

August 7, 1981

Docket No. 50-389A

George R. Kucik, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
Federal Bar Building
1818 H Street, N. W.
Washington, D. C. 20006

Dear Mr. Kucik:

On June 22, 1981, you filed a petition pursuant to 10 C.F.R. 2.206 on behalf of Parsons and Whittenore, Inc. and Resources Recovery (Dade County), Inc. In that petition, you requested the NRC to institute enforcement action against the Florida Power & Light Company (FP&L) for the asserted failure by FP&L to abide by an antitrust condition of the license FP&L holds for the St. Lucie Unit No. 2 nuclear power facility. For the reasons set forth in the enclosed "Director's Decision Under 10 C.F.R. 2.206", your request has been denied.

A copy of this decision will be placed in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D. C. 20555, and the local public document room for the St. Lucie Plant, Unit No. 2, located at Indian River Community College Library, 3209 Virginia Avenue, Ft. Pierce, Florida. A copy of this decision will also be filed with the Secretary of the Commission for its review in accordance with 10 C.F.R. 2.206(c) of the Commission's regulations. As provided in 10 C.F.R. 2.206(c) of the Commission's regulations, this decision will constitute the final action of the Commission

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25 days after the date of issuance, unless the Commission on its own motion institutes the review of this decision within that time.

Sincerely,

[Handwritten Signature]
 Original Signed By
 F. G. Case
 Harold R. Denton, Director
 Office of Nuclear Reactor
 Regulation

Enclosures:
 Director's Decision
 Federal Register Notice

cc: Harold F. Reis
 J. A. Bouknight, Jr.
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OFFICE	OELD	OELD	NRR	NRR	NRR	NRR	NRR
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DATE	7/16/81	7/16/81	7/17/81	7/17/81	7/17/81	7/20/81	7/17/81

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U. S. Environmental Protection Agency
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION
HAROLD R. DENTON, DIRECTOR

In the Matter of)	
FLORIDA POWER & LIGHT COMPANY)	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2))	(10 C.F.R. 2.206)

DIRECTOR'S DECISION UNDER 10 C.F.R. 2.206

By letter dated June 22, 1981 George R. Kucik, Esq. requested, on behalf of Parsons & Whittemore, Inc. and its wholly owned subsidiary Resources Recovery (Dade County) Inc., (hereinafter jointly referred to as petitioners) that enforcement action be instituted against the Florida Power and Light Company (FP&L) for the asserted failure by FP&L to abide by an antitrust condition of the license it holds for its nuclear power plant known as St. Lucie Unit 2. Florida Power & Light Company submitted a response to the petition on July 15, 1981. For the reasons which follow I decline to institute the requested enforcement action.

DISCUSSION

The license condition in question ^{1/} requires, among other things, that FP&L transmit under certain conditions electricity generated by two defined categories of electrical generating entities:

^{1/} See Florida Power & Light Company, CPPR 144, Amendment No. 3, 3.F.(6), Section X, issued May 26, 1981 (46 F.R. 31394).

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- "qualifying small power production facilities", as that term is defined by a regulation of the Federal Energy Regulatory Commission ^{2/}; and
- "neighboring entities", a term defined in the license condition itself.

The petitioners here are the designers/constructors of a resource recovery plant said to be capable of producing 77 megawatts of electricity by burning fuel derived from refuse. Claiming status both as a "qualifying small power production facility" and as a "neighboring entity" they assert that they have requested FP&L to provide transmission service and that, in violation of its NRC license condition, FP&L has refused.

Whether the petitioners are a "qualifying small power production facility" is a question involving the interpretation of provisions of the recently enacted Public Utility Regulatory Policies Act of 1978 (PURPA) and the implementing regulations promulgated by the Federal Energy Regulatory Commission at 18 C.F.R., Part 292. Not only are these provisions of law the proper province of the Federal Energy Regulatory Commission but, in fact, the very issue of petitioners' status as "qualifying small power production facility" is currently pending before that agency. ^{3/} Moreover, it is my understanding that both the

^{2/} 18 C.F.R., Part 292, Subpart B.

^{3/} FERC Docket No. QF81-19-001, 46 Fed. Reg. 30557.

petitioners' claim and FP&L's challenge to that claim in the pending proceeding involve a question of first impression before FERC. In these circumstances, FERC should be afforded the opportunity to interpret PURPA and its own regulations free of any intrusion an advance interpretation on my part might cause.

Assuming for the sake of argument only that petitioners otherwise fit within the definition of "neighboring entity", ^{4/} the petitioners' claimed status as a "neighboring entity" in this petition is intertwined with the question of whether it is a "qualifying small power production facility". The relationship is as follows. In order to come within the definition of "neighboring entity" the petitioners must satisfy several enumerated criteria including this one:

"(3) it is, or upon commencement of operation will be subject to regulation as a public utility with respect to rates or service under applicable state law, or under the Federal Power Act, or it is legally exempted from such regulation by law."

Petitioners assert that the resource recovery plant satisfies this criterion because it "is subject to regulation as a public utility under the Federal Power Act". ^{5/} The reason petitioners assign for the facility being subject to regulation under the Federal Power Act is that it has a capacity "in excess of 30 megawatts" and, therefore, is not exempt from regulation under a provision of the Federal Energy Regulatory Commission's regulations (18 C.F.R.


^{4/} Because the decision I reach does not require determining whether petitioners do indeed otherwise fit within the definition of "neighboring entity", I make no determination in that regard.

^{5/} See "Request for Enforcement Action Against Florida Power & Light Company", submitted by George R. Kucik, 6/22/81, at 6.

292.601) which exempts from the Federal Power Act "qualifying small power production facilities" having capacities of 30 megawatts or less. By employing this reasoning process the petitioners have inferentially asserted that the resource recovery plant is a "qualifying small power production facility" and thus rendered their "neighboring entity" argument dependent upon the resolution of their status as a "qualifying small power production facility". For the reasons discussed at the outset I decline to attempt to pre-judge the outcome of the pending FERC proceeding, the very purpose of which is to determine whether or not petitioners' resource recovery plant is a "qualifying small power production facility". Pending resolution of petitioners' status, an adequate basis upon which to institute the requested enforcement proceeding is lacking. Accordingly, I decline to do so and deny the request of the petitioners. 6/

A copy of this decision will be filed with the Secretary of the Commission for its review in accordance with 10 C.F.R. 2.206(c) of the Commission's regulations.

As provided in 10 C.F.R. 2.206(c) of the Commission's regulations, this decision will constitute the final action of the Commission 25 days after the date of issuance, unless the Commission on its own motion institutes the review of this decision within that time.


Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 7 day of August, 1981.

6/ If FERC were to decide that the resource recovery plant does qualify as a "qualifying small power production facility" the decision I reach today would, of course, not prevent the petitioners from resubmitting their request for enforcement action. Should the petitioners choose to resubmit their petition after FERC rules, a determination will be made at that time as to whether the requested enforcement action is appropriate.