ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 06-1285

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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FINAL BRIEF: JULY 31, 2007

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*, 113 FERC ¶ 61,290 (December 20, 2005) and

2. *Florida Power & Light Company*, Docket Nos. ER93-465, *et. al*, 116 FERC ¶ 61,012 (July 6, 2006).

C. Related Cases:

This case is a review of Commission orders issued after this Court's remand in *Florida Municipal Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005). Also relevant is *Florida Municipal Power Agency v. FERC* , 315 F.3d 362 (D.C. Cir. 2003), which affirmed Commission orders on related issues. There are no related cases pending judicial review.

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Judith A. Albert
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GLOSSARY

behind the meter	generation (or load) located on the customer's side of the point of delivery
Commission or FERC	Federal Energy Regulatory Commission
FMPA	Florida Municipal Power Agency
FPA	Federal Power Act
Florida Power	Florida Power & Light Company
load	the total demand for service on a utility system at any given time
load ratio pricing	determination of transmission charges on the basis of "load ratio share"
load ratio share	a ratio of a network customer's load to the transmission provider's entire load on its transmission system
network service	A transmission service available under the Order No. 888 *pro forma* open access transmission tariff that permits a transmission customer to use the entire transmission network to provide service for specified resources and loads without having to pay multiple charges for each resource-load pairing
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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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") complied with this Court's remand and, in so doing, reasonably concluded: (1) that the physical limitations of a transmission customer's facilities did not entitle the customer to an exception to transmission service tariff requirements that apply to other transmission customers and to the transmission provider itself; and (2) that the customer, like other customers, must weigh the

advantages and disadvantages of the services offered and choose the one best suited to its circumstances.

COUNTERSTATEMENT OF JURISDICTION

The opening brief of Petitioner Florida Municipal Power agency ("FMPA") asserts arguments that FMPA either failed to raise at all on rehearing before the Commission or failed to raise with specificity as required by the Federal Power Act ("FPA"), § 313(a) and (b), 16 U.S.C. § 825*l*(a) and (b). Consequently, these issues are jurisdictionally barred. *See*, *e.g.*, *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 34-35 (D. C. Cir. 1992) ("Under the FPA's judicial review provision, 16 U.S.C. § 825*l*(b), parties seeking review of FERC orders . . . must themselves raise in [the rehearing] petition all of the objections urged on appeal. Neither FERC nor this court has authority to waive these statutory requirements.") (internal quotations and citations omitted).

The arguments now urged that were not raised on rehearing, or not raised with specificity in FMPA's limited (6-page) rehearing request (JA 392), include:

- That the Commission should have addressed the Affidavit of Joe N. Linxwiler, filed July 31, 2003, in deciding the remanded issue. Pet. Br. at 22.
- That the Commission's premise that FMPA can buy point-to-point service lacks merit. Pet. Br. at 24.
- That the Commission was required to determine the transmission provider's actual costs for transmission service to Key West. Pet. Br. at 31-34.

- That "FERC is factually incorrect to the extent that it implies that Florida Power does not benefit from or sell partial network service." Pet. Br. at 28, note 15.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out 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 FMPA, a public agency which sells electric power for its 29 member cities, and Florida Power & Light Company ("Florida Power"), a public utility, over the rates Florida Power may charge FMPA for transmission service. In an earlier chapter (the "Transmission Case"), FERC orders (affirmed by this Court) directed Florida Power to offer a particular type of service (network integration service) to FMPA and, *inter alia*, to adopt load ratio pricing (based on the customer's contribution to overall system demand) for the service. *See Florida Municipal Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003), *cert. denied*, 315 U.S. 946 (2003) ("*Florida Municipal I*").

Subsequently, FMPA sought to revisit load ratio pricing in a related proceeding (the "Rate Case"). In orders remanded by this Court in *Florida Municipal Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) ("*Florida Municipal II*"), the Commission declined to do so on the grounds that earlier orders

had already addressed FMPA's circumstances. The Court disagreed and remanded so that the Commission could consider the "discrete issue" of "whether a network service provider can charge a network customer full load ratio prices where it is physically impossible for that provider to service the customer's full load." *Id*. at 288, 292. The Commission considered the remanded issue in the orders challenged here, finding that FMPA was not entitled to an individualized service or rate reflecting its particular circumstances. *Florida Power & Light Company*, 113 FERC ¶ 61,290 (December 20, 2005) ("Remand Order") (JA 386), *reh'g denied*, 116 FERC ¶ 61,012 (July 6, 2006) ("Rehearing Order") (JA 486).

II. STATEMENT OF FACTS

A. Regulatory Background

The background is set forth in *Florida Municipal II*, 411 F.3d at 289-291, and the cases cited therein. In brief, in 1993 FMPA filed the network transmission access request in the Transmission Case that led to *Florida Municipal I*, and Florida Power filed the extensive tariff overhaul in the Rate Case that led to *Florida Muncipal II*. In 1995, FERC initiated the Order No. 888 rulemaking which addressed similar transmission access and pricing issues on an industry-wide basis.[1] The three cases proceeded concurrently and informed one another.

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[1] *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. &

Ultimately, in the Transmission Case, the Commission ordered Florida Power to offer network service, rejected FMPA's contract demand pricing proposal, accepted Florida Power's load ratio pricing proposal, and rejected two alternative FMPA proposals to reduce its load for load ratio pricing purposes.[2] FERC, however, did agree that FMPA might be entitled to pricing credits for facilities that are integrated into Florida Power's network, but found that none of FMPA's facilities qualified.[3] FMPA sought review of FERC's denial of pricing credits, but did not seek review of the ruling that its load ratio share must include all behind-meter load.[4] This Court affirmed the orders in all respects. *Florida Municipal I*, 315 F.3d at 366.

Regs. ¶ 31,036 (1966), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *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 (2002).

[2] Under FMPA's pricing proposal, charges would reflect contract demand, *i.e*. the amount of power FMPA or its members chose to dispatch over Florida Power's system. This would permit FMPA to split loads at discrete points of delivery at its discretion between network and point-to-point service. *See Florida Municipal Power Agency v. Florida Power & Light Co.*, 67 FERC ¶ 61,167 at 61,478 (1994).

[3] *See generally Florida Municipal Power Agency v. Florida Power & Light Co.*, 67 FERC ¶ 61,167 (1994), *order granting clarification in part and denying rehearing*, 74 FERC ¶ 61,006 (1996), and *order denying rehearing*, 96 FERC ¶ 61,130 (2001).

[4] Behind-the-meter refers to generation (or transmission) located on the customer's side of the point of delivery. *TAPS*, 225 F.3d at 725 n. 14.

Meanwhile, in its Order No. 888 rulemaking proceeding, the Commission sought to end discriminatory and anticompetitive practices in the national energy market by requiring each transmission-owning public utility to file an open access tariff that provided specified services. "Open access" means that utilities must "provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as they use their own lines." *TAPS*, 225 F.3d at 681; *see* Order No. 888 at 31,635-36. The standardized services required by the Order No. 888 *pro forma* open access tariff are network integration transmission service and point-to-point transmission service.

In point-to-point transmission service, transmission customers pay for transmission service between designated points of receipt and delivery. *TAPS*, 225 F.3d at 725 n.12. Network service permits a transmission customer "to fully integrate load [(the total demand for service on a utility system)] and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources." *Florida Municipal I*, 315 F.3d at 363 [citation omitted]; Order No. 888 at 31,951. Each service has its own advantages and disadvantages, and customers must choose between them. Order No. 888-A at 30,260.

Relying in part on the Transmission Case orders, Order No. 888 also adopted load ratio pricing for network integration service. With this pricing method, the costs of the transmission system are allocated on the basis of the ratio of each customer's total load to the transmission provider's entire transmission system load. A customer may exclude its entire load at a discrete point from its designated network load, but may not exclude only part of the load at a discrete point. *See TAPS*, 225 F.3d at 725.

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. FERC 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.

Subsequently, FMPA sought to revisit load ratio pricing again in the Rate Case. Specifically, FMPA contended that it should not be charged for load that Florida Power cannot serve because of physical transmission limitations, citing Key West (one of FMPA's member cities), among others. Key West cannot receive its total load from Florida Power because the transmission line Key West relies on for connection to Florida Power's delivery point is inadequate. Finding that Order Nos. 888 and 888-A had already addressed FMPA's pricing arguments,

FERC rebuffed FMPA's efforts and reiterated that all potential transmission customers, including those with behind-the-meter generation, must choose between network integration and point-to-point service. *See Florida Power & Light Company*, 105 ¶ 61,287 (2003), *reh'g denied*, 106 FERC ¶ 61,204 (2004). FMPA petitioned for review.

B. The *Florida Municipal II* Decision And Orders On Remand

The Court found that Order No. 888 "does *not* address the specific issue of *physical impossibility* as it relates to load ratio pricing" and remanded for further proceedings. *Florida Municipal II*, 411 F.3d at 288 [emphasis in the original]. In particular, the Court was concerned that:

> FERC has failed to explain why network customers should be charged by the transmission provider for network service that the provider is physically constrained from offering and, relatedly, why physical impossibility should not be recognized as an exception to the general rule against permitting partial load ratio pricing for network customers. We therefore remand this discrete issue to the Commission. We emphasize, however, the narrow contours of our ruling: FMPA has conceded that it must pay for full capacity regardless of whether it intends to use that full capacity . . . Because we find that FERC erred in failing to consider the appropriateness of an exception to Order No. 888's general provisions, we do not reach FMPA's statutory argument, *i.e.*, that such a charge for service that cannot be provided is not just and reasonable under the Federal Power Act.

Id. at 292 (citations omitted).

As required by the Court, on remand the Commission considered whether "physical impossibility" warrants an exception to load ratio pricing. The

Commission concluded that it does not. FERC found that requiring a transmission provider to offer services uniquely tailored to each customer's particular circumstances would be "virtually impossible" for the provider to administer and would undercut the goal of ensuring that transmission owners provide non-discriminatory service. Remand Order at P 6-7 (JA 389-90). Moreover, the physical limitations are FMPA's, not Florida Power's. Florida Power does provide the service as required by the tariff, *id*. at 8 (JA 390-91). *See also* Rehearing Order at P 15 (JA 491-92).

This appeal followed.

SUMMARY OF ARGUMENT

Florida Municipal II required the Commission to consider the single issue of whether physical impossibility provides a proper basis for an exception to full load ratio pricing. The Commission did so and concluded that it does not. The physical impossibility here arises from limitations in the customer's system. Crafting services and rates unique to every customer's circumstances is impractical and would undercut the primary Order No. 888 goal of non-discriminatory access to transmission service. FMPA, like all other Florida Power customers and like Florida Power itself, must weigh the advantages and disadvantages of the standard network and point-to-point service offerings. It is not entitled to a preferential service aimed at its particular circumstances.

Load ratio pricing for network service does not result in unjust or unreasonable rates as to FMPA. The price that Florida Power may charge is dictated by the service it provides, not by the physical arrangements FMPA has made. Florida Power's network service tariff requires that it plan its system to accommodate full load service to FMPA. Florida Power has done so. Key West, like other transmission customers, has chosen to satisfy its energy needs through a combination of local generation and other resources. Like these other customers, Key West (and FMPA) must decide whether network or point-to-point service best suits their needs.

ARGUMENT

I. THE COMMISSION COMPLIED WITH THE COURT'S REMAND IN *FLORIDA MUNICIPAL II*.

In proceedings on remand, the Commission's determinations are generally reviewed to ensure that they are responsive to the Court's mandate. *See*, *e.g.*, *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). The Court's opinion in *Florida Municipal II* directed the Commission to consider the "discrete issue" of "whether physical incapacity provides a proper basis for an exception to full load ratio pricing." *See Florida Municipal II*, 411 F.3d at 292; Remand Order at P 1 (JA 386). The Commission did so in the orders under review.

A. The Commission Considered A Physical Impossibility Exception To Load Ratio Pricing.

The Commission observed that Order No. 888's statement that FERC would evaluate alternative proposals for allocating the cost of network integration service on a case-by-case basis did not mean that each customer could demand a special service to fit its special circumstances:

> However, we did not intend for each and every customer of a transmission provider to have the opportunity to demand that the transmission provider create alternative services which benefit that particular customer, i.e., we did not intend to create the option of separate and individual customer-by-customer transmission services and rates.

Remand Order at P 6 (JA 389). Rather, if a transmission provider believed that an alternative arrangement made more sense for its system, it could propose such an arrangement. *Id*., *quoting* Order No. 888 at 31,736.

The Commission explained that customer-specific services were not practical and would result in undue discrimination:

> Given that there is a single transmission system to accommodate all customers, multiple individual, customer-specific services (and rates) would be virtually impossible for the utility to administer and for the Commission to oversee to ensure that there would be no undue discrimination.

Remand Order at P 6 (JA 389-90). While a transmission provider might offer an additional service to its customers, it "is another, very different matter for each individual transmission customer to seek transmission services uniquely tailored to its particular needs. Allowing services and rates unique to every customer would undercut the primary goal of Order No. 888 of providing non-discriminatory open access transmission." Rehearing Order at P 14 (JA 491) (footnote omitted).

Thus, in "disagree[ing] with FMPA's position" that the Commission was obligated to consider FPMA's proposal to fit its particular circumstances, Remand Order at P 6 (JA 389), the Commission was not "disagree[ing]" with the Court's mandate, as FMPA submits (Br. at 14). To the contrary, the Commission was responding to the Court's mandate by explaining the limited applicability of Order No. 888. While that order, as the Court recognized, "explicitly left open the

possibility" of exceptions and alternative proposals on a "case-by-case basis," 411 F.3d at 291, such exceptions and alternatives could be submitted by the transmission provider when it filed an open access transmission tariff in compliance with Order No. 888. Remand Order at P 6 (JA 389). The Commission did not commit itself to consider and accept any exception or case-specific proposal filed at any time by any particular transmission customer. *See id*. (noting that the Commission "duly evaluated and ultimately accepted" an alternative "third category" of transmission service, available generally to all customers, proposed by another Florida transmission provider when that provider filed its post-Order 888 open access transmission tariff).

Moreover, there is nothing so unique about FMPA's "physical impossibility" circumstance that warrants prescription of a special alternative service for FMPA. FERC observed that there are always physical constraints limiting transmission, that transmission is not an infinite resource, and that all customers, including Florida Power itself, face these constraints. Remand Order at P 7 (JA 390). "Thus, while a 'physical impossibility exception' to full load ratio pricing, by allowing partial load pricing, sounds appealing on its face, the circumstances and limitations of the transmission system just described make any such exceptions virtually impossible to develop and administer." Remand Order at P 7 (JA 390).

The Commission also considered that load ratio pricing might not be desirable to a customer like FMPA, which has transmission constraints. Remand Order at P 8 (JA 390). However, the price Florida Power may charge is dictated by the service Florida Power provides, not by the physical arrangements its customers, like FMPA, have made. *Id.* The physical limitations here are not on Florida Power's system. If they were, Florida Power would have "to expand its system to serve its network customers' full load." *Id.*; *see also id.* at P 8, n. 16 (quoting Section 28.2 of the *pro forma* open access tariff); Rehearing Order at P 15, and n. 27 (quoting Section 28.2 of Florida Power's open access tariff) (JA 491-92).

Instead, the limitations are on FMPA's system. One of FMPA's 29 member cities, Key West, has chosen to use local generation and to rely on the intervening Florida Keys Electric Cooperative-City of Key West transmission system that can carry only part of its load. Rehearing Order at P 15, note 25 (JA 492). To the extent that impossibility exists, it lies beyond Florida Power's delivery point, with the intervening transmission system that Key West has chosen to rely on. Remand Order at P 8 (JA 391). That this system "cannot transmit enough power from Florida Power to serve Key West's entire load should not dictate what [Florida Power] may charge for transmission service that Florida Power provides." *Id.*

FMPA, moreover, "has chosen to take network integration transmission service, with its attendant full-load charge, when point-to-point transmission

service is available and would not include a charge for the entire load." Rehearing Order at P 15 (JA 491). There are advantages and disadvantages to each type of service, and FMPA, like every other customer, must decide which is appropriate for its particular circumstances. Remand Order at P 7, 9 (JA 390, 391); Rehearing Order at P 15-16 (JA 491-92).

B. FMPA's Various Contentions That The Commission "Violated The Court's Mandate" Are Without Merit.

For its part, FMPA contends (Br. at 13-17) that the Commission "refused to consider a load ratio exception" (Br. at 13), "declar[ed] on remand that it will not entertain the Court's inquiry" (Br. at 15), and "violated the Court's mandate" (Br. at 13). These contentions are without merit. The Court remanded the orders for further proceedings so that FERC could "address the specific issue of physical impossibility." *Florida Municipal II*, 411 F.3d at 288. As demonstrated above, the Commission did so.

FMPA's offerings in support of its allegations are similarly without merit. FMPA contends (Br. at 14-15) that FERC's explanation that Order No. 888 anticipated alternative proposals from transmission providers (not customers), constitutes a refusal to consider FMPA's request at all. FMPA's quotation from FERC's order, however, omits the point that the Commission was making, which is that approving customer-specific services and rates would make monitoring for undue discrimination very difficult. *See* Remand Order at P 6 (JA 389). FERC did

not "refuse" to consider FMPA's proposal, but simply explained a major drawback to it.

In a similar vein, FMPA argues (Br. at 17-18, 37-41), that the Court has already rejected FERC's conclusion that Order No. 888 did not intend for each and every customer to have the opportunity to demand alternative services tailored to its particular circumstances. All the Court required, however, was that FERC consider a physical impossibility exception (which the Commission did). *See Florida Municipal II*, 411 F.3d at 292. The Court did not mandate that the Commission grant the exception. FMPA is wrongly conflating consideration of a request with its granting. *See Process Gas Consumers Group v. FERC*, 292 F.3d at 840 (rejecting petitioner's claim that FERC "ignored" the court's remand when FERC "satisfactorily" explained its decision to reach the same result).

FMPA's broader argument (Br. at 16, 17) that the Commission "mainly repeated arguments that this Court has already rejected" is wrong for the simple reason that the Court found that "FERC has never expressly addressed FMPA's request for an impossibility exception." *Florida Municipal II*, 411 F.3d at 291. Since FERC had not previously addressed FMPA's impossibility exception, the Court could not have already rejected the Commission's subsequent findings. *See id.* at 292 (declining to reach FMPA's "statutory argument" that the Commission's ratemaking treatment of FMPA "is unjust and unreasonable under the Federal

Power Act" and leaving consideration of this issue to the Commission "in the first instance").

Finally, FMPA's argument (Br. at 18-20) that the Commission is "defeating and thwarting" the statutory scheme by failing to consider customer objections demonstrates special bravado. The Commission has considered FMPA's objections to load ratio pricing on numerous occasions, including the Order No. 888 rulemaking, the Transmission Case, and the Rate Case. *See TAPS*, 225 F.3d at 725-27 (rejecting FMPA's objections to pricing provisions of the Order No. 888 rulemaking); *Florida Muncipal I* (addressing three Commission orders on FMPA's pricing objections), and *Florida Municipal II* (addressing two FERC orders on FMPA's objections). Moreover, additional FMPA objections to Florida Power's pricing are still being addressed by FERC in another permutation of the Rate Case. *See Florida Power & Light Company*, 105 FERC ¶ 61,287 at P 16 (JA 367); *Florida Power & Light Company*, 116 FERC ¶ 61,013 (July 6, 2006) (rehearing pending). Now, as required by the Court and demonstrated by the challenged orders, FERC has explicitly addressed FMPA's request for an impossibility exception to load ratio pricing.

In sum, FMPA's problem is not that the Commission did not comply with the Court's mandate, but that FMPA does not like FERC's response. As FERC concluded after considering a similar FMPA argument on rehearing, FMPA's

argument is "tantamount to saying that the only conclusion [the Commission] could reach that would be acceptable to the court is to agree with FMPA." Rehearing Order at P 13 (JA 490). That clearly was not the intent of the remand, which dictated no particular result. *Id*.; *Florida Muncipal II*, 411 F.3d at 288.

II. THE COMMISSION'S DETERMINATION THAT FMPA IS NOT ENTITLED TO SPECIAL TREATMENT WAS REASONABLE.

A. Standard of Review

In addition to assessing whether the Commission complied with the Court's mandate in *Florida Municipal II*, the Commission's determination that FMPA was not entitled to special treatment is subject to the arbitrary and capricious standard of the Administrative Procedure Act. *Sithe Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court "will affirm the Commission's orders so long as FERC 'examined the relevant data and articulated a . . . rational connection between the facts found and the choice made.'" *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Deference to FERC's decisions regarding rate issues is broad, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

B. The Transmission Services Provided By Florida Power Under Its Open Access Tariff Do Not Result In Undue Discrimination As To FMPA.

The Commission's overarching concern in Order No. 888 was the prevention of undue discrimination in transmission. "The legal and policy cornerstone of [Order No. 888] is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce." Remand Order at P 9 (JA 391), quoting Order No. 888 at 31,634. "[T]he network transmission service that is available under Order No. 888 is intended to put the transmission customer in the same position as the transmission provider itself for transmission service over its network." Remand Order at P 9 (JA 391). FMPA has access to exactly the same services as all transmission customers, including Florida Power; Florida Power does not offer the hybrid (and preferential) service that FMPA wants to anyone. *Id*.

FMPA contends (Br. at 27-28) that there is undue discrimination because Florida Power is treating differently-situated customers the same. However, as the Commission found, physical constraints do not support a requirement that Florida Power provide a special service for FMPA:

> [T]here are always physical constraints limiting transmission service, and those constraints can vary hour by hour as load and generation change hour by hour and as facilities go out of service or are put back in service. FP&L itself faces those constraints, just as

> FMPA and all other customers face those constraints. In short, no one is exempt from the limitations of the transmission system; it is simply not an infinite resource. Thus, while a 'physical impossibility exception' to full load ratio pricing, by allowing partial load ratio pricing, sounds appealing on its face, the circumstances and limitations of the transmission system just described make any such exceptions virtually impossible to develop and administer.

Remand Order at P 7 (JA 390). FMPA contends (Br. at 21-23) that the Commission is wrongly comparing transitory effects with FMPA's long-term disability, but FMPA misses the point. There is only a single transmission system to accommodate all customers. *Id.* at P 6 (JA 389-90). Like a subway system that cannot craft a unique service for each rider, a transmission provider cannot craft a unique service for each customer.

Under these circumstances, the Commission's conclusion that Florida Power is not unduly discriminating against FMPA by failing to offer a hybrid service to suit FMPA's particular operational choices is reasonable. *See* Remand Order at P 9 (JA 391). As discussed *supra* at 6, the Commission ordered transmission owners to provide network service so that other customers could obtain service on the same basis as the transmission owner itself uses its transmission system. This is the service that Florida Power provides under its network service tariff. FMPA wants something different, *i.e.*, service for that only that portion of its Key West load for which FMPA is willing to make arrangements to accept delivery. This the

Commission is unwilling to require, for the reasons stated in Order No. 888 and the orders challenged here.

FMPA's argument (Br. at 23, 41-42) that FERC has allowed exceptions to full load ratio pricing in the past likewise lacks merit. Most of the cited exceptions pre-date Order No. 888 and are therefore irrelevant. Moreover, FMPA's citation to the Florida Power Corporation case misses the point that the Corporation voluntarily offered the service on a system-wide basis. *See* Remand Order at P 6 (JA 389); *Florida Power Corporation*, 81 FERC ¶ 61,247 at 62,064-65 (1997). That an alternative to point-to-point and network services makes sense for a particular transmission provider's system does not entitle customers to individualized transmission services. Remand Order at P 6 (JA 389).

Finally, the prevention of undue discrimination in the provision of transmission service continues to be a major concern. The Commission is currently revisiting the Order No. 888 *pro forma* tariff to address and remedy opportunities for undue discrimination that continue to exist. *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119 (February 16, 2007). FERC initially sought comments on, *inter alia*, whether it should require transmission providers to offer transmission services in addition to, or in place of, point-to-point and network services. Notice of Inquiry, 112 FERC ¶ 61,299 at P 13 (September 16, 2005). More particularly,

FERC asked whether network service alone or both network and point-to-point services should be converted into a single contract demand service. *Id.* FMPA, in fact, filed comments arguing that "the Commission should order contract demand service where the transmission provider does not plan and operate its system to meet total customer load . . . ." Notice of Proposed Rulemaking, 71 Fed. Reg. 32,636 (June 6, 2006), FERC Stats. & Regs. ¶ 32,603 (2006) at P 75.

Based upon the comments received, including comments arguing that any contract demand service required should be restricted to situations where deliverability is physically limited, FERC retained the Order No. 888 point-to-point and network services, Notice of Proposed Rulemaking at PP 72-79, adding only a conditional firm service offering for point-to-point customers, Order No. 890 at P 4. In sum, Order No. 890 underscores the impracticability of trying to tailor transmission services to the individual customer circumstances, and the fact that FMPA is being treated the same way as are other transmission users.

C. Order No. 888 And Florida Power's Own Tariff Require Florida Power To Plan Its Transmission Network With Sufficient Capacity To Serve FMPA's Full Network Load.

FMPA's repeated theme (*see*, *e.g*. Br. at 17, 26, 31, 36) is that it is unreasonable for Florida Power to charge FMPA for a service Florida Power "cannot perform," *i.e*., deliver integrated service to Key West's full load. However, the service that Florida Power performs is measured by Florida Power's

actions, not the customer's. Remand Order at P 8 (JA 390-91); *see also Enron Power Marketing, Inc. v. FERC*, 296 F.3d 1148, 1151 (D.C. Cir. 2002) ("In FERC's view . . . comparability of [a transmission tariff] is tested on the basis of terms and conditions offered to customers, not on the usefulness of those terms and conditions to a particular customer because of that customer's capacities and needs."). Here the infirmity is with FMPA's facilities, not Florida Power's. Florida Power's transmission system is planned with sufficient capacity such that it could serve FMPA's full network load from network resources at any given moment. Remand Order at P 8 (JA 391); Rehearing Order at P 15 (JA 492).

If there were constraints on Florida Power's system, "[Florida Power] would have the obligation to expand its system to serve its network customers' full load." Remand Order at P 8 (JA 390). "Network service is founded on the notion that the transmission provider has a duty to plan and construct the transmission system to meet the present and future needs of its native load and, by comparability, its third-party network customers." Remand Order at P 8, note 16 (JA 390) (quoting Order No. 888-A at 30,220). Section 28.2 of the *pro forma* open access tariff imposes this duty on the transmission provider:

> The Transmission Provider will plan, construct, operate and maintain its Transmission System in accordance with Good Utility Practice in order to provide the Network Customer with Network Integration Transmission Service over the Transmission Provider's Transmission System. . . . The Transmission Provider shall include the Network Customer's Network Load in its Transmission System planning and

> shall, consistent with Good Utility Practice, endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load Customers.

Order No. 888 at 31,951; Order No. 888-A at 30,530; Remand Order at P 8, note 16 (JA 390); *see TAPS*, 225 F.2d at 725 (for network service, "the transmission provider incorporates the network customer's resources and loads (projected over a minimum ten-year period) into its own long-term planning").

Florida Power's tariff contains the same provision. Rehearing Order at P 15, n. 27 (JA 492). Under the tariff, all customers (including FMPA) are offered the same service, *i.e.*, planning, construction, and operation by Florida Power of a transmission system that allows integration of the customers' full loads. The use that FMPA (or any other customer) makes of the service is up to the customer. However, as the Commission found, "[t]hat the Florida Keys Electric Cooperative-City of Key West intervening transmission system cannot transmit enough power from [Florida Power] to serve Key West's entire load should not dictate what [Florida Power] may charge for transmission service that [Florida Power] provides." Remand Order at P 8 (JA 391).

D. FMPA, Like Other Transmission Customers With Behind-the-Meter Generation, May Choose Point-to-Point Service.

FMPA contends (*see*, *e.g.*, Br. at 29, 36) that Key West is different from other cities with behind-the-meter generation because it is "physically impossible" for Florida Power to serve Key West's entire load. However, Key West (like other network customers with behind-the-meter generation, including Florida Power itself) has chosen to rely on local generation. As FMPA stated in its January 31, 1994 brief to the Commission in the Transmission Case:

> The City of Key West . . . provides the clearest example of the unfairness and irrationality of [Florida Power]'s proposal. Key West generation is on an island approximately 120 miles from the nearest [Florida Power] transmission lines. . . . The city has a policy that it will always operate some local generation both for reliability and electrical reasons. FMPA intends to continue this policy. . . . This generation is at the end of a radial transmission line, which is jointly-owned by Key West and the Florida Keys Electric Cooperative, Inc. Given the configuration of Key West's system and its operating policy, there can be no possible justification for requiring FMPA to pay for [Florida Power] transmission equal to the total of Key West's loads, a portion of which will not be a load on the [Florida Power] transmission system.

See FMPA January 31, 1994 brief at 4, attached as Addendum B to this brief; Rehearing Order at P 15, n. 25 (JA 492) (citing FMPA's statement for the proposition "that Key West has chosen not to rely entirely on [Florida Power] but instead uses local generation").

In sum, Key West has chosen to "always operate some local generation" and to rely for its remaining load on a transmission line that cannot deliver its full load.

It has made its operational choices and, like other transmission customers, can weigh the advantages and disadvantages of network service and choose point-to-point service if it does not desire full network service for its load. Remand Order at P 7 (JA 390); *see TAPS*, 225 F.3d at 726 (noting 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").

FMPA contends (Br. at 24-25) that FERC did not explain why the availability of point-to-point service justifies load ratio pricing for network service. FMPA did not make this contention on rehearing before the Commission (and indeed, did not raise any issues regarding point-to-point service). Consequently, the Court lacks jurisdiction to consider it. *See* discussion *supra* at page 2.

In any case, FMPA's arguments regarding point-to-point service are without merit. FMPA contends (Br. at 25, 42-44) that Order No. 888 (and *TAPS*, 225 F.3d at 724-35) established network transmission service "as an essential service, one that is different from and superior to point-to-point service," and that "it is no answer" to FMPA's claims about network service pricing that FMPA can take point-to-point service. However, whether or not network service is, in fact, "superior" depends on circumstances. As the Commission has explained, "Each of these services has its own advantages and risks." Order No. 888-A at 30,260; *TAPS*, 225 F.3d at 726.

For example, point-to-point transmission service can be subdivided and reassigned on the secondary market and network service cannot be. Order No. 888-A at 30,221-223. Point-to-point customers can also change receipt and delivery points on both a firm and a non-firm basis; *e.g.*, a customer that reserves firm point-to-point service may modify its points of receipt and/or delivery on a firm basis and may also transmit power from secondary delivery and/or receipt points on a non-firm, as-available basis at no additional charge. Order No. 888-A at 30,528 (Section 22 of the *pro forma* open access tariff). Indeed, some transmission providers contended that the flexibility of point-to-point service puts the transmission owner and the network service customer at a competitive disadvantage. *See* Order No. 888 at 31,750; Order No. 888-A at 30,252.

Moreover, while network service customers pay a load-ratio share of the costs of the transmission provider's system on an ongoing basis, point-to-point service customers pay only for their reserved capacity on a contract-demand basis over the contract term. *Florida Municipal I*, 315 F.2d at 363. However, while a network service customer's full load-based needs will be met on a firm basis, because point-to-point service is reservation-based, capacity may not be available to satisfy a point-to-point service customer's additional capacity needs. Order No. 888-A at 30,260.

This Court, moreover, recognized on a number of occasions in *TAPS* that network service may not suit a particular customer's circumstances, but that point-to-point service is available to such a customer in those instances. *See*, *e.g.*, *TAPS*, 225 F.3d at 733 (discussing a customer's unused transmission capacity); *id*. at 734 (addressing customers serving load in two or more control areas).

FMPA also argues (Br. at 24) that the challenged orders "leave[] the transmission provider with the unfettered discretion whether to raise prices to its customers or to its competitors' customers." This contention hardly needs rebuttal. Not only does the Commission review rate filings pursuant to FPA § 205, but Order No. 888 also requires transmission providers to offer non-discriminatory services. *See TAPS*, 225 F.3d at 682.

Finally, FMPA contends (Br. at 31-34) that the Commission cannot decide that Florida Power's transmission rates are just and reasonable without determining Florida Power's actual transmission costs for service to Key West. As FMPA did not raise this issue on rehearing, the Court has no jurisdiction to consider it. In any case, FMPA is simply trying to reframe the issue. FMPA would like to have a new service defined and provided for one of its 29 member cities, a preferential service that would provide Key West with network service at a lower rate. The Commission properly concluded that FMPA, like other transmission customers, is not entitled to services tailored to its particular circumstances.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C)(i), I certify that the brief of Respondent Federal Energy Regulatory Commission contains 6,453 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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