

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.

FPL Group, Inc

Docket No. PH06-76-000

ORDER ON WAIVER NOTIFICATION

(Issued August 11, 2006)

1. On June 14, 2006, FPL Group Inc. (FPL) filed for waiver of Commission regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005).¹ For the reasons discussed below, the Commission will grant FPL's requested waiver.

Background

2. On June 14, 2006, pursuant to 18 C.F.R. § 366.4(c)(1), FPL filed a FERC-65B, a waiver notification seeking waivers of 18 C.F.R. §§ 366.21, 366.22, and 366.23.² FPL

¹ The Energy Policy Act of 2005, Pub. L. No 109-58, 119 Stat. 594 (2005)(EPA Act 2005), among other things, repealed the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (2000) and enacted the Public Utility Holding Company Act of 2005, Pub. L No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594, 972-78 (2005).

² These regulations were promulgated in *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 Fed. Reg. 75592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667-A, 71 Fed. Reg. 28446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, 71 Fed. Reg. 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006).

submits that its public-utility company operations are confined substantially to the State of Florida, and Florida Power and Light Company is the sole public utility company owned by FPL that is not exempt from the provisions of Part 366 of the Commission's regulations. FPL explains that it does own merchant generating companies that are "electric utility companies" but that these entities (qualifying facilities (QFs) and exempt wholesale generators (EWGs)) are automatically exempt from the Part 366 filing requirements under Order No. 667-A. FPL adds that annual revenues of Florida Power and Light Company are approximately \$9.5 billion, of which less than \$65 million arises from operations outside Florida. This amounts to less than 7 percent of public-utility company revenues from outside a single state.

Public Notice, Interventions and Protests

3. Notice of FPL's filing was published in the *Federal Register*, 71 Fed. Reg. 35887 (2006), providing for motions to intervene and protests to be filed on or before July 5, 2006.

4. Motions to intervene and protests were submitted by Seminole Electric Cooperative, Inc. (Seminole) and Florida Municipal Power Agency (FMPA). Seminole and FMPA protest FPL's filing on two grounds. First, they argue that FPL has misinterpreted the Commission's regulations pertaining to waivers for single state holding companies by failing to include the revenues of its out-of-state QF's and EWG's in determining whether the holding company system derives no more than 13 percent of its public-utility company revenues from outside a single state. They thus assert that more data is needed to determine whether FPL's operations meet the 13 percent test.

5. Second, Seminole and FMPA state that the filing failed to mention the pending Federal Power Act section 203³ merger application between FPL and Constellation Energy Group, Inc. (Constellation). They assert that, given Constellation's public utility operations in Maryland and its merchant activities across the United States, if the merger is approved by the Commission, the merged entity will not qualify for a waiver as a single state holding company system. They assert that the Commission should consider deferring acting upon the waiver request until such time as the Commission acts upon the merger application.

³ 16 U.S.C. § 8246 (2000).

Discussion

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make Seminole and FPL parties to this proceeding.

7. The issue raised by Seminole and FMPA concerning what revenues are to be included in the calculation for the 13 percent test to determine whether an entity qualifies as a single state holding company was recently resolved by the Commission in Order No. 667-B.⁴ There the Commission, among other things, revised section 366.3(c) of the Commission's regulations pertaining to the waiver for single state holding companies. That regulation now provides that:

[F]or purposes of § 366.3(c)(1), a holding company system will be deemed to be a single-state holding company system if the holding company system derives no more than 13 percent of its public-utility company revenues from outside a single state (for purposes of this waiver, revenues derived from exempt wholesale generators, foreign utility companies and qualifying facilities will not be considered public-utility company revenues).

Therefore, Seminole's and FMPA's argument that FPL failed to include revenues from QFs and EWG's in the calculation of its public-utility company revenues is no longer valid; for purposes of this waiver, such revenues are not considered public-utility company revenues. As a result, less than 7 percent of FPL's revenues come from outside a single state, and thus FPL qualifies for waiver as a single state holding company under the Commission's regulations. The waiver will be granted to be effective on the date that the revised regulations adopted in Order No. 667-B become effective.

8. The Commission also finds that the pending merger application between FPL and Constellation is not grounds for denial of waiver in this proceeding. At this point, FPL and Constellation are still separate entities and have not merged. FPL is still, therefore, a single state holding company entitled to a waiver because only 7 percent of its public-utility company revenues come from outside Florida. Any issues concerning the merger itself are properly raised in the merger proceeding. Further, if the merger is consummated, FPL remains under an obligation pursuant to section 366.4(d) of the

⁴ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667-B, 71 Fed. Reg. 42750 (July 28, 2006), FERC Stats. & Regs. ¶ 31,224 (2006).

Commission's regulations⁵ to notify the Commission whenever there is a material change in facts, and to address the change in facts. Finally, the grant of FPL's waiver here in no way affects the obligation of any new holding company formed as a result of the merger to comply with the PUHCA 2005 filing requirements.

The Commission orders:

Waiver is hereby granted to FPL pursuant to 18 C.F.R. §§ 366.3-.4, to be effective on the date that the revised regulations adopted in Order No. 667-B become effective, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁵ 18 C.F.R. § 366.4(d).