

127 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Florida Power & Light Company

Docket No. OA09-22-000

ORDER ACCEPTING COMPLIANCE FILING

(Issued May 5, 2009)

1. On February 17, 2009, pursuant to section 206 of the Federal Power Act (FPA),¹ Florida Power & Light Company (FPL), submitted its compliance filing regarding the methodology for the distribution of revenues related to operational penalties for unreserved use and late studies in conformance with the requirements of Order Nos. 890 and 890-A.² In this order, we accept FPL's filing, subject to a further compliance filing, as discussed below.

I. Background

2. In Order No. 890, the Commission determined that transmission customers would be subject to unreserved use penalties in any circumstance where the transmission customer uses transmission service that it has not reserved and the transmission provider has a Commission-approved unreserved use penalty rate explicitly stated in its open access transmission tariff.³ The Commission also established a rebuttal presumption that unreserved use penalties no greater than twice the firm point-to-point transmission service rate for the penalty period are just and reasonable, provided that the penalty rates

¹ 16 U.S.C. § 824e (2006).

² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

³ Order No. 890 at P 834, 848.

are consistent with certain principles articulated in Order No. 890.⁴ Specifically, the Commission stated that: (1) the unreserved use penalties must be based on the period of the unreserved use not the period for which service is reserved; (2) the unreserved use penalty for a single hour of unreserved use must be based on the rate for daily firm point-to-point transmission service; and (3) more than one assessment of an unreserved use for a given duration (e.g., daily) will increase the penalty period to the next longest duration (e.g., weekly). Order No. 890 provided that transmission providers proposing to charge an unreserved use penalty in excess of twice the relevant point-to-point transmission service rate could do so in a filing under section 205 of the FPA for Commission approval.⁵

3. In Order No. 890-A, the Commission clarified the process for distributing operational penalties.⁶ The Commission explained that if a transmission provider elects to impose unreserved use penalties, it must submit to the Commission a tariff filing under section 205 of the FPA⁷ stating the applicable unreserved use penalty rate. Also, each transmission provider must submit a one-time compliance filing under section 206 of the FPA of the transmission provider's methodology for distributing revenues from late study penalties and, if applicable, for distributing revenues from unreserved use penalties. This one-time compliance filing can be submitted at any time prior to the first distribution of operational penalties.

II. Notice of Filing and Responsive Pleadings

4. Notice of FPL's filing was published in the *Federal Register*, 74 Fed. Reg. 9,609 (2009), with interventions and protests due on or before March 10, 2009. Seminole Electric Cooperative, Inc. (Seminole) filed a timely motion to intervene and comments. On March 20, 2009, FPL filed an answer to the motion to intervene and comments submitted by Seminole.

⁴ *Id.* P 846, 848.

⁵ *Id.* P 849.

⁶ Order No. 890-A at P 472.

⁷ 16 U.S.C. § 824d (2006).

III. Methodology for Distribution of Operational Penalties

A. FPL's Filing

5. FPL proposes in its filing to distribute unreserved use penalty revenues on a monthly basis to non-offending customers as a credit on the customers' next invoice for transmission services after the actual receipt of the unreserved use penalty revenues by FPL. FPL provides that in the event a non-offending customer due a distribution of penalty revenues does not receive an invoice for transmission services from FPL prior to December 31 of the year of the distribution, FPL will make a payment to the non-offending customer on or before December 31 of that year.

6. FPL defines a non-offending customer as a transmission provider, on behalf of its native load customers, and any transmission customer that purchased and scheduled or utilized point-to-point or network integration transmission service during the calendar month the unreserved use occurred and was not assessed an unreserved use penalty during that calendar month. FPL states that the dollar value of the penalty revenues collected for a calendar month will be distributed to each non-offending customer that calendar month on a pro-rata basis according to their transmission service schedule or usage during the month the unreserved use penalties were assessed to the offending customer(s). FPL notes that the penalty revenues accrued to date will not be distributed until the first bill for transmission services after the Commission accepts FPL's filing.

7. FPL proposes to calculate late study penalty distributions on an annual basis on or before the deadline for submitting the FERC Form No. 1. The total dollar value of study penalties incurred by FPL during the calendar year will be divided by the number of customers eligible for a distribution in the calendar year and distributed equally to those transmission customers. In addition, late study penalties that are the subject of a notification filing by FPL seeking to have the Commission waive the penalties will be excluded from the penalty distribution calculations and adjusted for in a subsequent calendar year depending upon the date of the resolution of the waiver request, including any subsequent judicial appeals.

B. Seminole's Comments

8. Seminole contends that FPL's proposed compliance filing does not indicate whether interest will accrue on penalty revenues it receives for unreserved use, during the time interval between collection and distribution. Seminole states that it will therefore assume that FPL intends to pay interest on these revenues because FPL is retaining such revenues during the dispute period. Seminole suggests that if this is true, the methodology should so state. Seminole states that if FPL does not intend to pay interest on such revenues, the Commission should require that it do so. Similarly, Seminole observes that FPL provides for annual (versus quarterly) crediting for the

distribution of penalty revenues for late studies, but does not provide for interest on the retained revenues prior to distribution.

9. Seminole further suggests that penalty revenues should be allocated to non-offending customers based on the transmission revenues during the month, as Florida Power Corporation⁸ proposed in its methodology and which Seminole states is consistent with the manner in which transmission service is priced. Seminole states that FPL's proposed kWh usage method is flawed because it is both illogical because transmission is priced on the basis of peak demand, and it also unfairly penalizes low load factor customers.

C. FPL's Answer

10. In response to Seminole, FPL states that the Commission did not specify what distribution methodology each transmission provider should employ, and that the Commission gave transmission providers flexibility in developing distribution methodologies.⁹ FPL further states that the Commission was silent regarding the payment of interest applicable to unreserved use or late study payments.

11. With respect to Seminole's suggestion that penalty revenues be allocated to non-offending customers based on an allocation method similar to Florida Power Corporation's methodology, FPL states that under its proposal, the dollar value of the penalty revenues collected for unreserved use for a calendar month will be distributed to each non-offending customer during that month on a pro-rata basis according to the customer's transmission service schedule or usage during the month the unreserved use penalties were assessed to the offending customer(s). FPL proposes that for each point-to-point transmission service customer not receiving Schedule 3 and 4 services from FPL, its usage shall be the sum of each megawatt-hour received by FPL for delivery for the calendar month. Similarly, for each network integration transmission service customer, the transmission provider on behalf of its native load customers and point-to-point transmission service customers receiving Schedules 3 and 4 services from FPL, the usage shall be the sum of each hour's network load or delivery point load, including transmission losses, for the calendar month.

12. FPL also states that it believes that the methodology it designed for the purpose of

⁸ See Seminole's March 10, 2009 Protest at 3 (*citing Florida Power Corporation*, 125 FERC ¶ 61,006 (2008) and Florida Power Corporation's Tariff Schedule 7, Section B.7.6, and Schedule 8, Section B.8.6).

⁹ See FPL's March 20, 2009 Answer at 2 (*citing Order No. 890-A at P 475*).

unreserved use penalty and late study penalties complies with the Commission's requirements and that it is reasonable. FPL asserts that the fact that there are several methodologies that could be employed to distribute the penalty amounts does not make the one that FPL selected unreasonable or inappropriate.

13. Finally, regarding Seminole's concern that FPL should be required to pay interest on the unreserved use penalty revenues that it retains during a dispute period, FPL states that to the extent that a customer is assessed a penalty for unreserved use, disputes the penalty and is successful in that dispute, FPL will refund the money, with interest, to that customer. Also, FPL states that unreserved use penalties in dispute at the time of a distribution will be excluded from such distribution and will occur in the first monthly distribution occurring subsequent to the date of resolution, including any judicial appeals.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214¹⁰ of the Commission's Rules of Practice and Procedure the timely, unopposed motion to intervene serve to make the entity that filed it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹¹ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept FPL's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

15. We agree with FPL's assertion that the Commission did not specify what distribution methodology each transmission provider should employ. We note that the Commission was silent with regard to other requirements in an effort to provide flexibility in the development of distribution methodologies. With respect to Seminole's observation that FPL has not provided for interest on unreserved use and late study penalties, Order Nos. 890 and 890-A did not mandate interest payments as a requirement for the collection and distribution of these fees.

16. Specifically, FPL stated that unreserved use penalty revenues would be distributed to non-offending customers during a calendar month on a pro-rata basis; therefore no

¹⁰ 18 C.F.R. § 385.214 (2008).

¹¹ 18 C.F.R. § 385.213(a)(2) (2008).

interest would be necessary. Furthermore, FPL stated that unreserved use penalties in dispute at the time of a distribution will be excluded from such distribution and will occur in the first monthly distribution occurring subsequent to the date of resolution, including any judicial appeals. Nevertheless, interest on the unreserved use amounts that FPL retains during a dispute period will be subject to refund if the Commission alters the distribution mechanism upon review. Also, we direct FPL to submit a compliance filing, within 30 days of the date of this order, to revise its methodology consistent with the statement in FPL's answer¹² that to the extent a customer is assessed a penalty for an unreserved use, the customer disputes the penalty and is successful in that dispute, FPL will refund the money with interest to such customer.

17. With respect to late study penalty revenues, these are monies that FPL would be distributing to non-affiliates as a result of studies not being completed in accordance with due diligence deadlines. The Commission has established prescribed fees associated with these penalties, and did not specifically mandate that interest be applied to these revenues.

18. We therefore find that FPL is under no obligation to pay interest on unreserved use penalties or late study penalties except in a situation where unreserved use penalty amounts are retained during a dispute period where the customer ultimately wins the dispute. FPL stated that, and it is required to make a compliance filing with respect to the fact that, in such cases it will refund the money with interest to the customer.

19. We also find FPL's allocation of penalty revenues to be adequately supported. We have determined that FPL's method is one of a number of reasonable methodologies that sufficiently complies with the Commission's requirement regarding unreserved use and late study penalties and FPL is in no way required to adopt the procedures used by Florida Power Corporation. Finally, while the allocation of the fixed costs of a transmission system is typically done on a peak demand basis, there are no comparable computations for the allocation of penalty revenues that would dictate one methodology to be more efficient than another methodology. Accordingly, we accept FPL's compliance filing to be effective February 17, 2009.

¹² FPL's March 20, 2009 Answer at 3.

The Commission orders:

(A) FPL's compliance filing is hereby accepted as filed, effective February 17, 2009.

(B) FPL is hereby directed to make a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.