of FP&L's data request objections (and it objected to virtually all of the Staff's antitrust-related data requests) were overruled by the May 4, 1977 Order of Presiding Judge McGowan. Since FP&L's proposed acquisition could not be consummated without Commission

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1/ By Order issued February 7, 1977, establishing a hearing and granting interventions.

2/ Various Staff members conducted interviews by phone and in person with individuals in Tallahassee, Clewiston, Ft. Pierce, Gainesville, Orlando, Daytona Beach, New Smyrna Beach, Homestead, Vero Beach, St. Petersburg.

3/ The Justice Department of course later entered the proceedings in this docket as an intervenor by Commission order dated March 27, 1978.

approval, and since FP&L therefore had greater incentive (at that stage) to rush through its proposal than to delay, it filed only one motion to reconsider the Judge's discovery ruling. That motion was also overruled by the Judge during a prehearing conference held May 24, 1977, and FP&L reluctantly turned over discovery materials by June 10, 1977.

On May 24, 1977, the Presiding Judge further affirmed his earlier decision to separate the proceedings into three phases: Phases I and II, to be held concurrently, were to deal with the benefits to FP&L and the benefits to Vero Beach, respectively. Phase III was to be an examination of the alleged anticompetitive implications of the proposed acquisition and an examination of potential alternatives to acquisition.

Hearings in Phases I and II were held from June 27, 1977 to July 12, 1977. Since Staff had approximately 30,000 document pages to review, and since Staff testimony for the Phase III hearing was scheduled for filing on July 15, 1977, Staff Counsel requested an extension of time to prepare adequately. Not surprisingly, FP&L vigorously opposed any extension, stressing the urgent need for expedition. The Staff did obtain an extension until August 5, 1977 for the filing of its testimony. The hearing in Phase III was then scheduled for August 22, 1977.

What followed the filing of Staff's case (essentially the testimony and exhibits of Dr. Taylor and Mr. Brown) was an unparalleled string of dilatory motions and tactics by FP&L, the former proponent of speedy resolution. The Company filed no fewer than four pleadings to narrow the scope of the proceeding, culminating with an "emergency" appeal to the Commission days before the rescheduled hearing date for Phase III. This interlocutory motion was denied by Commission Order dated October 28, 1977.

On November 1 and 2, 1977, prehearing conferences concerning Phase III were held. Two of the six witnesses from Florida subpoenaed to testify for the Staff were present for the start of the hearing. Upon recommendation from the Presiding Judge, and with the agreement of all parties, the commencement of Phase III was deferred, pending an interim ruling on Phases I and II by the Presiding Judge. As a result, briefing schedules were then established with initial briefs due December 5, 1977 and reply briefs due December 20, 1977.

B. Recent Developments

FP&L's decision to withdraw its application and the import of various circumstances surrounding that decision must be viewed in the context of four significant factors:

1. FP&L placed great stock in the fact that the residents of Vero Beach voted by a two-to-one margin to permit the sale of their electric system.
2. To Staff's knowledge, this Commission's predecessor had never previously rejected a public utility's proposed acquisition of a municipal electric system.
3. On February 6, 1978, the Presiding Judge issued a ruling favorable to FP&L with respect to Phases I and II of the hearing.
4. The City of Vero Beach apparently remains interested in the sale of its system.

In light of these factors, FP&L's abrupt decision to withdraw its application to purchase the Vero Beach system should be considered incongruous. However, these factors cannot be viewed in isolation. It is clear that FP&L's vulnerability to antitrust allegations, by the Staff and by the Department of Justice, as well as the contradictory positions it has propounded in various proceedings before this agency, have made FP&L's continued effort in pursuit of the Vero Beach system untenable.

According to the Company's March 31, 1978, pleading, FP&L is concerned that "a substantial period of time has elapsed since FP&L's application was filed and it is clear that, with further hearings scheduled, it would be a considerable length of time before the Commission would be able to rule on the merits of FP&L's Application." (Notice, p.1).

This is no doubt true. What is also true is that FP&L has anticipated lengthy proceedings for quite some time. On March 15, 1978, only two weeks before the Notice of Withdrawal was filed, FP&L Vice President Gardner (during testimony offered in Docket Nos. ER78-19, ER78-81) indicated that FP&L had offered to extend its contract with Vero Beach for three years (Docket Nos. ER78-19, ER78-81, Tr. 311-312).

Indeed, not only had it extended its offer in anticipation of lengthy litigation, it had retained the services of three law firms to handle the case. Teams of FP&L's attorneys had been sent to search the files of its municipal competitors in Ft. Pierce, Lake Worth, Orlando, etc. The Company was quite actively pursuing litigation until days before its proposed withdrawal.

As late as March 21, 1978, FP&L was seeking a detailed clarification of the Staff's request for stipulations. On March 23, 1978, the Company apparently felt compelled to file a "Motion for Reconsideration" of the Presiding Judge's March 17, 1978 order in which he indicated that exceptions to his February 6, 1978, Interim Ruling could be taken at the conclusion of all three phases. As he stated:

It is somewhat unusual to hear the prevailing party except to a ruling on the ground that it was prevented from submitting a rebuttal. I suspect that Florida Power & Light is less concerned with an opportunity for its own rebuttal than it is with seeking to impose a restraint on Staff's time to except to a final decision on Phases I and II which would now have expired if the ruling had been a final appealable decision. (Order of March 30, 1978, p. 2)

FP&L's cryptic "Notice of Withdrawal" avoids the basic motives underlying its decision to drop the acquisition. The pleading raises more questions than it answers, not unlike its testimony in Phases I and II, as characterized by the Presiding Judge:

Florida Power & Light has presented evidence on all the relevant issues of Phases I and II and although I have found that evidence to be presented at times with reluctance and marked by less than candid testimony, they have complied with requirements as outlined in my order of May 4, 1977. (Emphasis supplied) Interim Ruling, (February 6, 1978, p. 3). (emphasis supplied).

Staff believes that the sequence of events immediately preceding the Company's March 31, 1978 filing suggests certain unavoidable conclusions regarding FP&L's likely reasons for withdrawal of its application.

### C. The Final Days - A Chronology

#### 1. March 15, 1978

A hearing began in Docket Nos. ER78-19 and ER78-81, involving FP&L's proposed limitations on the availability of wholesale service and its proposed termination of service to the City of Homestead. During that hearing, testimony was given by FP&L Vice

President in charge of Strategic Planning, Robert J. Gardner.

In response to questioning from the Presiding Judge, Mr. Gardner indicated that FP&L would have no desire to serve the Cities of Ft. Pierce or Homestead at retail or wholesale because of "very definite limitations" on existing and future generation (ER78-19, ER78-81, Tr. 225-256).

He also testified that FP&L's alleged "precarious" fuel supply will affect its ability to plan for future facilities (Tr. 309). It is because of these supposed problems that FP&L has sought to limit the availability of its wholesale service (Tr. 519).

Mr. Gardner stated that although FP&L's contractual obligation to the City of Vero Beach would have expired in November, 1977, it was subsequently renewed because of the Company's "moral obligation" to the City of Vero Beach (Tr. 319-320).

2. March 17, 1978

FP&L had apparently already offered to extend the contract with Vero Beach for three years (ER78-19, ER78-81, Tr. 311-312). On March 17, 1978, however, under questioning from the Presiding Judge, Mr. Gardner responded:

I don't think we would entertain the purchase of Vero Beach if it were to be presented to us for the first time today, given our situation today (Tr. 572).

3. March 23, 1978

FP&L filed its "Motion for Reconsideration" seeking to preclude a Staff appeal from the Phase I and Phase II interim ruling (Discussed, infra).

4. March 27, 1978

a) The Commission granted intervention to the Department of Justice, which had filed a petition in opposition to FP&L's proposed acquisition. It rejected FP&L's attempt to place restrictions on the Department's right to participate. (Order attached)

b) Staff Counsel filed a petition with the Presiding Judge to reopen the record in Phase I (Docket No. E-9574), based on evidence revealed in Docket Nos. ER78-19, ER78-81. (Petition attached)

5. March 30, 1978

The Presiding Judge in Docket No. E-9574, issued an order denying FP&L's motion for reconsideration, postponing the scheduled hearing date for Phase III and establishing a date for hearing of the Staff's motion to reopen the Phase I record. (Order attached)

6. March 31, 1978

The contract extension previously agreed upon by FP&L and the City of Vero Beach expired.

FP&L filed its Notice of Withdrawal.

D. Conclusions

The timing of these occurrences and the date of FP&L's Notice of Withdrawal is no mere coincidence. Even after Mr. Gardner explained that the decision to purchase the Vero Beach system (originally made in 1976) was not attractive in 1978, FP&L pushed ahead. As late as March 23, 1978 (one week after Mr. Gardner's statement about the present alleged undesireability of the acquisition) FP&L was actively litigating in this docket.

Pressed by the Justice Department's intervention, Staff's petition to reopen the Phase I record, the Presiding Judge's decision to hear argument on that motion and the impending date for renewal of its agreement with Vero Beach, the Company took stock. FP&L no doubt realized the intolerable situation it was in. It had already decided to press contradictory positions in Docket No. E-9574 (i.e. the feasibility and attractiveness of assuming the Vero Beach load) and Docket Nos. ER78-19, ER78-81 (i.e. the undesireability and "insurmountable" difficulty of serving new load at wholesale). Mr. Gardner's testimony had only magnified the glaringly irreconcilable nature of its arguments.

FP&L could not win both cases. By going forward in this docket it risked a damaging, unfavorable ruling as well. Staff wishes to make clear that in our view there is no inconsistency between FP&L's underlying motivations in these two proceedings. They are consistent with Staff's allegations that FP&L has monopolized the retail and wholesale bulk power markets in eastern and southern Florida. The Staff's position and the evidence which we had intended to present in Phase III are discussed in Part II, infra.

II. The Staff Case in Phase III

The Commission Staff submitted the direct testimony of Dr. Gordon T. C. Taylor and Mr. James M. Brown, Jr., for Phase III of this proceeding. Dr. Taylor's testimony relates to the adverse economic (i.e. anticompetitive) consequences of the proposed acquisition; Mr. Brown's testimony deals with the potential power supply options from which Vero Beach could select as alternatives to sale of its system.

Dr. Taylor's filed testimony is based primarily on FP&L documents obtained in the course of discovery in this proceeding as well as his understanding of the economics of industrial organization. If Phase III were held, Dr. Taylor would have testified that:

- (1) Certain types of competition exist in the electric utility industry (Taylor, p. 45-52).
- (2) Competition exists in the bulk power market in FP&L's operating area (Taylor, p. 61-65).
- (3) Competition exists in the retail power market in FP&L's operating area (Taylor, p. 45-47).
- (4) Yardstick competition exists between FP&L and its neighboring municipal utilities (Taylor, p. 46-47).
- (5) FP&L recognizes the existence of competition in the bulk power market (Taylor, See, Exhibit GT-7, p. 3) and competition in the retail power market (Taylor, p. 46).
- (6) The relevant product and geographic markets in this proceeding are the bulk power (wholesale) market in FP&L's operating area and the retail power market in FP&L's operating area (Taylor, p. 43).
- (7) FP&L recognizes the existence of these two distinct power markets (Taylor, p. 43).
- (8) In the retail power market, FP&L dominates in sales to all of the retail customer classes with a range in market shares from 73 to 81 percent within the customer classes (Taylor, P. 50).

(9) Out of the total of 229 communities of 1000 persons or more in FP&L's operating area in eastern and southern Florida, FP&L serves 90 percent of them and holds franchises for nearly 50 percent of the total (Taylor, p. 51).

(10) FP&L's dominance of the retail market in eastern and southern Florida demonstrates its monopoly power there (Taylor, p. 51).

(11) FP&L's acquisition of the Vero Beach system, which controls 1 percent of the relevant retail market, would enhance FP&L's monopoly power (Taylor, p. 52).

(12) FP&L also dominates the actual bulk power market in eastern and southern Florida. It supplies all of the bulk power to its 259 distribution centers as well as the full requirements of Lee County Electric Cooperative (Taylor, p. 61). FP&L further dominates the bulk power exchange market with 98 percent of the generating capacity in 1976 (Taylor, p.63).

(13) FP&L's dominance of the bulk power (wholesale) requirements market in eastern and southern Florida demonstrates its monopoly power there (Taylor, p. 61).

(14) FP&L controls 81 percent of the high voltage (69 KV and above) transmission facilities in its operating area (Taylor, p. 60).

(15) FP&L's dominance of the transmission services market (a submarket of the bulk power market) demonstrates its monopoly power there (Taylor, p. 59).

(16) FP&L has a general policy of refusing to wheel power to other utilities (Taylor, p. 69-76).

(17) FP&L has refused to file a general wheeling tariff with this Commission (Taylor, p. 69, 74).

(18) FP&L's uniform requirement of retail franchises 30 years in length is both unnecessary and excessive (Taylor, p. 77). It exhibits FP&L's market power to foreclose potential competitive suppliers of bulk power and severely restricts any opportunities to obtain lower cost electricity (Taylor, p. 77). The extraction of identical terms from a large and diverse set

of customers indicates FP&L's possession of monopoly power (Taylor, p. 77).

(19) FP&L blatantly refused to sell firm bulk power to municipals during the 1950's and 1960's (Taylor, 78-87).

(20) FP&L refused to sell firm bulk power to the Fort Pierce Utilities Authority under its SR-1 Tariff (Taylor, p. 92-94).

(20) FP&L opposes the formation of a formal power pool in Florida (Taylor, p. 94).

(22) FP&L has denied access to its three nuclear units to any of the municipalities in Florida (Taylor, p. 98). FP&L denied access to its planned South Dade nuclear plant to all municipalities prior to its decision to cancel construction of the plant (Taylor, p. 96-97).

(23) FP&L has shown a long standing interest in acquiring competing electric utilities (Taylor, p. 97-99).

(24) FP&L has insisted on territorial agreements before entering into any kind of bulk power marketing arrangements (Taylor, p. 85). Such tying arrangements or conditions on sales are an example of the exercise of monopoly power (Taylor, p. 101).

(25) FP&L has attempted to force municipal electric systems to maintain an inefficiently large amount of generating capacity by insisting on interchange agreements rather than willingly selling wholesale power (Taylor, p. 92).

(26) FP&L's acquisition of the Vero Beach system would increase FP&L's market power (Taylor, p. 52). When a single firm is as dominant as FP&L is in a single market, any increase in its market power, even a relatively small one, is undesirable (Taylor, p. 100).

Staff witness James Brown, who also testified in the Phase I hearing in this docket, analyzed, in his Phase III direct testimony, the power supply situation in Florida generally and the power supply options available to Vero Beach specifically. Mr. Brown reached the following conclusions concerning possible alternatives to Vero Beach:

- (1) Vero Beach could purchase its full bulk power requirements from FP&L. This would mean mothballing its generating units and becoming strictly a municipal distribution utility (Brown, p. 13, 15).
- (2) Vero Beach could generate its base load requirements and purchase its peaking needs from another utility (Brown, p. 13).
- (3) Vero Beach could purchase its base load requirements from another utility and generate its own peaking requirements (Brown, p. 13).
- (4) Vero Beach and Ft. Pierce could combine their dispatch operations to achieve some economies by supplying the joint load as a single load (Brown, p. 13).
- (5) Vero Beach would benefit from participation in a formal power pool (Brown, p. 14).
- (6) Vero Beach would benefit from joint participation in a base load nuclear or coal-fired unit (Brown, p. 14, 15).
- (7) Vero Beach would benefit from unfettered access to the transmission system of FP&L which surrounds it (Brown, p. 15).

In short, the prepared testimony of Staff's witnesses Dr. Taylor and Mr. Brown demonstrated (1) that FP&L has continuously exercised monopoly power in the relevant markets in contravention of the policies underlying the nation's antitrust laws and (2) FP&L's acquisition of the Vero Beach system would foreclose Vero Beach from a selection of power supply options which would be available were it not for FP&L's anticompetitive conduct.

Also scheduled to testify for the Staff in Phase III were six witnesses from Florida, including representatives from municipal electric systems in Orlando, Ft. Pierce, Lake Worth and Gainesville as well as a consulting engineer from Orlando. These witnesses were: Mr. Harry Luff of the Orlando Utilities Commission, Messrs. Clifford Blaisdell and J. C. L'Engle of Lake Worth Utilities, Mr. Robert Skinner of the Ft. Pierce Utilities Authority, Mr. Stanley Livengood, Gaines-

ville-Alachua Utilities and Mr. Robert Bathen, R. W. Beck and Associates.

Basically these witnesses were prepared to testify about their dealings with FP&L over the years, the importance they have placed on coordination options which have been restricted by the Company and the significance of Vero Beach's decision to sell its system to the continued economic viability of other Florida municipal electric systems.

### III. Conclusions and Recommendations

Staff's objections to FP&L's proposed acquisition on anti-competitive grounds continue to be focused on two levels: 1) The acquisition itself would have tended substantially to lessen competition in the various markets outlined in Dr. Taylor's filed testimony; 2) Vero Beach's decision to sell is not unique among municipalities in Florida. In the last four years, Homestead, Ft. Pierce and New Smyrna Beach have given serious thought to the possibility that they might sell their respective electric systems to Florida Power & Light. The reactions of these cities are predictable responses to competitive difficulties. Their difficulties are the direct and foreseeable consequence of FP&L's efforts to monopolize the retail and wholesale bulk power markets in eastern and southern Florida.

#### A. The Lessening of Competition - Merger Principles

Quite apart from the Staff's concern over predatory business practices and their anticompetitive effects is our objection to those mergers, acquisitions or consolidations which, though voluntary arrangements between two firms, increase concentration and may tend substantially to lessen competition in various relevant markets. In the instant case, we have examined the relevant retail and wholesale bulk power markets in eastern and southern Florida, markets in which FP&L has shares of upwards of 75%.

Any possible trend toward concentration must be halted in its incipiency. United States v. Von's Grocery, 384 U.S. 270 (1966); Central Maine Power Company, Docket No. E-9547, (order issued May 25, 1976). Even a small increase in market share by a competitor with market power may tend substantially

to lessen competition in a manner not consistent with the public interest. As the Supreme Court stated:

[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of . . . eventual deconcentration is correspondingly great. United States v. Aluminum Co. of America, 337 U.S. 271, 279 (1969).

Here, FP&L's acquisition of a potentially viable competitor would have increased FP&L's approximately 75 percent share of the retail market by one percent, and equally significant, it would have eliminated one of the few independent electric systems remaining in the relevant geographic market. Withdrawal of the application certainly solves one of the Staff's basic objections. It does not, however, get at the root cause of Vero Beach's difficulties (which will remain) nor of the problems faced by FP&L's other competitors. These are discussed below.

#### B. Monopolization and Alternatives to Acquisition

It is unfortunate that many of the conflicts between jurisdictional electric utilities and municipal electric systems become mired in the rhetoric of historic public power vs. private power controversies. Stripped to their bare essentials, competitive problems between privately-owned utilities and municipals are the consequence of exercises of market power by dominant firms and are not solely the result of institutional ownership arrangements. There is certainly a benefit in the diversity of utility ownership and in the existence of a pluralistic utility industry. Our concerns as members of the Staff, however, would be much the same in this case, even if Vero Beach had been served by a small privately-owned system.

We have felt that the public interest in preserving competition would have militated against approval of the acquisition. It has been the Staff's opinion that approval of the FP&L application would increase the likelihood that other, artificially restricted, but not inherently inefficient utilities might fall by the wayside.

It has never been our intent to oppose acquisitions for the sake of opposition. There is no particular public benefit to be gained by preserving inefficient competitors. We believe it is important to recognize the need for preserving competition, and that giving competitors a fair opportunity to succeed or fail on their own merits is desirable. It is, in essence, this opportunity which has been and is being denied by the Company's consistent anticompetitive conduct over the years. 4/

There are desirable and competitively less restrictive alternatives to acquisition. As the Federal Power Commission noted in Central Maine, supra:

Sophisticated pooling arrangements between large and moderate sized generating utilities frequently offer significant benefits to participants and we recognize that such arrangements provide the advantages of merger without the attendant dampening of competition. (Slip, op. p.9)

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4/ We have alleged that FP&L's market shares and its restrictive practices (as described in Section II, infra) demonstrate the existence and exercise of its monopoly power in the electric utility industry in eastern and southern Florida. Once it is established that a company possesses monopoly power it cannot act to maintain or expand that power without violating the antitrust laws. United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2nd Cir. 1945). The Supreme Court has defined monopolization as follows:

The offense of monopoly under §2 of the Sherman Act has two elements: 1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966).

It is Staff's contention that FP&L's proposed acquisition was but one aspect of a consistent pattern of unlawful conduct to maintain or increase its monopoly in the relevant markets. What we contend to be FP&L's numerous other acts to preserve its monopoly have been addressed in Staff's filed testimony and exhibits in this case as well as in Staff's testimony and exhibits in Docket Nos. ER78-19 and ER78-81.

Of course, Staff has contended that FP&L refuses to engage in full coordination with all its neighbors and has obstructed efforts to form a power pool in Florida. Other problems remain for Vero Beach as well.

As FP&L witness Mr. Gardner testified in Docket Nos. ER78-19 and ER78-81, Vero Beach has informed the Company that the City will be short of generating capacity in 1981 (Tr. 312). Although FP&L had been willing to purchase the Vero Beach system and serve the City's load at retail, it has only offered the City short-term firm power through 1980 (Tr. 309). Clearly, this will not solve the City's 1981 capacity problems.

To make matters worse, Mr. Gardner has testified that FP&L would be unwilling to make wholesale power available to Vero Beach under the Company's currently effective SR-1 tariff (Tr. 604). That tariff requires FP&L to make wholesale power available to Vero Beach or any other system in its service territory.

What is most troublesome to the Staff is the likelihood that Vero Beach may believe it has been abandoned and its concerns ignored. While the withdrawal of FP&L's application resolves some of the Staff's concerns, it provides no solution to the power supply problems faced by Vero Beach and other similarly situated municipal electric systems.

The Staff is concerned about the problems Vero Beach continues to face. FP&L would apparently refuse any request for SR-1 power made by Vero Beach. A similar refusal by FP&L has been the subject of an investigation in Docket No. EL78-4. FP&L's other anticompetitive acts have been discussed in Section II, infra.

Had FP&L's application been pursued, evidence of its anti-competitive conduct as well as evidence concerning the potential alternatives for Vero Beach would have been developed during the Phase III hearing. Ordinarily, Staff would have had substantial reservations about recommending the withdrawal of a Section 203 application after an investigation had been completed and with the issues of alternatives to Vero Beach yet undressed. 5/

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5/ In a far-sighted dissent to the Federal Power Commission's decision to approve Public Service Co. of Indiana's acquisition of the Rushville municipal electric system, Commissioner Ross stressed the importance of identifying alternatives to potentially anticompetitive acquisitions of municipal systems. His dissent is reprinted, in Appendix A, in full.

Here, however, the need to pursue a hearing despite FP&L's Notice of Withdrawal is unnecessary. The Federal Power Commission, in Nantahala Power Company, 2 FPC 388 (1941) refused to allow an applicant for a hydroelectric license to withdraw its application after the Staff had conducted an extensive and costly investigation and hearings had been held. Unlike the situation in Nantahala, however, FP&L will not be able to evade the Commission's jurisdiction nor will the thrust of Staff's efforts be wasted. An extensive investigation and two phases of hearings have already been held in this docket. Nearly all of the Staff's contentions in Docket No. E-9574 have been addressed in testimony and exhibits received into evidence in Docket Nos. ER78-19 and ER78-81. The record in that proceeding has been concluded and an initial decision is expected by the first of May, 1978.

#### RECOMMENDATIONS

As a practical matter, the Staff does not oppose FP&L's request for authorization to withdraw its application in Docket No. E-9574. We have opposed the Company's efforts to acquire the Vero Beach electric system, and we have sought denial of the application. FP&L's decision to withdraw effectively accomplishes this purpose.

In our opinion, however, Commission approval of FP&L's Notice of Withdrawal does not end the matter. The Company's Notice of Withdrawal must be viewed in light of the facts previously discussed. Certainly, it is possible that FP&L's actions here have been motivated by the desire to avoid an adverse Commission decision on the merits. There is also no guarantee that FP&L may not seek to refile at a more "convenient" future date. 6/

In the event that the Commission decides to permit withdrawal of FP&L's application, the Staff urges that any Commission order take notice of the following matters discussed in Part II, infra:

- 1) The circumstances and the sequence of events surrounding FP&L's petition (as outlined in Part I, infra).
- 2) Staff's position that the proposed acquisition would have tended substantially to lessen competition in the relevant retail and wholesale bulk power markets in eastern and southern Florida.

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6/ See Appendix C.

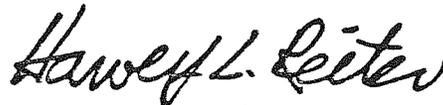
3) Staff's position that FP&L, through its past and present activities, is monopolizing the relevant retail and wholesale bulk power markets in eastern and southern Florida. These problems persist independent and irrespective of the acquisition.

4) Staff's position that FP&L has restricted (and continues to restrict) the power supply options of Vero Beach.

5) The Staff had conducted an investigation and had filed prepared testimony and exhibits for presentation in Phase III of this proceeding. The prepared testimony and exhibits dealt with antitrust issues and alternatives to acquisition.

FP&L's application to revise its wholesale tariff availability provisions is the subject of proceedings in Docket No. ER78-19. A decision in that docket is expected from the Presiding Judge on May 1, 1978 and the record in that proceeding will be before the Commission at that time. The Staff recommends that it may be appropriate for the Commission to consider FP&L's Petition to Withdraw concurrently with its review of the record in Docket No. ER78-19.

Respectfully submitted,



Harvey L. Reiter  
Commission Staff Counsel



Robert F. Shapiro  
Commission Staff Counsel

Washington, D. C.

ROSS, COMMISSIONER, DISSENTING:

[footnotes omitted]

The elimination of a strong public sector in the electric industry would, in my opinion, be a genuine loss to the consumers of electricity and to the regulatory process, which cannot help but be aided by this form of competition in an otherwise monopolistic industry. For this reason, I believe it is time for the Commission to investigate in greater depth the alternative avenues to buy-outs of public systems.

Too often, the municipal or small system is either unaware of other arrangements it might make to continue its independent existence or is not offered the kind of terms conducive to independent operations. Since the acquiring company probably surrounds a particular municipality's service area, it has little incentive and much disinclination to offer such terms to a municipal system. Moreover, there is a tendency on the part of some large systems to want to "round out" their service territories by providing the entire generation, transmission and distribution needs of their area. While such concepts are "neat", they remove the yardstick comparison available as long as the municipal stayed in business.

In this case, there is no indication that Rushville considered all possible alternatives to meet its future electric needs. The Utilities Service Board of the City presented only one other alternative to outright sale to the City Council, namely the construction of a new generating plant by the City and modernization of its distribution facilities. On this basis, it is not surprising that the City Council would accept the company's proposal.

However, a more logical approach but one not presented to the City Council might well have been some sort of long-term sale of energy by P.S.C.I., which is large enough to build the huge generation that is now available in the electric industry and without which the smaller systems cannot reasonably hope to compete. There is nothing in the record that would indicate that P.S.C.I. offered such a long-term arrangement to Rushville.

Although it is easy to sympathize with the City's action in light of the facts in this case, a regulator's view point in passing upon the merits of the acquisition must be broader. Thus, as a regulator, I find it most disturbing that the majority

does not question more fully the wisdom of permitting a situation which, collectively and in time, could mean the disappearance of public power. Such a result could have significant implications for the customers of both public and private systems.

Let me elaborate. First, a pluralistic electric system, in my opinion, has the potential to lead to lower rates and better service for the consumers of all the systems simply because it provides tangible differences against which the consumers are able to assess their particular utility. For example, the manager of a publicly-owned utility may be more highly motivated to provide certain services to customers since these customers are generally the owners of the system as well. To the extent that he satisfies well his consumers-owners, the public system manager will set a standard against which the private system manager will be measured, despite the latter's primary responsibility to more distant and diffuse shareholders. In other words, the effect of the competing philosophies behind public and private utility systems may well be to assert more fully into the private utility's operations the customer orientation of the public system, thus counter-balancing the influence of the stockholders, who are mainly concerned with profits. It should go without saying that managers of public systems would also do well to adopt some of the efficiency criteria that private managers are more likely to employ. The point is: there won't even be such opportunities without the existence of two, competing sectors in the industry.

Second, the least the Commission could do is to analyze the role of small distribution systems, both public and private, to determine whether large integrated systems are inherently more efficient in this specialized function, distribution, than small systems. Depending on its analysis, the Commission may establish merger and acquisition guidelines that vary, depending upon whether generation or distribution facilities are being acquired.

Third, this Commission has an obligation to inform Rushville that other small systems have been able to arrange for an economic and reliable power supply in a manner that enabled them to remain separate entities. In several instances, small systems have also received assistance from the Commission staff in the form of proposed alternative power supplies, including

purchase, self-generation and combinations of these. With such advice both as to the pro's and con's of each alternative, Rushville and its customers will be better advised as to the full range of their choices.

Moreover, it distresses me that the majority has ignored the antitrust implications in the case. If we do not begin now, when will antitrust come into play? When the last municipal system in America is being gobbled up?

There is no question in my mind that the law requires this Commission to include antitrust considerations in its determination of the public interest. As the Court stated in the Denver Railroad case, an agency cannot ignore the existence of other laws relevant to its consideration of the public interest. Rather, it must seek to make the existing law and its statutory mandate as consistent as possible. The Court in the Scenic Hudson case emphasized the necessity for agencies to assume the role of the public guardian inasmuch as there is no one else to protect the diverse interests affected by an administrative decision.

Recently, the Supreme Court discussed the juxtaposition of the antitrust laws and the public interest test in the Nashville Bank case. In reversing the lower court's approval of the merger, the Court stated:

The Act [Bank Merger Act] directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. However, the Act requires as well that the "future prospects of the existing and proposed institutions" be appraised. Part of such appraisal, where managerial deficiencies exist as they do in this case, is determining whether the merging bank is capable of obtaining its own improved management. This test does not demand the impossible or the unreasonable. It merely insists that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means.

The ultimate test of Section 203 of the Federal Power Act is likewise the public interest. To ignore judicial decisions setting forth the duty of this Commission to consider antitrust in arriving at a public interest determination seems erroneous especially in light of the Commission's cognizance of the necessity to preserve the public-private power balance and the difficulties faced by the smaller systems, whether public or private.

With regard to the latter point, if one of the several proposed Electric Reliability bills in Congress is eventually enacted, the position of small systems like Rushville will be greatly enhanced. They or their representatives will, under present proposals, be allowed to participate in regional councils and thus become aware of generation and transmission sources as they are planned. Given efficient and aggressive management, the smaller systems are more likely to be able to hold their own under such circumstances. The Commission, too, will be better informed and able to judge better the total public interest as to the proposed merger or acquisition as a result of the proposed legislation.

Since the bill is not yet law, however, I believe it incumbent upon this Commission, at a minimum, to instruct its staff to meet either individually or collectively with the Service Board of Rushville, P.S.C.I. and the State Commission in Indiana, to discuss alternatives to a complete sale of Rushville's facilities. While I would also be in favor of a hearing, I recognize the majority's reluctance to initiate hearings. What puzzles me, however, is their refusal even to instruct staff to meet informally with all the parties to discuss the alternatives open to Rushville. Surely, their aversion to hearings does not extend to informal meetings, too!

Furthermore, within P.S.C.I.'s service territory, there are now 45 municipal systems that are customers of P.S.C.I. in addition to Rushville. There is also one electrically isolated system, the City of Washington. If P.S.C.I. were to embark on a plan to acquire all these smaller systems at the high prices reflected in this purchase agreement, the cumulative effect may be detrimental to the financial standing of the company and its shareholders. Its customers, too, may experience the higher costs of an impaired financial standing in their rates.

For this reason, the Commission should have a clear idea of P.S.C.I.'s intentions as to these systems before proceeding with this particular transaction.

I don't want the consumers to learn too late the benefits of having a strong public power system. At some period of time, we shall reach the point of irreversibility in the structure of the electric industry. I think we are approaching closely that time, and would require more scrutiny of the transaction than is evident in the majority's opinion.

There is an added element in the case that calls for such closer inspection by the majority. Under the terms of the acquisition, Rushville's customers will eventually receive an increase of \$65,000 annually because of P.S.C.I.'s higher rates, which are among the highest in the country. Because customers of a municipal electric system do not necessarily constitute the electorate which either votes to sell the system or to whom a representative group, like the City Council, is responsible, the Commission must exercise particular care to see that the increased rates from the acquisition are, overall, in the public interest. That there is no Intervenor in this case to protest the increased rates does not mitigate the duties of this Commission in this matter.

## INTERVENTION

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;  
Don S. Smith, Georgiana Sheldon,  
Matthew Holden, Jr., and George R. Hall.

Florida Power & Light  
Company )

) Docket No. E-9574

ORDER GRANTING INTERVENTION AND DENYING  
REQUESTED LIMITATIONS

(Issued March 27, 1978)

On January 25, 1978, the United States Department of Justice (Department) filed a petition to intervene in the above-captioned proceeding, a hearing under Section 203 of the Federal Power Act on the proposed purchase of the electric system of the City of Vero Beach, Florida (Vero Beach) by Florida Power & Light Company (FP&L). As grounds for the petition, the Department stated that it has responsibility for enforcing the antitrust laws of the United States and for presenting to regulatory agencies facts and considerations relating to the accommodation of antitrust law and policy with regulatory policy. The Department further states that it fully supports the publically stated position of the Commission's Staff in opposing the application of FP&L to acquire the electric system of Vero Beach, since the acquisition would tend substantially to lessen competition in various markets contrary to the public interest. To assist the Commission in determining whether the proposed acquisition would be in the public interest, the Department petitions to intervene for the purpose of filing a post-hearing brief limited to a discussion of the anticompetitive effect of the proposed acquisition after the close of the evidentiary record in this proceeding.

On February 2, 1978, FP&L filed a motion for an extension of fifteen days of the time to answer the petition to intervene. By notice issued February 8, 1978, the time to answer was extended to and including February 24, 1978. On the latter date, answers were filed by the Commission Staff counsel and FP&L.

The Staff counsel's answer notes that the Department's petition was timely filed 1/ and supports the request to intervene on the ground that the expertise of the Department in the field of antitrust enforcement can assist the Commission in accomodating antitrust law and regulatory policy.

FP&L's answer does not oppose the intervention, but requests that the Commission specify that the Department is limited in its brief, to the extent it opposes the proposed acquisition, to supporting the Commission staff's theory of the case as presented in Staff's testimony and as it may be limited by evidentiary rulings of the Presiding Administrative Law Judge during the course of the Phase III hearing. In support of its request, FP&L contends that it would be highly prejudicial to allow the Department to "sit back" and watch the record in the case develop and then propound a new theory of the case on brief after the close of the evidentiary record, possibly requiring the company to request a reopening of the record in order to present evidence to fully protect its rights.

We find that the Department of Justice has sufficient interest in this proceeding to warrant intervention for the limited purposes set out in the petition to intervene.

As to the further limitations on the Department's intervention sought by FP&L in its answer, we find no merit in the company's request. It is not the substantive position advanced by a petitioner which should be the basis for granting, denying or limiting intervention, but rather whether the petitioner has an interest which may be adversely affected by a decision in the subject proceedings. 2/ Here, the interest of the Department of Justice is in promoting the accomodation of antitrust law and policy with regulatory policy. The Department's interest in giving and the Commission's interest in receiving the assistance of the Department's expertise in this area would not be well served by limiting the input of the Department to the theory of the case which the Commission Staff has already adopted.

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1/ FP&L filed an amended application on December 12, 1977. By notice issued December 23, 1977, protests and petitions to intervene were due on or before January 25, 1978.

2/ Midwestern Gas Transmission Company, 34 FPC 1132 (1965).

The cases cited by FP&L in support of its request to limit the Department's theory of the case on brief are inapposite: Easton Utilities Commission v. AEC 3/ concerned denial of an untimely petition to intervene and Algonquin LNG Inc. v. FERC 4/ involved a rate first proposed on brief which was rejected because it was found to be inadequately supported by the record evidence. In the instant case, the petition to intervene was timely filed, and the Department, like all parties, will be limited to the evidentiary record as it is developed at hearing for factual support of whatever theory it adopts on brief. 5/ Similarly, like all parties, the Department will be free to present on brief whatever theory of the case or policy considerations it believes to be appropriate in light of the record evidence, subject only to the limitations set forth in the petition to intervene.

The Commission finds:

Intervention in these proceedings by the Department of Justice for the purposes stated in the petition to intervene may be in the public interest.

The Commission orders:

(A) The Department of Justice is hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission: Provided, however, that the participation of such intervenor shall be limited to the issues set forth in the petition to intervene; and Provided, further, that the admission of such intervenor shall not be construed as recognition by the Commission that it might be aggrieved because of any orders of the Commission entered in this proceeding.

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3/ 424 F.2d 847, 852 (D.C. Cir. 1970).

4/ D. C. Cir. No. 76-2157, decided January 6, 1978.

5/ To the degree that official notice of facts is permitted after the conclusion of a hearing by our Rules of Practice and Procedure (§1.26), an opportunity to show the contrary is also permitted on timely request.

Docket No. E-9574

- 4 -

(B) The intervention granted herein shall not be the basis for delaying or deferring any procedural schedules heretofore established for the orderly and expeditious disposition of this proceeding.

(C) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

( S E A L )

Kenneth F. Plumb,  
Secretary.

# City of Vero Beach

3033 - 20th PLACE  
 VERO BEACH, FLORIDA - 32960  
 Telephone 367-3131

GENTLEMEN:

March 31, 1978

Negotiations between the City of Vero Beach and the Florida Power and Light Company were terminated today at the request of Florida Power and Light Company AND simultaneously with this announcement, the application to the Federal Energy Regulatory Commission for approval of the acquisition of the Vero Beach Electric System by FP&L is being withdrawn.

History will provide little solace to the many local people who stood to gain benefit from the results of this proposed acquisition

The rate payer of the Vero Beach Electric System  
 The tax payer of the City of Vero Beach  
 The tax payer of Indian River County  
 and importantly the employee of the Electric System

However a certain amount of reflection is necessary to understand WHY Florida Power and Light Co. found it necessary, in order to protect its present system customers and stockhold to withdraw their offer to purchase the Vero Beach Electric Sy

- 1st: A Hostile regulatory climate at the Federal Power Commis. from the inception of the request for acquisition approv.
- 2nd: Intervention by the JUSTICE DEPARTMENT at the last minute in support of the FERC staff opposition to the acquisition.
- 3rd: Strong evidence that approval would be subject to CONDITIONS by both FERC and JUSTICE which would require lengthy negotiations without surety of acceptance by all parties.
- 4th: Legal restraints on FP&L in the conduct of the Hearings before FERC which their found unacceptable.

These are the "WHY'S" that will be given and which will fill the pages of radio script and newspaper articles, AND which are all TRUE-----but I would like to make a personal observation formed after 2½ years of deep involvement in this matter, and which will probably not be said publicly by others, but never-the-less in my judgement summarizes WHY Florida Power and Light Company has withdrawn their offer of acquisition.

" THE CITY OF VERO BEACH HAS BEEN HELD AS A HOSTAGE, THE RANSOM FOR WHICH HAS BEEN NEGOTIATED BY SPECIAL INTEREST GROUPS IN CONCERT WITH RAW GOVERNMENT POWER, TO A LEVEL OF PAYMENT TOO HIGH FOR THE BEST INTERESTS OF THE FLORIDA POWER AND LIGHT COMPANY "

Should be...

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light  
Company )

) Docket No. E-9574

PETITION OF THE COMMISSION STAFF  
TO REOPEN PROCEEDINGS IN  
PHASE I

Since the close of the record in Phases I and II of this proceeding and since the February 6, 1978 issuance of the Presiding Judge's Interim Ruling and Order on Phases I and II, new evidence has come to light in the Docket Nos. ER78-19, ER78-81 proceedings. This evidence has a direct bearing on the issue of whether the acquisition will have a beneficial or detrimental effect on FP&L's stockholders or customers. Pursuant to Section 1.33 of the Commission's Rules of Practice and Procedure, Staff counsel submits a petition to reopen the record in Phase I. Staff counsel's reasons in support of this petition are set forth below.

Testimony of FP&L Vice President Robert J. Gardner

On March 15, 1978, a hearing in Docket Nos. ER78-19 and ER78-81, involving FP&L's proposed limitations on the availability of wholesale service and on its proposed termination of wholesale service to the City of Homestead, began. Mr. Gardner, a Company Vice President, in response to questioning from the Presiding Judge indicated that FP&L would have no desire to serve Homestead or Ft. Pierce under a retail franchise (Tr. 255). Neither does FP&L wish to serve Ft. Pierce or Homestead at wholesale, because of "very definite limitations" on existing and future generation (Tr. 256).

He also indicated that FP&L's fuel situation is precarious and has been so since 1973 (Tr. 307-308). Mr. Gardner testified that the precarious fuel situation now faced by FP&L will affect its ability to plan for future facilities (Tr. 309). Further, because of its alleged precarious fuel supply and the uncertainty that FP&L will be able to plan and install new capacity, the Company states it is only able to offer firm power for resale (under Schedule D of its interchange agreements), through 1980 (Tr. 309).

Although FP&L states that presently it can only assure potential firm bulk power sale for resale customers of its ability to serve through 1980, Mr. Little of Vero Beach has informed Mr. Gardner that the City would need additional generating capacity in 1981 (Tr. 312). Clearly, if FP&L can only provide assurance of firm bulk power to Vero Beach and other municipal systems through 1980 (as Mr. Gardner testifies) and if Vero Beach will need additional capacity (above its present installed generation) in 1981, serious questions are raised about FP&L's ability to serve the Vero Beach community.

Under questioning from Counsel for the Florida Cities, concerning FP&L's service obligations, Mr. Gardner stated:

A. And we have undertaken the obligation to serve FPL historic service area. And those are the obligations we are going to continue to try to carry out to the best of our ability. We have a limited ability to carry out those obligations. And we feel it is necessary to not permit service obligations which we have not historically assumed, to redound to the detriment of those customers, retail and wholesale, whom we have historically served. (Emphasis supplied) (Tr. 519)

Apparently this is why FP&L states it has no desire to serve Homestead or Ft. Pierce under a retail franchise (Tr. 519, 571). Most important, however, was the following statement made on March 17, 1978, by Mr. Gardner, in answer to a question from the Presiding Judge:

I don't think we would entertain the purchase of Vero Beach if it were to be presented to us for the first time today, given our situation today. (Tr. 572)

Mr. Gardner's view, as expressed in his testimony, that the Vero Beach acquisition is now undesirable, is apparently shared by the Company's expert witness, economist Abraham Gerber. Mr. Gerber has advised FP&L "not to try to acquire any additional loads." (Tr. 1151). He also sees a "possible inconsistency" between FP&L's proposal to acquire the Vero Beach system, which would raise FP&L's average costs, and its refusal to serve new wholesale loads under a wholesale tariff (Tr. 1141).

It should also be noted that FP&L (presumably due in part to its capacity problems) would apparently be unwilling to provide Vero Beach with service under its currently effective SR-1 tariff (Tr. 604).

As the Presiding Judge is aware, the contract between FP&L and the City of Vero Beach expired by its own terms on March 1, 1978. Since the Company now apparently believes that the proposed acquisition is not in its interest, renewal of the contract would be illogical. However, in the event that the contract is renewed, modified or extended, Staff counsel believes that the new evidence discussed above which could not have been known at an earlier date, would have a major bearing on the outcome of this proceeding.

WHEREFORE, Staff counsel respectfully requests that the Petition to Reopen Proceedings in Phase I be granted.

Respectfully submitted,

*Harvey L. Reiter*

Harvey L. Reiter

*James E. Rogers, Jr.*

James E. Rogers, Jr.  
Commission Staff Counsels

Washington, D.C.  
March 27, 1978

Attachments

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power &amp; Light Company ) Docket No. E-9574

ORDER CANCELLING HEARING DATES AND ESTABLISHING  
DATE FOR HEARING OF STAFF'S MOTION TO  
REOPEN THE RECORD ON PHASE I  
(March 30, 1978)

The presentation of evidence in this case was divided into three phases to assist in the orderly development of issues as directed by the order herein issued on May 4, 1977. Subsequently hearings were held and evidence was presented in Phases I and II. On November 2, 1977, the parties to this proceeding joined with Staff in open session and agreed that the testimony on the first two phases had been concluded and that the record could be closed. The undersigned then issued an interim ruling on February 6, 1978, which indicated that the applicant had met its burden of proof in these two phases and by order set the date for hearing of Phase III.

Following a motion of Staff on February 3, 1978, seeking clarification of the interim ruling, the undersigned held that the ruling of February 6, 1978, had not been a final appealable order.

The applicant, Florida Power & Light Company, has now asked that this ruling be reconsidered because it has in essence lengthened the period of time in which exceptions could be filed, to the prejudice of the applicant, and has alleged that the applicant was precluded from filing a rebuttal case by its presumption that the interim ruling was an initial decision on Phases I and II which would be a final order, fully appealable. Applicant cites the record as the basis for this assumption.

The record does not indicate that in such event an initial decision was to be issued on Phases I and II prior to the hearing on Phase III. Had the ruling been dispositive of the case, the right to an appeal would be inherent. This was not the nature of the ruling. The ruling itself bears the caption, "Interim Ruling and Order on Phases I and II of

Proceeding, Pursuant to Section 203 of the Federal Power Act." The ruling contained findings that the applicant had met its burden of proof in Phases I and II. The ordering paragraph merely set the date for the hearing of Phase III.

It is somewhat unusual to hear the prevailing party except to a ruling on the ground that it was prevented from submitting a rebuttal. I suspect that Florida Power & Light is less concerned with an opportunity for its own rebuttal than it is with seeking to impose a restraint on Staff's time to except to a final decision on Phases I and II which would now have expired if the ruling had been a final appealable decision.

It would be inconsistent and totally illogical to hold that the rulings on Phases I and II constituted a final appealable decision which could then be appealed prior to the conclusion of the hearing on Phase III. This was not contemplated at the time the phasing was ordered and there is no conceivable good reason for allowing such a procedure to be followed at this time. Exceptions to any initial decision eventually issued in this case may be directed to one or all three of the phases in this matter, not sequentially but contemporaneously, so as to avoid more than one review by the Commission and a multiplicity of litigation. Therefore applicant's motion for reconsideration is denied.

All this, however, may become moot by reason of a motion filed by Staff on March 21, 1978, seeking to reopen the record on Phase I alleging as the reason therefore the discovery of new evidence which has come to light as a result of testimony given in other proceedings involving Florida Power & Light which are now in the hearing process.

I have examined the motion of Staff and believe that it poses a substantial issue which should be addressed by all the parties after time for sufficient review and at the conclusion of the hearing of testimony in the other pending proceedings Dockets Nos. ER78-19 and ER78-81.

Whereupon on my own motion I now cancel the hearing dates of April 5 and April 10, 1978, presently established for determining issues relating to Phase III of this proceeding,

and establish a date for hearing of Staff's motion to reopen the record for the admission of newly discovered evidence in Phase I of this proceeding as of May 9, 1978, at 10:00 A.M. in the offices of the Federal Energy Regulatory Commission, 825 North Capitol Street, Washington, D.C.

If any of the parties desire to present briefs in aid of or opposition to the motion they shall be presented on or before May 3, 1978.

It is so ordered.



Graham W. McGowan  
Presiding Administrative Law Judge

CERTIFICATE OF SERVICE

We hereby certify that we have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D. C. this 28th day of April, 1978.

  
Robert F. Shapiro  
Commission Staff Counsel