ORAL ARGUMENT IS SCHEDULED FOR MARCH 22, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1116

FLORIDA MUNICIPAL POWER AGENCY
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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DECEMBER 1, 2004
FINAL BRIEF: FEBRUARY 1, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties and amici are as stated in the brief of the Florida Municipal Power Agency.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Florida Power & Light Company*, Docket Nos. ER93-465, *et. al*, 105 FERC ¶ 61,287 (December 16, 2003) and

2. *Florida Power & Light Company*, Docket Nos. ER93-465, *et. al*, 106 FERC ¶ 61,204 (March 3, 2004).

C. Related Cases:

This case is a review of Commission orders issued in a Florida Power & Light Company rate case. That case was the subject of a mandamus petition in *In re: Florida Municipal Power Agency*, D.C. Circuit Docket No. 03-1059. The mandamus case was dismissed on May 19, 2004. There are no related cases pending judicial review.

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Judith A. Albert
Attorney

February 1, 2005

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GLOSSARY

behind the meter	generation (or transmission) located on the customer's side of the point of delivery
load	the total demand for service on a utility system at any given time
FERC	Federal Energy Regulatory Commission
FMPA	Florida Municipal Power Agency
FPA	Federal Power Act
FPL	Florida Power & Light Company
network service	service which permits a transmission customer to use the entire transmission network to provide service for specified resources and loads
OATT	open access transmission tariff
Point-to-point service	transmission service reserved and/or scheduled between specified points of receipt and delivery
TAPS	Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000)

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Commission appropriately rejected Petitioner's latest iteration of its oft-repeated efforts to have behind-the-meter generation treated specially in network integration transmission service ratemaking, based on: (1) FERC's prior resolution of the proper treatment of this generation in two proceedings in which Petitioner participated, and (2) the availability of alternative (point-to-point) transmission service if the previously approved network service terms were unacceptable to Petitioner.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in Addendum A to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This is the latest chapter in a long-running dispute between Florida Municipal Power Authority ("FMPA"), a public agency which sells electric power for its 29 member cities, and Florida Power & Light Company ("FPL"), a public utility, over the rates FPL may charge FMPA for network integration transmission service. In an earlier chapter, the so-called "TX Case," FERC orders (affirmed by this Court) directed FPL to provide network integration service to FMPA and, *inter alia*, to adopt load ratio pricing for the service.[1]

The instant case, known as the "Rate Case," initiated about the same time and running parallel to the TX Case, addressed FPL's comprehensive overhaul of its transmission tariff. The orders under review, *Florida Power & Light Company*, 105 FERC ¶ 61,287 (Dec. 16, 2003) ("First Order") (R 84, JA 2);[2] and *order*

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[1] *See, Florida Municipal Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003), *reh'g denied*, Case No. 01-1381 (D.C. Cir. March 28, 2003), *cert. denied*, 124 S. Ct. 386 (2003) ("*FMPA v. FERC*").

[2] "R" refers to the record item number in the Certified Index to the Record. "JA" refers to the Joint Appendix page number.

denying rehearing, 106 FERC ¶ 61,204 (Mar. 3, 2004) ("Rehearing Order") (R 90, JA 4): (1) directed FPL to exclude from its rate base those FP&L facilities that fail to meet the same network integration test applied to FMPA facilities in the TX Case; (2) denied FMPA a rate credit for its customer-owned facilities because that issue had been determined in the TX Case; and (3) declined to revisit the treatment of behind-the-meter generation in the pricing of network integration service because that issue had been addressed in Order Nos. 888 and 888-A.[3] FMPA has sought review of only the last issue.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Section 201(b) of the Federal Power Act ("FPA") confers upon the Commission jurisdiction over all rates, terms, and conditions of electric transmission service provided by public utilities in interstate commerce, as well as the sale by public utilities of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824(b). The Commission reviews rates proposed by a public utility

[3] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles [Jan. 1991-June 1996] ¶ 31,036 (1966) ("Order No. 888"), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles [July 1996-Dec. 2000] ¶ 31,048 ("Order No. 888-A"), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS*"), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S.Ct. 1012 (2002).

under FPA § 205 to assure that they are just and reasonable and not unduly discriminatory. FPA § 205(e), 16 U.S.C. § 824d(e). For existing rates, FPA § 206(a), 16 U.S.C. § 824e(a), provides that, whenever the Commission, after a hearing had upon its own motion or upon complaint, finds a rate "unjust, unreasonable, unduly discriminatory or preferential," the Commission shall determine the just and reasonable rate thereafter in force. The Commission or the complainant has the burden of proof in any § 206 proceeding. 16 U.S.C. § 824e(b).

Under FPA § 211, as amended by the Energy Policy Act of 1992,[4] any person "generating electric energy for sale for resale, may apply to the Commission for an order . . . requiring a transmitting utility to provide transmission . . . to the applicant." 16 U.S.C. § 824j(a). Following passage of the Energy Policy Act, several proceedings were initiated under amended FPA § 211, including FMPA's TX Case, seeking to obtain transmission service. Ultimately, Order No. 888 provided for industry-wide open access transmission, thus overtaking the prior case-by-case approach to transmission requests. Not only did the Order No. 888 rulemaking proceed concurrently with FMPA's TX case, but it also addressed some of the same issues.

[4] Pub. L. No. 102-486, Title VII.

More particularly, Order No. 888 required each transmission-providing utility's open access transmission tariff ("OATT") to offer, *inter alia*, a network integration transmission service, the service FMPA sought in the TX Case. *See generally*, *FMPA v. FERC*, 315 F.3d at 364-65. This service "allows the Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve its Network Load in a manner comparable to that in which the Transmission Provider utilizes its Transmission System to serve its Native Load Customers." Order No. 888 at 31,951.

Relying in part on the rulings in the TX Case orders, Order No. 888 also adopted load ratio pricing for network integration service. Under this methodology, the costs of the transmission system are allocated on the basis of the ratio of each customer's load to the transmission provider's entire transmission system load. FMPA (and others) argued that a network transmission customer should be able to exclude from its designated network load any portion of that load served from generation "behind the meter," *i.e.*, local generation that does not rely on the provider's transmission. The Commission rejected this argument, Order No. 888-A at 30,258-61, FMPA petitioned for review, and this Court affirmed. *TAPS*, 225 F.3d at 726.

B. Events Preceding The Challenged Orders

1. The FMPA TX Case

In 1989, FMPA requested transmission service from FPL in support of its plan to integrate all its member cities' resources and loads so that any FMPA resource could be dispatched to meet any FMPA load at any moment. After FMPA and FPL were unable to agree on the terms of the service, FMPA filed a complaint on July 2, 1993 against FPL (Docket No. EL93-51), and, in the alternative, a request (Docket No. TX-94) that the Commission order network service pursuant to FPA §§ 211 and 212. On October 28, 1993, the Commission directed FPL to provide the requested service and, as required by FPA § 212, ordered the parties to attempt to negotiate the rates, terms, and conditions of the service. *Florida Municipal Power Agency v. Florida Power & Light Co*., 65 FERC ¶ 61,125 at 61,599 (1993).

Because FMPA and FPL failed to reach an agreement, FERC resolved the cost allocation issue. *Florida Municipal Power Agency v. Florida Power & Light Co*., 67 FERC ¶ 61,167 (1994) ("*FMPA I*"). FMPA argued for a "contract demand, i.e., based on the maximum power flows it places on the transmission system during each year," *id*. at 61,478, while FPL proposed load ratio pricing under which the costs of FPL's transmission system would be shared "based on the relative native loads that receive network service," *id*. at 61,477. Foreshadowing

Order No. 888, *FMPA I* adopted FPL's load ratio pricing proposal. *Id*. at 61,481. As discussed *infra* at 16-17, *FMPA I* also rejected two alternative FMPA proposals to reduce its load included in the load ratio pricing methodology. *Id*. at 61,482. FERC, however, did agree that FMPA might be entitled to pricing credits for facilities that are integrated into FPL's network. *Id*. n. 76.

In response, FPL submitted a proposed Network Integration Service Agreement and a proposed Network Operating Agreement between it and FMPA. *See Florida Municipal Power Agency v. Florida Power & Light Co*., 74 FERC ¶ 61,006 at 61,005-06 (1996) ("*FMPA II*"). FMPA protested the filing and FMPA, FPL, and others requested rehearing and/or clarification of *FMPA I*. FMPA also filed several motions, including a request to incorporate the FPL Rate Case record. *See FMPA II*, 74 FERC at 61,006-07.

The Commission saw no reason to supplement the record with Rate Case evidence and declined to do so. *Id*. at 61,007. On the merits, the disagreement relevant to the instant appeal centered on which, if any, FMPA facilities qualified for transmission facilities credit. FMPA's claim that all FMPA transmission facilities should be considered part of a combined FMPA/FPL transmission network would result in a credit that would exceed the charges FMPA would otherwise owe FPL for network service. *Id*. FPL contended that crediting should be allowed only if FMPA facilities materially benefited the grid by deferring or

eliminating construction of FPL transmission facilities, and that none of FMPA's facilities qualified because, *inter alia*, they were only interconnected to, not integrated with, FPL's transmission system. *FMPA II*, 74 FERC at 61,008-09. The Commission agreed with FPL, and after examining the evidence, concluded that FMPA's transmission facilities were not integrated with FPL's and thus not entitled to credits. *Id*. at 61,009-10.

FPL and FMPA each requested rehearing. Subsequently, after issuance of the Order No. 888 orders and their affirmance in *TAPS*, and after *certiorari* had been granted in part and denied in part, FERC sought comments as to whether the TX Case may have become moot as a result of Order No. 888 and a settlement in the Rate Case.[5] FMPA responded that its request for rehearing was not moot.

FMPA's rehearing request was denied in *Florida Municipal Power Agency v. Florida Power & Light Co*., 96 FERC ¶ 61,130 (2001) ("*FMPA III*"). The Commission reaffirmed that FMPA's transmission facilities did not meet the system integration criteria, and thus were not entitled to credits. *Id*. at 61,544-45. FERC also denied rehearing on FMPA's two alternative arguments: (1) that FMPA local generation used to serve loads beyond the FPL transmission network need not be included in FMPA's load ratio share calculation, and (2) that FPL transmission

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[5] *Florida Municipal Power Agency v. Florida Power & Light Co*., 95 FERC ¶ 61,001 (2001) ("April 2, 2001 Order").

facilities not meeting the system integration test should be excluded from FPL's rate base. *FMPA III*, 96 FERC at 61,545. FERC noted that the latter issue, since it was being litigated in the Rate Case, was outside the scope of the TX Case. *Id*.

FMPA's appeal from *FMPA III* sought review of the rulings: (1) denying pricing credits, (2) excluding the Rate Case evidence, and (3) refusing to consolidate the Rate and TX Cases, but did not seek review of the rulings that FMPA's load ratio share must include all behind-the-meter load. This Court affirmed *FMPA II* and *III* in all respects, finding that: (1) FMPA had failed to argue that the Rate Case evidence would directly establish integration of FMPA and FPL facilities, *FMPA v. FERC*, 315 F.3d at 366, (2) FMPA had offered no reason to believe that FERC had abused its discretion in refusing to consolidate, *id*., and (3) substantial evidence supported FERC's denial of pricing credits, *id*. at 367.

2. The FPL Rate Case

On March 19, 1993, as completed on July 26, 1993, FPL filed an extensive overhaul of its existing tariff structure. The filing included, among other things, new "open access" tariffs making certain bulk power wholesale transmission services available to all other utilities and generators. Numerous parties intervened, including FMPA.[6] On September 24, 1993, the Commission accepted

[6] FMPA intervened as a member of the "Florida Cities" intervenor group.

and suspended FPL's filing, and set most of the issues for hearing before an Administrative Law Judge ("ALJ").[7] *Florida Power & Light Co.*, 64 FERC ¶ 61,361 (1993).

On December 13, 1995, the ALJ issued a lengthy initial decision addressing 167 primary issues and subsidiary issues "too numerous to mention." *Florida Power & Light Co*., 73 FERC ¶ 63,018 (1995). The ALJ declined to address the issue of credits for FMPA facilities, explaining that because the issue was before the Commission on rehearing in the TX Case, it would be inappropriate for him to consider it. *Id*. at 65,143. The ALJ also found that all the network transmission facilities FPL proposed were properly included in its rate base because they benefited all transmission customers. *Id*. at 65,198-200. Behind-the-meter generation was not an issue in the Rate Case and was not addressed by the ALJ.

After exceptions and responses were filed, the parties filed a settlement on April 17, 2000, disposing of most issues, which the Commission approved. *Florida Power & Light Co*., 92 FERC ¶ 61,241 (2000). The settlement resolved all issues pertaining to FPL's cost-of-service with the exception of FMPA Reserved Issues. These issues related to network service and FMPA's claims for:

[7] The order listed 28 cost-of-service issues and 22 issues concerning the justness and reasonableness of terms and conditions. Due to the complexity and magnitude of FPL's filing, the Commission issued a supplemental order on seven generic pricing issues that did not require a trial-type, evidentiary hearing. *Florida Power & Light Co.*, 66 FERC ¶ 61,227, *order on reh'g*, 67 FERC ¶ 61,326 (February 24, 1994).

> (i) credits for customer-owned transmission facilities, (ii) treatment of behind-the-meter generation and associated load, and (iii) exclusion from FPL's transmission rates of the costs of facilities that under the appropriate standard should not be considered part of FPL's integrated transmission system . . .

Global Settlement Agreement at 6. R 22, JA 57.

The settlement also provided for continued negotiations on interchange issues. On December 4, 2002, the Commission inquired as to the status of the settlement negotiations. Between December 13, 2002 and March 10, 2003, FMPA and FPL filed ten answers to that inquiry and to each other's answers. On February 14, 2003, FPL notified the Commission that an agreement in principle had been reached on the interchange issues. On June 30, 2003, FMPA requested that the Commission direct it and FPL to file further pleadings addressing the FMPA Reserved Issues. Ultimately, the Commission directed the parties to file supplemental initial and reply briefs. The orders challenged here followed.

C. The Challenged Orders

The First Order observed that as the network integration criteria established in Order Nos. 888 and 888-A apply to both transmission providers and customers, neither a customer nor a provider can receive credits for facilities that are not integrated with the transmission grid. Consequently, a transmission provider may not include in its rate base (and charge the customer for) facilities not used to

provide transmission service. First Order, 105 FERC ¶ 61,287 at P 14-15.[8] JA 7-8. To assure that standard was met, the Commission required FPL to file, within 90 days, a proposed rate schedule that excluded those FPL facilities that "failed to meet the same integration test applied to FMPA facilities in the TX [C]ase." *Id*. at P 16. JA 8.

The First Order then addressed the other two FMPA issues not resolved by the settlement: credits for customer-owned transmission facilities and the appropriate treatment of behind-the-meter generation and associated load. Because the credits issue had been resolved in the TX Case and affirmed by this Court, the Commission found "no persuasive reason to revisit that determination here." *Id*. at P 18. JA 9. Likewise, the Commission found no reason to revisit behind-the-meter generation issues, as they had been addressed in Order Nos. 888 and 888-A and affirmed on appeal, and FMPA had provided no persuasive reason to revisit the issues. *Id*. at P 19. JA 9.

FMPA sought rehearing, contending first that the denial of credits should be reversed if FP&L did not reduce its rate base to eliminate all FPL facilities that are like FMPA's facilities which receive no credits. The Commission denied this conditional rehearing request, finding that if FMPA believed that FPL's compliance filing failed to meet the network integration standards, the appropriate

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[8] "P" refers to the paragraph number.

remedy was to challenge the filing. Rehearing Order, 106 FERC ¶ 61,204 at P 6. JA 15.

The Commission also denied rehearing on the load ratio pricing issue, stating that:

> We disagree with FMPA's premise that the transmission pricing guidance contained in Order Nos. 888 and 888-A is only generic in nature and did not address the application of load ratio pricing to the circumstances raised here by FMPA; Order No. 888-A clearly addressed the circumstances cited by FMPA and states that the "bottom line is that *all* potential transmission customers, including those with generation behind-the-meter, must choose between network integration transmission service or point-to-point transmission service. Each of these services has its own advantages and risks." Because FMPA has chosen to take network integration service along with the attendant advantages, it must accept everything else, i.e., the disadvantages and risks, that go along with that choice.

Id. at P 10, citing Order No. 888-A at 30,260. JA 16. This appeal followed.

SUMMARY OF ARGUMENT

The inclusion of load served by behind-the-meter generation in determining a customer's share under the load ratio pricing methodology was addressed and resolved in the TX Case and the Order No. 888 proceeding and upheld on review. FMPA participated fully in both proceedings at the Commission and judicial review levels. FMPA's arguments here are simply a variation on themes already presented and rejected in these earlier cases. Under these circumstances, the instant challenged orders appropriately declined to revisit the issue.

FMPA's contention that FPL unfairly charges FMPA for network service FPL "cannot" provide to Key West lacks merit. As FMPA concedes, the so-called inability to provide service is caused by Key West, not by FPL. The transmission line owned by Key West and Florida Keys Electric Cooperative connecting Key West with FPL cannot transmit sufficient power available from FPL to serve Key West's entire load in the event that Key West's generation is not available. FMPA's contention overlooks that FPL offers the same network integration transmission service to all its customers, including FMPA and FPL, with the same load ratio pricing methodology under which every customer's (including FPL itself when serving native load) allocated share is based on its total load – a pricing methodology found to be just and reasonable in other proceedings in which FMPA participated fully.

ARGUMENT

I. STANDARD OF REVIEW

"The role of judicial review is only to ascertain" if the agency "has met the minimum standards set forth in the statute." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 7 (2001). A court reviews FERC orders under the "arbitrary and capricious" standard set out in the Administrative Procedure Act at 5 U.S.C. § 706(2)(A). *Sithe Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry under that standard is whether the agency has

"examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

II. THE COMMISSION'S REFUSAL TO REVISIT BEHIND-THE-METER GENERATION ISSUES WAS NEITHER ARBITRARY NOR CAPRICIOUS.

A. Behind-The-Meter Generation Issues Were Resolved In Both The Open Access Rulemaking And The TX Case.

The Commission declined to revisit FMPA's behind-the-meter generation claims because that issue had already been decided in Order Nos. 888 and 888-A, First Order at P 19 (JA 9) and Rehearing Order at P 10 (JA 16), based on FERC's behind-the-meter analysis in *FMPA II*. *See* Orders No. 888 at 31,736 and 888-A at 30,258-59. FMPA sought in those earlier cases, as it did here, to split its load between network load and behind-the-meter load, with only the former being counted for the load pricing ratio. As the question had been heard and answered, the Commission's rejection of FMPA's instant efforts to litigate the split loads issue yet again was reasonable.

FMPA participated fully in both Order No. 888 and the TX Case before the Commission and on judicial review. In the TX Case, FMPA argued that integrated

network service costs should be allocated on a contract demand basis,[9] and that load ratio pricing was unjust and unreasonable because it would require FMPA to pay for transmission it would not use or need. *FMPA I*, 67 FERC at 61,478-79; *see* FMPA's 1994 TX Case brief at 9 (attached hereto in Addendum B to this brief). FMPA urged that Key West provided the "clearest example" of the unreasonableness of load ratio pricing, because Key West will always operate some local (behind-the-meter) generation.[10] *Id*. at 10. The TX Case orders rejected the argument that FPL should provide the service on a split load basis.[11]

FMPA had also proposed two alternatives in the TX Case. One would reduce FMPA's obligation under load ratio pricing by the amount of its loads that could be served by local resources, and the other (if the first alternative were not accepted) would give FMPA a credit for facilities located in Key West and elsewhere that are routinely run for reliability purposes or local support and

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[9] By specified contract demand, FMPA meant the maximum power flows it places on the transmission system during each year.

[10] FMPA noted that Vero Beach, Fort Pierce, and Lake Worth, as well as Key West, each had its own generating facilities.

[11] FERC stated (*FMPA I*, 67 FERC at 61,481-82) that:

> FMPA wants to be able to serve all loads from local or remote resources, at its discretion. It wants to receive service of exactly the same quality as the service [FPL] provides itself. It wants to be able to use [FPL's] transmission system as freely as [FPL] uses the system to serve [FPLs'] native load. To provide such service, [FPL] must plan for FMPA's load in the same way it plans for its own load.

stability. *FMPA I*, 67 FERC at 61,482. FERC rejected those proposals as well.[12] FERC did agree, however, that a credit for any FMPA facilities integrated into FPL's grid would be reasonable, *id*. n. 76, and did note that FMPA could eliminate any load that it did not want to integrate from its FPA § 211 request for network integration service. *Id*. n. 77.

FMPA's TX Case rehearing request focused on demonstrating that its facilities were integrated with FPL's and entitled to credits. *FMPA II*, 74 FERC at 61,008. FMPA also submitted a "conditional" rehearing request, contending that if FERC did not find an integrated FMPA/FPL system, then FMPA should be charged "for its use of FPL transmission based on the contract demands which it places on the system, i.e., on a use basis." *Id*.; FMPA 1994 TX Case rehearing request at 41 and at Appendix 1 (included in Addendum B).

The Commission declined to grant FMPA credits and denied its conditional request for rehearing, *FMPA II*, 74 FERC at 61,009, noting again that FMPA was free to file a new § 211 application requesting exclusion of particular loads (such as Key West's) from integration if it so desired, *id*. at 61,011. On February 5, 1996, FMPA again requested rehearing; its primary contention was that its

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[12] The Commission found that the alternatives would limit the credits only to FMPA facilities, even though FPL had similar local facilities that would be entitled to such credits as well. FPL pointed out that if both its facilities and FMPA local facilities received such credits, FMPA's cost responsibility would be twice the level as under FPL's load pricing proposal. *FMPA I*, 67 FERC at 61,482.

facilities were integrated with FPL's and entitled to credits. *FMPA III*, 96 FERC at 61,544-45. In the alternative, FMPA reiterated its claims that: (1) its load ratio share should exclude loads served by behind-the-meter generation, and (2) the Commission must apply the same standards in determining what transmission should be included in FPL's rate base as it used in determining whether FMPA's transmission is part of an integrated grid. *Id*. at 61,545; FMPA's TX Case 1996 rehearing request at 6, 7 (included in Addendum B).

FMPA reiterated the same arguments yet again in its (post-Order No. 888 and post-*TAPS*) 2001 TX Case filings, *see, e.g*., FMPA's response to the April 2, 2001 Order at 12-13 (included in Addendum B). *FMPA III* denied rehearing as to credits and load ratio share, and found questions related to FPL's rate base outside the scope of the TX Case. *FMPA III*, 96 FERC at 61,545. FMPA sought judicial review of FERC's denial of credits, but *not* of its refusal to permit reduction of FMPA's load ratio share. *See FMPA v. FERC*, 363 F.3d at 365-69.

While the TX Case was ongoing, Order No. 888 found that "the load ratio allocation method of pricing network service continues to be reasonable . . . ." Order No. 888 at 31,736. Citing *FMPA II*, it also stated that a customer with load served by behind-the-meter generation could exclude that particular load from its load ratio share but would have to use point-to-point transmission service to serve

the load. *Id*. In other words, if a customer sought network service at a discrete point, behind-the-meter load would be counted for the load ratio share.

FMPA sought rehearing of Order No. 888, arguing (as it had in the TX Case) that a network customer should be able to exclude load served by behind-the-meter generation from its load ratio share. Order No. 888-A at 30,257. In a lengthy discussion that relied heavily upon *FMPA I* and *FMPA II*, Order No. 888-A denied FMPA's rehearing request, Order No. 888-A at 30,258-61, on the basis that a "split system" is antithetical to the concept of network service; that is, the entire load at a discrete point of delivery is either fully integrated or not integrated. *Id*. at 30,259. Thus, a network service customer may exclude all of a discrete load from network load by taking point-to-point service, but may not apportion that load into one share served by network service and another share served by behind-the-meter generation. *Id*. at 30,258.

FMPA (and its supporters) sought judicial review of Orders No. 888 and 888-A, objecting "many times and in many ways throughout their briefs" that FERC erred by requiring a network customer's total load at a point of delivery to be used in calculating the load ratio when a portion of that load is served by behind-the-meter generation. *TAPS*, 225 F.3d at 725. The Court "detect[ed] nothing in [FMPA's arguments] to warrant setting aside this aspect of the Commission's rule." *Id*. at 726. To the contrary, the Court found that:

> [N]etwork service, as the Commission defined it, means that network customers can call upon the transmission provider to supply not just some, but all of their load at any given moment, when for instance, they experience blackouts or brownouts. The Commission decided that if a customer does not desire such full network service for its entire load, it may exclude loads at discrete delivery points and purchase point-to-point service instead. What it cannot do is split loads at delivery points.

Id.

As this discussion demonstrates, FMPA has reiterated many times prior to the instant case that it is entitled to split loads for behind-the-meter generation in Key West, and the issue has been resolved against FMPA in final orders affirmed on appeal. Consequently, the Commission's refusal to consider the behind-the-meter issue yet again in the instant matter was entirely reasonable.

B. If Key West Lacks the Capability To Utilize Integrated Network Service Fully, FMPA May Choose Other Service For It.

FMPA harps throughout its brief that it is unfair for FPL to charge for service FPL "cannot" provide.[13] FMPA concedes, however, that the difficulty lies with Key West, not with FPL. The transmission line owned by Key West and Florida Keys Electric Cooperative ("FKEC") and connecting Key West with FPL cannot transmit sufficient power available from FPL to serve Key West's entire

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[13] *See, e.g.*, FMPA's brief at 14 ("because of physical transmission limitations, such service cannot be provided by FPL"); at 19 ("FERC allows FPL to charge FMPA for service that FPL cannot provide."); at 21 ("In allowing FPL to charge FMPA for transmission service that it does not and cannot possibly provide, FERC reaches an absurd result.").

load. FMPA Br. at 9. The inability of the Key West-FKEC transmission line to transmit sufficient power to serve the entire load reflects Key West's operational choices, not an operational flaw in FPL's system. Key West chose to rely on local generation being available at all times in all conditions.[14] That choice does not diminish the quality of network service made available by FPL, and thus offers no reason to lower FMPA's rate for network service. Key West is no different from any other transmission customer (or from FPL itself) which, for whatever reason, has behind-the-meter generation, yet chooses network service for that load.

Network integrated transmission service allows the transmission customer to economically dispatch and regulate its network resources to serve its loads in a manner "comparable to that in which the Transmission Provider utilizes its Transmission System to serve its Native Load customers." Order No. 888-A at 30,530. All customers are offered the same service and all customers, including FMPA, other transmission system users, and FPL itself (in serving its native load) are "required to designate resources and loads in the same manner." *Id*. These terms and conditions (along with other *pro forma* tariff requirements) were found to be just and reasonable and not unduly discriminatory or preferential. *See TAPS*,

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[14] FMPA states (Br. at 9-10) that Key West "must" operate local generation and would choose to import power if it could. This is contrary to FMPA's TX Case arguments, which stated that Key West ran local generation as a matter of policy. *See* FMPA's 1994 TX Case brief at 10 (included in Addendum B).

225 F.3d at 682. It follows that all customers should pay on the same basis (load ratio pricing) for the service.

That one[15] of FMPA's 29 members operates a system that cannot take full advantage of network integrated service does not entitle FMPA to split the load at that delivery point. Order Nos. 888 and 888-A declined to split loads for behind-the-meter generation no matter what the alleged justification. *See* Order No. 888-A at 30,257. Indeed, FPL also has generation that can serve local loads.[16] *FMPA I*, 67 FERC at 61,482. FMPA, like other transmission users, may choose point-to-point transmission service for particular loads if it concludes that network service is not appropriate.

FMPA contends (Br. at 32-36) that "it was arbitrary for the Commission not to consider a deviation from full load pricing when it had permitted a deviation in other cases," and cites as an example Florida Power Corporation's ("FPC") Contract Demand Network Service, Br. at 33, *citing Florida Power Corporation*, 81 FERC ¶ 61,247 (1997).[17] This argument lacks merit. FMPA also relied on this

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[15] FMPA suggested in its rehearing request that a similar situation exists with respect to Ft. Pierce-Vero Beach and Lake Worth, but has not developed that argument. See rehearing request at 6. JA 267.

[16] FPL observed that if both its and FMPA's local facilities were considered in the load ratio calculations, FMPA's costs would increase twofold. *See* n. 12, *supra* at 17.

[17] FMPA states (Br. at 6) that "many" transmission providers offer contract demand service. This statement is belied by FMPA's own brief, which, besides FPC's

case in its *TAPS* brief as an alternative pricing for network integration service, but this Court found that FPC's service "involved not network integration transmission service, but a sort of hybrid service called 'network contract demand transmission service.'" *TAPS*, 225 F.3d at 726 n. 16.

Moreover, FPC's hybrid service was a voluntary FPA § 205 filing by FPC. In contrast, FMPA seeks to maintain its network integration service under the *pro forma* tariff, but with special pricing. But Order No. 888 (and *TAPS*) established that the *pro forma* network integration terms used by FPL are just and reasonable and not unduly discriminatory or preferential, and FPL's load ratio pricing terms were approved as just and reasonable in the TX Case orders. Under these circumstances, the only way that FMPA could achieve its special pricing for network integration service would be to meet the burden under FPA § 206 to establish that FPL's rates have become unjust and unreasonable. FMPA failed to make such a showing.

III. PETITIONERS' ARGUMENTS ARE UNAVAILING.

FMPA contends throughout its brief (see Br. at 11, 15, 25, 27) that the challenged orders "rely solely" on Orders No. 888 and 888-A without acknowledging that modifications can be made to the *pro forma* tariff and without consideration of the facts presented here. But, as discussed above, these orders

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service, lists only five examples, all of which pre-date Order No. 888 and go back as far as 1978.

relied on the orders in the TX Case, *FMPA I* and *FMPA II*. See Order No. 888 at 31,736; Order No. 888-A at 30,528-59. FMPA had ample opportunity in its TX Case to argue its case-specific facts. Moreover, FMPA was hardly restricted in the arguments it raised in the Order No. 888 proceedings. As *TAPS* stated, FMPA (and its supporters) objected "many times and in many ways throughout their briefs" to a network customer's total load being used to calculate its load ratio share when part of the load is served by behind-the-meter generation. *TAPS*, 225 F.3d at 725.

FMPA's parallel argument (Br. at 27) that this "is the first opportunity the Court has had to address the issue" of "whether a company can charge for transmission it is incapable of providing to the customer" misstates the issue. As discussed *supra* at 20-21, FPL can provide the service, but the customer (Key West) has inadequate facilities to accept the power.

Finally, the fact (cited in FMPA's Br. at 31) that *FMPA II* made the rates for network service subject to retroactive correction in the Rate Case is irrelevant here. The Rate Case will correct the rates to the extent necessary to account for the exclusion from FPL's rate base of facilities that fail the network integration test. The TX Case resolved the split load issue, however, and the fact that the network service rates are subject to retroactive correction in the Rate Case does not transfer that issue to the Rate Case. The fact that the FMPA Reserved Issues in the Rate

Case settlement included "the treatment of behind-the-meter generation and associated load" (s*ee* pp. 10-11, *supra*) likewise does not transfer the issue. FMPA cannot, by "reserving" an issue, decide that the issue must be litigated in a particular case when the issue has already been resolved elsewhere. *See FMPA III*, 96 FERC at 61,545 (reserving an issue in one case does not serve to transfer that issue from another proceeding).

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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