February 25, 1982 SECY-82-80

For: The Commissioners

From: James A. Fitzgerald, Assistant General Counsel

Subject: REVIEW OF ALAB-665 -- In the Matter of Florida Power & Light Co. (Denial of Late Antitrust Intervention)

Facility: St. Lucie Plant, Unit No. 2 50-389

Purpose: To inform the Commission of the Appeal Board's affirmance of a denial of late intervention EX. 5

Review Time Expires: March 10, 1982

Petitions Received: None

Discussion:

1/ See SECY-81-482.

2/ See SECY-82-5 and ALAB-665 at n.2 and accompanying text.

Contact:
Marjorie S. Nordlinger, OGC, 41493

Briefly told, P&W complains that it is harmed by FP&L's refusal to wheel for it and alleges that FP&L has a transmission monopoly. It says that interim license conditions agreed to in a settlement between FP&L, the Department of Justice and tne NRC staff 4/ and approved by the Licensing

3/

4/ Intervenor Florida Cities did not join the settlement. Thus the litigation continued. But see SECY-82-48 and discussion infra regarding reports of settlement between FP&L and Florida Cities.

Board address FP&L's obligations to wheel, but those conditions do not cure the situation with respect to P&W. Because the license conditions may affect FP&L's obligations to wheel for P&W pursuant to FP&L's NRC license, P&W argues that its complaint has nexus to the NRC proceeding. Stated simply, P&W argues that a nexus to the license is sufficient.

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(Continued on following page)

While closing the door to intervention in the St. Lucie proceeding, the Appeal Board noted that other fora, such as FERC, were available to P&W. Moreover, the Licensing Board had granted P&W conditional amicus status to present legal arguments concerning the appropriateness of certain kinds of relief to a specified unrepresented class in the event that Florida Cities prevailed that grant of an unconditioned license would create or maintain a situation inconsistent with the antitrust laws. 6/ According to the February 18, 1982 Eastern edition of the Wall Street Journal, FP&L has reached a settlement with Florida Cities. The article (attached) stated that the agreement is subject to formal approval by the municipalities' governing bodies, [redacted]

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6/ The Licensing Board subsequently found for Florida Cities. LBP-81-58, 14 NRC ___ (Dec. 11, 1981).

EX. 5

Recommendation: We recommend that

James A. Fitzgerald
Assistant General Counsel

Attachments:
1. ALAB-665
2. Newspaper article

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, March 10, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT March 3, 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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7/ If, for argument's sake, we were to find that there was nexus, termination of the proceeding but for P&W's intervention could make it even more difficult for P&W to show good cause for late intervention. However, like the Appeal Board, this discussion need not reach that issue.

ATTACHMENT 1

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

'82 JAN 29 P2:07

Administrative Judges:

Alan S. Rosenthal, Chairman
Christine N. Kohl
Stephen F. Eilperin

SERVED JAN 29 1982

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

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

Mr. J. A. Bouknight, Jr., Washington, D.C. (with whom Mr. Herbert Dym, Washington, D.C., was on the brief), for the applicant, Florida Power & Light Company).

Mr. Benjamin H. Vogler (with whom Messrs. Joseph Rutberg and Stephen H. Lewis were on the brief) for the Nuclear Regulatory Commission staff.

DECISION

January 29, 1982

(ALAB-665)

Opinion of the Board by Mr. Eilperin, in which Mr. Rosenthal and Ms. Kohl join:

This case marks the second occasion Parsons and Whittemore, Inc. (P&W), has sought to press its antitrust concerns in connection

with the licensing of St. Lucie 2.[1] In Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC __ (1981) (P&W I), we rejected P&W's petition to intervene at the operating license stage of St. Lucie 2. We ruled that where, as here, the construction permit antitrust review proceeding is still in progress, the antitrust provisions of the Atomic Energy Act preclude the Commission from instituting a second antitrust hearing in conjunction with FPL's operating license application.[2]

We now affirm the Licensing Board's denial of P&W's late petition to intervene in the construction permit antitrust review proceeding. We do so because P&W has failed to explain, as required by the Atomic Energy Act, how the activities under the St. Lucie 2 license will have an anticompetitive effect

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1/ P&W's subsidiary, Resources Recovery (Dade County), Inc. (RRD), joins P&W in this endeavor.

2/ Our reasoning was as follows: Section 105c(2) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(2), explicitly states that the construction permit antitrust review shall not be repeated at the operating license stage 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 ...." Where the construction permit antitrust review is ongoing, there necessarily is no "previous" review subsequent to which any "significant changes" could have occurred. We also noted that the Commission has delegated the triggering "significant changes" decision to the NRC staff, and no such decision had been made. P&W I, 14 NRC at ___ and n.12 (slip opinion at 6-7 and n.12).

on P&W's electric generating facility. Section 105c(5) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(5); Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-25, 6 AEC 619, 621 (1973)(Waterford II).

I.

We draw on our earlier opinion for factual background.

> 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 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.
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> 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.
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> 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 [footnotes omitted; emphasis in original].

P&W I, supra, 14 NRC at __ (slip opinion at 2-4).

When FPL opposed that operating license stage petition on the ground that the Licensing Board had no jurisdiction over the asserted antitrust claims (a position we later upheld in P&W I), P&W filed a similar petition in this ongoing construction permit antitrust review. Its petition concerned primarily the antitrust implications of a proposed settlement agreement negotiated in this proceeding.[3/]

P&W explained that it had recently completed construction of a solid waste processing facility in Dade County, Florida, which was capable of processing 18,000 tons of solid waste (or garbage) per week, converting the combustibles to fuel, and burning the fuel to create steam. In conjunction with the solid waste processing facility P&W had constructed a 76 megawatt electrical (MWe) generator to use the steam. P&W asserted that its electric generator facility was a qualifying small power producer within the meaning of the Public Utilities Regulatory Policies Act of 1978, ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (found in scattered sections of Titles 15, 16, 30, 42 and 43

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3/ The settlement agreement, which was negotiated among the Department of Justice, the NRC staff, and FPL, was accepted by the Licensing Board in an unpublished memorandum and order issued April 24, 1981. The Board's order made the settlement license conditions effective immediately, allowed the nonsettling parties, Florida Cities, to proceed with their antitrust claims against FPL, and left open the possibility that more stringent (but no lesser) antitrust conditions could be imposed after hearing.

of the United States Code) -- an Act intended to encourage the generation of electric energy through unconventional means by small power producers.[4/] Its ability to become commercially viable, and thus to fulfill Congress' expectation that PURPA facilities contribute to the overall energy independence of the nation, depended, said P&W, upon its ability to compete with entrenched utilities such as FPL.

P&W claimed that FPL had monopoly power over the transmission grid that spans southern and eastern Florida and had used that monopoly power in refusing to wheel power for P&W.[5/] According to P&W, the settlement agreement negotiated among the Department of Justice, the NRC staff, and FPL in this construction permit antitrust review proceeding (supra n.3) poses a competitive threat because the settlement provisions diminish qualifying facilities' benefits under PURPA, thereby further limiting P&W's access to FPL's transmission grid and adversely affecting P&W's

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4/ Toward that end PURPA grants qualifying facilities the right, in accordance with Federal Energy Regulatory Commission (FERC) regulations, to sell their output to an electric utility, to interconnect with a utility, and to buy at retail from the utility the electric power the facility needs. 16 U.S.C. 824a-3. See generally 18 CFR Part 292.

5/ "Wheeling" is the "transfer, by direct transmission or displacement, [of] electric power from one utility to another over the facilities of an intermediate facility." Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973).

ability to compete with FPL in the sale of electric power. In particular, P&W complained that the settlement conditions fall short of a "clean" wheeling provision (that is, wheeling upon P&W's request) and allow FPL excessive discretionary latitude to deny PURPA facilities access to FPL's transmission grid.[6/] P&W's petition went on to detail why it believed it satisfied the late filing requirements of 10 CFR 2.714(a)(1) despite the fact that the time to intervene had expired more than seven years earlier.[7/]

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6/ For example, P&W pointed to the proviso in Section X(b) of the settlement conditions that nothing in the license will require FPL to wheel to or from a retail customer. Because P&W expected to be a retail customer of FPL and claimed that as a PURPA facility it had a right to make such purchases, P&W argued that the settlement conditions could be construed by FPL to deny it and its customers transmission access. P&W also pointed to Section X(a)(5) which obliges FPL to wheel for PURPA facilities only if the facility's customer agrees to sell the PURPA facility backup and maintenance power during the time and to the extent of its purchases from the PURPA facility. P&W argued that this provision conflicted with a PURPA facility's right to have the principal utility, here FPL, provide backup and maintenance power upon request. See 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 (filed April 7, 1981) at 18-20 (OL Brief) (incorporated by reference in P&W's construction permit antitrust intervention petition).

7/ P&W claimed it had good cause for late intervention because only when it unearthed the settlement (apparently in March, 1981) did it realize FPL was utilizing the construction permit antitrust review proceeding assertedly to undercut P&W's rights as a qualifying PURPA facility. P&W also claimed that no other means besides intervention in the NRC antitrust review was adequate to protect against FPL's monopoly power; that it alone was in a position to develop

(FOOTNOTE CONTINUED ON NEXT PAGE)

FPL and the staff opposed P&W's late intervention petition. First, FPL argued that P&W was not a qualifying PURPA facility and thus had no interest in the antitrust review proceeding. According to FPL, P&W had a contractual commitment to turn over the solid waste processing facility and the 76 MWe generator it had constructed to Dade County. (In turn, Dade County was to transfer the generator to FPL to own and operate.) P&W also had committed to a long-term contract to operate the solid waste processing facility for Dade County. FPL claimed that P&W had breached those commitments when P&W realized it would lose large sums of money under its contract with Dade County to operate the solid waste processing facility. Second, FPL argued that the settlement license conditions of which P&W complained could, as a matter of law, neither create or maintain a situation inconsistent with the antitrust laws nor diminish P&W's asserted PURPA rights, because the license conditions imposed no obligations on anyone other than FPL. For the same reasons, FPL argued that P&W had not shown a meaningful tie or nexus between the activities under the nuclear license and the allegedly anticompetitive situation.

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7/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
a sound record as to the effect of the settlement agreement on PURPA facilities; and that intervention would not delay the proceeding because the impact of the settlement agreement was already an issue before the NRC.

Lastly, FPL argued that P&W's intervention petition failed to meet NRC standards for late intervention.[8] In very general terms, the staff also argued against granting the intervention petition.[9]

In a memorandum and order issued August 5, 1981, the Licensing Board denied P&W's intervention petition, but granted it conditional amicus status to present legal arguments concerning the appropriateness of granting relief to PURPA facilities if the Board should find that a situation inconsistent with the antitrust laws existed in connection with Florida Cities' antitrust objections to the licensing of St. Lucie 2. LBP-81-28, 14 NRC 333. The Board found that

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8/ FPL's arguments were as follows: good cause was lacking because the settlement agreement to which it was tied was irrelevant; petitioner's asserted interest as a PURPA facility could adequately be protected by the Federal Energy Regulatory Commission; its participation here would not assist NRC in developing a sound record on the antitrust claims before it; inquiry into the evolving relationship between FPL and asserted PURPA facilities would broaden the issues, delay the proceeding, and require NRC to resolve the commercial dispute which surrounded the solid waste disposal facility. See 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. (filed June 26, 1981).

9/ See Tr. 60-69 (July 20, 1981). The staff did not have an opportunity to brief its position because the Licensing Board issued its ruling on P&W's intervention petition before full briefing.

in each particular P&W failed to satisfy the requirements for late intervention. See 10 CFR 2.714(a)(1). The Board also ruled, as a separate and independent matter, that P&W failed to meet the Commission's nexus requirement of alleging a meaningful tie between the operation of St. Lucie 2 and the anticompetitive situation complained of by P&W. Thereafter, in a memorandum and order issued October 2, 1981, the Licensing Board adhered to its ruling denying intervention. LBP-81-41, 14 NRC __.

This appeal followed. We affirm the Licensing Board on its nexus ruling and do not reach its alternative holding.

II.

P&W's intervention petition is fundamentally deficient in failing to explain how the operation of St. Lucie 2 will have an anticompetitive effect on P&W's generating facility. For us to exercise jurisdiction over P&W's antitrust claims, the existence of that tie is essential. Because P&W has failed to demonstrate such a nexus here, we affirm the denial of its intervention petition.[10/] We begin by recounting the NRC's nexus requirement, then turn to P&W's allegations and an analysis of why those allegations do not satisfy the governing criteria.

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10/ Nothing that we say in this opinion is meant to express any view on the merits of P&W's antitrust claims.

A. The Nexus Requirement

When licensing the construction of a nuclear power plant, the antitrust review undertaken by the Commission is, by statute, to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws ...."[11/] We and the Commission have explained the purpose and scope of that jurisdictional grant on numerous occasions. For example, in Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 756-57 (1978), we stated:

> [T]he Commission's writ to enforce the antitrust laws does not run to the electric utility industry generally. Neither does it reach all actions by utilities that generate electricity with nuclear-powered facilities. Rather, Congress authorized this Commission to condition nuclear power plant licenses on antitrust grounds only where necessary to insure that the activities so licensed would neither create nor maintain situations inconsistent with the antitrust laws. The reason for the grant, as the Commission has explained, was "a basic Congressional concern over access to power produced by nuclear facilities," because the industry was nurtured by public funds and the legislature was anxious that nuclear power "not be permitted to develop into a private monopoly via the [NRC] licensing process." Put another way, the preservation and encouragement of competition in the electric power industry through "fair access to nuclear power" is the principal motivating consideration underlying Section 105c of th. Atomic Energy Act [footnotes omitted].

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11/ Section 105c(5) of the Atomic Energy Act of 1954, 42 U.S.C. 2135c(5).

Other NRC decisions in the antitrust area have been an elaboration of that basic theme. Thus, in Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 574-75 (1975) (Wolf Creek I), we explained how the Commission had devised its pleading requirements to flesh out the statutory standard:

> Where an intervenor proposes to raise antitrust matters, the Commission has elucidated its regulations to make clear, first, that his petition "must describe a situation inconsistent with the antitrust laws" [Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), CLI-73-7, 6 AEC 48, 49 (1973) (Waterford I)]; second, that "[a] description of a situation inconsistent with the antitrust laws -- however well pleaded -- accompanied by a mere paraphrase of the statutory language, alleging that the situation would be created or maintained by the activities under the license, would be deficient" (Waterford II, supra, 6 AEC at 621 n.2); and, third, that the petition must "identify the specific relief sought ... and whether, how and the extent to which the request fails to be satisfied by the license conditions proposed by the Attorney General" (Waterford I, supra, 6 AEC at 49).

Most critical is the second of the requirements -- an explanation of how the activities under the license would create or maintain an anticompetitive situation (Waterford II, supra, 6 AEC at 621):

> In our view, it is the existence of that tie which is critical to antitrust proceedings under the Atomic Energy Act. If activities relating to a facility have no substantial connection with alleged anticompetitive practices, there is no need for a hearing as to such practices or proposed forms of relief from them. In short, an intervenor must

> plead and prove a meaningful nexus between the activities under the nuclear license and the "situations" alleged to be inconsistent with the antitrust laws.
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> * * *
>
> The hearing issues cannot and should not be divorced from the overriding requirement that there be a reasonable nexus between the alleged anticompetitive practices and the activities under the particular nuclear license. This is a primary and predominant question which must pervade the proceeding [footnote omitted].

Where such a tie has been shown, we have not hesitated to order relief designed to remedy an anticompetitive situation. See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-646, 13 NRC 1027 (1981) (Farley), petition for review pending sub. nom., Alabama Power Co. v. Nuclear Regulatory Commission, No. 81-7547 (11th Cir., filed June 30, 1981); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-560, 10 NRC 265 (1979)(Davis-Besse); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-452, 6 NRC 892 (1977) (Midland).

B. Analysis of P&W's Petition

The crux of P&W's petition is its claim that FPL exercises monopoly power over the transmission of electric power in southern and eastern Florida, and that the settlement conditions for St. Lucie 2 do not afford small power producers, such as P&W, fair access to FPL's transmission grid. Without fair access to that transmission grid requiring FPL to wheel P&W-

generated power to potential P&W customers (access that FPL has refused), P&W claims it will be injured competitively, and the congressional purpose to foster small power production through unconventional means will be frustrated.

We think that claim -- the use of monopoly power to injure a potential competitor by a refusal to deal -- sufficiently pleads the existence of a situation inconsistent with Section 2 of the Sherman Act. 15 U.S.C. 2.[12/] The Supreme Court has expressly ruled that a utility company's unjustified refusal to wheel, where its control of transmission facilities precluded a potential competitor from obtaining low cost power, constitutes

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12/ This is not to say that we consider P&W's papers a model pleading. They do not, for example, name the particular antitrust statute alleged to be violated by FPL's conduct. We are entitled to more from experienced counsel and have so cautioned in the past. Wolf Creek I, supra, 1 NRC at 576. Nevertheless, because the Sherman Act, Section 2, claim can fairly be inferred from the pleadings, and because the point in any event is not dispositive, we are willing to treat the petition as satisfactorily outlining a situation inconsistent with the antitrust laws.

We also reiterate that nothing in this decision is meant to express any opinion on the merits of P&W's antitrust claims. FPL, for example, argues that it had perfectly justifiable business reasons for refusing to wheel power for P&W.

a violation of the anti-monopoly provisions of the Sherman Act, 15 U.S.C. 1, 2. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), affirming, 331 F. Supp. 54 (D. Minn. 1971).[13/] The fact that here P&W's claim is centered on its desire to use FPL's transmission grid to transmit rather than to receive power is of no consequence.[14/] In either case, the key is that monopoly power has allegedly been used to restrict potential competition. See generally Midland, supra, 6 NRC at 912-14, 918-24.

So too, we think that P&W has adequately pleaded the specific relief it seeks, and how the settlement conditions agreed to by the Department of Justice do not afford it that relief. As noted supra p. 6 and n. 6, P&W enumerated the specific settlement conditions it found objectionable, and explained its interest in obtaining a "clean" wheeling provision which would afford more extensive access to FPL's transmission grid.

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13/ See also Lorain Journal Co. v. United States, 342 U.S. 143, 154 (1951)(newspaper's refusal to accept advertisements from customers who also advertise on local radio station is use of monopoly power to destroy threatened competition in violation of Sherman Act, Section 2); Klors v. Broadway-Hale Stores, 359 U.S. 207, 211-13 (1959) (concerted refusal by appliance retailers, manufacturers and distributors to deal with retail dealer violates Sherman Act, Section 1).

14/ P&W does in fact also allude to its need to have power wheeled in to it. See OL Brief, supra n.6, at 18.

What is lacking in the petition, however, is what the Commission has termed the "overriding requirement", Waterford II, supra, 6 AEC at 621, of a meaningful tie between the activities under the license (here, operation of St. Lucie 2) and the anticompetitive situation (in this case, FPL's allegedly monopolistic control over the transmission of electric power in southern and eastern Florida).

P&W's nexus argument is twofold. First, P&W argues that because the St. Lucie settlement agreement contains license conditions that take into account (but, according to P&W, do not cure) FPL's transmission monopoly, there exists a tie between operation of St. Lucie 2 and the anticompetitive transmission grid situation. It is P&W's argument that the "statute requires not that you have a nexus with the facility as such, but with the license under which the facility will operate. This license takes into account FPL's entire transmission grid." App. Tr. 10.[15/] Second, P&W argues that it has a constitutional right to intervene in the proceeding because it is a PURPA facility affected by the license conditions. App. Tr. 25, P&W App. Brief at 51-58. We find neither argument persuasive.

The controlling language of Section 105c(5) requires that the anticompetitive situation be linked to "the activities ... under the license". As we construe that statutory term, and

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15/ See also Brief of Parsons and Whittemore, Inc. and Resources Recovery (Dade County) Inc. in Support of their Appeal from Denial of their Intervention Petition and Request for Hearing (filed October 26, 1981) at 18-23 (P&W App. Brief).

as we have construed it throughout, the licensed activities must play some active role in creating or maintaining the anticompetitive situation. Put another way, the nuclear power plant must be an actor, an influence, on the anticompetitive scene.

Wherever we have found the nexus requirement met, that fundamental linkage has existed. Thus, in each of our cases 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. For example, in Midland, supra, 6 NRC at 1094-95, we had

> no difficulty in making the requisite connection on the basis of this record. One reason we have written at length -- perhaps prolixly -- is precisely to demonstrate that nexus between the existing anti-competitive situation and the introduction of the Midland generating capacity. Without repeating our findings chapter and verse, fair access to efficient, dependable and economical baseload generation is at the heart of the competitive situation before us [footnote omitted].

Similarly in our recent Farley decision (supra, 13 NRC at 1086), we found

> no doubt as to the company's short and long-range objectives in refusing to share in the ownership of Farley: the preservation of its dominant power in the wholesale and retail markets for electricity in central and south Alabama.

See also Davis-Besse, supra, 10 NRC at 293-94.

This is not to say that a refusal to wheel -- the situation of which P&W complains -- cannot be an antitrust violation or

form the predicate for relief that the NRC is entitled to impose to remedy an anticompetitive situation. (As we have already observed, supra p. 13, the P&W petition does adequately outline a Sherman Act, Section 2, violation by FPL.) Indeed, in each antitrust case that has reached us on the merits, we have found that a wheeling provision was justified in order for the potential competitor to make efficient use of its access to the nuclear plant's power.[16/] But the wheeling relief we have ordered has been in the context of remedying an anticompetitive situation that was influenced by the power plant being licensed. We stressed in Midland, supra, 6 NRC at 1099, that as to that situation,

> no type of license condition -- be it a requirement for wheeling, coordination, unit power access, or sale of an interest in the plant itself -- is necessarily foreclosed as a possible form of relief. Section 105c imposes no limits in this respect; it gives the Commission "authority ... to issue a license with such conditions as it deems appropriate" [footnote omitted].

See also Davis-Besse, supra, 10 NRC at 291-92; Farley, supra, 13 NRC at 1098-99.

Our focus here, for purposes of deciding whether P&W has satisfied the statutory nexus requirement, must therefore be

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16/ See Midland, supra, 6 NRC at 1044 ("without access to the company's transmission network, the small utilities cannot coordinate with or buy wholesale power from ... utilities other than Consumers"); Farley, supra, 13 NRC at 1108 ("[i]t is evident that AEC needs access to the applicant's transmission system to make effective use of its share of the output from Farley "). See also Davis-Besse, supra, 10 NRC at 294 n.76 (approving of wheeling conditions parallel to those imposed by the Supreme Court in Otter Tail, supra).

on what way P&W claims operation of St. Lucie 2 will harm it competitively, not whether access to FPL's grid is an appropriate form of relief to remedy a Sherman Act, Section 2, violation. All that P&W offers on this score is the claim that the settlement 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. But that is insufficient. The license conditions do not adversely affect P&W. As P&W concedes, and as is plainly so, the license conditions impose obligations only on FPL.[17/] P&W is in no worse position with the license conditions than with no license conditions whatever.

Nor is there any way other than the settlement license conditions in which P&W claims operation of St. Lucie 2 will adversely affect its competitive position. There is simply no explanation by P&W of how FPL's bringing on line St. Lucie 2

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17/ The following exchange for example, took place at oral argument (App. Tr. 9):

> [MR.] EILPERIN: It is my understanding that the settlement agreement does not impose any obligations on anyone other than FPL. Is that inaccurate?
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> MR. KUCIK [P&W]: No, that is accurate.

While P&W's intervention petition claimed that the settlement license conditions restricted its PURPA rights before FERC (see supra, pp. 5-6), Section XIII of the conditions belies that claim, for it provides that "[n]othing herein shall be construed to affect the jurisdiction of FERC or any other regulatory agency." See also 14 NRC at 339. We expressly rule that the settlement license conditions in no way diminish whatever PURPA rights P&W may have.

will act to maintain or entrench FPL's alleged transmission monopoly. In essence, P&W's argument reduces to the proposition that, where an applicant for a nuclear power plant enjoys a monopoly position, this Commission can take the licensing of the plant as the occasion for remedying the anticompetitive situation, despite the fact that the nuclear power plant has no influence on that situation. That position reads out the nexus requirement of Section 105c(5) in its entirety. Whatever may be the merits, as a matter of antitrust policy, of P&W's position that this Commission should exercise such wide-ranging antitrust authority, Congress has not seen fit to extend NRC's antitrust jurisdiction that far.

Lastly, P&W claims that it has a constitutional right to intervene in the proceeding because the proceeding ostensibly affects its interest. P&W relies on three cases, none of which is apposite.[18/] The short answer to P&W's argument is that the

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18/ In Natural Resources Defense Council, Inc. v. Costle, 561 F.2d 904, 909 n.27 (1977), the D.C. Circuit reversed a district court order that denied the intervention petition of certain manufacturers who "will almost certainly be affected by regulations promulgated pursuant to the settlement agreement" between the Environmental Protection Agency and an environmental organization relating to a rulemaking timetable for regulating pollutants under the Federal Water Pollution Control Act Amendments of 1972. The court of appeals found that that interest, coupled with their interest in possible further proceedings about modifications in the timetable and exclusion of certain substances from regulation, satisfied the practical impairment of interest standard of Fed. R. Civ. P. 24(a)(2). Even assuming that the practical impairment of interest standard of Rule 24(a)(2) is constitutionally mandated (a dubious proposition at best because it would mean that the pre-1966 version of Rule 24 was constitutionally defective), the multiplicity of interests at stake in Costle

(FOOTNOTE CONTINUED ON NEXT PAGE)

proceeding does not affect any constitutional interest. Nothing in the proceeding, including the license conditions that are the focus of P&W's concern, imposes any obligation whatever on P&W. Nor, in a practical sense, does denial of intervention impair or impede P&W's ability to protect its interest in obtaining PURPA wheeling rights from FPL. Cf. Fed. R. Civ. P. 24(a). Indeed, the settlement license conditions explicitly recognize the Federal Energy Regulatory Commission's power and authority to grant wheeling rights to PURPA facilities. See n.17 supra.

Our rejection of P&W's position does not leave it without a forum in which to press its case. It can pursue its antitrust

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18/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) present a far more compelling case than this, where the settlement license conditions do not trench on how P&W is to conduct its business, and P&W can protect its interest against FPL's allegedly anticompetitive practices in other forums. See infra, pp. 20-21.

In Sea-Land Service, Inc. v. Federal Maritime Commission 653 F.2d 544 (1981), the D.C. Circuit ruled that Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, requires a new notice and opportunity for third persons to comment on final agency action that expands the authority proposed by parties to a Section 15 shipping agreement. That case, which has due process overtones, is inapposite for a variety of reasons, most notably because the settlement license conditions here do not expand, but rather limit, FPL's NRC-licensed activities. For the same reason, Arkansas-Best Freight System v. United States, 399 F. Supp. 157 (W.D. Ark. 1975), aff'd sub. nom., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 425 U.S. 901 (1976), upon which the Sea-Land court relied, is inapposite.

claims before a federal district court; its PURPA and associated claims before the Federal Energy Regulatory Commission; its claims for interconnection before the Florida Public Service Commission; and its contract dispute claims (supra, p. 7) before the appointed arbitrator. But Congress has limited our antitrust review jurisdiction to anticompetitive situations influenced by the nuclear power plant being licensed, and, absent an explanation by P&W of that tie, we must deny its petition for intervention.[19/]

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19/ While we do not understand P&W to have filed a federal district court lawsuit, other avenues are being pursued. The contract dispute is in arbitration and FERC has before it P&W's claim to PURPA status. Moreover, on December 20, 1981 the Florida Public Service Commission ordered FPL to interconnect its transmission grid with P&W. See Florida Public Service Commission, Order Requiring Interconnection, Order No. 10481, Docket No. 810249-EU(MC). Interconnection was accomplished January 9, 1982, but the order is still subject to a pending appeal. See Amicus Curiae Brief and Proposed License Conditions Submitted by Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. (filed January 13, 1982) at p. 4 n.5.

In addition, the Licensing Board has found that, insofar as Florida Cities' claims are concerned, the operation of St. Lucie 2 would create or maintain a situation inconsistent with the antitrust laws. LBP-81-58, 14 NRC (December 11, 1981). As noted earlier, supra p. 8, P&W has been granted amicus status before the Licensing Board to present legal arguments concerning the appropriateness of granting relief to PURPA facilities. Thus, it may be that even our own adjudicatory forum offers P&W the possibility of some remedy. But see pp. 17-18, supra. We, of course, express no opinion on the correctness of this recent Licensing Board decision, or on the appropriate scope of relief should that decision stand.

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The Licensing Board's denial of Parsons and Whittemore's intervention petition is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

ATTACHMENT 2

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WALL STREET JOURNAL
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# Florida Power & Light Settles Out of Court With 15 Municipalities

By a WALL STREET JOURNAL Staff Reporter

MIAMI, Fla.—Florida Power & Light Co. said it reached an out-of-court settlement with 15 Florida municipalities that filed antitrust charges against the company with the U.S. district court in Miami and the Nuclear Regulatory Commission.

Florida Power & Light said it agreed to sell to the Florida Municipal Power Agency a certain amount of power and the right to buy an approximate 9% interest in each of two planned coal fire units.

In addition, the power company said it will pay a certain part of the municipalities' legal expenses.

The company said the agreement is subject to formal approval by the municipalities' governing bodies. A company spokesman said it initiated the settlement so that an operating license pending with the Nuclear Regulatory Commission won't be delayed due to litigation.