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

FLORIDA POWER & LIGHT COMPANY	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	August 5, 1981

MEMORANDUM AND ORDER

CONCERNING
PETITIONS FOR LEAVE TO INTERVENE
FILED BY PARSONS AND WHITTEMORE, INC. AND
RESOURCES RECOVERY (DADE COUNTY), INC.

On April 24, 1981, Parsons and Whittemore, Inc. and Resources Recovery (Dade County), Inc. (hereinafter "RRD") filed a Petition for Leave to Intervene and Request for Hearing (Petition). This Memorandum and Order analyzes the merits of the Petition.

A conference of Counsel was conducted on July 20, 1981, for the purpose of considering the RRD Petition. At that conference, the parties argued the merits of this motion and responded to a series of questions posed in our Order of July 7, 1981.

RRD's Petition to intervene in this antitrust proceeding was filed after Florida Power & Light (FPL) refused to buy power or wheel power to third parties from an electrical generating facility (EGF) located in Dade County, Florida and controlled by RRD. The EGF is part of a plant designed

D501
S
1/1

to generate steam and electricity from waste. The plant was built by RRD for Dade County, which contracted to buy the entire plant and in a separate contract, agreed to reconvey the EGF to FPL.

Prior to the completion of construction of the plant, the project became mired in dispute, including federal court litigation, arbitration, filings before the Federal Energy Regulatory Commission, this proceeding and an incipient proceeding before the Florida Public Service Commission.

RRD argues that, as the result of this dispute, it is currently the owner of the EGF. It also claims that the facility is a qualifying small power production facility, covered by the Public Utilities Regulatory Policy Act of 1978 (PURPA), which was designed to encourage uncoventional means of small power production. Under PURPA, RRD requested that FPL buy its power at FPL's "avoided cost" and that it wheel its power to third persons. However, FPL refused RRD's request for PURPA rights and contested its claim before FERC.

RRD argues that FPL's refusal was at the same time a violation of PURPA and inconsistent with the antitrust laws. In this proceeding, it seeks to intervene because of its antitrust concerns and its desire to impose on FPL license conditions favoring PURPA entities.

FPL argues that the EGF was built for it, that RRD has created the present situation by refusing to abide by its contractual commitments to Dade County, that there are specific contractual provisions prohibiting RRD from operating the EGF, that the EGF is not a qualifying facility under PURPA and that it has not violated PURPA nor committed an act that is inconsistent with the antitrust laws. It also argues that RRD has failed to allege a nexus between its complaint and the operation of St. Lucie 2 and

that RRD has not met the criteria for intervention in this proceeding, concerning an application for a construction permit filed by FPL eight years ago.

I. THE APPLICABLE REGULATIONS

Under 10 CFR §2.714(a)(2), a petition for leave to intervene as a party

> shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioners should be permitted to intervene with particular reference to the factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

Paragraph (d) of §2.714 states:

> [T]he Atomic Safety and Licensing Board designated to rule on petitions to intervene and/or requests for hearing shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:
>
> (1) The nature of the petitioner's right under the act to be made a party to the proceeding.
>
> (2) The nature and extent of the petitioner's property, financial or other interest in the proceeding.
>
> (3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

In addition to these factors, which are applied to any intervention petition, there are special factors that must be balanced and applied to late petitions. Those factors, found in §2.714(a)(1), are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

II. CONSIDERATION OF FACTORS GOVERNING LATE INTERVENTION

Although the bulk of the effort expended by the participants has been related to the standing of RRD, we consider it more important to apply to this case the standards governing late intervention. On balance, we find that those standards require that RRD's intervention petition be denied. In this portion of the Memorandum, we shall discuss the application of those standards.

A. Other Means to Protect RRD's Interest

(1) Position of RRD

RRD's principal argument about the availability of other means to protect its interest is its statement that "petitioner's interest can be protected only by allowing them to be heard in the interrelated construction and operating licensing proceedings." (Petition at 8.) Petitioner also states that "the Commission has ample power to implement its statutory mandate to protect Petitioners' interest at this stage of the licensing proceedings." (Ibid.)

The Petition does not compare the remedy provided by Federal Energy Commission regulations to the remedy that might be provided in this

proceeding. RRD does state that FERC regulations, at 18 CFR §292.305(b)(1), provide that upon request of a qualifying facility, a utility:

> shall provide (i) Supplementary power, (ii) Back-up power, (iii) Maintenance power, and (iv) Interruptible power.

(Petition at 5.) Furthermore, RRD informs us in its petition to intervene in the operating license proceeding for St. Lucie (OL Application), which it attached to its petition to intervene here, that:

> Section 210 of PURPA [Public Utilities Regulatory Policy Act of 1978] seeks to encourage cogeneration 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.

(OL Application at 4-5.)

RRD is currently involved in a FERC proceeding. (July 20 transcript [Tr.] at 13.) It also is about to initiate a proceeding before the Florida Public Service Commission. (Ibid.)

RRD's apparent reason for believing that its FERC remedy is incomplete is its concern that a settlement agreement entered into between Staff, the United States Justice Department and FPL will adversely affect its PURPA rights. It states that "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." (OL Application at 8.)

(2) Position of FPL

FPL asserts that petitioner seeks to protect interests that arise

under PURPA and not the Atomic Energy Act. Partial Response of Florida Power & Light Company, etc. (Response) at 29. It also states that PURPA contains provisions (16 U.S.C. §824; (Supp. III 1979)), which empower FERC to order any electric utility to provide transmission service upon the application of any qualifying small power producer.

At oral argument, FPL enlarged upon this position in the following language:

> The reason [RRD] . . . is not getting wheeling under the [settlement] license condition is that we don't concede they're a qualifying facility [under PURPA]. If we conceded they were a qualifying facility or if someone found that they are a qualifying facility --and that someone clearly ought to be FERC-- then something is going to happen pretty quickly. On the other hand, if we go through a year's worth of proceeding here and at the end of that time this Board concludes that people who are qualifying facilties are entitled to something a little different, if these people still aren't qualifying facilities they won't get anything out of that.

Tr. 58. In addition, the following dialogue occurred:

> JUDGE BLOCH: I take it if there were an antitrust violation under PURPA, a refusal to deal, [FERC] . . . would not be a forum for that aspect of it. . . .
>
> MR. BOUKNIGHT (FPL): . . . I think that the FERC's position is that under PURPA it can consider antitrust positions. . . .

(3) Conclusion

We conclude, based on the facts and argument before us, that RRD can seek complete relief for all its grievances from FERC. RRD has not shown us any aspect of the relief it seeks which could not be granted by FERC, which has the authority to require FPL to buy power from a qualifying small power producer, and to physically connect with and wheel power for qualifying small power production facilities. 16 CFR §824i and §824k.

Furthermore, in reaching that determination, FERC is required to consider antitrust issues, so that any antitrust problems relevant to the case also can be considered by FERC. See Gulf States Utilities Co. v. Federal Power Commission, Dist. Col. 1973, 93 S.Ct.1870, 411 U.S. 747, 36 L.Ed. 635, rehearing denied 93 S.Ct. 2767, 412 U.S. 944, 37 L.Ed.2d 405.

In addition to the FERC remedy, RRD also is engaged in arbitration, which could completely resolve its problems. During the Conference of Counsel, we learned that RRD also is pursuing action before the Florida Public Service Commission. Since we were not informed what is at issue in that proceeding, it is possible that RRD's entire problem also could be cleared up there.

In short, RRD has a plethora of remedies and has not explained why it is in special need of intervening in this case.

We also agree with FPL that RRD appears to have brought this proceeding to protect interests that arise under PURPA rather than under the Atomic Energy Act. Petitioners explained their interest in intervention primarily in terms of PURPA. Petition 3-6; OL Petition 2-6. Indeed, as the following language indicates, the principal harm of which RRD complains is that a partial settlement agreement previously approved by the Board in this case adversely affected their PURPA rights:

> Petitioners contend overall, 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. This has occurred without prior notice to the affected qualifying facilities and without their participation or comment. . . .

Petition at 5; see also OL Petition at 7-9, 16-20.

However, RRD has not moved to reopen the question of whether or not the Board should approve the partial settlement agreement, which was reached by the Department of Justice, Staff and FPL. The Order approving the Agreement was issued on April 27, 1981, three days after RRD petitioned to intervene in this proceeding. Consequently, that Order has become final and even were RRD to succeed in intervening it could not challenge that Order.

In addition, as RRD conceded at the Conference, neither the April 27 Order nor the settlement agreement deprived RRD of PURPA rights. If RRD chooses to avail itself of the licensing terms, it may do so. However, Section XII(c) of the Settlement Licensing conditions, expressly preserves the jurisdiction of FERC. (See Response at 19.) If RRD finds that in some respects rights available to it under PURPA are more extensive than the licensing rights, then there is nothing in the settlement or the licensing conditions that prevents RRD from asserting PURPA rights. (See Tr. 16-18, 131-134.)

At this stage of the proceeding, Florida Cities continues to be a party because it did not agree to the settlement. It tried and failed to have the Board attempt to persuade the parties to make the settlement favorable to it. In particular, it was unable to show how the settlement would injure it.

Florida Cities is contending that a situation inconsistent with the antitrust laws exists. If it proves that contention it will be entitled to appropriate relief, in the form of remedial conditions ordered by the Board. Those conditions, if imposed, may consider the terms of the settlement. However, the reason for imposing conditions on FPL would be that

Florida Cities prevailed on the merits, and not because a settlement was negotiated. See April 24 Order, pp. 12-13.

As a result of this procedural posture of our case, which seems not to have been fully appreciated by RRD, there is no quick way for us to resolve the problem confronting RRD. Tr. 24-25. RRD's request would require us to determine the merits of the case. Although we may conclude this case before FERC concludes its, that is by no means certain.

Were RRD seeking to participate fully in the adjudication of the merits of this case, then it is possible that relief would be available before the NRC that is not available before FERC. But RRD wants to limit its participation as much as possible to exactly the same issues as pend before FERC. RRD does not seek to participate in adjudicating the merits of the case. Tr. 22. It seeks limited participation only with respect to the circumstances surrounding FPL's refusal to sell it power.

The limits RRD places on its own participation make it clear that its FERC remedy is adequate for its purposes. Since FPL states that it is willing to permit P&N to operate the steam generating portion of the plant on a one year basis and to pay PURPA prices for steam bought by the EGF, even the adjudicatory delay at FERC does not seem a serious problem for RRD. (Tr. 41.) Furthermore, we agree with FPL that the antitrust issues impliedly raised by RRD are peculiarly within the competence of FERC. Were these issues legitimately raised by a party to our proceedings, we would necessarily resolve them. But when the issues may be admitted or not in our discretion, we can weigh the special competence of FERC in deciding whether to admit the issues. That competence arises because FERC has the responsibility for administering PURPA and the antitrust issue impliedly

raised here is whether small power facilities have antitrust rights additional to their PURPA rights or whether PURPA rights preempt antitrust rights.

To summarize, we have concluded that the other remedies available to RRD are not only sufficient for its purposes but, for public policy reasons, are actually superior. RRD has failed to demonstrate any way in which an NRC proceeding might provide it relief which it cannot receive from FERC if, as it claims before both agencies, it is a qualifying small power producer.

B. Good Cause for Late Filing

(1) Position of RRD

The Petition's only stated ground for good cause for late filing is that RRD "recently unearthed" the partial settlement agreement adopted in this case. Petition 7-8.

In the course of the Conference of Counsel, the Board suggested that RRD's filing implied better cause for late filing than had been explicitly stated. Tr. 56-57. Later, RRD adopted the suggested argument as its own. RRD stated that:

> [W]e had discussions [with Dade County] . . . about changing the contracts, but we had had those before. The thing blew up at the end of 1980, with a lawsuit by Dade that got aborted by the Court's throwing it out on [lack of] diversity on its own motion, [by] our arbitration, [by] our demand for partial payment, [and by] their claim of anticipatory breach. And then we qualified the facility in March of 1981. . . . [and] asked them to wheel in April, and we get involved here in April. . . .
>
> We had a disagreement. There was never any intention on our part prior to that to just take what they consider to be their plant. But after things became intractable and we were sued and we had to go to arbitration, we terminated the contracts pursuant to [the contract] . . . terms. . . . [W]e had to do something with [the facilities]. . . . And that is where we are.

Tr. 116-117. RRD also argued that it would not have had standing had it sought to intervene prior to the contract problems because it was only then that they began to have a need to exercise PURPA rights, including a request for interconnection and wheeling. Tr. 117.

(2) Position of FPL

FPL highlights the Petition's claim that the settlement license conditions create and maintain a situation inconsistent with the antitrust laws. FPL regards this argument as patently false as a matter of law and argues, therefore, that RRD's failure to hear of these conditions cannot create "good cause," as a matter of law. (Response 18-19, 25-27.) FPL also cites St. Lucie, CLI-78-12, 7 NRC at 946-947, for the proposition that, "A very late petition must present a very strong petition for late intervention."

FPL also argues that the Board's "good cause" determination should weigh adverse factors in the balance. It suggests that the Board make a subjective judgment about whether RRD is attempting to use Commission proceedings merely to gain commercial advantage in a contract dispute. It also suggests that RRD's Petition should have fully disclosed the contract dispute concerning ownership of the EGF and that failure to disclose constitutes an unacceptably "recalcitrant attitude."

At the Conference of Counsel, FPL argued that the proceedings are so far advanced that no further intervention should be allowed. (Tr. 57.) It also argued that even if intervention were allowed at this stage for egregious violations of the antitrust laws, the present allegations arise in

the context of a contract dispute and do not constitute egregious antitrust violations. (Tr. 57-58, 55-56.)

FPL advanced the argument that RRD must bear the burden of showing cause for late filing. In this instance, FPL argues that RRD would have to show "that indeed only at that very last moment did it occur to Parsons & Whittimore that they might want to wheel some power out of this facility." Tr. 86. Furthermore, FPL said that considerably before December 1980, at a time not specified in the record, RRD had indicated that it was financially unable to operate the EGF according to its contractual commitment. Tr. 38, 92-93 (citing Dade County's federal district court complaint, since dismissed for want of diversity of jurisdiction), 98 (complaint does not just "get filed out of the blue"). FPL also said it was prepared to show that an official of Parsons & Whittimore told FPL last autumn that Parsons & Whitimore never had any intention of transferring title to FPL. Tr. 86-87. Consequently, FPL argues that RRD did not suddenly wake up last April and decide it wanted to get power wheeled out of its facility. Ibid. Hence, it is FPL's position that RRD also has not shown good cause for late filing due to its unexpected position as owner of the EGF. FPL also requested discovery on this possible ground for good cause. Tr. 87-88.

3. Conclusion

(a) Seriousness of Problem in View of Extreme Lateness

We find that the antitrust problem alleged by RRD is not sufficiently serious to justify intervention.

The proceeding is eight years old and FPL estimates an October 1981 date for St. Lucie 2 to begin operations. Although we are not prepared to

accept FPL's argument that intervention is impossible in so old a proceeding, we agree that the test for intervention becomes increasingly rigorous as time passes.

If RRD were alleging an egregious violation of the antitrust laws, particularly one which differed in nature and kind from other allegations in the proceeding, we would be more ready to accept intervention. But RRD's allegation of a situation inconsistent with the antitrust laws is not particularly egregious.

The record contains contracts pursuant to which FPL expected to assume ownership of the EGF. We have been informed, without contradiction by RRD, that if RRD begins generating electricity from that plant FPL would lose a tax credit for which it had bargained. In addition, should FPL later gain title to this facility it would not be able to commence generating power without first petitioning FERC for the right. The FERC petition would be necessary because FPL would be seeking to begin selling electricity from a plant which had previously generated electricity (other than for demonstration or test purposes). Tr. 40, 42.

Under these circumstances, it is possible that after a lengthy evidentiary hearing RRD could persuade us that it was inconsistent with the antitrust laws for FPL to decide to contest RRD's alleged PURPA rights before FERC. However, the extent of the alleged fault would be that FPL, as part of a broader scheme of monopolization, was participating in a proceeding provided for by law under circumstances where it has an arguable ownership right in the alleged small power facility. We find that not to be the kind of egregious antitrust violation for which such such late intervention is appropriate.

In addition, we note that the only ground RRD alleged for its late intervention had to do with lack of knowledge of a settlement agreement reached in this case. However, notice of a hearing concerning that agreement was published in the Federal Register of January 15, 1981 at 3683. RRD has not sought to show that it was entitled to personal notice of that agreement. Hence, we are not able to find that lack of notice deprived it of due process of law.

For reasons we already stated, RRD has no legal grievance at all resulting from the settlement agreement. Its rights have not been adversely affected by the agreement. Consequently, lack of knowledge of that agreement can not have created good cause for intervention.

(b) Excuse for Lateness

We find that RRD's reasons for late filing were not specific enough.

It was initially our impression that RRD had better grounds for intervention than it had stated in its Petition. We hinted as much in our July 7 Order at p. 13. We stated as much at the Conference. Tr. 56. However, we are persuaded by FPL that, despite our prompting, RRD's statements at the Conference did not allege good cause with sufficient specificity.

In particular, we are concerned that RRD failed to contradict FPL's representations that RRD should have filed soon after February 1980. FPL stated that by then, RRD knew that it could not afford to operate the EGF pursuant to the operating contract. Furthermore, RRD apparently learned

shortly thereafter that its demand for renegotiation of key payment terms would not be met.

RRD conceded that Dade County's decision not to pay it for the facility occurred only after RRD had informed Dade that it would not live up to the terms of the operating agreement. This subject was addressed extensively at the Conference. FPL asserted (Tr. 38) that:

> Some time in 1979, Parsons & Whittimore told Dade County: "We are going to lose our shirts if we have to comply with that contract. We will be operating at a loss every year. We've got to have some more money in order to make the deal go."

Later, FPL appears to have modified this assertion by stating that it possesses a letter, which is not in our record, documenting that Parsons and Whittimore said in February 1980 it would not operate the EGF.

FPL also referred to paragraph 39 of a complaint that Dade County filed in federal district court; and that complaint, which is attached to FPL's request for a subpoena, asserts that RRD would not operate the EGF under the terms of the EGF contract.

By contrast, RRD never denied the validity of either the 1979 date or the February 1980 date suggested by FPL. Nor did RRD suggest its own date. Instead, it admitted on several occasions a lack of detailed knowledge of the ongoing arbitration proceedings. Tr. 10, 74, 78-79. It also participated in the following dialogue (Tr. 76), which we interpret to confirm that RRD's decision not to meet its obligation to operate preceded Dade's decision to refuse to pay for the facilities:

> JUDGE BLOCH: So your understanding was that the first thing to occur was a refusal to pay based on nonperformance, and that other issues concerning whether or not you were going to operate occurred later.

> MR. KUCIK (RRD): They said that they were afraid that if it were true, what we were saying, that the shortfall was so great that we simply wouldn't be able to operate and we would walk away from it, and therefore they were not going to pay us any money and they were going to go to court. We said, look, we just want to talk about it, the plant is substantially completed, we need the $90 million. We have earned it and we are getting killed by the interest and we are now in arbitration. We were in court and we are in this big mixup.

We conclude that RRD may have known of its serious contractual impass on or before February 1980. RRD has not asserted anything to the contrary, and it is its burden to allege with particularity its good cause for late filing. Similarly, RRD has not explained its delay in petitioning for intervention from the date it knew of the contract impass to the present. That is a substantial delay during which a company of RRD's size should have uncovered potential forums for its concerns, including this forum.

Had RRD learned of this proceeding earlier, it could have sought to persuade the Staff and the Justice Department to seek more stringent settlement terms with respect to PURPA facilities. This could have gone part way to resolve its current problems. It also could have sought to persuade the Board to require amendment of the settlement agreement. Or, it could have sought PURPA status before FERC, thereby forcing FPL to declare whether it would concede that RRD had PURPA rights or would stand by contract provisions that prevented any other firm from first operating the EGF. Once FPL had declared its position before FERC, RRD could have decided to seek more timely intervention here.

In summary, RRD failed to show good cause for late filing because it failed to state with specificity when it first learned that it might have to operate the EGF and it failed to excuse the delay between finding out about the need to operate and petitioning to intervene in this proceeding.

C. Delay

(1) Position of RRD

RRD states that its intervention will not broaden the issues or delay the proceeding. Petition at 10. It does not intend to participate in litigation of general issues in this proceeding, even by way of submitting briefs on an issue such as the appropriateness of summary judgment. Tr. 22-23. It would accommodate its needs to the needs of the ongoing proceedings. Tr. 25. It would stipulate that the issuance of the operating license need not be held up pending the determination of its claim. Tr. 90.

(2) Position of FPL

FPL argues that the PURPA issues RRD raises are complex and that they are not likely to be considered unless RRD becomes a party to this proceeding. Response at 32. Furthermore, FPL argues that we cannot resolve antitrust issues related to RRD unless we first address the contractual dispute between the parties. Response at 32-33. That, in FPL's opinion, would itself be a lengthy inquiry, involving discovery concerning over 60,000 documents. Tr. 91.

FPL also asserts that the antitrust issues raised in this case are complex and would involve matters of first impression relating to the relationship between antitrust law and PURPA. Tr. 46-50. Necessarily, the decision would require evidence concerning the structure of markets and the relationship, if any, between this one refusal to deal and an alleged pattern of refusals to deal. Tr. 103 (implication).

(3) Conclusion

Although RRD sincerely desires to keep its intervention from complicating this case, we find that it would be unable to accomplish that purpose. For us to consider whether there has been a PURPA violation would require us to investigate in depth the entire dispute concerning the sale of the EGF. At that point, we might be only starting our antitrust inquiry, into whether RRD's injury were also a competitive injury. We would need to consider the relationship of RRD's claim to market structure and whether this is a single bona fide contract claim or part of a pattern of behavior that was inconsistent with the antitrust laws.

Although RRD's intervention would not retard the licensing of St. Lucie, because it has stipulated to permitting the plant to open, its participation in this proceeding inevitably would complicate and delay it. Hence, this factor mitigates against approving RRD's intervention.

D. Assistance in Developing a Sound Record

(1) Position of the Parties

RRD argues that without its assistance the record will not adequately reflect its interests or the interests of other PURPA facilities. Petition 9-10. FPL argues that RRD's interests relate primarily to PURPA questions and that its concerns would not contribute to resolution of other substantive issues in the proceeding. Response at 31.

(2) Conclusion

RRD's principal interest concerns the relationship between a single commercial dispute and the operation of the antitrust laws. Although we

do not know enough as yet to resolve the knotty factual questions lurking behind this legal issue, we know that FPL's position on its contract rights is not frivolous and that an inquiry into the possible relationship between this dispute and other behavior would substantially overlap facts already in controversy. Hence, RRD either would begin against its will to participate in the entire case or it would choose to restrict itself to one very limited matter.

We find that elaboration on the record of this tiny facet of FPL's overall conduct is unlikely to be highly probative of whether operation of St. Lucie 2 would create or maintain a situation inconsistent with the antitrust laws. Consequently, we conclude that inquiry into this issue would not contribute to the development of a sound record.

On the other hand, this proceeding could arrive at a posture in which RRD could help to protect its interests and contribute to the development of a sound record. Should we decide that the operation of St. Lucie would create or maintain a situation inconsistent with the antitrust laws, we would then need to fashion relief. At that time, RRD could present legal arguments concerning the appropriateness of granting relief to PURPA facilities to supplement rights already granted by PURPA. The two principal issues that apparently would be involved are whether PURPA facilities are "competitors" entitled to antitrust protection and whether license conditions should supplement relief provided for by PURPA. So that we might have RRD's assistance at that time, we grant it conditional status as amicus curiae for the purpose we have just outlined.

We note that in our July 7 memorandum and order we permitted RRD to participate as amicus curiae in the summary judgment proceeding scheduled

for August 17 and 18, 1981. However, RRD has stated that it does not intend to accept that invitation. Tr. 22. Consequently, that invitation is withdrawn.

E. Representation by Existing Parties

RRD argues that no existing party has the same interests as it does. Petition at 10. FPL agrees with RRD, on the ground that RRD's interests, as expressed in its Petition, have no nexus with this proceeding. Response at 31.

We disagree with both parties. RRD's success in this proceeding necessarily would depend on some party proving that the operation of St. Lucie would create or maintain a situation inconsistent with the antitrust laws. However, RRD is satisfied to permit Florida Cities to pursue this issue without its aid. Tr. 22. Hence, RRD acknowledges that Florida Cities would adequately represent its interest in that portion of the proceedings.

Although Florida Cities does not have identical interests with RRD, it does have an interest in showing that FPL is maintaining a situation inconsistent with the antitrust laws. In its discovery efforts, Florida Cities has obtained some documents relevant to whether FPL's conduct toward incipient PURPA facilities is inconsistent with those laws. Tr. 19-20. Florida Cities apparently intends to pursue that issue.

However, even if Florida Cities does not pursue the PURPA issue, we do not believe that we would be restricted in fashioning relief from protecting legitimate interests of PURPA facilities providing
we first find that there is a situation inconsistent with the antitrust laws. If we were to make that general finding, based on evidence presented

by Florida Cities, we would be in a position to fashion appropriate relief to protect all affected entities, including PURPA entitites.

Under these circumstances, we conclude that Florida Cities adequately represents RRD's interests in this proceeding, up to the point at which its participation amicus curiae is required to address issues uniquely related to PURPA facilities. Since we decided, in the previous section of this Memorandum, to grant RRD limited status as amicus curiae, we find that RRD's interests are already adequately represented and that this factor operates against its intervention.

F. Conclusion About Late Intervention

After examining the five factors governing late intervention, we are convinced that RRD should not be permitted to intervene.

We find that the balance is heavily weighted against intervention. Unless we were required to find that one or more of the other factors weighed heavily in favor of intervention, we would exclude RRD solely based on its failure to show good cause for late intervention and we also would exclude it solely based on the availability of other means to protect its interest. Although we consider the other factors to weigh against RRD's intervention, findings on those factors are not, in our opinion, required for the balance to weigh against intervention.

III NEXUS

A. Arguments of FPL and Staff

FPL argues:

[T]he Petition fails utterly to allege a situation inconsistent

> with the antitrust laws . . . , and does not address whether "activities under the license would create or maintain" any such situation. (Atomic Eneregy Act §105(c)(2), 42 U.S.C. §2135(c)(5) (1976)) [Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559 (1975); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-299, 2 NRC 740 (1975).]
>
> * * *
>
> [T]he successful petition must show a "meaningful nexus" between the activities under the nuclear license and the "situation." (Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619 (1973); Wolf Creek, ALAB-279, 1 NRC at 566). Petitioner makes no effort to allege any nexus between the situation inconsistent with the antitrust laws and activities under the operating license for St. Lucie Unit No. 2. This is not surprising in view of the absence of any factual basis for demonstrating such a nexus. The closest that Petitioner comes to acknowledging any such requirement is in paragraphs (18) and (19) of the OL Petition, where it states, in essence, that its interest will be affected by FPL's "intended implementation" of the settlement conditions. (OL Petition, pp. 8-9). As is demonstrated above, the settlement conditions affect Petitioner only in that they do not go as far as Petitioner would like in addressing what Petitioner contends is a situation inconsistent with the antitrust laws -- a "situation" which is not alleged to bear any nexus to activities under the license. The requirement of such a nexus is jurisdictional [Waterford 6 AEC at 619.], and Petitioner's failure to allege any such nexus is fatal to the substance of its allegations.

(Response 2, 21.)

Staff agrees with FPL that RRD had not specified, with the specificity required by Wolf Creek, the nexus between its petition and the operation of St. Lucie 2. Tr. 66-68.

FPL expanded its arguments at the Conference. It argues that PURPA "has nothing to do with competition." Tr. 47. A PURPA facility is given special protections that are more stringent than are afforded to competitive entitites. RRD is, therefore, not a competitor of FPL, in the sense of an entity striving to survive in open market competition. Tr. 46-47. It also argues that if RRD is a PURPA facility it can gain its rights through FERC; and if it is not a PURPA facility, then its claim that it was improperly

denied PURPA rights does not constitute an allegation of a violation of the antitrust laws or of any other law or regulation. Tr. 48.

B. Arguments of RRD

In its Petition, RRD relied on the partial settlement agreement to establish its nexus to this proceeding. Petition 4-6; OL Petition 2-4. At the Conference, RRD appears to have conceded that a settlement agreement, which was "trying to give us something" could not provide a nexus with the proceeding. Tr. 17.

However, later in the same Conference, RRD was asked to address "nexus" specifically. At that time, RRD appears to have resurrected its argument that its nexus to the proceeding rests on "the wheeling and transmission provision for PURPA facilities and neighboring entities" which are already contained in the license conditions. They claim "a nexus with that, and . . . a nexus with whatever underlay that that made it part of this proceeding." Tr. 118.

> At that point, Judge Bloch asked RRD the following question: How will the fact that they are going to open a nuclear facility adversely affect your situation or create or maintain a situation inconsistent with the antitrust laws with relationship to P&W?

RRD refused to specify a nexus but relied, instead, on an earlier decision in this case which it said stood for the proposition that "An unambiguous demonstration of a connection between violations of law and NRC-licensed activities is not, in our view, a necessary precondition to the institution of a section 105(a) antitrust proceeding." Tr. 119. RRD also stated that "we do not have to have a nexus with . . . this particular [nuclear] plant." Tr. 126.

In another part of the record, RRD relies on the proposition that the licen : conditions negotiated by the Justice Department was the ground for withd awing the Justice Department's request for a §105(a) proceeding. Tr. 120-121. On that ground, RRD asserts that it has a nexus with the settlement condition and a nexus to the proceeding.

RRD also asserts that FPL has the only transmission grid in the area (Tr. 123) and that the opening of St. Lucie 2 would enhance FPL's ability to maintain its transmission monopoly. Tr. 121-122.

C. Conclusion

We find that RRD has not alleged the required nexus to this proceeding and that, on this independent ground, it should not be permitted to intervene in this proceeding. Compare Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Generating Station, Unit No. 1), LBP-75-13, 1 NRC 268 at 271 (1975) (finding a nexus between failure to wheel and an inability of petitioner to obtain "meaningful access to nuclear generated power"); reversed on other grounds, Wolf Creek, ALAB-299, 2 NRC 740 (1975).

RRD's petition is extraordinary. It is not a municipal utility or cooperative engaged in the regular business of selling power at wholesale. Unlike such businesses, it is not concerned about the impact of nuclear power on its cost structure. It does not depend on its ability to sell power at competitive prices, and it is not concerned that the opening of a nu lear plant will adver ely affect its abil ity to compete.

In this proceeding, RRD does not seek to obtain a share in St. Lucie or to purchase unit power. If it were granted such rights, they would

not help it. Since it has no obligations to supply retail power and is not interested in competitively bidding for retail franchises, these rights would be of no value to it.

In many cases, merely by alleging the nature of its own business and the existence of a situation inconsistent with the antitrust laws, a petitioner to intervene will have alleged a sufficient nexus to the opening of a nuclear plant that likely will sell cheaper power. A nuclear plant would place it at a competitive disadvantage. Consequently, competititive entities may not need to make a particularly strong showing of nexus.

However, RRD's extraordinary situation requires more of it. It is by no means obvious that it will be hurt by FPL opening a nuclear power plant. Although there may be some weak connection between the opening of a plant and the maintaining of a monopoly on transmission (as RRD argues), there is little reason to believe that a transmission monopoly would abate merely because FPL could not open a nuclear plant. We find that the remote chance of an abatement of a transmission monopoly is insufficient nexus to this proceeding to support intervention.

We also are persuaded by FPL's arguments concerning relief. If RRD proves that it is a qualified facility, it will be entitled to PURPA relief, which will in every way meet its needs. If RRD is not a qualified facility under PURPA, then it has alleged no further ground for relief in this proceeding.

If FERC agrees, RRD will be able to sell power at avoided costs, to interconnect, to buy power and to wheel power to third party purchasers. 16 CFR §824i and §824k. RRD's PURPA rights are not affected by whether or not FPL opens St. Lucie or by whether or not FPL maintains a transmission

monopoly. RRD has PURPA rights that are not even affected by whether or not the operation of St. Lucie will create or maintain a situation inconsistent with the antitrust laws.

As a PURPA facility, RRD would have no need to intervene in an NRC antitrust proceeding. Because it has alleged special PURPA status as its entire ground for relief in this proceeding, RRD also has failed to allege a nexus to this proceeding. It has failed to allege how the opening of St. Lucie would injure it or even how the existence of a situation inconsistent with the antitrust laws would injure it.

We conclude that RRD's claim is a PURPA claim and not an antitrust claim and should not be admitted in this proceeding.

IV PROCEDURAL RULINGS

In its June 20 Motion to Add Questions, RRD requested to file a written response concerning its ownership of the EGF, an issue that was hotly contested in this proceeding. We find that the motion was not properly made in the invited filing, which was solely for the purpose of adding questions to the agenda for the Conference. We also find that it would not be proper to grant the motion because RRD has had several opportunities to respond in detail to FPL's allegations. It could have forthrightly described the property dispute in its Petition, in its May 14, 1981 Motion for an extension of time to respond to FPL's request for issuance of a subpoena, in its June 1, 1981 response to FPL's request for issuance of a subpoena or at the Conference.

We also note that ownership of the EGF is irrelevant to the grounds of the Board's decision. We are convinced that RRD has a sufficient

interest in the EGF to support its participation in this proceeding had it been able to meet the other grounds for intervention and late intervention. It would not be necessary for it to establish both equitable and legal title as a condition to intervention. While FPL might be able to use its alleged equitable title to the facilities as a defense to the argument that its actions have been inconsistent with the antitrust laws, its alleged right to the facilities would not have defeated RRD's standing in this proceeding, nor would it have been entitled to extensive pre-intervention discovery.

As a result of this decision, FPL's request for the issuance of a subpoena is moot and shall not be granted. Dade County's contingent petition to intervene, filed on July 9, 1981, also is moot and shall not be granted.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 5th day of August 1981

ORDERED

(1) The Petition to Intervene filed by Parsons and Whittimore and Resources Recovery (Dade County), Inc. on April 24, 1981 is denied.

(2) Florida Power & Light Company's May 8, 1981 request for the issuance of a subpoena is moot and shall not be granted.

(3) Dade County's July 9, 1981 petition to intervene is moot and shall not be granted.

(4) Pursuant to 10 CFR §2.751a(d) objections to this Order may be filed by a party within five (5) days after

service of this order, except that the regulatory staff may file objections within ten (10) days after service.

(5) Paragraph (1) of this Order is appealable to the Atomic Safety and Licensing Appeal Panel within ten (10) days after service of this order, pursuant to 10 CFR §2.714a(b).

FOR THE
ATOMIC SAFETY AND LICENSING BOARD,
WITH THE CONCURRENCE OF

JUDGE MICHAEL A. DUGGAN
AND
JUDGE ROBERT M, LAZO

Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE

August 5, 1981
Bethesda, Maryland