

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Docket No. 50-389A

Dated: June 5, 1981



RESPONSE OF FLORIDA POWER & LIGHT COMPANY
TO BRIEF OF PARSONS & WHITTEMORE IN OPPOSITION TO
APPLICATION FOR ISSUANCE OF SUBPOENAS

Parsons & Whittemore, Inc. and its subsidiaries ["P&W"],

late Petitioners to intervene in this proceeding, have filed a pleading styled as a "Brief in Opposition to Application for Issuance of Subpoenas." Though P&W's pleading is somewhat lengthy, FPL requests leave to file this brief response.*/

In general, P&W contends that the information sought by the subpoenas is not relevant, that it is available to FPL through other avenues and that, in any event, the Board lacks authority to issue subpoenas prior to P&W's having been admitted as a party. FPL confines itself here to three points.

1. The information sought is directly relevant to issues which must be resolved before P&W's Petition can be granted. The Petition is predicated on the assertion that P&W has a legal right to own and control both a solid waste processing facility in Dade County, Florida, and an electric generator

*/ The NRC rules make no provision for a "Brief" opposing an application for a subpoena. Though styled as such a "Brief," P&W's pleading is in substance a "Motion to Quash," to which FPL ordinarily would have 10 days to respond under NRC practice. 10 C.F.R. § 2.720(f), § 2.730(c). FPL respectfully requests that the Board accept this brief expedited response, both in accordance with the provisions cited above, and in order to facilitate the Board's decision.



which will produce electricity from steam raised by the solid waste facility.^{*/} (Petition, App. A at 5). The late Petition failed to disclose to the Board that FPL's expressed reason for refusing to provide the services requested by P&W was the existence of at least one contract which gives FPL the legal right to own, operate and produce electricity from that electric generator.

It is FPL's position that P&W has no legal rights to the electric generator in question,^{**/} and that the assertions in its late Petition are demonstrably unfounded. This is hardly a "technical" point as P&W would have it. In its pleading responding to the Petition filed by P&W in the St. Lucie 2 operating license proceeding, FPL was able to provide to the operating license Board a contract between FPL and Dade County, Florida (P&W is obligated by contract to construct the waste disposal facility for Dade County) under which Dade County is committed to vest in FPL the ownership of the electrical generator, which FPL thereafter will operate. The contract was

^{*/} The assertion that P&W now "owns" the facility and that that should end the inquiry is disingenuous. The most casual student of the law of real property appreciates that the concept of "ownership" is not that simple. If P&W holds some kind of legal title to the facility at this time (and FPL has no direct knowledge of whether it does or not), it matters whether P&W retains that title by breaching its contractual obligations to others and whether that title is subject to defeasance by the valid rights of others.

^{**/} Nor, it would appear from other contracts P&W omitted to mention, does P&W have any legal right to the solid waste treatment facility.

one of several P&W omitted to mention in its late Petition. The subpoenas at issue here were requested upon the surfacing of another contract whose existence P&W failed to disclose, the so-called "Assumption Agreement." Under this Agreement P&W has apparently assumed the obligations of Dade County to FPL and has itself confirmed that FPL has the legal rights to the generating facility.

The information sought regarding P&W's contractual obligations is squarely relevant in at least three respects. First, it evidently defeats any alleged legal right on P&W's part to control, ownership, or operation of the electrical generation facilities in question.

Second, if the dispute between P&W and FPL results from FPL's assertion of its legitimate contractual position and not from any wrongful antitrust conduct directed at Parsons & Whittemore, no antitrust issue can credibly be asserted.

Third, the facts underlying P&W's contractual obligations bear on P&W's claim that its extraordinary lateness in filing should be excused. In many respects, the considerations which a licensing board is required to weigh in ruling on a late petition are equitable in nature. If it is shown that a person has filed a petition with this Commission merely as a ploy in its efforts to escape its contractual obligations, and if that is compounded by a failure fully to disclose the actual commercial situation in its filing with the Board, those considerations should weigh heavily against excusing lateness on the part of the Petitioner.

It is true that the Board could deny the Petition without reaching these questions, on the grounds, inter alia, of lateness for which no good cause has been alleged and that it fails to allege either a situation inconsistent with the antitrust laws or any nexus between any such situation and activities under the license for St. Lucie Unit No. 2. FPL intends to file, within the next week, a partial response to the Petition urging that the Board do so.^{*/} In the meanwhile, there is no equitable or legal reason for withholding subpoenas which merely compel the Petitioner to disclose the facts which underlie assertions on which its petition is inescapably grounded.

2. The assertion that FPL can gain access to the evidence which it seeks by other means is not entirely accurate, but is immaterial in any event. FPL is making efforts to obtain the contracts of which it is aware, but there is no reason why FPL should be required to grope in the dark.

A petitioner seeking intervention before this Commission has an obligation to come forward with the facts that establish vel non the basis on which he asserts he should be permitted to participate and this, of course, is particularly true vis-a-vis the extraordinarily late filing here. Yet from the outset, P&W has engaged in a sequence of maneuvers striving to avoid airing of the facts underlying its Petition.

^{*/} FPL has refrained from doing so to date because of its reluctance to make serious allegations without more certain knowledge of the facts. FPL believes that it will be able to obtain at least some of the contractual documents between P&W and Dade County from the County within the next week.

It began by omitting from its Petition any mention of the contractual relationships which bear on the factual assertions on which the Petition is predicated. Next, following FPL's application for subpoenas, P&W moved the Board for an extension of time in order to "coordinate" with counsel handling other P&W litigation and assertedly "to do the factual and legal research" necessary to meet the issue.*/ Now, after receiving this extension, P&W has come forward with a pleading that reveals nothing about the facts and instead contains refractory arguments and repeats the same assertions. The existence of the Assumption Agreement, which was asserted by FPL as an important basis for seeking the subpoenas, is not even mentioned by P&W in its Brief, much less brought before the Board. Apparently having ascertained the facts, P&W has concluded its late Petition would not be advanced by having them brought forward. The question at issue here is a substantial one, and should not be forced against a wall of non-disclosure.**/

*/ Motion of Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. Extension of Time to Respond to Florida Power & Light Company's Application for Issuance of Subpoenas (dated May 13, 1981) at 2-3.

**/ Obviously, FPL does not know all of the "critical facts" concerning P&W's contractual relationships. (Brief at 7). FPL has managed to learn enough about these relationships to demonstrate that P&W's assertions cannot be taken at face value. This is hardly ground for suppressing further inquiry.

3. Nor can P&W's resistance to disclosure of the facts be excused on the basis of its assertion that FPL's application is "procedurally defective." P&W's reliance on Rule 2.740(b)(1) is misplaced. In the first instance, Rule 2.740 is by its terms a general provision which goes to discovery on the merits. FPL does not here seek "discovery" as defined within Rule 2.740; it seeks subpoenas, for which any party may apply under Rule 2.720;*/ a general provision of the NRC's regulations which is entirely separate from the provisions governing discovery among parties, which appear under separate heading at 10 C.F.R. § 2.740, et seq. Secondly, the argument that "discovery" is inappropriate until after the first special prehearing conference (10 C.F.R. § 2.751a) makes no sense here. That conference has been held over four years ago.

Moreover, FPL believes that the Licensing Board's mandate to rule upon petitions to intervene in accordance with the factors set forth in the regulations plainly encompasses the inherent authority to permit such discovery as is necessary to evaluate those factors; if not, the Board would be powerless to deny demonstrably groundless petitions. "Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is

*/ Rule 2.720 implements the subpoena authority vouchsafed to the Commission in Section 161 of the Atomic Energy Act. 42 U.S.C. § 2201. Under § 2.720 the authority to issue a subpoena is delegated to "the designated presiding officer."

granted." Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n. 1 (1978).*/

Conclusion

The basic question before the Board is whether the subpoenas sought by FPL seek information which may assist the Board in ruling upon P&W's late Petition. The answer to this question quite obviously is in the affirmative. **/ For this

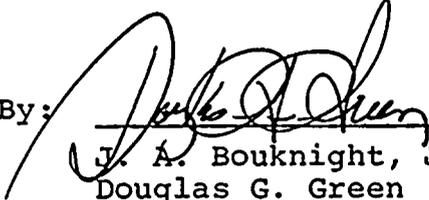
*/ P&W's assertion that issuance of the subpoenas should be denied because they would cause "delay," is inexplicable, to say the least, given P&W's seven years' late filing and its recent request for an extension of time in order to oppose the subpoenas. Absent that request the subpoenas could have been executed by now. Prompt execution of the subpoenas now would not delay this proceeding in any respect. FPL respectfully proposes that the Board order the subpoenas to be returned within 10 days from the date of their issuance.

Not only could the subpoenas be executed promptly, they plainly are not unduly burdensome. In its first sentence P&W terms the subpoenas "massive." In the body of its pleading it is evident that what P&W finds "massive" is FPL's definition of the word "document." That FPL, like most prudent applicants for subpoenas, defined "document" carefully in a fashion unambiguously encompassing all paper writings is hardly a meritorious ground for complaint. The substantive subpoenas consist of merely two paragraphs and seek strictly those documents related to the P&W contractual arrangements in question.

**/ Unlike P&W, we do not understand the Board's April 24, 1981 Order to be in any respect a "clear signal" that it would grant P&W's Petition. (Brief at 2-3). The Board simply stated that "the adequacy of the settlement" was not before it at that juncture and would "be open to litigation." Order, dated April 24, 1981 at 3 n. 1. P&W's late petition must be judged by the standards prescribed in the Commission's regulations and decisions which apply these regulations. FPL believes that it is clear beyond reasonable dispute that the late Petition does not and cannot meet these standards and that when the Board addresses the issue it will indeed so find.

reason, FPL requests that the Board grant its application and issue the subpoenas, returnable within 10 days.

Respectfully submitted,

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Response of Florida Power & Light Company To Brief Of Parsons & Whittemore In Opposition To Application For Issuance Of Subpoenas" was served by hand delivery* or by deposit in the U.S. Mail, first class, postage prepaid this 5th day of June, 1981.

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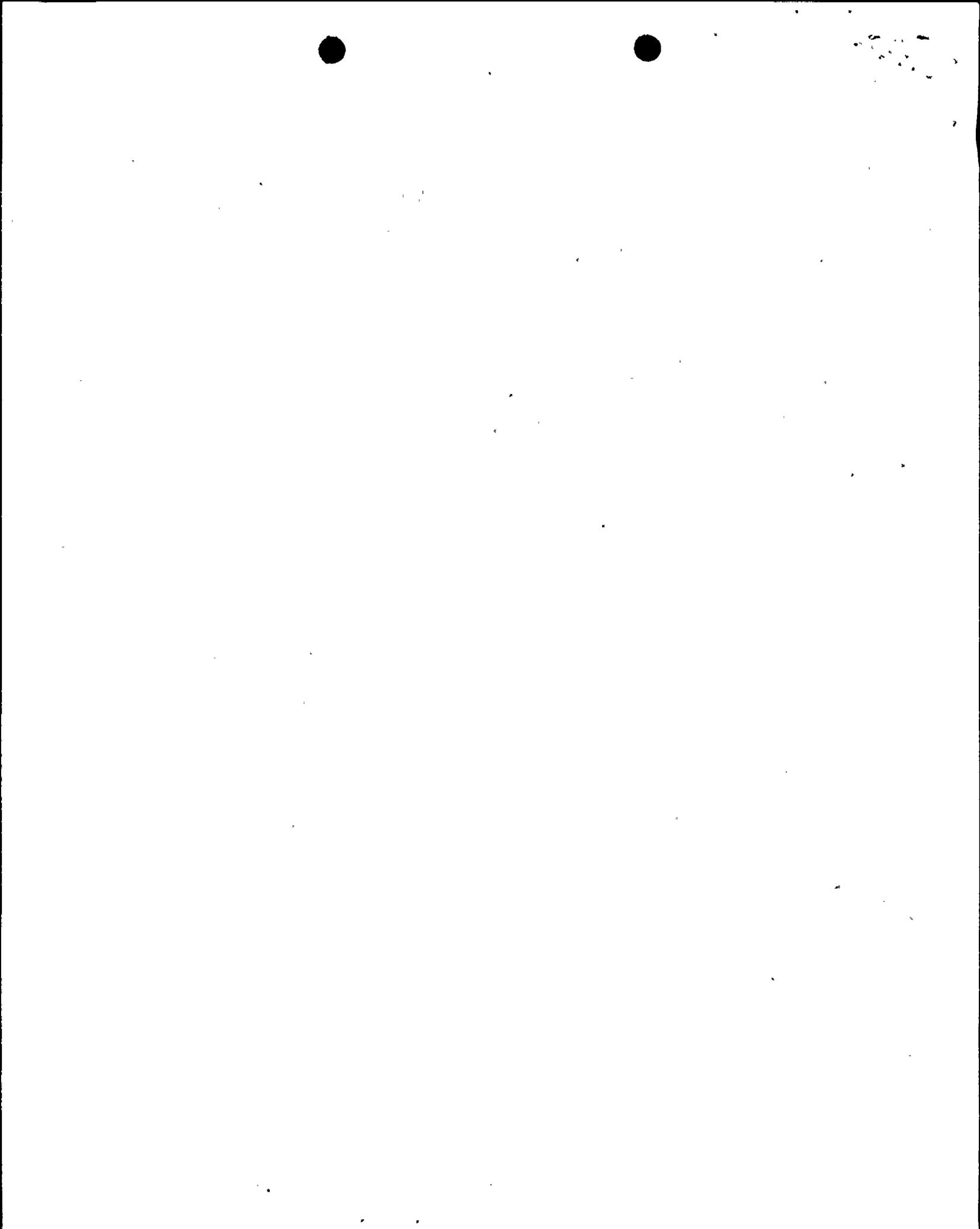
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