

**PRIORITY 1**  
(ACCELERATED RIDS PROCESSING)

REGULATORY INFORMATION DISTRIBUTION SYSTEM (RIDS)

ACCESSION NBR: 9412080056      DOC. DATE: 94/12/05      NOTARIZED: NO      DOCKET #  
FACIL: 50-389 St. Lucie Plant, Unit 2, Florida Power & Light Co.      05000389  
AUTH. NAME      AUTHOR AFFILIATION  
JABLON, R.A.      Spiegel & McDiarmid  
BLAIR, B.S.      Spiegel & McDiarmid  
RECIP. NAME      RECIPIENT AFFILIATION  
GODY, A.T.      Office of Nuclear Reactor Regulation, Director (Post 870411)

SUBJECT: Submits rept on events relevant to "Petition of Florida Municipal Power Agency for Declaration & Enforcement of Antitrust Licensing Conditions & to Impose Requirements by Order" filed on 930702, in response to B Lambe request.

DISTRIBUTION CODE: Z998D      COPIES RECEIVED: LTR 1 ENCL 0 SIZE: S  
TITLE: Antitrust Info Re Reg Guide 9.3

NOTES:

	RECIPIENT		COPIES			RECIPIENT		COPIES	
	ID CODE/NAME		LTR	ENCL		ID CODE/NAME		LTR	ENCL
	DRP/ADR-2		1	1		PD2-2 LA		1	1
	PD2-2 PD		1	1		NORRIS, J		1	1
INTERNAL:	<u>FILE CENTER 01</u>		1	1		NRR/PMAS/PTSB		1	1
	<u>OGC/AD-15-B-18</u>		1	1					
EXTERNAL:	NOAC		1	1		NRC PDR		1	1

NOTE TO ALL "RIDS" RECIPIENTS:

PLEASE HELP US TO REDUCE WASTE! CONTACT THE DOCUMENT CONTROL DESK, ROOM P1-37 (EXT. 504-2083) TO ELIMINATE YOUR NAME FROM DISTRIBUTION LISTS FOR DOCUMENTS YOU DON'T NEED!

TOTAL NUMBER OF COPIES REQUIRED: LTR 9 ENCL 0

P  
R  
I  
O  
R  
I  
T  
Y  
  
1  
  
D  
O  
C  
U  
M  
E  
N  
T



1  
2  
3  
4  
5

6  
7  
8

9  
10  
11

12

50-389

## SPIEGEL &amp; McDIARMID

1350 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-4799TELEPHONE (202) 879-4000  
TELECOPIER (202) 393-2866

GEORGE SPIEGEL, PC  
ROBERT C. McDIARMID  
SANDRA J. STREBEL  
ROBERT A. JABLON  
JAMES N. HORWOOD  
ALAN J. ROTH  
FRANCES E. FRANGIS  
DANIEL I. DAVIDSON  
PETER K. MATT  
DAVID R. STRAUS  
SONNIE G. BLAIR  
THOMAS C. TRAUGER  
JOHN J. CORBETT  
CYNTHIA S. BOGORAD  
GARY J. NEWELL  
P. DANIEL BRUNER  
SCOTT H. STRAUSS  
BEN FINKELSTEIN  
STEPHEN M. FELDMAN  
MARGARET A. MCGOLDRICK  
LISA G. DOWDEN

RISE J. PETERS  
PETER J. HOPKINS  
RUSSELL F. SMITH, III  
DAVID E. POMPER  
TERESA A. FERRANTE  
MARK S. HEGEDUS  
SAMUEL B. JOHNSON  
\*CAROLYN E. CARMODY  
\*\*WENDY S. LADER  
\*\*\*MATTHEW W. WARD  
\*\*\*JEFFREY A. SCHWARZ  
\* MEMBER MD BAR ONLY  
\*\* MEMBER NY BAR ONLY  
\*\*\* MEMBER OF VA BAR ONLY

OF COUNSEL  
RENA I. STEINZOR  
PHILIP E. CLAPP  
GOVERNMENT AFFAIRS DIRECTOR  
(NOT A MEMBER OF THE BAR)

December 5, 1994

Mr. Anthony T. Gody  
Chief, Inspection Program Branch  
Directorate for Inspection and Support Programs  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852

Re: Docket No. 50-389, St. Lucie Plant, Unit No. 2 – Up-Date  
Regarding Petition for Enforcement by Florida Municipal  
Power Agency

Dear Mr. Gody:

In response to Bill Lambe's request, we are submitting this report on events relevant to the "Petition of Florida Municipal Power Agency for Declaration and Enforcement of Antitrust Licensing Conditions and to Impose Requirements by Order" ("FMFA's Petition"), filed on July 2, 1993. Although much has occurred in the seventeen months since FMFA filed its Petition, two critical conditions remain unchanged: (1) no regulatory or judicial authority has acted to enforce the St. Lucie Plant, Unit No. 2 antitrust license conditions ("Antitrust Conditions"), and (2) Florida Power & Light Company ("FPL"), which agreed to the Antitrust Conditions, still is not selling network transmission service to FMFA.

### I. RELEVANT FERC PROCEEDINGS

There are two proceedings currently pending before the Federal Energy Regulatory Commission which are relevant to FMFA's efforts to secure network transmission service. In FERC Docket Nos. TX93-4-000 and EL93-51-000, initiated by a FMFA complaint filed on July 2, 1993, the FERC has ordered FPL to file a rate for network transmission service pursuant to the FERC's authority under §§ 211 and 212 of

070039

9412080056 941205  
PDR ADCK 05000389  
M PDR

2998 1/0

Mr. Anthony T. Gody  
December 5, 1994  
Page 2

the Federal Power Act ("FPA"), 16 U.S.C.A. §§ 824j and k; the FERC expressly deferred making any ruling on FMPA's complaint that FPL violated § 206 of the FPA by failing to comply with the Antitrust Conditions. In FERC Docket No. ER93-465-000 and consolidated dockets, the FERC has set for hearing, among other issues, whether FPL's proposed rates, terms, and conditions for transmission and other wholesale services are unduly discriminatory in failing to offer transmission users comparable access to the FPL transmission network.

A. FERC Docket Nos. TX93-4-000 and EL93-51-000

As reported at page 13 of FMPA's Petition, FMPA filed a complaint with the FERC simultaneously with its Petition to the NRC. On October 28, 1993, the FERC determined that, under the newly enacted Energy Policy Act of 1992 ("EPA"), Section 211 of the Federal Power Act, 16 U.S.C.A. § 824j, it would issue a "proposed order requiring [FPL] to provide network transmission service to support FMPA's IDO Project, without multiple point-to-point pricing and consistent with 212(a)" of the Federal Power Act, 16 U.S.C.A. § 824k ("Proposed Order"). The Proposed Order is reported at 65 FERC ¶ 61,125 (1993). The Proposed Order directed the parties to negotiate for a period of sixty days to attempt to reach agreement on the proper terms and conditions for network transmission service. The FERC expressly deferred the issue of FPL's obligations to sell network transmission pursuant to the Antitrust Conditions, Proposed Order, 65 FERC at page 61,618.

FMPA and FPL were unable to agree on the terms and conditions for network transmission service, and during the first quarter of 1994, both parties filed briefs and supporting materials setting forth their respective positions. On May 11, 1994, the FERC issued a "Final Order" in Docket No. TX93-4-000, 67 FERC ¶ 61,167 (May 11, 1994), reh'g pending. In the Final Order, the FERC approved FPL's proposed load ratio approach to the pricing of network transmission with the crucial additional requirement, proposed by FMPA, that FMPA receive credit for transmission facilities owned by FMPA or its members that will be used, along with FPL transmission facilities, to integrate FMPA's loads and resources. 67 FERC at pages 61,481-2. Both FPL and FMPA sought rehearing of certain aspects of the Final Order, and those requests for rehearing remain pending.

On July 11, 1994, FPL filed a document styled a Network Integration Service Agreement ("NISA"), with which FMPA did not agree, which purported to comply with the requirements of the Final Order. In fact, FPL's July 11, 1994 filing did not comply with the Final Order in a number of critical respects. Most notably, FPL's proposed NISA contained no provision for crediting FMPA or member-owned transmission facilities, contrary to the directive in the final Order. On August 12, 1994 FMPA filed a

Mr. Anthony T. Gody  
December 5, 1994  
Page 3

Protest to FPL's NISA, demonstrating that it does not comply with the FERC's Final Order. The FERC has not yet acted on FPL's proposed NISA or on FMPA's Protest.

**B. FERC Docket No. ER93-465-000 et al.**

On March 19, 1993, prior to the filing of FMPA's Petition in this proceeding, FPL filed proposals to revise its rates, terms and conditions for virtually all of its wholesale services, including wholesale power sales, transmission, and interchange services. The FERC initially rejected that filing through a deficiency letter dated May 18, 1993. On July 26, 1993, FPL re-submitted its filing. FPL did not include proposed terms and conditions for network transmission service, despite FMPA's long-standing requests for such service. The FERC initiated hearing procedures in Docket No. ER93-465-000 and consolidated dockets to consider whether FPL's proposals, which took effect subject to refund on February 26, 1994, are just and reasonable.

On June 16, 1994, the FERC expanded the scope of the proceedings in Docket No. ER93-465-000 to consider whether FPL's proposals will afford FPL's competitors, including FMPA, access to FPL's transmission network on terms comparable to FPL's own uses of the transmission network. 67 FERC ¶ 61,326. The FERC expressly included as an issue the significance of network transmission service in evaluating comparability of access.

FPL filed testimony on the comparability issues on August 5, 1994. Although FPL stated that it generally is willing to offer network transmission services on terms similar to those proposed in its NISA in Docket No. TX93-4-000, described above, FPL did not file any proposal for a generally applicable network transmission service tariff in Docket No. ER93-465-000.

On October 21, 1994, the FERC Staff filed a proposed network service tariff in Docket No. ER93-465-000. FMPA generally supports the FERC Staff's proposals, although FMPA believes that some modifications are appropriate. FPL has not accepted the FERC Staff network transmission proposal.

Evidentiary hearings in Docket No. ER93-465-000 are scheduled to begin in January, 1995.

**II. PROCEEDINGS BEFORE THE U.S. DISTRICT COURT AND U.S. COURT OF APPEALS**

At the time FMPA filed its Petition in this proceeding, the parties were preparing for trial on FMPA's claims in the United States District Court for the Middle District of Florida, Docket No. 92-35-CIV-ORL-3A22. On December 16, 1993, the District Court

Mr. Anthony T. Gody  
December 5, 1994  
Page 4

dismissed FMMPA's claims on grounds that the "filed rate" doctrine precludes FMMPA's claims for damages, and that FMMPA's claims for injunctive relief are moot in light of the proceedings pending before the FERC in Docket No. TX93-4-000. Florida Municipal Power Agency v. Florida Power & Light Co., 839 F. Supp. 1563 (M.D. Fla. 1993), appeal pending. The District Court's application of the filed rate doctrine was based upon FPL's point-to-point transmission service rates on file at the FERC. *Id.* at 1571. The District Court did not rule on FMMPA's claim that the Antitrust Conditions obligate FPL to sell network transmission service to FMMPA.

FMMPA has appealed the District Court's dismissal of FMMPA's claims to the United States Court of Appeals for the Eleventh Circuit, Case No. 94-2320. FMMPA maintains that the District Court erred in disregarding the crucial distinction, highlighted by this Commission in Louisiana Power and Light Co. (Waterford Unit No. 3), 8 AEC 718 (1974), *aff'd* 1 NRC 45 (1975), between network transmission and point-to-point transmission. The filed rate doctrine applies only to rates for service which are actually filed with a regulatory agency and which therefore can be corrected by the agency. Because FPL refused to file a rate for network transmission service with the FERC, there was no filed rate for network transmission, and FMMPA is entitled to seek damages for FPL's unlawful refusals to sell network transmission. On August 10, 1994, the United States Department of Justice filed a brief *amicus curiae* agreeing with FMMPA that the filed rate doctrine does not apply where there was no rate on file for the service at issue, although it did not take any position on the underlying merits of matters in controversy.

Briefing before the Eleventh Circuit has been completed, but oral argument has not yet been scheduled.

### III. FPL PROPOSAL TO ACQUIRE LAKE WORTH SYSTEM

In response to a June 7, 1994 Request for Proposals regarding power supply alternatives by the City of Lake Worth, Florida, FPL on September 1, 1994 submitted a proposal to acquire the Lake Worth electric system. Lake Worth is a prospective member of FMMPA's IDO Project, which FMMPA has been blocked from implementing due to FPL's refusals to sell network transmission service to FMMPA. Thus, while continuing to interfere with FMMPA's ability to maximize efficiencies and to offer lower cost power to its IDO members, FPL has sought to acquire one of those members. It is FMMPA's understanding that Lake Worth has rejected FPL's acquisition proposal.



Handwritten scribbles and marks in the top right corner.

Mr. Anthony T. Gody  
December 5, 1994  
Page 5

### CONCLUSION

The foregoing sets forth the current status of FMPA's ongoing efforts to obtain network transmission service from FPL. Despite all of FMPA's efforts, FPL still is not selling network transmission service to FMPA, and no court or regulatory agency has adjudicated FMPA's rights to enforce the Antitrust Conditions and to buy network transmission service under the Antitrust Conditions. The Antitrust Conditions had the purpose of curing an alleged "situation inconsistent with the antitrust laws" by providing assurance that certain services, including transmission, would be available on reasonable terms to requesting neighboring entities. Section X(b) of the Antitrust Conditions requires that in the event of a dispute over the services which are required to be provided, FPL is obligated to "immediately file" a service agreement with the FERC. FPL's compliance with this provision would have given the FERC immediate and unquestioned jurisdiction over the terms for network transmission, thereby preventing a denial of services and substantial harm to FMPA and to the competitive process.


Although the FERC's Final Order in Docket No. TX93-4-000 defers ruling on FMPA's rights under the Antitrust Conditions, it does determine that network transmission service is in the public interest, and that there are no reliability or technical impediments to FPL providing network transmission. These conclusions, of which FPL has not sought rehearing, eliminate any legitimate factual basis for FPL's refusal to file a network transmission rate pursuant to the Antitrust Conditions. The issues remaining concern FMPA's legal rights under the Antitrust Conditions. Action by this Commission still is necessary and appropriate to assure proper enforcement of FMPA's rights and FPL's obligations under the Antitrust Conditions, and FMPA therefore requests that the NRC take appropriate action to that effect.

If we can be of further assistance, please do not hesitate to contact us.

Sincerely,



Robert A. Jablon



Bonnie S. Blair

Attorneys for Florida Municipal Power  
Agency

cc: J.A. Bouknight, Jr.