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July 6, 1998

FEDERAL EXPRESS

986 283-EQ

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: **Florida Power Corporation's Notice of Filing Order Granting
Summary Judgment to Defendants in Federal Court Litigation**

Dear Ms. Bayó:

Enclosed for filing please find an original and fifteen copies of Florida Power Corporation's Notice of Filing Order Granting Summary Judgment to Defendants in Federal Court Litigation.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Thank you for your assistance in this matter.

Sincerely,

Robert L. Ciotti

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Enclosures

cc: James D. Wing, Esquire
Counsel for Metropolitan Dade County (w/accompanying Response)

DOCUMENT NUMBER-DATE

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CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Declaratory Statement that Commission's Approval of Negotiated Contract for Purchase of Firm Capacity and Energy between Florida Power Corporation and Metropolitan Dade County, Order No. 24734, Together with Order Nos. PSC-97-1437-FOF-EQ, Rule 25-17.0832, F.A.C. and Order No. 24989, Establish that Energy Payments thereunder, including when Firm or As-Available Payment is Due, Are Limited to Analysis of Avoided Costs based upon Avoided Unit's Contractually-Specified Characteristics,

Docket No. 980283-EQ

by Florida Power Corporation

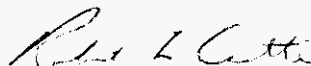
**NOTICE OF FILING ORDER GRANTING
SUMMARY JUDGMENT TO DEFENDANTS IN FEDERAL COURT LITIGATION**

Petitioner, Florida Power Corporation ("FPC"), hereby gives notice of filing the Order of the United States District Court for the Southern District of Florida, dated June 25, 1998, granting defendants' (FPC, Florida Progress Corporation, and Electric Fuels Corporation) motion for summary judgment on the grounds that plaintiffs (Metropolitan Dade County and Montenay Power Corp.) lack antitrust standing. The Order dismisses the case against defendants with prejudice. A copy of the Order is attached hereto as Exhibit A.

FPC is filing the summary judgment order to bring the commission up to speed on the status of the pending federal antitrust litigation between Dade and FPC, which was mentioned in paragraph 18 of FPC's Petition for Declaratory Statement. In light of the granting of defendants' motion, the federal action obviously is no longer set for trial on the

Court's October 19, 1998 trial calendar. However, the state court action over the energy payments being made by FPC to Dade County under their Negotiated Contract (also mentioned in paragraph 18) remains pending as before.

Respectfully submitted,



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St. Petersburg, FL 33733-4042

Attorneys for Florida Power Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to Gail P. Fels, Esq., Assistant County Attorney, Dade County Aviation Dept., P.O. Box 592075 AMF, Miami, Florida 33159, counsel for Dade County; Robert Scheffel Wright, Esq., Landers & Parsons, 310 West College Avenue, P.O. Box 271, Tallahassee, Florida 32302, counsel for Montenay; and David E. Smith, Esq., Director of Appeals, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Third Floor, Gunter Building, Tallahassee, Florida 32399-0850; this 6th day of July, 1998.

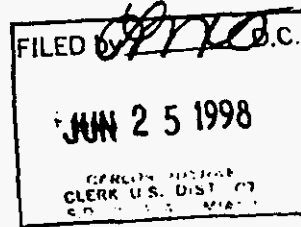


Robert L. Ciotti

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-594-CIV-LENARD

METROPOLITAN DADE COUNTY,
a political subdivision of the State of
Florida, and MONTENAY POWER CORP.,
a Florida corporation, as general partner of
MONTENAY-DADE, LTD., a Florida
limited partnership,



Plaintiffs,

vs.

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

FLORIDA PROGRESS CORPORATION,
a Florida corporation, FLORIDA POWER
CORPORATION, a Florida corporation,
and ELECTRIC FUELS CORPORATION,

Defendants.

THIS CAUSE comes before this Court upon Defendants' motion for

summary judgment (D.E. 85).

In need of additional energy to supply its customers with electrical power, in January 1991 Florida Power Corporation (Florida Power), a wholly owned subsidiary of Florida Progress Corporation¹ (Florida Progress), solicited bids from independent electrical power producers. After receiving a number of bids, in March 1991 Florida Power entered a contract with Metropolitan-Dade County (Metro-Dade) in which Florida Power agreed to purchase from Metro-Dade, annually until the year 2013, electrical power produced by Metro-Dade at its Dade County Resources Facility (Facility), which is operated by Montenay Power Corporation (Montenay), a general partner of Montenay-Dade Ltd. (Montenay-Dade). Since March 1991, Metro-Dade has been selling to Florida Power all electrical power it produces at Facility.

Pursuant to contract, the price Florida Power pays Metro-Dade for electricity is calculated based upon a formula which considers both Facility's capacity, capacity payments, and the amount of power Metro-Dade delivers to Florida Power, energy payments. On February 13, 1996, Metro-Dade, Montenay and Montenay-Dade (collectively 'Metro-Dade') filed suit in Florida state court

¹Florida Progress also wholly owns Electric Fuels Corporation (Electric Fuels), which supplies fuel to power producers.

against Florida Power, alleging that Florida Power was improperly calculating its energy payments to Metro-Dade, thereby violating the terms of its contract and working violations of this country's antitrust laws, 15 U.S.C. §2, §15 and §26. Florida Power removed the action to this Court on March 1, 1996. On May 14, 1996, Metro-Dade filed an amended complaint in which it voluntarily dismissed its breach of contract claim. Subsequently, Metro-Dade filed a separate breach of contract action in Florida state court. On March 20, 1997, Metro-Dade again amended its complaint, adding as defendants Florida Progress and Electric Fuels. Florida Power, Florida Progress and Electric Fuels (collectively 'Florida Power') have moved for summary judgment.

A motion for summary judgment may be granted only if no genuine dispute exists as to any material fact. Fed. R. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the Court must view the pleadings, affidavits and other evidence in the record "in the light most favorable to the non-movant."

Retina Associates, P.A. v. Southern Baptist Hosp. of Florida, Inc., 105 F.3d 1376, 1380 (11th Cir. 1997).

Florida Power submits that Metro-Dade does not have standing to bring an antitrust action against Florida Power. "[T]he doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with

speculative or remote claims.” Florida Seed Company, Inc. v. Monsanto Company, 105 F.3d 1372, 1374 (11th Cir. 1997) (citing Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S.Ct. 897, 912 (1983)). An entity has antitrust standing only if it has suffered ‘antitrust injury’ and it is an ‘efficient enforcer’ of the antitrust laws. Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1449 (11th Cir. 1991).

In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 485, 489, 97 S.Ct. 690, 697 (1977), the Supreme Court defined ‘antitrust injury’ as

injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be “the type of loss that the claimed violations . . . would be likely to cause.”

(quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 89 S.Ct. 1562, 1577 (1969)).² Under this definition of antitrust injury, an entity must demonstrate

²Metro-Dade requests damages pursuant to 15 U.S.C. §15, in addition to injunctive relief pursuant to 15 U.S.C. §26. The Supreme Court has held that an ‘antitrust injury’, as it previously defined that term in Brunswick, is a necessary element of antitrust standing under both of these statutes because they are “best understood as providing complementary remedies for a single set of injuries.” Cargill, Inc. v. Montfort of Colorado, Inc., 479 U.S. 115, 113, 107 S.Ct. 484, 491 (1986).

that [its] own injury coincides with the public detriment tending to result from the alleged violation. This requirement increases the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition.

Austin v. Blue Cross and Blue Shield of Alabama, 903 F.2d 1385, 1390 (11th Cir. 1990) (quoting Areeda and H. Hovenkamp, Antitrust Law, 335.1, at 261 (Supp. 1987)). An entity can only suffer an 'antitrust injury' if it is either a competitor or a customer in the market in which the purported tortfeasor operates. Associated General, 459 U.S. at 539, 103 S.Ct. at 909; Florida Seed Company, Inc. v. Monsato Company, 105 F.3d 1372, 1374-76 (11th Cir. 1997); Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376 (9th Cir. 1996); Southeast Florida Laborers District Health and Welfare Trust Fund v. Morris, 1998 WL 186878, *6 (S.D. Fla.).

Florida Power contends that Metro-Dade is neither a competitor nor a customer of Florida Power in the market for electrical energy. Only two published opinions, Schuykill Energy Resources, Inc. v. Pennsylvania Power & Light Company, 113 F.3d 405 (3rd Cir. 1997), and Crossroads Cogeneration Corporation v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907 (D.N.J. 1997), directly address the question whether a power producer which sells electrical energy to a utility constitutes a competitor of that utility for the purpose

of 'antitrust injury' analysis. In both of these cases, the courts answered that question in the negative.

In Schuykill, the Third Circuit Court of Appeals found that a power producer and the utility to which it sold energy were not competitors both because the contract into which the two entities entered prohibited the power producer from selling electrical energy to any other utility, and because federal and state law prohibited the producer from selling electrical energy to retail customers served by the utility. Schuykill, 113 F.3d at 415-17. The Schuykill court also rejected the power producer's argument that newly enacted legislation would permit it to sell electrical energy to retail customers in the near future. Similarly, in Crossroads, the district court noted that a power producer does not compete with a utility to which it sells electrical energy merely because the producer at some point in the near future may decide to sell energy to other utilities or retail customers.³ Crossroads, 969 F. Supp. at 914. This Court finds Schuykill and

³Metro-Dade suggests that this Court held otherwise in TEC Cogeneration, Inc. v. Florida Power & Light Company, 1994 WL 242149 (S.D. Fla.). In that case, a power producer filed an antitrust suit against a utility to which it sold electrical energy. Although the TEC Cogeneration court ultimately concluded that the power producer had suffered an 'antitrust injury', it was never presented with the issue whether the power producer and the utility were in competition. Consequently, the case is inapposite.

Crossroads instructive. To determine whether Metro-Dade is a competitor of Florida Power in the market for electrical power, the Court therefore will examine whether Metro-Dade sells electrical energy to either other utilities or retail customers, and whether it is prohibited from doing so either by contract or by law.

Florida Power alleges that Metro-Dade currently does not sell, and has not sold since it entered its contract with Florida Power in 1991, electrical energy to retail customers or any utility other than Florida Power. Dr. Roy Shanker (Shanker), a natural resources economist, Charles Strong (Strong), a Montenay vice president, and Dennis Carter (Carter), Assistant Dade County Manager, have each testified in support of this allegation. Shanker Deposition, pp. 176, 177; Strong Deposition, p. 13; Carter Deposition, p. 84. Additionally, Lee Schuster (Schuster), a Florida Power manager, has explained that Facility does not have any excess capacity which it could sell to other utilities. Declaration of Lee Schuster, ¶17-21.

To refute Florida Power's allegation, Metro-Dade has produced letters written by Metro-Dade to City of Homestead, Florida and City of Key West, Florida, regarding the possible future sale of electrical energy. Appendix to Plaintiffs' Response to Defendants' Motion for Summary Judgment, Tabs 54 & 55. Each of these letters, however, was written in March 1991, prior to the time

Metro-Dade entered its contract with Florida Power. Moreover, Carter has testified that before entering its contract with Florida Power, Metro-Dade entered discussions with a number of entities, including City of Homestead and City of Key West, regarding the sale of electrical energy. According to Carter, however, Metro-Dade ceased all of these negotiations when it finally executed a contract with Florida Power. Carter Deposition, pp. 33-41. Metro-Dade therefore has failed to rebut Florida Power's allegation that Metro-Dade does not sell, and has not sold since 1991, any electrical power to any retail customer or utility other than Florida Power.⁴

Florida Power also alleges that federal regulations prohibit Metro-Dade from selling electricity to retail customers or utilities other than Florida Power. Florida Power, however, has not directed the Court's attention to any particular

⁴Metro-Dade further points out that it has explored the possibility of expanding Facility and selling energy to other utilities. Both Shanker and Juan Portuondo (Portuondo), Montenay's president, have affirmed that Metro-Dade indeed has considered these possibilities. Declaration of Juan M. Portuondo, ¶ 5-7; Shanker Deposition, pp. 178, 238, 239. Regardless, the Schuykill and Crossroads courts have warned that a power producer is not transformed into a competitor of a utility to which it sells energy simply because it has entertained the notion that it might one day in the future sell energy to a retail customer or another utility. Schuykill, 113 F.3d at 416; Crossroads, 969 F. Supp. at 914.

regulation to support its position.⁵ Moreover, Florida Power concedes that its contract with Metro-Dade does not prohibit Metro-Dade from selling electrical energy to other utilities. Shanker Declaration, ¶¶11, 13, 15, 20; Portuondo Declaration, ¶4.

The absence of any contractual or statutory prohibition on Metro-Dade's right to sell electrical power to another utility or retail customers, however, is not dispositive of the question whether Metro-Dade competes with Florida Power. More important to answer this question in the Court's view is the fact that Metro-Dade neither sells, nor has sold since it entered a contract with Florida Power, electrical power to other utilities or retail customers. Consequently, the Court must conclude that Metro-Dade and Florida Power are not competitors for the purpose of 'antitrust injury' analysis. Metro-Dade thus cannot suffer an 'antitrust injury' at the hands of Florida Power. Therefore, it does not have standing to bring an antitrust action against Florida Power.


Accordingly, it is hereby ORDERED AND ADJUDGED that:

⁵Enacted pursuant to Congressional mandate, 16 U.S.C. §824a-3, 18 C.F.R. §292.303(a) expressly obligates utilities to purchase electrical energy from power producers such as Metro-Dade. If anything, this regulation therefore suggests that Metro-Dade is *not* prohibited from selling electrical energy to utilities other than Florida Power.

(1) Defendants Florida Power, Florida Progress and Electric Fuels' motion for summary judgment be GRANTED. The instant action is therefore DISMISSED with prejudice, and the Clerk of Court is directed to close the case.

(2) all pending motions be DENIED as MOOT.

DONE AND ORDERED in Chambers, at Miami, Florida on this 25 day of June, 1998.


Joan A. Lenard
United States District Judge

cc: Chris S. Coutroulis, Esq.
James D. Wing, Esq.