

FERC 120 ¶ 61,156
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. PH06-76-001

ORDER DENYING REHEARING

(Issued August 13, 2007)

1. On August 11, 2006, the Commission issued an order¹ granting FPL Group, Inc.'s (FPL) request for waiver of Commission regulations under the Public Utility Holding Company Act of 2005 (PUHCA 2005).² Requests for rehearing of the order were filed by Seminole Electric Cooperative, Inc. (Seminole) and Florida Municipal Power Agency (FMPA). For the reasons discussed below, the requests for rehearing are denied.

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 366.23.³ FPL

¹ *FPL Group, Inc.*, 116 FERC ¶ 61,135 (2006).

² 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 L. No 109-58, 119 Stat. 594 (2005)(EPA Act 2005), among other things, repealed the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (2000) and enacted the Public Utility Holding Company Act of 2005, Pub.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).

³ 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), *reh'g denied*, Order No. 667-C, 72 Fed. Reg. 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

(continued)

stated 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 explained that it did 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 added that the annual revenues of Florida Power and Light Company were approximately \$9.5 billion, of which less than \$65 million arose from operations outside Florida. This amounted to less than 7 percent of public-utility company revenues from outside a single state.

3. FPL's filing was protested by Seminole and FMPA. Seminole and FMPA argued that FPL failed to include revenues from QFs and EWG's in the calculation of its public-utility company revenues. Seminole and FMPA also argued that the Commission should have deferred action on FPL's waiver request because of its then-pending merger with Constellation Energy Group, Inc. (Constellation).

4. The Commission rejected the protests and granted FPL's requested waiver. The Commission found that the issue of 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 resolved by the Commission in Order No. 667-B.⁴ Order No. 667-B revised section 366.3(c) of the Commission's regulations to state:

[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).

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), *reh'g denied*, Order No. 667-C, 72 Fed. Reg. 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

5. The Commission also found that the pending merger application between FPL and Constellation was not grounds for denial of waiver in this proceeding. The Commission found that FPL and Constellation were still separate entities and had not merged. The Commission concluded that FPL was still a single state holding company entitled to a waiver because only 7 percent of its public-utility company revenues come from outside Florida.

6. Requests for rehearing of the August 11, 2006 order were filed by Seminole and FMPA.

Requests for Rehearing

7. Seminole and FMPA assert that the Commission's decision to grant FPL's request for waiver was incorrect inasmuch as it was based on the Commission's decision in Order No. 667-B. Seminole and FMPA state that they filed for rehearing of Order No. 667-B, pointing out the legal and practical problems of exempting a company like FPL, which they state has a far-flung, multi-state operation, on grounds that it is a "single state holding company system." Seminole and FMPA request that the Commission grant rehearing of Order No. 667-B and reverse the determination to exclude revenues from EWGs, foreign utility holding companies (FUCOs) and QFs from a determination as to whether a holding company like FPL Group qualifies for a waiver of the PUHCA 2005 reporting requirements. Seminole and FMPA submit that if rehearing of Order No. 667-B is granted, the order in the instant proceeding must be likewise corrected.

8. In addition, FMPA argues that it was imprudent for the Commission to act on the waiver request given the pending merger proceeding. FMPA argues that the waiver request raised significant issues regarding potential cross-subsidization and cost allocation, which issues have been raised as well in the pending merger proceeding. FMPA states that, given this overlap, the Commission should not have granted the waiver without consideration and imposition of the ameliorative conditions proposed by parties.

Discussion

9. On February 20, 2007, the Commission issued Order No. 667-C,⁵ which addressed the requests for rehearing of Seminole and FMPA of Order No. 667-B, concerning whether EWGs, FUCOs and QFs should be included in public utility revenues for

⁵ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, 72 Fed. Reg. 8277 (Feb. 26, 2007), 118 FERC ¶ 61,133 (2007).

purposes of determining whether a holding company qualifies for a single state holding company waiver under its PUHCA regulations. The Commission denied Seminole's and FMPA's requests for rehearing.

10. The Commission found that, in adopting the Securities and Exchange Commission's 13 percent of revenue standard (and the exclusion of EWGs, FUCOs and QFs from consideration in the 13 percent of revenue calculation) for purposes of determining who qualifies for the single state holding company waiver, the Commission sought to be consistent with the general intent of Congress, in repealing PUHCA 1935, to remove unnecessary regulatory burdens and not to create new ones in PUHCA 2005. The Commission further found that FMPA and Seminole had presented no convincing argument that other state and federal regulation would be insufficient to protect against abuse in the circumstances envisioned by FMPA and Seminole. The Commission added that it would still have full access under the FPA to the accounts and records of the traditional public utility within the holding company system (i.e., the utility with captive customers and traditional regulated rates) and of the holding company and any other company controlled by the holding company, insofar as they relate to transactions with or the business of the public utility. From those accounts and records, the Commission would be able to discern whether the public utility is attempting to recover, from its captive customers, costs that are properly attributable to other businesses within the holding company system. For the same reasons given in Order No. 667-C, FMPA's and Seminole's requests for rehearing are denied here.

11. The Commission also finds that FMPA's claim that the Commission should not have granted waiver because of the pending FPL/Constellation merger is moot. On October 26, 2006, in Docket No. EC06-77-000, FPL and Constellation notified the Commission that, on October 24, 2006, they entered into an agreement to terminate their merger and withdraw their application in Docket No. EC06-77-000.

The Commission orders:

Seminole's and FMPA's requests for rehearing are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary