

DE 03-186

FLORIDA POWER & LIGHT COMPANY

Petition for Declaratory Ruling

Order Following Pre-Hearing Conference

O R D E R N O. 24,220

October 23, 2003

APPEARANCES: Joel D. Newton, Esq. and Orr & Reno, P.A. by Douglas L. Patch, Esq. for Florida Power & Light Company; Robert A. Bersak, Esq. for Public Service Company of New Hampshire; Devine, Millimet & Branch, P.A. by Mark W. Dean, Esq. for New Hampshire Electric Cooperative, Inc.; Office of Consumer Advocate by Kenneth Traum on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On September 10, 2003, the Federal Energy Regulatory Commission (FERC) granted a petition by FPL Energy Seabrook, LLC (FPLE Seabrook) and Florida Power & Light Company (FP&L) for authority pursuant to 16 U.S.C. § 824b (Section 203 of the Federal Power Act) to transfer to FP&L the interest presently owned by its affiliate FPLE Seabrook in the transmission substation located at the Seabrook nuclear power plant. See *FPL Energy Seabrook, LLC*, 104 FERC ¶ 61,258 (Sept. 10, 2003) (FERC Order). The New Hampshire Public Utilities Commission (Commission) intervened in the proceedings leading to the FERC Order, noting that it is unresolved whether such a transfer would subject FP&L to regulation as a public utility under New Hampshire law. The FERC indicated that FP&L's "commitment to

resolve this state jurisdictional issue with [the Commission] prior to closing, and to provide [the FERC] with documentation once a determination is made," satisfies the FERC's regulations. FERC Order at ¶ 24.

Accordingly, FP&L filed a petition for declaratory order with the Commission on September 23, 2003. FP&L requested a Commission determination that it would be exempt from regulation as a New Hampshire public utility in light of RSA 362:4-c, which defines an exemption from Commission regulation for certain generation and generation-related facilities. In the alternative, FP&L requested a determination that it be subject only to very limited regulation, either as a foreign electric utility pursuant to the applicable provisions of RSA 374.

Appended to the FP&L petition was a motion for a waiver of the requirement in rules Puc 202.11(a) and 204.01(b) that petitions be accompanied by pre-filed direct testimony and exhibits. According to FP&L, in light of its position on RSA 362:4-c, pre-filed testimony is inapplicable and would serve no purpose.

The Commission entered an Order of Notice on September 29, 2003, scheduling a Pre-Hearing Conference for October 16, 2003 and establishing a deadline for intervention petitions. The Commission received requests for intervention from Public

Service Company of New Hampshire (PSNH) and the New Hampshire Electric Cooperative, to which there were no objections. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers on October 13, 2003. The Pre-Hearing Conference took place as scheduled, at which time the Commission granted the pending intervention petitions.

Following the Pre-Hearing Conference, the parties and Commission Staff conducted a technical session; Staff submitted a report of the technical session on October 17, 2003.

II. POSITIONS OF THE PARTIES AND STAFF

A. Florida Power & Light Company

FP&L argued at the Pre-Hearing Conference that it is exempt from Commission regulation by virtue of the plain language of the exemption contained in RSA 362:4-c. In the alternative, FP&L urged the Commission to craft appropriate terms and conditions for Commission regulation of FP&L as a foreign electric utility under RSA 374.

According to FP&L, having the Seabrook substation owned by a separate transmission entity (as opposed to being retained by the owner of the majority interest in Seabrook station, FPLE Seabrook) is consistent with the Electric Industry Restructuring Act, RSA 374-F, as well as the standards of conduct approved by the FERC. FP&L further argued that permitting such a transaction to go forward with little or no

regulation under state law would enhance competition in the electric industry, particularly given that such transmission entities are extensively regulated at the federal level. FP&L requested an expedited determination from the Commission.

Responding to certain statements in PSNH's intervention petition, FP&L took the position that claims of adverse rate impacts from the transfer are premature and speculative. According to FP&L, the relevant determinations will be made by the FERC at a later date. FP&L characterized as a "side issue" the question of whether it should pay an assessment pursuant to RSA 363-A with respect to the Commission's expenses. According to FP&L, if it is determined to be a New Hampshire public utility, it will pay an appropriate assessment.

Further responding to PSNH's stated position at the Pre-Hearing Conference, FP&L contended that once it acquires the transmission substation and begins recovering on it in transmission rates, these rates as assessed against New Hampshire electric utilities (and, thus, New Hampshire customers) will actually be lower than they were under the ownership that preceded the FP&L Seabrook acquisition. According to FP&L, this is because under the prior ownership a greater portion of the substation was included in Local Network

Service rates, as opposed to Regional Network Service rates that are socialized across the entire New England electric grid.

FP&L conceded that the substation serves a dual purpose - i.e., interconnecting Seabrook station with the transmission grid and providing a key transmission link along the north-south interface connecting Maine, New Hampshire and Massachusetts. FP&L indicated that it would be willing to have the proceeding bifurcated, so that the Commission can first decide the RSA 362:4-c question and then proceed to additional issues if necessary.

B. Public Service Company of New Hampshire

PSNH sought to focus the Commission's attention on what it characterized as the unstated but real basis of FP&L's petition: FP&L's desire to recover on the Seabrook substation in transmission rates. PSNH pointed out that, unlike FP&L, FPLE Seabrook is an Exempt Wholesale Generator (EWG) under the federal Public Utility Holding Company Act and thus unable to include the Seabrook substation in transmission rates.

According to PSNH, when FPLE Seabrook purchased its controlling interest in Seabrook Station from PSNH affiliate North Atlantic Energy Company (and, with it, PSNH's commensurate entitlement to Seabrook power) FPLE Seabrook knew or should have known that it would be unable to recover on the substation in transmission rates. Thus, according to PSNH, FPLE already

reduced its successful bid for the plant, the proceeds from which were used to offset stranded costs that PSNH would otherwise recover from its retail customers. PSNH therefore reasons that granting the FP&L petition here would, in effect, force PSNH customers to pay for the substation twice - once via the reduction in FPLE Seabrook's bid and second via the transmission rate recovery facilitated by the granting of the instant petition.

PSNH concedes that when the majority interest in Seabrook station was owned by a PSNH affiliate, the substation was included in transmission rates. However, according to PSNH, allowing the new owner to take the same step would lead to higher rates than those paid prior to the transfer to FPLE Seabrook, because part of the FPLE Seabrook interest in the substation was previously owned by two EWGs - Great Bay Power Company and Little Bay Power Company - that were not eligible for transmission rate recovery.

According to PSNH, the owners of merchant generation plants may recover their expenses and reap a return on their investments from the wholesale energy market. By contrast, in PSNH's view, FP&L and its affiliate FPLE Seabrook are seeking "the best of both worlds" - the kind of exemption from regulation as a public utility enjoyed by merchant generators, but the ability to recover via wholesale tariffs enjoyed by regulated

transmission entities. Such a "scheme," according to PSNH, has "severe public interest implications."

PSNH noted that when FPLE Seabrook purchased its interest in Seabrook Station, a condition of the sale was FPLE Seabrook's purchase of station service from PSNH. PSNH expressed the concern that, because the transfer of the substation to FP&L would interpose a new entity between Seabrook Station and PSNH's distribution system, FPLE Seabrook would thereby contend that it is relieved of its station service obligation - a development that would have a significant impact on PSNH's revenue and, thus, on PSNH's remaining customers. PSNH expressed a similar concern about the transmission support payments presently being made by FPLE Seabrook.

C. New Hampshire Electric Cooperative, Inc.

The NHEC indicated that it was still developing its position with respect to the FP&L petition. However, the NHEC contended that the Commission must assess possible rate impacts in the event it is determined that the Commission will be making a public interest determination. According to the NHEC, the Commission should treat the FP&L petition as a request for declaratory judgment only as to the threshold question - i.e., the applicability of RSA 362:4-c.

D. Office of Consumer Advocate

The OCA expressed concerns about the potential rate impacts of the planned transfer of the substation.

E. Staff

The Commission Staff indicated that it takes no position on the merits of the FP&L petition. However, Staff urged the Commission to keep in mind the question of whether it is appropriate for a Florida utility with no connection to New Hampshire other than its affiliation with FPLE Seabrook to own a small but key portion of the state's electric transmission grid. According to Staff, this policy question informs both the determination as to the meaning and intent of RSA 362:4-c as well as any public interest determinations to be made in the event the RSA 362:4-c does not apply.

III. PROCEDURAL SCHEDULE

At the Pre-Hearing Conference, the Commission asked the parties to consider whether they could develop a statement of stipulated facts that would allow the Commission to decide the RSA 362:4-c question without conducting an evidentiary hearing or requiring FP&L to submit pre-filed direct testimony. However, in its report of the ensuing technical session, Staff indicated that the parties and Staff agreed not to present a set of stipulated facts to the Commission.

According to Staff's letter, the parties and Staff agreed that the docket should be conducted in two phases: (1) a determination of whether FP&L would be exempt from regulation as a New Hampshire public utility under RSA 362:4-c as the owner of the Seabrook substation, and (2) assuming no such exemption, determinations as to the other issues raised in the FP&L petition.

In lieu of presenting stipulated facts, the parties and Staff proposed the following procedural schedule:

Pre-filed direct testimony	Oct. 24, 2003
Merits Hearing	Oct. 29, 2003, 9:00 to noon
Briefs	Nov. 12, 2003
Reply briefs	Nov. 21, 2003

The parties and Staff further agreed to request that the Commission enter an order resolving the first phase of the docket by December 8, 2003. According to Staff's letter, the parties and Staff agreed that the relevant factual question at the October 29 hearing would be: What, if any, of the facilities to be transferred by FPLE Seabrook to FP&L are facilities that interconnect Seabrook Station to the electric transmission grid? The proposal includes a recommendation that the Commission schedule a status conference to determine what further proceedings would be necessary, in the event the

Commission determines that FP&L is not exempt from regulation pursuant to RSA 362:4-c.

We approve this proposed schedule as reasonable and consistent with the public interest. It is our assumption that by joining this proposal, the other parties are waiving any objection to the lack of pre-filed direct testimony accompanying the FP&L petition. Thus we grant FP&L's request for waiver of the applicable rules because such waiver serves the public interest and will not disrupt the orderly proceeding of the Commission. See Puc 201.05.

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule outlined above is APPROVED; and it is

FURTHER ORDERED, that the motion of Florida Power & Light Company for waiver of Puc 202.11(a) and 204.01(b) is GRANTED.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of October, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary