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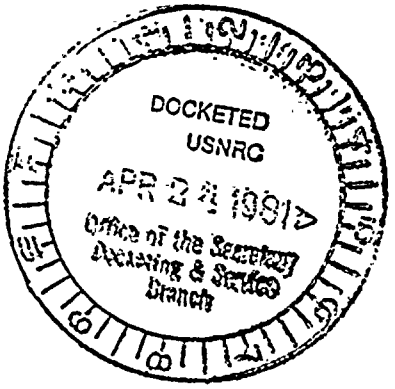

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
FLORIDA POWER & LIGHT COMPANY (St. Lucie Plant, Unit No. 2)	)	Docket No. 50-389

PETITION FOR LEAVE TO INTERVENE
AND REQUEST FOR HEARING

Parsons & Whittemore, Inc. (P&W) and Resources Recovery (Dade County), Inc. (RRD) petition for leave to intervene in this construction licensing proceeding and request the Commission to hold a limited antitrust hearing.

On April 7, 1981, we petitioned for leave to intervene and requested an antitrust hearing in the companion operating licensing proceeding. That petition responded to a notice of application from Florida Power & Light Company (FP&L) which had been published in the Federal Register on March 9, 1981 (46 Fed. Reg. 15831). On April 16, 1981, FP&L argued that the April 7 petition was "defective procedurally" because the operating licensing proceeding "does not pertain to the antitrust aspects of the application." Motion of FP&L for an Extension of Time to Answer, p. 1.

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We believe that the April 7 petition complies with the law and with NRC's procedural regulations. In particular, it should be noted that intervention is sought not solely to request an antitrust hearing, but also to protect petitioners' rights under the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §796 et seq. Beyond this, the March 9, 1981, notice does not preclude an antitrust hearing, and the changed circumstances described in our April 7 pleading mandate one.

The Department of Justice acknowledged our essential point in South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station Unit No. 1), Docket No. 50-395A. There, in its October 10, 1980, response to the Commission's request for comments on the "significant changes" criteria, the Department pointed out that --

> "ongoing negotiations concerning access to a nuclear power plant may preclude analysis of the whole access issue at the time of a construction permit review. In such a case, there should be an opportunity to consider this issue in an antitrust review at the operating license stage." [Id. at 6n. 14.]

That quotation precisely states the position that petitioners are advancing in the operating licensing proceeding.

Nevertheless, to cover all procedural technicalities, Petitioners now request permission to intervene in the ongoing construction licensing proceeding. Petitioner's April 7, 1981 pleadings are attached as Appendix A and incorporated herein by reference. This Petition focuses upon the reasons for Petitioner's delayed filing of its intervention papers in this construction licensing proceeding.

I. The Petitioners and Their Interest in Intervention

P&W is a New York corporation engaged in a variety of activities, including the construction and operation of solid waste processing facilities. RRD is a Delaware corporation and a wholly-owned subsidiary of P&W. It has recently completed construction of a solid waste processing facility in Dade County, Florida. The Dade County facility is a qualifying small power producer within the meaning of Section 201 of PURPA, 16 U.S.C. §796, and the implementing regulations, 18 CFR, Part 292.

PURPA is designed to encourage co-generation and small power production of electric energy. Toward that end, PURPA grants qualifying facilities the right to sell their output to an electric utility, to interconnect with a utility, and to buy at retail from the utility all the electric power the facility needs. Qualifying facilities under PURPA are unique. They comprise a new class of entrants into the market for electric power generation

and sale. Congress has singled them out for special treatment to advance the public interest in using energy that is produced as a byproduct of other industrial operations or that could be produced by other unconventional sources.

Qualifying PURPA facilities are expected to contribute to the overall energy independence of the nation. To achieve that end, they must become commercially viable. In the field of electric generation, their commercial viability depends upon their ability to compete with entrenched utilities like FP&L, which has monopoly power over the transmission grid that spans southern and eastern Florida.

FP&L recognizes the long-term competitive threat posed by qualifying PURPA facilities. In fact, the Settlement Agreement that purports to resolve the anti-trust problems associated with this nuclear facility specifically acknowledges the existence of qualifying PURPA facilities, and it impacts upon their operation. See, e.g., Section X(a)(5) of the Agreement. The Agreement even treats PURPA facilities differently than other electric generating facilities in important ways: e.g., to avail themselves of the transmission provisions of the Agreement, qualifying PURPA facilities may have to waive their PURPA right to purchase FP&L's power at retail.

Also, the Federal Energy Regulatory Commission (FERC) regulations provide, 18 CFR §292.305(b)(1), that upon request of a qualifying facility, a utility "shall provide: (i) Supplementary power, (ii) Back-up power, (iii) Maintenance power and (iv) Interruptible power." The FERC regulations establish standards and procedures for waiving those requirements. 18 CFR §292.305(b)(2). Yet without following those standards or procedures, the Settlement disregards FP&L's duty to provide backup and maintenance power, arguably allowing FP&L not to do so when it transmits electricity for a qualifying facility. These illustrate the kinds of issues that have been raised by Petitioners in greater detail in their April 7 pleadings.

Petitioners contend overall, that FP&L has used the settlement process as part of a calculated effort to diminish qualifying facilities' benefits under PURPA, thereby weakening them competitively. This has occurred without prior notice to the affected qualifying facilities and without their participation or comment. What is more, now that Petitioners have learned of the Agreement, FP&L argues -- on grounds that it concedes are technical -- that qualifying facilities should be excluded from any participation in the settlement process that affects them so profoundly.

FP&L's determination to conclude the Settlement Agreement without Petitioner's participation confirms our worst fears about the utility's intended use of its monopoly power to deny Petitioners access to the transmission grid -- the access they need to compete. To ensure that the NRC will hear both sides of the transmission controversy between FP&L and Petitioners, we now move to intervene in the construction licensing proceeding to complement our pending Motion in the operating licensing proceeding.

II. Criteria for Delayed Intervention

NRC has recognized that delayed (or untimely) intervention petitions may deserve serious consideration, and it has issued regulations to implement its power to allow intervention at advanced stages of a proceeding. The factors for consideration are enumerated in 10 CFR §2.714(a)(1):

> (i) Good cause for not filing on time;
>
> (ii) The availability, if any, of other means to protect the Petitioner's interest;

(iii) The extent to which Petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) The extent to which Petitioner's interest will be represented by existing parties; and

(v) The extent to which Petitioner's participation will broaden the issues or delay the proceeding.

These factors supplement the standard intervention criteria outlined in Subsection (d) of CFR §2.714. Our discussion of those criteria in the April 7 Petition for leave to intervene in the operating licensing proceeding (Appendix A), will not be repeated here. The remainder of this Petition discusses the factors quoted above, in order.

A. Good cause for untimely filing

It was only when Petitioners unearthed the proposed Settlement Agreement that they realized FP&L was using this proceeding to undercut their rights as a qualifying PURPA facility. Petitioners had no notice, actual or formal (through the Federal Register), of the settlement negotiations. Although Section X of the proposed Agreement directly bears upon Petitioners' competitive interests and PURPA rights, creating the need to intervene, the Agreement was only recently made public. The public "notice", moreover, consisted of filing a copy of the Agreement in the NRC's docket room,

but doing so without attendant publicity or the requisite formalities. Until now, Petitioners have been effectively deprived of an opportunity to participate or comment.

In these circumstances, FP&L cannot be heard to complain that Petitioners' intervention is untimely. Petitioners' delay was caused by a lack of knowledge attributable to the secrecy of the settlement process. That is "good cause" by any fair and reasonable measure.

B. Availability of other means to protect Petitioners' interest

Petitioners' interest can be protected only by allowing them to be heard in the interrelated construction and operating licensing proceedings. FP&L contests Petitioners' right to air its antitrust concerns at the operating license stage. If FP&L were to prevail on that point, and if late intervention is not allowed in the construction licensing proceeding, FP&L will have succeeded in using the NRC to help it maintain and enhance its monopoly power in the ways outlined in our Brief in support of the April 7 Petitioner. That surely must be FP&L's objective, for there is no imaginable pro-competitive reason for objecting to Petitioners' efforts to protect their right to compete with FP&L.

The Commission has ample power to implement its statutory mandate to protect Petitioners' interest at this stage of the licensing proceedings. Intervention

may be granted at the operating license stage, which would be a logical choice since it is a new phase of the licensing process, or in the ongoing construction license proceeding, which is where the settlement agreement was negotiated, or in both. Regardless of how NRC chooses to formulate its intervention order, however, we contend that petitioners have a statutory and constitutional right to be heard on the issues delineated in Appendix A. One possible solution is a variant of that suggested by the other intervenors in these proceedings: permit petitioners to intervene late in the construction license proceeding, and then consolidate the two proceedings for purposes of an antitrust hearing.

C. Development of a sound record

Petitioners' rights are deeply affected by the settlement agreement. PURPA facilities are a new and unique kind of entity, and they have been afforded less favorable treatment than other electric generators covered by that agreement. So far as we are aware, no other qualifying PURPA facility has moved to intervene in either proceeding. Therefore, a complete record of the petitioners' interests and those of similarly situated facilities cannot be made without petitioners' participation.

To ignore these interests would be unfair to petitioners and unsound as a matter of regulatory policy. The number of PURPA facilities is sure to increase over time,

since PURPA was enacted but two years ago. NRC should move to protect those interests now, at the outset, by rejecting FP&L's effort to control the competitive future of PURPA facilities through a settlement agreement that will become final while petitioners and their counterparts are just starting their competitive ventures.

D. Representation by existing parties

No party to these proceedings has the same interest as petitioners, and no party has sought to speak on behalf of qualified PURPA facilities (in the context of the issues we have raised). The existing parties cannot adequately represent petitioners' interest.

E. Broadening of issues or delay of proceeding

Petitioners' intervention will neither broaden the issues nor delay the proceeding. The issues are already before the Commission by virtue of the settlement agreement, which the Commission must approve or disapprove. A hearing on these issues could not be significantly delayed by allowing petitioners to intervene and make their position known through such evidence and pleadings as the Commission deems appropriate. Indeed, because we have done no more than articulate existing issues which NRC must decide with or without our participation, intervention by a qualifying PURPA facility is essential to ensure a fair and complete record.

CONCLUSION

The petition for leave to intervene and the petitioners' request for an antitrust hearing should be granted.

Respectfully submitted,

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APPENDIX A