NUCLEAR REGULATORY COMMISSION

ORIGINAL

In the Matter of: :

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FLORIDA POWER & LIGHT COMPANY : DOCKET NO. 50-389 OL

: :

(ST. LUCIE PLANT, UNIT NO. 2) :

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Fifth Floor Hearing Room
4350 East-West Highway
Bethesda, Maryland

Thursday, August 20, 1981

Oral argument in the above-entitled matter was convened, pursuant to notice, at 10:55 a.m.

BEFORE ADMINISTRATIVE JUDGES:

ALAN S. ROSENTHAL, Chairman

DR. JOHN H. BUCK

CHRISTINE N. KOHL

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P R O C E E D I N G S

(10:55 a.m.)

CHAIRMAN ROSENTHAL: If the reporter is ready, we will go on the record.

This Board is hearing oral argument today on the appeals taken by Parsons & Wittimore and Florida Cities from the Licensing Board's June 3, 1981, order in this operating license proceeding involving Unit 2 of the St. Lucie nuclear facility.

In that order, the Licensing Board denied the Appellant's petitions for leave to intervene in the proceeding on the ground that it had no jurisdiction to entertain the issues which the Appellant sought to raise. The order below is supported on the appeals by the Applicant, Florida Power & Light Company, and the NRC staff.

This oral argument is governed by the terms of our July 21 order. As provided therein, each party is being allotted a total of 40 minutes for the presentation of argument, to be divided equally between the parties on that side unless some other division of time has been agreed upon.

I will now call upon counsel for the respective parties to identify themselves formally for the record and to advise the Board as to the division of time as well as with respect to which counsel will argue first on the particular side. And we will start with counsel for Parsons

& Wittimore.

MR. KUCIK: My name is George Kucik. We have agreed with Mr. Jablon that we will divide the time 25 minutes for Parsons & Wittimore and 15 minutes for Florida Cities, and that Florida Cities will go first.

MS. KOHL: Florida Cities will go first. Very well, Mr. Kucik. For Florida Cities.

MR. JABLON: Your Honor, Robert Jablon. With me is Daniel Guttman.

CHAIRMAN ROSENTHAL: All right, Mr. Jablon.

And for the Florida Power & Light Company.

MR. BOUKNIGHT: Mr. Chairman, J. A. Bouknight, Jr. With me is Peter G. Flynn and Harold F. Reese. We and the staff will divide the time equally, and we will go first.

CHAIRMAN ROSENTHAL: And for the NRC staff?

MR. THESSEN: Good morning, Mr. Chairman and members of the Board. My name is James Thessen of the Office of Executive Legal Director. With me this morning is Mr. Joseph Blackburn of our office.

CHAIRMAN ROSENTHAL: All right, we will proceed with the oral argument for the Appellants. Let me ask counsel for the Appellants, did you plan to reserve any time for rebuttal?

MR. JABLON: If we may reserve ten minutes, Your Honor.

CHAIRMAN ROSENTHAL: On whose time is this?

MR. JABLON: On Florida Cities.

CHAIRMAN ROSENTHAL: Very well.

MR. KUCIK: For Parsons & Wittimore, we also plan to reserve ten minutes for rebuttal.

CHAIRMAN ROSENTHAL: Well, now, wait a minute. How much time re you taking in total?

MR. KUCIK: We are taking a total of 40 minutes between us.

CHAIRMAN ROSENTHAL: How much for Parsons & Wittimore?

MR. KUCIK: Fifteen minutes for opening presentation and ten minutes for rebuttal.

CHAIRMAN ROSENTHAL: Now, you are planning to take 15 minutes for which you want to reserve ten for rebuttal, Mr. Jablon?

MR. JABLON: Your Honor, essentially, all we want to do is rely on our brief, and I would simply reserve any time if something came up. I can express our position really in a minute.

CHAIRMAN ROSENTHAL: Well, you may be able to express your position in a minute, but it is possible that the Board has a few questions with regard to that position.

All right, we will see how it goes in that regard. I would remind both of you gentlemen that rebuttal

is reserved to a response to matters that your adversary had put forth during the argument. There can be no new matters raised during rebuttal.

All right, then, on that understanding, Mr. Jablon, you may proceed.

ORAL ARGUMENT ON BEHALF OF FLORIDA CITIES

BY MR. JABLON

MR. JABLON: Thank you, Your Honor.

On page 6 of our brief, we intended to cite the Commission's South Texas decision, so our citation is wrong. And in a footnote the citation should have been to 680(c).

As Your Honors know, I represent the Florida Cities. We sought intervention below in the operating proceeding as a protective measures in the fear that had we not done so we would have been deemed to have waived rights.

However, we recognize that the Board below and the Staff take the position that the Board below did not have jurisdiction to rule on the matter one way or the other because we were raising antitrust concerns. We think that there is sufficient latitude in the notice so that the Board could have taken jurisdiction.

CHAIRMAN ROSENTHAL: Let us leave the notice aside and go to the statute, section 105(c)(2) of the Atomic Energy Act of 1954, as amended.

Now, as I read that section -- and you can tell me in what respect I am wrong -- on the operating-license level the review is to be confined to, and I quote, "significant changes in the Licensee's activities or proposed activities," and I would add the word "which," "have occurred subsequent to the previous review by the Attorney General and the Commission under the subsection in connection with a construction permit for the facility."

Now, as I understand it, the antitrust review on the construction permit level is still underway. Your client is one of the parties to that proceeding. And I do not understand how, consistent with that statutory provision, one can be talking about an antitrust review on the operating-license level, because by definition there cannot have been significant changes in the Licensee's activities or proposed activities occurring subsequent to the construction permit antitrust review.

MR. JABLON: Yes, Your Honor. It is a question of statutory interpretation. If you deem -- first of all as a factual matter, the unit is now under construction -- if you deem the subsequent review -- that is, the operating license antitrust review -- to be able to take place only after the conclusion of a construction permit antitrust review, then the purport of your question is correct.

However, I believe there would be leeway to

consider the construction permit review as the initial stages of that review and to permit the simultaneous review. Otherwise, you run into the situation that you approach the operating license date and you do not start the subsequent review.

There was somewhat of an analogous situation faced in South Texas, I believe, where the Commission decided to advance the operating license review to make the process work better.

MS. KOHL: Where in the statute do you find that leeway?

MR. JABLON: The question is -- oh, excuse me -- I think the question is the scope you give to the words "construction permit review." And I just want to take a second to find the statutory phrase.

CHAIRMAN ROSENTHAL: Did you look at the legislative history of this particular provision, Mr. Jablon?

MR. JABLON: Yes, Your Honor.

CHAIRMAN ROSENTHAL: And does it provide any assistance in terms of your suggested construction of it?

MR. JABLON: I think it is clear that Congress intended, as the Supreme Court said, in power reactors a two-stage proceeding, and the question is what happens when construction permit antitrust review is not complete, so that the processes can be deemed merged together.

Let me be very practical here. I believe that whether we get or are denied the rights we are seeking in the construction permit antitrust review, either way, that there ought not to be a need for a subsequent review, because the standards would be the same.

In other words, I think you finish the construction permit antitrust review, the construction license conditions would attach, they would become part of the operating license, and there would be a scintilla in time where, okay, the construction permit review is finished, you look at the operating license review, obviously the facts would be the same. Therefore, we are talking about the same thing.

To the extent that there were a possibility that the standards might be different or that you might look at different things, i tmakes sense to me to look at the possible antitrust problems in connection with operation now, because you are coming up before operation will take place.

MS. KOHL: What if the Commission completes its review of the operating license proceeding before the antitrust review is completed, can the Commission issue the operating license? Is there anything in the statute that would preclude that?

MR. JABLON: I would think under your Davis-Besse

decision, the grandfathered case, that you cannot. I would think that the sensible thing to do would really be to merge the or to consolidate the operating license and construction permit antitrust proceedings and, therefore, you have touched all the bases.

MS. KOHL: Let us assume that there is no antitrust proceeding in conjunction with the operating license, there is only the ongoing antitrust proceeding that we have now in conjunction with the construction permit.

MR. JABLON: Well, for the reasons stated in the grandfather case, except, of course, upon stipulation of the parties, I would say that you could not.

CHAIRMAN ROSENTHAL: Supposing the construction permit proceeding comes to an end, the antitrust construction permit proceeding comes to an end with whatever result may be reached in it, could the following day the Commission issue an operating license? It has had its full antitrust review on the construction permit level, which presumably encompassed all of the Applicant's proposed activity or actual activities right up until the time of decision. And down come the Licensing Board decision on, say, September 1. Could on September 2 the Commission issue an operating license? And if not, why not?

MR. JABLON: If you look technically at the statute and the Commission's regulations, I would think not,

because the Commission would have to issue a notice. They would have to do the antitrust review, the Staff or whoever, look at the antitrust review, notice in the Federal Register the possibility of an operating license, and go through the procedures for --

CHAIRMAN ROSENTHAL: The question is whether there have been significant changes subsequent to the construction permit review. Now, obviously, if the operating license issues within a day of the completion of the CP review, there is precious little room for any kind of significant change.

What I am getting at is this: I read this statute -- and you can tell me if I am wrong -- as dealing with or envisaging the normal situation where the construction permit antitrust review is completed well before the plant is up for operating license, and when the plant comes up for operating license there has to be given an opportunity for someone to come in and say, "Wait a minute. Between the time you have completed that construction permit review and now, the Applicant has become a pirate and is willy-nilly knocking off competitors."

And, therefore, the result in the construction permit antitrust proceeding should not be the last antitrust word, and so we are providing this opportunity to claim that there have been some significant changes in the interim.

And if so, there is a hearing.

Now, if, however, the construction permit proceeding goes right up -- I am talking about the antitrust aspects, obviously -- goes right up to the door of the OL, that construction permit proceeding presumably will have considered all of the Applicant's activities along the line. And there is obviously in that circumstance no real possibility of there being a significant change in that pleading interim.

Now, why am I wrong in that analysis?

MR. JABLON: Unless Florida Power & Light were awfully fast --

CHAIRMAN ROSENTHAL: Yes, well, I am assuming that they are not that fast.

MR. JABLON: I think that speaking for Florida Cities, for people in Florida Cities, speaking for people who were involved in the construction permit process, that the Commission could know this, that there just was not the time for a change.

The South Carolina cases at least imply that there ought to be notice to other parties. As far as Florida Cities are concerned, that would be perfectly acceptable.

DR. BUCK: Excuse me. It is your view then that the Commission has to do something positive no matter how short the time?

MR. JABLON: I would think so, yes.

DR. BUCK: Where do you find the specific requirement either in the statute or in the regulation to that effect?

MR. JABLON: I would --

CHAIRMAN ROSENTHAL: Where does the regulation say, in this hypothetical tht we have posed to you where the construction permit antitrust review is completed and the OL is ready to go, that the Commission must issue some kind of notice?

MR. JABLON: I find support for my statement primarly in the South Carolina cases, the two Commission decisions which spoke about the situation of Central Co-Op, I believe it is, and the lack of notice it was perceived to have. I think, borrowing from the grandfather case, Your Honors wrote at some length and some persuasion as to statutory interpretation. I just think it makes sense not to intepret the language as precluding starting operating license review before the completion of the construction permit.

But if you disagree, all we are trying to do is protect ourselves in the event that somebody might argue that the construction permit antitrust conditions did not automatically attach to the operating license.

CHAIRMAN ROSENTHAL: Let me ask you this

question: With respect to anything that Florida Power & Light has done up to this point which your clients regard as having anticompetitive implications, have those been thrown into the antitrust proceeding that is now pending?

MR. JABLON: Yes, Your Honor. And if the Board merely said, if this Board merely said, that it is apparent that anything that could be raised in the operating license can be raised as part of the constrution permit review and the license conditions would automatically attach, we have no problem.

In other words, the reason I said I would only take a minute, although I have taken longer, all we wanted to say to you is that, as we have said in our brief, as far as we are concerned we have no problem with affirming the Licensing Board either on grounds that the issue is premature or on grounds that the antitrust conditions automatically attach so long -- and all we wanted to do is protect our position -- that there was no adverse consequence from not having an operating license proceeding.

CHAIRMAN ROSENTHAL: Thank you.

Mr. Kucik.

ORAL ARGUMENT ON BEHALF OF PARSONS & WITTIMORE

BY MR. KUCIK

MR. KUCIK: Mr. Chairman, members of the Board, I wanted to make a preliminary procedural point involving the

relationship from Parsons & Wittimore's point of view of its petition in the construction licensing proceeding and its position in the operating license proceeding.

We are here solely on an appeal from a denial of our petition to intervene in the operating license proceeding. On August 5, as the Board is aware, in the construction license proceeding, which is pending in the context of an antitrust hearing, we were denied leave to intervene.

CHAIRMAN ROSENTHAL: We are fully aware of that. Can you tell me, just as a matter of vital interest, whether you are planning to file objections with the Licensing Board by September 4 or come before the Appeals Board by September 8? Or has that not been decided yet?

MR. KUCIK: I do not think it has been definitively decided. But I think what we will do is file objections by September 4 with the Licensing Board, with the expectation that should the Board adhere to its position, then we would appeal.

CHAIRMAN ROSENTHAL: Before you get into your argument, I would like to ask you a question with regard to your brief. The Licensing Board, as you are fully aware, decided this matter solely on the basis of our Marble Hill decision. It thought that our Marble Hill decision was controlling authority for the proposition that it had no

jurisdiction to entertain antitrust issues.

Now, I think in that circumstance I was justified in being somewhat curious as to what position your clients were taking with respect to Marble Hill. And I read your brief from cover to cover, and I do not find any reference to the case.

Now, is it not fair for me to assume that if you thought that decision was either distinguishable or in error and worthy of our reconsideration, you would have said so? And that normally is the case if a lower tribunal rests its decisions on a single decision of the tribunal to which the appeal is being taken, the appellant will either endeavor to distinguish the case or will again, alternatively, claim that it is worthy of reconsideration.

So I must say I was very puzzled by the absence of any reference in your brief to Marble Hill, and I just wanted to know whether it is fair to assume that you recognized that that really is controlling authority, since you did not mention it?

MR. KUCIK: Marble Hill is controlling authority. We think Marble Hill is distinguishable because of the nature of the notice in Marble Hill and the factual circumstances in this case.

MS. KOHL: Why did you not attempt to distinguish it in the brief?

CHAIRMAN ROSENTHAL: Yes, why did you not?

MS. KOHL: Is that not basic appellate practice?

CHAIRMAN ROSENTHAL: In fairness also to your opponents, who I think, if you thought it was distinguishable, I think you should have indicated that i your brief and given them an opportunity to respond to it in writing.

MR. KUCIK: I did not intend today but to argue the antitrust aspects of the matter. The point has been I was not intending to distinguish Marble Hill, although I am prepared to discuss that, if the Court wishes.

MS. KOHL: But regardless of how you view the relevance of Marble Hill, was that not the sole legal basis that the Licensing Board gave for its decision that you have appealed here?

MR. KUCIK: Yes.

MS. KOHL: Regardless of what you think of it, I assume you would have addressed it in some form. It does not go, certainly, to the merits of the antitrust issues; it arguably relates to a need for an operating license proceeding to include and encompass antitrust issues, and that is the essence of your petition to intervene below.

MR. KUCIK: Yes.

MS. KOHL: It makes it difficult for us, as a reviewing body, to understand really where you really come

out on the very decision which you have appealed. We can only assume that you concede somehow th relevance of Marble Hill and the way the Licensing Board employed it in its decision.

MR. KUCIK: Basically, our position was this: that we felt that because of the ongoing antitrust proceeding in the construction license, that that was where the antitrust issue was raised by Parsons & Wittimore, which was new issues, ought to be heard. This petition was filed merely as a protective matter. Both cases have been moving along at the same time.

Marble Hill does state that, absent a clear statement to the contrary, that a board that is designated to do environmental safety and health review does not do antitrust review.

CHAIRMAN ROSENTHAL: Is that what this board was designated to do? What was the composition of the Licensing Board? Who was on it? I mean by discipline; I do not mean their names. Was it three lawyers? Was it one lawyer and two scientists?

MR. KUCIK: It was two scientists --

CHAIRMAN ROSENTHAL: And one lawyer. I realize that you are not generally involved in our proceedings. But the fact of it is that this Commission has a practice of assigning to proceedings which involve radiological health

and safety and environmental issues, boards composed of two scientists and a lawyer. Antitrust boards, as you appreciate, are generally either three lawyers or two lawyers and perhaps an economist.

Now, I do not think there was any doubt in anybody's mind that this Board was established for the purpose of considering, assuming that there was a successful petition for leave to intervene, the environmental and radiological health and safety aspects of this application.

Certainly, while notice concedely did not specifically exclude antitrust, neither did it indicate that antitrust issues were to be within its ambit. And if it had indicated that, as Marble Hill points out, that would be entirely contrary to the customary policy of this agency, which is an understandable policy.

You do not have antitrust issues normally considered by a board on which only one of the three members is a lawyer.

MR. KUCIK: As I say, we did argue in our brief, as we construe the broad language of point 4 of the Federal Register Notice, the operating license proceeding, that it was not limited to health and safety and environmental issues. But the antitrust aspects, insofar as Parsons & Wittimore was concerned, are before the Licensing Board now in the construction proceeding, and we have been denied

intervention.

CHAIRMAN ROSENTHAL: On the grounds that you are inexcusably late and that the other four factors did not balance in your favor; is that correct?

MR. KUCIK: Yes. That we were denied intervention on an appraisal of the late-filing criteria and on an appraisal of the intervention standards.

The preliminary point I wanted to make was that in that memorandum order Chairman Bloch said, at page 26, "We conclude that RRD's claim is a PURPA claim and not an antitrust claim. It should not be admitted in this proceeding."

The order under review right now by this Appeal Board states, at page 4, "There is no question that the interest of the Petitioners lies solely in antitrust concerns. The petitions are identical."

MS. KOHL: Is that not how you yourself characterized them in your petition?

MR. KUCIK: In part, no. I think the answer to that --

MS. KOHL: Maybe we should address a more fundamental issue: How can the NRC, either the Commission itself or any of its adjudicatory boards, enforce or take any action under PURPA? Where do you get -- your brief again fails to cite to any specific provisions of the

statute that would confer jurisdiction on this agency to entertain any claims or right under that statute.

MR. KUCIK: We are not asking the NRC to entertain any claims under PURPA.

MS. KOHL: Well, then we can forget about that, and you are limited then to your antitrust issues? I mean you have to decide. About a minute ago you just said that you were raising claims under PURPA. Are you or are you not?

MR. KUCIK: No, what I said was we have PURPA claims. I would like to explain that for a moment, because I think there may be some misunderstanding. We are not asking this Board to enforce PURPA. What we are asking this Board to do is to protect our rights under the Nuclear Regulatory Commission's settlement conditions that apply to qualifying facilities under PURPA.

What we are saying is that the settlement agreement entered into gives certain rights to facilities such as us, and it is those rights that we are interested in having protected. We have two grounds for protecting them: One is antitrust, and the other is simply that in our status as a qualifying PURPA facility, we are impacted by those conditions.

MS. KOHL: Well, assuming that you are a so-called qualifying facility under PURPA, I still do not understand where you get the jurisdictional basis for saying that the

NRC in any proceeding, whether it is this appellate proceeding, whether it is the OL case or whether it is the CP antitrust case, where can this agency intervene to protect and preserve those rights?

Secondly, the settlement agreement that you refer to, as I understand it, that was only conditionally approved, and the Licensing Board involved in that case indicated that it permitted that to take effect subject to any findings that the agency may make at a later point in time to assure that the parties are in compliance with the statutes that this agency is mandated to enforce.

MR. KUCIK: That is true, but the review that is going to go on is solely an antitrust review. Our point is this: We are a qualifying facility within the meaning of PUPA.

MS. KOHL: Do we have to accept your word for that? I assume that that in itself is a legal issue and one that the Nuclear Regulatory Commission, as I read PURPA, is not entitled to make. It would seem to me that that is a judgment for the Federal Energy Regulatory Commission.

MR. KUCIK: As of the moment, we elected to file a notice of qualification under the regulations of the Federal Energy Regulatory Commission, and after that would have been filed 54 days Florida Power & Light, a postdate. And that matter is now pending.

The opposition was based on this contract dispute which has been brought up to your attention somewhat obliquely, too. But Judge Bloch, in ruling on the question of whether we had a sufficient interest in the facility to intervene in the antitrust proceeding, said he believed we did. He believed that our interest in the facility, despite the contract dispute, was sufficient to allow us to intervene had we not been late.

We did plead that we are a qualifying facility, and, as I say, Judge Bloch and the Licensing Board found that we had a sufficient interest to assert those rights. Section 10(a)(5) of the settlement agreement imposes some transmission obligations on Florida Power & Light. They affect qualifying facilities under PUPRA specifically, and we are within the geographic area covered.

So it is our position that we have a right to be heard on those. We have a right to be heard on the question of whether they are adequate, whether they should be more stringent, whether they should be different or supplemented.

CHAIRMAN ROSEN: I still do not see where you find the jurisdictional base in this agency for the consideration of those questions. We do not enforce, as far as I am aware, that statute. We enforce the Atomic Energy Act. We enforce the National Environmental Policy Act. And we enforce those specific antitrust statutes which are

enumerated in section 105(a) of the Atomic Energy Act.

Now, if you have got some rights that you are claiming under PURPA, my impression is that those rights have to be ascertained and enforced as they exist by the Federal Energy Regulatory Commission.

MR. KUCIK: I think the difference is that we are not claiming here any rights under PURPA. We are claiming rights under a Nuclear Regulatory Commission approval of the settlement conditions which confers rights to PURPA facilities.

MS. KOHL: Assuming all of that, then are you not more arguably -- should you not arguably be involved in the CP antitrust proceeding? How does any of that relate to the issue before us now, and that is, whether or not you are entitled to raise any of these arguments whether you characterize them as PURPA arguments or settlement agreement arguments, how can you raise that in this particular operating license proceeding?

MR. KUCIK: Well, here is our position on that: The operating license proceeding, when concluded, when the license issues, will import all of the conditions that are presently attached to the construction permit and that will become attached to the construction licensing proceeding when it is concluded. Florida Power & Light has conceded as much in its papers in opposition to the Cities' brief.

That means that section 10(a)(5) conditions on transmission that affect Parsons & Wittimore will become effective in connection with the operating license issued --

CHAIRMAN ROSENTHAL: Is it the case if you have something that you have a right to be heard on by this agency, I would have thought that it grew out of the antitrust proceeding on the construction permit level, that is where you belong now?

You may not be entitled to get in there because you are late, but you cannot, assuming that the Licensing Board was correct -- and I do not know whether it was or not, and I gather something will eventually will come to grips with or may come to grips with -- assuming that the Licensing Board was right that you were inexcusably late in your endeavor to get into the CP proceeding and that the other factors did not balance into your favor, I do not see how you can then turn around and say, "Well, we can overcome the otherwise consequences of our inexcusable lateness by raising these things in an operating license proceeding."

MR. KUCIK: Let me look at it this way for a second: There are admittedly conditions in effect now and that will become in effect in the operating license that affect Parsons & Wittimore. The conditions were never that -- the fact that those kinds of conditions were under scrutiny was never publicly noticed. The January 15th

notice that the settlement agreement was under consideration, the Federal Register Notice, simply listed three questions. None of them related to the kinds of issues that we are raising. None of them mentioned that the settlement agreement affected qualifying facilities under PURPA. And the settlement agreement was --

CHAIRMAN ROSENTHAL: This all may be --

MS. KOHL: Assuming all that is true, this is not the proceeding in which you raise this. This proceeding did not even come into effect until March of 1981, when this particular OL proceeding was noticed. You may have perfectly sound arguments, but I do not understand how they can be made in the context of this particular case.

MR. KUCIK: The difficulty, though, is this: There are two proceedings pending. We have asked to intervene in both, and we have been denied in both. It is our position that we have a right to be heard.

Now, it is true that --

MS. KOHL: But you would admit, though, that in any judicial or quasi-judicial context, if you want to get into something you have to meet certain basic procedural prerequisites and satisfy standing requirements and so on, regardless of the nature of the case. There are plenty of people that may have very good causes or very good arguments to make, but unless you satisfy certain fundamental

requirements that the tribunal might have, you are not going to be able to make them. Right?

MR. KUCIK: Yes. The timeliness argument, though, is something we are going to bring up on appeal.

CHAIRMAN ROSENTHAL: That belongs, I think, on your appeal if one comes up in the other matter in the denial of your petition. My point was simply this: that if you are entitled to press these points before this Commission at this time, it would seem to me that your entitlement is in the construction permit antitrust proceeding and not here. And I think that is particularly so in view of the statutory language that I discussed with Mr. Jablon.

MR. KUCIK: Well, our situation is different from his, and I can address that for a second. But let me just make my concluding point on my preliminary point.

It seems to me that we have had two fundamentally different opinions as to our pleading by the two licensing boards. One says it is a PURPA pleading, and one says it is antitrust. And each denies it.

I think the appropriate way to resolve this is to have a consolidation of these for decision at the appellate level because I do not think it is a reasonable way to go about the decision for each to say we should have done something in the other and for us to be denied in both.

MS. KOHL: Well, we cannot consolidate when we do not even have an appeal in the other case yet.

MR. KUCIK: Well, what I was suggesting was that --

MS. KOHL: If you are arguing that the decisions are inconsistent, you know, that is one thing. But you have had since August 5 to bring that to our attention and to move for leave to make that kind of argument.

MR. KUCIK: We did. We argued --

MS. KOHL: It was received yesterday, your copy. We, of course, were aware of it before, but we never received it until yesterday, the copy of the opinion you undertook to file.

MR. KUCIK: What happened with that was that the opinion came down while all of the lawyers on this case were out of the office, and we just got back the day before yesterday and just had to -- but we had asked initially that this Board hold this appeal as a protective appeal until resolution of the issues in the construction licensing proceeding. And I think the Board can still do that.

The question here is a little bit perplexing and is novel. This is the first settlement agreement that we know of, the first license condition that the Nuclear Regulatory Commission has ever issued that specifically deals with qualifying facilities under PURPA. There are no procedures for giving PURPA facilities the right to be heard

on those conditions.

And I think it is fair to say that they should have the right to be heard. The conditions do affect them, and at some point when they have no discipline, they should be entitled to be heard on them.

MS. KOHL: Where do you derive that right? Do you derive it from PURPA itself or do you derive it from the statutes that we are mandated to enforce?

MR. KUCIK: From section 189 of the Atomic Energy Act, as amended, which says that a person has the right to be heard before this agency.

MS. KOHL: Is that an absolute and unqualified right without regard to certain procedural and other prerequisites that the agency might enforce or apply?

MR. KUCIK: No. The agency is entitled to make reasonable conditions.

CHAIRMAN ROSENTHAL: Does it have to be an interest which is within the zone of interests intended to be protected by the statutes involved? Now, I do not know myself of any statute we are called upon to enforce that has within its particular zone of interest the kind of PURPA claim that you are now making.

MR. KUCIK: I think it has to be within the zone of interest of the statutes enforced by the Nuclear Regulatory Commission because it is a condition of a Nuclear

Regulatory Commission license. The transmission provisions that we are interested in being heard on are in the Nuclear Regulatory Commission license.

We are not asking this Commission to enforce PURPA, but simply to give us an opportunity to be heard on its imposition of transmission conditions on facilities having our status. I think that means that it is within the ambit of the proceeding for the licensing of St. Lucie Number 2, and the proceeding is broken up between operating license and construction license.

CHAIRMAN ROSENTHAL: Even assuming that also, where do you find the basis for your claim that you can insert these concerns into an operating license proceeding, particularly in the light of the language of section 105(c)(2), unless you are arguing that does not apply because you are not coming in under antitrust provisions?

MR. KUCIK: On this aspect of our argument, the argument that we have rights of status as a qualifying facility, 105 does not apply.

CHAIRMAN ROSENTHAL: This is not antitrust claim, then, right; notwithstanding the fact that it was characterized as an antitrust claim?

MR. KUCIK: Well, what we said was that we had two reasons for having our rights enforced. One was because Florida Power & Light had committed -- a chain of

circumstances occurred: They refused to wheel for us, which is a violation of the antitrust law; and also because these conditions, transmission conditions, were put into the license.

CHAIRMAN ROSENTHAL: Your full time has expired. I will give you a little rebuttal time in light of the fact that a lot of your 25 minutes was consumed in questions.

MR. KUCIK: I just would like to make one other comment, if I might. Under section 191 of the Atomic Energy Act, the licensing boards have been delegated authority to modify, amend, grant, or deny any license under the provisions of the Atomic Energy Act or any other provision of law.

MS. KOHL: Mr. Kucik, I just have one question by wa of background. When did your client, Parsons & Wittimore and Resources Recovery, come into existence?

MR. KUCIK: They were in existence, I believe in -- I am not certain. The contracts, they would have to have been in existence in 1976, and it was sometime before that, between '72-'76, for Resources Recovery. Parsons & Wittimore has been in existence a long time.

MS. KOHL: So you have been around since the inception of the CP case?

MR. KUCIK: Parsons & Wittimore has existed. We did not know that anything was happening in the CP case that

would affect our operation of the facility in Dade County. In fact, we did not learn that until late March or early April when a copy of the settlement was, without public register notice, put into the file at the Nuclear Regulatory Commission. There never was a public notification that any of this was going to occur.

CHAIRMAN ROSENTHAL: Mr. Bouknight.

ORAL ARGUMENT ON BEHALF OF FLORIDA POWER & LIGHT COMPANY

BY MR. BOUKNIGHT

MR. BOUKNIGHT: Mr. Chairman, members of the Board, you have before you two petitioners who filed papers requesting for what they style as "antitrust hearings." They filed it beore a licensing board which is authorized to conduct a hearing on health and safety and environmental --

CHAIRMAN ROSENTHAL: Now, you say "authorized." I read the notice issued in this instance, and I did not see anything that specifically limited the hearing to environmental and health and safety issues. Was I wrong about that? Can you point me to the language which has that restriction in it?

MR. BOUKNIGHT: No, I could not quote you the language which has that restriction in it. I would say two things to you: The first is that this is the kind of formal notice specifying what this board was to hear which was before the Appeal Board in the Marble Hill case. And that

case would be determinative. However, there is another point here --

CHAIRMAN ROSENTHAL: Well, now, wait a minute, before you go further than that, I have not taken the trouble to go back into the files and extract the Marble Hill notice.

MR. BOUKNIGHT: I do not purport to have done so either.

CHAIRMAN ROSENTHAL: I do not think it is quoted directly in the decision, but I was under the impression that it might have been a little more specific than was this notice.

MR. BOUKNIGHT: You may well be correct. I think the point, however, even if one were to assume, which I think one should not, that this notice could have encompassed antitrust issues, there is another point here, and that is there cannot be an operating license antitrust proceeding pending anywhere before this Commission until the findings specified in section 105(c)(2) have been made. So you have a different situation than you had in Marble Hill, and Marble Hill you had a construction permit proceeding where antitrust issues, where consideration of antitrust issues is mandatory.

The issue before this Appeal Board was whether the Health and Safety Licensing Board in Marble Hill could also

entertain antitrust petitions. You decided that it could not. In this instance, you have a situation where there could not be an operating license antitrust proceeding pending anywhere before --

CHAIRMAN ROSENTHAL: Well, let us leave the matter of section 105(c)(2) to one side for the moment, and let us just focus on Marble Hill.

Ms. Kohl was kind enough to provide me with a copy of the notice of hearing in Marble Hill, and I can assure you it does set out specifically the issues which are to be considered. The first issue is pursuant to the Atomic Energy Act, then issues pursuant to NEPA, then issues pursuant to limited work orders.

DR. BUCK: In addition to that, it sets out the licensing board amendments.

CHAIRMAN ROSENTHAL: So one would have to, I think, agree that this notice is an entirely different breed of cat from the notice that we have got here in terms of its specificity on the issues to be considered.

Now, if you will accept my word on that for the moment, where does that leave your Marble Hill argument, as such, leaving aside again section 105(c)(2)?

MR. BOUKNIGHT: I think it leaves my Marble Hill argument with two strings to my bow. The first is that if you read the notice that was issued in this case, it gave no

hint that antitrust issues would be entertained. It certainly indicated that other matters would be considered.

And secondly, as the Appeal Board observed in Marble Hill, there is a reason why these antitrust issues are not ordinarily considered by a licensing board designated to consider health and safety issues.

And in light of Marble Hill, for a notice which was merely silent on antitrust concerns to be interpreted as a decision by the Commission in this particular instance to depart from its unvarying practice in the past and to entrust both antitrust and health and safety matters to the same licensing board I think would be completely inconsistent with the Marble Hill decision.

MS. KOHL: Is there anything in the Atomic Energy Act, though, to preclude the Commission from ordering any licensing board that has been convened to hear an operating license proceeding from entertaining also in the context of that same proceeding antitrust issues?

MR. BOUKNIGHT: No, Ms. Kohl, there is not. I think that assuming, as the chairman asked me to assume, that we did not have the 105(c)(2) problem, the question would be whether they intended to do that through this notice. If the question were arising as a matter of first impression, it might be one thing. But where the matter was litigated in another context, in Marble Hill, and where a

decision was handed down holding that the legislative history contemplated that except in very exceptional circumstances the Commission would designate different boards to do it and where this notice gives you no hint that it is an effort by the Commission to make this one of those extraordinary circumstances, then it seems to me that is a pretty compelling case.

MS. KOHL: But does not Marble Hill really address a different circumstance? Does not Marble Hill just simply say that it is a matter of long standing and good Commission policy that we will have separate licensing boards here, antitrust issues, and safety and environmental issues? Whereas in this case the real issue, is it not, whether or not this particular operating license proceeding should hear antitrust issues when the antitrust review in the CP case has not yet been completed?

MR. BOUKNIGHT: I think not.

MS. KOHL: It is not quite the same issue.

MR. BOUKNIGHT: I think there are a few jumps there which I cannot make. And one of those jumps is the 105)c,(2) finding. It is important here. In the absence of the 105(c)(2) finding, I do not think, first, that the Commission without -- this notice said explicitly, "We will entertain antitrust petitions in response to this notice without the Commission first having made the 105(c)(2)

finding," then the notice would have been illegal and I think would have been set aside. Those proceedings would have been set aside on appeal.

And where that finding has not been made, there are a lot of jumps to make to begin speculating as to what would happen in the future were that finding once made and were the Commission --

CHAIRMAN ROSENTHAL: You say that finding cannot be made here at this time because the construction permit antitrust review has not been completed? Is that your position?

MR. BOUKNIGHT: I think I am saying two things. I think I am saying that without regard to the status of the construction permit antitrust proceeding, that 105(c)(2) finding cannot be made here at this time and could not have been made by that licensing board below.

And I am saying, secondly, that under the Commission's decisions, the Commission or its delegee, the Director of Nuclear Reactor Regulation, cannot make that finding until the construction permit proceedings are over.

DR. BUCK: All right, then, could not this notice of hearing be an invitation to anyone? And, by the way, this notice of hearing of this case says nothing about anything except the interest of people who wish to intervene, and certainly antitrust problems can be of

interest to them.

Now, could this notice of hearing not be read as a request that if you know anything in the antitrust hearing, let us know and maybe we will be put up a separate hearing?

It does not say that there is going to be one hearing. This is a notice of opportunity for hearing in matters of interest.

MR. BOUKNIGHT: Dr. Buck, first of all, I do not think the notice can be fairly read that way. But even if you were --

DR. BUCK: Well, I fail to see where you say it cannot be read that way.

MR. BOUKNIGHT: Well, it does not say anything about antitrust issues.

DR. BUCK: It says "interest." That is all it says. That's all it says about anything.

MR. BOUKNIGHT: But I thinkyou have to look at the background. Once again, the background including the Marble Hill case. The Commission was not writing on a blank slate. It knew that in the past there had been people who, in response to notices in the health and safety arena, had filed petitions seeking to raise antitrust issues and that the question of whether those could be entertained had been litigated.

And I do not think that in this instance there i-

anything about that notice that is uncommon in contrast to the notices of the health and safety operating license notices that the Commission is publishing today.

DR. BUCK: I find it very peculiar that in the Marble Hill case the Commission went to extremes in setting out the issues to be taken care of, numbering them, setting them o. . It named the licensing board panel, which is obviously two scientists and a lawyer, and obviously they are not going to do your antitrust hearing. That was the decision that was made by the appeal panel.

Now, there is a vast difference between that and this recent notice in this case for an opportunity of hearing, because that very carefully says that the petitioner's right under the Act to be made a party to the proceeding, the nature and the extent of the petitioner's property, financial, and other interest -- period.

MR. BOUKNIGHT: Dr. Buck, I would make a second point, if I may, and that is, even if you were to read that notice as inviting the submittal of views on antitrust matters, then those views would be submitted to the Commission and the Commission then, in its discretion, if it wanted to make the finding under section 105(c)(2) and felt that it was not barred by its decision in the South Carolina case and the statute, then the Commission would do that.

What we have got here is a licensing board which

clearly did not have the authority to make that section 105(c)(2) finding.

CHAIRMAN ROSENTHAL: What is your response to Mr. Kucik's argument that insofar as he is asserting PURPA claims, they do not fall within section 105 at all?

MR. BOUKNIGHT: Well, I certainly have a response to Mr. Kucik's view on that. I will summarize it for you briefly here, but I think you may be hearing it again in a month or two. First, the Atomic Energy Act does not create any PURPA rights. That seems to me to be quite obvious.

Secondly, the license conditions that Mr. Kucik has cited to you did not in any way restrict and could not be read to restrict anything that Parsons & Wittimore can do under PURPA or any relief that the FERC can give Parsons & Wittimore under PURPA.

I just find it difficult to put any logical parameters around an argument that PURPA gives someone a right to be heard before this Commission.

CHAIRMAN ROSENTHAL: Let me ask you this, Mr. Bouknight. Do you think that Florida Power & Light can get an operating license for this facility before the antitrust proceeding now underway is completed?

MR. BOUKNIGHT: Yes, sir, I do.

CHAIRMAN ROSENTHAL: So this is really a "Catch-22" situation, is it not, that on the one hand if

they cannot raise antitrust issues in connection with the operating license because the construction permit review has not been completed, and yet notwithstanding the fact that the construction permit proceeding is not complete, an operating license can issue, so that everything works in favor of Florida Power & Light, does it not?

MR. BOUKNIGHT: Well, something is working very strongly against Florida Power & Light Company, and that is that that construction permit proceeding is going on and we are not at the evidentiary hearing stage yet.

Now, Mr. Kucik petitioned to intervene in that proceeding, and his petition was denied for two reasons. And I think there are more reasons why it should have been denied.

CHAIRMAN ROSENTHAL: Well, we are not going to litigate this morning the question of whether it was properly or improperly denied. That is going to be a separate matter, if it comes to us at all.

MS. KOHL: What if the operating license is ready to be issued and in fact issued by the Director and at a subsequent point in time the antitrust review is completed and it is the determination of the licensing board that certain conditions that Florida Power & Light is in violation of the antitrust laws and that certain conditions should be or should have been applied to both the CP and th

OL. Then what happens? Is that just tough luck for Florida Cities and Parsons & Wittimore and any other potentially aggrieved party? Or is there some recourse that the Commission would have at that point?

MR. BOUKNIGHT: The Commission attached a condition to the construction permit providing that the construction permit was subject to whatever conditions might eventually be ordered in this proceeding that is now going on. It is my understanding that that condition would carry over just like all the other antitrust conditions to the operating license.

MS. KOHL: Even though the operating license would have already been issued?

MR. BOUKNIGHT: Yes. We are in the same situation as --

MS. KOHL: But that antitrust licensing board then would have the authority, as you see it, to add subsequent conditions to an already-issued operating license?

MR. BOUKNIGHT: Yes, they would, as I understand it. As I understand it, the decision to go ahead and issue tne construction permit, notwithstanding the pendency of that proceeding, was based on the attachment of a condition that any order subsequently issued by that licensing board or the Commission would attach, or any conditions contained in those orders would attach to that permit. And as I see

it, that would carry over directly to the operating license.

MS. KOHL: Could those conditions be retroactive to take account of any injury that parties may suffer in the time period between the issuance of the operating license and the subsequent conditioning of that license by the antitrust licensing board?

MR. BOUKNIGHT: No, I do not think they can be. That would really be a question of assessing damages, and I do not believe the Commission --

CHAIRMAN ROSENTHAL: Assessing damages? The point is you have gotten an operating license before the antitrust review was completed. Now, is it not a matter of simple equity that if, when that proceeding is completed, it turns out that there should have been certain conditions on the operating license from the outset in order to rectify an anticompetitive situation and any injury that was suffered in the interim be remedied?

MR. BOUKNIGHT: No, sir, I do not think so.

CHAIRMAN ROSENTHAL: I am sure your client does not think so. But I would like to know the reasons.

MR. BOUKNIGHT: Well, I think that the reason is that there is a difference between being able to impose remedial relief in the sense of license conditions and being able to go back and order someone to pay money to someone else. Now, maybe I misunderstanding you.

MS. KOHL: Is that not in itself remedial effect, ordering somebody to pay damages or to take some other action? Those are all forms of remedies.

MR. BOUKNIGHT: Well, I do not read the Atomic Energy Act as permitting the Commission to assess money damages against an Applicant as a result of an antitrust review.

MS. KOHL: Well, then, let us say the Commission, aware of this potential situation, decides upon completion of the operating license proceeding to withhold issuance of the license until the antitrust review is complete. Is that within the agency's authority?

MR. BOUKNIGHT: It could well be within the agency's authority. I am not certain of that. If the agency were to do that, the penalty on the customers in Florida would be quite substantial.

I think the only other two points that I would make --

CHAIRMAN ROSENTHAL: Your time is running short.

MR. BOUKNIGHT: -- are: The 105(c)(2) point, which is, very simply, that that finding has not been made, there cannot be an operating license antitrust proceeding until it is made and that the only way it can be made is either by the Commission or its delegee, the Director of Nuclear Reactor Regulation --

CHAIRMAN ROSENTHAL: Could it be made before this construction permit antitrust proceeding is completed?

MR. BOUKNIGHT: Mr. Rosenthal, I do not think so. I have two reasons for not thinking so. The first is --

CHAIRMAN ROSENTHAL: Have you looked at the legislative history of this provision?

MR. BOUKNIGHT: Yes, I have.

CHAIRMAN ROSENTHAL: Does it provide any assistance on that question?

MR. BOUKNIGHT: It provides no direct assistance. The indirect assistance that you foresee from the legislative history is that the purpose of the second optional review is to make certain that after you have completed your first review that someone has not turned around 180 degrees on what you thought he was going to do in the first review.

MS. KOHL: I do not understand what you mean by the "second optional review."

MR. BOUKNIGHT: My understanding is that under section 105(c)(2) the Commission is not required to do anything. The Commission has the --

MS. KOHL: Are they precluded from doing anything?

MR. BOUKNIGHT: No, they are not. They have the discretion.

MS. KOHL: They are not? We have the discretion

in this case to take a look at the antitrust aspects of this matter in conjunction with the operating license.

MR. BOUKNIGHT: Let me put it this way: I do not mean they are not precluded from doing anything; they are not precluded from making the finding provided in the statute so long as there is a factual basis for their making that finding, unless they can find reasonably that there have been significant changes in the Licensee's activities or proposed activities, then as I read the statute, they cannot hold an antitrust review in connection with the operating license.

DR. BUCK: Is the burden of that entirely upon the Commission?

MR. BOUKNIGHT: I think it is, Dr. Buck. I think that the provision is there simply to give the Commission an opportunity to deal with the situation where someone has turned around from what he indicated he was going to do during --

DR. BUCK: He does not know if nobody comes in and tells him, "Look, something is happening down here and the company is going wild," nobody says a thing to the Commission; you say it is the Commission's responsibility to search this out before the operating license then?

MR. BOUKNIGHT: No, sir, I do not think the Commission has any responsibility under section 105(c)(2) to

search anything out. The Commission has the power --

DR. BUCK: How does it make a finding then?

MR. BOUKNIGHT: Well, it does not have to. It does not have to. And indeed, I think, in the early cases, until the case involving the Texas utilities arose, no thought was given to section 105(c)(2).

CHAIRMAN ROSENTHAL: It is your thought -- let us take what I would hope would be a more customary situation; namely, the construction permit antitrust review is completed, several years later the plant is coming up for operating license.

Now, at that point, I take it that any competitor, potential competitor, could come to the Commission and say, "We believe that in those ensuing years since the construction permit review has been complete, there have been significant changes in the Applicant's way of doing business, and therefore we would like affirmative significant changes determination in a hearing"? They could do that?

MR. BOUKNIGHT: Yes, sir.

CHAIRMAN ROSENTHAL: All right. Now, absent that, nobody comes to the Commission and says anything, your view is that the Commission has no statutory responsibility to itself to look at what the Applicant has been doing over that course of years and to reach an independent conclusion

as to whether significant changes have or have not occurred?

MR. BOUKNIGHT: Yes, sir, that is my view. Now, in practice, the Director of Nuclear Reactor Regulation does look at that.

CHAIRMAN ROSENTHAL: Does he require the Applicant to come forth -- now we are at the OL stage -- and tell him just how he is conducting business and in what respect there have been changes since the antitrust review at the CP level was completed?

MR. BOUKNIGHT: He has promulgated a regulatory guide requesting that kind of information. And moreover, it is the practice of the Director of Nuclear Reactor Regulation to solicit comments of others who may be involved.

CHAIRMAN ROSENTHAL: All right. But if the Director, getting this information, finds no problem and nobody has come to the Director and sought affirmatively a significant-changes determination, the Director, I take it, does not issue something formally which says, "I have looked at this and I see no significant chnge"?

MR. BOUKNIGHT: The Commission has issued a proposed regulation under which the Director would do that.

CHAIRMAN ROSENTHAL: In every case, it would have to be a "yea" or "nay," sort of like the negative declaration in the environmental field?

MR. BOUKNIGHT: Yes, sir, tht is the scheme of the

proposed regulation.

CHAIRMAN ROSENTHAL: That regulation has not been adopted?

MR. BOUKNIGHT: That is my understanding.

DR. BUCK: How long has it been proposed, do you know?

MR. BOUKNIGHT: I believe it has been -- I have the Federal Register notice back at my desk. it has been proposed for several months.

CHAIRMAN ROSENTHAL: Well, I am sure staff will tell us about that.

MR. BOUKNIGHT: Mr. Chairman, may I make one more point?

CHAIRMAN ROSENTHAL: Yes.

MR. BOUKNIGHT: Mr. Jablon has suggested that perhaps the Board should, in denying his petition, give him some words of solace about the scope, respectively, of the construction permit and operating license proceedings. I submit that someone who files a petition in a proceeding that is not pending with the wrong licensing board is entitled to nothing more than to have the petition denied.

Thank you.

CHAIRMAN ROSENTHAL: A forthright declaration.

Mr. Thessen.

ORAL ARGUMENT ON BEHALF OF THE NUCLEAR REGULATORY

COMMISSION, BY MR. THESSEN

MR. THESSEN: Members of the Board, I would like to return to what I think is the central question presented by this appeal: whether the licensing board below properly defined the scope of its jurisdiction.

I believe the answer to that question depends upon two factors: First, that the petitions of Parsons & Wittimore and Florida Cities raise only matters of antitrust.

CHAIRMAN ROSENTHAL: That is denied by your adversary. Your adversary claims it also raises PURPA matters which are not antitrust.

MR. THESSEN: I am prepared to show to the extent Parsons & Wittimore raises PURPA matters which are also cognizable within the scope of the Atomic Energy Act, that those matters are, in essence, only antitrust matters. Let me show you how that is the case.

If we look at the petition of Parsons & Wittimore on the question of PURPA rights, we can see that it hinges completely on section 10 of the license conditions imposed in the antitrust proceeding. Now, the antitrust board in that license proceeding was empowered to consider only antitrust matters. It imposed those conditions to ensure that a situation inconsistent with the antitrust laws would not be created and maintained.

To the extent Parsons & Wittimore's petition is

within the scope of the authority and within the scope of the statutes that the Commission can consider, it must therefore be an antitrust matter when it depends on antitrust conditions imposed by an antitrust board for an antitrust purpose.

So I believe, to the extent the PURPA right depends upon paragraph 10 of the settlement order, it really is only an antitrust complaint. To the extent that it depends upon something other, it is outside the scope of this agency's jurisdiction, and clearly the agency could not have delegated authority which it did not also have it itself.

Let me go to the question of the jurisdiction of this licensing board. The threshold inquiry is to determine the parameters of the Federal Register notice, and that is what was done by the licensing board below. As in Marble Hill, the critical inquiry was: What does the notice say, and what helps us decide what is the scope of that notice?

CHAIRMAN ROSENTHAL: You do agree that the notices in the two instances were quite different in the sense that the Marble Hill notice spelled out with considerable specificity the Atomic Energy Act, National Environmental Policy Act, and limited work authorization issues that were to be considered?

MR. THESSEN: Yes, sir.

CHAIRMAN ROSENTHAL: Nobody could have had any doubt in that notice that antitrust issues were not included?

MR. THESSEN: That is correct. The notice was quite different, as was pointed out previously.

But the form of analysis in Marble Hill is the same form of analysis which applies here. And that is the step of looking at the notice, reading it, and, to the extent there is any ambiguity, looking at related matters. In Marble Hill, the board considered two things: the wording of the notice, and the fact that a previous antitrust review had already been noticed prior to this notice in issue.

I think the same form of analysis applies here. The licensing board looks at the notice before it to determine the scope of its jurisdiction. It is the principal instrument of delegation.

When it reads the notice, to the extent there are any ambiguities, it looks to three factors at the operating license stage:

The first factor is section 105(c) of the Act;

The second factor is the long-standing Commission practice which separates antitrust issues from matters of health, safety, and environment;

And the third factor, I think, which has not been raised yet this morning, is the Summer decision -- I believe

it is CLI-80-28 -- in which the Commission looked at the whole issue of significant changes.

Let me start with the Summer decision. In Summer, the Commission was faced with an analogous issue: whether a materially identical Federal Register notice, the notice that we have before us today, of March 9, whether that materially identical notice put Intervenors and warned them of the need to raise antitrust concerns.

It was important because in that case a petitioner had filed for a significant-changes determination several months late, in the sense that the operating license had been previously noticed about a year and a half before. The Commission had to determine whether that notice put the Intervenors on warning of their need to raise antitrust questions.

The Commission looked at that notice which was, again, materially identical to the one before us, and indicated that the notice dealt exclusively with matters of health, safety, and environment, and concluded that it did not put the --

MS. KOHL: Counsel, how does a party with a legitimate antitrust claim lay that issue in the context of an operating license proceeding?

MR. THESSEN: The statute section 105(c) sets forth the procedure, and the Commission has held that, in

South Texas, that the procedure at the operating license stage is part of a two-step process, and only within the context of licensing will antitrust questions be considered.

The petitioner for intervention must read that statute and determine whether the previous antitrust review has been completed. On the facts of this case, there is no dispute that that proceeding has not been completed.

CHAIRMAN ROSENTHAL: What represents completion?

MR. THESSEN: Under the Commission's standards in Summer, it requires at the very least the antitrust review by the Attorney General, with his letter, and any subsequent hearings of the Commission on the matter.

CHAIRMAN ROSENTHAL: Well, now, if it goes to hearing before a licensing board, the licensing board renders its decision, is that the end of it? Or suppose there is an appeal and, as I think is common knowledge, the appeal boards are not exactly swift in the disposition of antitrust appeals. Now, supposing, as, you know, in the recent Farley case which was up here for a couple of years, appeal is pending, is the antitrust review complete? Could you come in then seeking a significant-changes determination? And if so, as of when did the significant change have to have occurred?

MR. THESSEN: Your question is when did the previous antitrust review end?

CHAIRMAN ROSENTHAL: Well, the statute, yes, talks in terms of --

MS. KOHL: It just says "previous review." It does not use the word "complete.?

CHAIRMAN ROSENTHAL: "Subsequent to the previous review by the Attorney General and the Commission under this subsection." Now, does the previous review have to be complete? And if so, what represents completion?

MR. THESSEN: Let me answer that question in two parts. On the facts of this case, the Summer decision is controlling. When continuing hearings are ongoing in connection with the construction permit antitrust review, subsequent to the finding that significant changes be subsequent to cannot be made, and the Commission so held in Summer.

Now, let us take the hypothetical, which admittedly is different from th facts of this case, where a decision has been rendered at the construction permit antitrust stage. The Commission has not answered this question. I think what we would have to do to answer it is to look at section 105(c) of the statute and look behind that statute to understand its purposes.

And I think that analysis is also at the heart of the ambiguities and uncertainties which petitioners have here. That 105 proceeding requires the Commission prior to

issuing a license to consider all significant elements. Whether that is --

MS. KOHL: But the Commission cannot issue an operating license until the antitrust review is complete?

MR. THESSEN: That is the Staff's position, based on the Commission's analysis in Water Firth and --

CHAIRMAN ROSENTHAL: They can or cannot?

MR. THESSEN: They cannot issue a license.

CHAIRMAN ROSENTHAL: So you and Mr. Bouknight do not see eye to eye on that?

MR. THESSEN: I think that is correct.

CHAIRMAN ROSENTHAL: So that we could look down the road, presumably, and see yet another battle in this case?

MR. THESSEN: The staff believes the Water Firth decision of the Commission as well as the appeals board decision in Davis-Besse make it clear that licenses will not issue until the previous antitrust review has been completed unless all parties agree. And that is the positin of the Staff as well.

MS. KOHL: Where in the statute do you get the support for holding up the issuance of the license on that basis? Would that not be agency action unlawfully withheld under the APA?

MR. THESSEN: First, we are not faced with that

situation here. Let me point that out initially.

MS. KOHL: It is something that we cannot be completely ignorant of in our consideration of this case. We are talking about closing the door on parties and eliminating them from a proceeding. And since it is likely that this particular operating license will not go through adjudication, it may well be issued in the near future. And given this current posture of the antitrust review case, it is likely that that will not be resolved in the near future. So we may well be faced down the road with this particular hypothetical situation.

MR. THESSEN: Let met see if I can be responsive in this fashion. In the present proceeding what we are asking is what is the jurisdiction of the operating license hearing board? That is the issue before us. Whether Parsons & Wittimore has some forum someplace in this agency is not the question.

So, first of all, we must focus on the operating license antitrust -- excuse me -- the operating license hearings board's jurisdiction when we decide the merits of this particular case.

With respect to what authority the Staff points to for its conclusion that an operating license cannot issue until the antitrust review is completed, I think we must look at the same legislative history that this appeal board

and the Commission canvassed when they decided Davis-Besse and Water Firth, respectively.

That legislative history makes clear that Congress was referring to a pre-license antitrust review. It was important that that review be completed so the Applicant knows where he stands before he builds an expensive plant and because once the license is issued incentives are different for cooperation on matters and what not.

The timeliness factor is also considered. This antitrust revew could go on forever if we did not have it as a pre-license proceeding.

CHAIRMAN ROSENTHAL: But it has been going on forever anyway, has it not?

MS. KOHL: I assume that was a rhetorical question.

If what you say is true, you are basing your argument on the legislative history. How do you deal with the actual language of the statute itself, which, of course, is always what you resort to first; that is, 105(c)(6)? That seems to give the Commission the authority not only to issue or to continue a license, to refuse to issue a license, but also to rescind a license or amend it on the basis of findings that an Applicant might be operation or maintaining a situation inconsistent with the antitrust laws.

Does not the fact that that language appears and seems to permit recision or amendment of an already-issued

license, that would seem to suggest that the OL can be issued before the antitrust review is complete but the Commission would have the opportunity to come in at that time and apply relevant conditions on it?

MR. THESSEN: I think your argument is persuasive if it is not read also in the light of the Water Firth decision. The Commission is foreclosed --

MS. KOHL: It is the statute that the Commission is obliged to act in compliance with, not necessarily its own interpretation or decisions.

MR. THESSEN: No; I agree. I agree. And I think if the Commission felt that its previous interpretation of the statute was inaccurate, it would be, I think, in the first instance for the Commission to make that determination before the Staff or any other board could conclude differently. And that is the basis. We read the legislative history the same as the Commission does.

MS. KOHL: So your view is that a licensing board and an appeal board are bound by prior Commission decision and in no instance could authorize the issuance of an operating license prior to the completion of the antituust review?

MR. THESSEN: The decision in Water Firth and the language there is pretty straightforward and would be hard to distinguish, I believe. And the Commission clearly

intended that an operating license not issue.

But let us look at what is at stake in this proceeding and how that may affect the issuance of an operating license. It is clear that the operating license must be held in obeisance to the construction permit antitrust review which is still ongoing. It is also clear that that construction permit antitrust review can consider every significant event and every significant element in the antitrust posture of the Applicant, Florida Power & Light.

CHAIRMAN ROSENTHAL: If there are significant changes from the time that the antitrust proceeding started, say, the thing is before a licensing board and it went before the licensing board two years ago and it is wending its weary way on. And if at some point during that period there is a significant change, that could be considered by the licensing board in the CP antitrust proceeding?

MR. THESSEN: If it has not rendered its final decision.

CHAIRMAN ROSENTHAL: I am assuming that it is ongoing.

MR. THESSEN: Yes.

CHAIRMAN ROSENTHAL: And now a party who was already in the proceeding could move for leave to amend its petition to assert these new contentions based upon significant change?

MR. THESSEN: That is correct.

CHAIRMAN ROSENTHAL: And a party that was not in the proceeding could at least seek intervention, assuming as justification for its tardiness the fact that it was only these new developments that gave it concern?

MR. THESSEN: Had good cause because the developments did not previously exist.

CHAIRMAN ROSENTHAL: Now, would you agree, therefore, that the purpose of 105(c)(2) was simply to cover any interval of time which might exist between the completion of the CP antitrust review and the operating license?

MR. THESSEN: Yes, that is correct.

CHAIRMAN ROSENTHAL: Does the legislative history make that clear?

MR. THESSEN: I think, yes, it does, and I think for this reason: What is enshrined in 105 is the principle that the Commission, when it finally authorizes the operation of a nuclear power plant, that the Commission is satisfied that that operation will be consistent with the antitrust law.

The Congress set forth the two-stage proceeding for the benefit of Applicants to make sure that before they made a huge investment in these power plants that they knew what their antitrust conditions would be.

MS. KOHL: But that is not really relevant here, because they were granted the construction permit and began in 1977 before the antitrust proceeding was even --

MR. THESSEN: Yes, but all parties agreed to the issuance of that permit.

MS. KOHL: Who were the parties that agreed to that at the time?

MR. THESSEN: I believe at the time Florida Cities was involved in the proceeding, the Staff was involved in the proceeding, Justice Department, and the Applicant. Parsons & Wittimore had not yet come on the scene.

CHAIRMAN ROSENTHAL: Now, can you refer me to some specific legislative history that supports your construction of the purpose underlying 105(c)(2)?

MR. THESSEN: I would point to the amendments of 105(c) in 1970. And the legislative history which was canvassed by this appeal board in Marble Hill and in Davis-Besse and the Commission's look at the same legislative history in South Texas.

And I forget the chairman of the committee's name at the time, but he makes clear his concern that the second antitrust review be an entirely new proceeding which goes over all the same grounds.

And he says, "Look, there will be no end to litigation, there will be no finality to the Applicant's

investment decisions, and we just do not want to do that. That would be unfair. What we do want to do, however, is make sure that we do not miss any significant elements. So we will put in this limited second phase. If any significant changes take place, we will allow the Commission to have a hearing, having made that determination."

DR. BUCK: Well, maybe I am not understanding all this legal argument, but it seems to me that there is a problem here. Supposing the construction antitrust hearing finishes up and comes out with a decision, and that decision suggests certain conditions. Now, the next day the operating license is issued on the basis of that.

What does a person do or a company do that looks at those conditions and says, "My gosh, this, as far as I am concerned, interferes with my rights under the antitrust Act"? He was not in the case before, did not know those conditions were coming down, and yet here are the conditions which he now believes are infringing on his rights. What can he do about that?

MR. THESSEN: I think he has two recourses. Parsons & Wittimore has gone through both proceedings and is still involved.

DR. BUCK: He has only got 24 hours to do anything; is that right?

MR. THESSEN: What you are suggesting is that

there was no publication of the conditions prior to --

DR. BUCK: I am saying that the license conditions were proposed and so on, but the licensing board, the antitrust board, comes up and puts on some conditions that nobody had really considered before, and this is what happens sometimes with antitrust boards, some completely new conditions. And the reactor is ready to go. The Commission says, "Okay, we do not have to do any more about this," and issues the license.

MS. KOHL: Or, as a variation, they were conditions that all of the parties to the particular proceeding formulated and were in agreement with, but they were to the detriment of outside third parties.

DR. BUCK: That is what I am talking about: working to the detriment of outside third party who was not in the thing at all, who sees that condition, maybe he does not see the conditions for a week. And yet, in the meantime, the license was issued.

MR. THESSEN: I think there are two principles, or several principles, here which would be looked to to address this question. First of all, the conditions apply only to the behavior of the Applicant. To the extent a party is disadvantaged, it would not mandate anything affirmative on the part of that party.

Now, a party can always come in under 2.206 as

soon as it finds out about the conditions and ask the Director of Nuclear Reactor Regulation to issue a show-cause order why the permit should not be modified.

Of course, finally, the petitioner could attempt to intervene in the appeal at that point and assert that the decision should be stayed, the operating license should not be issued.

DR. BUCK: Well, he cannot appeal, suppose nobody appeals?

MR. THESSEN: You would have to intervene successfully first.

I think, though, that that situation is unlikely and is clearly not the situation here. The conditions which are complained about have already been imposed. Parsons & Wittimore clearly has notice now what those conditions are, is attempting to use what legal remedies it has to correct what it sees as problems with those conditions. And it will have at least another year before the operation of this plant commences, as I understand it. So we are not talking about the situation before us. We are not talking about a midnight imposition of conditions with a subsequent operating license issuance.

I think, as well, the conditions, the situation you describe, would not be in any way helped by a reading of sectin 105(c) because whatever the conditions are themselves

would not provide an opportunity for a significant-changes determination. You would have to have that determination before you could institute a second proceeding.

So even in those situations, if we read the right to an operating license proceeding --

DR. BUCK: They might involve significant changes to the third party that was not in the proceeding at all. The conditions put on by the licensing board might, to that party, represent significant changes in operation by the power company. That is all I am saying.

What confuses me is, particularly in this notice of hearing, it seems to me that the Commission is really playing fast and loose with the definition of the word "interest," because in some cases "interest" means a "whole interest" and in other cases it only means "partly interest" and so on.

But I am just concerned as to what happens here. We seem to be caught in the middle because of antitrust hearings going on so long. They always do. And I am concerned that something can drop between the cracks here, and I do not know how the party gets out of it, or the third party, for example.

MR. THESSEN: I think in this case what your concern is is that Parsons & Wittimore has been turned down in the antitrust review. They have been turned down here.

And they do not know where to go.

However, let us look at the issue before us right now. It is whether this operating license proceeding has authority over antitrust questions. Parsons & Wittimore's complaint, to the extent it goes to matters within the jurisdicton of the Commission, is concededly witin the authority of the antitrust review board now empaneled at the construction permit phase.

Nobody denies, to the extent they allege issues within the cognizance of our statutes, that that board has the authority to consider the merits. So there is a forum. Now, their hurdle is late intervention, and their hurdle is the other procedural requirements, the nexus, interest, and what not.

Now, in the BPI versus AEC case, the Court of Appeals indicated that the Commission can put procedural requirements on petitioners to intervene, that the 189 of the statute authority to intervene is not absolute, and that the interest that the Intervenor must show are interest within the scope of the jurisdiction of both the board and, more broadly, of the Commission.

Now, to the extent Parsons & Wittimore alleges interest within the scope of the statute, the broader notion, they have an opportunity in the construction permit phase, if they meet these procedural requirements. Judge

Bloch has ruled that they do not. If they think that was improperly applied, they have an appeal.

That does not mean, however, that because they may allege interest within the broader scope of the statute, that they necessarily have the right in this narrower proceeding. The case would be different if there were no proceeding at all that could address the merits of their complaint.

But that is concedely not the case here. Admittedly, to the extent that they allege issues beyond the scope of any statute we enforce, they are outside the scope of any proceeding we have.

CHAIRMAN ROSENTHAL: Your time has expired.

MR. THESSEN: Let me make one final point. I think the jurisdiction of the licensing board in this case is clearly limited to the consideration of health, safety, and environmental questions.

The Commission could not have delegated anything broader than that in the light of section 105(c), in the light of its long-standing Commission practice of separation, a practice which is so engrained that it would only modify it with a specific delegation that it was to be overturned.

CHAIRMAN ROSENTHAL: You have made this argument already, Mr. Thessen.

MR. THESSEN: Fine. Thank you.

CHAIRMAN ROSENTHAL: All right.

MR. JABLON: You raised the question just now whether an operating license could issue in view of the authority to terminate the operating license. Unfortunately, I tried that issue and lost before the Court of Appeals in Fort Pierce on the grounds of the Commission's thorough antitrust responsibilities under 105. The question was asked more generally whether an operating license can issue before the completion of a construction permit, again absent waiver.

I think Davis-Besse rested on the grounds that the section 105(c)(5) finding of whether there was a situation inconsistent with the antitrust laws had to be made. The specific question on Davis-Besse was whether there was an exception in the circumstances possibly covered by 105(c)(8).

I think the Appeal Board decision in Davis-Besse properly recognized that there was a dual interest in obtaining the electricity from the plants and an interests in not having the Commission issue licenses which may give injury to antitrust concerns.

Dr. Buck, you commented on the endless antitrust proceedings. If counsel representing a party is permitted to be rhetorical, there is a canard is that the best defense to an antitrust claim is delay.

Now, under the interim settlement conditions, many of my clients will own an interest in the plant, so that they do have an interest in the operation of the plant on time. They also have an interest, however, in efficacious antitrust review, and what this Russian roulette does, perhaps, is focus the mind to get resolution of the issues.

In any event, it was a statutory question which was decided in Davis-Besse.

The question was asked by the Chairman as to the general 105(c)(6) authority to condition a license to provide for retroactive relief in the event, contrary to my position, that an operating license did issue. I think the words used in 105(c)(6) is upon a finding of a situation inconsistent, the Commission is granted the authority to grant relief in the "public interest." This statutory language, especially in the context of the FERC cases, Scenic Hudson, for example, this kind of statutory language, has been interpreted to give broad remedial powers to Commissions. I would also cite a Niagara-Mohawk case. In any event, the question is not before you.

The question was asked -- Mr. Bouknight closed his argument saying that he hoped you gave us dismissal but not solace. On the solace point, I can assure you -- I cannot assure you, but I can surmise that in view of the Federal Register notice, had Florida Cities not moved to intervene

on the operating license, that we certainly would have expected to have heard arguments, and I think you would have heard arguments, that by not intervening then that we had waived our rights.

The only solace we ask is I think what is the function of this forum, which is law clarification, that we have not, if you rule against us on the law -- that is, either we were premature or in articulated ground so that we cannot be deemed to have waived rights.

We are not seeking anything more than to be placed in no worse of a position that we would have otherwise by not intervening.

With regard to the question of the Board which focused on Mr. Bouknight, of the statutory construction, I agree with the tenet of some of the Board questions that the 105(c)(2) language -- specifically, the words should be "previous review," where the proposed activities have occurred subsequent to the previous review -- would be consistent with an interpretation that the previous review did not have to encompass the entire review.

The statute does not say so. The institutional agency purpose to be served by such interpretation is not to get yourself in the dilemma which many of your questions raised where you are dealing with a scintilla of time and you are forcing decisions into a scintilla of time, when

everybody knows and the world knows that there are cognizable antitrust claims.

Finally, I agree with Mr. Bouknight: Of course, Florida Cities do not seek to actually hear antitrust terms with a board not constituted to do so. I think this agency has authority to consolidate operating license and construction terms in one antitrust board.

And the appropriate practical resolution of the matter would be either to make a finding that there are grounds that significant changes exist and have a consolidation or to have the law clarification that I suggest.

Thank you.

CHAIRMAN ROSENTHAL: Now, I take it, just before you sit down, that any significant change in the utility's operations, proposed operations, which might affect your clients, you could now inject into the construction permit antitrust proceeding?

MR. JABLON: I certainly could if you say so. And that is my position.

CHAIRMAN ROSENTHAL: Well, you say you cannot amend your petition to reflect changes?

MS. KOHL: Or seek leave to --

MR. JABLON: As a practical matter, I think I can. I am certain I can, because the grounds of

intervention were significantly broad that I can raise certainly anything I would propose to raise --

CHAIRMAN ROSENTHAL: Is it not normally the case if there is a new significant development that affects the merits of a particular case, I thought antitrust or not, it was always open to a party to come in and say, "Look, there has been a very significant change in operations. It is fraught with enormous antitrust significance, and we wish, if necessary, amend our petition to accomplish this purpose. Bring this to the attention of the Board and have it factored into the case."

MR. JABLON: I agree with you on two grounds. The grounds you state; but, in addition, there is authority at least on the licensing board level that all the petitions board does is grant intervention and then the job of the antitrust licensing board is to determine --

CHAIRMAN ROSENTHAL: This is the merits board, is it not?

MR. JABLON: Yes, it is the merits board now. Chairman Smith, in the St. Lucie board, had ruled that in fact the petitions to intervene had no relevance once a merits board was convened. So, in fact, there would be the authority you seek on that grounds also.

CHAIRMAN ROSENTHAL: Thank you.

Mr. Kucik.

MR. KUCIK: Both Appellees argue that the petition filed by Parsons & Wittimore was solely an antitrust petition. That simply ignores the plain language of the petition. The rights we claim solely in our status as a qualifying facility in paragraphs 8 to 12, in paragraph 22 we said specifically those rights "can be separately considered and protected without an antitrust hearing."

We then filed a brief and attached it to the petition. The brief it was devoted solely to the antitrust concerns. But in a footnote it said the rights we had in our status as a PURPA facility form "an independent basis for allowing intervention without the necessity of a finding that FP&L's circumstances have changed."

CHAIRMAN ROSENTHAL: But would the licensing board, in order to entertain that claim, have to make a determination that you in fact were a qualifying facility?

MR. KUCIK: No, I do not believe so. I believe that issue was taken up. No, I do not believe so.

In any event, that question was raised before the construction licensing boad, and Judge Bloch ruled that we had a sufficient interest in the facility to support intervention.

CHAIRMAN ROSENTHAL: Judge Bloch might have been wrong about that. We are not bound by that determination any more than we are bound by the determinations of the

other licensing boards which you are challenging.

MR. KUCIK: Of course not, this board is not bound. But I would think the issue is between Florida Power & Light and us at another tribunal below the appellate level would be res judicada. Florida Power & Light litigated that question with us, the identical question, at the lower level.

This board has the power to reverse or to affirm. But I think that issue as between the parties has been adjudicated.

It is true that in the construction permit the ruling was we were untimely. And I do not want to argue that here. But what happened was these license conditions that identified a class of persons, qualifying facilities under PURPA, were made effective on April 24. We had found out about them without any public notice somewhat earlier when we filed this intervention petition in this pending proceeding on April 7.

CHAIRMAN ROSENTHAL: I do not really want to hear about that at this late date. As you correctly point out, that is not before us. And we have to assume for the present purposes that your petition in that case was properly denied. It may or may not have been. That will be up here on appeal.

The argument that your adversaries make is that you had a remedy -- that was a timely petition for leave to

intervene in the construction permit antitrust proceeding -- and that the question of whether you were properly denied intervention in that proceeding is, of course, for another day. They said that was the proceeding you belonged in, and if, in fact, you were properly denied intervention on the basis that you slept on your rights, then you have no complaint here.

MR. KUCIK: That is what I was getting at.

CHAIRMAN ROSENTHAL: Well, why is that not right?

MR. KUCIK: Because, forgetting the antitrust aspects of it, which is the other case, prior to April 24 there was no public notice that any class of persons denominated qualified facilities under PURPA would be affected by this.

Our right to be heard on the settlement conditions that affect us could not have possibly arisen until the conditions were approved by the board or at least until we had notice that they were made.

CHAIRMAN ROSENTHAL: Well, that may be an argument you can advance in support of your claim that the licensing baord erroneously denied your petition for leave to intervene.

MS. KOHL: Your complaint is with that licensing board, and that they did not publish or give adequate notice of that settlement agreement prior to April of this year.

MR. KUCIK: That is certainly one aspect of it. But there is another aspect of it.

MS. KOHL: What complaint do you have with this particular licensing board in this OL case?

MR. KUCIK: That there was a broad notice, that the notice said that it would take into account all aspects of the matter pending and then issue an operating license. It said any person with an interest should intervene. And the fact is that we have an interest in the settlement conditions.

CHAIRMAN ROSENTHAL: Well, if we read this notice contrary to your interpretation of it, we conclude that this notice is fairly read as limiting this operating license proceeding to health and safety and environmental issues, then do you have anything left to complain about with respect to this Licensing Board as opposed to the licensing board in the antitrust proceeding?

MR. KUCIK: Yes. I think that what we have to complain about is if both licensing boards are right, qualifying facilities under PURPA will have no opportunity before the Commission, if they are both right.

CHAIRMAN ROSENTHAL: But the point is I am asking you what is the basis you insist that this notice was broad enough -- I am talking about the notice in the operating license proceeding -- you insist that it was broad enough to

embrace PURPA antitrust issues, alike.

Now, what I am asking you is: If we do not agree with you on that, if we say, "No, this notice could be fairly read and properly read as being limited in scope to environmental and health and safety issues," what remaining grievance do you have against this Licensing Board?

Now, you still have a grievance against the other licensing board, because you apparently believe that you were entitled to intervene in that proceeding, notwithstanding the lateness of your petition.

But I am not looking at this Board and this Board alone. And that is all that is before us this morning is whether this Board correctly or incorrectly denied your petition for leave to intervene in the OL proceeding on the ground that it had no jurisdiction to entertain the issues.

Now, what is your grievance with that board if we do not agree with your interpretation of the notice?

MR. KUCIK: Our argument is, in those circumstances, that the Commission had the obligation to delegate to this Board the right to hear the claims of interested persons under the settlement agreement --

CHAIRMAN ROSENTHAL: All right. Were there not proceedings going on in which they could have been litigated, and at least if you had timely filed your petition?

MR. KUCIK: But that leads to a peculiar result. We are interested in settlement conditions that occur in the context of our status as a qualifying facility. In order to get into the ongoing antitrust case and in order to litigate those interests, we have to show a changed circumstance. But all we are really talking about is a right to be heard on a settlement condition that affects us.

Now, we do argue and we have --

MS. KOHL: He just stated that your complaint is with the Commission's delegation of authority, that they did not delegate enough authority to the operating licensing board.

MR. KUCIK: On the assumption in Mr. Rosenthal's question, yes, that they would have had an obligation to allow --

MS. KOHL: But is not your proper recourse then not to appeal the decision of the licensing board but rather to file a petition with the Commission itself, challenging its delegation of authority?

MR. KUCIK: I suppose we could do that. I think it was not unreasonable for us to choose to intervene in the pending proceedings, and I think that we had filed a petition directly with the Commission first, that would be subject to the argument that there were proceedings we could have brought it up in. There was no good way. There was no

good way, in these circumstances, where the antitrust proceeding had been going on, and the conditions affecting PURPA facilities did not come out until April 1979.

But I would say this: I know of no case in court or no administrative decision where a party covered by a decision of an agency by an approval of a condition, a party who was directly within the class affected has been denied an opportunity to participate when they learned promptly of what had happened. The problem here is that it is being killed on technicalities, circumstances on the scope of hearings, on the delegation of authority to various boards.

MS. KOHL: Timeliness of intervention, timeliness of expression about party's interests in a matter in which that party argues it has substantial claims.

MR. KUCIK: But that is only as to antitrust. As to the claims in our status, where Judge Bloch held was that that is only an antitrust hearing and he cannot take into account the claims that are not based upon antitrust changed circumstances.

So it is sort of a dilemma there. This Licensing Board cannot take into account the antitrust claims because of the delegation, and Judge Bloch cannot take into account the other claims because of the scope of the ongoing hearing. And we do not have any remedy.

MS. KOHL: Let us assume that the Commission's

delegation of authority to the licensing board, the OL board, was extremely broad, as broad as you want to read it, and let us assume or agree with your interpretation that the OL notice in this case, that it was broad. In other words, it excluded nothing; it was an open invitation to anybody with any kind of interest.

Is there not a higher restriction on what the Commission can undertake to review in any given proceeding? In other words, is not the broad construction of a Federal Register notice and broad construction of the delegation of authority inherently limited by the agency's jurisdiction as granted by Congress?

MR. KUCIK: All we would say to that is that the agency necessarily had jurisdiction to impose these license conditions, because it did it. It did it. They affect us. And we were not parties at the time the agency did it. I would think it would be a strange result to hold that the agency did this ultra vires and now we cannot get in to have our say about the impact on us.

CHAIRMAN ROSENTHAL: Your time has expired.

MR. KUCIK: Thank you.

CHAIRMAN ROSENTHAL: On behalf of the entire Board, I once again wish to apologize for the delay in our commencement this morning. And we thank counsel for the respective parties or their helpful submissions.

And on that note, the appeals will stand submitted.

(Whereupon, at 12:49 p.m., the Board adjourned.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

In the matter of: Florida Power & Light Company (St. Lucie Plant, Unit No. 2)

Date of Proceeding: August 20, 1981

Docket Number: 50-389 OL

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Alfred H. Ward

Official Reporter (Typed)

Alfred H. Ward

Official Reporter (Signature)