

DE 03-186

FLORIDA POWER & LIGHT COMPANY

Petition Regarding Seabrook Transmission Substation

Order Approving Settlement Agreement

ORDER NO. 24,321

May 7, 2004

APPEARANCES: Joel D. Newton, Esq. and Orr & Reno, P.A. by Douglas L. Patch, Esq. for Florida Power & Light Company; Robert A. Bersak, Esq. for Public Service Company of New Hampshire; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

In Order No. 24,258 (December 31, 2003), the New Hampshire Public Utilities Commission (Commission) determined that petitioner Florida Power & Light Company (FP&L) would be subject to regulation as a public utility under New Hampshire law by acquiring a majority interest in the transmission substation located on the grounds of the Seabrook nuclear power plant. In this Order, the Commission determines that it is consistent with the public good for FP&L to become a New Hampshire public utility and describes the extent to which the Commission will regulate FP&L upon consummation of its purchase.

Order No. 24,258 contains a detailed recitation of the background and procedural history of this case. In brief, FP&L affiliate FPL Energy Seabrook, LLC (FPLE Seabrook) acquired an 88.23 percent interest in the Seabrook nuclear power plant in 2002 and, with it, an 88.23 percent interest in the transmission substation located on the grounds of the nuclear facility. Thereafter, FPLE Seabrook obtained approval from the Federal Energy Regulatory

Commission (FERC) to transfer its interest in the substation to FP&L. See *FPL Energy Seabrook, LLC*, 104 FERC ¶ 61,258 (Sept. 10, 2003).

FP&L and FPLE Seabrook have been forthright as to the purpose of this transfer. As a merchant generator, the only manner in which FPLE Seabrook could recover on its investment in the transmission substation would be in the competitive energy market through the sale of power generated by the nuclear plant. FP&L, however, would be permitted under federal law to recover its costs through tariffed rates.

The FERC conditioned its approval of the transaction on a resolution by this Commission of the question of whether FP&L would be subject to regulation as a New Hampshire public utility. See RSA 362:2 (defining “public utility”). The answer turned on construction of RSA 362:4-c, reciting an exemption from regulation for certain wholesale power facilities. Order No. 24,258 resolved this issue by concluding that the exemption did not apply and FP&L would be subject to regulation under state law. See Order No. 24,258, slip op. at 14-21.

In addition to FP&L, the parties to this case include the Office of Consumer Advocate (OCA) as well as intervenors Public Service Company of New Hampshire (PSNH) and the New Hampshire Electric Cooperative, Inc. (NHEC). On February 4, 2004 Staff submitted a proposed procedural schedule for the remainder of the case, agreed to by the parties, which the Commission approved by secretarial letter on February 19, 2004. The schedule provided for pre-filed direct testimony, discovery and a merits hearing on April 19 and 21, 2004. As contemplated, FP&L submitted pre-filed testimony on February 18, 2004, PSNH submitted testimony on February 23, 2004 and FP&L submitted rebuttal testimony on April 7, 2004. On April 16, 2004, FP&L filed a Settlement Agreement entered into by all parties, FPLE Seabrook

(which did not seek party status) and Staff, resolving all issues in the case. The Commission conducted its merits hearing on April 19, 2004.

II. SUMMARY OF THE SETTLEMENT AGREEMENT

The parties and Staff agreed, and asked the Commission to determine, that it would be for the public good for FP&L to become a public utility under New Hampshire law for the purpose of operating the Seabrook transmission substation and owning a majority interest in it. The parties and Staff further agreed that so long as FP&L's operations in New Hampshire are limited to the substation, the Commission's regulatory oversight would similarly be limited. The Settlement Agreement recites the limitations in some detail; FP&L confirmed at hearing that the basic intention of the Settlement Agreement is to recognize that FP&L would be subject to the rights and responsibilities of a foreign electric utility as specified in RSA 374-A:7. FP&L also explicitly agreed it would be subject to the annual assessment for Commission expenses described in RSA 363-A, applicable state taxes (i.e., the real estate transfer tax associated with the transfer of the substation from FPLE Seabrook to FP&L, business profits taxes and any other taxes lawfully imposed by the state or one of its subdivisions) and the requirement that it file with the Commission a schedule of its rates and charges pursuant to RSA 378:1. FP&L confirmed that it would participate in New Hampshire's underground utility damage prevention program as set forth in RSA 374:49 and related Commission rules, to seek a license pursuant to RSA 371:17 before constructing facilities under or across public waters, obtaining Commission approval under RSA 374:30 before transferring assets to another entity and to comply with Commission requests for inspection of the property, works, system, plant, devices, appliances, methods, books, papers or records of FP&L's New England Division pursuant to RSA 365:6 and

7. With respect to this requirement, FP&L agreed to produce within New Hampshire any applicable books and records.

The Settlement Agreement contains specific provisions related to the purchase by FPLE Seabrook of station service (i.e., replacement power needed by FPLE Seabrook at times when its generation facilities are not operating) from PSNH. Accordingly, FPLE Seabrook is a signatory to the agreement. FPLE Seabrook's obligation to purchase station service from PSNH is contained in the interconnection agreement between it and PSNH. In the Settlement Agreement, FPLE Seabrook agreed to make PSNH whole for certain lost stranded cost payments in the event the FERC or a court determined that FPLE Seabrook was no longer obligated to purchase station service from PSNH. Such stranded cost payments are those that FPLE Seabrook would have otherwise made in connection with its station service obligation through the approximate date that PSNH projects its Part 1 stranded costs will be fully recovered – June 30, 2013.¹ The Settlement Agreement establishes the sum of \$28,500 as “a liquidation of the monthly stranded cost payment obligation agreed upon by the Settling Parties and Staff” through the estimated date of full Part 1 recovery. FPLE Seabrook agreed to make, at the time of any termination of the station service obligation, a payment consisting of the net present value (based on an 8 percent discount rate) of the remaining monthly \$28,500 payments. PSNH, in turn, agreed to credit this payment to its stranded cost recovery account. The Settlement Agreement further provides that if, thereafter, FPLE Seabrook resumes taking station service from PSNH, the retail bill of FPLE Seabrook rendered by PSNH would include a credit of \$28,500 per month through June of 2013, with PSNH recovering this payment as a stranded cost.

¹ Under the Agreement to Settle PSNH Restructuring (Restructuring Agreement) approved by the Commission in 2000, PSNH's recoverable stranded costs were divided into three parts, Part 1 consisting of stranded costs that were securitized so as to reduce their ultimate cost to ratepayers by guaranteeing their full recovery.

Also included in the Settlement Agreement are provisions related to the possibility of PSNH constructing a new substation that would be “the functional replacement” for the existing Seabrook substation proposed to be transferred to FP&L. The interconnection agreement between PSNH and FPLE Seabrook provides PSNH with the right to construct such a facility. Accordingly, in the present agreement, FP&L agreed not to exercise any public utility authority obtained in this proceeding that would interfere with PSNH’s right to construct such a project.

FP&L’s right to exercise eminent domain under RSA 378 in its capacity as a New Hampshire public utility is the subject of specific provisions in the Settlement Agreement. The agreement clarifies that FP&L would enjoy such rights, but that FP&L would only take such action with respect to requests pursuant to a FERC-approved Local Network Service tariff, directives from ISO-New England or any successor, or directives from government agencies with appropriate jurisdiction. The parties and Staff further agreed that if FP&L voluntarily seeks to construct transmission facilities beyond those at the existing substation, FP&L could seek all necessary government approvals on a concurrent basis.

The Settlement Agreement acknowledges that FPLE Seabrook presently is obligated to purchase so-called “campus power” (i.e., power required by Seabrook Station other than station service) from Unitil Energy Systems. The parties and Staff agreed that the Settlement Agreement is not intended to affect or to modify this obligation.

Finally, the Settlement Agreement contains an acknowledgement by FP&L that the parties and Staff have relied upon FP&L’s representation that certain charges imposed via the substation’s proposed Local Network Service (LNS) tariff would not apply to jurisdictional New Hampshire utilities or their retail customers with the exception of FPLE Seabrook. At issue are

charges associated with the delivery of station service to FPLE Seabrook under the proposed LNS tariff filed by FP&L at the FERC on April 1, 2004. The Settlement Agreement further provides that this representation by FP&L would not apply if a New Hampshire utility were to agree voluntarily to pay charges under the substation's LNS tariff as part of a sale of station service to FPLE Seabrook or if such a utility were to otherwise request service over the substation's LNS facilities not related to the sale of station service to FPLE Seabrook.

III. COMMISSION ANALYSIS

RSA 374:22, I provides that no person or entity shall commence business as a public utility in New Hampshire "without first having obtained the permission and approval of the commission." RSA 374:26 requires the Commission to grant such permission "whenever it shall, after due hearing, find that such engaging in business . . . would be for the public good." Section 26 also authorizes the Commission to "prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest."

We evaluate the technical, managerial and financial expertise in determining whether to grant a company authority to operate as a public utility. *See, e.g., West Swanzey Water Co.*, Order No. 24,128 (February 28, 2003), slip op. at 8. Florida Power and Light Company is a major electric utility in its home state; its expertise is not in dispute. The only potential issue relates to whether a utility based in a considerably more temperate climate than New Hampshire's has the expertise to operate a significant transmission facility on the New England coast. However, FP&L offered testimony that FPLE Seabrook has now successfully operated the substation for two winters and that FP&L would rely on the same personnel that FPLE Seabrook did. In these circumstances, we find that FP&L has the necessary expertise.

We are likewise satisfied that the Settlement Agreement provides an appropriate guarantee by FP&L that it will meet the requirements of a foreign electric utility under New Hampshire law. In several places, the Settlement Agreement seems to refer to the New England Division of FP&L as the entity to be regulated in New Hampshire. However, FP&L clarified at hearing that the New England Division will not itself be a regulated entity. Rather, according to FP&L, it intends to maintain a separate New England Division for purposes of keeping the Seabrook substation operationally and financially independent from its utility operations elsewhere. Such a separation is appropriate but we make clear that Florida Power and Light Company, as opposed to any administrative division of the Company, is the entity that is subject to the jurisdiction of the Commission.

A significant issue that was not discussed at hearing concerns the affiliate relationship between FP&L as majority owner of the substation and FPLE Seabrook as majority owner of the state's largest merchant generation facility. It is obvious, and we reaffirm, that we will require FP&L and FPLE Seabrook to abide scrupulously by all applicable codes of conduct and affiliate transaction rules so as to eliminate the possibility of either company gaining an inappropriate advantage over other participants in the region's wholesale electricity markets.

We are aware that the most significant net effect of granting the approval FP&L seeks here will be to allow recovery in tariffed transmission rates on the majority interest in the substation that FP&L plans to acquire. We are also aware that the Settlement Agreement makes clear that the applicable rates will be approved by the FERC rather than state authorities. As the Settlement Agreement implicitly acknowledges, our principal concern is not so much the return of the majority interest in the substation to the wholesale rate base but, rather, the preservation of the customer benefits assured by the sale of the majority interest in the Seabrook nuclear power

plant to FPLE Seabrook. This involves assuring that PSNH will receive the stranded cost charges associated with the station service FPLE Seabrook is contractually obligated to purchase from PSNH. The Settlement Agreement seeks to achieve such an assurance even in the face of possible FERC reexamination of whether station service is a retail, as opposed to a wholesale, matter. Laudably, the Settlement Agreement seeks to make PSNH customers indifferent to any such policy reexamination at least insofar as stranded cost recovery is concerned. This necessitated the making of an estimate of the value of FPLE Seabrook's stranded cost charges. We are satisfied that the estimate in the Settlement Agreement is reasonable and that the mechanism is consistent with the public interest.

The Settlement Agreement additionally contains provisions that protect PSNH's contractual right to construct a new substation to replace the existing one at issue here, to define the extent to which FP&L would acquire the ability to exercise eminent domain under RSA 371, to protect the right of Unitil Energy Systems to provide certain retail service to the Seabrook nuclear facility and to clarify the purpose of the LNS tariff FP&L has recently filed with the FERC in connection with the Seabrook substation. These provisions are consistent with the public interest. In particular, we note our understanding of the provisions relating to the wholesale tariff and the exercise of state-law eminent domain rights. We read these provisions as clarifying that neither the Settlement Agreement nor the FERC tariff filing is intended to authorize FPLE Seabrook to do anything more than operate the existing substation (which interconnects three important 345 kilovolt transmission lines) and also to provide LNS to the Seabrook nuclear facility. While the Settlement Agreement does not preclude FP&L from serving additional LNS customers via its substation, or from expanding its New Hampshire operations beyond the substation, the agreement makes clear that no such authority is being

granted or acceded to here. Subject to this understanding, we find these provisions to be consistent with the public interest.

In summary, we approve the Settlement Agreement and treat it as resolving all outstanding issues in this proceeding.

Based upon the forgoing, it is hereby

ORDERED, that the Settlement Agreement entered into by Florida Power and Light Company, FPL Energy Seabrook, LLC, the New Hampshire Electric Cooperative, the Office of Consumer Advocate and the Commission Staff is hereby APPROVED; and it is

FURTHER ORDERED, that Florida Power and Light Company be granted authority to operate as a public utility in connection with the transmission substation on the grounds of the Seabrook nuclear power plant, subject to the conditions set forth in the Settlement Agreement.

By order of the Public Utilities Commission of New Hampshire this seventh day of May, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary