

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Florida Power & Light Company

Docket Nos. ER93-465-035
ER96-417-004
ER96-1375-005
OA96-39-012
OA97-245-005

ORDER ON REMAND

(Issued December 20, 2005)

1. This order addresses a June 14, 2005 remand from the U.S. Court of Appeals for the District of Columbia Circuit that directed the Commission to consider the “discrete issue” of whether physical incapacity provides a proper basis for an exception to full load ratio pricing.¹

Background

2. This case has a long history, dating back to 1993, when Florida Power and Light Company (FP&L) first filed a comprehensive restructuring of its then-existing tariff structure, including a new open access transmission tariff. On September 18, 2000, in Docket No. ER93-465-000, *et al.*, the Commission approved a settlement agreement that fully resolved most of the rate issues related to FP&L’s network integration transmission service tariff.²

¹ *Florida Municipal Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) (Remand Order).

² *Florida Power and Light Co.*, 92 FERC ¶ 61,241 (2000). Although the active parties reached a settlement in principle, negotiations have continued to prepare the interchange service schedules that would fully implement the parties’ settlement in principle. On June 27, 2005, FP&L notified the Commission that it will endeavor to file a new settlement agreement shortly after July 14, 2005.

3. The Commission addressed the three remaining issues on December 16, 2003.³ The Commission directed FP&L to make a compliance filing revising its proposed rate schedules to exclude those FP&L facilities that fail to meet the same integration test applied to its network transmission service customer, Florida Municipal Power Agency (FMPA) in the TX Case.⁴ In addition, the Commission denied FMPA credits for its customer-owned facilities because this issue had been determined in the TX Case. Finally, and as relevant here, the Commission declined to revisit the issue of behind-the-meter generation and load ratio pricing for network integration transmission service, explaining that “FMPA raised the same concerns in Order Nos. 888 and 888-A, and we addressed the issue of load ratio pricing for network integration service in that context^[5] – and were affirmed on appeal^[6] – and we, likewise, see no persuasive reason to revisit that determination here.”⁷

4. On January 15, 2004, FMPA filed a request for rehearing, challenging the determinations on credits and load ratio pricing for network integration transmission service. On March 3, 2004, the Commission denied rehearing.⁸ On load ratio pricing, the Commission explained:

³ *Florida Power and Light Co.*, 105 FERC ¶ 61,287 (2003) (December 16 Order).

⁴ See *Florida Municipal Power Agency v. Florida Power & Light Company*, 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), *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).

⁵ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,259-61 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁶ *TAPS*, 225 F.3d at 726.

⁷ December 16 Order at P 19.

⁸ *Florida Power and Light Co.*, 106 FERC ¶ 61,204 (2004) (March 3 Order).

We will also deny the request for rehearing regarding network load pricing. We disagree with FMPA's premise that the transmission pricing guidance contained in Order Nos. 888 and 888-A is only generic in nature and did not address the application of load ratio pricing to the circumstances raised here by FMPA; Order No. 888-A clearly addressed the circumstances cited by FMPA and states that the "bottom line is that *all* potential transmission customers, including those with generation behind the meter, must choose between network integration transmission service or point-to-point transmission service. Each of these services has its own advantages and risks."⁹ Because FMPA has chosen to take network integration service along with the attendant advantages, it must accept everything else, *i.e.*, the disadvantages and risks, that go along with that choice.¹⁰

5. FMPA appealed the December 16 Order and the March 3 Order to the D.C. Circuit. In the Remand Order, the court found that, despite having considered "myriad permutations of the behind-the-meter generation issue in Order No. 888-A," the Commission "has never expressly addressed FMPA's request for an impossibility exception," and that Order No. 888 "explicitly left open the possibility of such exceptions by stating that [the Commission] would continue to consider alternative proposals for allocating the cost of network integration and would evaluate those alternatives on the merits on a case-by-case basis."¹¹ The court continued:

Simply put, [the Commission] has failed to explain why network customers should be charged by the transmission provider for network service that the provider is physically constrained from offering and, relatedly, why physical

⁹ FERC Stats. & Regs. at 30,260 (emphasis added; footnote omitted). *See also id.* at 30,260-61 ("a network customer will not be permitted to take a combination of both network and point-to-point transmission services under the *pro forma* tariff to serve the same discrete load"; "the Commission will allow a network customer to either designate all of a discrete load as network load under the network integration transmission service or to exclude the *entirety* of a discrete load from the network service and serve such load with the customer's 'behind-the-meter' generation and/or through any point-to-point transmission service" (emphasis in original; footnotes omitted)).

¹⁰ March 3 Order at P 10.

¹¹ Remand Order, 411 F.3d at 291.

impossibility should not be recognized as an exception to the general rule against permitting partial load ratio pricing for network customers. We therefore remand this discrete issue to the Commission. We emphasize, however, the narrow contours of our ruling: FMPA has conceded that it must pay for full capacity regardless of whether it intends to use that full capacity.^[12]

Discussion

6. As a preliminary matter, we disagree with FMPA's position that we were bound to consider its alternative proposal. When we stated in Order Nos. 888 and 888-A that we would consider alternative proposals for allocating the cost of network integration and would evaluate those alternatives on the merits on a case-by-case basis, we intended those alternative proposals to come from the utilities who we were directing, in those rulemakings, to file open access transmission tariffs; if a transmission provider believed that an alternative arrangement made more sense for its system, we permitted that transmission provider to voluntarily propose such an alternative.¹³ And when, as FMPA has pointed out, Florida Power Corporation proposed revisions to its *pro forma* open access transmission tariff to allow it to create a third category of transmission service in its open access transmission tariff, called network contract demand transmission service, we duly evaluated and ultimately accepted that alternative.¹⁴ However, we did not intend for each and every customer of a transmission provider to have the opportunity to demand that the transmission provider create alternative services which benefit that particular customer, *i.e.*, we did not intend to create the option of separate and individual customer-by-customer transmission services and rates. Given that there is a single

¹² *Id.* at 292.

¹³ Specifically, in Order No. 888 we explained:

Utilities that plan their systems to meet an annual system peak . . . are free to file another method if they demonstrate that it reflects their transmission system planning. Moreover, we recognize that alternative allocation proposals may have merit and welcome their submittal by utilities in future applications. They will be evaluated on a case-by-case basis and decided on their merits.

FERC Stats. and Regs. at 31,736.

¹⁴ *Florida Power Corp.*, 81 FERC ¶ 61,247 (1997).

transmission system to accommodate all customers, multiple individual, customer-specific services (and rates) would be virtually impossible for the utility to administer and for the Commission to oversee to ensure that there would be no undue discrimination.

7. Moreover, there are always physical constraints limiting transmission service, and those constraints can vary hour by hour as load and generation change hour by hour and as facilities go out of service or are put back in service. FP&L itself faces those constraints, just as FMPA and all other customers face those constraints. In short, no one is exempt from the limitations of the transmission system; it is simply not an infinite resource. Thus, while a “physical impossibility exception” to full load ratio pricing, by allowing partial load ratio pricing, sounds appealing on its face, the circumstances and limitations of the transmission system just described make any such exceptions virtually impossible to develop and administer. If a customer does not believe that the advantages of network transmission service outweigh the disadvantages, it may opt for point-to-point transmission service instead. Under point-to-point transmission service, the transmission customer pays only for the transmission capacity that it reserves, not for its actual load, as is the case under network transmission service. While point-to-point transmission service is not as flexible as network transmission service, a customer can still reserve firm point-to-point transmission capacity for service from the generators primarily used to serve it. Moreover, point-to-point transmission customers have the flexibility to change their receipt and delivery point on a non-firm basis.¹⁵ The decision whether to use network transmission service or point-to-point transmission service is made by the transmission customer. That customer, however, is not permitted to craft a transmission service unique to its circumstances, but which is not offered by the transmission provider.

8. We recognize that load ratio pricing may not be desirable for a customer facing transmission constraints. However, as FP&L has explained, it is not physical constraints on FP&L’s transmission system that are causing the limitations here; if it were, FP&L would have the obligation to expand its system to serve its network customers’ full load.¹⁶

¹⁵ See section 22.1 of the pro forma open access transmission tariff (OATT) (modifications on a non-firm basis). We also note that a firm point-to-point transmission customer may modify its receipt and delivery points on a firm basis. See section 22.2 of the pro forma OATT (modification on a firm basis).

¹⁶ See Order No. 888-A at 30,220 (“network service is founded on the notion that the transmission provider has a duty to plan and construct the transmission system to meet the present and future needs of its native load and, by comparability, its third-party network customers”); see also section 28.2 of the *pro forma* OATT (“The Transmission Provider will plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider’s Transmission System”).

Rather, FP&L's transmission system is planned with sufficient capacity such that it could serve FMPA's full network load from network resources at any given moment. It is a transmission limitation on *another system*, beyond FP&L's point of delivery, *i.e.*, the Florida Keys Electric Cooperative-City of Key West delivery system, that creates the alleged impossibility.¹⁷ That Florida Keys Electric Cooperative-City of Key West intervening transmission system cannot transmit enough power from FP&L to serve Key West's entire load should not dictate what FP&L may charge for transmission service that FP&L provides.

9. Finally, we note that the "legal and policy cornerstone of [Order No. 888] is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce."¹⁸ In other words, the network transmission service that is available under Order No. 888 is intended to put the transmission customer in the same position as the transmission provider itself for transmission service over its network. Here there is no allegation that FP&L is attempting to unduly discriminate against FMPA by failing to offer a hybrid service; rather, as FP&L points out, network contract demand service "is not available to *any* entity in the [FP&L] system – even [FP&L] itself."¹⁹

The Commission orders:

The December 16 Order and the March 3 Order are hereby clarified in accordance with the discussion in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁷ See FP&L December 16, 2004 Brief at 15-16.

¹⁸ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,634.

¹⁹ FP&L December 16, 2004 Initial Brief (emphasis in original).