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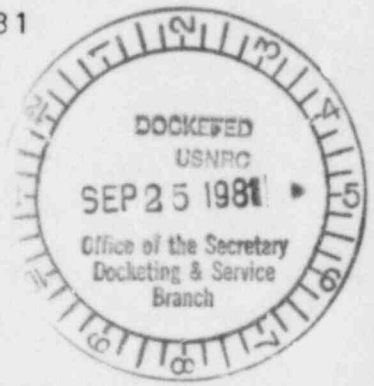


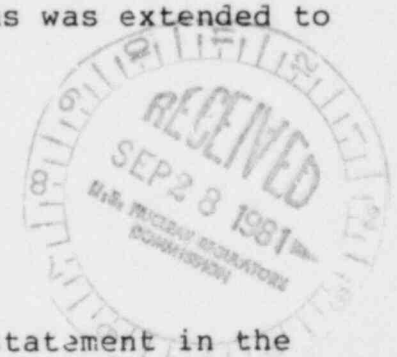
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	)	Dated: September 25, 1981

OBJECTIONS OF PARSONS & WHITTEMORE, INC.
AND RESOURCES RECOVERY (DADE COUNTY), INC.
TO AUGUST 5, 1981 MEMORANDUM AND ORDER

Petitioners, Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. ("RRD"), object to the Board's August 5, 1981 Order denying their Petition to Intervene, and to the underlying findings of fact and conclusions of law contained in that Order. The objections are arranged to follow the sequence of the Board's Memorandum (which is cited "Mem. ___, ¶ ___").[1/] RRD's time for filing objections was extended to September 25, 1981 by orders of the Board.



1/ We do not specifically discuss every statement in the Memorandum with which RRD disagrees, limiting these objections to those findings and conclusions that we deem central to the Board's decision to deny RRD leave to intervene.

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INTRODUCTION

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

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

CONSIDERATION OF FACTORS GOVERNING LATE INTERVENTION

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

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

1. FERC's antitrust jurisdiction differs from that of the NRC (see discussion relating to Objection #3, infra).

2. Petitioners have alleged that FPL's activities under license conditions approved by the Board would create or maintain a situation inconsistent with the antitrust laws. "[O]nly the NRC is empowered to make the initial determination under Section 105c whether activities under the license would create or maintain a situation inconsistent with the antitrust [laws and policies], and if so what license conditions should be required as a remedy." Houston Power & Lighting Co. (South Texas Project, Units 1 and 2, 10 NRC 563, 574 (ASLB, 1979)(emphasis added).

3. Under Section 221(c) of the Atomic Energy Act of 1954, 42 U.S.C. §2271, as amended by Pub. L. 91-161, §5, 83 Stat. 445 (1969), only the Attorney General and the NRC may enforce the Atomic Energy Act, NRC Regulations or licenses issued by the NRC. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3rd Cir. 1980), cert. denied, __ U.S.___, 101 S.Ct. 893 (1981); Liesen v. Louisiana Power & Light Co., 636 F.2d 94 (5th Cir. 1981). FERC therefore would have no authority to redress Petitioners' grievances as to the NRC settlement license conditions at issue here. "[T]he only exception [to §221(c)] for private enforcement appears to be the opportunity to participate in the NRC's administrative proceeding as provided in the Commission's regulations and seek judicial review under [42

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

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

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

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

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

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

Id. at 284.

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

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

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

Id. at 576-77 (citations omitted).

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

The divergent issues before FERC and the NRC would make it impossible for RRD to limit its NRC participation "to exactly the same issues as pend before FERC" (Mem. 9, ¶2), and RRD has

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

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

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

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

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

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

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

qualifying small power producers -- a new class of competitors. The interrelationship between RRD's antitrust rights and its separate rights under PURPA was pointed out in the Petition to Intervene (App. A, pp. 7-9). And, PURPA's competitive thrust was recently noted by the Second Circuit. New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 402 (2d Cir. 1980), cert. pending, Sup. Ct. No. 80-1858, 40 U.S.L.W. 3865 (May 19, 1981). In sum, there is no conflict between RRD's rights under PURPA and its antitrust rights, and neither the Board nor FERC would be called upon to decide which category of rights is paramount.

Objection #4: The Board erred in holding that "RRD also is engaged in arbitration, which could completely resolve its problems. During the Conference of Counsel, we learned that RRD also is pursuing action before the Florida Public Service Commission. Since we were not informed what is at issue in that proceeding, it is possible that RRD's entire problem also could be cleared up there". (Mem. 7, ¶2)

The referenced arbitration proceeding is styled In Re Resources Recovery (Dade County) Construction Corp. v. Metropolitan Dade County, AAA No. 32-10-0031-81-F. That proceeding involves only the RRD-Dade County dispute. FPL is not a party to the arbitration, and the St. Lucie license and its conditions are not at issue therein.

The Florida Public Service Commission proceeding (Docket No. 810249-EU) is at issue on RRD's Petition for an Interconnection Order. That proceeding does not involve RRD's

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

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

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

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

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

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

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

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

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

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

prior to the Order approving the settlement agreement, which was docketed and served on April 27, 1981. For that reason, inter alia, the April 27 Order cannot be accorded finality until such time as RRD's Petition to Intervene is finally adjudicated. As the Appeal Board in this docket held after the Licensing Board had denied RRD's Petition to Intervene in the companion St. Lucie operating license proceeding, and then dismissed that proceeding (No. 50-389-OL):

> Obviously, the validity of the June 16 order dismissing the proceeding hinges on the outcome of the [intervention] appeal. For this reason, that order shall not be accorded finality until such time as the appeal is determined.

Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), __NRC__, [CCH Nuclear Reg. Rpts. ¶30,601.01] (ASLAB 1981). Here, too, the Order approving the settlement agreement cannot be final until RRD's status as an intervenor is finally determined.

The April 27 Order, in any event, was not a final order by its own terms, having been entered "without prejudice to the Board's authority to impose different or additional conditions after a hearing" (Order, p. 1). See Florida Power & Light Co. (St. Lucie Plant, Units No. 1 and 2 and Turkey Point Plant, Units No. 3 and 4), 6 NRC 847, 848 (1977, by the Commission); Toledo Edison Co. (Davis-Besse Nuclear Power Station), 2 NRC 752, 758 (1975, by the Appeals Board).

Objection #6: The quotation of RRD's position at Mem. 10, ¶4, is unclear and misleading because the lead-in sentence has been omitted. That sentence reads as follows (Tr. 116):

> But I think that if you look at all these facts, you come up with this: Everything they [FPL] have said is compatible with an honest dispute that did not erupt until April of 1981. (emphasis added)

Objection #7: The Board erred in finding "that the antitrust problem alleged by RRD is not sufficiently serious to justify intervention" (Mem. 12, ¶3).

First, satisfaction of the good cause factor for late intervention may depend upon the "substantiality" of the petitioner's reasons for delay. See, e.g., Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), 7 NRC 939 (1978); Duke Power Company (Oconee Nuclear Station), ALAB-528, 9 NRC 146 (1979). This, however, is not a test of the substantiality of the substantive claims that the petitioner is intervening to protect. On the contrary, petitioner's intervention must stand or fall on the five factors delineated at 10 CFR §2.714(a), and the seriousness of its antitrust allegations is not one of them. The Board's consideration of that irrelevant point amounts to an improper denial of RRD's Petition to Intervene by ruling against RRD on the merits of its antitrust claim. See Flast v. Cohen, 392 U.S. 83, 99 (1968); Aiken v. Obledo, 442 F.Supp. 628, 639 (E.D. Calif. 1977); Hiatt Grain & Feed, Inc. v. Bergland, 446 F.Supp.

457, 463 (D. Kan. 1978), aff'd, 602 F.2d 929 (10th Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

Second, RRD's antitrust allegations raise substantial and serious issues. As the Supreme Court held in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213-214 (1959), anticompetitive behavior:

> is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop.

Third, the Board stated, "it is possible that after a lengthy evidentiary hearing RRD could persuade us that it was inconsistent with the antitrust laws for FPL to decide to contest RRD's alleged PURPA rights before FERC" (Mem. 13, ¶4). This is the antitrust claim that the Board deemed not serious enough to warrant late intervention. It is not, however, the claim that RRD made.

RRD has advanced three distinct but interrelated antitrust claims in support of its Petition to Intervene:

1. FPL has refused to deal with RRD by denying RRD access to its transmission lines. Specifically, FPL has refused

to interconnect and to wheel. These refusals have enormous anticompetitive consequences, for FPL has monopoly control over the transmission grid in RRD's operating area. RRD therefore must deal with FPL or perish.

2. FPL has used the NRC settlement proceeding to undermine the procompetitive policies of PURPA. The settlement agreement contains conditions that conflict with PURPA, diminishing the rights that qualified small power producers, like RRD, have under PURPA. If those conditions are given effect as written, a small power producer's costs associated with obtaining a "wheeling" arrangement would be increased, adding another obstacle to the facility's ability to compete with FPL.

3. FPL has used the NRC settlement proceeding to maintain its existing monopoly power over the wholesale sale of bulk power supplies.

RRD's antitrust allegations -- which are grounded in its PURPA capacity as a potential competitor of FPL -- differ "in nature and kind from other allegations in the proceeding" (Mem. 13, ¶2). The fact that "a broader scheme of monopolization" (Mem. 13, ¶4) may link the Florida Cities' antitrust claims with those of RRD is no reason for denying RRD leave to intervene. Indeed, that linkage demonstrates the complementary nature of the intervenors' claims, and is an argument in favor of granting RRD's Petition. See Florida Power & Light Co. (St. Lucie Plant, Unit 2), 9 NRC 939, 949 (1978)(intervenors with claims related to that

of another intervenor allowed to intervene despite lack of good cause because hearing "should encompass all significant antitrust implications of the license.")

Objection #8: The Board erred in ruling that "notice of a hearing concerning that [settlement] agreement was published in the Federal Register of January 15, 1981 at 3683. RRD has not sought to show that it was entitled to personal notice of that agreement. Hence, we are not able to find that lack of notice deprived it of due process of law.

> For reasons we already stated, RRD has no legal grievance at all resulting from the settlement agreement. Its rights have not been adversely affected by the agreement. Consequently, lack of knowledge of that agreement cannot have created good cause for intervention" (Mem. 14, ¶¶1, 2).

The January 15 Federal Register publication noticed a prehearing conference. It gave no indication of the terms of the settlement agreement and no clue that PURPA facilities would be affected by the settlement. Furthermore, the notice did not invite public comment, and it did not make the settlement agreement available for public inspection. In fact, the settlement agreement was not made available to the public until March, 1981, one month before Petitioners filed their Petition to Intervene. Since two of Petitioners' antitrust allegations allege abuse of the NRC settlement proceedings, it would have been impossible for Petitioners to formulate those allegations prior to March, 1981.

The date of public release of the settlement agreement is the critical date in determining the timeliness of RRD's Petition to Intervene. Natural Resources Defense Council v. Costle, 561 F.2d 304 (D.C. Cir. 1977). There, the United States Court of Appeals for the District of Columbia upheld the timeliness of intervention petitions under Rule 24 of the Federal Rules of Civil Procedure. The case was seven years old when Petitioners moved to intervene. Their petitions, however, were filed within four weeks of the date on which they first learned of the critical settlement agreement. What is more, the intervention petitions indicated no interest in litigating the merits of the case; they sought leave only to monitor the future administration of the settlement agreement.

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

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

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

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

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

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

1981. Tr. 116. 7/

The objective evidence in the record supports Petitioners' date of April, 1981 and is inconsistent with the February, 1980 date relied upon by the Board. The Board based its finding on the following analysis:

> FPL stated that by [February, 1980], RRD knew that it could not afford to operate the EGF pursuant to the operating contract. Furthermore, RRD apparently learned shortly thereafter that its demand for renegotiation of key payment terms would not be met. (Mem. 14, ¶5 to 15, ¶1).

First, the Board erred by relying on FPL's unsubstantiated assertions. Those oral assertions and quotations from a complaint that was dismissed before a responsive pleading was due, are simply entitled to no weight. RRD has a right to have its intervention petition evaluated upon the facts in the record; anything less would amount to a denial of RRD's rights to due process of law. Gonzales v. United States, 348 U.S. 407, 416 (1955)(fair hearing requires that record contain facts upon which decision rests). See also Crowell v. Benson, 285 U.S. 22, (1932)(administrative adjudication must be rendered upon facts in the record after notice and an opportunity to be heard). Moreover, to be proper for agency consideration, evidence must

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7/ In this context, it is significant that FPL's oral representations during the July, 1981 hearing were inconsistent on the contract impasse date, ranging from "[s]ometime in 1979" (Tr. 38) to February, 1980 (Tr.98).

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

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

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

examine, explain, or rebut facts relied upon by administrative agency in adjudicative process) and Gonzales v. United States, supra, 348 U.S. at 416 ("prime requirement of any fair hearing" requires reasonable opportunity to respond to new facts). Consideration by the Board of the complaint's allegations and FPL's new contentions tainted the Board's decision such that it erred.

Second, the quotation from the transcript at Mem. 15, ¶4 to 16, ¶1 utterly fails to support the Board's conclusion. Nothing in that quotation (or in the entire transcript, for that matter) indicates that RRD ever decided not to meet its contractual obligation to operate the facility, let alone that RRD made such a decision before Dade County denied a demand for renegotiation "of key payment terms."

The quoted language states that Dade County had told RRD that it (Dade County) anticipated that RRD would breach the contract. RRD responded that it just wanted to talk about the financial "shortfall" under the contract. RRD also asked Dade County for a $90 million payment under the contract, because at that time the facility, in RRD's view, had been substantially completed. Since it has never been contended by anyone that the facility was substantially completed before early 1981, this quotation cannot possibly support the Board's finding that RRD "may have known of its serious contractual impass before February 1980." Furthermore, the quoted reference to $90 million was to a

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

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

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

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

The Commission's legitimate concern with the factor of delay is that the proceedings may become so protracted that licensing would be postponed. See St. Lucie, 7 NRC 939, supra. Delay is also critical where late intervention could result in diversion of anticipated capacity to late intervenors who seek participation. Id. Neither of these concerns is relevant here. Although the Board recognized that RRD has stated that it would consent to the licensing of St. Lucie, the Board refused to give any weight to this factor in determining whether RRD's intervention would delay the proceeding. This was an error. See Id. Indeed, because RRD is willing to permit the operating license to issue while its claims are being considered, there is no basis for the Board's finding that RRD's intervention will delay issuance of the operating license.

Moreover, FPL and Cities are engaged in a quarrel over the timing of the operating license issuance. The delay engendered by Cities' opposition to the license ameliorates any negative impact of RRD's intervention. Thus, to that extent, the putative delay cannot be assessed against RRD.

Objection #11: The Board erred in finding that consideration of RRD's allegations "would not contribute to the development of a sound record" and that its interests are already adequately represented in this proceeding. (Mem. 19, ¶2, and 21, ¶2)

The Board recognized that RRD does possess sufficient legal and equitable interests in the facility to support its

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

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

parties to the proceeding.[9/]

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

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

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

antitrust issues and the subsequent determination of appropriate relief.

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

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

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

situation inconsistent with the antitrust laws. See 10 C.F.R. §2.715(a)(non-party may be permitted to make statement of position but not otherwise participate in the proceedings). While RRD may be allowed to offer its views, it would be unable to contribute to the development of an evidentiary record before the Board because its statement could not be considered as evidence. See, e.g., Iowa Electric Light & Power Co., et al. (Duane Arnold Energy Center). ALAB-108, 6 A.E.C. 195 (1973). RRD must be permitted to intervene to assist in the development of a sound record.

Finally, RRD will not be able to protect its interests through the limited status of amicus curiae. The right to appeal from a Board decision on the merits is limited to participants in the proceeding before the Board. Duke Power Company (Perkins Nuclear Station, Units No. 1-3), ALAB-433, 6 NRC 469 (1977) and Consolidated Edison Co. of N.Y. (Indian Point Station, Unit No. 2) ALAB-369, 5 NRC 129 (1977). An amicus curiae making a limited appearance before the Board may not appeal an adverse decision. See Metropolitan Edison Company, et al. (Three Mile Island Nuclear Generating Station, Unit No. 2), ALAB-454, 7 NRC 39 (1978). The status offered RRD denies it an opportunity to make any contribution at a most sensitive and important phase of the proceedings. As the Commission has noted, limited status is not an adequate substitute for participation as a party because of "a party's attendant procedural rights." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), 1 NRC 273, 276 (1975). See

also, Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), 7 NRC 759, 763 (ASLAB 1978).

NEXUS

Objection #11: The Board erred in ruling that "RRD has not alleged the required nexus to this proceeding". Describing RRD's petition to intervene as "extraordinary", the Board found that RRD had alleged no nexus to the proceeding because:

1. RRD is not a facility in the relevant competitive market (Mem. 24, ¶4 and 25, ¶2).

2. RRD alleged only a weak connection between the St. Lucie plant and FPL's tran mission monopoly. (Mem. 25, ¶3).

3. FERC may provide RRD relief "which will in every way meet its needs". (Mem. 25, ¶4)

4. RRD's Petition is premised exclusively on its PURPA status. (Mem. 26, ¶2)

These findings are based on misinterpretations of the applicable law or on a misunderstanding of the facts underlying RRD's claims. First, in accepting FPL's argument that PURPA "doesn't have anything to do with competition, (Tr. 47; Mem. 22, ¶4), the Board overlooked judicial precedent and express legislative history to the contrary. See New York State Electric & Gas Corp. v. FERC, 638 F.2d 388, 402 (2d Cir. 1980), cert. pending, Sup. Ct. No. 80-1858, 40 U.S.L.W. 3865 (May 19, 1981) and the legislative history cited therein. PURPA was intended, as that court noted, to promote competition between qualifying

facilities and established electric monopolies such as FPL. Id. RRD's facility is a potential competitor of FPL, which accounts for FPL's intransigence in refusing to deal with RRD. As a competitor of FPL, RRD is, therefore, entitled to the benefit of the Board's observation that "competitive entities may not need to make a particularly strong showing of nexus." (Mem. 25, ¶2).

Second, in ruling that nexus was insufficiently established, the Board failed to apply the applicable NRC law. Petitions to intervene on antitrust grounds need not relate exclusively to the nuclear facility being licensed. As the Commission has observed:

> '[A]ctivities under the license,' in most circumstances, would not be limited to construction and operation of the facility to be licensed.

Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit No. 3), 6 A.E.C. 48, 49 (1973)["Waterford I"]. RRD has satisfied the nexus test by alleging a nexus to FPL's monopolistic conduct with respect to transmission services; that conduct is, in turn, supported by FPL's nuclear activities, which enable FPL to produce cheaper electricity thereby perpetuating its monopoly.

The Board also misperceived the nature and extent of RRD's contentions. The Board apparently believed that RRD was contending that FPL's anticompetitive conduct would abate if the license were denied. (Mem. 25, ¶¶2-3) RRD has not made such an

argument. Rather, RRD's contention is that FPL's anticompetitive conduct will be aggravated under the license unless the conditions sought are imposed.

Apart from RRD's allegations that it has a nexus to FPL's activities under the license, RRD alleged that it has a nexus with the settlement agreement and the circumstances underlying the formulation of that agreement on both antitrust and PURPA grounds. The settlement agreement sanctions FPL's violations of the Sherman Act and of PURPA. This effect alone is sufficient to establish RRD's "nexus to the proceeding". (Mem. 26. ¶2). Indeed, RRD's claims strike at the heart of this proceeding. In ignoring those claims, the Board erroneously concluded that RRD had failed to allege a sufficient nexus with the proceeding.

Third, by finding that FERC can afford relief sufficient to meet RRD's needs, the Board committed clear error. (Mem. 25, ¶4). That specific ruling failed to make the distinction between the respective rules of FERC and the NRC, as has been discussed above. (See Objection #3, supra). The issue of relief cannot serve as a basis for denying RRD's nexus to the proceeding.

Finally, the Board concluded that RRD's claims were grounded solely on its PURPA status, and, therefore, no nexus with the antitrust proceeding had been established. (Mem. 26. ¶2) As previously explained, RRD has raised three distinct antitrust claims, only one of which is related to PURPA. (See Objection #7,

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

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

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

RRD's interest in the settlement agreement arises because the parties to the agreement chose to affect PURPA facilities in the section on transmission. Having injected PURPA issues into the settlement agreement, the Board cannot now deny RRD's legitimate interest in intervening to challenge the agreement's treatment of PURPA facilities. The PURPA issues raised by RRD cannot be pursued in any other forum because of the Board's unique antitrust jurisdiction (see Objection #7, supra) and its role in implementing the settlement agreement.

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

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

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

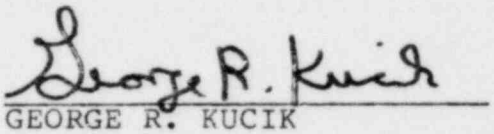
> [RRD was] asserting that there was a situation inconsistent with the antitrust laws. That was the only thing they could assert here. They were a little confused and at some time said more things about direct PURPA issues. (Tr. 1194).

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

CONCLUSION

For the foregoing reasons, the Board should reconsider its decision of August 5, 1981 and should grant RRD's Petition to Intervene.

Respectfully submitted,



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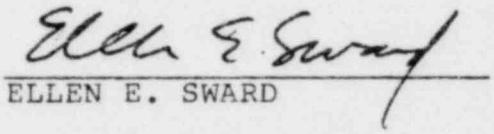

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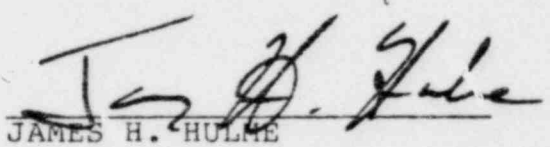

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713, 10 C.F.R. Part 2, the following information is provided:

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Respectfully submitted,

James H. Hulme

Dated at Washington, D.C.
this 25th day of September, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)
	)
FLORIDA POWER & LIGHT COMPANY	)
	)
(St. Lucie Plant, Unit No. 2	)

I hereby certify that copies of the foregoing Objections of Parsons & Whittemore, Inc. and Resources Recovery (Dade County), Inc. to August 5, 1981 Memorandum and Order were served upon the following persons via first-class mail, postage-prepaid, or by hand, this 25th day of September, 1981.

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