

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Florida Power Corporation

Docket No. ER07-141-000

ORDER CONDITIONALLY ACCEPTING AGREEMENT

(Issued January 19, 2007)

1. On November 1, 2006, Florida Power Corporation (FPC), doing business as Progress Energy Florida, Inc., filed a cost-based power sales agreement (Agreement) with the City of Mount Dora, Florida to provide capacity and energy to serve Mount Dora's requirements for a five-year period beginning January 1, 2007 through December 31, 2011. The Commission conditionally accepts the agreement, without suspension, effective January 1, 2007, as requested.

Background

2. The Agreement states that FPC will sell power to Mount Dora as firm as FPC's service to its Firm Native Load Customers, a defined term in the Agreement. Article 6 of the Agreement provides for a capacity charge of \$9.20/kW-month, a non-fuel energy charge of \$8.70/MWh and a monthly fuel charge as defined in Exhibit B of the Agreement. Article 3 of the Agreement provides that FPC and Mount Dora may mutually agree to a minimum three-year extension (or a longer extension) of the Agreement.¹

3. Regarding the Agreement's capacity charge, non-fuel energy charge and monthly fuel charge, FPC explains that the charges are based on the costs of FPC's System

¹ FPC states that any extension of the Agreement, including the rates for the extension, would be submitted to the Commission for filing in accordance with the Commission's requirements.

Resources necessary to serve Mount Dora. As FPC explains, it utilized a fixed charge methodology based on FPC's 2005 actual costs from its 2006 FERC Form No. 1, and a 10.75 percent return on equity, which FPC asserts is reasonable for a vertically integrated utility with captive customers. FPC further explains that this return should remain consistent over the five-year term of the Agreement since the capacity and non-fuel energy charges remain constant for the five-year term of the Agreement.

4. Article 21(a) of the Agreement states that “Except as provided in Article 20 and Article 21(b), absent the agreement by the Parties, the standard of review for changes to the charges, terms and conditions of the Agreement proposed by a Party, a non-Party or the FERC acting *sua sponte* shall be the “public interest” standard of review....” Article 21(b) of the Agreement states that “As set forth in Article 20, the Company reserves the right to make application to the Commission for a change in the rates of this Agreement pursuant to Section 205 of the Federal Power Act and pursuant to the FERC’s rules and regulations promulgated thereunder. The Customer reserves the right to oppose, to seek modification, to seek rejection, to seek suspension, or to seek refunds of any change in the rates proposed by the Company under Section 205 of the Federal Power Act and FERC’s rules and regulations. The standard of review of such proposed changes shall be the ‘just and reasonable’ standard.”

5. FPC explains that Article 21 of the Agreement specifies that the public interest standard of review applies to changes to the Agreement except with respect to a Material Adverse Event, as set forth in Article 19,² or a Change in Environmental Law, as set forth in Article 20.³ FPC explains the Agreement provides that in the case of the occurrence of a Material Adverse Event, as defined in the Agreement, the parties shall negotiate in good faith to amend the Agreement so as to restore the benefits and burdens that the parties

² Article 19(a) of the Agreement defines a Material Adverse Event as (1) the agreement is not approved or accepted for filing by the FERC without modification or condition; or (2) a regional transmission organization or regional reliability organization or a restructuring of the electric utility industry in the State of Florida prevents, in whole or in part, either party from performing any provision of the Agreement in accordance with its terms or imposes obligations on a party that materially affect the costs that a party incurs to comply with the agreement.

³ Article 20 of the Agreement defines a Change in Environmental Law and describes the parties’ rights and responsibilities if such a change were to take place.

originally intended under the Agreement.⁴ In the event of a Change in Environmental Law, as defined in the Agreement, FPC can make a filing for a change in rates in the Agreement that shall be subject to the just and reasonable standard of review, in contemplation of the significant investment that FPC would be making in the future to comply with environmental requirements.

6. On December 22, 2006, as corrected on December 26, 2006, FPC extended the date for Commission action to January 22, 2007.

Notice of Filing and Response

7. Notice of FPC's filing was published in the *Federal Register*, 71 Fed. Reg. 66,324 (2006), with interventions and protests due on or before November 22, 2006. None was filed.

Discussion

8. The Agreement, as revised as ordered below, appears to be just and reasonable, and has not been shown to be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will conditionally accept the Agreement, as revised as ordered below, effective January 1, 2007.

9. Article 21(a) of the Agreement purports to bind parties, non-parties, and the Commission to the *Mobile-Sierra* "public interest" standard.⁵ Article 21(b), however, would allow FPC, but seemingly would not allow the Commission, to propose changes under a "just and reasonable" standard. We find that, given that in Article 21(b) FPC has

⁴ Article 19(b) of the Agreement provides that if, within 120 days after written notice of the Material Adverse Event, the parties are unable to reach agreement as to what, if any, amendments to this agreement are necessary to put each party in effectively the same position as the parties would have been had the Material Adverse Event not occurred, then either party shall have the right, within 12 months' written notice to the other party, to unilaterally terminate the Agreement, subject to complying with any regulatory requirements applicable to such termination and subject to the other party's right to dispute whether a Material Adverse Event has occurred.

⁵ The "public interest" standard is set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

reserved to itself the right to make changes to address “Changes in Environmental Law”⁶ pursuant to a “just and reasonable” standard, the Commission likewise should be bound only to a “just and reasonable” standard.⁷ Accordingly, we will conditionally approve the Agreement on the condition that FPC file an amended Agreement, within 45 days, to provide that in such circumstances the Commission will be bound to the “just and reasonable” standard and not the “public interest” standard.⁸

The Commission orders:

(A) The Agreement is hereby conditionally accepted for filing, effective January 1, 2007, as discussed in the body of the order.

(B) FPC is hereby directed to submit a compliance filing within 45 days of the date of this order, as discussed in the body of the order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

⁶ See *supra* note 3 and accompanying text.

⁷ As a general matter, parties may bind the Commission to a public interest standard of review. *Northeast Utilities Service Co. v. FERC* 993 F.2d 937, 960-62 (1st Cir. 1993). However, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006).

⁸ See *Southern Company Services, Inc.*, 60 FERC ¶ 61,273 (1992), *order denying reh’g*, 67 FERC ¶ 61,080, at 61,227-28 (1994). The Commission will not allow parties to bind it to a higher standard of review than they bind themselves.

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KELLY, Commissioner, *dissenting in part*:

The parties to this Agreement have requested that the Commission apply the *Mobile-Sierra* “public interest” standard of review to any future changes to the Agreement. As I explained in my separate statement in *Transcontinental Gas Pipe Line Corporation*,¹ in the absence of an affirmative showing by the parties and reasoned analysis by the Commission regarding the appropriateness of approving the “public interest” standard of review to the extent future changes are sought by a non-party or by the Commission acting *sua sponte*, I do not believe the Commission should approve such a contract provision.²

Accordingly, I must respectfully dissent in part from this order.

Suedeen G. Kelly

¹ *Transcontinental Gas Pipe Line Corporation*, 117 FERC ¶ 61, 232 (2006).

² I agree with the majority’s decision to order FPC to modify the Agreement so that, if and when the “Changes in Environmental Law” provision in 21(b) is triggered, the Commission will be bound to the just and reasonable standard. As stated in footnote 8 of this order, the Commission will not allow parties to bind the Commission to a higher standard of review than the parties bind themselves.

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WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by a non-party, or the Commission acting *sua sponte*. The parties are also bound to the “public interest” standard of review, except for changes to address changes in environmental law.

The Commission finds that parties may not seek to bind the Commission to a higher standard of review than they bind themselves. Accordingly, FPC is directed to amend the settlement to provide that where the parties have reserved the right to make changes pursuant to the “just and reasonable” standard, the Commission acting *sua sponte* will apply the “just and reasonable” standard and not the “public interest” standard. I agree. In all other circumstances, however, the Commission accepts the “public interest” standard. Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).