

120 FERC ¶ 61,102  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Florida Power & Light Co.  
FPL Energy Power Marketing, Inc.

Docket Nos. ER07-944-000  
ER07-945-000

ORDER CONDITIONALLY ACCEPTING FOR FILING AMENDMENTS TO CODES  
OF CONDUCT AND MARKET-BASED RATE TARIFFS

(Issued July 27, 2007)

1. In this order, the Commission accepts for filing, as conditioned herein, Florida Power & Light Co.'s ("FPL") and FPL Energy Power Marketing, Inc.'s ("PMI") (collectively "Applicants") proposed amendments to their market-based rate codes of conduct.<sup>1</sup> We accept these amendments for filing, as discussed herein, for the limited purpose of allowing PMI employees to assist FPL with certain long-term wholesale power sales and related power purchases within peninsular Florida. We also accept for filing PMI's amendment to its market-based rate tariff to prohibit sales of power by PMI in peninsular Florida.<sup>2</sup>

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<sup>1</sup> We note that the Commission has recently revised and codified in its regulations the standards pertaining to market-based rates, including codifying as part of the affiliate restrictions in 18 C.F.R. § 35.39 the requirements that previously have been known as the market-based rate "code of conduct," as revised in Order No. 697. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007). Applicants are reminded that they will be subject to the requirements of Order No. 697 upon the effective date of that order.

<sup>2</sup> Applicants also submit proposed tariff revisions to remove the market behavior rules from their market-based rate tariffs. *See Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006) (February 16 Order).

## **I. Background**

2. Applicants state that FPL is a direct wholly-owned subsidiary of FPL Group, Inc. (“FPL Group”). According to Applicants, FPL is a public utility that provides wholesale and retail electric service to customers in peninsular Florida. FPL has two tariffs for the sale of power, a market-based rate tariff and a cost-based rate tariff. Applicants state that FPL is not permitted to make sales of power under its market-based rate tariff in peninsular Florida; rather, FPL can make wholesale power sales in peninsular Florida only under the cost-based tariff, which is an “up-to” tariff that allows use of negotiated rates subject to cost-based minimum and maximum rates.

3. According to Applicants, FPL Group's indirect wholly-owned subsidiary, FPL Energy, LLC, is the parent of PMI and FPL's other marketing affiliates. Applicants state that PMI makes sales of power on its own behalf,<sup>3</sup> and its employees act in an agency capacity to make wholesale sales on behalf of other FPL marketing affiliates.<sup>4</sup> According to Applicants, most of PMI's operating revenues are derived from wholesale electricity sales, and none of those sales, or any other PMI operations (including sales or purchases on an agency basis for other FPL marketing affiliates), occur within peninsular Florida. Applicants further state that PMI's current market-based rate tariff prohibits sales to, and purchases from, FPL without prior Commission authorization; however, unlike the tariffs of most other FPL marketing affiliates, PMI's tariff does not expressly prohibit PMI from making sales at market-based rates in peninsular Florida. PMI proposes to amend its market-based rate tariff to include an express prohibition on sales in peninsular Florida.

### **A. Proposed Code of Conduct Amendments**

4. On May 29, 2007, Applicants submitted for filing proposed amendments to the codes of conduct contained in their market-based rate tariffs. They explain that their codes of conduct currently place separation of functions and information sharing restrictions on the relationship between employees of FPL and employees of PMI. These restrictions prevent FPL and PMI from sharing employees who engage in wholesale power sales activities and prohibit FPL employees and PMI employees engaged in wholesale merchant functions from sharing market information. According to Applicants, the proposed amendments are designed to allow FPL to utilize PMI employee

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<sup>3</sup> Transmittal Letter at 5 (*citing FPL Energy Maine Hydro, Inc.*, 85 FERC ¶ 61,214 (1998) and stating at n.10 that PMI does not have any other tariffs or rates on file).

<sup>4</sup> *See* Transmittal Letter at 5, n.10.

expertise in the area of structuring long-term wholesale power sales transactions. They state that FPL's long-term wholesale power sales are a very small percentage of its total sales, and that it enters into long-term wholesale power sales infrequently.<sup>5</sup>

Consequently FPL employs few individuals with experience in making such sales. According to Applicants, PMI has significant expertise in structuring long-term wholesale transactions.

5. In an attempt to make cost effective use of employees, Applicants state that they propose a narrow revision to their codes of conduct to permit the sharing of personnel and market information to allow certain PMI employees to assist FPL in negotiations for long-term wholesale power sales (and related power purchases) in peninsular Florida, an area of the country where PMI and FPL do not, indeed cannot, compete with each other. Applicants note that PMI does not engage in wholesale power sales within peninsular Florida and PMI proposes to amend its market-based rate tariff to clarify that it cannot make sales under the tariff in peninsular Florida.<sup>6</sup> Moreover, Applicants state that when FPL transacts outside of Florida (almost exclusively in Georgia), PMI employees do not now, nor will they after the code of conduct is amended, participate in such transactions or receive market information about those transactions.

6. Finally, Applicants propose to revise their market-based rate tariffs to eliminate the market behavior rules and to include in FPL's tariff the change in status language required by the Commission in Order No. 652.<sup>7</sup>

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<sup>5</sup> According to Applicants, FPL's long-term wholesales are less than 2 percent of its total sales at present, and FPL has entered into only four long-term wholesale sales over the last 15 years. *See* Transmittal Letter at 1.

<sup>6</sup> PMI proposes to formalize this requirement by adding the following language to paragraph 1 of its market-based rate tariff (the proposed additional language is italicized):

FPL Energy Power Marketing, Inc. makes electric energy and/or capacity and ancillary services available under this Rate Schedule for wholesale sales to any purchaser for resale, *except that no such sales shall be made under this Tariff to purchasers located in peninsular Florida. For purposes of this Tariff, peninsular Florida is the area in the State of Florida located east of the Apalachicola River.*

<sup>7</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111

**B. Notice, Interventions and Protests**

7. Notice of FPL's filing was published in the *Federal Register*, 72 Fed. Reg. 31,572 (2007), with interventions and protests due on or before June 19, 2007. None was filed.

**II. Discussion**

8. As discussed more fully below, we will permit Applicants to amend their codes of conduct to permit the sharing of personnel and market information for the limited purpose of allowing PMI employees to assist FPL in negotiations for long-term wholesale power sales at cost-based rates and related power purchases within peninsular Florida -- a market in which the Applicants cannot compete with each other -- as specifically discussed and conditioned below.<sup>8</sup> However, as discussed below, we will require that the proposed amendment be revised to make clear that it is limited to PMI.

9. The Commission requires a code of conduct to govern the relationship between a traditional franchised utility and its non-regulated power sales affiliates with market-based rate authority.<sup>9</sup> The purpose of the code of conduct requirement is to safeguard customers against affiliate abuse in order to protect against the possible diversion of benefits or profits from franchised public utilities (i.e., traditional public utilities with captive ratepayers) to an affiliated entity for the benefit of shareholders.

10. Just as the Commission has expressed concern about the potential for affiliate abuse in connection with power sales between affiliates, it also has recognized a potential for affiliate abuse through other means, such as the sharing of market information between affiliates.<sup>10</sup> The Commission's concern with sharing marketing information is

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FERC ¶ 61,413 (2005).

<sup>8</sup> The Commission has allowed entities to amend the market-based rate code of conduct and has waived the code of conduct requirement in cases where there are no captive customers, and thus no potential for affiliate abuse, or where the Commission finds that such customers are adequately protected against affiliate abuse. *See Allegheny Energy Inc.*, 119 FERC ¶ 61,025 at P 7 (2007) (*Allegheny Energy*).

<sup>9</sup> While for purposes of this order we refer to "non-regulated power sales affiliate," we note that the Commission adopted the use of "market-regulated power sales affiliate" instead of "non-regulated power sales affiliate" in Order No. 697.

<sup>10</sup> *See, e.g., Allegheny Energy; CMS Mktg., Servs. & Trading Co.*, 92 FERC

(continued)

that a public utility might, for example, refrain from competing for a power sale so as to enable its power marketing affiliate to make that sale instead. This would in turn reduce the revenue credits that otherwise would be used to lower the rates of captive customers.

11. In support of their proposal, Applicants state that the narrow revision they propose to their codes of conduct will not lead to any improper cross-subsidization or transfer of benefits, or other harm to retail customers, because PMI does not engage in any type of wholesale sales within peninsular Florida. They state that the proposed amendments will limit PMI's access to market information about FPL's transactions within peninsular Florida. This information may only be used by PMI to assist FPL with such transactions. Applicants assert that since PMI cannot conduct such transactions on behalf of itself or any other FPL affiliate, customers will be fully protected.

12. Applicants argue that their narrowly tailored request may help retail customers, but cannot harm them. They contend that they are not seeking to modify the affiliate transfer pricing rules, as they apply to power or non-power goods and services. Applicants state that those restrictions will remain for retail customer protection and will prevent cross-subsidization of shareholders. Applicants further state that PMI will provide its services at cost, which meets the Commission's code of conduct requirement that such services be provided at a rate no higher than market, because PMI's salaries are determined based on market analysis, and therefore costs and market are comparable measures.<sup>11</sup>

13. Applicants state that there will be no transfer of benefits from customers to shareholders as a result of the limited relaxation of the functional separation and information sharing requirements proposed here. They state that customers will not be harmed by having PMI employees assisting FPL in long-term power sales transactions or by having market information regarding such transactions transferred to PMI. Applicants state that information about markets outside of peninsular Florida will continue to be subject to the information sharing restriction. Applicants represent that, in the limited instances where FPL engages in wholesale sales or purchases outside of peninsular Florida, FPL will not seek the assistance of or utilize employees of PMI, and FPL will not

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¶ 61,262 (2000); *Potomac Elec. Power Co.*, 93 FERC ¶ 61,240 at 61,782 (2000) (*PEPCO*); *Heartland Energy Services Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

<sup>11</sup> Applicants represent that a specific accounting code will be used to accumulate payroll directly charged to FPL; the payroll then will be automatically loaded for employee benefits, payroll taxes and overheads. They state that a report will be generated monthly and billed to FPL by accounting personnel.

share market information with any employee of PMI (or any other FPL marketing affiliate) with respect to markets outside of peninsular Florida. Applicants add that even if PMI learns from FPL of an attractive power sales opportunity in peninsular Florida, PMI cannot take advantage of it because PMI is barred from making the sale (as are all of its affiliates other than FPL). Applicants contend that the only way PMI can use such information is to FPL's benefit by helping FPL make the sale. Applicants state that because PMI only will receive market information with respect to transactions within peninsular Florida, and only will assist FPL with such transactions, and cannot conduct such transactions of behalf of itself (or any other FPL affiliate), customers will be fully protected.

14. Based on Applicants' representations as set forth above, the Commission accepts for filing Applicants' proposed revisions to their codes of conduct, as modified below, to permit the sharing of personnel and market information for the limited purpose of allowing PMI employees to assist FPL in negotiations for long-term wholesale power sales at cost-based rates and related power purchases within peninsular Florida. However, although FPL proposes only to obtain assistance from PMI, its proposed code of conduct amendment is not limited to PMI; it covers "Marketing Affiliates" in general. On this basis, we find that FPL's proposed amendment to its code of conduct is broader than necessary to accomplish its stated goal. Therefore, we conditionally grant the approval requested and direct FPL to make a compliance filing, within 30 days of the date of issuance of this order, to revise its code of conduct to make clear that the exception granted applies only to PMI. In addition, we will require FPL to inform any counterparties that PMI employees may be participating in or otherwise providing assistance to FPL in negotiations for long-term cost-based wholesale power sales.

15. As so limited, this approval will only permit PMI employees access to FPL market information regarding long-term wholesale power sales transactions within peninsular Florida. This access to information will be for the sole purpose of assisting FPL with such transactions, and cannot be used by PMI to conduct such transactions on behalf of itself or any other FPL affiliate. Applicants are required to maintain sufficient records to enable the Commission to audit their compliance.

16. We accept PMI's revision to its market-based rate tariff to prohibit it from making sales of power at market-based rates in peninsular Florida, which is consistent with current restrictions on sales within peninsular Florida by other FPL marketing affiliates.<sup>12</sup>

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<sup>12</sup> See *Backbone Mountain Windpower, LLC*, 111 FERC ¶ 61,242 at P 33 (2005).

We also accept Applicants' proposed modifications that eliminate the market behavior rules contained in their market-based rate tariffs.<sup>13</sup>

17. We note that the Commission in Order No. 697 recently revised and codified in its regulations the standards pertaining to market-based rates, including codifying as part of the affiliate restrictions in 18 C.F.R. § 35.39 the requirements that previously have been known as the market-based rate "code of conduct." In addition, the Commission adopted two standard required provisions that each seller must include in its market-based rate tariff. The first required provision states that failure to comply with the applicable provisions of the regulations adopted in Order No. 697 or with any Commission orders concerning a seller's market-based rate authority will constitute a violation of the seller's tariff. The second required provision requires that the seller identify all limitations and exemptions or waivers regarding the seller's market-based rate authority. The Commission also adopted a set of standard provisions that must be included in a seller's market-based rate tariff to the extent that they are applicable based on the services provided by the seller. The regulations adopted in Order No. 697 become effective on September 18, 2007. All sellers are required to amend their market-based rate tariffs to include the required standard provisions, as well as the required applicable provisions, either at the time that they file any other amendment to their current tariffs, when they report a change in status, or when they file their updated market power analysis, whichever occurs first. However, regardless of the date on which sellers make their compliance filing, the provision providing that failure to abide by the regulations will constitute a tariff violation will be considered part of each seller's current market-based rate tariff as of the effective date of Order No. 697.

18. As discussed above, we conditionally accept, effective July 27, 2007, Applicants' amendment to their codes of conduct, as modified herein, to allow the limited sharing of personnel and market information discussed herein, and direct FPL to make a compliance filing, within 30 days of the date of issuance of this order, to revise its code of conduct to make clear that the exception granted applies only to PMI. Alternatively, in lieu of making the compliance filing to revise FPL's code of conduct as directed herein, Applicants may elect instead to submit a compliance filing within 30 days of the date of

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<sup>13</sup> We note that PMI proposes amendments to its code of conduct to reflect the model used by other FPL marketing affiliates. We will accept such amendments for filing, but note that, as of September 18, 2007 the codes of conduct will be superseded by the affiliate restrictions in 18 C.F.R. § 35.39. By accepting these additional amendments, we are not waiving any of the restrictions in 18 C.F.R. § 35.39.

this order to comply with Order No. 697, including modifying their existing market-based rate tariffs in accordance with Order No. 697.<sup>14</sup>

The Commission orders:

(A) Applicants' proposed amendments to the codes of conduct contained in their market-based rate tariffs are hereby accepted for filing, effective July 27, 2007, subject to the conditions discussed in the body of this order.

(B) Applicants are directed to either make a compliance filing within 30 days of the date of this order revising the proposed FPL code of conduct to apply only to interactions with PMI, or alternatively to make a compliance filing within 30 days of the date of this order to revise their market-based rate tariffs in accordance with Order No. 697.

(C) Applicants are required to maintain records to enable the Commission to audit their compliance, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>14</sup> If Applicants choose to revise their tariffs in accordance with Order No. 697, they are reminded to identify the limited waiver granted herein (as well as the restriction regarding PMI sales in peninsular Florida) in accordance with the new required market-based rate tariff requirement that sellers "list all limitations (including markets where seller does not have market-based rate authority) on its market-based rate authority and any exemptions from or waivers granted of Commission regulations and include relevant cites to Commission orders." Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, Appendix C.