

147 FERC ¶ 61,236
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Seminole Electric Cooperative, Inc.
and Florida Municipal Power Agency

Docket No. EL12-39-000

v.

Florida Power Corporation

ORDER ON COMPLAINT AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued June 19, 2014)

1. On February 29, 2012, Seminole Electric Cooperative, Inc. (Seminole) and the Florida Municipal Power Agency (FMPA) (collectively, Complainants) filed a complaint against Florida Power Corporation (Florida Power) pursuant to sections 206, 306 and 309 of the Federal Power Act (FPA)¹ and rule 206 of the Commission's regulations,² alleging that the current 10.8 percent base return on equity (ROE) in Florida Power's transmission formula rate (Formula Rate) is unjust and unreasonable and should be replaced with a just and reasonable ROE of 9.02 percent. In this order we establish hearing and settlement judge procedures. Further, we establish a refund effective date of February 29, 2012.

I. Background

2. Florida Power recovers its transmission revenue requirements through a Formula Rate included in its Open Access Transmission Tariff (OATT). The transmission rate formula resulted from a settlement between Florida Power and its customers, including Complainants (Rate Settlement). On December 17, 2007, the Commission approved the Rate Settlement, which provided for a ROE of 10.8 percent.³ Under the Rate Settlement,

¹ 16 U.S.C. §§ 824e, 825e, 825h (2012).

² 18 C.F.R. § 385.206 (2013).

³ *Florida Power Corp.*, Docket No. ER08-105-000 (Dec. 17, 2007) (delegated

(continued...)

the ROE remained fixed until the end of a rate moratorium (December 31, 2011), at which time either Florida Power or its customers could seek to change the ROE under either section 205 or 206 of the FPA.

II. The Complaint

3. Complainants assert that, due to significant changes in market conditions occurring since the Rate Settlement was filed, the 10.8 percent base ROE currently used in Florida Power's Formula Rate has become unjust and unreasonable. Complainants assert that their expert witness performed a discounted cash flow (DCF) analysis that shows that the zone of reasonableness ranges from 6.95 percent to 11.58 percent with a median of 9.02 percent. Complainants argue that a just and reasonable base ROE should not exceed 9.02 percent, which is 178 basis points lower than the current base ROE.

4. Complainants assert that their witness' DCF analysis conforms to Commission policy and precedent and results in a national proxy group of 18 companies.⁴ The analysis eliminates two low-end ROE outliers⁵ consistent with the 100 basis point utility bond yield test. The analysis also excludes Integrys Energy Group, Inc. (Integrys), which has a high-end ROE estimate of 15.42 percent, as an extreme outlier that exceeds the next highest ROE in its proxy group (Sempra Energy) by 384 basis points.

5. Complainants assert that the reduction from a 10.8 percent ROE to a 9.02 percent ROE would yield a substantial decrease in transmission rates for Seminole and FMPA of \$3 million and \$500,000, respectively. Complainants request that the Commission set a refund effective date coincident with the date of filing of the complaint and either summarily lower the ROE from 10.8 percent to 9.02 percent (with appropriate refunds) or, in the alternative, hold a paper hearing.

6. Complainants also state that additional rate adjustments will be required under the procedures set forth in the Rate Settlement. Complainants assert that the complaint was

letter order).

⁴ Complainants selected the proxy group using the following screening criteria: (1) classified as an electric utility in *Value Line*; (2) having an investment grade bond rating by Standard & Poor's (S&P) and Moody's; (3) currently paying and expected to continue paying a dividend, with no dividend cuts in the past year; (4) having a Thomson Financial/IBES published analysts' consensus 5-year earnings per share growth rate; (5) not engaged in any major merger or acquisition activity; and (6) being followed by at least two generally recognized industry analysts.

⁵ PG&E Corporation (5.74 percent) and Public Service Enterprise Group (4.24 percent).

filed when the annual update “was not yet final”⁶ and therefore a favorable ruling by the Commission is controlled by section 4 of the Formula Rate Implementation Protocols (Protocols).⁷ Complainants argue that, under section 4(d) of the Protocols, the changes resulting from the complaint should be effective on June 1, 2011 and should be applied to the true-up for 2010.⁸ Complainants further assert that the existing moratorium in the Rate Settlement does not preclude rate adjustments since the moratorium only expressly limits when customers may file a section 206 complaint.

III. Notice and Responsive Pleadings

7. Notice of the complaint was published in the *Federal Register*, 77 Fed. Reg. 13,589 (2012), with interventions and protests due on or before March 20, 2012. On March 20, 2012, Florida Power filed a motion to dismiss the complaint and a motion for summary disposition. Florida Power also filed its answer to the complaint on March 20, 2012.

8. North Carolina Electric Membership Corporation and Reedy Creek Improvement District filed timely motions to intervene. Complainants filed an answer to Florida Power’s motion to dismiss on March 23, 2012 and submitted a response to Florida Power’s answer on March 30, 2012. Florida Power submitted a response to Complainants’ response on April 13, 2012, and Complainants filed an answer to that response on April 18, 2012. Florida Power filed an additional response on April 26, 2012 and Complainants filed an answer to that response on April 27, 2012. On March 7, 2013, Complainants filed a motion seeking action on the Complaint.

A. Florida Power’s Motion to Dismiss and Answer

9. Florida Power moves to dismiss the complaint. Florida Power contends that the complaint is procedurally deficient and was not appropriately served on the Florida Public Service Commission (Florida Commission) as required under Rule 206(c) of the

⁶ Complainants February 29, 2012 Complaint at 10-11 (stating that the annual update is not final under Section 3(e) of the Protocols since 12 months have not passed since publication date of the annual update and the Commission has not issued a final order in response to a Formal Challenge or a proceeding issued by the Commission).

⁷ *Id.* (referencing section 4(d) of the Protocols).

⁸ *Id.* at 11 (stating that the annual update was performed in 2011 and 2010 was the calendar year upon which the annual update was based).

Commission's Rules of Practice and Procedure.⁹ In the alternative, Florida Power requests that the Commission require Complainants to serve the Florida Commission with the complaint, require the Complainants to notify the Commission that it has completed the proper service, and reissue the notice of complaint in the Federal Register for the twenty-day comment period, in order to fully preserve the rights of the Florida Commission. Florida Power also requests that the refund effective date be established coincident with the date that the Complainants served the complaint on the Florida Commission.¹⁰

10. In its answer, Florida Power requests that the complaint be summarily dismissed, stating that the 10.8 percent base ROE remains just and reasonable. Florida Power asserts that Complainants failed to establish that: (1) Florida Power's existing 10.8 percent ROE is no longer just and reasonable; and (2) Complainants' proposed ROE of 9.02 percent is just and reasonable. Instead, Florida Power argues that Complainants have merely established that the existing ROE is higher than the median ROE they pinpoint in their DCF analysis. Florida Power asserts that the existing 10.8 percent ROE is well within Complainants' own range of reasonableness and therefore the Commission should grant summary disposition for failure to meet the burden of proof that section 206 of the FPA requires.

11. Additionally, Florida Power asserts that Complainants' proposed ROE of 9.02 percent is based on a flawed analysis. Specifically, Florida Power asserts that Complainants' analysis: (1) improperly used a Moody's rating screen, which is not consistent with Commission policy and is not supported by the facts; (2) improperly used and deviated from a \$1 billion revenue criterion for the proxy group,¹¹ and (3) improperly excluded Integrys in its proxy group based on its 15.42 percent cost of equity. Florida Power asserts that, if the complaint is not summarily dismissed, "[a] hearing concerning the ROE would be appropriate and consistent with the Commission's long-standing

⁹ 18 C.F.R. § 385.206(c) (2013) ("Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint.").

¹⁰ Florida Power March 20, 2012 Motion to Dismiss at 4.

¹¹ While Florida Power claims that the Complainants did not adequately support their use of a \$1 billion revenue criterion, Complainants state that, "if they had used that screen, it would have eliminated only one company." Therefore, the Complainants did not use the screen, but instead mentioned that use of the screen would result in one company being eliminated. *See* Complainants March 23, 2012 Response at 10.

policy of setting utilities' proposed rates of return for hearing, and its recognition of ROE as a 'uniquely factual issue.'"¹²

12. If the Commission sets the case for hearing, Florida Power argues that it should establish a refund effective date that is consistent with section 206 of the FPA.¹³ Florida Power asserts that section 3(f) of the Protocols binds Complainants to the section 206 refund effective date and refund requirements in the event they seek to amend the Formula Rate. Florida Power further asserts that the section 4(d) refund provisions for the annual update process do not apply to a section 206 complaint to amend the Formula Rate, and are therefore inapplicable in the instant proceeding. Florida Power also claims that the ROE was fixed until the rate moratorium ended on December 31, 2011.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to the answers and will, therefore, reject them.

15. We will not grant Florida Power's motion to dismiss the complaint. Florida Power was served appropriately. Florida Power has not demonstrated that it has suffered any prejudice as a result of Complainants' failure to serve the Florida Commission. Further, under Rule 206(c), failure to serve does not necessarily require dismissal of a complaint. In any event, the Commission issued a notice of the complaint, and such notice was published in the Federal Register.¹⁴

¹² Florida Power March 20, 2012 Answer at 7 (citing *CNG Trans. Corp.*, 67 FERC ¶ 61,030, at 61,098 (1994)).

¹³ *Id.* at 32 (citing 16 U.S.C. § 824e(b) (2012) (stating that "[i]n the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint.")).

¹⁴ *Cf. Borough of Chambersburg, PA v. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,219, at P 58 (2006).

B. Commission Determination

16. We find that the complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA. We note that the Commission is issuing Opinion No. 531, the order on initial decision in Docket No. EL11-66-001, concurrently with this order.¹⁵ In Opinion No. 531, the Commission is changing its practice for determining the ROE for public utilities. Accordingly, we expect the evidence and any DCF analyses presented by the participants in this proceeding to be guided by our decision in Opinion No. 531.

17. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

18. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Consistent with our general policy of providing

¹⁵ See *Martha Coakley, Mass. Attorney Gen., et al v. Bangor Hydro-Elec. Co., et al.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014).

¹⁶ 18 C.F.R. § 385.603 (2013).

¹⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

maximum protection to customers,¹⁸ we will set the refund effective at the earliest date possible, i.e., February 29, 2012, the date of the complaint, as further discussed below.

19. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within 12 months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by June 30, 2015. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or by April 30, 2016.

20. With regard to whether additional rate adjustments are required before the refund effective date of February 29, 2012, Complainants argue that additional rate adjustments are required for calendar years 2010 and 2011 under section 4 of the Protocols. Specifically, they argue that changes resulting from the complaint should be effective on June 1, 2011, and should be applied to the true-up for 2010. Florida Power disagrees that the Protocols require additional rate adjustments. Instead, Florida Power asserts that section 4 of the Protocols concerns changes to an Annual Update and is not applicable to a section 206 complaint to amend the Formula Rate. Florida Power further asserts that section 3(d) of the Protocols, which cross-references the refund protections in section 4, applies only to the resolution of challenges to the Annual Update. Thus, Florida Power argues that Complainants should not receive the benefit of the refund provisions of sections 3 and 4 of the Protocols.

21. Section 3 (Resolution of Challenges) of the Protocols states, in relevant part:

d. In any proceeding initiated under Federal Power Act Section 206, interested parties seeking to change the Formula Rate shall bear the burden of proof. Notwithstanding any refund effective date that may be assigned to such Section 206 proceeding, any change to the Formula Rate or input data that results from such Section 206 proceeding, which was filed during the period when an Annual Update was not yet final pursuant to Section 3(e), shall be implemented using the same procedures included in Section 4.

¹⁸ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

f. Except as provided in Section 1.h,¹⁹ no interested party may seek to amend the Formula Rate by means of a Preliminary or Formal Challenge. Except as specifically provided herein, nothing herein shall be deemed to limit in any way (i) the right of the Transmission Provider to file unilaterally, pursuant to FPA Section 205 and the regulations thereunder, proposed changes to the Formula Rate or any of its inputs that are stated values, or (ii) the right of any interested party to request such changes pursuant to FPA Section 206 and the regulations thereunder.

22. Section 4 (Changes to Annual Informational Filings) of the Protocols states, in relevant part:

d. All refunds and additional charges to Transmission Customers resulting from changes to an Annual Update (including, but not limited to, changes resulting from a Section 206 filing pursuant to Section 3.d) shall include interest determined in accordance with 18 C.F.R. § 35.19a and (a) shall be effective on June 1 of the year in which the Annual Update was performed; and (b) shall be applied to the true up for the calendar year upon which the Annual Update is based. All such refunds and additional charges shall also appropriately take into account refunds and additional charges, if any, that shall have previously been made in connection with prior changes, if any, to the subject Annual Update.

23. We find that section 4(d) of the Protocols is ambiguous to the extent that it refers to both “changes to an Annual Update” and “changes resulting from a Section 206 filing pursuant to Section 3.d.” Accordingly, we find that the issue of whether additional rate adjustments will be required before the refund effective date of February 29, 2012, raises

¹⁹ Section 1(h) of the Protocols states:

Any interested party seeking changes in the application of the Formula Rate (including a change in the Formula Rate itself) due to a change in one or more of the Fundamental Predicates shall raise the matter with the Transmission Provider. If such changes to the application of the Formula Rate for the current Annual Update are not resolved within one hundred and twenty (120) days of the Publication Date, any interested party shall have the right to challenge such application of the Formula Rate, in the manner otherwise provided pursuant to this Schedule 10.1, due to the change(s) in such Fundamental Predicates. The final resolution of any such challenge(s), including interest calculated in accordance with 18 C.F.R. § 35.19a, (a) shall be effective on June 1 of the year in which the Annual update was performed; and, (b) shall be applied to the true up for the calendar year upon which the Annual Update is based.

issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

The Commission Orders

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the complaint. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(E) The refund effective date established in Docket No. EL12-39-000 pursuant to section 206(b) of the FPA will be February 29, 2012, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.