UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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

PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

Pursuant to 10 CFR § 2.714 and the Commission's March 9, 1981, notice of receipt of an application from Florida Power & Light Company (FP&L) for a facility operating license, 46 Fed. Reg. 15831, Parsons & Whittemore, Inc. (P&W) and its subsidiary, Resources Recovery (Dade County), Inc. (RRD), jointly petition for leave to intervene in this proceeding and request the Commission to hold a limited antitrust hearing, as described below, on FP&L's application. The grounds for this petition and request are set forth below and some of them are elaborated upon in the accompanying brief.

IDENTITY OF PETITIONERS

(1) P&W is a New York corporation engaged in a variety of industrial activities in the United States and throughout the world. One of the activities in which P&W and

its subsidiaries are engaged is the construction and operation of facilities for processing solid waste.

(2) RRD is a Delaware corporation that is wholly owned by P&W. 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 nameplate 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).

INTEREST OF PETITIONERS IN THIS PROCEEDING

(3) Petitioners seek to intervene in this proceeding to protect their rights and the rights of similarly situated entities under PURPA, the federal antitrust laws and Section 105c of the Atomic Energy Act, as amended, 42 U.S.C. § 2135(c). It is Petitioners' contention that if FP&L is permitted to operate St. Lucie Plant, Unit No. 2, under the terms of the proposed Settlement Agreement pending in NRC Docket No. 50-389A,

particularly Section X relating to transmission services, the effectuation of an important aspect of federal energy policy as reflected in PURPA may be frustrated and a "situation inconsistent with the antitrust laws" may be created or maintained. 42 U.S.C. § 2135(c)(5).

(5) Petitioners will be directly impacted by the above-described consequences of implementing Section X of the proposed Settlement Agreement. RRD has complied with the requirements of PURPA and has taken the necessary steps to secure the benefits to which it is entitled. On March 13, 1981 RRD notified the Federal Energy Regulatory Commission (FERC) that it is a Qualified Facility under the Act. A copy of that notice was served the same day on FP&L with a covering letter informing FP&L that RRD "will begin sales of electric energy to Florida Power & Light on or after ninety days from the date hereof." (Letter to Robert Tallon of FP&L from George E. Boyhan of RRD; Appendix A).

(6) RRD has also sought "to explore competitive opportunities for sales to other electric utility entities." To that end, RRD wrote FP&L on April 3, 1981 and asked it to confirm that FP&L "will transmit electricity in behalf of RRD to potential customers other than FP&L." As authority for requiring FP&L to provide RRD with transmission services, RRD cited the antitrust laws and the proposed Settlement Agreement. See Letter from David Bardin, Counsel for P&W and RRD, to L. Christian Hauck, FP&L's Vice President, Legal Affairs (Appendix B).

(7) As described more fully below and in Petitioners' accompanying brief, Section X of the proposed Settlement Agreement affects Petitioners' ability to secure its full rights under PURPA and to gain access to FP&L's transmission grid so it can compete with FP&L in the sale of electric power. To the extent that the operating license sought by FP&L in this proceeding incorporates Section X, Petitioners will be directly and detrimentally affected.

POTENTIAL EFFECTS OF THIS PROCEEDING ON PETITIONERS' INTERESTS

A. Effects on Petitioners' PURPA rights.

(8) Section X of the Settlement Agreement, for the first time in an NRC licensing proceeding, purports to confer benefits on Qualifying Facilities within the meaning of PURPA. In reality, those benefits may be entirely illusory; indeed, Section X may even require RRD and other Qualifying Facilities to abandon valuable PURPA rights to benefit from the transmission services afforded by Section X.

(9) Section 210 of PURPA seeks to encourage co-generation and small power production. It does so by conferring upon Qualifying Facilities the right to sell their electrical output to an electric utility, to interconnect with a utility and to buy at retail from the utility electric power needed within the facility. The implementing regulations exempt Qualified Facilities from most utility-type regulations to encourage

competitive entry by industrial concerns into the generation business. Congress enacted these PURPA provisions to overcome the reluctance of electrical utilities to do business with such Qualifying Facilities on an economically viable basis. One of the important effects of PURPA is the facilitation and encouragement of competition from new electrical power sources. */

(10) Section X appears to advance the principles summarized in paragraph (9) above by requiring FP&L to transmit power "(5) from any qualifying cogeneration facility or small power production facility (as defined by the Federal Energy Regulatory Commission in 18 CFR Part 292, Subpart B) with which Company is interconnected to a neighboring entity or neighboring distribution system, ..." That commitment to transmit power, however, is conditioned upon a Qualifying Facility's forfeiture of valuable rights under PURPA. Specifically, under Section X(a)(5) the Qualifying Facility must arrange to receive any sales of backup power and maintenance power from the neighboring entity or neighboring distribution system to which transmission services are provided. That condition would force RRD and other Qualifying Facilities to abandon their right to sell all of their electric power at the buyer's avoided costs, under the

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*/ Several provisions of PURPA have been recently held unconstitutional by Judge Harold Cox of the United States District Court for the Southern District of Mississippi, Mississippi v. FERC, Civ. Action No. J79-02212(c), (Feb. 19, 1981). Petitioners' counsel have been informed that the Solicitor General intends to appeal that decision directly to the Supreme Court.

terms of PURPA, and to buy at retail from FP&L in accordance with the latter's obligations to provide all of the energy needed by the Qualifying Facilities.

(11) By placing restrictions on the provision of transmission services to Qualifying Facilities which do not apply to "neighboring entities," Section X unfairly and unreasonably discriminates against Qualifying Facilities. Although Petitioners believe that the RRD facility in Dade County is both a Qualifying Facility and a "neighboring entity," language of subsection X(a)(5) might be construed by FP&L as diminishing rights that had been conferred by the other subsections.

(12) Subsection (b) of Section X introduces a further restriction of the rights conferred on neighboring entities and Qualifying Facilities. That provision states that "Nothing in this license shall be construed to require Company to wheel power and energy to or from a retail customer." Although the restriction should be interpreted only as a limit on retail customers which are <u>not</u> in the generation business, a clarification or modification to this effect is essential to assure that the proviso will not force a Qualifying Facility, exercising its right to purchase electricity at retail, to cut itself off from the needed transmission services.

B. Antitrust Effects

(13) FP&L possesses monopolistic control over the provision of transmission services in southern and eastern Florida.

(14) Section X of the Settlement Agreement is so written as to afford FP&L unreasonable opportunities to construe the provisions contained therein in a way that would defeat their procompetitive objective, thereby maintaining FP&L's monopoly power over transmission services.

(15) The unreasonable and unfair discrimination between Qualifying Facilities and other generators of electricity described in paragraph (11) above, would place Petitioners and other similarly situated entities at a competitive disadvantage.

(16) Subsection X(a) of the Settlement Agreement, particularly conditions (3), (4), and (5), give FP&L excessive discretionary latitude in denying Petitioners and other similarly situated entities access to FP&L's transmission grid, thereby enabling FP&L to prevent Petitioners and others from selling their generated electricity to municipal utilities.

(17) The effects described in paragraphs (13) through (16) above are more fully analyzed in the accompanying brief. They support Petitioners' contention that implementation of the Settlement Agreement as written would significantly change FP&L's activities and proposed activities within the meaning of Section 105c of the Atomic Energy Act, as amended, 42 U.S.C. § 2135 (c)(2), requiring the Commission to hold an antitrust hearing at this time. These new anticompetitive activities are particularly invidious since, once approved, they will appear to have the sanction of NRC and the Justice Department. That fact coupled

with the superficial impetus to competition afforded by the Section X transmission provisions make it critical that the position of Qualifying Facilities under PURPA be taken into account before the operating license issues.

NATURE OF PETITIONERS' RIGHTS UNDER THE ATOMIC ENERGY ACT TO INTERVENE

(18) Petitioners are entitled to intervene in this proceeding pursuant to Sections 105c and 189 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2135(c), 2239. Section 189 states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." As described in paragraphs (8) to (17) above, Petitioners' PURPA rights and their competitive interests will be directly impacted by the issuance of an operating facility license containing, or subject to, the conditions of the Settlement Agreement. Therefore, they should be permitted to intervene and be heard to protect those rights and interests and the rights and interests of other similarly situated entities.*/

(19) Section 105c of the Atomic Energy Act provides an additional statutory basis for intervening and seeking a

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*/ The staff of the Florida Public Service Commission has estimated that the Florida capacity for Qualifying Facility projects approaches 2700 megawatts.

hearing on the antitrust issues. That section requires that an antitrust review be held at the operating license stage if "significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission ... in connection with the construction permit for the facility." The significant changes brought about by FP&L's intended implementation of the Settlement Agreement and their effects upon Petitioners, as described in paragraphs (13) to (17) above and in the accompanying brief, give Petitioners the right to intervene for the purpose of establishing the need for, and participating in, a second antitrust review under Section 105c.

ASPECTS OF PROCEEDING AS TO WHICH PETITIONERS WISH TO INTERVENE

(20) Petitioners seek to intervene in the instant proceeding 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 potentially detrimental impact on the PURPA rights and competitive interests of Petitioners and other similarly situated Qualifying Facilities.

(21) Petitioners do not believe that a trial-type antitrust hearing is necessarily required here. They are

prepared to accept the record as developed to date, and would not ask that it be reopened. Petitioners seek only to supplement that record, in any manner the Commission deems appropriate, to present their evidence to the Commission and to argue their position based upon the supplemented record. Petitioners' evidence will include FP&L's answer to the letter marked as Appendix B, which they have requested by April 17.

(22) As the accompanying brief points out, Petitioners' PURPA rights are interrelated with their antitrust concerns. The PURPA rights, however, can be separately considered and protected without an antitrust hearing, if the Commission is so inclined. One of Petitioners' contributions as intervenors will be to demonstrate the inconsistencies between the Settlement Agreement and the rights afforded by PURPA.

(23) Since Petitioners' interest in the proceeding is limited to Section X of the Agreement, their rights could be easily and efficiently protected without undue delay in the issuance of FP&L's operating license.

CONCLUSION

This petition to intervene should be granted, and an order allowing intervention should be entered. A limited anti-trust hearing, as described above, also should be ordered.

Respectfully submitted,

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