

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Florida Power & Light Company

Docket No. ER07-404-000

ORDER CONDITIONALLY ACCEPTING AGREEMENT

(Issued March 2, 2007)

1. On January 3, 2007, Florida Power & Light Company (FPL) submitted an unexecuted Large Generator Interconnection Agreement (LGIA) between itself and Lee County, Florida (Lee County) to interconnect Lee County's proposed generating unit to the FPL transmission system. The Commission accepts the LGIA, effective March 5, 2007, subject to conditions, as discussed below.

Background

2. FPL filed the unexecuted LGIA after negotiations with Lee County failed regarding the inclusion of certain non-conforming terms in the LGIA. Specifically, Lee County proposes to (1) include language in the LGIA's "Indemnification" section, Article 18.1,¹ that recognizes Lee County's sovereign immunity status as a political

¹ Article 18.1 of FPL's *pro forma* LGIA states that "The Parties shall at all times indemnify, defend, and hold the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or inactions of its obligations under this LGIA on behalf of the Indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnified Party."

subdivision of the State of Florida; and (2) remove the word “corporate” from the LGIA’s “Good Standing” section, Article 28.1.1.²

Notice, Interventions and Protests

3. Notice of FPL’s filing was published in the *Federal Register*, 72 Fed. Reg. 1,718 (2007), with comments, protests or motions to intervene due on or before January 24, 2007. Lee County filed an intervention and protest on January 19, 2007. On February 2, 2007, FPL filed an answer to Lee County’s protest. On February 9, 2007, Lee County filed an answer to FPL’s answer, and on February 16, 2007, FPL filed an answer to Lee County’s answer.

4. In its protest, Lee County states that as a political subdivision of the State of Florida, it has not historically had the authority to indemnify a private entity or to waive its sovereign immunity status beyond specifically prescribed limits set by the Florida Legislature.³ The Florida Legislature has waived the State’s (and thus, Lee County’s) sovereign immunity for torts resulting from its own negligence,⁴ but the *pro forma* LGIA would hold Lee County responsible even for the torts of others (i.e., FPL). Thus, Lee County argues, the indemnity provision is unenforceable.

5. Lee County notes that, despite the traditional rule in Florida that “if a political subdivision of the State has not been specifically authorized to indemnify private parties by contract, any contract containing an indemnification provision would remain limited

² Article 28.1.1 of FPL’s *pro forma* LGIA describes Good Standing. It states that “Such Party is duly organized, validly existing and in good standing under the laws of the state in which it is organized, formed, or incorporated, as applicable; that it is qualified to do business in the state or states in which the Large Generating Facility, Interconnection Facilities and Network Upgrades owned by such Party, as applicable, are located; and that it has the *corporate* (emphasis added) power and authority to own its properties, to carry on its business as now being conducted and to enter into this LGIA and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this LGIA.”

³ See Art. X, § 13, Fla. Const.; *Manatee County v. Town of Longboat Key*, 365 So.2d 143 (Fla. 1978).

⁴ See Ch. 73-313, Laws of Fla., § 768.28(1), Fla. Stat. (1997) (“section 768.28”).

by section 768.28,”⁵ a recent decision by the Florida Supreme Court in *American Home Assurance Co., et al. v. National Railroad Passenger Corp.*⁶ calls into question Lee County’s sovereign immunity in such circumstances. *American Home* found that Florida municipalities are broadly authorized to execute contracts with private parties and thereafter become liable for all terms and conditions in such contracts, including indemnifications.⁷ The court further stated that the limitations on waiver established by section 768.28 do not apply to indemnification provisions in municipal contracts because section 768.28 only applies to tort action liability.⁸ Despite the fact that, on its face, the *American Home* decision seems only to apply to municipalities, and not the State or its political subdivisions (such as Lee County),⁹ Lee County states that the majority’s reasoning in the case *could* be read as affecting the indemnification provisions in State contracts as well.

6. Lee County notes that the Commission generally does not accept non-conforming provisions in LGIAs. However, Lee County argues that the Commission did recognize in Order No. 2003¹⁰ that there would be a small number of interconnections where novel

⁵ Lee County January 19, 2007 Protest at p. 6.

⁶ 908 So.2d 459 (Fla. 2005) (*American Home*).

⁷ *American Home*, 908 So.2d 459, 476 (Fla. 2005).

⁸ *Id.* at 474.

⁹ Lee County states that, according to the majority, Florida municipalities are separate legal entities from the State, that they are granted broad powers, and that therefore they do not need to rely on specific authorization from the Florida Legislature in order to contractually waive their sovereign immunity.

¹⁰ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 FR 49,845 (August 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, 69 FR 15,932 (March 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, 70 FR 265 (January 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, 70 FR 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *affirmed sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, No. 04-1148, 2007 U.S. App. LEXIS 626 (D.C. Cir. Jan. 12, 2007).

legal issues or other unique factors would call for non-conforming agreements. Lee County states that the ambiguity caused by the *American Home* decision qualifies as a unique factor that merits a non-conforming agreement. As a result, Lee County proposes the following language at the beginning of Article 18.1:

To the extent permitted by Florida law, including without limitation, Section 768.28, Florida Statutes,¹¹

At the end of Article 18.1, Lee County proposes the following language:

Notwithstanding anything to the contrary set forth in this Agreement (including without limitation any or all of the provisions of the Article 18), the Parties agree that the Interconnection Customer does not in any manner waive and hereby specifically preserves its sovereign immunity to the maximum extent permitted under Florida law.¹²

7. Lee County also proposes to eliminate the word “corporate” from Article 28.1.1, but offers no explanation.

Discussion

8. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

9. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept FPL’s or Lee County’s answers and will, therefore, reject them.

10. In Order No. 2003, the Commission required Transmission Providers to file *pro forma* interconnection documents and to offer their customers interconnection service consistent with these documents. The use of *pro forma* documents ensures that Interconnection Customers are treated on a consistent and fair basis. Using *pro forma* documents also streamlines the interconnection process by eliminating the need for an Interconnection Customer to negotiate each individual agreement. This reduces

¹¹ See Lee County January 19, 2007 Protest at p. 3.

¹² *Id.*

transaction costs and reduces the need to file interconnection agreements with the Commission to be evaluated on a case-by-case basis.¹³

11. At the same time, the Commission recognized in Order No. 2003 that there would be a small number of extraordinary interconnections where reliability concerns, novel legal issues or other unique factors would call for non-conforming agreements.¹⁴ The Commission made clear that the filing party must clearly identify the portions of the interconnection agreement that differ from its *pro forma* agreement and explain why the unique circumstances require a non-conforming interconnection agreement.¹⁵

12. The Commission analyzes such non-conforming filings, which we do not expect to be common, to ensure that operational or other reasons necessitate the non-conforming agreement. A Transmission Provider seeking a deviation from its approved *pro forma* interconnection agreement must explain what makes the interconnection unique and what operational concerns or other reasons necessitate the change.^{16,17} The Commission

¹³ See Order No. 2003 at P 10 ("[I]t has become apparent that the case-by-case approach is an inadequate and inefficient means to address interconnection issues."); see, e.g., *PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,098, at P 8, *order on compliance*, 111 FERC ¶ 61,461 (2005) (*PJM*); *El Paso Electric Company*, 110 FERC ¶ 61,163, at P 4 (2005).

¹⁴ See Order No. 2003 at P 913-915.

¹⁵ Order No. 2003-B at P 140 ("[E]ach Transmission Provider submitting a non-conforming agreement for Commission approval must explain its justification for each nonconforming provision and provide a redline document comparing the nonconforming agreement to the effective *pro forma* [Interconnection Agreement].").

¹⁶ *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,270, at P 9 (2005) (citing *PJM*, 111 FERC ¶ 61,098, at P 9 (2005)). See also *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 61,252, at P 11 (2006).

¹⁷ Although Order No. 2003 refers only to Transmission Providers that seek deviations from the *pro forma* agreement, the Commission has previously accepted an unexecuted agreement and directed that a compliance filing be made where it was the interconnection customer that requested the non-conforming modifications. See *Southern Company Services*, 116 FERC ¶ 61,231 (2006).

recognizes that allowing non-conforming agreements may result in interconnection customers being treated differently, but nonetheless finds it to be necessary in certain situations.

13. Here, the Commission finds Lee County's sovereign immunity situation to be a unique circumstance that necessitates a non-conforming agreement.¹⁸ The Commission stated in Order No. 2003 that it did not intend to interfere with state provisions regarding indemnification. More specifically, it stated that "[t]he indemnification provision . . . does not strip any court or other tribunal of jurisdiction. To the extent that this provision would cause a specific Transmission Provider to violate statutory or other restrictions, the issue should be raised on compliance in a filing explaining the special circumstances."¹⁹ The Commission finds this to be the case here.

14. The Commission accepts the filing, effective March 5, 2007, subject to the condition that FPL file revisions to the LGIA, within 30 days of the date of the order, containing Lee County's non-conforming modifications.

The Commission orders:

(A) The unexecuted LGIA is conditionally accepted, effective March 5, 2007, as discussed in the body of the order.

(B) FPL is directed to make a compliance filing, within 30 days of the date of this order, as discussed in the body of the order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁸ Although Lee County offers no explanation for the exclusion of the word "corporate" from Article 28.1.1, the Commission nevertheless finds that this modification is warranted because Lee County is not a corporate entity.

¹⁹ Order No. 2003 at P 640.