

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. ER93-465-037
ER96-417-006
ER96-1375-007
OA96-39-014
OA97-245-007

ORDER DENYING REHEARING

(Issued July 6, 2006)

1. This order denies a request for rehearing filed by Florida Municipal Power Agency (FMPA) of the Commission's order on remand issued on December 20, 2005,¹ which addressed 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.²

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. The Commission ultimately approved a settlement that resolved most of the issues related to the new tariff.³

3. As relevant here, the Commission addressed the three unsettled issues on December 16, 2003.⁴ In particular, the Commission declined to revisit the issue of behind-the-meter generation and load ratio pricing for network integration transmission

¹ *Florida Power and Light Co.*, 113 FERC ¶ 61,290 (2005) (December 20 Order).

² *Florida Municipal Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) (Remand Order).

³ *Florida Power and Light Co.*, 115 FERC ¶ 61,020 (2006).

⁴ *Florida Power and Light Co.*, 105 FERC ¶ 61,287 (2003) (December 16 Order).

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. On March 3, 2004, the Commission denied rehearing.⁸ On load ratio pricing, the Commission explained:

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

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).

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 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]

6. In the December 20 Order, the Commission explained that:

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

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.

¹² *Id.* at 292.

intended those alternative proposals to come from the *utilities* who we were directing, in those rulemakings, to file open access transmission tariffs . . . 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.^[13]

7. We also explained that there are always physical constraints limiting transmission service, as the system is not an infinite resource, and those constraints are faced by FP&L as well as its customers. Given those constraints, a customer is free to choose point-to-point rather than network integration transmission service; however, a customer may not craft a transmission service unique to its circumstances.¹⁴ We also noted that the transmission constraints present in this case are not caused by FP&L; FP&L's transmission system is planned with sufficient capacity such that it could serve FMPA's full network load.¹⁵

8. Finally, the Commission pointed out that the intent of Order No. 888 was to address undue discrimination, and here there was "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."¹⁶

9. On January 19, 2006, FMPA filed a request for rehearing. FMPA alleges that the Commission failed to respond to the directive of the Court of Appeals to "meaningfully" consider the issue before it on remand.¹⁷ FMPA also reiterates its position that the Federal Power Act requirement that regulated transmission rates be just and reasonable precludes a transmission provider from charging a customer for the customer's entire load when there is a physical impossibility preventing service to the entire load at all times, and that it is irrelevant whether the transmission constraints are on the system of the transmission provider or the customer.

¹³ December 20 Order at P 6 (emphasis added, citations omitted).

¹⁴ *Id.* at P 7-8.

¹⁵ *Id.* at P 8.

¹⁶ *Id.* at P 9, *citing* FP&L December 16, 2004 Initial Brief (emphasis in original).

¹⁷ FMPA Request for Rehearing at 2-3.

10. On February 3, 2006, FP&L filed an answer to FMPA's request for rehearing. FP&L argues that comments FMPA filed in Docket No. RM05-25-000, on January 23, 2006, "show that there in fact is no physical limitation on FMPA's ability to serve the entire load at Key West from the [FP&L] transmission system."¹⁸ FP&L maintains that FMPA has conceded that there is 270 MW of firm transfer capability from the FP&L system to Key West, so that the only "limitation" in FMPA's ability to serve the entire load at Key West with deliveries from the FP&L transmission system is a contractual limitation, because of FMPA's contractual arrangements with Florida Keys Electric Cooperative, not a physical limitation. FP&L points out that the discrete issue remanded by the D.C. Circuit is whether "physical impossibility" justifies an exception to full load ratio pricing and, because no physical impossibility exists, FMPA's request for rehearing should be denied.

11. On February 21, 2006, FMPA filed an answer to FP&L's Answer. FMPA states that it supports FP&L's attempt to introduce new evidence, but maintains that FP&L mischaracterizes some facts and leaves out others. Specifically, FMPA concedes that FP&L has demonstrated that, with some regularity, Key West can import its total load. However, FMPA argues, what matters is whether Key West can import its total *peak* load on a firm basis or rely on FP&L to serve its full load at all times, and it cannot do so. Finally, FMPA takes issue with FP&L's suggestion that it renegotiate Key West's sharing agreement to obtain a larger share of the total import capability, as there is inadequate transfer capability from the FP&L system into the Florida Keys.

Discussion

12. Rule 713(d) of the Commission's Rules of Practice and Procedure¹⁹ prohibits an answer to a request for rehearing. Accordingly, we will reject FP&L's answer to FMPA's request for rehearing, and dismiss FMPA's answer to FP&L's answer.

13. We will deny rehearing. On rehearing, FMPA's sole allegation of error is that we failed to respond to the court's directive that we give "meaningful" consideration to FMPA's position.²⁰ FMPA does not identify, let alone challenge, particular flaws in the analyses provided in our December 20 Order, other than to generally complain that we reached the same wrong conclusion we reached prior to the appeal to the D.C. Circuit. This is tantamount to saying that the only conclusion we could reach that would be acceptable to the court is to agree with FMPA. Clearly the court did not dictate this result; had the court believed FMPA's interpretation of Order Nos. 888 and 888-A to be

¹⁸ FP&L Answer at 2.

¹⁹ 18 C.F.R. § 385.213(a)(2) (2005).

²⁰ *See* FMPA's Request for Rehearing at 2.

the only correct one, it would have reversed our earlier orders outright and directed that we adopt FMPA's interpretation – which it did not do. Rather, the court wanted us to more thoroughly consider FMPA's argument. That we have done. And that more thorough consideration led us in the December 20 Order to reaffirm our earlier determinations. Nothing presented on rehearing leads us to conclude that we erred.²¹

14. Other than alleging that we failed to respond to the D.C. Circuit's directive, FMPA raises no new arguments on rehearing. Nonetheless, we will briefly address its remaining points. FMPA states that “[w]hy the Commission can consider and administer a specific and unique rate proposed by a utility but cannot do the same when a specific individual rate is requested by a customer is inexplicable.”²² We disagree. Order No. 888 and its *pro forma* transmission tariff provide for network integration and point-to-point transmission service. It is one thing for a transmission provider to propose to offer an additional service to its customers. It is another, very different matter for each individual transmission customer to seek transmission services uniquely tailored to its particular needs.²³ Allowing services and rates unique to every customer would undercut the primary goal of Order No. 888 of providing for non-discriminatory open access transmission.

15. Additionally, FMPA reiterates its assertion that, because FP&L cannot provide transmission to FMPA's entire load, it is unjust and unreasonable for FMPA to be charged based on its entire load.²⁴ We disagree. As we have pointed out in our prior orders, FMPA has *chosen* to take network integration transmission service, with its attendant full-load charge, when point-to-point transmission service is available and

²¹ FMPA also contends that the December 20 Order contains the “same arguments” that appeared in the Commission's brief in the court case, and that this “suggests that the Court did not believe that those arguments represented reasoned explanations.” *See* FMPA Request for Rehearing at 3. This argument is incorrect. The December 20 Order does, in fact, contain rationale beyond that presented in the Commission's brief. *See, e.g.*, December 20 Order at P 7 (discussing physical constraints limited transmission service).

²² FMPA Request for Rehearing at 3-4.

²³ FMPA also maintains that our discussion of fluctuations in transmission availability is “irrelevant.” *Id.* at 4-5. We disagree. This discussion supports our conclusion that the exceptions FMPA is seeking for individual customers would be “virtually impossible to develop and administer.” December 20 Order at P 7.

²⁴ FMPA Request for Rehearing at 5-6.

would not include a charge for the entire load.²⁵ Moreover, as we reiterated in the December 20 Order, 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.²⁶ Indeed, FP&L's tariff requires that it be able to do so.²⁷

16. Finally, we again emphasize that here there is no undue discrimination present (nor even any allegation of undue discrimination), as FP&L is not offering itself or any other entity transmission service other than network integration and point-to-point transmission service.²⁸ Accordingly, FMPA has not persuaded us that our conclusions were in error.

The Commission orders:

FMPA's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁵ See March 3 Order at P 10; December 20 Order at P 7-8. Indeed, in prior but related litigation FMPA has stated that Key West has chosen not to rely entirely on FP&L but instead uses local generation. See FMPA January 31, 1994 brief in Docket No. TX93-4-000.

²⁶ See December 20 Order at P 8.

²⁷ See FP&L Open Access Transmission Tariff § 28.2 ("The Transmission Provider will plan, construct, operate and maintain its Transmission System . . . in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's Transmission System. . . . The Transmission Provider shall include the Network Customer's Network Load in its Transmission System planning and shall . . . endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load Customers.")

²⁸ See December 20 Order at P 9.