

138 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Florida Power & Light Company

Docket No. ER10-1149-000

ORDER APPROVING UNCONTESTED SETTLEMENT, AS MODIFIED

(Issued January 30, 2012)

1. On April 30, 2010, Florida Power & Light Company (FP&L) filed revised tariff sheets to implement a cost-of-service formula rate for Network Integration Transmission Service and Point-to-Point service. The proposed formula rate incorporated a true-up mechanism, with interest, to reconcile the projected revenue requirement amounts with the actual cost-of-service. Lee County Electric Cooperative, Inc. filed comments in support of this filing. Florida Municipal Power Agency and Seminole Electric Cooperative, Inc. protested FP&L's filing. On June 29, 2010, the Commission accepted FP&L's tariff sheets for filing, suspended them for a nominal period, subject to refund, and established hearing and settlement judge procedures.¹

2. On September 23, 2011, FP&L, Florida Municipal Power Agency, Seminole Electric Cooperative, Inc., and Lee County Electric Cooperative, Inc. (collectively, the Settling Parties) submitted a settlement agreement and revised tariff sheets in this proceeding.² The Settling Parties state that the settlement (Settlement) resolves all the issues that were set for hearing in this proceeding.³ On September 28, 2011, the Chief Administrative Law Judge granted Settling Parties' motion for interim rate relief and authorized the Settlement rates on an interim basis effective October 1, 2011.⁴

¹ *Florida Power & Light Co.*, 131 FERC ¶ 61,279 (2010).

² Settling Parties September 23, 2011 Settlement Agreement.

³ *Id.* at 1.

⁴ *Florida Power & Light Co.*, Docket No. ER10-1149-000 (Sept. 28, 2011) (unpublished order).

3. On October 28, 2011,⁵ the Administrative Law Judge certified the Settlement as uncontested despite comments submitted by Commission Trial Staff (Trial Staff) that raise concerns about the Settlement. Trial Staff states that it generally does not oppose the Settlement. It does, however, ask the Commission to modify the Settlement in two respects. The Settling Parties filed comments responding to Trial Staff's comments.

4. First, Trial Staff contends that section 3.12 of the Settlement adopts depreciation and amortization rates previously established by the Florida Public Service Commission (Florida Commission).⁶ It expresses concern that "the depreciation and amortization rates for wholesale transmission services will be assumed to have changed" if the Florida Commission modifies these rates in a retail proceeding and the Commission-jurisdictional stated rates agreed to in the Settlement remain unchanged.⁷ While Trial Staff acknowledges that, under Order No. 618⁸ a utility may change its depreciation rates for accounting purposes without Commission approval, it argues that section 3.12 of the Settlement could limit the Commission's ability to monitor FP&L's depreciation practices for use in wholesale services under FP&L's Open Access Transmission Tariff (Tariff).⁹ Trial Staff also believes that some of the language in section 3.12 is unclear. To address its concerns, Trial Staff asks that the Settlement be modified to require a Federal Power Act (FPA) section 205¹⁰ filing to effectuate any changes to depreciation and amortization rates for wholesale services under the Tariff. It asserts that this modification will ensure that changes to such rates "will not be automatically 'deemed' to be the rates approved by the [Florida Commission]."¹¹

5. In response, the Settling Parties argue that acceptance of the Settlement will not result in any change to depreciation rates on file with the Commission. Additionally, they state that the Settlement will permit FP&L to make changes to depreciation rates for accounting purposes but will not permit changes in depreciation rates for accounting

⁵ *Florida Power & Light Co.*, 137 FERC ¶ 63,005 (2011).

⁶ Trial Staff October 13, 2011 Comments at 8 (Trial Staff Comments).

⁷ *Id.* at 9.

⁸ *Depreciation Accounting*, Order No. 618, FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,104 (2000).

⁹ Trial Staff Comments at 9-10.

¹⁰ 16 U.S.C. § 824d (2006).

¹¹ Trial Staff Comments at 10.

purposes to cause any change to wholesale transmission rates.¹² While they acknowledge that the Settlement sets forth depreciation rates in Appendix G, they assert that the Settlement does not provide for their incorporation into the Tariff. Instead, they state that the Settlement provides for “black box” stated rates and that the terms of section 3.12 and Appendix G of the Settlement, “do not reflect an agreement among the Settling Parties concerning any depreciation expense or other cost components that might be derived from the depreciation and amortization rates set forth in Appendix G and reflected in any of the agreed-upon stated rates.”¹³ They state that any changes to the depreciation rates in Appendix G will be for accounting purposes only and will not result in any changes to rates, terms, or conditions under the Tariff. Further, they assert that any proposed changes to depreciation or amortization rates for ratemaking purposes “must be filed pursuant to the FPA.”¹⁴ The Settling Parties also argue that the Settlement is consistent with the settlement approved in FP&L’s last transmission rate case in Docket No. ER93-465-000.¹⁵

6. Trial Staff also takes issue with section 3.8(b) of the Settlement. It argues that this section provides that changes to the rates agreed upon in sections 3.1 through 3.5 of the Settlement that would take effect prior to January 1, 2014 will be subject to the *Mobile-Sierra* “public interest” standard of review.¹⁶ They argue that application of this standard is inconsistent with recent Commission precedent because it allows the *Mobile-Sierra* “public interest” standard to apply to a tariff of general applicability. In response, the Settling Parties argue that the purpose of this provision is to provide for rate stability and certainty. They argue that the Commission should exercise its discretion, consistent with *Devon Power, LLC*,¹⁷ to apply the *Mobile-Sierra* “public interest” standard here.

7. The Settlement addresses all issues that were set for hearing in Docket No. ER10-1149-000. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved, subject to the modification discussed below.

¹² Settling Parties October 24, 2011 Comments at 4 (Settling Parties Comments).

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 7 (citing *Florida Power & Light Co.*, 92 FERC ¶ 61,241 (2000)).

¹⁶ Trial Staff Comments at 10-11.

¹⁷ Settling Parties Comments at 12 (citing *Devon Power, LLC*, 134 FERC ¶ 61,208, at P 9, 16 (2011) (*Devon Power*), *reh’g denied*, 137 FERC ¶ 61,073 (2011)).

8. With regard to the depreciation and amortization rates, we find no reason to modify section 3.12 of the Settlement. The Settlement provides for a stated rate and does not reflect an agreement among Settling Parties concerning any underlying cost components or derivation of the agreed-upon rates. We agree with the Settling Parties that the Settlement:

1) will not result in a change to depreciate rates on file with the Commission; 2) will permit [FP&L] to make changes to depreciation rates for accounting purposes in accordance with its provisions; and 3) will not permit any changes in depreciation rates for accounting purposes to cause any change in wholesale transmission rates.¹⁸

9. With regard to the standard of review, section 3.8(b) of the Settlement provides that:

[t]o the extent that the Commission considers changes to . . . [the rates, terms and conditions described in sections 3.1 through 3.5 of the Settlement] – on its own initiative or pursuant to a filing by a person other than a Settling Party or Non-Opposing Party – and the proposed changes would take effect prior to January 1, 2014, or in the case of Losses, before the later of January 1, 2014, or the effective date of the Commission order approving a change, the standard of review for such proposed changes shall be subject to the “public interest” application of the just and reasonable standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), as clarified in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008) and refined in *NRG Power Mktg. v. Maine Pub. Utils. Comm’n*, 130 S.Ct 693, 700 (2010).¹⁹

10. Section 3.8(b) would impose the *Mobile-Sierra* “public interest” standard of review on proposed changes to the rates, terms, and conditions agreed upon in sections 3.1 through 3.5 of the Settlement that would take effect prior to January 1, 2014

¹⁸ Settling Parties Comments at 4.

¹⁹ Settlement at § 3.8(b). Section 3.8(c) of the Settlement provides that changes to the rates, terms, and conditions described in sections 3.1 through 3.5 of the Settlement that would take effect on or after January 1, 2014 will be subject to the “ordinary” just and reasonable standard.

by the Commission “on its own initiative or pursuant to a filing by a person other than a Settling Party or Non-Opposing Party.”²⁰

11. Because the Settlement provisions to which this standard would apply pertain entirely to FP&L’s Tariff and service provided thereunder, we find that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,²¹ does not apply to the Settlement. As we have stated in several recent orders, in the context of reviewing settlements that do not involve “contract rates,” the Commission has discretion as to whether to approve a request to impose the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard of review.²² The Commission has also stated in those orders that we will not approve imposition of that more rigorous application of the “just and reasonable” standard of review to future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as we found to exist in *Devon Power*. We find that the circumstances surrounding the Settlement do not satisfy that test. In *HIOS*, the Commission found that the requisite compelling circumstances did not exist where the purpose of the Settlement was “simply to resolve an ordinary . . . rate case of general applicability.”²³ Similarly, we find that the Settlement’s resolution of the formula rate implementation matter at issue here does not present compelling circumstances such as we found to exist in *Devon Power*. Thus, we find it unjust and unreasonable to impose the more rigorous application of the “just and reasonable” standard of review in the instant proceeding with respect to future changes to the Settlement by the Commission on its own initiative or pursuant to a filing by a person other than a Settling Party or Non-Opposing Party .

12. While we are requiring the Settlement’s standard of review provision to be modified as discussed above, the Commission continues to recognize the role of settlements in providing rate certainty. The Commission has discretion to initiate FPA

²⁰ *Id.*

²¹ *Morgan Stanley Capital Group, Inc., v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 546 (2008); *NRG Power Mktg. v. Me. Pub. Utils. Comm’n*, 130 S.Ct. 693, 700 (2010).

²² See, e.g., *Devon Power*, 134 FERC ¶ 61,208 (2011). See also *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011); *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011) (*HIOS*).

²³ *HIOS*, 135 FERC ¶ 61,105 at P 24; see also *Duke Energy Carolinas, LLC*, 137 FERC ¶ 61,058, at P 29 (2011).

section 206²⁴ proceedings, either on its own motion or at the request of others.²⁵ In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission would take into account the Settling Parties' interest in maintaining the Settlement.

13. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. This order terminates Docket No. ER10-1149-000.

14. Lastly, because FP&L did not file the Settlement in the eTariff format required by Order No. 714, FP&L is required to make a compliance filing through eTariff to ensure that its electronic tariff data base reflects the Commission's action in this order.²⁶ In its compliance filing, FP&L should request that the Settlement terms and conditions become effective in accordance with the terms of the Settlement.

The Commission orders:

The Settlement filed on September 23, 2011 is hereby approved, subject to FP&L making a compliance filing within 15 days of the issuance of this order to modify the Settlement as directed in the body of this order.

By the Commission. Commissioner Norris is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ 16 U.S.C. § 824e (2006).

²⁵ *General Motors Corp v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979); *Southern Union Gas Co.*, 840 F.2d 964, 968 (D.C. Cir. 1988); *see also Iroquois Gas Transmission System*, 69 FERC ¶ 61,165, at 61,631 (1994); *JMC Power Projects v. Tennessee Gas Pipeline*, 69 FERC ¶ 61,162 (1994), *reh'g denied*, 70 FERC ¶ 61,168, at 61,528 (1995); *aff'd*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at *18.

²⁶ *See Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 96 (2008).

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Florida Power and Light Company

Docket No. ER10-1149-000

(Issued January 30, 2012)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves an uncontested settlement (Settlement) that resolves a dispute over Florida Power & Light Company's cost-of-service formula rate for Network Integration Transmission Service and Point-to-Point Service, subject to the Settlement being revised to not impose the "public interest" standard of review on future changes proposed by the Commission or a person other than a Settling Party or Non-Opposing Party. I agree that the Settlement does not establish "contract rates", and that as a result, the public interest presumption does not apply.¹ For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms and conditions.² Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the Settlement sought by the Commission or a person other than a Settling Party or Non-Opposing Party.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹ *Florida Power & Light Company*, 138 FERC ¶ 61,063, at P 11 (2012).

² *Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

³ *Florida Power & Light Company*, 138 FERC ¶ 61,063 at P 11. I note that I agree with the statement in this order that the Commission "continues to recognize the role of settlements in providing rate certainty," and that when deciding whether to exercise its discretion to initiate Federal Power Act section 206 proceedings, the Commission "would take into account the parties' interest in maintaining the Settlement." *Id.* P 12; *see also Devon Power LLC, Norris, dissenting in part* at 5-6 (noting the Commission's responsibility to take into account the need for certainty and stability and to respect settlements under the usual "just and reasonable" standard).