## INTRODUCTION

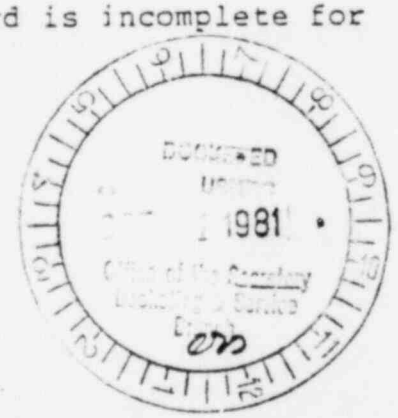
Objection #1: The Board erred in finding that "FPL refused RRD's request for PURPA rights and contested its claim before FERC" (Mem. 2, ¶2).

RRD has asserted no claim before FERC. On March 13, 1981, RRD filed with FERC formal notice of its qualifying status. The purpose of that required notice, according to FERC, is to facilitate the agency's environmental monitoring of qualifying facilities. See 45 Fed. Reg. at 17971 (March 20, 1980). Thereafter, on May 6, 1981, FPL petitioned FERC to declare that RRD is not a qualifying facility, and that "claim" by FPL is now pending before FERC (Docket No. QF-81-19-001). RRD contends before FERC that FPL's Petition for a Declaratory Order should be dismissed because the agency lacks authority to determine RRD's qualifying status in circumstances where RRD did not request such a determination.

## CONSIDERATION OF FACTORS GOVERNING LATE INTERVENTION

Objection #2: The Board erred in stating that "RRD's apparent reason for believing that its FERC remedy is incomplete is its concern that a settlement agreement entered into between Staff, the United States Justice Department and FPL will adversely affect its PURPA rights" (Mem. 5, ¶3).

The FERC remedy mentioned by the Board is incomplete for several reasons:



U.S.C.] §2239(a)." Susquehanna Valley, supra, 619 F.2d at 238; see Liesen, supra, 636 F.2d at 95.

Objection #3: The Board erred in concluding "that RRD can seek complete relief for all its grievances from FERC" (Mem. 6, ¶3); that "RRD wants to limit its participation as much as possible to exactly the same issues as pend before FERC" (Mem. 9, ¶3); "that the antitrust issues impliedly raised by RRD are peculiarly within the competence of FERC" (Mem. 9, ¶4); and that FERC's "competence arises because FERC has the responsibility for administering PURPA and the antitrust issue impliedly raised here is whether small power facilities have antitrust rights additional to their PURPA rights or whether PURPA rights preempt antitrust rights" (Mem. 9, ¶3, to 10, ¶1).

For several reasons, FERC's antitrust jurisdiction is not an "other means whereby the petitioner's interest will be protected" within the meaning of 10 CFR §2.714(a)(1)(ii). Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) 10 NRC 265, (ASLAB 1979); South Texas, supra.

First, in Davis-Besse ~~(Perry)~~, the applicants had argued that the NRC was required to take into account the "public interest" (and thus impose lesser competitive duties) when making its §105c determinations. The applicants had reasoned that this analysis would make NRC review consistent with Federal Power Commission (now FERC) antitrust responsibilities. The Appeals Board rejected that argument, ruling:

> The "public interest" standard applied by the FPC and FCC is not appropriate for section 105c purposes. Among those agencies' primary roles is economic regulation, either of a line of commerce or of a particular industry. NRC

> responsibilities are not of that kind. Rather, section 105c calls upon the Commission to determine only whether the specific and (in the overall context of the electric power industry) relatively limited activities of its licensees would cause or continue situations inconsistent with antitrust requirements. The section nowhere mentions -- much less conveys -- the right to relax or ignore settled antitrust strictures in favor of some broad conception of the "public interest" or to further another regulatory scheme with a different purpose.

Id. at 284.

The Licensing Board in the South Texas case applied similar reasoning to reach a result that is inconsistent with this Board's conclusions. There, the applicants argued that the enactment of PURPA and its grant of authority to the FERC to order wheeling and interconnection eliminated the need for §105c hearings where the petitioner sought interconnection or wheeling. That argument was rejected. The Board noted that "the legislative history and the language of PURPA clearly establish that it was not intended to divest NRC or any other antitrust tribunal of jurisdiction, nor to require deferral of such matters to FERC." Id. at 576 (emphasis added, citations omitted). Quoting Senator Metzenbaum, a member of the PURPA conference committee, the Board ruled:

> the authority of the NRC in conducting an antitrust review [under section 105c] would not be affected by this extremely limited wheeling authority granted to FERC under this new

> legislation. These two agencies are charged with different responsibilities with respect to wheeling. FERC's new authority is conditioned on conservation, efficiency, reliability, and public interest. NRC's authority relates to correcting or preventing a situation inconsistent with the antitrust laws.
>
> Accordingly, it cannot be held that proceedings by FERC based upon this statute in any way supersede the instant NRC proceeding.

Id. at 576-77 (citations omitted).

Second, there is no issue pending before FERC as to RRD's wheeling (or interconnection) rights. See the discussion of Objection #2, supra. Yet, the issues raised by RRD's interest in this proceeding are limited to the wheeling conditions of the NRC's settlement license conditions. The FERC proceeding therefore involves totally different issues than those before this Board. 2/

The divergent issues before FERC and the NRC would make it impossible for RRD to limit its NRC participation "to exactly the same issues as pend before FERC" (Mem. 9, ¶3), and RRD has

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2/ Even under FPL's view of the FERC proceeding there is no "public interest" standard to be applied, thus precluding FERC consideration of antitrust issues. The present FERC proceeding concerns FPL's efforts to convince FERC to revoke RRD's qualifying status. Antitrust matters are thoroughly irrelevant to that limited issue and thus cannot be raised there.

never sought to do so. RRD's agreement "that we would take the [NRC] record as it existed" (Tr. 22) and that "[w]e weren't going to try to affect the [NRC] outcome based upon the issues that were already joined by the parties" (Tr. 23) were no more than statements of its understanding of the requirements of NRC law governing late intervention petitions. That understanding, we submit, is correct. Florida Power & Light Co. (St. Lucie Plant, Unit 2, 7 NRC 939, 948 (1978)(late intervenors should be amenable to limitations on scope); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 109 (1976)(limited scope of late intervenors' contentions militated in favor of intervention); Nuclear Fuel Services, Inc., et al. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975)(late intervenors to take the proceeding as they find it). RRD's compliance with the limitations imposed by NRC Regulations and precedents cannot fairly be cited against it as a reason for denying its intervention petition.

Third, the Board's conclusions quoted in Objection #3, supra, are inconsistent with the reasons for granting RRD conditional amicus curiae status to be heard on "the appropriateness of granting relief to PURPA facilities to

supplement rights already granted by PURPA" (Mem. 19, ¶3).[3] Those conclusions also conflict with the Board's recognition that "[w]ere RRD seeking to participate fully in the adjudication of the merits of this case, then it is possible that relief would be available before the NRC that is not available before FERC" (Mem. 9, ¶3)(emphasis added).[4] This Board has thus correctly recognized that the NRC is empowered to afford Petitioners relief unavailable in any FERC proceeding; that power cannot be diminished by considerations of RRD's status (as amicus or intervenor) or of the scope of its participation.

Fourth, the antitrust issue raised by RRD is not "whether small power facilities have antitrust rights additional to their PURPA rights or whether PURPA rights preempt antitrust rights" (Mem. 10, ¶1). Rather, the issue is whether FPL, a utility with a monopoly over the South Florida transmission grid, can use the nuclear licensing process to subvert the procompetitive policies reflected in PURPA's creation of

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3/ The Board's pronouncements on this point would lead to the result that Petitioner has greater rights before the NRC as an amicus curiae than it could have as an intervenor.

4/ The Board's reliance on the possibility that RRD might operate the facility on an interim, one-year basis is wholly inappropriate. (Mem. 9, ¶4) Such issues of interim relief and the timing of the plant's operation are irrelevant to a decision upon the NRC's ability to afford RRD relief. Further, the Board's reference to FPL's alleged offer to permit the facility ~~if~~ to operate for one year mischaracterized counsel's comments, which are unsupported by any evidence in the record. (Mem. 9, ¶4; Tr. 41). ~~Moreover,~~ FPL has not made the unconditional offer described by the the Board.

wheeling rights; nor does it involve FPL's St. Lucie license and the conditions therein.

The issues in the arbitration and FPSC proceedings are totally inapposite to the issues raised by RRD's intervention petition before the NRC. Those proceedings therefore are factually inadequate substitutes for an order allowing RRD to intervene in this proceeding. Beyond this, those proceedings are inadequate substitutes, as a matter of law, for the relief RRD seeks here.

Even the paramount method of private antitrust enforcement, a federal court lawsuit under the Sherman Act, has been held to be an insufficient replacement for a §105c antitrust hearing. The Appeals Board in this very docket has observed "the barrier to such [antitrust] relief is higher in court than before us."

> In an NRC proceeding, a remedy is available under section 105c to an intervenor who can demonstrate the existence of a "situation inconsistent with the antitrust laws." According to the Joint Committee which drafted the provision, "[t]he concept of certainty of contravention of the antitrust laws or the policies clearly underlying these laws is not intended to be implicit in this standard."

Florida Power & Light Co. (St. Lucie Unit No. 2), 6 NRC 8 (1977). This point was elaborated upon in the South Texas case, supra. Finding that a federal antitrust suit failed to provide adequate relief, the Licensing Board held:

> The instant proceeding involves a finding under §105c(5).... Such an inquiry covers a broad range of activities considerably beyond the scope of the "violation" standard of Section 1 of the Sherman Act. It is well-established that in a Section 105 proceeding it is not necessary to show an actual violation of the antitrust laws.... The scope of Section 105c proceedings also includes consideration of §5 of the Federal Trade Commission Act, which permits proscription of unfair or deceptive business practices that infringe neither the letter nor the spirit of the Sherman and Clayton Acts.... There are substantial differences between the standards and issues involved in the Sherman Act, Section 1 suit based on restraint of trade...when contrasted with the issues involved in this proceeding arising from allegations of monopolization, unfair methods of competition, and inconsistency with underlying policies of antitrust laws (Section 105c).

Id. at 570-71 (citations and footnotes omitted) ~~(emphasis added).~~

Objection #5: The Board erred in holding that the Order approving the settlement agreement "has become final and even were RRD to succeed in intervening it could not challenge that Order" (Mem. 8, ¶1).

RRD seeks intervention to challenge (on antitrust grounds) the terms of the settlement agreement as well as FPL's conduct in reaching that settlement.[5/] RRD's petition to intervene was filed

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5/ RRD also seeks intervention to challenge the terms of the settlement agreement solely in its capacity as a qualified PURPA facility specifically covered by the agreement. See §X(a)(5). That point, which is not based upon an antitrust argument, is discussed in connection with Objection #13, infra.

The date of public release of the settlement agreement is the critical date in determining the timeliness of RRD's Petition to Intervene. Natural Resources Defense Council v. Costle, 561 F.2d 904 (D.C. Cir. 1977). There, the United States Court of Appeals for the District of Columbia upheld the timeliness of intervention petitions under Rule 24 of the Federal Rules of Civil Procedure. The case was seven years old when Petitioners moved to intervene. Their petitions, however, were filed within four weeks of the date on which they first learned of the critical settlement agreement. What is more, the intervention petitions indicated no interest in litigating the merits of the case; they sought leave only to monitor the future administration of the settlement agreement.

Similarly, RRD petitioned to intervene within a month of the public notice of the settlement agreement, and its Petition asserted claims for relief limited to the agreement's Section X(a)(5), the wheeling provisions. There is NRC precedent for allowing intervention to pursue a limited goal (see Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976)), and that precedent should be followed here. To hold otherwise would deprive RRD of its due process rights. See Sea-Land Service, Inc. v. Federal Maritime Commission, ___F.2d __ (D.C. Cir. 1981)(No. 79-2493, Slip Op. at 16)(Commission alteration of a settlement agreement without opportunity for affected ~~parties~~ persons to be heard was violation of due

process); Arkansas-Best Freight System v. United States, 399 F.Supp. 157 (W.D. Ark. 1975), aff'd, 425 U.S. 901 (1976)(Interstate Commerce Commission's failure to give interested persons adequate notice and opportunity to comment before expanding a grant of authority "results in depriving a person or corporation of due process.")

Objection #8: The Board erred in finding "that RRD's reasons for late filing were not specific enough" (Mem. 14, ¶3), and that "[i]n particular, we are concerned that RRD failed to contradict FPL's representations that RRD should have filed soon after February 1980" (Mem. 14, ¶3).[6/]

RRD was not advised until the July 20, 1981 hearing that FPL would argue in this proceeding that the parties' contractual dispute had reached an impasse in February, 1980. RRD denied that assertion during the July hearing (Tr. 74-79 and 116-117). Indeed, RRD contended that it would need discovery as to FPL's unsubstantiated assertion, Tr. 116, based on nothing in the record, that Petitioners said in February, 1980 they "would not operate the EGF." (Mem. 15, ¶2) RRD followed that request with a summation of its position, as follows:

> Everything they [FPL] have said is compatible with an honest dispute that did not erupt until April of

6/ The FPL representations referred to were made orally during the July 20, 1981, conference of counsel. They are summarized at Mem. 12, ¶1.

have sufficient probative force. See Coates v. Califano, 474 F.Supp. 812 (D. Colo. 1979).

By relying upon FPL's references to the unanswered and unsupported allegations in a civil complaint filed by Dade County against RRD, the Board fell below the minimum standards of due process of law required of it. A naked complaint, especially one that was dismissed, is lacking any probative force whatsoever. Reference to it by FPL was improper; reliance upon it by the Board was arbitrary and capricious. At the conference of counsel, FPL, for the first time, raised the tax credit, the alleged February, 1980 letter, and the FERC petition as grounds for denying the Petition to Intervene.[8/] Obviously, RRD could not respond to these new ~~conditions~~ contentions at the hearing, and the Board denied it the opportunity to respond subsequently. Because the Board rested its decision, in part, upon the new ~~conditions~~ contentions of FPL, it was a violation of RRD's due process rights not to provide it with an opportunity to examine, explain or rebut FPL's assertions. See Kelly v. Herak, 252 F.Supp. 289, 295 (D. Mont. 1966), aff'd 391 F.2d 216 (9th Cir. 1968)(party has right to

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8/ FPL's reference to the tax credit issue goes to the merits of the controversy between FPL and RRD and is wholly irrelevant to a decision on an intervention petition. In mentioning FPL's "arguable ownership right in the alleged small power facility" (Mem. 13, ¶4), the Board improperly evaluated the intervention petition upon a factor going to the merits of the antitrust issues. Moreover, FPL does not claim ownership of the facility. See Objection #7, supra.

contractually determined amount to which RRD became entitled when it substantially completed the construction. The $90 million figure does not indicate a starting point for price renegotiations, as the Board seemed to assume.

Third, for over a year after Feburary, 1980, Petitioners continued to add to their construction expenditures by continuing to build the facility. The $150 million facility was built solely at Petitioners' expense, and they have not been paid for it. In addition, it was RRD who sought arbitration of the contractual dispute with Dade County in January, 1981, after the County had sued RRD in December, 1980. These actions run counter to the idea that RRD ever intended to abandon its legitimate obligations under the disputed contracts. And they are flatly inconsistent with the finding that such abandonment crystallized nearly a year earlier, in February, 1980.

Objection #9: The Board erred in finding that "[a]lthough RRD's intervention would not retard the licensing of St. Lucie..., its participation in this proceeding inevitably would complicate and delay it" (Mem. 18, ¶2).

In reaching its decision on the delay factor, the Board completely discounted RRD's stipulation to accept the scheduled issuance of FPL's operating license. The Board, in addition, failed to consider the impact of the ongoing dispute between FPL and the present intervenors over the issuance of the operating license.

particpation in the proceedings (Mem. 26, ¶5 to 27, ¶1). However, the Board concluded that inquiry into RRD's claims "would substantially overlap facts already in controversy," (Mem. 19, ¶1) and thus, RRD would not contribute to the development of a sound record. Further, the Board found "that Florida Cities adequately represents RRD's interests in this proceeding," up to the point at which RRD is accorded status as amicus curiae (Mem. 21, ¶2). Such findings are factually incorrect and legally unsound.

RRD's claims, while based in part on FPL's maintenance of a situation inconsistent with the antitrust laws, are unique to this proceeding. RRD has raised antitrust claims related to FPL's refusals to deal with RRD, FPL's conduct in reaching the settlement, and FPL's use of the settlement to undermine PURPA. (See Objection #7, supra). No other entity has raised these contentions. RRD's perspective is distinct from that of the other

parties to the proceeding.[9/]

Moreover, RRD's allegations do not relate to a "tiny facet of FPL's overall conduct" (Mem. 19, ¶2). RRD directly challenges FPL's use of the Commission's settlement process and its persistent conduct and policy in refusing to deal with the RRD facility. Central to RRD's claim is its contention that FPL's anticompetitive behavior is a product of its market position as developed by its monopolization of nuclear-powered electrical generation in Southern Florida. There is no other PURPA facility (nor PURPA-like facility) presenting these claims to the Board. RRD's input into the development of the record is, therefore, essential for a full and fair consideration of the threshold

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9/ Moreover, the NRC licenses construction of nuclear plants on the fundamental premise of a need for the power. If alternative technology sources of power or competing producers of power, or both, are available economically, they will affect the need for more nuclear sources. Conversely, if FPL's monopoly powers are allowed to disadvantage and to suppress alternative sources and competing producers, FPL will be allowed both to inflate the apparent need for central-station, nuclear power and to fulfill FPL's negative prophecies as to the alternative.

The need for power issue has confronted NRC with a series of dilemmas. The solution lies in assuring the most vigorous competitive opportunity to the non-nuclear sources, the correction and prevention of anticompetitive actions by licensees, and to that end full exercise of the NRC's responsibilities, including denial of licenses, conditional issuance of licenses, revocation of licenses, and enforcement of licenses. Proper exercise of NRC responsibility would welcome to these proceedings the only party that speaks from the vantage of a competing producer that would introduce an alternate, non-nuclear source into the energy market. Exclusion of that party violates the fundamental mandates of the NRC.

antitrust issues and the subsequent determination of appropriate relief.

The record is devoid of any basis for the Board's conclusion that Florida Cities will adequately represent RRD's interests. Indeed, the Board cited no support for its finding that Cities intends to pursue PURPA-related issues, and RRD knows of no such intention on the part of Cities.

The Board recognized that RRD and Cities do not have identical interests, but it went on to observe that both have raised antitrust issues. (Mem. 20, ¶4) The mere assertion of claims under the antitrust rubric does not reflect upon the similarity of the claims. The Commission recognized as much when it permitted Florida Cities to intervene after the City of Orlando had intervened. St. Lucie, 7 NRC at 949. Both intervenors sought to prove the existence of a situation inconsistent with the antitrust laws, but neither could adequately represent the interests of the other. The same result must obtain here.

The Commission's rules, ~~however,~~ prevent RRD, as an amicus curiae, from contributing to the record developed before the Board. RRD would be prohibited from participating in discovery and would be required to rely wholly upon Cities' attempts to elicit information relevant to the interests of PURPA facilities. See 10 C.F.R. §2.740. Further, RRD would be barred from adducing any evidence at the hearing on the antitrust issues or the relief to be provided upon a finding of an existing

supra). The Board did not give adequate consideration to all of those claims in making the nexus determination and thus it erred. (Mem. 26, ¶1)

Objection #13: The Board erred in failing to recognize that PURPA provides an independent basis for RRD to intervene to challenge the settlement agreement.

The settlement agreement between FPL, the Commission staff, and the Department of Justice requires FPL to provide transmission services as a condition of its license to operate St. Lucie Unit No. 2. Because RRD is directly affected by the terms of the settlement agreement, it sought to intervene to challenge that agreement and the circumstances prompting it.

RRD's interest in the settlement agreement arises because the parties to the agreement chose to affect PURPA facilities in the section on transmission. Having injected PURPA issues into the settlement agreement, the Board cannot now deny RRD's legitimate interest in intervening to challenge the agreement's treatment of PURPA facilities. The PURPA issues raised by RRD cannot be pursued in any other forum because of the Board's unique antitrust jurisdiction (see Objection #12, supra) and its role in implementing the settlement agreement.

In sum, the settlement agreement provides an independent ground that requires granting RRD's Petition to

Intervene.[10/] To the extent that the Board overlooked this independent basis for intervention, it erred.

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10/ At the oral argument on August 17, 1981 on Cities' Motion for Summary Judgment, the Chairman evidenced some miscomprehension on this point:

> [RRD was] asserting that there was a situation inconsistent with the antitrust laws. That was the only thing they could assert here. They were a little confused and at some time said more things about direct PURPA issues. (Tr. 1194).

Therefore, there is no question that the PURPA claim was asserted, and the Board understood this. As stated in the text, the settlement agreement, which directly affects the interests of PURPA entities, requires that such entities be permitted to participate in order to protect their statutory and due process rights. See Sea-Land Service, Inc. v. Federal Maritime Commission, ___F.2d___ (D.C. Cir. 1981)(No. 79-2493, Slip Op. at 16)(affected ~~parties~~ persons must be heard in challenge to settlement agreements.)