50L-1-410-4-L

January 5, 1982

SECY-82-5

ADJUDICATORY ISSUE
(Notation Vote)

For: The Commissioners

From: James A. Fitzgerald, Assistant General Counsel

Subject: REVIEW OF ALAB-661 -- IN THE MATTER OF FLORIDA POWER & LIGHT CO., OL (DENIAL OF ANTITRUST INTERVENTION)

Facility: St. Lucie Plant, Unit No. 2

Purpose: To inform the Commission and recommend

EX 3

Review Time Expires: January 19, 1982, as extended

Discussion: In ALAB-661 (attached) the Appeal Board upheld a Licensing Board order denying two petitions 1/ to intervene filed in response to notice of opportunity for an operating license (OL) stage hearing on health, safety and environmental matters. Both petitions were based solely on antitrust and related economic concerns. The Licensing Board, relying on Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976), found that its jurisdictional grant did not embrace the petitions because they raised solely antitrust concerns rather than health, safety and environmental matters. While affirming the Licensing

1/ Petitioners for intervention are Parsons & Whittemore, Inc. with their wholly owned subsidiary RRD (jointly P&W) and a group of municipalities owning and operating electric power systems (collectively "Florida Cities"). Florida Cities' pursuit of this appeal appears to be purely a protective matter. Florida Cities is a participant in the construction permit (CP) antitrust proceeding where it is raising the issues that concern it. Slip opinion at 5, n. 6. Thus P&W's petition is the focus of this paper.

Contact:
Marjorie S. Nordlinger, OGC, 41493

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Board's result, the Appeal Board specifically disagreed with the lower Board's reasoning and provided a statutory basis for the denial. The Appeal Board's reasoning depended on the anomalous, but not unique, circumstance of the St. Lucie proceeding in which the antitrust hearing connected with the construction permit 2/ was ongoing at a time when the application for an operating license was under consideration.

EX.5

Neither P&W nor Florida Cities has petitioned for review,

EX.5

(1) The link between P&W's sought OL intervention and two other legal efforts before NRC.

Parsons and Whittemore (P&W) are designers and constructors of a resource recovery plant in Dade County, Florida, said to be capable of producing 77 megawatts of electricity by burning fuel derived from refuse. The facility was apparently destined for ownership and operation by Dade County but is currently the subject of legal disputes, including

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2/ The construction permit was issued in light of consent by all parties to post-issuance hearing and conditioning of the license, if necessary.

3/ [

EX.5

disputes over title, involving P&W and the county. P&W is seeking now to operate the plant and requires transmission services which it requests from Florida Power & Light (FP&L). P&W says that FP&L has wrongfully refused to transmit power for P&W. In light of this, P&W has instituted a three-pronged effort to find at the NRC a forum in which to obtain an order requiring FP&L to provide the sought transmission: (a) On April 7, 1981 P&W filed the subject petition seeking a "limited antitrust" hearing at the OL stage. (b) On April 24, 1981 P&W petitioned to intervene in the ongoing CP antitrust proceeding. The Licensing Board in that case denied the petition on the grounds of untimeliness and lack of nexus to the proceeding. LBP-81-28 (August 5, 1981), as modified, LBP-81-41 (October 2, 1981). P&W's appeal of that decision is pending before the Appeal Board and a decision is not expected before late January. (c) On June 22, 1981 P&W requested enforcement action alleging FP&L was required under existing license conditions to transmit power. The Director of NRR denied the request noting that a legal determination regarding P&W's status was necessary to any NRC enforcement under the referenced provision and such a determination was currently pending before FERC. Denial of enforcement was without prejudice to resubmission of the request after FERC rules. The Commission did not take review of the Director's denial. See SECY-81-482, Memorandum for Commissioners from Martin G. Malsch, Director's Denial of 2.206 Relief (Florida Power & Light Co., Antitrust), August 12, 1981.

As the Appeal Board recognized, the situation now stands that "if petitioners have a forum anywhere [at NRC] for their antitrust arguments, it must and should be in the context of the pending construction permit proceeding." Slip op. at 9. Thus, we will provide a more comprehensive discussion of the underlying matters in the course of our customary review when the Appeal Board decides the CP intervention petition question.

(2) Identification of a possible legal issue arising from the "anomaly".

As the Appeal Board explicated in ALAB-661, no formal antitrust review at the OL stage can commence before the conclusion of the antitrust review at the

CP stage. This is the case because formal OL antitrust review may only be instituted after a finding that there have been "significant changes" since the previous review. The current situation -- where there is an operating license application while the construction permit antitrust proceeding is ongoing -- is not anticipated by the statute, but does not appear explicitly to be barred. See slip op. at 8. Yet, the anomaly has the theoretical potential for squeezing out a party desirous of intervening. Intervention in the ongoing CP proceeding would perforce be very late and thus the would-be intervenor would carry a particularly heavy burden to justify intervention. In the event the CP proceeding were concluded without the intervention being permitted, it is almost certain that the would-be intervenor would be unsuccessful in having the Commission make a significant changes finding because the matters on which he wished to intervene had occurred before the conclusion of the CP hearing, and by statute significant changes must have occurred since the conclusion of the formal review at the CP stage. In order to avoid such a squeeze special consideration may be warranted in some cases of late intervention requests. Any assessment of whether such an issue is presented with regard to P&W must await the Appeal Board's decision on P&W's CP intervention request.

Recommendation: [ ] EX 5

James A Fitzgerald
Assistant General Counsel

Attachment: ALAB-661

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Tuesday, January 19, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT January 12, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Christine N. Kohl

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

Mr. George R. Kucik, Washington, D.C. (with whom Ms. Ellen E. Sward, Washington, D.C., was on the brief), for the petitioners, Parsons and Whittemore, Inc., and Resources Recovery (Dade County), Inc.

Mr. Robert A. Jablon, Washington, D.C., for the petitioners, Gainesville Regional Utilities, et al. (Florida Cities).

Mr. J. A. Bouknight, Jr., Washington, D.C. (Messrs. Douglas G. Green and Herbert Dym, Washington, D.C., on the briefs), for the applicant, Florida Power & Light Company).

Mr. James H. Thessin for the Nuclear Regulatory Commission staff.

DECISION

December 3, 1981

(ALAB- 661)

This operating license proceeding comes before us on appeals under 10 CFR 2.714a from an unpublished Licensing Board order denying petitions for leave to intervene filed

by Parsons and Whittemore, Inc. (P&W), [1] and a group of municipalities owning and operating electric power systems (collectively, "Florida Cities"). Citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976), the Board found that it lacked jurisdiction to consider those petitions because they raised "solely . . . antitrust concerns." We affirm the Board's order denying the petitions but disagree with its reasoning.

I.

This Commission's consideration of the antitrust aspects of the licensing of Unit 2 of the St. Lucie facility began when Florida Power & Light Company (FPL) filed its application for a construction permit in September 1973. As required by subsection 105c(1) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(1), the Commission referred the application to the Attorney General of the United States for his antitrust review. On November 14, 1973, the Attorney General advised the Commission by letter that he did not, at that time, recommend holding an antitrust hearing. The Commission published the Attorney General's advice in the Federal Register, but nonetheless invited

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1/ Resources Recovery (Dade County), Inc. (RRD), a wholly owned subsidiary of P&W, joined in the petition.

interested parties to petition to intervene and request a hearing on the antitrust aspects of FPL's construction permit application. 38 Fed. Reg. 32159 (November 21, 1973). No such petition was filed during the time specified in the notice, and, thus, no antitrust hearing was instituted. 2/

Four years later, however, Florida Cities requested such a hearing. Having demonstrated good cause for failing to do so in a timely manner, they were granted an antitrust hearing before a specially convened licensing board. LBP-77-23, 5 NRC 789, affirmed, ALAB-420, 6 NRC 8 (1977), affirmed, CLI-78-12, 7 NRC 939 (1978). That hearing is still in progress. 3/

2/ A separate hearing, of course, was held on the health safety, and environmental aspects of FPL's construction permit application. See note 3, infra.

3/ The parties to that proceeding agreed that the issuance of a construction permit need not await the outcome of the antitrust hearing. See Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621-622 (1973). Thus, on the basis of a separate licensing board's decision in LBP-77-27, 5 NRC 1038 (1977), the Commission issued FPL a construction permit on May 2, 1977. 42 Fed. Reg. 24127 (May 12, 1977).

On March 9, 1981, the Commission published a notice of opportunity for hearing on FPL's recently filed application for a license to operate Unit 2. 46 Fed. Reg. 15831. On April 7, P&W filed a petition to intervene and request for a "limited antitrust" hearing.[4/] Florida Cities filed a similar petition on the same date. The Licensing Board below was subsequently established to rule on these and other petitions in the instant operating license proceeding.

P&W's petition concerned primarily the antitrust implications of a proposed settlement agreement negotiated in the still ongoing construction permit antitrust proceeding. The petition set forth claims under the antitrust provisions of the Atomic Energy Act and general antitrust law. In addition, P&W argued that the proposed settlement agreement will impair its rights as a "qualifying facility" under the Public Utility Regulatory Policies Act of 1978 (PURPA).[5/] The Florida Cities petition essentially paralleled the antitrust claims it has advanced in the pending construction permit proceeding.

4/ On April 24, 1981, P&W, again joined by RRD, filed a petition to intervene in the ongoing construction permit antitrust proceeding as well. The Licensing Board in that case denied the petition on the grounds of untimeliness and the lack of a nexus to the proceeding. LBP-81-28, 14 NRC __, as modified, LBP-81-41, 14 NRC __ (1981). P&W's appeal of that decision is pending but presents issues that differ from those now before us.

5/ Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of Titles 15, 16, 30, 42, and 43 of the United States Code).

Both the NRC staff and FPL argued principally that the Licensing Board had no jurisdiction over the asserted antitrust claims. The Board agreed and denied both petitions. It found "no question" that both petitions raised "solely . . . antitrust concerns." Therefore, relying on our holding in Marble Hill, 3 NRC 167, that "a [l]icensing [b]oard convened to consider environmental, health and safety issues lacks jurisdiction to grant a petition to intervene which seeks to raise only antitrust issues," the Board found no jurisdiction to consider the petitions in this proceeding. Order of June 3, 1981, at 4. P&W and Florida Cities now appeal.[6/]

II.

Section 105c of the Atomic Energy Act, as amended (42 U.S.C. 2135c), "establishes a particularized regime for the consideration and accommodation of possible antitrust concerns arising in connection with the licensing of nuclear power plants."[7/] It effectively places this Commission's antitrust review into two distinct "tracks," depending on the stage of the licensing process. At the construction permit stage, subsections 105c(1)

6/ Florida Cities believe they can "raise all issues and obtain all relief in the construction permit antitrust proceedings" in which they are participants. Br. at 2. Accordingly, while adopting many of P&W's arguments, they pursue this appeal, as they did their petition to intervene below, as a protective matter.

7/ Houston Lighting and Power Co. (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1309 (1977).

and (5) require the Commission to solicit and publish (in the Federal Register) the Attorney General's advice on the antitrust aspects of the application. The Commission must hold an antitrust hearing on a construction permit application if the Attorney General so recommends. If the Attorney General does not recommend or request a hearing, the Commission nonetheless offers interested parties an opportunity to intervene and request an antitrust hearing.[8/]

As the Commission discussed in its decisions in South Texas and Summer,[9/] the Act sets out a wholly different procedure for obtaining antitrust review at the operating license stage. Subsection 105c(2) states explicitly that the antitrust review required at the construction permit stage "shall not apply"[10/] to an operating license application unless the Commission determines that

> significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility.

8/ South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-80-28, 11 NRC 817, 823 n.11 (1980).

9/ See notes 7 and 8, supra.

10/ Emphasis added.

Thus, the Commission must find changes in the licensee's activities that are both "significant" and "subsequent" to the previous Attorney General and Commission review (including any NRC antitrust hearing).[11/] Only then is it authorized to conduct a further antitrust review at the operating license stage.

In the instant case, neither of these prerequisites for operating license antitrust review is present. Because the antitrust proceeding in connection with the construction permit for Unit 2 is still in progress, there has been no "previous" review subsequent to which any "significant changes" could have occurred.[12/] Thus, as long as the construction permit antitrust proceeding is under way, the antitrust provisions of the Atomic Energy Act effectively preclude the Commission from instituting a second antitrust hearing in conjunction with FPL's operating license application. To that extent, the Licensing Board was correct in finding that it had no

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11/ Summer, supra, 11 NRC at 824, 825.

12/ In Summer, supra, the Commission noted that it has "delegated to [the Directors of Nuclear Reactor Regulation and the Office of Nuclear Material Safety and Safeguards] authority to make the significant changes decision for the Commission." 11 NRC at 821 & n.6. It therefore appears -- but we need not decide -- that even if there had been a "previous" antitrust review in this case, the Licensing Board would have lacked authority to make the "significant changes" determination that would trigger an antitrust hearing at this stage.

jurisdiction to consider P&W's and Florida Cities petitions.[13/]

We recognize the anomaly created by the unusual circumstances of this case, where a construction permit has been issued and an application for the corresponding operating license is pending -- all before the construction permit antitrust review is completed. The ordinary expectation is that the construction permit antitrust review is completed at least before any operating license proceedings begin. The statutory scheme, however, does not foreclose the situation before us. It simply requires, inter alia, termination of one antitrust review before commencement of another.

The fact that P&W's -- and to some extent, Florida Cities' -- concern is with the proposed settlement agreement negotiated in the ongoing construction permit proceeding lends additional

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13/ Marble Hill, upon which the Board relied for its lack of jurisdiction finding, at first blush appears dispositive of this case but is, in fact, inapposite. In that construction permit case, we held that, where a prior opportunity for a separate hearing on antitrust issues was offered but not taken, a licensing board later convened specifically to hear health, safety, and environmental issues does not have jurisdiction delegated from the Commission to entertain a petition raising antitrust issues. We took that occasion to reaffirm the Commission's strong policy of holding antitrust hearings separate from those involving health, safety, and environmental issues. 3 NRC 167, 170-174. By contrast, the issue in the instant case is not so much whether there should be separate hearings at any given stage, but rather simultaneous ones at both the construction permit and operating license stages.

practical support to what the statute mandates. Logically, that proceeding provides the more appropriate and direct forum for petitioners' challenge to the settlement agreement negotiated and proposed therein. Thus, if petitioners have a forum anywhere for their antitrust arguments, it must and should be in the context of the pending construction permit proceeding.[14/]

On appeal, neither P&W nor Florida Cities address the requirements of subsection 105c(2) and its limitations on the Commission's authority. Instead, they argue that the notice of opportunity for hearing in the instant operating license proceeding was broad enough to encompass all licensing issues, including those based on the antitrust laws. The Licensing Board, in their view, perceived its role too narrowly. But this argument misses the point. A notice of opportunity for hearing necessarily corresponds to the agency's statutory authority over a given matter; it cannot confer or broaden that jurisdiction to matters expressly proscribed by law. Thus, petitioners come up short in their attempt to stretch the language of the notice in this case.[15/]

14/ As noted above, Florida Cities are already parties to the construction permit antitrust proceeding. P&W's appeal of the Licensing Board's denial of its petition to intervene in that proceeding is pending. See note 4, supra. Our comments here are not intended to reflect any opinion on the merits of that appeal.

15/ In any event, the notice, similar to those published in other operating license proceedings, clearly refers throughout to the consideration of only health, safety, and environmental issues if a hearing were to be held. No mention of

(FOOTNOTE CONTINUED ON NEXT PAGE)

Finally, P&W argues that the Licensing Board erred in failing to address its PURPA-based claim, which P&W contends was an independent ground for its intervention. We find that the Board's overall assessment of P&W's petition as raising only antitrust matters is reasonable and, in the circumstances, represents an adequate treatment of the arguments raised. PURPA deals with the economics of energy conservation, distribution, and production -- not with protection of the public health and safety. Moreover, P&W expressly linked its PUPPA concern to the settlement agreement proposed in the construction permit antitrust proceeding. P&W argued that that agreement will impair certain rights to which it is assertedly entitled as a "qualifying facility" under PURPA.[16/] Therefore, because P&W itself based its PURPA ground for intervention on an alleged infringement of economic rights by a proposed antitrust agreement, the Licensing Board did not err in characterizing P&W's interest as lying "solely in antitrust concerns."

15/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
antitrust issues is made. See 46 Fed. Reg. 1[illegible]932, and compare 38 Fed. Reg. 32159, the notice affording the opportunity for hearing on antitrust issues in the St. Lucie construction permit proceeding. Petitioners, therefore, had no reasonable basis for inferring from the notice itself an invitation to raise antitrust claims.

16/ P&W Petition at 4. Counsel for P&W elaborated on this claim in oral argument before us, stating that he was not "asking [the Appeal] Board to enforce PURPA," but asking instead "to protect our rights under the Nuclear Regulatory Commission's settlement conditions that apply to qualifying facilities under PURPA." App. Tr. at 21.

In view of our disposition of this matter, we need not address whether and to what extent the NRC has jurisdiction to take any action pursuant to PURPA.

One last matter requires our attention. On June 16, 1981, the Licensing Board entered an order dismissing this operating license proceeding on the ground that the only admitted intervenor had withdrawn. We essentially stayed the effectiveness of that order, pending disposition of the instant appeals, on June 18, 1981. In view of our decision here upholding the Board's denial of P&W's and Florida Cities' petitions to intervene, we now deem "final" the Board's June 16 order dismissing this proceeding.

The Licensing Board's June 3, 1981, order denying the petitions to intervene of P&W and Florida Cities is affirmed, and its June 16 order dismissing the proceeding is deemed final.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board