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Atomic Safety and Licensing Board
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Florida Power & Light Company
(St. Lucie Plant, Unit No. 2),
Docket No. 50-389A

Dear Members of the Board:

Florida Power & Light Company ("FPL") and Florida Cities have today submitted a joint motion which, referring to the settlement resolving all matters in dispute between them in this proceeding, requests the Board to terminate the proceeding and to vacate the Board's December 11, 1981, Memorandum and Order. The motion states that none of the parties to this matter is now requesting or seeking further proceedings or relief and that there is no controversy among them with respect to this matter. However, on March 2, 1982, Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (collectively "P&W"), which have been granted conditional status as amici curiae in the proceeding, submitted a letter to the Board objecting to the grant of the relief requested in the motion unless the Board also imposes license conditions upon FPL relating to wheeling power for P&W. The purpose of this letter is to respond to P&W's request and to demonstrate why it would be wholly inappropriate for the Licensing Board to grant it.

In sum, it is FPL's position that consideration of P&W's request is precluded by the decisions of this Board and the Appeal Board denying P&W's petition to intervene in this proceeding

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on the ground that P&W's allegations do not satisfy the "nexus" requirement of Section 105(c)(5) of the Act. Under these decisions, the Nuclear Regulatory Commission lacks the jurisdiction to grant the relief requested by P&W in its recent letter.

A brief description of P&W's efforts to intervene in this proceeding and the matter in which this Board and the Appeal Board have responded to those efforts will help to place P&W's current request in context. In its letter of March 2, 1982, P&W refers to "FP&L's monopoly over transmission in the relevant markets and the others facts giving rise to Parsons & Whittemore's proposal for remedial license conditions . . . ." Essentially it argues that the settlement does not affect the controversy between P&W and FPL or reduce FPL's alleged dominance over transmission facilities. This is no more than a repetition of P&W's principal basis for seeking intervention in this proceeding which was rejected by this Board on the ground, among others, "that RRD [P&W] has not alleged the required nexus to this proceeding and that, on this independent ground, it should not be permitted to intervene in this proceeding." Florida Power & Light Co. (St. Lucie Unit No. 2), LBP-81-28, 14 NRC 333, 350 (1981). In reaching this conclusion, the Board emphasized that P&W's claim was dependent upon the existence of an alleged monopoly on transmission, not upon the opening of a nuclear power plant, and that "there is little reason to believe that a transmission monopoly would abate merely because FPL could not open a nuclear plant." Consequently, this Board concluded that abatement of the alleged "transmission monopoly is insufficient nexus to this proceeding to support intervention." Ibid. It also stated that RRD "has failed to allege how the opening of St. Lucie would injure it or even how the existence of a situation inconsistent with the antitrust laws would injure it." 14 NRC at 351. Thus this Board in essence held that P&W's request to intervene went beyond the jurisdictional grant to this Commission to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws . . ." pursuant to Section 105c(5) of the Atomic Energy Act (42 U.S.C. §2135(c)(5)).

In ALAB 665 of January 29, 1982, the Appeal Board affirmed this Board's decision in the foregoing respects. The Appeal Board first elaborated upon the nexus requirement in detail, summarizing the principal holdings relating to that requirement in AEC and NRC decisions. It then analyzed P&W's Petition to Intervene, taking note of the Amicus Curiae Brief and Proposed License Conditions submitted by P&W in this proceeding on January 13, 1982 (ALAB 665, slip op. 15, n. 15; 21, n. 19) upon

which the March 2, 1982, letter relies. The Appeal Board characterized P&W's claim to be based on the contention "that the settlement [among the Department of Justice, the NRC Staff and FPL] license conditions for St. Lucie 2 do not cure the anticompetitive situation of FPL's monopolistic hold on the transmission grid for southern and eastern Florida." Slip op. at 18. This the Appeal Board held to be insufficient to justify intervention. In reaching its conclusion the Appeal Board emphasized that whereever the nexus requirement has been met the "focus has been on the claim that the cheaper power of the nuclear plant being licensed would actively support the dominant competitive position of the license applicant. . .," and that P&W had not explained "how FPL's bringing on line St. Lucie 2 will act to maintain or entrench FPL's alleged transmission monopoly." It therefore concluded that P&W "reads out the nexus requirement of Section 105c(5) in its entirety." Slip op. at 16, 18-19.

In addition, the Appeal Board emphasized that

> The license conditions [agreed to by FPL, the DOJ and NRC Staff] do not adversely affect P&W. As P&W concedes, and as is plainly so, the license conditions impose obligations only on FPL. P&W is in no worse position with the license conditions than with no license conditions whatever.

(Slip op., p. 18; emphasis in original, footnote omitted).

The position which this Board took in denying P&W's Petition to Intervene, and which the Appeal Board approved and elaborated upon in ALAB-665, precludes grant of the request contained in P&W's letter of March 2, 1982. In the letter P&W summarizes the basic ground for its request as follows:

> Under the parties' proposed settlement, FP&L has agreed to increase dramatically the extent of the transmission services it will provide Florida Cities. This settlement may moot the controversy between them, but it neither affects the controversy between Parsons & Whittemore and FP&L nor contributes to the development of a fully competitive energy market by enhancing the ability of small power producers to overcome FP&L's strategic dominance over transmission.

However, when P&W petitioned to intervene, it made the identical argument with respect to the earlier settlement between the

Department of Justice, the NRC Staff and FPL; the Appeal Board noted the settlement conditions do not affect P&W or put it in a worse position than it would be if a settlement agreement had not been reached; and both this Board and the Appeal Board held that the allegations failed to demonstrate how activities under the license would "create or maintain a situation inconsistent with the antitrust laws." Consequently both boards held the allegation insufficient to support intervention. It is also insufficient to support P&W's instant request.

FPL, of course, does not concede the validity of P&W's claim (if in fact P&W makes such a claim) that FPL has violated Section 2 of the Sherman Act in any respect. The Appeal Board has expressly noted that FPL "argues that it has perfectly justifiable business reasons for refusing to wheel power for P&W . . ." and has pointedly declined "to express any opinion on the merits of P&W's antitrust claims." ALAB 665, slip op., p. 13, no. 12. Consequently this Board could not simply grant P&W's request. It would have to institute a proceeding to determine whether the alleged violation or situation exists.

However, the authority to institute such a proceeding does not exist. Both this Board and the Appeal Board have found that even if the facts are as alleged by P&W, they would not establish a "reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license . . ." as required by the Commission for the maintenance of a proceeding under Section 105c(5). Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973). Indeed, in that proceeding the Commission also directed that "if it becomes apparent at any point that no meaningful nexus can be shown, all or part of the proceeding should be summarily disposed of." Ibid. Thus, under this holding even if P&W had been admitted as parties, upon the basis of the present allegations the proceeding would have to be "summarily disposed of." Clearly amici curiae can be accorded no more favorable treatment.

Accordingly, it is clear that the request contained in P&W's March 2, 1982, letter should be denied.

Respectfully submitted,

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