

125 FERC ¶ 61,344
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Florida Power & Light Company

Docket Nos. ER93-465-041
ER96-417-010
ER96-1375-011
OA96-39-018
OA97-245-011

ORDER DENYING REHEARING

(Issued December 22, 2008)

1. On February 21, 2008, the Commission reconsidered a July 6, 2006 order,¹ and held that Florida Power & Light Company (Florida Power) employed comparable standards to analyze the integration of Florida Municipal Power Authority's (Florida Municipal) Fort Pierce-Vero Beach facilities in 1994 and Florida Power's looped-transmission facilities.² The order accepted Florida Power's April 25, 2005 compliance filing, and rejected the later September 5, 2006 compliance filing as moot. In this order, we deny Florida Municipal's request for rehearing of the February 21, 2008 Order on Reconsideration.

I. Background

2. On January 25, 2005, the Commission accepted in concept four factors for determining integration that were developed by Florida Power in a related case known as

¹ *Florida Power & Light Co.*, 116 FERC ¶ 61,013 (2006) (July 6, 2006 Order).

² *Florida Power & Light Co.*, 122 FERC ¶ 61,159 (2008) (February 21, 2008 Order on Reconsideration).

the TX Case³ to ensure rate-treatment comparability between Florida Power and Florida Municipal facilities.⁴ Of those four factors, the one factor at issue in this proceeding states that a facility that provides only “unneeded redundancy” is not eligible for cost recovery.⁵ To ensure adherence to the principle of comparability, the Commission ordered Florida Power to apply this “unneeded redundancy” factor to each of its own transmission facilities as they existed in the model that Florida Power had previously used to analyze the integration of Florida Municipal’s Fort Pierce-Vero Beach facilities.⁶ We further directed Florida Power to “demonstrate, through modeling the system with and without the facility, that each facility included in its transmission rate base was needed to deliver power to customers in the area where the facility is located *and* to other Florida Power load centers.”⁷

3. In the December 15, 2005 Order, the Commission accepted Florida Power’s compliance filing in part, but stated that the test that Florida Power had applied to its own facilities should have been “whether, even without a line, Florida Power is able to deliver power to customers in that area *and* to other Florida Power load centers.”⁸ On January

³ *Florida Municipal Power Agency v. Florida Power & Light Co.*, 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *clarified*, 74 FERC ¶ 61,006 (1996) (TX Order on Clarification), *reh'g denied*, 96 FERC ¶ 61,130 (2001), *aff'd*, *Florida Municipal Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 946 (2003) (TX Case).

⁴ *Florida Power & Light Co.*, 110 FERC ¶ 61,058, at P 11 (2005) (January 25, 2005 Order).

⁵ *Id.* P 13.

⁶ *Id.*

⁷ *Id.* (emphasis added in previous order).

⁸ December 15, 2005 Order, 113 FERC ¶ 61,263 at P 21 (emphasis in original). Specifically, we stated:

. . . [I]t is not clear whether Florida Power interprets loss of load not directly connected to the affected line or transformer, due to a contingency, as a violation of reliability criteria. . . . Florida Power lists the facilities that it tested for unneeded redundancy. For each test period, Florida Power indicates a number of facilities that, during contingencies, violated one of the following reliability criteria: (1) load was shed; (2) thermal ratings were violated; or (3) voltages at substations were at or above 95% of normal voltage. However, our review of

(continued...)

17, 2006, Florida Power filed a request for rehearing (January 17, 2006 Request for Rehearing) arguing that the December 15, 2005 Order failed to comply with comparability standards because it determined unneeded redundancy in a manner inconsistent with precedent. Specifically, Florida Power challenged the determination that a “Florida Power facility provides more than unneeded redundancy only if *two* conditions are met. That is, [Florida Power] must show that, under the test cases, load cannot be served by [Florida Power] in the area of the facility being tested *and* (simultaneously) that load cannot be served by [Florida Power] in other load centers.”⁹

4. In the July 6, 2006 Order, the Commission did not decide the merits of Florida Power’s January 17, 2006 Request for Rehearing, but rather denied the request as untimely. Specifically, the Commission held that Florida Power should have requested rehearing of the January 25, 2005 Order, when the Commission first determined that Florida Power had failed to comport with comparability standards.¹⁰

5. On August 7, 2006, Florida Power filed a request for rehearing or reconsideration (August 7, 2006 Motion to Reconsider), alleging that it “reasonably did not perceive the January 25, 2005 Order as aggrieving.”¹¹ Florida Power argued that the Commission should reconsider its July 6, 2006 Order because issues were raised in Florida Power’s January 17, 2006 request for rehearing that the Commission had not previously considered. Moreover, Florida Power argued that the Commission had shifted its comparability standard and test for integration from that previously used in this proceeding.

Florida Power 's compliance filing has revealed that there are a number of test cases, in which the only reliability violations are what Florida Power describes as "unserved load," and which do not demonstrate any thermal rating or voltage violations. Since Florida Power does not indicate whether it is referring to load that is directly connected to or supplied by the faulted element *and/or* load in other Florida Power load centers, we need clarification that Florida Power’s test is indeed compliant with the January 25, 2005 Order and the applicable . . . standards.

December 15, 2005 Order, 113 FERC ¶ 61,263 at P 23 (footnote omitted).

⁹ Florida Power, January 17, 2006 Request for Rehearing at 11 (emphasis in original).

¹⁰ July 6, 2006 Order, 116 FERC ¶ 61,013 at P 20.

¹¹ August 7, 2006 Motion to Reconsider at 1.

6. In addition to its August 7, 2006 Motion to Reconsider, Florida Power made a compliance filing on September 5, 2006, removing from its network-service rate approximately \$5.6 million in costs associated with transmission facilities that produced only an unserved-load violation for load directly connected to facilities taken out of service as a first contingency and, as such, not used to deliver power to other Florida Power load centers. According to Florida Power, the rate base reduction of approximately \$5.6 million did not result in a change to the \$1.23/kW-month rate that had been calculated in the April 25, 2005 compliance filing. Florida Municipal filed a protest to Florida Power's compliance filing, asking that the Commission order Florida Power to reduce rates and pay certain refunds, or appoint a presiding law judge as a special master to determine appropriate rate reductions and refunds for comparability.

7. In the order at issue here, the February 21, 2008 Order on Reconsideration, the Commission acknowledged that, in the January 25, 2005 and December 15, 2005 Orders, it misinterpreted Karabet Adjemian's (Adjemian) 1994 testimony, and therefore, had misstated the test that Florida Power was required to perform on its own facilities to ensure comparability with the test it performed on the Fort Pierce-Vero Beach line:

In our January 25, 2005 and December 15, 2005 Orders, we relied on FP&L witness Adjemian's July 7, 1994 prepared testimony describing the 1994 Test. Describing certain power flows across FMPA facilities, Adjemian stated:

The fact that a negligible amount of power can flow over the [FMPA] line is not, however, determinative of whether the [FMPA] line benefits [FP&L]. The question is whether [FP&L] has sufficient transmission facilities in the area such that, even without the [FMPA] line, [FP&L] is able to deliver power to retail customers in that area *and* to transmit power to [FP&L's] other load centers in South Florida.

FP&L witness Adjemian focused on whether FP&L's facilities could serve *all* loads absent FMPA's Vero Beach-to-Fort Pierce facilities. As such, reconsidering this language, the "and" in that passage does no more than indicate that the FMPA line was "unneeded" for either local *or* remote load. It does not signal that FP&L had used a two-step threshold for integration, as we initially (and incorrectly) thought. In other words, the issue was and is whether removing FMPA's facilities from the test case curtails either local or remote load, not whether it curtails both.^[12]

¹² February 21, 2008 Order on Reconsideration, 122 FERC ¶ 61,159 at P 12-13 (internal footnotes and paragraph numbers omitted).

8. The Commission then reviewed affidavits submitted by Florida Power as well as evidence submitted by Florida Municipal, and held that Florida Power had employed comparable standards to analyze the integration of Florida Municipal's Fort Pierce-Vero Beach facilities in 1994 and Florida Power's looped-transmission facilities:

We now turn to the question of whether the 1994 Test FP&L applied to the FMPA facilities was, in fact, comparable to the tests FP&L performed on its own facilities to determine if they provided "unneeded redundancies." We find that the tests were comparable. Both the 1994 Test applied to FMPA's facilities and FP&L's analysis of its own facilities considered the threshold question, whether a given facility provided *any* benefit to FP&L's system, by removing the facility at issue and looking for violations of the planning criteria. In each instance it was understood that load should continue to be served, that transmission facilities should be at or below 100 percent of their applicable respective thermal ratings and that voltages at substations should be at or above 95 percent of nominal voltage.

In sum, we find that the 1994 Test, as described and applied by FP&L witness Adjemian, and the testimony and models provided by FP&L with respect to its own facilities show that the test performed on FMPA's facilities, i.e., the 1994 Test and the tests performed on its own looping-transmission facilities are comparable. Accordingly, FP&L's April 25, 2005 compliance filing properly removed transmission facilities that provided only unneeded redundancy, consistent with the 1994 Test and nothing more is needed. Thus, we also reject the September 5, 2006 compliance filing as moot.^[13]

9. Accordingly, in the February 21, 2008 Order on Reconsideration, the Commission accepted Florida Power's earlier April 25, 2005 compliance filing and rejected its later September 5, 2006 compliance filing as moot.

II. Rehearing Request

10. On rehearing, Florida Municipal argues that the Commission has no evidence that Florida Power had ever studied its own and Florida Municipal's transmission facilities on a comparable basis on which the Commission can rely. Florida Municipal states that neither Florida Power's witness Adjemian nor its witness Hector J. Sanchez (Sanchez) knows how (or even if) Florida Power tested its system in 1994, and it argues that there is no such study in the record. Moreover, Florida Municipal argues that its own witness, Joe N. Linxwiler, Jr. (Linxwiler), demonstrated an alternative methodology that tests by

¹³ *Id.* P 14-15 (internal footnotes and paragraph numbers omitted).

removing entire lines, not line segments, and it argues that the Commission failed to consider this additional evidence.¹⁴

11. Florida Municipal argues that, when Adjemian concluded in 1994 that Florida Municipal's facilities do not add value to the grid, he either did not make a study but merely eyeballed information to proffer a conclusion, or he destroyed or failed to retain a copy of his study. It argues that Florida Power should have provided an explanation of the alleged disappearance of the study from its computer system and its attorneys' files. Florida Municipal argues that due process and principles of evidence applicable to administrative hearings entitle Florida Municipal to an "adverse inference" concerning the allegedly non-existent study, that is, that the 1994 test was relevant evidence in Florida Power's control, and its failure to produce the study gives rise to an inference that the evidence is unfavorable to Florida Power.

12. According to Florida Municipal, in 2005, when Florida Power recreated the 1994 study for use on its own facilities, Florida Power did not also test Florida Municipal's facilities. It argues that, because comparability between Florida Power's and Florida Municipal's facilities was at issue, Florida Power should have also tested Florida Municipal's facilities. It faults Florida Power's witness Adjemian for not, in 2005, attesting that his test applied the same standards as the earlier 1994 test.

13. Florida Municipal maintains that, by contrast, in 2005, its witness Robert Williams tested its Fort Pierce-Vero Beach facilities by applying the same standards to both Florida Municipal's and Florida Power's facilities, and Florida Municipal's facilities "passed the test."¹⁵

14. Even assuming *arguendo* that Florida Power properly tested Florida Municipal's facilities, Florida Municipal argues, Florida Power skewed the test by treating Florida Power and Florida Municipal facilities differently. It contends that the test could not measure the usefulness of Florida Power's facilities to the provision of network service and thus did not measure comparability.¹⁶ It states that Florida Power's test methodology, including its use of line segments to test its own facilities (but not Florida Municipal's), did not provide an accurate or comparable assessment of the necessity of Florida Power's lines to the grid.

¹⁴ Affidavit of Joe N. Linxwiler Jr. (Linxwiler 2006 Affidavit), Attachment A to Florida Municipal Power Agency Protest (October 3, 2006).

¹⁵ Rehearing Request at 16.

¹⁶ *Id.* at 22 (referencing Linxwiler's 2006 Affidavit).

15. Further, Florida Municipal argues that the Commission's February 21, 2008 Order on Reconsideration fails to address Florida Municipal's evidentiary challenge to Florida Power's reconstruction of the 1994 test. It states that, in accepting Florida Power's April 25, 2005 Compliance Filing, the Commission did not consider how Florida Power performed its test. Unless Florida Power actually tested its own facilities in 1994 or at present uses the same standards as it applied to Florida Municipal's facilities, there can be no showing of comparability, Florida Municipal argues.

16. Florida Municipal states that the Commission and Court of Appeals have consistently ruled that the ultimate rates ordered in this case must treat Florida Power and Florida Municipal transmission facilities comparably, and that this comparability could be achieved through Florida Power rate base reductions instead of Florida Municipal credits. It argues that there is no evidence in this proceeding showing that Florida Power's transmission facilities are in any way used to provide Florida Municipal's network transmission service, and that the February 21, 2008 Order on Reconsideration fails to address this point.

17. Florida Municipal states that, via the "and" standard, the Commission implemented the principle that Florida Power was subject to rate base reductions for those of its facilities that were similar to those Florida Municipal facilities for which credits were denied. Florida Municipal contends that the February 21, 2008 Order on Reconsideration reverses a decade of precedent in this case by eliminating rate base reductions. Moreover, even if the Commission correctly reinterpreted the intentions of Adjemian in 1994, the Commission provides no basis to support its finding that Florida Power treated Florida Municipal's facilities comparably with its own facilities or the Commission's reversal of the standard announced in prior cases.

18. Florida Municipal also repeats earlier arguments that Florida Power treats those of its own transmission facilities serving only Florida Power's local load as part of the grid, charging the costs to all transmission users, but then treats Florida Municipal's transmission serving only Florida Municipal's local load as not part of the grid. Thus, Florida Power spreads all of its transmission costs to its transmission customers and competitors, while Florida Municipal, its member cities, and their ratepayers must bear not only all of their own transmission costs, but also their load-ratio share of Florida Power's transmission costs.

19. With respect to the Commission's statement that "the issue was and is whether removing Florida Municipal's facilities from the test case curtails either local or remote load, not whether it curtails both,"¹⁷ Florida Municipal contends that it has not received

¹⁷ See February 21, 2008 Order on Reconsideration, 122 FERC ¶ 61,159 at P 13.

credits for its facilities that are needed only to serve its local load; if the issue is as the Commission now describes it, Florida Municipal should receive those credits. It argues, more broadly, that comparability can be achieved only by reducing Florida Power's rate base or by providing credits for Florida Municipal's facilities. It states that many of Florida Power's non-radial transmission facilities at 69 kV or above are functionally identical to Florida Municipal facilities for which Florida Municipal has been denied credits. Florida Municipal states that it has demonstrated that its facilities that connect its generation to the grid and which serve its load are functionally the same as Florida Power's Georgia ties (which Florida Power uses to import power for its native load and to connect Florida Power's Georgia generation to the grid) and six of the Turkey Point generating plant's lines that Florida Power includes in its rate base (which are primarily used to carry Turkey Point power to the grid near Miami). In sum, Florida Municipal argues that the Commission makes no assessment whether its order allowing Florida Power to include all of its facilities except for radials in its rate base, and charging Florida Municipal a full load-ratio share, provides comparability and non-discrimination and avoid preference.

III. Discussion

20. We deny rehearing. We re-affirm our determinations in the February 21, 2008 Order on Reconsideration:

The substantive issue before us is a narrow one: is the test that FP&L used on its own facilities to determine if they provided "unneeded redundancies" comparable to the 1994 Test used to evaluate FMPA's Vero Beach-to-Fort Pierce facilities. Upon further consideration, we find that the tests are comparable.

In sum, we find that the 1994 Test, as described and applied by FP&L witness Adjemian, and the testimony and models provided by FP&L with respect to its own facilities show that the test performed on FMPA's facilities, i.e., the 1994 Test and the tests performed on its own looping-transmission facilities are comparable. Accordingly, FP&L's April 25, 2005 compliance filing properly removed transmission facilities that provided only unneeded redundancy, consistent with the 1994 Test and nothing more is needed. Thus, we also reject the September 5, 2006 compliance filing as moot.^[18]

¹⁸ *Id.* P 10, 15.

A. Appropriate Test

21. We reiterate that, in the January 25, 2005 and December 15, 2005 Orders, the Commission misinterpreted Adjemian's 1994 testimony, and therefore, misstated the test that Florida Power was required to perform on its own facilities to ensure comparability. In the February 21, 2008 Order on Reconsideration, the Commission re-examined Adjemian's 1994 Testimony, realized it had erred, acknowledged its error, and recognized that Adjemian focused on whether Florida Power facilities could serve all loads absent Florida Municipal's Fort Pierce-Vero Beach line.¹⁹ Based on Adjemian's 1994 testimony, the Commission explained that Adjemian had found that the Florida Municipal facilities were "unneeded" because they were not necessary to serve either local or—not "and"—remote load. Florida Power facilities that were similarly unneeded to serve local or remote load were correctly eliminated from the transmission rate base. Accordingly, we deny Florida Municipal's argument that the February 21, 2008 Order on Reconsideration violated comparability, or is otherwise improper.

22. While Florida Municipal contends that the Commission has departed from its longstanding position with regard to Adjemian's 1994 test, we note that the Commission's holding in the February 21, 2008 Order on Reconsideration—correcting an error—is, in fact, consistent with its January 5, 1996 Order Granting Clarification in the related TX Case:

While [Florida Municipal] has the ability to use the Fort Pierce-Vero Beach line to independently transmit power between its resources and loads, Florida Power will not be using the line to transmit power for itself or to provide transmission service to FMPA or any other Florida Power transmission customer.²⁰

In other words, the Commission determined in both its earlier January 5, 1996 Order Granting Clarification in the TX Case and its February 21, 2008 Order on Reconsideration at issue here that the Fort Pierce-Vero Beach line was not eligible for credits because it was not needed to serve either local or remote load.

23. Indeed, this is also the same standard—i.e., whether the facility is needed to serve either local or remote load—that Florida Municipal itself applied in 1996 to argue that its Fort Pierce-Vero Beach line should receive credits.²¹ While Florida Municipal argued at

¹⁹ *Id.* P 13.

²⁰ TX Order on Clarification, 74 FERC ¶ 61,006.

²¹ Florida Municipal February 5, 1996 Request for Rehearing at 16-19.

that time that the Commission had incorrectly applied the standard to the Fort Pierce-Vero Beach line, the relevant point here is that Florida Municipal did not argue (as it does now) that the standard itself was improper. Accordingly, we find that the Commission correctly held in its February 21, 2008 Order on Reconsideration that, correcting its error, Florida Power was required to test each of its facilities included in its transmission rate base to determine if that facility's absence curtailed either local load *or* remote load, not whether the facility's absence curtailed both local *and* remote loads.

B. Florida Power's Evidence Demonstrates Comparability

24. We reject Florida Municipal's argument that the Commission has violated comparability principles. The Commission did not require Florida Power to give Florida Municipal credit for the Fort Pierce-Vero Beach line because the line was "not used by Florida Power to provide transmission service to itself or others in the Florida Power control area, [and] its existence [had] no effect on Florida Power's cost of providing service to any Florida Power customer, including Florida Municipal."²² Comparability, in this context, requires only that Florida Power exclude from rate base those facilities not needed to provide transmission service to either local or remote loads. Substantial record evidence shows that Florida Power has done just that.

25. For example, Florida Power submitted affidavits from its witness Sanchez in which he describes, in detail, the test he performed on Florida Power's facilities, and how that test was comparable to Adjemian's 1994 test.²³ Specifically, Sanchez testified why he chose his particular model, explaining that the 1994-vintage Florida Coordinating Group (FCG) load flow model was officially made available in May-June 1994. He further explained that it would have been the most recent model available to Adjemian when his testimony was filed in July 1994. Moreover, Sanchez noted that, according to Adjemian's 1994 testimony, the Fort Pierce-Vero Beach line had been a 69 kV line and was not included in the FCG model until it was upgraded to 138 kV, which records show occurred in 1994.²⁴ Thus, the Commission was persuaded by the reasoned explanations for the choices that Sanchez made to recreate what was, in his expert opinion, Adjemian's 1994 test.

²² TX Order on Clarification, 74 FERC ¶ 61,006 at 61,010.

²³ Affidavit of Hector Sanchez (Sanchez 2005 Affidavit), Attachment to Florida Power Compliance Filing (April 25, 2005).

²⁴ *Id.* at 3-4.

26. Moreover, Sanchez also explained in detail which facilities he tested and why: “I analyzed all [Florida Power] facilities with a voltage of 69 kV or higher, other than those facilities the Commission specifically addressed in the January 25, 2005 Order (i.e., the Georgia ties and the Turkey Point lines).”²⁵ He then explained how he went about testing the facilities,²⁶ and included data showing his results.²⁷

27. As Sanchez describes, Florida Power tested its existing 69 kV and above transmission facilities for unneeded redundancy by removing each facility from base models, and performing a load flow simulation to determine whether any reliability criteria violations occurred for a first contingency (i.e., for a sudden loss of a single transmission line, transformer, or generator).²⁸ Under those reliability criteria, without the facility that was being tested and following single contingencies, Florida Power examined whether load continued to be served, transmission facilities remained at or below 100 percent of their applicable respective thermal ratings, and voltages at substations were at or above 95 percent of nominal voltage.²⁹ For each transmission line tested, Florida Power analyzed the system under each first contingency that could arise. If, without a facility, any first contingency resulted in a violation of a reliability criterion, that facility was determined to be needed, i.e., to provide more than “unneeded redundancy.”³⁰

28. When asked the central question, i.e., whether his test was comparable to that described by Adjemian in his 1994 testimony, Sanchez gave a direct and concise answer:

Yes. In his analysis (at pages 49-50 of his testimony), Adjemian removed the Fort Pierce-Vero Beach line from the FCG model and determined whether, without that line, [Florida Power] would be able to meet its wholesale transmission and retail obligations.³¹

²⁵ *Id.* at 4.

²⁶ *Id.* at 5-7.

²⁷ *Id.* at 10-15.

²⁸ *Id.* at 5-7.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 7.

29. As we noted in the February 21, 2008 Order on Reconsideration, Sanchez's findings were validated by Adjemian himself. In his June 15, 2005 affidavit, Adjemian explained that he tested the Fort Pierce-Vero Beach line to determine whether Florida Power had sufficient transmission capability in the area of the line such that, even without it, Florida Power would be able to deliver power to its customers in that area, and to transmit power to Florida Power's other load centers in South Florida. Adjemian stated that he concluded that Florida Power did not need to rely on the Fort Pierce-Vero Beach line, and therefore, that the line did not provide a benefit to the Florida Power transmission system. Adjemian's June 15, 2005 affidavit was compelling not only because he was the individual who actually performed the 1994 test (and thus was in the best position to describe the test), but also because his statements were consistent with his earlier testimony in 1994.

30. Florida Municipal's arguments that the Commission cannot rely on Adjemian's and Sanchez's affidavits as evidence because their testimony is speculative and because Florida Power has never produced the actual 1994 test are without merit. First, Florida Municipal has missed its opportunity to make such arguments. For example, it did not object to Adjemian's 1994 testimony when the Commission relied on it in the January 25, 2005 Order on Compliance. At that time, the Commission adopted Florida Power's four-factors for ensuring comparability, and agreed that the second factor—that a facility that provides unneeded redundancy is not eligible for cost recovery—was consistent with the test Florida Power had applied to Florida Municipal.³² The Commission found that Adjemian modeled the Florida Power system with and without the Fort Pierce-Vero Beach line, and it quoted and relied on his testimony, stating in part that “even without the line, [Florida Power] is able to deliver power to customers in that area and other [Florida Power] load centers.”³³ No request for rehearing was filed and the Commission's reliance on Adjemian's 1994 testimony was thus not challenged at that time.

31. In addition, Florida Municipal has misapplied the “adverse inference” principle and the “substantial evidence” standard. According to Florida Municipal, the Commission should have required Florida Power to produce the 1994 test, and, without the test itself, the Commission should draw an inference against Florida Power's position. We disagree. The “adverse inference” principle is not merely a principle for weighing

³² January 25, 2005 Order, 110 FERC ¶ 61,058 at P 13.

³³ *Id.* P 13 n.10 (quoting affidavit of Adjemian (Adjemian 1994 Affidavit) at 13, Attachment to Florida Power Motion for Clarification in Docket No. TX93-4-002 (June 10, 1994)).

evidence; it also affects the assignment of the burden of proof.³⁴ Thus, where only one party has access to certain information, and that party does not produce the information, the information is presumed to be unfavorable to that party.³⁵ But this is not the end of the analysis, as Florida Municipal would have it. Instead, the burden shifts, and the party with the adverse inference, if it is to prevail, must provide adequate information to support its position.³⁶ Moreover, while the burden shifts, the evidentiary standard under the FPA does not. The party with the burden is required to produce “substantial evidence,” not some heightened level of evidence as Florida Municipal seems to argue.³⁷

32. Florida Power was required to produce “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³⁸ As explained in detail above, Florida Power has produced substantial evidence from a record that stretches back to 1994, and the Commission has reasonably relied upon that evidence to support its findings that Florida Power has used a comparable test on both its own facilities and Florida Municipal’s facilities. In short, the lack of the 1994 model does not prevent us from reaching the conclusions that we do given that there is substantial evidence that is

³⁴ *Town of Highland v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149, at 61,357 (1986), *order on reh’g*, 38 FERC ¶ 61,052 (1987) (Highland Rehearing Order).

³⁵ *See, e.g., Alabama Power Co. v. FPC*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974).

³⁶ Highland Rehearing Order, 38 FERC ¶ 61,052 at 61,154 (“if adequate information is not produced, the facts are presumed to be adverse to the regulated entity”).

³⁷ Section 313(b) of the FPA states that a “finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive.” 16 U.S.C. § 8251(b) (2006). In other words, proceedings such as this case are subject to a “substantial evidence” standard, which requires a lesser showing than the “beyond a reasonable doubt” standard that applies in criminal proceedings.

³⁸ *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938)). Substantial evidence “must do more than create a suspicion of the existence of the fact to be established. . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” *Id.* (quoting *Labor Bd. v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

available to us; we are not persuaded that the lack of the 1994 model is a fatal evidentiary flaw.³⁹

C. Florida Municipal's Evidence is Unpersuasive

33. With regard to Florida Municipal's own evidence, we continue to find it unpersuasive. Most significantly, we are not convinced that the test that Florida Municipal now champions resembles the one that Adjemian used in 1994. The May 31, 2005 affidavit of Robert C. Williams states that:

Using the 1994 load flow databank data, we set up a contingency run to test the effect of the Emerson Tie not being available along with the generation at Vero Beach or, alternatively, the Fort Pierce generation being dispatched off (i.e., not in operation). Then single line contingencies of [Florida Power] transmission lines were run to test the effects on the transmission system.

34. Unlike Florida Power's test, which used a single contingency of one generator being out of service, Williams used a multiple contingency scenario by shutting down all of the generators at either Vero Beach or Fort Pierce. Also, unlike Florida Power's test, Williams' multiple-contingency scenario would result in an increase in the peak load that Florida Power must deliver to Fort Pierce and Vero Beach. It is unreasonable to assume that Florida Power would deliver more than the peak load it is obligated to deliver. Moreover, Florida Municipal included single line contingencies without explaining how the use of such contingencies is consistent with Adjemian's 1994 description of his 1994 test. The Commission therefore concludes that Florida Municipal's test of its facilities is different (and stricter) than the tests conducted by Florida Power.

35. In addition, we are not persuaded by Florida Municipal's witness Linxwiler, who argues that, because Florida Power only considered removing individual segments of

³⁹ We further note that Florida Municipal has provided no evidence that Florida Power deliberately destroyed the 1994 test or acted improperly with regard to any evidence in this case. Florida Municipal references *More v. Snow*, 480 F.Supp. 2d 247, 275 (D.D.C. 2007), for the proposition that the adverse inference principle is appropriate, even if deliberate or reckless conduct is not present. But in *More*, the court weighs the degree of negligence or bad faith involved, the importance of the evidence involved, the importance of the evidence lost to the issues at hand, and the availability of other proof enabling the party deprived of the evidence to make the same point. *Id.* at 275. Here, there is no evidence that Florida Power acted in bad faith or with a high degree of negligence.

lines, Florida Power's reexamination of each line segment really only considers potential first-contingency losses of load on other segments of the same line as the segment being tested, and not in other areas. Linxwiler incorrectly focuses on how Florida Power should have performed an "and" test on its own facilities. As we stated above, Florida Power did not perform an "and" test on Florida Municipal's facilities in 1994, and therefore, did not need to perform one on its own facilities in 2005 in order to satisfy comparability. Instead, what is relevant is that both Florida Power's and Florida Municipal's facilities were comparably tested by eliminating loop flow.

36. For the reasons explained above, we find that Florida Power has acted consistently with the Commission's comparability principle with regard to its own facilities included in rate base. We thus again find that Florida Power's April 25, 2005 compliance filing properly removed transmission facilities that provided only unneeded redundancy, consistent with the 1994 test. Accordingly, we deny rehearing.

The Commission orders:

Florida Municipal's request for rehearing is hereby denied.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light Company

Docket Nos. ER93-465-041
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(Issued December 22, 2008)

WELLINGHOFF, Commissioner, dissenting:

I dissented from the February 21, 2008 Order on Reconsideration, of which the majority now denies rehearing. In that dissent, I agreed with the majority's characterization of the narrow issue before the Commission: whether the test that FP&L used on its own facilities to determine if they provided "unneeded redundancies" is comparable to the 1994 Test that FP&L used to evaluate FMPA's Vero Beach-to-Fort Pierce facilities. I dissented because I was not convinced that FP&L had satisfied the Commission's comparability requirement and because I concluded that the majority had not adequately explained its decision to reverse the Commission's repeated previous findings on that issue.

In today's order, the majority elaborates on its rationale for that reversal. The majority reiterates that, prior to the February 21, 2008 Order on Reconsideration, it had misinterpreted testimony dating to 1994 and, therefore, had misstated the test that Florida Power was required to perform on its own facilities to ensure comparability. The majority states that it has reasonably relied on evidence produced by Florida Power to support a finding that Florida Power has used a comparable test on both its own facilities and FMPA's facilities. The majority further states that the absence of the model that Florida Power actually used in 1994 is not a "fatal evidentiary flaw" that requires a different result.

I agree that the Commission is entitled to weigh a range of evidence in reaching a conclusion. However, I continue to disagree with the majority's contention that the evidence here justifies the reversal made in the February 21, 2008 Order on Reconsideration. For that reason, I would have granted FMPA's request for rehearing. Therefore, I respectfully dissent.

Jon Wellinghoff
Commissioner