

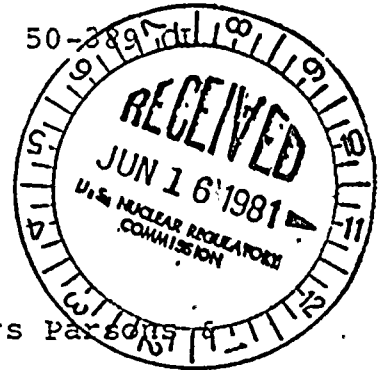
UNITED STATES OF AMERICA  
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

*6/15/81*

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

Docket No. 50-2897d-1011



NOTICE OF APPEAL

Pursuant to 10 C.F.R. §2.714a, petitioners ~~Parsons~~ Whittemore, Inc. and Resources Recovery (Dade County), Inc. appeal from the June 3, 1981 order of the Atomic Safety and Licensing Board denying their petition for leave to intervene and request for hearing in the captioned proceeding. The order was docketed and served on June 4. In support of this appeal, petitioners attach a brief as required by 10 C.F.R. §2.714a(a).

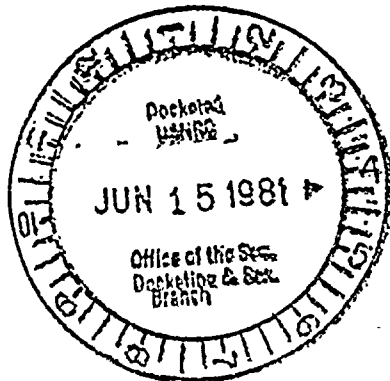
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June 15, 1981

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

BRIEF OF PARSONS & WHITTEMORE, INC. AND  
RESOURCES RECOVERY (DADE COUNTY), INC.  
IN SUPPORT OF THEIR APPEAL FROM DENIAL  
OF THEIR INTERVENTION PETITION AND  
REQUEST FOR HEARING

Parsons & Whittemore, Inc. (P&W) and Resources Recovery (Dade County), Inc. (RRD) petitioned for leave to intervene in this proceeding for issuance of a license to operate Florida Power & Light Company's St. Lucie Plant, Unit No. 2. The petition was denied on June 3, 1981 on the ground that petitioners sought to raise only antitrust issues before a Licensing Board that was constituted to consider only health, safety and environmental issues.<sup>1/</sup> Pursuant to 10 C.F.R. §2.714a, petitioners have appealed from this order of denial.

The Federal Register notice under which petitioners sought to intervene did not, by its terms, limit the justiciable

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<sup>1/</sup> The Licensing Board's June 3 order denying intervention was served on petitioners the next day, June 4.

issues to health, safety and environmental matters. Moreover, the Board's order focused only on the antitrust aspects of petitioners' pleading, ignoring petitioners' expressed concern with protection of their rights under the Public Utility Regulatory Policies Act of 1978 (PURPA) (Petition, pp. 4-6). Those rights have been adversely affected by a settlement agreement entered into in the companion construction license proceeding, Docket No. 50-389A, involving St. Lucie No. 2. Our petition to intervene in that proceeding is presently pending. That petition raises the same PURPA and antitrust issues that petitioners seek to raise in this operating license proceeding.

Petitioners have noticed the instant appeal to protect their right to be heard by the NRC on the important issues that they have raised. Should the NRC decline to hear and address the merits of petitioners' contentions in either proceeding, we would contend that the NRC had violated its statutory obligations as well as the due process clause of the Constitution. That issue, however, is not ripe for decision at this time, since the construction licensing intervention pleading has not yet been decided.

We respectfully submit, in these circumstances, that it would be appropriate for this Appeal Board to docket petitioners' appeal but defer action upon it until after the Licensing Board decision in the construction licensing proceeding.

That decision might make it unnecessary for petitioners to pursue this appeal. The policy against piecemeal litigation, in any event, commends the idea that the Appeal Board should not rule upon the instant appeal without having the benefit of the Licensing Board's decision in the pending companion matter. We will undertake to notify the Appeal Board of that decision promptly after it is rendered, and to apprise the Board of our views as to its effect on the instant appeal.

BACKGROUND

Petitioners own and operate a solid waste processing plant in Dade County, Florida. The plant converts solid waste into refuse-derived fuel, and burns it to produce steam, which is then converted into electric energy. This facility is complete and ready to begin generating electricity from waste.

On March 9, 1981, a notice of receipt of an application for a facility operating license for FP&L's St. Lucie Unit No. 2, nuclear facility was published in the Federal Register, 46 Fed. Reg. 15831-32. The notice stated that the Commission would consider issuing a license "which would authorize [FP&L] to possess, use and operate the St. Lucie Plant, Unit 2 in accordance with the provisions of the [construction] license . . . ." [Emphasis added.] The notice further stated that the Commission would have to find, prior to issuing an operating license, that the application "complies with the requirements

of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 C.F.R. Chapter 1." Following its description of the proceeding, the Notice invited "any person whose interest may be affected by this proceeding [to] file a petition for leave to intervene."

On April 7, 1981, petitioners filed a timely petition for leave to intervene and request for a limited antitrust hearing, alleging that issuance of the operating license (1) would create or maintain a situation inconsistent with the antitrust laws in violation of the Atomic Energy Act, 42 U.S.C. §2135, and (2) would adversely affect their rights under the Public Utility Regulatory Policies Act of 1978 (PURPA). Petitioners were mostly concerned with Section X of a settlement agreement negotiated in the St. Lucie Unit 2 construction license proceeding.<sup>2/</sup> The Construction Licensing Board issued an order on April 24, 1981, making the settlement agreement immediately effective without prejudice to the NRC's right "to impose different or additional conditions after a hearing" (Memorandum and Order, p. 1 and p. 3 at fn. 2).

The NRC Staff responded to petitioners' intervention pleadings on April 22, 1981, asserting that the Board lacked jurisdiction to entertain the petition because it sought to

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<sup>2/</sup> That agreement, for example, obligated FP&L to transmit electricity on behalf of small power producers within the meaning of PURPA, such as petitioners, but allowed FP&L to condition the transmission in an unfair and discriminatory manner.



raise only antitrust issues. The Staff argued the Board was constituted to hear health, safety and environmental issues only and could not consider antitrust claims. FP&L responded to the Petition on May 6, asserting the same jurisdictional defense and raising other issues not relevant to this appeal.

Petitioners then moved for leave to answer the opposition pleadings of FP&L and the NRC Staff. Permission to answer was denied on May 22, with the Board ruling that "it has sufficient information to consider the petition . . ." (Order, p. 2). Thereafter, on June 3, the Board denied the petition, adopting the jurisdictional argument that petitioners had been denied an opportunity to answer.

For the reasons explained below, petitioners respectfully request that the Licensing Board's June 3 order be reversed and set aside and that this matter be remanded to the Board with instructions to grant the petition for leave to intervene and request for hearing.

#### ARGUMENT

- A. THE COMMISSION'S FEDERAL REGISTER NOTICE OF THE OPERATING LICENSE PROCEEDING DID NOT EXCLUDE ANTITRUST ISSUES FROM THE AMBIT OF THE PROCEEDING

The Licensing Board has ruled that the notice under which petitioners seek to intervene related exclusively to health, safety and environmental issues. That ruling, we contend, is erroneous.

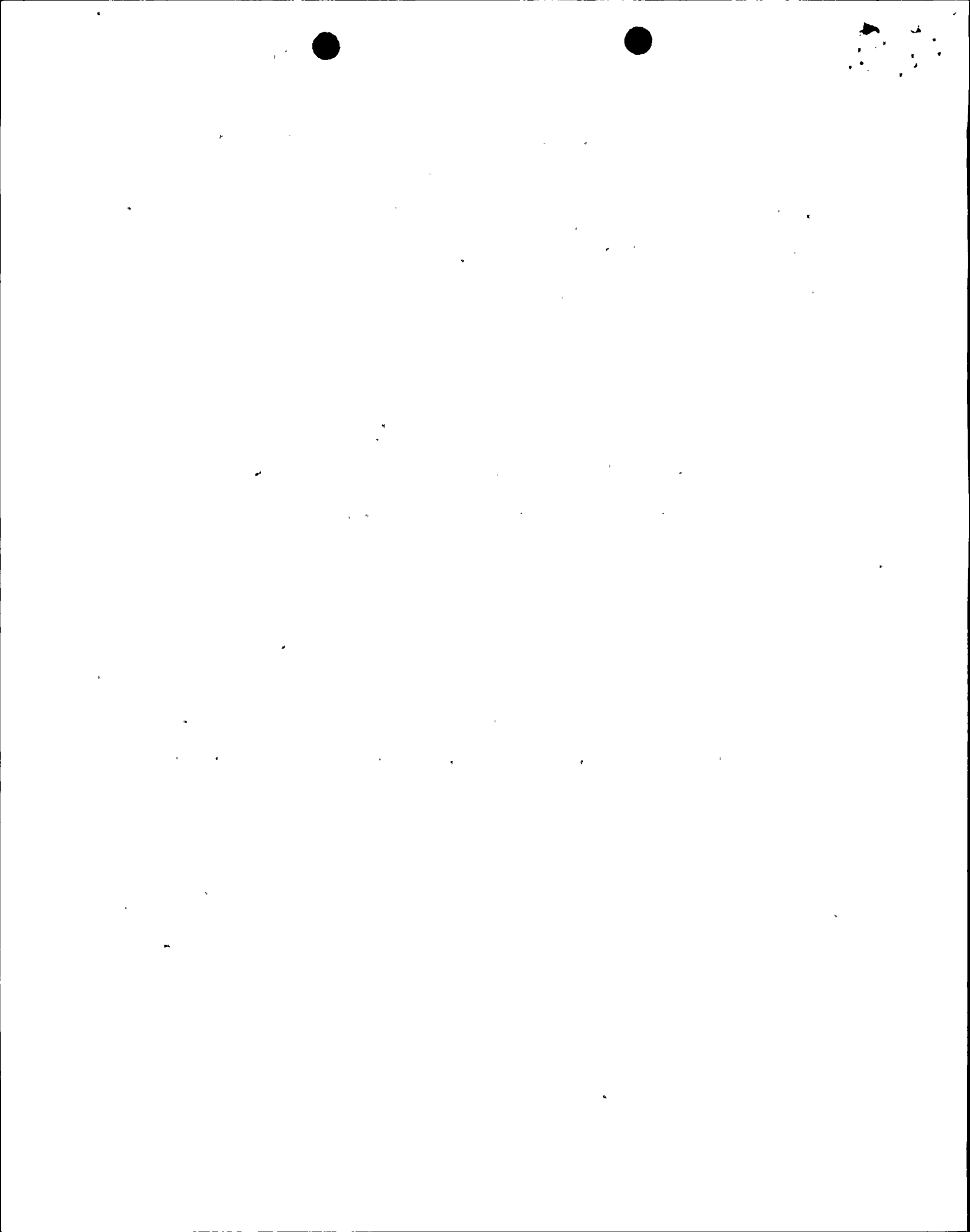


The March 9 notice under which petitioner sought to intervene does not exclude antitrust issues. Rather, the operative intervention language is all-encompassing, inviting participation by "any person whose interest may be affected by this proceeding." [Emphasis added.] The notice, moreover, does not expressly state that the proceeding is limited to consideration of health, safety and environmental issues. Here, too, the substantive issue framed by the notice is all-encompassing: whether a facility operating license should be issued. Antitrust issues must necessarily be considered by the Board in deciding whether such a license shall issue and under what circumstances and conditions. See 42 U.S.C. §2135(c).<sup>3/</sup>

Antitrust considerations are of particular relevance in this matter, because the Federal Register notice specifically stated that the ultimate issue is whether FP&L should be allowed to operate the St. Lucie Plant "in accordance with the provisions of the [construction] license . . . ." One provision of the construction license, currently in effect under the Board's April 24 order, is that FP&L transmit electricity for neighboring entities and qualifying PURPA facilities. The explicit purpose of this condition is to mitigate negative antitrust implications (see the April 24 Order at, e.g., pp. 3 fn. 2). Thus, antitrust issues must be relevant in the operating license proceeding.

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<sup>3/</sup> The Commission's Regulatory Guide 9.3 states Commission policy on what information will be considered in making this statutory review of antitrust implications at the operating license stage.



Beyond this, the notice's neglect to mention antitrust issues is a violation of the Commission's Statement of General Policy and Procedure, 10 C.F.R., Part 2, App. A. Section X of that Appendix requires that the Commission's notice of receipt of application (for operating licenses as well as their construction counterparts) establish a procedure for raising antitrust issues. Specifically, Section X provides that the notice --

will state that persons who wish to have their views on the antitrust aspects of the application presented to the Attorney General for consideration shall submit such views to the Commission within sixty (60) days. [Emphasis added.]

No such statement appears in the March 9 notice; nor does the notice state that no opportunity to raise antitrust issues will be afforded, or that such an opportunity will be afforded at a later date. Antitrust issues are simply ignored by the notice. Furthermore, Section X(e) of the Statement of General Policy and Procedure states that antitrust hearings will "generally" be held separately from hearings on radiological health and safety and common defense and security; therefore, separation of issues is not an absolute requirement.

In sum, the operative Federal Register notice, coupled with the NRC's preexisting policy statements, indicated that antitrust issues were to be open for consideration in this proceeding. If the Commission did not intend this result, its notice was defective.

B. THE ORDER BELOW IMPROPERLY FAILED TO ADDRESS  
PETITIONERS' SECOND GROUND FOR INTERVENTION --  
THE ADVERSE EFFECT ON THEIR PURPA RIGHTS

Petitioners sought to intervene not only on antitrust grounds but to protect their rights under PURPA as well. PURPA insures that small power-producing facilities shall have a market for their electricity by requiring that utilities, such as FP&L, purchase that electricity at the utilities' avoided costs. And the settlement agreement in the construction license proceeding specifically deals with PURPA facilities, in Section X. The Licensing Board erred by denying the petition to intervene without mentioning this aspect of petitioners' interest in the proceeding.<sup>4/</sup>

It must be emphasized that petitioners' need to protect their PURPA rights before the NRC stems not from anything that petitioners have done or failed to do. Intervention is necessary at this time because of the earlier decision of FP&L, the NRC Staff and the Department of Justice to cover PURPA facilities in the settlement agreement without Federal Register notice and an opportunity for interested persons to be heard. The Licensing Board's continued failure to allow petitioners to be heard

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<sup>4/</sup> The rights of PURPA facilities under the settlement are less extensive than the rights of facilities which have not qualified under PURPA. That is one reason why petitioners' rights are adversely affected by the Section X conditions of the settlement agreement which became effective on April 24.

in their capacity as a qualifying PURPA facility is erroneous as a matter of law.

CONCLUSION

Petitioners' appeal should be granted and the June 3, 1981, order of Atomic Safety and Licensing Board should be reversed and set aside. The matter should be remanded to the Board with instructions to grant petitioners' April 7, 1981, petition to intervene and request for hearing.

Respectfully submitted,

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June 15, 1981

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of )  
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I hereby certify that copies of the foregoing Notice of Appeal and Brief of Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. in Support of Appeal from Denial of Their Intervention Petition were served upon the following persons via first class mail or by hand\*, postage prepaid, this 15th day of June, 1981.

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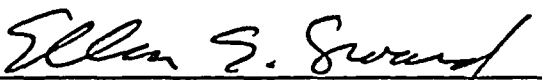
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