147 FERC ¶ 61,237
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Seminole Electric Cooperative, Inc. and Florida Municipal Power Agency	Docket Nos. EL13-63-000
v.	
Duke Energy Florida, Inc.	
Seminole Electric Cooperative, Inc. and Florida Municipal Power Agency	EL12-39-000 (Consolidated)
v.	
Florida Power Corporation	

ORDER ON COMPLAINT, ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES, AND CONSOLIDATING PROCEEDINGS

(Issued June 19, 2014)

1. On May 13, 2013, Seminole Electric Cooperative, Inc. (Seminole) and the Florida Municipal Power Agency (FMPA) (collectively, Complainants) filed a complaint against Duke Energy Florida, Inc. (Duke Energy Florida) (formerly Florida Power Corporation) pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA)[1] and rule 206 of the Commission's regulations,[2] alleging that the current 10.8 percent base return on equity (ROE) in Duke Energy Florida's transmission formula rate (Formula Rate) is unjust and unreasonable and should be replaced with a just and reasonable ROE

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

[2] 18 C.F.R. § 385.206 (2013).

of either 8.63 percent or 8.84 percent (2013 Complaint). Duke Energy Florida requests that the Commission consolidate the 2013 Complaint with the ongoing proceeding in Docket No. EL12-39-000 (2012 Complaint). As discussed below, we set the 2013 Complaint for hearing and settlement procedures, and consolidate this proceeding with Docket No. EL12-39-000 for purposes of settlement, hearing, and decision. Further, we establish a refund effective date of May 13, 2013 for the 2013 Complaint.

I. Background

2. Duke Energy Florida recovers its transmission revenue requirements through a Formula Rate included in its Open Access Transmission Tariff (OATT). The Formula Rate resulted from a settlement between Duke Energy Florida and its customers, including Complainants (Rate Settlement). On December 17, 2007, the Commission approved the Rate Settlement, which provided for a ROE of 10.8 percent.[3] Under the Rate Settlement, the ROE remained fixed until the end of a rate moratorium (December 31, 2011), at which time either Duke Energy Florida or its customers could seek to change the ROE under either section 205 or 206 of the FPA.

3. On February 29, 2012, in Docket No. EL12-39-000, Complainants filed their 2012 Complaint. Complainants asserted that their expert witness performed a discounted cash flow (DCF) analysis that showed that the zone of reasonableness ranged from 6.95 percent to 11.58 percent with a median of 9.02 percent. Complainants argued that a just and reasonable base ROE should not exceed 9.02 percent, which was 178 basis points lower than the current base ROE.

4. In the 2012 Complaint, Complainants asserted that their expert's DCF analysis conformed to Commission policy and precedent and resulted in a national proxy group of 18 companies.[4] The analysis eliminated two low-end ROE outliers[5] consistent with the

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

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

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

100 basis point utility bond yield test. The analysis also excluded Integrys Energy Group, Inc. (Integrys), which had a high-end ROE estimate of 15.42 percent, as an extreme outlier that exceeds the next highest ROE in its proxy group (Sempra Energy) by 384 basis points.

5. Complainants asserted in the 2012 Complaint that the reduction from a 10.8 percent ROE to a 9.02 percent ROE would yield a substantial decrease in transmission rates for Seminole and FMPA of $3.0 million and $500,000, respectively. Complainants requested that the Commission set a refund effective date coincident with the date of filing and either summarily lower the ROE from 10.8 percent to 9.02 percent (with appropriate refunds) or, in the alternative, hold a paper hearing. In an order being issued concurrently, the Commission is setting the 2012 Complaint for hearing and settlement procedures and establishing a refund effective date of February 29, 2012.[6]

II. 2013 Complaint

6. On May 13, 2013, Complainants filed their 2013 Complaint. Complainants assert that, since the filing of the 2012 Complaint, capital markets have experienced continued volatility and utilities have continued to experience declining costs of equity as established by the Commission's DCF model. According to Complainants, these changed circumstances meet the Commission's criteria for what is required to file a new complaint with a new refund-effective date.[7] Therefore Complainants, in April 2013, authorized their expert witness to review the "most relevant market data" to determine a just and reasonable ROE.[8]

7. Complainants again assert that the 10.8 percent base ROE currently reflected in the Duke Energy Florida Formula Rate is unjust and unreasonable. Complainants assert that their expert witness performed two DCF analyses, a "Preferred Approach" and an "Alternative Approach" using the most recent relevant market data[9] in compliance with the Commission's policy demonstrating that a just and reasonable ROE for Duke Energy Florida is either 8.63 percent or 8.84 percent. Therefore, Complainants argue that the

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[6] *Seminole Electric Coop., Inc. v. Florida Power Corp.*, 147 FERC ¶ 61,236 (2014) (*Seminole v. Florida Power*).

[7] Complainants May 13, 2013 Complaint at 14 (referencing *Consumer Advocate Div. of the Pub. Serv. Comm'n of W.V. v. Allegheny Generating Co.*, 67 FERC ¶ 61,288, at 61,998 (1994) and *Southern Co. Servs., Inc.*, 83 FERC ¶ 61,079, at 61,385-86 (1998)).

[8] *Id.* at 6.

[9] The expert witness used market data for the six months ending March 2013.

existing 10.8 percent ROE is between 196 and 217 basis points above what is acceptable under the FPA's just and reasonable standard.

8. Complainants state that their witness' Preferred Approach DCF analysis, which was the same approach used by their expert in the 2012 Complaint, conforms to Commission policy and precedent and results in a national proxy group of 24 companies.[10] The Preferred Approach analysis eliminates one low-end ROE outlier consistent with the 100 basis point utility bond yield test. Complainants state that their witness' Alternative Approach DCF analysis results in a national proxy group of 35 companies. Complainants explain that the screening criteria for both approaches are the same, except the Alternative Approach used only S&P as the credit rating screen. According to Complainants, the Alternative Approach analysis eliminates three low-end ROE outliers while also excluding PNM Resources (PNM), which has a high-end ROE estimate of 12.25 percent, as an extreme outlier that exceeds the next highest ROE in its proxy group (Northeast Utilities) by 126 basis points.

9. Complainants assert that the shift from the current 10.8 percent ROE to an 8.63 percent ROE is substantial since Seminole and FMPA are being annually overcharged by $4.2 million and $740,000, respectively. Moreover, Seminole and FMPA explain that even if the current ROE were reduced to 8.84 percent, their cost savings would be $3.8 million and $670,000, respectively. Complainants request that the Commission set a refund date contemporaneous with the date of filing of the Complaint and either summarily lower the ROE from 10.8 percent to either 8.63 percent or 8.84 percent (with appropriate refunds) or, in the alternative, hold a paper hearing.

10. Complainants also state that additional rate adjustments will be required under the procedures set forth in the Rate Settlement. Complainants assert that the 2013 Complaint was filed when the annual update "was not yet final"[11] and therefore a favorable ruling by the Commission is controlled by section 4 of the Formula Rate Implementation Protocols (Protocols).[12] Complainants argue that, under section 4(d) of the Protocols, the changes

[10] *DCF Analysis*, *supra* note 4.

[11] 2013 Complaint at 15-16 (stating that the annual update is not final under section 3(e) of the Protocols since either 12 months have not passed since publication date of the annual update or the Commission has not issued a final order in response to a Formal Challenge or a proceeding issued by the Commission).

[12] *Id*. at 16 (referencing section 4(d) of the Protocols).

resulting from the 2013 Complaint should be effective on June 1, 2012 and should be applied to the true-up for 2011.[13]

11. Complainants assert that Duke Energy Florida is likely to argue, as it did in its answer to the 2012 Complaint,[14] that FPA section 206 does not reach any ROE that falls within some "broader area of statutory reasonableness."[15] Complainants preemptively argue that ROEs should instead be set at the central value within the range of proxy company results.[16] Complainants assert that "the 'zone' of reasonableness consists of a zone within which reviewing courts afford the Commission broad discretion to weigh case-specific factors, explain its reasoning, and select a particular rate."[17] Complainants claim that whenever a wholesale customer believes that the ROE is unreasonable, the remedy is to "appl[y] for and secure[] a review and, perhaps, a reduction of the rates by the Commission."[18]

III. Notice and Responsive Pleadings

12. Notice of the 2013 Complaint was published in the *Federal Register*, 78 Fed. Reg. 29,364 (2013), with interventions and protests due on or before June 3, 2013. On June 3, 2013, Duke Energy Florida filed its answer to the complaint.

13. Reedy Creek Improvement District filed a timely motion to intervene. Complainants submitted a response to Duke Energy Florida's answer on June 18, 2013. Duke Energy Florida submitted a response to Complainants' response on July 3, 2013. On July 18, 2013, Complainants filed a response to Duke Energy Florida's July 3, 2013 response. On August 2, 2013, Duke Energy Florida filed a response to Complainants' July 18, 2013 response.

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[13] *Id*. (stating that the annual update was performed in 2012 and 2011 was the calendar year upon which the annual update was based).

[14] Florida Power Corporation March 20, 2012 Answer in Docket No. EL12-39-000 (Duke Energy Florida Answer).

[15] 2013 Complaint at 10 (citing Duke Energy Florida Answer at 14).

[16] *Id*. at 11 (citing *Pub. Serv. Co. of N.M.*, 137 FERC ¶ 61,119, at P 13 (2011)).

[17] *Id*. at 12 (citing *Bangor Hydro-Electric Co.*, 120 FERC ¶ 61,093, at P 14 (2007), *order on reh'g*, 122 FERC ¶ 61,038, at PP 9-14 (2008)).

[18] *Id*. at 12-13 (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 250-51 (1951)).

Duke Energy Florida's Answer to the 2013 Complaint

14. Duke Energy Florida asks the Commission to deny the 2013 Complaint. In the alternative, Duke Energy Florida requests that the Commission consolidate the 2012 and 2013 Complaints for joint hearing and disposition.[19]

15. In its answer, Duke Energy Florida requests that the 2013 Complaint be denied, stating that the 10.8 percent base ROE remains just and reasonable. Duke Energy Florida asserts that Complainants failed to establish that: (1) Duke Energy Florida's existing 10.8 percent ROE is no longer just and reasonable; and (2) Complainants' proposed alternative ROEs are just and reasonable.[20]

16. Additionally, Duke Energy Florida asserts that the 2013 Complaint suffers from material deficiencies. Duke Energy Florida states that its expert was able to produce "substantial evidence" demonstrating the reasonableness of the existing 10.8 percent ROE and the unreasonableness of the ROE values proposed by the Complainants. Specifically, Duke Energy Florida asserts that its expert's analysis "showed a range of ROE results that encompassed … the existing 10.8 [percent] ROE."[21] Duke Energy Florida further asserts that its expert concluded that the proposed alternative ROEs "are unrealistically low, would fail to recover Duke Energy Florida's cost of common equity capital, and are not credible."[22]

17. Duke Energy Florida asserts that Complainants' proposed alternative ROE values are based on a flawed analysis. Specifically, Duke Energy Florida asserts that Complainants' analysis: (1) improperly used a Moody's rating screen, which is not consistent with Commission policy and is not supported by the facts; (2) failed to consider the outlook for capital costs in evaluating low-end DCF outliers; and (3) improperly excluded PNM in its proxy group based on its 12.25 percent cost of equity. Duke Energy Florida asserts that, if the 2013 Complaint is not denied, "[t]he Commission should consider a wide array of evidence, gathered in a trial-type

[19] Duke Energy Florida June 3, 2013 Answer at 2.

[20] *Id*. at 6-7 (stating that, in addition to the requirements of section 206 of the FPA, Complainants are also bound by the requirements of Duke Energy Florida's Formula Rate Implementation Protocol (Duke Energy Florida OATT, Attachment H.2, Section 3(e)).

[21] *Id*. at 12 (citing Avera Testimony, Exhibit DEF-100 at 5-16).

[22] *Id*. at 12-14 (citing Avera Testimony, Exhibit DEF-100 at 16-38).

evidentiary hearing, before rendering a decision."[23] Duke Energy Florida argues that "according any credence to the [2013] Complaint would raise numerous material issues of fact," and therefore "a standard trial-type hearing process with opportunity for discovery, the submittal of rebuttal evidence and cross-examination would be required."[24]

18. If the Commission sets the case for hearing, Duke Energy Florida argues that the Commission should establish a refund effective date that is consistent with section 206 of the FPA. Duke Energy Florida asserts that the Rate Settlement, FPA section 206, the filed rate doctrine and the rule against retroactive rulemaking prohibit the retroactive application of any ROE adjustment resulting from this proceeding. According to Duke Energy Florida, the earliest possible date for any ROE reduction is May 13, 2013.[25] Duke Energy Florida states that it fully addressed and responded to Complainants' retroactivity claims in responsive pleadings filed in Docket No. EL12-39-000.[26]

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

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

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[23] *Id*. at 19-21.

[24] *Id*. at 22-23.

[25] *Id*. at 25-26.

[26] In its answer to the 2012 Complaint, Duke Energy Florida, as Florida Power Corporation, stated that section 4 of the Protocols concerns changes to an Annual Update and is not applicable to a section 206 complaint to amend the Formula Rate. Duke Energy Florida further asserted that section 3(d) of the Protocols applies only to the resolution of challenges to the Annual Update. Thus, Duke Energy Florida argued that Complainants should not receive the benefit of the refund provisions of sections 3 and 4 of the Protocols. *See* Florida Power Corporation April 26, 2012 Answer in Docket No. EL12-39-000 at 6-7.

B. Commission Determination

21. We find that the 2013 Complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly, we will set the 2013 Complaint for investigation and a trial-type evidentiary hearing under section 206 of the FPA. Given the common issues of fact and law, we will consolidate this proceeding with Docket No. EL12-39-000 for purposes of hearing, settlement and decision. We note that the Commission is issuing Opinion No.531, the order on initial decision in Docket No. EL11-66-001, concurrently with this order.[27] In Opinion No. 531, the Commission is changing its practice for determining the ROE for public utilities. Accordingly, we expect the evidence and any DCF analyses presented by the participants in this proceeding to be guided by our decision in Opinion No. 531.

22. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[28] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[29] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

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

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

[28] 18 C.F.R. § 385.603 (2013).

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

maximum protection to customers,[30] we will set the refund effective at the earliest date possible, i.e., May 13, 2013, the date of the Complaint, as further discussed below.

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

25. Consistent with the Commission's explanation in Docket No. EL12-39-000, we find that the issue of whether additional rate adjustments will be required before the refund effective date of February 29, 2012, raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

The Commission orders:

(A) Docket No. EL13-63-000 is hereby consolidated with Docket No. EL12-39-000 for purposes of hearing, settlement and decision, as discussed in the body of this order.

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

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603

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

and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

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

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

(F) The refund effective date in Docket No. EL13-63-000, established pursuant to section 206(b) of the FPA, is May 13, 2013.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.