6/1/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

BRIEF OF PARSONS & WHITTEMORE, INC. AND ITS SUBSIDIARIES IN OPPOSITION TO APPLICATION FOR ISSUANCE OF SUBPOENAS

Florida Power & Light Company (FPL) has applied for the issuance of three massive subpoenas duces tecum in an effort to initiate pre-intervention discovery against petitioners. We respectfully submit that FPL's diversionary application should be denied, and the applicant should be ordered to respond to the merits of petitioners' intervention papers.[1/]

A. BACKGROUND

On April 24, 1981, Parsons & Whittemore, Inc. (P&W) and its subsidiary Resources Recovery (Dade County), Inc. (RRD) petitioned for leave to intervene and requested that NRC

1/ The application for issuance of subpoenas is dated May 8, 1981. Petitioners' motion for an extension of time until June 1 to respond was granted on May 19, as we were orally notified by a telephone call from Chairman Smith's office.

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hold a limited antitrust hearing in this construction licensing proceeding. Intervention is sought to protect petitioners' interests under the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §796 et seq., and under the antitrust provisions of the Atomic Energy Act, 42 U.S.C. §2135(c). The petition alleged that those interests would be adversely affected by Section X of a proposed settlement agreed to by FPL, the Department of Justice and the NRC staff.[2/]

Earlier, on April 7, petitioners had applied for leave to intervene in NRC's companion operating license proceeding; that petition was incorporated as part of their April 24 filing. That same day, April 24, the settlement agreement was approved, and the Board ordered that the agreement's "license conditions are effective immediately" (Memorandum

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2/ Petitioners' standing to intervene, as alleged in the April 24 petition (at App. A, p. 2), is predicated upon the following facts:

> RRD has recently completed the construction of a solid waste processing facility in Dade County, Florida. It is anticipated that the facility will process up to 18,000 tons of solid waste per week, convert combustible materials into refuse-derived fuel, burn the fuel to raise steam, and generate electricity. The facility has an installed name-plate electric generation capacity of approximately 76 megawatts. It is a qualifying small power production facility within the meaning of Section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA),16 U.S.C. §796, and the implementing regulations, 18 CFR Part 292 (1980).

and Order, p. 12). In that memorandum, the Board noted its familiarity with P&W's allegation "that Section X of the settlement agreement would have anticompetitive effects." But the Board deemed it unnecessary at that time to inquire into the merits of P&W's petition, observing that the anti-trust adequacy of the settlement agreement "will be open to litigation in this proceeding" (id. at 3 fn. 2).

Despite the Board's clear signal that the merits of petitioners' claims are to be explored in this proceeding, FPL has elected not to join issue on the merits. The applicant instead has made a diversionary move; it has asked this Board to sanction a broad discovery foray into irrelevant contractual disputes between petitioners and Dade County, Florida. Thus, FPL would subpoena from each petitioner and from another P&W subsidiary, Resources Recovery (Dade County) Construction Corp., the following records:

> 1. All contracts and amendments to such contracts between or among any of Parsons & Whittemore, Inc., Resources Recovery (Dade County), Inc., Resources Recovery (Dade County) Construction Corporation, Inc., Metropolitan Dade County, Florida, and other persons affiliated with any of the foregoing entities, which relate to or affect the Solid Waste Facility.
>
> 2. All documents that affect or relate to the contracts and amendments in description 1, including all correspondence, and any documents pertaining to litigation or arbitration involving such contracts or amendments . . . .

The word "documents" in paragraph 2 of the requested subpoenas embraces twenty-seven separate categories of --

> written, recorded or graphic matters, however produced or reproduced, whether or not now in existence, of [1] correspondence, [2] telegrams, [3] notes or sound recordings of any type of conversation, meeting or conference, [4] minutes of directors' or committee meetings, [5] memoranda, [6] inter-office communications, [7] studies, [8] analyses, [9] notes, [10] books, [11] records, [12] reports, [13] summaries and results of investigations and tests, [14] reviews, [15] contracts, [16] agreements, (17] pamplets, [18] diaries, [19] calendar or diary entries, [20] maps, [21] graphs, [22] charts, [23] statistical records, [24] computer data or [25] papers similar to any of the foregoing, however denominated, including [26] preliminary versions, drafts or revisions of any of the foregoing and [27] any supporting, underlying or preparatory material. [Schedule to Subpoenas, ¶4.]

The requested subpoenas, moreover, would span a decade, covering "the entire period from January 1, 1970 to the date on which documents are made available" to FPL (id. at ¶1).

FPL's sole justification for this ambitious pre-intervention discovery effort is an allegation of "good reason to believe" that somewhere in the 137-month accumulation of paper comprehended by the requested subpoenas there will be evidence, presently unknown to FPL, that petitioners do not own the facility described in its intervention papers (and at fn.2 supra). That evidence, FPL asserts, "may be decisive of the issue of Petitioner's standing" (Application, p. 3, emphasis added).

We demonstrate below that, as a matter of law, the "contracts and related documents" FPL seeks to discover cannot affect petitioners' standing. The requested discovery is therefore irrelevant. Moreover, FPL's subpoena application is

based upon misleading and erroneous factual assumptions -- assumptions disproved by public documents as well as by FPL's own writings. These points are discussed in some detail in the remainder of this brief.

B. THE INDISPUTABLE FACTS

It is beyond dispute (1) that Petitioners own the small power production facility which is the subject of their intervention filings, (2) that until Dade County pays petitioners more than $125,000,000 there is no conceivable basis on which petitioners' extant title can even be questioned, and (3) that FPL has long been aware of both of these points and has reviewed the contractual documents which manifest them. Any one of the above facts viewed in isolation would suffice to defeat FPL's discovery effort. Taken together, they establish that FPL's application is at best frivolous.

(1) RRD owns the small power production facility described in fn. 2 supra. FPL conceded that fact in a pleading filed with the Federal Energy Regulatory Commission on May 6, 1981 -- a scant two days before it applied for the subpoenas at issue.[3/] The FERC pleading asks the agency to "presume" that "RRD will transfer title to the Facility to Dade County in

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3/ FPL's Protest, Petition for a Declaratory Order, and Petition to Intervene before FERC in a matter styled In Re Resources Recovery (Dade County), Inc. QF-81-19-000.

return for Dade's payment of a purchase price [of over $125 million]." And, the pleading concludes, "[o]nce it relinquishes title to the Facility, RRD cannot be a small power producer under the Commission's regulations." Id. at 4 (emphasis added). Those statements by FPL unequivocally acknowledge RRD's present ownership of the facility.

(2) Dade County has not paid (or offered to pay) RRD the purchase price for the facility, an event which FPL concedes is a precondition to any transfer of title.[4/] What is more, Dade County's litigation posture manifests an intention not to voluntarily make that payment. Indeed, in the recent federal complaint that FPL claims alerted it to its discovery needs, Dade County prayed:

> That the Court declare a recission of the Project Agreement. [Attachment A to Application for Subpoenas, p. 11.]

The "Project Agreement" comprehends every contract and amendment thereto covered by FPL's requested subpoenas (see Attach A. at ¶3 and ¶¶18-36).

In sum, FPL already knows the critical facts about petitioners' contractual relationship with Dade County: RRD currently owns the subject facility, and the issue of contractual status that FPL seeks to raise through discovery is subject to a condition precedent that Dade County pay

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4/ The contractual disputes between petitioners and Dade County are currently pending in an arbitration proceeding that was initiated by petitioners.

petitioner more than $125,000,000.

(3) FPL not only knows the critical, overriding facts about petitioners' contractual disputes with Dade County, FPL knows the factual details of the contracts themselves, for it participated in negotiating those very contracts. This point can be established by FPL's own documents.

By way of illustration, in October 1976, Ms. Susan Lytle, one of Dade County's attorneys, forwarded to Mr. Williams of FPL "at [his] request" --

> substitution Pages 56 and 62 to the Purchase Contract between Resources Recovery (Dade County), Inc. and Metroplitan Dade County, Florida, together with Appendix "E" thereto. [App. I to this Brief.]

And, earlier that month, Ms. Lytle had sent to RRD's agents FPL's "changes" to the Management Contract between petitioners and Dade County:

> We are, therefore, enclosing a copy of the various charts and calculations incorporating the changes from FPL . . . . [App. II, emphasis added.]

In this context, FPL's protest of ignorance by "its counsel of record in this proceeding and its in-house counsel" (Application, p. 2) is of no moment. The applicant itself has already reviewed the salient contracts it now seeks to "discover." Those contracts, in addition, are subject to Florida's Public Record Act and, as such, have been available to FPL for the asking, as it well knew. See Wait v. Florida Power & Light Co., 372 F. 2d 420, 424-425 (Fla. Sup. Ct. 1979), where FPL successfully employed the Public Record Act to obtain documents

from a municipality with which it was litigating before the NRC.[5/]

C. ARGUMENT

(1) Petitioners' allegations of injury state a a justiciable claim for relief by the NRC. Contemporary judicial standards of "standing" are useful guides to the NRC in determining a party's intervention rights. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), 4 NRC 610 (1976). As the Commission there ruled:

> Our administrative process benefits from the concrete adverseness brought to a proceeding by a party who may suffer injury in fact by Commission licensing action, and whose interest is arguably within the "zone of interests" protected by the statutes administered by the Commission. [Id. at 613.]

That quotation adopts the standard enunciated by the Supreme Court in, e.g., Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-56 (1970).

5/ In light of the facts in the text, it is difficult to credit the carefully-worded disclaimer of knowledge that FPL has set forth in its subpoena application: "FPL's attempts to determine the facts underlying Petitioner's assertions have been considerably hindered because FPL has not had access to certain documents, including contracts and amendments thereto, which are relevant to whether Petitioner can indeed substantiate the assertions on which it bases its claims of interest in this proceeding." [Id. at 1, emphasis added.]

Petitioners have met the Pebble Springs requirements.[6/]

Petitioner RRD is a qualifying small power producer within the meaning of PURPA (App. III to this Brief), and, as such, a potential competitor of FPL (see Petition to Intervene, pp. 3-6). The NRC's governing statute, the Atomic Energy Act of 1954, directs the agency to protect against the "adverse antitrust aspects" of its licenses. Section 105c(5), 42 U.S.C. §2135(c)(5). And Section X of the settlement agreement recently approved by this Board expressly purports to regulate FPL's transmission obligations on behalf of "any . . . small power production facility (as defined by the Federal Energy Regulatory Commission in 18 CFR Part 292, Subpart B). . . ." (§X(a)(5)) -- the PURPA regulations.

6/ It is now well established that a party is not required to prove the merits of its claim in order to have standing (e.g., Flast v. Cohen, 392 U.S. 83, 99 (1968); Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 468 (D. Kan. 1978); Aiken v. Obledo, 442 F. Supp. 628, 639 (E.D. Calif. 1977)); that the injury suffered can be a loss of potential business (e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Singleton v. Wolff, 428 U.S. 106 (1976); Rental Housing Association of Greater Lynn, Inc. v. Hills, 548 F. 2d 388, 389 (1st Cir. 1977); Krueger v. Morton, 176 U.S. App. D.C. 233, 539 F. 2d 235 (1976); Pacemaker Monitor Corp. v. United States, 440 F. Supp. 473, 481-83 (S.D. Fla. 1977)); and that the requisite interest may consist of the unwarranted diminution of a statutory or regulatory benefit (Worth v. Seldin, 422 U.S. 490, 500 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 no. 3 (1973); Clark v. Richardson, 431 F. Supp. 105, 114 (D.N.J. 1977)).

Petitioners' allegations that the settlement agreement may detract from their PURPA rights and create a situation inconsistent with the antitrust laws plainly affords them standing to protect those PURPA and antitrust interests during the ongoing aspects of this proceeding.

Petitioners' right to standing is especially compelling in the present context of this proceeding. The Board already has authorized an antitrust hearing to determine whether it should "impose different or additional conditions" in FPL's construction license (Memorandum and Order, p. 1, dated April 24, 1981); that hearing has not yet begun; and while approving the challenged license conditions the Board stated -- in a footnote devoted to P&W's petitions -- that the "adequacy of the settlement . . . will be open to litigation in this proceeding . . ." (id. at 3 fn. 2).

(2) Nothing in the contracts and related documents sought by FPL could alter petitioners' judicially cognizable interest in this proceeding. In light of the indisputable facts set forth above, the contractual relationship between petitioners and Dade County, including the parties' contractual disputes, is irrelevant to petitioners' standing to protect its PURPA and antitrust interests before NRC. This can be established by hypothesizing -- against all reason -- a set of assumptions most favorable to FPL: i.e., if Dade County elects not to seek rescission of the contracts, and if Dade County elects to pay

petitioners the $125+ million due, and if the contracts are specifically enforceable as a matter of law, and if the contracts are so enforced and petitioners then transfer title to Dade County, petitioners would nonetheless retain their present standing to intervene in this proceeding.

Rule 25(c), F.R. Civ. P., provides that whenever a party to a lawsuit transfers its interest in the res, that party may continue to prosecute the action -- it does not lose its standing.[7/] In fact, the adjudicatory tribunal has discretion to allow the original party to continue to prosecute the action alone, or to do so in conjunction with the transferee (e.g., Dade County). Although the transferee may be substituted for the original party, the action may not be dismissed because of "any transfer of interest" in the subject of the litigation. See, e.g., Hilbrands v. Far East Trading Co., 509 F. 2d 1321 (9th Cir. 1975); Veverica v. Drill Barge Buccaneer No. 7, 488 F. 2d 880 (5th Cir. 1974).

Those cases are specific applications of the general rule that once standing attaches, a party cannot lose it by subsequent events; standing is determined by the allegations of the operative pleading, by the facts as they exist when the action is commenced. See Wolfinger v. Standard Oil Company, 442 F. Supp. 928, 931 (S.D. Ohio 1977); Goodson v. Board of Trustees

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7/ Rule 25(c) reads as follows: "In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." [emphasis added.]

of the YMCA of Vincennes, 251 N.E. 2d 858 (Ind. App. 1969). The logic of the above cases defeats FPL's claim of relevance for the requested subpoenas. If petitioners' standing would survive a subsequent transfer of interest, as those cases hold, petitioners' standing simply cannot be defeated by an inchoate possibility of a future transfer of interest.[8/]

The above discussion establishes that, as a matter of law, FPL's requested subpoenas could not unearth any facts that would contravene petitioners' legitimate interest in intervening in this proceeding. Contemporary judicial standards of standing therefore dictate that the subpoena application be denied.

(3) Issuance of the requested subpoenas would delay petitioners' intervention and the operation of their small power production facility to the detriment of the public interest. Several interrelated considerations of public policy support our contention that the subpoena application should be denied. First, issuance of the subpoenas would delay action on the petition to intervene for quite some time. The Board would have to decide, then, whether to postpone hearing the intervenor-cities' antitrust claims until petitioners' intervention is

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8/ It should be noted that petitioners' interest in this proceeding and their standing to protect that interest do not depend solely upon ownership of the subject facility. RRD is also the facility's "operator" and, in that capacity, it may assert the facility's rights under FERC's regulations which implement PURPA, 18 CFR §292.207(a)(2) -- the regulations cited in Section X of the settlement agreement. FPL does not even suggest that the requested discovery would impact upon petitioners' rights as the facility's "operator."

resolved or to proceed with that hearing under the risk of having to duplicate much of it later. However the Board might decide to proceed, petitioners would be prejudiced by the outcome: One unalterable consequence of delaying petitioners' intervention would be a further setback in the commercial production and sale of electricity from petitioners' facility in competition with FPL -- a result inimical to the public interest reflected in PURPA and expressed in the antitrust laws.

Second, the information sought by FPL is not even arguably relevant to any substantive issue before the NRC in this proceeding, and the applicant does not contend otherwise. In the FERC "proceeding," however, FPL has asserted the substantive relevance of the identical information in connection with its attempt to have FERC revoke RRD's status as a qualifying small power producer (see supra, pp. 5-6).

FPL's pending contentions before FERC as to the identical contractual issues strongly support our position that NRC should deny the requested subpoenas. The settlement agreement in this proceeding explicitly states that "[n]othing herein shall be construed to affect the jurisdiction of FERC . . . ." (§ XIII(c)). That proviso, which was approved on April 24, 1981, would have to be ignored for this Board to issue subpoenas in connection with a dispute that NRC has no power to adjudicate and which FPL has raised before FERC. Thus, while granting the subpoenas would serve no legitimate end, denying them would properly remit FPL to its revocation

proceeding before FERC. That result is not only fair, it is compelled by the quoted language from Section XIII (language which FPL agreed to and may have authored).

Finally, were Petitioners' standing to intervene defeated by its disputed Dade County contracts, the important antitrust and PURPA issues raised by the settlement agreement might never be resolved. For, if petitioners' legal title to the subject facility were insufficient to confer standing upon them, as FPL claims, there is no basis on which Dade County could have the requisite standing.[9/] Dade County, in any event, has not moved to intervene, and, as mentioned earlier, has sued to rescind its contracts with petitioners.

To fulfill NRC's antitrust obligations and its duty to evaluate the settlement agreement's impact on the small power producers that it affects, NRC must have the views of interested persons. Petitioners are the only ones in that class who have come forward to speak, and their concerns are not hypothetical: E.g., petitioners' small power production facility is ready to be interconnected with FPL's monopoly transmission grid and

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9/ The eminent domain cases are instructive on this point. A person with a "contractual interest" in property is usually not entitled to compensation when the property is taken. See, e.g., United States v. 677.50 Acres of Land in Marion County, Kansas, 420 F. 2d 1136 (10th Cir. 1970); United States v. 180.37 Acres of Land, More or Less, in Dickinson County, Commonwealth of Virginia, 254 F. Supp. 209 (W.D. Va. 1966); 2 Nichols on Eminent Domain §5.23[7]. On the other hand, a compensable interest in the property is retained by a title holder who has contracted to sell his property for less than he would have received absent the taking. See, e.g., Town of East Haven v. Eastern Airlines, Inc., 331 F. Supp. 16, 33 n. 11 (D. Conn. 1971).

to produce and sell electricity.[10/] FPL, however, is committed to "[d]eter the competitive threat of municipal generation" (Petition to Intervene, App. 6), and the applicant's anticompetitive purposes would be well served by allowing RRD's facility to rust unused while the parties litigate (and arbitrate) for years over their disputed versions of the contracts.

FPL's patent effort to delay petitioners' intervention by raising irrelevant issues should not be countenanced by this Board. The public interest would be seriously undermined by allowing the electric generation capacity of RRD's facility to be wasted while the NRC is added to the list of forums in which the parties' contractual disputes are to be aired. The Board has the power to avoid that result; it should do so by denying FPL's application for the issuance of subpoenas that will serve only dilatory, anticompetitive ends.

(4) FPL's application for issuance of subpoenas is procedurally defective. Apart from the substantive reasons for denying FPL the requested subpoenas, its application should be dismissed because it does not comply with the NRC Rules of Practice. FPL has cited no proceeding in which NRC has issued a discovery subpoena at the intervention stage. The agency lacks power to do so, we submit, due to the limitations on discovery set forth in its Rules of Practice For Domestic

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10/ See the attached pictures of petitioners' facility (App. IV).

Licensing Proceedings, 10 CFR §2.740.

Rule 2.740(b)(1) provides that discovery may begin only after the agency has issued a prehearing order and "shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order . . . ." That Rule would seem to be directed precisely at the instant situation -- at a burdensome, time-consuming effort to delve into irrelevancies before the agency has had an opportunity to focus the issues actually in dispute. FPL's application should therefore be denied.

CONCLUSION

FPL's Application for Issuance of Subpoenas should be denied. FPL should be ordered to file any response to the Petition for Leave to Intervene and Request for Hearing within ten days, and Petitioners should be afforded five days to respond.

Respectfully submitted,

George R. Kucik

George R. Kucik

Ellen E. Sward

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& KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6000

Counsel for Petitioners

June 1, 1981

October 25, 1976

Mr. Arnold Willen
Florida Power & Light Company
9250 West Flagler Street, Room 5413
Miami, Florida

Dear Mr. Willen:

Pursuant to your request, we are enclosing substitution Pages 56 and 62 to the Purchase Contract between Resources Recovery (Dade County), Inc. and Metropolitan Dade County, Florida, together with Appendix "B" thereto. We are also enclosing a similar Acceptance Criteria which includes the sections from the original acceptance criteria concerning the guarantees and testing of the Electrical Generation Facility. We may attach all or a portion of this Acceptance Criteria to the Steam Purchase Agreement between Florida Power & Light Company and the County. We would appreciate your comments on the testing which is also to be made in accordance with Appendix "B" of the Steam Purchase Agreement submitted by Florida Power & Light Company.

Sincerely yours,

SUSAN LEE LEVIS

SLL/cmb

Enclosures

October 13, 1976

Mr. E. N. Bechamps
Carr Smith & Associates, Inc.
123 Almeria Avenue
Coral Gables, Florida 33134

Re: DADE COUNTY SOLID WASTE RESOURCE RECOVERY FACILITY - (Our File 3302.04-01-27)

Dear Gene:

Florida Power & Light Company has reviewed Appendix "C" to the Management Contract and has given us some minor changes. We are, therefore, enclosing a copy of the various charts and calculations incorporating the changes from FPL and would appreciate it if you would use these updated figures in all future negotiations with FPL.

Please call me if you have any questions.

Sincerely yours,

SUSAN ZEH LYTLE

SLL/gmb

Enclosure

cc: Melvin N. Greenberg
Norwood Viner

RESOURCES
RECOVERY
(DADE COUNTY)
INC.

GEB-81-58
March 13,1981

Mr. Robert Tallon
Executive Vice President
Florida Power & Light Company
P.O. Box 529100
Miami, Florida 33152

RE: Notice of Qualification of Small Power Production Facility Under Section 210 of PURPA

Dear Mr. Tallon:

I attach a Notice of Qualification, which was filed today with the Federal Energy Regulatory Commission, in accordance with 18 C.F.R. Section 292.207(a). By service of this notice upon you, Resources Recovery (Dade County), Inc., notifies you that we will begin sales of electric energy to Florida Power & Light on or after ninety days from the date hereof.

Yours very truly,

George E. Boyhan
Executive Vice President

/mdp
Enclosure

cc: Secretary, Federal Energy Regulatory Commission

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.AMI, FLORIDA 33152
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