

108 FERC ¶ 61,279
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

September 22, 2004

In Reply Refer To:
Orlando Utilities Commission
Docket No. NJ04-4-000

Orlando Utilities Commission
c/o Duncan, Weinberg, Genzer & Pembroke, P.C.
1615 M Street, N.W., Suite 800
Washington, DC 20036

Attention: Wallace L. Duncan
Michael Postar
Derek A. Dyson
Attorneys for Orlando Utilities Commission

Reference: Filing of Tariff Revisions to Maintain “Safe Harbor” Status

Dear Mr. Duncan, Mr. Postar, and Mr. Dyson:

1. On April 27, 2004, the Orlando Utilities Commission (Orlando) filed revisions to its non-jurisdictional “safe harbor” open access transmission tariff (OATT) to incorporate a revised *pro forma* Large Generator Interconnection Procedure (LGIP) and a revised *pro forma* Large Generator Interconnection Agreement (LGIA). Pursuant to Order Nos. 2003 and 2003-A,¹ Orlando requests that the Commission find that its OATT will continue to

¹ Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 104 FERC ¶ 61,103 (2003) (Order No. 2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *reh’g pending*; *see also* Notice Clarifying Compliance Procedures, 106 FERC ¶ 61,009 (2004).

be an acceptable reciprocity tariff.² In this order, the Commission finds that Orlando's OATT continues to be an acceptable reciprocity tariff, subject to the Commission's discussion below of certain proposed modifications to the *pro forma* LGIP and LGIA.

Background

2. In Order No. 2003, pursuant to its responsibility under sections 205 and 206 of the Federal Power Act (FPA)³ to remedy undue discrimination, the Commission required all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append a *pro forma* LGIP and *pro forma* LGIA to their OATTs. Revisions to the *pro forma* LGIP and LGIA in Order No. 2003-A became effective on April 26, 2004. The Commission left it to Transmission Providers⁴ to justify any variation to the *pro forma* LGIP or LGIA based on either regional reliability requirements or the "consistent with or superior to" rationale.⁵

3. Orlando, an electric utility authorized by the State of Florida to produce, transmit and distribute electric energy at wholesale or retail, is not a public utility within the Commission's jurisdiction under sections 205 and 206 of the FPA. It is therefore not subject to the open access requirements of Order Nos. 888 and 2003 applicable to public utilities, although it may voluntarily file an OATT with the Commission.

² While Orlando requests that the Commission find that its revised OATT continues to be an acceptable reciprocity tariff, its filing is in essence a petition for a declaratory order, and we will treat it as such. Moreover, consistent with Order No. 888-A, we will waive the filing fee for Orlando. *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,760-61(1996) (Order No. 888), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,288-89 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1997), *aff'd in relevant part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.* New York v. FERC, 535 U.S. 1 (2002).

³ 16 U.S.C. §§ 824d-e (2000).

⁴ The "Transmission Provider" is the entity with which the Generating Facility is interconnecting. The term "Generating Facility" means the specific device (having a capacity of more than 20 megawatts) for which the Interconnection Customer has requested interconnection. The owner of the Generating Facility is referred to as the "Interconnection Customer."

⁵ *See* Order No. 2003 at P 826.

4. In Order No. 888, the Commission required non-public utilities that own, operate or control transmission facilities, as a condition of receiving open access transmission service from a public utility under its OATT, to provide reciprocal transmission service on comparable terms.⁶ As one method of satisfying this reciprocity requirement, the Commission allowed non-public utilities to file OATTs with the Commission under the voluntary “safe harbor” provision.⁷ Under this provision, the Commission issues a declaratory order finding that the OATT is an acceptable reciprocity tariff if its provisions “substantially conform or are superior” to the *pro forma* OATT.⁸ Order No. 2003 states that a non-public utility that has a “safe harbor” tariff may add to its tariff an interconnection agreement and interconnection procedures that “substantially conform or are superior to” the *pro forma* LGIA and *pro forma* LGIP if it wishes to continue to qualify for “safe harbor” treatment.⁹ The Commission previously determined Orlando’s safe harbor tariff to be acceptable¹⁰ and, in this filing, Orlando proposes to incorporate an LGIA and LGIP to its reciprocity tariff so that it can continue to qualify for safe harbor treatment.

5. Orlando’s filing proposes variations from the *pro forma* LGIP and *pro forma* LGIA, as permitted by Order No. 2003. Orlando states that the proposed variations reflect: (1) its status as a non-public utility not subject to the filing and review requirements of sections 205 and 206 of the FPA; (2) its status as an arm of the Florida state government; (3) restrictions in state law governing its operations; (4) Orlando’s established interconnection guidelines, and (5) ministerial clarifications. On July 29, 2004, Orlando filed a supplemental explanatory statement, providing further explanation of its initial April 27, 2004 filing.

Proposed Modifications to the LGIP and LGIA

6. Orlando states that several of its proposed modifications to the *pro forma* LGIP and LGIA are intended to reflect its status as a non-public utility outside of the jurisdiction of the Commission, and the fact that Commission review of a non-public utility OATT is only for the purpose of determining whether the non-jurisdictional entity is entitled to reciprocal service. For example, sections 3.4, 5.1.1.3, 5.1.2, 5.2, 6.2, 7.3, 11.2, 11.3, 11.4 and 13.5 of the *pro forma* LGIP state that customers involved in disputes

⁶ Order No. 888 at 31,761.

⁷ *Id.*

⁸ *Id.*

⁹ *See* Order No. 2003 at P 842.

¹⁰ *See* Orlando Utilities Commission, 81 FERC ¶ 61,397 (1997), *reh'g denied*, 84 FERC ¶ 61,069 (1998).

over the terms of service may request that the unexecuted LGIA be filed with the Commission for the resolution of the issues. Orlando proposes to adopt these provisions with modifications to enable customers to initiate service under an unexecuted LGIA, subject to dispute resolution under section 13.5 of the LGIP, rather than subject to a Commission decision, since it does not have to file the LGIA with the Commission. Also, in section 13 (Miscellaneous) of the *pro forma* LGIP, and article 14 (Regulatory Requirements and Governing Law) of the *pro forma* LGIA, Orlando adds language regarding the limitation of the Commission's jurisdiction over Orlando, and stating that Orlando has not acceded to the Commission's jurisdiction by amending its non-jurisdictional OATT to include the LGIP and LGIA. Further, in articles 2.2 and 4.3 (Effective Date and Performance Standards, respectively) of the *pro forma* LGIA, Orlando proposes to delete the obligation to file the LGIA with the Commission. Additionally, in section 13.5 of the *pro forma* LGIP and article 27 of the *pro forma* LGIA, both dealing with resolution of disputes, Orlando removes the obligation to file decisions resulting from mediation or assisted negotiation with the Commission. Finally, Orlando proposes to modify article 30.11 (Reservation of Rights) of the *pro forma* LGIP, regarding the requirements for submitting section 205 or 206 filings with the Commission to modify the LGIA, to eliminate the need to make a filing at the Commission, and to eliminate the option allowing the Interconnection Customer to request a unilateral filing at the Commission for action under section 206 of the FPA.

7. Orlando also proposes to modify certain definitions common to both the *pro forma* LGIP and the *pro forma* LGIA. First, Orlando proposes to modify the definition of "Applicable Reliability Standards" to add the Orlando Utilities Commission Guide for Interconnection, Control and Protection of Producer-Owned Generation Interconnections (Interconnection Guide) as Appendix H to the LGIA. According to Orlando, the Interconnection Guide was created pursuant to the requirements of the predecessor of the Florida Reliability Coordinating Council (FRCC), and establishes standards that address system protection, safety and reliability. Second, Orlando proposes to modify the definition of "Dispute Resolution" to reference section 13.5, "Disputes," for the LGIP and article 27, "Disputes," for the LGIA. Third, Orlando proposes to eliminate the requirement that the LGIA be filed with the Commission from the definition of effective date, and elsewhere throughout the LGIP and LGIA, to reflect its non-public utility status, as discussed above. Fourth, Orlando proposes to clarify the definition of Transmission Provider to provide that Orlando is the Transmission Provider.

8. Section 2 (Scope and Application) of the *pro forma* LGIP, and article 2 (Effective date, Term and Termination) of the *pro forma* LGIA set forth the scope, application and duration of the LGIP and LGIA. Orlando proposes to add section 2.1 (Scope of Transmission Provider's Responsibility) and article 2.1 (Scope of Transmission Provider's Responsibility) which state that Orlando is not required to provide service that

it determines, in its sole discretion, it is incapable of providing. Orlando argues that these provisions would require it to provide only comparable service and service it makes available to itself or its affiliates, rather than having to provide any service offered by a public utility.

9. Section 2.3 (Base Case Data) of the *pro forma* LGIP sets forth the requirements for providing database information. It requires the Transmission Provider to provide base power flow, short circuit and stability databases upon request, subject to the confidentiality provisions of LGIP section 13.1. Orlando proposes to modify this section such that it will require that a confidentiality agreement be completed by the Interconnection Customer before the release of commercially sensitive information or Critical Energy Infrastructure Information (CEII), rather than simply permitting the Transmission Provider to require that such a release be signed. Orlando notes that this revision is permitted by Order No. 2003-A.¹¹

10. Orlando proposes to add a provision, Applicability to New Large Generation Facilities, to section 2 (Scope and Application) of the *pro forma* LGIP that would require that Generation Facilities of 75 MW or greater secure a “need determination” from the Florida Public Service Commission (PSC). Orlando argues that such a determination is required under the Florida Electrical Power Plant Siting Act (Siting Act).¹²

11. Section 13.5 (Disputes) of the *pro forma* LGIP, and article 27 (Disputes) of the *pro forma* LGIA, set forth detailed requirements for the resolution of disputes. Orlando proposes to replace the requirement for binding arbitration with either assisted negotiation or mediation as a dispute resolution measure.

12. Section 13.6 (Local Furnishing Bonds) of the Commission’s *pro forma* LGIP is applicable only to a Transmission Provider that has financed facilities for the local furnishing of electric energy with tax-exempt bonds, as described in section 142(f) of the Internal Revenue Code. Section 13.6 provides that, notwithstanding other provisions of the LGIP and LGIA, the Transmission Provider is not required to provide Interconnection Service to an Interconnection Customer if the provision of such Transmission Service would jeopardize the tax-exempt status of any local furnishing bonds used to finance Transmission Provider facilities that would be used in providing such Interconnection

¹¹ See Order No. 2003-A at P 92.

¹² See FLA. STAT. § 403.519 (2003), which requires that the PSC investigate the need for an electrical power plant, and issue a “determination of need” for a proposed plant, before it may be constructed under the Siting Act.

Service. Orlando has deleted the statement that a jurisdictional utility need not provide service that jeopardizes the tax-exempt status of any local furnishing bonds, which is inapplicable to Orlando, in favor of a provision providing similar protections vis-à-vis tax-exempt bonds issued by Orlando as municipal utility.

13. Article 4.1.2.2 (Transmission Delivery Service Implications) of the *pro forma* LGIA discusses cost responsibility for additional studies and the construction of additional upgrades that may be required to provide Network Integration Transmission Service or firm Point-to-Point Transmission Service. It requires that the cost responsibility for such studies and upgrades be in accordance with the Commission's policy for pricing transmission delivery services. Orlando proposes to modify this language to state that the cost responsibility for the additional studies and upgrades will be in accordance with the provision for either Point-to-Point or Network Integration Transmission Service under the OATT.

14. Article 5.17 of the *pro forma* LGIA concerns customer contributions in aid of construction. Orlando proposes to change this provision to recognize its municipal status under the tax code. Specifically, Orlando deletes language that relates almost exclusively to provisions of the Internal Revenue Code applicable to contributions to capital, and related questions regarding the taxability of such revenues received by taxable entities for system improvements. Orlando proposes to retain the statement in article 5.17.1 that Interconnection Customer payments are not taxable, but would modify it to indicate that the basis for this treatment is Orlando's status as a nontaxable municipal entity. Orlando proposes to adopt the provision in article 5.17.3 specifying that the Interconnection Customer will indemnify Orlando in the unanticipated event that the interconnection transaction causes Orlando to incur a tax liability.

15. Article 9.9.2 (Third Party Users) of the *pro forma* LGIA governs cost allocation in situations where third parties use interconnection facilities. Orlando proposes to eliminate the requirement that disputes be resolved by the Commission, and instead resolve disputes in accordance with article 27 (Disputes).

16. Article 14.2 (Governing Law) of the *pro forma* LGIA states that the LGIA shall be governed by the laws of the state where the Point of Interconnection is located. Orlando proposes to revise this provision to state that the governing law of the LGIA shall be that of the State of Florida.

17. Finally, Orlando proposes to add, as Appendix H to the LGIA, the Interconnection Guide. According to Orlando, the Interconnection Guide was created pursuant to the requirements of the predecessor of the FRCC and establishes standards that address

system protection, safety and reliability. Orlando states that the Interconnection Guide is included in its filing because the Commission has said that such supplemental interconnection requirements regarding system protection and safety may be filed as a separate Appendix.¹³

Notice of Filing

18. Notice of Orlando's April 27, 2004 filing was published in the *Federal Register*¹⁴ with comments, protests, or interventions due on or before May 27, 2004. Notice of Orlando's July 29, 2004 supplemental explanatory filing was published in the *Federal Register*¹⁵ with comments, protests, or interventions due on or before August 20, 2004. None was filed.

Discussion

19. The Commission finds that, subject to the discussion below clarifying our understanding of the proposal, Orlando's proposed revisions substantially conform or are superior to the requirements of the *pro forma* LGIP and LGIA, and that it will continue to qualify for "safe harbor" treatment.¹⁶

20. With regard to Orlando's Interconnection Guide, the Commission reiterates that it intends to supplement, rather than supplant, the work that regional reliability groups have already undertaken regarding interconnection.¹⁷ Accordingly, a Transmission Provider, when complying with Order Nos. 2003 and 2003-A, generally may offer variations based on existing regional reliability requirements. The Transmission Provider must show that each such proposed variation is in response to established (*i.e.*, approved by the Applicable Reliability Council) reliability requirements.¹⁸ In Order No. 2003-A, the Commission further specified that the Transmission Provider should be able to impose supplemental interconnection requirements not specifically delineated in the Applicable Reliability Council requirements.¹⁹ As we noted in Order No. 2003-A, if the Transmission Provider wishes to impose additional operational requirements, such as

¹³ See Order No. 2003-A at P 399.

¹⁴ 69 Fed. Reg. 26,578 (2004).

¹⁵ 69 Fed. Reg. 51,659 (2004).

¹⁶ See Order No. 2003-A at P 773.

¹⁷ See Order No. 2003 at P 823.

¹⁸ See Order No. 2003 at P 823-24, 826.

¹⁹ Order No. 2003-A at P 399.

those related to system protection and safety that are not contained in or referenced in the Applicable Reliability Council requirements, it may propose and justify such requirements in its compliance filing in the form of a separate Appendix.²⁰ Since Orlando has shown that these additional requirements are sufficiently supported by existing reliability standards and substantially conform or are superior to the *pro forma* LGIP, we accept Orlando's modification.

21. The Commission will accept Orlando's modifications to section 2.1 of the LGIP and article 2.1 of the LGIA, which state that Orlando is not required to provide service that it determines, in its sole discretion, it is incapable of providing. However, if the Commission receives complaints alleging that Orlando is abusing its "sole discretion," it will reevaluate whether Orlando's OATT is an acceptable reciprocity tariff.

22. The Commission will accept Orlando's modification to article 4.1.2.2 of the LGIA, which provides that the cost responsibility for the additional studies and upgrades that may be required to provide Network Integration Transmission Service or firm Point-to-Point Transmission Service will be in accordance with the provision for either of these services under the OATT. However, consistent with Order 2003-A, Orlando must ensure that costs are recovered from third-party interconnections in a manner consistent with the way costs are recovered for interconnections of Orlando's own affiliate generation.²¹

23. The Commission will accept Orlando's modification to article 4.3 of the LGIA, deleting the requirement that amendments to the LGIA be submitted to the Commission for approval. The Commission reminds Orlando, however, that while it is not required to file amendments, "safe harbor" status is determined based on the tariff sheets that are on file with the Commission. If those tariff sheets change, that could affect the status of the OATT as satisfying the "safe harbor" reciprocity standards.

24. We find that Orlando's remaining proposed modifications substantially conform or are superior to the *pro forma* LGIP and LGIA. Many of these changes reflect the fact that Orlando is not a public utility subject to the requirements of section 205 and 206 of the FPA. These modifications include the definition changes, ministerial clarifications, confidentiality requirements, removal of the obligation to file arbitration decisions and the LGIA itself with the Commission. In addition, we find it acceptable for Orlando to modify the *pro forma* LGIP and *pro forma* LGIA to reflect its municipal status under the

²⁰ *Id.*

²¹ *See* Order No. 2003-A at P 778.

tax code, and remove the obligation to provide service that jeopardizes the tax exempt status of any local furnishing bonds. The proposed additional confidentiality requirements regarding commercially sensitive information or CEII in the LGIP are also acceptable.

25. Orlando's petition for a declaratory order is hereby granted, subject to the discussion in the body of this order.

By direction of the Commission.

Linda Mitry,
Acting Secretary.