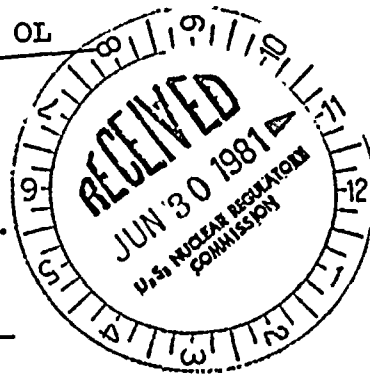
FPL 6/25/81

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 FLORIDA POWER & LIGHT COMPANY IN OPPOSITION TO "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"

(June 25, 1981)

Florida Power & Light Company (FPL) hereby submits its brief in opposition to the appeal of Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (Petitioner) from the Licensing Board's June 3, 1981 "Order Relative to Petitions to Intervene Concerning Antitrust Matters" (Order) in this docket.

On March 9, 1981 the Commission published in the Federal Register a notice entitled "Florida Power & Light Co.; Receipt of Application for Facility Operating License; Availability of Applicants' Environmental Report; and Consideration of Issuance of Facility Operating License Opportunity of Hearing." (46 Fed. Reg. 15831 (1980)) (Notice of Hearing). The Notice of Hearing offered an opportunity for any person "whose interest may be affected by the proceeding" to file by April 7 a petition to intervene and a request for hearing. (Id.) On April 7, Petitioner filed a "Petition For Leave To

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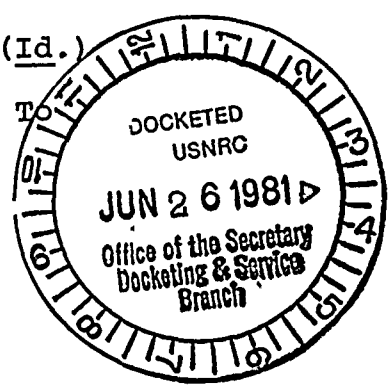

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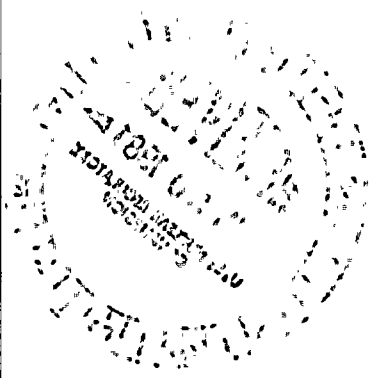

Intervene and Request for Hearing" (Petition) in which it requested leave to intervene and asked the Commission "to hold a limited antitrust hearing." (Petition, p. 1). Both FPL and the NRC Staff opposed the Petition on the grounds, among others, that it sought to raise only antitrust issues in a proceeding convened to consider the health, safety and environmental considerations associated with operation of St. Lucie Unit No. 2.*/ On June 3, 1981 the Licensing Board issued its Order, in which it explained that the Notice of Hearing provided an opportunity for hearing on health, safety, and environmental matters associated with issuance of an operating license for St. Lucie Unit No. 2; observed that there is currently an ongoing proceeding to review the antitrust aspects of the construction permit for St. Lucie Unit No. 2; and found that Petitioner sought to raise only antitrust issues and that such issues were outside the scope of its jurisdiction. Consequently, the Licensing Board, relying on the Appeal Board's pronouncements in Marble Hill (Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976))

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*/ FPL also demonstrated in its response that Petitioner has no cognizable interest which would support its intervention in this, or any other, NRC proceeding; that there is no pending antitrust proceeding associated with the Commission's review of the St. Lucie Unit No. 2 operating license; and that the Petition was insufficient to cause the Commission to initiate such a review.

dismissed the Petition.*/ (Order, p. 4).

On June 15, 1981 Petitioner noted its appeal from the Licensing Board's Order. In its Brief**/ supporting its appeal Petitioner argues that the Board committed reversible error in two respects, described below. For the reasons hereinafter set forth, FPL opposes the appeal in both respects.***/

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*/ "Order Relative To Petitions To Intervene Concerning Antitrust Matters." That order also dismissed a petition by certain Florida cities to intervene on antitrust grounds. On June 16, 1981, the sole Petitioner for intervention on non-antitrust grounds having withdrawn, the Licensing Board issued an "Order Dismissing The Proceeding." On June 18, 1981, this Board issued an Order in which it noted the instant appeal and stated that the finality of the Licensing Board's June 16 Order is dependent upon the determination of the appeal.

**/ "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" (Brief).

***/ In its Brief, Petitioner advances a strange procedural suggestion. As Petitioner notes, it now has pending before the Atomic Safety and Licensing Board presiding over the St. Lucie Unit No. 2 construction permit antitrust review a petition to intervene (filed seven years and four months late). Petitioner suggests that this appeal be docketed by the Appeal Board but that action be deferred on the matter "until after the Licensing Board decision" (Brief, p. 2) on its late petition to intervene. Petitioner believes that the Appeal Board, before ruling on the instant appeal, should have "the benefit of the Licensing Board's decision in the pending companion matter." (Id. at 3). Petitioner's suggestion is without merit and should not be heeded by the Appeal Board.

Petitioner erroneously assumes that the issue presented by this appeal is in some way related to the issues raised in its late petition to intervene in the construction permit antitrust proceeding. This, of course, is not the case. The issues presented by its late petition to intervene in the construction permit docket include, among others, whether Petitioner can show good cause for filing its petition seven years and four months late. However, the issue raised in this appeal is simply whether antitrust issues can be heard in a proceeding convened to hear health, safety, and environmental matters. The answer to that question is quite clear, and there is no need for the Appeal Board to delay its decision on that point.

I. The Issues Which Petitioner Seeks To Raise Are Beyond The Scope Of This Proceeding And The Licensing Board Was Correct In Denying The Petition To Intervene

In its Brief, Petitioner contends that the Licensing Board erred when it determined that antitrust issues were not within the scope of the proceeding initiated pursuant to the Notice of Hearing. Petitioner argues that the Notice of Hearing "coupled with the NRC's preexisting policy statements" specifically indicates that antitrust issues were to be included, and states that "[i]f the Commission did not intend [to include antitrust issues], its notice was defective." (Brief, pp. 5-7).

Finally, Petitioner contends that the failure of the Notice specifically to mention antitrust issues violates the Commission's Statement of Policy, Section X of Appendix A to Part 2 because, says Petitioner, that provision compelled the Commission to offer an opportunity for an antitrust hearing when it published the March 9 Notice.*/ (Brief, p. 7).

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*/ Petitioner supports its assertions with respect to the requirements of Section X by quoting in its Brief that part of Section X which provides that, under certain circumstances, a 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 by Petitioner] (Brief, p. 7)

This is true so far as it goes, of course. But what seems to escape Petitioner is that the opening clause in the sentence which Petitioner quotes states, in relevant part, that

> When an application for . . . an operating license for a facility under section 103 of the Act subject to antitrust review under section 105 is received, the notice . . . will state . . . (emphasis added) (10 C.F.R. Part 2, App. A § X(b)(1980))

thus making it clear that such notice provisions are applicable only to antitrust proceedings.

Petitioner's arguments reflect a misunderstanding of the Commission's dual licensing process. It is standard, and long-standing, Commission policy to review antitrust matters raised in connection with the licensing of a facility "separately from the hearings held on matters of radiological health and safety" for the same facility. (10 C.F.R. Part 2, App. A § X(e) (1980); See, e.g., Duke Power Co. (Oconee Nuclear Station, Units 1, 2, and 3), 4 AEC 592 (1971); Boston Edison Co. (Pilgrim Nuclear Power Station), 4 AEC 666 (1971)). In fact, the Commission's rules specifically provide both with respect to construction permits and operating licenses that "unless the Commission determines otherwise" a hearing on the antitrust aspects of an application will be considered at a proceeding other than the one convened to hear environmental and safety matters.*/ (10 C.F.R. § 2.104(d) (1980)).

Moreover, the Appeal Board has previously been faced with a situation virtually identical to that here--that is, an intervenor seeking to raise antitrust issues in a health and

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*/ It is clear that if the Commission chose to do so, it could order a combined antitrust/health and safety hearing; separation of the two is not an absolute requirement. (See, e.g., 10 C.F.R. Part 2, App. A § X(e) (1980) "If a hearing on antitrust aspects of [an] application is [ordered]. . . , it will generally be held separately from the hearing held on matters of radiological health and safety. . . .") (emphasis added). In this instance, however, the Commission has issued no such order and it is well settled that the Licensing Board could not have initiated a new or different proceeding in response to the Petition. (Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582 (1977); Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514 (1980)).

safety proceeding--and has determined that the Commission's policies with respect to convening separate boards to consider antitrust matters apart from health, safety, and environmental matters associated with the same nuclear generating facility "are neither unreasonable nor unfair." (Marble Hill, supra at 171). In fact, the Appeal Board found that policy to be a direct consequence of the expressed intention of the Congress when, in 1970, it adopted the present prelicensing antitrust review provisions of the Atomic Energy Act, Section 105c, and concluded that not to conduct separate proceedings "would conflict with Congressional expectations." (Marble Hill, supra at 171-172). Under the system which has been established, the Commission's Notice sets the scope of the proceeding and establishes the authority of the Licensing Board, and where--as here--a Licensing Board is convened to hear health, safety and environmental issues*/ it lacks jurisdiction to grant a petition to intervene which seeks to raise antitrust issues.

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*/ Petitioner's emphasis on the failure of the Notice to specifically state that antitrust issues are excluded is misplaced. Petitioner fails to comprehend what the Notice includes. The Notice announces receipt of Applicant's application for a facility operating license and environmental report for St. Lucie Unit No. 2 and is therefore limited to the matters set forth therein. The matters in those documents are limited exclusively to the health, safety and environmental effects of operation of the facility. In inviting participation to those whose interest may be affected by "this proceeding" the Notice referred to the proceeding which it announced--an environmental/safety and health proceeding in which antitrust issues are not involved.

(See, e.g., Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 25-26 (1980); Marble Hill, supra).*/

Finally, no opportunity to raise antitrust issues could have been offered by the Notice, because no proceeding to review antitrust matters associated with the review of the operating license for St. Lucie Unit No. 2 has been ordered by the Commission. As FPL pointed out in its Response (pp. 13-14), such a proceeding cannot be initiated until the construction permit antitrust review has been completed, and, even then, only after the Commission, following the advice of the Attorney General, makes the finding that "significant changes" have occurred in FPL's activities after completion of the construction permit antitrust review. (Atomic Energy Act, Section 105(c)(2); South Carolina Electric and Gas Co., CLI-80-28, 11 NRC 817, 823 (n.11), 825 (1980)). Here, the construction permit antitrust review has not been completed and no such finding has been made.

II. The Licensing Board Did Not Err In Failing To Treat Separately Petitioner's Asserted PURPA Interests

Petitioner further argues that its Petition presented a second, independent, ground for intervention in the proceeding,

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*/ See, "Response Of Florida Power & Light Company In Opposition to 'Petition To Intervene and Request For Hearing' Filed by Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc." May 6, 1981, pp. 6-8, (Response), for an additional description of the manner in which the Commission carries out its antitrust responsibilities and the case authorities.

viz., the claimed adverse effect of the settlement license conditions on its asserted rights under the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3 (Supp. III 1979). Petitioner alleges that the Licensing Board erred in dismissing its Petition without mentioning its allegations with respect to the effects of the proceeding on rights to which it claims it is entitled under PURPA. (Brief, pp. 8-9).

Petitioner's assertion that the Licensing Board should have treated its PURPA allegations as a separate grounds for intervention is without merit. First, the Petition represented that it was being filed to "request the Commission to hold a limited antitrust hearing, as described below, on FP&L's application." (emphasis added) (Petition to Intervene, p. 1).

Moreover, the Petition stated that "Petitioner's PURPA rights are interrelated with their antitrust concerns." (Petition, p. 10). Clearly it was rational for the Board to characterize P&W's assertions as dealing "solely" with "antitrust concerns."

Petitioner made no effort before the Board below (and makes no effort before this Appeal Board) to show any interest in the determination of the health, safety and environmental issues with which the Notice was concerned, much less that any such interest might be affected by any proceeding ordered pursuant to that Notice.

In any event Petitioner's assertions with respect to how

any rights to which it might be entitled under PURPA may be affected by action taken by the NRC are groundless. Even if Petitioner did lawfully own or control a Qualifying Facility, which Licensee disputes (Response, pp. 8-12), its arguments that the settlement license conditions somehow affect adversely Petitioner's rights under PURPA*/ are without substance.

Qualifying Facilities are entitled to certain benefits under PURPA. (16 U.S.C. § 824a-3 (Supp. III 1979)). The Federal Energy Regulatory Commission (FERC) is the federal agency charged with administering PURPA and in fact the FERC has promulgated rules which govern both qualification of facilities and benefits conferred on those facilities by PURPA. (18 C.F.R. §.292 (1980)). PURPA contains a comprehensive regulatory scheme regarding the relationship between electric utilities and small power producers. That scheme is unaffected by any license conditions imposed by this Commission**/ and therefore Petitioner's appeal should be dismissed on these grounds as well.

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*/ FPL assumes that this assertion is the thrust of footnote 4, p. 8, in Petitioner's Brief. However, that footnote is not a model of clarity, and it is difficult to tell what point Petitioner attempts to make.

**/ The settlement license conditions expressly acknowledge this in Section XIII(c) which provides: "[n]othing herein shall be construed to affect the jurisdiction of FERC or any other regulatory agency."

III. Conclusion

For the reasons given above, FPL submits that the Order of the Licensing Board should be upheld and Petitioner's appeal denied.

Respectfully submitted,

Douglas G. Green
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036

Herbert Dym
Covington & Burling
888 16th Street, N. W.
Washington, D. C. 20006

Attorneys for Florida Power
& Light Company

DATED: June 25, 1981

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NUCLEAR REGULATORY COMMISSION

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(St. Lucie Nuclear Power Plant Unit No. 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Brief of Florida Power & Light Company in Opposition to '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'", dated June 25, 1981, were served upon the following persons by hand delivery* or by deposit in the U. S. Mail, first class, postage prepaid this 25th day of June 1981.

*Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

*Dr. John H. Buck
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

*Christine N. Kohl
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Ivan W. Smith, Esquire
Chairman
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Robert M. Lazo, Esquire
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Michael A. Duggan, Esquire
College of Business Administration
University of Texas
Austin, Texas 78712

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jerome Saltzman, Chief
Antitrust & Indemnity Group
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard S. Salzman, Esquire
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

*William D. Paton, Esquire
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Joseph Rutberg, Esquire
Lee Scott Dewey, Esquire
Fredric D. Chanania, Esquire
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Ann P. Hodgdon, Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Thomas Gurney, Sr., Esquire
203 North Magnolia Avenue
Orlando, Florida 32802

Robert E. Bathen
Fred Saffer
R. W. Beck & Associates
P. O. Box 6817
Orlando, Florida 32803

George Spiegel, Esquire
Robert Jablon, Esquire
Daniel Guttman, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

William C. Wise, Esquire
Suite 500
1200 18th Street, N. W.
Washington, D. C. 20036

William H. Chandler, Esquire
Chandler, O'Neal, Avera, Gray & Stripling
Post Office Drawer 0
Gainesville, Florida 32602

Janet Urban, Esquire
U.S. Department of Justice
P. O. Box 14141
Washington, D. C. 20044

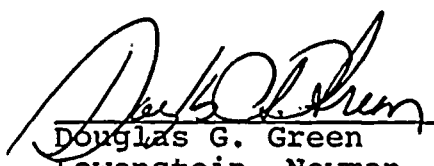
Donald A. Kaplan, Esquire
Robert Fabrikant, Esquire
Antitrust Division
U.S. Department of Justice
Washington, D. C. 20530

Charles R. P. Brown, Esquire
Brown, Paxton and Williams
301 South 6th Street
P. O. Box 1418
Fort Pierce, Florida 33450

* George Kucik, Esquire
Marc Gary, Esquire
Ellen E. Sward, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006

Benjamin H. Vogler, Esquire
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Norman A. Coll, Esquire
Steel, Hector & Davis
Southeast First National Bank Bldg.
Miami, Florida 33131



Douglas G. Green
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N. W.
Washington, D. C. 20036

(202) 862-8400