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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389A
	)	
(St. Lucie Plant, Unit No. 2)	)	November 16, 1981

FLORIDA POWER AND LIGHT COMPANY'S BRIEF IN OPPOSITION TO APPEAL BY PETITIONER

J. A. Bouknight, Jr.
LOWENSTEIN, NEWMAN, REIS
& AXELRAD
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Herbert Dym
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Attorneys for Florida Power
& Light Company

Dated: November 16, 1981

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I. Introduction

On April 24, 1981, Parsons & Whittemore, Inc. (P&W) and its subsidiary Resources Recovery (Dade County), Inc. (RRD) [hereinafter individually and collectively termed "Petitioner"] petitioned for leave to intervene in the construction permit antitrust proceeding involving St. Lucie Unit No. 2.[1/] Florida Power and Light Company (FPL) filed a response in opposition to the Petition.[2/] Following a conference on July 20, 1981, at which counsel argued the merits of the Petition, presented background information, and responded to

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1/ Petition for Leave to Intervene and Request for Hearing (April 24, 1981) ("Petition").

2/ Partial Response of Florida Power & Light Company in Opposition to "Petition for Leave to Intervene and Request for Hearing" Filed Out of Time by Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (June 26, 1981) ("FPL's Partial Response").

questions posed by the Licensing Board,[3] the Board issued an order denying the Petition.[4] The Petitioner submitted objections to the Order,[5] which the Licensing Board also largely denied.[6] Petitioner has now appealed the Licensing Board's Order.[7] FPL hereby submits its brief in opposition to that appeal.

II. Statement of the Case

A. Factual Background

The Petitioner's only stated basis for intervention in this proceeding is predicated upon its alleged interest in a solid waste resource recovery plant (Plant) in Dade County, Florida. The purpose of the Plant is to convert refuse into fuel, which is then burned to produce steam, which in turn is used to generate electricity.

Ownership, construction, and operation of the Plant is the subject of a series of contracts dating from 1976 between

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3/ The transcript of that conference will hereinafter be denoted as "Tr."

4/ Memorandum and Order (August 5, 1981) ("Order").

5/ Objections of Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. to August 5, 1981 Memorandum and Order (September 25, 1981) ("Petitioner's Objections").

6/ Memorandum and Order (October 2, 1981).

7/ Notice of Appeal and Brief of Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. in Support of Their Appeal from Denial of Their Intervention Petition and Request for Hearing (October 26, 1981) ("Petitioner's Appeal Brief").

the Petitioner and Dade County and between FPL and Dade County. Under the terms of the contracts, the Plant is to be composed of two functionally discrete facilities: a solid waste processing facility (SWPF) and an electrical generating facility (EGF). Provisions in the contracts stipulate that the Petitioner will construct the Plant on a site owned by Dade County; that upon completion of construction and satisfactory tests, the Petitioner will transfer title and ownership of the SWPF to Dade County; that Petitioner is to sell to FPL title and ownership of the EGF; that the Petitioner will operate the SWPF and FPL will operate the EGF; and that FPL will purchase steam from the SWPF and use it to generate electricity which FPL will own. Additionally, the contracts provide that the Petitioner is to finance the costs of construction, that Dade County is to pay a specified purchase price for the Plant upon completion of construction and satisfactory tests, and that Dade County is to pay the Petitioner specified amounts for operation of the SWPF.8/

8/ A copy of the Purchase Contract between the Petitioner and Dade County is attached to a letter from Douglas G. Green to the Docket and Service Section (July 6, 1981) for inclusion in Docket No. 50-389A. See in particular § 1.05 (FPL to own EGF); § 1.11 (Petitioner to be retained by Dade County to operate the SWPF under the Management Contract); § 3.01 (Dade County to lease site to Petitioner); § 3.04 (Petitioner to construct the SWPF); § 3.08 (Petitioner to construct SWPF at its own expense); § 3.09 (construction price); § 5.02 (passage of title to SWPF to Dade County); § 7.03 (tests); § 11.02 (construction of EGF and sale of steam to FPL); § 12.01 (Dade County owns site). A copy of the Agreement for the EGF and (footnote continued)

At some time prior to December 1980, the Petitioner and Dade County engaged in discussions regarding the payment amounts specified in the contracts for operation of the SWPF. The Petitioner stated that there would be a "shortfall" between the payment amounts and the expenses which the Petitioner actually expected to incur, and it expressed its desire to amend the payment amounts specified in the contracts.[9/]

(footnote continued)
Steam Delivery between FPL and Dade County is attached to Response of Florida Power & Light Company in Opposition to "Petition to Intervene and Request for Hearing" filed by Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (May 6, 1981), filed in Docket No. 50-389-OL. See in particular § 3.7 (Petitioner will construct Plant); § 3.21 (the SWPF does not include the EGF); § 6.6 (FPL to purchase steam); § 7.1 (title to EGF to pass to FPL upon completion of construction and inspection). Petitioner entered into an agreement assuming the obligations of Dade County to FPL in May 5, 1978. See Restated Assumption Agreement, attached to FPL's Partial Response as Exhibit C, in particular § 3 (Petitioner to assume obligation to sell EGF and steam to FPL).

9/ The record does not fully reflect the position of the Petitioner on this point. It is FPL's position that, as early as February 1980, the Petitioner may not have intended to transfer title to the Plant as required by the contract unless the contract terms were renegotiated. FPL's Partial Response, p. 16; Tr. 37-38, 92-98. This position is supported in part by a letter written in February 1980 by the Petitioner. Tr. 98. The Petitioner has not denied this intent, but has instead argued that the Licensing Board erred in relying upon a letter which was not entered into the record and has stated that the Petitioner presently intends to abide by the arbitration results. Tr. 76-77; Petitioner's Appeal Brief, p. 25. However, Petitioner has conceded that discussions between the Petitioner and Dade County took place in the fall of 1980 regarding the economic viability of operation of the SWPF, Petitioner's Appeal Brief, p. 4; Petitioner's counsel has admitted that there may have been discussions regarding changes in the contract before December 1980, and that the Petitioner desired to amend the contracts, Tr. 11, 77-78, (footnote continued)

As a result of these discussions, Dade County became afraid that the expected shortfall was so great that the Petitioner simply would not be able to operate the SWPF and "would walk away from it."[10/] Consequently, in December 1980, Dade County filed suit against Petitioner in federal district court for anticipatory breach of contract. The complaint alleged that that Petitioner did not intend to perform its obligations under the contracts because to do so would bankrupt it.[11/] This suit was dismissed for lack of diversity of citizenship.

In January 1981, the Petitioner notified Dade County that the Plant was substantially completed and requested that payment be made as specified in the contracts.[12/] Dade County refused to make payment on the ground that the Plant was not in fact substantially completed.[13/] The Petitioner then unilaterally declared that the contract was terminated.[14/] The contract dispute between Dade County and the Petitioner is presently in arbitration.

(footnote continued)
Petitioner's Appeal Brief, pp. 30-31; and Petitioner's counsel also stated that he did not know whether the Petitioner demanded a change in the contract before the Petitioner would transfer title to the Plant. Tr. 78.

10/ Tr. 77 (Statement by Petitioner's counsel, Mr. Kucik).

11/ See Attachment A to Application for Issuance of Subpoenas, submitted to the Licensing Board by FPL on May 8, 1981.

12/ Tr. 11-12 (Statement by Mr. Kucik).

13/ Id.

14/ Petitioner's Appeal Brief, pp. 4-5; Tr. 78 (Statement by Mr. Kucik).

On March 13, 1981, Petitioner submitted a notice to the Federal Energy Regulatory Commission (FERC) which stated that the Petitioner is the owner and operator of the Plant, and it claimed that the Plant is a "qualifying small power production facility" within the meaning of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 796 et seq.[15/] In response, FPL requested FERC to reject the Petitioner's claim because the Petitioner is not lawfully entitled to own and operate the EGF.[16/] This matter is presently pending before FERC.

The Petitioner has also filed a petition with the Florida Public Service Commission (FPSC) requesting that the Commission order FPL to interconnect the Plant with FPL's system.[17/] FPL has urged the FPSC to deny that petition. That matter is also pending.

Finally, on March 13, 1981, and on April 3, 1981, the Petitioner stated its intention to sell electricity to FPL from the Plant and requested that FPL transmit electricity from the Plant to customers other than FPL.[18/] FPL resisted this demand.[19/]

15/ Appendix A to Petition for Leave to Intervene and Request for Hearing (April 7, 1981) filed in Docket No. 50-389-OL, incorporated by the Petition, p. 3.

16/ FPL's Partial Response, p. 12 n.*.

17/ Petitioner's Objections, pp. 9-10.

18/ Petitioner's Appeal Brief, p. 5.

19/ Id. It should also be noted that the Petitioner filed a Petition for Leave to Intervene and Request for Hearing (footnote continued)

B. The Petition and Proceedings Below

On November 21, 1973, a notice was published in the Federal Register which permitted any person whose interest may be affected by the St. Lucie Unit 2 construction permit antitrust proceeding to file a petition to intervene by December 28, 1973.[20/] No petitions were received within the time frame designated by the notice. However, in August 1976, Florida Cities filed a petition to intervene which was eventually granted.

In the course of the subsequent proceeding, FPL, the United States Department of Justice (Justice), and the NRC Staff entered into a Settlement Agreement, under which it was agreed that certain conditions would be attached to the license for St. Lucie Unit 2. Among other things the settlement license conditions contain provisions regarding transmission by FPL of electricity generated by qualifying

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(footnote continued)
(April 7, 1981) ("OL Petition") in Docket No. 50-389-OL, which concerns FPL's application for an operating license for St. Lucie Unit 2. This petition was denied by the Licensing Board in a Memorandum and Order dated June 3, 1981, and the matter is presently before the Appeal Board. Additionally, on June 22, 1981, the Petitioner submitted a Request for Enforcement Action Against Florida Power & Light Company, which requested that the Commission institute a § 2.202 enforcement proceeding to compel FPL to abide by license conditions for St. Lucie Unit 2. This request was denied by the Director of Nuclear Reactor Regulation or August 7, 1981.

20/ 38 Fed. Reg. 32159 (November 21, 1973).

cogeneration facilities or small power production facilities as defined by FERC.[21] The settlement license conditions were subsequently made effective by the Licensing Board in a Memorandum and Order dated April 24, 1981.

On April 24, 1981, or more than seven years late, the Petitioner submitted its request to intervene in the antitrust proceeding. The Petitioner alleged that it had recently completed construction of the Plant and that the Plant is a qualifying facility under PURPA.[22] The Petitioner further alleged that the settlement process was used by FPL to diminish qualifying facilities' transmission rights under PURPA, thereby weakening it competitively.[23] Finally, the Petitioner argued that it had "good cause" for late intervention because it had only recently discovered the existence of the Settlement Agreement.[24]

On June 26, 1981, FPL filed its Partial Response opposing the intervention of the Petitioner.[25] It stated that the aforementioned contracts defeat any legal right of the Petitioner to title to the completed Plant and therefore argued

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21/ St. Lucie Plant, Unit No. 2, Proposed License Conditions, § X, attached to Joint Motion of Department of Justice, NRC Staff, and Applicant to Approve and Authorize Implementation of Settlement Agreement (September 12, 1980) ("settlement license conditions").

22/ Petition, p. 3.

23/ Id., pp. 5-6.

24/ Id., pp. 7-10.

25/ On May 8, 1981, FPL submitted an Application for Issuance of Subpoenas for the purpose of obtaining access to documents in the possession of the Petitioner which could (footnote continued)

that the Petitioner had not demonstrated any interest which could be affected by this proceeding.[26] Furthermore, FPL asserted that the Petitioner had not alleged the existence of a situation that is inconsistent with the antitrust laws or that bears a meaningful nexus to activities under the license for St. Lucie Unit 2.[27] Finally, FPL demonstrated that the Petitioner did not show good cause for late intervention and did not otherwise justify its untimely filing under the other four factors of 10 CFR § 2.714.[28]

Although the NRC Staff did not file a written response to the Petition,[29] it did reveal some of its positions at the July 20 Conference. The Staff stated that the Petition did not establish good cause for late intervention and did not allege with specificity a situation that is inconsistent

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(footnote continued)
substantiate facts underlying this matter. When the Licensing Board rejected the Petition, it also denied the request for subpoenas as moot. Order, p. 27.

26/ FPL's Partial Response, pp. 11-18.

27/ Id., pp. 18-24.

28/ Id., pp. 24-33.

29/ This might be attributable to the procedural posture of the case. On May 19, 1981, the Licensing Board issued a Memorandum and Order which extended the time for filing responses to the Petition until a date to be identified after the Board's ruling on FPL's request for subpoenas. Since the Board denied the Petition at the same time it denied FPL's request, the extension was in essence pre-empted.

with the antitrust laws and that bears a nexus to the activities under the St. Lucie Unit 2 license.[30]

The Licensing Board denied the Petitioner's request to intervene. Although the Board held that the Petitioner possessed a sufficient interest in the EGF to support its participation in the proceeding,[31] it ruled that the Petitioner had not alleged a sufficient nexus between its claims and the activities under the St. Lucie Unit 2 license.[32] Furthermore, the Licensing Board held that the Petitioner had not shown good cause for late intervention and that the Petitioner had other means to protect its interests, each of which justified denial of the Petition.[33] Finally, the Board also found the other factors governing late intervention to weigh against intervention.[34] However, the Board did authorize the Petitioner to participate conditionally as amicus curiae for the purpose of fashioning appropriate relief if necessary as a result of the Board's findings.[35]

Following the Petitioner's Objections to the Order and the rejection of all but one of those objections, the Petitioner filed the instant appeal.

30/ Tr. 60-69.

31/ Order, pp. 26-27.

32/ Id., pp. 24-26.

33/ Id., pp. 4-6, 21.

34/ Id., pp. 17-21.

35/ Id., p. 19.

III. Argument

The Licensing Board denied the late Petition on two grounds: (a) that Petitioner failed to allege the required nexus between its antitrust complaints and activities under the license for St. Lucie Unit No. 2; (b) that the Petition was filed seven years late, and Petitioner failed utterly to carry the burden of justifying the lateness that is imposed upon it by 10 CFR § 2.714 and the NRC's decisions. FPL submits that the Licensing Board is right on both counts. These issues are addressed in Sections A and B, below.

FPL believes that two additional, independent grounds exist for denial of the Petition: (a) that Petitioner has not demonstrated an interest which might be affected by this proceeding; and (b) that the Petitioner failed to allege a situation inconsistent with the antitrust laws with the specificity required by the decisions of this Appeal Board. FPL advanced these positions below, and they were rejected, erroneously in FPL's view, by the Licensing Board. These arguments are addressed in Sections C and D below.

A. The Petitioner Did Not Demonstrate A Nexus Between Activities Under The License For St. Lucie Unit No. 2 And Any Situation Inconsistent With The Antitrust Laws.

Even if it is assumed arguendo that the Petitioner sufficiently alleged the existence of a situation which is inconsistent with the antitrust laws, it did not demonstrate a nexus between the situation and th[illegible]ities under the

license for St. Lucie Unit 2. Such a nexus is required by Section 105(c)(5), which limits the Commission's considerations to "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws," and by the Commission's decision in Louisiana Power and Light Co. (Waterford Steam Electric Generating Station Unit 3) (Waterford I), CLI-73-7, 6 AEC 48, 49 (1973), which stated that a "meaningful nexus" was a prerequisite to intervention "regardless of how grievous the situation might appear to be."

From the outset, the Petitioner has grounded its "nexus" argument on the view that all it must show is that its contentions bear some relationship to the subject matter addressed in the settlement license conditions that were made effective by the Licensing Board's Memorandum and Order of April 24, 1981. Petitioner adheres faithfully to that position in its Brief to the Appeal Board.[36/] It argues that "FPL has used the settlement process to obtain wheeling conditions that discriminate against and adversely affect PURPA "facilities" and that the situation alleged by Petitioner "will be maintained by the NRC settlement conditions at issue."[37/]

Three fundamental defects exist in the Petitioner's argument:

36/ "[Petitioner's] claims are directly related to the license conditions approved in this proceeding. . . ." Petitioner's Appeal Brief, p. 23.

37/ Petitioner's Appeal Brief, p. 21.

1. Petitioner's contention that the settlement license conditions diminish the rights of qualifying facilities under PURPA is not so and cannot be so as a matter of law. The settlement license conditions provide that "[n]othing herein shall be construed to affect the jurisdiction of FERC or any other regulatory agency,"[38/] a provision which is no more than recognition that, as a matter of law, the NRC cannot, by conditioning a license, deprive a sister agency of jurisdiction bestowed upon it by Congress. PURPA contains a comprehensive regulatory scheme regarding the obligations of electric utilities to deal with qualifying small power producers. The license conditions do not and cannot mitigate FPL's obligation to comply with PURPA's statutory and regulatory requirements stating those obligations. Whatever rights the Petitioner had under PURPA before the license conditions were imposed, it has now.

2. To the extent Petitioner is claiming that the license conditions themselves create or maintain a situation inconsistent with the antitrust laws, such a contention likewise is groundless as a matter of law. The settlement license conditions impose obligations upon FPL. They do not grant FPL any new rights or privileges. The Petitioner contends that the conditions unduly qualify FPL's obligations

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38/ Settlement license conditions, § XIII(c).

to wheel power produced by small power production facilities. However, before the license conditions were attached, FPL had no NRC-imposed obligation to wheel such power. Thus, the claim that the imposition of such a remedial condition can, itself, create or maintain a situation inconsistent with antitrust laws is absurd.

3. The "nexus" required under Section 105(c) cannot be established merely by a claim that a Petitioner is dissatisfied with the reach of remedial conditions imposed in an NRC proceeding. Rather, a petitioner must delineate a situation inconsistent with the antitrust laws that calls for relief and demonstrate how construction or operation of the nuclear power facility under consideration would "create or maintain" that situation. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1) (Wolf Creek I), ALAB-279, 1 NRC 559, 566-74 (1975). The Petitioner has steadfastly declined to address this question because it cannot make the required showing. Instead, Petitioner has argued that it does "not have to have a nexus with the nuclear plant, with this particular plant." Tr. 126.

Assuming arguendo that Petitioner has alleged a situation inconsistent with the antitrust laws,[39/] its failure to allege

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39/ As demonstrated, infra, pp. 30-34, Petitioner failed to do so in any manner sufficient to satisfy the basic substantive standards applicable to antitrust intervention petitions.

a nexus between that situation and activities under the license for St. Lucie Unit No. 2 is fatal to its petition.

B. The Licensing Board Correctly Found That The Five Factors Governing Late Intervention Weigh Against Admission Of The Petitioner.

A petition to intervene which is filed after the time specified in the notice of hearing will not be entertained unless the presiding officer determines that the petition should be granted based upon the following five factors:

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

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

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

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

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

10 CFR § 2.714(a)(1) (1981). In the instant case, the Licensing Board found that each of these factors weighs against a grant of the Petition, and "that the balance is heavily weighted against intervention." Order, p. 21. The Licensing Board was correct on each count and did not abuse its discretion in rejecting the Petition on the ground that it is untimely. See South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, __ NRC ___, slip op. p. 5 (June 1, 1981).

1. The Petition did not show good cause for failure to file on time.

As was stated previously, the Petitioner requested leave to intervene almost seven years after the filing deadline. It is doubtful whether good cause could ever be shown for such a late intervention. In any case, the Commission itself has stated that "[a] very late petition must present a very strong reason for late intervention." Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), CLI-78-12, 7 NRC 939, 946-947 (1978). In fact, if a filing deadline is missed by years, a petitioner has "an enormously heavy burden to meet." Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 172 (1979). The showing made by the Petitioner in this case is wholly inadequate to satisfy this burden.

Petitioner now argues that the Licensing Board erred in finding no good cause for the lateness of the Petition, because the Licensing Board improperly relied on statements made by FPL at the July 20, 1981, Conference. Petitioner overlooks that the burden of demonstrating good cause lies with it,[40/] and perhaps prefers to forget the context in which the exchanges quoted in its Appeal Brief arose in the Conference. A review of the entire record demonstrates that Petitioner failed utterly to carry its burden of demonstrating good cause for the

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40/ Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352-53 (1980).

extreme lateness of the Petition.

As Petitioner acknowledges toward the end of its argument on the "good cause" issue,[41] the Petition filed on April 24, 1981, presented but a single excuse for its tardy filing; i.e., that Petitioner did not uncover the Settlement Agreement until March 1981.[42] FPL, in its Partial Response, pointed out that even if this were true, it could hardly serve to excuse Petitioner's tardiness. If Petitioner has any claim that the NRC can entertain it must be based upon allegations of a situation inconsistent with the antitrust laws which pre-existed imposition of the settlement license conditions and which the conditions do not adequately cure.[43] In showing good cause for extreme lateness, Petitioner must explain why it never came forward to complain of the situation, not why it only now complains of the breadth of remedial conditions. On that point, there is no case to be made.

The Licensing Board's reaction to Petitioner's effort to demonstrate "good cause" was to state in its Order setting a conference on the Petition that it was not inclined to accept Petitioner's asserted excuse for its

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41/ Petitioner's Appeal Brief, pp. 35-36.

42/ See Order, pp. 10, 14; Petition, pp. 7-8; Petitioner's Appeal Brief, p. 16.

43/ It is indisputable that Petitioner is at least as well off with the protection of an allegedly inadequate injunction as it was with no injunction at all.

tardiness, and to advise that it was "left with the uncomfortable feeling that [Petitioner] has better grounds for intervention that it has stated."[44/] But Petitioner stated no other grounds at the hearing. Petitioner does not appear to cling to its original "good cause" argument on appeal. However, its Appeal Brief fails to articulate any other identifiable theory on which good cause could be found to excuse the lateness of its filing.

During the course of the July 20 Conference, Licensing Board Chairman Bloch again expressed amazement at the weakness of the "good cause" argument advanced by Petitioner. When counsel for FPL addressed Petitioner's "good cause" argument, Chairman Bloch inquired:

> CHAIRMAN BLOCH: But he [counsel for Petitioner] had better grounds than that, didn't he? He didn't state them, but he's got them.

Tr. 56. Later, questioning Staff counsel, Chairman Bloch elaborated:

> CHAIRMAN BLOCH: Ms. Hodgdon, how about the refusal to deal? I take it the refusal to wheel occurred much later. If you take that as the first time that they knew that there was an antitrust problem, might that have created good cause?

Tr. 62. Chairman Bloch went on, later, to hypothesize that Petitioner possibly might not have known until shortly before April 1981 that there would be a contract dispute and that

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44/ Memorandum and Order (July 7, 1981), p. 13.

Petitioner would ever want to sell power from the EGF. Tr. 84-87. When Chairman Bloch sought to explore this hypothesis from the bench, it was the first time that this theory of "good cause" had been advanced in this case.

Counsel for FPL replied extemporaneously that the "Bloch theory" of good cause could not be squared with the facts. The record reflects that Dade County sued Petitioner for anticipatory breach of contract in December 1980.[45/] Surely that establishes that Petitioner was aware, at some time before December 1980,[46/] of the existence of a serious contract dispute. Counsel for FPL was pressed by the

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45/ See n. 11, supra.

46/ Petitioner quotes from page 97 of the Transcript, where counsel for FPL is recorded as having said that Petitioner's knowledge that it would have possession of the EGF and that it might attempt to qualify the facility under PURPA "could not realistically have arisen before the date that this Dade County contract [which should read "complaint"] was filed, which was in December [1980]" Petitioner's Appeal Brief, pp. 33-34.

This reflects either that counsel for FPL misspoke or an error in transcription. It is abundantly clear from a reading of the entire Transcript, including the entire exchange quoted at pp. 33-34 of the Petitioner's Appeal Brief, that FPL asserts that Petitioner must have possessed such knowledge before December 1980.

Licensing Board to state FPL's belief of how long before December 1980 Petitioner was aware of the existence of a contract dispute which could prevent Petitioner from "easily divest[ing] [itself] of [the EGF]." Tr. 97. It was in this context that FPL asserted that it could present evidence that, as early as February 1980, Petitioner had communicated a desire to operate the EGF itself. Tr. 97-99.

At no time during the Conference did Petitioner assert that it could provide any factual support for the "Bloch theory" of good cause. Petitioner did not even take a position as to when it first became aware that it might claim the right to operate the EGF for its own benefit. Chairman Bloch's efforts to elicit from Petitioner's counsel some indication that factual support could be provided for the "Bloch theory" yielded nothing other than vague generalities and protestations of counsel's unfamiliarity with the facts. Tr. 73-80.

On this record the Licensing Board's decision that Petitioner failed to demonstrate good cause for its lateness should be affirmed, for the following reasons:

1. Until the Conference before the Licensing Board, Petitioner relied solely upon the theory that its

recent discovery of the Settlement Agreement excuses its lateness, a position that is patently untenable and Petitioner now appears to have abandoned. If the record consists of the pleadings submitted to the Licensing Board, Petitioner clearly failed to carry its burden of showing good cause.

2. Petitioner's appeal appears to be grounded on the proposition that the Licensing Board, having first advanced the "Bloch theory" of good cause from the bench during the Conference, erroneously rejected that theory on the basis of extra-record material.[47/] That contention is untenable for at least two reasons:

a. The Board simply did not base its rejection of the Petition on extra-record material. Petitioner bore the burden of making a showing sufficient to support the theory of "good cause" that it ultimately adopted. See Perkins, supra, 12 NRC at 352-53. The Licensing Board, by raising a hypothetical theory of good cause for exploration, perhaps over generously offered Petitioner the opportunity to do orally what it failed to do in its pleadings, and Petitioner did not avail itself of the opportunity. Clearly, the Licensing Board found Petitioner's reticence all the more remarkable in light of the specificity of FPL's

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47/ Petitioner's Appeal Brief, p. 28.

extemporaneous rebuttal. The ground on which the Licensing Board's order rests, however, is Petitioner's failure to carry its initial burden:

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

Order, p. 16.

b. Even if the February 1980 letter is put aside, the record contains ample evidence -- which is undisputed -- to show that Petitioner was aware of the contract impasse long before it filed its Petition in April 1981. By December of 1980 the impasse had reached the stage of Dade County's filing a lawsuit against Petitioner,[48/] and it is undisputed that discussions between Petitioner and Dade County preceded the filing of that suit.[49/] Furthermore, Petitioner itself requested arbitration and purported to terminate the contracts in January 1981.[50/] Under the theory suggested by the Chairman -- that Petitioner could be excused from filing until, and only until, it became aware of a serious contractual dispute --

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48/ See n. 11, supra.

49/ Tr. 77.

50/ Tr. 78; Petitioner's Appeal Brief, pp. 4-5.

it should not matter whether the time between the crystallization of that awareness and filing of the Petition was four months or fourteen months. No excuse has been offered for either interval.

2. The Petitioner did not show that other means were not available to protect its interests.

The Petitioner has argued that there are no other means whereby the Petitioner may protect its interest, since no other forum possesses the same jurisdiction as the NRC under Section 105(c)(5) and since no other forum can impose conditions upon the license for St. Lucie Unit 2. Petitioner's Appeal Brief, pp. 37-38. The Licensing Board rejected this argument on the ground that the Petitioner can seek relief from FERC and possibly from the FPSC and arbitration. Order, pp. 6-7.

As the Licensing Board recognized, the essence of the dispute between Petitioner and FPL concerns whether Petitioner can properly claim the status of the lawful operator of a qualifying small power production facility.[51/] That question is pending before the FERC and the FPSC.[52/] Both agencies have promulgated comprehensive regulations requiring utilities, such as FPL, to interconnect with, purchase power from and

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51/ Order, p. 6.

52/ See n. 15 and 17, supra.

provide power to qualifying small power production facilities.[53] It is clear that the FERC will consider antitrust law and policy in any proceeding concerning the PURPA rights of such facilities.[54] In summary, Petitioner is before two forums which can act on its claim that it is entitled to "qualifying producer" status, and, if Petitioner once obtains that status, its rights and procedural opportunities under the FERC and FPSC regulatory schemes are myriad. Moreover, Petitioner is now before an arbitration panel which appears to have authority to resolve the commercial dispute between Petitioner and Dade County, the result of which may moot the controversy.

Petitioner does not deny this. Instead, it emphasizes that neither PURPA nor any other statute contains a legal standard that duplicates the standard found in Section 105.[55] However, by this argument it is obvious that the Petitioner

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53/ 18 CFR Part 292; FPSC §§ 25-17.80 to 25-17.89.

54/ See Gulf States Utilities Co. v. Federal Power Commission, 411 U.S. 747 (1973) and H. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 68 (1978), reprinted in [1978] U.S. Code Cong. & Ad. News 7659, 7802.

55/ In addition, Petitioner stated that no other forum can "redress [Petitioner's] grievances as to the NRC settlement license conditions at issue here." Petitioner's Appeal Brief, pp. 32-38. As we state elsewhere in this brief, Petitioner is simply wrong in its view that it can bootstrap its dissatisfaction with the scope of the settlement license conditions into participation in this proceeding (pp. 11-15, supra).

has misconstrued the nature of the second factor governing late intervention. This factor questions whether there are other means for the Petitioner to protect its interests; it does not question whether other forums possess jurisdiction precisely the same as that of the NRC. As the Appeal Board itself has noted, "[t]he rule does not say that the 'other means' must be equivalent in every respect to the intervention sought." Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), ALAB-420, 6 NRC 8, 23 (1977), aff'd CLI-78-12, 7 NRC 939 (1978).

In conclusion, there are at least two other means whereby the Petitioner can seek protection for substantially all of its alleged interests. The Licensing Board ruled that this fact alone is sufficient to warrant exclusion of the Petitioner from this proceeding. Order, p. 21. Nothing the Petitioner has adduced justifies a contrary conclusion.

3. The Petitioner's participation would not assist in developing a sound record.

The Petitioner argues that its participation would assist in developing a sound record because it would be the only qualifying small power producer in this proceeding and because no other party has raised issues similar to the Petitioner's. Petition, pp. 9-10; Petitioner's Appeal Brief, pp. 49-50. In contrast, the Licensing Board found that the Petitioner's principal interest concerns the relationship between a single commercial dispute and the antitrust laws, and that elaboration "of this tiny facet

of FPL's overall conduct is unlikely to be highly probative of whether the operation of St. Lucie 2 would create or maintain a situation inconsistent with the antitrust laws." Order, pp. 18-19.

Undoubtedly, the Licensing Board was correct. The entire basis for the Petitioner's request to intervene arises out of a contract dispute. Litigation of the Petitioner's claim would inevitably encompass matters peculiar to this dispute. In short, admission of this Petitioner would result in a lengthy excursion from, instead of a contribution to, development of a sound record on the issues in this proceeding.

4. Petitioner's participation would broaden and delay this proceeding.

The Petitioner argues that its participation will not delay the proceeding, since the Petitioner has stipulated that it will not oppose the grant of an operating license for St. Lucie Unit 2. Petitioner's Appeal Brief, pp. 46-48.

However, Florida Cities have taken the position that the operating license for St. Lucie Unit 2 cannot be issued until this proceeding is completed. If the Cities' view prevails, a hearing prolonged to consider Petitioner's contentions could further delay operation. Accordingly, notwithstanding Petitioner's stipulation, its participation could well have the effect of delaying operation of the unit.

In any event, even if St. Lucie Unit 2 were to be licensed in a timely fashion, there would still be interests which would be impacted by extended litigation -- both the interests of the private parties involved and the interests of governmental and administrative efficiency. The Licensing Board found that, notwithstanding the stipulation, grant of the Petition would delay and complicate this proceeding. Order, p. 18. This conclusion is clearly correct. If Petitioner were to be admitted to the proceeding, it might be necessary for the Licensing Board to determine whether FPL's unwillingness to recognize Petitioner's claim to the EGF is unreasonable under the antitrust laws. Accordingly, since FPL's position is that its contractual rights and the illegality of Petitioner's conduct justify FPL's actions, it would be necessary to delve into the complex commercial dispute among Petitioner, Dade County and FPL. Undoubtedly, the necessity for this inquiry would broaden and delay the proceeding.

Clearly, this factor weighs heavily against granting of intervention.

5. Representation by Existing Parties.

It is FPL's position that Petitioner has no interest which may be affected by this proceeding, has not stated a proper antitrust contention and, assuming arguendo that Petitioner has described a situation inconsistent with the antitrust laws, no nexus has been shown between that situation and activities under the license. In these circumstances, this fifth factor has no relevance.

C. Petitioner Failed To Demonstrate An Interest Which Would Be Affected In This Proceeding.

The Commission's rules require that the Petitioner must demonstrate, among other things, an interest which would be affected in this proceeding. 10 CFR § 2.714(d) (1981). The record below establishes that Petitioner has failed to make, and indeed cannot make, such a showing. This failure, FPL submits, would be decisive, even leaving aside the other defects discussed above.

Petitioner's assertion of an interest in this proceeding, in its Petition, rested on the representation that it "owns" the SWPF and EGF facilities, and that together they constitute a "qualifying small power production facility" within the meaning of PURPA. Remarkably, the Petition failed to disclose the existence of contracts which on their face defeat any claim or right on Petitioner's part to title to the electrical generator or to any right, title or interest in the electric power produced from that generator.

When FPL sought to obtain these contracts and related documents via subpoena, Petitioner vigorously resisted FPL's efforts. However, FPL was able to obtain and present some of these contracts and documents to the Board. It is unnecessary to discuss these contracts and documents in detail here. It suffices to note that they refute Petitioner's claimed "interest" in at least two decisive respects. First, they show that Petitioner has obligated itself to cede title to the EGF and has confirmed

that FPL has the right to the EGF's electrical output. Thus, Petitioner in fact clearly does not "own" or have any right to that output. Second, the documents show that the SWPF is to operate as a steam production facility, with this steam to be sold to the operator of the EGF. FERC has explicitly provided that such plants are not, and were not intended to be, qualifying facilities under PURPA.—/ Either of these facts would refute Petitioner's claimed "interest": the plant in question is not a "qualifying facility" and even if it were, Petitioner would have no right to its electrical output.

In the view of the Licensing Board, the fact that Petitioner is currently retaining "legal title" to the EGF (i.e., it has retained possession) would be sufficient, were its Petition otherwise sustainable, to support its participation. FPL respectfully submits that the mere fact Petitioner retains possession of the EGF cannot be sufficient to satisfy Section 2.714. That section must mean something more than physical dominion over a facility to whose output one is not lawfully entitled. To hold otherwise would permit a party to file a petition with this Commission as a ploy to avoid his contractual obligations.

The burden is on the Petitioner to demonstrate the legitimacy of its claim of interest in any NRC proceeding in which it seeks to participate. Here, it has utterly failed

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56/ 18 CFR § 292.206; 45 Fed. Reg. 17959, 17963 (March 20, 1980).

to do so. Instead, in this instance, it simply avoided dealing with the matter by electing not to disclose any of the facts relevant to its claim. However, FPL has placed before the Commission solemn contractual commitments, entered into by Petitioner, and of full force and effect,[57] which negate those claims. Petitioner's failure to substantiate the claims on which its assertion of interest is based is yet another reason its Petition should be denied.[58]

D. The Petition Fails To Meet The Substantive Standards For Intervention In An Antitrust Proceeding.

Finally, the late Petition must be rejected because it fails to meet the substantive standards for intervention in an antitrust proceeding. The late Petition is devoted almost entirely to airing Petitioner's dissatisfaction with one of the provisions of the settlement license conditions. No meaningful effort is made to allege the independent existence of a situation inconsistent with the antitrust laws which

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57/ Petitioner, in essence, asks the Commission to presume those contracts are invalid.

58/ In light of its rejection of the Petition, the Licensing Board held that FPL's application for issuance of subpoenas was "moot." However, FPL believes it was error for the Licensing Board to opine as to Petitioner's "interests," given the evidence of record refuting Petitioner's claims, without requiring Petitioner to make open disclosure of relevant facts. Inquiry into the truth of allegations advanced in support of granting a petition for intervention is appropriate before action is taken on the petition. Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), CLI-78-18, 7 NRC 939, 948-49 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 n. 1 (1978).

would be created or maintained by activities under the license and would call for remedial license conditions. The law is plain that failure to allege a situation inconsistent with the antitrust laws requires rejection of the Petition.

Where one seeks to intervene in an NRC antitrust proceeding, his petition must identify with specificity the "situation inconsistent with the antitrust laws" which will be created or maintained by activities under the license. Substantially more than bare allegations must be pleaded, for simply alleging a "situation inconsistent" and mouthing in a talismanic fashion that that situation will be created or maintained by the activities under the license is insufficient. To be successful, the petition must at a minimum identify the specific provisions of the antitrust laws which it is claimed will be offended by the activities, identify the relevant markets in which it contends competition exists and is affected, and describe how activities under the license will affect competition and offend the antitrust laws in those markets. Waterford I, supra, 6 AEC at 49; Wolf Creek I, supra, 1 NRC at 574-75; Duke Power Co. (Catawba Nuclear Station, Units 1 and 2 -- Antitrust), LBP-81-1, 13 NRC 27, 32 (1981). The Petition fails to make these showings, and FPL denies any such showing could be made.

Not only does Petitioner fail to allege a situation inconsistent with the antitrust laws, but the few references in its intervention filings and Appeal Brief to any relationship

between FPL and Petitioner which might have competitive implications are confused and internally inconsistent.[59/] At page 17 of its Brief submitted in Docket No. 50-389-OL,[60/] Petitioner states that: "FP&L, of course, would rather buy electric power from qualified PURPA facilities than compete with those facilities for sales to FP&L's other customers." This sentiment, in essence, is echoed in Petitioner's Appeal Brief, page 8. The fallacy of this assertion is demonstrated by the footnote on the same page of the OL Brief, which acknowledges that an electric utility is required by FERC rules to purchase electricity from small power producers at the utility's avoided cost. Thus, a utility cannot under the law profit or reduce the costs which its customers must pay as a result of making any such purchase. Contrary to

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59/ The only reference to market structure found in Petitioner's filings is Paragraph (13) of its Petition in the St. Lucie No. 2 operating license proceeding which charges that FPL "possesses monopolistic control over the provision of transmission services in southern and eastern Florida," assertions it repeated in its Appeal Brief at p. 8. FPL denies that allegation and avers that it cannot credibly be maintained in any event by one who asserts as his basis for participating in the proceeding that he is a qualifying small power producer. Assuming Petitioner had such status, it would be entitled to interconnection to the transmission facilities of any utility, including FPL. PURPA, § 202, 16 U.S.C. § 824i. And, of course, this would be true irrespective of any license from this Commission relating to St. Lucie Unit No. 2.

60/ Brief of Resources Recovery (Dade County), Inc. and Parsons & Whittemore, Inc. in Support of Their Petition for Leave to Intervene and Request for an Antitrust Hearing, attached to OL Petition.

Petitioner's glib assertion, FPL has no economic incentive to seek to make purchases under these circumstances.

Perhaps recognizing the transparent weakness of the antitrust allegations in the Petition, Petitioner's antitrust rhetoric in its Appeal Brief largely reduces to the argument that FPL is acting wrongfully by opposing Petitioner's attempts to obtain "qualifying facility" status. Thus, it alleges that by declining to accede to Petitioner's attempt to take over the facility, opposition has "prevented the SWPF from operating commercially." Petitioner's Appeal Brief, p. 8. This characterization is more than a little revealing. Petitioner plainly is not complaining of any situation inconsistent with the antitrust laws, or of any activities under the license. Its lead complaint is about the pending contract dispute which Petitioner has so far been unable to win in other forums.

Petitioner has failed to meet substantive standards for intervention in antitrust proceedings before this Commission, and its Petition accordingly should be denied.[63/]

61/ PURPA §§ 202 and 210, 16 U.S.C. §§ 824i and 824a-3.

IV. Conclusion

The Petitioner has not demonstrated that it may have an interest affected by this proceeding and has not alleged that the activities under the license for St. Lucie Unit 2 will create or maintain a situation inconsistent with the antitrust laws. Furthermore, all of the five factors governing late intervention weigh against admission of the Petition. The Licensing Board's denial of intervention should be upheld.

Respectfully submitted,

J. A. Bouknight, Jr.
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Herbert Dym
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044

Attorneys for Florida Power & Light Company

62/ As noted, Petitioner also alleges that the "settlement agreement would allow FPL to avoid its PURPA duties." Petitioner's Appeal Brief, p. 8. This argument, as demonstrated, supra, is plainly wrong as a matter of law.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Florida Power and Light Company's Brief in Opposition to Appeal by Petitioner" were served upon the following persons by deposit in the U.S. Mail, first class, postage prepaid this 16th day of November, 1981.

Alan S. Rosenthal, Esquire
Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Christine N. Kohl, Esquire
Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stephen F. Eilperin, Esquire
Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Peter B. Bloch, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Robert M. Lazo, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael A. Duggan, Esquire
College of Business Administration
University of Texas
Austin, Texas 78712

Ivan W. Smith, Esquire
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Station
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas Gurney, Sr., Esquire
203 North Magnolia Avenue
Orlando, Florida 32802

Robert E. Bathen
Fred Saffer
R.W. Beck & Associates
P.O. Box 6817
Orlando, Florida 32803

Robert A. Jablon, Esquire
Alan J. Roth, Esquire
Spiegel & McDiarmid
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

William C. Wise, Esquire
Suite 500
1200 18th Street, N.W.
Washington, D.C. 20036

Janet Urban, Esquire
P.O. Box 14141
Washington, D.C. 20044

William H. Chandler, Esquire
Chandler, O'Neal, Avera, Gray & Stripling
Post Office Drawer 0
Gainesville, Florida 32602

Donald A. Kaplan, Esquire
Robert Fabrikant, Esquire
Antitrust Division
U.S. Department of Justice
Washington, D.C. 20530

Benjamin H. Vogler, Esquire
Ann P. Hodgdon
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Charles R.P. Brown, Esquire
Brown, Paxton and Williams
301 South 6th Street
P.O. Box 1418
Fort Pierce, Florida 33450

George R. Kucik, Esquire
Marc Gary, Esquire
Ellen E. Sward, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006

Argil L. Toalston
Acting Chief
Antitrust and Economic Analysis Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

J. A. Bouknight, Jr.

Lowenstein, Newman, Reis & Axelrad
(202) 862-8400

Dated: November 16, 1981