UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Michael A. Duggan
Robert M. Lazo
Ivan W. Smith, Alternate

SERVED JUL 8 1981

FLORIDA POWER & LIGHT COMPANY	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	July 7, 1981

MEMORANDUM AND ORDER

CONCERNING
FLORIDA POWER & LIGHT COMPANY'S MOTION FOR RESUMPTION OF DISCOVERY,
FLORIDA CITIES' MOTION FOR SPECIAL PROCEDURES,
FLORIDA POWER & LIGHT COMPANY'S MOTION
TO DEFER CONSIDERATION OF MOTION FOR SUMMARY DISPOSITION
AND PARSONS AND WHITTEMORE, INC.'S PETITION TO INTERVENE

I MOTION TO RESUME DISCOVERY

On June 12, 1981, Florida Power & Light Company (FPL) moved to resume discovery. FPL stated that it expects to load fuel in the St. Lucie facility in October of 1982 and that Florida Cities (Cities) have not stipulated that it may load fuel pending the outcome of this proceeding. Consequently, FPL is concerned about possible delay of the opening of its power plant and requests that discovery be resumed.

In its answer of June 22, 1981, Cities urge that "the motion to complete discovery must be considered in light of other motions now before this Board." In particular, they request that discovery be delayed "pending meeting of counsel to limit the issues." To do otherwise, Cities argues, would cause unnecessary expense and delay. They also argue that further

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discovery should be permitted only under firm deadlines so that discovery will not continue indefinitely into the future. They suggest that a pretrial conference be convened prior to the resumption of discovery.

We grant FPL's motion to resume discovery. The possibility of delay in commencing the operation of St. Lucie outweighs the interim inconvenience and delay which Cities may experience while we gain increased control over the discovery process. Although we accept--for reasons stated below--Cities' suggestion that we hold a conference for the purpose of limiting issues, limiting further discovery, and setting discovery deadlines, we will not suspend discovery while the work of the conference is being finished.

II MOTION FOR SPECIAL PROCEDURES

A. Position of Cities

Florida Cities filed a "Motion to Establish Procedures," on May 27, 1981. That motion contains several independent suggestions. First, Cities move for summary judgment pursuant to 10 CFR §2.749(b). They claim that the merits of the dispute have been resolved by the decisions in Gainsville Utilities Department v. Florida Power & Light Company, 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978) and Florida Power & Light Company, Opinion Nos. 57 and 57-A, 32 PUR 4th 313,340 (Federal Energy Regulatory Commission, 1979). Cities also claim that the discovery process has developed conclusive evidence, included in their motion, establishing the existence of a situation inconsistent with the antitrust laws.

Cities has also asked that we bifurcate the proceedings by concentrating on the merits of the case and reserving issues of relief for later. Cities argue that this would be expeditious because the parties could be expected to settle relief issues after the merits are resolved.

Finally, Florida Cities have asked that a prehearing conference be convened pursuant to 10 CFR §2.751a. The purpose of such a conference would be to limit the scope of further discovery and establish a discovery schedule.

B. Position of FPL

FPL has requested relief from the obligation to respond to Cities motion for summary judgment. It argues that "discovery has not yet progressed to the point where FPL should be required to respond to a motion which, on its face, seeks disposition of all issues in the case other than relief." It also states that "it is unlikely that anything useful can be accomplished by consideration of the motion in its present form, particularly at a time when issues have not been clearly defined." FPL then points to a number of alleged defects in Cities' filing, including its inclusion of "sweeping, highly argumentative generalizations" and its alleged resemblance to a trial brief rather than a motion for summary disposition.

FPL urges that before it responds to Cities motion, Cities must submit a "clear and unambiguous statement of the issues and a specific statement of the additional relief which they seek."

C. Conclusion

We find considerable merit in arguments presented by both parties, and we have attempted to find a procedural solution which meets the needs of both.

FPL is correct in criticizing Cities motion for its lack of clarity. In its present form, we have had special difficulty in determining what issues Cities feels have been determined by previous judicial decisions and what issues have been determined as a result of discovery. In addition, Cities' motion is a narrative that does not consistently relate its allegations to a theory of recovery, garnered from previously decided cases.

However, we find that Cities motion was properly filed under §2.749 and FPL has not suggested any authority for the proposition that it need not respond to a summary judgment motion either because it is not clearly written or because FPL would prefer to respond at a later time. Indeed, our evaluation of the current status of this case persuades us that a response to the motion could serve to crystalize the issues. Furthermore, we have resolved the apparent lack of clarity in Cities' motion by framing a series of questions which can serve as a framework for FPL's response and for the prehearing conference needed to discuss the motion and to guide the discovery process to a fair and efficient conclusion. (See Table 1.)

1. Board Questions

The framework we are suggesting for FPL's response should make it easier for it to respond to the Board's concerns; however, it does not relieve it of the obligation to admit or refute Cities allegations. While this may be cumbersome because of the form in which the facts are presented, FPL has already been granted one extension of time within which to respond and this order will provide a further extension of time.

Since FPL has not completed its discovery, it may respond to factual allegations by indicating that certain facts may be refuted as the result of

TABLE 1
SUMMARY JUDGMENT QUESTIONS

Collateral Estoppel

(1) How are these proceedings affected by Gainsville Utilities Department v. Florida Power & Light Company, 573 F.2d 292 (5th Cir.), cert. denied, 439 U.S. 966 (1978) and Florida Power & Light Company, Opinion Nos. 57 and 57-A, 32 PUR 4th 313, 340 (Federal Energy Regulatory Commission, 1979)?

(2) Should the market definitions contained in Gainsville and Florida Power & Light bind us in this proceeding? (See FERC memorandum opinion at 11-13.)

(3) Is it necessary in this proceeding to determine whether there is a separate market for nuclear power?

Factual Issues

(4) To which of Cities assertions is FPL willing to stipulate?

(5) Which of Cities assertions does FPL believe to be rebutted by evidence that is already available to it? What evidence?

(6) Which of Cities assertions does FPL believe it can rebut through discovery it has not yet completed? (Please present a discovery plan indicating with particularity the issues to be covered by remaining discovery and the persons to whom it will be addressed.)

(7) Which of Cities assertions, whether or not they have been stipulated to or challenged, are considered irrelevant by FPL? Why are they considered irrelevant?

Relief

(8) Specifically, what additional relief does Cities seek?

(9) What are FPL's current policies concerning wholesaling, interconnection, wheeling, sales of unit power, and sales of interests in the St. Lucie plant to Cities?

Scheduling

(10) What is a reasonable schedule for the completion of discovery, including estimates of reasonable time periods in which others may be expected to respond to discovery requests which you expect to make?

(11) What special rules for this proceeding could expedite discovery or otherwise hasten its conclusion?

further discovery. However, such assertions should not be broad or sweeping. FPL should clearly indicate the questions it will explore in further discovery and should indicate the inquiries or category of inquiries which it believes will permit it to challenge Cities allegations. It should also indicate to whom those inquiries will be addressed.

Cities also should answer Board questions which are appropriate for it. This will help to crystallize the issues. Since some questions also require the parties to set forth their views concerning relief and concerning their present policies, answers to the Board's questions may improve the prospects for settlement.

2. Conference on Summary Judgment Issues

Because of the complexity and importance of the issues, we are convening a conference for the purpose of oral argument concerning the Board's questions. See 10 CFR §2.718(h). No later than ten days prior to the conference, parties may file written motions to add additional questions to the agenda. Replies to the required filings or to motions to add questions may be made in writing, providing that they are served on the parties and on the Board no later than the day of the conference. Responses also may be made orally at the conference.

It is anticipated that the parties will be permitted 15 minute opening statements and that they will then address specific questions asked by the Board or added to the agenda. The Board will fix a specific time limit for each question and parties will be permitted to exceed that limit only for good cause. Although the conference has been set for two days, every effort will be made to conclude it sooner. However, if speed proves impossible, the parties should be prepared for extended sessions.

III Intervention of Parsons & Whitemore, Inc.

On April 24, 1981 Parsons & Whitemore, Inc. and Resources Recovery (Dade County), Inc. (hereafter "RRD") petitioned to intervene in this proceeding. Since that time, FPL has taken a variety of steps in opposition to that petition. FPL's most recent step, taken on June 26, 1981, was to file a "Partial Response" to the Petition for Leave to Intervene.

A. Specificity of RRD's Allegations

RRD's petition for Intervention incorporated its earlier petition to intervene in the Operating License proceeding for St. Lucie 2. In that document, RRD explained that:

> Petitioners seek to intervene . . . for the limited purpose of assisting the Licensing Board and the Commission to evaluate fully the consequences of implementing Section X of the proposed Settlement Agreement. In particular, Petitioners wish to be heard as to Section X's detrimental impact on the PURPA rights and competitive interests of Petitioners and other similarly situated Qualifying Facilities.

[Emphasis added.] In its brief in support of its petition in the operating license proceeding, RRD shows knowledge of the antitrust issues in this proceeding. It also indicates its support for the allegation that a situation inconsistent with the antitrust laws exists. (See, especially, page 12 of the "Brief.") Furthermore, it sets forth in detail actions of FPL which it contends are violations of the Public Utilities Regulatory Policies Act of 1978 (PURPA) and contends 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."[Emphasis added.]

Under these circumstances, we are unable to accept FPL's argument that RRD "fails utterly to allege a situation inconsistent with the antitrust laws with the specificity required by NRC decisions. . . ."

(Partial Response of FPL, at 2.) In particular, we interpret RRD to be alleging that FPL refused to grant RRD its PURPA rights, thereby committing an act which was inconsistent with the antitrust laws. Unlike the circumstances in Kansas Gas and Electric Company and Kaqnsas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1, ALAB-279, 1 NRC 559, we already have a proceeding in which it is alleged that the issuance of an operating license would maintain a situation inconsistent with the antitrust laws; and this specific allegation (buttressed by legal citations supporting the existence of such a situation) should be interpreted in light of those other, pending allegations. We also are aided in accepting the specificity of this contention because, unlike Wolf Creek, acceptance of this contention would add to an existing proceeding rather than providing grounds for an entirely new proceeding.

B. Good Cause for Late Intervention

FPL also contests the intervention petition because it fails to meet the intervention criteria of 10 CFR §2.714(d) or the late intervention criteria of §2.714(a)(1). It asserts that petitioner's showing of "good cause" is defective, that its rights can be protected in other proceedings, that its concern about purchasing power and gaining access to transmission facilities is not related to the possible effect of St. Lucie on competition, and that its participation would delay the proceeding.

C. Cognizable Interest to Support Intervention

Although we have delayed our discussion of FPL's principal argument concerning RRD's petition, we have not overlooked it. FPL contends that RRD lacks standing in this proceeding because RRD does not own the PURPA facil-

ity for which it is asserting PURPA rights and with respect to which it is alleging anticompetitive practices.

1. FPL's Allegations

The facts which FPL alleges are complex, and they could become more complex if we grant FPL's pending motion to discover additional facts concerning RDD's allegation that it owns the PURPA facilities. Since FPL's allegations are presented clearly and economically in its brief, we have decided to use the following extensive quotation (with footnotes and some parenthetical expressions deleted) to present the allegation:

> Petitioner's assertion of interest in any licensing proceeding conerning St. Lucie Unit No. 2 rests on its representations to the effect that it lawfully owns and controls a solid waste processing facility in Dade County, Florida, as well as an electric generator which will produce electricity from steam raised by the solid waste facility. . . . Petitioner also alleges that it has sought assurance from FPL that it will transmit electricity for Petitioner to potential customers other than FPL.
>
> What Petitioner has failed to disclose to the Commission is that contracts are in existence which defeat any legal right on Petitioner's part to title to the electric generator and to any right, title, or interest in the electric output from the facility. What follows is a brief account of the pertinent facts.
>
> On May 11, 1976 the Black Clawson Parsons-Whittemore Organization submitted a "Proposal" to Metropolitan Dade County for a "Resource Recovery Plant." The Proposal encompassed the construction of a solid waste processing facility (SWPF) which would be owned by the County and operated by the contractor for an agreed upon fee, and an electrical generation facility (EGF) which would be owned and operated by FPL. . . .
>
> Ultimately, these arrangements became discrete formal contractual commitments, covering the SWPF and the generating facility, respectively. In the contract relating to the SWPF, Petitioner, through one of its subsidiaries, agreed to build the SWPF and vest title and ownership in it to Dade County. . . . Even that contract, however, contains provisions establishing that the electrical generating facility is to be owned an operated by FPL.
>
> This commitment to vest ownership of the electric generating facilities in FPL was sealed by a contract between FPL and Dade County, executed in late 1977 [the EGF Agreement]. That contract provides that upon completion of construction and after certain

technical tests have been satisfactorily completed, but before any electric energy has been produced by the facility, Dade County will transfer to FPL the title to the electric generator and those directly associated transmission lines required to connect the electric generator to the FPL grid. Thereafter, FPL will own and operate the electric generators and associated transmission facilities. . . . [T]he contract reflects that Dade County contemplates holding sufficient title to the site, the electric generator, and the transmission facilities to permit the County to perform unconditionally its obligations to transfer to FPL ownership of such facilities and a leasehold interest in the underlying real estate.

Moreover, FPL has now been able to obtain from Dade County a copy of a "Restated Assumption Agreement." By that contract, Petitioners agreed to assume all of the principal obligations of Dade County under its contract with FPL. . . .

* * *

Under the Restated Assumption Agreement, Petitioner, by assuming the obligations of Dade County, has committed to vest in FPL the ownership and operation of the electric generating facility, and has itself confirmed that FPL has the valid legal right to the generating facility and its output. Yet it is that output which Petitioner now seeks to appropriate, in derogation of the rights of FPL (and the citizens of Dade County as well).

At the heart of the matter is the contractual dispute between Petitioner and Dade County. According to a Complaint filed by Dade County in the U.S. District Court in Miami, Dade County has placed in escrow the entire purchase price of the SWPF facility and equipment -- $128 million -- to be paid upon adequate assurance of performance by Petitioner; however, Petitioner has failed to provide those assurances and has purported to repudiate its contractual commitments. . . . FPL is informed that these contractual disputes between Petitioner and the County are now in arbitration. [At the same time, FPL is engaged in settlement negotiations involving Parsons & Whitemore and Dade County.]

* * *

The burden is on the Petitioner to demonstrate the legitimacy of its claim of interest in any NRC proceeding in which it seeks to participate. Here, Petitioner's ability to do so depends upon its ability to demonstrate before this Commission the invalidity of solemn contractual commitments which, on their face, defeat Petitioner's claim. It is not the function of the NRC to resolve a commercial contractual dispute among private parties. . . .

FPL Partial Response at 11-17.

2. Conclusions About Cognizable Interest

RRD has not yet had an opportunity to respond to the FPL allegations. Consequently, we are unable to determine whether those allegations are true. However, we shall assume that those allegations are true for purposes of this discussion.

FPL's allegation relates to 10 CFR §2.714(d)(2), which requires that a petitioner for intervention show "the nature and extent of the petitioner's property, financial, or other interest in the proceeding." It also relates to RRD's specific allegation that it owns the Electrical Generating Facility (EGF).

In the course of its Partial Response, FPL expressed chagrin that RRD did not fully disclose the nature of its interest in the alleged PURPA property. We share in that chagrin and feel that, unless RRD had strong contrary reasons of which we are unaware, it should have fully explained the nature of its interest.

However, even if we accept FPL's version of the facts, it appears likely that RRD has a sufficient interest to be affected by these proceedings. It appears to be in possession of the EGF, whose legal status is subject to litigation and arbitration. If it cannot sell power from the EGF during the pendency of litigation, then the facility will sit idle and the public will not benefit from its capacity to generate power from waste. On the other hand, if it does sell power and did not have any right to do so, FPL has not explained what harm will result. If the proceeds do not belong to RRD, the right to revenues from the sale of power can become an additional issue in the pending litigation.

Whether or not RRD has an interest, it must also show why it is inconsistent with the antitrust laws for FPL to refuse to sell power to the possessor of a facility which it owns. This seems a difficult burden for

RRD to carry. However, the Board is unsure of the proper resolution of this issue because it has not been briefed about whether FPL would be permitted to refuse to sell to RRD if that company's dispute was with a third party. The parties also have not briefed us concerning whether that refusal to sell might be inconsistent with the antitrust laws. In addition, we need to be briefed concerning whether FPL's refusal to sell should be treated differently because RRD's dispute is with it rather than with a third party.

The Board agrees with FPL that the Commission should not become embroiled in a pending contract dispute. On the other hand, it is not clear how we can best accomplish that goal. We are required to consider antitrust issues. If we decide that RRD must be the owner of the generating plant in order to become a party, then we must litigate its interest. If we decide that a lesser interest would support RRD's participation, then we may avoid the necessity for resolving a property dispute. In that case, if RRD is unjustly enriched, it will be up to a court to rectify the potential damage.

D. Conclusion

1. Development of a Sound Record

The Board believes that RRD's participation could lead to the development of a record which might otherwise be incomplete, providing that RRD meets other parts of the test governing the granting of late intervention. There is at present no PURPA entity represented in the proceedings, and it is possible that such entities could be affected by a condition inconsistent with the antitrust laws in different ways than Cities are affected. The principal contribution RRD might make, in this regard, would occur were we to decide that relief is appropriate. Then RRD could assist the Board in fashioning relief.

It does not seem that RRD would make extensive discovery demands in this proceeding. Its participation might be limited to briefs and arguments. Consequently, it is possible that its interests could be as well served by becoming amicus curiae as by being a party.

At the present time, a motion for summary judgment is pending in this proceeding. It is unclear whether RRD wants to participate in briefing and arguing that issue. However, if RRD wants to do so, it should file a Notice of Intention to Appear and then it may file a brief and participate in oral argument as amicus curiae at the Summary Judgment conference. After that, however, its status in this proceeding will be determined by further order.

2. Possible Misunderstanding

We consider that it is not yet appropriate to decide whether RRD can intervene. Although we agree with FPL's assessment of many aspects of the record in the proceeding, we are left with the uncomfortable feeling that RRD has better grounds for intervention than it has stated. While we can not be sure that these better grounds will support its intervention, we prefer not to act before we find out.

RRD should know that the Board agrees with the general tenor of the following passage from FPL's brief:

> Petitioner's complaint is nothing more than that the settlement conditions do not provide it with significant advantages in addition to those it receives under PURPA regulations. The contention that an injunctive condition does not go as far as one would like is no basis for the allegation that activities under the license would create or maintain a situation inconsistent with the antitrust laws.
>
> Thus, to the extent that the Petition may be read as complaining that the license conditions themselves create or maintain a situation inconsistent with the antitrust laws because they diminish Petitioner's rights under some other regulatory scheme, that contention is groundless as a matter of law.
>
> * * *
>
> If Petitioner has any claim that the NRC can entertain it must be based upon allegations of a situation inconsistent with the antitrust laws which pre-existed imposition of the settlement license conditions and which the conditions do not adequately cure. In showing

> good cause for extreme lateness. Petitioner must explain why it never came forward to complain of the situation, not why it only now complains of the breadth of remedial conditions.

[Emphasis in original.] ("Partial Response" at 19-20, 26.)

3. Need for a Conference

For the reasons we have just stated, we do not believe that the petition presented by RRD is satisfactory in its present form; but we also believe that RRD's participation in this proceeding could be helpful and that it has not yet stated its grounds for intervention in their strongest form.

To help us to determine whether RRD's petition should be granted, we have decided to convene a conference. The purpose of the conference will be to explore the questions raised in this memorandum and presented in Table 2. We expect that the parties will begin with 15 minutes each for opening argument. Then we will expect argument on each of the questions to be kept within time limits set by the Board. Extensions of time will be granted only for good cause. Additional questions may be added to the agenda by written motion filed no later than three days before the conference.

O R D E R

For all the foregoing reasons and based upon consideration of the entire record in this matter, it is this 7th Day of July, 1981

ORDERED

(1) The motion of Florida Power & Light Company (FPL) to Resume Discovery, filed on June 12, 1981, is granted.

Table 2
PARSONS AND WHITEMORE QUESTIONS

1. What is the minimum interest required by law for Parsons & Whitemore to obtain standing?

2. Are there serious unresolved questions concerning whether Parsons & Whitemore meets minimum standing requirements?

3. Does FPL continue to request the issuance of a subpoena? Is the present request more limited? How burdensome would it be for Parsons & Whitemore to comply?

4. Has Parsons & Whitemore alleged that licensing of St. Lucie would create or maintain a situation inconsistent with the antitrust laws?

5. Has Parsons & Whitemore shown good cause for its late filing?

6. Would it be appropriate to admit Parsons & Whitemore provisionally as a party, subject to subsequent discovery concerning its party status?

7. Would the presence as a party of a PURPA entity be helpful: (1) to the determination of whether there is a situation inconsistent with the antitrust laws; (2) if necessary, to the fashioning of remedies?

8. Would it be appropriate to grant Parsons & Whitemore the status of amicus curiae? Would that status fulfill its needs?

9. If Parsons & Whitemore is amicus, would it be appropriate for Cities to propound interrogatories, at its suggestion, concerning whether Florida Power & Light's treatment of it (or other PURPA entities) constitutes a situation inconsistent with the antitrust laws?

10. If Parsons & Whitemore is admitted as a party, are there conditions which should be attached to its participation in order to avoid undue complexity and delay?

(2) FPL's motion to defer consideration of Florida Cities' (Cities) Motion for Special Procedures, filed on May 27, 1980, is denied, except to the extent that specific times are set for responding to that motion in this Order.

(3) On or before August 4, 1981, parties shall file briefs addressing the questions asked by the Board in Table 1 to the Memorandum accompanying this Order.

(4) The brief filed by FPL on or before August 4, 1981, shall include its complete response to Cities May 27 motion.

(5) In the brief they file on or before August 4, 1981, parties also should indicate their complete discovery plans, described with enough specificity to know what factual conclusions might be affected by the remaining discovery and how much effort and time might reasonably be expected to be consumed in responding to planned discovery requests.

(6) A conference shall be held at 9:30 am on July 20, 1981, in the Nuclear Regulatory Commission hearing room, on the 5th floor of East-West Towers, 4350 East West Highway, Bethesda, Maryland, for the purpose of addressing the Board's questions contained in Table 2 of the Memorandum accompanying this Order.

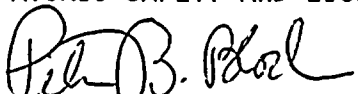
(7) A conference shall be held at 9:30 am on August 17 and 18, 1981, in the Nuclear Regulatory Commission hearing room, on the 5th floor of East-West Towers, 4350 East West Highway, Bethesday, Maryland, for the purpose of addressing the Board's questions contained in Table 1 of the Memorandum accompanying this Order.

(8) Parsons & Whitemore may file, as amicus curiae, the brief described in paragraphs (3) through (5) of this Order and may

appear for the purpose of oral argument at the Conference called in paragraph (7) of this order, providing that it signify its intention in a Notice of Appearance filed on or before July 13, 1981.

(9) Written motions to add items to the agenda of the conferences called pursuant to this Order must be filed no later than four days prior to the conference provided for in paragraph (6) or ten days prior to the conference provided for in paragraph (7).

FOR THE
ATOMIC SAFETY AND LICENSING BOARD



Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

July 7, 1981
Bethesda, Maryland