133 FERC P 61121 (F.E.R.C.), 2010 WL 4340095

FEDERAL ENERGY REGULATORY COMMISSION
**1 Commission Opinions, Orders and Notices

Before Commissioners: Jon Wellinghoff, Chairman; Marc Spitzer, Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.

Florida Power & Light Company

Docket No. EL10-43-000
ORDER DENYING PETITION FOR DECLARATORY ORDER
(Issued November 3, 2010)

*61598 1. In a petition for declaratory order (Petition) filed by Florida Power & Light Company (FPL) on February 17, 2010, FPL requests reversal of certain Commission orders concerning the scope of Commission jurisdiction over interconnection agreements between a public utility and a qualifying facility (QF). We find that prior Commission precedent articulating jurisdiction over QF interconnection agreements is consistent with the Public Utility Regulatory Policies Act of 1978 (PURPA) [1] and the Federal Power Act (FPA), [2] as well as Commission policies and decisions issued thereunder. Therefore, we deny FPL's request for reversal of the challenged precedent but nonetheless clarify our authority, as discussed below.

I. Background

2. In two related orders issued in November 2007 and April 2008, [3] the Commission addressed the scope of its jurisdiction over an interconnection agreement governing the interconnection of a cogeneration QF to the transmission system of a host utility. In that proceeding, a host utility submitted to the Commission an amended interconnection agreement, which it conceded was being filed out-of-time. Due to the lateness of the filing, the utility acknowledged its obligation to provide customer refunds equivalent to the time-value of revenues collected under the interconnection agreement, to be calculated from the date when the agreement had become subject to the Commission's jurisdiction, until the date when the Commission authorized the charges imposed under the agreement. The filing utility argued that the interconnection agreement had not become jurisdictional, and that the Commission's filing requirements therefore did not apply until the date that the utility ceased purchasing the full output of the QF. The Commission concluded, however, that its jurisdiction applied from the time of the consummation of the agreement releasing the host utility from its obligation (under the associated power purchase agreement) to purchase the QF's entire output and expressly authorizing the QF to sell its output to third parties. [4]

II. Summary of Petition

3. FPL states that it is party to three QF interconnection agreements, entered into in 1989, 1991, and 1997, respectively, pursuant to which each QF sells its entire power output to FPL, on an as-available basis. [5] FPL further asserts that *61599 none of the QFs party to the agreements sell power to third parties, procure transmission service from FPL, or have ever taken actions, such as requesting wheeling service, that indicate any plans to sell to third parties. [6] Based on these facts, FPL argues that while the aforementioned QF interconnection agreements would not have fallen within the scope of the Commission's jurisdiction prior to *Niagara Mohawk*, FPL may now, albeit wrongly according to its interpretations of Commission policy and precedent, be obligated to file such QF interconnection agreements with the Commission even though sales to a third party are neither occurring nor planned. If it were required to make such filings, FPL expresses concern that a Commission decision giving the agreements an effective date on a prospective basis, from the time of filing (or 60 days thereafter), would expose FPL to an obligation to make significant time-value refunds. [7]

**2 4. Prior to *Niagara Mohawk*, FPL asserts that the Commission's jurisdiction over QF interconnection agreements was clearly and explicitly determined by a "bright line" test that centered on the identity of the purchaser of QF output. [8] Citing to language from Order No. 2003— "the presence of any output sold to a third party determines Commission jurisdiction"—FPL argues that the Commission clearly and properly ruled that where QF sales of output are to the host utility, the relevant state regulatory commission retains jurisdiction. [9] However, FPL asserts that in *Niagara Mohawk*, the Commission subsequently applied a different test whereby QF interconnection agreements become jurisdictional to the Commission upon expiration of the QF's firm contract with the host utility. According to FPL, *Niagara Mohawk* conflicts with prior Commission precedent, including *Western Massachusetts* [10] and relevant sections of Order No. 2003, inasmuch as *Niagara Mohawk* stands for the proposition that "if any capacity [is] not committed by contract for sale to the host utility, then the interconnection agreement [falls] under the Commission's jurisdiction, whether or not such sales to third parties actually [occur]." [11] Based on this interpretation, FPL argues that the Commission should reverse *Niagara Mohawk* as incorrectly decided and should instead make clear that "interconnection agreements with QFs do not have to be filed with the Commission so long as the host utility purchases all the QF's power, regardless of whether there is a firm contract in place." [12]

5. In support of its request for reversal of *Niagara Mohawk*, FPL offers additional arguments. FPL claims that the Commission, by adopting in *Niagara Mohawk* what FPL calls a stricter standard for determining Commission jurisdiction over interconnection agreements, engaged in impermissible modification of policy without adhering to the applicable notice and comment requirements of the Administrative Procedure Act (APA). [13] FPL further argues that the outcome of *Niagara Mohawk* conflicts with the established boundary between PURPA and the FPA, and that the Commission lacks jurisdiction where wholesale transactions are not actually taking place. [14]

6. FPL further argues that adherence to *Niagara Mohawk* would impermissibly divest states of their jurisdiction through an improper extension of the Commission's own jurisdiction based merely upon potential transactions. [15] FPL also argues that various provisions of its interconnection agreements with QFs, while not explicit in limiting sales of QF output to FPL exclusively, are particularly tied to certain rates, terms, and conditions set forth in FPL's COG-1 tariff governing as-available energy sales, and thus imply an obligation on the QFs to sell all output to FPL despite the absence of firm contracts. Finally, FPL argues that provisions of the same tariff, which require a QF to obtain transmission service from FPL before wheeling any power to other parties, conflict with any notion that the QFs at issue could have freely chosen to sell to third parties at any time. [16]

**3 7. FPL alternatively argues that if the Commission is not compelled to reverse *Niagara Mohawk*, it nonetheless should acknowledge that the policies established therein, created new rules rather than mere clarifications of existing rules, and that such policies should therefore be applied only prospectively from 2007. [17]

61600 **III. Notices, Interventions and Comments

8. Notice of the Petition was published in the *Federal Register*, 75 Fed. Reg. 9591 (2010), with comments, interventions, and protests due on or before March 19, 2010. Upon request, the Commission extended its deadline for comments, interventions, and protests, to April 9, 2010. [18]

9. Niagara Mohawk Power Corp. (Niagara Mohawk), Edison Electric Institute (EEI), Florida Public Service Commission (FPSC), Dominion Resources Services, Inc., the PSEG Companies, [19] Xcel Energy Services, Inc., [20] Consumer Energy Company, Entergy Services, Inc., Southern Company Services, Inc., and the Detroit Edison Company, each filed timely motions to intervene. Niagara Mohawk, EEI, and FPSC also filed comments in support of the Petition.

10. EEI supports the Petition and urges the Commission to grant the relief requested by FPL. [21] EEI asserts that, in Order No. 2003, the Commission established that when an electric utility purchases a QF's entire output, the relevant state authority has

jurisdiction over the interconnection and allocation of interconnection costs. In contrast, EEI further asserts that, irrespective of any distinction between firm or as-available sales, the Commission's exclusive jurisdiction over the rates, terms and conditions affecting or related to the transmission of electricity in interstate commerce is triggered only when an electric utility interconnecting with a QF does not purchase all of the QF's output and instead transmits that power in interstate commerce. [22]

11. EEI asserts that an interconnection agreement is part of the overall transaction by which a host utility procures power from a QF to sell to its retail load and should thus be subject to state jurisdiction. EEI further asserts that *Niagara Mohawk* was improperly based on speculation about possible future actions by a QF or other party, and that Commission jurisdiction is proper only when a QF actually sells its output to a third party. [23] Accordingly, EEI argues that the Commission's exercise of jurisdiction in *Niagara Mohawk* cannot be supported by *Western Massachusetts* because there the Commission based its jurisdiction on a wholesale sale and related transmission transaction.

****4** 12. In the event that *Niagara Mohawk* is upheld, EEI requests Commission acknowledgement that the decision represents a change in policy, made in 2007, for which only prospective application is appropriate. Alternatively, EEI requests an amnesty period during which utilities may, without the possibility of being subjected to time-value penalties, review and submit any QF contracts and interconnection agreements that might need to be filed with the Commission. [24]

13. Niagara Mohawk supports the ultimate action requested in the Petition (i.e., reversal of *Niagara Mohawk*) but nonetheless asserts that FPL has misapprehended the meaning and scope of *Niagara Mohawk.* Irrespective of whether *Niagara Mohawk* is reversed, Niagara Mohawk asserts that, based upon its own interpretations of that proceeding, the Commission can and should clarify that it would not require the filing of QF interconnection agreements under the facts described in the Petition—i.e., when an interconnected utility is purchasing the full output of a QF pursuant to a regulatory requirement or when purchases are pursuant to a firm contract that does not provide the QF with the affirmative right to make wholesale sales to third parties. While Niagara Mohawk asserts that FPL does not explicitly request clarification in the aforementioned terms, Niagara Mohawk argues that such a clarification would resolve the concerns raised by the Petition. [25]

14. In support of its proffered interpretation of the Commission's precedent, Niagara Mohawk asserts that while FPL correctly observes that, in the facts underlying *Niagara Mohawk*, the original power purchase agreement (PPA) had expired, Niagara Mohawk argues it was not this expiration upon which the Commission found that the filing obligation existed. Instead, Niagara Mohawk suggests that it was the nature of the new “put option” language in the PPA that gave rise to the filing obligations imposed by the Commission in *Niagara Mohawk.* Likewise, according to Niagara Mohawk, it was not the mere absence of language in the PPA prohibiting third party sales but rather the presence of language expressly providing for third party sales, for which the Commission found that a filing obligation existed. [26]

15. Notwithstanding its suggested clarifications of arguments made in the Petition, Niagara Mohawk agrees with FPL that the Commission should reverse *Niagara Mohawk.* Like FPL, Niagara Mohawk argues not only that *Niagara Mohawk* is inconsistent with the FPA, PURPA, the Commission's implementing regulations under PURPA, and Commission precedent and rulemakings ***61601** established thereunder, but also that the decision is ill-advised as a matter of policy. [27]

****5** 16. FPSC argues that if the Commission were to exercise jurisdiction where a QF may sell any of its output to a third party, this would have a negative effect on efforts to encourage the development of renewable energy resources in Florida. [28]

17. FPSC also expresses a belief that, in deciding *Niagara Mohawk*, the Commission may have violated the APA by changing policies that were previously adopted by rulemaking. Specifically, FPSC asserts that the generally applicable notice and comment requirements were impermissibly ignored by the Commission in making its decision and that interested persons were thus unable to discern that such a policy shift was occurring in what was a utility-specific proceeding. [29]

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

19. We disagree with FPL that *Niagara Mohawk* is inconsistent with policies established in *Western Massachusetts* and further articulated in Order No. 2003. [30] In Order No. 2003, [31] the Commission addressed the boundary between state and federal jurisdiction over agreements pursuant to which QFs interconnect with the transmission grid:

> The Commission's Regulations govern a QF's interconnection with most electric utilities in the United States [32] including normally non-jurisdictional utilities [footnote omitted]. When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it must purchase the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs. [33] But when an electric utility interconnecting with a QF does not purchase all of the QF's output and instead transmits the QF power in interstate commerce, the Commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections. [34]

The Commission further explained that its interconnection jurisdiction applies to new or existing QFs that "plan to sell" output to third parties. [35] The Commission concluded that it has jurisdiction over a QF's interconnection to a transmission system if the QF's owner may sell any of the QF's output to an entity other than the electric utility directly interconnected to the QF. Thus, the presence of the right to sell *any* output to a third party determines Commission jurisdiction.

****6** 20. This jurisdictional rule applies whenever the owner of a QF seeks interconnection to a transmission system for the purpose of selling any of the output of the QF to a third party. That is, Commission jurisdiction exists when a new QF plans to sell its output to a third party, and when an existing QF, which historically sold its total output to a directly interconnected utility (or an on-site customer) and which is already interconnected to a transmission system pursuant to a state-approved agreement, now plans to sell output to a third party. [36] In *Niagara Mohawk*, the Commission explained that an agreement which releases the interconnecting utility from its obligation to purchase the QF's full output authorizes the QF to make sales that require the transmission of electric energy in interstate commerce, and thus any interconnection agreements affecting or relating to such sales require Commission authorization. [37]

21. We agree with FPL that the termination of a firm offer contract alone does not release the host utility from its obligation to purchase a particular QF's output. As was recognized by Niagara Mohawk in its comments in this proceeding, the finding of jurisdiction by the Commission in *Niagara Mohawk* was not a function of the expiration of a firm contract requiring purchase of all output by the host utility, or the absence of a contractual provision prohibiting sales to third parties, but was instead based upon the presence of an explicit affirmation of the QF's right to make sales to third parties. Thus, if a QF avails itself of its PURPA privileges (i.e., the requirement that a utility purchase power from and sell power to QFs) by selling to the host utility pursuant to the PURPA-mandated purchase obligation of the host utility, Commission jurisdiction will attach (thereby requiring that the interconnection agreement be filed) as soon as and only if the QF is provided with an express right to sell output to third parties rather than on the date that sales to third parties occur. However, where a PPA or related interconnection agreement expires or is silent on the right to sell to third parties, we will not assume that third party sales are occurring or planned. Instead,

as we explained in Order No. 2003 and reiterated in *Niagara Mohawk*, we will exercise jurisdiction or require the filing of an interconnection agreement only if there is some manifestation of a QF's "plan to sell" output to third parties.

22. With respect to QF sales of output on an "as available" basis, [38] we agree with FPL that, while a QF has a choice to sell to a third party, should it instead choose to sell all of its output to the host utility, under both PURPA and the Commission's implementing regulations, the host utility is obligated to purchase that output, and such transactions are not within our jurisdiction. Therefore, consistent with our conclusions in *Niagara Mohawk*, where a host utility is not given notice that third-party sales of output are occurring or are planned (e.g., through a QF's request for wheeling service or a contract providing the QF an express right to sell output to third parties), we will assume that all sales of a QF's output are being made to the host utility and therefore that Commission jurisdiction will not attach.

****7** 23. Based on the foregoing discussion, we find that the Petition fails to provide any persuasive arguments that support reversal of *Niagara Mohawk*. Thus, consistent with the clarifying guidance provided, we will not limit our jurisdiction over QF interconnection agreements exclusively to instances where actual sales of output are occurring nor will we alter the policies applied in *Niagara Mohawk* by applying our jurisdiction over QF interconnection agreements prospectively from 2007, as requested. [39]

The Commission orders:

The Petition is hereby denied, as discussed in the body of this order.

By the Commission.

(SEAL)

Nathaniel J. Davis, Sr.,
Deputy Secretary

Footnotes

1 16 U.S.C. § 2601 *et seq*. (2006).

2 16 U.S.C. § 824 *et seq*. (2006).

3 *Niagara Mohawk Power Corp*., 121 FERC ¶ 61,183 (2007) (*2007 Niagara Mohawk Order*), *order denying reh'g*, 123 FERC ¶ 61,061 (2008) (*2008 Niagara Mohawk Order*) (collectively, *Niagara Mohawk*).

4 *2007 Niagara Mohawk Order*, 121 FERC ¶ 61,183 at P 13.

5 Petition at 9 n.21.

6 *Id*. at 9-10.

7 *Id*. at 9 n.21.

8 *Id*. at 8.

9 *Id*. (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007)).

10 *Western Massachusetts Elec. Co*., 59 FERC ¶ 61,091, *order denying reh'g*, 61 FERC ¶ 61,182 (1992) (*Western Massachusetts*), *aff'd sub nom. Western Massachusetts Elec. Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999).

11 Petition at 9.

12 *Id*. at 10.

13 *Id*. at 10-11.

14 *Id*. at 11-12.

15 *Id*. at 13-14 (stating that under *Niagara Mohawk*, the Commission seizes jurisdiction over "an overall arrangement by which a host utility is procuring power from the QF to serve its retail load...solely because a potential transaction that would come under its jurisdiction may occur at some point in the future.")

16 *Id*. at 14.

17 *Id*. at 15-16.

18 *Florida Power & Light Co*., Docket No. EL10-43-000 (March 24, 2010) (notice of extension of time).

19 Public Service Electric and Gas Company, PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Global LLC, collectively filed, as the PSEG Companies, a motion to intervene.

20 Xcel Energy Services Inc., filed a motion to intervene on behalf of its utility operating company affiliates, Northern States Power Company (both the Wisconsin and Minnesota corporations), Public Service Company of Colorado, and Southwestern Public Service Company.

21 EEI March 19, 2010 Comments at 2 (EEI Comments).

22 *Id*. at 3.

23 *Id*.

24 *Id*. at 4.

25 Niagara Mohawk March 19, 2010 Comments at 5 (Niagara Mohawk Comments).

26 *Id*. at 8.

27 *Id*. at 17-19.

28 FPSC April 7, 2010 Comments at 1 (FPSC Comments).

29 *Id*. at 4.

30 To the extent we find that our decision in *Niagara Mohawk* was consistent with previously established policy, we find that the APA-related due process challenges raised by FPSC are without merit.

31 Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 813.

32 Citing 18 C.F.R. §§ 292.303, 292.306 (2003).

33 Citing *Western Massachusetts*, 61 FERC ¶ 61,182.

34 Citing *Western Massachusetts*, 61 FERC ¶ 61,182 at 61,661-62. In that case, the Commission further clarified that the use of facilities for non-jurisdictional services is not dispositive when determining jurisdiction, stating that: "The fact that the facilities used to support the jurisdictional service might also be used to provide various non-jurisdictional services, such as back-up and maintenance power for a QF, does not vest state regulatory authorities with authority to regulate matters subject to the Commission's exclusive jurisdiction."

35 Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 814.

36 *Id*.

37 *2008 Niagara Mohawk Order*, 123 FERC ¶ 61,061 at P 12.

38 Under the Commission's regulations, a QF has the option to provide energy or capacity to an electric utility pursuant to a legally enforceable obligation, such as a PPA or other contract, or to provide energy on an "as available" basis. 18 C.F.R. § 292.304(d)(1) (2010); *see also JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009), *reh'g denied*, 30 FERC ¶ 61,127 (2010).

39 In a Commission order issued concurrently with this decision, *see* Docket No. ER10-251-001, *et al*., *Florida Power & Light Company*, 133 FERC ¶ 61,120 (2010), we address concerns raised by FPL in this proceeding as to potential liability for time-value refunds associated with late-filed interconnection agreements. Consistent with our determination in that order, we reiterate that time-value refunds are not required if the monies received did not include a profit and time-value refunds would result in a loss.

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