

153 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

NextEra Energy, Inc.

Docket No. ER15-1843-000

ORDER ON REQUEST FOR WAIVER OF THE AFFILIATE PRICING RULES

(Issued October 20, 2015)

1. On June 2, 2015, NextEra Energy, Inc. (NextEra), on behalf of the companies within its holding company system, filed a request for waiver of sections 35.44(b)(1)¹ and 35.44(b)(2)² of the Commission's regulations to allow affiliates within NextEra's holding company system to continue to price sales of general, administrative and management non-power goods and services to each other at cost following NextEra's proposed acquisition of Hawaiian Electric Industries, Inc. (Hawaiian Electric), which will

¹ 18 C.F.R. § 35.44(b)(1) (2015) ("Unless otherwise permitted by Commission rule or order, and except as permitted by paragraph (b)(4) of this section, sales of any non-power goods or services by a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, including sales made to or through its affiliated exempt wholesale generators or qualifying facilities, to a market-regulated power sales affiliate or non-utility affiliate must be at the higher of cost or market price.").

² 18 C.F.R. § 35.44(b)(2) (2015) ("Unless otherwise permitted by Commission rule or order, and except as permitted by paragraphs (b)(3) and (b)(4) of this section, a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate at a price above market.").

be implemented through a series of merger transactions.³ In this order, we grant the requested waivers of the Commission's regulations, subject to the outcome of the decision of the Hawaii Commission regarding the proposed merger.

I. Background

2. NextEra states that it is a Florida corporation and an energy holding company. NextEra explains that its operations are conducted primarily through its two business units: Florida Power & Light Company (FPL), a traditional, franchised public utility that owns and operates generation and transmission in the State of Florida, and NextEra Energy Resources, LLC (NextEra Resources), a merchant power subsidiary. NextEra states that a third business unit, NextEra Energy Transmission, LLC (NextEra Transmission), owns certain regulated transmission assets.

3. NextEra states that FPL owns approximately 24,000 megawatts (MW) of generation and transmission in peninsular Florida and NextEra Resources currently owns or controls 19,000 MW of generation throughout the United States and Canada. NextEra further states that NextEra Resources' subsidiaries own interconnection facilities that are either solely used to connect to the transmission grid, have an OATT on file, or have received waiver of the Commission's OATT requirements.⁴ NextEra also states that NextEra Transmission owns New Hampshire Transmission, LLC, a public utility that owns the Seabrook Substation, located in New Hampshire, and Lone Star Transmission, LLC, a transmission service provider operating in the Electric Reliability Council of Texas. NextEra also states that NextEra Transmission has been selected in a competitive procurement process to construct two transmission substations in the California Independent System Operator Corporation market.

³ On March 27, 2015, the Commission issued an order authorizing the proposed merger in *Hawaiian Electric Industries, Inc.*, 150 FERC ¶ 62,209 (2015). Currently, an application for approval is pending with the Hawaii Public Utilities Commission (Hawaii Commission). See *In the Matter of the Application of Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., Maui Electric Company, Limited, and NextEra Energy, Inc., For Approval of the Proposed Change of Control and Related Matters*, Docket No. 2015-0022 (Hawaii Commission) (filed Jan. 29, 2015).

⁴ NextEra's June 2 Filing at 3 & nn.3-4.

4. NextEra states that it currently qualifies as a single-state holding company system as defined in 18 C.F.R. § 366.3(c)(1)⁵ because it derives no more than 13 percent of its public-utility company revenues from outside of the State of Florida, excluding revenues from exempt wholesale generators, foreign utility companies, and qualifying facilities. NextEra states that, accordingly, the companies within NextEra's holding company system are eligible to use at-cost pricing for sales of general, administrative and management non-power goods and services to each other consistent with the requirements of 18 C.F.R. § 35.44(b)(4).⁶

5. NextEra states that FPL provides a variety of general, administrative and management non-power goods and services to other companies within the NextEra holding company system at cost. These services include information technology and management; corporate communications systems; engineering and construction management; finance and accounting; legal; human resources; auditing; environmental services; risk management; technical nuclear, power generation, and transmission and distribution support services; federal government affairs; federal regulatory affairs; and compliance responsibility management. NextEra states that, except with respect to the Power Generation Division and the Fleet Performance Diagnostic Center, as described below, the other companies within NextEra's holding company system provide general, administrative and management non-power goods and services back to FPL on a limited basis.

6. NextEra describes the Power Generation Division as a business unit that utilizes centralized outage and maintenance management for its fossil and wind generation fleet. NextEra explains that the Power Generation Division personnel provide services to the FPL generation fleet, the NextEra Resources generation fleet, and unaffiliated third parties in a limited number of instances pursuant to operations and maintenance service agreements. NextEra states that the Power Generation Division is staffed by both FPL and NextEra Resources employees. NextEra represents that the work performed by FPL

⁵ 18 C.F.R. § 366.3(c)(1) (2015) (“[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)”).

⁶ 18 C.F.R. § 35.44(b)(4) (2015) (permitting a company in a single-state holding company to provide general administrative and management non-power goods and services to, or receive such goods and services from, other companies in the same holding company system, at cost, provided that the only parties to such transactions are affiliates or associate companies of a holding company in the holding company system).

employees with respect to NextEra Resources generation is billed to the appropriate NextEra Resources subsidiary at fully loaded cost,⁷ and work performed by NextEra Resources employees with respect to FPL generation is billed to FPL at fully loaded cost. NextEra states that all Power Generation Division services performed for unaffiliated third parties are performed by NextEra Resources employees, and no FPL employees work or provide any services with respect to generation facilities owned by unaffiliated third parties. NextEra further states that the Power Generation Division services included as charges under third party operations and maintenance service agreements (which were negotiated with unaffiliated parties in a market context) are charged at higher than fully loaded cost and the price paid by FPL for these services are always less than the arms-length price paid by third parties under operation and maintenance service agreements.

7. NextEra describes the Fleet Performance and Diagnostic Center as a business unit within the Power Generation Division that monitors critical generation operating parameters using advanced statistical techniques. NextEra states that these monitoring services are provided to the NextEra Resources and FPL generation fleets and a limited number of third parties under NextEra Resources' operations and maintenance service agreements. NextEra represents that the services performed for FPL, NextEra Resources and third parties are solely provided by NextEra Resources' employees. NextEra states that it performed a market study which determined that there was no market for monitoring services or expertise similar to that provided by the Fleet Performance and Diagnostic Center. Accordingly, in the absence of a discernible market price, the monitoring services of the Fleet Performance and Diagnostic Center are charged pursuant to the third party operations and maintenance service agreements as well as to the NextEra Resources and FPL generation fleets at cost.

8. NextEra describes the Power Delivery Division as a business unit tasked with overseeing the transmission and distribution infrastructure within FPL's service territory for NextEra Resources' generation facilities as well as for the limited generation facilities served under third party operations and maintenance service agreements. NextEra states that the NextEra Resources team within the Power Delivery Division includes FPL and NextEra Resources employees. NextEra states that no FPL employees work on any

⁷ NextEra states that "[f]ully loaded cost reflects the total cost including corporate overhead to provide a particular service." NextEra explains that fully loaded cost includes the applicable costs of salary, incentives, commissions, bonuses, and rewards; insurance such as health and life insurance; paid time off; taxes; retirement planning/pension benefits; office space, furniture, and utilities; office equipment such as computers; telecom and internet; operational/functional management and oversight; human resources and administration; finance and payroll; miscellaneous fringe and welfare benefits; training and education; and travel expenses. NextEra's June 2 Filing at 8 n.18.

matters associated with third party operations and maintenance service agreements. In addition, NextEra states that FPL charges NextEra Resources for Power Delivery Division services provided by FPL employees under at-cost pricing (i.e., at fully loaded cost) and NextEra Resources employees do not provide any Power Delivery Division services to FPL.

9. NextEra describes Hawaiian Electric as a publicly traded holding company incorporated in the State of Hawaii whose principal subsidiaries are engaged in electric utility and banking businesses operating exclusively in Hawaii. NextEra states that Hawaiian Electric is the parent company of three vertically integrated utilities, Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited (collectively, the Hawaiian Electric Companies). NextEra states that the Hawaiian Electric Companies are regulated by the Hawaii Commission. NextEra further states the Hawaiian Electric Companies are not subject to Commission regulation as public utilities under the Federal Power Act (FPA) because they provide utility service exclusively within the islands of Hawaii and have no sales for resale within the continental United States.

10. NextEra states that, in addition to the three Hawaiian Electric Companies, Hawaiian Electric also owns the following non-utility subsidiaries: ASB Hawaii, Inc. (ASB) and its wholly owned subsidiary, American Savings Bank, F.S.B (American Savings); HEI Properties, Inc., a company holding venture capital investments; and Hawaiian Electric Industries Capital Trusts II and III, vehicles formed to facilitate preferred security financings for the three Hawaiian Electric Companies. NextEra explains that the acquisition of Hawaiian Electric will be implemented through a series of merger transactions that will result in NextEra indirectly acquiring 100 percent of the shares of Hawaiian Electric and the Hawaiian Electric Companies, as well as HEI Properties, Inc. and Hawaiian Electric Industries Capital Trusts II and III. NextEra notes that prior to closing the merger, ASB and American Savings will be spun-off to Hawaiian Electric's shareholders in a separate, publicly traded company and will have no affiliation with NextEra.

11. NextEra states that, although none of the Hawaiian Electric Companies is a public utility under the FPA, each of the Hawaiian Electric Companies is a "public-utility company" as defined under the Public Utility Holding Company Act of 2005 and as that term is used in the Commission's affiliate pricing rules. Thus, NextEra states that, following the closing of the merger, NextEra will no longer meet the definition of a single-state holding company system under 18 C.F.R. § 366.3(c)(1) because the future revenues of the Hawaiian Electric Companies together with the revenues of NextEra's existing public-utility companies outside of Florida will exceed 13 percent of NextEra's total public-utility company revenues (the large majority of which are generated by FPL within Florida).

12. In addition, NextEra states that, with the loss of single-state holding company status, the members of NextEra's holding company system will no longer be able to use the at-cost pricing exception for affiliate sales of non-power goods and services pursuant to 18 C.F.R. § 35.44(b)(4). Therefore, NextEra seeks a waiver in this proceeding to be able to continue its use of at-cost pricing.

13. NextEra asserts that in Order No. 707-A, which adopted the at-cost pricing exception for single-state holding company systems, the Commission stated that it would be willing to consider requests for waiver on a case-by-case basis for at-cost pricing in the multi-state context, under the same circumstances as for single-state holding companies (i.e., only for general and administrative services and the goods to support those services and only where members of the holding company do not sell such goods and services outside the holding company).⁸ In support of NextEra's request for waiver to continue at-cost pricing, NextEra contends that such waiver is justified because the new potential affiliate relationships that would become subject to the Commission's affiliate pricing rules after the merger are *de minimis*, and that the policy considerations that led the Commission to adopt the at-cost pricing exception in 18 C.F.R. § 35.44(b)(4) for single-state holding companies will continue to apply with respect to NextEra and its holding company system after completion of the merger.⁹

14. NextEra maintains that in establishing the at-cost pricing exception for single-state holding companies, the Commission recognized that defining a market price for general and administrative services is a speculative task and that concern over foregone profits (and thus the requirement to sell goods or services at the higher of cost or market price) does not apply where the utility does not provide those goods or services to non-affiliates.¹⁰ NextEra states that FPL does not sell general, administrative and management services to non-affiliates under at-cost pricing and that in most instances

⁸ *Id.* at 13 (citing *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272, at P 28 (2008)).

⁹ NextEra notes that the waiver of the affiliate pricing rules requested in its petition is similar to the one granted by the Commission in *TECO Energy, Inc.*, 149 FERC ¶ 61,294 (2014) (granting waiver of section 35.44(b)(1) to Tampa Electric Company to permit continued use of at-cost pricing for sales of non-power goods and services to its affiliates when its parent company, TECO Energy, Inc., lost single-state holding company status upon acquisition of a gas distribution company operating in another state).

¹⁰ NextEra's June 2 Filing at 16 (citing Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 at PP 24-25).

FPL would have great difficulty establishing a market price in the future because such services are provided on an integrated basis in support of FPL's regulated operations and because such services are provided with more flexibility than can typically be obtained in a market context. As a condition of this application, NextEra commits that it will continue to ensure that general, administrative and management goods and services sold under at-cost pricing within NextEra's holding company system are not sold to non-affiliates after completion of the merger.¹¹

15. In addition, NextEra notes the Commission's statement in Order No. 707-A that it would not serve the public interest to have rules that create an incentive for a single-state holding company to incur additional costs to set up a separate centralized service company (that would be allowed to use at-cost pricing) to provide the very same services and the goods to support those services that could be provided more inexpensively, e.g., through the investor-owned utility, without a centralized service company.¹² NextEra contends that it would take substantial time, effort and cost to extract and move the employees and systems involved in providing general, administrative and management non-power goods and services from their present locations within NextEra's holding company system and reorganize them in a centralized service company and this change would not produce any cost savings other than those already being realized.

16. NextEra maintains that the Commission permitted a special pricing rule for single-state holding company systems in part because it believed that the purchase and sale of general and administrative goods and services by franchised public utilities would be susceptible to appropriate state oversight. NextEra notes that the Florida Administrative Code prescribes rules for sales and purchases of non-power goods and services to and from affiliates by FPL and other utilities subject to the jurisdiction of the Florida Public Service Commission (Florida Commission).¹³ NextEra adds that the Florida Commission is able to monitor FPL's compliance with those rules through review of a comprehensive report on all affiliate contracts that FPL is required to submit each year. NextEra further states that under Hawaii law each of the Hawaiian Electric Companies is required to file any contract for the sale or purchase of non-power goods or services with an affiliate having a value of \$300,000 or more with the Hawaii Commission for review. Therefore, NextEra asserts that after the merger, any affiliate contracts entered into by any traditional utility within NextEra's holding company system will be subject to state commission review, and no regulatory gap will exist.

¹¹ NextEra's June 2 Filing at 16.

¹² *Id.* at 17-18 (citing 707-A, FERC Stats. & Regs. ¶ 31,272 at P 26).

¹³ *Id.* at 19 (citing Rule 25-6.1351 of the Florida Administrative Code).

17. Lastly, NextEra asks the Commission to clarify that, after the merger, the members of NextEra's holding company system will be permitted to continue the use of at-cost pricing for general, administrative and management non-power goods and services as long as NextEra does not receive more than 13 percent of its public utility company revenues from outside a single state, but excluding from this 13 percent calculation: (i) public-utility company revenues received through the three Hawaiian Electric Companies that will become part of NextEra's holding company system; and (ii) revenues received from exempt wholesale generators, foreign utility companies, and qualifying facilities (consistent with the exclusion of the revenues of such entities under section 366.3(c)(1)). NextEra states that this clarification will ensure that NextEra has "headroom" to continue its ongoing transmission development activities after the merger without the need to file a waiver for each new transmission project that it constructs.¹⁴

II. Notice of Filing

18. Notice of NextEra's June 2, 2015 filing was published in the *Federal Register*,¹⁵ with interventions and protests due on or before June 23, 2015. On June 18, 2015, the Hawaii Commission filed a notice of intervention and comments. On July 2, 2015, NextEra filed an answer in response to the Hawaii Commission's comments.

19. In its comments, the Hawaii Commission states that, at this point, the Hawaii Commission has made no determination that it will either approve or reject the proposed merger and that NextEra's filing in this proceeding appears to be premature. The Hawaii Commission informs the Commission that no decision concerning the proposed merger will be rendered until sometime during 2016. The Hawaii Commission asserts that the Commission should consider deferring making a decision until such time as the Hawaii Commission renders a final order concerning the proposed merger.

20. In response to the Hawaii Commission, NextEra asks the Commission not to defer consideration of NextEra's filing. NextEra contends that if the Hawaii Commission grants approval of the merger, the parties will need to be positioned to close the merger soon thereafter. NextEra states that it does not object to the Commission making any approval in this proceeding explicitly contingent upon approval of the proposed merger by the Hawaii Commission.

¹⁴ *Id.* at 2.

¹⁵ 80 Fed. Reg. 32,557 (2015).

III. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notice of intervention filed by the Hawaii Commission serves to make it a party to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NextEra's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

23. The Commission's pricing rules for affiliate transactions provide that unless otherwise permitted by Commission rule or order, the sale of non-power goods or services to a market-regulated power sales affiliate or a non-utility affiliate from a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities "must be at the higher of cost or market price."¹⁶ Also, unless otherwise permitted by Commission rule or order, a franchised public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities may not purchase or receive non-power goods and services from a market-regulated power sales affiliate or a non-utility affiliate "at a price above market."¹⁷ The Commission's regulations further specify that a company in a single-state holding company system may provide or receive such non-power goods and services from its affiliates at cost.¹⁸ In Order No. 707-A, the Commission stated it would "consider requests for waiver on a case-by-case basis for at-cost pricing in the multi-state context, under the same circumstances as for single state holding companies (i.e., only for general and administrative services and the goods to support those services and only where members of the holding company do not sell such goods and services outside the holding company)."¹⁹

¹⁶ 18 C.F.R. § 35.44(b)(1).

¹⁷ 18 C.F.R. § 35.44(b)(2).

¹⁸ 18 C.F.R. § 35.44(b)(4).

¹⁹ Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 at P 28.

24. If the proposed merger is consummated, NextEra will no longer qualify under section 35.44(b)(4) of the Commission's regulations for the at-cost pricing exception for affiliate sales of non-power goods and services as described in its application. Therefore, NextEra requests waiver of sections 35.44(b)(1) and 35.44(b)(2) of the Commission's regulations. Based on the information NextEra has provided, we grant the requested waiver, subject to the outcome of the Hawaii Commission's decision regarding the proposed merger. Based on NextEra's representations, we find that granting the request for waiver will not result in inappropriate cross-subsidization. NextEra commits that it will continue to ensure that general, administrative and management goods and services sold under at-cost pricing within NextEra's holding company system are not sold to non-affiliates after completion of the merger. Additionally, we note NextEra's representation that affiliate contracts entered into by traditional utilities within NextEra's holding company system will be subject to state commission review.²⁰

25. The waiver granted herein is based on the specific facts and representations made by NextEra. To the extent that there is any material change in circumstances that would reflect a departure from the facts and representations that we have relied upon in granting the requested waiver, NextEra will be required to inform the Commission within 30 days of any such change. Further, we direct NextEra to notify the Commission of the Hawaii Commission's decision, within 30 days of the date of its decision. If the Hawaii Commission approves the merger, then the NextEra companies must also submit a compliance filing containing revisions to the limitations and exemptions sections of their market-based rate tariffs to include a citation to this order.²¹

26. Finally, we dismiss as unnecessary NextEra's request for clarification that revenues received from the Hawaiian Electric Companies may be excluded from the calculation of the percentage of NextEra's out-of-state public-utility company revenues. As indicated, NextEra argues that the requested clarification would ensure that NextEra has "headroom" to continue its ongoing transmission development activities outside

²⁰ See *National Grid USA*, 133 FERC ¶ 61,241, at P 36 (2010) (citing state review of affiliate contracts as the basis for finding that waiver of section 35.44(b)(1) would not result in inappropriate cross-subsidization).

²¹ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 384, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

Florida without the need to file a waiver request for each new transmission project that NextEra may develop. However, granting the clarification is unnecessary since nothing in section 35.44 would preclude FPL, NextEra's only franchised public utility with captive customers, from using at-cost pricing for the sale or purchase of non-power goods and services to or from any existing or future transmission-only affiliates, whether or not NextEra qualifies as a single-state holding company system. Section 35.44(b)(1) and (b)(2) mandate the use of asymmetrical pricing for non-power goods and services only when a franchised public utility that has captive customers or that owns or provides transmission service sells or purchases non-power goods and services to or from a market-regulated power sales affiliate or non-utility affiliate. NextEra's transmission-only subsidiaries are not market-regulated power sales affiliates or non-utility affiliates. Thus, nothing in section 35.44 would preclude FPL from using at-cost pricing for non-power goods and services with any such affiliates, or necessitate the filing of any new waiver requests each time NextEra develops a new out-of-state transmission-only affiliate.

The Commission orders:

(A) NextEra's request for waiver of the affiliate restrictions under sections 35.44(b)(1) and 35.44(b)(2) of the Commission's regulations is hereby granted, as discussed in the body of this order, subject to the outcome of the decision of the Hawaii Commission regarding the proposed merger.

(B) NextEra's request for clarification regarding the exclusion of revenues received from the Hawaiian Electric Companies from the calculation of the percentage of NextEra's out-of-state public-utility company revenues is dismissed, as discussed in the body of this order.

(C) The NextEra companies with market-based rate authority are hereby directed to submit a compliance filing, as discussed in the body of this order.

(D) NextEra must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts and representations the Commission relied upon in granting the waivers herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.