

139 FERC ¶ 61,254
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Seminole Electric Cooperative, Inc.

v.

Florida Power & Light Company

Docket No. EL12-53-000

Florida Power & Light Company

Docket No. ER12-1576-000
(Not Consolidated)

ORDER ON COMPLAINT AND PROPOSED TARIFF REVISIONS

(Issued June 28, 2012)

1. On March 30, 2012, pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA) and Rule 206 of the Commission's Rules of Practice and Procedure,¹ Seminole Electric Cooperative, Inc. (Seminole) filed a complaint against Florida Power & Light Company (FPL), seeking a ruling that FPL has violated the filed rate by misapplying Schedule 4 (Energy Imbalance Service) of FPL's Open Access Transmission Tariff (OATT).² On April 19, 2012, pursuant to section 205 of the FPA and Part 35 of the Commission's regulations,³ FPL submitted proposed OATT revisions to reflect Seminole's method of calculating imbalance charges on a prospective basis.⁴ In this

¹ 16 U.S.C. §§ 824e, 825e, and 825h (2006); 18 C.F.R. § 385.206 (2011).

² Seminole March 30, 2012 Complaint Requesting Fast-Track Treatment, Docket No. EL12-53-000 (Complaint).

³ 16 U.S.C. § 824d (2006); 18 C.F.R. Part 35 (2011).

⁴ Florida Power & Light Company April 19, 2012 Revisions to Schedules 4 and 9, Docket No. ER12-1576-000 (Proposed Tariff Revisions).

order, as explained below, the Commission grants in part and denies in part Seminole's Complaint. In addition, the Commission directs FPL to refund to Seminole the amount of overcharges that accrued since October 20, 2009, with interest. Consistent with the resolution of Seminole's Complaint, the Commission accepts FPL's Proposed Tariff Revisions, effective July 1, 2012.

I. Background

2. Seminole is a non-profit electric generation and transmission cooperative that supplies wholesale electricity to ten member non-profit, rural distribution cooperatives. To serve its members located in the FPL balancing authority area, Seminole purchases network transmission service from FPL under FPL's OATT pursuant to a Network Integration Transmission Service Agreement (NITS Agreement) between the parties. In connection with this transmission service, Seminole has been purchasing Schedule 4 energy imbalance service under the FPL OATT since the inception of service on January 1, 1999. In August 2007, FPL modified its OATT consistent with Order No. 890.⁵

A. Energy and Generator Imbalance Service Under the *Pro Forma* OATT

3. In Order No. 888, the Commission concluded that an OATT must include six ancillary services, one of which is energy imbalance service under Schedule 4 of the *pro forma* OATT.⁶ Energy imbalance service is provided when there is a difference between the transmission customer's scheduled delivery of energy and the actual energy used to serve load during a scheduled hour.⁷ The Commission found that energy imbalance service should have an energy deviation band appropriate for load variations and a price for exceeding the deviation band that is appropriate for excessive load variations. The Commission established an hourly deviation band of +/-1.5 percent (with

⁵ *Florida Power & Light Co.*, 122 FERC ¶ 61,079 (2008) (accepting FPL's Order No. 890 compliance filing, including modifications to Schedule 4).

⁶ *See generally Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,708, *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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 (1998), *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).

⁷ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,703.

a minimum of 2 megawatts (MW)) for energy imbalance. The Commission explained that this deviation band promotes good scheduling practices by transmission customers, so that the implementation of one scheduled transaction does not overly burden another.⁸

4. In Order No. 890, the Commission amended the *pro forma* OATT to require standardization of charges for generator and energy imbalance services.⁹ In the Notice of Proposed Rulemaking for Order No. 890, the Commission expressed concern over the variety of methodologies used to determine imbalance charges and “whether the level of the charges provides the proper incentive to keep schedules accurate without being excessive.”¹⁰ To ameliorate this situation, the Commission proposed to modify the current *pro forma* OATT Schedule 4 treatment of energy imbalances and to adopt a separate *pro forma* OATT Schedule 9 for the treatment of generator imbalances. The Commission amended the existing energy imbalance schedule and created a new generator imbalance schedule based on three principles:

- (1) the charges must be based on incremental cost or some multiple thereof;
- (2) the charges must provide an incentive for accurate scheduling, such as by increasing the percentage of the adder above (and below) incremental cost as the deviations become larger; and
- (3) the provisions must account for the special circumstances presented by intermittent generators and their limited ability to precisely forecast or control generation levels, such as waiving the more punitive adders associated with higher deviations.[¹¹]

5. In proposing reforms to energy and generator imbalance service, the Commission noted in the 890 NOPR that Bonneville Power Administration (Bonneville) “has adopted

⁸ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,232.

⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 663, 667, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

¹⁰ *Preventing Undue Discrimination and Preference in Transmission Services*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603, at P 238 (2006) (890 NOPR). *See also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 646.

¹¹ 890 NOPR, FERC Stats. & Regs. ¶ 32,603 at P 239. *See also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 635.

an energy imbalance pricing approach based on a three-tiered deviation band that appears workable for both energy and imbalance service and generator imbalance service.”¹²

6. The Commission sought comment on whether it should include this tiered approach in the *pro forma* OATT for energy and generator imbalances. The Commission specifically asked whether this approach provides sufficient incentive to ensure that transmission systems can be operated in a reliable manner and ensure that customers are treated in a just and reasonable manner.

7. The Commission adopted the tiered approach in Order No. 890, noting that “a number of entities generally support a tiered approach to imbalance penalties that progressively increases the penalties for imbalances, as implemented by Bonneville.”¹³ Specifically, the Commission stated that “[i]n order to increase consistency among transmission providers in the application of imbalance charges, and to ensure that the level of the charges provides appropriate incentives to keep schedules accurate without being excessive, the Commission adopts in the *pro forma* OATT imbalance provisions similar to those implemented by Bonneville.”¹⁴ The Commission also emphasized that standardizing (generator) imbalance provisions in the *pro forma* OATT from the wide variety that existed at the time “would lessen the potential for undue discrimination, increase transparency and reduce confusion in the industry that results from the current plethora of different approaches.”¹⁵ The Commission reaffirmed this approach to imbalances in Order No. 890-A.¹⁶

B. Seminole’s Complaint

8. On March 30, 2012, Seminole filed the Complaint alleging that FPL violated the filed rate by misapplying Schedule 4 of FPL’s OATT.¹⁷ Seminole states that the excess penalty charges FPL levied through its misapplication of Schedule 4 from August 2007 to

¹² 890 NOPR, FERC Stats. & Regs. ¶ 32,603 at P 240. *See also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 636; *United States Dep’t of Energy – Bonneville Power Administration*, 112 FERC ¶ 62,258 (2005) (*Bonneville*).

¹³ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 638.

¹⁴ *Id.* P 663.

¹⁵ *Id.* P 667.

¹⁶ Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 270.

¹⁷ Complaint at 1, 4.

January 2012 total \$4,432,098.¹⁸ Seminole argues that FPL owes Seminole this amount, plus interest, as well as the additional overcharges, with interest, that accrue while the Complaint is pending.

9. Seminole explains that it first initiated an internal inquiry of FPL's Schedule 4 billing practices in the summer of 2011, and notified FPL of the problem in an invoice protest letter dated October 20, 2011.¹⁹ Seminole states that FPL responded with an October 31, 2011 letter stating that section 12.0 of the NITS Agreement between the parties precludes Seminole from challenging invoices from August 2007 to September 2009, and that FPL is preparing a response regarding invoices on and after October 20, 2009.²⁰ On January 12, 2012, FPL further responded that it does not contest Seminole's description of FPL's Schedule 4 billing practice, but FPL maintains that this billing practice is consistent with FPL's OATT.²¹ Seminole states that Seminole and FPL representatives have attempted to resolve the dispute on a number of occasions and, while the discussions were amicable and conducted in good faith, a mutually agreeable settlement is not possible. Having reached impasse, Seminole filed the Complaint.

C. FPL's Proposed OATT Revisions

10. On April 19, 2012, FPL submitted proposed revisions to Schedule 4 and Schedule 9 (Generator Imbalance Service) of its OATT. FPL states that the proposed OATT revisions reflect the method of calculating imbalances that Seminole advocates in the Complaint. FPL requests that, if in the Complaint proceeding the Commission upholds in whole or in part FPL's current application of Schedule 4, then the Commission should reject any OATT changes that are superfluous based on the resolution of the Complaint.²² FPL asks the Commission to accept the proposed OATT revisions effective July 1, 2012, the first day of the month that begins after 60 days from the date of filing.²³

¹⁸ *Id.* at 8.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 9.

²² FPL Proposed Tariff Revisions, Transmittal Letter at 2.

²³ *Id.* at 3.

II. Notice of Filings and Responsive Pleadings

11. Notice of Seminole's Complaint in Docket No. EL12-53-000 was published in the *Federal Register*, 77 Fed. Reg. 21,093 (2012), with interventions, answers, and protests due on or before April 19, 2012. Florida Municipal Power Agency (FMPA) filed a timely motion to intervene and comments. FPL filed a timely answer. Seminole filed a motion for leave to answer and answer on May 2, 2012. FPL filed an answer on May 17, 2012. Seminole filed a motion for leave to reply and reply on May 21, 2012.

12. Notice of FPL's Proposed Tariff Revisions in Docket No. ER12-1576-000 was published in the *Federal Register*, 77 Fed. Reg. 27,221 (2012), with interventions and protests due on or before May 10, 2012. Seminole filed a timely motion to intervene and protest and FMPA filed a timely motion to intervene.

III. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene filed in Docket Nos. EL12-53-000 and ER12-1576-000 serve to make the entities that filed them parties to the respective proceedings.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2011), prohibits an answer to a protest or an answer, unless otherwise permitted by the decisional authority. We are not persuaded to accept the answers filed by Seminole (May 2, 2012 and May 21, 2012) and FPL (May 17, 2012) and will, therefore, reject them.

B. Complaint Proceeding (Docket No. EL12-53-000)

1. Schedule 4 Imbalance Charges

15. The focus of the Complaint is the proper interpretation of the second paragraph of Schedule 4 of the FPL OATT, which is identical to Schedule 4 of the *pro forma* OATT. Schedule 4 provides a three-tiered penalty structure with percentage and/or MW threshold for deviations, as follows:

Charges for energy imbalance shall be based on the deviation bands as follows: (i) deviations *within +/- 1.5 percent (with a minimum of 2 MW)* of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of incremental or decremental cost; (ii) deviations

greater than +/- 1.5 percent up to 7.5 percent (or greater than 2 MW up to 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month, 110 percent of incremental cost or 90 percent of decremental cost; and (iii) deviations greater than +/- 7.5 percent (or 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month, at 125 percent of incremental cost or 75 percent of decremental cost.^[24]

a. Seminole's Complaint

16. Seminole argues that FPL violated Schedule 4 of its OATT in two respects: (1) by misconstruing tier thresholds; and (2) by apportioning penalties within the highest possible tier. First, with regard to tier thresholds, Seminole argues that FPL violated Schedule 4 by using the "lesser of" either the percentage or the MW amount as the threshold for determining when the deviation threshold has been breached. Seminole argues that, contrary to FPL's interpretation, Schedule 4 requires determining whether a threshold has been breached using the "greater of" either the percent or MW amount of deviation from the hourly schedule. Second, with respect to apportionment, Seminole asserts that FPL improperly applies the imbalance penalty charge for a given tier to the entire amount of the imbalance. Seminole argues that instead, Schedule 4 requires FPL to apportion deviations within each tier in each hour for the amount specified for imbalance within that tier (i.e., use a multiple tiers rather than a single tier approach).

17. Seminole states that in Order No. 890, the Commission explicitly adopted the multiple tiers approach to calculating imbalance penalties used by Bonneville.²⁵ Seminole points out that in the 890 NOPR that led to Order No. 890, the Commission noted that Bonneville used a three-tiered deviation band and sought comment on whether to adopt Bonneville's tiered approach for calculating energy and generator imbalance charges under the OATT.²⁶ Seminole states that in the preamble to Order No. 890, the Commission expressly adopted the approach taken in *Bonneville*. Seminole states that

²⁴ FPL OATT, Schedule 4 (emphasis added).

²⁵ Complaint at 14-15.

²⁶ See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 636-637 ("The Commission specifically asked whether [the Bonneville] approach provides sufficient incentives to ensure that transmission systems can be operated in a reliable manner and to ensure that customers are treated in a just and reasonable manner.").

the Order No. 890 preamble tracks the language of the Bonneville approach, describing the relationship between the percent and nominal MW criteria as follows:

Specifically, imbalances of less than or equal to 1.5 percent of the scheduled energy (or two megawatts, *whichever is larger*) will be netted on a monthly basis and settled financially . . . Imbalances of between 1.5 and 7.5 percent of the scheduled amounts (or two to ten megawatts, *whichever is larger*) will be settled financially at Imbalances greater than 7.5 percent of the scheduled amounts (or 10 megawatts, *whichever is larger*) will be settled at^[27]

Seminole states that the Commission reaffirmed use of the Bonneville tiered approach to imbalances in Order No. 890-A.²⁸

18. Seminole explains that the Bonneville tiered approach the Commission adopted provided for three deviation bands (or tiers) and specific charges for “imbalances within” each band. Seminole also states that the second and third bands in the Bonneville tariff expressly provided that each band “applies to the portion of the deviation” that falls within the band. Thus, Seminole argues that there is no question that the Commission intended to adopt the Bonneville approach to imbalances in the Order No. 890 series because the *pro forma* language was “crystal clear” and because the references to the Bonneville tariff, which were also clear, left no doubt regarding the Commission’s true intent.²⁹

19. Seminole adds that the Commission’s decision in *Louisville Gas and Electric Co.*³⁰ indicates that the Commission understood and intended deviation charges to be applied to deviations within the specified tiers. Seminole states that Louisville Gas and Electric Company (LG&E) sought to amend Schedules 4 and 9 to clarify that the

²⁷ Complaint at 3 and n.2 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 664 (emphasis added by Seminole)). Seminole adds that this language is quoted nearly verbatim in Order No. 890-A, where the Commission explains that the 2 MW and 10 MW minimums were inserted to “allow increased tolerance to smaller customers.” *Id.* at 3 and n.3 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at PP 266, 271).

²⁸ *Id.* at 15 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 270). *See* Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 266 (describing Order No. 890).

²⁹ Complaint at 16.

³⁰ 120 FERC ¶ 61,227 (2007) (*LG&E*).

imbalance charges for each tier would apply to the portion of the deviation within each tier.³¹ Seminole points out that, in accepting the filing, the Commission stated:

LG&E/[Kentucky Utilities] propose to calculate imbalance charges for each tier based on the portion of the deviation in each tier and the incremental/decremental costs for the hours in which the imbalances occur. We will accept this aspect of [LG&E/Kentucky Utilities'] proposal because it is consistent with the *pro forma* Schedules 4 and 9.^[32]

20. Further, Seminole states that its other transmission provider in Florida, Florida Power Corporation, also has an OATT Schedule 4 that is identical to the *pro forma* OATT Schedule 4, but unlike FPL, Florida Power Corporation has applied Schedule 4 consistent with Seminole's interpretation since it began providing OATT service in August 2007.³³

21. Seminole adds that, in April 2010, FPL changed its application of Schedule 4 (and, therefore, the filed rate) when, without notice to anyone or correcting past invoices, FPL began determining whether an imbalance is Tier 1 as opposed to Tier 2 based on whether the imbalance amount is the "greater of" 1.5 percent or 2 MW. Seminole notes that FPL continued to use the "lesser of" test to determine whether an imbalance falls within Tier 2 or Tier 3, and still assessed the penalty as though the entire imbalance fell within the highest relevant tier. Seminole asserts that FPL's failure to adhere consistently to its interpretation of Schedule 4 refutes FPL's defense that it has been applying the "plain language" of Schedule 4 to assess imbalances.

22. Seminole states that the combined errors resulted in a total of approximately \$4.4 million overcharges from August 2007 through January 2012.³⁴ Breaking down the total overcharges through January 2012, Seminole states that the overcharges resulting from misapplication of the percent/MW threshold for determining in which tier the imbalance falls total approximately \$3,166,103. Overcharges resulting from applying the highest tier rate to the entire imbalance total \$1,265,995.³⁵ Seminole adds that in

³¹ Complaint at 16.

³² *Id.* (citing *LG&E*, 120 FERC ¶ 61,227 at P 27).

³³ *Id.* at 13.

³⁴ *Id.* at 4 (citing *Wallace Aff.* at P 8, 11 and *Wallace Exh. No. 12*). For more precise figures and additional details, *see supra* background section at paragraph 10.

³⁵ *Id.* at 7 (citing *Wallace Aff.* at P 11).

April 2010, FPL apparently inadvertently changed the 1.5 percent and 7.5 percent in its billing program to 1.55 percent and 7.55. Consequently, during the period from April 2010 through January 2012 (and presumably through the present), a “very small” amount of imbalance was treated as Tier 1 or 2 that should have been treated as Tier 2 or 3. Seminole states that this programming error resulted in undercharging Seminole by approximately \$8,230. Seminole states that the \$3,166,103 reflects the amount of overcharges resulting from the misapplication of the tier threshold criteria (\$3,174,33) minus the amount that Seminole was undercharged due to the programming error.

b. FPL’s Answer

23. FPL asserts that its long-standing application of Schedule 4 of the OATT is reasonable and consistent with the plain language of the OATT provision. FPL asserts that the OATT language, “strictly read,” requires that: (1) for the tier threshold issue, determining a Tier 2 or Tier 3 imbalance by reference to either the percentage or the megawatt (nominal) amount; and (2) for the apportionment issue, applying the highest applicable tier rate to the entire amount of an imbalance (a single tier, rather than multiple tiers, approach).

24. With respect to the tier threshold issue, FPL states that it believes that an imbalance has both relative (percent) and nominal (MW) characteristics, and that the “plain language” of Schedule 4 requires making a determination as to each. FPL states that this interpretation “necessarily follows” from the word “or,” such that exceeding *either* the relative threshold *or* the nominal threshold triggers the imbalance penalty. FPL argues that Seminole’s interpretation requires substituting the word “and” for the word “or.” FPL explains that under Seminole’s interpretation, the imbalance penalty would not be triggered unless an imbalance exceeded *both* the relative threshold *and* the nominal threshold.³⁶

25. FPL adds that the difference in wording for Tier 1 versus Tiers 2 and 3 supports its interpretation. Specifically, Tier 1 states the nominal (2 MW) imbalance as a “minimum,” which means it is allowed without penalty regardless of the relative imbalance. FPL asserts that this formulation is in contrast to the “or” formulations for Tiers 2 and 3. FPL states that the “whichever is larger” language in the preamble to Order No. 890, which Seminole relies on, is not in the *pro forma* language itself. FPL argues that the plain language of the OATT should govern a question between the plain language of the OATT and the preamble of the promulgating order.³⁷

³⁶ FPL April 19, 2012 Answer, Docket No. EL12-53-000, at 4 (FPL Answer).

³⁷ *Id.* (quoting *Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004): “The Commission’s interpretation reflects the plain meaning of the language of
(continued...)”)

26. With respect to the apportionment issue, FPL asserts that, while the Commission adopted Bonneville's multiple tiers approach, it did not include the specific language from the Bonneville provision requiring apportionment of an imbalance among multiple tiers.³⁸ FPL asserts that Schedule 4 contemplates a single penalty for a single tier, rather than apportionment among tiers. FPL argues that this interpretation is supported by the Commission's description of the tiered approach in Order No. 890 "in terms of imbalances exceeding a given threshold paying the prescribed imbalance charge percentage – not multiple charges based on multiple percentages."³⁹

27. FPL contends that *LG&E* does not support Seminole's position. FPL states that the transmission provider in *LG&E* proposed tariff changes to implement the Bonneville apportionment approach, which the Commission accepted as ". . . consistent with *pro forma* [s]chedules 4 and 9."⁴⁰ FPL contends that "if *pro forma* [s]chedules 4 and 9 already required the apportionment approach then no tariff changes would have been necessary."⁴¹

28. Notwithstanding its opposition to Seminole's Complaint, FPL states that it does not oppose treating imbalances in the manner that Seminole advocates on a prospective basis.⁴²

c. FMPA's Comment

29. FMPA, the sole intervenor in this proceeding, also takes transmission service from FPL, including Schedule 4 energy imbalance service. FMPA agrees with Seminole that FPL is misapplying Schedule 4 of FPL's OATT in the calculation of imbalance energy charges.

OATT § 28.2, and Entergy's interpretation cannot be reconciled with that language. Insofar as the language of § 28.2 is viewed as inconsistent with extracts from the preambles of Orders, FERC correctly notes that 'language in the preamble of a regulation is not controlling over the language of the regulation itself.' *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)" (*Wyoming Outdoor Council*)).

³⁸ *Id.* at 5.

³⁹ *Id.* at 6 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 636).

⁴⁰ *Id.* (citing *LG&E*, 120 FERC ¶ 61,227 at P 27).

⁴¹ *Id.* at 6.

⁴² *Id.* at 2.

d. Commission Determination

30. The Commission grants in part and denies in part the Complaint. As discussed above, resolution of this Complaint requires analysis of two features of Schedule 4: (1) tier thresholds, i.e., whether the tier thresholds are determined by the “lesser of” or the “greater of” the percent or MW amount of deviation from the hourly schedule; and (2) apportionment, i.e., whether the entire amount of a single imbalance should be charged a single rate or rather apportioned across multiple tiers. As explained below, with respect to tier thresholds, the Commission grants the Complaint, finding that Order No. 890 requires that the appropriate tier threshold should be the greater of the percent or MW amount. With respect to apportionment, the Commission denies the Complaint, finding that Schedule 4 does not specify a single manner of apportionment.

31. Our analysis begins with the question whether the plain meaning of Schedule 4 is clear on its face. While Seminole and FPL proffer two competing interpretations of Schedule 4, a contract or tariff is not ambiguous simply because the parties disagree as to its interpretation.⁴³ However, an ambiguity may be found where, as here, the contract or tariff is susceptible to different constructions or interpretations.⁴⁴ When a contract or tariff provision is found to be ambiguous, the ambiguity must be resolved by reference to the contract or tariff as a whole.⁴⁵

32. Courts have “often recognized that the preamble to a regulation is evidence of an agency’s contemporaneous understanding of its proposed rules.”⁴⁶ Because it is not clear whether the greater of or the lesser of the percent or MW is the threshold for the deviation band, we turn to the Order No. 890 and Order No. 890-A preambles for further

⁴³ See *Appalachian Power Co. v. FPC*, 529 F.2d 342, 347-48, (D.C. Cir.), *cert. denied*, 429 U.S. 816 (1976).

⁴⁴ See *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 85, *clarified*, 123 FERC ¶ 61,060 (2008); *Southern Cal. Edison Co.*, 41 FERC ¶ 61,188 (1987).

⁴⁵ See *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,314, at P 19 (2007) (contract provisions should be interpreted as consistent with the contract as a whole); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (“[It is a] cardinal principal of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.”); *Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003) (rejecting interpretation that would render contract provisions superfluous, and stating “contracts must be read as a whole, with meaning given to every provision.”).

⁴⁶ *Wyoming Outdoor Council*, 165 F.3d at 53 (citations omitted).

guidance. With respect to determining tier thresholds in Schedule 4, the preambles of Order Nos. 890 and 890-A indicate that the Commission intended to adopt Bonneville's tiered approach to levying imbalance charges, including the graduated percent or nominal MW thresholds to each tier, "whichever is larger."⁴⁷ The Commission proposed to adopt the Bonneville tiered penalty approach in the 890 NOPR,⁴⁸ solicited comments on this proposal,⁴⁹ noted general receptivity to this proposal,⁵⁰ and adhered to this tiered approach in the final rule, Order No. 890, adopting *pro forma* OATT provisions "similar to Bonneville,"⁵¹ and affirmed this approach in Order No. 890-A.⁵² Therefore, we grant the Complaint with respect to tier thresholds.

33. As for whether a single imbalance should be apportioned in a single tier or across multiple tiers, we conclude that Schedule 4 does not specify a single manner of apportionment, nor did the Commission address that issue in Order No. 890. Schedule 4 does not include the apportionment (or "portion") language used in the Bonneville tariff, which provides that "Deviation Band 2 applies to *the portion of the deviation* greater than or equal to +/- 1.5 percent or +/- 2 MW, whichever is larger in value" and "Deviation 3 applies to *the portion of the deviation* i) greater than +/- 7.5% of the

⁴⁷ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 664. See text of Order No. 890, quoted at paragraph 17, *supra*. See also Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at PP 266, 270-271.

⁴⁸ 890 NOPR, FERC Stats. & Regs. ¶ 32,603 at PP 240-241. The 890 NOPR stated that Bonneville's energy imbalance pricing approach appears consistent with the Commission's three principles for imbalance pricing and seems to be working well. Significantly, the 890 NOPR expressly included the "whichever is larger" language from the tier thresholds used in the Bonneville approach. *Id.* P 240.

⁴⁹ *Id.* P 241 ("Does this [Bonneville] approach provide sufficient incentives to ensure that transmission systems can be operated in a reliable manner and ensure that customers are treated in a just and reasonable manner?").

⁵⁰ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 638 ("A number of entities generally support a tiered approach to imbalance penalties that progressively increases the penalties for imbalances, as implemented by Bonneville.") (citations omitted).

⁵¹ *Id.* PP 663-64.

⁵² Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 270; see also *id.* P 266.

scheduled amount of energy, or ii) greater than +/- 10 MW of the schedule amount of energy, whichever is the larger in absolute value.”⁵³

34. While Order Nos. 890 and 890-A expressly adopted the graduated, three-tiered approach to imbalance charges that Bonneville used, the Commission did not address whether transmission providers are required to levy imbalance charges in a single or across multiple tiers.⁵⁴ In *LG&E*, the company proposed apportionment language patterned after the Bonneville tariff, and the Commission accepted LG&E’s proposal to apportion imbalances among multiple tiers “consistent with the *pro forma* OATT.”⁵⁵ This acceptance, in tandem with the Commission’s express goal in Order No. 890 of standardizing the treatment of energy and generator imbalances, could support Seminole’s interpretation. On the other hand, Order No. 890 is silent with respect to apportionment; the language of Schedules 4 and 9 is similarly silent and provides no guidance regarding what the Commission intended regarding apportionment. Consequently, we conclude that FPL’s reading of Schedule 4 is not unreasonable. Therefore, we find that FPL did not violate Schedule 4 of its OATT by levying imbalance charges on a single imbalance in the highest applicable tier. Therefore, we deny the Complaint with respect to apportionment.

C. Refunds

35. Having granted in part the Complaint, the Commission must determine the appropriate refund period. Seminole contends that since FPL violated Schedule 4 of its OATT, the filed rate doctrine requires FPL to refund the amount of overcharges to Seminole, plus interest, back to the date the overcharges began, or October 2007. In contrast, FPL asserts that refunds are limited by section 12.0 of the NITS Agreement between FPL and Seminole. Section 12.0 of the NITS Agreement between FPL and Seminole provides that:

The Customer may, in good faith, challenge the correctness of any bill rendered under the Tariff no later than twenty-four (24) months after the date the bill was rendered. Any billing challenge will be in writing and will state the specific basis for the challenge. A bill rendered under the Tariff

⁵³ See Complaint at Att. 2, Bonneville Tariff 2006, Schedule II.D.1.b. and c.

⁵⁴ In describing the Bonneville approach, the orders repeat the “whichever is larger” language from the Bonneville Tariff, but not the “portion of” tier balance language. Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 636, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 266.

⁵⁵ *LG&E*, 120 FERC ¶ 61,227 at P 27.

will be binding on the Customer twenty-four months after the bill is rendered or adjusted, except to the extent of any specific challenge to the bill made by the customer prior to such time. Customer's challenge of any bill rendered under and in accordance with this Tariff is limited to: (i) the arithmetical accuracy of the bill and the use of the correct rate and billing determinants for the service provided; (ii) the determination of redispach costs allocated to the customer; and (iii) the application of the incremental fuel cost mechanism. FPL will provide the Customer, upon request, such information as is reasonably necessary to confirm the correctness of the bill; provided, however, that neither the Customer's challenge nor the Customer's request shall serve as a basis for a general audit or investigation of FPL's books and records.^[56]

1. Seminole's Complaint

36. Seminole argues that section 12.0 only applies to disputes over the accuracy of a bill, and does not apply when a utility has violated its tariff by charging a rate other than the filed rate. Seminole asserts that, by its terms, section 12.0 limits challenges to those bills that are "rendered under and in accordance with this [FPL OATT];"⁵⁷ that is, bills that have applied the rate on file, but which may contain errors related to "the arithmetical accuracy of the bill and the use of the correct rate and billing determinants for the service provided." Seminole argues that Commission precedent distinguishes between challenges to the mathematical accuracy of bills and challenges that bills result from violations of the filed rate, and that section 12.0 by its own terms only addresses the former situation.⁵⁸

2. FPL's Answer

37. In contrast, FPL argues that section 12.0 reflects an intent to put a reasonable time limit on any kind of billing challenges, and that Seminole disregards the third sentence: "A bill rendered under the Tariff will be binding on the Customer twenty-four (24)

⁵⁶ NITS Agreement, § 12.

⁵⁷ Complaint at 18.

⁵⁸ *Id.* at 19 (citing *California ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178, at P 93 (2011) ("The Complaint seeks a market wide remedy for alleged tariff violation under the FPA; it is not a dispute regarding the clerical accuracy of bills."); *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103, at 61,643-44 (1993) (ordering company to replace the word "propriety" with "amount" in its billing challenge limitation clause because the word propriety "could be interpreted as applying to more than billing errors"))).

months after the bill is rendered or adjusted, except to the extent of any specific challenge to the bill made by the customer prior to that time.”⁵⁹ FPL argues that reasonable time limitations on billing challenges have been enforced because such OATT provisions are part of the rate on file.⁶⁰ FPL states that, in *Boston Edison*, for example, the First Circuit held that the “limitation provision restricted the Commission’s power to impose refunds, because the limitation clause ‘represents precisely the sort of contractual commitment which is completely consistent with the filed rate and thus protected under *Mobile-Sierra*.’”⁶¹

38. Noting that every monthly bill Seminole received showed how each hourly imbalance charge was calculated, FPL asserts that a “ cursory inspection” of any bill at any time would have revealed how FPL calculated imbalance charges.

3. FMPA

39. FMPA supports Seminole’s position that section 12.0 does not apply to this situation and does not limit FPL’s obligation to provide refunds to Seminole because FPL did not charge the rate on file. FMPA states that seven of its municipal utility members are located on the FPL transmission system and states that review of Seminole’s Complaint reveals that FPL may also be misapplying Schedule 4 of its OATT in its calculation of similar charges to FMPA in connection with its transmission service. FMPA states that, while it is in the process of preparing its own complaint, it has approached FPL to obtain information necessary to calculate the overcharges, and, if possible, resolve the dispute without resorting to litigation.⁶²

⁵⁹ FPL Answer at 8. For discussion of this issue, *see id.* at 6-10.

⁶⁰ *Id.* at 9 and n.9 (citing *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086, at P 22 (2009) (*NYISO*) (holding that the claims limitation provisions in the tariff “make up the filed rate” and that “[p]roviding this financial certainty to customers is fully consistent with the filed rate doctrine.”)).

⁶¹ *Id.* at 9 (quoting *Boston Edison Co. v. FERC*, 856 F.2d 361, 372 (1st Cir. 1988) (*Boston Edison*)).

⁶² FMPA Comment at 2-4 and n.2.

4. Commission Determination

40. As explained below, the Commission finds that section 12.0 of the NITS Agreement applies to this situation, limiting refunds to the period beginning October 20, 2009.⁶³

41. First, the word “correctness” in the first sentence of section 12.0 can reasonably be read as encompassing not just computational errors in bills that correctly use the filed rate, but also bills that are based on a rate other than the filed rate. Thus, we do not agree with Seminole that section 12.0 applies only to bills that include simple mathematical errors and excludes bills based on a non-filed rate.

42. The third sentence of section 12.0 dictates the point in time at which any bill becomes final and limits the time period for raising billing disputes. This sentence provides that: “A bill rendered under the Tariff *will be binding* on the Customer twenty-four months after the bill is rendered or adjusted, *except* to the extent of any specific challenge to the bill made by the customer prior to such time.” (emphasis added.) This sentence means that “a bill” – any bill – “will be binding” unless the bill was challenged within 24-months after the bill was made available or adjusted. The fourth sentence describes the categories of challenges that customers can raise, and includes both “the arithmetical accuracy of the bill” *and* “the use of the correct rate and billing determinants for the service provided.” We find the phrase “the use of the correct rate” indicates that section 12.0 is intended to encompass situations where FPL did not charge the rate on file with the Commission, the precise challenge that Seminole makes in the complaint proceeding.

43. Thus we conclude, based on an analysis of the critical phrases in section 12.0, that this provision indicates the parties’ knowing waiver of their statutory right for refunds for violations of the filed rate that fall outside the time limitation in section 12.0.⁶⁴ While under the FPA, parties must adhere to the filed rate, the Commission has allowed and courts have upheld parties’ knowing waiver of their right to refunds for violations of the

⁶³ October 20, 2009 is the date 24 months prior to the date that Seminole first sent FPL a letter protesting imbalance charges. *See, e.g., PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,030 (2012) (*PJM*) (billing limitation period runs from the date that formal written notice of the claim was provided). The refund period runs until FPL’s Proposed Tariff Revisions become effective, which will be on July 1, 2012.

⁶⁴ *See PJM*, 139 FERC ¶ 61,030 at P 33 (“A tariff should be interpreted to give all of its provisions meaning.”); *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114, at P 21 (2012) (an agreement must be interpreted as a whole, giving meaning to all provisions, if possible).

filed rate.⁶⁵ Construing provisions that are substantially similar to section 12.0,⁶⁶ the Commission has recognized the parties' right to place a premium on financial certainty⁶⁷ and upheld as consistent with the filed rate doctrine legitimate time limitations on retroactive correction of bills involving violations of the filed rate doctrine.⁶⁸ Indeed,

⁶⁵ See, e.g., *Boston Edison*, 856 F.2d at 374.

⁶⁶ See, e.g., *PJM*, 139 FERC ¶ 61,030 at PP 2, 36-37 (applying two-year limit on back billing in Section 10.7 of the PJM tariff, where software coding error resulted in overpayments of Balancing Operating Reserve Lost Opportunity Cost credits to generators dating back to August 2008).

⁶⁷ See, e.g., *New York State Electric & Gas. Corp.*, 133 FERC ¶ 61,094, at P 63 (2010) (*NYSEG*) (explaining that the billing limitation in the New York Independent System Operator, Inc.'s (NYISO) tariff "reflects the Commission's policy that, once invoices are finalized, they should generally remain unchanged, even if later found to contain errors, so that the market participants can rely on the charges contained in the invoices.").

⁶⁸ See, e.g., *D.C. Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165, at PP 17, 101 (2012) (where duration of tariff violation exceeded two-year limitation on retroactive billing (rebilling) in PJM tariff, Commission required two years of rebilling); *Midwest Indep. Trans. Sys. Operator v. PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,243, at PP 24-25 (2011) (*MISO*) (accepting settlement with one-year claim limitation provision as consistent with Commission precedent); *NYSEG*, 133 FERC ¶ 61,094 at PP 25, 63-64 (declining to correct 99 months of finalized invoices for meter errors, where NYISO's correction period for metering errors is limited to only 55 days although tariff expressly allows Commission to make further retroactive corrections); *NYISO*, 128 FERC ¶ 61,086 at PP 19-22 (enforcing billing limitation in NYISO tariff and refraining from ordering NYISO to reopen its invoices and refund erroneously billed congestion charges to a transmission owner does not violate the filed rate doctrine); *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289, at P 34 (2008) ("As a by-product of the *Exelon* case, PJM filed to impose a two-year limitation on challenges to billing errors, a tariff change accepted by the Commission.") (citing *PJM Interconnection, L.L.C.*, Docket No. ER06-1497-000, at 1 (Nov. 13, 2006) (unpublished letter order)).

“[o]ne purpose of the filed rate doctrine is rate predictability for customers.”⁶⁹ Courts have also enforced such billing limitation provisions.⁷⁰

44. Significantly, the 24-month limitation on retroactive billing in section 12.0 of the NITS Agreement is itself the filed rate.⁷¹ That 24-month period reflects the balance struck between billing accuracy, on the one hand, and financial certainty, on the other.⁷² As discussed above, that 24-month period also reflects the parties’ knowing waiver of refunds for violations that fall outside the 24-month period, encompassing violations of the rate on file with the Commission, such as FPL’s misapplication of Schedule 4. Because section 12.0 is the filed rate and this filed rate limits the refund period for violations that fall outside the 24-month period, we therefore conclude that section 12.0 precludes refunds beyond October 20, 2009.

45. Moreover, even if Section 12.0 did not limit refunds for violations of the filed rate, we nevertheless would find it appropriate to establish a refund effective date of October 20, 2009. Seminole received monthly invoices that included the hourly information for imbalance charges. While the invoices did not explicitly indicate which tier rate was used per imbalance, that information is discernible from billing information that accompanied the monthly invoices.⁷³ Consequently, under these circumstances, we are not persuaded to require refunds back to August 2007.⁷⁴

⁶⁹ *NYISO*, 128 FERC ¶ 61,086 at P 22 (citing *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (*Towns of Concord v. FERC*); *Columbia Gas Transmission Co.*, 831 F.2d 1135, 1141 (D.C. Cir. 1987)).

⁷⁰ *Boston Edison*, 856 F.2d at 374.

⁷¹ *Id.* at 372; *see also id.* at 373 (“At the bottom line, petitioner was entitled to rely on the enforceability of [claims limitation clause] as part of its filed rate contract.”); *NYISO*, 128 FERC ¶ 61,086 at P 22 (billing limitation provisions make up the filed rate). We note that section 12.0 is essentially the same as section 8.0 of the *pro forma* NITS Agreement in Attachment F of the FPL OATT. *See* FPL Answer at 6 and n.7.

⁷² *E.g.*, *MISO*, 135 FERC ¶ 61,243 at P 26.

⁷³ *See* Complaint, Wallace Exh. No. 3.

⁷⁴ Refunds are discretionary, *see, e.g.*, *Towns of Concord v. FERC*, 955 F.2d at 76, and the Commission’s authority is at its zenith in fashioning refunds, *see, e.g.*, *Niagara Mohawk Serv. Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). *See also Boston Edison*, 856 F.2d at 373 (billing limitations provisions are “not inherently unconscionable . . . nor does it seem inequitable to hold less diligent purchasers to forfeit.”); *NYISO*,

(continued...)

46. In sum, the refund effective date established is October 20, 2009, and FPL is directed to file a refund report within 30 days of the date of issuance of this order detailing the computation of the refunds it makes to Seminole.

D. Proposed Tariff Revisions (Docket No. ER12-1576-000)

1. FPL's Proposed Tariff Revisions

47. On April 19, 2012, FPL submitted revisions to Schedules 4 and 9 of its OATT to reflect the method of calculating imbalance penalties that Seminole advocates in its complaint. FPL states that the proposed changes are substantively the same as those accepted by the Commission in *Bonneville*.⁷⁵ FPL states that it “simply does not believe that Schedule 4 as presently written actually effectuates those approaches.”⁷⁶ Accordingly, FPL states that OATT modifications are necessary “to implement Seminole’s approaches,” and, therefore, FPL proposes the filed revisions “to accommodate Seminole on a prospective basis.”⁷⁷ FPL asserts that if the Commission were to deny Seminole’s Complaint in whole or in part regarding how Schedule 4 operates, then these changes would be “superfluous.”⁷⁸ Thus, FPL asks the Commission to reject any proposed changes to Schedules 4 and 9 that are superfluous. FPL requests an effective date for these proposed OATT revisions of July 1, 2012, the first day of the month that begins after 60 days from the date the OATT revisions were filed.⁷⁹

2. Seminole's Protest

48. Seminole argues that the Commission must first determine how Section 4 of the *pro forma* OATT was intended to operate before the Commission can assess whether FPL’s Proposed Tariff Revisions are consistent with or superior to the *pro forma* OATT

128 FERC ¶ 61,086 at P 20 (“NYSEG’s failure to carefully review its invoices for the 46-month period is the primary reason that the error was not discovered earlier.”).

⁷⁵ FPL Proposed Tariff Revisions, Transmittal Letter at 2 (citing *Bonneville*, 112 FERC ¶ 62,258).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1.

and rule on them.⁸⁰ Consequently, Seminole asks the Commission to hold FPL's filing in abeyance pending issuance of a final order on Seminole's Complaint.

49. Seminole protests FPL's Proposed Tariff Revisions on the grounds that FPL is using it as a pretext to bolster its position in the Complaint proceeding.⁸¹ Seminole also objects that it was not consulted by FPL prior to submission of the Proposed Tariff Revisions.⁸²

50. While repeating the arguments raised in its Complaint, Seminole explains that in Order No. 890, the Commission gave transmission providers the opportunity to file "non-rate terms and conditions that differ from those set forth in the final rule if those provisions are 'consistent with or superior to' the *pro forma* OATT."⁸³ Seminole argues that FPL cannot claim that its Proposed Tariff Revisions are either "consistent with" or "superior to" the *pro forma* OATT. First, Seminole argues that FPL cannot argue that the Proposed Tariff Revisions are "consistent with" the *pro forma* OATT because that would be an admission that Seminole's interpretation in the Complaint is correct. Second, Seminole argues that FPL cannot claim that its changes are "superior to" the *pro forma* OATT because "that would undermine any policy rationale" supporting FPL's position in the Complaint proceeding.⁸⁴

3. Commission Determination

51. The Commission accepts FPL's Proposed Tariff Revisions. FPL has submitted Proposed Tariff Revisions under section 205 of the FPA to clarify Schedules 4 and 9, and asked the Commission to act on these revisions in accordance with our resolution of the Complaint. The tariff changes proposed by FPL provide clarity to the tier threshold and apportionment provisions of Schedule 4 and Schedule 9 and accommodate Seminole's position on a prospective basis. As FPL indicates in its filing, the proposed changes are "substantively the same" as the modifications the Commission accepted in *Bonneville* as

⁸⁰ Seminole May 21, 2012 Motion to Intervene and Protest, Docket No. ER12-1576-000, at 5.

⁸¹ *Id.* at 2-3.

⁸² *Id.* at 2, 4.

⁸³ *Id.*

⁸⁴ *Id.*

consistent with the *pro forma* OATT.⁸⁵ Accordingly, we accept FPL's Proposed Tariff Revisions for filing, effective July 1, 2012, as requested.

The Commission orders:

(A) The Complaint in Docket No. EL12-53-000 is hereby granted in part and denied in part, as discussed in the body of this order.

(B) The refund effective date established is October 20, 2009, and FPL is directed to file a refund report within 30 days of the date of issuance of this order detailing the computation of the refunds it makes to Seminole.

(C) FPL's Proposed Tariff Revisions filed in Docket No. ER12-1576-000 are hereby accepted, as discussed in the body of this order, effective July 1, 2012.

By the Commission. Commissioner Clark is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁸⁵ FPL Proposed Tariff Revisions, Transmittal Letter at 2 (citing *Bonneville*, 112 FERC ¶ 62,258).